

COMMENTARIES

The Proposed Balanced Budget/Tax Limitation Constitutional Amendment: No Balance, No Limits

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Introduction

Much of the legitimate public frustration with continuing, record shattering federal budget deficits has been corralled by supporters of proposed constitutional amendments that purport to require a balanced federal budget. The Senate approved such an amendment in 1982, but a similar proposal failed to gain the two-thirds constitutional majority in the House of Representatives. The ultimate objective of the proposed amendments—increased budgetary discipline of governmental decisionmakers—may be sound. However, the central issue is whether the proposed amendments would achieve this objective without imposing crippling costs.

This Commentary reviews the questions underlying the debate over the constitutional amendments, focusing principally on H.R.J. Res. 350, the proposed amendment the House considered—and rejected—in the Ninety-seventh Congress.¹ It argues that this proposed amendment places too high a priority on a single objective; is based on dubious economic assumptions; is misleading because it will not lead

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1. H.R.J. Res. 350, 97th Cong., 1st Sess., 127 CONG. REC. H7946 (1981). Representative Ed Jenkins introduced H.R.J. Res. 350 on October 29, 1981, for himself and others. The proposed amendment was written as follows:

“Section 1. Prior to each fiscal year, the Congress shall adopt a statement of receipts and outlays for that year in which total outlays are no greater than total receipts. The Congress may amend such statement provided revised outlays are no greater than revised receipts. Whenever three-fifths of the whole number of both Houses shall deem it necessary, Congress in such statement may provide for a specific excess of outlays over receipts by a vote

to, let alone guarantee, a balanced budget or meaningful budgetary discipline; is likely either to be unenforceable or to restructure in some unknown and unprecedented way the traditional allocation of power among the three branches of American government; and is antithetical to traditional American principles of majority rule. This amendment, if ever adopted, would trivialize our Constitution and would be meaningless at best, devastating at worst. It cannot substitute for the firm political resolve urgently needed to balance our economy so as to cope with our pressing national problems. This Commentary concludes by setting forth several alternatives that would provide greater budgetary discipline, while avoiding the pitfalls of a constitutional amendment.

I. The Balanced Budget Movement

Three principal concerns have prompted the recent interest exhibited by the citizenry, the states, and the Congress in constitutional change to require a balanced budget. The first and most commonly cited concern centers on the levels of federal taxes, expenditures, and, most importantly, deficits.² Proponents of an amendment suggest that

directed solely to that subject. The Congress and the President shall ensure that actual outlays do not exceed the outlays set forth in such statement.

"Section 2. Total receipts for any fiscal year set forth in the statement adopted pursuant to this article shall not increase by a rate greater than the rate of increase in national income in the last calendar year ending before such fiscal year, unless a majority of the whole number of both Houses of Congress shall have passed a bill directed solely to approving specific additional receipts and such bill has become law.

"Section 3. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect.

"Section 4. The Congress may not require that the States engage in additional activities without compensation equal to the additional costs.

"Section 5. Total receipts shall include all receipts of the United States except those derived from borrowing and total outlays shall include all outlays of the United States except those for repayment of debt principal.

"Section 6. This article shall take effect for the second fiscal year beginning after its ratification."

The House considered H.R.J. Res. 350 on Oct. 1, 1982, and rejected it by a vote of 236 to 187. 128 CONG. REC. H8337 (1981). The proposal thus fell 46 votes short of the required two-thirds majority.

2. *See, e.g.*, SENATE COMM. ON THE JUDICIARY, BALANCED BUDGET—TAX LIMITATION CONSTITUTIONAL AMENDMENT, S. REP. NO. 151, 97th Cong., 1st Sess. 34 (1981) [hereinafter cited as SENATE REPORT]: "Two statements summarize the economic issues addressed by S.J. Res. 58: a) The federal sector has become increasingly prone to deficit financing since World War II; and b) the federal sector, during that period, has come to command an increasing share of the nation's economic output and income."

As of fiscal year 1982, the federal budget has had a deficit for every year since 1969. Federal budgets have run deficits for 19 of the last 20 years and for 42 of the last 50 years. CONGRESSIONAL BUDGET OFFICE, BALANCING THE FEDERAL BUDGET AND LIMITING FEDERAL SPENDING: CONSTITUTIONAL AND STATUTORY APPROACHES 9 (1982) [hereinafter

persistently high levels of federal expenditures evidence the inability of elected officials to use existing mechanisms to resist special interest appeals for expenditures of public funds.³ The recent sharp rise in the growth of the deficit and the despair of seeing any sharp downturn undoubtedly fuel the amendment drive.

A second concern is the feeling of many that the federal government has become too large and intrusive a force in the economy and in American life generally.⁴ Proponents point to the incremental growth in recent years of federal spending as a proportion of gross national product (GNP).⁵

A third concern cited by proponents of the amendment arises from the interplay of inflation with the progressive income tax structure of the Internal Revenue Code.⁶ In inflationary periods, absent a system of tax rates indexed to inflation, the relative tax burden on the taxpayer will rise. As inflation pushes up the taxpayer's income (to correspond with increases in the general price level), the taxpayer will be driven into increasingly higher tax brackets and thereby pay a greater portion of real income to the federal government. Proponents of a balanced budget amendment suggest that this so called "bracket creep" permits tax revenues to rise without the need for legislated tax increases or improved collection methods, and therefore provides an expedient way of

cited as CBO STUDY]. In recent years, however, deficits have grown enormously as a result of increases in defense spending and tax cuts. Previously, deficits had been shrinking as a percentage of gross national product (GNP). *Id.* Presently, deficits in excess of \$150 billion are projected for each of the next three years. *Id.* at 7.

3. The alleged inability to resist such appeals is said to arise from the so-called "concentrated benefit-dispersed cost" phenomenon. In describing why the "legislative process itself . . . is flawed," the SENATE REPORT, *supra* note 2, at 2, states: "The tax-spending interests are intense and articulate in support of their programs—for they normally stand to gain considerable amounts of public funds on a per capita basis—while the tax-paying interests are diffuse and unorganized—for they stand to lose only nominal sums in the context of any single spending program. Such an unequal competition for tax dollars, not surprisingly, results in defeat more often than not for the tax-paying interests."

4. See SENATE REPORT, *supra* note 2, at 34, 38.

5. *Id.* at 35-38; *Constitutional Amendments Seeking to Balance the Budget and Limit Federal Spending: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong., 1st & 2d Sess.* 319, 320 (1982) (statement of Hon. Donald T. Regan, Secretary, Department of the Treasury) [hereinafter cited as *Hearings*]. Federal budget outlays as a percentage of GNP have grown modestly over the past few decades. In the fiscal year 1951, outlays were about 14.6% of GNP; in 1961, they were 19.2%; in 1971, they were 20.4%, and by 1981, they were 23%. See CBO STUDY, *supra* note 2, at 16. By other measures—e.g., the number of civilian employees—the "contention of bigness cannot be confirmed." *Id.*

6. SENATE REPORT, *supra* note 2, at 11, 43; *Hearings, supra* note 5, at 321 (statement of Hon. Donald T. Regan).

increasing revenues without congressional voting to raise taxes.⁷

These concerns are not new. Americans have traditionally been apprehensive about management of their national budget, tax levels, and the growth of government. Presidential candidates from the time of Herbert Hoover and Franklin Roosevelt have vowed to balance the budget.⁸ The sprawling federal bureaucracy has been studied by Congress and national commissions for the last three decades.⁹ Public outcry over tax levels, said to have contributed to the American Revolution, seems to have abated only sporadically since that time.

In light of this tradition, it is hardly surprising that public opinion polls consistently show that, in the abstract, Americans favor the concept of a balanced budget amendment.¹⁰ A majority of state legislatures have called for the Congress to send forth an amendment for

7. See SENATE REPORT, *supra* note 2, at 8. The Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 104(a) (codified at 26 U.S.C. § 1(f) (Supp. 1982)) (amending I.R.C. § 1), provides for indexation of federal income and estate taxes no later than December 15, 1984.

8. SENATE REPORT, *supra* note 2, at 23-24. Efforts to amend the Constitution to require a balanced budget date from 1935. *Id.* at 17.

9. In 1947, Congress created by statute a Commission on Organization of the Executive Branch, the so-called "first Hoover Commission," named after its Chairman, President Herbert Hoover. Pub. L. No. 47-162, 61 Stat. 246 (1947). Congress created a second Hoover Commission in 1953. Pub. L. No. 83-108, 67 Stat. 184 (1953). See generally R. MOE, EXECUTIVE BRANCH REORGANIZATION: AN OVERVIEW, CONGRESSIONAL RESEARCH SERVICE REP. NO. 77-246G, at 18-26 (1977). President Eisenhower maintained from 1953 to 1961 a President's Advisory Committee on Government Organization under the direction of Nelson Rockefeller. Exec. Order No. 10,432, 18 Fed. Reg. 617 (1953). Dean James Landis wrote a report for President-elect John Kennedy on regulatory agencies. SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMM. ON THE JUDICIARY, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960). President Johnson created a Task Force on Government Organization under Ben Heineman. R. MOE, EXECUTIVE BRANCH, *supra* at 31. President Nixon established the President's Advisory Council on Executive Organization under Roy Ash. R. MOE, EXECUTIVE BRANCH, *supra* at 32. President Carter appointed a President's Reorganization Project. R. MOE, THE CARTER REORGANIZATION EFFORT: REVIEW AND ASSESSMENT, CONGRESSIONAL RESEARCH SERVICE REP. NO. 80-172 (1980). President Reagan has created the President's Private Sector Survey on Cost Control in the Federal Government. Exec. Order No. 12,369, 47 Fed. Reg. 288-99 (1982).

10. See SENATE REPORT, *supra* note 2, at 73; CBO STUDY, *supra* note 2, at 28-30. Proponents often cite these polls, which purport to show that the vast majority of Americans favor the idea of a constitutional amendment. Generally, however, these polls do not tie the balancing of the budget to the spending reductions in such vital areas as social security and defense that would be necessary to balance the budget. SENATE REPORT, *supra* note 2, at 73; 128 CONG. REC. S7996-97 (daily ed. July 12, 1982) (statement of Sen. Hatch). Other polls in which respondents are asked whether they favor spending cuts in specific policy areas show that majorities favor deficits rather than spending reductions. CBO STUDY, *supra* note 2, at 28-30.

ratification, or alternatively, for a constitutional convention.¹¹ While these expressions show strong public support for a balanced budget amendment in the abstract, for the most part, they do not reflect a careful analysis of the costs and practicability of such an amendment.

The congressional response to this public sentiment demonstrates the difficulty of achieving a constitutional solution. In the Ninety-seventh Congress alone, members of the House introduced more than sixty-five resolutions representing a wide variety of approaches. In various combinations, these proposals contain provisions with balanced budget "requirements,"¹² spending limitations,¹³ revenue limitations,¹⁴ borrowing limitations,¹⁵ and mandated schedules for the repayment of the national debt.¹⁶ Even within the general rubric of "balanced budget proposals," the resolutions would operate in widely varying

11. SENATE REPORT, *supra* note 2, at 13; Hildreth, *Chances for an Amendment to Balance the Budget*, 13 U.S. NEWS & WORLD REP., Apr. 5, 1982, at 84. These resolutions are not uniform and do not specify a single text.

12. *See, e.g.*, H.R.J. Res. 2, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 3, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 11, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 14, 97th Cong., 1st Sess., 127 CONG. REC. H68-69 (daily ed. Jan. 6, 1981).

13. Some "absolute" spending limitation proposals would limit federal expenditures to a specified fraction of GNP or national income. *See, e.g.*, H.R.J. Res. 3, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 82, 97th Cong., 1st Sess., 127 CONG. REC. H90 (daily ed. Jan. 13, 1981); H.R.J. Res. 113, 97th Cong., 1st Sess., 127 CONG. REC. H176 (daily ed. Jan. 22, 1981). Other "relative" spending limitations would limit the growth of federal spending on the basis of past ratios of federal spending to GNP or national income. *See, e.g.*, H.R.J. Res. 4, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 43, 97th Cong., 1st Sess., 127 CONG. REC. H69 (daily ed. Jan. 6, 1981); H.R.J. Res. 58, 97th Cong., 1st Sess., 127 CONG. REC. H70 (daily ed. Jan. 6, 1981).

14. Like spending limitations, some revenue limitations are absolute, *see, e.g.*, H.R.J. Res. 11, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981), while others are relative, limiting increases to growth patterns in prior years. *See, e.g.*, H.R.J. Res. 100, 97th Cong., 1st Sess., 127 CONG. REC. H132 (daily ed. Jan. 20, 1981); H.R.J. Res. 211, 97th Cong., 1st Sess., 127 CONG. REC. H1035 (daily ed. Mar. 19, 1981); H.R.J. Res. 350, 97th Cong., 1st Sess., 127 CONG. REC. H7946 (daily ed. Oct. 29, 1981).

15. *See, e.g.*, H.R.J. Res. 2, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 14, 97th Cong., 1st Sess., 127 CONG. REC. H68-69 (daily ed. Jan. 6, 1981); H.R.J. Res. 555, 97th Cong., 2d Sess., 128 CONG. REC. H4890 (daily ed. July 29, 1982). S.J. Res. 58, 97th Cong., 1st Sess., 127 CONG. REC. S2892 (daily ed. Mar. 27, 1981), as altered in the Senate by a floor amendment offered by Senators Armstrong and Boren, would require a supermajority vote to raise the debt limit. 128 CONG. REC. S9626-33 (daily ed. Aug. 3, 1982).

16. *See, e.g.*, H.R.J. Res. 2, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 10, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 14, 97th Cong., 1st Sess., 127 CONG. REC. H68-69 (daily ed. Jan. 6, 1981).

manners. Some merely declare that the budget shall be balanced,¹⁷ while others restrict the power of Congress to appropriate.¹⁸ Various proposals require Congress to plan a balanced budget;¹⁹ place a general duty on Congress to balance the budget;²⁰ require a supermajority to approve a planned unbalanced budget;²¹ mandate that a deficit be extinguished within a given period;²² or merely establish a balanced budget as a goal.²³ Finally, there are differences in such basic matters as whether the restrictions could be waived in times of war or other national emergency, and, if so, what emergency would suffice;²⁴ how the restrictions would be enforced;²⁵ and the anticipated role of the Ex-

17. *See, e.g.*, H.R.J. Res. 3, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 19, 97th Cong., 1st Sess., 127 CONG. REC. H69 (daily ed. Jan. 6, 1981); H.R.J. Res. 100, 97th Cong., 1st Sess., 127 CONG. REC. H132 (daily ed. Jan. 20, 1981).

18. *See, e.g.*, H.R.J. Res. 2, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 11, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 14, 97th Cong., 1st Sess., 127 CONG. REC. H68-69 (daily ed. Jan. 6, 1981).

19. Both H.R.J. Res. 350 and S.J. Res. 58 employ the "predictive statement" approach. Other resolutions use this approach as well. *See, e.g.*, H.R.J. Res. 157, 97th Cong., 1st Sess., 127 CONG. REC. H350 (daily ed. Feb. 3, 1981); H.R.J. Res. 211, 97th Cong., 1st Sess., 127 CONG. REC. H1035 (daily ed. Mar. 19, 1981); H.R.J. Res. 546, 97th Cong., 2d Sess., 128 CONG. REC. H4594 (daily ed. July 23, 1982).

20. *See, e.g.*, H.R.J. Res. 10, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 41, 97th Cong., 1st Sess., 127 CONG. REC. H69 (daily ed. Jan. 6, 1981).

21. *See, e.g.*, S.J. Res. 58, 97th Cong., 1st Sess., 127 CONG. REC. S2892 (daily ed. Mar. 27, 1981); H.R.J. Res. 350, 97th Cong., 1st Sess., 127 CONG. REC. H7946 (daily ed. Oct. 29, 1981).

22. *See, e.g.*, H.R.J. Res. 33, 97th Cong., 1st Sess., 127 CONG. REC. H69 (daily ed. Jan. 6, 1981); H.R.J. Res. 157, 97th Cong., 1st Sess., 127 CONG. REC. H350 (daily ed. Feb. 3, 1981); H.R.J. Res. 181, 97th Cong., 1st Sess., 127 CONG. REC. H548 (daily ed. Feb. 19, 1981).

23. *See, e.g.*, H.R.J. Res. 45, 97th Cong., 1st Sess., 127 CONG. REC. H69 (daily ed. Jan. 6, 1981); H.R.J. Res. 181, 97th Cong., 1st Sess., 127 CONG. REC. H548 (daily ed. Feb. 19, 1981).

24. There is an important difference on this point between the Administration and the House sponsors of H.R.J. Res. 350. H.R.J. Res. 350 would limit waivers to fiscal years in which war had been declared; the Administration favors expanding the waiver to situations of imminent and unforeseeable threat to national security. *Hearings, supra* note 5, at 226, 239 (statement of Hon. David A. Stockman, Director, Office of Management & Budget). Others would allow waivers in time of national emergency as declared by a supermajority. *See, e.g.*, H.R.J. Res. 2, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 3, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 11, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981).

25. Some proposals would empower Congress to enforce their provisions through appropriate legislation. *See, e.g.*, H.R.J. Res. 3, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 10, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 42, 97th Cong., 1st Sess., 127 CONG. REC. H69 (daily ed. Jan. 6, 1981). At least one proposal, H.R.J. Res. 45, 97th Cong., 1st Sess., 127 CONG. REC. H69 (daily ed. Jan. 6, 1981) would give the President power to impose an income tax surcharge; another, H.R.J. Res. 21, 97th Cong., 1st Sess., 127 CONG. REC. H69 (daily ed. Jan. 6, 1981), would simply give the President item veto power. An amendment to S.J. Res. 58 that would

ecutive in the budget process.²⁶

The debate in the Senate further demonstrates the proponents' lack of consensus on the best approach. The Subcommittee on the Constitution of the Senate Judiciary Committee reported out a proposal that was approved, with substantial dissent, by the full Committee. Even before the matter was considered by the full Senate, however, the Committee made a further key change, deleting a provision that ostensibly would have required full federal compensation for the cost of any new responsibilities imposed on the states.²⁷ In the lengthy debate on the Senate floor, four more changes were made before final approval.²⁸

In the House, the most widely supported measure was H.R.J. Res. 350. While it was identical to the resolution that the Senate Judiciary Committee originally reported, it differed in five respects from the reso-

have explicitly precluded judicial enforcement power was defeated on the Senate floor by a 51 to 45 vote. 128 CONG. REC. S9392-9407 (daily ed. July 29, 1982).

26. Some proposals would require the President to submit a balanced budget. *See, e.g.*, H.R.J. Res. 9, 97th Cong., 1st Sess., 127 CONG. REC. H68 (daily ed. Jan. 6, 1981); H.R.J. Res. 25, 97th Cong., 1st Sess., 127 CONG. REC. H69 (daily ed. Jan. 6, 1981). An amendment to require the President to submit a balanced budget was defeated in the Senate by a 53 to 43 vote. 128 CONG. REC. S9294-99 (daily ed. July 28, 1982).

27. Section 4 was deleted, apparently out of a recognition that it would be complicated to administer and would engender litigation. 128 CONG. REC. S7984 (daily ed. July 12, 1982) (statement of Sen. Hatch). Secretary of the Treasury Donald Regan explained, "As worded, this section could entangle the federal government in lengthy litigation regarding almost any ongoing federal activity or program. We urge that this section be dropped." *Hearings, supra* note 5, at 318 (statement of Hon. Donald T. Regan).

28. These changes are as follows: 1) In § 1, adding in the last sentence after "shall" the phrase "pursuant to legislation or through exercise of their powers under the first and second articles." The purpose of this change is to make clear that the duty imposed on the President by § 1 to "ensure" that actual outlays do not exceed statement outlays does not create any new impoundment powers. 128 CONG. REC. S9178-80 (daily ed. July 27, 1982) (statement of Sen. Domenici). 2) In § 2, the phrase "last calendar year ending" was stricken and inserted in its place was "year or years ending not less than six months nor more than twelve months." The purpose of this change was to allow Congress more flexibility in choosing a base period to measure the amount by which federal receipts would be allowed to grow in the fiscal year. *Id.* 3) A new § 5 was added, providing that "Congress shall enforce and implement this article by appropriate legislation." The purpose of this section is to make clear the duty and power of Congress to enact implementing legislation. *Id.* at 9184-86. 4) A new § 6 was added, reading: "On and after the date this article takes effect, the amount of the federal debt as of such date shall become permanent and there shall be no increase in such amount unless three-fifths of the whole number of both Houses of Congress shall have passed a bill approving such increase and such bill has become law." This is the amendment cosponsored by Senators Armstrong and Boren. The effect of the amendment is to establish a mechanism to ensure that forecasts of receipts are not overly optimistic. If there is a shortfall of receipts, H.R.J. Res. 350 would allow the necessary borrowing and any increase in the debt limit would require only a majority of both Houses. Under this amendment, a supermajority would be required. 128 CONG. REC. S9726-27 (daily ed. Aug. 3, 1982) (statement of Sen. Boren).

lution the Senate finally endorsed.²⁹ During the House deliberations, the Administration, fervent in support of H.R.J. Res. 350, advocated yet another change.³⁰

H.R.J. Res. 350 combines two concepts—a plan for a balanced budget and a limitation on the growth of receipts.³¹ Section 1 requires Congress, prior to the beginning of each fiscal year, to adopt a statement of receipts and outlays in which total outlays do not exceed total receipts; gives the Congress power to amend the statement provided revised outlays do not exceed revised receipts; provides for a planned deficit only if three-fifths of the “whole number of both Houses” shall deem it necessary by a vote directed solely to that subject; and directs the Congress and the President “to ensure that actual outlays do not exceed” the statement outlays. Section 2, the revenue limitation, provides that

[t]otal receipts for any fiscal year . . . shall not increase by a rate greater than the rate of increase in national income in the last calendar year ending before such fiscal year, unless a majority of the whole number of both Houses . . . shall have passed a bill directed solely to approving specific additional increases and such bill has become law.

Section 3 provides that Congress may waive the requirements of the amendment in any fiscal year in which a declaration of war is in effect. Section 4 prohibits the Congress from requiring that the states engage in additional activities without offsetting compensation.³² Section 5 describes total receipts as excluding borrowed funds, and total outlays as excluding repayment of debt principal. Section 6 provides that the amendment shall go into effect the second year after ratification.³³

The House Subcommittee on Monopolies and Commercial Law extensively studied the various proposals during fourteen hearings in the Ninety-sixth and Ninety-seventh Congresses, taking testimony and comments from a variety of experts of varying political views, including current and former Cabinet level officials, Nobel Laureates in economics, and constitutional scholars. These experts pointed out a number of fundamental problems with H.R.J. Res. 350. Amendments considered by the Subcommittee would have addressed some of these underlying deficiencies, but the fallacy of locking a particular economic theory into the Constitution would remain.

29. *See supra* notes 27 and 28.

30. *See supra* note 24.

31. For the complete text of H.R.J. Res. 350 see *supra* note 1.

32. *See supra* note 27 and accompanying text.

33. *See supra* note 1.

Although proponents, in effect, succeeded in discharging the Judiciary Committee from further consideration of H.R.J. Res. 350 in September 1982, in October the full House considered and rejected H.R.J. Res. 350, as well as a milder substitute offered by Representative Bill Alexander (D-Ark.).³⁴

The hopes of proponents have, in short, run squarely into the realities of devising a workable amendment. Thus far, proceedings in the Congress underline the concern of experts with varying political views that any amendment would be nothing more than a constitutional hoax, engendering cynicism about our greatest document and distracting our attention from the most important task at hand—to channel the strong political will for more budgetary discipline into constructive political action assuring an overall balanced economy.

II. Balanced Budget In Perspective

Proponents of H.R.J. Res. 350 state that a principal purpose would be to establish a balanced federal budget as a “norm.”³⁵ While, in the abstract, such a budget may be desirable, achieving it in the proposed manner may carry a high price that cannot be ignored in deciding whether a balanced budget should be established as a constitutional “norm.”

Our Constitution endows the federal government with specific enumerated powers and entrusts it with limited but vital responsibilities,³⁶ among which are the responsibilities of providing for the defense of our nation;³⁷ collecting and expending funds for the general welfare of our people;³⁸ regulating interstate and foreign commerce;³⁹ and administering justice.⁴⁰ These immense responsibilities, and the limited resources available for meeting them, require that the government choose among competing goals, of which a balanced budget is but one.

34. The House rejected H.R.J. Res. 350 by a vote of 236 to 187. 128 CONG. REC. H8336 (daily ed. Oct. 1, 1982). The House rejected the Alexander Substitute by a vote of 346 to 77. *Id.* at H3019 (daily ed. Apr. 29, 1980).

35. *See, e.g.*, SENATE REPORT, *supra* note 2, at 3, 75; 128 CONG. REC. S7982 (daily ed. July 12, 1982) (statement of Sen. Thurmond).

36. The Preamble recites that the purpose of the Constitution is “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common Defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, . . .” U.S. CONST. preamble.

37. U.S. CONST. art. I, § 8, cls. 1, 11, 16; art. II, § 2, cl. 1; art. IV, § 4.

38. *Id.* at art. I, § 8, cl. 1.

39. *Id.* at art. I, § 8, cl. 3.

40. *Id.* at art. I, § 8, cl. 9; art. III.

In times of economic adversity, the choices between competing uses of resources become all the more difficult. The current Administration assigns defense spending a very high priority. It is, of course, not possible, in this day of modern weaponry, for the United States to rely on geographic isolation from Europe for its security. While estimates on how much is needed vary, even proponents of reduced military outlays recognize the need to spend substantial sums for the common defense.

At least since the New Deal, the federal government has recognized its broad responsibility to provide for the well being of its citizens. Full employment, Social Security and income assistance, the maintenance of a national system of roads and waterways, the preservation of our environment, the funding of vital research, the safety of American workers, the health of our citizens, and assisting the states in the education of future generations are a few of the responsibilities that the federal government must meet.

Placing a balanced budget in perspective among these priorities requires, in my view, a twofold recognition. First, as some proponents have realized, a balanced budget in itself is not absolutely necessary for a sound economic policy. The size of a deficit,⁴¹ how it is financed,⁴² and prevailing economic conditions⁴³ are critical in determining whether a deficit can be tolerated. Second, a balanced budget is but a part of a larger fiscal policy that includes other aspects such as levels of

41. It would, of course, be possible for the government to run a small deficit every year. As long as real growth of the economy outpaced the growth of the deficit, no problem would arise.

42. As OMB Director Stockman candidly acknowledged in debate when he was a member of the House: "I would suggest to the House . . . that the budget balancing frenzy that has been underway in this institution for some weeks now is mainly an exercise in symbolism, political desperation, and policy gimmickry, with little anchoring in solid economics Deficits in themselves are neither good nor bad. They promote neither inflation nor unemployment. They cause neither inflation nor expansion. In fact, they are absolute economic eunuchs until they join hands with other policies and other economic facts." 128 CONG. REC. H3019 (daily ed. Apr. 29, 1980) (statement of Rep. Stockman).

43. The CBO Study makes clear that the consequences of a deficit depend on the condition of the economy: "[P]ersistent and large deficits portend continued difficulties in lowering interest rates and encouraging economic growth. Additionally, when the economy is operating close to capacity, a deficit contributes to inflationary pressures. Moreover, service of a growing national debt is preempting an ever larger share of the budget. . . . While concern over the implications of chronic deficits for long-run growth and for inflation is warranted, a federal deficit can be an important instrument for countering a recession. A deficit can help moderate income losses during a recession, thereby lowering the risk of a deeper decline in the economy. Moreover, in a prolonged or severe downturn, planned deficits—from a tax cut or temporary expenditure rise—can help to reverse the economic slide. A budget forced to be in surplus or balance during a downswing in the business cycle would harm rather than help the faltering economy." CBO STUDY, *supra* note 2, at 4-5.

taxation and expenditures. And, of course, the monetary policy of the United States—in particular the actions of the Federal Reserve Board—are nonfiscal policies that play an important part in our national economic policy.

In sum, a balanced budget is but one of a number of objectives that the federal government, with limited resources, must attempt to achieve simultaneously. It is but a part of our fiscal policy, which in turn is a part of the overall economic policy of the United States. Elevating this one goal to constitutional status makes no more sense than enshrining any other goals, such as stable value of money, social security, low interest rates, full employment, or, for that matter, sufficient nuclear capability, in the Constitution.

Assuming for the sake of argument that a constitutional amendment could produce a “norm” of a balanced budget, the effect on other competing goals would likely be substantial. In prepared testimony before the House Judiciary Committee’s Subcommittee on Monopolies and Commercial Law, David Stockman, Director of the Office of Management and Budget, suggested that “non-defense spending” was “the driving force behind the present fiscal disequilibrium.”⁴⁴ This statement suggests that the current Administration would sacrifice the goals of these programs to achieve a balanced budget. It is not clear, however, that social programs would suffer the most. My Republican colleague, Henry Hyde, has expressed his fear that our national defense interests would suffer under an amendment requiring a balanced budget.⁴⁵ Even assuming across the board spending cuts, the effect on other macroeconomic goals such as full employment and high productivity might be devastating. A study done by the American Federation of State, County and Municipal Employees (AFSCME) using the econometric model of Data Resources, Inc., projects that, if a balanced budget were effected in 1985, by 1987 the number of persons unemployed would increase by 2.65 million and the GNP would be reduced by \$519 billion.⁴⁶ The Congressional Budget Office confirms that implementation at an early date “could endanger the economic recovery and create widespread dislocations.”⁴⁷

44. *Hearings, supra* note 24, at 2.

45. Hyde, *Balanced Budget Amendment: Can we Make it Work?*, Wash. Post, July 19, 1982, at A13, col. 2.

46. See *Hearings, supra* note 5, at 395 (statement of Gerald W. McEntee, International President, AFSCME).

47. *Hearings, supra* note 5, at 529 (statement of Alice M. Rivlin, Director, Congressional Budget Office).

The implementation of a balanced budget as a “norm” could wreak havoc with other federal goals. As James Madison recognized, spending and taxation authority are closely related to the ability of the federal government to achieve popular objectives: “This power over 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, for obtaining a redress of every grievance, and for the carrying into effect every just and salutary measure.”⁴⁸ A limitation on federal fiscal authority would inhibit the ability of the government to carry out the popular will.

III. Economic and Budgetary Considerations Counsel Against Adoption of a Constitutional Amendment

A. Short Term: Circumvention and Timing

The preceding discussion has assumed that an amendment would achieve a balanced budget. Proponents also urge that it would somehow help resolve our current economic difficulties. Neither proposition withstands scrutiny.

A drafter of an amendment must make it sufficiently flexible to allow for necessary deviations, while not creating so much flexibility that the amendment would be meaningless.⁴⁹ H.R.J. Res. 350 does not require a balanced budget, but it does mandate that the Congress plan for one. Section 1 requires that Congress adopt a balanced budget plan and that the President and the Congress somehow “ensure” that actual outlays not exceed statement outlays. There is no mechanism to guarantee that actual receipts equal statement receipts. Therefore, if there is a shortfall of receipts, nothing need be done about it, and a deficit will ensue. This loophole will, of course, create a strong incentive for

48. THE FEDERALIST NO. 58, at 391 (J. Madison) (Harvard ed. 1961).

49. Federal Reserve Board Chairman Paul Volker testified: “[I] can only be impressed by the difficulty of attempting to write a constitutional provision to induce discipline otherwise lacking[;] . . . a provision that will serve us in fair weather and foul, and in economic circumstances that can only be dimly foreseen.” *Hearings, supra* note 5, at 75 (statement of Paul A. Volker, Chairman, Board of Governors of the Federal Reserve System). At his confirmation hearings, OMB Director Stockman testified: “[I] have become convinced that the process of trying to define what an outlay of the Government is, what its 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, some people would invent a way to get around it. Loan guarantees, off-budget expenditures, and various other creative accounting techniques . . . would be developed to totally frustrate or circumvent the purposes of that kind of requirement.” *Nomination of David A. Stockman: Hearing before the Senate Committee on Governmental Affairs, 97th Cong., 1st Sess. 58 (1981)* [hereinafter cited as *Stockman Confirmation*].

Congress—the very body proponents so distrust—to adopt a rosy forecast of receipts to circumvent the limitations on a planned deficit.

There are other loopholes that, in the words of Professor Laurence Tribe, are “[e]ach big enough to drive the federal budget through.”⁵⁰ Without limitations, Congress could transfer federal programs to the private sector through regulation; charter federal corporations to tax and spend outside the budget; pass on burdens to the states; and use loan guarantees in place of direct spending.⁵¹

Pressure to employ such subterfuges would undoubtedly increase if a supermajority were required to approve a deficit. If, as proponents suggest, constitutional restraints are necessary because our elected officials have acted irresponsibly, it is clear that H.R.J. Res. 350 will not preclude similar conduct in the future. Use of these ruses would be particularly dangerous because, in many instances, their mechanisms are more insulated from political control than is the current federal budget process.⁵² Circumvention of the budget process would put these items outside the scrutiny of the annual review procedure developed through the President’s Office of Management and Budget and the Congressional Budget Act. Thus, the economic result of a constitutional amendment could well be decreased accountability in, and popular control of, the federal budget process.

Even assuming that a balanced budget requirement would be effective, due to a delay in implementation, it could not help us out of our current economic troubles. H.R.J. Res. 350 provides that it shall be effective in the second fiscal year after ratification. Assuming that the Ninety-eighth Congress had approved a similar amendment and sent it forth for ratification in 1983, the states would likely take several years to approve it. If it were to have been ratified in 1984, it would not have become effective until fiscal 1986. The government will certainly have to take steps before then to curb the mounting deficits, lest we face dire economic consequences. As OMB Director Stockman testified in his 1981 confirmation hearings, “if we don’t move to a sounder fiscal position within the next few years, we are going to have such serious economic problems that we won’t have to worry about a constitutional

50. *Hearings, supra* note 5, at 295 (testimony of Prof. Laurence H. Tribe, Harvard Law School).

51. *See supra* note 49. “But I think the very practical problem is how do you define spending? Once you begin to unravel that onion, it unravels and unravels and unravels forever. There are any number of innovative means that could be developed to circumvent that type of constitutional amendment.” *Stockman Confirmation, supra* note 49 at 56.

52. *See CBO STUDY, supra* note 2, at 103-13.

amendment.”⁵³ Recognizing the immediacy of the problems, a number of statutory proposals have been introduced to require a balanced budget in the immediate future.⁵⁴ The Administration has not supported these proposals.

B. Long Term: Reduced Flexibility and Difficulties of Forecasting

In the long term, a balanced budget amendment would introduce undesirable rigidities into the federal budget process and would require Congress to predict and control that which it cannot—the future. Amendment proponents view past federal fiscal policy as the source of the current problem.⁵⁵ Unquestionably, a huge federal debt can harm the economy.⁵⁶ The interplay between fiscal policy and the economy is complex, however, and, to a certain extent, short term growth of the deficit is attributable to immediate problems of the economy.⁵⁷

Assuming just for argument that the deficit is the result of fiscal abuses, the fact of past abuses is insufficient reason to limit future use of fiscal policy. Since the time of Lord Keynes, it has been widely recognized that “automatic stabilizers” in the federal budget moderate fluctuations in the economy and prevent depressions. In times of high unemployment and sinking demand, jobless benefits and other payments are important stimuli; in times of excess demand and inflation, surplus revenue caused by the progressive tax system is a natural damper on demand.

The balanced budget and revenue limitations provisions of H.R.J. Res. 350 would undermine the budget’s “automatic stabilizers” by requiring extraordinary procedures for their use. Under Section 1, without approval of a supermajority, planned outlays could not exceed planned receipts and actual outlays could not exceed planned outlays. Under Section 2, without use of special procedures, receipts could not grow at a rate faster than the growth of the national income in the

53. *Stockman Confirmation*, *supra* note 49, at 58-59.

54. *See, e.g.*, H.R. 6834, 97th Cong., 2d Sess., 128 CONG. REC. H4535 (1982); H.R. 6962, 97th Cong., 2d Sess., 128 CONG. REC. H5619 (1982).

55. *See* SENATE REPORT, *supra* note 2, at 34-41.

56. *See supra* note 43.

57. In his confirmation hearings, OMB Director Stockman attributed the deficits during the Carter Administration to the economy, and not to irresponsible spending: “[B]ut there is no way you can really say there has been some kind of wreckless [sic] attitude, a spending spree on Capitol Hill in terms of policy actions. What has happened instead is that the economy has collapsed out from under the budget. This deterioration, both on the production side of the economy and in the financial markets, has simply driven outlays upward and revenues downward in an uncontrollable way.” *Stockman Confirmation*, *supra* note 49, at 25.

previous calendar year. And, because planned outlays could not exceed planned receipts, outlays as well as receipts would be tied to the previous year's change in national income.

The combined operation of these provisions, absent the use of the special procedures, would ordinarily result in government fiscal policy that would worsen inflation and recession, rather than counter them. The harmful effects of the proposed amendment would be felt in at least four situations. (1) In a recession, a planned stimulative tax cut would have to be counterbalanced by a decrease in planned outlays, and any increase in planned outlays would need to be offset by increased revenue. (2) Planned increases in outlays would be tied to increases in planned receipts, with receipts linked to the growth of national income. In a prolonged recession, national income would decline, planned receipts for subsequent fiscal years would also decline, and hence planned outlays would decline. (3) If an unanticipated recession occurs during a fiscal year, requiring increased outlays for unemployment compensation, there would have to be outlay reductions in other areas. (4) In inflationary periods, Section 2 would prohibit naturally occurring increases in tax revenues that would cool demand.

If it worked as proponents anticipate, H.R.J. Res. 350 would thus tend to exacerbate, rather than counteract, market fluctuations. Rather than serving as a natural stabilizer, fiscal policy would tend to destabilize our economy. This could shift responsibility for economic stability entirely to the Federal Reserve Board's monetary policy.⁵⁸

Quite apart from its inherent destabilizing effect, H.R.J. Res. 350 would require a result—a balanced budget—which is to some degree beyond the government's control. Economics is such an inexact "science" that economists using similar assumptions about the future reach vastly different conclusions. For example, "supply siders" and traditionalists differ over whether tax cuts lead to increased or decreased revenues. Second, and more basically, budgeting requires predictions of future events. Crop failures, natural disasters, the need for military buildups, and unexpected recessions are examples of exigencies that might change the levels of federal outlays and receipts in a fiscal period, yet could not be anticipated at the time the budget is written. If the actual outlays could not exceed planned outlays, the government's ability to react to unforeseeable events would be severely restricted; if, on the other hand, the federal government responds, actual outlays would exceed planned outlays and the budget would not be balanced.

58. See *Hearings, supra* note 5, at 532 (statement of Alice M. Rivlin); CBO STUDY, *supra* note 2, at 112.

For such reasons, economist and Nobel Laureate Paul Samuelson has suggested that attempting to impose constitutional strictures on the budgeting process is "arrogant folly."⁵⁹

IV. Political and Constitutional Considerations Counsel Against Adoption of an Amendment

A. Enforceability and Separation of Powers Considerations

If an amendment were unenforceable, its "requirements" would become mere aspirations and the amendment an empty exhortation that means be found and goals attained.

If, on the other hand, the amendment were enforceable, there could be profound alteration of the traditional allocation of powers among the branches of government. To make certain that the purposes of the amendment were carried out, the Executive, the Judiciary, or both, would have to be empowered to review congressional budgetary decisionmaking.⁶⁰ The two most commonly discussed techniques for the Executive to enforce the amendment are impoundment and item vetoes. Both would vastly increase the power of the Executive over the Congress in budgetary decisions.

An item veto would permit the President to pick and choose among appropriated items, approving only those that conformed to the President's policies. It would remove much of the Executive's incentive to compromise in the budgetary process. The President's decisions could be overcome only if the veto were overridden. Impoundment would give the Executive even greater authority than would an item veto because the Executive could refuse to spend any money or could fix expenditures for an appropriated item at any amount up to the full appropriation. It is unclear whether Congress could override an impoundment decision.⁶¹

59. *Constitutional Amendments to Balance the Federal Budget: Hearings before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. 23 (1979-80) (statement of Prof. Paul A. Samuelson).

60. See CBO STUDY, *supra* note 2, at 112. Mr. Stockman has admitted: "The effect then would be to throw into the courts in one way or another the responsibility for defining expenditures, and the responsibility would not simply stop with definition. It would sooner or later have to move to substantive considerations and decisions as well and in the process, the Congress would have alienated one of the central and essential powers that were granted by the Constitution; namely, the power to raise and spend money for the public interests of this country." *Stockman Confirmation*, *supra* note 49, at 56.

61. The relative scope of congressional and executive power is largely undefined, as constitutionality of impoundment has never been decided. Most cases are settled through the political process. See L. TRIBE, *CONSTITUTIONAL LAW* 193-98 (1978).

Giving the Executive these powers would be inconsistent with our basic Constitutional structure. The Constitution designates the Congress as the taxing and spending authority. So fundamental is the need for popular control over these decisions that the Constitution specifically provides that revenue bills shall originate in the House,⁶² and it is a long established tradition that appropriation bills originate there as well.⁶³ The historical instances in which Presidents have claimed impoundment powers have led to widespread concern⁶⁴ and legislation to prevent and control impoundment.⁶⁵

Judicial supervision of legislative decisionmaking on the budget is equally inappropriate. As explained earlier,⁶⁶ budgetary decisions are quintessentially legislative because they involve the reconciliation of competing national priorities. A judicial forum simply is not suited to make such choices. Courts do not maintain staffs of budgetary experts. Article III judges have no political constituency; indeed, their life tenure is intended to insulate them from the political process. The relief that courts may grant to enforce a balanced budget amendment is limited.⁶⁷ Finally, the multiplicity of district courts and courts of appeals creates the possibility of conflicting judgments about a single national

62. U.S. CONST., art. I, § 7, cl. 1.

63. See R. FENNO, *THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS 1* (1966).

64. President Nixon, in particular, used impoundment as a device to implement Executive policies, rearrange national priorities, and undercut legislative decisions. A. SCHICK, *CONGRESS AND MONEY: BUDGETING, SPENDING AND TAXING* 45-48 (1980).

"The executive branch has unilaterally set aside congressionally approved programs it deems less worthy than others and nullified national policies established by Congress. Critics assert that by these acts the executive branch has encroached upon the legitimate role of Congress in establishing spending priorities, eroded Constitutional balance of powers between the legislative and executive branches, aggrandized executive power, exercised an item veto never authorized by Congress, and created chaos in the operations of State and local governments." H.R. REP. NO. 658, 93d Cong., 2nd Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3462, 3471.

65. See Impoundment Control Act of 1974 §§ 1001-17, 31 U.S.C. §§ 1400-07 (1976).

66. See *supra* notes 35-48 and accompanying text.

67. Noted constitutional expert Professor Philip B. Kurland has succinctly described the limited remedies that a court might have if actual outlays appeared to exceed statement outlays:

"[W]hat could the courts do to enforce the proposed amendment? It is possible, however unlikely, that the courts would declare all the appropriations laws for the budget year invalid. Or the courts could feel free to pick and choose among the appropriations measures, validating enough to meet the income requirements and invalidate the rest. . . .

"Equally unlikely, the courts could say that all appropriations should be reduced by that proportion in which the total outlay exceeds the authorized outlay. Or, again with the same likelihood, the courts could say that all appropriations measures passed before the limit was reached would be valid and all passed after that would be invalid." *Hearings, supra* note 5, at 344 (statement of Prof. Philip B. Kurland, Univ. of Chicago Law School).

budget that could be slow to resolve, possibly bringing the entire government's fiscal machinery to a standstill.

Perhaps recognizing these difficulties, H.R.J. Res. 350 is vague about enforcement. The only explicit reference to enforceability is Section 1's statement that the President and the Congress shall "ensure" that actual outlays do not exceed planned outlays. The report of the Senate Committee on the Judiciary on an identical text suggests that this provision in Section 1 is not intended to establish any new presidential authority to impound appropriated funds.⁶⁸ Yet, this interpretation is not clear from the text of the amendment.⁶⁹

If the President could not impound funds or exercise an item veto, how could Section 1 be enforced? Although the Senate report states that the President would be confined to existing tools such as proposing budgets and general veto authority,⁷⁰ constitutional scholar Laurence Tribe reaches a different conclusion—impoundment would not only be permissible but commonplace:

On the face of it, this constitutional command would seem to override any merely statutory limit on executive impoundment authority, such as that of the 1974 Impoundment Act. And if the President concludes that only impoundment, decreed pursuant to his Article II powers as Chief Executive, can meet his duties under the new Amendment, then such an act—*involving a refusal to spend appropriated funds on whichever programs the President chooses to designate as the causes of excessive total outlays*—could well be deemed authorized by the new Amendment.⁷¹

H.R.J. Res. 350 says nothing about the role of the judiciary in enforcing the amendment. The Senate report states that, by remaining silent, this text does not preclude the federal courts from intervening in budgetary matters. While acknowledging the traditional role of courts in constitutional interpretation, the report suggests that concepts of standing, political question, and justiciability will restrain the judiciary.⁷² An amendment precluding judicial review was defeated in the Senate.⁷³ Absent such a flat prohibition, it is likely that the federal courts would soon face a flood of lawsuits from taxpayers, recipients of outlays, members of Congress, and others claiming violation of the

68. See SENATE REPORT, *supra* note 2, at 61.

69. The full Senate amended § 1 because it was not clear that no additional impoundment authority was created. See *supra* note 28.

70. See SENATE REPORT, *supra* note 2, at 60-61.

71. See *Hearings*, *supra* note 5, at 301 (statement of Prof. Laurence H. Tribe) (emphasis added).

72. See SENATE REPORT, *supra* note 2, at 62.

73. 128 CONG. REC. S9392-407 (daily ed. July 29, 1982).

amendment. In cases in which courts determined to pass on the merits, they would soon be embroiled in technical questions of budgetary definitions,⁷⁴ and likely be called upon to resolve confrontations between the Executive and the Congress, and even among factions within Congress. It would be unfair to burden the judicial system with such questions and unwise to afford it such authority.

The power to tax and spend "is generally believed to be the most fundamental legislative power in representative democracies."⁷⁵ An enforceable constitutional amendment would strip the legislative branch of much of its budgetary authority, and thus fundamentally alter the previous allocation of power among the three branches of government. As OMB Director Stockman testified at his confirmation hearing, by adopting a balanced budget amendment, "the Congress would have alienated one of the central and essential powers that were granted by the Constitution; namely, the power to raise and spend money for the public interests of this country."⁷⁶

B. Legislative Impasses

The requirements of H.R.J. Res. 350 would increase the possibility of legislative impasses that would halt government operations. For example, Section 1 commands Congress to formulate a statement of receipts and outlays before the beginning of the fiscal year. If Congress were unable to reach an agreement on a budget statement, there would be no outlay projection, and, presumably, the government would shut down because any outlay would not be within an outlay projected by a statement.⁷⁷ And, if a deficit were planned, the process of formulating a timely statement would become even more difficult because of the supermajority requirement. Similarly, if it appeared during a fiscal year that actual outlays could exceed statement outlays, it might be impossible to find a majority to cut outlays or raise taxes or a supermajority to approve a deficit. For example, even if fifty-five percent of the members of each House favored increasing outlays rather

74. For example, what constitutes "outlays," "receipts," or "national income"? So controversial and difficult are the definitional questions that the Administration has proposed the creation of a Bipartisan Budget Concepts Commission to formulate definitions. *See Hearings, supra* note 5, at 242 (statement of Hon. David A. Stockman).

75. R. FENNO, CONGRESSMEN IN COMMITTEE 17 (1973).

76. *Stockman Confirmation, supra* note 49, at 56.

77. If Congress did not adopt a statement in time, "there is an implied adoption of a statement in which both receipts and outlays are zero. In conjunction with the fourth sentence of this Section [Section 1], the Congress and the President would be mandated constitutionally to ensure that fiscal year outlays also would be zero." SENATE REPORT, *supra* note 2, at 46.

than cutting outlays or increasing taxes, a determined minority in one House could force the government to cease operations when actual outlays equalled projected outlays.⁷⁸

Recent experience under the Congressional Budget Act of 1974⁷⁹ shows that it is sometimes impossible for Congress to obtain even majority approval of a budget resolution before the expiration of externally imposed deadlines.⁸⁰ The inability to meet such deadlines reflects the depth of sincerely held—though differing—views on national priorities, not irresponsibility or lack of effort. Although H.R.J. Res. 350 would require agreement and is clear on the consequences of failure to reach a majority or supermajority, it would not—and could not—provide any mechanism for ordering priorities. Permitting another branch of government to do so—for example, the Judiciary—would be rank interference by one branch of government (in this instance, an unelected branch) in the affairs of another.

C. Minority Rule

The requirement of a supermajority for certain budgetary decisions would enable a minority to thwart the will of the majority. The Senate report contends that the amendment would make the budget process more democratic,⁸¹ but precisely the opposite is true. If, as *Webster's* postulates, “democracy” is “government by the people; esp. rule of the majority,”⁸² then the supermajority provision of H.R.J. Res. 350 would limit the power of a simple majority to plan deficits, and so would be undemocratic.

The legislative process set forth in the Constitution is based on majority rule. Special minority rights are granted only in limited circumstances, such as votes on impeachment in the Senate,⁸³ exclusion of members of Congress,⁸⁴ veto overrides,⁸⁵ Senate approval of treaties,⁸⁶

78. The difficulty of enforcing the outlay limitations is compounded by the fact that the federal government does not finish computing its outlays until at least 20 days after the close of the fiscal year. See *Hearings, supra* note 5, at 89 (statement of Rudolph G. Penner, economist, American Enterprise Institute).

79. See Congressional Budget Act of 1974 §§ 101-906, 31 U.S.C. §§ 1301-53 (1976).

80. Under 28 U.S.C. § 1331(h), Congress is scheduled to complete action on the second concurrent resolution of the budget by Sept. 15 of each year. For the past several years, this action has been completed, if at all, in Nov.

81. SENATE REPORT, *supra* note 2, at 28.

82. WEBSTER'S NEW COLLEGIATE DICTIONARY 299 (1979).

83. U.S. CONST. art. I, § 3, cl. 6.

84. *Id.* at art. I, § 5, cl. 2.

85. *Id.* at art. I, § 7, cl. 2.

86. *Id.* at art. II, § 2, cl. 2.

and recommended amendments to the Constitution.⁸⁷ These exceptions protect individual rights, check the power of the Executive, give meaning to executive veto power, or require a broad consensus on changing fundamental law. The vast majority of legislative decisions⁸⁸ are entrusted to majority rule. Although the Constitution requires a simple majority to declare war, under H.R.J. Res. 350 it would take a supermajority to vote even a small planned deficit. Surely, requiring an enhanced majority in budget matters would be inconsistent with our constitutional commitment to majority rule.

V. Alternative Solutions

Proponents of the amendment argue that the federal budget process is biased toward a few groups that have intense interest in obtaining special spending legislation or preserving tax loopholes because the benefits to them are so great. The vast majority of citizens, according to the argument, have little incentive to resist these appeals because the incremental cost of each program is small.⁸⁹ In addition, proponents suggest that Congressional organization is based on committees which have an interest in perpetuating the programs and benefits within their jurisdiction. These biases, it is argued, can only be rectified by constitutional means.⁹⁰

Assuming that these biases do exist, corrective action is within existing congressional authority. If analysis were to show that special interest groups exert undue leverage, changes in rules governing financing of congressional campaigns might be considered.⁹¹ If the problem relates to the organization of Congress by committee, Congress could consider changing its rules. The Congressional Budget Act of 1974 has already curbed the power of committees.⁹² If further re-

87. *Id.* at art. V.

88. *Id.* at art. I, § 8, cl. 11.

89. *See supra* note 3.

90. *See* SENATE REPORT, *supra* note 2, at 41-43.

91. *See generally*, *Symposium on Political Campaign Finance Reform*, 10 HAST. CONST. L.Q. (1983).

In the Ninety-seventh Congress, several House members joined in introducing legislation, H.R. 4070, 97th Cong., 1st Sess., 127 CONG. REC. H4111 (1981), that would limit to \$75,000 per campaign the total amount any candidate for the House of Representatives could receive from authorized Political Action Committees. Other groups have urged public financing for election campaigns.

92. Congressional Budget Act of 1974 §§ 101-906, 31 U.S.C. §§ 1301-53 (1976) and scattered sections of the *United States Code*. The general purpose of this important legislation was to bring increased cohesion to the authorization and appropriations process. The basic technique that the Act employs is for Congress to consider the federal budget as a whole rather than piecemeal. The Act reduced the powers of individual committees over the

strictions or different approaches to budgeting are in order, the Act might be strengthened.

Other goals of the proposed constitutional amendment could also be achieved without it. Congress has already taken action to combat "bracket creep" by indexing tax rates statutorily.⁹³ Finally, nothing prevents Congress from adopting a balanced budget policy today. The pent-up public frustration might be better channelled to challenging specific items in the budgets the President and the Congress work out today, rather than tilting at constitutional windmills. If a majority wants a balanced budget declared the "norm," appropriate legislation establishing that "norm" would be entirely possible.⁹⁴

While some rule reform may be called for, ultimately only firm political resolve can control budget growth. If the political will does not exist, a constitutional amendment will not help. If the will does exist, created by "an aroused popular conscience that sears the conscience of the people's representatives,"⁹⁵ an amendment would not be needed to bring about the fiscal balance we all want.

Conclusion

The Senate report correctly observed that H.R.J. Res. 350 represents "economic policy."⁹⁶ In a famous dissent, Mr. Justice Holmes once warned that the Constitution is not intended to "embody a particular economic theory."⁹⁷ An objective analysis of H.R.J. Res. 350 affirms the wisdom of Justice Holmes' injunction.

Adoption of H.R.J. Res. 350 would do nothing to solve our current, crushing economic problems. Ratification could take as long as seven years, and implementation would take another two years. Mean-

spending process by placing committee authorization decisions on rigid timetables, creating budget committees in the House and Senate to recommend spending totals by subject category, requiring cost estimates on reported bills by the Congressional Budget Office, and providing for House and Senate floor consideration of committee spending recommendations simultaneously with those of other committees. *See generally* A. SCHICK, CONGRESS AND MONEY: BUDGETING, SPENDING AND TAXING (1980).

93. *See supra* note 7.

94. While proponents have argued that a legislative approach would be ineffective because subsequent inconsistent legislative action can implicitly repeal a statute, some approaches, such as that adopted in H.R. 6834, 97th Cong., 2d Sess., 128 CONG. REC. H4535 (daily ed. July 22, 1982) (co-sponsored by Rep. William Hughes and Rep. Henry Hyde), circumvent this problem by making the consideration of an unbalanced budget subject to a point of order.

95. *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

96. SENATE REPORT, *supra* note 2, at 4.

97. *Lochner v. New York*, 198 U.S. 45, 75 (1904) (Holmes, J., dissenting).

while, this proposal would not shave a single point off interest rates or inflation, or trim one dollar off the deficit.

The Constitution is a document designed to guarantee fundamental rights and freedoms, and to provide for the orderly operation of government. If implanted into the Constitution, H.R.J. Res. 350 would guarantee nothing. As this analysis has shown, H.R.J. Res. 350 provides for a balanced budget—except when three-fifths of Congress says otherwise; when revenues fall below estimates; when there is a declared war; when Congress can't agree on raising taxes; or when Congress just decides to circumvent it.

The supermajority restrictions of the proposed amendment could actually decrease the budgetary controls painstakingly being developed through the President's Office of Management and Budget and the procedures of the Congressional Budget Act. Circumventions of the budgetary procedure would result in items being placed outside the careful scrutiny that yearly budgetary review entails.

A single and, in isolation, a rather meaningless measurement of the overall economic policy of this nation, should not be enshrined in the Constitution. Today's measure of a responsible budgetary policy may be an amusing historical anecdote to the next generation of economists.

Alexander Hamilton cautioned against writing mere parchment provisions into the Constitution because "nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society."⁹⁸ He counseled:

Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers toward the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable!⁹⁹

98. THE FEDERALIST NO. 26, at 212-13 (A. Hamilton) (Harvard ed. 1961).

99. *Id.*

