



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY



Issue Brief

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November 2011

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The Balanced Budget Amendment: A Threat to the Constitutional Order

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At the heart of the balanced budget debate is a disagreement over economic policy. Many economists believe that fiscal policy (increasing spending and/or cutting taxes to promote growth in the private economy or decreasing spending and/or raising taxes to mollify inflationary pressures) is an important tool for promoting the nation's economic goals. Others believe that fiscal policy either cannot or should not be employed to promote economic growth. I am a constitutional law professor, not an economist. As such, I have no special expertise to offer on this dispute and, in fact, take no position on which economic school of thought has the better of the argument.

Over the last few years, there have been renewed calls not only to resolve this policy dispute, but to place its resolution effectively beyond question or revision by amending the Constitution to require a balanced budget.¹ This suggestion raises constitutional questions of the highest order. Below, I offer my analysis of these questions and the extremely serious threats that a balanced budget amendment would pose for our constitutional order.

I. The Balanced Budget Amendment Contradicts Our Constitutional Design

The Constitution does not bind the nation or future generations to adhere to any particular conception of the public good or of appropriate social or economic policy. Rather, the Constitution recognizes that our vast nation will encompass groups and individuals with starkly contrasting and sharply conflicting notions of the public good and sound policy. Instead of trying to resolve these disagreements, the Constitution focuses on structuring governmental power and establishing decision-making processes that will promote deliberation and public-interested measures over oppressive or special-interested ones.

Our foundational law goes on to supplement these procedural and structural protections by enshrining individual rights. Together these structures and rights allow us to resolve policy disagreements in a manner that we all can agree is fair, even if we disagree with specific outcomes. It is precisely because of this basic design that we regard ourselves as a free and self-

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¹ The leading proposals to amend the Constitution refer to the provision as a "balanced budget amendment" and virtually all public rhetoric employs this phrase. For this reason, I adopt it as well to refer to the proposals collectively, even though the phrase is an inaccurate expression of what the amendment would require. The so-called balanced budget amendment would forbid federal spending to exceed federal revenues for any fiscal year. Thus, the amendment would forbid the federal government to run a deficit. The amendment, however, would not require that expenditures *equal* revenues. The amendment thus would not forbid the federal government to run a surplus, and thereby to employ fiscal policy as a means of contracting economic activity in order, for example, to restrain inflation.

governing people. This may also explain why ours is the world's longest enduring written Constitution.²

It is no accident that our Constitution does not dictate outcomes. The founding generation faced divisive controversies that were every bit as momentous as the present-day budget crisis. Yet they consciously designed the Constitution not to resolve these issues, instead leaving them to be resolved through the constitutionally ordained process of legislation in accordance with constitutionally guaranteed individual rights. For example, the founding generation was deeply divided over whether to allow the federal government to establish and maintain a standing army.³ Rather than resolving this issue, the Constitution authorized Congress to provide and maintain an army and navy, and designated the President as commander in chief, without requiring that Congress deploy this power and establish a standing military force.⁴ Thus, the first Congress could decide whether to create a standing army and subsequent Congresses, and subsequent generations, could decide for themselves whether to follow suit.

There was broad public agreement at the time of the Constitution's adoption regarding the need to provide for a judicial power and a Supreme Court to exercise that power. There was no consensus regarding the need for, much less the structure and powers of, a system of lower federal courts. The Constitution expressly left this contentious and significant issue to be resolved by Congress.⁵

One final example, not from the period of the Constitution's original ratification, is the controversy over the adoption of a federal income tax. In 1895, the Supreme Court held that the Constitution as originally ratified did not allow the federal government to impose an income tax.⁶ The Constitution was amended not to establish an income tax, but to authorize the federal government to create one.⁷ As a result, Congress remains free to abolish the income tax if it chooses to do so. When the public determined in the late-nineteenth century that the best way to

² See TOM GINSBURG & ROSALIND DIXON, *COMPARATIVE CONSTITUTIONAL LAW* (2011).

³ Compare George Washington, *Sentiments of a Peace Establishment* (May 2, 1783), *reprinted in* 3 PHILIP KURLAND, *THE FOUNDER'S CONSTITUTION* 128 (1987) (favoring a standing military force) and Alexander Hamilton, *id.* at 130 (same) with Richard Henry Lee, *Letter to James Monroe* (Jan. 5, 1784), *reprinted in id.* at 131 (opposing the establishment of a standing army), *Federal Farmer* No. 3 (Oct. 10, 1787), *reprinted in id.* at 132 (same), and *A Democratic Federalist* (Oct. 17, 1787), *reprinted in id.* at 133 (same). The records of the drafting convention show that the delegates held conflicting views on the subject. See *id.* at 132.

⁴ See U.S. CONST. art I, sec. 8, cl. 12; U.S. CONST. art. II, § 2, cl. 1. In advocating for the ratification of the Constitution, Alexander Hamilton urged the public to recognize that the Constitution would neither require nor forbid the establishment of a standing army, but would leave the matter in the discretion of Congress, which could then exercise its judgment as circumstances might dictate. See *THE FEDERALIST* No. 24 (Alexander Hamilton).

⁵ See U.S. CONST. art. I, § 8, cl. 9 (authorizing Congress to "constitute Tribunals inferior to the supreme Court"); U.S. CONST. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). At the drafting convention, for example, John Rutledge moved to strike from the initial draft of the Constitution the provision establishing lower federal courts on the ground that this function should be left to state courts. After Rutledge's motion passed, James Madison and James Wilson moved to authorize Congress to create lower federal tribunals. "They observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them." This motion passed overwhelmingly. See *Records of the Federal Convention* (June 5, 1787), *reprinted in* 3 PHILIP KURLAND, *THE FOUNDER'S CONSTITUTION* 61 (1987).

⁶ *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).

⁷ See U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes").

raise revenue for the federal government was through an income tax, they did not impose that judgment in the Constitution, but left ensuing generations free to select for themselves the most appropriate means of raising federal revenue.

There is one counter example, but it ultimately reinforces the general constitutional design outlined above. Effective in 1920, the Constitution was amended to prohibit “the manufacture, sale, or transportation of intoxicating liquors” in the United States.⁸ The amendment clearly did not involve the structure of governmental power or the processes of governmental decisionmaking, nor did it protect an individual right. Rather, it sought to enshrine in the Constitution a resolution of general social policy. Such a failure was this deviation from the Constitution’s design that it stands as the only amendment ever to be repealed.⁹ The repealing amendment is instructive in this regard. It does not, so to speak, prohibit prohibition. Rather, it leaves the question of whether to permit the sale and possession of alcoholic beverages (and if so under what regulations) to be determined by each state through its own democratic process.¹⁰

It may seem that these observations about the Constitution’s design operate at too high a level of abstraction to have any practical relevance to the debate over the balanced budget amendment. These concerns, however, play out in very practical ways that raise insuperable objections to the proposed amendment. In particular, the Framers understood fully well that attempts to define and resolve disputes in the Constitution itself would render the Constitution a charter of useless “parchment barriers” that could not be enforced.¹¹ This concern informs the following analysis of the balanced budget amendment.¹²

II. The Disastrous Consequences of Enforcing the Proposed Amendment

The proposed balanced budget amendment provides no express enforcement mechanism.¹³ The leading proposals simply declare that total outlays shall not exceed total receipts, without explaining how this balanced budget is to be achieved. Merely imposing a mandate does not mean Congress will be able to fulfill it. One Member of Congress might vote to raise taxes, another to reduce entitlement benefits, a third to cut military spending, and a fourth to adopt a combination of each. No single measure may gain a majority in the House or Senate, with each individual legislator honestly claiming to have fulfilled the new constitutional

⁸ U.S. CONST. amend. XVIII.

⁹ See OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 247 (Kermit Hall ed., 1992). To be sure, some amendments, such as those dealing with the process of presidential succession, have been refined and improved by successive amendments. Nonetheless, the Prohibition amendment stands as the only amendment actually to have been repudiated.

¹⁰ U.S. CONST. amend. XXI, § 2.

¹¹ THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

¹² In referring to the balanced budget amendment, I refer principally to H.J. Res. 2, which I understand to be the version that Congress is presently focused on. The problems with H.J. Res. 2, however, inhere in the very concept of a balanced budget amendment, and so apply to varying degrees to any proposal to adopt such a constitutional amendment.

¹³ I use the term “enforcement mechanism,” as distinguished from an “enforcement clause.” While some balanced budget amendment proposals do include clauses providing that Congress shall enforce the amendment through appropriate legislation, they do not articulate how the amendment would be implemented and, rather, leave the matter to future legislation and/or judicial decision.

duty to support a budget that is balanced.

It is also possible for Congress and the President to fully comply with their constitutional obligations and nevertheless enact outlays in excess of receipts. Congressional budgeting depends on forecasting of both receipts and outlays. If these forecasts turn out to be in error – for example, because a subsequent economic downturn substantially reduces government receipts and significantly increases outlays due to a greater than foreseen number of individuals becoming eligible for various forms of government assistance – then the federal budget enacted it would be out of balance even though it appeared to be balanced when Congress and the President.

The omission of an enforcement mechanism is not likely an oversight, as this same problem plagued the last several significant efforts to ratify a balanced budget amendment.¹⁴ This problem, moreover, is insurmountable. Every conceivable enforcement mechanism would do serious violence to the fundamental structure of our government and of our Constitution.

There is little doubt that the sponsors of the amendment intend for it to be an enforceable legal requirement. In advocating the amendment's ratification, sponsors repeatedly speak of what the amendment would require or mandate. For example, Senator Orrin Hatch, the measure's principal sponsor in the Senate, states that a balanced budget amendment "is the only way to *force* Washington to act."¹⁵ Senator Mike Lee asserts that "a balanced-budget *requirement* will *ensure* we do not continue to drive our country further into debt"¹⁶ Representative Bob Goodlatte introduced the measure in the House, declaring "Mr. Speaker, I rise to re-introduce legislation that will amend the United States Constitution to *force* Congress to rein in spending by balancing the federal budget.... Unless Congress is *forced* to make the decisions necessary to create a balanced budget, it will always have the all-too-tempting option of shirking this responsibility. A Constitutional balanced budget *requirement* ... will set our nation's fiscal policies on the right path. This is a common sense approach to *ensure* that Congress is *bound* by the same fiscal principles that guide America's families each day"¹⁷

In the absence of an express enforcement mechanism, this role will fall to the judiciary and so I will focus on this prospect. After examining the consequences of assigning this power to the judiciary, I will consider alternative enforcement mechanisms.

A. The Perils of Judicial Enforcement

¹⁴ Robert H. Bork, *On Constitutional Economics*, AM. ENT. INST. J. ON GOV'T AND SOC'Y 14, 18 (1983), reprinted in *Proposed Balanced Budget Constitutional Amendments: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 100th Cong. (1989) 645, 649; *The Balanced Budget Amendment: Hearing Before the Joint Economic Committee*, 104th Cong. (1995) (statement of Walter E. Dellinger), available at http://www.justice.gov/olc/jtecon.95.8.htm#N_26_.

¹⁵ See Orrin Hatch, *Balanced Budget Amendment Needed to Fix National Debt Crisis*, U.S. NEWS, Apr. 25, 2011 (emphasis added), available at <http://www.usnews.com/opinion/articles/2011/04/25/balanced-budget-amendment-needed-to-fix-national-debt-crisis>.

¹⁶ Mike Lee, *Why We Need a Balanced Budget Amendment*, WASH. POST, Mar. 4, 2011 (emphasis added), available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/03/AR2011030304714.html>.

¹⁷ See *Balanced Budget Amendment Introduced in House* (emphases added), <http://bbanow.org/news/2011-01-07/bba-introduced-congress> (last visited Nov. 11, 2011).

If a balanced budget amendment were ratified, it would in all likelihood empower the courts to make appropriate remedial orders for any violation of the newly enacted provision. Indeed, the Supreme Court jealously guards its authority to interpret the Constitution and to provide remedy for its violation.¹⁸ This is not a recent development, but one that extends back to *Marbury v. Madison* and Chief Justice Marshall's famous declaration that "it is emphatically the province and duty of the judicial department to say what the law is."¹⁹ Perversely, many supporters of the balanced budget amendment have criticized the judiciary's lack of self-restraint in interpreting the Constitution in other contexts. Why, then, would they expect reticence and restraint with respect to a balanced budget amendment?

If the courts were to play their usual role as constitutional interpreter and enforcer with respect to the balanced budget amendment, however, it would threaten not merely to alter but to eviscerate the fundamental character of the judiciary. Our judiciary is able to perform its function because it is independent of politics, and because the public trusts that independence. This character stems from the Constitution's specific design.²⁰ Federal judges do not depend on politics to maintain office and do not participate in the political functions of government. In advocating for the Constitution's ratification, Alexander Hamilton wrote, in *The Federalist* No. 78, that "The judiciary [has] no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment."²¹ The Constitution's framers understood that the judicial role was to decide cases according to law and completely independent of political considerations or influence.

Our independent federal judiciary is highly skilled at deciding legal questions. It is not at all competent to make decisions of a political or policy nature. Judges are not, generally speaking, trained in matters of economics or finance. They have no special competency that would recommend committing such decisions to them. Moreover, the processes of litigation are not well adapted to resolving disputes over sound economic policy. Judges can hear and weigh evidence from witnesses, witnesses who are chosen and called by the parties and not by the judge. But they do not hold hearings of a legislative sort. Legislators can call any witness they like and ask whatever questions they like. Legislative hearings allow the legislature to call all interested parties, not just the parties to a lawsuit, and allow legislators to pursue any line of inquiry they believe to be worthwhile. Finally, legislators are politically accountable for their decisions. Judges are not and should not be. Decisions regarding how to achieve a balanced budget are precisely the type of decisions that involve will and not judgment, to use Hamilton's phrase, and so should be made by accountable officials rather than judges.

If the balanced budget amendment were ratified and Congress were to fail to enact a balanced budget, the judiciary would be pressed into declaring the constitutional violation. In a

¹⁸ See, e.g., *Dickerson v. United States*, 530 U.S. 428 (2000); *Boerne v. Flores*, 521 U.S. 507 (1997); *Cooper v. Aaron*, 358 U.S. 1 (1958).

¹⁹ 5 U.S. (1 Cranch) 137, 177 (1803).

²⁰ The Constitution allows judges to retain office during "good behavior," which effectively guarantees life tenure subject to removal through impeachment and conviction. The Constitution further secures the independence of the judiciary by forbidding their compensation to be reduced. U.S. CONST. art. III, § 1.

²¹ THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

prospective suit²² for relief, however, there would be no way of ordering a remedy without making decisions that would be inextricably political. Such a decision inevitably would involve a judgment about tradeoffs between spending reduction and revenue raising and, within each of these categories, between types of spending reductions (national defense spending or entitlement spending, for example) and between types of revenue raising (income tax, capital gains tax, estate tax, etc.).

For these reasons, one might expect the courts to regard questions raised regarding the balanced budget amendment to be non-justiciable political questions. In fact, there is no reason to expect that this is the road the courts would follow. Indeed, there is a consensus that the courts will become embroiled in controversies over balancing the budget. As Judge Robert Bork declared in opposing a balanced budget constitutional amendment,, “[t]he result . . . would likely be hundreds, if not thousands, of lawsuits around the country, many of them on inconsistent theories and providing inconsistent results.”²³

Professor Charles Fried of Harvard Law School, has observed that neither the political question doctrine nor limitations on standing would necessarily preclude litigation that would ensnare the judiciary in the thicket of budgetary politics.²⁴ To be sure, "the political question doctrine . . . is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government,"²⁵ but many Supreme Court decisions indicate the Court is prepared (wisely or unwisely) to resolve questions that might once have been considered "political." For example, in *United States v. Munoz-Flores*,²⁶ the Court adjudicated a claim that an assessment was unconstitutional because Congress had failed to comply with the Origination Clause, which mandates that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." U.S. Const. art. I, § 7, cl. 1. The Court rejected the argument that this issue was a nonjusticiable political question. And in 1992, the Court held that congressional selection of a method for apportionment of congressional elections is not a "political question" and is therefore subject to judicial review.²⁷

Following these cases, the Supreme Court decided a case, *Clinton v. Jones*, in which a sitting President was sued personally. The Court did not see lawsuits involving a sitting President as inherently political and authorized a federal trial court to exercise jurisdiction over the claim and over the President personally.²⁸ Most blatantly, the Supreme Court decided a case, *Bush v. Gore*, where the political nature of the question presented was evident from the caption itself. In that case, of course, the Supreme Court actually decided the outcome of a presidential

²² By "prospective suit," I mean a suit brought before outlays actually exceed receipts.

²³ See Bork, *supra* note 14, at 14, 18.

²⁴ *Balanced Budget Amendment -- S.J. Res. 41: Hearings Before the Senate Comm. on Appropriations*, 103d Cong. 82-83, 86-87 (1994) [hereinafter *1994 Senate Hearings*].

²⁵ *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990); see also *Baker v. Carr*, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is . . . a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.").

²⁶ 495 U.S. 385 (1990).

²⁷ *Department of Commerce v. Montana*, 503 U.S. 442 (1992).

²⁸ 520 U.S. 681 (1997).

election.²⁹

The judiciary has not shied away from disputes over the budget or the budgeting process. The Supreme Court struck down Congress's first attempt to impose a structure that would yield a balanced budget – the Gramm-Rudman-Hollings Act.³⁰ It has also struck down the so-called Line Item Veto Act.³¹ The Court also heard a case involving President Richard Nixon's assertion of constitutional authority to impound funds.³² Lastly, some of the legislative history surrounding previous versions of the balanced budget amendment suggests that at least limited judicial review is contemplated. In light of this background, it is doubtful that courts would refuse to hear balanced budget claims on political question grounds.³³

In the end, there is a range of views as to the extent to which courts would involve themselves in issues arising under the balanced budget amendment. Judge Bork believes that there "would likely be hundreds, if not thousands, of lawsuits around the country" challenging various aspects of the amendment.³⁴ Similarly, the late Professor Archibald Cox of Harvard Law School predicted that "there is a substantial chance, even a strong probability, that . . . federal courts all over the country would be drawn into its interpretation and enforcement,"³⁵ and Professor Charles Fried has testified that "the amendment would surely precipitate us into subtle and intricate legal questions, and the litigation that would ensue would be gruesome, intrusive, and not at all edifying."³⁶ Other commentators, such as former Attorney General William Barr, believe that the political question and standing doctrines likely would persuade courts to intervene in relatively few situations, and that there will not be an "avalanche" of litigation, but that, "[w]here the judicial power can properly be invoked, it will most likely be reserved to address serious and clearcut violations."

Former Attorney General Barr may well be right that courts would be reluctant to get involved in most balanced budget cases -- and it would be proper for them to be so reluctant. However, none of the commentators, including former Attorney General Barr himself, believes

²⁹ 531 U.S. 98 (2000). For a discussion of the justiciability of the case, see Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001).

³⁰ See *Bowsher v. Synar*, 478 U.S. 714 (1986).

³¹ *Clinton v. New York*, 524 U.S. 417 (1998).

³² *Train v. New York*, 420 U.S. 35 (1975) (holding that the president must spend funds if a statute requires that they be spent).

³³ It might also be thought that the requirement that a plaintiff have standing could serve as a barrier to litigation involving the balanced budget amendment. This is doubtful as well. See *The Balanced Budget Amendment: Hearing Before the Joint Economic Committee*, 104th Cong. (1995) (statement of Walter E. Dellinger), available at http://www.justice.gov/olc/jtecon.95.8.htm#N_26_. Since that testimony, the Court has narrowed both congressional standing, see *Raines v. Byrd*, 521 U.S. 811 (1997), and taxpayer standing, *Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007). The Court has not, however, closed off these bases of standing entirely. The Court, for example, quite emphatically refused to abolish the doctrine of taxpayer standing in *Hein*. See *id.* (Scalia, J., concurring). Aside from these specialized categories of potential plaintiffs, any party who is adversely affected by government spending in excess of revenues would appear to suffer an injury-in-fact for standing purposes and so would have a strong claim to hold standing to litigate.

³⁴ See Bork, *supra* note 14, at 14, 18.

³⁵ *1994 Senate Hearings*, at 157 (statement of Archibald Cox, Professor of Law, Harvard University).

³⁶ *Id.* at 83 (testimony of Charles Fried, Professor of Law, Harvard University).

that the amendment would bar courts from at least occasional intrusion into the budget process.³⁷ Accordingly, whether we would face an "avalanche" of litigation or fewer cases alleging "serious and clearcut violations," there is a consensus that the amendment creates the potential for the involvement of courts in issues arising under the balanced budget amendment, and that while judicial review of alleged constitutional violations is appropriate, judicial resolution of budget disputes is not. In the end, it matters little whether the number of cases brought under a balanced budget amendment would be large or small. A single case could easily represent an avalanche of litigation in terms of its far-reaching consequences.

There is also a set of cases, unnoticed in previous commentary on balanced budget amendment proposals, over which the Court would seem to have undeniable authority to exercise review. Prior commentary has considered litigation brought at a time when a budget is passed but before it has actually taken effect and so before outlays have actually exceeded receipts. In this setting, as discussed above, there are very significant problems relating to the sort of prospective remedy a court might order and to what parties might satisfy the constitutional and prudential requirements of standing. None of these problems is present if the litigation is brought *after* the fiscal year's receipts have been exhausted. If outlays exceed receipts for a given year, the federal government would be in violation of the balanced budget amendment for every expenditure it makes from that point through the end of the fiscal year. The Constitution already contains a separate provision that would render such spending illegal: "no money shall be drawn from the Treasury but in consequence of appropriations made by law."³⁸ The balanced budget amendment would establish the invalidity of any outlay, or appropriation of funds, in excess of receipts, and therefore such an appropriation would not be "made by law."

A single lawsuit could be sufficient to have government operations declared invalid once the year's revenues have been exhausted and this, in turn, could require the entire federal government to shut down, because everything the federal government does involves an expenditure of funds to pay the official or officials that undertake the government action. Thus, for example, any individual who is subject to a criminal prosecution on the day after federal receipts have been exhausted would have standing to assert that the prosecutor is illegally in court, because his salary for that day represents an outlay in excess of receipts. Or, a coal mine operator who is subject to a mine safety inspection could seek an injunction to prohibit federal officials from carrying out the inspection on the same grounds.

While a prospective suit would raise serious concerns with respect to remedy, requiring federal judges to determine which spending to cut or how to raise revenues, a lawsuit brought after federal outlays exceed receipts would not. For such a suit, the remedy would be quite simple and judicially manageable: an order prohibiting further outlays. This remedy is judicially manageable in that it does not require a judge to make any inappropriate determination of economic policy, but the consequences of such a remedy would be catastrophic. This remedy would require a complete government shutdown, unlike the much more limited statutory

³⁷ Attorney General Barr has stated that "I would be the last to say that the standing doctrine is an ironclad shield against judicial activism. The doctrine is malleable and it has been manipulated by the courts in the past." *The Balanced-Budget Amendment: Hearing on S.J. Res. 1 Before the Senate Comm. on the Judiciary*, 104th Cong. 126 (1996) (statement of former Attorney General William Barr).

³⁸ U.S. CONST. art. I, § 9, cl. 7.

shutdowns that have occurred from time to time.³⁹

There are several illuminating distinctions between a constitutionally compelled complete shutdown and a statutory shutdown. First, unlike a statutory shutdown, Congress could not solve the problem through the simple expedient of passing a continuing resolution. Congress would have to actually raise the revenue to pay for the continuance of federal operations. Second, the relevant statutes have been interpreted to allow for exceptions where the obligation of funds in advance of an appropriation is necessary to protect life or property and in other “emergency” situations.⁴⁰ The balanced budget amendment contains no such exceptions⁴¹ and thus, on its face, could require the federal government to cease all operations, including the operation of federal prisons, air traffic control facilities, food and workplace safety inspections, border control, military operations, and other critical functions.⁴²

There would be an alternative judicial route to enforcing compliance with the balanced budget amendment: federal courts might impose taxes or other revenue raising measures to fund the continuing operations of the federal government. In *Missouri v. Jenkins*, the Supreme Court held that a federal district court could mandate that a state increase taxes in order to fund a school desegregation program. This would avoid the seriously harmful consequences of requiring a cessation of federal operations, but at the expense of the judiciary taking on a role that, in our constitutional system, is properly assigned to the politically accountable branches.

Thus, once federal expenditures equal federal revenues in a given year, a small number of cases or even a single lawsuit would do lasting damage to the judiciary and to our constitutional structure. To put it differently, a single case could represent an avalanche of litigation. And, should it turn out that courts do not become involved, we would be faced with the prospect of an

³⁹ I refer to these as statutory government shutdowns because the requirement that the government cease operations and the scope of the cessation are defined by statute, particularly the Anti-Deficiency Act, 31 U.S.C. §§ 1341-1342 (2006).

⁴⁰ See Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, to Alice Rivlin, Dir., Office of Mgmt. and Budget (Aug. 16, 1995), available at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m95-18.pdf>; Applicability of the Antideficiency Act Upon A Lapse in an Agency's Appropriations, 4A Op. O.L.C. 16 (1980).

⁴¹ It is true that many proposals, such as H.J. Res. 2, include an exception for times when the nation is at war or is engaged in military conflict. But none of the leading proposals includes an exception for emergencies generally. Presumably, this is because such an exception could be made to render the amendment meaningless, since Congress would then be free to declare an emergency whenever it lacks the political will to balance the budget. While understandable, the result is that the amendment, if ratified, would not allow deficit spending for such non-military emergencies as the need to keep federal prisons or air traffic control systems operating.

⁴² It is possible that, under the guise of constitutional interpretation, the Supreme Court would create exceptions to make the balanced budget amendment workable and to avoid the serious dislocation that would attend a literal application of its terms. I am not confident that the Court would do so. The Court has been willing, for example, to accept dramatic dislocation of the criminal justice system as the consequence of the literal application of other constitutional guarantees. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In another instance, the Supreme Court ruled the entire system of federal bankruptcy courts to be constitutionally defective. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The Court employed its equitable powers to toll the effective date of its ruling and give Congress time to comply with its ruling. Since that case, the Court has disavowed such an exercise of equitable power and ruled that its constitutional decisions must be applied retroactively. See *Harper v. Va. Dep't of Revenue*, 509 U.S. 86 (1993). Even if the Court were to accept the invitation to eviscerate the balanced budget amendment through interpretation, it is difficult to see how this counts in the amendment's favor. If we are not serious about forcing compliance with the amendment, why pass it in the first place?

amendment that includes no enforcement mechanism, and of constitutional violations for which there is no judicial remedy. As discussed below, this prospect also would be deeply troubling.

B. Alternative Enforcement Mechanisms Offer No Solution

1. Executive Enforcement

It is possible that, in the alternative, the power to enforce balance in the federal budget would devolve upon the president.⁴³ The president could plausibly⁴⁴ interpret the constitutional command of the balanced budget amendment that expenditures not exceed revenues to take precedence over mere statutes, including appropriations bills, entitlement packages, and the Congressional Budget and Impoundment Control Act of 1974.⁴⁵ Although the president might interpret that command to authorize him to impound funds, nothing in the amendment would guide the exercise of such a power. For example, the proposal does not say whether the President may select particular areas of his choosing for impoundment, or whether certain areas - - such as Social Security and other entitlement programs -- would be beyond the purview of his impoundment authority. Under this potentiality, it would be up to the President and the President alone to make fundamentally important policy choices about what spending should continue and what spending should be cut. This prospect is in deep tension with the existing Constitution. The framers assigned the power of the purse in no uncertain terms to Congress. This was an intentional decision. In our constitutional system, Congress is most directly accountable to the public.⁴⁶ Moreover, Congress is structured in a way that facilitates debate and deliberation, allows for a wide range of interests and viewpoints to be heard, and permits the public to follow and participate in the deliberation.⁴⁷ The President and the executive cabinet are not similarly constructed and are, in fact, designed to operate with greater dispatch and secrecy. Those who wrote and ratified our Constitution thought that decisions about how to fund the operations of the government and what operations to continue funding were the sort of decisions that should be committed to the open and deliberate process of the legislative branch rather than

⁴³ I do not mean to suggest that this would be the best reading of the balanced budget amendment.

⁴⁴ Such an interpretation would be plausible not only because the Constitution vests the President with the executive power, but also because it imposes on the President the duty to take care that the laws be faithfully executed. U.S. CONST. art. II, § 3, cl. 4. This duty includes the obligation that the President take care that the Constitution be faithfully executed. *See generally* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000); CHRISTOPHER N. MAY, *PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE* (1998).

⁴⁵ 2 U.S.C. §§ 601-692 (2006).

⁴⁶ Congress's direct popular election stands in contrast to the President's, which is mediated through the Electoral College. Moreover, the House of Representatives stands for election every two years, leaving it most closely connected to current public sentiment. It is for this very reason that the Constitution requires that all bills for raising revenue originate in the House of Representatives.

⁴⁷ *See, e.g.*, U.S. CONST. amend. 1 (securing the right to petition); *id.* art. I, § 5 (authorizing Congress to establish its own internal structures and anticipating that these would foster deliberation through mechanisms such as the committee structure and, in the Senate, the filibuster); *id.* ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.").

closed and unitary action of the executive. To reassign this power to the President would represent a fundamental break with the original design of the Constitution.⁴⁸

The assignment of this power to the President would undermine the Constitution's structure in an additional way. It would upset the balance of power between the President and Congress. The framers of the Constitution understood that allocating the power of the purse to Congress would serve to make it "the most dangerous branch."⁴⁹ Indeed, the framers thought it inevitable that, in a representative republic, the legislative branch would predominate. To check against the potential for abuse of its relatively vast powers, the Constitution imposes a range of internal checks on Congress, such as dividing the legislature into two chambers of notably different character. There are no corresponding internal checks on the operations of the executive branch. Thus, the reallocation of Congress's power of the purse to the President would significantly alter the balance of power between Congress and the President and would leave that power unconstrained by the constitutional structures that promote deliberation and that deter Congress from exercising its powers oppressively. Uniting these powers to formulate fiscal policy and to then enforce that policy in the hands of the President alone would represent what the framers considered to be the paradigmatic violation of the principle of separation of powers.⁵⁰

2. Independent Enforcement

Given that either judicial or executive enforcement of the balanced budget amendment would subvert our constitutional framework and possibly lead to substantial practical harm, it might be tempting to revise the amendment to provide for enforcement by an independent agency on the model of the Federal Reserve. Such a model would not only repeat but exacerbate the problems that inhere in executive enforcement. Because an independent agency is, by definition and design, insulated from political accountability, the fundamental fiscal policy choices involved in balancing the budget would be even more effectively removed from public input and accountability. The insulation of monetary policy, which the Federal Reserve presently sets, from immediate political control and accountability can be justified by the peculiar dangers of allowing political manipulation of the money supply. Whatever the merits of this justification with respect to monetary policy,⁵¹ it does not apply to fiscal policy.

3. No Enforcement: The Balanced Budget Amendment as Empty Platitude

In the absence of enforcement mechanisms such as presidential impoundment of funds or judicial involvement in the budgeting process, a balanced budget amendment is unlikely to bring about a balanced budget. To have the Constitution declare that the budget shall be balanced,

⁴⁸ This argument derives from the position of the Department of Justice set forth by then-Assistant Attorney General Walter Dellinger. See *The Balanced Budget Amendment: Hearing Before the Joint Economic Committee*, 104th Cong. (1995) (statement of Walter E. Dellinger), available at http://www.justice.gov/olc/jtecon.95.8.htm#N_26_.

⁴⁹ THE FEDERALIST NOS. 47, 48, 51 (James Madison). Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) ("the power to tax involves the power to destroy").

⁵⁰ THE FEDERALIST NO. 47 (James Madison) (uniting the power of one branch with the power of another "may justly be pronounced the very definition of tyranny.").

⁵¹ This judgment finds affirmation from the nearly universal practice of economically developed democracies in committing decisions over monetary policy to independent central banks.

while providing no mechanism to make that happen, would place an empty promise in the fundamental charter of our government and lead to countless constitutional violations. Moreover, to have a provision of the Constitution routinely violated would inevitably make all other provisions of the Constitution seem far less inviolable. As Alexander Hamilton noted:

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 towards 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.⁵²

Some have suggested that even if the amendment failed to eliminate the deficit, it would nonetheless have the salutary effect of creating pressure to reduce the deficit. While this might be true, the effect would come at considerable cost. Even supposing that the amendment brought about a reduction in the size of the deficit, the remaining excess of expenditures over receipts would constitute a continuing multi-billion-dollar violation of the Constitution, every day that the budget is not in balance. For how long would we as a people continue to make difficult decisions to comply with the First Amendment or with the Due Process or Takings Clauses of the Fifth Amendment if we had routinely failed, for lack of an enforcement mechanism, to come within billions of dollars of complying with the most recent amendment to our Constitution?

If only we could declare by constitutional amendment that from this day forward justice would prevail and sound economic policy would be followed. But merely saying those things in the Constitution does not make them happen. As nations around the world have discovered, placing a statement of principle in a constitution does not mean the principle will be obeyed. Many constitutions "guarantee" a clean environment or freedom from poverty; the only effect when such promises fail is that the constitution is not taken seriously as positive law, the kind of law that may be invoked in court by litigants. The framers of our Constitution, on the contrary, understood that its provisions must be enforceable if the rule of law is to be respected. We

⁵² THE FEDERALIST NO. 25, at 167 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For further expression of this concern, as it relates to proposed balanced budget amendments quite similar to this one, see, e.g., Peter W. Rodino, *The Proposed Balanced Budget/Tax Limitation Constitutional Amendment: No Balance, No Limits*, 10 HASTINGS CONST. L.Q. 785, 800 (1983); *Proposed Balanced Budget Constitutional Amendments: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 100th Cong. 614-15 (1989) (letter from William Van Alstyne, Professor of Law, Duke University to Warren Grimes, Counsel, House Judiciary Committee); *id.* (letter from Jonathan Varrat, Professor of Law, U.C.L.A. to the Honorable Peter W. Rodino, Jr., Chairman, House Judiciary Committee); and *Constitutional Amendments to Balance the Federal Budget: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 96th Cong. 22 (1980) (testimony of Paul A. Samuelson, Nobel-prize-winning economist) ("If the adopted amendment provides escape valves so easy to invoke that the harm of the amendment can be avoided, the amendment degenerates into little more than a pious resolution, a rhetorical appendage to clutter up our magnificent historical Constitution. . . . There is no substitute for disciplined and informed choice by a democratic people of their basic economic policies.").

should hesitate long before placing an unenforceable promise in the fundamental document that binds our nation together.⁵³

III. Conclusion

A balanced budget amendment would threaten to tear irrevocably the fabric of our constitutional structure. First, amending the Constitution to require a balanced budget would be a unique and dangerous experiment. It is fundamentally inconsistent with the bedrock constitutional value of democratic self-government. A balanced budget amendment would be the only constitutional provision, other than the failed attempt to mandate prohibition, that dictates the outcome of a policy dispute rather than governing the process by which decisions are made or protecting individual rights.

Second, as a practical matter, enforcing a balanced budget amendment would have catastrophic consequences. Previous commentary on balanced budget amendment proposals has focused on whether the courts would find the failure to enact a budget that is balanced to present the sort of controversy that judges can resolve. There appears to be a broad consensus that in at least some, and perhaps in many, instances, judges would resolve balanced budget controversies. In such instances, this would mean judges would be required to order either spending cuts or tax increases. This prospect is so troubling that it has justly alarmed commentators across the political spectrum.

In this Issue Brief, I have identified an additional type of lawsuit – one brought not before, but rather, after the year's outlays exceed receipts – where there can be no question that the courts would have authority to make a ruling and where there would be no issue as to what the proper remedy would be. In this setting, a balanced budget amendment operating in tandem with the Appropriations Clause would compel all government functions to cease immediately and for the remainder of the fiscal year. There is no hyperbole in calling this result catastrophic. It would mean that the balanced budget requirement would force the federal government to close prisons, to stop air traffic control, to end border patrol and other national security enforcement, to withdraw criminal prosecutions, to abandon all military activities not involving actual conflict or the prosecution of a declared war, to close Veterans Administration hospitals, and to withhold Social Security payments. These, of course, are only a few examples of what a balanced budget amendment would inflict on the nation.

In light of these dramatic consequences, attention has understandably shifted to the possibility of alternatives. As shown above, there are no viable options. If the power to enforce the requirement of balance were vested in the President, it would undo the constitutional separation of powers. The Constitution quite intentionally located the power of the purse in Congress. To join that power with the executive power would create the very threat of tyranny the framers specifically designed the Constitution to safeguard against. Allocating enforcement power to an independent agency modeled on the Federal Reserve would only heighten this threat.

⁵³ This argument also derives from the position of the Department of Justice. *See The Balanced Budget Amendment: Hearing Before the Joint Economic Committee, 104th Cong. (1995) (statement of Walter E. Dellinger), available at http://www.justice.gov/olc/jtecon.95.8.htm#N_26_.*

Finally, it may be tempting to treat a balanced budget amendment as a symbolic and aspirational statement that is not legally enforceable; that, indeed, is not law at all. This is clearly not how the advocates of an amendment see it. Moreover, even a purely hortatory declaration would be far from harmless. There is no reason to expect that Congress, even a Congress composed of members in good faith committed to the principle of a balanced budget, would agree on how to balance the budget. The result would be an open and notorious constitutional violation. This would undermine in previously unknown ways the binding force of the Constitution's otherwise binding legal norms. I do not mean to suggest that this would lead straightaway to anarchy, but it would almost certainly water down the force of other constitutional guarantees. Over time this erosion could leave some constitutional provisions as empty as the illusory promise of a balanced budget.

The threat a balanced budget amendment would pose to our constitutional order is unavoidable. Congress, of course, remains free to enact a balanced budget if it believes this is sound economic policy. It also remains fully equipped to institute effective controls to ensure restraint and balance in the budgeting process. Therefore, there is no sufficient reason to incur the dramatic risks that the balanced budget amendment would entail for our Constitution and our nation.