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FOREWORD

PATRICIA SCHROEDER*

For those in search of serious debate on public policy, this has been the worst of times. For those looking for tabloid journalism, this is the best of times. In a political climate dominated by accusations of scandal and political corruption, this Congress Issue provides a welcome forum for our nations' lawmakers to thoughtfully express and outline their ideas for legislation that is needed as we prepare for the new millennium.

Due to a recent drought of meaningful interchange of political ideas, the Academy Award-winning film *As Good as It Gets* may have provided the year's broadest discussion of a public policy issue—managed health care. Audiences all over America cheered at the anger and frustration expressed by Helen Hunt's single mother/waitress character as she described the nightmare of trying to cope with her son's asthma. While Hollywood should be applauded for their effort to fill the void created by Washington's reluctance to talk about real issues facing the American people, we must not underestimate the need for serious introspection and deliberation within the Beltway about where our nation stands today and in what direction we should embark tomorrow.

Recent articles in the popular press have accused Congress of going AWOL, and of hiding behind political rhetoric and partisan lines instead of generating any new policy ideas. *The Economist* recently noted that the 105th Congress is reminiscent of the Eastern Bloc Communist Party conferences late in the Cold War—so afraid of ideology that their only accomplishment was to name public places after old leaders, after which they adjourned, congratulating themselves on their work. As we approach the twenty-first century, we must not allow our nations' leaders to hide in a partisan cloak while ignoring the pressing

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problems in America that can be alleviated through effective legislation.

Several important policy issues—health care, workfare, a new global order, sexual harassment in the military, education, and many more—are waiting to be aired on the national stage. To initiate a meaningful debate on these and other policy issues, several legal scholars, Members of Congress, and students of the law have come together in this Congress Issue to describe in detail their ideas about how legislation can serve as an important tool in addressing social change. Several of my former colleagues have contributed essays with thought-provoking ideas that rise above mere politics or partisanship. Senator Feingold and Congressman Knollenberg outline their ideas about why there is a need for campaign finance reform, and set forth their proposals for change. Senator Enzi offers a new approach to workplace safety and health, and Senator Byrd explains why the line item veto power undermines the constitutional scheme of separation of powers and checks and balances. These views from inside Congress are joined by legislative proposals from legal scholars outside of Congress to create an unprecedented exchange of ideas.

In this Congress Issue, lawmakers and scholars alike are able to present and to support their legislative proposals without the additional pressure of packaging their message to fit into a particular sound byte. The result is a meaningful interchange of policy arguments with the potential of generating a longer conversation on each social issue that is addressed within these pages. Such a dialogue will prepare us for the day—and may that day come soon—when this nation once again turns its energy to serious public policy debate.

POLICY ESSAY

THE CONTROL OF THE PURSE AND THE LINE ITEM VETO ACT

SENATOR ROBERT C. BYRD*

In 1996, Congress passed the Line Item Veto Act. This Act enables the President to strike spending and other provisions from Congressionally passed bills before signing such legislation into law. Advocates of the Item Veto argue that it offers an effective tool to cut excess "pork" spending from otherwise sound laws. In this Essay, Senator Byrd argues that the Line Item Veto Act is an ill-conceived effort to tackle the budget deficit and address the issue of Congressional spending. The Act fundamentally alters the balance of power between the Legislative and Executive Branches by taking the purse strings away from Congress and placing them in the hands of the Executive.

The absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people.[1]

On the basis of the Constitution and traditional legislative prerogatives, Congress lays claim to exclusive control over the purse.[2]

The finance of the country is ultimately associated with the liberties of the country. It is a powerful leverage by which English liberty has been gradually acquired . . . . If the House of Commons by any possibility lose the power of the control of the grants of public money, depend upon it, your very liberty will be worth very little in comparison. That powerful leverage has been what is commonly known as the power of the purse—the control of the House of Commons over public expenditure.[3]

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[1] Hart's Administrator v. U.S., 16 Ct. Cl. 459, 484 (1881) *aff'd*, 118 U.S. 62 (1886).

[2] LOUIS FISHER, PRESIDENT AND CONGRESS: POWER AND POLICY 110 (1972). *See also* U.S. v. Lovett, 328 U.S. 303, 313 (1946) (" . . . Congress under the Constitution has complete control over appropriations.").

[3] William Gladstone, Speech at Hastings (Mar. 17, 1891), *quoted in* PAUL EINZIG, THE CONTROL OF THE PURSE: PROGRESS AND DECLINE OF PARLIAMENT'S FINANCIAL CONTROL 3 (1959).

I. INTRODUCTION

For some years, I have questioned whether Congress possesses the will to fulfill its constitutional duty of checking the power of the Executive Branch. As Madison pointed out in the *Federalist*, it is of no use to rely only on "parchment barriers" in constitutions to keep the branches separate.[4] Rather, "Ambition must be made to counteract ambition,"[5] and each branch must be given the weapons necessary to defend its prerogatives and powers.

Coequal branches cannot maintain their separateness unless they have the capacity to check and balance each other. But they need more than the capacity to act. Coequal powers need the will and the energy to fight off encroachments from the other branches. Alone among the three branches, the Legislative Branch appears today to have lost that will and energy to guard zealously the powers which the Framers so carefully reserved for the "people's branch." My experience as a member of the Congress, especially in recent years, has been that the basic reasons and historical underpinnings for the careful organization and balance in the Constitution are not well understood by most Senators and Representatives.

My concerns have increased over the course of the past year, as I have witnessed first-hand the effects of Congress's decision to grant the President item veto authority.[6] I spent many years arguing against passage of a line-item veto. Now, I would like to take this opportunity to explore how the item veto—after only one year of operation—is beginning to undermine the constitutional scheme of separation of powers and checks and balances. In particular, I shall show how Congress, by passing the Line Item Veto Act of 1996,[7] has impaired its own exercise of the power of the purse, thereby transforming the dynamic of executive-legislative relations, subverting the system of intragovern-

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

[5] THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

[6] A note on my use of terms: While the Line Item Veto Act purports to give the President a line-item veto, it actually gives him an item veto. As I explain below, the Act does not limit the President to vetoing lines in a bill; he may cancel items of discretionary spending "represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying" the bill. 2 U.S.C. § 691e(7) (1997). For that reason, and contrary to common usage, I refer to it as an "item veto" and not a "line-item veto."

[7] 2 U.S.C. § 691 (1997).

mental checks and balances, and restricting the ability of the most representative branch of the federal government to make spending decisions.

I begin with a discussion of the major sources of the constitutional power of the purse, focusing on the histories of Rome, England, the American colonies and finally the fledgling American states prior to the 1787 convention. The Framers' familiarity—often through personal experience—with this history and with European political theory convinced them to place the control of the purse in the hands of Congress. Indeed, it is no exaggeration to say that the Framers considered the power over the purse to be one of the most important components of the complex system of checks and balances that they devised.

I next explore two of the principal rationales for Congress's control over the national purse strings. First is the need to give the Legislature a check upon executive power; second is the value of assigning spending decisions to the most open, representative, deliberative political body.

Finally, having discussed the roots of, and the rationales for, the legislative control over the purse, I address the item veto. I shall show how Congress, by passing the Line Item Veto Act of 1996, abdicated a portion of its control over the purse to the President. By giving the President the ability to unilaterally amend law by repealing or canceling certain spending and tax provisions, Congress has sacrificed a vital independent check upon executive power while undermining its own constitutional responsibility to make appropriate spending decisions for the country.

In short, I see the Line Item Veto Act as a twofold failure. On its own terms, the Act is an ineffective way of cutting government spending. More importantly, the Act also gives the President a new and powerful weapon to intimidate members of Congress—the duly elected representatives of the people—and to usurp the Legislature's constitutional power. This argument is not simply theoretical; as I shall show, the President has already used the item veto to diminish the independence of members of Congress.[8] Although we are still in the early days of the item

[8] This Article does not address concerns that the item veto may also enhance the President's leverage over the Judicial Branch by allowing him to cancel (or threaten to cancel) items in the budget for the Judiciary. For discussion of this point see 142 CONG. REC. S2943–44, S2946–47 (daily ed. Mar. 27, 1996) (statement of Sen. Byrd); Louis Fisher, *Judicial Independence and the Line Item Veto*, 36 THE JUDGE'S J. 18 (Winter

veto, it is already becoming clear that the directly elected representatives of the people, by transferring a portion of their control over the national purse to the Executive Branch, have given the President a powerful new tool for imposing his will on them.

II. The Historical Roots of the Power of the Purse

A. *Introduction*

The Framers' decision to invest the Legislative Branch with the control over the purse was neither arbitrary nor novel. Rather, in assigning the Legislature the power of the purse, the Framers were relying on their familiarity with the lessons of Roman, English, and colonial history; with the history of the American states prior to the adoption of the Constitution; and with English and continental political theory. Because of their knowledge of this history and theory, the Framers understood that legislative independence was largely dependent on control of the purse strings.

Accordingly, in this Section, I shall provide an overview of the origins of the legislative power of the purse, beginning with the Roman Senate. Then I shall show how the English Parliament gradually assumed control over the national purse, and how this control gave Parliament a means of checking royal prerogatives. Finally, I shall draw upon colonial and early state history, focusing on the attempts of colonial legislatures to assert control over spending decisions. Only by understanding this historical background can one fully appreciate why the Framers decided to place the power of the purse in the hands of Congress.

1997); Robert Destro, *Whom do You Trust? Judicial Independence, the Power of the Purse & the Line Item Veto*, 44 Fed. Law. 26, 29–30 (1997); Michael J. Gerhardt, *The Bottom Line on the Line-Item Veto Act of 1996*, 6 Cornell J.L. & Pub.Pol'y 233, 242 (1997); Anthony R. Petrilla, Note, *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 Harv.J. on Legis. 469, 482–83 (1994) (mentioning the need for a limitation on item veto power to prevent the President's targeting the budgets of the Judiciary or the Legislature). *But see* J. Gregory Sidak, *The Line-Item Veto Amendment*, 80 Cornell L. Rev. 1498, 1504 (1995) (suggesting constitutional limits on the President's ability to cancel items in the budget for the Judiciary).

B. *Roman History*[9]

As the American Framers well knew, during much of the period of the Roman Republic (509 B.C.–ca. 27 B.C.), the Senate exercised unchallenged control over all public monies. No soldier could receive his pay, nor could money be earmarked for public works, without the Senate's authorization. But, during the dictatorship of Julius Caesar, the Roman Senate ceded control over the state treasury. By 27 B.C., the Republic had collapsed, and from that year to 476 A.D., the Roman Empire was governed by emperors who exercised control over the purse and over matters of taxation. Without control of the purse, the Senate could not check the power of the emperors.

C. *English History*[10]

Since time immemorial, Anglo-Saxon kings had levied taxes on their subjects with the advice and consent of the witenagemot, or King's Council. In 991, for example, the witenagemot allowed Ethelred II to levy a tax, the Danegeld, in response to Danish invasions.[11] Under the Normans, the witenagemot was succeeded by the *magnum concilium* ("Great Council"), which, in turn, evolved into Parliament during the latter part of the thirteenth century and the first half of the fourteenth century.[12] Over time, Parliament forced the King to seek its approval for supplies to fund government operations, national defense, and the waging of wars. Parliament also discovered that its control over the granting of funds to the King allowed it to seek redress of grievances and to exact concessions from the King. This principle lay behind the "Confirmation of the Charters" that Edward I reluctantly accepted in 1297; in clause 6 of the Confirmation, the King promised not to levy "aids, taxes, and prises, except by the common consent of the whole Kingdom. . . ."[13]

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[9] For a more complete discussion of Roman history, see generally ROBERT C. BYRD, THE SENATE OF THE ROMAN REPUBLIC: ADDRESSES ON THE HISTORY OF ROMAN CONSTITUTIONALISM (1994).

[10] For a more complete discussion of English history, see generally 138 CONG. REC. S2278–86 (daily ed. Feb. 26, 1992) (statement of Sen. Byrd).

[11] *See* GOLDWYN ALBERT SMITH, A HISTORY OF ENGLAND 27 (3d ed. 1966); WILLIAM EDWARD LUNT, HISTORY OF ENGLAND 52 (3d ed. 1945).

[12] *See* C. ELLIS STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES 72 (2d ed. 1894).

[13] SMITH, *supra* note 11, at 119.

Parliament's power to allocate funds for specific purposes, instead of placing the money without restrictions into the King's hands, has a long and distinguished pedigree in English history. One example of conditional appropriations occurred in 1340, when the House of Commons made a grant to Edward III on condition that it "shall be put and spent upon the Maintenance and Safeguard of our said Realm of England, and on Wars in Scotland, France and Gascoign, and in no places elsewhere during the said Wars."[14]

Many early parliamentary appropriations were made specific to certain purposes. For instance, in 1472, Parliament granted Edward IV money to cover the expenses of 13,000 archers for one year at a daily wage of sixpence.[15] A few years later, in 1475, another grant was made to Edward IV for his war in France, on the conditions that his departure for France be no later than St. John's Day of 1476 and that he not receive the money until his ships were actually ready to set sail.[16]

During Cromwell's Commonwealth, the House of Commons exercised control over government expenditures; following the Restoration in 1660, King Charles II grudgingly accepted this status quo in the Appropriation Act of 1665. Over the next few years, Parliament continued to consolidate its control over the purse. In 1678, the House of Commons asserted its sole prerogative to grant "aids and supplies" on such conditions as it stipulated.[17] Finally, in the 1689 Bill of Rights, Parliament forbade the levy of money "by pretence of prerogative" without its consent.[18] From the reign of William and Mary (1689–1702), the annual supply bills contained a clause forbidding, under threat of heavy penalties, any expenditure of national monies for any purpose other than that designated by Parliament.[19]

D. *Colonial Experiences*

By the time that the first colonial charters were granted to Virginia and certain colonies in New England, the basic frame-

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[14] EINZIG, *supra* note 3, at 79.
[15] *See id.* at 80.
[16] *See id.* at 80–81.
[17] Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 891 (1994).
[18] *Id.*
[19] *See* STEVENS, *supra* note 12, at 111.

work of the English system of constitutional government, safeguarded by a House of Commons elected by the people, was established (though it was not until the 1689 English Bill of Rights that this framework was fixed securely in place). The House of Commons had long asserted both its exclusive power to initiate tax legislation and the inability of the House of Lords to amend tax bills passed by the Commons.[20] The Commons' assertion of authority over tax and appropriation legislation was copied by the lower houses of the colonial legislatures and proved to be a crucial factor in their struggles for power with the royal governors.[21] By stipulating in (unamendable) tax bills the purposes for which revenue was being raised, the colonial legislatures gained control, not only over how much, but also for what purposes, appropriated funds were to be spent.

The colonial legislatures further emulated the English Parliament by using their control over military expenditures to check executive power. As England increasingly required the colonies to finance their own self-defense, the ability of the legislatures to make military spending decisions took on greater importance.[22] By specifying "the purposes for which military appropriations could be spent, including the number, distribution, organization, pay, place and period of service, and supplies of the officers and men to be raised," the legislators were able to keep a tight leash on governors' military actions.[23]

E. *The American States Before the Constitutional Convention*

In the spring of 1776, the Continental Congress adopted a resolution encouraging "the respective assemblies and conventions of the United Colonies . . . to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."[24] Many of the new state constitutions that followed this resolution were but "expansions and amend-

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[20] *See id.*, at 100.

[21] *See* Paul R. Q. Wolfson, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J. 838, 843 (1987).

[22] *See* Raven-Hansen & Banks, *supra* note 17, at 892.

[23] *Id.*

[24] THE FEDERAL CONVENTION AND THE FORMATION OF THE UNION OF THE AMERICAN STATES 28–29 (Winton U. Solberg ed., 1958).

ments" of the colonial charters.[25] Reflecting their writers' familiarity with colonial experiences, several state constitutions ensured the supremacy of the lower houses of the state legislature by stipulating that the upper house could not amend money bills.[26] States also ensured that the legislature accounted for the receipts and expenditures of all public monies. The Massachusetts and New Hampshire constitutions, for example, provided for payments of public monies only in consequence of appropriations made by law.[27]

F. *The Constitutional Convention*

The fifty-five delegates who gathered in Philadelphia in 1787 brought with them a vast array of knowledge. They were classically educated, learned in the philosophies of ancient thinkers, and knowledgeable about the history of ancient Rome.[28] The Framers were also influenced by the early settlers from England, who had brought to the American colonies the English language, the common law of England, and the traditions of British customs, rights, and liberties.[29] Several Framers had themselves been educated in England or at colonial colleges modeled after their English counterparts, and even such autodidacts as Washington and Franklin were "partakers of British attitudes."[30]

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[25] DAVID HUTCHISON, THE FOUNDATIONS OF THE CONSTITUTION 3 (1975) (reporting that Connecticut and Rhode Island retained their charters as constitutions until 1818 and 1842 respectively).

[26] *See* Wolfson, *supra* note 21, at 844. The Framers rejected this model; in Madison's words, "When you send a bill to the Senate without the power of making any alteration, you force them to reject the bill. The power of proposing alterations removes this inconvenience." HUTCHISON, *supra* note 25, at 73 (citations omitted).

[27] *See* HUTCHISON, *supra* note 25, at 146.

[28] *See generally* CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT (1994) (exploring the Framers' extensive knowledge of antiquity).

[29] *See* Henry Steele Commager, *Introduction* to CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION at xviii (1986) ("[The Framers were steeped] in the political theology of the British Puritans who served Oliver Cromwell in the time of the kingless Commonwealth and their American successors like Roger Williams and Thomas Hooker, who established enlightened colonies in Rhode Island and Connecticut in the seventeenth century, and Timothy Dwight and Jonathan Mayhew, who rallied to the cause of independence in the eighteenth century."). *See also* HUTCHISON, *supra* note 25, at 1 ("[The Constitution] contains matter centuries older than Magna Carta, and its provisions establish organic living institutions transplanted from English soil to America. The Revolutionary War was not fought by the Americans to destroy existing institutions, but to secure British rights and liberties guaranteed them by the English Constitution.") (internal citations omitted).

[30] BROADUS MITCHELL & LOUISE PEARSON MITCHELL, A BIOGRAPHY OF THE CON-

Based on their knowledge of the English constitutional tradition, the Framers strove to create a system in which power was diffused among different branches of government. The purpose of diffusing powers, wrote Madison, was to "divide and arrange the several offices [of government] in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights."[31] One of the Framers' concerns was that the Executive might dominate the other governmental branches. Having recently experienced the dangers of executive high-handedness in their dealings with King George III, they were determined to prevent the American President from assuming king-like powers.[32] Accordingly, the Framers decided to protect the Legislature against executive encroachments by giving Congress the authority, enjoyed by Parliament, to make all spending decisions (subject, of course, to the President's Article I veto).

The Framers ensured Congress's control over the national purse by approving the following clause: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from Time to Time."[33] The phrase "by law" invoked the first clause of the Constitution, reserving "[a]ll legislative powers herein granted" to Congress.[34] Taken together, the Appropriations Clause and the Legislative Powers Clause affirmed that Congress alone was entrusted with making appropriations pursuant to its regular lawmaking procedures.

Although there was little discussion about the Appropriations Clause during the convention,[35] the Framers later clarified their intent—and demonstrated their familiarity with the history of the power of the purse—in the *Federalist* essays. In the words of

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STITUTION OF THE UNITED STATES: ITS ORIGIN, FORMATION, ADOPTION, INTERPRETATION 20–21 (2d ed. 1975).

[31] THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

[32] *See* MITCHELL & MITCHELL, *supra* note 30, at 95–96; BOWEN, *supra* note 29, at 59. Although there was, as Bowen notes, some discussion inside and outside the Convention about instituting an American elective monarchy, the Framers ultimately rejected such a move. *See* BOWEN, *supra* note 29, at 188–92. In THE FEDERALIST, Hamilton elaborates on the differences between the President and the king of Britain. *See* THE FEDERALIST Nos. 67, 69 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[33] U.S. CONST. art. I, § 9, cl. 7.

[34] U.S. CONST. art. I, § 1.

[35] *See* J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1171; HUTCHISON, *supra* note 25, at 145.

Madison, the "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 carrying into effect every just and salutary measure."[36] Alexander Hamilton echoed this thought when he pointed out that "[m]oney is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions."[37] It follows from the Framers' words that, by controlling the flow of money, Congress can control the "most essential functions" of the body politic.

III. CONGRESS'S CONTROL OF THE PURSE: THEORY AND PRACTICE

A. *Introduction*

In this Section, I explore the two primary rationales for congressional control over the purse. The first rationale, which should be clear from the foregoing Section, is procedural, by which I mean that the power of the purse gives Congress a means of checking the Executive. If the President were able to spend freely in pursuit of his executive goals, he would be able to deviate from the course charted by the legislative body. I shall give specific examples of how the exercise of control over the purse has, until now, allowed Congress to ward off such executive encroachments.

The power of the purse is not just a prophylactic device, however. The Framers saw control of the purse as more than a means of checking executive discretion; they also recognized that Congress can use the power of the purse to implement its views and make affirmative spending decisions (subject to a qualified veto by the President). My thesis is that Congress is best equipped to decide how to spend the nation's money. This is, admittedly, somewhat against the grain of current popular opinion. Congress has been the subject of much abuse in recent years for its supposedly profligate spending. Because these ac-

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[36] THE FEDERALIST No. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961).
[37] THE FEDERALIST No. 30, at 188 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

cusations laid the foundations for passage of the Line Item Veto Act, I shall take some time to address them.

B. *The Power of the Purse as a Check on the Executive*

A key to the power of the purse is Congress's power to specify the *purpose* for which it is appropriating money. "The 'Appropriations' required by the Constitution are not only legislative specifications of money amounts, but also legislative specifications of the powers, activities, and Purposes—what we may call, simply, 'objects'—for which appropriated funds may be used."[38] If Congress's control over appropriations meant only that executive requests for funds needed a legislative rubber-stamp of approval, or if other branches of government could decide how to spend money appropriated by Congress, then the power of the purse would be a weak power indeed. This was not the intent of the Constitution's Framers. As I have suggested above, the Framers, who were familiar with Roman, English, colonial, and early state history, intended the power of the purse to be a vital check upon executive power. It follows from the Framers' intentions that legislative authority over spending allows Congress to determine the precise uses to which its appropriations should be put.

In recent years, Congress has been accused of abusing its control over the purse by passing huge omnibus spending bills with many riders attached (some of them nongermane). Critics have condemned Congress for "forcing" the President to accept these riders in return for funding executive functions and prerogatives. Such practices, however, are not new. In the seventeenth century, the House of Commons used riders "to frustrate the wishes of the House of Lords or the monarch."[39] The Framers were doubtless aware of such practices, as they were also aware of the struggles between the colonial legislatures and governors over the power of the purse:

> The Framers granted the President no special veto power over appropriation bills, yet they had experienced the con-

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[38] Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1352 (1988). *See also* Raven-Hansen & Banks, *supra* note 17, at 844.

[39] Robert J. Spitzer, *The Constitutionality of the Presidential Line-Item Veto*, POL. SCI. Q., Summer 1997, at 265. Spitzer cites several instances in which the House of Commons, relying on the inability of the House of Lords to amend money bills, attached nongermane riders to such bills. *See id.* at 272.

> frontations between the branches of the colonial governments that had resulted from vetoes of spending measures, and they understood the advantage that power over spending had given the colonial lower houses.[40]

Rather than "abusing" its power by passing large spending bills containing substantive provisions, Congress has merely followed the examples of its colonial predecessors and of Parliament—examples with which the Framers were well acquainted.

The principle that Congress's power of the purse includes the power to specify how money is to be spent has been reaffirmed throughout this nation's history:

> Since the First Congress, appropriations acts have always incorporated or specified particular object limitations; Congress has never simply enacted a gross expenditure ceiling. Although the first general appropriations bill broke down the total sum ($639,000) into only four line items, Act of Sept. 29, 1789, 1 Stat. 95, "[t]his early dependence upon the Treasury [to allocate the amount appropriated] seems to have arisen because of the unpreparedness and lack of time on the part of the members [of the First Congress]."[41]

Even Hamilton, who argued repeatedly for presidential prerogatives during and after his tenure as Secretary of the Treasury from 1789 to 1795, conceded that "no money can be expended, but for an object, to an extent, and out of a fund, which the laws have prescribed."[42]

Hamilton's words were expanded upon by President Thomas Jefferson. In his first annual message to Congress, Jefferson stated:

> In our care, too, of the public contributions entrusted to our direction it would be prudent to multiply barriers against their dissipation by appropriating specific sums to every specific purpose susceptible of definition; by disallowing all applications of money varying from the appropriation in object or transcending it in amount; by reducing the undefined field of contingencies and thereby circumscribing

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[40] Wolfson, *supra* note 21, at 845.

[41] V. BROWNE, THE CONTROL OF THE PUBLIC BUDGET 35 (1949), *quoted in* Stith, *supra* note 38, at 1354 n.50.

[42] Explanation (Nov. 11, 1795), *in* 8 A. HAMILTON, WORKS 122, 128 (H.C. Lodge ed. 1885), *quoted in* Stith, *supra* note 38, at 1354. The quoted statement is from Hamilton's response to an anonymous open letter criticizing his performance as Secretary of the Treasury. Hamilton argued that the President had the authority to spend money even without explicit prior appropriation by Congress. Hamilton's view has since been discredited, though some still argue that his position was correct. *See* Sidak, *supra* note 35 (providing a comprehensive defense of Hamilton's position).

> discretionary powers over money, and by bringing back to a single department all accountabilities for money, where the examination may be prompt, efficacious, and uniform.[43]

Congress enacted Jefferson's principle of object limitations on appropriations when it passed the Act of March 3, 1809.[44] In its current incarnation, that statute requires that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."[45]

The principle underlying the Act of March 3, 1809 was further clarified by the Anti-Deficiency Act of 1905, which made it a criminal offense for members of the Executive Branch to spend money without a prior legislative appropriation.[46] These and other statutes clarifying the appropriations clause have proved to be important bulwarks against executive hegemony. Throughout this century, as the Executive Branch has grown in scope and influence to an extent that the Framers never imagined, Congress's control over the purse has become a vital buffer against presidential power.[47] Indeed, the power of the purse is arguably more important now as a check upon the Executive than at any time in the nation's history; in the last thirty years alone, it has resolved several significant executive-legislative skirmishes.

One such skirmish was settled in 1974 when Congress enacted the Congressional Budget and Impoundment Control Act.[48] Responding to President Nixon's repeated impoundments of congressionally appropriated funds,[49] the Act required presidential

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[43] First Annual Message of Thomas Jefferson to Congress (Dec. 8, 1801), *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS 329 (J. Richardson ed. 1897).

[44] Act of Mar. 3, 1809, 28 Stat. 535 (amending the acts establishing and regulating the Treasury, War and Navy departments). This was one of the first statutes enacted by Congress to implement the appropriations clause. *See* Stith, *supra* note 38, at 1354.

[45] 31 U.S.C. § 1301(a) (1997).

[46] Act of Mar. 3, 1905, ch. 1484 § 4, 33 Stat. 1214, (codified as amended at 31 U.S.C. § 1341 (1982)). Statutory bans on the expenditure of public funds without appropriation date back to 1820.

[47] *See, e.g.*, Abner J. Mikva, *Congress: The Purse, The Purpose, and the Power*, 21 GA. L. REV. 1, 4 (1986) ("The growth and increasing complexity of government, the frequency, scale, and terror of modern war, and the emergence of the mass media have transformed the role and power of the executive branch. In this new and very different political world, Congress's control over the nation's purse strings has become even more critical than before.").

[48] P.L. 93-344, 88 Stat. 299 (codified as amended in scattered sections of 2 U.S.C. and 31 U.S.C. (1994)).

[49] Impoundments occur when the executive delays or withholds the obligation or expenditure of budget authority. While the history of presidential impoundments dates back to the early years of the Republic, President Nixon took impoundments to a new level. Estimates of Nixon's impoundments run as high as $18 billion. Many of these impoundments were challenged in court, and by 1974 over 50 impoundments had been

rescissions to be approved by both houses of Congress, while retaining a one-house veto over presidential spending deferrals.[50] The Impoundment Control Act may be seen as a logical successor to the Anti-Deficiency Act. While the Anti-Deficiency Act prevented any expenditure of funds without congressional appropriations, the Impoundment Control Act ensured that, barring explicit approval by Congress, all congressional appropriations must be spent—period. The combined effect of both statutes was to prevent the Executive from evading the constraints that Congress, through its control over the purse, imposes.

Another important intragovernmental skirmish took place in the 1980s, when the Reagan administration secretly sought to evade Congress's prohibition on funding for the Nicaraguan Contras. The Iran-Contra Report[51] issued by Congress in November 1987 reaffirmed that:

> [T]he power of the purse, which the Framers vested in Congress, has long been recognized as "the most important single curb in the Constitution on Presidential Power". . . . The appropriations clause was intended to give Congress exclusive control of funds spent by the Government, and to give the democratically elected representatives of the people an absolute check on Executive action requiring expenditure of funds.[52]

The Iran-Contra Report made clear that, while Presidents have traditionally assumed primacy in making foreign policy decisions, Congress's power of the purse allows it to check such decisions. This view has been reaffirmed by one leading constitutional scholar who observed, "Congress may simply refuse to appropriate funds for policies it deems unsound. Moreover, Con-

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overturned, while only four were upheld. The one impoundment case that reached the Supreme Court was decided on relatively narrow statutory grounds, the Court holding that the Clean Water Act did not allow the President to withhold funds appropriated by Congress. *See* Train v. City of New York, 420 U.S. 35 (1975); Mikva, *supra* note 47, at 11–12.

[50] The 1974 Act divided impoundments into two categories. A deferral delays the use of funds; a rescission is a presidential request that Congress cancel specific budget authority. Following the Supreme Court's decision in I.N.S. v. Chadha, 462 U.S. 919 (1983), striking down a legislative veto, the Court of Appeals for the D.C. Circuit declared the deferral provision to be unconstitutional. *See* City of New Haven v. U.S., 809 F.2d 900 (1987).

[51] SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216 (1987).

[52] *Id.*, at 411–12 (quoting E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 101 (3d ed. 1975)).

gress may condition appropriations in ways that limit presidential foreign policy choices."[53]

A more recent—and less controversial—example of Congress using its appropriations authority to influence foreign policy occurred in October 1993, when the Senate passed an amendment I sponsored to sharply narrow the mission of U.S. forces in Somalia.[54] As I stated at the time:

> This is the appropriate bill on which to debate our policy in Somalia, because it highlights the importance of the power of the purse—the ultimate arrow in Congress's quiver—to effect the policy of the Nation in such weighty matters as wars and deployments of American forces. The Framers of the Constitution were well aware that the power of the purse was the key to the power of this institution, and we cannot guard the American people and it too closely.[55]

President Clinton's cooperation with Congress in setting policy for the Somalia mission suggests that the Executive Branch has learned to accept Congress's right to influence foreign policy through the power of the purse.

Congress's control over appropriations is not unlimited. Congress cannot, for example, deny the President sufficient money to carry out his Article II duties (by, for example, stipulating that no money be expended by the Executive on receiving foreign ambassadors, in contravention of section 3).[56] Nor can Congress use its appropriations authority to circumvent other constitutional provisions by, for example, denying the Judiciary their full salaries, in contravention of section 1 of Article III.[57] Nonetheless, within such limits, Congress has tremendous discretion in appropriating funds for purposes it identifies; it is this discretion that provides the Legislature with the powerful pro-

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[53] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 221–22 (2d ed. 1988). *See also* Raven-Hansen & Banks, *supra* note 17, at 890 (arguing that the power of the purse carries particular weight in military and national security affairs).

[54] *See* Department of Defense Appropriations Act of 1994, Pub. L. No. 103-139, 107 Stat. 1418, 1475-78.

[55] 139 CONG. REC. S13432 (daily ed. Oct. 14, 1993) (statement of Sen. Byrd). *See also id.* at S13425 ("[T]he amendment exercises the authority of the Congress to put a strict limit on funding in order to effect the limited policy and missions. I might add that Congress has used this power far too sparingly in exercising its constitutional authority in matters of going to war. The last time Congress did so exercise this authority was in June 1973, when Congress included a funding cutoff for all combat activities in Cambodia, Laos, and North and South Vietnam.").

[56] *See, e.g.*, Stith, *supra* note 38, at 1352; Sidak, *supra* note 35, at 1184–88.

[57] "The Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

cedural check upon executive actions that the Framers rightly insisted upon.

C. *The Power of the Purse as a Means of Making Good Spending Policy*

As I have stated above, the power of the purse is more than a procedural device to fence in the Executive; it is also a way of ensuring that spending decisions are made by the most representative and open political institution. Admittedly, the argument that Congress is better suited than the President to make spending decisions flies somewhat in the face of current popular opinion. The conventional wisdom (best expressed by many line item veto supporters) runs roughly as follows: Congress, with its penchant for "log-rolling" and "pork barrel politics," is incapable of making responsible appropriations decisions. Instead of legislating for the good of the entire country, members of Congress tend to parcel out money among their respective constituents, thereby facilitating their own reelection.[58] Instead of representing the national interest, as the Executive supposedly does, members care only about the narrow interests of their constituents. To quote one observer, "[A]rguably, the constitutional balance between parochial interests—members of Congress—and the national interest—the President—has been skewed toward the former."[59]

Attacks on the way Congress exercises its power of the purse are not only made outside the confines of Congress; some of the strongest criticisms have been made on Capitol Hill.[60] Although these criticisms are often vigorous and heartfelt, they are also often misguided. While space prevents me from refuting every charge of congressional abuse of its appropriations power, I will highlight the general fallacies that undergird and motivate those charges.

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[58] *See, e.g.*, Destro, *supra* note 8, at 28; Susan Rose-Ackerman, *Judicial Review and the Power of the Purse*, 12 INT'L REV. L. & ECON. 191, 196 (1992) ("Individual legislators seek to maximize their chances of re-election by trading off overall spending levels against benefits to their home districts.").

[59] Petrilla, *supra* note 8, at 471 (providing a summary of popular opinion).

[60] *See, e.g.*, 135 CONG. REC. S614 (daily ed. Jan. 25, 1989) (statement of Sen. Alan Dixon (D-Ill.)) (decrying Congress's lack of "fiscal discipline"); 141 CONG. REC. S4171 (daily ed. Mar. 20, 1995) (statement of Sen. Dan Coats (R-Ind.)) (proclaiming that "there is a great history of abuses of the spending power by the Congress").

1. Why Concerns About Budgetary "Pork" Are Overblown

The demonization of so-called "pork barrel" politics in popular discourse tends to discount the value of local spending. Local projects are often criticized as "pork" for allegedly squandering national funds on projects whose benefits are primarily local. Such criticisms overlook the fact that many seemingly parochial projects serve important national goals, such as improving infrastructure or enhancing educational opportunities. Too few people seem to recognize that one person's pork barrel project is another's very necessary bridge (or health clinic or Veterans Administration hospital). Too many pundits and politicians are quick to condemn the spending of taxpayer dollars in one region of the country unless the benefits of those dollars will also reach into other regions. It is *their* arguments that are parochial, however, for they reveal a narrow self-interest and an inability to see the states' interconnectedness and interdependency.

Senator Daniel Webster of Massachusetts conclusively and eloquently rejected such cramped visions of government spending over a century and a half ago. Responding to the suggestion put forward by South Carolina's Robert Y. Hayne that the people of a state should not have to pay for internal improvements within another state, Webster proclaimed:

> I look upon a road over the Alleghenies, a canal round the falls of the Ohio, or a canal or railway from the Atlantic to the Western waters, as being an object large and extensive enough to be fairly said to be for the common benefit.[61]

Webster continued:

> I have never seen any more difficulty in erecting lighthouses on the lakes, than on the ocean; in improving the harbors of inland seas, than if they were within the ebb and flow of the tide; or in removing obstructions in the vast streams of the West, more than in any work to facilitate commerce on the Atlantic Coast. If there be any power for one, there is power also for the other; and they are all and equally for the common good of the country.[62]

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[61] Daniel Webster, Second Reply to Hayne (Jan. 26 and 27, 1830), *in* 3 THE SENATE, 1789–1989: CLASSIC SPEECHES 1830–1993, at 48–49 (Sen. Robert C. Byrd ed. 1994).
[62] *Id.*

Webster understood perfectly that, without federal appropriations tending to localized needs, the nation's communications, education, transportation, and defense would suffer.

Moreover, while any budget will inevitably contain *some* questionable spending—whether it is the budget of a single homeowner, a Fortune 500 corporation, or a global superpower—the amount of wasteful pork in the national budget is often exaggerated. Identifying fat in the budget has become a cynical political game in which journalists and politicians seek to establish their credentials as crusaders against government excess by identifying supposedly wasteful spending. The politically unpalatable truth is that the budgetary impact of so-called pork-barrel spending is relatively trivial, while the economic impact—in creating jobs, modernizing infrastructure, etc.—can be quite considerable.

Anti-pork rhetoric has flourished in recent years along with valid concerns about the mushrooming federal deficit and debt. Sadly, too few people have taken the time to point out that "pork" was not responsible for the explosive growth of the deficit. Instead, much of the blame for the deficit is attributable to three factors: the rising cost of entitlements since the 1960s, the Reagan era defense build-up, and the tax cuts of the 1980s. In 1967, 30% of the federal budget went toward entitlements and other forms of spending that are mandated by law and not subject to annual congressional appropriations.[63] Another 6.5% of the 1967 budget went toward paying off the net interest on the federal debt. By 1987, mandatory (or direct) spending represented 46% of the national budget and interest represented 14%. Today, those numbers are 54% and 15%, respectively. Mandatory spending ant interest, then, which are beyond the regular purview of Congress and which are unrelated to pork-barrel spending, currently make up two-thirds of the federal budget and are expected to continue rising faster than inflation.[64]

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[63] All data on the federal budget come from OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: HISTORICAL TABLES, FISCAL YEAR 1998 (1997), unless otherwise indicated. (Current numbers are estimates for fiscal year 1997). Mandatory spending totals do not include undistributed offsetting receipts.

[64] Reagan-era tax cuts exacerbated the rising cost of entitlements. The Economic Recovery Tax Act of 1981 produced a 23% across-the-board cut in individual income tax rates and substantial reductions in business taxes. *See* GREGG A. ESENWEIN & JACK TAYLOR, CONGRESSIONAL RESEARCH SERVICE, THE RELATIVE SIZE OF FEDERAL TAX CHANGES SINCE 1980 (1996). Although the full effects of the 1981 Act were mitigated the next year by the Tax Equity and Fiscal Responsibility Act of 1982, tax revenues were substantially reduced throughout the 1980s. *See id.* at 6. Nonetheless, "it is not

Even much "discretionary" spending is, for practical purposes, mandatory. While there will always be some quibbling about the exact levels of funding that are necessary, few people think of, say, a strong military (roughly half of the discretionary budget) or income security programs (7% of the budget) as truly "discretionary." When you strip away all the spending that is indisputably necessary from the discretionary budget, you are left with a small fraction of that budget—itself a third of the overall budget—in which the "pork" supposedly resides. Even if this "pork" could be identified and surgically removed by some form of budgetary liposuction,[65] federal spending levels would be virtually unchanged. As was pointed out during the 1995 line-item veto debate, "domestic appropriations are only a sixth of the budget and already under tight control; the pork in the budget amounts to much less than the mythology surrounding federal spending would suggest."[66]

2. Why the Legislative Process Is Ideally Suited to Making Appropriations Decisions

Critics of Congress's power of the purse tend to exaggerate the existence of log-rolling and backroom dealing. The legislative process is inevitably geared towards achieving consensus and compromise among different members representing different ideological, geographic, and party interests. Nowhere is this more true than in appropriations decisions, where Congress funds projects whose effects and constituencies may be primarily local. Characterizing congressional appropriations as motivated solely by log-rolling ("I'll vote for your project if you vote for mine"), however, misses the complex calculus that figures into each member's attempt to reconcile the interests of his or her constituency, party, ideology, committee(s), and conscience. The same internal calculus is repeated at a *meta* level in debate and colloquy until, by a process of almost sublime complexity, agreement is reached.

Having participated in countless appropriations decisions, I can testify to the wisdom of entrusting spending decisions to a

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possible to determine the 'actual' change in federal tax revenue that results from a change in the tax law." *Id.* at 2.

[65] Arguably the item veto was intended to be such a device. As I demonstrate below, it has not lived up to expectations.

[66] *Disenfranchising Congress*, WASH. POST, Feb. 3, 1995, at A18.

body that is both diverse and politically responsive enough to give differing viewpoints fair consideration. Other observers concur:

> Apportioning the fisc requires hearing from interested recipients, assessing the validity of the conflicting demands, and coordinating all the programs in a compromise package. Only Congress can adequately balance these interests, for its size allows it to bring to policy-making a diversity of opinion, reflecting that of the members' constituents, that the President cannot have.[67]

As the branch of government best able to consider and represent the diverse interests of the country, Congress is uniquely qualified to make spending decisions.

The tendency towards coordination and compromise that is the hallmark of the legislative process is essential when it comes to slicing the national budgetary pie. The Framers recognized that members of Congress would often be, as Madison put it, "partisans of their respective states."[68] They also knew that the need for compromise in lawmaking would inevitably blunt the harshest excesses of partisanship. Hamilton observed, "The result of the deliberations of all collective bodies must necessarily be a compound, as well of the errors and prejudices, as of the good sense and wisdom, of the individuals of whom they are composed."[69] The decision to give the power of the purse to Congress, rather than the President, was not an arbitrary one. Rather, the Framers recognized that the natural tendency of the Legislative Branch toward compromise and conciliation would enable it to make broadly acceptable spending decisions. As one scholarly observer noted (in pre-item veto days):

> The wisdom of leaving the power of the purse in legislative hands, as a means of checking the executive, is buttressed by the recognition that pork barrel appropriations—the bete noir of item-veto advocates—are but unattractive examples of legislating for diverse interests, which is the very stuff of representative government. Apportioning the public fisc in a large and diverse nation requires degrees of coordination and

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[67] Wolfson, *supra* note 21, at 851–52. The Framers demonstrated their commitment to giving the people a say in decisions about the national pocketbook by requiring all revenue bills to originate in the House of Representatives, the more representative house of Congress. U.S. CONST. art. I, § 7, cl. 1.

[68] THE FEDERALIST No. 46, at 297 (James Madison) (Clinton Rossiter ed., 1961).

[69] THE FEDERALIST No. 85, at 523–24 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

compromise that might be unavailable under a line-item veto regime.[70]

Furthermore, Congress's role in setting tax policy gives it a special responsibility when it comes to spending money. The explicit power to tax[71] brings with it an implicit responsibility to ensure that tax revenues are allocated fairly and wisely. Congress would be derelict in its duties if it did not supervise closely the expenditure of the revenues it raises.

3. Why the President Is Ill-Equipped to Make Appropriations Decisions

I have argued above that the supposed "parochialism" of members of Congress is a positive attribute, for it allows Congress as a whole to consider the welfare of all sectors of the country. What about the suggestion that the President has a uniquely "national" perspective? That argument is a curious one, for it overlooks the obvious fact that the President is no less a political creature than Congress, subject to the same partisan pressures, popular sentiments, and deep-pocket lobbying that supposedly disqualify members of Congress from wisely exercising their power over the purse. It also ignores the practical matter that the President's "constituency" includes executive agencies, whose emergence and proliferation since the New Deal have fundamentally reshaped the nature of our federal government. The President's stewardship over the Executive Branch gives him a vested interest in allocating money to executive agencies. Congress can evaluate the fiscal needs of each agency and department with greater objectivity.

The argument that Congress is better equipped than the President to control the nation's purse strings is readily verifiable. Empirical and statistical evidence show that Presidents are no more fiscally conservative than Congress, and that presidential spending requests often exceed those of Congress. This was notable during the 1980s, when Congress appropriated a total of $16.1 billion less than President Reagan requested throughout his presidency.[72] Even before the 1980s, however, Congress had dem-

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[70] TRIBE, *supra* note 53, at 267–68.

[71] "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

[72] *See* 138 CONG. REC. S2301–02 (daily ed. Feb. 26, 1992) (appendix to statement of Sen. Byrd, citing data from the House Committee on Appropriations).

onstrated itself to be more fiscally conservative than the President. From 1945 through 1991, the Executive Branch cumulatively requested $11.71 trillion in spending, while Congress appropriated $11.52 trillion. In other words, over the course of forty-seven years, Congress appropriated $189 billion *less* than the Executive Branch had requested.[73]

The President does have an important role in setting fiscal priorities. First, the veto power allows him to reject bills outright (unless Congress can muster the votes to override him). Second, since 1921, Congress has required the President to submit annual budget proposals.[74] Congress takes these executive proposals seriously, and there is typically much discussion between the Legislative and Executive Branches in formulating the budget. The ultimate decisions of how much money to spend and how to spend it, however, remain with Congress. While Congress properly involves the President in its deliberations, control of the purse rests, as intended, with Congress.

By carefully scrutinizing presidential budget requests, Congress has reduced or eliminated a lot of wasteful spending. If not for congressional vigilance, scores of misguided or unnecessary projects supported by the Executive would have been fully funded. In 1992, for example, Congress rescinded funding for several programs supported by President Bush. President Bush had proposed approximately $7.9 billion in rescissions, a figure Congress increased to approximately $8.2 billion.[75] Much of the additional $300 million or so in rescissions initiated by Congress was aimed at particularly egregious examples of Executive Branch waste. For example, Congress cut $2 million from the National Science Foundation, which had used past lump-sum appropriations to make grants for such specious purposes as a study of sexual aggression in Nicaraguan fish; an inquiry into the importance of lawyers to the middle-class; and a comparison of the roles of intra- and intersexual selection in the evolution of sex-limited mimicry of swallowtail butterflies.[76] Congress also rescinded $183,000 from the National Institutes of Health, which

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[73] *See id.*

[74] This is discussed more fully in the following Section.

[75] *See* Pub. L. No. 102298, 106 Stat. 217 (1992). The act, H.R. 4990, passed by votes of 404-11 in the House and 90-9 in the Senate, and was signed by the President on June 4, 1992.

[76] *See* 138 CONG. REC. 7121 (daily ed. May 21, 1992) (statement of Sen. Byrd regarding proposed rescissions); H.R. CONF. REP. No. 530, 102d Cong. (1992).

had gone towards grants to: (1) calibrate the amount of dental pain persons experience by studying their facial expressions; (2) study the incidence of dental fear in the population; and (3) study why people fear the dentist.

Inevitably, Congress will make some mistakes in its appropriations decisions. Some unworthy projects will be funded, and some worthy projects will be funded at excessive or insufficient levels. But the logical flaw underlying many criticisms of congressional spending is the assumption that the President is sufficiently impartial and apolitical to correct Congress's mistakes. As the brief history of the Line Item Veto Act illustrates, the President is as much a political creature as are members of Congress. In my view, President Clinton's use of the item veto so far suggests a desire to: (1) achieve minimal and largely symbolic savings, while (2) demonstrating to Congress that the Executive is now master of the national purse. The following Part explores these two points.

IV. How the Line Item Veto Act Weakens Congress's Control over the Purse and Shifts the Balance of Power

A. *The Mechanics of the Line Item Veto Act*

The Line Item Veto Act of 1996[77] was signed into law on April 9, 1996, and became effective on January 1, 1997. Under the Act, the President may take any bill "that has been signed into law" within the previous five days and "cancel in whole (1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit."[78] "Direct spending" refers to spending required by law, such as the food stamp program and individual entitlements,[79] while "discretionary budget authority" refers to all other spending, including military spending and foreign assistance.[80] A "limited tax benefit" is defined as any revenue-losing provision that applies to 100 or fewer beneficiaries or any tax provision that provides "temporary or permanent transitional relief for 10 or

[77] 2 U.S.C. § 691 (1996).
[78] 2 U.S.C. § 691(a) (1996).
[79] 2 U.S.C. § 691e(5) (1996).
[80] 2 U.S.C. § 691e(7) (1996).

fewer beneficiaries."[81] The standards for a cancellation are either vague or tautological: all the President must do is decide that a cancellation will: (a) "reduce the Federal budget deficit;" (b) not impair any "essential Government functions;" and (c) "not harm the national interest."[82]

Cancellations become effective whenever the President sends a "special message" to Congress notifying it of the items vetoed.[83] After receiving a special message, Congress has five calendar days of session to introduce a "disapproval bill" reenacting canceled items, and it has up to thirty calendar days of session to pass the bill by majority vote.[84] If the President vetoes the disapproval bill, that veto can only be overridden by the constitutionally required two-thirds vote of both houses of Congress. The President may not veto items in a disapproval bill.[85]

The Line Item Veto Act violates the clear language of the Presentment Clause.[86] The Presentment Clause offers the President three mutually exclusive alternatives in considering a bill passed by both houses of Congress: (1) he may "sign it;" (2) he may "return it, with his Objections" to Congress, which may then pass the measure into law by a two-thirds vote of both houses; or (3) he may choose not to return the bill, whereupon "the Same shall be a Law," unless Congress has adjourned before the bill's ten-day return limit has expired.[87] Whatever path the President chooses, he is compelled to consider "it"—the entire bill as passed by Congress—*in toto*.

The Line Item Veto Act creates, in the opinion of many, an unconstitutional fourth option for the President by effectively allowing him to sign only certain portions of a bill into law. The drafters of the Act knew that they could not explicitly authorize the President to alter a bill passed by Congress before signing it because to do so would violate the Presentment Clause's man-

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[81] 2 U.S.C. § 691e(9) (1996).
[82] 2 U.S.C. § 691(a) (1996).
[83] 2 U.S.C. § 691b(a) (1996).
[84] 2 U.S.C. § 691d (1996).
[85] 2 U.S.C. § 691(c) (1996).
[86] U.S. CONST. Art. I, § 7, cl. 2. For a fuller discussion of the Line Item Veto Act's violation of the Presentment Clause, see 143 CONG. REC. S11411–16 (daily ed. Oct. 30, 1997) and Brief for Appellee, Raines v. Byrd, 117 S.Ct. 2312 (1997), 1997 WL 251423, at *65–*90. The only three federal jurists to consider the merits of the Line Item Veto Act have agreed with my assessment. *See* Raines v. Byrd, 117 S. Ct. 2312, 2325–27 (1997) (Stevens, J., dissenting); Byrd v. Raines, 956 F. Supp. 25 (D.D.C. 1997); and City of New York v. Clinton, 985 F. Supp. 168 (1998).
[87] U.S. CONST. Art. I, § 7, cl. 2.

date that he sign or return the bill unchanged. Thus, the Act inserts a gratuitous pause of up to five days between the President's signing a measure into law and canceling certain items of the measure he has signed. Although the Conference Report defends the five-day allowance as permitting the Administration sufficient time to provide Congress with "all supporting material" justifying any cancellation(s), the Report makes clear Congress's intention "that the President's cancellations be made as soon as possible."[88]

Supporters of the Line Item Veto Act argue that, because the Act applies only to any measure "that has been signed into law pursuant to Article I, section 7, of the Constitution," it cannot violate the Presentment Clause.[89] Since the Act explicitly requires prior compliance with the Presentment Clause, and since the Clause's requirements are fulfilled when the President signs a measure into law, the Presentment Clause cannot have been violated, they say. Even if we accept this syllogism, however, the Act still violates the Constitution by empowering the President to unilaterally repeal various provisions of an existing law that he has just signed.[90] The Act defines the President's cancellation authority as, "with respect to any dollar amount of discretionary budget authority, to rescind," and, with respect to any item of new direct spending or any limited tax benefit, to prevent "from having legal force or effect."[91] As this definition indicates, "cancellation" is but another word for "repeal," which Webster's Third New International Dictionary defines as "to rescind or revoke . . . from operation or effect."

The Act, in short, turns the President's duty to "take Care that the Laws be faithfully executed"[92] on its head, allowing the President to emasculate a law (or extinguish a portion of a law) that he has just approved. The President can now effectively and unilaterally amend or repeal items in a bill he has just signed into law, without seeking a majority vote of each House of Congress.

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[88] H.R. CONF. REP. No. 104-491, at 22 (1996).

[89] 2 U.S.C. § 691(a) (1996).

[90] "Amendment and repeal of statutes, no less than enactment, must conform with Art. I." I.N.S. v. Chadha, 462 U.S. 919, 954 (1983).

[91] 2 U.S.C. § 691e(4) (1996).

[92] U.S. CONST. Art. II, § 3.

B. *The Substantive Failure of the Line Item Veto Act*

Although the Line Item Veto Act is still in its infancy—and, if justice is served, will not live into adulthood—it is not too early to evaluate its effectiveness as a tool of fiscal discipline. One conclusion is inescapable: the President's item vetoes have so far resulted in, at best, minimal spending reductions. Even on the one occasion when the President used his item veto with uncommon vigor, canceling thirty-eight items from the fiscal year 1998 military construction appropriations bill,[93] the budgetary savings were singularly unimpressive. Congress later voted to reinstate all thirty-eight canceled items, but had they remained in effect they would have cut only $287 million (or 3%) from a bill that provided $9.2 billion in budget authority.[94] Overall, the eighty-two item vetoes President Clinton has issued would only save approximately $355 million in fiscal year 1998 and $937 million over the next five years.[95] That amounts to just 1/100th of 1% of the estimated $9 trillion that the federal government will spend over those five years.

While line-item veto advocates insist that even these trivial spending cuts may eventually add up to *something*, it is hard to see how, even in the aggregate, item veto savings will ever have any appreciable impact on overall spending levels. As stated in Part II of this Essay, direct (mandatory) spending and interest currently make up two-thirds of the budget, which is governed by formulas set in law and is immune from any item veto. While the item veto does apply to any *new* items of direct spending (i.e., any attempts to create new statutory spending requirements) it does nothing to challenge the budgetary status quo in which two-thirds of annual spending is already mandated by statute.[96]

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[93] Pub. L. No. 105-45 (1997) (providing $9,183,248,000 of new budget (obligational) authority for military construction in fiscal year 1998).

[94] Data on cancellations were compiled by Senate Appropriations Committee staff.

[95] *See The Line Item Veto After Year One: Hearings Before the Subcomm. on Legislative and Budget Process of the House Comm. on Rules*, 105th Cong. (Mar. 11, 1998) (statement of June E. O'Neill, Director, Congressional Budget Office) <http://www.cbo.gov>. As O'Neill's testimony notes, these numbers actually overstate the ultimate budgetary effects of the President's item vetoes. After factoring in the 38 cancellations that were overturned by Congress, and the one cancellation that was overturned by court order, there remain only 43 cancellations yielding a net five-year savings of $569 million.

[96] While some entitlements (such as social security) are funded through one-time permanent appropriations, others (such as the pension system) are funded in annual appropriations acts. The latter process does not give Congress significantly more

That leaves only the third of the budget consisting of discretionary spending (primarily military and domestic spending), which must be provided by annual congressional appropriations, potentially subject to the item veto. But again, as discussed above, the bulk of discretionary spending is pork-free (or at least not overly fatty).

The inability of a line-item veto to make a dent in federal spending—regardless of whether such a dent is advisable—was clear long before the 1996 Act was passed.[97] Many people (myself included) predicted loudly and vociferously that a line-item veto would have no meaningful impact on spending levels. The *Washington Post* recognized the truth about the item veto's deficit reduction potential when it pointed out, during the 1995 item veto debate, that "[i]n purely fiscal terms, the item veto is more a symbol than anything else."[98] The House Budget Committee staff had made the same point more than ten years earlier when it testified that "the line-item veto would have limited usefulness in achieving spending cuts" in national defense and other areas of discretionary spending.[99] The Committee also pointed out that in any given year much supposedly discretionary spending "is based on prior year budget authority or is otherwise committed, and therefore ineligible for a line-item veto."[100]

Furthermore, the need for deficit reduction—and hence for the item veto—has decreased markedly in the past few years. The deficit for fiscal year 1997 was just $22 billion, an $85 billion decrease from the previous year.[101] The Congressional Budget Office is forecasting a surplus for fiscal year 1998 of $8 billion

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budgetary leeway than the former, however, because recipients are still entitled to the full benefits required by the underlying statute. In either event, the surest way for Congress to reduce the cost is to change the eligibility and benefit standards that are set in law for each entitlement.

[97] While advocates of the line-item veto often pointed out that most state governors have line-item veto authority, they failed to address studies showing that state line-item vetoes had produced minimal fiscal savings while allowing governors to exert considerable influence over state legislatures. *See, e.g.*, David C. Nice, *The Item Veto and Expenditure Restraint*, 50 J. POLITICS 487 (May 1988); Glenn Abney & Thomas P. Lauth, *The Line-Item Veto in the States: An Instrument for Fiscal Restraint or an Instrument for Partisanship?*, 45 PUB. ADMIN. REV. 372 (1985); James G. Gosling, *Wisconsin Item Veto Lessons*, 46 PUB. ADMIN. REV. 292 (1986).

[98] *Disenfranchising Congress*, *supra* note 66.

[99] HOUSE COMMITTEE ON THE BUDGET, 98TH CONG., THE LINE-ITEM VETO: AN APPRAISAL, at 5 (1984).

[100] *Id.*

[101] CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1999–2008 (Jan. 1998) <http://www.cbo.gov>.

and continued surpluses through 2003.[102] If these predictions prove accurate—and budgetary forecasting is notoriously difficult—the item veto may no longer be operational in the near future (the 1996 Act specifies that the veto may only be used if the President determines, *inter alia*, that a cancellation will "reduce the Federal budget deficit").[103]

C. *The Procedural Shortcomings of the Line Item Veto Act: Congress's Diminished Power over the Purse*

If the item veto has had (and will continue to have) such a minimal effect on the budget, and if it may no longer be operational in a few years, what cause for concern is there? The answer to this question is simple: While the item veto does little to cut spending, it does a lot to reduce Congress's control over spending and other legislative prerogatives. Despite its failure as a tool of fiscal restraint, the item veto has significant political repercussions. The Framers' wisdom in designing the power of the purse as a check upon the Executive has been underscored by President Clinton's apparent desire to use the item veto to impose his own budget priorities upon Congress.

The Line Item Veto Act allows the President to immunize his budget proposals from congressional cuts. Office of Management and Budget Director Franklin Raines said as much when he noted, concerning the President's cancellations, that "where the [congressional] committees respected the administration's priorities, we have shown deference to the committees' priorities."[104] In other words, so long as Congress abides by the President's budget priorities, the President will refrain from canceling projects important to those members who support him. This politically strategic approach to the item veto is most clearly demonstrated by the President's cancellations of items in the fiscal year

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[102] CONGRESSIONAL BUDGET OFFICE, REVISED BASELINE BUDGET PROJECTIONS FOR FISCAL YEARS 1999–2008 (Mar. 3, 1998) <http://www.cbo.gov>.

[103] 2 U.S.C. § 691(a)(A)(i) (1996). *But see The Line Item Veto After Year One: Hearings Before the Subcomm. on Legislative and Budget Process of the House Comm. on Rules*, *supra* note 95 (suggesting that Presidents may continue to make item vetoes even if there is a budget surplus). The Act also contains a sunset provision under which its authority will expire on January 1, 2005. *See* Pub. L. No. 104-130, § 5 (1996).

[104] 143 CONG. REC. S11183 (daily ed. Oct. 24, 1997) (letter from Franklin Raines, Director, Office of Management and Budget).

1998 military construction bill.[105] The President's military construction item vetoes were explicitly directed at projects initiated by Congress, rather than the Executive.[106] Whereas Congress traditionally has corrected oversights in presidential budget proposals, the President has indicated that congressional appropriations will now be routinely questioned and possibly canceled if they do not accord with executive budget priorities.

This represents a potentially radical reversal of the status quo. From the beginnings of the Republic through the end of the First World War, the President had no formal budgetary responsibilities. During that time, Congress was reluctant to diminish its own budgetary power by granting the President a significant role in spending decisions.[107] As Joseph Cannon, Speaker of the House of Representatives from 1903 to 1911, put it, "I think we had better stick pretty close to the Constitution with its division of powers well defined and the taxing power close to the people."[108] With passage of the 1921 Budget and Accounting Act,[109] however, Congress reformed the budgetary process to include the President. The Budget and Accounting Act requires the President to submit an annual budget proposal for Congress's consideration. Congress carefully demarcated the limits of this proposal, however. Some had suggested requiring a two-thirds vote whenever Congress sought to appropriate money not requested by the Executive Branch; this argument was rejected. Congress made clear that the President's budget was to be a proposal only, which it would review and, where necessary, revise.[110] While the

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[105] Military Construction Appropriations Act, Pub. L. No. 105-45, 111 Stat. 1142, (1998).

[106] *See* Cancellation Pursuant to Line Item Veto Act: Military Construction Appropriations Act, 1998, 62 Fed. Reg. 52452 (Oct. 7, 1997) (President Clinton said he only considered canceling military construction projects if they met the following conditions: (1) *they were not requested in his fiscal 1998 budget*; (2) they would not substantially improve the quality of life of military service members; and (3) they would not begin construction in 1998. (emphasis added)). Based on these criteria, Clinton used the line-item veto to cancel 38 of the 145 projects funded by Congress that had not been included in the President's budget request. The White House later admitted that some of those cancellations were based on inaccurate information supplied by the Department of Defense. *See* 143 CONG. REC. S11183 (daily ed. Oct. 24, 1997) (letter from Raines).

[107] *See* Louis Fisher & Neal Devins, *How Successfully Can the States' Item Veto Be Transferred to the President?*, 75 GEO. L.J. 159, 162 (1986). For a fuller account, see also LOUIS FISHER, PRESIDENTIAL SPENDING POWER 7–58 (1975).

[108] *Quoted in* Louis Fisher & Neal Devins, *supra* note 107, at 162.

[109] Budget and Accounting Act, Pub. L. No. 105-153, 42 Stat. 20, (1921).

[110] *See* Fisher & Devins, *supra* note 107, at 162–63. This is consistent with the

Budget and Accounting Act increased the President's advisory role in the budget process, it did not fundamentally impinge upon Congress's ability to make final spending decisions.

Now, the roles of the Legislature and the Executive in making spending choices have been effectively reversed. As the President's explanation of his military construction item vetoes indicates, the executive budget proposal is now much more than merely a proposal; it is an instruction which Congress disregards at its own peril. Many members of Congress have reacted to this development with varying degrees of surprise and indignation. Although Congress glibly and cavalierly handed off this power over the purse to pander to public opinion, now that the change has been implemented, members have openly protested against the seeming arbitrariness of the President's cancellations. Some of the harshest criticisms have come from item veto supporters, who have charged President Clinton with "a raw abuse of political power"[111] and "a raw exercise of power meant to threaten and intimidate,"[112] and criticized the cancellations as "unduly influenced by political considerations."[113]

While I share the anger of my colleagues, I do not share their surprise. The handwriting was on the wall long before the 1996 Act was passed. Although President Clinton is the first President to exercise an item veto, since 1870 most presidents have periodically asked Congress for it. Several of these Presidents (or their aides) said frankly that they saw the line-item veto as a way to shift the balance of power in spending decisions from the Legislature to the Executive. President Eisenhower's budget director Percival Brundage candidly told the House Judiciary Committee in 1957 that:

> the authority to veto an appropriation item would include authority to reduce an appropriation—but only to the extent necessary to permit the disapproval of amounts added by

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Constitution, which limits the President's role in proposing legislation to: (1) giving "Information of the State of the Union" periodically to Congress and (2) recommending "to their Consideration such Measures as he shall judge necessary and expedient." U.S. CONST. art. II, § 3.

[111] Sen. Ted Stevens (R-Alaska), Chairman of the Senate Appropriations Committee, *quoted in* Guy Gugliotta & Eric Pianin, *Clinton's Line-Item Veto Hits a Nerve in Congress: Officials Don't Like Pet Projects Thrown Out*, NEW ORLEANS TIMES-PICAYUNE, Oct. 24, 1997, at A10.

[112] Rep. Robert Livingston (R-La.), Chairman of the House Appropriations Committee, *quoted in* Stephen Moore, *Cuts of Pork*, NATIONAL REV., Dec. 8, 1997, at 26.

[113] Sen. John McCain (R-Ariz.), *quoted in* Paul Leavitt et al., *Clinton Says Democracy Needs Youths of America*, USA TODAY, Oct. 17, 1997, at 10A.

> Congress for unbudgeted programs or projects, or of increases by Congress of amounts included in the [President's] budget.[114]

Brundage's words were confirmed by President Reagan's 1985 Economic Report. The Report stated that while the item veto "may not have a substantial effect on total Federal expenditures" it may be used by the President "to change the composition of Federal expenditures—from activities preferred by the Congress to activities preferred by the President."[115] And Richard Darman, Office of Management and Budget Director under President Bush, candidly predicted a few years ago that the line-item veto would put the President in "a stronger position" in budget negotiations with Congress.[116] Just how much "stronger" has become clear since the item veto took effect in 1997.

I fear that, as the full effects of the item veto become apparent, the anger expressed by some of my colleagues may give way to a more dangerous complacency and pragmatism. Several members of Congress and lobbyists already appear to have adopted a conciliatory approach to the new item veto order.[117] Sensing clearly which way the political winds are blowing, they have courted the President in order to ensure that their favored projects are spared the item veto cutting block. According to one news article, for example, Senator Joseph I. Lieberman (D-Conn.), upon learning on October 8, 1997, that an $18 million research grant he favored might be cut from the fiscal year 1998 Department of Defense appropriations bill,[118] launched an intensive effort to save the grant:

> Over a day and a half, Mr. Lieberman wrote to [presidential budget director Franklin] Raines about the matter and called Jacob Lew, the deputy budget director. Members of Mr. Lieberman's staff called John H. Gibbons, the President's science director; Deputy Defense Secretary John J. Hamre, and officials on the President's National Economic Council. The project survived and is now law.[119]

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[114] *Quoted in* Fisher & Devins, *supra* note 107, at 192–93.

[115] *Id.* at 193.

[116] *Bush May be Willing to Trade Tax Increase for a Line-Item Veto*, COURIER-J. (Louisville, Ky.), May 14, 1990, at 3A.

[117] This much was evident when the public relations and lobbying firm of Burson-Marsteller held a half-day seminar for lobbyists entitled "The Line Item Veto: What You Need to Know, When You Need to Know It." *See* David E. Rosenbaum, *New Kind of Veto Brings a New Way of Doing Business*, N.Y. TIMES, Oct. 22, 1997, at A1.

[118] Pub. L. No. 105-56, 111 Stat. 1203 (1997).

[119] Rosenbaum, *supra* note 117.

Similarly, Representative Scotty Baesler (D-Ky.) is reported to have lobbied Rahm Emanuel, the President's senior policy advisor, to ensure that a $25 million appropriation that benefited a company in his district would not be item-vetoed.[120] Representative Baesler's project was subsequently "removed from the veto list."[121] Doubtless, many more members of Congress have been or will become equally willing to accept the President's partial seizure of the national purse-strings.

Further evidence that the item veto bolsters the power of the Executive vis-à-vis Congress comes from the fast-track trade debate at the end of the first session of the 105th Congress. Some House Democrats reportedly contacted the White House to point out that "[h]itting farm-state Democrats with line-item vetoes . . . would make them less likely to back Clinton on trade."[122] Raines's account of these conversations was revealing: "They call up and say they've got a project they want to save. Were they in their own minds making a fast-track link or not? I didn't get into that."[123] Despite Mr. Raines's determination not to "get into that," I doubt that I am alone in suspecting that such a "link" was indeed being made.

The item veto has also had more subtle effects on the legislative-executive dynamic, as demonstrated by a reported conversation between Representative Sonny Callahan (R-Ala.) and White House lobbyist John Hilley.[124] The conversation ostensibly concerned a threatened cancellation of $1.5 million for expansion of a veterans cemetery in Callahan's home city of Mobile. But Hilley soon "turned the subject to something he needed, too: $3.5 billion for the International Monetary Fund," which Callahan could deliver in his capacity as Chairman of the House Appropriations subcommittee overseeing foreign aid.[125] While neither party complained openly of any undue influence or pres-

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[120] *See id.*

[121] *Id.*

[122] *Line-Item Veto Scorecard: $1.9 Billion Over 5 Years*, WASH. POST, Dec. 4, 1997, at A21.

[123] *Id. See also Skaggs Criticizes Line Item Veto, Despite Its Limited Use*, CONGRESS DAILY, Dec. 9, 1997 (Rep. David Skaggs (D-Colo.) suggested that the President used the item veto as leverage during the fast-track debate); Rick Rothacker, *Few Satisfied with Inaugural Use of the Line-Item Veto*, LEGI-SLATE NEWS SERVICE, Dec. 2, 1997.

[124] *See* David Rogers, *Line-Item Veto Was Supposed to Strengthen Hand of Clinton, But it Put Him on Defensive This Fall*, WALL ST. J., Nov. 21, 1997, at A24.

[125] *Id.*

sure, "to nearly everyone else, the conversation was a classic in the unspoken political log-rolling of the line-item veto."[126]

The President's new power does have limits. One may be the President's inexperience in using the item veto.[127] Still, it is hard to see inexperience as more than a temporary obstacle to the Executive Branch. President Clinton and his successors will doubtless learn from his mishaps, and we may anticipate a more sophisticated and carefully honed use of the item veto in the future.

Some observers claim that a substantial limit on the President's power exists because the item veto does not give the President the final say in canceling items. Item vetoes, like other presidential vetoes, can be overridden by a two-thirds vote of Congress. But the possibility of an override is not much of a threat. For one thing, congressional overrides of presidential vetoes are much less common than many people realize. History shows that Congress is often reluctant or unable to override a veto. From 1789 to the present, Congress has only overridden 105 of the 1,469 regular presidential vetoes—a mere seven percent.[128]

Furthermore, there are compelling reasons to believe that Congress will have an even harder time overriding item vetoes than regular vetoes. As long as the President cancels a limited number of projects with largely local appeal, he is unlikely to raise the ire of two-thirds of Congress. While some members of Congress may support a large-scale spending bill containing priorities of which they approve (roads or military preparedness, for example), the same members will probably be less willing to support a handful of projects taken out of the context of that bill. Few members today share Senator Webster's expansive view of government spending on projects outside their own constituencies.

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[126] *Id.* Funding for the Alabama veterans cemetery was not item-vetoed. Because of an unrelated dispute between the Clinton administration and House leadership over family planning issues, the House failed to appropriate any money for the International Monetary Fund's new arrangements for borrowing.

[127] *See id.* As the *Wall Street Journal* article pointed out after describing the Hilley-Callahan conversation, "[f]or all the raw politics displayed, the administration seems to have been unprepared to use this new power." *Id.* This may explain why, since the mistaken cancellations of the military construction bill, the President has used the item veto relatively cautiously.

[128] Current statistics are courtesy of Gary Sisco, Secretary of the Senate. For the most recent printed statistics, see PRESIDENTIAL VETOES, 1989–1996, S. PUB. 105-22, at ix (1997). These statistics probably understate the veto's true effect because they do not include the many cases in which Congress decided to withdraw or alter legislation for fear of a presidential veto. In addition to the regular vetoes, there have been 1065 pocket vetoes, which by definition cannot be overridden. *See id.*

This does not mean that those projects are not meritorious—it merely recognizes that few members are willing to pass up the opportunity to look tough on pork.

From a purely strategic standpoint, the President is best advised to limit his cancellations, because the more states affected, the more votes there are likely to be for a disapproval bill restoring the canceled items. Experience bears this out. The only time Congress has overturned the President's cancellations was when it restored all thirty-eight items, affecting twenty-four states, that the President struck from the fiscal year 1998 military construction bill. No other bill has suffered more than fourteen cancellations.[129] This track-record indicates that, as long as the President uses the item veto selectively, Congress may find that the possibility of an override is not much of a shield against the President's new sword.

But, critics may ask, if the item veto is necessarily circumscribed, how can it have such a major effect on Congress's power of the purse? How can a few vetoed projects from any given bill constitute a radical change in spending power? Certainly, it is true that the President will not be free to entirely reshape Congress's appropriations to match his budget proposal. Nonetheless, the threat of a veto may be a big enough stick to discourage members from deviating too far from the President's budget. In politics, as in nuclear deterrence, the threat of power—however unlikely its actual use may be—is often enough to achieve one's objectives.[130]

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[129] The President canceled fourteen items from the Department of Defense Appropriations Act of 1998, Pub. L. No. 105-56, 111 Stat 1203; eight items from the Energy and Water Development Appropriations Act of 1998, Pub. L. No. 105-62, 111 Stat 1320; seven items from the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1998, Pub. L. No. 105-65, 111 Stat 1344; five items from the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Act of 1998, Pub. L. No. 105-86, 111 Stat 2079; three items from the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-66, 111 Stat 1425; two items from the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat 788; two items from the Department of Interior and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-83, 111 Stat 1543; and only one item each from the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat 251; the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat 2440; and the Treasury, Postal Service, and General Government Appropriations Act of 1998, Pub. L. No. 10561, 111 Stat 1272.

[130] Rep. Skaggs was quoted using a similar metaphor, describing the cancellation of items in the military construction bill as, "in effect, a test of a nuclear device—that he [the President] had it and he knew how to use it." *Skaggs Criticizes Line Item Veto, Despite Its Limited Use*, *supra* note 123. Skaggs added that the vetoes succeeded in "changing the strategic relationship" between Congress and the White House. *Id.*

Members of Congress may also be less likely to express their opposition to administration policies publicly for fear of item veto retaliation. The Constitution's Speech or Debate Clause[131] sought to protect legislators from, among other things, executive pressure. As the Supreme Court has noted, the Speech or Debate Clause was intended by the Framers "to prevent intimidation by the executive and accountability before a possibly hostile judiciary."[132] There is reason to suspect that legislators' freedom to speak their minds—something the Framers believed to be an essential component of the legislative process—will be compromised by fear of item vetoes. Since the ability of legislators to exercise their independence depends upon their freedom to speak and debate without fear of presidential retaliation, the ramifications of the item veto may be quite far-reaching.

V. CONCLUSION

I have tried to impress upon the reader the central role of the power of the purse in the Framers' constitutional design. By placing the power of the purse in the hands of Congress, the Framers demonstrated their awareness of Roman, English, colonial, and early state history and experience, all of which showed that authority over expenditures was a prerequisite to legislative independence. At the same time, the Framers demonstrated their confidence in the ability of Congress to make wise spending decisions for the good of the entire country.

The Line Item Veto Act was passed in flat disregard of these procedural and substantive justifications for congressional control over the purse. In contrast to the studious and meticulous work of the Framers in 1787, Congress in 1996 passed an ill-conceived and loosely worded statute whose ramifications it is only now beginning to understand. Although its ostensible purpose was to cut the budget deficit, the item veto has had a very different effect so far: namely, loosening Congress's grasp on the drawstrings of the national purse. Unless the Judiciary saves

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[131] "[F]or any Speech or Debate in either House, [the members] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1.

[132] U.S. v. Johnson, 383 U.S. 169, 181 (1966). The roots of legislative freedom of speech can be traced back to the reign of King Henry IV (1399–1413), during which he recognized the right of the Commons to debate freely. *See* 138 CONG. REC. S2283 (daily ed. Feb. 26, 1992) (statement of Sen. Byrd). *See also* HUTCHISON, *supra* note 25, at 69–71.

Congress from its own folly by striking down the Act as unconstitutional—or unless Congress summons the wisdom and the will to revoke the Act by a veto-proof majority—Congress may find itself unable to check the power of the President as effectively as it has done in the past.

Regardless of whether the Line Item Veto Act is adjudged constitutional, there is still a lesson that the item veto experience should teach us; namely, to beware of quick fixes to perceived institutional problems. The institutional machinery devised by the Framers can be inefficient and frustrating, but there is much wisdom in its design.[133] By tinkering so cavalierly with a system that was produced through diligence and careful consideration, we run the risk of throwing the entire constitutional apparatus into disarray. If we are to take upon ourselves the awesome responsibility of improving upon the Framers' work—as we must, from time to time—we should at least accompany our efforts with the same degree of hard work and serious thought that the Constitution memorializes.

While the new item veto order is still being shaped—and while that order may change in future administrations—its general contours are becoming apparent. Although the item veto does not give the President absolute spending authority, it does allow him to immunize his own budget proposals from congressional review, while relegating Congress's spending priorities to a less privileged position. At the same time, the item veto gives the President new bargaining leverage in negotiating with Congress in arenas (such as fast-track) that have little to do with spending.

Inevitably, much of this leverage will be invisible to both the media and the public. It will be exercised privately, discreetly, and subtly, behind closed doors and along secure phone lines. Nonetheless, the power transformation I am describing is real and meaningful. Professor Laurence Tribe's warnings about a line-item veto were prescient:

> Empowering the President to veto appropriations bills line by line would profoundly alter the Constitution's balance of power. The President would be free not only to nullify new congressional spending initiatives and priorities, but to wipe

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[133] "With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." I.N.S. v. Chadha, 462 U.S. 919, 959 (1983).

> out previously enacted programs that receive their funding through the annual appropriations process. Congress, which the Constitution makes the master of the public purse, would be demoted to the role of giving fiscal advice that the executive would be free to disregard.[134]

How many members of Congress will agree to support a bill or nomination or treaty in return for assurances that their pet project will not be canceled? And how many worthy projects will be de-funded by a President seeking to prove his own fiscal responsibility to the public? These questions remain to be answered. As Gladstone suggested over a century ago, what *is* at stake are nothing less than the "liberties of the country." So far, there is every reason to fear that Congress's ability to set national spending priorities, to represent its constituents, and to check the power of the President will continue to be eroded by the item veto.

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[134] TRIBE, *supra* note 53, at 267.

POLICY ESSAY

THE SAFETY ADVANCEMENT FOR EMPLOYEES ACT

SENATOR MICHAEL B. ENZI*

The Occupational Safety and Health Administration is charged with ensuring safe working conditions for nearly 97 million workers in over 6 million worksites. In this Essay, Senator Enzi discusses flaws in OSHA's approach to regulation, criticizing the agency for its "adversarial" methods. The author then discusses legislation he has introduced to increase cooperation among employers, employees, and OSHA in improving workplace safety—the Safety Advancement for Employees Act.

The Occupational Safety and Health Act of 1970[1] ("1970 Act") paved the way for the creation of the Occupational Safety and Health Administration ("OSHA") within the United States Department of Labor. The Act charged OSHA with ensuring safe and healthful working conditions for all workers "by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment."[2] Since its creation, critics have bitterly debated whether OSHA has met its statutory mandate.

OSHA has consistently relied upon an adversarial approach rather than emphasizing a collaborative strategy geared toward increasing worker safety and health.[3] The agency's approach has failed American workers because it falls short of effectively addressing safety problems or helping employers in their compliance efforts. Although even OSHA itself admits that "95 percent of the employers in the country do their level best to try to voluntarily comply" with the law, the agency still treats those employers as adversaries—issuing them citations for what they have not done, rather than assisting them in complying with

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[1] Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. §§ 651–678 (1994)).

[2] 29 U.S.C. § 651(1) (1970).

[3] *Oversight of the Occupational Safety and Health Admin.: Hearing before the Senate Subcomm. on Public Health and Safety of the Senate Labor and Human Resources Comm.*, 105th Cong. (1997) (testimony of Pete Lunnie Jr., Executive Director of the Coalition on Occupational Safety and Health) [hereinafter Lunnie Testimony].

regulations to make the workplace safer.[4] The result of this approach has been an ineffective enforcement climate that frustrates both employers and workers because it fosters poor communication and little cooperation between OSHA and the business and labor communities.

OSHA has operated since its inception as a reactionary regulator—inspecting worksites primarily after a fatality or injury has occurred.[5] While it is important that OSHA retain its ability to enforce the law and to respond to employee complaints in a timely fashion, it is apparent that the agency can maintain these objectives while also broadening preventative initiatives so that fewer workplace fatalities and injuries occur.

On September 30, 1997, I introduced the Safety Advancement for Employees Act ("the SAFE Act").[6] The SAFE Act is structured to increase cooperation between employers, employees, and OSHA in an effort to improve safe and healthful working conditions for employees. The SAFE Act will allow the objectives prescribed by Congress when it wrote the 1970 Act to finally be achieved by strengthening and expanding voluntary and cooperative compliance initiatives currently available to employers, while preserving OSHA's enforcement responsibilities.

The SAFE Act reflects a new approach to worker safety that is centered on cooperation. This important legislation has been crafted to promote and enhance workplace safety and health—rather than to dismantle it. The SAFE Act would not waive any of OSHA's power to inspect workplaces, but it would recognize that employers who actively seek expert assistance to improve safety should not be treated as adversaries. The spirit of cooperation must overpower political polarization to achieve true improvements in occupational safety and health. Simply put, the SAFE Act will result in increased compliance by employers resulting in greater safety for workers.

I. The Need for Legislation

OSHA has consistently neglected the compliance needs of good faith employers and has failed to adequately police the

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[4] *See* Ellen Byerrum, *Decline in Inspection Numbers Prompts Renewed Emphasis, OSHA Official Tells BNA*, 26 O.S.H. Rep. (BNA) No. 38 (Feb. 26, 1997).

[5] *See infra* note 19.

[6] S. 1237, 106th Cong. (1997).

existing minority of those employers who ignore OSHA's regulations. Most employers want to improve worker safety by complying with OSHA regulations.[7] It is apparent that a growing number of these employers need compliance assistance. As well, the threat of fines has little impact on employers who disregard compliance. They will continue to play the odds that OSHA will not inspect them. As a result, OSHA's adversarial model neither assists compliance nor deters violations effectively. The result is an ineffective adversarial approach that has not achieved its mandate of creating safer workplaces—leaving the worker to face the consequences.

There is little, if any, conclusive evidence that OSHA's adversarial approach has actually improved worker safety.[8] Since the passage of the 1970 Act, the total number of workdays lost because of injuries—indicative of the severity of an injury—has significantly increased.[9] In fact, the average number of lost workdays per 100 full-time workers actually rose from 54.6 in 1974 to 76.1 in 1988.[10] Such statistical anomalies prompted the General Accounting Office ("GAO") to conclude that "OSHA's impact on injury and illness is largely unknown."[11]

Recently, OSHA's enforcement activities have declined. The total number of inspections throughout the United States fell from 42,377 in 1994 to 24,024 in 1996 and the number of OSHA's citations dropped 62%, from 145,900 to 55,100, during the same period.[12] Despite this decline, work-related injuries and illnesses dropped to their lowest rate in nearly a decade.[13]

In addition to employing an ineffective adversarial approach, OSHA is an agency plagued by its inability to inspect every American workplace. Currently, OSHA only has 2451 state and federal inspectors.[14] Yet, as of 1994, OSHA had to regulate 96.7 million

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[7] *See* Byerrum, *supra* note 4, at A-8 (OSHA Deputy Assistant Secretary Frank Strasheim said "95 percent of the employers in the country do their level best to try to voluntarily comply with OSHA.").

[8] After numerous attempts, I failed to locate a comprehensive study that proves OSHA's 25-year presence is responsible for the steady decline in the number of workplace injuries and fatalities.

[9] *See* GENERAL ACCOUNTING OFFICE, HUMAN RESOURCES DIVISION, OPTIONS FOR IMPROVING SAFETY AND HEALTH IN THE WORKPLACE 15 (1990).

[10] *See id.*

[11] *Id.*

[12] *See* Anne Scott, *A Kinder, Gentler, OSHA?*, 93 BUS. REC. No. 14 at 10 (Apr. 7, 1997).

[13] *See Health and Safety: On-Job Injuries, Illnesses Drop In 1995 to Lowest Level in Decade*, 49 DAILY LABOR REPORT (BNA), at D-1 (Mar. 13, 1997).

[14] Letter from Gregory Watchman, OSHA Acting Assistant Secretary of Labor, to

workers in 6.5 million worksites.[15] The AFL-CIO has recognized that under current conditions, it would take OSHA 167 years to visit every workplace under its jurisdiction.[16] Along with this monumental time lapse, the sheer diversity of safety and health concerns stemming from workplaces as different as restaurants and funeral homes prohibits an inspector from fully comprehending each individual worker's needs and concerns.

Even more revealing is the fact that in 1994 and early 1995, three quarters of worksites in the United States that were the scene of serious accidents had never been inspected by OSHA in this decade.[17] Those accidents claimed the lives of 1,835 workers and injured thousands more.[18] In response to this statistic, OSHA officials acknowledged that their inspectors do not investigate most lethal worksites until after accidents occur.[19] Despite the small number of preventative inspections, OSHA requested an additional 110 inspectors for fiscal 1998 so that the agency "can respond quickly to any reports of injury or death that occur."[20] Such inconsistencies lead me to conclude that the agency defines its success by its failures. That philosophy is jeopardizing the lives of American workers.

Regulatory morass has also plagued employers' abilities to comply with OSHA's mandate. As a small business owner for twenty-seven years, I believe that time spent by businesses addressing safety and health in the workplace should be dedicated to abating hazards, rather than sifting through and trying to understand hundreds of pages of regulations. Many of OSHA's regulations are so vague that to expect a small business employer to correctly interpret them is practically inconceivable. As a result, employers are left to fend for themselves, spending a significant portion of their time and money misinterpreting regulations and making safety improvements that are either not required by law or not related to workplace safety, or both.

Rep. James Talent (R-Mo.), Chairman, Small Business Committee, Aug. 15, 1997, at 4 (on file with author).

[15] *Id.*

[16] AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT, A STATE-BY-STATE PROFILE OF WORKER SAFETY AND HEALTH IN THE UNITED STATES 4 (6th ed. 1997).

[17] *See OSHA Failed to Inspect Majority of Workplaces Where Workers Died in '94*, ASHEVILLE CITIZEN TIMES (N.C.), Sept. 5, 1995, at 1-A.

[18] *See id.*

[19] *Id.*

[20] Byerrum, *supra* note 4, at A-8.

Employers will only understand what they are required to do by law if OSHA "improve[s] communication with business and labor, including making information more accessible, and enhance[s] cooperation with employers and workers throughout the regulatory process."[21] In an attempt to counter the criticism of the regulatory process, OSHA points to the wide variety of informational resources and programs available to help employers. OSHA promotes its more than eighty different publications, safety and health standards in CD-ROM format (available for purchase), its presence on the Internet, its safety and health courses, and its consultation programs.[22] In fact, OSHA has remarked that it believes that "determining which standards apply to a particular worksite can be done *easily* (by regulated business) through a process of elimination."[23] The GAO has rejected this claim, noting that the "dizzying array of brochures, toll-free numbers, and other methods to inform businesses of their regulatory requirements" does not go far enough towards alleviating the vast communication problem in OSHA's regulatory arena.[24]

Employers who want to comply with OSHA's regulations continuously encounter enormous obstacles. A company safety official once described the overwhelming range of regulatory requirements as being akin to "getting pecked to death by ducks—each bite may not hurt, but all together they are very painful."[25] According to the GAO, businesses complain about "confusing, ambiguous, or conflicting terminology used in the regulations themselves or on the required forms."[26] Businesses also note that they do not understand some regulatory requirements because of frequent changes to the regulations, which make it difficult to stay current regarding compliance requirements.[27] Dramatically compounding this compliance problem is the fact that employers are left feeling stranded without helpful assistance. Businesses are not able to get the clarifications they need from OSHA staff.[28] Among the

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[21] *OSHA: Potential to Reform Regulatory Enforcement Efforts: Hearing Before the Subcomm. on Human Resources and Intergovernmental Relations of the House Comm. on Government Reform and Oversight*, 103d Cong., 99 (1995) (statement of Cornelia M. Blanchette, Associate Director, General Accounting Office).

[22] *See* GENERAL ACCOUNTING OFFICE, REGULATORY BURDEN: MEASUREMENT CHALLENGES AND CONCERNS RAISED BY SELECTED COMPANIES 78 (1996).

[23] *Id.* at 74 n.2 (emphasis added).

[24] *Id.* at 192.

[25] *Id.* at 61.

[26] *Id.* at 148.

[27] *See id.* at 150.

[28] *See id.* at 148

most widespread concerns of the participating businesses was that regulators lacked knowledge regarding the particular business and therefore, provided little assistance to aid compliance with the regulations.[29]

It is apparent that OSHA lacks sufficient compliance assistance for employers. Vice President Gore acknowledged this when he poured the foundation for a new cooperative approach to workplace safety and health regulation by using private sector compliance experts to consult with employers to achieve greater workplace safety.[30] Acknowledging that OSHA "doesn't work well enough," because there are "only enough inspectors to visit even the most hazardous workplace once every several years,"[31] the Vice President has called on OSHA to rely on private consultation companies in its effort to ensure the safety and health of American workers.[32] In this way:

> [OSHA] would use the same basic technique the federal government uses to force companies to keep honest financial books: setting standards and requiring periodic certification of the books by expert financial auditors. No army of federal auditors descends upon American businesses to audit their books; the government forces them to have the job done themselves. In the same way, no army of OSHA inspectors need descend upon corporate America.[33]

OSHA must understand and embrace the concept that employers who hire and pay for the expertise of an OSHA-qualified, third party consultant are, by definition, cooperating with the agency. Fining employers for their good faith compliance efforts does not promote a spirit of cooperation and, in fact, poses a disincentive to employers to voluntarily undertake compliance. By promoting cooperation with employers through the use of private sector compliance auditors, Vice President Gore believes that the "health and safety of American workers could be vastly improved."[34]

In its effort to adhere to Vice President Gore's initiatives, however, OSHA has failed to go beyond rhetoric. Despite OSHA's claim that it is "putting a lot of resources into compliance assis-

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[29] *See id.* at 153.
[30] *See* ALBERT GORE, THE GORE REPORT ON REINVENTING GOVERNMENT 62 (1993).
[31] *Id.* at 62.
[32] *Id.*
[33] *Id.*
[34] *Id.*

tance and partnership initiatives,"[35] only 22% of OSHA's 1997 fiscal appropriation was spent on federal and state compliance assistance.[36] It is difficult to conclude that current initiatives are having an impact on the number of workplace fatalities and injuries when OSHA spends so little of its annual funds on preventive measures.

The GAO has also cited paperwork as a cause of frequent miscommunication and wasted resources. According to GAO reports, businesses complained that paperwork or other procedural requirements were excessive, while regulatory agencies said that in several of those cases, the businesses had misinterpreted the paperwork requirements and as a result, incurred unnecessary expenses.[37] In one instance, a business explained how OSHA required them to retain certain employee safety training records "forever," while OSHA said that no such employee safety training records were needed and, therefore, no retention requirement existed.[38]

By far, the largest number of citations issued to employers by OSHA are for paperwork violations. In 1994, the top six most-cited violations involved paperwork deficiencies.[39] As OSHA continues to channel its resources toward paperwork, unsafe workplaces remain uninspected. In fact, even OSHA officials acknowledge that their inspectors "do not get to a lion's share of the lethal sites until after accidents occur."[40] The end result is that many incompetent or reckless employers go undetected while good faith employers spend time and money on paperwork rather than safety.

Workplace safety and health suffer when the employer's resources are tied up with paperwork that OSHA acknowledges is unnecessary. As well, the safety and health of workers is jeopardized when OSHA fines employers who are making a good faith effort to comply with all existing regulations. Small businesses, in particular, express concern "that overzealous OSHA

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[35] *Oversight of the Occupational Safety and Health Admin.: Hearing before the Senate Subcomm. on Public Health and Safety of the Senate Labor and Human Resources Comm.*, 105th Cong., 28 (1997) (testimony of Gregory Watchman, OSHA Acting Assistant Secretary of Labor).

[36] H. REP. No. 659, 104th Cong. (1996).

[37] *Id.* at 152–55.

[38] *Id.* at 153.

[39] *See* Lunnie Testimony, *supra* note 3.

[40] *OSHA Failed to Inspect Majority of Workplaces Where Workers Died in '94*, *supra* note 16, at 1A.

inspectors, determined to meet monthly citation quotas, were citing them for minor paperwork violations and other inconsequential actions that posed little or no threat to workers."[41]

To bring a greater number of American workplaces into compliance, OSHA's ineffective adversarial approach must be modified to promote increased cooperation between the agency and employers and employees. The agency's current approach pits the employer against the inspector—fostering distrust and suspicion. This environment does not encourage employers and employees to work together with OSHA to provide safe and healthful working conditions as prescribed by the 1970 Act. Both the government and the private sector, devote vast resources trying to discover employers in violation of regulations as part of an effort that is unlikely to advance worker safety and health. In its current form, the agency is incapable of handling the safety problems of millions of individual workplaces as America races toward the 21st Century. As recognized by Vice President Gore, OSHA's system "doesn't work well enough."[42]

II. THE SAFE ACT

The SAFE Act promotes one goal—the advancement of safety and health in the workplace. The bill's theme was primarily derived from the suggestions of employees, employee representatives, employers, and certified safety and health professionals. I understand past concerns regarding OSHA's ability to meet its responsibilities as an enforcement agency, as well as the importance of maintaining an employee's right to an inspection. I listened carefully to these concerns and as a result, the SAFE Act has been crafted to improve workplace safety and health—rather than to dismantle it.

When the Occupational Safety and Health Act was enacted twenty-seven years ago, it was intended to free the workplace from recognized hazards that were causing, or were likely to cause, death or serious physical harm to employees.[43] By focusing too narrowly on heavily weighted penalties and enforcement, OSHA has strayed far from its original mission of protecting employees from occupational safety and health hazards. Although

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[41] Lunnie Testimony, *supra* note 3, at 94.
[42] GORE, *supra* note 30, at 62.
[43] *See* 29 U.S.C. § 651(b)(1).

OSHA will retain its ability to punish employers who do not embrace workplace safety and health, the SAFE Act encourages OSHA to reward those who willingly comply by expanding cooperative and voluntary compliance initiatives. Workers will be better served by an OSHA that places an equal emphasis on both its compliance initiatives and enforcement responsibilities.

The SAFE Act would facilitate cooperation, as well as communication, by encouraging employers to implement employee/employer participation programs that focus on addressing occupational safety and health hazards. These programs will encourage employees and employers to discuss, identify and correct occupational safety and health hazards at their respective worksites. Safety and health participation programs, as prescribed by the SAFE Act, complement what the Clinton administration had in mind when it stated that "employer commitment and meaningful employee participation and involvement in safety and health is a key ingredient in effective programs."[44]

By allowing employers to hire OSHA-qualified, third-party consultants to assist them in the identification and correction of safety and health hazards, the SAFE Act would promote voluntary compliance. Studies have shown that many sites where serious workplace accidents have occurred were not inspected by federal OSHA inspectors for several years prior to the accident. Since only 2400 inspectors from OSHA and approved state programs are charged with ensuring the safety and health of 93 million workers and 6.2 million worksites, Vice President Gore has called on OSHA to rely on private consultation companies in its effort to protect the safety and health of American workers.[45] It is clear that by injecting third party consultative services into the mix, the availability of technical assistance to employers who voluntarily seek to make their workplace safer for their employees will dramatically increase.

To help ensure that all federal occupational safety and health standards are based on sound, scientific data, the SAFE Act would include independent scientific peer review in the rulemaking process, producing greater clarity and simplicity in future regulations. Although OSHA currently conducts risk assess-

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[44] NATIONAL PERFORMANCE REVIEW, THE NEW OSHA: REINVENTING WORKER SAFETY AND HEALTH, May 1995, *reprinted in Occupational Safety and Health Reform and Reinvention Act, S. 1423: Hearing of the Senate Comm. on Labor and Human Resources*, 104th Cong. 63 (1995).

[45] *See* GORE, *supra* note 30, at 62.

ment as part of its rule making process, the establishment of some form of external peer review would assure greater consistency and transparency. Furthermore, the addition of an independent scientific peer review will ultimately speed up the implementation process for OSHA's rules. Under the present system, draft rules can idle in this process for several years.[46] At the same time, Congress channels annual federal funding toward research, at the expense of the taxpayer.[47] By incorporating independent scientific peer review in the rule-making process, the promulgation period for new rules will be shortened over time without compromising the integrity, validity, or need for regulation.

OSHA personnel performing inspections and consultations must have a detailed knowledge of and expertise in the required industry in which they perform inspections. OSHA currently does not require its personnel to be certified in a safety and health profession. The SAFE Act would require that certain OSHA personnel receive continuing education and professional certification to ensure that the rapid advancement of technology does not surpass OSHA's ability to identify occupational safety and health hazards in the workplace. These personnel are responsible for the safety and health of America's workers. It is essential that their skills reflect proper training and education in their respective professional fields prior to entering and inspecting a worksite. In doing so, the communication between OSHA and employers, as well as the safety and health of employees, will be enhanced.

I recognize OSHA's limited resources and believe that federal law should provide the agency with greater discretion in handling formal complaints by codifying OSHA's phone/fax policy. Under current law, OSHA is required to respond to every formal, written complaint with an onsite inspection.[48] By statutorily providing OSHA with the ability to use a phone or fax machine to see if an employer has taken corrective action, the agency will more effectively identify which worksites need immediate attention.

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[46] *See Oversight of the Occupational Safety and Health Admin.: Hearing before the Senate Subcomm. on Public Health and Safety of the Senate Labor and Human Resource Comm.*, 105th Cong. 28 (1997) (testimony of Steven Lewis, Chair of the Science Policy Committee of the American Industrial Health Council).

[47] *Id.*

[48] 29 U.S.C. § 651(b)(1).

Acknowledging the volume of paperwork that employers are mandated to understand and prepare, it is practically inconceivable to expect employers to read and remember hundreds of pages of technical language. Such mandates are a deterrent for individuals who are considering starting their own business. The SAFE Act would waive civil penalties for posting or paperwork requirements except when an employer willfully or repeatedly violates this mandate. This change would refocus OSHA inspections on the most serious hazards, while allowing employers to expend resources on the elimination of these hazards.

The SAFE Act would encourage cooperation among employees by placing additional emphasis on the importance of wearing personal protective equipment. Employees have the ultimate control as to whether they wear their steel-toed shoes, hard hats or safety goggles. The SAFE Act would allow OSHA the discretion of issuing citations to employees who refuse to wear their personal protective gear. Employees must contribute to the advancement of workplace safety, not only for their personal protection, but for those working around them as well.

To further expand cooperative initiatives currently provided by OSHA to employers, the SAFE Act would codify OSHA's state plan program where states, rather than OSHA, regulate occupational safety and health. After listening to small businesses from states with safety and health plans, I found that employers sometimes face a lengthy waiting period after requesting a free consultation. Meanwhile, the employer is left vulnerable to routine OSHA inspections and fines, while employees may be subject to hazards—despite the employer's good faith effort to request compliance assistance. To help address potential backlogs, the SAFE Act establishes a "pilot" program to provide expedited consultation services to small business employers who generally cannot afford a third party consultation service.

The SAFE Act would further expand the availability of voluntary compliance initiatives for employers. The SAFE Act codifies OSHA's fifteen-year-old Voluntary Protection Programs ("VPP") to further establish cooperative agreements that encourage: comprehensive safety and health management systems including requirements for the systematic assessment of hazards; comprehensive hazard prevention, mitigation, and control programs; and, active and meaningful management and employee participation in the VPP. Currently, there are approximately 400 VPP participants nationwide. The SAFE Act increases that number by

encouraging more small businesses to participate by providing additional outreach and assistance initiatives and developing program requirements that meet their unique needs.

The SAFE Act constitutes an important first step in passing rational and sensible legislation that advances occupational safety and health in our nation's workplaces. Rather than dismantling OSHA's enforcement responsibilities or eliminating agencies and programs within the Administration as proposed in previous legislation, the SAFE Act focuses on expanding employer and employee participation, consultative compliance services, individual responsibility, and voluntary compliance initiatives. I firmly believe that this legislation represents a fresh start to the establishment of a cooperative approach between OSHA, employers and employees.

POLICY ESSAY

THE CHANGING OF THE GUARD: REPUBLICANS TAKE ON LABOR AND THE USE OF MANDATORY DUES OR FEES FOR POLITICAL PURPOSES

REPRESENTATIVE JOE KNOLLENBERG*

The union practice of using mandatory member dues and non-member fees for political purposes lies at the intersection of campaign finance reform and traditional labor law. In this Essay, Representative Joe Knollenberg describes the Supreme Court's approach to the practice in Communications Workers of America v. Beck *and the Republican efforts in Congress since 1994 to strengthen this decision. He advocates the enactment of the Worker Paycheck Fairness Act or comparable legislation empowering union members and non-members to decide individually if their dues or fees can be used by the union for political or other purposes not germane to collective bargaining.*

The National Labor Relations Act ("NLRA")[1] has withstood nearly forty years of the Supreme Court, Congress, and eight presidents without any major statutory changes.[2] This is remarkable given Congress's insatiable appetite to regulate, amend, repeal, and regulate again. On Wednesday, November 9, 1994, the headline read: IT'S A KNOCKOUT.[3] Republicans had captured the U.S. House of Representatives for the first time in forty-two years,[4] and thereby gained control of both chambers, an accomplishment last achieved in 1947.[5] The status quo mentality for labor policy in America began to change.

I was elected to Congress in 1992, when Republicans were in the minority and being a member of the minority proved quite a struggle. The structure of the House rules enables the majority

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[1] 29 U.S.C. §§ 151–169 (1994).

[2] The NLRA was last amended by the Landrum-Griffin Act of 1959, Pub. L. No. 86-257 (1959), when President Eisenhower was in office. Since then, Presidents Kennedy, Johnson, Nixon, Ford, Carter, Reagan, and Bush have held office.

[3] WASH. TIMES, Nov. 9, 1994, at A1.

[4] *See* JOINT COMMITTEE ON PRINTING UNITED STATES CONGRESS, CONGRESSIONAL DIRECTORY 1997–1998, S. Pub. 105-20, 533 (1997). Republicans last held the majority in the U.S. House of Representatives in the 83d Congress, 1953–1955.

[5] *See id.* During the 80th Congress, 1947–1949, 51 of 96 Senators were Republican, as were 246 of 435 Representatives.

to control the agenda, while in the Senate each senator, even if a member of the minority, has influence over the agenda. Without a majority of votes in the House, the minority cannot derail the majority's agenda. At best, the minority can only slow the majority down through the use of procedural votes.

After the 1994 election, Republicans were in the unfamiliar position of setting the legislative agenda. Democrats were in the unfamiliar position of trying to stop the Republican agenda. I was assigned to the Employer-Employee Relations Subcommittee of the Committee on Economic and Educational Opportunities.[6] The Subcommittee's primary jurisdiction covers the NLRA and the Employee Retirement Income Security Act of 1974 ("ERISA").[7]

As a Representative from Michigan, where labor unions are a way of life, I accepted this new assignment as an opportunity to work with Subcommittee Chairman Harris Fawell (R-Ill.) on initiatives to bring America's labor policy into the twenty-first century. These initiatives included legislation to provide employers with broader authority to discuss quality, productivity, and efficiency in Employee Involvement Programs,[8] to prevent unions from "salting,"[9] and to implement the Supreme Court's holding in *Communications Workers of America v. Beck*.[10] The efforts to implement the Court's holding in *Beck* are the focus of this Essay.

The *Beck* holding and a union's use of compulsory dues for political purposes are highly controversial. Proponents of *Beck* view the decision as an opportunity to open up a process shrouded in secrecy and intimidation and to give union members a greater voice in how their dues are spent, especially when the dues are

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[6] During the 105th Congress, the House changed the name of the Committee on Economic and Educational Opportunities to the Committee on the Education and the Workforce.

[7] Pub. L. No. 93-406 (1974) (codified in scattered sections of 26 & 29 U.S.C.).

[8] *See* H.R. Res. 743, 104th Cong. (1995). The Teamwork for Employees and Managers Act of 1995 passed the House on September 27, 1995 and the Senate on July 10, 1996. The President vetoed the bill on July 30, 1996. *See* H.R. Doc. No. 104-248, at 1 (1996). The bill has since been reintroduced as House Bill 634, H.R. 634, 105th Cong. (1997).

[9] Salting is a union practice in which unions send members, either paid or volunteer, into a non-union workplace to harass the employer with frivolous NLRB complaints. *See, e.g.*, H.R. 758, 105th Cong. (1997) (banning salting practices); H.R. 3211, 104th Cong. (1996) (same).

[10] 487 U.S. 735 (1988) (holding that dues or fees collected from non-members may not be spent for purposes unrelated to collective bargaining over those non-members' objections).

spent in support of political views they find offensive. Opponents view the decision as an attempt to weaken labor's political power and to punish labor for its proactive political participation.

Labor unions and their allies oppose legislation implementing *Beck* primarily because they risk losing substantial amounts of money, and thus, political clout. Private sector unions raise an estimated $4.9 billion from mandatory dues and $1.2 billion from voluntary dues annually.[11] When President Bush issued Executive Order 12,800[12] requiring federal contractors to post *Beck* notices, unions were expected to lose an estimated $2.4 billion annually.[13] Consequently, unions have strenuously resisted Republican efforts to strengthen *Beck*.

Republicans, nonetheless, have continued to push for *Beck* legislation. Republicans are motivated by both poll data showing that only nineteen percent of union members knew they have a right to object to their unions' use of their dues for political purposes[14] and testimony from many long-standing union members who say they were harassed after attempting to exercise their *Beck* rights.[15] Moreover, Republicans have been further energized by the fact that unions use the mandatory dues from members who are registered Republicans to attack the party's candidates and agenda.[16]

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[11] *See* Carl Horowitz, *Behind Big Labor's New Facade Before Membership Is Down, Right-to-Work Bill is Up*, INVESTORS BUS. DAILY, Mar. 27, 1996, at A1.

[12] Exec. Order No. 12,800, 57 Fed. Reg. 12,985 (1992); *but see* Exec. Order No. 12,836, 58 Fed. Reg. 7045 (1993) (repealing Exec. Order No. 12,800).

[13] *See* ROBERT HUNTER, *Compulsory Union Dues in Michigan*, MACKINAC CENTER REPORT (Mackinac Center for Public Policy, Midland, Mich.) May 1997, 13.

[14] *See* Memorandum from Frank Luntz, The Luntz Research Companies, to Americans for a Balanced Budget Amendment 5 (Apr. 29, 1996) (on file with author); *see also* HUNTER, *supra* note 13, at 2–3 (citing a *Wall Street Journal/NBC News Poll* Jan. 25–27, 1997, showing that 53% of union households believe a union should not be allowed to use members' dues for political purposes and 63% of the general public agrees that dues should not be used for politics).

[15] *See* H.R. REP. No. 105-397, at 8 (1997).

[16] *See Worker Paycheck Fairness Act: Hearings on H.R. 1625 Before the House Comm. on Educ. and the Workforce*, 105th Cong. 5 (1997) (statement of Kevin Spence) (stating that he was livid that AFL-CIO spent his dues money to oppose his political ideologies); *Mandatory Union Dues: Hearing Before the House Subcomm. on Employer-Employee Relations*, 105th Cong. 28 (1997) (statement of Grady Thurston); *Mandatory Assessment of Union Dues: Hearing Before the House Subcomm. on Employer-Employee Relations*, 104th Cong. 48 (1996) (statement of John Wilson) (stating that an estimated 40% of union membership is conservative); *Mandatory Assessment of Union Dues: Hearings Before the House Subcomm. on Employer-Employee Relations*, 104th Cong. 34 (1996) (statement of Charles Serio) (stating that exit polls during the 1980 Presidential election showed that 57% of blue-collar workers voted for Ronald Reagan, even though labor endorsed Walter Mondale).

In early 1996, labor organizations added fuel to the fire when AFL-CIO President John Sweeney announced a widely publicized campaign to spend an unprecedented $35 million to "take back the Congress and take back our country."[17] The campaign targeted seventy-five vulnerable Republicans, including freshmen and candidates in competitive districts with high union membership.[18] The union planned to raise $25 million for the campaign from a new assessment of about $1.80 per union member.[19]

Each individual union member has a larger stake in this debate than merely $1.80. As union membership has declined, revenues have increased, resulting in a larger burden per member.[20] Estimates of per member dues or fees range from $709.36 to as high as $2,019.35 per year.[21] The portion of contributions spent on activities unrelated to collective bargaining can range from $200 to more than $1,000 annually, depending on a union's spending practices and accounting procedures.[22]

To strengthen *Beck*, Republicans introduced the Worker Right to Know Act, House Bill 3580,[23] in the 104th Congress and similar legislation, the Worker Paycheck Fairness Act, House Bill 1625,[24] in the 105th Congress. These two bills were the subject of a total of six hearings by the Committee on Education and the Workforce.[25]

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[17] Juliana Gruenwald & Robert Marshall Wells, *At Odds with Some Workers, AFL-CIO Takes Aim at GOP*, 54 CONG. Q. 969, 993 (1996); *see* Glenn Burkins, *AFL-CIO Sets Drive to Back Democrats: A Minimum of $35 Million Is Committed to Help in 73 House Districts*, WALL ST. J., Feb. 22, 1996, at A4; Glenn Burkins, *AFL-CIO Votes to Back Clinton in Re-Election Bid*, WALL ST. J., Mar. 26, 1996, at A4.

[18] *See* Gruenwald & Wells, *supra* note 17; Burkins, *AFL-CIO Sets Drive to Back Democrats Before A Minimum of $35 Million Is Committed to Help in 73 House Districts*, *supra* note 17; Burkins, *AFL-CIO Votes to Back Clinton in Re-Election Bid*, *supra* note 17.

[19] *See* Gruenwald & Wells, *supra* note 17.

[20] *See* KENNETH WEINSTEIN & THOMAS WIELGUS, HOW UNIONS DENY WORKERS' RIGHTS, 4–5, (The Heritage Foundation Backgrounder No. 1087, 1996).

[21] *See id.* at 5.

[22] *See id.*

[23] H.R. 3580, 104th Cong. (1996).

[24] H.R. 1625, 105th Cong. (1997).

[25] *See Hearing on Mandatory Assessment of Union Dues*, *supra* note 16; *Worker Right To Know Act: Hearing on H.R. 3580 Before the House Subcomm. on Employer-Employee Relations*, 104th Cong. (1996); *Hearing on Mandatory Union Dues*, *supra* note 16; *Hearing on Worker Paycheck Fairness Act*, *supra* note 16; *Mandatory Union Dues and the Abuse of Workers' Rights: Hearings Before the House Subcomm. on Employer-Employee Relations*, 105th Cong.(1997) (on file with author); *Abuse of Worker Rights and H.R. 1625, the Worker Paycheck Fairness Act: Hearings Before the House Subcommittee on Employer-Employee Relations*, 105th Cong. (1998).

Since unions spend millions on elections, the debate on *Beck* legislation has become part of the debate on campaign finance reform. When campaign finance reform legislation reached the House floor during the 104th Congress, the Republican legislation included House Bill 3580.[26] The House eventually rejected the Republican version and later rejected a Democratic alternative, which did not include the provisions of House Bill 3580.[27]

Campaign finance reform is complicated and achieving consensus is difficult. No clear party-line litmus test exists for predicting how members will vote. The inclusion of the *Beck* provisions gave some members more reason to oppose the Republican bill. The Democratic alternative that did not include a *Beck* provision also failed to obtain a majority.[28] *Beck* provisions had a similar effect in the Senate, where an amendment to a campaign finance bill intended to incorporate comparable provisions was described as a "poison pill."[29]

Among four campaign finance bills introduced during the 105th Congress,[30] House Bill 2608, the Paycheck Protection Act,[31] was intended to implement *Beck*. The bill required both unions and corporations to obtain the approval of their members or stockholders before making campaign contributions.[32] The bill failed to gain the necessary two-thirds vote for passage.[33] Despite the bill's defeat, both the public and the Republicans still strongly support a system that does not force union members to pay for political activities without their consent.

This Essay will discuss Republican efforts to enact *Beck* legislation during the 104th and 105th Congress and to change the labor union practice of spending members' mandatory dues or fees for political purposes. Part I briefly reviews the Supreme Court's *Beck* decision. Part II discusses the *Beck* legislation

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[26] *See infra* notes 49–51 and accompanying text.

[27] *See* 142 CONG. REC. H8516 (daily ed. July 25, 1996) (Roll Call No. 365, 162 voting yea and 259 voting nay); Jackie Koszczuk, *House Rejects Democratic, Republican Overhauls*, 54 CONG. Q. 2085, 2095 (1996); *see also* 142 CONG. REC. H8485 (daily ed. July 25, 1996).

[28] *See* 142 CONG. REC. H8513 (daily ed. July 25, 1996).

[29] Gail McCallion, *The Use of Union Dues for Political Purposes and Agency Fee Objectors*, CONG. RESEARCH SERVICE, 97-555 E, Updated Oct. 14, 1997, at 8; *see* Ruth Marcus, *Union Fees Dispute Threatens Finance Reform*, WASH. POST, Sept. 30, 1997, at A4.

[30] *See infra* note 106 and accompanying text.

[31] H.R. 2608, 105th Cong. (1997).

[32] *See id.*

[33] *See* 144 CONG. REC. H1765-66 (daily ed. Mar. 30, 1998); *see also infra* notes 106–107 and accompanying text.

introduced in the House since 1994, particularly House Bills 3580, 1625, and 2608. Part III reviews House committee hearings on the use of mandatory dues for political purposes and the various obstacles faced by union members in attempting to exercise their *Beck* rights, including lack of notice, intimidation and coercion, loss of workplace rights, lack of financial disclosure and procedural complications. Part IV considers the arguments asserted against *Beck* legislation. Finally, I conclude by arguing that union members should be able to choose whether their unions can spend a portion of their dues on political activities and that the Worker Paycheck Fairness Act, House Bill 1625, is the most effective means of ensuring that union members are given that choice.

I. *BECK*: THE USE OF UNION DUES OR FEES FOR PURPOSES UNRELATED TO COLLECTIVE BARGAINING ACTIVITIES

The Supreme Court held in a line of seven cases that, when non-members object, unions are prohibited from using the dues of non-members for political purposes and must refund the dues as soon as possible.[34] In *Beck*, the Court applied this principle to private sector unions.[35] The case was brought by Harry Beck and twenty fellow employees who challenged the practice of the Communications Workers of America ("CWA") spending union dues for purposes unrelated to collective bargaining.[36] Beck argued that activities, such as organizing other employers' employees, lobbying, and participating in social, charitable, and political events, violated the union's duty of fair representation as

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[34] *See* Johan Contrubis & Margaret Mikyung Lee, *The Use of Union Dues for Political Purposes Before A legal Analysis*, CONG. RESEARCH SERVICE, 97-618, June 2, 1997, at i (citing *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (prohibiting the use of objecting public sector employees' dues to finance political or ideological causes unrelated to items germane to collective bargaining); *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees*, 466 U.S. 435 (1984); *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986); *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991)); *see also* Keller v. State Bar of California, 496 U.S. 1 (1990) (holding integrated state bar is analogous to a union and use of dues for purposes unrelated to regulation of legal profession violates a members' First Amendment rights).

[35] *See Beck*, 487 U.S. at 741–42.

[36] *See id.* at 739–40.

required by § 8(a)(3) of the NLRA,[37] as well as their First Amendment rights.[38]

The Court's analysis in *Beck* began by stating that § 8(a)(3) of the NLRA and § 2 of the Railway Labor Act ("RLA")[39] are analogous because their construction was born out of the same Congressional intent.[40] The decision in *International Association of Machinists v. Street*[41] was controlling because the Court found that Congress did not intend for unions to have unfettered power to force employees, "over their objection, to support political causes which they oppose."[42] The purpose of union security clauses was to support activities related to collective bargaining, contract administration, and grievance adjustments.[43] For this reason, and because of the NLRA's legislative history, the Court held that § 8(a)(3) of the NLRA does not allow a union, when a dues-paying non-member employee objects, to use funds collected from his dues for activities unrelated to collective bargaining.[44] Moreover, the Supreme Court supported the practice of union disclosure of the financial breakdown of union activities to determine how much is spent on representational and non-representational activities.[45] Consequently, when a union security clause exists, those employees who object are entitled to reimbursement of the portion of dues used for non-chargeable activities. Activities such as lobbying for legislation, participating in political or social events, and organizing other employer's employees cannot be charged to an employee.[46]

II. IMPLEMENTING *BECK*: THE 104TH AND 105TH CONGRESS

A. *The 104th Congress: The Battle Begins*

Even before the 104th Congress, several House bills had been introduced that required unions to notify members of their *Beck* rights and also required that unions provide more detailed finan-

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[37] 29 U.S.C. § 158(a)(3) (1994).
[38] *See Beck*, 487 U.S. at 740.
[39] 45 U.S.C. § 152 (1994).
[40] *See Beck*, 487 U.S. at 746.
[41] 367 U.S. 740 (1961).
[42] *Beck*, 487 U.S. at 751 (citing *Street*, 367 U.S. at 764).
[43] *See id.* at 750.
[44] *See id.* at 737.
[45] *See id.* at 740.
[46] *See id.* at 745.

cial information to their members about the unions' expenditures.[47] Legislation was also introduced prohibiting unions from using non-member dues for political activities, such as get-out-the vote campaigns.[48] None of these bills, however, reached the House floor.

During the 104th Congress, Representative Fawell introduced House Bill 3580, the Worker Right to Know Act, the only bill exclusively devoted to addressing union use of mandatory dues for political purposes.[49] The bill was never debated on its own, but it was incorporated into House Bill 3820, the Campaign Finance Reform Act of 1996,[50] and debated on the House Floor.[51]

House Bill 3580 was motivated by the Court's *Beck* decision and the failure of the National Labor Relations Board (NLRB) to implement that decision by improving the ability of employees to exercise their *Beck* rights.[52] It had four provisions. First, the bill amended the NLRA to require unions to obtain written consent from members covered by a security agreement in order to spend their dues or fees for purposes unrelated to collective bargaining.[53] Second, the bill required employers to post *Beck* notices throughout their workplaces.[54] Third, the bill provided workers who attempt to exercise their *Beck* rights with continuing economic rights to participate in union activities such as collective bargaining, contract administration, and grievance adjustment.[55] Fourth, the bill required every union to report ex-

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[47] *See, e.g.*, H.R. 708, 103d Cong. (1993) (prohibiting unions from spending members' due for political purposes without written consent); H.R. 2307, 103d Cong. (1993) (amending Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–434, 437(c)–439(c), 441(a)–(h), 451–455 (1994), to prohibit unions from spending members dues for political purposes without written consent); H.R. 3470; 103d Cong. (1993) (amending Federal Campaign Act of 1971 to condition union spending on financial disclosure requirements).

[48] *See generally* Contrubis & Lee, *supra* note 34, at 14–15.

[49] *See* H.R. 3580, 104th Cong. (1996).

[50] H.R. 3820, 104th Cong. (1996).

[51] *See* 142 Cong. Rec. H8491 (daily ed. July 25, 1996).

[52] *See* H.R. 3580 § 2; *Hearing on Worker Right to Know Act*, *supra* note 25, at 174.

[53] *See* H.R. 3580 § 5; *Hearing on Worker Right to Know Act*, *supra* note 25, at 176–77.

[54] *See* H.R. 3580 § 6; *Hearing on Worker Right to Know Act*, *supra* note 25, at 177–78.

[55] *See* H.R. 3580 § 7; *Hearing on Worker Right to Know Act*, *supra* note 25, at 178. This provision goes beyond the *Beck* decision which only addressed the issue of whether a union could use non-member dues, against their wishes, for purposes unrelated to collective bargaining. *See* Kidwell v. Transportation Communications International Union, 946 F.2d 283, 306 (4th Cir. 1991) (holding that RLA does not require unions to admit employees who pay only for collective bargaining activities); Pattern Makers' League v. NLRB, 473 U.S. 95, 116 (1985) (holding that employee

penses by functional classification.[56] These latter two provisions were included because unions were forcing employees to forgo workplace rights if they objected to their unions' use of their dues for purposes unrelated to collective bargaining and because employees lacked adequate financial information on how their unions were spending their dues.[57]

The Subcommittee on Employer-Employee Relations held hearings on House Bill 3580 on April 18, 1996, and June 19, 1996.[58] The testimony proffered at these hearings is discussed in Part III. The bill was never reported out of Committee, but as described above, it was incorporated as Title IV of House Bill 3820, the Campaign Finance Reform Act of 1996.[59]

The House began debating House Bill 3820 on July 25, 1996.[60] The debate lasted several hours and covered many issues.[61] Several members specifically debated Title IV. First, Representative William L. Clay (D-Mo.), though not opposing the *Beck* rule, did oppose Title IV and argued that the provision would impose costly paperwork requirements on unions.[62] He also argued that *Beck* already protects employees who disagree with their fellow workers.[63]

Representative Fawell spoke in support of the *Beck* rule and explained why he thought Title IV was necessary.[64] He cited polling data showing that seventy-eight percent of union members did not realize they were entitled to a refund for dues spent on political activities.[65] He also argued that *Beck* has never been properly implemented because employees were still being compelled to support financially activities with which they disagreed.[66] Representative Bill Thomas (R-Cal.) reported that his commit-

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required by a union security agreement to pay membership dues is a member of the union only in the most limited sense).

[56] *See* H.R. 3580 § 8; *Hearing on Worker Right to Know Act*, *supra* note 25, at 178–79.

[57] *See* H.R. 3580 §§ 2, 7–8; *Hearing on Worker Right to Know Act*, *supra* note 25, at 174; H.R. REP. NO. 105-397, at 9–10 (1997) (citing several witnesses who testified about loss of workplace rights).

[58] *See Hearing on Mandatory Assessment of Union Dues*, *supra* note 16; *Hearing on Worker Right to Know Act*, *supra* note 25.

[59] *See* H.R. 3820 tit. IV; 142 CONG. REC. H8491 (daily ed. July 25, 1996).

[60] *See* 142 CONG. REC. H8470 (daily ed. July 25, 1996).

[61] *See id.* at H8458–516.

[62] *See id.* at H8462–63.

[63] *See id.*

[64] *See id.* at H8463.

[65] *See id.*

[66] *See id.*

tee, the Committee on House Oversight, heard testimony that unions spend between $300 to $400 million annually on politics.[67] During the debate, I stated that rank-and-file members are kept in the dark about how unions use their dues and argued that we should let the members decide for themselves how they want their hard-earned money spent.[68]

During actual consideration of House Bill 3820, Representatives Mathew G. Martinez (D-Cal.) and Dale Kildee (D-Mich.) spoke in opposition to the bill's Worker Right to Know provision, while Representatives Cass Ballenger (R-N.C.), John A. Boehner (R-Ohio), Dave Weldon (R-Fla.), and Andrea Seastrand (R-Cal.) spoke in support of the provision.[69] Representative Martinez argued that the provision was an unjustified retaliation on organized labor for its efforts to educate Americans "about the anti-worker, anti-family, anti-child 104th Congress."[70] Representative Kildee argued that unions are responsive to the wishes of their members because unions such as the American Federation of State, County, and Municipal Employees Union fulfilled 15,000 member requests for dues rebates this year.[71] Representative Kildee also drew an analogy to corporate shareholders who do not have a right to a rebate for a corporation's political activities that they find contrary to their interests or even offensive to their beliefs.[72]

The members who spoke in support of the Worker Right to Know provision of House Bill 3820 argued that the provision promoted fairness and employee empowerment. Representative Boehner explained that first, the bill requires unions to disclose how much of member dues are spent on activities related to collective bargaining, and second, it empowers workers to decide for themselves whether the remainder of their dues may be used for political activities.[73] Similarly, Representative Ballenger stated the Worker Right to Know provision was not intended as an attack on labor, but rather is an effort to promote basic fairness.[74]

Representative Fawell spoke again and argued that the new procedure requiring members to "opt in" would be far less burdensome than the current procedure requiring members to "opt

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[67] *See id* at H8465.
[68] *See id.* at H8466.
[69] *See id.* at H8474, H8477, H8504, H8505, H8506, H8511.
[70] *Id.* at H8474.
[71] *See id.* at H8511.
[72] *See id.*
[73] *See id.* at H8474–75.
[74] *See id.* at H8477.

out" of unions' political spending.[75] Representative Seastrand described how difficult it can be for workers to exercise their *Beck* rights.[76] Representative Weldon argued that it was the AFL-CIO's transparent attempt to buy the November elections, by spending an unprecedented $35 million to attack Republican House members, that politicized this issue of compulsory union dues.[77]

When the debate ended, House Bill 3820 failed 162 to 259.[78]

B. *The 105th Congress: The Battle Continues*

After the 1994 elections, labor was at a crossroads. Union membership had declined from its peak in 1945 of 35.5% to its all-time low of 14.5% in 1996.[79] When the AFL-CIO held its 1995 leadership elections, it elected John Sweeney president after Lane Kirkland resigned.[80] Sweeney ran on a platform calling for aggressive grassroots organizing and mobilization of its rank-and-file members.[81] To that end, John Sweeney took aim at the Republican Party and announced plans for an unprecedented $35 million media and organizing blitz.[82] This campaign focused on seventy-five House Congressional districts the AFL-CIO believed were politically competitive districts with high union membership.[83] The AFL-CIO aimed not only to increase its membership, but also to enable the Democrats to recapture the majority.[84] Sweeney's announcement was made in early 1996 and Republicans were cautious about the prospect of maintaining its thirty-seven member advantage over Democrats in the House.[85]

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[75] *See id.* at H8504.

[76] *See id.* at H8505.

[77] *See id.* at H8506–07.

[78] *See id.* at H8516; Koszczuk, *supra* note 27.

[79] *See* Gail McCallion, *Union Membership Statistics*, CONG. RESEARCH SERVICE, 97-701E, July 10, 1997, at 2.

[80] *See id.* at 1; *see also* James Worsham, *Labor Comes Alive*, NATION'S BUS., Feb. 1996, at 16, 23; Paul A. Gigot, *For Unions, 1996 is Armageddon*, WALL ST. J., Mar. 29, 1996, at A10.

[81] *See* McCallion, *supra* note 79.

[82] *See* Gruenwald & Wells, *supra* note 17; Gigot, *supra* note 80; Burkins, *AFL-CIO Sets Drive to Back Democrats: A Minimum of $35 Million Is Committed to Help in 73 House Districts*, *supra* note 17, at A4; Burkins, *AFL-CIO Votes to Back Clinton in Re-Election Bid*, *supra* note 17 at A4.

[83] *See* Gruenwald & Wells, *supra* note 17; Gigot, *supra* note 80, Burkins, *AFL-CIO Sets Drive to Back Democrats: A Minimum of $35 Million Is Committed to Help in 73 House Districts*, *supra* note 17; Burkins, *AFL-CIO Votes to Back Clinton in Re-Election Bid*, *supra* note 17.

[84] *See* Worsham, *supra* note 80, at 16; Gruenwald & Wells, *supra* note 17.

[85] At the beginning of the 104th, there were 236 Republicans, 198 Democrats, and

Despite the AFL-CIO's efforts, Democrats won only 13 of 32 targeted Republican incumbent seats.[86] Republicans retained the majority, albeit by only 19 members.[87] Along the way, the AFL-CIO's aggressive campaign annoyed many of its members, most notable those Republican members who felt the wrath of labor's expenditures. Long-time union member and Republican Gerhard Veith stated that the AFL-CIO's organized effort was "not 'voter education' but a bald-faced partisan campaign. I have joined a craft union . . . I have not joined the Democratic Party. Is it in the interest of unions to be one-sided? We have to be able to work with everyone."[88] By the time Congress convened in January of 1997, statements like Veith's and the fact that many members had to defend themselves against labor advocacy advertisements had invigorated many Republican members to find ways to prohibit unions from using compulsory dues or fees for political purposes. One approach was to amend federal election and campaign laws and the other was to amend traditional labor law.

In the first session of the 105th Congress, five Republican House members introduced bills to limit labor's ability to use union dues or fees for political purposes.[89] House Bill 59 is the most far-reaching bill in that it amends the NLRA and RLA by repealing those provisions that require employees to join a union or pay dues or fees as a condition of employment.[90] House Bills 1303 and 1625 both require that a union receive written authorization before it can use union dues or fees for political or related purposes.[91] Moreover, they both require labor organizations to post notices of employee *Beck* rights and to report by function classification how expenses relate to collective bargaining, contract administration, or grievance adjustment.[92] However, House

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1 Independent. The one Independent, Bernard Sanders (I-Vt.), votes consistently with Democrats, and thus Democrats were considered to hold 199 seats.

[86] *See* Alan Greenblatt, *Labor Wants Out of the Limelight After Glare of Probes, Backlash*, 56 CONG. Q. 787, 789 (1998).

[87] *See* Juliana Gruenwald & Deborah Kalb, *Despite Push, Democrats Fail to Topple GOP*, 54 CONG. Q. 3225 (1996) (Republicans won 226 seats, Democrats 206, and Independents 1. Two Texas seats remained unfilled); *New Congress Opens with Gingrich Focus*, 55 CONG. Q. 3 (1997) (reporting 227 Republicans, 207 Democrats, and 1 Independent).

[88] Gruenwald & Wells, *supra* note 17.

[89] *See* H.R. 59, 105th Cong. (1997); H.R. 928, 105th Cong. (1997); H.R. 1303, 105th Cong. (1997); H.R. 1625; H.R. 2608.

[90] *See* H.R. 59 §§ 2–3.

[91] *See* H.R. 1303 § 504; H.R. 1625 § 4.

[92] *See* H.R. 1303 §§ 501–504; H.R. 1625 § 6.

Bill 1625 includes a civil right of action for employees if a labor organization is found to violate any of the legislation's provisions.[93] The private action includes recovery of reasonable attorney's fee, expert witness fees, and other costs of the action.[94] The Union Members Right to Know Act, House Bill 928, amends the Labor-Management Report and Disclosure Act of 1959[95] to require labor organizations to disclose, in their report to the Secretary of Labor, the itemization of the amount of employee dues and fees spent on political and related activities.[96] Lastly, House Bill 2608, by amending the Federal Election Campaign Act of 1971, prohibits national banks, corporations, and labor organizations from using dues or fees for political purposes without prior, written, and voluntary authorization.[97]

Of these five bills, House Bill 1625 has generated the greatest amount of attention during the 1st Session of the 105th Congress. This legislation is a slightly modified version of the bill Representative Fawell introduced in the 104th Congress.[98] It does not amend the NLRA, but is a free-standing statute and it does not provide workers with specific economic rights, but imposes civil liability on labor organizations should they violate any of its provisions.[99] The bill was later modified to include a new section to prohibit union retaliation and coercion.[100]

Committee action during the first session of the 105th Congress consisted of four hearings and a full Committee mark-up.[101] During the full Committee mark-up, Representative Fawell offered an amendment in the nature of a substitute to House Bill 1625 that added a new section to make it unlawful for a labor union to coerce, intimidate, interfere with, or retaliate against a

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[93] *See* H.R. 1625 § 4.

[94] *See id.*

[95] 29 U.S.C. §§ 401–402, 411–415, 431–441, 461–466, 481–483, 501–504, 521–531 (1994).

[96] *See* H.R. 928 § 3.

[97] *See* H.R. 2608 § 2.

[98] *Compare* H.R. 3580, *with* H.R. 1625; *see also supra* notes 59–76 and accompanying text.

[99] *See* H.R. 1625 § 4, *cf.* H.R. 3580 §§ 4–7.

[100] *See* H.R. 1625 § 7; H.R. REP. No. 105-397, at 3 (1997).

[101] *See Hearing on Mandatory Union Dues*, *supra* note 16; *Hearing on H.R. 1625, The Worker Paycheck Fairness Act*, *supra* note 16; *Hearing on Mandatory Union Dues and the Abuse of Workers' Rights*, *supra* note 25; *Hearing on Abuse of Worker Rights and H.R. 1625, the Worker Paycheck Fairness Act*, *supra* note 25; H.R. REP. No. 105-397, at 5 (1997).

worker for exercising his or her rights under this statute.[102] Thus, a union could not force members to resign.[103]

The full Committee mark-up on October 8, 1997 was a legislative accomplishment absent in the prior Congress. Unlike the previous year's debate on the House floor, Republicans were able to isolate this issue without the burden of other legislation, i.e., campaign finance reform, and thereby achieved a major victory. This Republican action forced Democrats to decide whether they were willing to vote against it, which could be construed as a vote for the labor establishment and against many of its rank-and-file members, or to vote in favor of it and provoke the scorn of the inside-the-beltway labor establishment. Surprisingly, they chose neither, and it passed by voice vote.[104] It has since been reported to the House and currently awaits consideration.[105]

In March, when campaign finance reform was again brought to the House floor, the Paycheck Protection Act, House Bill 2608, was one of the four campaign finance reform bills debated.[106] Debate was limited to forty minutes and two-thirds vote was required for passage.[107] Like debate the previous year, Republicans argued that working men and women were tired of seeing their hard-earned money used for political purposes without their consent.[108] Over 30% of the union workforce is Republican, another 10% back third-party candidates, so over 40% are forced to spend their money on candidates and issues they do not support.[109] Overall, the Paycheck Protection Act is designed to make the process less political and more democratic. If an

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[102] *See* H.R. REP. No. 105-397, at 3 (1997).

[103] *See id.*; *cf.* H.R. 3580 § 7 (amending § 8(b)(1) of the NLRA to provide employees with the same right to participate in collective bargaining, contract administration, or grievance adjustment).

[104] *See* H.R. REP. No. 105-397, at 5 (1997).

[105] *See id.*

[106] *See* H.R. 34, 105th Cong. (1997) (prohibiting illegal foreign contributions); H.R. 3582, 105th Cong. (1998) (strengthening reporting requirements and increased the type of disclosure for campaign contributions); H.R. 2608, 105th Cong. (1997) (prohibiting corporations and labor organizations from making political contributions without union member or stockholder approval); H.R. 3581, 105th Cong. (1998) (providing comprehensive reform). House Bills 34 and 3582 passed with over two-thirds vote, 369-43 and 405-6, respectively. *See* 144 CONG. REC. H1764–1766 (daily ed. Mar. 30, 1998). House Bills 2608 and 3581 both failed to get the two-thirds vote, 166-246 and 74-337, respectively. *See id.*

[107] Debate on House Bill 2608 was under the Suspension Calendar which by special rule limits debate to 40 minutes and requires two-thirds vote for passage. *See id.*

[108] *See* 104 CONG. REC. H1749 (daily ed. Mar. 30, 1998) (statement of Rep. Bob Schaffer (R-Colo.)).

[109] See 104 CONG. REC. H1751 (daily ed. Mar. 30, 1998) (statement of Rep. Randy Cunningham (R-Cal.)).

organization wants to use an employee's money for political purposes, then consent is necessary. Led by Representative David Bonior (D-Mich.), the Democrats argued that the Paycheck Protection Act was nothing more than a "Trojan horse" designed to silence workers' voices by cutting-off free speech and the ability of millions of Americans to communicate with each other.[110] Ultimately, the bill was defeated, mostly along party lines, by a vote of 166 to 246.[111]

III. CONGRESSIONAL HEARINGS: REAL LIFE EXAMPLES OF THE PROBLEMS EMPLOYEES FACE WHEN EXERCISING THEIR *BECK* RIGHTS

Despite the Supreme Court's proclamation in *Beck*, implementation remains illusive for the vast majority of American workers. First, employees are unaware that they have the right to object to unions' use of their dues for non-collective bargaining activities. In fact, only nineteen percent knew they had such a right.[112] Second, individual employees, not unions, bear the burden to object and if they fail to object, they are liable for full dues. Moreover, if an employee decides to object, the union, under most security agreements, can require the employee to resign from the union. In doing so, the employee loses considerable workplace rights, such as the right to ratify a contract or to vote to go on strike. Should a worker make it through these procedural hurdles, an employee faces threats, harassment, and intimidation from fellow co-workers and union officials. An employee must exhibit resilience, persistence, and a knowledge of the law if he or she is going to buck the system and take on the union establishment.

It is evident from the hearings held during the 104th and 105th Congresses that the rights set forth by the Supreme Court in *Beck* do not offer an employee adequate procedures and protections to object to a union's use of dues or fees for purposes beyond collective bargaining.[113] In each of these hearings, Congress heard from a wide array of workers, legal experts, and organizations that represent employees. Lack of notice, intimi-

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[110] *See* 104 CONG. REC. H1749 (daily ed. Mar. 30, 1998) (statement of Rep. Bonior).
[111] *See* 104 CONG. REC. H1765 (daily ed. Mar. 30, 1998).
[112] *See* Luntz, *supra* note 14, at 5.
[113] *See, e.g.*, H.R. REP. NO. 105-397, at 5–11 (1997).

dation and coercion, loss of employee rights, lack of financial disclosure, and burdensome procedural hurdles represent the common themes echoed by these sources. I believe their testimony is compelling, and I have thus taken the liberty to quote them at length.

A. *Notice or the Lack Thereof*

Four years after the *Beck* ruling, President Bush issued Executive Order 12,800 to require federal contractors to post a notice informing employees of their *Beck* rights.[114] Although this was a step in the right direction to make labor organizations account for how they spend an employees' dues, it was short-lived. The final rule took effect on December 2, 1992,[115] and by February 1, 1993, newly elected President Clinton, exercising his Presidential power, repealed former President Bush's Executive Order.[116]

Workers all across the country continue to lack the knowledge to freely exercise their *Beck* rights. Witness after witness testified just how pervasive a problem it is for workers to gain any knowledge of their *Beck* rights through the union establishment.

Marshall Breger, a former Solicitor for the Department of Labor under President Bush stated it this way:

> There has been considerable controversy as regards how non-union agency fee "core" payers are expected to learn of their *Beck* rights. Union's [sic] have no specific interest in appraising worker[s] of their "refund rights," because use of the refund option reduces their discretionary funds. Indeed even some employers believe that it is in their interest to reduce the transaction costs under union security agreements. Perhaps it is the case that *Beck* rights have passed into the common consciousness of industrial relations—I have seen no evidence to sustain that proposition, however.[117]

He later stated that the decision in *California Saw & Knife Works*,[118] holding an employee was afforded proper *Beck* notice

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[114] *See* Exec. Order No. 12,800, 57 Fed. Reg. 12985 (1992).

[115] *See* McCallion, *supra* note 29 at 6.

[116] *See* Exec. Order No. 12,836, 58 Fed. Reg. 7045 (1993); McCallion, *supra* note 29, at 6.

[117] *Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 12 (statement of Marshall Breger).

[118] 320 NLRB No. 11 (1995).

if the union published the notice once a year, did little to solidify an employee's knowledge of his or her *Beck* rights.[119]

Employees' experiences were just as telling. Jane Gansmann, a TWA employee and member of the IAM, testified that the "union never mentioned that my dues could be used for things other than collective bargaining. In other words, I was given only half truths. I now realize the union was, and is, operating by misinformation."[120] Similarly, Daniel Klosowski testified:

> No one explained what my obligations for union dues were, [n]or was I given a copy of the contract to read. That should have been the time when my obligations were discussed regarding union dues, and whether I had choices in even joining the union. This is still the current practice used by the stewards today; they do not tell new hires what their rights are.[121]

Finally, Robert A. St. George, an aviation worker, told the Committee:

> [The local union representative] told us that we had to join the union, that HAI [Hughes-Avicom International] was a closed shop. At which point I informed him that as I understood it closed shops were illegal. When asked at this meeting if there wasn't some way we could just pay for representation, as I remember it [a union representative] made the incredible claim that we could not because Minnesota was not a Right to Work State and that can only be done in a Right to Work State. [He] would not even tell us about our *Beck* rights when asked.[122]

It is unclear whether the obstacles to information are from unions' lack of effort to educate their locals or a concerted effort to knowingly keep their locals uninformed in order to keep their coffers full. Whatever the case, there are many more who testified about unions' unwillingness to be forthright about their *Beck* rights.[123] As I mentioned before, there is evidence this problem extends well beyond those who took the time and effort to testify.[124] Moreover, even the NLRB and the Department of

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[119] *See Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 5 (statement of Marshall Breger).

[120] *Hearing on Mandatory Union Dues*, *supra* note 16, at 32, 34 (statement of Jane Gansmann).

[121] *Hearing on H.R. 1625, The Worker Paycheck Fairness*, *supra* note 16, at 77 (statement of Daniel Klosowski).

[122] *Hearing on Mandatory Union Dues*, *supra* note 16, at 26 (statement of Robert A. St. George).

[123] *See* H.R. REP. No. 105-397, at 7 (1997).

[124] *See* Luntz, *supra* note 14, at 5.

Labor have shown little willingness to support a posting requirement of a *Beck* notice and the NLRB's decision in *California Saw* continues a procedural process weighted against employees.[125]

B. *Employees Face Intimidation and Coercion*

Employees who know their rights and decide to take on the union establishment find the process an eye-opening experience, marked by threats of life and family, intimidation, insults, and coercion. The testimony before the Employer-Employee Subcommittee shed light on exactly what obstacles a worker faces when he or she begins to question a union's use of his or her dues. Charles Barth, a long-time union member from North Carolina, faced a dilemma of either being a political objector by declining union membership or joining the union and surrendering his individuality.[126] He chose the former, and "almost immediately the lies started: anti-union, scab, free loader, and religious fanatic were labels that were ascribed to me. They did anything to create hate and mistrust between myself and the other union members."[127] Once Kerry Gipe learned the unions supported causes that contradicted his own Christian and moral beliefs, he filed for political objector status. Mr. Gipe later testified:

> To our dismay, the union began an almost immediate smear campaign against us . . . portraying us as scabs and freeloaders . . . . We had our names posted immediately on both union property and company property accusing us of being scabs. We were thrown out of our local union hall and threatened with physical violence . . . . We were accosted at work, we were accosted on the street, we were harassed, intimidated and threatened. We were told that our names were being circulated among all union officials in order to prevent us from ever being hired into any other union shop at any other union location. The union membership was told that we were refusing to pay any dues whatsoever, which created a very hostile environment among our fellow workers

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[125] *See* 320 NLRB No. 11 (holding yearly notice in a newsletter is sufficient); *Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 5 (statement of Marshall Breger).

[126] *See Hearing on H.R. 1625, The Worker Paycheck Fairness*, *supra* note 16, at 89–90 (statement of Charles Barth).

[127] *Id.* at 90.

> . . . . I have been harassed, black listed, threatened, and removed from the union as a result of refusing to pay for non-germane political expenses.[128]

Similarly, James Cecil testified:

> The union agent wanted to know why I would not sign the check-off and join . . . . At that point he became angry and asked me who the hell I thought I was? Did I think I was some kind of an intellectual? Did I think I was better than the other workers out there? I told him no, but I know what my rights are and I intend to defend them . . . . At that he promised me in no uncertain terms that he would bring the full force of his and the other unions down on me if I dared to do that . . . . At this point, I was greatly concerned about retaining my job and for my physical well-being.[129]

Others testified to threats of loss of seniority, loss of employment, loss of advancement, and threatening phone calls simply because they exercised their rights.[130] Whatever the amount of intimidation and coercion used, it is wrong. We live in a society that should not tolerate this type of activity. I firmly believe all those who testified before the committee sacrificed a great deal more than time. In the end, I believe workers all across this great country will thank them for their courage and persistence to fight for their beliefs.

C. *Loss of Workplace Rights*

In 1991, the Fourth Circuit for the first time directly answered whether a worker could pay only for collective bargaining and still remain a member of a union.[131] The Court answered this in the negative.[132] Consequently, this decision clarified the fact that a union could not be compelled to admit a worker who chooses

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[128] *Hearing on Mandatory Union Dues*, *supra* note 16, at 15, 18 (statement of Kerry Gipe).

[129] *Hearing on H.R. 3580, The Worker Right to Know Act*, *supra* note 25, at 29 (statement of James Cecil).

[130] *See, e.g.*, *Hearing on H.R. 3580, The Worker Right to Know Act*, *supra* note 25, at 52 (statement of Gary Dunham) (testifying to threat of loss of seniority); *Hearing on H.R. 3580, The Worker Right to Know Act*, *supra* note 25, at 49 (statement of John Wilson) (testifying to loss of employment and others who have suffered beatings and shootings); *Hearing on H.R. 1625, The Worker Paycheck Fairness Act*, *supra* note 16, at 89–90 (statement of Charles Barth) (testifying to loss of advancement); *Hearing on H.R. 1625, The Worker Paycheck Fairness*, *supra* note 16, at 5 (statement of Kevin Spence) (testifying to harassing phone calls).

[131] *See Kidwell*, 946 F.2d at 288.

[132] *See id.* at 302.

to only pay for collective bargaining activities.[133] Resignation from the union is required and with it the worker loses the right to vote on terms and conditions affecting his or her employment.[134] These can include significant rights such as the right to vote on strikes, contracts, or the internal affairs of the union.[135]

Several witnesses before the Employer-Employee Relations Subcommittee expressed disappointment with the choice to join the union and gain valuable workplace rights or to resign and lose any rights they had. Kerry Gipe testified:

> The current system of resigning from the union and then re-applying annually in order to prevent from being forced to support these political causes is a further heavy burden that the worker of this country should not be required to bear. This practice is clearly intended to make your objection to supporting these causes as difficult as possible. Why is this continued to be allowed in a country that prides itself on democracy and the freedom to hold dissenting points of view?[136]

James Young, a staff attorney for the National Right to Work Legal Defense Foundation, asserted that the current process requiring a worker to resign so that the worker was not forced to subsidize a union's political activities presents a worker with a Hobson's choice: either subsidize these political activities or lose important rights.[137] Further, many employees are not adequately informed by the union that they have a choice at all. Instead, several of the workers who testified stated they were told that they had to join the union or be fired.[138] Gary Dunham testified that he was "forced to choose between my First Amendment rights and my work-place rights."[139] Lastly, Len Cipressi, testifying that resigning from the union was only beneficial to the union, explained:

> You see, the union still gets to take the dues from me because they must still represent me, but now I cannot attend meetings or vote, which is great for them when it comes to the

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[133] *See id.*

[134] *See id.* at 294; H.R. REP. No. 105-397, at 8–9.

[135] *See* H.R. REP. No. 105-397, at 9 (1997).

[136] *Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 18 (statement of Kerry Gipe).

[137] *See Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 114 (statement of James Young).

[138] *See* H.R. REP. No. 105-397, at 8 (1997).

[139] *Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 54 (statement of Gary Dunham).

> apathy issue . . . . [N]o one should forfeit his or her right to vote on a contract between a union and an employer, especially if being forced to pay the dues.[140]

Thus, workers face a lose-lose situation.

The courts have spoken on this issue, so it is clear that, absent Representative Fawell's House Bill 1625 or comparable legislation, individual workers will continue to forgo valuable workplace rights while still paying for collective bargaining activities.

D. *Lack of Financial Disclosure*

Another hurdle employees face is trying to determine how a union spends their dues or fees. Witness after witness told stories of how unions, when confronted with the question of how dues were spent, gave vague and oftentimes no answer to the question. Mary Burkholder of Pennsylvania testified to the fact that she and several other employees asked "just how our dues were being spent. The answer to our question was illustrated on a chalkboard. One knows that, once the chalkboard was erased, the evidence was gone. This chalkboard demonstration was supposed to satisfy us."[141] John Moses of San Diego testified:

> I had become so disillusioned with the union at this point, from their violent tactics to their abuse of members' dues, I started to question what exactly the union was doing with my dues. I wrote a letter . . . asking for a breakdown of where my dues were going and what they were being used for. Their response to me was they did not understand what I was asking for. I wrote a second letter explaining in detail what I wanted to know. I did not receive any response. So, I wrote a third letter resigning from my local . . . . Again, I never received any type of response. I know that they received my letter because I sent it certified mail and I received the certificate back.[142]

It is not surprising that unions have an aversion to disclosing to their members how they spend members' dues or fees. There

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[140] *Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 41 (statement of Len Cipressi).

[141] *Hearing on H.R. 3580, The Worker Right to Know Act*, *supra* note 25, at 187 (statement of Mary S. Burkholder).

[142] *Hearing on Mandatory Union Dues and the Abuse of Workers' Rights*, *supra* note 25 (statement of John Moses); *see also Hearing on H.R. 3580, The Worker Right to Know Act*, *supra* note 25, at 25 (statement of Gary Bloom) (testifying he never received a breakdown of union dues); *Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 34 (statement of Charles Serio).

is no incentive for them to disclose. They have thrived from a veiled secrecy for years and not until Republicans gained control of Congress had there been any significant attempt to pierce through this veil. Even union members support more disclosure. When asked if they support making unions explain exactly how dues are spent, a resounding 84% of members supported more disclosure and only 9% opposed it.[143]

E. *Procedural Hurdles*

Even after overcoming the coercion, intimidation, and the lack of notice and financial information, the worker is still faced with procedural obstacles: limited time constraints to make an objection, yearly renewal requirements, and specific mailing requirements.[144] Nadia Davies gave compelling testimony about the extraordinary effort she made to have the union finally acknowledge her resignation:

> I found out that I could opt out of union membership and still pay for representation, so I contacted union officials and asked that I be allowed to exercise that option. I was told in no uncertain terms that I could not do that and that I was locked in for the duration of the contract, all four years. In 1994, when the contract expired, I then demanded to be exempted from membership. I wrote the letters required by law, but somehow they kept getting lost . . . . I wrote several letters that according to the Union official that I was dealing with were never received or were not worded properly . . . . I kept calling the union office, at least three or four additional times to find out the status of my request. Finally in desperation, I wrote another letter and had my husband drive to the San Diego Teachers' Union office, hand carry the letter and had a copy of the original letter date and time stamped. That was the only way that I finally was able to exercise my right to withdraw as a member of the organization.[145]

Likewise, Gary Dunham testified at length about his four-year ordeal and was now turning to Congress for help.[146] Charles Serio had a similar experience when he testified:

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[143] *See* Luntz, *supra* note 14, at 7.

[144] *See* H.R. REP. No. 105-397, at 10 (1997).

[145] *Hearing on Mandatory Union Dues and the Abuse of Workers' Rights*, *supra* note 25 (statement of Nadia Davies).

[146] *See Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 51–53 (statement of Gary Dunham).

> Organized labor would have you believe that workers who object to the use of agency fees for nonrepresentational expenses need only register their objections with the union to have their agency fee reduced to only those costs specified by the U.S. Supreme Court in *CWA v. Beck*, that is, collective bargaining, contract administration and grievance adjustment. My experience was quite different, however. No matter how scrupulously I followed the policy prescribed by CWA, my demands for an agency fee reduction were ignored . . . . I subsequently received my first agency fee reduction . . . more than two years after my initial effort.[147]

Whether it is receiving a refund or resigning from a union, no member should have to go through what Nadia Davies, Gary Dunham, or Charles Serio had to go through. Certainly, there are many others who could have told similar stories. It should be a straightforward process free of any procedural high hurdles. One union in particular has instituted an "up front" refund policy.[148] I commend them for this, but it is only one of hundreds of unions.

IV. The Opposition: Republicans Continue to Attack a Worker's Rights

Labor organizations' and Democrats' opposition to strengthening *Beck* is threefold: current law already protects political objectors, it places political obligations on unions not required by similar organizations, and it places onerous compliance costs on unions. Some of these objections were highlighted in the 1996 debate on campaign finance reform. The extensive amount of their opposition has been expressed through legal counsels of various unions during Committee hearings.[149]

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[147] *Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 35–36 (statement of Charles Serio).

[148] *Hearing on H.R. 1625 The Worker Paycheck Fairness*, *supra* note 16, at 171–73 (statement of James Coppess).

[149] *See Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 107 (statement of Victoria Bor, International Brotherhood of Electrical Workers); *Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 100 (statement of Mark Schneider, Associate General Counsel, International Association of Machinists and Aerospace Workers ("IAMAW")); *Hearing on H.R. 3580, the Worker Right to Know Act*, *supra* note 25, at 319 (statement of James Coppess, General Counsel, CWA); *Hearing on Mandatory Union Dues*, *supra* note 16, at 58 (statement of Allison Beck, General Counsel, IAMAW); *Hearing on Mandatory Union Dues*, *supra* note 16, at 70 (statement of James Coppess); *Hearing on H.R. 1625, The Worker Paycheck Fairness Act*, *supra* note 16, at 165 (statement of James Coppess); *Hearing on H.R. 1625, The Worker Paycheck Fairness Act*, *supra* note 16, at 125 (statement of Mitchell Kraus,

Based on *Beck* and the NLRB's holding in *California Saw*,[150] the Democrats' witnesses assert that there are ample protections for those workers who wish to object to the portion of their dues used for activities not germane to collective bargaining activities.[151] Unions are voluntary organizations, and no members are required to support activities with which they do not agree.[152] Further, the Federal Elections Campaign Act requires unions to report their dues expenditures.[153] James Coppess, General Counsel for the CWA, testified at length about the how the *California Saw* case "provided dissident workers, who do not agree with the majorities' decisions to pursue certain legislative or political ends, with a fully developed set of rules to protect the dissident's rights."[154] Members who feel a union has violated their *Beck* rights now have legal recourse. These avenues include bringing charges before the NLRB or suing the unions directly for violating their duty of fair representation.[155] The Committee also heard extensive testimony from two unions, the CWA and the IAM, about the procedural measures they have implemented to comply with the Supreme Court and NLRB's ruling and guidelines.[156] Two union representatives acknowledged that between twenty and twenty-five percent of their union expenditures go to support activities deemed non-chargeable.[157]

Democrats, in an attempt to circumvent the argument that unions force employees to support unfavorable activities, also argue that House Bill 1625 silences a union's political participation in a way not required of other organizations, such as

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General Counsel, Transportation Communications International Union); *see also* H.R. REP. No. 105-397, at 29 (1997).

[150] *See* notes 118, 122, and accompanying text.

[151] *See* H.R. REP. No. 105-397, at 31 (1997); *Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 102 (statement of Mark Schneider); *Hearing on H.R. 3580, the Worker Right to Know Act*, *supra* note 25, at 321 (statement of James Coppess).

[152] *See Hearing on H.R. 1625, the Worker Paycheck Fairness Act*, *supra* note 16, at 12 (statement of Mitchell Kraus).

[153] *See Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 101 (statement of Mark Schneider); H.R. REP. No. 105-397, at 31.

[154] *Hearing on Mandatory Union Dues*, *supra* note 16, at 75 (statement of James Coppess).

[155] *See* H.R. REP. No. 105-397, at 32, 35.

[156] *See Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 102–03 (statement of Mark Schneider); *Hearing on H.R. 3580, The Worker Right to Know Act*, *supra* note 25, at 322–23 (statement of Helen Gibson).

[157] *See Hearing on Mandatory Assessment of Union Dues*, *supra* note 16, at 102 (statement of Mark Schneider); *Hearing on H.R. 3580, The Worker Right to Know Act*, *supra* note 25, at 322 (statement of Helen Gibson).

corporations.[158] Corporations, through employee retirement plans and stockholders, have access to a large amount of capital. Corporations in turn can use this capital to engage in political activities without seeking prior authorizations.[159] Moreover, those opposed to strengthening *Beck* point to their own polls that show eighty-five percent of union members approve of a union's involvement to increase minimum wage and to protect Medicare.[160] A look at corporate spending shows corporations significantly outspend unions.[161] Targeting unions, without requiring corporations to abide by the same rules, places labor organizations and their members at a substantial disadvantage in their ability to speak on behalf of their members.[162] AFL-CIO President John Sweeney stated in a press release regarding House Bills 1625 and 2608, "These bills have only one purpose—and that's to knock working families off the political playing field so corporations can have it to themselves . . . . They impose no such limits on businesses or other organizations, at a time when corporations outspend unions in the political arena by a ratio of 11-to-1."[163]

Last, Democrats argue that the reporting requirement imposed on unions is, in effect, a tax increase on union members.[164] The requirement to obtain authorization from the 16.3 million union members would cost $1 per person to prepare authorization forms and $40.6 million to collect and process the signatures.[165] Moreover, making unions differentiate between chargeable and non-chargeable expenditures would overwhelm many locals because they lack the staff, experience, or the computer hardware to accomplish this task.[166] Initial costs to implement these procedures could run $3.4 million and anywhere between $13.2 and $26.5 million to maintain accounting and reporting systems each

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[158] *See* 142 CONG. REC. H8511 (daily ed. July 25, 1996) (statement of Rep. Kildee); H.R. REP. No. 105-397, at 41 (1997).

[159] *See* H.R. REP. No. 105-397, at 41–42 (1997).

[160] *See* H.R. REP. No. 105-397, at 32 (1997); *but see* Luntz, *supra* note 14, at 5 (citing a clear plurality (49%) want unions less involved in political campaigns).

[161] *See Hearing on Mandatory Union Dues*, *supra* note 16, at 100 (statement of Rep. Donald Payne (D-N.J.)).

[162] *See* H.R. REP. No. 105-397, at 43 (1997).

[163] John J. Sweeney, President, AFL-CIO, *H.R. 1625 and H.R. 2608 Attempt to Silence Working Families*, (Jan. 21, 1998) <http://www.aflcio.org/publ/press98/pr0121.htm>.

[164] *See* 142 CONG. REC. H8462 (daily ed. July 25, 1996) (statement of Rep. Bill Clay (D-Mo.)); H.R. REP. No. 105-397, at 39 (1997).

[165] *See* H.R. REP. No. 105-397, at 39 (1997).

[166] *See id.* at 39–40.

year.[167] In total these new administrative requirements could cost as much as $90 million initially and $27 million annually.[168]

The arguments of the opposition are inadequate and inapposite. First, the six hearings held in the Education and the Workforce Committee over the past two years have shown that workers continue to face many obstacles when they exercise their *Beck* rights. Their voices speak volumes about what is taking place in the "real world." They want to be treated with respect, and I think they deserve nothing less. The respect they are talking about is the opportunity to be informed of their workplace rights, including *Beck,* and to have clear and easily accessible information about how a union spends their dues or fees. Then and only then can individuals make informed decisions about whether they want to support their union's extracurricular activities. If they then choose to object to these activities, they should not be denied the right to vote on employment decisions affecting their workplaces. To that end, the process should be done in an environment free of intimidation, coercion, misinformation, and duress.

Furthermore, the argument that House Bill 1625 and comparable legislation favors corporations over labor organizations misses the point. Unions, by a grant of power from the federal government, can force employees to pay dues to the union as a condition of keeping their jobs. Corporations, on the other hand, cannot force individuals to invest in them. It is entirely fair to make unions receive prior consent because unions are the only organization who can force individuals to pay to them. Bill Hitchings, a longtime Carpenters' Union member, drew the distinction between unions and corporations when he stated "I can take money from an investment in AT&T and turn it into another stock if I disagreed terribly with what AT&T is doing with my money. I have no option of joining another carpenters' union. There ain't one."[169]

Finally, in an information age replete with computers, the Internet, wireless communication, and faxes, the public should no longer acquiesce to labor organizations' thriving on keeping workers in the dark. Given the special power and role allocated to labor unions by the NLRA, they should maintain modern

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[167] *See id.* at 40.

[168] *See id.*

[169] *Hearing on Mandatory Assessment of Union Dues, supra* note 16, at 362 (statement of Bill Hitchings).

technology and accounting methods so any added accounting and/or disclosure requirements can be done with a touch of a button. The Democrats' argument that implementing additional reporting requirements would place a financial burden on unions and, consequently, on their members should not be persuasive.

CONCLUSION

Thomas Jefferson said over two hundred years ago that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[170] This inspiring statement goes to the core of the *Beck* issue. Not one Republican disputes the fact there are laws or at least judicial opinions prohibiting unions from using mandatory dues for purposes not germane to collective bargaining. Republicans, however, know that the implementation of these judicial opinions, rules, and regulations has fallen short. As I have previously mentioned, the Democratic minority cites polls showing that union members support a union's political activities. Unfortunately, this misses the point by trying to justify the means with the ends. Further, Republicans realize that although joining a union is voluntary, employees must pay dues or fees in order to keep their job. That leaves many workers with a Hobson's choice: either assert your *Beck* rights and lose workplace rights while paying dues and hoping for a refund or keep quiet and compromise your beliefs, principles, and ideologies.

Those opposed to House Bill 1625, or any other legislation trying to strengthen *Beck*, strenuously oppose a system requiring unions to ask "up front" whether their members want a portion of their dues spent on activities such as political, social, or charitable activities. Ironically, these are the same people who decry that the political system is not democratic enough. The Congressional Republicans' belief that workers should have a say in how their dues are spent on these unrelated union activities is reflected in states from California to Florida that have embraced the concept of a "Worker's Right to Know" by starting their own "paycheck protection" ballot initiatives.[171] A Washing-

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[170] THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM, at xvii (Merrill D. Peterson & Robert C. Vaughan eds., 1988).

[171] *See* David S. Broder, *Campaign to Reduce Union Clout Revs Up—Californians May Vote on "Payroll Protection" Initiatives in June*, WASH. POST, Nov. 13, 1997, at

ton state initiative in 1992 shows just how powerful this type of legislation can be; within a year of its passage, the Washington Education Association found that the number of its 65,000 members from which it had collected money had dwindled from 48,000 to 8000.[172] This past March, Wyoming became the fourth state to enact "paycheck protection" legislation.[173] California and Oregon have similar ballot initiatives placed on their June 2 and November 3 ballots, respectively.[174] Currently, polls in California show an overwhelming seventy-one percent of California's registered voters support such a measure.[175] The opposition is not taking this lying down and labor is expected to spend as much as $20 million to defeat the effort.[176]

These state initiatives have caused the AFL-CIO to rethink its past strategy of solely defeating Republican candidates.[177] It is now discussing a plan to budget $20 million for advertising and grassroots operations this year, the vast amount of it going to block state and federal "anti-union" proposals.[178]

After forty-two years of Democratic control, it was a Republican majority that believed all workers deserve the respect to make their own choices about how their money is spent. The two votes held in the House do not reflect what the vast number of people support. I believe the best approach to implement the spirit of *Beck* is to approach it on a federal level as a traditional labor law issue. Though success on a state level is welcome and good arguments have been made why it should be included in campaign finance reform, campaign finance reform is a nonstarter. When stripped away of collateral issues and focusing on the unfairness of union security agreements and the NLRA, I

A13; GROVER G. NORQUIST, AMERICANS FOR TAX REFORM, "PAYCHECK PROTECTION" INFORMATION AND RESOURCE GUIDE, Jan. 1998; *Paycheck Protection*, WALL ST. J., Jan. 6, 1998, at A18; Jim VandeHei, *AFL-CIO Budgets $20 Million to Block 'Anti-Labor' Bills Across the Country*, ROLL CALL, Feb. 5, 1998, at 15; Cristopher Rapp, *Check-mate, Protecting Workers' Paychecks from Predatory Unions is Good Politics-and Simple Justice*, NAT'L REV., Jan. 26, 1998, at 30.

[172] *See Union Permission Slip*, WALL ST. J., Nov. 21, 1996, at A22.

[173] *See Wyoming Enacts "Paycheck Protection,"* POL. MONEY MONITOR (National Center for Public Policy Research, Washington, D.C.), Mar. 27, 1998.

[174] *See* Broder, *supra* note 171; Norquist, *supra* note 171; Rapp, *supra* note 171.

[175] *See Polls Show Initiative Retains Commanding Support*, POL. MONEY MONITOR (National Center for Public Policy Research, Washington, D.C.), Feb. 13, 1998.

[176] *See* Greenblatt, *supra* note 86, at 788; *see also Teachers Union Commits Big Money to Defeat Initiative*, POL. MONEY MONITOR (National Center for Public Policy Research, Washington, D.C.), Feb. 13, 1998.

[177] *See* VandeHei, *supra* note 171.

[178] *See id.*

believe we can replicate the success in Education and the Workforce Committee. Again, as support for the Worker Paycheck Fairness Act continues to grow throughout the country, Representative Fawell, the sponsor of House Bill 1625, the Republican leadership and many others continue to push for the Act's passage. I welcome its enactment.

POLICY ESSAY

REPRESENTATIVE DEMOCRACY VERSUS CORPORATE DEMOCRACY: HOW SOFT MONEY ERODES THE PRINCIPLE OF "ONE PERSON, ONE VOTE"

SENATOR RUSSELL D. FEINGOLD*

The costs of political campaigns have spiraled in the past decade. Individuals and groups have seized on this ever-increasing need to spend money by purchasing access to politicians and influence over policymaking. In this Essay, Senator Feingold explains how the explosion of "soft money," unlimited contributions to political parties from corporations, labor unions, and wealthy individuals, has tilted the electoral playing field away from ordinary Americans. A "representative democracy" is thus being displaced by what the author calls a "corporate democracy," in which a person or group's influence over the political process is in proportion to the amount of money they put into the process. The author concludes by describing how legislation he has proposed, the McCain-Feingold bill, would ban soft money and still be constitutional under the Supreme Court's Buckley v. Valeo *decision.*

America's electoral process is rooted in the principle of "one person, one vote," but that principle is drowning in a flood of unlimited political campaign contributions that are, through their ability to secure privileged access to lawmakers, undermining the integrity of both our elections and the legislative process.[1]

As candidates and parties battle to win elections, they are forced to raise ever-greater sums of money.[2] The current cam-

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[1] The concept of "one person, one vote" has been exhaustively examined both in case law and in scholarly articles. Many commentators trace the phrase to Justice William Douglas's majority opinion in *Gray v. Sanders*. *See* 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.").

[2] Congressional candidates raised a total of $790.5 million in the 1996 election cycle, a 20% increase from the $659.3 million raised in 1992. *See* FEDERAL ELECTION COMMISSION, *Congressional Fundraising and Spending Up Again in 1996*, Apr. 14, 1997 (visited Apr. 27, 1998) <http://www.fec.gov/press/canye96.htm>. The Democratic and Republican parties raised $638.1 million combined in the 1996 election

paign finance system has taken on the dynamic of the Cold War arms race, with both sides unwilling to relinquish real or perceived political advantages that come from spending more and more money, particularly on negative campaign advertising. The course that both parties so zealously pursue poses a serious threat to the integrity of our democratic process.

That threat is the transformation of our representative democracy into what I call a corporate democracy, in which the "one person, one vote" principle is supplanted by a system that allocates influence over the political process in proportion to the amount of money an individual or group puts into that process.

In this Essay, I will describe the insidious role that so-called "soft money" is playing in the transformation of our representative democracy into a corporate democracy and explain how the campaign finance reform legislation I have introduced with Senator John McCain (R-Ariz.), the McCain-Feingold bill,[3] would end the pernicious influence of soft money. I will also address the argument that a ban on soft money violates the Constitution.

I. Corporate Democracy and Soft Money

I learned about the difference between representative and corporate democracy at an early age. When I was thirteen years old, a relative gave me a gift of one share of stock in the Parker Pen Company, an economic fixture in my hometown of Janesville, Wisconsin. My relative wanted me to learn something about how the stock market worked. My one share was probably worth about $13 then, but my father told me that because I owned a share of stock, I owned a small piece of the company. Therefore, I was entitled to a vote at the company stockholders' meeting.

By that age, I was already excited about the political process, and I thought voting at a shareholders' meeting was like voting in an election. I was anxious to exercise my new power so I asked my father when I could go to the shareholders' meeting to vote.

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cycle, increasing party fundraising 43% from their total of $445 million in the 1992 cycle. *See* Federal Election Commission, *FEC Reports Major Increase In Party Activity For 1995-96*, Mar. 19, 1997 (visited Apr. 27, 1998) <http://www.fec.gov/press/ptyye1.htm>.

[3] *See infra* note 17.

My father explained that I could go to the meeting but my vote would not count for much, because the number of votes you get at a shareholders' meeting depends on how many shares you have. Needless to say, my enthusiasm was somewhat dampened, but I quickly came to understand how power in a corporation is apportioned according to the size of the stake held in that corporation by various investors.[4]

This makes sense in the corporate world because those who have invested the most should have the most say about a corporation's direction. But the model of power in a corporation is antithetical to the democratic process of electing representative lawmakers and, by extension, making public policy. I am deeply disturbed that our representative democracy, while still existing in theory, has been transformed in practice to the corporate model.

Soft money contributions, which can run into the hundreds of thousands of dollars from one donor alone, are the main engine behind this transformation. Soft money is a popular umbrella term describing contributions to political parties from sources that are otherwise prohibited from making contributions in connection with federal elections, such as corporations and labor unions, or by wealthy individuals in amounts greater than the limits allowed by federal law.[5] Because they are unlimited, soft money donations have the largest potential to tilt the electoral playing field away from ordinary Americans in favor of very wealthy individuals and organizations.[6]

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[4] Shareholders in a corporation usually vote *pro rata*, rather than *pro capita*. *See, e.g.*, Davis v. American Telephone and Telegraph Co., 478 F.2d 1375 (2d Cir. 1973):

> Even assuming that appellee's public character is sufficient to subject it to Fourteenth Amendment requirements, certainly it does not exercise "normal governmental" authority, and its actions, to the extent they affect stockholders qua stockholders, affect each stockholder in proportion to the number of shares he owns . . . . Therefore, the strict equal protection standard implicit in the phrase "one man, one vote" does not apply.

[5] Corporations and unions are prohibited from making contributions or expenditures "in connection with any election to any political office." 2 U.S.C. § 441b(a) (1994). Corporations have been barred from making such contributions since the passage of the Tillman Act of 1907, ch. 420, 34 Stat. 846. Labor unions have been similarly barred since 1943, when Congress passed the Smith-Connally Act as part of the War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943). Individuals have been limited to contributing $1,000 to candidates and $20,000 per year to national political parties since passage of amendments to the Federal Election Campaign Act in 1974. *See* 2 U.S.C. § 441a(1) (1994). Because it is not subject to the restrictions of federal law, soft money is sometimes referred to by the Federal Election Commission as "non-federal money."

[6] Philip Morris Companies, Inc., including its executives and subsidiaries, donated slightly more than $1.4 million to the Republican and Democratic parties between January 1, 1997 and December 31, 1997, making it the largest soft-money donor last

Soft money was not created by federal law, but by the evolution of party fundraising strategies in response to Federal Election Commission advisory opinions.[7] Originally, soft money was only used for party building activities such as get-out-the-vote campaigns and voter registration drives. But in the last election cycle, the parties paid for much of their tens of millions of dollars of television advertising supporting candidates with soft money.[8] The soft money channel, deeper than a well and far wider than a church door, has allowed millions upon millions of dollars that would have otherwise been barred by federal law to pour into our political system. And, just as floodwaters can wash away everything in their path, so has the flood of soft money overwhelmed our political process.

It has been widely publicized, for example, that during the 1995-1996 election cycle, the Republican and Democratic parties raised more than $263 million in soft money, more than a three-fold increase over the previous presidential election cycle, 1991-1992.[9]

Despite almost continuous news reporting of fundraising scandals and several Congressional investigations into allegations of illegal fundraising, and despite the growing public outrage surrounding political fundraising, the soft money chase continues apace. In fact, the pace is picking up. During calendar year 1997, the FEC reports, the Democratic and Republican parties raised a total of more than $67 million in soft money. This was $8 million more than the parties raised in 1995 and more than double

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year. *See* COMMON CAUSE, *Party Favors: An Analysis of More Than $67 Million In Soft Money Given To Democratic and Republican National Party Committees in 1997* (Feb. 1997) (visited Apr. 27, 1998) <http://www.commoncause.org/publications/partyfavors6.htm>. It also was the biggest soft money contributor in the 1996 cycle, giving over $3 million to the political parties. *See* CENTER FOR RESPONSIVE POLITICS, *1995-96 Soft Money Update* (visited Apr. 27, 1998) <http://www.crp.org/btl/top10soft.htm>. The top 10 soft money contributors for 1997 gave over $337,000 each. *See* COMMON CAUSE, *supra*.

[7] For a good description of the development of the soft money loophole, see CAMPAIGN FINANCE REFORM: A SOURCEBOOK, 168–73 (Anthony Corrado et al. ed., 1997). FEC Advisory Opinion 1978-10 may have opened the soft money door. That opinion, responding to inquiries from Kansas State Republican Party, states: "It is also the Commission's view that with respect to an election in which there are candidates for Federal office, expenditures for registration and get-out-the-vote drives need not be attributed as contributions to such candidates unless the drives are made specifically on their behalf." *See id.* at 191.

[8] *See id.* at 175.

[9] *See* FEDERAL ELECTION COMMISSION, *Political Parties' Fundraising Hits $881 Million*, Jan. 10, 1997, *available in* LEXIS, CMPGN/ELCT 96 Library.

the amount raised in 1993, the analogous year in the previous presidential election cycle.[10]

I believe this huge amount of unregulated money represents a threat to the stability and integrity of our representative political system. That is why soft money should be banned.

I am convinced that large campaign contributions are frequently made with at least the expectation of some kind of benefit returning to the contributor. Consider the results of a *Business Week*/Harris poll, which surveyed 400 senior executives from large public corporations, asking questions regarding their opinions on campaign finance and how best to reform the current system.[11] Half the respondents claimed that securing access to lawmakers "to gain fair consideration on issues affecting our business" constituted the major reason for making political contributions—and an additional 27% acknowledged that seeking access was at least part of the reason for making contributions. Fifty-eight percent said fear of losing influence to labor or environmental organizations or being placed in a competitive disadvantage to a rival was at least one reason, if not the major reason, for making contributions. Forty-one percent acknowledged that at least part of the reason they made political contributions was the hope of receiving "preferential consideration on regulations or legislation benefiting our business."[12] Potential loss of access to lawmakers and other policy professionals was clearly a concern for the respondents.

Some lawmakers have learned to play on this expectation. On one hand, they extend the offer of special access, as one fundraising letter, sent out over the signature of Senator Mitch McConnell (R-Ky.), chairman of the National Republican Senatorial Committee, did last year. Senator McConnell promised "the rewards of leadership, friendship, effectiveness and *exclusivity*" to contributors in exchange for a $5,000 contribution that would secure membership in a group called the Presidential Roundtable.[13] On the other hand, lawmakers can make it clear

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[10] *See* COMMON CAUSE, *supra* note 6.

[11] *See* Amy Borrus & Mary Beth Regan, *The Backlash Against Soft Money*, BUS. WK., Mar. 31, 1997, at 34.

[12] *Id.* at 36. Sixty-eight percent of the business executives polled agreed with the statement, "the system is broken and is in need of fundamental reform." *Id.* When the Harris poll-takers offered a list of possible reforms, 68% of the respondents recommended ending unlimited "soft money" contributions. *Id.*

[13] Letter from Sen. Mitch McConnell, Chairman of the Nat'l Republican Senatorial Comm. at 4 (Aug. 30, 1997) (emphasis added) (on file with author).

to the representatives of various special interests that their chances of being heard when they drop by to discuss legislation may have a direct relationship to their ability to raise and contribute money to their legislators. In 1995, for example, the *Washington Post* reported that House Majority Whip Tom DeLay of Texas maintained a ledger listing amounts and percentages of money that the 400 largest political action committees contributed to Republicans and Democrats during the previous two years.[14] Large contributors to Republicans were labeled "Friendly," the others "Unfriendly."[15] The *Post* story then recounted a meeting between DeLay and an unnamed corporate lobbyist:

> "See, you're in the book," DeLay said to his visitor, leafing through the list. At first the lobbyist was not sure where his group stood, but DeLay helped clear up his confusion. By the time the lobbyist left the congressman's office, he knew that, to be a friend of the Republican leadership his group would have to give the party a lot more money.[16]

Anecdotes like this illustrate the transformation that is so deeply disturbing to me. With our representative democracy becoming a corporate democracy, the amount of money one can put into the electoral process determines the "voice" one has in the legislative process. This transformation raises fundamental issues about how our democracy is supposed to work, and who it is supposed to serve. In a representative democracy, elected officials are accountable to all people equally, but in a corporate democracy, they become the servants of those who give the most money. Those who have greater wealth can purchase a greater voice in determining the outcome of the public policy debates, for large campaign contributions easily translate into special access to lawmakers.

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[14] *See* David Maraniss & Michael Weisskopf, *Speaker and His Directors Make the Cash Flow Right*, WASH. POST, Nov. 27, 1995, at A1. This is one of many press reports on the nexus between contributions and political influence. *See, e.g.*, Leslie Wayne, *A Special Deal for Lobbyists: A Getaway With Lawmakers*, N.Y. TIMES, Jan. 26, 1997, at 1.

[15] *See* Maraniss & Weiskopf, *supra* note 14, at A1.

[16] *Id.*

II. THE MCCAIN-FEINGOLD BILL: A FIRST STEP TOWARD RECLAIMING OUR DEMOCRACY

For more than two years, I have worked closely with Senator McCain and several other Senate colleagues on a bipartisan, comprehensive campaign finance reform proposal, which has come to be known as the McCain-Feingold bill.[17] This legislation, which is now supported by a majority of the United States Senate, would take an important first step toward reversing the transformation of our political system to a corporate democracy.

The centerpiece of the bill is a ban on soft money.[18] It would require all contributions to the national political parties to comply with the restrictions on hard money contributions in current federal election law.[19] In addition, it would bar federal officeholders and candidates for those offices from soliciting, receiving, or spending soft money.[20] Further, to prevent the loophole from simply migrating from national to state party fundraising, McCain-Feingold would prohibit state and local political parties from spending soft money on any activity that might affect a

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[17] The first campaign finance legislation that Senator McCain and I introduced died in a filibuster in June 1996. *See* Senate Campaign Finance Reform Act of 1996, S. 1219, 104th Cong. (1996). We reintroduced the legislation as Senate Bill 25 on January 21, 1997. *See* Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. (1997). A modified version, introduced on September 25, 1997, was considered on the floor of the Senate in September and October 1997, and again in late February of this year.

[18] As amended on the floor in February 1998, the bill contains a number of other important reforms, including restrictions on corporate and union spending on campaign advertisements close to an election, a requirement for disclosure of funding sources for campaign advertisements by outside groups, incentives for candidates to curb the amount of personal wealth they contribute to their campaigns, a ban on fundraising on federal property, and various provisions designed to improve FEC disclosure and enforcement. *See* Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. (1997).

The September 29, 1997 version of the bill was introduced during the February 1998 campaign finance reform debate as an amendment to S. 1663, the Paycheck Protection Act, introduced by the Majority Leader, Sen. Trent Lott (R-Miss.). *See* 144 CONG. REC. S933–38 (daily ed. Feb. 24, 1998). Subsequently, the Senate adopted an amendment proposed by Sen. Olympia Snowe (R-Me.). That amendment replaced § 201 of McCain-Feingold with provisions that define and regulate "electioneering communications," a term referring to radio and television advertisements clearly identifying a candidate for federal office that are made within 60 days before a general election or within 30 days of a primary election, and that are broadcast to an audience that includes the electorate for that election. *See id.* at S938–39.

[19] *See id.* at S933–34. Section 101 creates a new section, § 324, of the Federal Election Campaign Act. The requirement that national party committees raise only hard money is contained in § 324(a)(1). *See id.* at S933. The requirement applies to all entities controlled or maintained by the political party committee and its officers and agents. *See id.*

[20] *See id.* at S933–34.

federal election.[21] It would also prohibit the political parties from fundraising for, or transferring money to, non-profit organizations.[22]

These provisions would bring some sanity back to the federal election laws by closing the most prominent loophole in the system today. Few opponents of reform defend soft money, but some do argue that the ban would run afoul of the Supreme Court's 1976 decision in *Buckley v. Valeo*, the landmark U.S. Supreme Court decision striking down certain parts of the post-Watergate amendments to the Federal Election Campaign Act.[23]

Campaign finance reform bills often raise difficult questions of constitutional law. Whether Congress has the power to ban soft money, however, is not one of them. Last September, 126 constitutional scholars co-signed a letter from the Brennan Center for Justice at the New York University School of Law stating that the soft money ban contained in the McCain-Feingold bill will pass constitutional muster.[24]

In *Buckley v. Valeo*, the Supreme Court held that individual contributions *can* be limited—the current federal limit, which the Court upheld, is $1,000 per election from an individual to a candidate.[25] The Court found that restrictions on the source and size of contributions to candidates are permissible in order to protect our electoral system from corruption or the appearance of corruption. The Court concluded that unrestricted contributions could undermine the integrity of our elections and our democracy.[26]

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[21] *See id.* at S933. During the 1996 elections, both political parties frequently transferred soft money to state committees, which under current FEC regulations are permitted to fund a larger percentage of their activities with soft money. *See, e.g.*, Kevin McDermott, *'Soft' Money Sent Through Illinois*, ST. LOUIS POST-DISPATCH, Oct. 6, 1997, at B1; Jill Abramson & Leslie Wayne, *Democrats Used the State Parties To Bypass Limits*, N.Y. TIMES, Oct. 2, 1997, at A1.

[22] *See* 144 CONG. REC. S933–34 (daily ed. Feb. 24, 1998). The most notorious of such transfers in the 1996 campaign was the Republican Party's gift of $4.6 million to Americans for Tax Reform to pay for direct mail and phone bank activities in the last weeks before the election. *See, e.g.*, Charles Babcock, *Anti-Tax Group Got Big Boost From RNC as Election Neared*, WASH. POST, Dec. 10, 1996, at A4.

[23] 424 U.S. 1 (1976) (per curiam).

[24] Letter from the Brennan Ctr. for Justice to Sens. John McCain and Russell Feingold (Sept. 22, 1997) (*reprinted in* CONG. REC. at S10104 (daily ed. Sept. 29, 1997)) (hereinafter "Brennan Center Letter").

[25] *See* 424 U.S. at 23–35; 2 U.S.C. § 441a (a)(1)(A) (1994).

[26] *See* 424 U.S. at 26–27. The Court noted:

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing exam-

This is exactly what is happening with soft money. In recent years, both political parties have collected soft money contributions and used them to benefit federal candidates.[27] The McCain-Feingold bill would enforce the law's current restrictions on the size and sources of contributions that the parties can accept. The suggestion that closing the soft money loophole that currently allows prohibited money to make its way back into the system violates a constitutional right is simply wrong.

As the 126 constitutional scholars stated in their letter:

> [S]oft money has become an end run around the campaign contribution limits, creating a corrupt system in which monied interests appear to buy access to, and inappropriate influence with, elected officials . . . . The soft money loophole has raised the specter of corruption stemming from large contributions (and those from prohibited sources) that led Congress to enact the federal contribution limits in the first place . . . . [C]losing the loophole for soft money contributions is in line with the longstanding and constitutional ban on corporate and union contributions in federal elections and with limits on the size of individuals' contributions to amounts that are not corrupting.[28]

The current campaign finance system is corrupting our democratic process. Lawmakers solicit contributions by promising special access or threatening to cut off access. The great majority of the American people, unable to make large donations, are angry and frustrated at the belief they are being excluded from their own political system.[29] Voter turnout in the last presidential

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> ples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

Id. at 26–27 (citation omitted). The scandals of the 1996 election, perhaps best symbolized by Roger Tamraz, who gave hundreds of thousands of dollars in soft money to the Democratic National Committee hoping to obtain the Clinton administration's support for an oil pipeline deal, demonstrate that the problem still exists. *See* David Rosenbaum, *Oilman Says He Paid for Access By Giving Democrats $300,000*, N.Y. TIMES, Sept. 19, 1997, at A1; Marc Lacey & Robert Jackson, *Financier Says Donations Opened White House Doors*, L.A. TIMES, Sept. 19, 1997, at A1.

[27] The Annenberg Public Policy Center estimates that the Democratic National Committee spent $44 million and the Republican National Committee $24 million on so-called issue ads supporting President Clinton and Bob Dole in the last election. A significant portion of these expenditures came from the parties' soft money funds. *See* Deborah Beck et al., Annenberg Public Policy Ctr., *Issue Advocacy Advertising During the 1996 Campaign* 34, 55 (visited Apr. 27, 1998) <http://www.asc.upenn.edu/appc/reports/rep16.pdf>; *see also* Abramson and Wayne, *supra* note 21.

[28] *See* Brennan Center Letter, *supra* note 24.

[29] Public opinion polls have consistently shown that the public wants reform of the current campaign finance system. For example, in a Gallup/*USA Today*/*CNN* poll conducted between October 3 and October 5, 1997, 77% of the respondents agreed

election hit its lowest level in seventy-two years.[30] We must not ignore these warning signs about the health of our democracy.

CONCLUSION

While it is not the only problem that reformers must address, soft money is the hard core of the current campaign funding scandal. It is imperative that we work to limit the influence of money on the process of making public policy, and banning soft money is the first step.

Unfortunately, even taking this one simple step for reform has not been easy in the United States Senate. In late February, we were unable to muster the necessary sixty votes on the Senate floor to break a threatened filibuster, so, despite having majority support, McCain-Feingold did not pass.[31] But a minority cannot prevail indefinitely. In the end, the American people will decide if they want a representative democracy or a corporate democracy, and the Congress will heed their wish. I am confident they will choose the right course.

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with the statement, "Elected officials [are] influenced mostly by pressure from campaign contributors." Fifty-nine percent agreed with the statement, "Elections [are] for sale to whoever can raise the most money." Fifty-nine percent also said they believed that, no matter how the law reads, special interests will "always find a way to maintain power." Fifty-six percent said the most important goal of campaign finance reform is "protecting government from influence by contributors." *See* Tom Squiteri, *Thompson Challenges President, Calls on Clinton to 'Step Up To the Plate,'* USA TODAY, Oct. 8, 1997, at A6.

In a *Los Angeles Times* poll conducted between September 6 and September 9, 1997, 63% of the respondents said the campaign finance system needs either "a fundamental overhaul" or "major improvements." Seventy-three percent believed both major political parties were guilty of fundraising abuses. Seventy-nine percent believed that limiting the role of soft money should be a goal of reform. *See* Jonathan Peterson, *The* Times *Poll: Clinton Retains High Job Rating; Gore Image Hurt*, L.A. TIMES, Sept. 12, 1997, at A1.

[30] *See* Curtis Gans, *Voter Malaise Hobbles the Nation*, NEWSDAY, Nov. 11, 1996 at A33 (reporting the Committee for the Study of the American Electorate's finding that voter turnout dropped in the 1996 elections to 48.8 % of eligible voters). *See generally* FEDERAL ELECTION COMMISSION, *About Elections & Voting* (visited Apr. 14, 1998) <http://www.fec.gov/pages/electpg.htm> (indexing FEC voter turnout information).

[31] A motion to invoke cloture and end debate on McCain-Feingold, which required 60 "aye" votes, failed by a margin of 51-48. *See* 144 CONG. REC. S1045 (daily ed. Feb. 26, 1998).

ARTICLE

RETHINKING THE STRUCTURES OF DECISIONMAKING IN THE FEDERAL BUDGET PROCESS

ELIZABETH GARRETT*

In this Article, Professor Garrett argues that it is time to reconsider and, perhaps, restructure the federal budget process. After reviewing the current system and another option, functional budgeting, the author concludes that a functional approach might make the budget process more transparent to voters and produce better outcomes. Professor Garrett then considers the Budget Process Reform Act and finds that it does not propose reform that would make a real impact on budget decisionmaking. Specifically, the author notes that the Act does not require Congress to consider tax subsidies in its allocations and does not alter the current jurisdictional divisions of the relevant congressional committees.

The federal government's budget decisions inevitably involve trading the demands of some groups against those of others. Congressionally established budget rules define the scope of these tradeoffs. They help determine which issues are most salient to lawmakers, and they can make budget outcomes and the decisionmaking process more transparent to the electorate. As the fiscal environment changes from one where participants have been preoccupied with a budget deficit to one where lawmakers are debating how to use a small budget surplus,[1] the time may

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[1] *See* OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1999, at 30 (1998) (showing move from deficit to surplus beginning in fiscal year 1999). *See also* Philip G. Joyce, *Congressional Budget Reform: The Unanticipated Implications for Federal Policy Making*, 56 PUB. ADMIN. REV. 317, 324 (1996) ("Someday, the problem of large federal deficits may be behind us. At that point, it will be worth reconsidering what we have done to the budget process and evaluating whether the procedures established under the 1974 act were fundamentally correct and should be reestablished."). The "surplus" is an artifact of the cash-flow measurements used to determine budget figures. If one considers the unfunded liabilities of the federal retirement programs, loan guarantees, and bank deposit insurance, the government faces greater financial commitments than it has resources to meet. *See* Ben Wildavsky, *Looming Liabilities*, NAT'L J., Jan. 17, 1998, at 102.

be ripe to rethink, and perhaps restructure, this mechanical foundation for congressional budgeting.[2]

The current procedural framework divides the budget into two parts: (1) discretionary spending programs, federal programs that are funded periodically (often annually) by the appropriations committees; and (2) tax provisions and entitlement programs, spending programs that usually remain in effect until they are repealed. Tradeoffs among groups competing for federal programs must be made within the boundaries of these two broadly defined domains, or budget packages.[3] In Part I of this Article, I describe the current system in order to provide a foundation for analyzing a different way to structure the process. After exploring the characteristics of the current system and its rather ad hoc development over time, we can better understand the need for more comprehensive and integrated reform and identify some of the institutional obstacles it faces.

Although the current structure arose largely as a matter of happenstance, most reform proposals leave the budget packages intact and merely change the procedures that enforce spending restraints in each. One recent budget reform proposal, however, the Budget Process Reform Act,[4] includes provisions that could fundamentally restructure the arenas of budget decisionmaking.

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[2] The phrase "mechanical foundation for budgeting" comes from the question posed over 50 years ago by V.O. Key: "[T]he absorption of energies in the establishment of the mechanical foundation for budgeting has diverted attention from the basic budgeting problem . . . , namely: On what basis shall it be decided to allocate x dollars to activity A instead of activity B." V.O. Key, Jr., *The Lack of a Budgetary Theory*, 34 AM. POL. SCI. REV. 1137, 1138 (1940). According to Key, the mechanical foundation for budgeting concerns issues such as "the organization and procedure for budget preparation, the forms for the submission of requests for funds, [and] the form of the budget document itself . . . ." *Id.* at 1137. At the time Key wrote, these issues were left largely to the Executive Branch; the imposition of a comprehensive congressional budget framework has moved them into the Legislative Branch as well. I have argued elsewhere that our efforts are best spent understanding, describing, and changing the mechanical foundation for budgeting because the underlying allocative decisions will defy our attempts to develop a comprehensive theory of budgeting. *See* Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501 (1998). *See also* DONALD F. KETTL, DEFICIT POLITICS: POLITICAL BUDGETING IN ITS INSTITUTIONAL AND HISTORIC CONTEXT 91 (1992) ("The basic problem that Key asked continues to go without an adequate answer. It can never be answered with purely analytical weapons because his question is fundamentally political, in the best sense of the word. The question can be answered only through the political process because it is, at its core, a political one.").

[3] Naomi Caiden coined the term "budget packages" in *The New Rules of the Federal Budget Game*, 44 PUB. ADMIN. REV. 109, 112 (1984).

[4] H.R. 1372, 105th Cong. (1997) (introduced by Rep. Christopher Cox (R-Cal.)). This proposal contains several other budget process reforms, but in this Article, I focus only on the change in the composition of the budget packages.

Under the Act, Congress would set budget policy and make tradeoffs in packages that correspond to budget functions, classifications of resources organized according to the missions or objectives of the federal government.[5] This sort of functional analysis is not now an important part of federal budgeting, although some budget documents include functional presentations of spending programs and proposals.

Using such a functional approach, lawmakers would first develop general categories describing major governmental missions or national objectives. They would then decide, based on a determination of the country's relative priorities, how much to allot to each function (perhaps within an overall limitation on spending). Finally, they would choose the particular ways in which the allocated resources would be delivered to beneficiaries, through tax expenditures, entitlement programs, or annually appropriated spending.[6] In other words, lawmakers would consider in one package all agriculture programs, for example, rather than considering some agriculture spending programs during the annual appropriations process and others, which take the form of tax subsidies and entitlement programs, in an entirely different package (governed by different rules and committees). Currently, with budgeting organized in two large arenas, lawmakers make tradeoffs between agriculture programs and completely unrelated programs, instead of concentrating on the best way to achieve political goals in a particular area.

Budget decisions must be structured so they are manageable,[7] and the structure that lawmakers adopt will affect both the shape

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[5] *See* ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 211 (1995) (defining budget function as "[a] classification of budgetary resources (budget authority, outlays, direct loans, loan guarantees, and tax expenditures) in terms of the principal purposes they serve"). Budget authority is the authority for federal agencies to enter into obligations that will result, either immediately or in the future, in budget outlays. Agencies cannot make outlays (actual expenditures) without first receiving budget authority. Budget authority in one fiscal year may result in outlays many years in the future if the obligation that arises is a long-term one (for example, construction of a building or of a weapons system). Thus, outlays in any one year can be traced to budget authority provided in many prior fiscal years as well as the current one.

[6] *See* Lester M. Salamon, *The Changing Tools of Government Action: An Overview*, *in* BEYOND PRIVATIZATION: THE TOOLS OF GOVERNMENT ACTION 3, 4 (Lester M. Salamon ed., 1989) (noting that federal programs are implemented through a variety of tools, not many of which appear as appropriations in budget documents).

[7] *See* Allen Schick, *Incremental Budgeting in a Decremental Age*, 16 POL'Y SCI. 1, 3 (1983) ("Incrementalism says more about what budgeting is not—and cannot be—than about what budgeting is. It asserts that budget makers cannot reexamine every item in the budget every year. They cannot pit all programs against one another in a competition for scarce funds. They cannot canvass all the options that might merit

and the size of the budget. One can think of potential budget packages as falling along a spectrum. At one end, legislators could eschew packages entirely and budget comprehensively, assessing the marginal value of each program and comparing it with all others. In the real world, this sort of bottom-up analysis is impractical and defies the "bounded rationality"[8] of policymakers. At the other end of the spectrum lies macrobudgeting, where policymakers work from the top-down by specifying large objectives for spending and revenues without reference to program design.

In between these two extremes lie numerous other frameworks; in each, the budget structure would be developed so that "a few broad sets of 'similar' programs [would] all [be] treated identically in terms of budgetary decisions."[9] The frameworks differ in which similarities they emphasize in structuring budget packages. Along the spectrum, for example, can be found the current structure, which packages programs according to the form of spending. Programs funded through annual appropriations bills are considered in one package, and tax subsidies and other programs not subject to periodic appropriations are placed in the other package. Functional budgeting, where the relevant similarity among programs is their relation to a particular governmental mission, also falls between the extremes. In both, macrobudgetary objectives are set before particular programs receive appropriations, but some details of programs are discussed as objectives are determined. Thus, the specifics inform, in a nonbinding way, the more abstract decisions.

In Part II, I discuss several factors relevant to shaping an effective structure for congressional budget decisions,[10] includ-

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consideration."). *See also* PAUL DIESING, REASON IN SOCIETY 198 (1962) ("Political rationality is the fundamental kind of reason, because it deals with the preservation and improvement of decision structures, and decision structures are the source of all decisions. Unless a decision structure exists, no reasoning and no decisions are possible.").

[8] *See* HERBERT SIMON, MODELS OF MAN 199 (1975) (defining bounded rationality as the concept that humans are "limited in knowledge, foresight, skill and time"). *See also* Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79, 80 (1959) (Comprehensive decisionmaking "assumes intellectual capacities and sources of information that [people] simply do not possess, and it is even more absurd as an approach to policy when the time and money that can be allocated to a policy problem is limited, as is always the case.").

[9] Eric A. Hanushek, *Formula Budgeting: The Economics and Analytics of Fiscal Policy under Rules*, 6 J. OF POL'Y ANALYSIS & MGMT. 3, 7 (1986).

[10] This Article focuses almost exclusively on congressional budgeting; I do not explore the important, and related, question of the Executive Branch's role in federal

ing the nature of interest group activity, political accountability, and the role of the budget structure in producing information about spending priorities. After analyzing these factors with respect to the current system and a functional approach, I suggest that a functional organization might allow legislators to make better-informed decisions and to reach desired outcomes in a more transparent way.

Finally, in Part III, I return to the Budget Process Reform Act and assess whether it would implement the kind of functional analysis that could improve decisionmaking. Although adoption of the Act would move Congress closer to using functional packages, it falls short of real reform. Most importantly, the Act would not require Congress to consider all budget resources, including tax subsidies, when allocating money within the categories. It would also leave intact the current jurisdictional divisions among the relevant congressional committees, which would undermine lawmakers' ability to engage in real functional analysis. Although radical change of jurisdictional boundaries might be politically impossible, consideration of these issues is an important part of any restructuring proposal.

I. THE BIFURCATED NATURE OF MODERN FEDERAL BUDGETING

Congress began to construct the procedural framework that guides modern budget decisions when federal budgeting became an unusually acrimonious and partisan process in the late 1960s and early 1970s. Allen Schick has labeled this period the "seven-year budget war,"[11] and it culminated in President Nixon's unprecedented use of policy impoundments to block the expenditure of funds for Congress's high priority projects.[12] Conflicts among those

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budgeting. Certainly, a decision to adopt a functional structure for congressional budgeting would affect the Executive Branch significantly and might require substantial reorganization of agency jurisdiction. *See, e.g.*, GENERAL ACCOUNTING OFFICE, TAX POLICY: TAX EXPENDITURES DESERVE MORE SCRUTINY 90–93 (1994) (discussing organizational impediments to more integrated review of spending programs by agencies and the Office of Management and Budget).

[11] ALLEN SCHICK, CONGRESS AND MONEY: BUDGETING, SPENDING AND TAXING 17 (1980).

[12] *See* LOUIS FISHER, PRESIDENTIAL SPENDING POWER 158–60 (1975); Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO L.J. 1549 (1974). An impoundment is "[a]n action or inaction by a government officer or employee that precludes the obligation or expenditure of budget authority." SCHICK, *supra* note 5, at 211.

competing for federal benefits resulted in greater and more apparent political strife as the crisis of the federal budget deficit, combined with several years of slow economic growth and the reduction in revenue caused by the indexation of tax brackets and entitlement programs, brought pressure to bear on budget decisions.[13] Not only was no additional increment available for new spending,[14] but Congress also had to reduce current spending levels to meet deficit targets.

A. *The Development of the Current System*

Reformers proposed various ways to deal with an era of decremental budgeting. For example, some budget analysts advocated reforms like zero-based budgeting ("ZBB") or planning, programming, and budgeting systems analysis ("PPBS"). Supporters characterize these systems as more rational than incremental approaches because they are more comprehensive and

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[13] *See* Charles H. Levine & James A. Thurber, *Reagan and the Intergovernmental Lobby: Iron Triangles, Cozy Subsystems, and Political Conflict*, *in* INTEREST GROUP POLITICS 202, 216–17 (Allan J. Cigler and Burdett A. Loomis eds., 1986); SCHICK, *supra* note 11, at 24–25. *See also* Hanushek, *supra* note 9, at 7 ("[M]ore importantly, *large, nonincremental cuts*, those apparently called for by the size of the aggregate deficits [in the mid-1980s], require different modes of decision making.").

[14] *See* SCHICK, *supra* note 11, at 23 (discussing the "lost increment"). Until this time, the most influential theory of budgeting was that of incrementalism. "[I]ncrementalism is a process in which budgetary bases (i.e., previous expenditures) are accepted . . . , [but] budgeting is a stable process in which individual allocative decisions are sufficiently independent of one another so that tradeoffs are only implicit, and conflict is thereby minimized." William D. Berry, *The Confusing Case of Budgetary Incrementalism: Too Many Meanings for a Single Concept*, 52 J. OF POL. 167, 171–72 (1990) (quoting John R. Gist, *"Stability" and "Competition" in Budgetary Theory*, 76 AM. POL. SCI. REV. 859, 859 (1982)). The primary exponent of incrementalism in the budget context was Aaron Wildavsky, who published, among other things, three editions of THE POLITICS OF THE BUDGETARY PROCESS and three editions of THE NEW POLITICS OF THE BUDGETARY PROCESS (the last published posthumously with Naomi Caiden). Such a perspective was easier to maintain when federal budgets seemed to be continually increasing. The major decisions concerned how to spend the additional budget resources (over those required to maintain services currently offered, taking account of inflation), and advocates of new or expanded federal programs adopted a variety of techniques to ensure that they received their "fair share." AARON WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS 16–32 (2d ed. 1974). Some argued that incrementalism was not accurate descriptively and might not be normatively desirable. *See, e.g.*, Gist, *supra*; Mark S. Kamlet & David C. Mowery, *Influences on Executive and Congressional Budgetary Priorities, 1955–1981*, 81 AM. POL. SCI. REV. 155 (1987); ROY T. MEYERS, STRATEGIC BUDGETING 1–16 (1994). The salience of the budget deficit and the disappearance of the increment further undermined the theory. Indeed, in his later writings, even Wildavsky referred to incrementalism as "classical budgeting," indicating the increased influence of different approaches and the changing environment of budgeting. *See* AARON WILDAVKSY, THE NEW POLITICS OF THE BUDGETARY PROCESS 70 (1988).

depend on nonpolitical assessments. Under ideal versions of these systems, budgeting starts anew each year, with the government specifying and ranking objectives and then comparing all the possible means of achieving the objectives so that the most effective and cost-efficient program can be chosen.[15] Policymakers do not accept the base of expenditures from the previous years as a starting point; rather, the base is zero and "any increases over past funding [are] won in an analytical competition with other proposals."[16]

Despite their obvious appeal, these budget processes challenge human limitations, requiring lawmakers to consider vast numbers of factors in designing programs and allocating resources to them. In theory, legislators must pit all parts of the budget against all others at the same time.[17] Realistically, budget decisions have to be structured, and the arenas of conflict limited in scope, to allow lawmakers to make decisions in a timely fashion. As Aaron Wildavsky explained in his critique of comprehensive approaches, "Commands like 'decide everything according to the intrinsic merits,' 'consider everything relevant,' 'base your decision on complete understanding,' are simply not helpful; they do not exclude anything; they do not point to operations that can be performed to arrive at a decision as do the aids to calculation."[18] Indeed, none of the comprehensive or rational theories of budgeting has been adopted on a widespread basis,

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[15] *See* AARON WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS 181–221 (3d ed. 1979) (describing the strategies in theory, and as practically implemented, and criticizing them); Lindblom, *supra* note 8, at 81 (arguing that budget analysis can never be rational (in the sense of comprehensive) and advocating analysis based on "successive limited comparisons"); CHARLES E. LINDBLOM, THE POLICY-MAKING PROCESS 13 (1968) (describing "a classical model of rational decision"). *See also* John F. Padgett, *Bounded Rationality in Budgetary Research*, 74 AM. POL. SCI. REV. 354 (1980); Allen Schick, *The Road to PPB: The Stages of Budget Reform*, 26 PUB. ADMIN. REV. 243 (1966).

[16] KETTL, *supra* note 2, at 81–82 (discussing perhaps the most straightforward attack on incrementalism, ZBB).

[17] *See* HOWARD E. SHUMAN, POLITICS AND THE BUDGET: THE STRUGGLE BETWEEN THE PRESIDENT AND THE CONGRESS 47–48 (3d ed. 1992) (explaining why no agency continues to use PPBS or ZBB); KETTL, *supra* note 2, at 77 (stating that "[t]he bright hopes of PPBS were soon tarnished, however. In the civilian agencies, the planning burdens soon overwhelmed the system," but noting that some defense budgeting is a modified form of PPBS and the five-year perspective of congressional budgeting is an outgrowth of PPBS); *id.* at 83 (with respect to ZBB, "[j]ustifying all programs from the bottom up each year thus is simply impossible—analytically, legally, or politically . . . . Therefore, instead of budgeting from a zero base, ZBB in practice means analyzing options at the margins of existing programs.").

[18] WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (2d ed. 1974), *supra* note 14, at 148.

although some agencies continue to use aspects of them to allocate funds or to manage their human and physical resources.[19] In addition, one can hear echoes of these budgeting strategies in the performance objectives and management techniques that the Executive Branch has adopted as part of the National Performance Review effort led by Vice President Gore.[20]

Realizing the impracticability of these ambitious proposals, congressional leaders decided they needed a budget structure that would limit the universe of options that they must consider in constructing the federal budget. They also wanted to coordinate the unwieldy legislative process so that they could better respond to Executive Branch proposals. For decades, Congress had developed its budget in a highly decentralized fashion so that lawmakers and voters had difficulty both developing an accurate picture of the magnitude of spending that resulted and controlling individual decisions so that they accorded with larger spending objectives.[21] Not only were the Appropriations Committees fragmented into various subcommittees that were at best weakly controlled by a central authority, but many other committees oversaw the financing decisions for a number of direct spending (more commonly called entitlement) programs.[22] The House Ways and Means Committee and the Senate Finance Committee often determined tax policy without seriously considering the spending side of the budget, except with respect to the large entitlement programs within their jurisdictions. Such decentralization may have been suited to (or at least not incompatible with) incremental decisions of how to apportion additional funds to new and existing programs,[23] but it was not conducive to the

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[19] *See* KETTL, *supra* note 2, at 87 (discussing the very limited success of "attempts to rationalize the budgetary process").

[20] *See* OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1999, at 33–47 (1998) (describing efforts to improve government performance through better management). *See also id.* at 44 (describing "budgeting for results" (using strategic plans and performance measures to make allocational decisions) and listing structural difficulties facing those who use such an approach).

[21] *See* Philip G. Joyce & Robert D. Reischauer, *Deficit Budgeting: The Federal Budget Process and Budget Reform*, 29 HARV. J. ON LEGIS. 429, 431 (1992); JOHN B. GILMOUR, RECONCILABLE DIFFERENCES?: CONGRESS, THE BUDGET PROCESS, AND THE DEFICIT 20 (1990) (describing the effect of committee fragmentation on budget policy).

[22] Direct spending is any spending pursuant to a binding legal obligation to pay, including, for example, interest on the national debt. Direct spending is also called mandatory spending. Entitlement spending is by far the largest component of direct spending. Because entitlement programs escape the jurisdiction of the appropriations committees, they are sometimes referred to as "backdoor" spending programs.

[23] *See* WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (2d ed., 1974), *supra* note 14, at 59 ("Budgets are made in fragments. Each subcommittee, and sometimes

retrenchment demanded by deficit politics. Moreover, basic collective action problems meant that Congress could not credibly promise to enforce decisions to limit spending to certain levels.[24]

Nevertheless, Congress could have adopted a simpler structure for decremental budgeting than the one imposed by the modern budget process, first put in place by the Congressional Budget and Impoundment Control Act of 1974.[25] One simple structure that lawmakers could have implemented, for example, is pro rata reductions in spending to meet established targets.[26] Such a structure could de-emphasize conflict among interest groups if applied uniformly, because all of the beneficiaries would suffer equally.

This strategy, however, is easily criticized, because it would accept the current relative allocations as the starting points for budgeting. The greater scrutiny of federal spending engendered by shrinking budgets led most to conclude that the original positions were not optimal and should not be retained, even in shrunken form.[27] Additionally, pro rata reductions might not pro-

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specialists within these bodies, operates as a largely autonomous unit concerned only with a limited area of the budget.").

[24] *See* John F. Cogan, *The Dispersion of Spending Authority and Federal Budget Deficits*, *in* THE BUDGET PUZZLE: UNDERSTANDING FEDERAL SPENDING 26–27 (John F. Cogan et al. eds., 1994); Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1133 (1997). *See also infra* text accompanying notes 69–70 (further explaining this collective action problem).

[25] Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified at 2 U.S.C. § 601 (1994)).

[26] Another simple, and rather arbitrary, system would be to select by lottery programs to be cut (or to select randomly programs eligible for a pro rata reduction). One could perhaps justify this approach by its incentive effects if it was triggered only when Congress failed to meet spending limits. The specter of random federal resource allocation might be so distasteful to interest groups, constituents, and lawmakers that they would face up to difficult budget choices to avoid meeting budget targets through such a default method. A similar rationale supported the Gramm-Rudman-Hollings Act's pro rata sequestration, although in practice its incentive effects were quite different. *See* Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593, 656–57 (1988). It seems unlikely that Congress would implement such a random selection process without numerous exceptions and political compromises, but further analysis of the proposal and randomness in the current system may be warranted. I appreciate Nick Zeppos' comments on this issue. *Cf.* Neal E. Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. L. REV. 1605, 1627 n.105 (1997) (crediting Jerry Mashaw with the insight that the Line Item Veto Act might act as a lottery whereby lawmakers, "rather than internalize the cost of budget cutting, would take their chances with the President").

[27] *See* Hanushek, *supra* note 9, at 8 (the appeal of pro rata reductions is premised on "an equity built upon the status quo"). *But see* WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (2d ed. 1974), *supra* note 14, at 148–49 (presenting a qualified defense of the "meat-axe" approach, at least as compared to more comprehensive strategies).

duce the ideal allocation of funds. Uniform reductions in ten good programs might leave ten mediocre programs; maintaining a degree of excellence in at least some of the programs might instead require those to be funded at current levels and others to be eliminated.

Finally, a strategy of uniform budget reductions would be difficult to apply to some kinds of federal spending. For example, it might be problematic to reduce by a uniform percentage the benefits of all tax subsidies, which are self-executing programs claimed by beneficiaries on their tax returns. Tax forms could perhaps require taxpayers to reduce their claimed deduction or credit by some amount, but this solution could increase tax complexity and might not yield enough revenue if fewer taxpayers than expected qualified for the tax subsidies. Applying a uniform reduction to tax subsidies that take the form of exclusions from income would present an even greater challenge. Nonetheless, lawmakers would have to address such technical problems because if they applied a pro rata reduction to some federal programs and not others, only a moderate amount of legislative sophistication would be required to craft new programs so that they would be left untouched by such reductions. For example, under the Gramm-Rudman-Hollings Act[28] regime, where spending discipline applied most rigorously to discretionary programs, interest groups turned their attention to tax expenditures or worked to construct programs funded by user fees, which would not count against the deficit caps.[29]

The modern congressional budget process includes an element of this pro rata approach in its use of sequesters (uniform reductions in federal programs, projects, and activities) to enforce spending targets and other spending constraints. Its relegation to a strategy of last resort, however, suggests that Congress does not believe it to be the best way to make budget tradeoffs. In addition, Congress's decision to exempt a number of federal programs from sequesters indicates that, in its view, not all

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[28] Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038, (codified as amended at 2 U.S.C. §§ 900–908, 922 (1994)) [hereinafter Gramm-Rudman-Hollings].

[29] *See, e.g.*, John F. Cogan & Timothy J. Muris, *Changes In Discretionary Domestic Spending During the Reagan Years*, *in* THE BUDGET PUZZLE: UNDERSTANDING FEDERAL SPENDING, *supra* note 24, at 79, 81 ("The availability of means of financing programs other than direct appropriations, such as receipts from user fees, transfers from entitlement programs, and limitations on obligations, can increase program size without affecting budget authority and outlays.").

programs are of the same marginal value.[30] Thus, Social Security benefits are absolutely protected from any sequestration because they are more politically important than, for example, agricultural subsides that are not similarly protected. Obligated commitments of the United States are also not subject to a sequester, perhaps because they are less amenable to curtailment without serious financial ramifications than are authorized, but unobligated amounts. Other exclusions from a sequester's coverage, such as the exemption for tax expenditures, are no doubt based on a mix of political considerations (as some in Congress do not equate tax subsidies with other kinds of federal spending[31]) and practical concerns of administrability. Further, the mechanics of sequestration allow administrators a degree of flexibility below the "program, project, and activity" level in meeting the mandatory cuts so that some items of spending can be eliminated entirely in order to leave other, more favored spending relatively unscathed.[32]

B. *Dividing the Budget into Two Packages: Discretionary Programs and Tax and Entitlement Legislation*

1. A Description of the Current System

Rather than a comprehensive process that ignores the bounded rationality of lawmakers or an automatic process that eliminates the need to reassess priorities, lawmakers have adopted a budget process that divides decisions into very large arenas of conflict.

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[30] *See* Stith, *supra* note 26, at 631 (noting that defense and discretionary spending programs were treated differently by Gramm-Rudman-Hollings, indicating that the programs were not relevantly comparable); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION 84 (1991) (noting that Gramm-Rudman-Hollings "contained several very discriminate loopholes); CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1992–1996, at 51–52 (1991) (describing exemptions under the sequester that enforces spending controls relating to entitlement programs and tax subsidies); S. REP. 104-70, at 18–20 (1996) (describing exemptions from sequesters).

[31] *See* Garrett, *supra* note 2, at 564; Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1171 (1988) (arguing that many members of Congress see repealing a tax expenditure as a tax increase, not a spending reduction); Theodore J. Eismeier, *The Power Not to Tax: A Search for Effective Controls*, 1 J. POL'Y ANALYSIS & MGMT. 333, 341–42 (1982) ("Nor do many in Congress share the view that, in principle, tax expenditure provisions are the equivalent of direct expenditures."). *See infra* text accompanying notes 125–127.

[32] *See* Stith, *supra* note 26, at 631–32, 645–46 (discussing significance of applying pro rata reductions at level of "program, project, and activity").

Budgeters set macrobudgetary spending or revenue goals for these packages and then make tradeoffs among the programs within the budget packages. In short, the budget is split into two arenas: discretionary spending programs that receive periodic, usually annual, appropriations, and direct spending programs and tax provisions that typically remain in effect until repealed.[33]

Discretionary spending is controlled by statutory spending caps that have often been decreased in real terms (and sometimes in nominal terms as well).[34] If spending exceeds the statutory limit, the President is required to enforce the cap by implementing a sequester to reduce the funding for nonexempt programs in that package. In the early part of this decade, discretionary spending was further divided into three segments—domestic, international, and national defense—with separate spending caps and enforcement mechanisms. These particular divisions, or firewalls, expired after fiscal year 1993,[35] but the 1997 budget agreement again divided discretionary programs into defense and non-defense with separate spending caps and enforcement procedures.[36]

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[33] Most budget scholars would place Social Security in a separate third package because it is extraordinarily protected by budget process rules. *See, e.g.*, KETTL, *supra* note 2, at 101–02; Caiden, *supra* note 3, at 113; Joyce, *supra* note 1, at 323. It is theoretically off-budget, although it is shown as part of the unified budget and lawmakers have relied on its surplus to reach a balanced budget. It is protected by the point of order process from any changes that would reduce benefits, and only a supermajority vote can waive the objection in the Senate. *See* Congressional Budget and Impoundment Control Act of 1974 § 301(i), 2 U.S.C. § 632 (1994). *See infra* text accompanying note 40 (describing point of order process). Finally, it is not subject to any sequesters. All this framework is in addition to the nearly invincible political protection the entitlement program enjoys.

[34] *See* OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: ANALYTICAL PERSPECTIVES, FISCAL YEAR 1999, at 215–19 (1998) (historical summary of changes to the discretionary spending limits). There are separate caps on budget authority and outlays, and an excess of either over the cap results in a sequester. The balanced budget agreement reached in 1997 severely constrains discretionary spending; for example, the caps are not adjusted to increase with inflation. *See id.* at 259. *See also* CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1999–2008, at 4 (1998) ("In 1998, the Congress boosted budget authority by more than $17 billion over the 1997 level to accommodate various spending initiatives. However, between now and 2002, the caps on budget authority allow for a maximum increase of only $24 billion. The 2002 total of $551 billion is $52 billion less than the amount of budget authority that would be required to maintain funding at the 1998 level adjusted for inflation.").

[35] *See* STANLEY E. COLLENDER, THE GUIDE TO THE FEDERAL BUDGET FISCAL 1998, at 79 (1997).

[36] *See* OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: ANALYTICAL PERSPECTIVES, FISCAL YEAR 1999, at 259 (1998) (describing division that applies to fiscal years 1998 and 1999 and expires thereafter). There is a minor exception to this statement. Certain programs established by the Violent Crime Control and Law Enforcement Act of 1994 are accounted for under a separate cap that is enforced through a separate sequestration procedure. This firewall will come down

For congressional budgeting purposes, the discretionary package also has subdivisions that correspond to the jurisdiction of the thirteen appropriations subcommittees. Annual budget resolutions[37] allocate discretionary funds to the House and Senate Appropriations Committees, which then make suballocations to their subcommittees. These suballocations are called section 602(b) allocations (the section in the Budget Enforcement Act of 1990 that describes the procedure).[38] The total parceled out to the subcommittees cannot exceed the aggregate amount of discretionary money available in the appropriations process and is limited by spending caps.[39] Unlike the discretionary spending caps, which are enforced through sequesters, the section 602(b) allocations (which are set by congressional rule, not law) are enforced through parliamentary procedure. If an appropriations bill violates the allocations, a lawmaker can prevent its consideration by raising a point of order.[40] In the Senate, this point of order can be waived under section 302(f), but only by a three-fifths vote.

Thus, discretionary programs first compete for limited funds with all other discretionary programs within their category (currently, defense or non-defense), and then all the programs within the jurisdiction of a particular subcommittee compete with all other programs within that subcommittee's purview. New programs receive funding only if they can fit within the spending caps and within the suballocations; they can succeed legislatively only if some previously funded programs receive fewer

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in fiscal year 2001 when Congress will consider all discretionary programs under a single cap. *See id.*

[37] The concurrent resolution on the budget sets forth Congress's macrobudgetary goals for the current fiscal year and the following four fiscal years. For example, it sets spending limits for discretionary programs, determines the amount of revenue that should be raised in taxes each year, and provides for the debt limit. It is a concurrent resolution, so it is not a law and is not signed by the President. Its aggregate totals guide the congressional budget process, however, and are enforced through parliamentary devices.

[38] *See* Pub. L. No. 101-508, Title XIII, 104 Stat. 1388-573 (1990) (codified in scattered sections of 2 U.S.C. (1994)). Before 1990, they were called section 302(b) allocations because the numbering of the relevant sections under Gramm-Rudman-Hollings was somewhat different. The process was the same, however, and some budget documents still use the older term.

[39] *See* OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: ANALYTICAL PERSPECTIVES, FISCAL YEAR 1999, at 231–37 (1998) (setting the discretionary spending limits for fiscal year 1998 and explaining the changes made in the levels of spending allowed).

[40] *See* Garrett, *supra* note 24, at 1161 (contrasting substantive points of order in the budget process with the parliamentary devices used generally to enforce congressional rules).

funds or no money at all. Because of this de facto offset requirement, those seeking federal funds must also adopt the role of funding predator.[41]

The other large budget package consists of revenue provisions and direct spending programs. Most of the programs in this budget package fall within the jurisdiction of the tax writing committees, although other committees have jurisdiction over some entitlement programs. Decisions in the tax/direct spending package are enforced not through spending caps, but through an explicit offset requirement called the pay-as-you-go ("PAYGO") provision. PAYGO requires that "any direct spending and revenue legislation that increases the deficit in any fiscal year . . . must be offset by legislation reducing spending or increasing revenues so that the net deficit is not increased."[42] PAYGO is a deficit control tool, not a way to reduce current levels of spending. PAYGO is thus not triggered if spending for an existing entitlement program increases because more people qualify for benefits or because payments rise automatically to account for a higher cost of living. If higher spending results from the enactment of new entitlement programs or new tax expenditures, however, PAYGO applies. PAYGO is enforced through a sequester; if revenue losses are not fully offset, the Executive Branch must uniformly reduce outlays for certain direct spending programs.[43]

While both sides of the budget are affected by offset requirements, the nature of the competition engendered by the PAYGO requirement is different from the conflict that characterizes the discretionary side of the budget. The caps on annually appropriated discretionary funds mean that advocates of new spending must identify other spending programs that can be repealed or scaled back so there is room for the new programs under the cap. In most cases, the offset process occurs within the jurisdiction of the relevant appropriations subcommittee, which often

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[41] *See* Garrett, *supra* note 2, at 515 ("Offset requirements force those seeking federal benefits to undertake an additional role; not only are they funding seekers, but they must also become funding predators."). *See also* GILMOUR, *supra* note 21, at 167–68 (describing interest group conflict affected by the subcommittee allocations).

[42] EDWARD DAVIS, "PAY-AS-YOU-GO" BUDGET ENFORCEMENT PROCEDURES IN 1992, CONGRESSIONAL RESEARCH SERVICE ORDER CODE IB92055, preface (1993). *See* Gramm-Rudman-Hollings § 252, *supra* note 28, 99 Stat. at 1054. *See also* Garrett, *supra* note 2, at 507–14 (detailing development and operation of PAYGO).

[43] Most entitlement spending, and all tax expenditures, are exempt from a sequester. For example, Social Security, net interest, veterans' compensation and pensions, federal retirement and disability benefits, and the Postal Service are exempt. Medicare is limited to no more than a four percent reduction.

places the competition within a subset of programs related loosely by subject matter. For example, the Appropriations Subcommittee on Agriculture and Rural Development oversees many, but not all, of the programs affecting agriculture (as well as other unrelated programs).[44] Sometimes the universe of unrelated programs available for offsets is quite large; for example, one appropriations subcommittee in each chamber oversees the discretionary spending for the Departments of Commerce, Justice, and State. During the Clinton years, this structure has allowed law enforcement programs to grow at the expense of items in the State Department's budget.[45]

In contrast, groups proposing a new tax subsidy are not limited to finding offsets in a universe of programs that serve largely the same general governmental objective or benefit similar groups. Instead, such proponents can meet PAYGO requirements by eliminating any current tax benefit or entitlement spending. For example, advocates of a new tax deduction for the oil and gas industry compete against all other beneficiaries of tax proposals and entitlements, not only against others seeking funds for the development of energy resources.

2. Justifications for the Current System

Before we assess a new way to package the budget, we should try to ascertain the justifications—political, practical, or both—for the current system. The modern budget structure has developed over the last twenty years in part as a result of an intentional strategy, but in larger part because it was engrafted incrementally on existing congressional institutions. The congressional budget acts did not make many changes in committee jurisdiction primarily because drafters did not have the political clout to take on established committee chairs.[46] The arenas of budget conflict

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[44] The subcommittee also has jurisdiction over programs in the Energy, Income Security, and Commerce functions, among others.

[45] *See* OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: HISTORICAL TABLES, FISCAL YEAR 1999, at 48–49, Table 3.1 (comparing the trends in the functions of International Affairs and Administration of Justice).

[46] *See* SCHICK, *supra* note 11, at 59–60 (noting that the Joint Study Committee "did not even consider the possibility of merging the authorizations and appropriations processes. Whatever disadvantages might derive from an added layer of budget procedures and institutions, the JSC scheme had one overriding virtue: no congressional committee would suffer a loss of its basic jurisdiction."); SCHICK, *supra* note 5, at 71 (noting that Congress "layer[ed] the budget resolution on top of existing authorizations, appropriations, and revenue-raising processes—all of which had been

have thus been determined to a large extent by the already established arenas of legislative power. For example, the tax writing committees did not want to become involved in a competition against the appropriators for scarce funds, and they wanted the flexibility either to use increased tax revenues to expand entitlement spending that they controlled or to reduce such programs to fund a tax cut.[47]

The current division between discretionary programs and direct spending/tax provisions may, however, be justified in a different manner. The current budget packages divide programs in a rough way according to their duration, an important design characteristic in a process that uses offset requirements to enforce spending limits. Any system that requires Congress to match the funding for new spending with a source for that spending contains a temporal element.[48] In other words, the offset must produce a stream of revenue that matches the expenses of the new program during the relevant budget window.

Long-term deficit reduction is unlikely if Congress can enact a new tax subsidy, which is essentially a permanent appropriation, and pay for it by reducing an appropriation effective for only one fiscal year. Although this strategy might be deficit neutral in the first year, the revenue loss from a tax expenditure would

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continued with only minor changes"). *See also* DAVID C. KING, TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION 11 (1997) ("Committee jurisdictions are akin to property rights, and few things in Washington are more closely guarded or as fervently pursued."); *Reconciliation and Enforcement: Hearing on a Midcourse Review of the Budget Enforcement Act before the House Budget Committee, Task Force on the Budget Process*, 102d Cong. (1991) (statement of Robert D. Reischauer, calling protection of jurisdiction "the bread and butter of politics"). *But see* H.R. Res. 6, 104th Cong. § 202 (1995) (expanding the jurisdiction of the House Budget Committee). The Executive Branch had no reason to push for divisions that transgressed committee boundaries because it wanted large categories that would preserve its flexibility to find sources of funding for new programs and to locate proposals within sympathetic committees' jurisdiction. *See generally* HUGH HECLO, *Executive Budget Making*, *in* FEDERAL BUDGET POLICY IN THE 1980S 255, 275, 281 (Gregory B. Mills & John L. Palmer eds., 1984).

[47] *See* G. EUGENE STEUERLE, THE TAX DECADE: HOW TAXES CAME TO DOMINATE THE PUBLIC AGENDA 202 (1992).

[48] Mandatory programs and discretionary programs also have very different outlay or spendout rates (the rates at which budget authority results in actual expenditures). Mandatory programs often have nearly 100% outlay rates as benefits are paid currently. Some discretionary programs have similar rates (such as appropriations for salaries or operating expenses), but others have much slower outlay rates (for example, budget authority that is obligated to build weapons systems or highways will produce outlays over several years). The mismatch in outlay rates can make it difficult to cut the budget authority for existing discretionary programs to provide funds for mandatory outlays. However, the varying range of outlay rates has been a problem for budgeters at least since the adoption of sequesters as an enforcement technique. *See* Stith, *supra* note 26, at 653–54, n.337.

continue indefinitely, while the reduction in spending would be certain for only one year. Moreover, under current conventions for constructing baselines,[49] future revenue loss from the tax subsidy would be incorporated in the next fiscal year's baseline and would not appear as additional spending that Congress would need to account for in future years through PAYGO or some other offset procedure.

Of course, the problem of mismatching is not entirely avoided by the current bifurcated system. For example, PAYGO requires revenue neutrality on a cash-flow basis[50] for five years after enactment, and new tax provisions or entitlement programs can be drafted so that most of the revenue is lost outside the budget window. Proponents can therefore escape some of the discipline of offset requirements.[51] Moreover, it is likely that there is always a mismatch between a new tax or entitlement proposal and its offset. One would not be surprised to find that many new proposals tend to cost more money over time, while many offsets are not strongly supported because they will provide less generous benefits over time. This difference in the benefit stream might not be apparent within a truncated budget window, but it is likely to occur over the long run.

Nevertheless, such timing problems would be exacerbated in two ways absent the current bifurcation of enforcement procedures. First, the temporal disjunction between periodically appropriated discretionary programs and permanently enacted tax subsidies or entitlement programs invites funding predators to

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[49] For a discussion of budget baselines, see Timothy J. Muris, *The Uses and Abuses of Budget Baselines*, *in* THE BUDGET PUZZLE: UNDERSTANDING FEDERAL SPENDING, *supra* note 24, at 41; W. Mark Crain & Nicole Verrier Crain, Fiscal Consequences of Budget Baselines (1996) (unpublished manuscript, on file with author).

[50] In general, federal budgeting uses cash-flow measures, rather than more sophisticated present-value computations. The limited exception is discretionary credit programs, which since 1990 have been displayed in the budget on a net present value basis rather than as federal outlays occur. *See* Federal Credit Reform Act of 1990, Pub. L. 101-508, Title XIII, § 13201(a), 104 Stat. 1388-610, 611 (1990), (codified at 2 U.S.C. § 661 (1994)). The reliance on cash-flow measures leads to timing distortions and has been criticized. *See, e.g.*, Jane G. Gravelle, *Estimating Long-Run Revenue Effects of Tax Law Changes*, 19 EASTERN ECON. J. 481 (1993); DANIEL SHAVIRO, DO DEFICITS MATTER? 104–05 (1997). *See also* Ron Feldman, *How Weak Recognition and Measurement in the Federal Budget Encouraged Costly Policy: The Case of "Supervisory Goodwill,"* PUB. BUDGETING & FIN., Winter 1996, at 31 (describing perverse incentives of cash-flow measure in context of bank failures and workouts).

[51] *See* Garrett, *supra* note 2, at 527–30 (discussing timing gimmicks that are used to manipulate the limited budget window and arguing that such tactics do not eliminate the discipline of PAYGO entirely). In response to this problem, the Senate sometimes lengthens the budget window to ten years; such requirements are enforced only through parliamentary procedure, not through a sequester.

use timing gimmicks in order to evade the discipline of offset requirements. If advocates of tax expenditures could repeal a discretionary program to pay for new the spending, it would be difficult to ensure that the offset would raise money for more than one fiscal year. Further, groups could draft the new tax provision so that it lost very little money in the first year, allowing them to meet offset requirements easily and still receive large benefits after a brief delay.

Second, under current legislative norms, discretionary programs are considered in appropriations bills while tax and entitlement programs are often enacted as part of omnibus budget reconciliation acts. Thus, a discretionary spending offset would be considered in legislation separate from, and usually subsequent to, the legislation containing the revenue losing tax subsidy. Without coordination, Congress could enact the law with the new tax expenditure without necessarily passing the appropriations bill with the offset by the end of the fiscal year. This problem arose in the context of the Unfunded Mandates Reform Act of 1995, a new part of the budget process, and it was solved by making a mandate's effectiveness conditional on enactment of a subsequent appropriations bill that would provide funding.[52] Congress could implement such a look-back procedure here, which would require the enactment of an offset before funds could be released to the new program. Similar procedures could link the duration of the spending provision to the duration of the offset, somewhat ameliorating the temporal disjunction problem.[53]

Although the foregoing analysis provides one principled reason for the bifurcated budget process, the packages actually developed without much thought being given either to this justification or others. Moreover, Congress continues to pay relatively little attention to restructuring the budget packages. Take, for example, one of the most frequently discussed reforms: proposed rules that would place caps on entitlement spending.[54] Such a

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[52] *See* Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.); Garrett, *supra* note 24, at 1157–58 (discussing the Byrd amendment to the Unfunded Mandates Reform Act).

[53] Indeed, given the uncertainty inherent in the estimates of long-range revenue effects, a look-back procedure to adjust laws to accord with experience, which often diverges from projections, could improve outcome-oriented federal budget rules considerably.

[54] *See, e.g.*, BIPARTISAN COMMISSION ON ENTITLEMENT AND TAX REFORM, 104TH CONG., STAFF REFERENCE MATERIALS ON LONG-TERM REFORM OPTIONS 246–47 (1995) (discussing options relating to entitlement caps); THE CSIS STRENGTHENING OF

proposal would retain the current distinction between discretionary and other federal spending, but it would adopt additional enforcement procedures in the latter category that would apply to existing programs rather than concentrating, as PAYGO does, on new legislation. An entitlement cap would limit the amount of outlays for enacted federal entitlements so that spending could grow only by the cost of living, to account for increased numbers of beneficiaries, and perhaps by some small additional amount. If spending for such programs exceeded this limit, either Congress could enact changes in the programs, or a sequester of the offending programs would automatically occur.[55]

It seems possible, however, that different packaging might allow Congress to reach its macrobudgetary goals (for example, to restrain federal spending, if that remains the overriding policy objective) and also to reach better decisions about how to divide the federal pie among particular programs. In the next Section, I will offer several factors that should receive sustained consideration during an effort to reform the structure of budget decisionmaking. So that we may more easily understand the importance of these factors, I will analyze them in the context of a particular budgetary reform, one that would structure budget packages according to function.

AMERICA COMMISSION, FIRST REPORT (1992) (recommending gradually phased-in entitlement cap to apply to all mandatory programs except Social Security); *House Approves Entitlement Target Plan Exempting Social Security Benefits,* DAILY TAX REPORT, July 22, 1994, at G-11 (House passed entitlement cap amendment to the budget acts that would apply to all programs except Social Security). *See also* Budget Enforcement Act of 1997, H.R. 2003, 105th Cong. (1997) (comprehensive reform retaining current divisions and enacting a binding entitlement cap enforced by a sequester). *See generally* GENERAL ACCOUNTING OFFICE, BUDGET POLICY: ISSUES IN CAPPING MANDATORY SPENDING (1994) (canvassing issues raised in adopting and implementing an entitlement cap).

[55] Congress has not enacted a legally binding entitlement cap, but as part of the compromise that led to the adoption of the Omnibus Budget Reconciliation Act of 1993, President Clinton issued an executive order that imposed targets for the growth of mandatory programs and established a nonbinding process to enforce them. *See* Exec. Order No. 12,857, 3 C.F.R. 623 (1993) (setting targets for mandatory spending for fiscal years 1994 through 1997). *See also* OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: ANALYTICAL PERSPECTIVES, FISCAL YEAR 1998, at 241–44 (1997). The executive order, which was accompanied by changes in the House Rules to speed consideration of program changes should the caps be breached, H.R. Res. 235, 103d Cong. (1993), has expired. It was never triggered because entitlement spending did not exceed the targets it established.

II. Considerations in Selecting a Structure for Congressional Budgeting

If we were designing packages to shape budget decisionmaking afresh, many would favor a structure allowing lawmakers, after deliberation, to implement budget policies consistent with the views of a majority of their constituents. Such a procedural framework would thus facilitate decisionmaking in a manner that would not obscure allocative decisions from the view of the electorate. Further, it would be sufficiently flexible to allow changes in policy when appropriate,[56] although it would also promote a degree of stability so that people could plan their futures with reasonable certainty that the law would be relatively durable. In this way, a budget structure could improve the quality of the decisions and could enhance political accountability. A variety of political and policy considerations affect whether a particular structure achieves these goals. Before I list and discuss some of these considerations, let me first describe what I mean by functional budgeting. We can then use that structure when analyzing the relevant factors, rather than trying to understand them as abstract principles removed from real-world decisions.

A budget function is "[a] classification of budgetary resources (budget authority, outlays, direct loans, loan guarantees, and tax expenditures) in terms of the principal purposes they serve."[57] This definition is the broadest; others do not include tax expenditures in the list of budget resources that should be included in each budget function.[58] Susan Irving, the Associate Director for Budget Issues at the General Accounting Office, explains the object of functional analysis:

> The functional structure of the budget resolution was intended to facilitate priority-setting even among related pro-

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[56] *See* Aaron Wildavsky, Speaking Truth to Power: The Art and Craft of Policy Analysis 121 (1979) ("Politics is about preferences. The point about preferences is that they are not ultimately knowable, either by those who profess them or by those who propose to act for those who prefer them . . . . [P]eople reserve the right to change preferences frequently to suit their experience. Ends or objectives, therefore, are held to be provisional—to be modified by experience or to accommodate others.").

[57] Schick, *supra* note 5, at 211.

[58] *See, e.g.*, Shuman, *supra* note 17, at 354 (similar definition but not including tax expenditures). The Congressional Budget Act does not require Congress to include tax expenditures as part of the functional presentation. *See* Congressional Budget and Impoundment Control Act of 1974 § 301(i), 2 U.S.C. § 632 (1974). *See infra* text accompanying notes 123–132 (discussing appropriate treatment of tax expenditures in functional budgeting).

> grams housed in different agencies and different committees. By organizing the budget along "national needs" or mission areas, the budget resolution sought to permit an examination of the totality of federal spending activity in each area—regardless of the committee of jurisdiction or the agency at issue—and to permit priority-setting and trade-offs between missions. Instead of focusing on what each department spent, the Congress and the President were to be able to look across departments at the totality of activity in education and training or income security or transportation.[59]

Under current law, the President must present his budget to Congress using functional categories. Although the President has a great deal of discretion in the way he organizes his budget and the information it contains, he can change the functional categories only after consulting with the congressional appropriations and budget committees.[60] Currently, there are eighteen budget functions (which are further divided into subfunctions): National Defense; International Affairs; General Science, Space, and Technology; Energy; Natural Resources and Environment; Agriculture; Commerce and Housing Credit; Transportation; Community and Regional Development; Education, Training, Employment, and Social Services; Health; Medicare; Income Security; Social Security; Veterans Benefits and Services; Administration of Justice; General Government; and Net Interest.[61] The Executive Branch provides the criteria it uses in establishing the functional categories and in assigning programs to particular functions. For example, "[a] function must be of continuing national importance, and the amounts attributable to it must be significant."[62]

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[59] *Reform of the Budget Process: Hearings Before the Committee on the Budget*, 104th Cong. 9 (1996) (statement of Susan J. Irving, Associate Director of Budget Issues, Accounting, and Information Management Division).

[60] *See* 31 U.S.C. § 1104(c) (1994). *See also* GENERAL ACCOUNTING OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS, EXPOSURE DRAFT, Appendix II (1993). Although functional breakdowns have been required as a matter of law since Congress enacted the Budget and Accounting Act of 1921, functional analysis first appeared in President William Taft's 1912 budget. *See* SHUMAN, *supra* note 17, at 29–30. The President's ability to alter functional categories, after consultation with the relevant committees, is broad; however, Congress instructed in 1992 that Medicare should always be considered a separate function in budget documents. *See* H.R. CONF. REP. NO. 102-529, at 58–60 (1992).

[61] *See* COLLENDER, *supra* note 35, at Appendix D. Social Security is still considered a functional category even though it was taken off-budget in 1990. It is included in the unified budget figures, the totals politicians use, for example, to support claims of a balanced budget. In addition, many lists of budget functions include Allowances and Undistributed Offsetting Receipts, which are adjustments to budget totals.

[62] OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: THE BUDGET SYSTEM AND CONCEPTS, FISCAL YEAR 1999, at 7 (1998).

Budget functions currently have little impact on Executive Branch or congressional budgeting practices. Some presidential budget documents (typically, the relatively political ones) are divided by functions, but the more detailed, technical information in the Budget Appendix is organized by Executive Branch departments and agencies. Indeed, the budget is confusing in part because it presents the same information divided in many different ways: as the President wishes to set forth his agenda, by function, by agency, by appropriations subcommittee, by kind of spending—to name just a few.

Similarly, congressional budgeting relies only slightly on functional categories. The concurrent budget resolution that begins the congressional process must include new budget authority, budget outlays, direct loan obligations, and primary loan guarantee commitments for each major functional category.[63] But, the relevant allocations for congressional budget enforcement purposes are those made to the appropriations committees and subcommittees, and they cut across the functional categories.[64] Statutory limits on spending, enforced through sequesters, do not relate to functional divisions. Without some sort of enforcement mechanism to make the functional information salient to lawmakers and the public, functional analysis tends to be lost in the deluge of information contained in the budget documents and congressional resolutions.

Functional budgeting would structure decisionmaking so that Congress would make tradeoffs only among programs serving a particular governmental mission. The budget process would enforce spending limits for each function, through sequesters, parliamentary rules, or both. This structure could be, but need not be, supplemented by an overall cap on total budget resources. Whether this framework would represent an improvement over the current bifurcated structure or more comprehensive approaches is the question to which we turn next.

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[63] *See* Congressional Budget and Impoundment Control Act of 1974 § 301(a)(4), 2 U.S.C. § 632 (1974).

[64] Interestingly, the Congressional Budget Office's running total of the amounts appropriated for discretionary programs in fiscal year 1998, which is used to enforce section 602(b) allocations, includes information about five functions considered to be priorities. *See* Congressional Budget Office, *CBO's Current Status of Discretionary Appropriations, FY 1998, Addendum* (visited Apr. 9, 1998) <http://www.cbo.gov/showdoc.cfm?index=268&sequence=0&from7#scs> (giving status of discretionary spending in the following five functions: International Affairs; Natural Resources and Environment,; Transportation; Education, Training, Employment and Social Services; and Administration of Justice).

A. *Charting a Middle Course Between Top-Down Approaches and Bottom-Up Perspectives*

One challenge for congressional budgeters has been controlling both macrobudgetary issues, such as the allocation of resources among large federal priorities, and microbudgetary decisions about particular programs and their design. Indeed, many of the features of the modern budget process represent an attempt to focus congressional attention on the larger budget outcomes such as aggregate spending levels, total revenues, and the debt ceiling.[65] Congress now determines all of these numbers in the concurrent budget resolution that sets the stage for the rest of the budget process and operates to constrain microbudgetary choices.

Determining these aggregate figures prior to filling in the details of federal spending can be justified in several ways, particularly when it occurs as part of an outcome-oriented budget procedure. Eric Hanushek has described budget rules as falling into one of two categories: process rules and outcome-oriented rules.[66] Process rules govern the manner in which Congress reaches a decision but have no intended effect on the substance of the decision itself.[67] At least since 1985 and the adoption of Gramm-Rudman-Hollings, many budget rules have instead been outcome-oriented—Congress has intended them to work to reduce the deficit by placing additional hurdles in the way of new spending programs.[68] In the current (but perhaps temporary) en-

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[65] *See* Allen Schick, *Why Study Microbudgeting?*, *in* THE BUDGET PUZZLE: UNDERSTANDING FEDERAL SPENDING, *supra* note 24, at 1, 4–6 (terming this era the "age of macrobudgeting"). *See also* GILMOUR, *supra* note 21, at 19 (describing shift in focus from individual components of the budget to a larger perspective that concentrates on aggregate measures.)

[66] *See* Hanushek, *supra* note 9, at 6.

[67] *See* ALLEN SCHICK, THE CAPACITY TO BUDGET 7 (1990) ("A budget process can be organized to ease or complicate the task of cutback; it can sensitize politicians to the financial implications of their policies or hide the implications from them; it can stimulate or retard expectations of program expansion; it can embolden politicians to seek more tax revenue or discourage them from trying; it can alter the relative strength of claimants for public funds and guardians of the treasury."). *See also* Garrett, *supra* note 2, at 508 (discussing distinction and casting doubt on neutrality of process rules).

[68] Beginning in at least 1981, with the first reconciliation bill passed during the Reagan administration, the procedures of the 1974 Congressional Budget and Impoundment Control Act were used with the purpose of reducing federal spending and taming the federal deficit. *See* Joyce, *supra* note 1, at 319–20. Nonetheless, the 1981 reconciliation process can be characterized as the outcome-oriented use of a neutral system to achieve deficit reduction. At other times, the same procedures were used to increase spending. *See* Louis Fisher, *The Budget Act of 1974: A Further Loss of Spending Control*, *in* CONGRESSIONAL BUDGETING: POLITICS, PROCESS, AND POWER 170 (W.

vironment of cash-flow surpluses, Congress and the public may determine that they no longer favor the outcome of deficit reduction, but it seems likely that some sort of budget framework will still be used to achieve whatever larger allocative outcomes the polity favors.

As long as the rules are designed to favor particular results, Congress must adopt a process that allows it to determine the macrobudgetary objectives before it works on the details of federal spending, and the congressional determination must be relatively binding for the remainder of the budget cycle. Indeed, such a process may be the only possible political strategy when consensus about a particular mix of programs is elusive but there is agreement about larger outcomes and priorities. For example, assume that a majority in Congress, and perhaps in the country, continues to favor reduced federal spending and a balanced federal budget. Further assume that vast disagreement continues to exist about how to achieve that objective. A relatively binding outcome-oriented process can keep lawmakers from continually revisiting the macrobudgeting issue once it has been resolved and allow them to proceed to work out microbudgeting details. This arrangement is particularly important where the threshold decision—here, to reduce federal spending—is one without unanimous support, and the losing coalition seeks repeatedly to overturn it. Even if minority factions do not have sufficient support to prevail, the procedures of Congress, particularly of the Senate, may allow them to cause policy paralysis.[69] A budget procedure that reduces the possibility that some decisions are open for further debate often can reduce the opportunities for gridlock and allow the body to move forward on other issues.[70]

Thomas Wander et al. eds., 1984) (arguing that the Act was used to increase, rather than to restrain, federal spending).

[69] Interestingly, the budget rules change many of the standing rules of the Senate that give such power to minority factions. *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 215–16 (1997).

[70] *See* Pete V. Domenici, *The Gramm-Rudman-Hollings Budget Process: An Act in Legislative Futility?*, 25 HARV. J. ON LEGIS. 537, 542 (1988); Randall Strahan, *Governing in the Post-Liberal Era: Gramm-Rudman-Hollings and the Politics of the Federal Deficit*, 25 HARV. J. ON LEGIS. 593, 604 (1988). *But see* GILMOUR, *supra* note 21, at 229–30 (arguing that such a process may actually increase the likelihood of stalemate with regard to microbudgetary decisions). The durability of the procedures entrenching the overarching decisions can implicate difficult questions of one Congress's ability to constrain the actions of future legislatures. For arguments that cross-temporal entrenchment of statutory outcomes is illegitimate and unconstitutional, see Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1986); Julian Eule, *Temporal Limits on the Legislative*

Some scholars have argued generally in favor of procedures that allow Congress to set larger goals before the precise consequences of its decision can be identified. Michael Fitts uses the budget process as an example of a "partial veil of ignorance" that may facilitate better policy outcomes. He writes:

> [L]ess information can make it easier to reach political agreements and to overcome stalemates because actors with less information may avoid politically contentious issues. While confronting problems normally improves the political process, in some contexts less information can serve to remove intractable problems from the political agenda. For example, many budget problems . . . appear to have resulted from our inability at times to prioritize among issues and to balance confrontation with avoidance in this way . . . . [A]s a normative, ethical matter, vagueness about a group's or an individual's place within the political system can serve to create a real-world veil of ignorance—a state of imperfect information about our own or other groups' place in society that can reduce self-interest in social decisionmaking processes. In this way, vagueness about the political position of different groups can promote public acceptance of and desire for resource distribution, help stimulate a rational dialogue, and even further a political consensus.[71]

In other words, members of the political branch cannot deliberate meaningfully about the larger issues of the appropriate size of the federal government, the aggregate amount of federal spending, and the government's overarching priorities at the same time they try to implement the policies required to meet those objectives. Once interest groups understand how the larger decisions will affect their government benefits, they will work to block or distort any change. Structures that encourage Congress to set macrobudgetary goals first may reduce pernicious interest group activity by obscuring the incidence of specific costs and benefits of decisions that mete out budget resources. Lawmakers thus may be less affected by factional pressure, and they can delib-

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Mandate: Entrenchment and Retroactivity, 1987 AM. B. FOUND. RES. J. 379 (1987); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997).

[71] Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 922–23 (1990). *See also* Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1644 (1988) ("[L]egislation like Gramm-Rudman-Hollings and constitutional amendments seek to transform political motivation without dispersing political responsibility or insulating actors from accountability. Rather, these devices attempt to induce public-regardingness by expanding the time frame of the decisionmakers.").

erate in a way that may result in more public-regarding decisions.[72]

In some cases, a precommitment to an overarching goal may be required because, in its absence, collective action problems will undermine the institution's ability to reach the desired endpoint. For example, without an enforceable precommitment to limit federal spending, members of Congress find themselves in a prisoner's dilemma. No rational member will adhere to the agreement because of the lack of credible assurance that her colleagues will not defect by voting to send greater levels of federal money to their constituents.[73] Such an outcome is the worst one possible for her: federal spending is not reduced, but her constituents receive none of the federal largesse. Thus, while it is true that the budget process does not remove the necessity for Congress to make difficult substantive decisions to allocate the pieces of an increasingly limited federal pie, it can facilitate those decisions and shape the nature of deliberation about them. Once a consensus forms around the larger objective, enforcement procedures can make it relatively binding so that it does not unravel when the more specific decisions bring particular costs and benefits clearly into focus.

The problem with top-down budgeting is that the relevant questions are abstract. How much aggregate federal spending is warranted? How great should the tax burden be? At that level of abstraction, the questions will not yield helpful answers. The macrobudgetary decisions demanded by functional budgeting are somewhat less abstract; they ask lawmakers to set spending levels for a dozen or so general governmental missions rather than for all federal spending. Nonetheless, to determine the appropriate level of spending for agriculture relative to other governmen-

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[72] *See* Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, *supra* note 71, at 967 ("[P]artial veils of ignorance can be created in public decisionmaking through any technique that serves to introduce a structural impediment to a clear identification of the ultimate winners and losers in a public decision."). *See also* Allen Schick, *Government versus Budget Deficits*, *in* DO INSTITUTIONS MATTER? GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD 187, 187–88 (R. Kent Weaver & Bert A. Rockman eds., 1993) ("Curbing budget deficits almost always requires two governmental capabilities . . . : setting and maintaining priorities when policy objectives are in conflict and resources are limited, and imposing costs on concentrated interests.").

[73] *See* Garrett, *supra* note 24, at 1133 (describing the collective action problem); Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 599 (1996). *See also* AARON WILDAVSKY & NAOMI CAIDEN, THE NEW POLITICS OF THE BUDGETARY PROCESS 127 (3d ed. 1997) ("At least since Ulysses and the Sirens, attempting to protect oneself against self-destructive tendencies has been a well-known strategy.").

tal objectives is hardly a concrete inquiry; it is certainly very difficult. At least two aspects of a functional structure suggest, however, that the decisions required at the outset of the process might be manageable.

First, when lawmakers allocate resources among functional classifications, some discussion of particular programs would inevitably occur. Budgeters cannot make intelligent and appropriate top-down decisions without an awareness of the way the government is likely to spend the money to achieve its objectives.[74] Accordingly, in constructing budget packages, it is important to consider the possible interaction between the two kinds of decisions, those affecting macrobudgetary priorities and those at the micro-level. The difference in the decisionmaking is one of emphasis; in setting the aggregate numbers, decisionmakers focus their attention on larger issues of governmental missions, placing less emphasis on the details of the spending programs. The current framework, which demands that lawmakers think about discretionary spending as a whole, may not allow lawmakers to mediate productively between the two levels of budget decisions. In this regard, functional classifications might be broad enough to forestall undesirable interest group activity but specific enough to allow lawmakers to consider appropriate bottom-up considerations.

Surprisingly, the description of functional analysis in the current presidential budget documents can be read as a misunderstanding of this important relationship. The budget drafters write that "[a] function encompasses activities with similar purposes addressing an important national need. The emphasis is on what the Federal Government seeks to accomplish rather than the means of accomplishment, the objects purchased, or the clientele or geographic area served."[75] This statement represents a wise strategy if the drafters mean that larger decisions should be made behind what Fitts calls the partial veil of ignorance so that

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[74] *See* Lindblom, *supra* note 8, at 82. *See also* Herbert Stein, *The Fiscal Revolution in America, Part II: 1964–1994*, *in* FUNDING THE MODERN AMERICAN STATE, 1941–1995, at 194, 201 (W. Elliot Brownlee ed., 1996) (even the current structure that focuses on aggregates is relatively "loose and shifting" as "we are adapting the decision about grand totals to the decisions about specific measures"); GILMOUR, *supra* note 21, at 66–69 (describing the process of moving from agrgegate numbers to particular programs as "iterative budgeting," which involves a conversation between the parts and the whole).

[75] OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: THE BUDGET SYSTEM AND CONCEPTS, FISCAL YEAR 1999, at 6 (1998).

the exact details of programs are left unclear and undecided; it is unrealistic policy if it means functional allocations are made in a vacuum without considering some of the ways resources will be delivered to beneficiaries. As Wildavsky puts it: "A moment's thought should convince anyone that objectives depend on resources, for what one might do depends in part on the resources one has for achieving goals."[76]

Second, functional categories could be narrowed further to reduce abstraction. With the exception of Medicare,[77] the functional categories are not determined by law. Instead, they develop over time through a dialogue between the Executive Branch and congressional appropriators. Since 1976, there have been several changes in the classification scheme. Among other alterations in the categories, the Natural Resources and Environment function was separated from the Energy function, the Commerce and Housing Credit function was spun off from the Transportation function, and other functions have been abolished and the programs under them reassigned.[78] Many of the functions that budgeters use today set objectives at a high level of generality. The function of Income Security comprises such disparate programs as welfare and other poverty programs, retirement and pension programs for federal workers, military retirement benefits, and the railroad retirement fund.

Resolving the tension between avoiding meaningless abstraction and maintaining the partial veil of ignorance that obscures the precise effects of decisions on particular beneficiary groups might lead decisionmakers to adopt a greater number of narrower classifications than the handful currently used. Perhaps, during the macrobudgetary stage, policymakers would choose to rely on the subfunctional categories. For example, the Transportation function is divided into ground, water, air, and other transportation, and most other functions similarly give rise to three to six subcategories.[79] I will return to this question of the appropriate scope for functional categories—a question that has no

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[76] WILDAVSKY, *supra* note 56, at 10.

[77] *See* H.R. CONF. REP. NO. 102-529, at 59 (1992).

[78] *See* GENERAL ACCOUNTING OFFICE, *supra* note 54, at Appendix II; OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: HISTORICAL TABLES, FISCAL YEAR 1989 (1988); OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: HISTORICAL TABLES, FISCAL YEAR 1987 (1986).

[79] *See* OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: HISTORICAL TABLES, FISCAL YEAR 1999, at 55, Table 3.2 (1998).

clear answer—as we continue to think about the factors that affect the structure of budget decisionmaking.

B. *The Dynamics of Interest Group Activity Within Budget Packages*

One of the most important elements to consider in constructing budget packages is the impact on interest group activity. As long as resources within each package are limited, interest groups eligible for those funds must compete among themselves for a piece of the action. Competition is particularly acute in a system that enforces increasingly restrictive spending caps through offset requirements, as does the current system.[80] It seems likely that structuring interest group competition along functional lines, that is, making tradeoffs among programs that serve the same national mission or objective, would present lawmakers with better choices and would allow them to make decisions that more accurately reflect the preferences of the public.

To get a sense of the dynamics of this interest group activity, consider how it would play out in a functional budgeting scheme. The zero-sum games produced by functional budgeting would result in conflict among interest groups at two different stages in budgeting. First, although one would expect some interest group activity at the macrobudgeting stage, it would be different and less intense than the activity we would observe later. As money was allocated to functional categories, groups would not yet be certain how their particular programs would fare in the later stages. Indeed, groups within a particular function might work together to win resources for the category in which their programs fit. During the microbudgetary stages, however, these groups would no longer be allies, but rather would find themselves as adversaries vying for the portion of funds allocated to their function.[81] The advantages to structuring interest group activity

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[80] *See supra* note 34. But remember that tradeoffs must be made even in eras of increasing federal budgets because federal resources are not unlimited. *See, e.g.*, Key, *supra* note 2, at 1138 (writing in 1940 that "[t]he budget-maker never has enough revenue to meet the requests of all spending agencies, and he must decide . . . how scarce means shall be allocated to alternative uses. The completed budgetary document . . . represents a judgment upon how scarce means should be allocated to bring the maximum return to social utility").

[81] Interestingly, politician behavior would also be different at the two levels of decisionmaking. Discussion of the aggregate figures tends to be more partisan as

along functional lines would become most apparent when Congress began to divide resources among particular programs.

1. Imposing Discipline by Requiring Interest Groups to Pay for Their Own New Benefits

Congressional decisionmaking can be enhanced if interest group activity can be harnessed so that groups actually do some of the work demanded of lawmakers. In a world of scarce resources, legislators will want to spend each dollar as effectively as possible. Thus, they try to provide incentives to encourage beneficiaries to inform Congress of the most effective delivery system for the level of benefits accorded to them. At first glance, functional budgeting appears to provide this incentive more strongly than the current system.

First, because all budgetary resources would be considered together and constrained by the same rules, groups would not advocate spending in the form of a tax subsidy, for example, solely because they believed PAYGO rules to be less onerous than the discretionary spending caps. Or, under different conditions, they would not lobby for a discretionary program in a year the caps allowed room for new programs but offsets in the PAYGO envelope were scarce. In other words, differences in budget rules would not drive decisions about program design.

Second, within a functional budgeting framework, groups might more often pay for their own benefits because offsets for new spending would sometimes be programs that also benefited them. If funding predators could not externalize the costs of the new benefit to the general public or an unrelated interest group, they might work even harder to design efficient delivery systems than they do now. Once lawmakers allocated $20.3 billion in budgetary resources to agriculture, for example,[82] the affected interests would have every incentive to choose programs that would produce the greatest benefits from that investment because the price

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lawmakers argue over their larger vision of government. Bills appropriating funds to particular projects, on the other hand, tend to receive bipartisan support as all members work to get funding for their projects. *See* SCHICK, *supra* note 5, at 80–81 (describing the differences).

[82] This is the amount of budget resources, including tax expenditures, that was allocated to the agriculture function in fiscal year 1997. *See* OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1999, at 144–45 (1998).

of every new program would theoretically be a reduction or elimination of a program that currently benefited them.[83]

By shaping interest group activity in this way, federal budgeting might approximate what some experts have identified as the unattainable ideal: comparing the marginal value of federal programs so that resources are used to their maximum efficiency.[84] At the same time, and unlike the ideal, functional budgeting would present lawmakers with choices that they could realistically handle. Charles Lindblom has argued that budgeters cannot think comprehensively, but that they use instead a process of successive comparisons to decide how to allocate resources. Because policymakers cannot "know all the consequences of each aspect of each policy," they work to "know . . . only the consequences of each of those aspects of the policies in which they differed from one another" and make decisions on the basis of that more limited information.[85] Functional categories, which group together programs seeking to advance similar governmental missions, could help highlight relevant differences between methods to achieve those objectives and thus facilitate decisions about program design.

Importantly, this structure might improve marginal comparisons within a particular function, but the change in interest group behavior would probably not enhance lawmakers' ability to make comparisons of marginal utility across functions. Of course, functional budgeting would not worsen the situation at this macro-level, and it might structure the decisions about aggregates in a way more easily managed by federal budgeters. As I argued previously, it is more meaningful to talk about allocating government resources according to governmental mission than it is to talk about allocations to all discretionary programs,

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[83] *See* Edward M. Gramlich, *U.S. Federal Budget Deficits and Gramm-Rudman-Hollings*, 80 AM. ECON. REV. 75, 80 (1990). *Cf.* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

[84] *See, e.g.*, Key, *supra* note 2, at 1138–39 (but noting that even this kind of comparison "leaves untouched a more fundamental problem. If it is assumed that an agency is operating at maximum efficiency, the question remains whether the function is worth carrying out at all, or whether it should be carried out on a reduced or enlarged scale, with resulting transfers of funds to or from other activities of greater or lesser social value"). *See also* Stein, *supra* note 74, at 284 (when comparing the benefits of spending $10 billion on military projects or $10 billion on Head Start, "[w]e have no way of reducing the benefits of these various budget decisions to a common denominator . . . . We have only a process in which duly elected people, using whatever hunches they have and responding to whatever interests they represent, make whatever decisions they make.").

[85] Lindblom, *supra* note 8, at 87.

or even to all defense and nondefense programs. Moreover, budgeters and voters could learn what percentage of total federal resources each function received and perhaps determine if the government's priorities were consistent with their objectives. More thought, however, must be given to ways to improve marginal comparison among functions.[86] The framework I have described is targeted primarily to intra-functional decisions.

Under current budget rules, lawmakers have sometimes employed strategies to ensure that interest groups pay for their own programs. For example, the President's tax proposals in 1993 included setting aside some of the money allocated to empowerment zones to be used to benefit American Indian tribes. Lobbyists and other tribal representatives successfully argued that they would prefer to receive the same amount of tax relief not as an empowerment zone but primarily as accelerated depreciation for certain property located on Indian reservations.[87] Lawmakers deferred to this request, reasoning that the beneficiary

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[86] One reason inter-functional comparisons may be difficult is that people find it difficult to understand the magnitude of spending when it is expressed in dollar amounts. We are all familiar with public opinion polls that reveal most Americans believe the government spends too much for international aid programs, and yet they would appropriate significantly greater amounts of federal money to such programs. My guess is that functional budgeting would improve this situation by allowing policymakers to present aggregate totals in percentages, for example, to show voters what percentage of federal resources is committed to international aid and how that percentage compares with other functional categories. Other techniques of presenting budget decisions should also be considered, such as expressing spending as a percentage of GNP (to allow for more meaningful comparisons across years) or even adopting entirely new units to express the magnitude of spending (again to allow comparisons over time as well as to move away from large dollar figures that are hard to comprehend). I appreciate Howell Jackson's comments on these issues.

[87] *See* I.R.C. § 168(j)(6) (1994). *See* 139 CONG. REC. S7941-42 (daily ed. June 24, 1993) (statement of Sen. Boren (D-Okla.) on introduction of the Indian Employment and Investment Act of 1993). *See also* Letter from Wilma P. Mankiller, Principal Chief of the Cherokee Nation to Sen. Bentsen (D-Tex.), Chair, Senate Committee on Finance (July 24, 1992) (on file with author). This provision is also a good example of the unexpectedly large benefits that groups can receive through a tax expenditure if drafters are not careful. Because the definition of "Indian reservation" was very broad, for the purpose of allowing tribes in Oklahoma not living on reservations to benefit, many businesses that were completely unrelated to tribes were able to qualify for accelerated depreciation of certain property. *See* Alissa J. Rubin, *Oklahoma, Where the Tax Breaks Come Sweeping Down the Plain*, 55 CONG. Q. 482, 482–83 (1997). *See also Congress Acts to End Tax Break Letting Corporations be "Tribes,"* N.Y. TIMES, Mar. 30, 1997, at 16. The 1997 tax bill contained a retroactive technical amendment to redraft the provision so that it is closer to the original intent of its supporters. *See* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (codified in scattered sections of 26 U.S.C. (1994)). This example demonstrates, however, why interest groups that can control the details of drafting might prefer an unlimited tax benefit to the capped appropriation of a direct subsidy.

group had the best information about which kind of tax subsidy would benefit its members the most.

This vision of the conflict within functions is not entirely realistic, however. First, there would be no guarantee that the competition to spend the money in each category would lead to the adoption of the most efficient delivery systems instead of the enactment of programs that benefited clientele groups the most. In most cases, interest groups want to maximize the returns that they capture and may care little if the program results in a lower return, or even a net loss, to society as a whole. For example, the competition I have described might still result in the federal government's subsidizing municipalities through the exclusion from income of interest on bonds, rather than through arguably more efficient direct subsidies.[88]

Second, functional and subfunctional categories, as they are currently formulated, are broad enough that proponents of new programs could find offsets in programs that benefit unrelated interest groups, thereby avoiding the discipline of paying for their own benefit. Although this strategy might be more difficult under functional budgeting than it is now under 602(b) allocations[89] that span several functions, general categories of governmental missions would no doubt encompass programs that benefit dozens, if not hundreds, of groups. For example, if we retained the current functional classifications, wheat farmers could propose to pay for a new subsidy by reducing subsidies to corn producers. Even if budgeters narrowed the functional categories, in part to reduce the abstraction inherent in very large general mission statements, any divisions broad enough to shape the right kind of macro-level decisionmaking will allow funding predators to target the programs of unrelated groups and avoid paying for their own benefits.

If the scope of functional categories did not eliminate the possibility that predators could target unrelated groups, the interest group activity it would promote might not be as helpful to decisionmakers in allocating resources as we thought at first. It seems likely that predators choose their offsets on the basis of the clout of the potential prey rather than the merit of the targeted program. Predators prefer to pay for new programs by

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[88] *See* Thuronyi, *supra* note 31, at 1161–62 (1988). *See also* MUNICIPAL TAXABLE BOND ALTERNATIVE BILL OF 1976, H.R. REP. No. 1016 (1976).

[89] *See supra* text accompanying notes 38–39.

repealing offsets that benefit the needy or other largely unorganized groups because such prey are unlikely to have the resources to put up much resistance.[90] In this case, predators would escape much of the discipline of an offset process, they would find it easier to enact their proposals, and they would have less incentive to design their programs for maximum efficiency. Indeed, my hypothetical above, where the wheat farmers targeted the subsidies of the corn farmers, is less problematic than it first appears to be because both groups are relatively powerful in the legislature, with able allies who can protect their constituents. Not only would the predators be forced to make a better case for their new program and be faced with more substantial obstacles to enactment, but the prey would possess the resources to attack weaknesses in the proposal as well as to defend the status quo.

Unless we can structure the budget framework to match interest groups of relatively equal clout,[91] avoiding this problem is difficult. Organizing packages according to interest group clout is impossible, however, because it would require Congress to make determinations for which it lacks good information and would demand constant revision as the political power of interest groups waxes and wanes. Instead, under functional budgeting, just as under the current system, we must assume that the strong would target the weak. The system would continue to rely on policy entrepreneurs and other political considerations (like the importance of distributional tables in analyzing policy changes)[92]

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[90] *See* Garrett, *supra* note 2, at 515–26 (discussing this possibility and current political realities that protect programs that benefit the poor from funding predators). *See also* Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 234 (1981) (noting that some groups are unrepresented in the political process so that procedures may not function either as their drafters intended or as they should when measured along other normative baselines).

[91] For a proposal along the lines of this suggestion, see Gordon Tullock, *Rent Seeking and Tax Reform*, 6 CONTEMP. POL'Y ISSUES 37, 46 (1988) (crediting James Buchanan for the idea). *See also* Julie A. Roin, *Reconceptualizing Unfunded Mandates and Other Regulations*, 93 NW. U. L. REV. (forthcoming 1998) (applying Tullock's idea of countervailing interest groups in the context of unfunded intergovernmental mandates). Of course, it is not clear that matching groups of equal clout, without considering any other factors, would result in good decisions regardless of how one measures merit. But such matching would reassure policymakers that some group with the organization and power to make its voice heard would defend the status quo against attack, rather than allowing change merely because of interest group might.

[92] *See* Michael J. Graetz, *Paint-By-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609 (1995) (discussing use of distributional analysis generally); DISTRIBUTIONAL ANALYSIS OF TAX POLICY (David F. Bradford ed., 1995) (same).

to protect the interests of the unorganized from the raids of predators.

Unfortunately, it is possible that functional budgeting might increase the ability of the powerful to target the weak. As we have seen, using functional analysis, Congress would make trade-offs among all the different kinds of federal spending. This structure is worrisome if the clout of the groups receiving tax benefits and direct spending is systematically greater than that of groups receiving discretionary spending. Some evidence suggests that such is the case. Currently, spending through the tax code or entitlement programs is often more valuable to interest groups than appropriated benefits. The former are more durable than discretionary programs because they usually need not be renewed once they are established and the funding is automatic as long as the law remains unchanged. Moreover, benefits under entitlement and tax programs are available to anyone who meets the eligibility requirements, and future growth, whether or not anticipated, is not constrained by offset requirements. In contrast, discretionary programs are usually capped in amount and must fit under spending caps in order to receive appropriations in the future. We would be unsurprised, therefore, to learn that the more powerful interest groups tend to get benefits through direct spending and tax subsidies, and the relatively weaker must rely on the vagaries of the annual appropriations process. The disparity in the strength of the two sets of interest groups is also indicated by the change over time in the two kinds of spending—discretionary spending has been declining in real terms while entitlement programs have continued to grow even in tight fiscal times.

The argument here is not that every group receiving benefits through entitlement spending or tax expenditures is stronger than every group in the discretionary package, but rather that on average interest groups in the former package have more clout. Moreover, programs benefiting dispersed groups, like spending for parks, general government activities, and the like, tend to be located in the discretionary spending package. Throwing all the kinds of spending programs together in functional packages might thus further disadvantage those who now receive appropriated funds because they would not only have to fend off other beneficiaries of discretionary programs but would also face the relatively stronger groups receiving money through entitlements and tax provisions. This hypothesis of differential interest group power

needs further testing, and its effect on this aspect of functional budgeting requires more thought. For example, power alone does not explain a group's decision to pursue one form of spending over another; some of the decisions can be explained by historical developments and some by jurisdictional decisions driven by politicians' preferences. In this Article's discussion of the factors relevant to budget structuring, I merely want to highlight the relevant factors and suggest ways in which they relate to the current structure and functional budgeting.

Third, and finally, groups might avoid the discipline of paying for their own benefits because their programs could fit within several functional classifications. The current formulation of budget function recognizes this reality. "Each basic unit being classified . . . usually is classified according to predominant purpose and assigned to only one subfunction. However, some large accounts that serve more than one major purpose are subdivided into two or more subfunctions."[93] Groups would have an incentive to locate their program in the function where the weakest prey was located and where Congress had allocated the most resources in the first stage of budgeting. One can imagine that groups might wait until they knew the results of the functional allocations before determining how to characterize the "predominant purpose" of their programs. For example, a tax subsidy for ethanol can be reasonably characterized as an agriculture program, part of transportation policy, or a component of the country's energy and natural resources agenda. Thus, an interest group advocating the ethanol provision could decide strategically which purpose to emphasize both in the program design and in the description of the new spending proposal. Advocates would work to ensure that the proposal was assigned to whichever function commanded the most resources, included the weakest prey, or fell within the jurisdiction of the most sympathetic committee.

Congress could implement procedures to limit this opportunistic behavior. Congress usually relies on precedent in resolving jurisdictional disputes among committees,[94] and it could apply the same sort of adherence to precedent to its functional deter-

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[93] OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: THE BUDGET SYSTEM AND CONCEPTS, FISCAL YEAR 1999, at 6 (1998).

[94] *See* KING, *supra* note 46, at 28–32 (describing process of allocating legislation to committees and resolving jurisdictional disputes). *See also* CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 111–14 (1989) (describing the process of referring bills to committees).

minations. Congress can, however, revise jurisdiction and disregard precedent, and it would certainly do so here if the stakes were high enough. Congress could also strengthen its resolve by requiring programs to stay within the same functional category for some determinate period, say, five years. Again, however, interest groups could circumvent this solution not only because Congress could change its rule before the end of the five years, but also because groups could change their program slightly and claim it was a different proposal, unaffected by the prior determination, and serving a different predominant purpose.

Thus, the first benefit of functional analysis, forcing an interested party to allocate a certain level of resources in the most efficient way by requiring it to pay for its own new spending, would not necessarily result from a functional approach, although it might be more likely than under the current system. Moreover, although functional budgeting might reduce the chance that groups would design programs solely to gain the advantage of less stringent budget enforcement procedures, strategic drafting might still occur as groups worked to construct programs that would fall within particular functional categories. In such cases, budget rules would continue to play a significant role in microbudgetary decisions, perhaps overshadowing concerns about efficiency or other policy considerations.

2. Using Interest Group Activity to Generate Information About Federal Spending

The second positive effect of interest group activity that would be affected by a move to functional budgeting is related to the first in that it is also a byproduct of the conflict among groups for limited funds. As predators seek offsets, they generate information not only about their own programs but also about the programs they propose to repeal or scale back. Although they may target programs on the basis of interest group clout, choosing relatively weaker and unorganized beneficiary groups, they phrase their arguments differently in public, discussing the relative merits of the programs. In this way, the conflict engendered by offset requirements produces information that lawmakers can use to make allocative decisions, along with the information generated by government agencies and experts.[95] Budget rules

[95] *See* Garrett, *supra* note 2, at 557–61 (discussing information-forcing function of

also provide a structure for considering such information that operates to highlight certain information for lawmakers and the electorate. Structuring information can be as important as requiring its disclosure; too much information without ways to understand and absorb it, can lead to policy paralysis just as the absence of data can.[96]

The scope of interest group conflict affects both the quality of information disclosed and the heuristics that shape decisions. A structure such as the current one that would pit groups from different industries or subject matters against one another might lead to lower quality information than one that packaged related groups together. In the latter framework, groups might have more knowledge and understanding of the federal programs that could serve as offsets, and thus, they could disclose better and more helpful information. Forcing the conflict into subject matter areas would therefore allow Congress to benefit more from the expertise of interest groups. Presumably, the programs within a particular function would be more related in subject matter than are programs that fall within the jurisdiction of a particular congressional committee. More specifically, the information that wheat farmers would generate about a proposed offset within the agriculture function would usually be better and more helpful

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offset requirements); Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act of 1995*, 20 CARDOZO L. REV., at Part II.A (forthcoming 1998) (same with respect to another part of the budget process, the President's cancellation power); CHARLES E. LINDBLOM & EDWARD J. WOODHOUSE, THE POLICY-MAKING PROCESS 82–83 (3d ed. 1993) (noting that disclosure of information helpful to policy formation is more likely when there are "many groups, representing diverse angles on a problem, so that inaccurate or misleading claims put forward by one interest group are effectively disputed by other groups; when these conditions are approximated, a good purpose sometimes can be served even by interest groups' somewhat manipulative and not fully sincere efforts at persuasion of others"). *See also* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation For Deliberative Decisionmaking*, 92 NW. U. L. REV. 1, 31 (1997) (noting that information, a public good, may be underproduced so that incentives to encourage its generation and disclosure may be necessary).

[96] *See* Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, *supra* note 71, at 940–41 (discussing the importance of heuristic devices in order for policymakers to use information effectively); Eismeier, *supra* note 31, at 338 (noting that "the problem Congress often faces is not getting more information but making use of information it already has, a process one former member of the Ways and Means Committee likened to 'getting a drink from a fire hydrant'"); LINDBLOM & WOODHOUSE, *supra* note 95, at 18 ("Many congressional practices can be understood as protection against this kind of information overload . . . . Everyone who wants to think through a policy problem must steer a course between too little information and too much information, but every path between the two is perilous."). *Cf.* Rossi, *supra* note 95, at 42 (discussing problems of too much information in the administrative law context).

than information they could generate about housing subsidies or child care programs.

As this observation suggests, the tax legislative process could benefit the most from such a reorganization of budget packages. Under the present system, funding predators who want tax subsidies can target any other tax subsidy in the Internal Revenue Code, they can pay for their expenditure through general tax rate increases, or they can get funds by modifying entitlement programs. Under functional budgeting, Congress would consider tax subsidies along with other budget resources serving the same governmental mission, so the relevant interest groups would be more likely to generate information that Congress could use in drafting the government program and determining which existing program should serve as an offset.

Interestingly, this benefit from the interest group conflict resulting from functional budgeting would not rely on predators paying for their own new benefits. Instead, the information-forcing and information-structuring advantages would flow from grouping related interests together and allowing lawmakers to evaluate, supplement, and use the information they disclose.[97] Again, however, this analysis emphasizes that lawmakers must give careful thought to the functional categories themselves. More precise functional classifications would be more likely to group only related interests together and thus would result in the disclosure of more accurate and relevant information.

C. *The Structures of Decisionmaking and Political Accountability*

Although the formulation of the federal budget lies at the heart of governing, it is a complex process in which important decisions can be hidden in omnibus bills or through the use of dense, technical language. The impact of individual decisions is difficult to ascertain. Once a decision becomes public, lawmakers can disavow responsibility, claiming they had no choice but to vote for a bill that also contained programs important to their constituents. In short, the complexity and immensity of budgeting

[97] *See* LINDBLOM & WOODHOUSE, *supra* note 95, at 32 ("Information seeking and shaping must intertwine inextricably with political interaction, judgment, and action.").

undermine the value of political accountability. As Louis Fisher has observed:

> The power of the purse is not merely a means by which Congress controls the executive branch. It is also the way the public controls the government. Any process that confuses legislators and the public, no matter how it may delight the conceptual dreams of technicians, is too costly for a democracy.[98]

One challenge in budgeting is developing a structure that allows a degree of transparency[99] and provides information necessary for voters to hold elected officials accountable, notwithstanding the technical complexity of the federal budget. Although we could delegate budget decisions to a body of fiscal and government experts, they might lack the crucial, and essentially political, information concerning the public's perception of the relative importance of governmental missions and programs. Certainly, they would have no particular expertise qualifying them to develop that information. In a democracy, budget decisions should turn on the preferences of a majority of the people, after a period of deliberation and discussion, not solely on the views of an unelected technocracy focused on utility or efficiency.[100] Experts can provide information and may be able to help implement the political decisions, but elected representatives, guided by their constituents, have the primary responsibility for laying the budget foundation. Even when Congress adopts unusual strate-

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[98] Louis Fisher, *Ten Years of the Budget Act: Still Searching for Controls*, 5 PUB. BUDGETING & FIN. 3, 24 (1985).

[99] *See Joint Economic Report, Budget Process Reform* (visited Apr. 9, 1998) <http://www. house.gov/jec/fiscal/budget/process.htm> ("The 'transparency' theory suggests that too complex a decision-making process will reduce the ability of taxpayers and voters to hold budget policy makers accountable."). For an interesting discussion of the increasing use of the word "transparency" in diplomatic and global political contexts, see William Safire, *Transparency, Totally*, N.Y. TIMES MAG., Jan. 4, 1998, at 4.

[100] *See* LINDBLOM & WOODHOUSE, *supra* note 95, at 7 ("People want policy to be informed and well analyzed, perhaps even correct or scientific; yet they also want policy making to be democratic and hence necessarily an exercise of power.") Prominent scholars have debated the wisdom of employing experts in other contexts, such as managing risk regulation. *See, e.g.*, CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 145 (1997) ("By centralizing so many aspects of risk regulation in a small cadre of experts, this approach provides insufficient space for a deliberative process among competing perspectives about regulation, and too little basis for incorporating reflective public understandings about qualitative differences among diverse risks."). *But see* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 60 (1993) (advocating greater reliance on experts in risk regulation in administrative law); *id.* at 78 (noting that the expert group's work should be "sufficiently visible" to the public).

gies to avoid political deadlock, like the Base Closure and Realignment Commission whose recommendations for closing military bases had to be voted up or down by Congress without amendment,[101] it must still make the difficult political choices in the end.

Framing budget tradeoffs in terms of functions, rather than in two large packages, might allow Congress to think about the government's role in achieving various defined missions in a way that would be more accessible to voters than the status quo framework. It might be easier for a policy entrepreneur—such as a political challenger, a political party, or a leader of a public interest group[102]—to bring to the attention of the public information about budget functions than it is to explain, or even to understand, 602(b) allocations or the operation of PAYGO. Comparing the relative allocations of federal resources between defense and education under a functional system, for example, might be easier than making the same comparison when those programs are divided among dozens of agencies and committees.[103] If a political entrepreneur could discover relevant information about the allocation of federal resources, she would have a better chance of presenting it in a way that could catch the attention of the largely inattentive public and influence their behavior at the ballot box. Moreover, the discussion sparked by the publicity could help voters think seriously about government priorities and objectives, and this public deliberation could inform representatives as they distribute federal resources.[104] Cer-

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[101] *See* The National Defense Authorization Act for Fiscal Year 1991, Title XXIX: Defense Base Closures and Realignments, Pub. L. No. 101-510, § 2908(d)(1) & (2), 104 Stat. 1485, 1817 (1990).

[102] *See* KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 84 (1986) (defining a policy entrepreneur as someone "who, through adroit use of the media, can mobilize public support by appealing to widely shared values such as a concern about health, safety, or environmental preservation and by making opponents seem self-serving and careless of the public interest"); R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 30–31 (1990) (discussing the need for an "instigator" to rouse the normally inattentive public to action at the polls as a result of a legislative decision).

[103] This factor may be relevant to the consideration of committee structure and jurisdiction in a functional budgeting system. *See* discussion *infra* Part III.B.

[104] *See* Lindblom, *supra* note 8, at 81 (noting that budgeters cannot proceed only on the majority's preferences, "for preferences have not been registered on most issues; indeed, there often *are* no preferences in the absence of public discussion sufficient to bring an issue to the attention of the electorate"); LINDBLOM, *supra* note 15, at 101–02 ("For any policy-making system has a prodigious effect on the very preferences, opinions, and attitudes to which it itself also responds. It is not, therefore, a kind of machine into which are fed exogenous wishes, preferences, or needs of those for whom the machine is designed and out of which come policy decisions to meet those wishes,

tainly, the increased risk that budgeting decisions would be prominent in the next election, and that decisions could be traced back to the lawmakers' actions, would have some effect on congressional behavior.[105]

Moreover, if voters believed that the decisions reached under functional budgeting presented lawmakers with better tradeoffs and with more complete and relevant information about federal priorities, they might change their perceptions of the final budget and of government in general. A process that seems more rational and fair is likely to be perceived as more legitimate, even by those who do not agree with the outcomes it produces.[106] A recent study by John Hibbing and Elizabeth Theiss-Morse reveals that the public perception of Congress, and political institutions generally, depends in part on adherence to norms of "procedural equity." By this term, they mean people's perceptions that policymakers have reached decisions through a fair and open procedure. The effect of this factor on public opinion appears to be independent from the public's view of the actual substantive decision.[107]

It is possible to overstate the improvement in transparency that a move to functional budgeting might cause. No matter what the structure, the process of formulating the federal budget will remain complicated and voters will continue to find it difficult to monitor their elected officials, even with the help of the media, political parties, and challengers in elections. But a process that required lawmakers to think about budgeting in terms of governmental missions and to work first on assigning relative priorities to federal objectives seems intuitively more accessible than the current bifurcation.

In the end, whether the new procedure would improve accountability or whether it would undermine accountability by reserving the budget field only to the budget technicians might

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preferences, and needs. The machine actually manufactures both policies *and* preferences.").

[105] *See* ARNOLD, *supra* note 102, at 47–51 (discussing traceability and the role of entrepreneurs).

[106] *Cf.* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 139 (1990) (finding in a study of attitudes toward the justice system that interpersonal and value-expressive elements, such as the opportunity to be heard and the belief that authorities are listening to input, are more important to people's perception of legitimacy than are aspects of procedure more directly linked to outcomes).

[107] *See* JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS 14–15 (1995) (relying on Tyler's work).

depend on the way the process was implemented. A system with separate spending limits and enforcement procedures for each of a dozen or so functional categories would remain a complex system. As we will see in Part III, certain methods of implementing a functional structure could substantially complicate any enforcement procedure such that decisions would remain obscure and untraceable and might severely diminish accountability.[108] Enforcement through the use of arcane parliamentary procedures like the point of order might confuse and frustrate even old legislative hands.[109] In addition, voters, watching the procedural shenanigans on the floor of the House or Senate, might become increasingly dazed and disgusted by the deliberation process. In the end, a more complex enforcement scheme might be counterproductive, leading the public to become more disillusioned with Congress.[110] Nonetheless, using functions to organize budget decisions might improve the process enough so that any increased complexity or delay could be counterbalanced.

D. *Flexibility in Budgeting to Allow Tradeoffs Across Packages*

Any budget structure that channels conflict and tradeoffs into packages necessarily constrains lawmakers' ability to make tradeoffs among programs located in different envelopes. For example, under the current budget structure, it is difficult to pay for increased spending for annually appropriated education programs with a tax increase. Similarly, Medicare benefits cannot be expanded if the offset for the lost revenue is a reduction in defense spending. Firewalls dividing discretionary programs into sepa-

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[108] *See infra* Part III.B. *See also* Joyce, *supra* note 1, at 321 (noting that the major source of complexity in budget rules stems from enforcement procedures).

[109] *See, e.g.*, 139 CONG. REC. S7700 (daily ed. June 23, 1993) (remarks of Sen. Bumpers (D-Ark.)) (Sen. Bumpers attempted to amend the budget law with a tax provision supported by a majority of the Senate, and the ranking member of the budget committee objected by raising a technical budget point of order (germaneness) that required 60 votes for waiver. Sen. Bumpers complained: "I never cease to be amazed in this body about how important issues can be made light of, how people can obfuscate the issue and distract people's attention from what we are trying to do here.").

[110] *See* HIBBING & THEISS-MORSE, *supra* note 107, at 18 ("To put it simply, Americans tend to dislike virtually all of the democratic processes . . . . They dislike compromise and bargaining, they dislike committees and bureaucracy, they dislike political parties and interest groups, they dislike big salaries and big staffs, they dislike slowness and multiple stages, and they dislike debate and publicly hashing things out, referring to such actions as haggling or bickering.").

rate packages further reduce budgeters' flexibility. In the early 1990s, for example, discretionary spending was divided into three packages—defense, domestic, and international. Members of Congress often argued that resources would be better spent if they could breach the firewalls and use money allocated to defense programs for domestic initiatives. Thwarted in a direct attack, they strategically drafted domestic programs to take advantage of the availability of money that had been allocated to defense years earlier but was no longer needed for military purposes after the end of the Cold War. In one typical case, they located a program establishing a national service program for youths on closed military bases and staffed the youth camps with retired soldiers and officers to convince budget technicians that it could be classified as defense spending.[111]

Of course, clever drafting is not the only way to cross boundaries separating budget packages. The President's fiscal year 1999 budget proposes to establish three deficit neutral Funds for America—the Research Fund for America, the Environmental Resources Fund for America, and the Transportation Fund for America. He plans to offset substantial increases in discretionary spending in those areas primarily with increased revenues from a proposed tax on cigarettes.[112] Spending from these funds would not be considered in the future when determining whether discretionary spending had exceeded the caps (and the President's Budget adjusts the caps to account for the treatment of the funds).[113] In other words, the President is proposing to remove these programs from the discretionary spending package so that his priorities are not undermined by the stingy spending caps adopted in 1997. Directly changing the budget rules to pay for this unusual offset for President Clinton's new programs, however, requires specific congressional approval.[114] This budget process

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[111] *See* S. Res. 3114, 102d Cong. § 1082 (1992) (enacted) (authorizing a youth public jobs program in the defense bill in part to take advantage of available funds and to circumvent the firewall).

[112] *See* OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: ANALYTICAL PERSPECTIVES, FISCAL YEAR 1999 at 269 (1998).

[113] *See id.* at 261.

[114] Such approval may not be forthcoming. *See* Committee on the Budget, Majority Caucus, U.S. House of Representatives, Reinventing the Era of Big Government? A Review of the Clinton Budget for Fiscal Year 1999, at 6 (1998) (complaining about "budgetary gimmicks to circumvent the intended discipline of the discretionary spending limits (caps) that were an essential part of the budget agreement"). Yet, the Republicans are also considering using cuts in direct spending programs to fund new discretionary programs, again because of the stringency of the caps adopted in the 1997

hurdle, in addition to the difficulty of passing the cigarette tax bill that the President hopes will provide funds for his initiatives, decreases the likelihood of enacting the Funds for America. But the budget rules, which can be waived or changed, do not absolutely preclude the possibility of such cross-package tradeoffs.

Functional budgeting would rely on a greater number of packages than the current system; thus, budgeters might be thwarted more frequently in plans to make cross-functional trades. Presumably, lawmakers would consider these divisions when setting the caps on spending in each function, but they would be likely to conclude in some years that they erred in their initial allocations, particularly as they moved to discussions of the details of program design. The question, then, is whether a functional arrangement would offer advantages that outweighed any loss of flexibility.

In the end, I am not especially troubled by the reduction in flexibility. Lawmakers should be somewhat wary of cries for cross-functional tradeoffs. While some may be justified, others may result from interest groups targeting less well-defended, but not necessarily less valuable, programs. If the shift in relative priorities occurs because of changed circumstances, as was the case when the end of the Cold War required an adjustment in the allocation of resources between defense and domestic programs, such a realignment should be discussed straightforwardly. Moreover, cross-functional tradeoffs would be possible in a functional system. Some would occur as interest groups recharacterized their programs so that they fit in a functional category where revenues were less constrained.[115] Others would occur when Congress waived rules enforcing the divisions or otherwise made exceptions to the macrobudgetary allocations.

I have identified only some of the considerations that are vitally important for Congress to discuss as part of any serious budgetary restructuring effort. A budget structure should allow lawmakers to set macrobudgetary policy with an awareness of some of the microbudgetary details but at a level of sufficient abstraction to avoid stalemate. The structure should also shape

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budget accord. *See* Andrew Taylor, *Tobacco Revenue Drives Debate as GOP Champions Medicare*, CONG. Q., Mar. 21, 1998, at 731 (noting that the Republicans would spend more than the caps allow "by using, to an unprecedented degree, savings from mandatory programs to finance more discretionary appropriations.").

[115] *See supra* text accompanying note 94 (discussing ways to decrease the number of opportunistic shifts among functions).

interest group conflict so that funding predators and prey have an incentive to provide Congress with helpful information about current programs and new proposals. Finally, the budget structure should improve the transparency of decisions so that voters can hold lawmakers accountable for these important decisions, and it should be flexible enough to allow appropriate cross-functional tradeoffs.

My discussion suggests that the current system may not be the optimal one. Further, my analysis should lead reformers to look seriously at proposals that put teeth into some sort of functional presentation of the budget. Moreover, they should focus significant attention on formulating new and somewhat narrower functional categories because the current classifications may be phrased too generally to result in positive change. Interestingly, there is one proposal before Congress now that purports to enforce functional budgeting, and it enjoys strong support in the House.[116] A more detailed understanding of House Bill 1372, the Budget Process Reform Act, will reveal both the promise and the real-world limitations of such reform.

III. Functional Reform in the 105th Congress: The Budget Process Reform Act

The Budget Process Reform Act, H.R. 1372, would codify the current functional categories[117] and then enforce budget authority and outlay limitations in each function through a point of order procedure. The effect of the new budget structure would be to require spending in a function to be offset only through reduced spending somewhere else within the same functional category,[118] which would in most cases fall within the jurisdiction of several committees. Under the proposed reform, if any appropriations bill included appropriations for a particular program that caused spending in a function to exceed the cap set in the budget resolution, the bill would be out of order. If a member objected to

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[116] The bill has 200 cosponsors in the House.

[117] It would rename the Income Security function as the Welfare, Federal Employee Benefits, and Social Transfer Payments function, and it would add a new function for the "rainy day" fund established by the Act to provide funding for emergency spending. Otherwise the Act would leave the classification scheme unchanged. *See* H.R. 1372, 105th Cong. § 701(c) (1997). *See also* H.R. 1372, § 204 (establishing rainy day fund). In my view, codifying current functional divisions is unwise and eliminates needed flexibility. *See supra* text accompanying notes 77–78.

[118] *See* H.R. 1372, § 309 (1997).

the bill on this ground, the House or Senate could consider the legislation only after a supermajority vote to waive the objection.[119] Although the current proposal would not change the sequester procedure to accord with functions, one could envision adopting that sort of enforcement as well so that any spending in excess of a functional cap would trigger automatic and uniform reductions in programs within that function to bring spending in line with the targets.[120]

The Budget Process Reform Act is an early draft of an ambitious proposal that addresses a number of issues; therefore, its treatment of each issue is not particularly detailed or thorough. As Congress begins to consider this reform more seriously, two of its shortcomings deserve greater scrutiny. First, the bill does not include all budgetary resources in its definition of the spending in each functional category. This omission is fatal to any comprehensive overhaul of the congressional budget process. Second, the bill leaves existing committee jurisdiction intact, perhaps because of the drafters' political assessment of the impossibility of sweeping change in committee structure. However, any meaningful reform must be accompanied by an analysis of the best committee configuration to implement the new structure for budget decisionmaking. Leaving the status quo intact might not undermine restructuring to the same extent as the failure to include tax subsidies in the definition of budget resources, but it would threaten the success of functional budgeting along the dimensions identified in Part II.

A. *Omitting Tax Expenditures from the Integrated Functional Analysis*

The biggest flaw in the current bill is the drafters' failure to include tax expenditures in the budget resources that are considered within each function. The proposal includes only budget authority, budget outlays, and credit authority as relevant spend-

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[119] Under the Budget Process Reform Act, points of order could be waived only by a two-thirds vote, and the House Rules Committee could not waive points of order in special rules. *See id.*, § 301. *See also* Garrett, *supra* note 24, at 1162–63 (discussing the interaction between budget points of order and special rules).

[120] The Act would expand the President's power under the Line Item Veto Act so that he could enforce limits on spending in functional categories by impounding or canceling spending that exceeded the caps. *See* H.R. 1372, § 304. *See also* Garrett, *supra* note 95, at Parts I.B & I.C. (describing the cancellation authority established in the Line Item Veto Act).

ing in each functional category,[121] and it does not include tax expenditures in its otherwise comprehensive definition of "spending."[122] Advocates of a larger role for tax expenditure analysis in budgeting have long argued that lawmakers must consider tax subsidies along with other spending programs designed to achieve the same objectives.[123] H.R. 1372 is not unusual in its oversight of tax expenditures; even the toothless functional analysis incorporated into the current budget process seldom displays tax expenditures in a particular function along with budget authority, outlays, and credit activity. The budget acts do not require that such information be contained in budget resolutions, and most presidential budget documents treat tax expenditures separately from other budget resources.[124]

Significant political resistance to including tax expenditures with other kinds of federal spending is likely because some lawmakers see the enactment of tax expenditures as tax cuts, rather than as new federal spending programs.[125] H.R. 1372 reflects

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[121] *See* H.R. 1372, § 701(c)(11). Other reform proposals also leave tax expenditures out of the definition of budgetary resources. *See, e.g.*, H.R. 2003, *supra* note 54, at § 2(5).

[122] *See* H.R. 1372, § 701(c)(13).

[123] *See, e.g.*, STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 33 (1985). *See also* Paul R. McDaniel, *Tax Expenditures as Tools of Government Action*, *in* BEYOND PRIVATIZATION: THE TOOLS OF GOVERNMENT ACTION, *supra* note 6 at 168 (noting that tax expenditures can be fit within a functional analysis). For a period during the 1980s, Canada used a variant of functional budgeting that required policymakers to consider tax expenditures along with other budget resources. *See generally* Satya Poddar, *Integration of Tax Expenditures into the Expenditure Management System: The Canadian Experience*, *in* TAX EXPENDITURES AND GOVERNMENT POLICY 259 (Neil Bruce ed., 1988) (discussing the Canadian system and the challenges faced by budgeters); GENERAL ACCOUNTING OFFICE, *supra* note 10, at 73 (same).

[124] The recent Clinton administration budgets are exceptions; they present the level of tax expenditures in each function as well as the other resources. The most recent budget includes a discussion of tax expenditures organized by budget function, as well as an analysis of the advantages and disadvantages of the different kinds of federal spending. *See* OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: ANALYTICAL PERSPECTIVES, FISCAL YEAR 1999, at 105–08 (1998). The new emphasis on functional analysis in the expenditure context is in part a result of Vice President Gore's efforts that led to the enactment of the Government Performance and Results Act of 1993. *See id.* at 89, 105. This has not always been the case even for President Clinton; for example, his first budget adhered to the traditional presentation in which tax expenditures are accounted for separately. *See also* McDaniel, *Tax Expenditures as Tools of Government Action*, *supra* note 123, at 185 (describing how lack of coordination between tax expenditures and direct subsidies in the same function may undermine the effectiveness of both).

[125] *See* Martin A. Sullivan, *Big Government, Republican Style, and the End of Tax Reform*, TAX NOTES, July 14, 1997, at 147 ("Republicans are so enamored of tax cutting they are blind to the fact that many tax cuts . . . are just big government in disguise."); Thuronyi, *supra* note 31, at 1171 (noting that some members of Congress see repealing a tax expenditure as a tax increase, not a spending reduction). *See, e.g.*, 132 CONG. REC. E899 (daily ed. Mar. 20, 1986) (statement of Harry K. Wells, put into the record

this misconception. In addition, even those who acknowledge the difference between tax provisions that are spending programs and tax provisions required to define accurately the income base disagree sometimes about the proper characterization of a particular provision. For example, the normal tax baseline used by the Joint Tax Committee classifies accelerated depreciation as a tax expenditure (properly, in my view), while the reference tax baseline used since 1983 by the Treasury does not.[126] Nonetheless, general agreement among tax policy experts exists on hundreds of tax subsidies in the Internal Revenue Code,[127] and at least those tax expenditures should be included in the budgetary resources available under each function.

In addition to the ideological and theoretical hurdles to more integrated review, practical difficulties would also have to be resolved in order to consider tax expenditures along with other kinds of federal spending. First, a head-to-head conflict between annually appropriated funds and tax expenditures would require some mechanism to align the duration of the two kinds of federal programs. This problem could be solved in part either by sunsetting the tax program or by adopting a look-back mechanism to ensure that the programs eliminated to pay for a tax subsidy were not reenacted in later years without a parallel change in the tax provision. Restructuring the process so that entitlement programs were directly compared with discretionary programs in the same function would also cause a temporal

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by Rep. Helen Delich Bentley (R-Md.)) ("[S]ome personal tax deductions including interest paid on home mortgages are being referred to as tax expenditures to the taxpayer, an interesting turn of phrase! Clearly indicating the idea, it's the government's money that they are expending on you—a pretty scarey [sic] prospect for a country that believes in free enterprise and democracy."); 142 CONG. REC. S5252 (daily ed. May 17, 1996) (remarks of Sen. Domenici (R-N.M.) ("What are tax expenditures and corporate loopholes? Frankly, there are two ways to look at it. One way to think about it is they were taxes the Government owned, and we said we are not going to collect them. That is a Democrat version of a tax expenditure. The other version is they belong to the taxpayer and not the Government."); Ben Wildavsky, *Where Social Programs Go to Hide*, NAT'L J., Feb. 7, 1998, at 294 (noting that Secretary Rubin, in characterizing tax expenditures that the Administration favored, spoke as though "they're not creating loopholes—they're cutting taxes").

[126] *See* OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: ANALYTICAL PERSPECTIVES, FISCAL YEAR 1999, at 103–04 (1998).

[127] The two branches disagree on only a dozen or so items out of more than 100 tax expenditure provisions, even with the differences in the baselines they use. *See* Thomas S. Neubig, *The Current Role of the Tax Expenditure Budget in U.S. Policymaking*, *in* TAX EXPENDITURES AND GOVERNMENT POLICY, *supra* note 123, at 245; GENERAL ACCOUNTING OFFICE, *supra* note 10, at 111–12. Of course, the scope of disagreement could expand if the importance of the lists in the budget process increased, as it would in a functional budgeting scheme.

disjunction and demand a similar solution. Indeed, the Budget Process Reform Act includes a provision that would align the duration of entitlement programs, other than Social Security, with that of discretionary programs. It would eliminate permanent appropriations, which it calls "blank check appropriations," and require Congress to appropriate each year a specific amount of money for most entitlement programs.[128]

Second, assigning tax expenditures to a particular function might be difficult given the variety of activities they can affect. As the General Accounting Office explained,

> For example, the tax expenditures for accelerated depreciation and capital gains provide incentives for a wide range of different types of investment. Likewise, the tax expenditure for mortgage interest may be partly used for consumption activities unrelated to home ownership. Since a homeowner can substitute mortgage debt for consumer debt, elimination of the deduction for consumer interest has meant that money borrowed on a home mortgage is more likely to finance spending on consumption other than housing. This casts doubt on the appropriateness of classifying the entire revenue loss from the tax expenditure on mortgage interest as "spending" on housing.[129]

The problem of classifying spending as part of one function is not unique to tax expenditures, however. As I noted before, budgeters decide the predominant purpose of the program and classify it accordingly.[130] It seems unlikely that tax expenditures are systematically more prone to classification difficulties than more traditional government spending programs.

Finally, whatever mechanisms were used to enforce functional allocations should be applied to tax expenditures. For example, if allocations were enforced through a pro rata sequester of spending in a category, tax expenditures in that function should also be pared back. Although such a reduction might be difficult for some tax subsidies, notably exclusions from income, deductions and credits could be sequestered. If any kind of spending was protected from cuts, interest groups would work to craft their programs so that they took the favored form, even if they would not otherwise advocate such a method of delivering government benefits. If the President was allowed to impound funds

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[128] H.R. 1372, 105th Cong., § 306 (1997).
[129] GENERAL ACCOUNTING OFFICE, *supra* note 10, at 76 (footnotes omitted).
[130] *See supra* text accompanying note 93.

when Congress exceeded spending limits, his cancellation power should extend to tax expenditures.[131]

A functional perspective on budgeting will be doomed to failure if reformers do not ensure that Congress and the President treated tax expenditures as budget resources, comparable to direct and discretionary spending. If tax expenditures were left out of the functional areas, the initial allocation of resources among functions would not clearly and completely represent the federal government's priorities, and the process would provide less accountability than a more comprehensive system. Moreover, interest groups would be able to transfer their attention to the tax writing committees if they lost in the competition for other budget resources. Although Congress would certainly retain PAYGO or some similar procedure to control the growth of new programs in the tax code, the information-forcing and political accountability benefits of the functional structure of conflict would be attenuated if policymakers neglected tax expenditures in the initial allocations. As Congress learned after the adoption of Gramm-Rudman-Hollings, which left mandatory programs and tax subsidies largely untouched, reform of less than half the budget is incomplete reform at best. Indeed, we should be thinking more broadly rather than narrowing our focus; a comprehensive proposal would include other federal programs such as federal regulations and inter-governmental mandates in the functional analysis. Students of the budget process seldom talk about how to account for spending programs implemented as federal regulations, but the absence of budget controls here can encourage interest groups and Congress to downstream programs to the executive branch agencies.[132]

B. *Rethinking Committee Jurisdiction as Part of Fundamental Restructuring*

None of the budget process acts enacted in the last two decades has included significant changes in committee jurisdiction.

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[131] *But see* Garrett, *supra* note 95, at Part I.C. (noting that cancellation of tax expenditures faces greater constitutional objections than does the impoundment of appropriated funds).

[132] *See* Garrett, *supra* note 2, at 530–36. *But see* OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: ANALYTICAL PERSPECTIVES, FISCAL YEAR 1999, at 257–60 (1998) (discussing the difficulty of measuring the costs and benefits of regulation and accounting for such programs in the budget documents).

Although the 1974 Congressional Budget and Impoundment Control Act established the Budget Committees to oversee the new congressional budget process, virtually no power was transferred to the new entities from the existing authorization, appropriations, or tax-writing committees. As Allen Schick explains:

> In Congress, as in other institutions, it is very difficult to reform by taking power away from those who hold it. If provoked by over-reaching change, powerful interests can block not only intrusions on their own position but overall reform as well. The surer way to institute change, therefore, is to accept existing arrangements and not try to divest powerholders of their special advantages. New rules would be applied to new matters, for which interests have not yet vested.
>
> The Budget Act illustrates this principle in operation. Budget power is not directly taken from the authorizing, appropriating, or taxing committees. No direct change is made to their jurisdiction; each committee can proceed pretty much as it has in the past . . . . Of course, the budget process might turn into a trespass on the work and discretion of committees, but this would be determined by later practices, not the bare terms of the Act.[133]

One consequence of leaving existing committee jurisdiction untouched would be a reduced ability to coordinate spending in a particular functional category. Spending in each function is controlled by many different committees in Congress (as well as by several Executive Branch departments and agencies). For example, programs in the Commerce and Housing Function are found in the Small Business Administration, the Commerce Department, the Department of Housing and Urban Development, the Agriculture Department, the Department of Veterans Affairs, several government-sponsored enterprises, the Department of Treasury, the Securities and Exchange Commission, the U.S. Postal Service, and the Commodity Futures Trading Commission. Moreover, ten different appropriations subcommittees have jurisdiction over discretionary funds in this category.[134] As long as the functions were

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[133] SCHICK, *supra* note 11, at 78. *See also* GILMOUR, *supra* note 21, at 150–63 (discussing ways in which the budget structure put into place by the 1974 Act necessarily reduced the power of existing committees).

[134] *See also* GARY R. EVANS, RED INK: THE BUDGET, DEFICIT, AND DEBT OF THE U.S. GOVERNMENT 61 (1997) (noting that outlays in 1995 for the agriculture function amounted to $9.8 billion while the Department of Agriculture was responsible for more than $56.6 billion in outlays for spending in several functions, including energy, community and regional development, and income security).

fragmented across a number of different decisionmakers, integrated decisionmaking would be difficult, and Congress would be unable to form an accurate picture of its activities within any given mission area. The most comprehensive version of functional budget reform would not only adjust the jurisdiction of appropriations subcommittees so that the authority of each corresponded exactly to one of the budget functions; it would also consolidate all resources, including tax expenditures, in the new committees.[135]

Sweeping institutional reform of this sort is not only unlikely, it is probably impossible.[136] Although the new authority to set functional allocations could be given to one committee, most logically the budget committee in each house, the committees with responsibility for funding the spending programs would resist mightily any attempt to reduce or reconfigure their power. For example, the tax writing committees would be unlikely to agree to give up their authority over the tax code or important entitlement programs like Social Security and Medicare.

Additionally, it is not clear that reform of this sort would be wise. To continue our focus on the House Ways and Means and the Senate Finance Commitees, the tax law could suffer if lawmakers (and staffs) with less expertise took on more responsibility for drafting revenue laws. If responsibility for the tax code was dispersed among several committees, the goal of budget stability might be seriously undermined—and in an area where certainty is important for taxpayers to plan their financial and

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[135] *See Hearings before the Committee on the Budget, supra* note 59, at 186–88 (1996) (statement of Rep. Neumann (R-Wis.)). I have focused on the congressional budgeting process in this Article, but complete reform might also include a reorganization of the Executive Branch so that departments and agencies were organized to adhere more closely to functional lines. *See* OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: ANALYTICAL PERSPECTIVES, FISCAL YEAR 1999, at 44 (1998) (discussing difficulties of functional analysis that cuts across agency and department lines).

[136] David C. King argues that committee jurisdiction changes incrementally as policy entrepreneurs work to place bills whose subject matter is ambiguous in terms of committee referral within committees on which they serve. KING, *supra* note 46, at 37–39 (likening this sort of jurisdictional change to legal change in a common law system). He argues that the sweeping, formal reforms of Congress actually work very little real change in committee jurisdiction. *Id.* at 56. To repackage the budget effectively would probably require more radical change than occurs incrementally, a reform that may be politically impossible. In fact, when the House Rules Committee considered a proposal to set a ceiling on tax expenditures in the annual budget resolution, the most serious objection was lodged by the Ways and Means Committee, which opposed the "unwarranted extension" of the budget process into its jurisdiction. *See* Neubig, *supra* note 127, at 248.

personal affairs. None of the players would see the entirety of the changes to the tax code, so we might expect the number and magnitude of the modifications to be greater than occurs in the current system where one committee has sole jurisdiction over the revenue laws.[137] More generally, aligning each committee's jurisdiction with a budget function rather than dispersing responsibility among more players might increase the chance that the committee would be captured by powerful interest groups that receive benefits from them.[138] In addition, the presence of multiple decisionmakers in one policy area can help to ensure that no important issues are overlooked for long periods of time.[139]

A crucial question is whether a budget system that enforced functional offset requirements but that spread responsibility for each function across several congressional committees would be too complex. Consider the tax writing committees. The reconciliation instructions in the budget resolution would require these committees to raise a certain level of revenues (similar to the current practice); in addition, the resolution would also set the level of revenue that could be lost in each functional category as a result of tax expenditures.[140] Given the breadth of the subsidies in the tax code, these committees would have to comply with at least seventeen functional limitations, as well as meeting instructions concerning the overall level of revenues that the tax code should raise, the amount of the federal debt ceiling, and the entitlement programs in their jurisdiction. Such a change certainly would increase complexity as the number of detailed

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[137] But the durability of the tax laws has been eroding in the past several decades, particularly as PAYGO's requirement for offsets has put many tax expenditures at risk of repeal or modification. *See Garrett*, *supra* note 2, at 545–46. Some of the suggestions for coordinating functional budgeting would ameliorate this concern about stability, for example, joint referral or a two-part authorization/appropriation mechanism would still vest ultimate responsibility for the revenue laws in one expert body of lawmakers. *See infra* text accompanying note 142.

[138] *See* Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1182–83 (1993) (arguing that broad jurisdiction of the tax writing committees keeps them freer from interest group influence and capture than committees with jurisdiction over one substantive area, such as agriculture appropriations subcommittees).

[139] *See* Lindblom, *supra* note 8, at 85 ("The virtue of such a hypothetical division of labor is that every important interest or value has its watchdog.").

[140] For a discussion of the various ways such limitations could be phrased, as ceilings on the amount of revenue that could be lost through tax expenditures or as targets for reductions in tax expenditures, see GENERAL ACCOUNTING OFFICE, *supra* note 10, at 61–63. *See also* Letter from Sen. Bill Bradley (D-N.J.) to Colleague (Mar. 22, 1994) (including a Sense of the Senate Resolution that Congress should set targets for reductions in tax expenditures similar to the targets for mandatory spending programs) (on file with author).

instructions to the House Ways and Means and the Senate Finance Commitees would rise dramatically and the enforcement hurdles would multiply accordingly.[141]

Alternatively, the tax writing committees could retain primary jurisdiction over tax expenditures, but appropriations subcommittees could be given joint jurisdiction over the provisions so that they could change the tax code to meet the limits on spending in each function.[142] Or other substantive committees could authorize tax subsidies, just as they do with more traditional spending programs, before the "appropriators"—in this case the House Ways and Means and the Senate Finance Committees—would have the power to act. This kind of solution would infringe on the autonomy of the tax writing committees and thus would face substantial opposition from powerful lawmakers. In addition, the House has been moving away from joint referrals in the past few years because leaders believe such referrals unduly delay important legislation; the Senate has only infrequently adopted the technique because of similar concerns.

Complexity and jurisdictional squabbles would also result from dividing functional allocations among the appropriations subcommittees. Any move to enforce a functional analysis would necessarily be accompanied by greater centralization of the appropriations process so that early spending bills would not use up all the resources in a function and crowd out programs in later bills. H.R. 1372 would use a process very much like the current 602(b) suballocations to parcel out the subcommittees' portions of the functional resources. The suballocations would be enforced, as they are now, through points of order. Each subcommittee would have to comply with as many spending caps as the number of functions within its jurisdiction.

The problem with this approach—using the budget resolution to send multiple instructions to each of the relevant committees—is that groups within a particular function might be limited to only a subset of the functional universe when searching for offsets. In other words, proponents of a new tax subsidy for farmers might be limited to other tax programs within the agri-

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[141] *See* Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995) (noting that complexity refers to the number and difficulty of the distinctions that rules make).

[142] *See* Neubig, *supra* note 127, at 253 (discussing the mechanics of such joint jurisdiction); GENERAL ACCOUNTING OFFICE, *supra* note 10, at 74–75 (describing a number of forms such joint review could take).

culture function *and* within the jurisdiction of the tax writing committees. They would lose the ability to argue that their tax program would be a better use of the resources for agriculture than a discretionary spending program in the jurisdiction of the appropriators. It seems overly optimistic to hope that the Budget Committees, in assigning the portions of each function to the committees with jurisdiction over agriculture programs, could successfully calibrate how much of the resources should be spent as tax subsidies and how much as other spending programs. Remember that this sort of top-down allocation would occur when the details of the programs were still vague, sometimes unknown, and before Congress had paid a great deal of attention to microbudgeting issues. One solution, to force groups to present the tax writing committee with offset proposals within the same function but in another committee's jurisdiction and then to adjust the allocations accordingly, could add a staggering level of complexity to the process and would require constant recalculations.

Coordination through the instructions in the congressional budget resolution would not be the only solution within the confines of the current jurisdictional environment. Congress could package all appropriations bills into one omnibus act, much as the current budget reconciliation process does with direct spending programs and tax provisions.[143] Although committees would still face multiple spending limits, enforcement would be easier because the Budget Committee could monitor all committees simultaneously when it collated their submissions into one omnibus act. Perhaps the reform could allow the Budget Committee the power to change a subcommittee's submitted legislative language if it violated the functional allocations it had received earlier.

This solution might be unrealistic, however, for reasons other than the inevitable opposition of subcommittee chairmen who would jealously guard their turf and autonomy. First, using one omnibus appropriations bill might hold widely supported bills that could be enacted quickly hostage to controversial provisions

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[143] This solution is not without precedent. The Legislative Reorganization Act of 1946 recommended consolidating all appropriations bills into one, and this advice was followed in 1950. The next year the House Appropriations Committee voted to abandon the innovation, a view the Senate also shared. *See* JAMES P. PFIFFNER, THE PRESIDENT, THE BUDGET, AND CONGRESS: IMPOUNDMENT AND THE 1974 BUDGET ACT 113–14 (1979).

in other appropriations bills. Most appropriations bills receive bipartisan congressional support, as well as the signature of the President; bitter battles over spending and riders to appropriations bills are usually limited to a few of the proposed laws. For example, the government shutdowns in 1995 included only the parts of the government for which appropriations bills had not yet been passed; the nineteen-day closure in December affected only 280,000 employees and resulted from disagreements over six of thirteen bills. Indeed, in the last two Congresses, there has been a trend to separate reconciliation provisions into several bills so that controversial provisions will not torpedo proposals with strong support. In the fiscal year 1998 budget process, Congress passed two reconciliation bills, one with tax proposals and one with changes to Medicare and other entitlement programs.

Second, presenting the President with a single enormous appropriations bill would change the effect of his veto power in a way that might benefit neither branch. It would increase the stakes to such a level that paralysis and gridlock would likely become even more salient to the electorate. The recently passed Line Item Veto Act,[144] if sustained by the Supreme Court,[145] might make such a comprehensive bill more palatable to the President and perhaps also to Congress, but the experience with this new presidential cancellation power is too limited to allow a firm conclusion.

Decisions about committee jurisdiction are thus intimately connected with the level of complexity that any new reform would add. There is a tradeoff between leaving current jurisdictional boundaries intact and more radical, and therefore less likely, reform that would change jurisdiction and would not exacerbate the problems of complexity that plague the federal budget process. Assessing the level of complexity is a necessary part of the analysis I provided in Part II of this Article. For example, if a plethora of functional categories and separate points of order made budgeting opaque even to political entrepreneurs,

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[144] Pub. L. No. 104-130 § 2, 110 Stat. 1200 (1996) (codified at 2 U.S.C. §§ 691–692 (1997)).

[145] Recently, a federal district court has declared the Act to be unconstitutional, at least to the extent that it allows the President to cancel direct spending provisions and tax expenditures. City of New York v. Clinton, 985 F. Supp. 168 (D.D.C. 1998), *prob. jurisdiction noted*, 118 S.Ct. 1123 (1998). *See also* Garrett, *supra* note 95 (discussing delegation issues as well as budget process issues relating to this act).

then the public would almost certainly continue to be unaware of important decisions and unable to hold elected officials accountable.

At the least, the Budget Process Reform Act suggests both the promise and the political limitations of functional reform. Given the improbability of far-reaching change in the jurisdiction of congressional committees, functional budgeting might not increase substantially the transparency of important decisions and the accountability of elected officials. Moreover, as long as politicians continued to resist the notion of tax expenditures as merely a different form of federal subsidy, functional budgeting would fall short.

IV. Conclusion

I offer the foregoing discussion of functional packages not necessarily as a description of the optimal budget framework, but rather to illuminate what is at stake if Congress chooses to pursue far-reaching reform that includes rethinking budget packages. Again, such restructuring could be part of a continuing effort to reduce federal spending, or it might occur as an effort to rationalize the process without committing to any particular substantive outcome. My analysis points out the tension between refining the scope of interest group conflict to produce relevant information and increasing the complexity of the budget process, particularly if current committee arrangements remain unchanged. The discussion, while inconclusive, is one that must continue, particularly as new fiscal developments render old procedures anachronistic.

As Congress considers alternative budget packages, lawmakers should remember that although no comprehensive theory can satisfactorily provide the answer of how to allocate society's limited resources, the political process can help representatives reach substantive answers at any particular time. As the rules of the budget process continue to develop, they must be crafted to maximize the transparency of budgeting decisions so that voters can hold lawmakers accountable for the decisions that they make. Organizing conflict around major functional categories, as opposed to placing conflict within the very broad arenas of mandatory and discretionary programs, would seem to come closer to an ideal method of decisionmaking than does the status quo.

But this process, just like any other, can be made so complicated that only budget process groupies will be able to understand congressional deliberations, allowing experts to manipulate the rules to achieve ends far removed from those that would result from more straightforward deliberation. Just as the illusion of consensus and virtually unlimited budgets allowed Congress to avoid making the difficult decisions for many years, a structure for conflict that masks the underlying realities of political decisions is inconsistent with democratic accountability. Certainly, some level of complexity is inherent in modern budgeting, but a true transformation of the federal budget process will use conflict and other mechanisms to increase the prominence of decisions about federal priorities without obscuring the political accountability of the major players.

ARTICLE

DISCRIMINATION AGAINST DAMAGES FOR UNLAWFUL DISCRIMINATION: THE SUPREME COURT, CONGRESS, AND THE INCOME TAX

LAURA SAGER*
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Should damages for victims of unlawful discrimination be taxable income? For over seventy years, damages for lost earnings and for pain and suffering were excluded from taxation in all personal injury cases, including discrimination claims. In 1992 and 1995, however, the Supreme Court held in two employment discrimination cases that damages for lost earnings were taxable. In 1996, Congress went further, amending the Internal Revenue Code to tax pain and suffering damages, as well as lost earnings, in all nonphysical injury cases, while retaining the exclusion for such damages resulting from physical injuries. This Article argues that the distinction between physical and nonphysical harm results in invidious treatment of discrimination damages. The authors contend that all personal injury awards should be governed by the "in lieu of" principle. Under this principle, damages for lost earnings should be taxed, because earnings are ordinarily taxable, and damages for pain and suffering should be excluded, because they compensate for rights that are ordinarily enjoyed tax-free.

For over seventy years, the Internal Revenue Code excluded from the income tax personal injury damages for both physical and nonphysical harm.[1] The exclusion applied to damages for lost earnings as well as for pain and suffering.[2] It covered not only claims based on traditional common-law torts, but also statutory claims of unlawful discrimination.[3]

In 1992 and 1995, however, the Supreme Court ruled in two employment discrimination cases that damages for lost earnings were taxable.[4] In the first case, *United States v. Burke*, the Court

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[1] *See infra* text accompanying notes 45–48.

[2] *See* O'Gilvie v. United States, 117 S. Ct. 452, 456 (1996).

[3] *See infra* text accompanying notes 70–83.

[4] United States v. Burke, 504 U.S. 229 (1992); Commissioner v. Schleier, 515 U.S.

held that the exclusion applied only if the victim was afforded a "broad range of damages."[5] In the second, *Commissioner v. Schleier*, the Court ruled that the exclusion applied only if available remedies included damages for pain and suffering[6] and only if damages compensated for an injury to physical or mental health.[7] The reasoning that defended these requirements was highly formalistic and did not consider the purposes or policies of the exclusion.[8]

Soon thereafter, in 1996, Congress amended the Code to distinguish between physical and nonphysical injuries.[9] In the case of physical harm, damages for lost earnings and for pain and suffering remain tax-exempt. In the case of nonphysical harm, such damages are now taxable.[10] The amendment's proponents specifically targeted employment discrimination cases and defamation claims,[11] although the change affects all discrimination cases as well as all torts causing nonphysical harm, such as intentional infliction of emotional distress.[12]

As a result, the current tax code creates bizarre and, we think, unjustified distinctions among taxpayers. Lost earnings paid to the victim of a physical injury continue to be excluded from taxation,[13] although the earnings would have been taxable absent the physical injury[14] and although lost earnings paid to the victim of a nonphysical injury are now taxable.[15] In addition, damages

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323 (1995). Both cases involved awards for back pay on account of employment discrimination. The discrimination claim in *Burke* was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994), and in *Schleier* under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1994).

[5] 504 U.S. at 235.

[6] 515 U.S. at 335–36.

[7] *Id.* at 329–31.

[8] *See infra* text accompanying notes 84–149.

[9] Under amended I.R.C. § 104(a)(2) (1994 & Supp. 1998), gross income does not include "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or periodic payments) on account of personal *physical* injuries or physical sickness" (emphasis added).

However, Congress added the following qualification: "[E]motional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care . . . attributable to emotional distress." I.R.C. § 104(a).

[10] Whether the injury is physical or not, damages for medical expenses remain excludable, and punitive damages are taxable. *See id.*

[11] *See infra* note 156.

[12] *See* Julia K. Brazelton, *The Income Tax Treatment of Damage Awards*, 75 TAXES 562 (1997) (1996 amendment to § 104(a)(2) affects damage awards in all nonphysical injury cases).

[13] *See* I.R.C. § 104(a)(2).

[14] *See* I.R.C. § 61(a)(1) (1994).

[15] *See* I.R.C. §§ 61(a)(1), 104(a)(2).

for the emotional suffering caused by a nonphysical injury are now taxable,[16] although such compensation substitutes for a right that, absent the injury, would be enjoyed tax-free,[17] and although damages for the pain and suffering of a physical injury remain tax-exempt.[18]

In this Article, we criticize the distinction between physical and nonphysical harm codified by Congress in 1996.[19] The distinction is especially troubling because its principal effect, given the volume of discrimination litigation in the federal courts,[20] is to impose a greater tax burden on victims of unlawful discrimination than on victims of physical injury.[21] It seems to us unfair to tax damages for sexual harassment,[22] for example, if damages for a broken leg are tax-exempt.[23]

We also question the treatment of personal injury damages to the extent that it departs from "the usual principle that recoveries are taxable if they compensate for amounts that would have been taxable if received in due course,"[24] but excludable if they "compensate for loss of a right that would otherwise have been enjoyed tax free."[25] Under this so-called "in lieu of" principle,

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[16] *See* I.R.C. § 104(a)(2).

[17] Psychic benefits are not subject to taxation. *See* Robert M. Haig, *The Concept of Income—Economic and Legal Aspects*, *in* THE FEDERAL INCOME TAX I, 7 (R. Haig ed. 1921), *reprinted in* READINGS IN THE ECONOMICS OF TAXATION 54, 75 (R. Musgrave & C. Shoup eds. 1959).

[18] Thus, damages received for physical injuries are treated more favorably than equivalent amounts received in a nonpersonal injury context and than equivalent amounts received for a nonphysical personal injury. *See* I.R.C. §§ 61(a)(1) (1994), 104(a)(2) (1994 & Supp. 1998).

[19] *See infra* text accompanying notes 254–264.

[20] *See, e.g.*, Mary Chlopecki & Ellen Duffy McKay, *The Dollar Impact of the 1991 Civil Rights Act*, HR FOCUS, Sept. 1, 1997, at 15 (noting the dramatic increase in discrimination lawsuits since 1991); Michael Gillis, *Bias Suits' New Day in Court*, CHI. SUN TIMES, Sept. 4, 1997, at 6 (attributing increase in employment discrimination lawsuits to rising employment); Diane E. Lewis, *Suits Fuel Liability Coverage for Employers*, BOSTON GLOBE, Feb. 3, 1998, at D7 ("skyrocketing" increase in discrimination lawsuits has increased need for employers' liability insurance).

[21] *See* Rev. Rul. 96-65, 1996-53 I.R.B. 5 (noting that the effect of the 1996 revision of § 104(a)(2) is to tax all damages based on a discrimination claim).

[22] Sexual harassment in the workplace is considered a form of employment discrimination based on sex under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (1994). *See, e.g.*, Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

[23] It seems especially unfair to us to tax *pain and suffering* damages for sexual harassment, which compensate for a normally untaxed good or condition, if pain and suffering damages for a broken leg are tax-exempt.

[24] BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS, ¶ 13.1.4, at 13-10 (1986).

[25] *Id.*, ¶ 5.6, at 5-43. *See also O'Gilvie*, 117 S. Ct. at 456 (1996) (damages that substitute for a "normally untaxed personal . . . quality, good, or 'asset'" (such as for

whether the harm is physical is irrelevant. Instead, in all personal injury cases, damages for lost earnings should be taxable and damages for pain and suffering should be excludable.[26]

We recognize but dispute the claims of scholars that pain and suffering damages should be taxed either under the "in lieu of" test or some other standard. These claims make a flawed comparison of pain and suffering damages to damages for the destruction of property, neglect the fact that victims generally do not consent to be injured, or assume that the loss in utility, for which pain and suffering damages compensate, should not influence the tax treatment of such damages.[27]

We are equally skeptical of the policy reasons cited for the exclusion of damages for lost earnings: the administrative burden of allocating damages between taxable and excludable components, and sympathy for the victim.[28] The administrative burden appears no greater than in other instances requiring the allocation of a lump sum payment among different items, such as the acquisition of improved real estate and recoveries in business torts and contract disputes.[29] Moreover, requiring allocation would not significantly increase the existing administrative burden. Under current law, an allocation is required in physical injury cases in order to identify punitive damages that are subject to income tax, and in nonphysical injury cases in order to determine lost earnings that may be subject to employment taxes.[30] Sympathy for the victim does not justify the exclusion of lost earnings, since it allocates the greatest benefits to those who have the least need, applies without regard to the gravity of the injury, and provides no benefit to victims who cannot recover damages at all.[31]

Even if the exclusion of lost earnings is justified by the administrative burden of allocating damages between taxable and excludable components or by sympathy for the victim, neither reason justifies the distinction between physical and nonphysical harm. Whether the injury is physical or nonphysical, damages may include lost earnings, which should be taxable, and com-

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pain and suffering and other emotional distress) should not be subject to income taxation).

[26] *See infra* text accompanying notes 176, 183.

[27] *See infra* text accompanying notes 184–218.

[28] *See infra* text accompanying notes 165, 219–221.

[29] *See infra* text accompanying notes 228–239.

[30] *See infra* text accompanying notes 240–243.

[31] *See infra* text accompanying notes 244–246.

pensation for pain and suffering, which should be excludable.[32] Moreover, the victim of a nonphysical injury, especially the nonphysical injury of unlawful discrimination, deserves sympathy no less than the victim of physical injury.[33]

We do not question the tax treatment of damages for medical expenses, which restore the taxpayer to the status quo that existed before the accident, or punitive damages, which constitute a clear economic gain. Under both current law and the "in lieu of" principle, damages for medical expenses are excludable, and punitive damages are taxable, regardless of whether the injury is physical or not.[34]

Part I below analyzes recent Supreme Court decisions on the taxation of personal injury damages. Part II discusses the justifications for excluding such damages. Part III addresses the differential tax treatment of physical and nonphysical injuries. We conclude that the tax law unjustifiably discriminates against victims of unlawful discrimination and should be amended to eliminate the distinction between physical and nonphysical harm.[35]

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[32] *See infra* text accompanying notes 255–262.

[33] *See infra* text accompanying note 263.

[34] *See infra* text accompanying notes 153–154, 177–182.

[35] Earlier discussions of excluding personal injury damages include: Joseph W. Blackburn, *Taxation of Personal Injury Damages: Recommendations for Reform*, 56 TENN. L. REV. 661 (1989); J. Martin Burke & Michael K. Friel, *Getting Physical: Excluding Personal Injury Awards under the New Section 104(a)(2)*, 58 MONT. L. REV. 167 (1997); J. Martin Burke & Michael K. Friel, *Tax Treatment of Employment-Related Personal Injury Awards: The Need for Limits*, 50 MONT. L. REV. 13 (1989); Douglas K. Chapman, *No Pain—No Gain? Should Personal Injury Damages Keep Their Tax Exempt Status?*, 9 U. ARK. LITTLE ROCK L.J. 407 (1986-87); Mark W. Cochran, *Should Personal Injury Damage Awards Be Taxed?*, 38 CASE W. RES. L. REV. 43 (1987-88); Joseph M. Dodge, *Taxes and Torts*, 77 CORNELL L. REV. 143 (1992); Lawrence A. Frolik, *Personal Injury Compensation as a Tax Preference*, 37 ME. L. REV. 1 (1985); Thomas D. Griffith, *Should "Tax Norms" Be Abandoned? Rethinking Tax Policy Analysis and the Taxation of Personal Injury Recoveries*, 1993 WIS. L. REV. 1115; Bertram Harnett, *Torts and Taxes*, 27 N.Y.U. L. REV. 614 (1952); Mary L. Heen, *An Alternative Approach to the Taxation of Employment Discrimination Recoveries under Federal Civil Rights Statutes: Income from Human Capital, Realization, and Nonrecognition*, 72 N.C. L. REV. 549 (1994); Robert J. Henry, *Torts and Taxes, Taxes and Torts: The Taxation of Personal Injury Recoveries*, 23 HOUS. L. REV. 701 (1986); Patrick E. Hobbs, *The Personal Injury Exclusion: Congress Gets Physical but Leaves the Exclusion Emotionally Distressed*, 76 NEB. L. REV. 51 (1997); Douglas A. Kahn, *Compensatory and Punitive Damages for a Personal Injury: To Tax or Not to Tax?*, 2 FLA. TAX REV. 327 (1994); Daniel C. Knickerbocker, Jr., *The Income Tax Treatment of Damages: A Study in the Difficulties of the Income Concept*, 47 CORNELL L.Q. 429 (1962); Patricia T. Morgan, *Old Torts, New Torts and Taxes: The Still Uncertain Scope of Section 104(a)(2)*, 48 LA. L. REV. 875 (1988); Malcom L. Morris, *Taxing Economic Loss Recovered in Personal Injury Actions: Towards a Capital Idea?*, 38 U. FLA. L. REV. 735 (1986); Aharon Yoran, *Tax Aspects in Tort Compensation*, 22 ISR L. REV. 37 (1987); Edward Yorio, *The Taxation of Damages: Tax and Non-Tax Policy Considerations*, 62 CORNELL L.Q. 701 (1977).

I. Recent Supreme Court Decisions

A. *The Historical Background*

1. The First Fifty Years

In 1916, three years after enactment of the modern income tax, the Treasury Department initially took the position that personal injury damages were taxable.[36] In 1918, however, the Attorney General advised the Treasury that proceeds of an accident insurance policy should be nontaxable because they "merely tak[e] the place of capital in human ability which was destroyed by the accident."[37] As a result of this opinion regarding accident insurance, the Treasury reversed its initial position on personal injury damages and stated that "upon similar principles . . . an amount received by an individual . . . for personal injuries" is not taxable income.[38] Later that year, at the Treasury's request, Congress enacted the predecessor of § 104(a)(2) of the Internal Revenue Code to provide explicitly for exclusion of "any damages received . . . on account of [personal] injuries or sickness."[39] For over seventy years this provision remained virtually unchanged.[40]

During the early period leading to the exclusion's codification, no party seems to have analyzed the issue carefully. The Attorney General's Opinion did not disclose whether the insurance proceeds compensated the beneficiary for lost earnings, pain and suffering, medical expenses, or anything else. Nor did the opinion define "capital in human ability," or explain clearly why, if insurance proceeds merely replace such human capital, they should

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[36] Treasury regulations issued under the Revenue Acts of 1916 and 1917 stated that an "[a]mount received as the result of a suit or compromise for personal injury, being similar to the proceeds of accident insurance, is to be accounted for as income." T.D. 2690, 20 Treas. Dec. Int. Rev. 130 (1918).

[37] 31 Op. Att'y. Gen. 304, 308 (1918) (emphasis added). The Attorney General's Opinion was written in response to a request by the Secretary of the Treasury.

[38] T.D. 2747, 20 Treas. Dec. Int. Rev. 457 (1918).

[39] Revenue Act of 1918, Pub. L. No. 65-254, § 213(b)(6), 40 Stat. 1057, 1066 (1919). Another section of the Act excluded from gross income amounts received under workmen's compensation acts for personal injuries or sickness.

[40] Major revisions of the Internal Revenue Code in 1939 and 1954 only altered the wording slightly and made no substantive changes to the provision. I.R.C. § 22(b)(5) (1939); I.R.C. § 104(a)(2) (1954). In 1982, Congress amended § 104(a)(2) to exclude deferred payments explicitly by adding the language that "periodic payments as personal injury damages are excludable from gross income of the recipient." S. Rep. No. 97-646, at 4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4580, 4583.

be excluded from taxation.[41] Reversing its initial stance, the Treasury appears simply to have reasoned that compensation for an accident should be taxed in the same way, regardless of whether it is paid by insurance or by damages resulting from a personal injury claim.[42]

When Congress enacted the predecessor of § 104(a)(2) in 1918, it did not indicate whether the exclusion was based on the unexplained human capital rationale mentioned in the Attorney General's Opinion,[43] or on any other policy reason that might justify special treatment for personal injury damages.[44] Moreover, while adopting broad language that excluded "any" damages received on account of personal injuries, Congress did not define the term "personal injuries" or otherwise specify the kinds of claims that would be covered by the exclusion. Nor did Congress indicate whether by the phrase "on account of" it intended to cover punitive damages, which do not compensate for the loss but punish the wrongdoer.

As early as 1922, the Bureau of Internal Revenue ruled that damages for the nonphysical injuries of alienation of affection and defamation were excludable.[45] The Bureau emphasized that the rights invaded in such cases are not marketable and cited, as analogous, damages received for personal injuries due to an

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[41] 31 Op. Att'y. Gen. 304.

[42] T.D. 2747, 20 Treas. Dec. Int. Rev. 457 (1918).

[43] Justice Scalia, dissenting in *O'Gilvie*, observed that there is no evidence that members of Congress were even aware of the human capital rationale for the Attorney General's opinion. He refers to the "unrealistic assumption that they knew about the Executive-Branch opinion." 117 S. Ct. at 461.

[44] In the Senate and the House, the deliberations provided no such definition or explanation. *See, e.g.*, S. REP. No. 65-617 (1918); H.R. REP. No. 65-767 (1918); Notes on the Revenue Act of 1918 by Sec'y. of Treas.; *To Provide Revenue for War Purposes: Hearings on H.R. 12863 Before S. Comm. On Finance*, 65th Cong. (1918); *Proposed Revenue Act of 1918, Hearings on H.R. 12863 Before House Comm. On Ways and Means*, 65th Cong. (1918). *See also* Chapman, *supra* note 35, at 414 (discussing the legislative history of the Revenue Act of 1918).

The House Report at the time merely indicated that Congress wished to clarify the law:

> Under the present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injuries or sickness, and damages received on account of such injuries or sickness, are required to be included in gross income. The proposed bill provides that such amounts shall not be included in gross income.

H.R. REP. No. 65-767, at 9–10 (1918), *reprinted in* 1939-1 C.B. 86, 92.

[45] Sol. Op. 132, 1922-1 C.B. 92. This position also marked the reversal of an initial stance. In 1919 and 1920, the Service ruled that damages for defamation and alienation of affection were taxable. *See* Sol. Mem. 957, 1919-1 C.B. 65; Sol. Mem. 1384, 1920-2 C.B. 71, 72.

accident, which were already treated as tax-exempt.[46] In 1927 the Board of Tax Appeals took the same position, explaining that such damages are "nonpecuniary," "add nothing to the individual," and simply "attempt to make the plaintiff whole as before the injury."[47] Later revenue rulings affirmed that position.[48]

In 1960, the Treasury issued a regulation construing § 104(a)(2) to exclude damages based on "tort or tort type rights."[49] By referring to "tort or tort type rights" the Treasury signaled the formal distinction, familiar to all first-year law students, between tort and contract law and suggested that the exclusion applied to the entire domain of torts.[50] Because the distinction is formal, it is unrelated to substantive tax policy considerations that might justify the exclusion and thereby define its scope.[51] Nevertheless, this interpretation was consistent with earlier revenue rulings and judicial decisions that the code excluded damages for nonphysical injuries based on traditional common-law torts, such as alienation of affection,[52] breach of promise to marry,[53] libel,[54] and slander.[55]

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[46] Sol. Op. 132, 1922-1 C.B. 92.

[47] Hawkins v. Commissioner, 6 B.T.A. 1023 (1927). *See also* McDonald v. Commissioner, 9 B.T.A. 1340 (1928). Although these early decisions referred to the predecessor of I.R.C. § 104(a)(2), the statutory basis for the exclusion of damages for nonphysical injury was that such damages did not qualify as "income" under the predecessor of I.R.C. § 61(a). Later decisions, however, referred to § 104(a)(2) as the statutory basis for excluding personal injury damages both for nonphysical and physical harm. *See* Hobbs, *supra* note 35, at 69–74.

[48] Rev. Rul. 58-418, 1958-2 C.B. 18; Rev. Rul. 74-77, 1974-1 C.B. 33; Rev. Rul. 85-98, 1985-2 C.B. 51. In addition, the Service ruled that payments to prisoners of war and to victims of Nazi persecution were excludable under § 104(a)(2). Rev. Rul. 55-132, 1955-1 C.B. 213 (payments to World War II prisoners of war on account of violations of the Geneva Convention were reimbursement for loss of personal rights); Rev. Rul. 56-462, 1956-2 C.B. 20 (similar payments to Korean War prisoners were also excludable); Rev. Rul. 56-518, 1956-2 C.B. 25 (reparations paid by Germany to victims of Nazi persecution were excludable); Rev. Rul. 58-370, 1958-2 C.B. 14 (similar reparations paid by Austria were also excludable).

[49] Treas. Reg. § 1.104-1(c) (1960) states:

> Section 104(a)(2) excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. The term "damages received (whether by suit or agreement)" means an amount received . . . through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement entered into in lieu of such prosecution.

[50] In *United States v. Burke*, the Court noted that "a 'tort' has been defined broadly as 'a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.'" 504 U.S. 229, 234 (1992) (citing W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 2 (1984)).

[51] *See infra* text accompanying notes 275–278.

[52] *See* Sol. Op. 132, 1922-1 C.B. 92-94.

[53] *See McDonald*, 9 B.T.A. at 1340.

[54] *See id.*

[55] *See Hawkins*, 6 B.T.A. at 1023.

Congress might have drafted, or the courts and the Service might have interpreted, § 104(a)(2) to conform to the "usual principle that recoveries are taxable if they compensate for amounts that would have been taxable if received in due course,"[56] but excludable if they compensate "for loss of a right that would otherwise have been enjoyed tax-free."[57] Under this "in lieu of" approach, as we argue in Part II below, damages for lost earnings would be taxable but damages for pain and suffering should be tax-exempt.[58]

However rational such an approach might have been, it was not the path taken. For the most part, the courts and the Service took the position that if the underlying claim was a "tort or tort type" claim, then all damages (with the off-again, on-again exception of punitive damages)[59] were excludable. Neither the courts nor the Service, however, mentioned any policy reasons for excluding lost earnings that would otherwise be taxable, with the notable exception of the Ninth Circuit: "The rationale behind the exclusion of the entire award is apparently a feeling that the injured party, who has suffered enough, should not be further burdened with the practical difficulty of sorting out the taxable and nontaxable components of a lump sum award."[60]

2. The Expansion of Discrimination Claims

In the 1960s, in response to the civil rights movement, Congress began to enact laws prohibiting discrimination based on

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[56] BITTKER & LOKKEN, *supra* note 24, ¶ 13.1.4, at 13-10.

[57] BITTKER & LOKKEN, *supra* note 24, ¶ 5.6, at 5-43. *See also O'Gilvie*, 117 S. Ct. at 453 (damages substituting for items normally untaxed should not be subject to income taxation).

[58] We recognize that others have argued that pain and suffering damages should be taxed. *See infra* text accompanying notes 184–218.

[59] The Service has vacillated over the years on the question of whether § 104(a)(2) excludes punitive damages. *Compare* Rev. Rul. 84-108, 1984-2 C.B. 32 (punitive damages taxable), *and* Rev. Rul. 58-418, 1958-2 C.B. 18 (punitive damages are taxable), *with* Rev. Rul. 75-45, 1975-1 C.B. 47 (punitive damages are excludable). As recently as 1985, however, the Service ruled that § 104(a)(2) excludes compensation for lost earnings. *See* Rev. Rul. 85-97, 1985-2 C.B. 50 (clarifying Rev. Rul. 61-1, 1961-1 C.B. 14).

[60] Roemer v. Commissioner, 716 F.2d 693, 695 (9th Cir. 1983) (citing Note, *Taxation of Damage Recoveries from Litigation*, 40 CORNELL L.Q. 345, 346 (1955)). In *Roemer*, the plaintiff prevailed on a claim of defamation, for which he sought damages for injury to his personal reputation as well as lost future earnings. The Tax Court held that damages for lost earnings were subject to taxation but the Ninth Circuit reversed, holding that because the underlying claim was for a personal injury all consequential damages were exempt from tax.

race, religion, national origin, sex, age, and disability in employment, public accommodations, and housing.[61] These statutes, like the Civil Rights Acts of 1866[62] and 1871[63] which they supplemented, permit individuals to sue for money damages as well as injunctive relief. State and local governments, moreover, enacted their own laws prohibiting discrimination and permitting individuals to maintain a cause of action for damages.[64]

The kinds of damages that may be awarded in discrimination cases vary depending on the statute. In the employment discrimination area alone significant differences exist. The Age Discrimination in Employment Act ("ADEA") allows damages for back pay and, in the case of willful violations, liquidated damages in an amount equal to the award of back pay.[65] Under the Civil Rights Act of 1866, which provides a cause of action for racial discrimination in employment, plaintiffs may recover damages for pain and suffering, in addition to back pay and punitive damages.[66] Before 1991, Title VII of the Civil Rights Act of 1964, which forbids employment discrimination on the basis of race, religion, national origin, and sex, allowed a monetary award only for back pay.[67] In 1991, Congress amended Title VII to

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[61] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994), prohibits employment discrimination on the basis of gender, national origin, race, and religion. The Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1994), forbids discrimination in employment on the basis of age. The Americans with Disability Act, 29 U.S.C. §§ 12101–12213 (1994), prohibits discrimination on the basis of disability. The Fair Housing Act, 42 U.S.C. §§ 3601–3619 (1994), prohibits discrimination on the basis of race, religion, national origin and family status in the sale and rental of residential housing.

[62] 42 U.S.C. §§ 1981 and 1982 (1994) (providing a cause of action for racial discrimination in employment and housing).

[63] 42 U.S.C. § 1983 (1994) (providing a cause of action for discrimination in the case of state action).

[64] *See, e.g.*, N.Y. CIV. RIGHTS LAW § 18-c & 18-d (McKinney 1992) (permitting damages for discrimination in public housing).

[65] The Supreme Court has held that liquidated damages under the ADEA are in the nature of punitive damages. *See* Trans World Airlines v. Thurston, 469 U.S. 111, 125 (1985) ("the legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature"). The ADEA also provides for an award of attorney's fees to the prevailing party. 29 U.S.C. § 626(c)(2); *see also* Loubrido v. Hull Dobbs Co. of Puerto Rico, Inc., 526 F.Supp. 1055 (D. P.R. 1981) (attorney's fees and costs are allowable under the ADEA); Monroe v. Penn-Dixie Cement Corp., 335 F.Supp. 231 (D. Ga. 1971) (same).

[66] *See, e.g.*, Johnson v. Railway Express, 421 U.S. 454, 460 (1975) (prevailing plaintiffs are entitled to compensatory and, under certain circumstances, punitive damages). In addition, a successful plaintiff may collect attorney's fees under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1994).

[67] The award of back pay under Title VII is considered equitable rather than legal relief. 42 U.S.C. § 2000e-5(g). Back pay compensates the plaintiff for lost earnings from the date of discrimination to the date of judgment. Courts may award front pay

distinguish between plaintiffs who prove intentional discrimination (so-called disparate treatment cases) and plaintiffs who prove that a facially neutral practice, without a business justification, adversely affects a protected group (so-called disparate impact cases).[68] As a result, since 1991, Title VII has permitted disparate treatment plaintiffs to recover punitive damages and damages for pain and suffering, in addition to back pay. The monetary award available to Title VII disparate impact plaintiffs, however, remains limited to back pay.[69]

With the enactment of comprehensive federal, state, and local anti-discrimination laws affording private rights to sue, taxpayers began to assert that damages received at trial or in settlement of discrimination claims were excludable under § 104(a)(2).[70] Until the Supreme Court's 1992 decision in *United States v. Burke*,[71] federal courts of appeal generally ruled that damages in discrimination cases, including lost earnings as well as pain and suffering damages, qualified for exclusion from taxation.[72] The courts cited earlier revenue rulings and judicial decisions which excluded damages received on account of nonphysical torts, particularly the decisions of the Ninth and Sixth Circuits in *Roemer v. Commissioner*[73] and *Threlkeld v. Commissioner*, respectively.[74]

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for lost future earnings, if the plaintiff establishes that she will be unable to obtain any, or comparable, employment after the date of judgment. *See, e.g.*, Hurst v. Beck, 771 F.Supp. 118, 123 (E.D. Pa. 1991) (discussing treatment of front pay as an equitable remedy). Title VII also authorizes the award of attorney's fees to the prevailing party. *See* 42 U.S.C. § 2000e-5(k) (1994).

[68] Civil Rights Act of 1991, 42 U.S.C. § 1981a (1994). The Act provides a variable cap on the total amount of compensatory and punitive damages that may be awarded, depending on the size of the employer's workforce.

[69] *See* 42 U.S.C. § 1981a.

[70] The Third, Sixth and Ninth Circuits ruled that damages for discrimination were excludable. *See* Burke v. United States, 929 F.2d 1119 (6th Cir. 1991) (back wages in settlement of a pre-1991 Title VII gender discrimination claim); Metzger v. Commissioner, 88 T.C. 834 (1987) (damages for claims of discrimination in employment on the basis of gender and national origin under a variety of federal laws, including § 1981 and Title VII), *aff'd*, 845 F.2d 1013 (3d Cir. 1988); Rickel v. Commissioner, 900 F.2d 655 (3d Cir. 1990) (damages in settlement of claims of age discrimination in employment); Pistillo v. Commissioner, 912 F. 2d 145 (6th Cir. 1990) (back pay awarded in trial of age discrimination claim); Redfield v. Insurance. Co. of N. Am., 940 F.2d 542 (9th Cir. 1990) (same).

For a contrary result, see Sparrow v. Commissioner, 949 F.2d 434 (D.C. Cir. 1991) (damages received in settlement of Title VII employment discrimination claim were taxable).

[71] 504 U.S. 229 (1992).

[72] *See supra* note 70.

[73] 716 F.2d 693 (9th Cir. 1983).

[74] 87 T.C. 1294, 1308 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988).

Roemer involved an award for defamation,[75] and *Threlkeld* an award for malicious prosecution.[76] Both courts declared that whether damages are "received on account of personal injuries" and consequently excludable depends solely on the nature of the claim.[77] The Court in *Threlkeld* added that personal injury damages are excludable if the claim is based on "rights that an individual is granted by virtue of being a person in the sight of the law."[78] Both the *Roemer* and *Threlkeld* courts noted that § 104(a)(2) did not distinguish between physical and nonphysical harm[79] and that, had a physical injury occurred, lost earnings would be excludable.[80] Therefore, the courts in both cases held that lost earnings received for a nonphysical personal injury were also excludable, even though lost earnings would ordinarily be taxable.

Applying the reasoning of *Roemer* and *Threlkeld* to the issue of taxing damages in discrimination cases, courts repeatedly held that the right not to suffer discrimination is a personal right,[81] and that discrimination is therefore a personal injury, analogous to traditional common-law torts for both physical and nonphysical harm.[82] Accordingly, these courts held that damages in dis-

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[75] *See* 716 F.2d at 694.

[76] *See* 87 T.C. at 1294.

[77] *See id.* at 1299; *Roemer*, 716 F.2d at 697 ("[W]e must look to the nature of the tort of defamation to determine whether the award should have been reported as gross income.").

[78] 87 T.C. at 1308.

[79] *See id.* at 697 ("[T]he relevant distinction that should be made is between personal and nonpersonal injuries, not between physical and nonphysical injuries. I.R.C. §104(a)(2) states that damages received on account of *personal* injuries are excludable; it says nothing about physical injuries."); *see also Threlkeld*, 87 T.C. at 1305 (citing *Roemer* with approval, stating that "A personal injury has long been understood to include nonphysical as well as physical injuries. Therefore, 'personal' must be defined more broadly than 'bodily' injury.").

[80] *See id.* at 1300 ("If a taxpayer receives a damage award for a physical injury, which almost by definition is personal, the entire award is excluded from income even if all or a part of the recovery is determined with reference to the income lost because of the injury."). The court in *Roemer* stated:

> When an individual recovers damages for a physical personal injury, the lump-sum award is not allocated between the personal aspects of the injury and the economic loss occasioned by the injury, nor is the taxpayer precluded from use of § 104(a)(2) when the predominant result of the injury is a loss of income.

716 F.2d at 696–97.

[81] *See, e.g.*, *Roemer*, 716 F.2d at 698 (the right not to suffer discrimination is based "on rights that a person is granted by virtue of being a person in the sight of the law").

[82] The courts also cited other instances in which damages for violation of constitutional or statutory rights were held to be excludable. *See, e.g.*, Bent v. Commissioner, 835 F.2d 67 (3d Cir. 1987) (holding that damages, including back wages, in settlement of a § 1983 claim for violation of First Amendment rights were excludable); Byrne v.

crimination cases for lost earnings or for emotional harm, like damages for common-law torts, are excluded from taxation.[83]

B. *The Supreme Court:* United States v. Burke

In the 1992 case, *United States v. Burke*,[84] the Supreme Court began to restrict the application of § 104(a)(2) to damages in discrimination cases. *Burke* involved a sex discrimination claim by female employees of the Tennessee Valley Authority against their employer under the pre-1991 version of Title VII of the 1964 Civil Rights Act.[85] The Court held that back pay received in settlement of the claim was not excludable under § 104(a)(2).[86]

1. The Focus on Remedies

Noting that Congress did not define "personal injuries," the Court looked to the 1960 Treasury regulation which states that the exclusion applies to damages based on a "tort or tort type" right.[87] As noted above, prior to *Burke*, the federal appellate courts had generally construed "tort or tort type" rights to mean rights other than those based in contract, namely, "rights that an individual is granted by virtue of being a person in the sight of the law."[88]

In *Burke*, however, the Supreme Court took a different approach. It held that whether or not a claim is based on a "tort or tort type" right depends on the kinds of remedies that may be awarded for that claim.[89] Tort victims, the Court observed, are often compensated with a "broad range of damages," including compensation for medical expenses, lost earnings, and pain

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Commissioner, 883 F.2d 211 (3rd Cir. 1989) (holding that damages, including back wages, for Federal Labor Standards Act claim were on account of personal injury and therefore excludable).

[83] *See supra* note 70.

[84] 504 U.S. 229 (1992).

[85] *See id.* at 230–31.

[86] *See id.* at 242.

[87] *Id.* at 234.

[88] *Threlkeld*, 87 T.C. at 1308. *See also Roemer*, 716 F.2d at 698.

[89] United States v. Burke, 504 U.S. 229, 234–37 (1992). The Court stated:

> A "tort" has been defined broadly as a "civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." *See* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts 2 (1984). Remedial principles thus figure prominently in the definition and conceptualization of torts.

Id. at 234.

and suffering, as well as punitive damages.[90] In addition, the Court noted, tort victims are ordinarily entitled to a trial by jury.[91]

The Court observed that remedies under pre-1991 Title VII, which applied to the *Burke* claim, were limited to back pay and injunctive relief.[92] Plaintiffs were not entitled to seek damages for pain and suffering or punitive damages and had no right to a jury trial.[93] In light of these limitations, the Court held that the sex discrimination claim in *Burke* did not assert a "tort or tort type" right, and that the amount received in settlement of the back pay claim was therefore not excludable under §104(a)(2).[94]

2. Dissent and Concurrence

Three Justices disagreed with the *Burke* majority's focus on the range of available remedies in order to determine whether a claim qualifies as a tort or tort type right. Justice O'Connor's dissent,[95] joined by Justice Thomas, adhered to the approach of the courts of appeal, which looked to the nature of the claim, rather than to the range of available remedies to determine whether the claim was based on "tort or tort type" rights.[96] The dissent also recalled that the Court had previously recognized the tort-like nature of discrimination claims under the Civil Rights Acts of 1866 and 1871 in determining the appropriate statute of limitations for those claims,[97] and therefore concluded that claims under pre-1991 Title VII were "tort like."[98]

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[90] *Id.* at 235, 237. The emphasis on available remedies creates the possibility that, under *Burke*, contract damages might qualify for exclusion if punitive damages as well as damages for pain and suffering are available, as may be the case in a product liability action.

[91] *See id.* at 238.

[92] *See id.* at 238–39.

[93] *See id.* at 238.

[94] *Id.* at 241–42.

[95] *Id.* at 248–54 (O'Connor, J., dissenting).

[96] *Id.* at 249–50. Justice O'Connor wrote:

> In my view, the remedies available to Title VII plaintiffs do not fix the character of the right they seek to enforce. . . .
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> . . . .
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> . . . . The question whether Title VII suits are based on the same sort of rights as a tort claim must be answered with reference to the nature of the statute and the type of claim brought under it.

Id.

[97] *See id.* at 250–52.

[98] *Id.* at 254.

Justice Scalia, while concurring in the judgment, also rejected the Court's focus on available remedies.[99] He noted that since its enactment in 1918, the statutory exclusion had referred to damages "for personal injuries *or sickness*."[100] Therefore, he reasoned, the term "personal injuries" under § 104(a)(2) refers only to injuries to physical or mental health.[101] Justice Scalia acknowledged that employment discrimination might cause psychological harm and that such harm would be a personal injury within the meaning of the Code.[102] However, he noted that the right to back pay under Title VII does not depend on a showing of such harm and the award does not compensate for it.[103] Therefore, he concluded, the back pay award under Title VII was not "on account of" a personal injury within the meaning of the Code. Rather, Title VII back pay awards are independent of, and thus not "on account of," a personal injury.[104]

3. The Effect of *Burke*

The Court's decision in *Burke* did not suggest that the taxability of damages should depend on whether a personal injury is physical or nonphysical, as Congress later provided in the 1996 amendment to § 104(a)(2).[105] Indeed, the *Burke* opinion noted that both the courts and the Service had recognized that § 104(a)(2) made no distinction between physical and nonphysical harm.[106] Moreover, the Court implied that damages awarded for discrimination under statutes that afforded a broader range of remedies than pre-1991 Title VII would qualify for exclusion. These statutes include the Civil Rights Acts of 1866, the Fair Housing Act, and post-1991 Title VII.[107]

Nevertheless, the *Burke* opinion confused the lower courts since it did not specify which damages from its list of a "broad range of damages" were necessary or sufficient to constitute a tort or tort type right, or whether the right to a jury trial was a

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[99] *See id.* at 242–46 (Scalia, J., concurring in the judgment).
[100] *Id.* at 243 (emphasis added).
[101] *Id.* at 243–44.
[102] *See id.* at 245.
[103] *See id.*
[104] *See id.*
[105] *See infra* text accompanying notes 153–156.
[106] *See Burke*, 504 U.S. at 235–36 & n.6. In *Burke*, the Court affirmed in the text, as well as in a lengthy footnote, that I.R.C. § 104(a)(2) was meant to include physical *and* nonphysical injuries. *See id.*
[107] *See id.* at 239–40.

necessary or merely helpful factor.[108] The confusion was compounded because the Court in *Burke* made no attempt to explain why, as a matter of policy or logic, the range of remedies available for a particular claim should determine whether the resulting damages are taxable. Thus, lower courts attempting to apply the decision could not turn to an underlying policy rationale to decide which remedies might be crucial.[109]

4. Observations

As noted above, the fundamental problem with the *Burke* decision is that after finding no evidence of the legislative intent, the Court did not attempt to define the scope of the exclusion in light of the various policies that might justify the exclusion. While the Court's failure to discuss congressional intent may be due to the paucity of legislative history with respect to § 104(a)(2),[110] it would have been useful if the Court had acknowledged that fact and then defined the universe of cases to which the exclusion would apply in light of policies that would justify the special tax benefit.

A ruling issued by the Internal Revenue Service applying *Burke* illustrates the peculiar lines that are drawn when qualification for exclusion depends on the range of available remedies.[111] As noted above, prior to 1991, Title VII allowed monetary awards only for back pay.[112] In 1991, Congress provided that plaintiffs alleging disparate treatment can also recover damages for pain and suffering and punitive damages.[113] However, such additional damages are not available to plaintiffs asserting claims under the

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[108] *See, e.g.*, Carolyn F. Kolks, Note, *United States v. Burke—Does it Definitively Resolve the Analytical Confusion Created by the Section 104(a)(2) Personal Injury Exclusion?*, 46 ARK. L. REV. 657 (1993); Michael C. Witte, Note, *Tax Ramifications of Age Discrimination in Employment Act Award Under the Section 104(a)(2) Exclusion*, 57 U. PITT. L. REV. 181 (1995).

[109] *Compare* Downey v. Commissioner, 33 F.3d 836 (7th Cir. 1994) (holding that the ADEA does not afford a broad range of remedies and therefore, under *Burke*, damages were taxable) *with* Schmitz v. Commissisoner, 34 F.3d 790 (9th Cir. 1994) (holding that the ADEA does afford a broad range of remedies and therefore, under *Burke*, damages were excludable).

[110] There was virtually no legislative history to which the *Burke* Court, or lower courts seeking to apply *Burke*, could refer as an aid for construing § 104(a)(2). *See supra* text accompanying notes 43–44.

[111] *See* Rev. Rul. 93-88, 1993-2 C.B. 61. This ruling was withdrawn following the Supreme Court's decision in *Commissioner v. Schleier*, 515 U.S. 323 (1995). *See* I.R.S. Notice 95-45, 1995-34 I.R.B. 20.

[112] *See supra* note 67.

[113] *See supra* note 68.

disparate impact theory.[114] Under the 1991 amendment, plaintiffs alleging disparate treatment, but not those alleging disparate impact, were also afforded the right to a jury trial.[115] Consequently, under *Burke*, the Service concluded that damages for disparate treatment claims under post-1991 Title VII and for claims made under the Civil Rights Act of 1866 were tax-exempt since these laws provide a broad range of remedies. However, the Service also concluded that damages for post-1991 Title VII disparate impact claims and for all pre-1991 Title VII claims remained taxable in full.[116]

C. *The Supreme Court:* Commissioner v. Schleier

In a 1995 decision, *Commissioner v. Schleier*, the Supreme Court restricted even further the application of § 104(a)(2) to damages in discrimination cases.[117] The case involved a claim under the Age Discrimination in Employment Act by a pilot against his former employer, United Airlines, which had fired him when he reached age sixty.[118] The question decided in *Schleier* was whether § 104(a)(2) applied to back pay and to liquidated damages received to settle an age discrimination claim.[119]

Holding the entire amount taxable, the Supreme Court once again failed to discuss the underlying rationale for excluding personal injury damages and relied instead on formalistic reasoning.[120] The Court reinterpreted § 104(a)(2) to incorporate two

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[114] *See supra* note 69.

[115] *See* 42 U.S.C. § 1981a (1994).

[116] *See* Rev. Rul. 93-88, 1993-2 C.B. 61. One commentator noted:

> [A] claim of intentional gender discrimination brought under current, amended Title VII would presumably qualify as tort-like under the principles of *Burke*, whereas the exact same claim brought under the pre-1991 version of the statute clearly would not. In both situations, however, the victim has been subjected to exactly the same discriminatory conduct and has suffered exactly the same harm or personal injury.

John W. Dostert, Note, *Commissioner v. Schleier: Adding Insult to "Personal Injury?"*, 74 N.C. L. REV. 1641, 1665–66 (1996).

See also Scott E. Copple, *How Many Remedies Make a Tort? The Aftermath of U.S. v. Burke and its Impact on the Taxability of Discrimination Awards*, 14 VA. TAX REV. 589, 602 (1995) ("The amendment to Title VII has only changed the remedies available to the injured party, not the nature of the injury itself.").

[117] 515 U.S. 323 (1995).

[118] *See id.* at 324.

[119] *See id.* at 327.

[120] This decision reversed the judgments of the Tax Court and the Court of Appeals for the Fifth Circuit, both of which had found for the taxpayer. *See* Commissioner v. Schleier, 1993 WL 767976 (U.S. Tax Ct.), *aff'd*, 26 F.3d 1119 (5th Cir. 1994).

separate requirements.[121] First, in order for a claim to qualify as "tort or tort type" claim, the available remedies must include damages for pain, suffering, or emotional distress.[122] Second, in order to be "received on account of personal injuries," damages must compensate the victim either for a physical or mental injury or for other harm that directly resulted from such physical or mental injury.[123] We discuss the Court's explanation of these requirements in more detail below.[124]

1. "Tort or Tort Type"

Like *Burke*, *Schleier* emphasized that § 104(a)(2) applied only to a "tort or tort type" claim and that such a claim was distinguished by the available remedies. However, the Court in *Schleier* shifted the focus of inquiry away from the general availability of a "broad range of damages"[125] to a focus on the specific availability of damages for pain and suffering:

> It is true . . . that we emphasized in Burke the lack of a jury trial and the absence of a provision for punitive damages as distinguishing the pre-1991 Title VII action from traditional tort litigation. We did not, however, indicate that the presence of either or both these factors would be

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[121] *See Schleier*, 515 U.S. at 336–37. The Court added, "[T]hough Burke relied on Title VII's failure to qualify as an action based upon tort type rights, we did not intend to eliminate the basic requirement found in both the statute and the regulation that only amounts received 'on account of personal injuries or sickness' come within § 104(a)(2)'s exclusion." *Id.* at 336.

[122] *See id.* at 335–36.

[123] This description of the second requirement is based on the Court's interpretation of the "on account of" language. *See infra* text accompanying notes 131–138.

[124] The *Schleier* opinion attracted considerable attention from commentators. *See* Lisbeth Baker, *Schleier v. Commissioner: The Supreme Court's Response to the Split among Circuits over Taxability of ADEA Awards*, 61 J. AIR L. & COM. 935 (1996); Debra Cohen-Whelan, *From Injury to Income: The Taxation of Punitive Damages "on Account of" Commissioner v. Schleier*, 71 NOTRE DAME L. REV. 913 (1996); Leandra Lederman Gassenheimer, *The Excludability of Employment Discrimination Awards under Code Section 104(a)(2) after United States v. Burke and Commissioner v. Schleier*, 28 ARIZ ST. L.J. 315 (1996); Peter J. Rimel, *Recovery Under the Age Discrimination in Employment Act Is Not Excludable Under 104(a)(2)*, 23 W. ST. U. L. REV. 325 (1996); Dostert, *supra* note 116; David B. Jennings, Note, *The Supreme Court Gets Tough with I.R.C. § 104(a)(2) Exclusions: Taxpayer Discrimination Awards Suffer Injury as a Result of Commissioner v. Schleier*, 40 ST. LOUIS U. L.J. 865 (1996); Michael C. Witte, Note, *Tax Ramifications of Age Discrimination in Employment Act Awards Under the Section 104(a)(2) Exclusion*, 57 U. PITT L. REV. 181 (1995); T. James Lee, Jr., Note and Comment, *Section 104(a)(2) After Commissioner v. Schleier: Litigating the Excludability of Statutory Damages "Received on Account of Personal Injuries,"* 1996 BYU L. REV. 531 (1996).

[125] *Burke*, 504 U.S. at 235.

> sufficient to bring a statutory claim within the coverage of the regulation.[126]

To qualify as a "tort or tort type" claim, the Court continued, available remedies must include damages for: "other traditional harms associated with personal injury, such as pain and suffering, emotional distress, [and] harm to reputation . . . ."[127]

Available remedies under the ADEA were somewhat broader than those afforded to the *Burke* taxpayers under the pre-1991 version of Title VII. In addition to back pay, the ADEA allowed liquidated damages in cases of willful discrimination.[128] Moreover, the ADEA, unlike pre-1991 Title VII, provided a right to trial by jury.[129] While the ADEA provided to successful plaintiffs a range of remedies that might have been broad enough to meet the standard of *Burke*, the Court in *Schleier* held that the ADEA remedies did not qualify for the § 104(a)(2) exclusion because the statute did not provide damages for pain and suffering.[130]

2. "Received on Account of Personal Injuries"

The Court in *Schleier* articulated a second and independent ground for its decision that the damages were not "received on account of personal injuries," for the purposes of the § 104(a)(2) exclusion. The Court explained its construction of this phrase with a hypothetical:

> Assume that a taxpayer is in an automobile accident, is injured, and as a result of that injury suffers . . . lost earnings . . . . [Any] recovery for lost earnings is . . . excludable as being 'on account of personal injuries,' as long as the lost earnings resulted from time in which the taxpayer was out of work as a result of her injuries.[131]

In other words, damages for lost earnings in this hypothetical are "received on account of personal injuries" because a personal injury (in the example, presumably a physical injury) directly causes the victim to be unable to work, which in turn causes the victim to lose wages.[132]

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[126] *Schleier*, 515 U.S. at 335.
[127] *Id.* at 335–36.
[128] *See* 29 U.S.C. § 626 (1994).
[129] *See id.*
[130] *Schleier*, 515 U.S. at 336.
[131] *Id.* at 329.
[132] *See id.* at 330.

The taxpayer in *Schleier*, the Court continued, may have suffered a personal injury, namely emotional distress. However, the loss of his job was not itself a direct result of such a personal injury.[133] Rather, it was the firing of the taxpayer on account of age that caused the loss of employment. Thus, the Court concluded: "Whether [the taxpayer's] attaining the age of 60 or his being laid off on account of his age is considered the proximate cause of [the taxpayer's] loss of income, neither the birthday nor the discharge can fairly be described as a 'personal injury' or 'sickness.'"[134]

In other words, damages for lost earnings in *Schleier* were not "received on account of personal injury," because a personal injury (in that case, possible emotional distress) did not cause the victim to lose his job and in turn lose wages.[135] Based on similar reasoning, the Court concluded that the liquidated damages, which are in the nature of punitive damages,[136] were not "received on account of personal injury" and therefore not excludable under § 104(a)(2).[137]

Thus, the Court interpreted "received on account of personal injury" to require that damages compensate the victim either for a physical or mental injury or for other harm that is a direct consequence of such physical or mental injury. In so doing, the Court in effect adopted the construction of § 104(a)(2) proposed by Justice Scalia in his concurring opinion in *Burke*.[138]

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[133] Compensation for the emotional distress, had it been afforded under the ADEA (which it was not), presumably would have qualified as "damages received on account of personal injuries."

[134] *Id.* at 330.

[135] Therefore, damages in *Schleier* were "completely independent of the existence or extent of any personal injury." *Id.* at 330. Notice the similarity between the language of the Court's construction of "on account of" in *Schleier* and the interpretation in Justice Scalia's concurrence in *United States v. Burke*, 504 U.S. 229, 245 (1992) (Scalia, J., concurring in the judgment).

[136] *Schleier*, 515 U.S. at 331. The Court had held in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985) that liquidated damages under the ADEA are punitive in nature.

[137] *See* 515 U.S. at 331.

[138] *See Burke*, 504 U.S. at 242–46 (Scalia, J., concurring in the judgment). In that opinion, Justice Scalia declared that even if the plaintiff had suffered a "personal injury" (i.e., to mental health) within the meaning of the Code, the back pay that she received was not "on account of" the personal injury because it did not depend on the injury. In other words, any personal injury that the plaintiff may have suffered was not a cause of the back pay award, since she was entitled to the back pay regardless of whether she suffered an injury. *See id.* at 242–45. The *Schleier* Court adopts this analysis, as Justice O'Connor noted in her dissent. *See* 515 U.S. at 341 (O'Connor, J., dissenting).

3. The Dissent

Justice O'Connor again dissented, joined by Justice Thomas and in part by Justice Souter.[139] She reiterated the view, set forth in her dissent in *Burke*, that whether damages are received for a personal injury, and are therefore excludable, depends solely on the underlying nature of the claim. Specifically, excludability from taxation depends on whether or not an amount is received on account of "any invasion of rights that an individual is granted by virtue of being a person in the sight of the law."[140] Consequently, Justice O'Connor rejected both the majority's holding that damages are excludable only if the cause of action authorizes an award for pain and suffering, and the Court's novel construction of the "on account of" requirement.[141] In addition, she argued that the range of remedies available under the ADEA, which included liquidated damages as well as back wages, was sufficiently broad to qualify the claim as a "tort or tort type" claim even under the *Burke* opinion.[142]

4. The Effect of *Schleier*

The Court's opinion in *Schleier* purported to reaffirm the principle that the § 104(a)(2) exclusion applied to damages for nonphysical as well as physical harm.[143] (Recall that *Schleier* was decided before Congress amended § 104(a)(2) to apply only to damages for physical personal injuries.) However, the decision significantly limited the circumstances in which an award or settlement of discrimination claims would be tax-exempt.

Nevertheless, following *Schleier*, damages in discrimination cases were not entirely taxable so long as the claim qualified as a "tort or tort type," that is, the cause of action provided for an award of damages for pain and suffering. In that case, the damages for the pain and suffering caused by discrimination were

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[139] *See id.* at 337–46.

[140] *Id.* at 338 (citing Threlkeld v. Commissioner, 87 T.C. 1294, 1308 (1986)).

[141] *Id.* at 340–46.

[142] *Id.* at 342.

[143] In *Schleier*, the Court stated, "We of course have no doubt that the intangible harms of discrimination can constitute personal injury, and that compensation for such harms may be excludable under section 104(a)(2)." *Id.* at 332 n.6. Previously in *Burke*, the Court had affirmed in the text, as well as in a lengthy footnote, that I.R.C. § 104(a)(2) was meant to include nonphysical, as well as physical, injuries. 504 U.S. at 235 n.6.

still excludable. Additionally, lost earnings could qualify for exclusion if the victim was unable to work because of the pain and suffering caused by discrimination. In that event, since damages for lost earnings would compensate for harm that is a direct consequence of physical or emotional injury, the discrimination plaintiff would be in a position analogous to the automobile accident victim who suffers a physical injury and consequently is unable to work.[144]

5. Observations

Just as the Court's opinion in *Burke* did not discuss why, as a matter of tax policy, the availability of a "broad range of damages"[145] might justify excluding personal injury awards, so the opinion in *Schleier* did not discuss why the availability of pain and suffering damages might justify the exclusion. However, as we explain in Part II, the availability of pain and suffering damages might justify the exclusion if: (1) pain and suffering damages should be excluded because they compensate for a "normally untaxed personal . . . quality, good, or asset"[146] while lost earnings should be taxable since the wages they replace are ordinarily taxable;[147] (2) the burden of allocating damages between those elements that should be excludable and those that should be taxable is considered too great;[148] and (3) it is more important to exclude pain and suffering damages than to tax lost earnings. Thus, although not discussed by the Court, the availability of pain and suffering damages offers a possible policy justification for excluding personal injury damages because of the resulting allocation burden.

An even more serious problem with the *Schleier* opinion is the Court's construction of the phrase "received on account of personal injuries," which is strained, artificial, and appears unrelated to any policy consideration whatsoever. In both the age discrimination case and the automobile accident example, the

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[144] *See Schleier*, 515 U.S. at 329. However, if the victim of employment discrimination was unable to work as a result of discriminatory firing, rather than as a result of emotional distress caused by discrimination, any recovery of lost earnings would be taxable under *Schleier*. In addition, any award of punitive damages would be taxable under the *Schleier* rationale. *See id.* at 331.

[145] O'Gilvie v. United States, 117 S. Ct. 452, 456 (1996).

[146] *O'Gilvie*, 117 S. Ct. at 456.

[147] *See* I.R.C. § 61(a)(1) (1994).

[148] *See infra* notes 221–243 and accompanying text.

plaintiff is injured by a wrongful act, and the injury consists of physical or emotional harm and the loss of earnings. In both instances, the phrase "damages received on account of personal injuries" could be read to exclude from taxation all damages that compensate the victim for harm proximately caused by the wrongful act, including lost earnings as well as compensation for physical or mental injury.[149] Alternatively, the phrase might be read to exclude only compensatory damages for physical or mental injury and not for lost earnings. However, there appears to be no principled reason for construing the section, as the Court does, to cover lost earnings in the automobile accident but not in the discrimination case. Nor does the Court's discussion provide any tax policy or other justification for its scholastic reading of § 104(a)(2).

D. *Congress Acts*

In 1989, the House of Representatives passed legislation that would have made § 104(a)(2) applicable only to physical injuries.[150] However, the Senate at that time would not accept limiting the exclusion to physical injuries, and the House's amendment was defeated.[151] As a curious compromise, Congress explicitly made punitive damages in the case of nonphysical injury ineligible for exclusion under § 104(a)(2), but made no reference to the treatment of punitive damages in the case of physical injury.[152]

In 1996, a year after the *Schleier* decision, the Senate agreed with the House to limit the § 104(a)(2) exclusion to damages for medical expenses in the case of nonphysical injury and damages for lost earnings, pain and suffering, and medical expenses in the case of physical injury.[153] Consequently, under current law, regardless of whether the injury is physical or nonphysical, damages for medical expenses are excludable and punitive damages

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[149] Such a reading, however, would cover only compensatory, and not punitive damages.

[150] *See* H.R. REP. No. 101-247, at 1354–55 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 2824–25.

[151] *See* H.R. CONF. REP. No. 101-386, at 415 (1989), *reprinted in* 1989 U.S.C.C.A.N. 3018, 3226.

[152] The amendment was part of the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(a), 103 Stat. 2379 (1989).

[153] *See* I.R.C. § 104(a)(2) (1994).

are taxable.[154] The critical difference between physical and nonphysical injuries is in the treatment of damages for lost earnings and for pain and suffering. In the case of physical harm, both components are tax-exempt. In the case of nonphysical harm, they are not.

The legislative history offers little explanation for the distinction between physical and nonphysical injuries.[155] However, both the Conference Report on the successful 1996 amendment and the House Report on the defeated 1989 amendment referred disparagingly to courts that had interpreted § 104(a)(2) to cover damages received in employment discrimination and defamation cases.[156]

E. *The Supreme Court:* O'Gilvie v. United States

O'Gilvie v. United States, decided after the 1996 amendment to § 104(a)(2), marked the first time that the Court discussed the underlying policy of § 104(a)(2).[157] Although *O'Gilvie* did not involve a discrimination claim, its policy discussion is relevant

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[154] *See id.* However, § 104(c) permits exclusion of punitive damages in cases of wrongful death if "applicable state law . . . provides, or has been construed to provide . . . that only punitive damages may be awarded in such an action." *Id.* This exception applies only to state laws "in effect on September 13, 1995 and without regard to any modification after such date" or state laws as construed as of that date "by a court of competent jurisdiction." *Id.*

[155] *See infra* text accompanying notes 255–263.

[156] The Conference Report on the 1996 amendment stated:

> Courts have interpreted the exclusion from gross income of damages received on account of personal injury [sic] or sickness that do not relate to a physical injury or sickness. For example, some courts have held that the exclusion applies to damages in cases involving certain forms of employment discrimination and injury to reputation where there is no physical injury or sickness.

H.R. CONF. REP. No. 104-737, at 142–43 (1996).

In 1989, the House Report on the failed amendment that would have restricted § 104(a)(2) to physical injuries used similar language:

> Under present law, gross income does not include any damages received . . . on account of personal injuries or sickness. . . . Courts have interpreted this exclusion broadly in some cases to cover awards for personal injury that do not relate to a physical injury or sickness. For example, some courts have held that the exclusion applies to damages in cases involving employment discrimination and injury to reputation where there is no physical injury or sickness. Amounts received as damages for personal injury or sickness receive favorable tax treatment in that they are excludable from gross income. The committee believes that such treatment is inappropriate where no physical injury or sickness is involved.

H.R. REP. No. 101-247, at 111 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 2824–25.

[157] 117 S. Ct. 452 (1996).

to the question of whether damages for nonphysical injury, including discrimination damages, should be treated less favorably for tax purposes than other personal injury awards.

The taxpayers, the husband and children of a woman who died of toxic shock syndrome, had received a jury award of $1,525,000 in actual damages and $10,000,000 in punitive damages from the manufacturer of the product that caused her death.[158] The excludability of the damage award was governed by the 1989 version of § 104(a)(2), which stated explicitly that punitive damages for nonphysical injury were ineligible for exclusion, but which made no specific reference to the treatment of punitive damages for physical injury.[159] The Supreme Court held that punitive damages for physical injury were not excludable even under the pre-1996 version of § 104(a)(2).[160]

The Court, in an opinion by Justice Breyer, justified its holding that the punitive damages were not excludable by relying on *Schleier*'s construction of the "on account of" language in § 104(a)(2). Punitive damages, said the Court, were intended to punish the wrongdoer, rather than to compensate for the personal injury, namely the death of the victim from toxic shock.[161] Therefore, such damages failed to satisfy the "on account of" requirement and were not excludable under § 104(a)(2).[162]

In addition to citing *Schleier*, the Court in *O'Gilvie* engaged in its first discussion of the policy reasons for the § 104(a)(2) exclusion. The Court observed that the exclusion had its genesis in the return of human capital rationale of the 1918 Attorney General's Opinion on accident insurance proceeds. Furthermore, the Court interpreted that rationale not to permit the exclusion of lost earnings:

> We concede that the original provision's language does go beyond what one might expect a purely tax-policy-related "human capital" rationale to justify. That is because the language excludes from taxation not only those damages that aim to substitute for a victim's physical or personal well-being—personal assets that the Government does not tax and would not have taxed had the victim not lost them. It also excludes from taxation those damages that substitute, say, for lost wages, which would have been taxed had the victim

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[158] *See id.* at 454.
[159] *See supra* note 152 and accompanying text.
[160] *O'Gilvie*, 117 S. Ct. at 455.
[161] *See id.* at 454–55.
[162] *See id.*

> earned them. To that extent, the provision can make the compensated taxpayer better off from a tax perspective than had the personal injury not taken place.[163]

This admission raises an important question: If lost earnings are excludable notwithstanding the human capital rationale for the statute, why shouldn't punitive damages also be excluded? The Court had two answers. First, even if "coverage of lost earnings is something of an anomaly . . . that circumstance would not justify the extension of the anomaly" to punitive damages.[164] Second, the purposes that might have led Congress to exclude lost earnings from income do not necessarily apply to punitive damages.

The Court identified two purposes that might have motivated Congress to exclude lost earnings: generosity to victims and avoidance of the administrative problems of separating out the taxable and nontaxable elements of a lump sum award or settlement. With respect to the first potential justification, the Court noted that generosity to victims has its limits, and need not extend to punitive damages.[165] With respect to the second, the Court declared that although the difficulty of allocating a lump sum damage award or settlement among its constituent elements might justify an exclusion for lost earnings, it does not necessarily justify an exclusion of punitive damages: "The administrative problem of distinguishing punitive from compensatory damages is likely to be less serious than, say, distinguishing among the compensatory elements of a settlement (which difficulty might account for the statute's treatment of, say, lost wages)."[166]

Justice Scalia dissented, joined by Justices O'Connor and Thomas.[167] He argued that the language of the statute, excluding "any damages received . . . on account of personal injuries," unambiguously covered punitive as well as compensatory damages: "[T]he personal injury is as proximate a cause of the punitive damages as it is of the compensatory damages; in both cases it is the reason the damages are awarded. That is why punitive damages are called damages."[168]

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[163] *Id.* at 456.
[164] *Id.*
[165] *Id.* at 457.
[166] *Id.*
[167] *Id.* at 460–63 (Scalia, J., dissenting).
[168] *Id.* at 460.

Moreover, Justice Scalia noted, the legislative history offered no evidence that Congress relied on, or was even conscious of, the human capital rationale of the 1918 Attorney General's Opinion on the exclusion of accident insurance proceeds.[169] Justice Scalia also rejected the notion that the administrative difficulty of allocating damages might justify the exclusion of lost earnings, but not of punitive damages.[170]

F. *The State of Current Law*

After the twists and turns of three Supreme Court opinions and two congressional amendments, the tax treatment of personal injury damages is at least reasonably clear. All damages resulting from physical harm, with the exception of punitive damages, are excluded from taxation under § 104(a)(2).[171] Damages resulting from nonphysical harm are not covered by § 104(a)(2) and are presumably taxable in full, with the exception noted above for the reimbursement of medical expenses for emotional distress.[172]

Neither Congress nor the Court, however, has coherently explained the purpose of the exclusion. Congressional reports on the 1989 and 1996 amendments contain little more than descriptions of existing law and proposed changes. The Supreme Court issued three opinions in four years discussing the exclusion, an unusual number, given the Court's limited resources. Yet the results were disappointing. The opinions in *Burke* and *Schleier* are formalistic and do not discuss the exclusion's purposes at all. The *O'Gilvie* opinion cites the so-called human capital rationale to justify the exclusion of damages for pain and suffering; it also cites the allocation burden and sympathy for victims as justifications for the exclusion of lost earnings. The Court, however, did not analyze these justifications in any depth. In Part II below, we consider them more fully.

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[169] *Id.* at 461–62.

[170] *Id.* at 462. Justice Scalia wrote, "Excluding punitive as well as compensatory damages from gross income 'avoids such administrative problems as separating punitive from compensatory portions of a global settlement.'" *Id.* (citation omitted).

[171] *See* I.R.C. § 104(a)(2) (1994).

[172] *See id.*

II. JUSTIFICATIONS FOR EXCLUDING PERSONAL INJURY DAMAGES

A. *The Taxation of Other Damages and the "in lieu of" Test*

The ordinary rule that governs the taxation of damages received after trial or settlement of nonpersonal injury claims (in business tort and contract disputes, for example), is that "recoveries are taxable if they compensate for amounts that would have been taxable if received in due course,"[173] but are excludable if they "compensate for loss of a right that would otherwise have been enjoyed tax-free."[174] As explained in the leading case on the issue of taxing damages, *Raytheon Production Corp. v. Commissioner*, "[t]he question to be asked is 'in lieu of what were the damages awarded?'"[175]

Application of this principle to claims that constitute "personal injuries" within the meaning of § 104(a)(2) would have the following results. Damages for lost earnings would be taxable since earnings are ordinarily taxed.[176] Punitive damages would also be taxed. They are intended to punish the wrongdoer and deter future wrongdoing. They do not compensate the plaintiff for a loss, and thus constitute a clear economic gain, which should be taxable as income. There has long been general agreement among commentators that such damages represent an "economic windfall," "do not compensate for any loss," and therefore "represent a pure accretion to wealth."[177]

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[173] BITTKER & LOKKEN, *supra* note 24, ¶ 13.1.4, at 13-10.

[174] *Id.* ¶ 5.6, at 5-43. *See also* the statement of the Supreme Court in *O'Gilvie* that damages that substitute for a "normally untaxed personal . . . quality, good, or asset" (such as for pain and suffering and other emotional distress) should not be subject to income taxation. 117 S. Ct. at 456.

[175] Raytheon Prod. Corp. v. Commissioner, 144 F.2d 110, 113 (1st Cir. 1944). As noted above, in *O'Gilvie* the Supreme Court interpreted the human capital rationale of the 1918 Attorney General Opinion on accident insurance proceeds to incorporate the "in lieu of" test.

[176] *See* I.R.C. § 61(a)(1) (1994). We assume that the amount of compensation for lost wages is computed on a before-tax basis. As part of such a computation, the present value of any future earnings (front pay) should be calculated using an after-tax interest rate. On the other hand, if damages for lost earnings are calculated on an after-tax basis, then an implicit tax has already been imposed and exclusion is appropriate in order to avoid taxing the earnings twice. *See* Dodge, *supra* note 35; Heen, *supra* note 35.

[177] Dodge, *supra* note 35, at 180. *See also* Kahn, *supra* note 35, who states:

> [O]ne of the roles of punitive damages is to compensate the victim for harm whose existence the victim is unable to demonstrate. However, even if punitive damages do play such a compensatory role, it is a minor feature that pales to insignificance when compared to their principal role—to punish.

In contrast, damages that compensate the victim for medical expenses incurred as a result of the injury would be tax-exempt. Such recoveries merely restore the taxpayer to the status quo that existed before the injury.[178] In other contexts, the tax treatment of medical care has generated controversy.[179] An extensive literature debates the deduction for unreimbursed medical expenses[180] and the exclusion of health insurance premiums and benefits.[181] However, even critics of these provisions appear to favor the exclusion of personal injury damages for medical expenses.[182]

Id. at 359. *See also* Paul C. Feinberg, *Federal Income Taxation of Punitive Damages Awarded in Personal Injury Actions*, 42 CASE W. RES. L. REV. 339 (1992); James Serven, *The Taxation of Punitive Damages: Horton Lays an Egg?*, 72 DENV. U. L. REV. 215 (1995).

[178] *See* William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 335–37 (1972); Dodge, *supra* note 35, at 145; Morris, *supra* note 35, at 748–49. *See also infra* note 180.

[179] *See* Andrews, *supra* note 178; Laura E. Cunningham, *National Health Insurance and the Medical Deduction*, 50 TAX L. REV. 237 (1995); Griffith, *supra* note 35; Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343 (1989); Louis Kaplow, *The Income Tax as Insurance: The Casualty Loss and Medical Expense Deductions and the Exclusion of Medical Insurance Premiums*, 79 CAL. L. REV. 1485 (1991); Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN L. REV. 831 (1979).

[180] I.R.C. § 213(a) (1994).

[181] I.R.C. §§ 104(a)(3), 105(b), 106 (1994).

[182] *See, e.g.*, Cunningham, *supra* note 179, who favors excluding from the income tax base only "essential" or "baseline" medical costs and taxing all other medical expenses:

> Where a plaintiff is compensated for baseline medical expenses, the exclusion of that recovery is consistent with the general proposition that those expenses should be excluded from the tax base. But extending the exclusion to an injured plaintiff who is reimbursed by a tortfeasor for "excess medicals" is more difficult although I believe ultimately correct. Consider an automobile accident victim who needs cosmetic surgery to restore her pre-injury appearance. Assume the expense is not covered by baseline insurance, and the plaintiff has not purchased supplementary insurance. If the plaintiff pays the cost of the surgery herself, the arguments offered in this Article would deny her a deduction. If she recovers the cost of the surgery from the tortfeasor, it might appear that consistency would require the victim to include the recovered amount in income. To allow an exclusion when the tortfeasor bears the expense would have the effect of giving her a deduction. Yet this result seems unduly harsh, as it treats the injured plaintiff more harshly than had she not incurred the injury.

Id. at 262.

See also Kaplow, *supra* note 179, n.64 at 1500; Kelman, *supra* note 179, at 842. Kaplow criticizes the deduction for medical expenses and also the exclusion of medical insurance proceeds while medical insurance premiums are themselves also excludable. However, he states that because his argument "depends on the prior payment of an insurance premium, it is inapplicable to tort . . . recoveries under § 104(a)(2)." *Id.* Kelman generally opposes a deduction for medical expenses yet would continue to allow personal injury victims to exclude damages for medical expenses. He argues that medical expenses are generally indistinguishable from other voluntary personal con-

Finally, we argue that, under the "in lieu of" principle, damages that compensate the plaintiff for pain and suffering or emotional distress should also be excluded. A person who breaks a leg in an automobile accident may receive damages for physical and psychic discomfort. Similarly, a person subject to racial or gender discrimination in employment or housing may be entitled to an award for emotional distress. As the Supreme Court recognized in *O'Gilvie*, such damages compensate the victim for the loss of rights that are ordinarily non-market or noncommercial. Absent the injury, these rights would produce psychic benefits that are tax-exempt.[183] As with reimbursement for medical expenses, the purpose of such damages is simply to make the victim whole.

We acknowledge, however, that the "in lieu of" principle does not by itself definitively resolve this issue, and that the exclusion of pain and suffering damages is controversial. We therefore examine the arguments of scholars in favor of taxing such damages more closely below.

B. *Criticisms of Excluding Pain and Suffering Damages*

Academic writers make four different criticisms of the exclusion of pain and suffering damages: (1) in similar circumstances damages received for the destruction of other property are taxable; (2) pain and suffering damages are analogous to wages; (3) the loss of utility compensated by pain and suffering damages should be disregarded for purposes of measuring income; and (4) taxpayer utility ex ante is greater if pain and suffering damages are taxed.[184]

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sumption expenditures, but that the medical expenses of a personal injury victim are different because they are involuntarily incurred.

[183] In *O'Gilvie*, the Supreme Court referred to "damages that aim to substitute for a victim's physical or personal well-being—personal assets that the Government does not tax and would not have taxed had the victim not lost them," and implied that such damages "substitute for [a] normally untaxed personal . . . quality, good or 'asset.' " 117 S. Ct. at 456. *See also* Bernard Wolfman, *Current Issues of Federal Tax Policy*, 16 U. ARK. LITTLE ROCK L.J. 543 (1994):

> Recoveries for physical and mental injury seek to help a person back into the position of well being enjoyed by that person prior to the injury. Since one's well being, one's happy psyche, is not taxed, it is not unreasonable . . . to exclude from taxation the sums recovered for the purpose of restoring the person to his or her well-being ante.

Id. at 549.

[184] *See* Dodge, *supra* note 35; Cochran, *supra* note 35; Griffith, *supra* note 35.

1. The Analogy to Other Property

The first criticism can be understood as a kind of extended syllogism:

> (1) Under the Code, damages that compensate the taxpayer for the destruction of property are taxable unless (a) the basis of the property at least equals the amount of damages received so that there is no gain realized;[185] or (b) the damages are used to replace the destroyed property with "similar" property so that the realized gain is entitled to nonrecognition.[186]
>
> (2) Pain and suffering damages compensate the taxpayer for the destruction of emotional well-being that is a kind of human capital.
>
> (3) Human capital should receive the same tax treatment as other property.
>
> (4) Given propositions (1)–(3), above, pain and suffering damages should be taxable unless (a) the basis of the taxpayer's emotional well-being at least equals the amount of damages received so that there is no gain; or (b) the damages are reinvested in similar property.
>
> (5) However, it is impossible to (a) assign any basis to a taxpayer's emotional well-being or (b) replace destroyed emotional well-being, which is a nonmarket good and therefore by definition irreplaceable.
>
> (6) Therefore, given propositions (4)–(5), above, pain and suffering damages, which compensate for the destruction of human capital, should be taxable.[187]

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[185] *See* I.R.C. § 1001(a) (1994).

[186] I.R.C. § 1033(a)(2) (1994).

[187] *See, e.g.*, Cochran, *supra* note 35:

> [A] return of capital is excluded from gross income only to the extent of the taxpayer's basis in the capital. A taxpayer's basis in property is generally the amount paid for the property. Any receipt in excess of the taxpayer's basis constitutes a taxable gain . . . . However, in the personal injury context, a taxpayer's basis is zero because a taxpayer does not pay for his limbs or organs. The recipient of a personal injury damages award is being "made whole" in the same sense that a taxpayer selling her stock for $150 is being made whole—by receiving the full value of what is given up. Like the taxpayer selling her stock, the personal injury plaintiff should be allowed to exclude only that portion of the award that represents recovery of an actual investment of capital. If the taxpayer's basis in the 'capital' cannot be established, no part of the award can be accurately called a return of capital.

Id. at 45–46. The author continues:

> Section 104(a)(2) might appear analogous to section 1033, but there are . . . important differences . . . . [I]n order to qualify . . . under section 1033, the taxpayer must invest the compensation for the destroyed property in replacement property . . . . [T]he [section 104(a)(2)] exclusion is not dependent on the taxpayer's use of the award; she may spend the money any way she likes.

Id. at 47.

a. *Is human capital like other property?* The fundamental problem with this argument is the assumption in the third step that human capital should receive the same tax treatment as other property. Although human capital might be analogized to other property, the Code has never attempted to treat them both in the same way.[188] In particular, appreciation in other property and in human capital are treated very differently. With other property, appreciation is generally taxed on the occasion of a realization event, usually a sale or exchange,[189] although increasingly even unrealized appreciation may be taxed.[190]

In contrast, appreciation in human capital is virtually never taxed. The failure to tax such appreciation might be explained in part by the absence of a realization event. However, even if we decided to tax unrealized appreciation in other property,[191] there are strong objections to taxing unrealized appreciation in human capital, which by definition represents an increase in an individual's future earning capacity.[192] Individuals may have capacities that they choose for reasons of their own not to exercise. An individual with the capacity to make a fortune as an investment banker may decide instead to become a school teacher. Thus, a tax on unrealized appreciation in human capital (the school teacher's capacity to be an investment banker) would violate "widely accepted concepts of individual liberty because

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See also Dodge, *supra* note 35:

> Section 104 currently excludes damages for pain and suffering . . . . Conceptually, the damages represent a conversion of some nonmaterial benefit, such as lost "normality," peace of mind, or dignity into cash. . . . Since no "basis" exists in any recovery of this type, such damages seemingly should be fully includible as pure accessions to material wealth.

Id. at 182.

[188] For example, the costs of improving or constructing income-producing property are generally deductible (either immediately in full or over time through depreciation). *See* I.R.C. §§ 162(a), 167(a) (1994). However, the costs of improving human capital, such as most individual educational expenses, are not. *See* Treas. Reg. § 1.162-5 (1994).

Moreover, when an individual dies, life insurance proceeds, which replace the lost human capital, are fully excludable, without a showing that basis at least equals the amount realized from insurance. *See* I.R.C. § 101(a)(1) (1994). In the case of term insurance, the exclusion of mortality gains might be justified as compensating for the Code's failure to allow a deduction for mortality losses. However, both gains and losses on investments in nonhuman capital are generally taken into account. Thus, this possible justification for the exclusion of term insurance proceeds simply underlines the point that the Code generally treats human and nonhuman capital very differently.

[189] Treas. Reg. § 1.61-6(a) (1994).

[190] I.R.C. §§ 475, 1256, 1272 (1994).

[191] *See, e.g.*, David J. Shakow, *Taxation Without Realization: A Proposal for Accrual Taxation*, 134 U. PA. L. REV. 1111 (1986).

[192] However, for a proposal that such a tax be considered, *see* Louis Kaplow, *Human Capital Under an Ideal Income Tax*, 80 VA. L. REV. 1477 (1994).

it would disregard such personal choices as which career to pursue, the amount of time to devote to work as opposed to leisure, and so on."[193]

Similar reasoning supports the exclusion of pain and suffering damages. The personal injury victim does not choose to be injured. The destruction of her human capital (such as emotional well-being) occurs against her will. The victim presumably would have preferred to retain her human capital intact rather than to receive cash compensation. Therefore, to tax her on appreciation in human capital that ordinarily is not the subject of taxation and that she did not choose to realize in cash form would violate individual liberty.

b. *Even if human capital is like other property.* Even if we accepted the proposition that damages for the destruction of human capital should be subject to the same tax rules as damages for the destruction of other property, the impossibility of assigning a basis to the destroyed emotional well-being may argue for exclusion rather than taxation of damages.

The starting point for determining the basis should be the total amount spent on the taxpayer's support since birth. A taxpayer is unlikely to have records of the total amount spent. Even if she did, it seems impossible to determine what fraction of that total to apportion to the emotional well-being destroyed in a particular case. The apportionment problems are especially daunting and probably impossible to resolve. Even if it is known, for example, that $1 million has been spent to support a taxpayer since birth, what fraction should be apportioned as the basis of the destroyed emotional well-being for which pain and suffering damages compensate?[194]

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[193] Alvin C. Warren, *Would a Consumption Tax Be Fairer than an Income Tax?*, 89 YALE L.J. 1081, 1114 (1980).

[194] Treas. Reg. § 1.61-6(a) generally requires apportionment of basis. The example involving human capital raises two different kinds of apportionment problems. First, there is the difficulty of determining the degree to which the total amount spent supports current as opposed to future activities. In the area of nonhuman capital, making the distinction is difficult enough. *See, e.g.*, Encyclopaedia Britannica v. Commissioner, 685 F.2d 212 (7th Cir. 1982). In the area of human capital, the problem appears even more intractable. Suppose an individual spends money on food. The food provides energy that is consumed currently but also may build organic structures that last through a person's entire life. Or suppose a person takes a trip to Europe. The experience may provide not only enjoyment in the year when the trip is taken but also lifetime memories. Is it possible to determine how much of the expenditure for food or a European trip should be considered a current expense and how much should be considered a capital expenditure? Second, even if the amount allocable to capital as opposed to current expenditures can be determined, there is the further problem of

In the case of other property, such difficulties of apportionment may be resolved in the taxpayer's favor. For example, if it is impossible to apportion a fraction of the entire basis of property to the sale or destruction of only part, the taxpayer may use up to the entire basis of the property to offset the amount received for the partial sale or destruction. Thus, *Inaja Land Co. v. Commissioner* held that damages for the partial destruction of real property could be offset by the property's total basis because it was impossible to determine what fraction of that basis to apportion to the part destroyed.[195] Since the basis of the entire property was $60,000 and the damages were $50,000, the taxpayer reported no gain. Because it is reasonable to assume that pain and suffering damages will seldom exceed the total expended on the taxpayer's support since birth (even though it is unlikely that records documenting that total are available),[196] perhaps such damages should ordinarily be exempt from tax under the *Inaja* principle.

Even if such damages exceed the total expended, we question the assertion that it is impossible to replace destroyed emotional well-being because it is a nonmarket good. The tax law does not treat unique material objects as irreplaceable, but merely requires that the destroyed property be replaced with "similar" property in order for damages in excess of basis to be entitled to nonrecognition. For example, a painting by Vincent Van Gogh is unique and thus literally irreplaceable. However, if such a painting is destroyed and replaced with a different painting (for example, a Jackson Pollack), damages in excess of basis will be treated as exempt from tax because the destroyed painting is replaced with "similar" property.[197]

The injury victim who receives pain and suffering damages cannot, of course, directly purchase emotional well-being to replace what has been destroyed. However, the victim will presum-

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determining what fraction of total expenditures for human capital to allocate to the emotional well-being destroyed in a particular case.

[195] 9 T.C. 727, 735–36 (1947). In *Inaja*, pollution emitted by the City of Los Angeles severely damaged the plaintiff's waterfront property. As a formal matter, the plaintiff sold the City of Los Angeles a permanent easement to pollute the property. In reality, the sales price represented damages for the destruction of the property attributable to past, continuing, and future pollution. *Id.*

[196] Of course, the assumption might not be reasonable in the case of young children on whose support relatively little will have been spent since birth. However, the nontaxation of pain and suffering damages in such cases can be defended by analogy to I.R.C. § 1033(a)(2) (1994). *See infra* text accompanying note 197.

[197] *See* I.R.C. § 1033(a)(2) (1994).

ably spend the damages in whatever way makes her most happy and therefore will best restore her lost sense of well-being. In other words, pain and suffering damages for destroyed emotional well-being can be regarded as spent on "similar" property. Therefore, if emotional well-being is considered a kind of human capital and if human capital should be treated like other property, then pain and suffering damages spent to replace destroyed emotional well-being should be exempt from tax.

2. The Analogy to Wages

A second criticism addresses the claim that pain and suffering damages should be excluded because they replace a right that would ordinarily not produce taxable income. This claim is said to be without merit because taxable wages substitute for leisure, yet leisure does not produce taxable income. Pain and suffering damages, the argument asserts, are no different from taxable wages, in that they replace or are "in lieu of" rights that would be enjoyed without producing taxable income.[198]

The analogy is flawed, however, because the individual wage earner makes a voluntary decision to enter the labor market and to work, whereas the personal injury victim does not voluntarily consent to sell his or her emotional well-being in return for a cash payment. One observer has characterized the tax law's distinction between the voluntary conversion of leisure into wages and the involuntary conversion of emotional well-being into pain and suffering damages as "a political recognition of a basic human resistance to commoditization,"[199] or in other words, as confirming society's recognition of the importance of individual autonomy. Thus, as noted above, pain and suffering damages should be excluded precisely because the taxpayer's emotional well-being is damaged or destroyed without the taxpayer's having exercised voluntary choice.[200]

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[198] *See* Dodge, *supra* note 35:

> A variation of the "substitute for" argument is that recoveries for noneconomic harms are mere restorations of a status quo which, in itself, would have been nontaxable . . . . [This argument] is essentially the same as arguing that wages, which involve a conversion of leisure to labor, should be excluded. This argument actually cuts in favor of includibility; noneconomic damages are like wages for a miserable job.

Id. at 183.

[199] Kelman, *supra* note 179, at 842.

[200] *See* Daniel I. Halperin, *Valuing Personal Consumption: Cost Versus Value and the*

3. The Irrelevance of Utility

A third criticism is that pain and suffering damages should be excluded only if in measuring income we take account of each taxpayer's utility rather than the taxpayer's actual economic receipts.[201] While it may be true, the criticism continues, that pain and suffering damages make the taxpayer no better off in terms of utility than if no accident had occurred, the taxpayer has additional cash, which should increase taxable income whatever the net effect on utility.[202]

This third criticism constitutes an assertion that in defining taxable income, we should count only economic receipts and not attempt to take account of a taxpayer's utility in any other way. In many instances, this is what the tax law does. Two individuals may purchase the same model automobile, drive under the same conditions, and provide the same level of maintenance. Yet one automobile may last for 100,000 miles, and the other for 200,000 miles. The individual whose car lasts 200,000 miles obviously has more utility. However, due to the administrative difficulty, the income tax does not generally try to account for differences in individual utility that result from variations in the quality of the same product.[203]

Nevertheless, one could also reasonably conclude that in other situations utility should be taken into account. The fact is that the tax system sometimes ignores cash receipts when it is thought that the taxpayer is made no better off in

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Impact of Insurance, 1 FLA. TAX REV. 1, 44 (1992) (pain and suffering damages should be excluded).

[201] *See* Dodge, *supra* note 35:

> We are left with the question of whether the core concept of "income" is ultimately tied to that of "utility." In practice . . . the concept of income is not systematically tied to subjective utility, as opposed to changes in objective net wealth . . . . Amounts includible are measured by market transactions, not subjective worth . . . .
>
> It is not obvious that the income tax base, as opposed to government policy in general, should be tied to utility in any normative sense, though influential commentators operating out of the tradition of Utilitarian welfare economics have made the connection. Though . . . virtually all items considered to be gross income potentially yield utility to the taxpayer . . . it does not logically follow that the tax base should be equated with utility. The tax base should be equated with material resources . . . . These concepts of the tax base are objective in principle . . . .

Id. at 185–86.

[202] *Id.*

[203] *See generally* Halperin, *supra* note 200, at 2–3 (the income tax generally ignores differences in utility resulting from random differences in quality of consumer goods and services).

terms of utility.[204] For example, the tax law excludes reimbursement of medical expenses, whether by insurance or by a tortfeasor.[205] The rationale for exclusion is that cash received merely restores the taxpayer in terms of utility to the status quo that existed before she became sick or injured and therefore should not result in taxable income. If the net effect on utility justifies excluding medical expense reimbursement, then it could also justify excluding pain and suffering damages, which serve the similar objective of restoring the taxpayer, in terms of utility, to the status quo before the injury.[206]

4. The Relevance of Utility

Professor Thomas Griffith suggests that, instead of the "in lieu of" principle, a different criterion, individual utility ex ante, might determine the tax treatment of pain and suffering damages.[207] He develops a mathematical model to determine under which rule, exclusion or taxation, individual utility ex ante is higher. The model makes four assumptions: (1) government tax revenues remain constant; (2) the marginal utility of money diminishes; (3) each individual has an equal chance of being injured; and (4) utility is a function of after-tax dollar receipts, without any deduction for pain and suffering.[208]

With revenues held constant, if pain and suffering damages are excluded, each individual pays relatively less in taxes if injured, but more if not injured. Thus, each individual has relatively more after-tax dollars if injured, but fewer after-tax dollars if not injured.[209] Conversely, if pain and suffering damages are taxed, each individual pays relatively more in taxes if injured, but less if not injured. Thus, each individual has relatively fewer after-tax dollars if injured, but more after-tax dollars if not injured.[210]

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[204] *See id.* at 28–45. *See also* I.R.C. § 123 (1994).

[205] *See* I.R.C. §§ 104(a)(2)-(3), 105(b) (1994).

[206] *See* Halperin, *supra* note 200, at 41: "[I]t seems unfair for a person who is no better off than he would have been had he not been injured or suffered a loss to bear a larger tax burden. Thus upon comparison to the uninjured, exemption seems required so as not to tax the injured more heavily."

[207] Griffith, *supra* note 35.

[208] *Id.* at 1118–23.

[209] *Id.* at 1131–33.

[210] *Id.*

Whether pain and suffering damages are taxable or excludable, the expected after-tax outcome (the weighted average of possible outcomes) is the same because each individual has the same chance of being injured.[211] However, there is greater variation in possible after-tax dollar outcomes when pain and suffering damages are excluded than when they are taxed.[212] Given the assumption of the diminishing marginal utility of money, if alternative tax rules produce the same expected after-tax outcomes, the rule with less variation in possible outcomes maximizes individual utility ex ante.[213] Therefore, the model demonstrates that taxation of pain and suffering damages produces greater individual utility ex ante because, for the same expected after-tax outcome, there is less variation in possible outcomes.[214]

The model appears to imply, in addition, that damages for medical expenses should be taxed rather than excluded. Professor Griffith avoids this result by making an additional assumption: that utility is a function of an injured individual's after-tax dollars, reduced by the amount of damages for medical expenses.[215] Again, the expected after-tax outcome is the same whether the damages are excluded or taxed.[216] However, because individual utility is a function of after-tax dollars, reduced by medical

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[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.* The following numerical example illustrates the workings of the model. Assume a society with two taxpayers, each with before-tax earnings of $1,000. Further assume that government must raise $220 in revenues, that one of the two individuals will be injured and receive $200 in damages for pain and suffering, and that each individual's chance of being injured is 50%.

If pain and suffering damages are excluded, a tax rate of 11% on the remaining $2,000 of earnings will raise the required $220 in revenues. Each individual will pay $110 in taxes. If injured, an individual will have before-tax receipts of $1,200 (only $1,000 of which are taxed) and after-tax receipts of $1,090. If uninjured, an individual will have before-tax receipts of $1,000 (all of which are taxed) and after-tax receipts of $890. Since there is a 50% probability of being injured, the expected after-tax outcome (defined as the weighted average of the possible outcomes) is $990.

If pain and suffering damages are taxed, a tax rate of 10% on total receipts of $2,200 will raise the required $220 in revenues. If injured, an individual will have before-tax receipts of $1,200 (all of which are taxed) and after-tax receipts of $1,080. If uninjured, an individual will have before tax receipts of $1,000 (all of which are taxed) and after-tax receipts of $900. Since there is a 50% probability of being injured, the expected after-tax outcome is $990.

Notice that whether pain and suffering damages are excluded or taxed, the expected after-tax outcome is $990. However, the variation in possible outcomes is $100 above or below the expected outcome under exclusion but $90 above or below the expected outcome under taxation. Thus, possible outcomes vary less under the taxation rule.

[215] *Id.* at 1127–28.

[216] *Id.* at 1131–33.

expenses, exclusion produces less variation in possible outcomes than taxation and therefore greater utility ex ante.[217]

In other words, the model *concludes* that damages for pain and suffering should be taxed (but that damages for medical expenses should be excluded) only by *assuming* that individual utility is a function of after-tax dollars, without any reduction for pain and suffering damages (but with a reduction for damages for medical expenses). On the other hand, the model *would conclude* that pain and suffering damages should be excluded *if it assumed* that individual utility is a function of after-tax dollars, reduced by pain and suffering damages.[218]

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[217] *Id.* This point can also be illustrated using the numerical example from *supra* note 214, but treating the $200 in damages as reimbursement of medical expenses rather than as damages for pain and suffering.

If damages for medical expenses are excluded for tax purposes, a tax rate of 11% on the earnings of $2,000 will raise the required $220 in revenues. If injured, an individual will have after-tax receipts of $1,090 and if uninjured, after-tax receipts of $890. In this case, however, utility is assumed to be a function of receipts, after taxes *and after deducting the amount of medical expenses*. Thus, for purposes of determining utility, if injured, an individual will have after-tax receipts of $890, and if uninjured, will also have after-tax receipts of $890. Thus, the expected outcome is $890, and there is no variation in possible outcomes.

If damages for medical expenses are taxed, a tax rate of 10% on total receipts of $2,200 will raise the required $220 in revenues. If injured, an individual will have before-tax receipts of $1,200 (all of which are taxed) and after-tax receipts of $1,080. However, for purposes of determining utility, if injured, an individual is treated as having only $880, which equals receipts after taxes and after damages for medical expenses. If uninjured, an individual will have before-tax receipts of $1,000 (all of which are taxed) and after-tax receipts of $900. Since there is a 50% probability of being injured, the expected after-tax receipts (for purposes of determining utility) are $890.

Notice that whether damages for medical expenses are taxed or excluded, the expected outcome is $890. However, under the exclusion rule, there is no variation at all, whereas under the taxation rule, receipts after taxes and after medical expenses may vary by $10 above or below the expected average amount.

[218] Another problem with his model, which Professor Griffith recognizes, is that individual utility ex ante is maximized when pain and suffering damages are taxed not at the same rate as the taxpayer's other income, but at a confiscatory rate of tax of 100%. If an individual is not injured, she receives no pain and suffering damages. If an individual is injured, she receives such damages but they are taxed entirely away. Thus, with this 100% rate, the expected average after-tax outcome is the same as under either exclusion or taxation at the individual's usual rate, but there is no variation whatsoever in possible outcomes.

This point can be illustrated using the numerical example from *supra* note 214. The confiscatory 100% tax raises $200 of government revenues by taxing the entire amount of pain and suffering damages. A tax rate of 1% on the $2,000 of earnings will raise the additional $20 required in government revenues. Whether injured or not, each individual can expect after-tax receipts of $990, which are certain and will not vary. Confiscatory taxation therefore maximizes individual utility ex ante, given the assumption of diminishing marginal utility.

This assumption may be unrealistic for some purposes even if generally reasonable. The expected outcome ex ante of purchasing a lottery ticket is usually much lower than the certain level of consumption that would result without the lottery ticket's purchase.

The critical question is why utility is assumed to be a function of after-tax income, excluding damages for medical expenses but including damages for pain and suffering. The rationale for asserting that individual utility is a function of after-tax dollars, reduced by damages for medical expenses, is that such damages simply restore the personal injury victim to the status quo before the injury and do not make the victim better off. However, the rationale applies to pain and suffering damages as well. Just as medical expenses are incurred to restore physical or mental health, so pain and suffering damages are intended to restore emotional well-being and not to make the victim better off. If pain and suffering damages did more, that is, if they made an individual better off in terms of utility than before the injury, there would be no reason to award them as compensation.

This description of the objective of pain and suffering damages helps clarify the issue. Since the objective is restoration of the status quo before the accident, it is more plausible to calculate individual utility by assuming that pain and suffering damages do no more than make the victim whole. This calculation requires assuming that utility is a function of after-tax dollars, reduced by (rather than including) the amount of pain and suffering damages.

Professor Griffith's model employs a novel and provocative approach to the resolution of income tax issues. However, because it adopts an implausible assumption regarding pain and suffering damages, we find it unpersuasive as a basis for concluding that pain and suffering damages should be taxed. If anything, under a more plausible assumption, the model supports exclusion.

5. Observations

We recognize that the decision whether to tax or exclude pain and suffering damages calls for a value judgment about which reasonable people may disagree. On balance, we favor exemption because such damages, like reimbursement for medical expenses, make the plaintiff no better off and simply restore the

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Professor Griffith notes that taxpayers should prefer taxation of pain and suffering damages because "a fixed level of consumption will generate greater utility than a lottery with the same expected value." *Id.* at 1132. Individuals nevertheless do play the lottery. They may also prefer exempting pain and suffering damages from taxation.

pre-accident status quo. Therefore, our analysis of the justifications for excluding lost earnings assumes that pain and suffering damages should be treated as tax-exempt. Where relevant, however, we explain why a decision to tax pain and suffering damages will not alter our basic contention that physical and nonphysical injuries should be treated alike.

C. *The § 104(a) Exclusion Compared with the "in lieu of" Principle*

To summarize the argument so far, under the "in lieu of" principle, damages for lost earnings would be taxable, while pain and suffering damages would be excluded from taxation. For over seventy years, the Code has departed from the "in lieu of" principle by excluding damages for lost earnings. More recently, the 1996 amendment, limiting the § 104(a)(2) exclusion to physical harm, departs further from this principle by taxing pain and suffering damages in the case of nonphysical harm.

Legislative history offers no explanation for the long-standing exclusion of lost earnings in contravention of the "in lieu of" principle. However, as noted above, the most recent Supreme Court decision construing Code § 104(a)(2), *O'Gilvie v. United States*, identified two justifications for excluding lost earnings from tax: (1) the administrative burden of distinguishing among the taxable and nontaxable elements of a global damage award or settlement;[219] and (2) sympathy for the victim of personal injury.[220] A third possible consideration is the need for income averaging.

Below we consider these three possible justifications in turn. For the most part, the discussion does not distinguish between cases of physical and nonphysical injury. In other words, we analyze the justifications as if they applied to the pre-1996 version of § 104(a)(2), which covered damages for both physical and nonphysical harm. In Part III, which addresses the distinction between physical and nonphysical injuries, we specifically discuss arguments for taxing pain and suffering damages in the case of nonphysical injury.

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[219] 117 S. Ct. 452, 457 (1996).
[220] *Id.*

D. *The Administrative Burden of Allocating Damages*

The administrative burden on the Service and the courts of allocating personal injury damages between lost earnings and pain and suffering is the argument most frequently cited for excluding lost earnings.[221] As a threshold matter, it should be noted that the problem of administrative burden can be solved either by excluding lost earnings or by taxing pain and suffering damages. Therefore, the argument assumes that excluding damages for pain and suffering is a better choice than taxing lost earnings.

Moreover, if one concluded, as we do not, that pain and suffering damages should be taxed, the administrative burden argument might become moot. All elements of personal injury recoveries would be taxable, except for the reimbursement of medical expenses, and, thus, the burden of determining the precise amount of the remaining nontaxable component could be minimal.[222]

We doubt that allocation would impose an excessive burden, as we explain more fully below. First, no significant burden arises if the Service can rely on an allocation by an independent third party, as in a jury verdict or court judgment. Second, the Service and the courts routinely review similar allocations in a variety of other contexts where one party receives a lump sum for more than one item, such as the acquisition of improved real

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[221] See, for example, Dodge, *supra* note 35, who states, "[T]he blanket exclusion obviates the need to differentiate among various components of the recovery—an extremely difficult task, especially in the case of settlements." *Id.* at 150. *See also* Kahn, *supra* note 35:

> If the income-connected amount of compensatory damages [i.e., using our terms, "lost earnings"] were to be treated differently for tax purposes than the portions attributable to other losses (e.g., pain and suffering), it would be necessary to separate an award or settlement between its income-connected and nonincome-connected portions. . . . The result would be a significant administrative burden on . . . the Service.

Id. at 353–54.

We note, however, that the allocation burden provides no justification for the exclusion of amounts received on account of personal injury or sickness through workmen's compensation acts, as provided in I.R.C. § 104(a)(1). Recoveries under such acts are limited to lost earnings and medical expenses and may not compensate the victim for pain and suffering. *See, e.g.*, Joseph W. McKnight, *Family Law: Husband and Wife*, 50 SMU L. REV. 1189, 1196 (1997) (discussing limited recovery under the Texas workers' compensation laws, which exclude awards for pain and suffering); Victor E. Schwartz, et al., *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and Legislature*, 28 LOY. U. CHI. L.J. 745, 755 (1997) (discussing the Illinois workers' compensation laws, which exclude awards for pain and suffering).

[222] The amount of past medical expenses can be established through bills and other records. However, a claim for damages to cover future medical expenses will necessarily involve subjective estimates.

estate or recoveries in business tort and contract disputes. Third, requiring allocation should not significantly increase the existing administrative burden. Under current law, an allocation must already be made in physical injury cases in order to identify punitive damages that are subject to income tax, and in non-physical injury cases in order to determine lost earnings that may be subject to employment taxes.

1. Jury Verdicts, Court Judgments, and Settlements

Taxing lost earnings should pose no difficulty when the amount received by the taxpayer is based on a jury verdict or court judgment, as contrasted with a settlement. Ordinarily, a verdict or judgment will specify the dollar amount awarded for each element of damages. The Service can rely upon this allocation because it is made by an independent trier of fact. The plaintiff will have been required to offer evidence substantiating the various elements of damages claimed, and a judge will presumably overturn any verdict for which there was an inadequate factual basis.

In those jurisdictions in which the courts do not require the verdict or judgment to allocate damages, the plaintiff can request such an allocation.[223] If the plaintiff fails to do so, and the verdict provides for a single, unallocated lump-sum award, the Service may fairly presume that the entire amount is taxable. A plaintiff who failed to avail herself of the opportunity to make such a request would have little cause to complain.

The allocation problem therefore arises principally when the amount received by the taxpayer is based on a settlement rather than a verdict or judgment.[224] The injured party has an incentive to under-allocate the settlement to taxable damages for lost earnings and punitive damages, and to over-allocate to excludable damages for pain and suffering and medical expenses. It is true

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[223] *See* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2505 (2d ed. 1994) (discussing requests for special verdicts and special interrogatories under FED. R. CIV. P. 49). *See also* CAL. CIV. PROC. CODE § 625 (West 1998); N.Y. C.P.L.R. 4110-b (McKinney 1997).

[224] If a settlement agreement is reached after a verdict, but while an appeal is pending, the allocation in the verdict can serve as a benchmark for judging an allocation subsequently made by the parties. *See, e.g.*, Robinson v. Commissioner, 102 T.C. 116, 134 (1994), *aff'd in relevant part*, 70 F.3d 23, 38 (5th Cir. 1995); McKay v. Commissioner, 102 T.C. 465, 483–84 (1994), *vacated on other grounds*, 84 F.3d 433 (5th Cir. 1996).

that misallocation cannot reduce the defendant's income taxes. If the injury is attributable to the defendant's business, all damages are deductible,[225] whereas if the injury is not attributable to business none of the damages are ordinarily deductible.[226] However, the defendant may agree to a misallocation that minimizes the plaintiff's tax burden in return for the plaintiff's agreement to accept a smaller settlement amount. Therefore, the Service must be prepared to question the allocation in all settlements.[227]

2. Review of Allocations in Other Contexts

There are many contexts other than personal injury settlements in which the Service and the courts must be prepared to review a taxpayer's allocation of a lump-sum amount to categories that are subject to different tax treatment.[228] One common example is the purchase for a lump sum of improved real estate as business or investment property. The part of the price allocable to the improvements is deductible through depreciation,[229] while the part allocable to the land is deductible only against the amount realized when the property is sold. The purchaser therefore has an incentive to over-allocate the price to improvements and to under-allocate the price to the land.

To review the taxpayer's allocation, the Service may have to construct a subjective appraisal of the land and of the improvements, based on a detailed examination of the characteristics of the real property in question and a comparison to other proper-

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[225] *See* I.R.C. § 162(a) (1994).

[226] *See* I.R.C. § 262 (1994). *But see* I.R.C. § 165(c) (1994) (damages may be deductible if the event producing the injury qualifies as a deductible "casualty").

[227] *See* Dodge, *supra* note 35:

> An allocation by the parties should not control, because their "tax" interests are not necessarily opposed. Nor should the plaintiff's allocation of damages in the complaint control, because tax law should not unnecessarily dictate the behavior of personal-injury lawyers. With no external reference, such as a judicial decree or findings, the allocation must be made on the basis of an independent "tax" examination of the cause of action.

Id. at 180–81.

[228] *See, e.g.*, Black Indus. Inc., v. Commissioner, 38 T.C.M. (CCH) 242 (1979) (carefully scrutinizing the allocation of purchase price of business assets between tangible and intangible assets in the agreement between buyer and seller, whose economic interests with respect to the allocation are not actually adverse); Concord Control Inc. v. Commissioner, 78 T.C. 742 (1982) (holding court not bound by allocation in purchase contracts, allowing it to value independently the intangible assets in purchase of going concern where interests of buyer and seller were not adverse in a tax sense).

[229] *See* I.R.C. §§ 167–168 (1994).

ties in the area. This scrutiny of the taxpayer's allocation of the price of real property between improvements and land resembles the scrutiny entailed in reviewing a taxpayer's allocation of a personal injury settlement between taxable and nontaxable components. To review a taxpayer's allocation of such a settlement, the Service may also have to appraise subjectively the value of the taxpayer's claims, based on a detailed examination of the characteristics of the claims in question and a comparison to settlements in other cases.

The Service and the courts must also be prepared to review the allocation of recoveries in business tort and contract disputes.[230] For example, if a motor vehicle crashes into a store, the store owner might make a claim both for lost profits and for damages to store property. A lump-sum award or settlement would need to be allocated between these two elements because the Code treats them differently. Amounts received for the damaged property may be received tax-free if reinvested in "similar" property.[231] Even if not reinvested in similar property, such amounts may be taxed as capital gain.[232] In contrast, amounts received for lost profits are taxable at ordinary income rates.[233] Therefore, the store owner has an incentive to over-allocate the award to damaged property and under-allocate to lost profits. Consequently, the Service and the Courts may have to review the factual basis of the taxpayer's allocation and estimate the value of the damaged property and the amount of lost profits.

The reported cases demonstrate the ability of the courts to review the allocation of settlement payments in yet another context: cases in which the taxpayer asserts personal injury claims, to which the exclusion applies, as well as other claims, such as contract claims, to which the exclusion does not apply.[234] At

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[230] *See, e.g.*, Getty v. Commissioner, 913 F.2d 1486 (9th Cir. 1990) (reviewing allocation of lump sum received by testator's son in settlement of claim to impose constructive trust on amounts received by the residuary legatee of father's estate between taxable bequest of income and nontaxable bequest of property); Eisler v. Commissioner, 59 T.C. 634 (1973) (reviewing the taxpayer's allocation of payments received from the defendant in settlement between amounts deductible as ordinary business expenses and nondeductible expenses which may only be added to basis of property).

[231] I.R.C. § 1033(a)(1) (1994).

[232] *See* I.R.C. §§ 1221–1222 (1994).

[233] *See* I.R.C. § 61(a)(1) (1994).

[234] The typical case involves a claim by the plaintiff against a former employer, alleging breach of an employment contract as well as claims of wrongful discharge, damage to reputation, intentional infliction of emotional distress, or employment discrimination. *See, e.g.*, Metzger v. Commissioner, 88 T.C. 834 (1987), *aff'd*, 845 F.2d

issue in the tax proceeding is the amount of damages attributable to the personal injury claim, which is excludable (including damages for lost earnings as well as for pain and suffering), and the amount of damages properly attributable to the contract (or other nonpersonal injury) claim, which is taxable.[235]

The central factor for the Service and the courts in reviewing settlements in these cases is determining the defendant's intent in making the payment.[236] When the parties to the settlement have bargained in an adversarial relationship, at arm's length and in good faith, and the settlement agreement specifies the allocation of the amount paid, the courts generally accept the allocation as binding. However, if the agreement is not the result of arm's-length adversarial bargaining, or if the agreement does not allocate damages among the various claims, the court will look to all the facts and circumstances of the case to determine the proper allocation.[237] As one court summarized: "Factors to consider include the details surrounding the litigation in the underlying proceeding, the allegations contained in the payee's complaint and amended complaint in the underlying proceeding, and the arguments made in the underlying proceeding by each party there."[238]

In applying these principles, courts require taxpayers to offer evidence justifying the claimed allocation, including the nature of the claims asserted, the strength of the evidence supporting the claims, as well as the assessment by the attorneys for one or

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1013 (3d Cir. 1988) (claim for breach of contract and employment discrimination on the basis of national origin and sex); Knuckles v. Commissioner, 349 F.2d 610 (10th Cir. 1965) (claim for breach of contract and injury to reputation); Bagley v. Commissioner, 105 T.C. 396 (1995); McKay v. Commissioner, 102 T.C. 465 (1994); Robinson v. Commissioner, 102 T.C. 116 (1994); Stocks v. Commissioner, 98 T.C. 1 (1992) (claim for breach of employment contract and racial discrimination); Bent v. Commissioner, 87 T.C. 236 (1986) (claim for breach of contract and violation of First Amendment rights); Seay v. Commissioner, 58 T.C. 32 (1972) (claim for breach of contract and personal injuries for damage to reputation).

[235] The question to be decided in these cases, the courts explain, is "in lieu of" what were the damages received. In other words, how much of the damages were paid on account of the personal injury claims and how much of the damages were paid on account of the contract or other nonpersonal injury claim. *See Bagley*, 105 T.C. at 406; *McKay*, 102 T.C. at 482; *Robinson*, 102 T.C. at 126; *Bent*, 87 T.C. at 244; Church v. Commissioner, 80 T.C. 1104, 1107 (1983).

[236] *See Knuckles*, 349 F.2d at 612–13; Agar v. Commissioner, 290 F.2d 283, 284 (2d Cir. 1961); *Robinson*, 102 T.C. at 126; *Metzger*, 88 T.C. at 847–48.

[237] *See Bagley*, 105 T.C. at 406; *McKay*, 102 T.C. at 482; *Robinson*, 102 T.C. at 126. *See also* Brent B. Nichols & Douglas K. Chapman, *Enforceability of Settlement Agreement Allocations under Section 104(a)(2) of the Internal Revenue Code*, 47 BAYLOR L. REV. 97 (1995).

[238] *Robinson*, 102 T.C. at 127.

both sides concerning the likelihood of prevailing on the various claims and the amounts likely to be received.[239] This approach recognizes that in settling the case, both parties must have considered the likelihood of the plaintiff's prevailing on the various claims asserted, and the range of probable awards with respect to each item of damages for each such claim. The courts will only approve an allocation that falls within a range of likely outcomes of the litigation.

The same approach can be followed in allocating personal injury settlements between the taxable and nontaxable components. The taxpayer would be required to produce evidence supporting the amount allocated to each component. Evidence regarding the taxpayer's past earnings and past medical bills would not be difficult to assemble. Evidence regarding future earnings and future medical bills would be more speculative. However, the taxpayer should be able to offer to the Service the same kind of evidence that would have been offered in court to support the claim for such compensation. Similarly, the taxpayer should be able to present evidence that would have been offered in support of claims for pain and suffering and for punitive damages, and possibly evidence of verdicts in similar cases, on which the taxpayer would have relied in appraising the range of potential recovery. Assessments by the attorneys who represented the parties to the lawsuit, as well as by other lawyers engaged in similar practice, would supplement the factual presentation. There is no reason to believe that the burden on the Service and the courts in reviewing such evidence would be significantly greater than the burden of reviewing the factual basis for allocations claimed by taxpayers in other contexts.

3. The Existing Allocation Burden in Personal Injury Cases

It is doubtful whether the existing burden on the Service and the courts would increase significantly if current law were changed to tax damages for lost earnings while excluding damages for

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[239] *See, e.g., id.* at 128–29 (rejecting allocation in the settlement agreement where there was no evidence that the parties, or the judge who approved the settlement, had assessed the merits of the respective claims, and taxpayers had been given unfettered discretion to allocate the amount in order to minimize their tax liability); *Stocks*, 98 T.C. at 11–12 (upholding allocation in the settlement agreement based, in part, on testimony by the defendant in the underlying action as to his intent in settling); *Metzger*, 88 T.C. at 858 (upholding allocation in settlement agreement in part based on evidence of what the defendant thought its liability would be on the contract claim).

pain and suffering in cases of both physical and nonphysical injury. Because physical and nonphysical injuries are treated differently under current law, they involve different considerations.

a. *Physical injuries.* In cases of physical injury, to which § 104(a)(2) currently applies, it is true that damages for both lost earnings and for pain and suffering, as well as medical expenses, are tax-exempt. Nevertheless, the Service must still be prepared to review the allocation of a recovery among its components. This need arises in any case in which a claim for punitive damages was made, or could have been made, because the punitive damage component is taxable pursuant to both the 1996 amendment to § 104(a)(2) and the Supreme Court's decision in *O'Gilvie*.[240]

The Service cannot rely on the amount allocated to punitive damages in a settlement since both plaintiff and defendant have an incentive to minimize the amount attributable to punitive damages. The plaintiff will prefer to limit the amount attributable to punitive damages because such payments are taxable, and the defendant will prefer not to characterize damages as punitive, so as not to admit serious wrongdoing.

The task of determining the proper allocation to punitive damages necessarily entails consideration of all the other potential components of the award, including lost earnings, pain and suffering, and medical expenses. Realistically, it is not possible to consider the amount attributable to punitive damages without considering the value of all other components. Thus, reviewing the allocation of a portion of an award to lost earnings should add little to the existing burden on the Service and the courts.[241]

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[240] 117 S. Ct. 452 (1996).

[241] Some commentators have stated that damages for lost earnings are subject to employment taxes (for Social Security and Medicare), even if excluded from income taxes by § 104(a)(2). *See* Burke & Friel, *Getting Personal: Excluding Personal Injury Awards Under the New Section*, *supra* note 35, at 187–88. If true, this would furnish an additional reason why taxing lost earnings would not increase the administrative burden on the Service and the courts. Allocation would already be required in personal injury cases in order to determine the amount of damages attributable to lost earnings and subject to employment taxes. No additional administrative burden would be imposed by similarly allocating the settlement proceeds between taxable and excludable amounts for income tax purposes in these cases.

However, the statement that lost earnings may be excluded from income tax by § 104(a)(2) but included in the wage base for employment tax purposes is open to question. *See* Redfield v. Insurance Co. of N. America, 940 F.2d 542, 548 (9th Cir. 1991) (the fact that damages were excluded from income taxes dictates a conclusion that the sums were not subject to employment taxes); Priv. Ltr. Rul. 9448014 (Aug. 30, 1994) (holding that damages excludable from income tax under § 104(a)(2) were

According to one commentator, "[T]he courts and the Service have dealt for years with the need to segregate punitive and compensatory damages from each other, and the task of making that allocation has not been burdensome."[242] If true, this experience of the courts and the Service in separating punitive from compensatory elements suggests they will also be able to separate damages for lost earnings from damages for pain and suffering, without undue burden.[243]

b. *Nonphysical injuries.* In the case of nonphysical injuries, to which § 104(a)(2) does not currently apply, it is true that damages both for lost earnings and for pain and suffering are subject to the income tax, as are punitive damages. Nevertheless, the Service and the courts must currently be prepared to review the settlement amount allocated to lost earnings, since that amount may in addition be subject to employment taxes (for Social Security and Medicare), while amounts allocated to pain and suffering and punitive damages are not part of the employment tax base.

Again, the Service cannot rely on the settlement allocation in a nonphysical injury case made by the parties since both plaintiff and defendant have an incentive to minimize the amount attributable to earnings in order to decrease their respective employment tax liabilities. Thus, excluding pain and suffering damages in the case of nonphysical injury, while continuing to tax lost earnings, should add little to the existing burden on the Service and the courts.

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also exempt from employment taxes); *Taxation of Back Pay Damages Under the Supreme Court's Decision in* U.S. v Burke, 11 Tax. Mgmt. Wkly Rep. (BNA) 1119 (Aug. 17, 1992) (stating that damages excludable from income tax under § 104(a)(2) are exempt from employment taxes).

The conclusion that lost earnings are subject to employment taxes, even if excluded from income taxes is understandable. I.R.C. § 3121 (1994), which defines the tax base subject to employment taxes, lists numerous specific items that are excludable without any mention of or reference to personal injury damages.

[242] Kahn, *supra* note 35, at 377. In 1958, the Service ruled that, in the absence of other evidence, settlement damages would be allocated in the same proportions that compensatory and punitive damages were alleged in the complaint. Rev. Rul. 58-418, 1958-2 C.B. 18. This earlier ruling was followed in Rev. Rul. 85-98, 1985-2 C.B. 51, which states that the complaint may be the best evidence of proper allocation of a settlement between compensatory and punitive damages.

[243] In *O'Gilvie*, the Supreme Court asserted the contrary without explanation: "The administrative problem of distinguishing punitive from compensatory elements is likely to be less serious than, say, distinguishing among the compensatory elements of a settlement (which difficulty might account for the statute's treatment of, say, lost wages)." 117 S. Ct. at 457.

4. Observations

To recapitulate, our argument here is not that allocating settlements between damages for lost earnings and for pain and suffering would necessarily be easy. We agree that allocation may impose some administrative burden on the Service and the courts. Whether on balance the burden would be excessive depends on the time, effort, and expense required for the Service and the courts to review taxpayer allocations of settlement amounts. Nevertheless, the burden appears no greater than in the various other contexts discussed above.

E. *Sympathy*

Sympathy is a second reason suggested for excluding lost earnings in personal injury cases.[244] Certainly, sympathy for the victim is natural and appropriate.[245] Nevertheless, it fails to provide an adequate justification for the exclusion of lost earnings under § 104(a)(2).

The fundamental problem with sympathy as the justification for an exclusion of lost earnings is that the exclusion's benefit rises with the taxpayer's marginal tax rate. The benefit of exclusion to a 15% bracket victim is 15 cents for each dollar of lost earnings; to a 28% bracket victim, 28 cents for each dollar; to a 31% bracket victim, 31 cents for each dollar; and so on. While sympathy might justify some financial relief for personal injury victims, it is difficult to rationalize a tax benefit based on sympathy that allocates the greatest benefits to those with the least economic need.

In addition, sympathy fits poorly with both the current and pre-1996 versions of the Code section for two reasons. First, lost earnings are (and were) excludable regardless of the severity of

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[244] The Supreme Court noted this justification in *O'Gilvie*, 117 S. Ct. at 456. *See also* Roemer, 716 F.2d at 696 (9th Cir. 1983) (the rationale for the exclusion is that "the injured party, who has suffered enough, should not be further burdened with the practical difficulty of sorting out the taxable and nontaxable components of a lump-sum award"); Downey v. Commissioner, 97 T.C. 150, 159 (1991) (the exclusion for lost earnings as well as pain and suffering "may have been based on emotional and traditional, rather than logical, factors"). The sympathy justification has also been advanced by other commentators. *See* Burke & Friel, *Tax Treatment of Employment-Related Personal Injury Awards, the Need for Limits*, *supra* note 35, at 43 (1989); Henry, *supra* note 35, at 728; Kahn, *supra* note 35, at 349–50.

[245] *See* BITTKER & LOKKEN, *supra* note 24, ¶ 13.1.4, at 13-2.

the injury and the degree of sympathy that the injury warranted. A plaintiff who suffers lost earnings due to a twisted ankle is just as entitled to the exclusion as a person who has suffered a permanent and serious disability.[246] Second, § 104(a)(2) has never extended a comparable benefit to persons who have been seriously injured but who are unable to recover lost earnings as a result of litigation. For example, a person who is grievously injured in an accident for which no one is at fault, or who is injured by a judgment-proof tortfeasor, and therefore never recovers income she expected to earn, probably deserves even more sympathy than the victim who receives compensation, yet is afforded no tax benefit for the lost income.

Finally, the factor of sympathy is already reflected in the award of damages for pain, suffering, and emotional humiliation. In determining the size of such damage awards, which are intended to compensate for harm to the victim's sense of well-being, the decision-maker will take into account the degree of sympathy that the victim's injury arouses. For all these reasons, sympathy does not provide a persuasive justification for the blanket exclusion of the lost earnings component of personal injury recoveries by § 104(a)(2).

F. *Income Averaging*

The need for income averaging provides the most persuasive argument for *some* tax relief for the lost earnings component of personal injury damages. Absent the injury, lost earnings might have been spread over a period of years and been subject to a lower rate of tax. With the injury, lost earnings attributable to a number of years may be received in a single year and be subject to a higher rate of tax than if spread over a number of years. Under the current structure of tax rates, with a top rate of 39.6% and a low bracket rate of 15%,[247] the result could be to more than double the tax due on a dollar from 15 cents to nearly 40 cents.

From 1964 to 1986, the Code contained income-averaging provisions to moderate the effect of progressive tax rates on fluctuating incomes.[248] Taxpayers were instructed to calculate

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[246] *See id.*

[247] I.R.C. § 1 (1994 & Supp. 1988).

[248] *See* I.R.C. §§ 1301–1305 (1994). *See* BITTKER & LOKKEN, *supra* note 24, ¶ 111.3.10, at 111-82 to -86.

their average income for the preceding four-year period and then to compare that amount to their current year's income.[249] If current income exceeded 120% of the average income for the four prior years, the marginal tax rate on such excess income was adjusted. The entire excess amount was taxed at the rate applicable to the first one-fifth of the excess.[250] In effect, four-fifths of the excess income was shielded from the impact of progression in rates.

These income-averaging provisions suffered from two major defects. First, they provided no relief for the taxpayer whose high-income years preceded low-income years.[251] Second, although the five-year averaging period reduced complexity, it also limited the amount of relief when a longer averaging period might have been appropriate.

Congress repealed the income-averaging sections of the Code in 1986 at the same time that it adopted a much flatter rate structure, which reduced the need for income averaging. Nevertheless, the increases in marginal rates since 1986 seem to justify some income-averaging relief tailored to the injured party's individual circumstances.[252] Such relief should attempt to tax damages for lost earnings at the rate that would have applied had the personal injury not occurred and had the wages been earned in the ordinary course of employment. Ideally, new income-averaging provisions would encompass a period longer than the five years under prior law. Thus, while the income-averaging rationale may justify some tax relief, it does not warrant the complete exclusion of lost earnings, without regard to the particular circumstances of individual taxpayers, that I.R.C. § 104(a)(2) currently provides.

G. *Implications for Distinguishing Physical from Nonphysical Harm*

We have argued that neither the burden of allocating damages, sympathy for the victim, nor the need for income averaging justifies the complete exclusion of damages for lost earnings arising from a personal injury action. If these arguments are

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[249] *See* I.R.C. §§ 1301–1305 (1994).
[250] *See id.*
[251] *See* BITTKER & LOKKEN, *supra* note 24, ¶ 111.3.10, at 111-83.
[252] *See* I.R.C. § 1 (1994 & Supp. 1988).

accepted, then the treatment of personal injury damages would be straightforward. Amounts allocable to punitive damages and lost earnings would be taxable, reimbursement of medical expenses would be tax-exempt, and depending on one's point of view, pain and suffering damages would be excludable or taxable. In addition, income averaging could be made available for the lost earnings component of personal injury recoveries.

Consequently, damages for physical and nonphysical injury would be treated alike, without distinction. The problem of discrimination in taxing discrimination damages would disappear.

III. The Distinction Between Physical and Nonphysical Harm

A. *The Distinction and Justifications for Excluding Lost Earnings*

In Part II above, we argue for taxing the lost earnings component of personal injury recoveries. Others may believe that the lost earnings component should not be taxed because of the burden of allocating damages between lost earnings and other excludable components or because of sympathy for the victim.[253] If accepted, these justifications should apply to damages for nonphysical as well as for physical injury.

We explain below why neither the allocation burden nor sympathy for the victim justifies the distinction between damages for physical and nonphysical harm enacted by Congress in 1996.[254] We then consider the effect of jury instructions on § 104(a)(2)'s distinction between physical and nonphysical injury. Finally, if the § 104(a)(2) exclusion remains in the Code, we propose that the exclusion's scope be determined by factors directly related to the allocation burden and sympathy justifications, rather than by the distinction between physical and nonphysical harm.

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[253] *See, e.g.*, Kahn, *supra* note 35 (burden of allocating damages between taxable and excludable components justifies lost earnings exclusion).

[254] For over 70 years the Service and the courts had consistently rejected a distinction between physical and nonphysical harm. *See supra* text accompanying notes 45–83, 105–106, 143.

B. *The Burden of Allocating Damages and Legislative History*

The Congressional report on the 1996 amendment to § 104(a)(2) asserts, without elaborating, that damages for nonphysical harm "generally consist of back pay and other awards intended to compensate the claimant for lost earnings or profits."[255] The language is hardly precise or careful. Yet this assertion is the sole reason offered by Congress for amending § 104(a)(2) to distinguish between physical and nonphysical injury and therefore bears closer examination.

A plausible interpretation is that Congress meant to refer to the allocation burden as follows:

(1) The difficulty of allocating damages between lost earnings and pain and suffering can be resolved either by taxing or excluding the entire amount for both.

(2) Pain and suffering damages are a less significant component of nonphysical injury recoveries (in the words of the Congressional report, such damages "generally consist of back pay"[256]) than of physical injury recoveries.

(3) Therefore, the entire amount of damages for lost earnings and for pain suffering should be taxed in the case of nonphysical injuries, but excluded in the case of physical injuries.

However, we question the assertion in step (2) that pain and suffering damages are a less important component of nonphysical injury recoveries. Awards in nonphysical injury cases often include significant compensation for pain and suffering. In nonphysical common-law torts, such as defamation or intentional infliction of emotional distress, recoveries typically consist of damages for emotional distress and humiliation.[257] In employment discrimination cases, awards for emotional distress may also be significant. In 1991, Congress specifically provided for pain and suffering damages in disparate treatment claims under Title VII.[258] Even before that amendment, employment discrimination claimants could recover pain and suffering damages under other statutes, such as the Civil Rights Acts of 1866 and 1871[259] and under state and local civil rights laws.[260]

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[255] H.R. CONF. REP. No. 104-737, at 142–43 (1996).
[256] *Id.*
[257] *See, e.g., Roemer*, 716 F.2d 693; *Threlkeld*, 848 F.2d 81.
[258] *See supra* note 68.
[259] *See supra* notes 62–63.
[260] *See supra* note 64.

Moreover, pain and suffering damages are available to compensate discrimination claimants in contexts other than employment, such as housing and public accommodations, for which damages contain no element of lost earnings whatsoever. For example, the Fair Housing Act permits recovery for actual damages, including the pain, suffering, and other humiliation caused by racial discrimination.[261]

In contrast, lost earnings are often the predominant component of physical injury awards. An example discussed in the *Threlkeld* opinion involves a surgeon whose hand was severely and permanently injured in an accident.[262] The surgeon's damages consisted principally of compensation for the lost earnings that the surgeon would have received had she not been injured.

For these reasons, it is mistaken to assume that pain and suffering damages are less significant in nonphysical injury recoveries than in physical injury cases.[263] Regardless of whether the injury is physical or nonphysical, damages may include lost earnings, which should be taxable, and compensation for pain and suffering, which should be excludable. Therefore, even if the burden of allocating damages between lost earnings and pain and suffering justifies the exclusion of lost earnings, it does not justify the distinction between physical and nonphysical harm.

C. *Sympathy*

At least one observer has argued that physical harm generally arouses much greater public sympathy than nonphysical harm and therefore that the exclusion should apply only to physical injury damages:

> In general, the plight of a victim who has suffered only nonphysical injuries does not arouse anything like the sympathy that is engendered by a physical injury. An extreme case in which the victim suffered great mental and emotional harm can arouse substantial sympathy. But, even such a case does not attract the degree of compassion that is felt for a victim of serious physical injury such as the loss of a limb or facial disfigurement.[264]

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[261] 42 U.S.C. § 3613(c) (1994).

[262] 87 T.C. at 1300.

[263] At a minimum, there ought to be empirical verification before the assertion is used to justify § 104(a)(2)'s distinction between physical and nonphysical harm.

[264] Kahn, *supra* note 35, at 357.

The argument does not make clear whether the viewpoint expressed is factual or normative. Is it factually true that nonphysical injuries arouse less sympathy then physical harms? In the alternative, normatively speaking, should nonphysical injuries arouse less sympathy?

If the former, there is no supporting evidence, such as polling data, to substantiate the claim. While "the loss of a limb or facial disfigurement" undoubtedly arouses great sympathy, relatively minor kinds of physical injury do not. Moreover, nonphysical injuries often arouse substantial sympathy. An African American who buys a residence in a previously all-white neighborhood and has a cross burned on his lawn may arouse as much sympathy as the victim who suffers a serious physical injury. If the notion is to provide exclusion only for claims that the public considers sympathetic, then the category of physical injuries is both over-inclusive and under-inclusive.

Alternatively, the argument could be read as a normative statement: that nonphysical injuries should not receive as much sympathy as physical harm. If so, it constitutes a value judgment with which we strongly disagree. Victims of unlawful discrimination on the basis of age, disability, gender, or race may suffer as great a harm and are as deserving of compassion as victims of physical injury. In our judgment, a person threatened with losing her job unless she provides sexual favors deserves at least as much sympathy as the victim of a broken arm. Therefore, sympathy for the victim does not justify an exclusion for damages limited to cases of physical harm.

D. *The Effect of Jury Instructions*

Jury instructions may profoundly alter the ultimate impact of § 104(a)(2)'s different tax treatment of damages from physical as opposed to nonphysical harm. In 1979, the Supreme Court ruled in *Norfolk & Western Railway Company v. Liepelt*,[265] a wrongful death action under the Federal Employers' Liability Act,[266] that the defendant is entitled to a jury instruction that any damage award for future lost earnings will not be subject to income taxes, and to offer evidence showing the amount of

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[265] 444 U.S. 490 (1979).
[266] 45 U.S.C. § 51 (1994).

income taxes that would have been payable on earnings had the decedent lived.

The purpose of the jury instruction and the evidence, the Court explained, is to avoid the danger that the jury may mistakenly think that the award is taxable, and therefore increase the award to take taxes into account.[267] The goal, in other words, is to ensure that the jury award for lost earnings will reflect the after-tax amount that the plaintiff's decedent would have received. The federal courts of appeal have extended the *Liepelt* rule to other cases governed by federal common law, such as the Longshoremen's and Harbor Workers' Compensation Act.[268] Some state courts have also adopted the *Liepelt* rule,[269] although others continue to adhere to the traditional rule that income tax is ignored and no instruction is given to the jury.[270]

Because the *Liepelt* rule reduces what the defendant must pay at trial and, by implication, in settlement as well, it has two undesirable consequences. First, the cost of wrongful behavior is reduced, and therefore the amount of wrongful behavior may increase. Second, the defendant rather than the plaintiff benefits from the § 104(a)(2) exclusion of lost earnings.

Benefiting the defendant makes no sense if sympathy for the victim is the exclusion's rationale. As the dissent noted in *Liepelt*, the effect of the ruling is that "the Court appropriates for the tortfeasor a benefit intended [under the sympathy rationale] to be conferred on the victim or his survivors."[271] Moreover, even if the burden of allocating damages between taxable and nontaxable elements, rather than sympathy, justifies the justification for the exclusion, it is not clear why the benefit should go to the wrongdoer rather than to the victim.

Curiously, the 1996 Supreme Court opinion in *O'Gilvie*, which cited sympathy for the victim as a justification for the § 104(a)(2) exclusion, failed to note that the sympathy justification is inconsistent with *Liepelt*'s requirement that juries be told that the damages for lost earnings are tax-exempt.[272] Moreover, commentators often cite the sympathy-for-the-victim justification for the

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[267] *Liepelt*, 444 U.S. at 497–98.

[268] *See, e.g.*, Fanetti v Hellenic Lines Ltd., 678 F.2d 424, 431–32 (2d Cir. 1982).

[269] *See* Lanzano v. City of New York, 519 N.E. 2d 331, 332–33 (N.Y. 1988).

[270] *See* Klawonn v. Mitchell, 475 N.E.2d 857 (Ill. 1985); Stover v. Lakeland Square Owners Association, 434 N.W.2d 866 (Iowa 1989); Gulf Offshore Co., Etc. v. Mobile Oil Corp., 628 S.W.2d 171 (Tex. Ct. App. 1982).

[271] 444 U.S. at 498–99 (Blackmun, J., dissenting).

[272] 117 S. Ct. 452 (1996).

exclusion, without considering how *Liepelt* might reallocate the exclusion's benefit from victim to tortfeasor.[273]

Paradoxically, the only desirable consequence of the *Liepelt* rule is that it reduces, although it does not eliminate, discrimination in the tax treatment of damages for nonphysical injury. In cases to which the rule applies, physical injury victims will tend to receive the same after-tax compensation for lost wages as victims of nonphysical injury.[274] However, the discriminatory tax treatment of pain and suffering damages persists. Under current law, such damages are excluded in the case of physical personal injury, taxable in the case of nonphysical injury, and no special instruction on their tax treatment is required.

If juries are to be instructed about the exclusion of ordinarily taxable amounts, perhaps they should also be instructed about the taxation of ordinarily excludable items. Juries may believe that pain and suffering damages are not taxed, since they are awarded in lieu of a right that is ordinarily tax-exempt. Therefore, if § 104(a)(2) remains unchanged, perhaps juries in nonphysical injury cases should be told that pain and suffering damages are taxable, and the plaintiff should be permitted to offer evidence of the applicable tax rates.

E. *The Appropriate Scope of a Lost Earnings Exclusion*

We conclude that the allocation burden and sympathy justifications for excluding damages for lost earnings should, if accepted, apply to nonphysical harm no less than physical injury. Therefore, if the exclusion remains in the Code, it should apply to cases of nonphysical injury as well as physical harm. In that event, there remains the problem of determining the appropriate scope of the exclusion.

That scope can only be properly fixed by reference to the underlying policy justifications for retaining the exclusion. The exclusion's scope should not turn on formalistic distinctions between tort and contract claims, as provided in Treasury regula-

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[273] *See generally* articles cited *supra* note 35.

[274] In most cases of nonphysical as well as physical injury, the jury will decide the amount of lost earnings as well as pain and suffering damages. Under Title VII, however, while the jury determines the amount of damages for emotional distress and punitive damages, if any, the judge determines the amount of back pay. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in 42 U.S.C. § 1981(a) (1994)).

tions, or on scholastic readings of § 104(a)(2)'s "on account of" language, as in the Supreme Court's decision in *Schleier*.[275]

The critical factor should be whether remedies include damages for pain and suffering or other humiliation or emotional distress. It is only when pain and suffering damages are available that the problem of allocating damages between lost earnings and pain and suffering exists. Moreover, causes of action for which pain and suffering damages are available seem to be the cases that the common law and the legislature deem most deserving of sympathy.[276] Therefore, if the exclusion for lost earnings in personal injury cases remains in the Code, it should apply to claims for which pain and suffering damages may be awarded, regardless of whether the injury is physical or not.

This view is generally consistent with the Supreme Court's holding in *Burke* that the range of available remedies is relevant to the exclusion's scope.[277] This view also exactly mirrors the part of the Court's opinion in *Schleier* that holds that the existence of "damages for pain and suffering" is a basic requirement for the application of § 104(a)(2).[278] However, as noted above, both opinions are highly formalistic. Neither explains the analytic connection between the availability of pain and suffering damages and the two principal justifications for the exclusion, namely the allocation burden and sympathy.

CONCLUSION

The taxation of damages for personal injury should be governed by the "in lieu of" principle. Damages for lost earnings should be taxable since earnings are ordinarily taxable. Damages for pain and suffering should be excludable because they compensate for the loss of rights that, absent the injury, would not produce taxable income.

Current law fails to allocate personal injury recoveries between damages for lost earnings that should be taxed and dam-

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[275] *Schleier*, 515 U.S. at 335–36.

[276] The 1991 amendment to Title VII, providing for the award of damages for emotional distress in cases of intentional discrimination, reflected just such an understanding. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in 42 U.S.C. § 1981(a) (1994)). However, we note that the Age Discrimination in Employment Act does not afford damages for pain and suffering or for other emotional distress. *See supra* note 130.

[277] *Burke*, 504 U.S. at 235.

[278] *Schleier*, 515 U.S. at 335–36.

ages for pain and suffering that should be excludable. Current law also favors physical injuries over nonphysical. In the case of physical injuries, damages for both lost earnings and for pain and suffering are excludable. In the case of nonphysical injuries, damages for both components are taxable.

Arguments that pain and suffering damages should be taxable under the "in lieu of" standard or some other principle are not persuasive. If analogized to damages for other property, pain and suffering damages would seldom exceed the amount expended on the taxpayer's support since birth and, thus, should be exempt under the *Inaja* principle.[279] Even if such damages did exceed that amount, they could be regarded as reinvested in "similar property" and therefore should not result in taxable gain. The fact that the victim does not voluntarily consent to be injured also counsels exclusion. In addition, the victim's pain and suffering damages are offset by the victim's loss of utility and, therefore, like medical expenses, do not produce a net gain.

The administrative burden does not justify the failure of the income tax to allocate recoveries between damages for lost earnings, which should be taxed, and damages for pain and suffering, which should be excluded. The burden appears no greater than in other instances requiring the allocation of a lump sum payment among different items, such as the acquisition of improved real estate and recoveries in business tort and contract disputes. Moreover, requiring allocation would not significantly increase the existing administrative burden. Under current law, an allocation must in any event be made in physical injury cases to identify punitive damages that are subject to income tax, and in nonphysical injury cases to determine lost earnings that may be subject to employment taxes.

Sympathy for the victim does not justify the exclusion of lost earnings under § 104(a)(2) since it allocates the greatest benefits to those who have the least need, applies without regard to the gravity of the injury, and provides no benefit to victims who cannot recover damages at all. The need for income averaging would justify relief for lost earnings tailored to the injured party's individual circumstances, but not the complete exclusion that the Code has provided.

Even if the allocation burden or sympathy justifies the exclusion of lost earnings, neither rationale affords adequate reason

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[279] Inaja Land Co., Ltd. v Commissioner, 9 T.C. 727 (1947).

to distinguish physical from nonphysical harm. Regardless of whether the injury is physical or nonphysical, damages may include lost earnings, which should be taxable, and compensation for pain and suffering, which should be excludable. Most important, the victim of unlawful discrimination merits sympathy no less than the victim of physical injury. If the exclusion of lost earnings is retained, it should extend to all claims affording pain and suffering damages, without regard to whether the injury is physical or not. It is such claims that present an allocation issue and also merit sympathy.

We have concluded that the tax law's distinction between physical and nonphysical injury is arbitrary. Yet the Internal Revenue Code makes all sorts of arbitrary distinctions: interest on home equity indebtedness is deductible,[280] although interest on other personal consumption loans is not;[281] the cost of psychoanalytic training may be deductible[282] but not the cost of a law degree;[283] damages for lost earnings from a physical personal injury are excludable, while such damages for breach of contract are taxable.

However, the distinction between damages for physical and nonphysical harm is not only arbitrary, but also invidious, because its principal effect is to discriminate against victims of discrimination. The national commitment to end unlawful discrimination is undermined when damages for the nonphysical injury of discrimination are taxed more heavily than damages for physical harm. We propose instead allocating recoveries between taxable damages for lost earnings and excludable damages for pain and suffering in all cases. In the alternative, we propose that, in all cases in which pain and suffering damages are available, such damages, as well as lost earnings, be excluded. Either solution would eliminate the tax law's arbitrary and invidious distinction between physical and nonphysical harm.

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[280] *See* I.R.C. § 163(h)(3)(A), (C) (1994).
[281] *See* I.R.C. § 163(h).
[282] *See* Treas. Reg. § 1.162-5(b), example 4 (1994).
[283] *See id.*, example 1.

ARTICLE

UNDERSTANDING CONGRESSIONAL REFORM: LESSONS FROM THE SEVENTIES

RAFAEL GELY*
ASGHAR ZARDKOOHI**

The effects of the procedural reforms that the House of Representatives enacted in the early 1970s might lend insight into the possible effects of the procedural changes enacted by the Republican Congress in 1995. While the reforms of the 1970s and 1995 are not similar in detail, both sets of changes increased the power of the majority leadership over its members. Professors Gely and Zardkoohi offer a model that considers the effects of 1970s institutional changes on the voting behavior of individual members of Congress. The authors argue that their model provides a useful framework with which to assess the possible implications of the 1995 reforms.

Over the last four decades, the House of Representatives has twice substantially changed its rules and procedures. The first round of changes occurred in the early 1970s.[1] They focused on diminishing the role of seniority in hierarchical promotions in the House, strengthening the role of party leadership in such promotions, and reducing the powers of committee chairs while at the same time increasing the powers of subcommittee chairs. The second round of changes happened immediately after the Republicans gained control of the House in January 1995.[2] The reforms of 1995 were similar to those of the early 1970s in spirit, although different in detail.[3] Among the several rules in-

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[1] *See infra* notes 16–61 and accompanying text.

[2] In 1994, after 40 years as the minority party, the Republican Party, under the leadership of Rep. Newt Gingrich (R-Ga.), took control of the House. *See* Jon Healey, *Jubilant GOP Strives to Keep Legislative Feet on Ground*, 52 CONG. Q. WKLY. REP. 3210, 3210 (Nov. 12, 1994). Republicans had called for changes in the way the House in general, and the committee system in particular, operated for many years before taking over the House in November 1994. Once elected, but before taking office in January 1995, the Republican leaders gathered support for changing major aspects of House procedural rules. *See* Janet Hook, *New Congress Poised to Turn Tradition on Its Head*, 52 CONG. Q. WKLY. REP. 3591, 3592 (Dec. 31, 1994).

[3] In addition to the policy changes that Republicans had promised to introduce if they held the majority, they also promised to incorporate a number of significant changes in the rules that control the inner workings of the House. *See* Healey, *supra* note 2, at 3211. The proposed rules changes would affect the committee system, term limits, floor procedures, and various others administrative functions of the House. *See Rules Changes Open the Process . . . But Strengthen the Reins of Power*, 53 CONG. Q. WKLY.

troduced were a reduction in the number of committees and subcommittees and the imposition of term limits for committee and subcommittee chairs and the Speaker.[4]

An important similarity between the two sets of reforms is the increase in the power of majority party leadership over its members. The reforms of the early 1970s reduced the role of seniority in promotional decisions and increased the role of party leadership.[5] They also substantially increased the number of subcommittees and eliminated multiple chairmanship of subcommittees so that there could be a greater number of junior representatives eligible for chairmanship than ever before.[6] Similarly, the 1995

REP. 13, 14–15 (Jan. 7, 1995) [hereinafter *Reins of Power*]. With respect to floor procedures, the new rules establish a requirement for a three-fifths majority of voting members to pass any bill, amendment, or conference report containing an increase in income tax rates, prevent the enactment of retroactive tax increases and the consideration of commemorative legislation, and require roll call votes for certain appropriations bills. *See id.* at 15. In terms of administrative House functions, the rules eliminate the Office of the Doorkeeper and create the new position of Chief Administrative Officer. *See id.* The Republicans introduced some major initiatives with respect to the workings of the committee system. Various committees were abolished and their jurisdictions divided among remaining committees. Three committees suffered this fate: District of Columbia, Merchant, Marine and Fisheries, and Post Office and Civil Service. *See id.* at 14. The new rules limit the number of staff that both committees and subcommittees can hire, and centralize the hiring of staff in the hands of the committee chairs. *See id.* The rules impose various procedural limitations, such as prohibiting proxy voting—the practice of allowing a committee chair or other designee to cast an absent member's vote in committee. *See id.* The rules also prohibit the practice of rolling quorums, by which committee chairs were able to hold open a vote in committee indefinitely, allowing members to show up at their convenience to vote. *See id.* Finally, the rules require committee and subcommittee meetings to be open to the public, except when an open meeting would endanger national security, compromise sensitive information, or possibly degrade, defame, or incriminate any person. *See id.*

[4] Under the new rules, with three exceptions, no committee is allowed more than five subcommittees. The three exceptions are: Appropriations, which is allowed 13 subcommittees, Government Reform and Oversight, with seven subcommittees, and Transportation and Infrastructure, with six subcommittees. *See Reins of Power*, *supra* note 3. This rule is interesting for two reasons. First, this recent change allegedly aims to decentralize and streamline the committee structure, which Republican leaders argued had become bloated over the past two decades. Paradoxically, the problem to which Republicans responded originated with the rules changes of the early 1970s, enacted under pressure from freshman Democrats seeking to decentralize committee power. In 1974, the House adopted a rule requiring that any committee with more than 20 members have at least 4 subcommittees. Second, the rules enacted and supported by the new class of freshman Republicans appear to undermine the self-interest of these junior members, as well as the interests of the Republican leaders. By limiting the number of subcommittees, the rule limits the number of chair positions available for distribution among committee members. The allocation of committee and subcommittee chairs has been used since the 1970s as a control and reward mechanism by party leaders in the House. To the extent that fewer of these positions are available, the leaders lose some leverage over the individual representatives, while the junior representatives face reduced opportunities to become chairs.

[5] *See infra* notes 31–61 and accompanying text.

[6] *See id.*

reforms were clearly designed to centralize power in the Speaker to implement the Republican's Contract With America agenda.[7] Although the numbers of subcommittees and committees were reduced, the introduction of term limits (a three-term maximum) for the chairs is expected to increase the opportunity for junior members to become chairs sooner and more frequently.[8]

For the purposes of this Article, an important implication of the two sets of reforms is that party leadership has become a more binding constraint on a representative's promotional ambitions.[9]

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[7] The new rules were part of a larger plan crafted by Speaker Gingrich to centralize power in the Republican leadership of the House. *See* David S. Cloud, *Shakeup Time*, 53 CONG. Q. WKLY. REP. 9, 9–10 (Supp. Mar. 25, 1995) [hereinafter *Shakeup*]. The purpose of the plan was to facilitate enactment of the Republicans' legislative agenda, described as their "Contract With America." The Contract With America included 10 major policy items which the Republicans promised to bring for a vote during the first 100 days of the 104th Congress. *See Republicans' Initial Promise: 100-Day Debate on 'Contract,'* 52 CONG. Q. WKLY. REP. 3216, 3216 (Nov. 12, 1994).

[8] On the one hand, these rules, in conjunction with the term limits rule, should accelerate the rate at which chairs turn over, creating more opportunities for junior members to ascend to power sooner in their careers. On the other hand, limiting the number of subcommittees and limiting congressional staff should create an immediate incentive problem, as it makes it more difficult to place junior representatives in positions of power immediately or to reward them with more resources. Which of these effects will dominate is clearly an open question.

[9] These developments beg the question of what substitute form of control the Republican leadership uses to maintain party unity. The answer seems to be threefold: the imposition of term limits for committee and subcommittee chairs, the Contract With America, and Speaker Gingrich himself.

A major component of the rule changes was the imposition of term limits for committee and subcommittee chairs. Under the new rules, committee and subcommittee chairs may hold their positions for no more than three consecutive terms. *See Reins of Power*, *supra* note 3, at 15. Such term limits could potentially balance the rule limiting the number of subcommittees. Although the leadership will not have as many subcommittees to distribute among loyal followers, those positions that exist will be up for allocation more frequently. *See* David S. Cloud, *GOP, to Its Own Delight, Enacts House Rules Changes*, 53 CONG. Q. WKLY. REP. 13, 13 (Jan. 7, 1995).

A second lever of control used by Republican leaders has been the Contract With America. As one observer has commented:

> During the first 100 days, a preprinted program could tell you not only who the players were in Congress, but what they were doing. All you had to do was follow the House Republicans' campaign manifesto known as the "Contract With America." It accurately scripted the House agenda and likely outcome.

Jeffrey L. Katz, *GOP Faces Unknown Terrain Without 'Contract' Map*, 53 CONG. Q. WKLY. REP. 979, 979 (Apr. 8, 1995) [hereinafter *Unknown Terrain*]. By committing Republican candidates to a simple "contract," the Republican leadership in Congress was able to control not only the agenda of the first 100 days, but also the behavior of party members. *See* Carrol J. Doherty, *Time and Tax Cuts Will Test GOP Freshman Solidarity*, 53 CONG. Q. WKLY. REP. 915, 916 (Apr. 1, 1995).

Finally, the figure of the Speaker and the party leadership became mechanisms of control. Committee chairs were put on notice that, at least during the first 100 days, the leadership would exercise complete control and demand complete loyalty. *See Shakeup*, *supra* note 7, at 9. Speaker Gingrich himself made it clear that he intended

The purpose of this Article is to examine voting behavior of representatives when faced with dual constraints (constituents back home and the leadership) as compared to one constraint (constituents back home).[10] An ambitious goal of the study would have been to examine the effects of both sets of reforms. However, there are two reasons for not using the 1995 reforms in our empirical examinations. First, not enough time has passed to fully observe the effect of term limits on voting behavior.[11] Second, and more importantly, the leadership, whose power it was to impose a constraint on a representative's promotional opportunities, lost power (due to ethical issues surrounding the Speaker) soon after implementing the reforms.[12]

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to keep tight control over the work of the committees by hand-picking the chairs of three major subcommittees, disregarding seniority, and using his conservative ideology as the criterion of selection. *See id.* at 10. The three committees were Appropriations, Energy and Commerce, and the Judiciary. *See* Karen Foerstel, *Gingrich Flexes His Powers in Picking Panel Chiefs*, 52 CONG. Q. WKLY. REP. 3326, 3326 (Nov. 19, 1994). In making appointments to coveted committees, the Speaker and the party leadership sought to reward freshmen members, especially those they believed electorally vulnerable in the next round of elections. Several seats on the Appropriations Committee were given to freshmen from traditionally Democratic districts who were expected to face tough races. For example, George Nethercutt (R-Wash.), who had beaten former House Speaker Thomas Foley, was appointed to the Appropriations Committee. *See* Jonathan D. Salant, *New Chairmen Swing to Right; Freshmen Get Choice Posts*, 52 CONG. Q. WKLY. REP. 3493, 3494 (Dec. 10, 1994). The message clearly resonated with Rep. Roger Wicker (R-Miss.), who won a congressional seat that had been occupied by a Democrat for over fifty years and who was appointed to the coveted Appropriations Committee: "My selection to the Appropriations Committee makes a statement to other Southern districts where Democrats are in office that we need not fear losing all our influence by voting for a conservative Republican." *Id.*

[10] *See infra* notes 16–30 and accompanying text.

[11] There is no clear consensus about the implications of the recent changes. While the impact of some of the new rules was immediately felt (e.g., the rule preventing voting by proxy in committees), the effects of other rules have yet to be felt (e.g., the imposition of term limits on committee and subcommittee chairs). Even though three years have passed since the enactment of these rules, it is still too early to conduct an empirical evaluation of their ramifications. Because the changes mirror those of the 1970s to an astonishing extent, we can survey that earlier period to help gauge the likely effects of the more recent revolution. This Article attempts this by developing and empirically testing a framework for congressional voting behavior that focuses on the context of the individual representative's congressional career.

[12] By most accounts, the efforts of the Speaker, at least initially, were highly successful. *See* Janet Hook, *Republicans Vote in Lock Step, But Unity May Not Last Long*, 53 CONG. Q. WKLY. REP. 495, 495 (Feb. 18, 1995). The Republican majority kept very close ranks during the first 100 days of the 104th Congress. *See Unknown Terrain*, *supra* note 9, at 979. The Speaker was able to control voting behavior of party members, as well as the agenda of committee chairs. The House leadership was also able to elicit specific outcomes from the committees, despite initial opposition by some committee chairs. Shortly after becoming House Speaker, however, Rep. Gingrich faced disciplinary hearings over ethical violations that have rendered him highly ineffective. *See* Jennifer Babson, *Ethics Reviews GOPAC*, 52 CONG. Q. WKLY. REP. 3323, 3323 (Nov. 19, 1994) (describing the investigation by the House Ethics Committee into the activities of the political action group headed by the Speaker).

Part I presents a theoretical framework that identifies voting behavior in the form of investment. The role of tenure and the changes in the rules of the House during the early 1970s are explained and specific investment hypotheses derived. Part II presents the empirical test of our theoretical framework. Part III discusses the implications of our findings with respect to the recent rules changes.

I. THEORETICAL FRAMEWORK

While the two major reforms of the House rules were separated by over two decades, they both raise a very similar analytical issue: the effect on the representative's voting behavior of the constraints imposed simultaneously by the constituents back home and party leaders in Congress.[13] Political scientists

[13] Of course, numerous other aspects of congressional voting have been identified in the political science literature on congressional voting behavior. For example, it is well established that the length of service in Congress is an important determinant of voting behavior. *See generally* RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978) (arguing that seniority in Congress influences the various "home styles" of members). It has also been argued that newly elected representatives have different concerns and priorities than their more senior colleagues. The differences are reflected in their use of resources, their home styles, and their voting behavior. *See* Jon R. Bond, *Dimensions of District Attention Over Time*, 29 AM. J. POL. SCI. 330, 334 (1985) (arguing that senior members of Congress pay less attention to their districts than junior members); Albert D. Cover, *Contacting Congressional Constituents: Some Patterns of Perquisite Use*, 24 AM. J. POL. SCI. 125, 129–30 (1980) (finding that senior members of Congress are less likely than junior members to send mass mailings to their constituencies). An intriguing dimension of the years-of-service literature is the so-called "last period" problem. *See generally* David N. Figlio, *The Effect of Retirement on Political Shirking: Evidence from Congressional Voting*, 23 PUB. FIN. Q. 226 (1995); James R. VanBeek, *Does the Decision to Retire Increase the Amount of Political Shirking?*, 19 PUB. FIN. Q. 444 (1991) (arguing that removing threat of re-election does not affect how congressmen vote whenver they do vote); Mark A. Zupan, *The Last Period Problem in Politics: Do Congressional Representatives Not Subject to a Reelection Constraint Alter Their Voting Behavior?*, 65 PUB. CHOICE 167 (1990) (arguing that retiring House members shirk their constituents' interests more after deciding to retire, but their amount of shirking does not vary widely from the amount of shirking undertaken by the average nonretirer). Do members of Congress who have no intention to run for re-election change their voting behavior in their last term because they are no longer subject to a re-election constraint? The last period problem indicates that an important dimension of the representative's voting behavior is his or her congressional career. If voting behavior changes in the representative's last period in Congress, might similar changes occur at other points in the representative's career? If so, what factors trigger those changes?

Another issue analyzed in the literature on congressional voting patterns is the effect of safety margins on voting behavior. Safety margins are a measure of how secure the incumbent is against an election challenge. *See* Gary C. Jacobson, *Deficit-Cutting Politics and Congressional Elections*, 108 POL. SCI. Q. 375, 382, 399 (1993) (explaining congressional votes on deficit reduction bills on the basis of safety margins) [hereinafter *Deficit Politics*]; *see also* Gary C. Jacobson, *Running Scared: Elections*

have noted that there exists a potential conflict between constituency and party.[14] In particular, it has been argued that members of Congress sometimes face conflicts when forced to decide issues in which the preferences of their constituents and their leaders differ.[15] A relatively unexplored aspect of the multiple constraints problem is the effect that different constraints have at different periods in a legislator's career. Prior research has assumed that the constraints placed on the legislator have similar effects throughout.[16] In this Article, we argue that the effect that constituents and party leaders play in the legislator's voting calculus varies over time.

In this Section, we develop a theory of congressional voting behavior through a model of investment that characterizes voting behavior longitudinally. The expected return on the legislator's investment accrues in the form of advancement within the congressional hierarchy. A higher position is expected to result in benefits for the legislator and her constituency. We treat tenure as a non-linear factor disjointed at two important points of time in a representative's career. We examine the effects of safety margins and multiple constraints on voting behavior during the three distinct periods in a representative's career.

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and Congressional Politics in the 1980s, *in* CONGRESS: STRUCTURE AND POLICY 39, 55 (Mathew D. McCubbins & Terry Sullivan eds., 1987) (explaining that campaign spending is influenced by subjective electoral safety margins) [hereinafter Jacobson, *Running Scared*]; THOMAS E. MANN, UNSAFE AT ANY MARGIN: INTERPRETING CONGRESSIONAL ELECTIONS 102–03 (1978) (arguing that worst-case scenarios give incumbents insecure sense that their seats are unsafe at any electoral margin). While there is dispute as to whether there is safety at any margin, a relationship seems to exist between voting behavior and the constituency's interests. An aspect of the question of safety margins that remains mostly unexplored is the interaction between safety margins and years of service. While there has been some attention to the effect of increased tenure on safety margins, *see generally* John R. Alford & John R. Hibbing, *Increased Incumbency Advantage in the House*, 43 J. POL. 1042 (1981) (arguing that the relatively uniform increase in incumbency advance across tenure levels, as well as the sudden mid-1960s shift in advantage, is inexplanable), little or no attention has been given to the effect of safety margins at different periods in the representative's career.

[14] *See* JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 117 (2d ed. 1981).

[15] *See id.* at 116–18. Kingdon shows that different groups of legislators handle this conflict in different ways. He concludes that Northern Democrats, for instance, tend to vote overwhelmingly with their constituencies and against the party leadership, while Southern Democrats split quite evenly between voting with their constituencies and with their committee chairman. *See id.* at 118.

[16] *See, e.g.*, *id.*

A. *The Players*

In a recent article on the politics of deficit-cutting, Professor Gary Jacobson characterizes the legislator's decision as influenced by both the voters' ratings of the legislator's performance and the preferences of her party leaders.[17] Following Professor Jacobson's basic proposal, we model the behavior of a legislator as influenced by two distinct constraints, one external to Congress and one internal. The external constraint is the legislator's constituency back home. Research has traditionally established that legislators are expected to maximize the probability of reelection through their voting behavior by considering the wishes of their constituents.[18]

The legislator's internal constraint is her party leadership in Congress. The reason we model leaders as a constraint derives from the hierarchical structure of Congress. Party leaders are in a position of power in at least two respects. First, the support of party leaders is likely needed for the passage of legislation.[19] Second, party leaders can sanction dissident members, by influencing the committee assignment process.[20] To the extent that committee assignments and legislation have value to an individual legislator, the positions party leaders take on various bills impose a constraint on the voting behavior of the legislator.

It is this trichotomy of interests, those of the leaders, the constituency, and the legislator, that motivates the investment framework. We define an "investment vote" as one which the legislator casts in favor of the party leadership position on an issue when it is against the immediate interest (but not necessarily the long-run interest) of the constituency. We define a "reverse investment vote" as one which the legislator casts in favor of the constituency when it is against the position of the leadership. When the interests of the leaders and the constituency are in tandem, the legislator is expected to vote in favor of those interests and no investment or reverse investment occurs.

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[17] *See Deficit Politics*, *supra* note 13, at 377.

[18] *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962) (arguing that in an economic theory of constitutions, any single individual might be able to adopt rules for collective decision-making that would satisfy his own interest).

[19] *See* David C. Coker & Mark W. Crain, *Legislative Committees as Loyalty-Generating Institutions*, 81 PUB. CHOICE 195, 199 (1994).

[20] *See* KINGDON, *supra* note 14.

What motivates an investment vote? If a legislator votes with the leadership, that legislator gains the support of the leaders, and thus enhances certain aspects of her political career. On the other hand such behavior might risk alienating the legislator's constituency, whose support is necessary for re-election.

Traditionally, situations characterized by these conflicts of interest have been explained using the concept of shirking, or consumption, on the part of the legislator.[21] That is, the legislator is seen as deviating from the constituency's interests and voting instead to satisfy his or her own ideology.[22] The concept of investment, however, implies that when the interests of leaders and constituents are in conflict, there is an optimal strategy that the legislator can follow to maximize total support from both groups.

This optimal strategy depends foremost on the constituents' electoral considerations.[23] Professor Jacobson identifies five decision rules that voters use in deciding which candidate to support in congressional elections.[24] According to Professor Jacobson, voters may decide on the basis of the political parties' positions on policy issues; the candidates' positions on policy issues; the president's party's performance in office; the incumbent's performance in office; and Congress's performance.[25] The incumbent's performance criterion is based on the idea that voters choose between candidates by deciding whether the incumbent must be rewarded or punished for his or her contribution to outcomes.[26] Aware of this criterion, legislators normally try to communicate to their constituents both their position or seniority within the congressional hierarchy and the resulting benefits that constituents derive from their member's status in Congress.[27] A portion of a speech by a senior representative participating in Professor Fenno's home style study is illustrative: "I have represented this district for the last twenty years. And I come to

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[21] *See* Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal Agent Slack in Political Institutions*, 33 J.L. & ECON. 103, 105 (1990); Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279, 282–84 (1984) [hereinafter Kalt & Zupan, *Capture and Ideology*].

[22] *See* Kalt & Zupan, *Capture and Ideology*, *supra* note 21, at 282.

[23] *See Deficit Politics*, *supra* note 13, at 376.

[24] *See id.* at 376–77.

[25] *See id. See also* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 44 (1990).

[26] *See* ARNOLD, *supra* note 25, at 44.

[27] *See* FENNO *supra* note 13, at 137–38.

you to ask for a two-year renewal of my contract. I'm running because *I have a twenty-year investment* in my job and because *I think you, as my constituents, have an investment in my seniority.*"[28]

The assertion that voters evaluate an incumbent's performance in part by considering his or her congressional status,[29] suggests that voters are willing to trade off an investment vote cast by their representative for an expected marginal gain associated with the representative's power in Congress. A rational constituent (with a relatively low discount rate) would understand that if the representative voted against the constituent's immediate interests, the legislator might be making an investment with the party leadership. The investment is expected to accrue otherwise unavailable benefits in the future. In other words, the constituent might like the legislator to cast investment votes for a period of time if that facilitates promotion to a committee important to the constituent's interests.[30] Whether an investment vote is cast, however, depends on the factors affecting the market (demand and supply) for such a vote.

B. *The Market for Investment Votes*

In this section we discuss factors that affect the supply of and the demand for investment voting, in other words, the investment voting market. We describe the development of that market, and identify the three factors we expect to affect the supply of and demand for investment votes: tenure, safety margins, and the representative's political ideology relative to the party leadership. We show that major reforms in Congress between the late 1960s and the early 1970s created a supply of and a demand for investment votes. Below we discuss these reforms and then examine their effect on investment voting behavior.

1. The 1970s Reforms

As a group the reforms were intended to: (1) diminish the role of seniority in obtaining promotions; (2) strengthen the role of

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[28] *Id.* at 138 (emphasis added).

[29] *See* ARNOLD, *supra* note 25, at 45–46.

[30] As discussed immediately below, tenure in Congress affects the extent and the timing of a legislator's investment. *See infra* notes 31–61 and accompanying text.

the party leadership; and (3) reduce the powers of committee chairmen and increase the power of subcommittee chairmen.[31]

a. *The changing role of seniority* In 1970, the Democratic Caucus Committee on Organization, Study and Review (the Hansen committee) substantially changed the rules concerning the seniority system.[32] It was established that upon demand from ten members the Caucus had to vote on the appointment of any committee chairman.[33] This rule allowed the members of the Democratic party, for the first time, to circumvent the seniority system in the appointment of chairs to the standing committees.[34]

b. *The changing role of party leadership.* Party leadership was strengthened through changes in control over policy matters. For example, in 1973, the House Democratic Steering and Policy Committee was created to serve as "a leadership forum for considering and pushing party policy positions" and made recommendations regarding legislative priorities and scheduling of matters for House or Caucus action.[35] The composition of the twenty-four member Steering Committee included twelve members elected by all Democratic representatives; the other twelve members included the three elected party leaders (Speaker, majority leader, and Caucus chair), the majority whip, four deputy whips, and four others appointed by the Speaker.[36] Thus, half of the votes in the powerful Steering Committee were controlled by the Speaker and his appointees.

A second important reform concerning the party leadership relates to the authority of the Rules Committee. The reforms concerning the Rules Committee were twofold.[37] First, the reforms allowed the Speaker to bypass the Rules Committee, if the Committee refused to grant a rule within twenty-one days from the date the bill was favorably reported out of the originating

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[31] *See* David W. Rohde, *Committee Reform in the House of Representatives and the Subcommittee Bill of Rights*, 411 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 42, 47 (1974).

[32] *See id.* at 42.

[33] *See id.*

[34] In 1973, reformers proposed the requirement of an automatic vote for each committee chair. This proposal was rejected, and in its place a 20% rule was adopted, under which a secret ballot vote was required if 20% of the Caucus members demanded it. *See id.* at 43.

[35] *See* STEVEN S. SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN CONGRESS 45–47 (1984).

[36] *See* LEROY N. RIESELBACH, CONGRESSIONAL REFORM IN THE SEVENTIES 56 (1977).

[37] *See* Rohde, *supra* note 31, at 40.

committee.[38] Second, the membership of the Rules Committee was enlarged from twelve to fifteen members in order to obtain a reform-favoring majority.[39] Also, the Speaker was given the right, with the approval of the Caucus, to appoint the Chairman and the members (from his own party) of the Rules Committee.[40]

Although the question of the effectiveness of these reforms has been the subject of considerable debate,[41] it is clear that the reforms influenced several determinants of the legislators' voting behavior.[42] The reforms then broke the monopoly power that the committee chairs had over policy matters and distributed this power among party leadership and subcommittee chairs, who were generally more junior members of Congress.[43]

c. *The changing role of subcommittee chairs.* As part of the Hansen committee report, reforms also increased the power of subcommittee chairs. First, the report recommended that the number of subcommittee chairs a member could hold be limited to one.[44] The immediate effect of this rule was to hand subcommittee chair positions to relatively junior representatives who otherwise would have had to wait several years before acquiring such positions.[45]

In 1973, the Democratic Caucus approved the Subcommittee Bill of Rights.[46] The Bill of Rights introduced several major changes. First, the limits of subcommittee jurisdiction were identified and fixed, and legislation was required to be referred to

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[38] *See id.*

[39] *See id.*

[40] *See* SMITH & DEERING, *supra* note 35, at 47, 92.

[41] *See generally* RIESELBACH, *supra* note 36 (arguing that the reforms advanced neither a useful mix of a responsible and responsive Congress nor a balance between the needs for deliberation and decisiveness).

[42] For example, Professor Rohde argues:

> Clearly, by making committee chairmen dependent for their position on the acquiescence of the Caucus and by affording protections in Caucus and committee rules for subcommittee chairmen and committee members, the powers of the committee chairmen have been reduced. Again, the potential for stronger influence by the Democratic leadership appears to have been created. If the leadership desires a particular outcome, the committee chairmen are less capable of blocking it, and the newly strengthened subcommittee chairmen would seem less likely to resist.

Rohde, *supra* note 31, at 47.

[43] The powers of the committee chairmen had already been modified in the Legislative Reorganization Act of 1970. The Act made committee affairs more open to the public by allowing, among other things, public broadcasts of committee hearings and by requiring that roll calls in committee be made public. *See* Rohde, *supra* note 31, at 41.

[44] *See id.* at 42.

[45] *See id.*

[46] *See id.* at 44.

the appropriate subcommittee within two weeks from the date the legislation was referred to the committee.[47] This rule sought to prevent the chair from unilaterally deciding which subcommittee would work on a given bill. Second, the Bill of Rights authorized subcommittees to hold hearings, receive evidence, and have an adequate budget and staff.[48] Finally, the bill reformed the bidding process for subcommittee chairs, making it more responsive to the committee caucuses.[49]

These reforms effectively created a market for the exchange of political power. By diminishing the pervasiveness of the seniority system, and thus making committee and subcommittee chairs open to electoral challenge, and by giving the leadership appointment and agenda powers, the reforms motivated members who wished to obtain benefits through the leadership to endow party leaders in Congress with a supply of investment votes. The reforms also created a demand for investment votes on the part of the leadership. Given that power was distributed to a relatively large number of less senior members, successful policy changes could require the support of these junior members. Below we demonstrate how the reforms created a supply of and a demand for investment votes.

2. Supply Factors

The change in the seniority system induced by the reforms was an important aspect of the supply effect. Although representatives still had to appeal to their constituents to get reelected, they could no longer rely solely on seniority as a consideration for promotion to higher positions in Congress. Instead, legislators had to appeal to a new constraint, the congressional leadership. We assert that the evolution of leadership as an important constraint created a trade-off for some representatives. Representatives whose constituents had views different from those of the leadership had to trade one set of benefits—those anticipated to be obtained from the leadership—for another set of benefits—those anticipated to be obtained from the constituents. Thus, after the reforms of the late 1960s and early 1970s, repre-

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[47] *See id.* An exception to the two-week rule occurred when a majority of Democratic members of the committee voted to consider a measure in the full committee.

[48] *See id.*

[49] *See id.*

sentatives who faced constituents with different preferences than those of the party were in a position to participate in the market for investment votes. The political preferences of the constituents relative to the party leaders became a factor to which representatives had to pay attention when casting their votes.

In addition to the importance that constituent preferences relative to those of the leadership obtained in the post-reform period, we assert that a major intervening determinant of the occurrence of investment and reverse investment is the representative's tenure. Tenure, we argue, affects the legislator's voting behavior by affecting the cost of, or the risk associated with, casting an investment vote, i.e., disagreeing with the constituency. This may imply that tenure influences the timing of investment behavior.

A newly elected representative might be at a higher risk of losing her re-election than a representative who has been in Congress for several years. This derives from two related factors. First, the legislator's ability to obtain electoral resources increases with more tenure. Second, establishing credibility takes time. We expect that when a newly elected representative votes against her constituency, her constituents might not perceive such a vote as an investment. Moreover, newly elected representatives are not in an immediate position to be promoted to an important committee, even if they vote in favor of leadership and against the interest of their constituents. Once these junior legislators establish credibility with their constituency, however, a vote against the immediate interest of the constituency is more likely to be perceived as an investment vote. This analysis suggests that the supply of investment votes is not expected from "junior" representatives.

At the other end of the tenure line are legislators who have served in Congress for a relatively long period of time. Unlike their more junior counterparts, we should expect that senior members are somewhat more secure in their chances for re-election.[50] There might be several reasons for this. First, most senior legislators have already achieved positions of power.[51] To the

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[50] For example, research shows that for the period 1948–1978, the average proportion of the votes cast in favor of non-Southern House incumbents increased with tenure, although at a diminishing rate. *See* Alford & Hibbing, *supra* note 13, at 1046–47.

[51] For example, in 1974, about 86% of the Democrats in the House with at least 18 years of experience (56 in total) had achieved positions of chairman. Of these, 33% chaired committees and 53% chaired subcommittees. These figures were calculated

extent that voters value this trait, they will be more likely to support the candidate. Second, senior members in positions of power enjoy the full advantages of incumbency: ability to raise money, access to the media, and use of congressional resources.[52] The advantages of incumbency can scare off strong challengers, further reassuring the likelihood of winning for the senior incumbent.[53]

While senior members are, on average, less likely than junior legislators to be defeated in their quest for re-election, there is little incentive for them to supply investment votes. These senior members are likely to be either leaders themselves, or hold positions in the congressional hierarchy important to their constituents.[54] This implies that the leadership constraint is no longer binding; the only constraint facing the senior members is their constituency.

There are the representatives, however, who are neither junior nor senior. It is this group of legislators that has the strongest incentive to supply investment votes. These legislators have enough tenure to have established a credible reputation with their constituents and therefore are not at as great a risk of losing a re-election campaign as a result of casting an investment vote as their junior counterparts. This group of representatives is most likely to benefit from investment votes, as they are on the margin of being chosen by the present leadership to chair subcommittee positions. They simply have the most to gain from investment behavior.

Viewed from the leadership position, our theory seems to suggest that these members have vacillating loyalties. In other words, it might appear that party leaders are being "fooled" by members who vote with the leadership only when it is time for promotion. Ideally, party leaders would prefer total loyalty from party members.[55] A legislator who decides to vote against the party leaders' preferences might risk political alienation.[56]

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using data from CONGRESSIONAL QUARTERLY INC., MEMBERS OF CONGRESS SINCE 1789 (2d ed. 1981) [hereinafter MEMBERS].

[52] *See generally* Jacobson, *Running Scared*, *supra* note 13, at 54–55 (explaining how incumbents utilize their office to conduct a perpetual campaign).

[53] *See id.* at 55.

[54] *See, e.g.*, SMITH & DEERING, *supra* note 35, at 172 (stating that seniority is still the primary determinant of accession to a committee or subcommittee leadership position).

[55] *See* Jacobson, *Running Scared*, *supra* note 13, at 73–76.

[56] *See id.*

Party leaders, however, also operate in a constrained environment.[57] For example, liberal party leaders who demand complete loyalty from legislators who represent more conservative districts might risk losing the district to the opposing party.[58] Party leaders' demand for loyalty from party members is constrained by the political preferences of the members' constituents. Our theory suggests that party leaders recognize that it is only during the middle years of legislative careers that they might be able to command the loyalty of these members.

A moderating factor that affects the supply of investment votes is the legislator's margin of re-election safety.[59] A legislator's willingness to cast an investment vote is constrained by his or her chances of re-election. Since an investment vote represents a vote against the immediate interest of the constituents, a legislator with a narrow margin of safety might be less likely to cast such a vote.[60]

While the safety margin has been incorporated in prior research on congressional voting, little attention has been paid to the interaction of safety and tenure. We believe that while safety margins matter, they matter most within the context of the congressional career. A junior legislator with a high safety margin will be unlikely to cast an investment vote until she has developed a reputation with her constituents that allow her to do so. The more trust the legislator is able to instill in her constituency, the more leeway she will have to diverge from the desires of her district when voting in Washington.[61] This, we argue, is likely to occur at some later point in the representative's career. At this later point, the representative is better positioned to exchange investment votes for a promotion to a desired subcommittee chair.

In sum, our model predicts that (i) "very junior" and "very senior" representatives on average will be less likely to supply investment votes, (ii) representatives in the middle of their careers will be more likely to supply investment votes, and (iii) a moderating factor for an investment vote is the reelection safety margin.

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[57] *See id.*
[58] *See id.*
[59] *See id.* at 40–44.
[60] *See id.*
[61] *See* FENNO, *supra* note 13, at 151–52.

3. Demand Factors

The reforms had a major effect on creating the demand (i.e., the willingness and ability to pay) for investment votes. Before the reforms, the party leadership had few resources with which to pay for an investment vote. Promotions were generally based on seniority. The near inability of party leaders to pay for an investment vote implied no demand for such votes.[62] Likewise, as investment votes are inherently costly, since they are by definition votes against the immediate interest of the constituents, a zero price would not have motivated their supply.

The breakdown of the near monopoly power of the committee chairs and the consolidation and vesting of such power in the leadership brought about the opportunity for investment-type behavior. Party leadership had the resources to pay for investment votes. Payments could be made in terms of helping the investor obtain the chairmanship of a subcommittee. The substitution of party leadership as a vehicle in effecting or granting promotion for seniority created a demand for investment votes.

It is important to note that party leaders may not demand investment votes from every party member at every possible opportunity. We assert that the demand for investment votes depends on the two factors we have identified as critical in the development of the investment market: the representative's seniority and the representative's probability of re-election. Consistent with our discussion of supply factors, we suggest that the demand for investment votes will tend to be stronger during the middle years of the congressional career. It is during this period that legislators establish a reputation that allows them to deviate from the immediate interest of their constituents. Leaders will be cognizant that demanding an investment vote from a representative either "too early" in the representative's congressional career, or when the representative faces a tough challenger, will be too costly for the leadership, since they risk losing control of the House if too many incumbents are defeated. This implies that the demand for investment votes from junior representatives and from those representatives who expect tough challenges at the

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[62] Of course, logrolling could have occurred. For a general discussion of logrolling, see generally Bruce Bender & John R. Lott, *Legislator Voting and Shirking: A Critical Review of the Literature*, 87 PUB. CHOICE 67 (1996) (reviewing the literature on congressional voting behavior).

polls is lower than the corresponding demand from senior representatives or from those representatives who enjoy a high probability of re-election.

4. Summary

Our model predicts that reverse-investment (i.e., voting with the constituency) occurs predominantly at the early stages of a representative's career. This is true both before and after the reforms of the 1970s. Second, pre-reform investment in favor of the leadership is not expected to have been prevalent since seniority was the vehicle by which a representative moved up the congressional hierarchy. Following the reforms, however, we should observe investment behavior in favor of the leadership. In particular, investment is more likely to occur in the middle stages of a representative's tenure, while reverse-investment is expected to occur at the earlier and later stages.

II. Empirical Test

A. *Sample and Data*

To test the investment model we need to identify situations in which the representative's two constraints (i.e., the constituents back home and the party leadership in Congress) take markedly distinguishable positions (i.e., liberal versus conservative) on policy issues. Based on the model, no investment occurs when the policy views of the constituency are in line with those of the party leadership. During the period under study, the Democratic Party was in control of the House. We thus focused on Democratic representatives.

Given our model, investment behavior is expected in situations in which Democratic representatives from relatively conservative districts face a relatively liberal party leadership. In such cases investment behavior could be empirically identified, since the party leaders are likely to take political positions that are opposite to the positions taken by the representative's respective constituencies on a variety of policy issues. As suggested by our model, investment votes will only be observed in the post-reform period, and only during the middle years of the representative's career. Thus, in order to test the model, we limit

our sample to those Democratic representatives who are relatively conservative; that is, we include in the sample only those Democrats whose districts voted for the Republican candidate for president and whose Americans for Democratic Action ("ADA") scores are less than those of their party's congressional leaders.[63]

We use the ADA ratings to create our dependent variable.[64] Our interest is to develop a measure that allows us to capture the relationship between a legislator's voting behavior and the preferences of that legislator's two principals: the party leadership and the constituents back home. For this purpose, we employ the variable ADAD, defined as, $ADAD = ADA_{leader} - ADA_i$, where ADA_{leader} is the ADA score of the majority leader for a given year,[65] and ADA_i is the representative's ADA score for the same year.

Given our sample (i.e., Democratic representatives facing somewhat conservative constituents) ADAD has the following interpretation. The larger the ADAD (i.e., the larger the difference between a representative's ADA and that of the leader), the more conservative the representative. A smaller ADAD means that the representative is voting more in line with the party leadership, thus taking more liberal positions.

We measure tenure as the number of years the representative has been in Congress. To capture the marginal effect of time, we create three variables based on the representative's tenure. We refer to these as TENURE1, TENURE2, and TENURE3, and they are defined as follows:[66]

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[63] The ADA is commonly used in studies of congressional behavior. *See, e.g.*, Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control?: Regulatory Policy-Making by the Federal Trade Commission*, 91 J. POL. ECON. 765, 783–96 (1983). The ADA rating is an index calculated for each representative by the Americans for Democratic Action, a liberal interest group. The rating shows the percentage of the legislator's votes in a selected sample that are considered liberal as defined by the Americans for Democratic Action.

[64] The dependent (or exogenous) variable represents the event or events that are explained by the model. *See* ERIC A. HANUSHEK & JOHN E. JACKSON, STATISTICAL METHODS FOR SOCIAL SCIENTISTS 3 (1977).

[65] For the periods under analysis, the House majority leaders were John W. McCormack (1961), Carl Albert (1962–71), Hale Boggs (1971–73), Thomas P. O'Neill, Jr. (1973–77), and Jim Wright (1978–80). *See* MEMBERS, *supra* note 51, at 179.

[66] For a similar treatment, see Randall Morck, et al., *Management Ownership and Market Valuation*, 20 J. FIN. ECON. 293, 298 (1988). The authors analyzed the effect of equity ownership by management of private firms on firm performance. Ownership concentration was divided into three classes: companies in which management owned up to 5%, between 5% and 25%, and above 25%.

For the 1960s:

TENURE1 = tenure if tenure $<$ 9.45 years,
= 9.45 if tenure $\geq$ 9.45 years;
TENURE2 = 0 if tenure $<$ 9.45 years,
= tenure minus 9.45 if 9.45 $\leq$ tenure $<$ 21 years,
= 11.55 if tenure $\geq$ 21 years;
TENURE3 = 0 if tenure $<$ 21 years,
= tenure minus 21 if tenure $\geq$ 21 years;

For the 1970s:

TENURE1 = tenure if tenure $<$ 6.09 years,
= 6.09 if tenure $\geq$ 6.09 years;
TENURE2 = 0 if tenure $<$ 6.09 years,
= tenure minus 6.09 if 6.09 $\leq$ tenure $<$ 20.5 years,
= 14.41 if tenure $\geq$ 20.5 years;
TENURE3 = 0 if tenure $<$ 20.5 years,
= tenure minus 20.5 if tenure $\geq$ 20.5 years;

For example, a representative whose tenure was 23 years in 1974, TENURE1 = 6.09; TENURE2 = 14.41; and TENURE3 = 2.5.

The rationale for using these specific thresholds (i.e., 9.45 and 21 for the 1960s; 6.09 and 20.5 for the 1970s) is to capture the different "turning points" in a representative's career. An indicator of this career path is the transition from being a junior member of a subcommittee to becoming a chair of a subcommittee and then moving into chairing a committee. Such a progression, we argue, indicates a change in the status of the representative in terms of her power in influencing policy outcomes.[67] The thresholds are calculated as the average number of years of service prior to obtaining a subcommittee chair for those individuals obtaining a subcommittee chair for the first time (e.g., 9.45 years in the 1960s, 6.09 years in the 1970s) or a committee chair (e.g., 21 years in the 1960s, 20.5 years in the 1970s).[68]

To capture the safety margin factor, we include the variable SAFETY. SAFETY is measured as the margin of victory the incumbent experienced on the prior congressional election. The

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[67] *See, e.g.*, KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 171 (1991) (stating that there is strong empirical support for the relationship between committee service and policy expertise).

[68] *See* SMITH & DEERING, *supra* note 35, at 191–92.

variable SAFETY is interacted with the three variables representing years of service (TENURE1, TENURE2 and TENURE3) to measure the total effect of years of service and safety margins on the investment variable.

We also examine the effect on voting behavior of the "prestige" of the committee on which the representative served over the periods being analyzed. It is conventionally accepted that there are differences in committee attractiveness.[69] For example, some committees are in an ideal position to shape important policy issues, are subject to a large degree of exposure, or place the chair in a strategic position vis-à-vis other members of Congress.[70] We expect that the more important the committee on which the representative wishes to serve, the greater the representative's propensity to invest, all else constant. Representatives who have already obtained a position on their "ideal" committee are expected to make less investment than those who wish to transfer to a more important committee. We focus on voluntary committee transfers (i.e., a departure from one committee to accept a seat on another committee) as a way to proxy the "value" or desirability of a given committee assignment to a given group of representatives.[71] Transfers are used as a measure of committee prestige.[72]

Finally, we include in the model a set of other variables normally used in congressional voting research to control for both the economic and ideological preferences of the constituents.[73] These variables are intended to empirically capture the effect of other

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[69] *See id.* at 89 (stating that Appropriations, Rules, and Ways and Means are among the elite committees in the House).

[70] *See* Charles S. Bullock III, *Committee Transfers in the United States House of Representatives*, 35 J. POLITICS 85, 92 (1973).

[71] *See generally id.* (studying the relationship between reassignment and tenure, prestige, seniority, electoral security, and constituency).

[72] Prestige is calculated as:

$$\text{PREST} = \frac{\text{Number of transfers to Committee } X}{\text{Number of transfers to Committee } X + \text{Number of transfers from Committee } X}$$

Suppose we are interested in computing the prestige of Committee X from the perspective of Southern Democrats in a given Congress. Holding the size of the committee constant, prestige is computed by the ratio of the number of Southern Democrats who transferred to the committee to the sum of the number of Southern Democrats who transferred to the committee and the number of Southern Democrats who left the committee. If, for example, two southern Democrats transferred to the committee during a given Congress but only one southern Democrat left the committee, the prestige of the committee to southern Democrats would be .67.

[73] *See* Sam Peltzman, *Constituent Interest and Congressional Voting*, 27 J. LAW & ECON. 181, 189 (1984) (listing variables of median family income, median education,

characteristics of the representative's constituency. These characteristics are likely to affect the policy preferences of the constituency, and thus, the voting behavior of the individual legislator.[74]

B. *Empirical Model and Results*

Our theory suggests that following the institutional reforms of the early 1970s, a market for investment votes was created. This implies that investment type behavior should be observed thereafter, but not before. Having constituents as their only constraint, representatives during this period will "vote their district" systematically regardless of their seniority.

With the reforms, however, we should begin to observe behavior consistent with investment type voting. Reverse-investment should occur during the TENURE1 period, as newly elected legislators tend to vote with their constituents to maximize their chance of re-election. The marked contrast between the 1960s and the 1970s can be observed when examining the total effect of tenure, safety, and prestige on the dependent variable, ADAD.[75] Our model predicts that early on, and taking the margin of safety into consideration, representatives should be more likely to vote with their constituents. Representatives in their midterm, on the other hand, will be likely to invest by siding with the leaders. Once the legislators' tenure increases up to the later stages of his or her congressional career (empirically captured in our model as the TENURE3 period), we should expect a revival of voting behavior toward constituents. The effect of tenure on voting behavior should also be affected by the probability of re-election.

To test this model we used a conventional linear regression methodology.[76] The results are reported in the Appendix. In gen-

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percentage of population over 65, percentage of black residents, percentage of those residing in urban areas, and the share of the labor force employed in manufacturing).

[74] Our analysis includes the following variables: INCOME (median family income); PERCC (percentage of the district's population living in urban areas); PERUN (percentage of the state's labor force that is unionized); PERBLACK (percentage of the district's population that is black); YEDU (median years of education of the district's population); FARM (percentage of the district's population involved in farming); OIL (state's per capita revenue in the oil industry); DOD (Department of Defense federal monetary outlays by state); and COAL (state's per capita revenue in the coal industry).

[75] In terms of our empirical model,
TENUREi + TENUREi*SAFETY + TENUREi*PREST, where i = 1, 2, or 3.

[76] The regression is of the form, $ADAD_i = c + dX_i + \mu_I$, where, $ADAD_i$ is the difference between the leader's ADA score and the representative's ADA score; X is a vector of independent variables; and, μ_I is the error term.

eral, the results are quite supportive of the theory. In the 1960s there is no evidence of investment behavior. The total effects of the years of service and safety variables are all insignificant.[77] These results indicate that investment behavior did not occur during the 1960s.

The results for the 1970s (column 2) are much different than those for the pre-reform period. As expected, the total effect of years of service and safety early in the representative's career is positive and highly significant.[78] The overall effect during the middle years of congressional service is negative and significant.[79] Compared to the results for the 1960s, the effect of the committee reforms of the early 1970s is apparent. The negative and significant effect during the mid-career years is consistent with the prediction of our investment model. Legislators at the second stage of their careers are in a position to be selected by the leadership for promotion to higher positions, such as chairing a subcommittee. In the post-reforms era, competition among legislators in mid-career is expected to have been intense. Whether those legislators invested, and whether the leaders demanded, such votes probably depended on the effect that the investment votes had on the chances of re-election.

The effect of tenure and safety on legislators late in their careers is less certain.[80] However, compared to the voting behavior during the second stage, representatives in the last stage of their careers do not necessarily side with party leaders.

A major proposition of our theory is that while safety margins matter, as has been evidenced in prior research,[81] they matter in a particular way. For example, they matter in the context of the

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[77] To determine the effect of tenure and safety in voting behavior we calculated the following equations:

$$\beta^* = b_{TENURE_i} + (b_{TENURE_i \cdot SAFETY})(X_{SAFETY}) + b_{TENURE_i \cdot PREST}(X_{PREST})$$

and,

$$S\beta^* = [Var(b_{TENURE_i}) + X^2 * Var(b_{TENURE_i \cdot SAFETY}) + X2 * Var(b_{TENURE_i \cdot PREST}) + 2\ Cov\ (b_{TENURE_i}, b_{TENURE_i \cdot SAFETY}) + 2\ Cov\ (b_{TENURE_i}, b_{TENURE_i \cdot PREST})]^{1/2}.$$

The coefficient for the total effect during the first period of the representative's career is -.38, with a standard error of 1.23. The coefficient for total effect during the middle years is .8, with a standard error of .92. The coefficient of the total effect during the last period is -1.1, with a standard error of 1.3.

[78] Using the formula described in *supra* note 76, the coefficient equals 2.76, and the standard error equals .68.

[79] Using the formula described in *supra* note 76, the coefficient equals -.65, and the standard error equals .24.

[80] Using the formula described in *supra* note 76, the coefficient equals .91, and the standard error equals .52.

[81] *See generally* Alford & Hibbing, *supra* note 13, *passim.*

congressional career. Once we account for the interaction effect of tenure and safety margins, the effect of SAFETY is insignificant in both specifications.

The variable PREST, which measures the "importance" or "prestige" of the committee on which a representative serves, appears to have had no effect on the voting behavior of representatives during either the 1960s or the 1970s. The interaction between PREST and TENURE is significant during the post-reform period, but insignificant in the 1960s. During the 1970s, the interaction term PREST*TENURE is negative and significant earlier in the representative's career but positive and significant during the mid-years of the individual congressional career. In other words, early on in the representative's career, the higher the importance of the committee upon which he or she serves, the closer the representative's voting behavior is to the leader's voting behavior, all else being constant. In the middle period, however, the higher the prestige of the committee on which the representative serves, the more likely the representative is to vote with his or her constituents and against the leadership.

We conducted further analysis to determine whether the results support the proposition that different voting patterns were developing during the different periods. That is, not only did we ask whether the voting behavior varied among representatives within the two time periods, but whether it also varied from one time period to the next. This question amounts to testing whether the reforms had any significant effect.[82]

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[82] We test whether the coefficients of the tenure variables are also statistically different from each other. T-tests of the difference between the tenure coefficients were conducted. Notice that the standard errors are in parentheses.

	1961–68	1973–78
TENURE1	-.05	2.63**
-TENURE2	(2.36)	(1.37)
TENURE1	1.45	2.98***
-TENURE3	(2.87)	(1.10)
TENURE2	1.5	.35
-TENURE3	(3.57)	(1.08)

The test statistic is calculated as β^*/s_{β^*}, where, β^* = TENURE1 – TENURE2, and S_{β^*} = [Var(TENURE1) + Var(TENURE2) – 2 Cov(TENURE1, TENURE2)]1\2.
All tests are two-tail. *,**,*** Significant at the .10 level (.05,.01).

The results of these further tests show that, for the 1960s, none of the differences between the coefficients of the various tenure variables is statistically significant. These statistics illustrate that, as expected, throughout the 1960s leadership was not a constraint during the middle years of the representative's career. Consistent with our investment model, the results depict that, unlike the 1960s, leadership was a constraint in the 1970s. This constraint became binding during the middle years of the representative's career.[83]

III. EVALUATING THE 1995 RULES CHANGES: A HISTORY LESSON

Our analysis leads us to two major conclusions. First, the rules changes matter. The movement away from a system based on seniority created an opportunity for an investment market to develop. By moving away from a seniority-based system, new mechanisms had to be created to maintain party unity. The distribution of important committee seats and committee chairs became one such mechanism. This, in turn, led to the creation of a market for "trading" these political favors. Second, the effects of the rules changes are filtered in the context of the congressional career. Not all representatives responded equally to the changes being introduced, neither were they in positions to provide the same degree of support for the leadership. While representatives in the middle point of their careers were in a position to engage in investment behavior, junior representatives were not.

How do these two results relate to the more recent changes enacted by the Republican majority in the House? We argue that

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[83] Finally, using the results of Table 1, we also test whether the tenure variables' coefficients for the 1960s (pre-reform) are significantly different from the coefficients of the 1970s (post-reforms). F-tests were conducted comparing similar models across the two periods. The resulting F-statistics for all the models are statistically significant at the .01 level. These results indicate that it is incorrect to assume that the coefficients across specifications are equal, i.e., two different regressions must be estimated. The test is of the form:

$$F_{k,N+M-2k} = \frac{(ESS_R - ESS_{UR})/k}{ESS_{UR}/(N + M - 2k)}$$

where k = number of restrictions; N + M = number of observations; ESS_R = Restricted residual sum of squares; and ESS_{UR} = Unrestricted residual sum of squares. *See* ROBERT S. PINDYCK & DANIEL L. RUBINFELD, ECONOMETRIC MODELS AND ECONOMIC FORECASTS 116 (3d ed. 1991). The F-statistic is 2.42.

there are at least two points of comparison. First, it seems that Speaker Gingrich was paying attention to the rule changes of the 1970s when implementing his recent reforms. For instance, the Speaker appears to have realized that party loyalty and unity were not free goods, but benefits for which party leaders must pay. The allegiance of party members comes at a price. That price is measured in terms of the allocation of resources over which the leadership has control. This explains, we argue, why the reform limiting the number of subcommittees was accompanied by the rule change that imposed term limits on committee and subcommittee chairs. Something has to be offered to party members for their loyalty. Thus, while reducing the number of subcommittees and accordingly decreasing the numbers of immediate positions of leadership available, the term limits created future opportunities for more members to have a chance at becoming chairmen.

While this tradeoff of numbers of subcommittees and term limits provided the structure for maintaining some leadership control, it was certainly not enough. To provide the leadership with more leverage, leaders took a more active approach in the distribution of resources. The Speaker put himself on the line by becoming actively involved in the distribution of chair positions and the allocation of committee seats. In this process, the Republican leadership appears to have been cognizant of the relevance of the congressional career effect and the electoral safety factors affecting a representative's ability to support party leadership. As described earlier, the party leadership was sensitive to the idiosyncrasies of particular members' constituencies when allocating committee seats and making chair appointments.

A final question raised by our analysis relates to the effect of missing pieces. Unlike 1970s amendments, which created a system of incentives independent of any one individual, the 1995 changes are highly dependent on the Speaker himself. Without Speaker Gingrich's intrusion into the allocation of the leadership resources, and past the initial 100 days' agenda, it is not clear that there are enough incentives to keep members in line with the party's position. Indeed, congressional observers have already pointed out that there has been a reversion to the pre-1995 reforms in Congress, at least with respect to the redistribution of power to committee chairs.[84] Our analysis suggests that the

[84] *See* Jackie Koszczuk, *A Full Circle*, 55 CONG. Q. WKLY. REP. 9, 9 (Supp. Mar. 22, 1997).

institutional factors that affect congressional voting behavior are nontrivial and likely to survive the personalities of particular individuals, even that of Speaker Gingrich.

CONCLUSION

This Article contributes to the literature on congressional voting behavior by developing a model of voting behavior which includes investment as a nontrivial component. By comparing the costs and benefits of a given course of action, and incorporating the effect of investment in the assessment of these costs, the model predicts specific and nontrivial changes in voting behavior corresponding to changes in tenure. Further, the model considers the effects on voting behavior of institutional changes in Congress that occurred during the 1970s, and analyzes the effects of the changes on the voting behavior of individual representatives.

The results presented in this Article are not only of historical interest, but also, we argue, provide a context against which we can evaluate the implications of the recent changes enacted by the Republican Congress in 1995.

APPENDIX

LINEAR REGRESSION—DEPENDENT VARIABLE: ADAD
(S.E. in Parentheses)

	1961–68	**1973–80**
INTERCEPT	96.54***	76.36***
	(20.84)	(14.31)
TENURE1	-.91	2.59***
	(1.31)	(.95)
TENURE2	-.86	-.04
	(1.41)	(.50)
TENURE3	-2.36	1.39
	(2.66)	(.73)
TENURE1*SAFETY	-2.57	4.99***
	(2.49)	(2.13)
TENURE2*SAFETY	4.20*	-3.17***
	(2.27)	(1.04)
TENURE3*SAFETY	-1.90	3.10***
	(3.20)	(1.19)
SAFETY	23.33	-2.16
	(15.29)	(8.92)
PREST	-13.91	8.65
	(11.90)	(5.99)
PREST*TENURE1	2.83	-3.82***
	(2.00)	(1.37)
PREST*TENURE2	-.70	1.47***
	(1.73)	(.56)
PREST*TENURE3	3.46	-.41***
	(2.78)	(.64)
INCOME	.002	-.003***
	(.002)	(.0006)
PERCC	-.02	-.05*
	(.12)	(.03)
PERUN	-1.14***	-.47***
	(.17)	(.09)
PERBLACK	.09	.19***
	(.10)	(.07)
YEDU	-5.75***	.26
	(1.92)	(.89)
FARM	-.0001**	-.12
	(.00005)	(.07)
AGE	.83	-.56**
	(.53)	(.22)
OIL	-.002	.004***
	(.002)	(.0009)
DOD	.0007	-.00004
	(.0004)	(.002)
COAL	-.05**	-.01
	(.03)	(.01)
R^2	.35	.44
N	304	612

All tests are two-tail. *, (**, ***) Significant at the .10 (.05, .01) level.

STATUTE

REMOTE PURCHASING AND FUNDAMENTAL FAIRNESS: THE SALES AND USE TAX EQUALIZATION ACT

THE HARVARD LEGISLATIVE RESEARCH BUREAU*

In this Essay, The Harvard Legislative Research Bureau proposes a congressional statute designed to rectify problems in state and local sales and use tax systems caused when out-of-state sellers make sales to in-state consumers via the Internet and mail order. The tax treatment of such sales often results in violations of tax neutrality and horizontal equity, as well as revenue loss at the state and local level.

The increasing reliance on new modes of commerce, fostered by rapid technological innovation, presents challenges to existing sales and use tax systems. Although remote purchases[1] have escaped use taxation for some time, the growth of the Internet[2] further expands opportunities for use tax avoidance. Increased avoidance dramatically affects the fairness of the tax system, distorts economic decision-making, and threatens state and local

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[1] Remote purchasing, as used in this Essay, refers to Internet as well as mail order transactions.

[2] In this Essay, the term "Internet" is used to refer to the global network of computers currently connected through the TCP/IP protocol, commonly known as the Internet, as well as other electronic commerce similar to the Internet. Examples of this include bulletin board systems ("BBS's") and other "dialup" services where goods and/or services are bought and sold.

revenue collection. These effects can best be illustrated through an example.

Betty Buyer and Bob Buyer live next door to each other in Spokane, Washington. The total sales and use tax rate in Spokane is 8.0%, consisting of a 6.5% state rate and a 1.5% city rate.[3] Bob Buyer goes to Suzy Seller's local computer software store and purchases a $100 word processing program. Suzy Seller computes and collects the 8% tax due on the sale, and Bob pays a total of $108 to obtain the program. Meanwhile, Betty Buyer sits down at her computer and accesses Sam Seller's virtual software store on the Internet. Betty Buyer purchases the same word processing program, also for $100. Although Betty owes the 8.0% use tax, she effectively obtains the program tax-free. This is so because Sam Seller, who is not a resident of Washington, is not legally obligated to collect the use tax from Betty,[4] and the use tax is rarely enforced against consumers.[5] In fact, many consumers are unaware that they even owe use tax.[6] As a result of her method of purchase, Betty avoids paying tax although she and Bob both purchased the same product for use in Washington.

Similarly situated taxpayers, in accordance with the commonly accepted principle of horizontal equity, should be treated similarly.[7] Although method of purchase may be used to distinguish among taxpayers, this is generally considered inappropriate.[8] Aside from the method of purchase, Betty and Bob are in all other

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[3] *See* 1 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM 99, tbl. 28 (1995) [hereinafter FISCAL FEDERALISM].

[4] *See* Quill v. North Dakota, 504 U.S. 298, 317–18 (1992) (holding states may not constitutionally impose use tax collection duties on out-of-state mail order sellers unless the seller has a minimum presence in the state).

[5] *See Hearing on Interstate Use Tax Collection: Hearings on S. 1825 Before the Senate Comm. on Small Business*, 103d Cong. 1–2 (1994) [hereinafter *Hearings on S. 1825*] (statement of Sen. Dale Bumpers (D-Ark.), Chairman of the Comm. on Small Business). *See* JOHN F. DUE & JOHN L. MIKESELL, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION 262 (2d ed. 1994) ("Most states make no effort to catch individual purchasers on goods bought outside the state. Administrators regard any effort as not worth the trouble."). Notable exceptions to this lack of enforcement include, however, checking registered items like boats, utilizing U.S. Customs border point information, and linking use tax to income tax reporting (which yields substantial revenue only in Maine). *See id.* at 262–66. *See also* Deborah L. Paul, *The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve?*, 76 N.C.L. REV. 151, 169 n.74 (1997).

[6] *See Hearings on S. 1825*, *supra* note 5.

[7] *See* David Brunori, *Principles of Tax Policy and Targeted Tax Incentives*, 12 ST. TAX NOTES 1731, 1733 (1997).

[8] *See* Amy Hamilton, *Economists Recommend Including Electronic Commerce in Sales Tax Base*, 12 ST. TAX NOTES 1596 (1997).

ways similarly situated so that horizontal equity is undermined when Bob pays sales tax and Betty does not.

The principle of neutrality, which is related to the principle of horizontal equity, requires that tax considerations not affect consumer choices.[9] Betty Buyer should not have an incentive to purchase goods or services over the Internet simply because of the tax savings she realizes by doing so.[10] Allowing Internet transactions to escape sales and use tax effectively subsidizes Internet commerce at a rate equal to the tax rate avoided. It puts non-Internet sellers at a competitive disadvantage[11] and may encourage inefficient purchasing behavior.[12]

Sales and use taxes are a critical component of most states' revenue raising systems.[13] In 1994, sales taxes accounted for approximately 36% of state tax revenue, raising about $125.5 billion dollars.[14] States use these revenues to fund important services such as schools, law enforcement, and environmental protection. Any erosion of the tax base would either harm state services or require the state to replace the lost revenue through other means.

The proposed statute seeks to equalize tax burdens among similarly situated purchasers of the same product, regardless of their mode of purchase, in order to redress the horizontal inequity, revenue loss, and economic distortions which occur under

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[9] States frequently use imposition of taxes in order to induce or discourage consumers from making certain choices. Excise taxes on cigarettes are a prominent example. We do not attempt to address conscious violations of neutrality. For a discussion of the wisdom of such policies, see Jendi B. Reiter, *Citizens or Sinners?—The Economic and Political Inequity of "Sin Taxes" on Tobacco and Alcohol Products*, 29 COLUM. J.L. & SOC. PROBS. 443 (1996).

[10] The importance of the neutrality principle has been recognized by the United States Treasury. *See* DEPARTMENT OF THE TREASURY OFFICE OF TAX POLICY, *Selected Tax Policy Implications of Global Electronic Commerce* 16 (1996) [hereinafter *Selected Tax Policy*].

[11] *See Small Business Panel Reviews Mail Order Use Tax Issue*, ST. TAX REV., Oct. 3, 1994, at 2–3 (recognizing that local retailers face competitive disadvantages in relation to direct marketers who are not required to collect sales and use taxes).

[12] *See* DUE & MIKESELL, *supra* note 5, at 28 (noting that economic efficiency is lost when the tax structure favors one distribution channel over another).

[13] Forty-five states and the District of Columbia currently impose a state sales tax. Only Montana, New Hampshire, Delaware, Oregon, and Alaska do not. Alaska, however, does have local sales taxes. *See* FISCAL FEDERALISM, *supra* note 3, at 97–99, tbl. 28. While typically sales taxes are imposed on the sales transaction, use taxes are typically imposed on the "use, storage, or consumption of tangible personal property within the state if such property has not already been subject to the state's sales tax." RICHARD D. POMP & OLIVER OLDMAN, 1 STATE AND LOCAL TAXATION 425 (2d ed. 1997).

[14] *See* John L. Mikesell, *State Retail Sales Taxation: A Quarter-Century Retrospective*, 97 ST. TAX NOTES 126–39 (July 1, 1997).

the current system. This is achieved by authorizing the imposition of use tax collection duties upon out-of-state sellers not currently subject to such duties.

Both the Due Process Clause and the Commerce Clause of the Constitution are implicated by the imposition of use tax collection duties upon out-of-state sellers. Under the current interpretation of the Constitution, out-of-state sellers must have a certain presence within the taxing state that constitutes nexus for Commerce Clause purposes.[15] Additionally, out-of-state sellers must have minimum contacts with the taxing state to satisfy the requirements of the Due Process Clause.[16] The statute proposed in this Essay authorizes limited state burdens upon interstate commerce. Based on Congress's power to regulate interstate commerce,[17] the statute grants states the authority to require out-of-state sellers to collect and remit use tax applicable to the buyer.

I. Constitutional Issues in Granting Authority for Use Tax Collection

The congressional grant of authority proposed in this statute should meet constitutional scrutiny. Scholars have increasingly favored a federal solution to the interstate use tax collection problem since the Supreme Court's 1992 decision in *Quill Corp. v. North Dakota*.[18] Prior to *Quill*, it was unclear whether consti-

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[15] *See Quill*, 504 U.S. at 313.

[16] *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding that for personal jurisdiction purposes, the defendant must have "minimum contacts" so as to not offend "traditional notions of 'fair play and substantial justice.'" *Id.* at 316.).

[17] The Commerce Clause is an express grant of power to Congress: Article I, section 8, clause 3, of the Constitution creates an express grant that "Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the Several States." In addition to this express textual grant of power is the judicially created negative sweep of power, known as the Dormant Commerce Clause. The Dormant Commerce Clause limits the ability of states to impede interstate commerce, even absent an express effort by Congress to legislate on the subject. The clause has traditionally served two purposes. First, the clause protects out-of-state interests that cannot be fairly represented in the state's political process. *See* Shane Buntrock, *Quill Corporation v. North Dakota: Spawning the Physical Presence "Nexus" Requirement Under the Commerce Clause*, 38 S. D. L. Rev. 130, 136 (1993). Second, the clause is seen as a way to advance the interest of uniform and free trade among the states. *See id.*

[18] *See* Saba Ashraf, *Virtual Taxation: State Taxation of Internet and On-Line Sales*, 24 Fla. St. U. L. Rev. 605, 628–29 (1997) ("[I]t appears that presently the only way states can constitutionally impose use tax collection obligations on out-of-state vendors selling to in-state customers over the Internet and on-line is if Congress passes a definitive statute allowing such taxation."); Gregory Ichel, *Internet Sounds Death Knell for Use Taxes: States Continue to Scream over Lost Revenues*, 27 Seton Hall L. Rev. 643, 663 (1997) ("Congress should legislate in the area of state attempts to require

tutional limitations on the imposition of use tax collection duties upon out-of-state sellers without tangible physical presence in the taxing state were rooted in the Due Process or Commerce Clause.[19] Consequently, Congress did not enthusiastically consider bills designed to grant states the authority to require out-of-state mail-order catalogs to collect use tax.[20] Commentators believed that even if Congress had authorized the burden on interstate commerce, the bills would nonetheless have violated the Due Process Clause.[21] However, the *Quill* Court's ruling that it is the Commerce Clause, not the Due Process Clause, which requires sellers to have a physical presence in the taxing state makes it clear that the Constitution does not pose an insurmountable obstacle to requiring out-of-state sellers to collect use taxes. The *Quill* decision opens the door for congressional intervention to alter Commerce Clause presence requirements to reflect the realities of the digital age.[22]

In this Part we will address three issues: how courts interpreted the Due Process and Commerce Clauses prior to *Quill*; how *Quill* interpreted these constitutional provisions; and post-*Quill* developments and implications for congressional remedies.

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nonresident companies to collect and remit use taxes."); Steven Forte, *Use Tax Collection on Internet Purchases: Should the Mail Order Industry Serve as a Model*, 15 J. MARSHALL J. COMPUTER & INFO. LAW 203 (1997) ("The states should seek federal legislation that focuses on an Internet vendor's economic presence in a taxing state rather than a physical presence."); Roberta Loberg, *State Authority to Require Tax Collection from Direct Marketers: Quill Corp. v. North Dakota*, 26 CREIGHTON L. REV. 603, 636–37 (1993) ("Congress should heed the Court's invitation and take action. [States] deserve guidance and uniformity of a sort the Supreme Court wisely recognized it could not provide."); W. Carl Spining, *Forcing Mail-Order Houses to Collect Use Taxes in the Wake of* Quill Corp. v. North Dakota, 60 TENN. L. REV. 1021, 1035 (1993) ("The due process holding provides Congress with the opportunity to prevent . . . uncertainty and resolve the issue.").

[19] *See Quill*, 504 U.S. at 305 ("[O]ur holding in Bellas Hess relied on both the Due Process Clause and the Commerce Clause.").

[20] *See* Interstate Sales Tax Collection Act of 1987 H.R. 1242, 99th Cong.; Main Street Fair Competition Act of 1988 S. 2368, 100th Cong.; Equity in Interstate Competition Act H.R. 2230, 101st Cong. (1989); S. 480, 101st Cong. (1989).

[21] *See* Ashraf, *supra* note 18, at 618. ("[B]efore *Quill*, Congress was not likely to consider the proposed bills [aimed at recapturing lost revenue caused by the inability of the state to tax out-of-state vendors who sold in mail order catalogs], even if it had authorized the burden on interstate commerce, [because] the bills would nonetheless violate the Due Process Clause.").

[22] *See* Forte, *supra* note 18, at 226 (noting that "[t]he physical presence requirement [of the Commerce Clause] is outdated and inequitable."); Ichel, *supra* note 18, at 663 ("The Court's call for legislative guidance is magnified by ever-increasing Internet usage.").

A. *Due Process and Commerce Clause Jurisprudence Prior to* Quill

Prior to *Quill*, an actual physical presence in the taxing state seemed necessary to sustain the requisite "minimum contacts" of the Due Process Clause as interpreted by the Supreme Court. In *National Bellas Hess v. Dept. of Revenue of Illinois*,[23] the Court suggested that a showing of some minimum physical presence in the taxing state was necessary to impose use tax collection duties upon out-of-state sellers.[24] The Court, in invalidating a use tax imposed on an out-of-state seller whose only contact with the state was through mail-order catalogs, adopted a "bright-line" test that provided retailers a "safe harbor" from taxation if they did no more than communicate to their customers by mail, telephone, or common carrier.[25] This test applied even if the corporation had availed itself of the "static infrastructure of the state in order to exploit the consumer market there."[26] While the *Bellas Hess* Court did not go so far as to define explicitly what constituted a physical presence, the decision pointed to the Court's holding in *Scripto Inc. v. Carson*[27] as the "furthest constitutional reach" of a state's power to impose a use tax collection duty.[28]

Pre-*Quill* Commerce Clause jurisprudence sought to define the extent of presence required to tax an individual.[29] In *Complete Auto Transit Inc. v. Brady*,[30] the Court established a four-prong test for establishing whether a tax survives Commerce Clause scrutiny.[31] The tax must: (1) be applied to an activity with a "substantial nexus" with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and

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[23] 386 U.S. 753 (1967).

[24] *See id.* at 757–58. In *Bellas Hess*, the State of Illinois assessed a deficiency against National Bellas Hess, a mail-order retailer with no outlets, sales representatives or property in Illinois, although it did solicit business in the state through mail-order catalogs. *See also* Adam Schwartz, *Nexus or Not?* Orvis v. New York, SFA Folio v. Tracy *and the Persistent Confusion over* Quill, 29 CONN. L. REV. 485, 493–97 (1996).

[25] *See Bellas Hess*, 386 U.S. at 758; Schwartz, *supra* note 24, at 494.

[26] Schwartz, *supra* note 24, at 494.

[27] 362 U.S. 207 (1960).

[28] *Bellas Hess*, 386 U.S. at 757 (referring to *Scripto*). In *Scripto*, the Court found that the continuous solicitation of ten salesman resident in the state represented the broadest minimum contacts necessary to remit the use tax. *See Scripto*, 362 U.S. 207.

[29] *See Quill*, 504 U.S. at 309–10; Buntrock, *supra* note 17, at 139.

[30] 430 U.S. 274 (1977).

[31] *Id.* at 279. *Complete Auto* emphasized the importance of looking "past the formal language of the tax statute [to] its practical effect." *Id.*

(4) be fairly related to services provided by the state.[32] Remote transactions pose the greatest problems under the first prong of the *Complete Auto* test, "substantial nexus." Following the *Complete Auto* decision, the Supreme Court reaffirmed *Bellas Hess*, holding that a seller whose only contacts with the taxing state were through a common carrier lacked "substantial nexus" under the Commerce Clause.[33] Consequently, under the *Bellas Hess* standard, a seller whose only contact with a state was through remote transactions would likely not be susceptible to the imposition of use tax collection duties by that state. The Supreme Court reexamined these issues, however, in *Quill Corp. v. North Dakota*.[34]

B. *Due Process and Commerce Clause Jurisprudence in the Era of* Quill

The Quill Corporation, incorporated in Delaware, sold office supplies nationwide through mail-order catalogs, flyers, trade journals and telephone orders.[35] Based upon these limited contacts, the state of North Dakota sought to impose use tax collection duties on Quill. In its decision, the Supreme Court held that a physical presence was not necessary to withstand due process analysis, but was still required to survive Commerce Clause scrutiny.[36] In its due process analysis, the Court overruled the formalistic test enunciated in *Bellas Hess* in favor of a more pragmatic standard. Due process was held to require only minimum contacts and not in-state presence of people or property, as long as a nonphysical or economic presence existed.[37] The Court also carefully distinguished the nexus requirements of the

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[32] *Id.*

[33] *See* National Geographic Society v. California Bd. Of Education, 430 U.S. 551, 559 (1977).

[34] 504 U.S. 298 (1992).

[35] *See id.* at 302. Quill did not have sales representatives, warehouses, or offices in North Dakota, but it did make over $1 million in sales to 3000 customers in the state. *See id.* North Dakota law required retailers "who engage in regular or systematic solicitation of consumer markets in the state" to collect and remit a use tax. Quill failed to comply with this requirement, despite the fact that the statute defined "regular or systematic solicitation" as three or more advertisements within a twelve month period. *See id.* For a discussion of *Quill*, see David Shore, *State Taxation of Interstate Commerce:* Quill, Allied Signal *and a Proposal*, 72 NEB. L. REV. 682 (1993); Matthew Troyer, *Mail-Order Retailers and Commerce Clause Nexus: A Bright Line or an Opaque Standard?* 30 IND. L. REV. 881, 887–98 (1997).

[36] *See Quill*, 504 U.S. at 313.

[37] *See id.* at 305.

Due Process and Commerce Clauses, noting that the two evolved from different constitutional standards.[38] The Court explained that since the goal of the Due Process Clause is fairness, courts should look to "notice and fair warning" in evaluating whether it is infringed.[39] In contrast, the Commerce Clause "was concerned with effects of state regulation upon the national economy and with limiting burdens on interstate commerce."[40] Consequently, nexus requirements for the Commerce Clause are informed not by concerns of fairness, but by "structural concerns about the effects of state regulation on the national economy."[41] The result is that a corporation may have the "minimum contacts" with a taxing state as required by the Due Process Clause, yet lack the substantial nexus with that state as required by the Commerce Clause.[42] In fact, this was the outcome in *Quill.*

The *Quill* Court created a bright line physical presence test to determine when "substantial nexus" under the Commerce Clause is satisfied. The Court favored a bright line test because such a test respected the twenty-five years of vendor reliance on *Bellas Hess*, established boundaries of legitimate state authority, and would reduce litigation concerning taxes.[43] According to the Court, a bright line test also encouraged settled expectations and fostered investment by businesses and individuals.[44] The Court also noted that while a balancing test could be applied in other contexts, in this case, society had an interest in the "'stability and orderly development of the law' that undergirds the doctrine of stare decisis."[45]

Due process jurisprudence evolved substantially in the personal jurisdiction context between the time of the *Bellas Hess* and *Quill* decisions. The requisite analysis increasingly involves determinations of whether an individual's contacts with the forum state are substantial enough to legitimate a state's exercise of power over him or her.[46] In *Burger King Corp. v. Rudzewicz*, the Court said:

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[38] *See Quill*, 504 U.S. at 312.
[39] *Id.*
[40] *Id.* at 305.
[41] *Id.* at 312.
[42] *Id.* at 313.
[43] *See id.* at 315.
[44] *See id.*
[45] *Id.* at 316–17.
[46] *See International Shoe*, 326 U.S. at 316; Milliken v. Meyer, 311 U.S. 457 (1940).

> [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.[47]

Commentators urged the application of the *Burger King* standard to taxing jurisdiction cases.[48] The *Quill* Court's agreement[49] has paved the way for implementation of the statute proposed in this Essay.

C. *Post-*Quill *Developments and Implications for Congressional Remedies*

Since *Quill*, several lower federal court holdings have considered the extent of due process "minimum contacts" provided by Internet transactions in the context of personal jurisdiction.[50] These cases suggest that under certain circumstances a corporation's single web site may constitute the minimum contacts necessary to allow a state to exercise personal jurisdiction over the corporation consistently with the Due Process Clause, even if the corporation lacks a physical presence or sales force in the state.[51] In holding proper personal jurisdiction over a company doing business over the Internet, the district court in *Zippo Manufacturing Co. v. Zippo Dot Com Inc.* explained that, "[t]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."[52] This principle was drawn from several prior cases. At one end of the spectrum, in *Compuserve, Inc., v. Patterson*,[53] Compuserve, located in Ohio, entered into a software agreement with

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[47] 471 U.S. 462, 476 (1985).

[48] *See* Paul J. Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 VAND. L. REV. 993, 1010–11 (1986); Charles Rothfeld, *Mail-Order Sales and State Jurisdiction to Tax*, 53 TAX NOTES 1405, 1405 (Dec. 23, 1991).

[49] *See Quill*, 504 U.S. at 307–08.

[50] *See, e.g.*, Compuserve, Inc. v. Patterson, 89 F.3d 1257 (N.Y. 1996); Inset Systems, Inc. v. Instruction Inc., 937 F. Supp. 161 (D. Conn. 1996).

[51] *See* Ichel, *supra* note 18, at 652–53.

[52] 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

[53] 89 F.3d 1257 (N.Y. 1996).

a Texas resident, involving repeated transmission of computer files over the Internet.[54] The Sixth Circuit ruled that the exercise of personal jurisdiction over the defendant on the basis of such contacts did not violate the Due Process Clause.[55] At the other end of the spectrum, the district court, in *Bensusan Restaurant Corp. v. King*,[56] denied personal jurisdiction based on a completely passive website that only provided calendar and ticket information about the defendant's jazz club.[57]

Internet sellers engaging in remote purchase transactions are, almost by definition, engaging in a high level of commercial activity on the Internet. The level of interactivity involved in a remote purchase transaction is more similar to that in *Compuserve* than that in *Bensusan*. By using the Internet to make sales to customers, a corporation reaps financial benefits from every state into which it sells.[58] Moreover, those soliciting business from a state enjoy the benefits and protections of that state's laws. Examples include state banking laws, a state court system, and consumer protection laws that create a climate of consumer confidence.[59] When a business chooses to engage in a remote transaction, selling goods or services to a purchaser in a given state, a court could reasonably conclude that the business had purposely availed itself of the benefits of that state. If the proposed statute were enacted, removing the Commerce Clause barrier, such a conclusion would allow the state to impose use tax collection duties upon the business.

Although Congress cannot authorize violations of the Due Process Clause, Congress has plenary power under the Commerce Clause to authorize actions that burden interstate commerce.[60] In dicta, the *Quill* Court recognized as much.[61] The

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[54] *See id.* at 1260.

[55] *See id.* at 1263–65. The agreement did provide that the contract was "entered into" in Ohio. *Id.* at 1260.

[56] 937 F. Supp. 295 (S.D.N.Y. 1996).

[57] *See id.* at 299 ("The mere fact that a person can gain information . . . is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York."). At least one court has permitted a state to exercise personal jurisdiction over a defendant based solely upon contacts through a passive website. *See* Inset Systems, Inc. v. Instruction Set, Inc., 937 F.Supp. 161 (D. Conn. 1996).

[58] *See id.*

[59] *See Quill*, 504 U.S. at 327 (White, J., concurring).

[60] *See Quill*, 504 U.S. at 318.

[61] *See id.* ("[T]oday, we have put the problem to rest. Accordingly, Congress is now free to decide whether, when and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.").

majority noted that its decision that the Commerce Clause required physical presence in the state was made easier by the fact that the issue is not only one that Congress may be better equipped to resolve, but that Congress has the ultimate power to resolve: "No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions."[62]

II. A CONGRESSIONAL REMEDY TO USE TAX COLLECTION IN INTERSTATE COMMERCE

In this Part we detail both the process used to arrive at our recommendations and the alternative considerations we ultimately rejected. After carefully considering other solutions, we settled on a congressional remedy to ensure equitable sales and use taxes. One proposal discussed was the elimination of all state sales and use taxes. The rationale for this proposal is that an overabundance of taxing jurisdictions in one nation is too cumbersome and inequitable in a global economy. The elimination of state sales and use taxes was rejected, however, as a gross infringement on state sovereignty that would be politically impractical. Several forms of state remedies were also seriously considered, including a system of state compacts facilitating use tax collection or state litigation strategies designed to relax current constitutional limitations. These, however, appeared too likely to result in mere preservation of the status quo or in ineffectual and extremely complicated systems of state regulation. In contrast, congressional action presented opportunities to preserve state sovereignty, reduce uncertainty for sellers, and allow efficient collection of the sales and use taxes.

Among congressional remedies, a national sales tax received serious consideration.[63] Administration of the system could be achieved by a central authority, and revenue from the tax would be apportioned among the states. Such a tax could be imposed on interstate sales only, with retention of current state sales and

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[62] *Id.*

[63] A national interstate sales tax was explored in the mail order context more than a decade ago. *See* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE AND LOCAL TAXATION OF OUT-OF-STATE MAIL ORDER SALES (1986) [hereinafter ACIR REPORT] ("[A] national mail order tax . . . would create a national tax (at a single uniform rate) on interstate mail order sales delivered to purchasers in state where the vendor does not meet nexus standards . . . ."); Hartman, *supra* note 48, at 1017.

use taxes on intrastate transactions, or such a tax could be imposed on all sales, replacing current state sales and use taxes altogether.[64] However, a national sales tax solution was rejected due to neutrality and horizontal equity considerations, the difficulties inherent in an apportioned tax, and sovereignty issues. The neutrality and horizontal equity of any national sales tax would rest upon the treatment of current state sales tax systems under the proposal. If current intrastate tax systems could be eliminated, a national sales tax would be completely neutral and horizontally equitable. However, elimination of systems so firmly embedded in the tradition of state taxation seemed untenable. If state systems were retained, however, rate differentials between the national tax and state taxes would lead to substantial violations of neutrality and horizontal equity. Apportionment issues were also paramount in the decision to reject a national sales tax. All conceivable formulas for apportionment seemed to systematically disadvantage at least one particular group of states, and the selection of the apportionment method would undoubtedly lead to squabbles among states. Finally, the enactment of a national sales tax simply did not sufficiently seem to respect state sovereignty. Such concentration of taxing power at the national level would preclude tax experimentation and tax base decisions based on local concerns.

After ruling out a national sales tax, we were convinced that a congressional statute granting states the authority to impose use tax collection duties on out-of-state sellers was the best remedy.[65] Still, many questions remained. Our resolution of those questions is described in the remainder of this Essay.

A. *Extending Authority to Localities as Well as States*

The most dramatic feature of the proposed statute is that sellers who will become subject to use tax collection duties will be responsible for collecting use taxes imposed by localities as well as states. A condition of the congressional grant of state author-

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[64] In order to pass constitutional muster, replacement of the current state sales tax systems would probably have to be done either through state agreement or by conditioning receipt of revenue from the national tax on abolition of the state system.

[65] Legislation supported by the White House is before the current Congress proposing a moratorium on new Internet taxes. *See* H.R. 3529, 105th Cong. (1997); S. 442, 105th Cong. (1997). It should be noted that the statute proposed in this Essay is not a new tax on the Internet but a way to equitably apply existing tax laws.

ity is that the states allow localities to have this same authority to the extent that the localities impose a use tax. This idea is unique among proponents of congressional remedies. However, we believe that the benefits of greater tax neutrality, horizontal equity, and local sovereignty produced by this more inclusive grant of authority outweigh the additional complexity and compliance costs.

The most popular variant of congressional action is to grant authority only to state tax jurisdictions and leave local jurisdictions without the authority to require out-of-state sellers to collect and remit use tax.[66] Remedies of this sort suggest the creation of a unified state tax structure for interstate transactions, thereby reducing the number of taxing jurisdictions from approximately 6600 to 46.[67] To the extent local sales taxes remain intact on intrastate transactions under such a proposal, tax neutrality and horizontal equity would be improved but not completely achieved.

Returning to our example transaction, Bob Buyer would still pay the full 8.0% tax rate (6.5% state rate and 1.5% local rate). Betty Buyer, on the other hand, would now pay the rate chosen by the State of Washington for its unified state tax structure. Although it may be attractive for Washington to choose a rate higher than 8.0%, such a rate might produce constitutional problems under the theory that its application discriminates against interstate commerce. Even if a state attempted to approximate a combined state and local rate, it would be unlikely to succeed. For example, Seattle, Washington, imposes a 1.7% local tax rate and Tacoma, Washington, imposes a 1.4% local tax rate.[68] A singular state rate simply could not account for the myriad of local rates currently imposed in many states.

While a unified state structure would be an improvement over the present system, a significant preference for Internet transactions would remain to the extent of the differential between the

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[66] Most recently, the National Governors' Association, led by Governor Michael Leavitt of Utah and Governor Roy Romer of Colorado, has proposed that large vendors be required to collect use taxes on behalf of states, provided that states conform to single tax structure. In the proposal, the federal government grants states the ability to create a single consolidated tax for both mail order and Internet out-of-state purchases. *See* Peter Passell, *Taxing Sales on the Internet: Many Governors v. Congressional Legislation*, N.Y. TIMES, Mar. 16, 1998, at D6. *See also* ACIR REPORT, *supra* note 63, at 16.

[67] There are currently 6579 sales and use tax jurisdictions in the United States. *See* FISCAL FEDERALISM, *supra* note 3, at 96.

[68] *See* FISCAL FEDERALISM, *supra* note 3, at 99, tbl. 28.

unified rate and the combined state and local rate in a particular locality. Such differential seems unlikely to exceed the highest local tax rate,[69] but would nonetheless cause substantial violations of the principle of neutrality. Further, consumers who do not use the Internet to make purchases would remain comparatively disadvantaged because of the rate differential, violating the principle of horizontal equity. Because we believe that neutrality and horizontal equity are essential, a remedy which sacrifices these principles is by definition insufficient.

To the extent that a congressional grant of authority conditioned on a unified state tax structure eliminated local sales and use taxes, tax neutrality and horizontal equity would be preserved. However, the elimination of sovereign local sales tax jurisdictions carries significant costs. Localities would be forced to turn to alternative revenue sources.[70] A unified state tax structure would concentrate taxing power in state governments, destroying the advantages of diffuse power such as checks and balances, responsiveness to the unique needs of local jurisdictions, and experimentation with tax policy. In short, extending authority to localities maintains the benefits of local sovereignty and achieves tax neutrality and horizontal equity.

The primary disadvantage of extending authority to localities is that compliance burdens will undoubtedly be substantial. Businesses who engage in transactions with purchasers nationwide may be required to comply with the laws of nearly 6600 taxing jurisdictions.[71] However, compliance can be simplified through the use of automated sales and use tax software.[72]

Software that computes use taxes is currently available and already in use by many Internet sellers.[73] The software, which interfaces with most major accounting software programs, consists mainly of a database containing constantly updated tax

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[69] This is so because it seems unlikely that a state would set the unified rate at a level lower than the state's own general sales and use tax rate.

[70] In fiscal year 1991, local governments received approximately 10% of their total tax revenues from sales taxes. *See* DUE & MIKESELL, *supra* note 5, at 277. Higher rates under a unified state tax structure might be distributed to localities to replace lost local sales tax revenue.

[71] *See* FISCAL FEDERALISM, *supra* note 3, at 96.

[72] *See* Ichel, *supra* note 18, at 658–59 ("Newly developed software will greatly ease the alleged burdens of complying with the multitude of differing state and local use tax rates.").

[73] *See* Amy Hamilton, *Online Demonstration of Netscape's Tax Tracking Software Coming Soon*, ST. TAX NOTES, Dec. 4, 1995, at 1613 ("[t]he software database . . . can track sales and use tax rates in more than 65,000 combinations of tax jurisdictions and determine whether a product is in fact taxable in each of them.").

information for every taxing jurisdiction in the United States.[74] In an Internet sale, the purchaser enters his or her zip code, the database is automatically accessed, and the software calculates the appropriate tax.[75] As an additional convenience, the software creates an auditing trail and provides sellers with proof of proper tax collection.[76]

As a practical matter, a seller on the Internet is unlikely to have the resources to contend with even forty-six different taxes without tax computation software.[77] As such, the marginal cost of merely utilizing a larger database in the tax computation software seems an insignificant disadvantage to allowing collection of local taxes when compared with the loss of sovereignty, neutrality, and horizontal equity under a unified state tax structure. Even so, effectively requiring sellers to use automated software is a cost that cannot be ignored.[78]

Although not specifically addressed by the proposed statute, sellers' costs of obtaining such software should be minimized. Many states already provide some reimbursement for sales and use tax collection costs.[79] However, such reimbursement is insufficient to defray the high cost of automated software.[80] This cost could be reduced by subsidization of the software purchase, state development of such software for provision to sellers at no cost, or the regulation of such software as a public utility.[81]

Providing a direct monetary subsidy or tax credit for small businesses to purchase software is attractive but extremely complex to administer. Although compliance cost reduction meas-

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[74] *See id.*

[75] *See id.*

[76] *See id.*

[77] Since Internet sales are generally automated, computing the tax by hand would be impossible.

[78] The need for expensive software could have the undesired effect of keeping small businesses from starting up on the Internet. One of the great benefits of the Internet to society has been that it provides a new horizon where entrepreneurs can flourish. While we firmly believe that these new businesses should share equally with local businesses the responsibilities of tax collection, we do not wish to see them unduly burdened.

[79] *See* DUE & MIKESELL, *supra* note 5, at 286–89, tbl. 11.3.

[80] *See id.* at 295 ("The compensation rates are no higher than 5 percent of tax collected, a rate applied in some Colorado jurisdictions. More typical is a rate of 2 percent or 3 percent" of tax revenue collected).

[81] An indirect approach suggested to alleviate compliance burdens is inclusion of a *de minimis* rule whereby out-of-state sellers who do not make enough sales to a state to meet the prescribed threshold would not be required to collect the use tax. *See* ACIR REPORT, *supra* note 63, at 15–16. This approach, while alleviating the burden on small businesses, fails to alleviate horizontal equity and neutrality problems which the proposed statute is designed to address.

ures should be enacted simultaneously with the proposed statute, perhaps states and localities rather than the federal government should bear the costs of such efforts. Since the proposed statute is intended to be enacted by Congress, equitable apportionment of the costs among states would be difficult. A second drawback to this approach is the difficulty small businesses may face if required to purchase the required software prior to receipt of the tax credit or subsidy.

As an alternative to a commercial product, Congress could facilitate the development of an integrated, state created software program that would provide sellers with the tool necessary to collect use tax from buyers in all jurisdictions.[82] State involvement in database development would ensure that each state's tax structure is accurately included. However, a coordinated effort would be necessary to produce a single program. To further the developmental efforts by states, Congress could create a committee to collaborate on the database. Such a database should interface with all major accounting programs so that it can be easily incorporated into a seller's system.

Finally, Congress could authorize the use of one software program as the required tool for tax computation and subject it to price regulation. The creation of a semi-public utility would ensure that compliance costs did not become unwieldy. All administrative costs, though, should be paid by the states and localities because of the benefit they receive from additional tax revenue.

B. *Operation and Feasibility of the Proposed Statute*

The proposed statute operates in such a way that neither states nor businesses will be unduly burdened. First, the proposed statute conditions the grant of authority upon each state's establishment of a single place for remittance of the use taxes due to the state and its localities.[83] This provision will preclude the possibility that sellers might be required to remit use taxes to

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[82] In a similar vein, Pennsylvania has developed sales tax filing software which it provides to businesses free of charge to facilitate electronic filing of sales taxes. *See* Adrienne Redd, *State Expands Use of Electronic Tax Filing Again*, E. PA. BUS. J., Sept. 16, 1996, at 3.

[83] Local sales taxes are administered locally in six states. In the remaining states, the local sales tax is administered by the states. *See* DUE & MIKESELL, *supra* note 5 at 299.

6500 locations. An additional protection is provided by the requirement that states may not demand remittance more frequently than quarterly.[84]

While the proposed statute allows localities to impose use tax collection duties upon out-of-state sellers, localities are prohibited from independently auditing such sellers. Instead, localities wishing to audit must utilize the auditing system of the state in which they are located.[85] This measure will limit to forty-six the number of jurisdictions that could audit any out-of-state seller. As many as forty-six audits, however, could become burdensome if not properly coordinated.

States have many options in enforcing the use tax collection duties of out-of-state sellers. First, states could independently audit those out-of-state sellers that merit review. Choosing this method of enforcement, however, will be inefficient insofar as the states will duplicate each other's efforts. More likely, states will enter into compacts or agreements to coordinate the auditing procedure.[86] Such agreements might allow one organization to audit each business and report to each state, or provide for information-sharing among the states, or implement a combination of these two approaches. Although states have many incentives to enter into such agreements, if states do not do so and the auditing burden on businesses becomes too great, Congress could take remedial action.

C. *Toward More State Uniformity*

Reform within each state's sales and use tax system is necessary to lower costs of compliance for all sellers. The natural development of the sales and use tax systems of the individual states, designed to effectuate different state policies, has created a number of absurd and unwieldy distinctions in state product definitions, which control whether or not a product is taxable.[87] We do not propose to subvert state policy by requiring that states

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[84] Currently, states generally impose remittance duties either quarterly or monthly, often depending upon the amount of sales tax collected by the seller. *See id.* at 155–58.

[85] Among localities which administer their own sales tax, most do not employ auditors. *See id.* at 304. Most local taxes are administered by states. *See id.* at 299.

[86] Some states currently adhere to agreements for income and sales tax collection, such as the Multistate Tax Compact. *See* COMMERCE CLEARING HOUSE, STATE TAX GUIDE ¶ 60-000 (1998).

[87] For example, the seemingly well intentioned exemption to New York State sales and use tax for medicine means that sterilized cotton and Head & Shoulders shampoo

adhere to a uniform system of taxation. Although such uniformity would create a more rational system, it would significantly undermine state sovereignty. Adopting standard product definitions, though, could help to achieve simplicity in state and local tax without infringing sovereignty.[88] Standardized definitions would allow each state legislature to decide simply to tax or exempt each item, creating sales and use tax bases that could be easily incorporated into automated sales and use tax computation software.[89]

States that accept the authority proposed in this statute would be required to send two delegates to a Sales and Use Tax Definitions Committee to work toward harmonization of product definitions. The goal of the Committee is to eliminate the marginal distinctions that have arisen from administrative and judicial pigeonholing. The Definitions Committee will produce a report for state legislatures, governors, and Congress, but it will not be required actually to amend the state tax systems. Principles of federalism suggest that Congress should not exert excessive control over state tax systems, and states have powerful incentives to produce a set of harmonized definitions.

The Definitions Committee will facilitate action that is already substantially in the best interest of both states and businesses. Not only do businesses benefit from the lower compliance costs that would be derived from a harmonized definitional system, but states benefit through lower administrative costs. The states would be able to cut significantly their administrative bureaucracy and allocate resources to a more productive use.

D. *International Effects*

The proposed statute is intended to apply only to American businesses and is not intended to authorize states to exercise power over international commerce. The Internet, however, is a global network which has served to facilitate not only interstate commerce but international commerce as well. The proposed statute will not fully solve the horizontal inequity, neutrality, and

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are exempt, but non-sterilized cotton and Prell shampoo are not. *See* Richard D. Pomp, *State Tax Reform for the Eighties*, 16 CONN. L. REV. 925, 932 (1984).

[88] The need for harmonization of product definitions was recognized in Charles E. McLure Jr., *Electronic Commerce and the Tax Assignment Problem: Preserving State Sovereignty in a Digital World*, ST. TAX NOTES, Apr. 13, 1998, at 1177.

[89] *See id.*

revenue raising problems associated with international remote purchasing. Until such time as these issues are resolved, Congress should resolve the domestic problems associated with state and local use tax by adopting the statute proposed here.

Because foreign businesses will not be required to collect use tax under the proposed statute, a preference for foreign sellers may be created among purchasers. Although this violates the principle of tax neutrality, a global initiative will be required to remedy international violations of this sort. This should not, therefore, deter Congress from addressing such an important domestic issue. Similar competitive disadvantages are imposed upon American businesses with respect to environmental regulations, working conditions, and minimum wages, but Congress has enacted statutes in those areas. Safe working conditions, a decent wage, and a clean environment are considered important enough to justify the competitive disadvantages that result. Similarly, furthering a state's ability to fund important services and reducing inequities in the tax system are important goals which justify the competitive disadvantages that may result for American businesses under the proposed statute.[90] It is important to note that many other countries rely on consumption taxes much more heavily than the United States, providing powerful incentives to address the problems of global remote purchase taxation. Any competitive disadvantage faced by American businesses is likely to be short-lived.

Additionally, the proposed statute may provide guidelines for resolving similar problems in an international context. The global nature of electronic commerce will require a global solution.[91] This statute will provide the experience necessary to tackle the problem globally by resolving it domestically.

III. CONCLUSION

In conclusion, the proposed statute represents the best solution to the horizontal equity and neutrality problems that result from states' inability to impose use tax collection duties upon out-of-state sellers engaging in remote purchase transactions.

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[90] These competitive disadvantages may be felt most acutely by businesses on the Internet since they directly compete with international sellers.

[91] *See generally Selected Tax Policy*, *supra* note 10, at 3.

IV. The Proposed Statute

This Act shall be known as "The Sales And Use Tax Equalization Act."

Section 1. Definitions.

Auditing, as used in this Act, shall include those activities directed toward ensuring compliance with sales and use tax laws.

Localities, as used in this Act, shall include cities, towns, counties and similar state subdivisions which impose use tax collection and remittance duties upon out-of-state sellers.

Out-of-State Seller, as used in this Act, shall include sellers who do not have a physical presence in the state and/or locality exercising authority under Sections 2 and 3 of this Act, but who have contacts with such state and/or locality sufficient to satisfy the Due Process Clause of the United States.

Penalties, as used in this Act, shall include interest, fines, and liability for use tax not collected.

Use Tax, as used in this Act, shall include all taxes imposed upon the use or consumption of goods and services within the state and/or locality imposing such tax.

Section 2. Grant of Authority.

States are hereby authorized to impose use tax collection and remittance duties upon out-of-state sellers who have delivered the purchased good or service to a purchaser who is subject to a use tax in the state imposing the use tax collection and remittance duties. The determination of the use tax due under this Section shall be in accordance with the laws of the state where the purchased and delivered good or service is used.

Section 3. Localities.

A state which exercises the authority granted in Section 2 of this Act shall grant localities located therein the same authority to the extent such localities impose a use tax, subject to the limitations in Sections 4, 5, and 6 of this Act.

Section 4. Good Faith Safe Harbor.

A state which exercises the authority granted in Section 2 of this Act or a locality which exercises authority pursuant to Section 3 of this Act shall not impose penalties upon an out-of state seller who makes a good faith effort to determine where a purchased and delivered good or service is used and to comply with the laws of the state and/or locality.

Section 5. Uniform Place of Reporting and Remittance.

A state which exercises the authority granted in Section 2 of this Act shall provide for one (1) place to which out-of-state sellers shall remit all state and local use taxes due. A state which exercises the authority granted in Section 2 of this Act shall require use tax remittance no more frequently than quarterly.

Section 6. Uniform Auditing and Enforcement.

A state which exercises the authority granted in Section 2 of this Act shall prohibit localities from auditing out-of state sellers.

Section 7. State and Local Sales and Use Tax Definitions Committee.

The "State and Local Sales and Use Tax Definitions Committee" is hereby created. The Committee shall prepare and present a report before January 1, 2002, for presentation to the legislature and governor of each state which is exercising the authority granted in Section 2 of this Act. The report shall recommend a uniform instrument upon which out-of-state sellers will report state and local use tax payments. The report shall recommend amendments to each state's sales

and use tax laws. Such amendments shall be directed toward instituting uniform definitions of the goods and services included within each state's sales and use tax base. The Committee shall prepare a report describing any such amendments enacted with respect to the sales and use tax laws of each state exercising authority granted in Section 2 of this Act. This report shall be presented to the United States Congress before February 1, 2003, and before each February 1 thereafter. Each state exercising the authority granted in Section 2 of this Act shall send two (2) delegates to the Committee at its own expense. The Committee shall meet at such times and places as agreed upon by the delegates thereto.

Section 8. Exercise of Authority.

A state shall be considered to be exercising the authority granted in Section 2 of this Act when the state's laws, regulations or practice require an out-of-state seller to collect and remit use taxes as authorized under Section 2 of this Act.

Section 9. Severability.

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to any other person or circumstance shall not be affected thereby.

Section 10. Effective Date.

The effective date of this Act shall be January 1, 2001.

NOTE

PROTECTING THE RIGHT TO PETITION: WHY A LOBBYING CONTINGENCY FEE PROHIBITION VIOLATES THE CONSTITUTION

STACIE L. FATKA*
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Every year the number of lobbyists and the amount spent on lobbying increases rapidly. Proposals to curtail lobbying by banning contingency fee lobbying arrangements are introduced in each session of Congress and have been passed in many states. The authors of this Note argue that such bans often preclude individuals and organizations with few financial resources from lobbying. They contend further that lobbying has become the most effective means of exercising the First Amendment right to petition. The authors note that regulating lobbying serves a compelling state interest in inhibiting political corruption, but conclude that a ban on all contingency fee lobbying contracts would be overbroad and would place an unconstitutional burden on the right to petition.

On election night in 1994, President Bill Clinton watched the returns at the White House. Among his guests was Washington insider Tom Boggs.[1] Perhaps the most powerful lobbyist in Washington, Boggs advocates his clients' viewpoints on public policy issues, providing access and influence unattainable without his services.

Boggs is not the only Washington lobbyist with special access to lawmakers. Weeks after the Republican victories of 1994, the congressional leaders of the new majority party permitted Gordon Gooch, a lobbyist for petrochemical companies, to draft legislation imposing a moratorium on new regulations.[2] Peter Molinari, a lobbyist for Union Carbide, and Paul Smith, a lobbyist for United Parcel Services, revised Gooch's draft.[3]

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[1] *See* CHARLES LEWIS AND THE CENTER FOR PUBLIC INTEGRITY, THE BUYING OF THE PRESIDENT 48 (1996).

[2] *See* John B. Judis, *The Contract with K Street*, *in* THE NEW REPUBLIC GUIDE TO THE ISSUES: THE '96 CAMPAIGN 55, 65 (Smith ed., 1996). This incident was not an isolated occurrence. For example, large portions of an American Petroleum Institute draft of changes to the Superfund program appeared in legislation sponsored by Representative Mike Oxley (R-Ohio), Chairman of the House Commerce Subcommittee on Hazardous Materials. *Id.*

[3] *Id.*

This Note does not challenge the extent of access provided to legislative advocates. Rather, it recognizes the often valuable and essential role in contemporary politics that these advocates play. In fact, this Note asserts that current jurisprudence provides lobbying with significant constitutional protection. As political pressure mounts to reform our system by limiting its exclusivity and providing a greater voice for more Americans, this Note seeks to enhance access to the political process for those unable to afford the hourly fee of Tom Boggs or Gordon Gooch.

Hiring lobbyists—while increasingly important in gaining influence on federal policies—is expensive. Because these costs often hamper the efforts of smaller groups with fewer financial resources to affect policy-making in Washington, the use of contingency fee arrangements in lobbying should receive Constitutional protection. Contingency fees have traditionally played a central role in providing individuals with greater access to the political system. By allowing individuals or organizations to forgo the cost of representation unless their advocate succeeds, contingency fees have served to give a voice to those who could otherwise not afford to lobby Congress. Accordingly, the ability to hire on a contingency fee basis is a vital tool for many groups that want to influence federal policy.

On January 4, 1995, Senator Strom Thurmond (R-S.C.) introduced legislation[4] that would prohibit any person lobbying the federal government from being paid on a contingency fee basis.[5]

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[4] *See* 141 CONG. REC. S189-05, S191 (1995) (introducing S.53, 104th Cong. (1995)). Senator Thurmond has introduced similar legislation each term since at least 1988. *See* 139 CONG. REC. S189-05, S191 (1993) (introducing S.44, 103rd Cong. (1993)); 137 CONG. REC. S433-05, S438 (1991) (introducing S.170, 102nd Cong. (1991)); 135 CONG. REC. S166-04, S169 (1989) (introducing S.91, 101st Cong. (1989)); 134 CONG. REC. S11633-04 (1988) (introducing S.2733, 100th Cong. (1988)). Senator Thurmond has also attempted to include this contingency fee ban as an amendment to other bills. *See, e.g.*, 136 CONG. REC. S12055-01, S12063 (1990) (introducing a provision containing a contingency fee ban as Amendment No. 2553 to the National Defense Authorization Act for Fiscal Year 1991).

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> It shall be unlawful for any person to make, with intent to influence, any oral or written communication on behalf of any other person other than the United States to any department, agency, court, House of Congress, or commission of the United States, for compensation if such compensation has knowingly been made dependent—(A) upon any action of Congress, including but not limited to actions of either the House of Representatives or the Senate, or any committee or member thereof, or the passage or defeat of any proposed legislation; (B) upon the securing of an award, or upon the denial of an award, of a contract or grant by establishment of the Federal Government; or (C) upon the securing, or upon the denial, of any Federal financial assistance or any other Federal contract or grant . . . .

The bill would punish violators with a $50,000 fine, two years in prison, or both.[6] Senator Thurmond and other members of Congress[7] have introduced similar legislation in recent congressional sessions and are intent on eliminating the ability of individuals to hire a lobbyist on a contingency fee basis.[8]

This Note contends that such a prohibition is not only bad public policy but is also unconstitutional. Part I identifies the historical foundation of the First Amendment's Right to Petition Clause, and discusses the influential role that the petition played in early America. Part II describes the powerful role of lobbying in modern America and argues that hiring a lobbyist has replaced the submission of a petition as an effective way to affect public policy. This Part also reviews the attempts to regulate lobbying through reporting requirements, and the courts' evolution toward providing First Amendment protection for lobbying. Part III notes the momentum for lobbying reform efforts that go beyond reporting requirements—laws that would regulate the way in which one can hire a lobbyist. It asserts that judicial support for the contention that such regulations do not violate the Right to Petition Clause in the Constitution is outdated. Part IV argues that a lobbying contingency fee ban is unconstitutional. It examines the role that contingency fee agreements have played in providing access to the system for those with fewer financial resources and contends that a ban on contingency fee agreements unduly burdens one's First Amendment right to petition the government. This Note concludes that such a prohibition would only enhance the exclusivity of policy-making in Washington.

S. 52, 104th Cong. (1995).

[6] *See id.*

[7] For example, Representative Charles Schumer (D-N.Y.) introduced similar legislation in the 103d Congress. *See* 140 CONG. REC. H1897-06, H1897 (1994).

[8] Contingency fee arrangements for lobbying services are already prohibited in some federal contexts. For example, the Foreign Agents Registration Act ("FARA") prohibits registrants under that act from entering into contracts for fees contingent upon the success of political lobbying. 22 U.S.C. §§ 611–621 (West 1998). Moreover, the "Byrd Amendment" prohibits the recipients of federal grants, contracts, loans, or cooperative agreements from using federally appropriated funds to pay any person to influence or attempt to influence any executive or legislative branch official, 31 U.S.C. §1352 (West 1998), and other federal procurement laws prohibit the use of contingency fee arrangements for the procurement of government contracts for goods and services. 41 U.S.C. § 254(a) (West 1998). This Note does not directly address the constitutionality of these more tailored prohibitions.

I. THE RIGHT TO PETITION THE GOVERNMENT IN ANGLO-AMERICAN DEMOCRACY

The right to petition is one of the oldest, most treasured rights in the history of Anglo-American democracy.[9] Section A of this Part traces the historical evolution of the right to petition. Section B discusses the manner in which citizens in early America exercised their right by directly addressing their representatives through written petitions.

A. *The Historical Foundation*

Specifically recognized in the Magna Carta of 1215,[10] the right to petition had become an important component of democratic government by the time of the American colonies. America's founders firmly believed that, in order to form a fair and just society in which all citizens have a voice in their government, they must protect this right to petition, thus leaving open the channels of communication between citizen and legislator.[11]

The first American codification of the right to petition occurred with the adoption of the Body of Liberties by the Mas-

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[9] The earliest petition recorded is the English leaders' petition in 1013 to Aethelred the Unready. The King had fled to France during an invasion of the Danes, and the nobles' petition listed grievances and summoned Aethelred to appear in council. He responded by promising not to retaliate against them for setting forth their complaints and for other actions they had taken and by promising that he would remedy their grievances. *See* HENRY MARSH, DOCUMENTS OF LIBERTY 13–14 (1971).

[10]

> [W]e give and grant to the under-written security, namely, that the barons . . . shall be bound with all their might, to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them, by this our present Charter, so that if we or our justiciar, or our bailiffs or any of our officers shall in anything be at fault toward anyone, or shall have broken any one of the articles of the peace or of this security and the offense be notified to four barons of the foresaid five and twenty barons, the said four barons shall repair to us or to our justiciar, if we are out of the realm, *laying before us the transgression, and let them ask that we cause that transgression to be corrected without delay.*

See WILLIAM SHARP MCKECHNIE, MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 467 (2d ed. 1914) (emphasis added).

[11] For example, in the Declaration of Independence, Thomas Jefferson wrote:

> In every stage of these oppressions, we have petitioned for redress, in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marred by every act which may define a tyrant, is unfit to be the ruler of a free people.

THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776). *See also, infra,* note 16 and accompanying text.

sachusetts Bay Colony Assembly in 1641.[12] The right was repeatedly affirmed in pre-Revolutionary declarations, including the Stamp Act of Congress of 1765[13] and the Declaration and Resolves of the First Continental Congress in 1774.[14] Eight of the twelve states that adopted constitutions following the Declaration of Independence recognized a specific constitutional right to petition.[15]

The right to petition, so established in colonial politics, received little resistance when considered for inclusion in the Bill of Rights.[16] Records of the debate and dialogue surrounding the framing and ratification of the right to petition are limited,[17] but

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> [E]very man whether Inhabitant or Foreigner, free or not free, shall have liberty to come to any publick [sic] Court, Council, or Town meeting, and either by speech or writing, to move any lawful, seasonable or material Question, or to present any necessary Motion, Complaint, Petition, Bill or Information, whereof that Meeting hath proper cognizance, so it be done in convenient time, due Order and respective Manner.

THE COLONIAL LAWS OF MASSACHUSETTS 90 (William H. Whitmore ed., 1887).

[13] "[I]t is the right of the British subjects in these colonies to petition the King or either House of Parliament." 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS—A DOCUMENTARY HISTORY 198 (1971).

[14]

> [T]he inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following: *[R]esolved*, N.C.D.8. That they have a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.

Id. at 216–17.

[15] *See generally* SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS (William F. Swindler ed., 1987).

[16] On June 8, 1789, James Madison introduced nine amendments to the House of Representatives and requested that the House go into a committee of the whole to consider the amendments. A select House committee was appointed to review the amendments, and on July 28, 1789, the committee issued a report delineating the amendments as modified. After the House reviewed the committee report, it debated amending the petition guarantee. Specifically, the debate focused on whether to bind legislatures to raise specific issues and to vote for or against legislation when individuals or communities "were committed to particular views they wished to have represented no matter what influence was brought to bear against their representatives." *See* 2 Bernard Schwartz, THE BILL OF RIGHTS—A DOCUMENTARY HISTORY 1092–95, 1098–1103 (1971). This proposed change was defeated in the house on August 15, 1789 by a vote of 41-10. The consensus was that Congress had a duty to consider petitions, but individual representatives were not bound to act favorably upon or to support the substance of the petitions presented on behalf of each constituent. *See id.* at 1146. *See also* Stephen A. Higginson, *A Short History of the Right to Petition the Government for a Redress of Grievances*, 96 YALE L.J. 142, 155–56 (1986) (noting that while Congress had a duty to receive and consider petitions, its members were not obligated to support a constituent's position).

[17] *See id.*

it is apparent that the history and tenure of the right to petition ensured its inclusion in the first ten amendments.[18]

B. *The Role of the Petition in Early America*

At the dawn of the new nation and well into the nineteenth century, Americans regularly approached their lawmakers with a written petition specifically outlining their grievances. In the states, petitioners used a simple, informal procedure, directly presenting written petitions (usually one or two paragraphs long with one or more signatures) to their legislative body, council, or governor.[19] Each petition submitted required both a governmental hearing and a response.[20] Noting that the right of access to lawmakers was one way to ensure that the voice of the minority was never quieted, the disenfranchised (including women, free blacks, and even slaves) were also granted the right to petition.[21]

Each petition required legislative consideration, allowing individuals to inject their views into the lawmaking process and thereby influence legislative agendas.[22] In eighteenth-century Virginia, more than half of all enacted statutes originated in the form of popular petitions,[23] and the number of petitions per session more than doubled during the second half of the century.[24] The Journals of the Virginia House of Burgesses state that petitions "concerning almost any conceivable subject," from changing the tobacco laws to prohibiting horse racing on the Sabbath, flooded the colonial legislature.[25]

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[18] The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, *and to petition the government for the redress of grievances.* U.S. CONST. amend. I (emphasis added).

[19] *See* RAYMOND C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 28–30 (1979). See also MARY P. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 210–15 (1943).

[20] *See* BAILEY, *supra* note 19, at 36. Because so many petitions were presented to the colonial assemblies, petitions were often referred to a committee for consideration. Petitions were often held over to the next session if a committee needed additional time to investigate and reach a decision, but petitions were always answered. *See id.* at 29–31.

[21] *See id.* at 43–44.

[22] Inherent in the right to petition was the corresponding right to a response. *See id.* at 36. *See also* Higginson, *supra* note 16, at 144–46.

[23] *See* BAILEY, *supra* note 19, at 43–44.

[24] *See id.* at 32.

[25] *See id.* at 19.

Petitioners also participated in the lawmaking process at the federal level. Following the ratification of the Bill of Rights, many ideas—the formation of a national bank, the abolition of slavery, homestead rights, and the abolition of dueling—found their way to Congress via petitions.[26] Thus, the right to petition government in early America ensured that individual citizens were granted a meaningful role in the legislative process.

II. THE ROLE OF LOBBYING IN MODERN AMERICA[27]

No longer can citizens submit a written recommendation to their legislator and expect the legislator to take notice,[28] much less provide a substantive response.[29] No longer can citizens expect a face-to-face conversation in the office of their congressional representatives. This Part discusses how today hiring a professional lobbyist is the most effective means by which citizens can exercise their right to petition and affect federal policy. Section A comments on the centralization of power in Washington and the corresponding growth of the professional lobbying trade. Section B discusses the efforts that have been made at

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[26] *See* Higginson, *supra* note 16, at 142, 150. Strains on the petitioning process began to appear, however, in the 19th century, strains that the slavery crisis exacerbated. In 1836, members of Congress sympathetic to slavery sought to silence debate on abolition by laying on the table all petitions dealing with slavery without any official notice. John Quincy Adams responded with a forceful defense of an untrammeled right to petition. Adams asserted that not even the "most abject despotism" would "deprive the citizen of the right to supplicate for a boon, or to pray for mercy." Kingsley Bryce Smellie, *Right of Petition*, *in* 11 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 100 (1937).

[27] The term "lobbyist" was coined during President Ulysses S. Grant's first term. Because Grant's wife did not like his drinking, Grant began seeking an afternoon cocktail at the Williard Hotel's bar not far from the White House. Individuals wanting to speak with the President soon learned the best place to see Grant, even if briefly, was in the lobby of the Hotel. Those who could not appear in person would hire others to approach Grant on their behalf. Frustrated that he was running into an ever-growing brigade each day, Grant complained incessantly of all the "lobbyists" who were getting in the way of his toddy. *See* Ron Smith, *Compelled Cost Disclosure of Grass Roots Lobbying Expenses: Necessary Government Voyeurism or Chilled Political Speech?*, 6-FALL KAN. J.L. & PUB. POL'Y 115 (1997).

[28] In 1995, Congress received several hundred million pieces of mail, up from 15 million in 1970. *See* Jeff Davidson, *Information Glut: Bombarded by Facts, We Must Learn to Cope*, DALLAS MORNING NEWS, July 7, 1996, at 1J. In addition, Congress now receives 5 to 10 times as much mail by email as through the post office. *See* Jonathan Prynn, *New Strand in the Tangled Web of American Politics*, TIMES NEWSPAPERS UNLIMITED, Nov. 6, 1996.

[29] Today, Members of Congress use the letters they receive to expand their database of potential financial contributors. Computers make it easy for Members of Congress to sort constituent mail by subject or interest groups. Then, when the member has "views" on that topic, the constituent receives an updated "FYI" letter. *See* Smith, *supra* note 27, at 130.

regulating this rapidly expanding practice, primarily through registration and reporting requirements. Section C argues that Supreme Court jurisprudence supports the contention that lobbying is a constitutionally protected freedom.

A. *The Washington Lobbyists*

The role of petitioning the government for redress of one's grievances has been fundamentally and irreversibly altered by the growth of the federal government and the corresponding evolution of our modern legislative process.[30] Today, if citizens wish to make their voice heard by their legislator, they must exercise their petition right by employing a lobbyist.[31]

The role of the federal government has expanded throughout American political history, accelerating during the last half-century due in part to the numerous federal programs formed during the New Deal and continuing through the Great Society. The complex issues faced by Congress have continually spawned new interest groups, each formed to lobby Congress for their members' needs.[32] The growth of both business and social issue

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[30] It is likely that the Framers of the Constitution were silent about lobbyists because they never considered that a need would arise for them. Indeed, the Framers envisioned a federal government much weaker than that which eventually developed. They imagined the power of government centered on the state level. *See* THE FEDERALIST No. 32, at 241 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States").

[31] Citizens can locate and hire professional lobbyists at both the state and federal level from a variety of sources. In addition to boutique lobbying firms that specialize in a particular type of lobbying activity, many law firms provide lobbying practice groups to complement their litigation and corporate departments. *See* David Segal, *Law Firm Makes Costly Bet That Dole, Other Big Names Mean Big Profits*, WASH. POST, Sept. 13, 1997, at A10 (detailing a Washington law firm's strategy to hire former lawmakers in order to offer clients strategic advice on moving legislation through Congress).

[32] One commentator has stated that the growth of PACS and interest groups may weaken the ties between members of Congress and their constituents. *See* MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 127 (2d ed. 1989). This development thereby heightens the need for constituents' to hire lobbyists in order to ensure their voices are heard. *See id.* Two commentators have calculated that the number of American interest groups grew 411.6% from 1960 to 1992. *See* Frank R. Baumgartner and Jeffrey C. Talbert, *From Setting a National Agenda on Health Care to Making Decisions in Congress*, 20 J. HEALTH POL'Y & L. 437 (1995).

lobbies has created a phenomenal, and unprecedented, concentration of power in Washington.[33]

In the last forty years, a new system of legislative representation has emerged based on this Washington power base. At its heart are business lobbyists and lobbies, spurred by new regulations and trade conflicts.[34] From 1961 to 1982, the number of corporate headquarters in Washington increased tenfold.[35] In the 1980s, foreign business money from Japan and other trade rivals poured into Washington.[36] In 1989 alone, the Japanese spent $150 million on Washington lobbyists, and by the 1990s, businesses employed about 10,000 lobbyists in Washington.[37] The Washington lobbying industry of the 1990s is quadruple that of the mid-1960s.[38]

The daily schedules of congressional members and their staffs are filled with meetings attended by professional lobbyists who have established personal relationships with policymakers.[39] The

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[33] *See* Judis, *supra* note 2, at 63 (citing the statistic that in 1994, residents of Washington gave more money to national candidates than residents of any other city, even though Washington itself only had a single uncontested congressional race, and noting that more PAC money emanated from Washington than from the rest of the country put together).

[34] *See id.* at 61.

[35] *See id.*

[36] *See id.*

[37] *See id.*

[38] *See* Steve Forbes, *Lobbyists: Their Gain Is Our Loss*, FORBES, July 15, 1996, at 23 (stating that Washington's lobbying industry employs 67,062, or 125 lobbyists per Member of Congress).

[39] *See* Judis, *supra* note 2, at 55, 65. For example, in the early months of the Clinton presidency, Alexis Herman, then White House public liaison chief and former Democratic National Committee chief of staff to Ron Brown (and currently serving as President Clinton's Secretary of Labor) met on Wednesdays with a select group of Washington lobbyists that she called "a gathering of elders"—Michael Berman of the Duberstein Group lobbying firm; Robert Healy, top Washington lobbyist for the Atlantic Richfield Company; Jody Powell of the lobbying firm Powell Tate; and Anne Wexler of the Wexler Group lobbying firm, among others. These lobbyists, some of whom served in previous administrations, assisted with legislation concerning the North American Free Trade Agreement, the General Agreement on Tariffs and Trade, and the budget legislation. Separately, then White House Chief of Staff Leon Panetta frequently met on Thursdays with other Washington lawyers and consultants. *See* CHARLES LEWIS, THE BUYING OF THE PRESIDENT 47 (1996).

Rod Cavaney, former Reagan White House official and president of the American Plastics Council, said the Clinton administration's relationships with lobbyists are "as good as I've ever seen in my 20-odd years of doing this, in terms of their willingness to sit down and discuss issues." A Washingtonian since 1970, Edward P. Faberman, the top lobbyist for American Airlines, echoed this sentiment, "I don't remember an administration that has given as much opportunity . . . to discuss issues and work with them." *Id.* at 47–48.

This level of access is not limited to the Clinton White House. Harry McPherson, another influential player in the Washington establishment, recalls a similar scenario in the Carter administration:

problem with this system is not that there are too many lobbyists, but that the skilled lobbyists are linked only to the large and powerful business and social issue groups that can afford them.[40] Thus the voices of individual citizens, minorities, and under-funded causes are shut out of political discourse because they cannot be heard without the intermediary of a professional lobbyist.

Professional lobbyists are better able to influence legislation than non-lobbyists for several reasons. First, they have already formed relationships with government officials and their staffs.[41] Second, many lobbyists are former legislative branch employees who have high levels of expertise regarding the legislative process and knowledge of the specific subject matters that congressional committees address.[42] In fact, members of Congress have even relied on the expertise of lobbyists to draft legislation.[43] Third, professional lobbyists have the time and resources to follow a bill through the legislative process, whereas most citizens do not have this capability. Therefore, hiring a professional lobbyist is the most effective means of communicating with lawmakers. The lobbyist serves as a link between congressional policymakers and citizens, thereby helping those groups and individuals that have the ability to pay voice their concerns in an organized and effective manner.[44]

> A political realist, Anne Wexler, was installed in the White House to communicate with the Washington regulars and with business groups around the country. She invited a number of us to meet with her once a week, to take the Administration's political blood pressure. We were the Wednesday group, and we came to the Roosevelt Room either early over coffee, or at midday . . . .
> HARRY MCPHERSON, A POLITICAL EDUCATION 468 (1995).

[40] *See, e.g.*, Arthur S. Hayes, *The Czars of Gucci Gulch, Verner Liipfert: Lobby Leader*, NAT'L LAW J., Apr. 6, 1998, at A4 (ranking lobbying clients by the size of lobbying fees paid to law firms during the first six months of 1997 and revealing that the top five lobbying clients were tobacco companies, followed by other large U.S. companies and foreign interests). *See also* Bill McAllister, *Special Interests: Lobbying Washington*, WASH. POST, Mar. 26, 1998, at 21 (revealing that Washington lobbying firm, Cassidy & Associates' six-figure fees are paid primarily by private universities and hospitals, including in 1997 $760,000 by Boston University and $600,000 from the defense contractor General Dynamics).

[41] *See supra* note 39, and accompanying text.

[42] *See* Segal, *supra* note 31, at A1 (noting the strategy of one D.C. law firm to hire former lawmakers in order to offer strategic legislative advice to its clients). *See also* Gannett News Service, The Newest Ex-Legislators-Turned Lobbyists, Apr. 15, 1998 (listing ex-members of Congress who recently registered as lobbyists).

[43] *See supra* note 2, and accompanying text. In 1994, when the House Committee on Transportation and Infrastructure established a coalition to rewrite the Clean Water Act, its chairman drew upon the Chemical Manufacturers Association and other business groups. In addition, House Republicans have allowed lobbyists to sit on the dais in the committee sessions. *See* Judis, *supra* note 2, at 65–66.

[44] One commentator asserts:

B. *Lobbying Reform Efforts*

Concern about the lobbying institution and its impact on the American political process is nothing new. Congress recognized the growth of the practice of lobbying and the necessity for its regulation as early as 1876, when the House of Representatives passed a resolution requiring lobbyists to register with the Clerk of the House.[45] Many states had criminalized the act of lobbying by the end of the nineteenth century.[46]

The first comprehensive attempt at federal lobbying reform did not come until after World War II with the enactment of the Federal Regulation of Lobbying Act of 1946 ("1946 Act").[47] The 1946 Act was the cornerstone for the regulation of federal lobbying activity for nearly five decades. While the Act did not go as far as many states had by proscribing some methods of lobbying altogether,[48] it did require disclosure by those attempting to lobby. According to supporters of the 1946 Act, it was meant to apply to three distinct groups of what it termed "so-called lobbyists."[49] The first group was those that had a corruptive influence on the legislative process by providing "misinformation" to people across the country.[50] The second group was those who spend their time "exerting some mysterious influence" in Washington but who conceal their purposes from members of

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> Politics can't be reformed as long as there are no countervailing membership organizations that can represent the 79 percent of Americans who have not graduated from college and have no hope of working as software programmers or corporate middle managers. It's not a question of achieving different outcomes, but of more of America being represented in the process of decision-making.

See Judis, *supra* note 2, at 67.

[45] *See* S. REP. No. 99-161, at 52 (1986) (noting that this House resolution was only effective for the 44th Congress).

[46] *See id.*

[47] Pub. L. No. 79-601, 60 Stat. 839–42 (codified at 2 U.S.C. §§ 261–270 (1994)).

[48] Section 308 of the Act provides:

> (a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included . . . .

2 U.S.C. § 308 (1994).

[49] S. REP. No. 79-1400, at 27 (1946).

[50] *See id.*

Congress.[51] Even supporters of this Act recognized that the lobbyist can play a positive role in the process—noting that "[t]here is a third class of entirely honest and respectable representatives of business, professional and philanthropic organizations who come to Washington openly and frankly to express their views for or against legislation . . . ."[52]

The Act's registration and reporting requirements applied to all three groups.[53] The Act did not regulate who could lobby or how a lobbyist could receive payment.[54] Rather, the Act's goal was to provide public information on the political pressures influencing legislation, and it recognized that "full realization of the American ideal of government by elected representatives depends to no small extent on [members of Congress] ability to properly evaluate" the political pressures to which they are regularly subjected.[55] Without this public information, "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal."[56]

The Act was widely criticized, however, for poor draftsmanship and the lack of extensive debate prior to its enactment.[57] The criticism was well-founded for it soon became apparent that the Act had not accomplished its goal. Statistics compiled more than four decades after its enactment indicated that fewer than ten percent of federal lobbyists working in the Washington area registered under the Act.[58] In addition, the Department of Justice was not focused on prosecuting those failing to register under the Act, but rather was only concerned with promoting voluntary compliance.[59]

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[51] *See id.*

[52] *See id.*

[53] *See id.*

[54] In interpreting the 1946 Act, the Supreme Court stated that Congress was not seeking to prohibit lobbying. Rather, "it has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose." United States v. Harriss, 347 U.S. 612, 625 (1954).

[55] *Id.* (interpreting the legislative intent of the Lobbying Act of 1946).

[56] *Id.*

[57] *See, e.g.*, Steven A. Browne, *The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right to Petition the Government*, 4 WM. & MARY BILL OF RTS. J. 717, 719 (1995) ("The language of the Act fails to cover a wide range of persons who might be considered lobbyists.")

[58] *See* William P. Fuller, *Congressional Lobbying Disclosure Laws: Much Needed Reforms on the Horizon*, 17 SETON HALL LEGIS. J. 419, 427 (1993) (noting that out of approximately 60,000 to 80,000 lobbyists, only 6000 were registered) (citing Gary Lee, *Lobbyists Acknowledge Loopholes*, WASH. POST, July 17, 1991, at A21 (quoting Sen. Levin)).

[59] *See* S. REP. NO. 99-161, at 52 (1986) (stating that the Department of Justice had

While the Act survived a challenge to its constitutionality,[60] its lack of effectiveness spurred the desire for improved legislation. In an attempt to remedy the inconsistencies and loopholes, Congress revamped its previous efforts by passing the Lobbying Disclosure Act of 1995 ("LDA").[61] The purpose of the LDA was to address the old law's "unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance."[62] Although this Act provides more guidance about registration and reporting requirements than the previous law,[63] it does not attempt to regulate the way in which individuals employ lobbyists. For example, while a lobbyist is required to report how much he is to be paid and by whom,[64] the Act does not proscribe any manner of payment or regulate the amount of such payments.

C. *Judicial Response to Lobbying Reform Efforts*

The Supreme Court has gradually granted the practice of lobbying protection under the First Amendment's right to petition. Although the Court has not specifically defined the right to petition, it has protected various lobbying activity as petitioning.

The Supreme Court's first implicit acknowledgment that lobbying is entitled to some protection on First Amendment grounds was found in Justice Frankfurter's majority opinion in *United States v. Rumely*.[65] Although the Court devoted most of its opin-

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"shifted the focus of its principle efforts from prosecution to promoting voluntary compliance by bringing the Act to the attention of those to whom it is potentially applicable"). In addition, the Clerk of the House of Representatives testified that since he was powerless to enforce the Act his office "was merely a depository for information for anyone who wanted to file." *Id.* at 51.

[60] *See* Harriss, *supra* note 54, at 625 and accompanying text.

[61] Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (codified at 2 U.S.C. § 1601–1612 (1995)).

[62] 2 U.S.C. § 1601(2) (1998).

[63] The LDA requires registration and semi-annual reporting by organizations employing lobbyists, or by lobbyists in business who accept compensation for conducting lobbying activities on behalf of others. Unlike its predecessor, the LDA applies to the lobbying of both the executive and legislative branches and to certain "covered" officials of each. The new law focuses on both lobbying "contacts" (defined as any communication with a covered executive or legislative branch official with regard to the formulation, modification, or adoption of a federal law or rule) and lobbying "activities" (defined as contacts and efforts in support thereof, including preparation and research). Lobbying contacts trigger the registration requirement while lobbying activities are the subject of disclosure. *See* 2 U.S.C. § 1601–1612 (1998).

[64] 2 U.S.C. § 1604 (1998).

[65] 345 U.S. 41 (1953). This case represents the first time the Supreme Court was

ion to an examination of the scope of congressional investigatory powers, the Court expressly recognized, for the first time, the implications of such legislation for the First Amendment rights of lobbyists.[66] *Rumely* has been hailed as "an important advancement toward a fully refined conception of lobbyists' First Amendment rights."[67]

A direct challenge to the constitutionality of the Federal Regulation of Lobbying Act of 1946 later appeared in *United States v. Harriss*.[68] While *Harriss* dealt primarily with the Act's vagueness problems and avoided the question of precisely what rights lobbyists enjoy, it nonetheless subjected lobbying restrictions to a First Amendment analysis,[69] thus suggesting that lobbyists are entitled to Constitutional protection.

Additional guidance for the present state of lobbyists' rights is found in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[70] In *Noerr*, the Supreme Court held that a scheme to mount a public relations campaign to influence the outcome of trucking legislation by a group of railroads was not a violation of the Sherman Act.[71] "The right of petition," observed the Court, "is one of the freedoms protected by the Bill of Rights," and the Court could not "lightly impute to Congress an intent to invade these freedoms."[72] Although the Court did not provide a complete discussion of the nature of lobbyists' constitutional rights, it nonetheless identified the right to petition as an important First Amendment right affected when Congress attempts to regulate lobbying activities.[73] Accordingly, the Court reinforced the notion that lobbyists possess First Amendment freedoms.[74]

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confronted with a challenge to the Federal Regulation of Lobbying Act of 1946. Mr. Rumely refused to comply with the demand of the House Select Committee on Lobbying Activities (known as the "Buchanan Committee") that he furnish the names of those who had purchased political tracts from his organization, an organization that allegedly had been engaged in activities constituting lobbying under the Act's definition.

[66] *See id.*

[67] Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149, 161 (1993).

[68] 347 U.S. 612 (1954).

[69] *Id.* at 625–27.

[70] 365 U.S. 127 (1961).

[71] *See id.* at 145.

[72] *Id.* at 138.

[73] *See id.*

[74] One court has maintained that just as booksellers and motion picture distributors do not lose their First Amendment rights just because they make a profit on them, the fact that one earns a living exercising First Amendment rights "vitiate the ability to

The most recent Supreme Court decision addressing lobbying rights was *Regan v. Taxation with Representation of Washington* ("TRW").[75] TRW, a public interest organization, challenged the Internal Revenue Service's denial of tax-exempt status to the group because of its substantial involvement in lobbying. TRW claimed that the IRS's ruling placed an "unconstitutional condition" on its tax exempt status because it violated the group's First Amendment rights.[76] Although the Court held that Congress is not obligated to "subsidize" an organization's lobbying activities[77] and therefore no First Amendment liberties were affected by the refusal to grant tax-exempt status, Justice Blackmun offered a separate concurring opinion expressly recognizing the right to lobby: "Because lobbying is protected by the First Amendment . . . § 501(c)(3) . . . denies a significant benefit to organizations choosing to exercise their constitutional rights."[78]

Together with this judicial recognition of lobbying as an important means of petitioning the government,[79] the compelling evidence that lobbying is now the only effective means of seek-

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assert those rights." Moffett v. Killian, 360 F. Supp. 228, 231 (D.Conn. 1973) (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952)). In the same holding, the court points out that an individual who purchases space in a newspaper to present his certain point of view retains his free speech rights even though he paid someone to express those views for them. *See id.* (citing New York Times Co. v. Sullivan, 376 U.S. 254, 265–66 (1964)). That same individual should not forfeit his First Amendment right to petition the government just because he pays someone to exercise his right for him. *See id.* at 231. In view of the right's status as a uniquely cherished freedom, state or federal statutes seeking to restrict lobbying are obligated to demonstrate that such measures pass constitutional muster. *See id.* ("It is therefore beyond dispute that lobbyists and their employers . . . have First Amendment rights . . . .").

[75] 461 U.S. 540 (1983).

[76] *Id.* at 545.

[77] *Id.* at 546.

[78] *Id.* at 552.

[79] While this Section is concerned only with Supreme Court jurisprudence, other courts have recognized the constitutional protection granted to lobbyists through the First Amendment's right to petition. In *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489 (D.C. Cir. 1968), then-Judge Warren Burger stated, "While the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition." *Id.* at 491.

The California Supreme Court acknowledged and applied a constitutional right to lobby in determining the constitutionality of state lobbying legislation. *See* California Fair Political Practices Commission v. Superior Court of Los Angeles, 599 P.2d 46 (Cal. 1979), *cert. denied*, 444 U.S. 1049 (1980).

The Michigan Court of Appeals held unconstitutional a provision in the state lobbying statute requiring disclosure of membership lists. *See* Pletz v. Secretary of State, 336 N.W.2d 789, 803–04 (Mich. Ct. App. 1983). A Montana court struck down parts of the state Lobbying Disclosure Initiative on a wide range of constitutional issues, including violations of the right to petition. *See* Montana Automobile Ass'n. v. Greely, 632 P.2d 300, 302–04 (Mont. 1981). *See infra* note 111 and accompanying text.

ing a redress of grievances mandates that lobbying be given explicit constitutional protection.[80]

III. Toward More Restrictive Lobbying Reforms

While courts have recognized that registration and reporting requirements are critical to preserving the integrity of our system of government,[81] many states have gone farther in regulating lobbying activities. Rather than simply attempting to shed light on the practice, these new reforms have made it more difficult, and sometimes impossible, for individuals and organizations to hire lobbyists. By denying some parties the opportunity to utilize lobbyists, these reforms have directly blocked the access of certain groups to the government.

This Part discusses the increasing pressure for greater regulation of lobbying. Section A notes that many states have proscribed the use of contingency fees in lobbying and points out that similar proposals are now being promoted on the federal level. Section B then elucidates the apparent judicial support for such a contingency fee ban. This Part shows that judicial precedent upholding such a prohibition is outdated and needs to be revisited.

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[80] One commentator has stated that because a petition was originally a specific procedure by which a citizen formally asked for and received consideration of an issue, it is not clear that lobbying in its current form is explicitly covered by the First Amendment. *See* Browne, *supra* note 57, at 717. Such an original intent analysis of the right to petition clause, however, implies that the rights set forth by our Founders are void if they are not be capable of being practiced in 1990s as they were in 1789. Historically, the right to petition the government encompassed more than just the tangible right of handing a piece of paper to one's legislator detailing one's grievances. Instead, the First Amendment's authors more generally intended to provide individuals with access to their legislators in order to air their grievances. That the manner in which a citizen asks for and receives consideration of an issue has been transformed from the submission of a formal petition to the legislator into a system in which a citizen submits a grievance via a professional lobbyist should not alter the substantive protection.

[81] Many commentators have argued that burdensome reporting and registration requirements have the effect of preventing some from employing lobbyists. First, the cost involved to meet these requirements are an issue for parties with fewer financial resources. Second, many have argued that these reporting requirements impinge on the right to associate, citing, for example, *McIntyre v. Ohio Elections Commission*, 115 S. Ct. 1511 (1995), which upheld the right of anonymous pamphleteering. There is little judicial support, however, for the assertion that lobbyists or their employers have a right to remain anonymous when attempting to influence legislators. *Cf.* Buckley v. Valeo, 424 U.S. 1 (1976) (upholding compelled record keeping by candidates of even small campaign contributions).

While the authors recognize both of these contentions, they have been addressed in other legal scholarship and are not the focus of this Note. *See, e.g.*, Comment, *Public Disclosure of Lobbyists' Activities*, 38 Fordham L. Rev. 524 (1970).

A. *The Banning of Contingency Fees in Lobbying Contracts*

In regulating the relationship between lobbyists and their clients, some states have regulated the manner in which lobbyists may receive payment for their work. Particularly since the 1960s, several states have banned the use of contingency fee agreements.[82] A California statute provides that "no lobbyist shall . . . [a]ccept or agree to accept any payment in any way contingent upon the defeat, enactment or outcome of any proposed legislative or administrative action."[83] Florida and Kentucky have passed similar legislation, precluding lobbyists from exchanging their services for an award contingent on legislative outcome.[84] The Kentucky statute states:

> No person shall engage any person to lobby in exchange for compensation that is contingent in any way upon the passage, modification, or defeat of any legislation. No person shall accept any engagement to lobby in exchange for compensation that is contingent in any way upon the passage, modification or defeat of any legislation.[85]

These state statutes are of a different character from laws that aim to shed light on the lobbyist's role rather than to dilute that role. As the current climate of political reform continues to intensify and the push for further limits on lobbying continues, it is likely that the federal government will follow the 35 states that currently outlaw lobbying contingency fee agreements.[86]

The momentum for a federal ban on contingency fee arrangements with lobbyists has grown stronger in recent years. Senator Strom Thurmond (R-S.C.) continues to introduce legislation that would prohibit any person who is being compensated for lobbying the federal government from being paid on a contingency fee basis.[87] In addition, Representative Charles Schumer (D-N.Y.) has introduced similar legislation in the House of Representatives.[88] Although these measures have not passed, it is likely that similar legislation will continue to be debated.

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[82] *See generally* Frank P. Maggio, *Lobbying—Multistate Statutory Survey—Requirements and Procedures for Lobbying Activities*, 38 NOTRE DAME LAW. 79, 85–86 (1962).

[83] *See* CAL. GOV'T CODE § 86205(f) (West 1998).

[84] FLA. STAT. ANN. § 11.047 (West Supp. 1998); KY. REV. STAT. ANN. § 6.811(9) (Michie 1996).

[85] KY. REV. STAT. ANN. § 6.811(9) (Michie 1996).

[86] *See* 139 CONG. REC. S195-02, S450 (1993) (statement of Sen. Thurmond).

[87] *See supra* notes 4–6 and accompanying text.

[88] *See* 140 CONG. REC. H1897-06, H1897 (1994).

B. *Judicial Support for Contingency Fee Bans in Lobbying*

Two landmark Supreme Court cases have been the backbone of judicial support for statutes banning contingency fees. In *Tool Company v. Norris*,[89] the Court was asked to enforce a contract that provided Norris compensation for his services in helping the Providence Tool Company obtain a government contract with the Secretary of War. The contract made Norris's earnings contingent on his ability to deliver government contracts for the sale of muskets.[90] Norris went to work in Washington, "soliciting acquaintances" and "getting letters from people who might be supposed to have influence with" the Secretary of War.[91] Although Norris successfully obtained a profitable contract for the Providence Tool Company, a dispute arose as to how much the company owed Norris.[92]

In determining whether or not a contingency fee agreement was enforceable in this context, the Court compared the Norris Tool Company agreement with agreements providing compensation for procuring legislation.[93] The Court ultimately voided the contract: "[A]n undoubted principle of the common law [is that] it will not lend its aid to enforce a contract . . . which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions."[94] In addressing a contingency agreement, the Court in *Marshall v. Baltimore and Ohio R.R. Co.* noted that "[b]ribes in the shape of high contingent compensation must necessarily lead to the use of improper means and the exercise of undue influence."[95] In addition, the *Norris* Court remarked that it was not necessary for the parties to have "sinister" motives in engaging in the contingency contract in order for it to be unenforceable.[96] Rather, "[l]egislation should be prompted solely from considerations of the public good, and the best means of advancing it."[97]

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[89] 69 U.S. (2 Wall.) 45 (1864).
[90] *See id.* at 46.
[91] *Id.*
[92] *See id.* at 47.
[93] In fact, the Court held that "[t]here is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments." *Id.* at 55.
[94] *Id.* (quoting Marshall v. Baltimore and Ohio R.R. Co., 57 U.S. 314 (1853)).
[95] *Id.* (quoting *Marshall*, 57 U.S. at 335).
[96] *Id.*
[97] *Id.* at 54–55.

The Court revisited this issue more than forty years later in *Hazelton v. Sheckells*.[98] In *Hazelton*, Justice Holmes found that a contingency fee agreement violated public policy and noted the Court's prior holdings that "all contracts for contingent compensation for obtaining legislation were void . . . ."[99] *Hazelton*, decided in 1906, is the last time the Court has significantly discussed contingency fees for lobbyists.

Recently, several lower courts have denied challenges to statutes banning contingency fees for lobbyists.[100] These courts have relied primarily on *Hazelton* and *Norris* in holding that a statute proscribing contingency fees in lobbying does not violate a party's right to petition the government.[101] In fact, in responding to the challenge to the Kentucky law banning contingency fees for lobbyists, the Supreme Court of Kentucky cited to *Hazelton* and merely noted that "[s]uch acts . . . are against public policy and are void."[102]

Citing to cases like *Hazelton* to support such a prohibition is misguided. As this Note has articulated, the role of lobbying and its relationship to the First Amendment right to petition the government has changed dramatically over the course of this century. The practice of lobbying, so loathed in the nineteenth and early twentieth centuries, has become more accepted by the public and the Court.[103] The evolution of the treatment of lobbying is seen most starkly upon an examination of *Harris v. Roof's Executors*,[104] a case relied upon by the *Norris* Court's 1864 opinion in holding contingency fee agreements in lobbying unenforceable. *Harris* involved a plaintiff who sought to recover for his services in prosecuting a claim to a certain tract of land before the New York legislature on behalf of the defendant.[105] In *Harris*, the Court held that "[i]t certainly would imply a most unjustifiable dereliction of duty to hold that the employment of

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[98] 202 U.S. 71 (1906).

[99] *Id.* at 79.

[100] *See, e.g.*, Florida League of Professional Lobbyists, Inc. v. Meggs, 87 F.3d 457, 462 (11th Cir.), cert. denied, 117 S. Ct. 516 (1996); Associated Industries of Kentucky v. Commonwealth of Kentucky, 912 S.W.2d 947, 951 (Ky. 1995).

[101] *See Florida League of Professional Lobbyists, Inc.*, 87 F.3d at 462; *Associated Industries of Kentucky*, 912 S.W.2d at 951 (citing *Hazelton v. Sheckells* in support of its argument that a ban on contingency fees in lobbying does not violate the appellant's right to petition the government).

[102] *Associated Industries of Kentucky*, 912 S.W.2d at 951.

[103] *See supra* Part II.

[104] 10 Barb. 489 (N.Y. App. Div. 1851).

[105] *See* Tool Company v. Norris, 69 U.S. at 49 (citing *Harris v. Roofs*, 10 Barb. 489 (N.Y. App. Div. 1851).

individuals to visit and importune the members [of the New York legislature] is necessary to obtain justice."[106] The Court concluded that "[i]t can neither be necessary or proper for the legislature to be surrounded by swarms of hired retainers of the claimants upon public bounty or justice."[107]

Judicial hostility toward the practice of lobbying has declined dramatically since *Harris* and *Norris*. While a number of courts continue to follow *Norris*, other courts have noted that the evolution of the right to lobby has altered the calculus in examining a state prohibition on the use of contingency fee agreements.[108] Most significantly, in 1981, the Montana Supreme Court reviewed a Montana statute prohibiting contingency fees for lobbyists.[109] The Court noted that "[i]n the past, contingent fee agreements for lobbying services were seen as inviting and inducing improper solicitations of Congress."[110] After acknowledging *Hazelton*, however, the Court did not follow this dated precedent and instead struck down the law as a violation of the right to petition the government.[111]

Courts have been hesitant to follow *Montana Automobile Ass'n. v. Greely*. Much of this hesitation stems from a commitment to follow Supreme Court precedent, rather than a disagreement over the reasoning that a contingency fee ban is unconstitutional. Most recently, in *Florida League of Professional Lobbyists, Inc. v. Meggs*,[112] the Eleventh Circuit confronted this issue. In challenging a law banning contingency fees for state lobbyists, the Florida League, an organization of professional lobbyists, argued that the "extensive, interim developments of First Amendment law establish conclusively that the Supreme Court today would strike a contingency-fee ban on lobbying."[113] The court did not challenge the Florida League's argument; rather it acknowledged that "[t]his prediction may be accurate . . . ."[114] Yet the court

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[106] *Id.* at 50.

[107] *Id.*

[108] *See infra* note 111 and accompanying text.

[109] *See* Montana Automobile Ass'n v. Greely, 632 P.2d 300, 307 (Mont. 1981). Among other issues, the plaintiff challenged an initiative that read: "No person may be employed as a lobbyist for a compensation dependent in any manner upon the passage or defeat of any proposed or pending official action by a public official or upon any other contingency connected with such action." MONT. CODE ANN. § 5-7-302 (1980) (repealed 1983).

[110] *Montana Automobile Ass'n v. Greely*, 632 P.2d at 308.

[111] *See id.*

[112] 87 F.3d 457 (11th Cir. 1996).

[113] *Id.* at 462.

[114] *Id.*

held that it was "not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court."[115] Still, the issues raised by this case, underscoring how more recent jurisprudence and the changed realities of political activity have undermined older Supreme Court precedent, make it imperative for the Supreme Court to revisit its precedent allowing bans on contingency fee lobbying.

IV. BANNING CONTINGENCY FEES FOR LOBBYING ACTIVITIES IS UNCONSTITUTIONAL

Prior sections of this Note have diagrammed how case law has evolved to grant greater protection for the right to lobby. This Part argues that a contingency fee ban on lobbying is unconstitutional. Section A discusses the role of contingency fees and points out that contingency fees provide greater access to the legal system. Section B establishes the analytical framework for judicial examination of such a regulation. It contends that courts should apply strict scrutiny to a contingency fee ban because it "significantly interferes" with the right to petition. Section C examines a contingency fee prohibition under strict scrutiny and maintains that it is overbroad, and therefore, unconstitutional. It concludes that a lobbying contingency fee ban on the federal level would have a damaging effect on the political process by blocking a critical avenue for parties with few financial resources to shape federal policy.

A. *The Nature of a Contingency Fee Arrangement*

The Supreme Court has embraced the contingency fee as an acceptable and often desirable method by which to contract for legal services.[116] Originating in the industrial era, the practice of using contingency fees emerged when large numbers of indus-

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[115] *Id.*

[116] *See, e.g.*, Wylie v. Coxe, 56 U.S. (15 How.) 415 (1853) (permitting a plaintiff's attorney to recover a contingent fee of 5% of the amount recovered on the client's claim against a foreign government, and representing the first time the Supreme Court recognized contingent fee contracts); Taylor v. Bemiss, 110 U.S. 42 (1884) (holding that a contingent fee constituting 50% of a client's recovery is not extortionate); Stanton v. Embrey, 93 U.S. 548 (1876) (approving the use of a contingent fee in a claim against the United States).

trial and transportation accident victims could not afford an attorney to pursue their personal injury claims.[117] Those injured would not have been able to bring a legal action to recover damages for their work-related injuries in the absence of such fee arrangements, as attorneys were not willing to take on cases with a high degree of risk.[118]

The principal use of contingency fees in our legal system continues to be for personal injury and tort claims,[119] and such fee arrangements continue to be particularly well-suited to provide representation for parties who could otherwise not afford it. Commentators have heralded the important role of contingency fees in providing the poor and middle class greater access to government.[120] In a legal system marked by prohibitively high hourly fees charged by attorneys,[121] there is often no other method available by which to finance a legal claim.

Other than in the context of lobbying, the law has only proscribed the use of contingency fee agreements in two areas: domestic relations and criminal defense.[122] Recently, however, the prohibition against contingent fee systems in the domestic relations arena has been relaxed,[123] and some commentators have

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[117] *See* Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813, 815 (1989).

[118] *See* Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, 2 LITIG. 27, 29 (1975–1976).

[119] *See id.* at 28. The contingency fee has also been used in class actions, collection matters, antitrust actions, shareholder derivative suits, corporate reorganizations, tax proceedings, condemnation actions, will contest litigation, debt collections, environmental actions, civil rights claims (including employment discrimination), and stockholders' suits. *See id.*

[120] *See* Alfred D. Youngwood, *The Contingent Fee-A Reasonable Alternative*, 28 MOD. L. REV. 330, 334 (1965) ("[P]ractically all American lawyers would agree . . . contingent fees are generally allowed in the United States because of their practical value in enabling the poor man with a meritorious cause of action to obtain competent counsel.").

[121] *See, e.g.*, David Segal, *Do-It-Yourself Lawyers Have Their Day in Court: Amateurs Making a Case for Self-Representation*, WASH. POST, Apr. 17, 1998, at A1 (attributing the rise in pro se litigants to the fact that most people cannot afford a lawyer's hourly fee, typically ranging from $100 to $250).

[122] The former has been justified by the state's interest in maintaining the marriage relationship, under the premise that contingent fee arrangements might encourage a lawyer to discourage reconciliation of the married couple. *See* Case Comments, *Contingent Fee Contracts: Contract Related to Divorce Action Upheld*, 56 MINN. L. REV. 979 (1972).

The latter has been designated as against public policy and justified by concerns such as the nature of fee collection for criminal defense attorneys, attorney/client conflicts of interest, and lack of a monetary recovery. *See* Angela Wennihan, *Let's Put the Contingency Back in the Contingency Fee*, 49 SMU L. REV. 1639 (1996).

[123] *See* Kathleen P. Southern, Comment, *Professional Responsibility—Contingent Fees*

called for a reexamination of the cursory treatment that the idea of criminal defense contingency fee contracts has received.[124]

B. *Providing an Analytical Framework for Judicial Review*

Since the Supreme Court has never clarified the constitutional standing of lobbying, the level of scrutiny applied to laws affecting the right to lobby remains unsettled.[125] While there has been a lack of judicial clarity as to the extent of this protection, several courts have applied heightened scrutiny to laws that significantly interfere with the right of a party to employ a lobbyist in order to exercise that party's right to petition.[126] Some commentators have argued that courts should apply strict scrutiny to any law that infringes on lobbying.[127] A few have gone even farther, maintaining that any restrictions on lobbying are per se unconstitutional.[128] On the other end of the spectrum, some have suggested only applying rational basis review to all laws affecting lobbying.[129] Neither of these standards, however, appropriately balances the right to lobby with the state's need to have some flexibility in combating the perception of corruption in the political process. In addition, neither is consistent with current jurisprudence.

A careful analysis of Supreme Court precedent, lower court holdings, and contemporary commentary elucidates a third standard for examining laws that affect the right to petition: laws that

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in Domestic Relations Actions: Equal Freedom to Contract for the Domestic Relations Bar, 62 N.C. L. REV. 381 (1984).

[124] *See* Wennihan, *supra* note 122, at 1648; *see also* Patrick Tuite, *The Case for Contingent Fees in Criminal Cases*, CHI. LAW., Feb. 1996, at 8.

[125] *See* Browne, *supra* note 57, at 732 (commenting on the lack of clarity as to the scrutiny applied to a law limiting the right to lobby). While the courts have developed an underlying constitutional protection for the right to lobby, the level of scrutiny that is to be applied to laws that affect lobbying remains unclear. This lack of clarity has led some commentators to apply strict scrutiny and others rational basis review. *See id.* at 733.

[126] *See, e.g.*, Fair Political Practices Comm'n v. Superior Court of Los Angeles County, 599 P.2d 46 (Cal. 1979); ACLU v. New Jersey Election Law Enforcement Commission, 509 F. Supp. 1123 (D. N.J. 1981).

[127] *See, e.g.*, HOPE EASTMAN, LOBBYING: A CONSTITUTIONALLY PROTECTED RIGHT (1977); David E. Landau, *Public Disclosure of Lobbying: Congress and Associational Privacy After* Buckley v. Valeo, 22 HOW. L.J. 27 (1979).

[128] *See* Thomas, *supra* note 67, at 188 (noting that some commentators support the position that lobbying restrictions are per se unconstitutional).

[129] For example in the Kentucky case, the dissent would have struck down a ban on contingency fees for lobbyists under the rational basis review, noting that such a regulation "defies reason." *See* Assoc'd. Indus. of Kentucky v. Commonwealth of Kentucky, 912 S.W.2d 947, 958 (Ky. 1995).

"significantly interfere" with the right to petition require strict scrutiny while laws that merely have an "incidental impact" garner rational basis review. This analytical framework is evidenced in several cases and has the support of commentators.[130] Applying strict scrutiny only when a statute "significantly interferes" with the right to petition balances the government's concerns of maintaining the integrity of the system with the recognition that the right to petition is a protected freedom.

The California Supreme Court first articulated this standard when it ruled on a challenge to the state's political reform act.[131] The act implemented lobbyist registration and reporting requirements.[132] After recognizing that the right to lobby, as part of the right to petition the government, is fundamental, the Court acknowledged that when a limit on the right to petition "merely has an incidental effect on exercise of protected rights, strict scrutiny is not applied."[133] The Court also recognized that when a law significantly interferes with the right to lobby, strict scrutiny is required.[134]

The Court applied this analytical framework to the registration and reporting requirements of the Political Reform Act of 1974.[135] The Court held that the statute's mandate to register and report expenditures merely had an incidental impact on the ability of the lobbyist to petition the government.[136] The Court, however, felt differently about the statute's requirement that lobbyists report all transactions involving business with government officials.[137] It noted that this was an onerous requirement since it required the reporting of transactions unrelated to lobbying activities.[138] Accordingly, once the Court determined that these requirements significantly burdened the right to petition the government, it applied strict scrutiny.[139]

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[130] *See, e.g.*, *Fair Political Practices Comm'n*, 599 P.2d at 46; Browne, *supra* note 57, at 717.

[131] *See Fair Political Practices Comm'n*, 599 P.2d at 46.

[132] *See id.* at 53.

[133] *Id.*

[134] *See id.* at 53–54.

[135] *See id.*

[136] *See id.* at 54 ("Application of the burdens of registrations and disclosure of receipts and expenditures to lobbyists does not substantially interfere with the ability of the lobbyist to raise his voice.").

[137] *See id.*

[138] *See id.* ("The extent of the reporting required is not directly related to the extent of lobbying activities but is determined mainly by lobbyist and employer transactions with others, which may be entirely unrelated to lobbyist activities.").

[139] *See id.* at 55.

Strict scrutiny was also applied in *A.C.L.U. v. New Jersey Election Law Enforcement Commission*,[140] where a federal district court examined New Jersey's lobbying registration and reporting requirements.[141] The court required the state to show that it had chosen the least restrictive means to further a compelling interest.[142] Finally, in *Moffett v. Killian*,[143] a federal district court applied strict scrutiny to a lobbying registration fee requirement.[144] Such a fee, the court maintained, would burden individuals' right to petition the government.[145]

An analytical framework dictating that a regulation will receive strict scrutiny only if it "significantly interferes" with the right to petition leaves open the question as to when a regulation does, in fact, "significantly interfere." Much of the focus in examining whether lobbying registration and reporting requirements unduly burden the right to petition has been on whether such laws will exclude parties by denying some the ability to exercise their right.[146] Accordingly, lawmakers have made a considerable effort to avoid locking out parties with fewer financial resources.[147] For example, lobbying reform supporters have advocated requiring that only those lobbyists with the financial capability to do so register and file reports.[148] In most instances, however, courts have remarked that "[r]equiring a person engaged in a business to describe it and to report its receipts and expenses may not be viewed in our commercial society as a substantial impediment to engaging in that business."[149] Consequently, courts have held that "[m]ere registration and reporting

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[140] 509 F. Supp. 1123 (D. N.J. 1981).

[141] *See id.*

[142] *See id.* at 1129.

[143] 360 F. Supp. 228 (D. Conn. 1973).

[144] *See id.*

[145] *See id.* at 231.

[146] *See, e.g.*, Pletz v. Austin, 336 N.W.2d 789, 804 (Mich. Ct. App. 1983) (applying strict scrutiny to a law because it would "discourage individuals from associating with organizations devoted to lobbying").

[147] *See, e.g.*, Browne, *supra* note 57, at 748 (explaining such efforts as attempts to mitigate the fact that "reporting and registration requirements may have a chilling effect on the exercise of citizens' rights"). Lobbying regulations provide a de minimis exception for groups with fewer financial resources. *See id.*

[148] *See id.* at 745. This is the position of the American Civil Liberties Union (ACLU). In a letter to Congress, the ACLU stated that the extensive paperwork and reporting requirements may cause some groups not to participate in lobbying. *See id.* at 751, n.225.

[149] *See, e.g.*, *Fair Political Practices Comm'n*, 599 P.2d at 54; Browne, *supra* note 57, at 734.

requirements do not interfere substantially with any First Amendment rights."[150]

Although registration and reporting requirements may not "significantly interfere" with the right to petition, a total ban on contingency fees would. A contingency fee prohibition is akin to the restrictive lobbying registration fee struck down in *Moffett*.[151] Preventing parties from using contingency fees to compensate a lobbyist denies some the ability to hire a lobbyist altogether,[152] thereby denying access to the most effective means of exercising the right to petition.

The concern with denying some individuals the ability to exercise this right is critical. What has triggered Americans' perception of our system as corrupt is the impression of "exclusivity" emanating from campaign finance and lobbying activities.[153] The idea that "access is bought" has been a unifying theme among reformers.[154] This theme makes the passage of a prohibition on lobbying contingency fees all the more repugnant. Contingency fees provide access to the system for those who otherwise lack the necessary financial resources.[155] Accordingly, a ban on contingency fees has the perverse effect of creating a more exclusive system where only the wealthy are able to exercise their right to petition the government by employing a lobbyist. A ban on lobbying contingency fee agreements, therefore, significantly interferes with the right to petition.

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[150] Browne, *supra* note 57, at 736–37 (remarking on how courts have determined what standard of review to apply to registration and reporting requirements).

[151] *Moffett*, 360 F. Supp. 228.

[152] *See supra* Part II.

[153] For example, on a *Meet the Press* episode, Senator Russell Feingold (D-Wis.), identifying benefits accruing to political donors, quoted from a fundraising letter distributed by Senator Mitch McConnell (R-Ky.): "They enjoy sharing the rewards of leadership, friendship, effectiveness, and *exclusivity*." *Meet the Press* (NBC television broadcast, Sept. 21, 1997) (transcript available at 1997 WL 7887548) (emphasis added).

[154] For example, international businessman Roger Tamraz recently testified in front of the Senate Governmental Affairs Committee that the only reason he contributed $300,000 to Democratic campaign committees and candidates during the 1996 election cycle was to gain access to senior governmental officials. Tamraz was promoting a plan to build an oil pipeline from the Caspian Sea region of central Asia to Western markets, a plan that never gained support from the U.S. government. When asked if Tamraz got his money's worth, he replied, "Next time I'll give $600,000." *See* Edward Walsh, *Tamraz Defends Political Donations—Access to Top Officials Was Only Reason, Pipeline Promoter Testifies*, WASH. POST, Sept. 19, 1997, at A1.

[155] *See supra* Part II.

C. *Applying Strict Scrutiny: A Contingency Fee Ban Is Overbroad*

The conclusion that we must apply strict scrutiny to such a prohibition, however, does not end the query. A regulation that "significantly interferes" with the right to petition is not per se unconstitutional. Rather, it can survive strict scrutiny if the state can identify a compelling interest for the law and if it is narrowly tailored to achieve this state interest.[156]

In this instance, the state can identify such a compelling interest for a lobbying contingency fee ban. The corruption or the appearance of corruption of our political system is what first led the Supreme Court to void contingency fee contracts for lobbying in the nineteenth century.[157] There is little doubt that the state interest in preventing this kind of corruption remains vital, if not more critical.[158] A ban on contingency fees in lobbying still fails strict scrutiny, however, because it is not narrowly tailored enough to satisfy this test.[159] While such a ban will clearly prevent some corruptive lobbying, it will also stifle the right to petition where there is no corruption.[160]

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[156] *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992) (holding that a Tennessee statute prohibiting solicitation of votes and display of distribution of campaign materials within 100 feet of an entrance to a polling place was narrowly tailored to serve a compelling state interest in preventing voter intimidation and election fraud as required by the First Amendment); *cf.* Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989) (applying "compelling interest" and "narrowly tailored" requirements to invalidate a statute prohibiting indecent interstate telephone communications because the statute's denial of adult access to telephone messages that are indecent but not obscene far exceeded that which was necessary to limit the access of minors to such messages).

[157] *See supra* Part II.

[158] *See* Buckley v. Valeo, 424 U.S. 1 (1976) (identifying the state's compelling interest in preventing corruption of the political process).

[159] While this Note does not directly address the constitutionality of the "Byrd Amendment" or other limitations upon contingency fee arrangements already in effect, *see supra* note 8, it is noteworthy that a ban on the use of federally procured funds from being used directly to pay a lobbyist on a contingent basis provides a tighter nexus, supporting the constitutionality of such a limitation.

[160] This contention that a contingency fee ban is overbroad and thus, unconstitutional, has direct support from contemporary jurisprudence. In *Montana Automobile Ass'n v. Greely*, 632 P.2d 300 (Mont. 1981), the Supreme Court of Montana struck down the state's prohibition on lobbying contingency fees. The Court found the prohibition overbroad because it precluded contingent fee agreements that were properly motivated as well as those that were improperly motivated. The Court remarked that "[t]he ability of individuals and organizations to fully exercise their right to petition the government may be severely curtailed by this broad prohibition." *Id.* at 308. The Court did not comment on the level of scrutiny that should be applied to such a law. It found, however, that the statute "unduly infringes the rights of those who, while contemplating

The lobbyist's evolution into an essential player in the passage of legislation and the corresponding change in the judicial treatment of lobbying has altered the equation. When the Supreme Court struck down such contingency fee agreements in the nineteenth century, it noted that all "lobbying" was corrupt. Today, the Court has moved dramatically in its protection of lobbying activities and its recognition of their legitimacy.[161] Accordingly, such a ban would prohibit legitimate, activity that has earned the Court's protection.[162]

In fact, rather than protecting the system from corruption, a ban on contingency fees may have the opposite effect. The appearance of corruption in our contemporary system increases when only those with substantial financial resources are able to exercise the right to petition by employing a lobbyist. Thus, by blocking an avenue for some to exercise this right, a contingency fee prohibition would increase the existence and perception of exclusivity.

CONCLUSION

Calls for reforming the political system in the United States have received a great deal of attention in recent years. Along with passing the Lobbying Disclosure Act of 1995, the 104th Congress also barred members and their staffs from receiving gifts or meals from lobbyists.[163] In addition, campaign finance reform continues to occupy a prominent place on the agenda of the 105th Congress.[164] Providing access and ending exclusivity have been at the heart of these reform efforts.

While the push for reform is well-intentioned, there is a growing concern that these reform efforts may in fact have a perverse effect. In contemporary society, legislative advocates wield an

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neither illegal or unethical conduct, need or desire to employ as lobbyist on a contingent fee basis in order to advance their interests before a public official." *Id.*

[161] *See supra* Part III.

[162] While this Note asserts that a total ban on contingency fees in lobbying is unconstitutional, the authors do not contend that any regulation of a contingency fee agreement in the lobbying context is unconstitutional. Lobbying contingency fees can be regulated, much the same as contingency fees in other contexts are. Statutory limits on contingency fees, as opposed to an all-out prohibition, are common throughout the country. *See, e.g.*, CAL. BUS. & PROF. CODE § 6146 (West 1998); CONN. GEN. STAT. § 52-251c (West 1998); OKLA. STAT. ANN. tit. 5, § 7 (West 1998).

[163] *See* H.R. Res. 250, 104th Cong. (1995).

[164] *See, e.g.*, S.25, 105th Cong., (1997) (proposing to reform the financing of federal elections); H.R. 3581, 105th Cong., (1998) (same).

increasing amount of power over federal policy. Those in government rely on them for information and insight into the concerns of interest groups. These legislative advocates are a necessary component of a system that needs their expertise and resources.

In the twentieth century, Congress and the courts have recognized the critical role played by lobbyists. Congress has also acknowledged the potential for abuse within the system and the concern that the public lacks sufficient knowledge of how interest groups affect public policy. Accordingly, Congress has enacted legislation focused on providing the public with accurate information. At the same time, the courts have indicated strong support for the recognition that hiring a lobbyist is a constitutionally protected freedom. Thus, the courts have rejected laws that substantially interfere with that right.

The recent proposal to ban lobbying contingency fees is excessive. It denies those with limited resources the opportunity to exercise their right to employ a lobbyist. While the government's interest in curtailing corruption within the system is compelling, a prohibition on all contingency fees would proscribe the hiring of a lobbyist on a contingency fee basis where there is no corrupting influence. Such a proscription is, therefore, overbroad and unconstitutional.

There are serious ramifications to the enactment of such a law. Without the ability to hire such an advocate, a party's ability to affect pending legislative and regulatory proposals is crippled. Thus, consistent with the spirit of reform efforts to end the exclusivity in Washington, this Note contends that a lobbying contingency fee ban would have the adverse effect of denying access and increasing exclusivity. The Supreme Court should revisit this issue in light of its more recent precedents and lower court decisions and grant lobbying for a contingency fee the constitutional protection it merits.

NOTE

RECONCILIATION AND THE FISCAL CONSTITUTION: THE ANATOMY OF THE 1995-96 BUDGET "TRAIN WRECK"

ANITA S. KRISHNAKUMAR*

Congress originally conceived of the budget reconciliation process as a minor fallback mechanism for bringing one year's tax and spending policy in line with overall budget targets. Reconciliation has since become central to congressional efforts to reduce the federal budget deficit. This Note argues, however, that reconciliation is limited in its capacity to impel significant budgetary reform. The author demonstrates how, in 1995-96, reconciliation caused repeated breakdowns in governmental budget-making, undermining the entire budget process. The author concludes that the legal, institutional, and political constraints inherent in the reconciliation process will continue to constitute powerful obstacles to congressional efforts to implement sweeping national reform via the annual budget.

> For months Washington had been obsessed with the notion of a train wreck coming down the line: Gingrich and his budget-cutting revolutionaries steaming in from one direction, Clinton and his veto rolling in from the other. Perhaps the fact that it was so visible for so long made few people believe that it would actually happen in the end. Certainly one side would stop, or both would move off to a track of compromise. But the train wreck did happen. Many times, in fact. A series of train wrecks began that day in mid-November and continued into the first two weeks of 1996.[1]

In 1995, Congress tried to use the budget reconciliation process to enact an ambitious fiscal agenda that would restructure the federal government, implement a mammoth tax cut, *and* balance the budget in seven years. Its efforts led to two historic federal government shutdowns, thirteen stopgap spending measures, several presidential vetoes, and ultimately failed to produce a meaningful fiscal agreement with the White House.[2]

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[1] DAVID MARANISS & MICHAEL WEISSKOPF, "TELL NEWT TO SHUT UP!" 149 (1996).

[2] *See* James A. Thurber, *Centralization, Devolution, and Turf Protection in the Congressional Budget Process*, *in* CONGRESS RECONSIDERED 325, 325 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1997).

This extraordinary breakdown in budget-making, while unprecedented in scope and degree, was not the first, nor is it likely to be the last "train wreck" of its kind. In accounting for the breakdown, legal and political commentators have focused on specific political differences over issues such as health entitlements[3] and the pride and ambition of individuals such as Representative Newt Gingrich (R-Ga.).[4] The repeated incidence of smaller-scale budget breakdowns over the past decade and a half,[5] however, suggests a more fundamental and enduring structural explanation for such episodes: Congress's failure to work within the limitations of the budget "reconciliation" process. Reconciliation is a procedure that allows Congress to alter tax and entitlement laws in order to raise or reduce both revenues and federal spending. Conceived in 1974 as a minor fallback mechanism for bringing one year's tax and spending policy in line with overall budget targets, reconciliation has since evolved into Congress's most powerful deficit-reduction tool, and has become an integral part of the government's implicit "fiscal constitution."[6] In recent years particularly, reconciliation has become the centerpiece of the congressional budget process, as both Congress and the President have made it the cornerstone for comprehensive fiscal packages aimed at reining in the deficit.

Yet reconciliation still bears the procedural marks of its modest origins, and is limited in its capacity to impel sweeping budgetary reform. First, reconciliation is an optional budgetary measure that provides Congress with almost no procedural leverage to force the President to accept or cooperate in its reforms. Second, reconciliation's late timing in the budget process, and restrictive rules governing the amendment of and debate on reconciliation legislation, make it an inapt vehicle for setting the year's fiscal agenda. Third, and related to the second, reconcili-

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[3] *See, e.g.*, Charles Tiefer, *Budgetized Health Entitlements and the Fiscal Constitution in Congress's 1995-1996 Budget Battle*, 33 HARV. J. ON LEGIS. 411 (1996).

[4] *See, e.g.*, ELIZABETH DREW, SHOWDOWN: THE STRUGGLE BETWEEN THE GINGRICH CONGRESS AND THE CLINTON WHITE HOUSE (1996).

[5] Budget breakdowns between Congress and the President had engendered federal government shutdowns nine times before 1995, although none had lasted longer than three days. *See* George Hager, *Budget Battle Came Sooner Than Either Side Expected*, 53 CONG. Q. WKLY. REP. 3503, 3503 (1995).

[6] The fiscal constitution is the legal framework that governs the federal budget process. It includes the constitutional provisions, statutes, and informal procedures followed by Congress in conducting federal spending, borrowing, and taxation. For a more detailed description of how the fiscal constitution operates, see Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

ation does not involve annual appropriations for federal departments (which are handled by the appropriations subcommittees); thus, when Congress attempts reconciliation, its work on annual appropriations often becomes derailed and remains unfinished at the October 1st start of the fiscal year. Congress must then pass one or more stopgap spending measures known as "continuing resolutions" ("CRs") in order to avoid a government shutdown while it continues to work on the budget. Finally, in situations of divided government, the partisan politics required to pass reconciliation legislation often conflicts with the compromises necessary to prevent a presidential veto. All of these limitations have played a significant role in engendering recent budget breakdowns, particularly that of 1995-96.

In order to appreciate the effect of the institutional limitations of the reconciliation process, it is necessary to understand the legal and political norms that govern the budget process generally, and reconciliation in particular. Part I of this Note analyzes reconciliation's place in the fiscal constitution, exploring how the process has evolved in the twenty-some years since its conception in the Congressional Budget Act of 1974 ("Budget Act").[7] Part II examines the 1995-96 budget battle, illustrating how Congress's attempt to use the reconciliation process as a tool for comprehensive governmental reform engendered that year's breakdown in budget-making. Part III assesses the legal and institutional limitations inherent in the budget reconciliation process, drawing lessons from 1995 and other recent budget battles between Congress and the President.

I. THE EVOLUTION OF RECONCILIATION IN THE CONSTITUTIONAL BUDGET PROCESS

A. *Reconciliation at First Blush*

Neither the federal Constitution nor our implicit "fiscal constitution" requires that federal spending be balanced against federal revenues.[8] In fact, prior to the passage of the Budget Act,

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[7] Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 1, 2, & 31 U.S.C.).

[8] *See* U.S. CONST. art. I, § 9, cl. 7 (requiring only legislative approval, not adequate revenue, before money may be drawn from the Federal Treasury); *see also* Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L.

Congress traditionally considered tax and spending legislation as separate measures,[9] and had no mechanism for combining all federal spending proposals into one comprehensive budget.[10] Moreover, social insurance and other "backdoor" entitlement spending lay entirely outside the budget process.[11] Thus, congressional budget policy was essentially the "accidental" aggregate of independent spending and revenue decisions made by different committees at different times. The Budget Act changed this by establishing budget committees and requiring Congress to pass a budget resolution setting forth congressional priorities and aggregate annual targets for new budget authority (appropriations), outlays (actual spending), revenues, the deficit, and the total public debt.[12] These targets were to be revised and enacted as "binding ceilings" in a second budget resolution two weeks before the start of the fiscal year.[13] Further, the Act created a reconciliation process through which Congress could direct changes in existing tax and entitlement legislation to bring the overall budget in line with the second resolution's targets.[14]

The Budget Act conceived of reconciliation as a wrap-up procedure to be conducted at the tail end of the budget process. If the second budget resolution called for an increase or decrease in either tax revenues or spending levels for statutory entitlements, the Act authorized Congress to write into the resolution "reconciliation instructions" directing the relevant committee(s)[15] to draft legislation to produce revenue and entitlement spending

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REV. 593, 600 (1988) (noting that the Constitution does not limit annual federal spending to available tax revenues).

[9] *See* V. BROWNE, THE CONTROL OF THE PUBLIC BUDGET 11–17 (1949), *cited in* Stith, *supra* note 8, at 601 n.43; L. LABAREE, ROYAL GOVERNMENT IN AMERICA 269–339 (1930), *cited in* Stith, *supra* note 8, at 601 n.43.

[10] *But see* Stith, *supra* note 8, at 600 n.42 (noting that the Legislative Reorganization Act of 1946 called for Congress to adopt an annual "legislative budget," but the call was ignored and the legislation repealed in 1970).

[11] *See* Alice M. Rivlin, *The Need for a Better Budget Process*, 4 BROOKINGS REV. 3, 5 (1986).

[12] *See* Congressional Budget Act of 1974 § 301, 88 Stat. at 306–08 (codified as amended at 2 U.S.C. § 632 (Supp. II 1996)); STITH, *supra* note 8, at 617.

[13] *See* Congressional Budget Act of 1974 § 310(a) & (b), 88 Stat. at 315 (codified as amended at 2 U.S.C. § 641(a) (1994)). The provision in the Budget Act requiring action by September 15 was repealed in 1985 with one requiring action by June 15. In 1990, this provision was deleted altogether by Pub. L. No. 101-508, § 13210(2).

[14] *See* Congressional Budget Act of 1974 § 310(c), 88 Stat. at 315 (codified as amended in scattered portions of 2 U.S.C. § 641 (1994)).

[15] For example, reconciliation instructions concerning tax laws go to the House Ways and Means Committee and the Senate Finance Committee, while instructions to reduce farm subsidy entitlements are sent to the Agriculture Committees.

in line with the resolution's ceilings.[16] Should these reconciliation instructions pertain to only one committee, that committee would then report its reconciliation legislation directly to the House or Senate floor for a vote.[17] Should the budget resolution direct more than one committee to write reconciliation legislation, however, the committees would report their recommendations to the budget committees, which would then combine the various committee reports into a single, omnibus reconciliation bill[18] without any substantive revision.[19] The packaged reconciliation bill would subsequently be reported to the floor of each chamber to be debated, possibly amended, and voted upon.[20] Any section of the bill failing to meet the responsible committee's deficit target would be subject to a floor amendment altering it to meet such targets or to a motion to recommit, requiring the committee to report back a new proposal that does meet the target.

The Budget Act also established special rules to expedite the consideration of reconciliation bills on the Senate floor.[21] In particular, it placed strict restrictions on the consideration of nongermane amendments[22] and limited debate on reconciliation bills to twenty hours, insulating them from filibusters.[23]

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[16] *See* Congressional Budget Act of 1974 § 310(a), 88 Stat. at 315 (codified as amended at 2 U.S.C. § 641(a) (1994)).

[17] *See id.* § 310(c)(1), 88 Stat. at 315 (codified as amended at 2 U.S.C. § 641(b)(1) (1994)).

[18] *See id.* § 310(c)(2), 88 Stat. at 315 (codified as amended at 2 U.S.C. § 641(b)(2) (1994)).

[19] While the Budget Act gives committees wide latitude in deciding how to reach their target levels, if they do not comply with these levels, Congress can amend their legislation on the floor to achieve the levels set out in the budget resolution. *See* CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 890 (1989). This procedure was codified by the Gramm-Rudman-Hollings Deficit Reduction Act § 310(d)(5), 2 U.S.C. § 641(d)(5) (1994) (permitting the House Rules Committee to authorize such amendments).

[20] *See* JOHN B. GILMOUR, RECONCILABLE DIFFERENCES? 97 (1990).

[21] With regard to both the House and the Senate, the Budget Act has been amended to sanction explicitly points of order against any amendment that would have the effect of increasing total outlays or decreasing total revenues, *see* 2 U.S.C. § 641(d)(1) & (2) (1994), and to bar reconciliation bills from altering Social Security in any manner. *See* 2 U.S.C. § 641(g) (1994).

[22] *See* Congressional Budget Act of 1974 §§ 305(b)(2), 310(e)(1), 88 Stat. at 311, 316 (codified as amended at 2 U.S.C. §§ 636(b)(2), 641(e)(1) (1994)).

[23] *See id.* § 310(e)(2), 88 Stat. at 316 (codified as amended at 2 U.S.C. § 641 (e)(2) (1994)).

1. Initial Implementation: Assumed Legislative Savings

From 1976 to 1979, the newly created budget committees attempted a voluntary form of reconciliation called "assumed legislative savings."[24] Essentially, the budget committees wrote the first budget resolution based on the *assumption* that the relevant committees would report legislation reducing spending on their entitlements.[25] These assumptions were in no way binding or enforceable; if the committees failed to produce the necessary savings, spending would exceed the targets set forth in the resolution.[26] Committees, however, consistently ignored the budget resolution's assumptions, and efforts to reduce federal spending via legislative savings were largely unsuccessful.[27]

2. Reinventing Reconciliation

The failure to achieve legislative savings combined with national economic decline spurred experimentation with the reconciliation process.[28] In 1980, in an effort to balance the budget and stem inflation,[29] the House Budget Committee, for the first time, included mandatory reconciliation instructions in its budget resolution.[30] This inaugural use of reconciliation set two important precedents. First, it initiated the use of reconciliation in the *first* budget resolution rather than the second, as envisioned by the Budget Act.[31] The Budget Committee defended its authority to amend the process in this manner by citing a provision in the Budget Act that states that the first budget resolution may require any procedure "which is considered appropriate to carry out the purpose of this Act."[32] Including reconciliation in the first resolution was necessary, the Budget Committee argued, to give the

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[24] *See* COMMITTEE ON THE BUDGET, 98TH CONG., 2D SESS., A REVIEW OF THE RECONCILIATION PROCESS 8 (Comm. Print 1984) [hereinafter *Reconciliation Review*]; GILMOUR, *supra* note 20, at 105.

[25] *See* GILMOUR, *supra* note 20, at 105.

[26] *See id.*

[27] *See Reconciliation Review*, *supra* note 24, at 9.

[28] *See id.* at 16.

[29] *See* GILMOUR, *supra* note 20, at 108–09.

[30] Specifically, the resolution contained instructions to eight House and eight Senate authorizing committees to report legislation saving $9.059 billion in outlays in fiscal year 1981. *See Reconciliation Review*, *supra* note 24, at 16.

[31] *See* Congressional Budget Act of 1974, Pub. L. No. 93-344, § 310, 88 Stat. 297, 315–16 (codified as amended at 2 U.S.C. § 641 (1994)).

[32] *Reconciliation Review*, *supra* note 24, at 17 (citing the Budget Committee Report explaining the source of its authority).

authorizing committees enough time to consider and propose the required savings legislation.[33]

Second, the 1980 reconciliation effort ushered in an era of top-down party leadership control over the budget process.[34] Before 1980, the budget committees negotiated and wrote the budget resolutions. In 1980, however, the budget committees performed an essentially ministerial function, drafting the resolution from an agreement negotiated by the Democratic party leadership and the White House.[35] Since then, party leaders have continued to mastermind the budget resolution, as well as control and engineer the passage of reconciliation legislation through Congress.[36]

In 1981, the newly elected Reagan administration redefined reconciliation once again by using the process to implement a sweeping reorientation of the federal budget.[37] Republican party leaders formulated a reconciliation bill that included the central elements of President Reagan's economic agenda: large tax cuts, increased defense spending, and reduced domestic spending.[38] Congress approved the bill essentially along party lines, with the

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[33] Representative Leon Panetta (D-Cal.), then HBC chairman, explained the need for reconciliation in the first budget resolution as follows:

> The Committee took the approach of including reconciliation in the first resolution because it believes that this method is fairer to the committees and fairer to the budget process than using reconciliation in the second resolution. With this approach, committees can be given more than the 10 days provided in the Budget Act for second resolution reconciliation to act on proposals. The reported resolution sets June 15 as the deadline for action, giving committees substantial leadtime to have hearings, consider alternatives, and report legislation. In addition, it insures that the changes in mandatory spending law are made sufficiently before the start of the fiscal year so that agencies can issue regulations or make other programmatic changes to be sure the savings begin on October 1. Under the second resolution approach, legislation may be enacted days or a few weeks before the start of the fiscal year, thus undercutting potential savings. Finally, too, the first resolution approach allows the Budget Committee time to fully evaluate the legislative actions that have been taken and incorporate this information into their second resolution marks. Under the second resolution method, the Committees on the Budget have no idea at the time of markup whether or how reconciliation will finally be implemented and what precise savings figures will be, leading almost certainly to a third resolution to adjust estimates after action is completed. The approach the committee took this year is a far more responsible one.

Reconciliation Review, *supra* note 24, at 17.

[34] *See* GILMOUR, *supra* note 20, at 109.

[35] *See id.* Although the final reconciliation bill failed actually to balance the budget, it did achieve $8.2 billion in deficit reduction savings. *See A History of Reconciliation*, 53 CONG. Q. WKLY. REP. 2714, 2714 (1995) [hereinafter *History*].

[36] *See infra* Part II.B.

[37] *See* Howard Baker, Jr., *An Introduction to the Politics of Reconciliation*, 20 HARV. J. ON LEGIS. 1, 2 (1983).

[38] *See* James A. Miller & James D. Range, *Reconciling an Irreconcilable Budget: The New Politics of the Budget Process*, 20 HARV. J. ON LEGIS. 10, 11 (1983).

support of conservative Southern Democrats in the House.[39] Reconciliation was the favored vehicle for Reagan's economic program because it allowed substantial spending reductions to be "packaged" into one bill, enabling party leaders to claim that all government programs would bear equally the brunt of budgetary sacrifices. More importantly, a single omnibus reconciliation bill facing a single vote in Congress was more likely to pass because dissatisfied congressmen would be unlikely to kill an entire budget agenda over a few disagreeable provisions.[40] Finally, unlike any other revenue or appropriation measure, reconciliation could originate in the then Republican Senate.[41]

The 1981 reconciliation process also involved two significant procedural innovations: multi-year reconciliation and instructions requiring alterations in authorization legislation.[42] Congress instituted multi-year reconciliation to prevent committees from fiddling with the books to achieve spending reductions[43] and to facilitate its own efforts at long-term deficit reduction. This innovation has since become a permanent part of the budget reconciliation process.[44] Congress implemented reconciliation instructions requiring changes in authorization legislation because they were essential to the success of Reagan's economic program (which relied almost exclusively on spending cuts to achieve deficit reduction).[45] Such instructions, however, have since been disfavored for usurping too much power from the authorization committees.[46]

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[39] Professor Charles Tiefer notes that although the House of Representatives had a nominal Democratic majority in 1981, on budget matters, the Republicans had a functional majority due to the support of Southern Democrats. *See* Tiefer *supra* note 3, at 430 n.67.

[40] *See* Miller & Range, *supra* note 38, at 12.

[41] *See id.* at 13. Article I, section 7, clause 1 of the Constitution mandates that all bills proposing to "raise revenues" must originate in the House. Based on this Taxation Clause, Congress has established a tradition that appropriation bills must originate in the House as well. *See* TIEFER, *supra* note 19, at 924. Reagan's reconciliation bill circumvented this constitutional provision because it sought to *reduce* revenues.

[42] In contrast to appropriations, entitlements, and other forms of direct spending, authorizations do not provide an agency with funds. Rather, authorization laws create programs and sanction future appropriations for specified purposes. *See* Miller & Range, *supra* note 38, at 16–18.

[43] Prior to the introduction of multi-year reconciliation, committees often "achieved" savings by shifting government payments due in September to October; this did not reduce total spending but gave the appearance of reducing spending in a given fiscal year. *See* GILMOUR, *supra* note 20, at 111 n.23.

[44] *See id.*

[45] *See* Miller & Range, *supra* note 38, at 18.

[46] *See* GILMOUR, *supra* note 20, at 96 n.3.

B. *Amending Reconciliation*

1. The Byrd Rule

The special rules governing reconciliation made the process an attractive tool for pursuing deficit reduction. However, these same rules also invited committees to attach extraneous, non-budgetary proposals to reconciliation legislation in order to insulate them from ordinary debate, filibuster, and amendment.[47] After several struggles between committees and other senators seeking to strip such extraneous proposals from reconciliation bills,[48] the Senate in 1985 adopted a budget procedure known as the "Byrd Rule."[49]

The Byrd Rule enables any senator to raise a point of order against provisions or amendments to the reconciliation bill or its conference report that are "extraneous to the instructions to a committee."[50] A provision or amendment is considered extraneous if it: does not produce a change in outlays or revenues, increases outlays or cuts revenues and the relevant committee fails to meet its target level, is outside the jurisdiction of the committee responsible for that section of the bill, produces changes in outlays or revenues that are "merely incidental" to the provision, leads to a net increase in outlays or decrease in revenues beyond the years covered by the bill, or changes Social Security.[51] When a senator raises a point of order against a provision, the presiding officer of the Senate decides whether it is extraneous under the Byrd Rule. Once he sanctions a Byrd Rule point of order, the provision must be stricken from the bill unless a three-fifths Senate supermajority votes to waive the Rule.[52] Although the Byrd Rule formally applies only to the Senate, in practice it governs the House as well because the two chambers

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[47] *See, e.g.*, TIEFER, *supra* note 19, at 891 n.117 (noting Senator Byrd's complaint about the Senate Commerce Committee's inclusion of seven extraneous provisions and the Banking, Housing, and Urban Affairs Committee's attachment of several more).

[48] For a more detailed account of these battles, see TIEFER, *supra* note 19, at 891–93.

[49] Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 20001, 100 Stat. 390, 390–91 (codified as amended at 2 U.S.C.A. § 644 (West 1998)). For a discussion of the specific considerations that motivated the Byrd Rule, see *The Budget Reconciliation Process: The Inclusion of Unrelated Matters: Hearings Before the Subcomm. on the Legislative Process of the House Comm. on Rules*, 99th Cong. 40–47 (1986) [hereinafter *Hearings*].

[50] 2 U.S.C. § 644(a) (1994).

[51] *See* 2 U.S.C. § 644(b)(1)(A) (1994).

[52] *See* TIEFER, *supra* note 19, at 908.

must approve identical conference reports for the reconciliation bill to pass.

The Byrd Rule was a significant innovation in the evolution of the budget process. It not only elevated the importance of the budget resolution, but also instituted a formal emphasis on deficit reduction (or at least curbing deficit growth) as the ultimate goal of reconciliation.

2. Gramm-Rudman-Hollings

In the years immediately following 1981, additional attempts to accomplish deficit reduction through reconciliation met with only limited success. Despite numerous negotiations, Congress and the President could not agree on specific tax or spending policies that would significantly reduce deficit growth.[53] By 1985, the nation faced a federal "budget crisis,"[54] to which Congress responded by passing the Gramm-Rudman-Hollings Deficit Reduction Act ("GRH").[55] GRH prescribed predetermined deficit maximums for the next five years. If Congress and the President failed to produce the deficit reductions necessary to comply with these maximums, GRH relied on a procedure called "sequestration" to impose across-the-board federal spending cuts that forced such reductions.[56] Congress enacted GRH with the belief that sequestration would never occur; the logic behind GRH was to use the threat of sequestration to scare both Congress and the President into working together to pass a deficit-reducing budget.[57] GRH

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[53] Although Republican Senate leaders persuaded the Reagan administration to support reconciliation bills in 1982 and 1984, both bills involved key compromises and failed to produce enough savings to control the deficit. *See History*, *supra* note 35, at 2714. In 1983, attempts to produce a reconciliation bill stalled due to a congressional-presidential impasse over increasing taxes. *See id.*

[54] Stith, *supra* note 8, at 595–96 (noting that members of Congress, scholars, and political observers widely recognized a budget crisis).

[55] Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (codified as amended in scattered sections of 2, 31 & 42 U.S.C.) [hereinafter *GRH*]. GRH was enacted as an amendment to a bill providing urgent supplemental appropriations and a critical increase in the statutory limit on the public debt.

[56] For a more thorough explanation of how GRH operated, see Stith, *supra* note 8, at 633–52. Notably, the original act empowered the Comptroller General of the United States to activate the cuts if and when sequestation became necessary. In 1986, however, the Supreme Court held that Congress's assignment of this function to the Comptroller General violated the separation of powers doctrine. *See* Bowsher v. Synar, 478 U.S. 714 (1986). Congress subsequently amended GRH to remove this unconstitutional delegation of power, but the rest of the Act survived in its original form.

[57] *See id.* at 624.

thus sought, in essence, to compel reconciliation—for the only practical way to achieve the deficit maximums set by GRH without across-the-board domestic spending cuts was to increase revenues or reduce entitlement spending.

GRH also accelerated the budget schedule within which reconciliation takes place[58] and set a precedent for employing five-year, rather than three-year, deficit projections. Indeed, although GRH itself was not part of a reconciliation bill, the five-year timetable it inaugurated has become the standard for subsequent reconciliation legislation.

C. *Recent Innovations*

GRH did force Congress and the President to pass some kind of reconciliation bill in subsequent years, though not in the manner Congress had envisioned. In 1987, for instance, a Democratic Congress and Republican President deadlocked over taxes and nearly accepted sequestration cuts rather than produce a reconciliation bill.[59] It was only the historic stock market crash in October, which many attributed to Wall Street malaise about impending GRH cuts, that impelled both sides to convene an economic summit and ultimately pass a two-year reconciliation bill.[60] A similar impasse over President Bush's proposed capital gains tax cut stalled attempts at reconciliation in 1989, triggering across-the-board GRH cuts. Rather than accept these cuts permanently, Congress and the President eventually enacted a reconciliation bill in late November.[61]

A bitter budget battle in 1990 culminated in an omnibus reconciliation bill that amended the budget process one more time, through the Budget Enforcement Act of 1990 ("BEA").[62] The BEA built on GRH's five-year deficit maximums by instituting a five-year budget process, discretionary spending caps, and pay-as-you-go ("PAYGO") rules for taxes and entitlements.[63] The

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[58] *See* Balanced Budget and Emergency Deficit Control Act of 1985 § 201(b), 99 Stat. at 1040 (codified as amended at 2 U.S.C. § 631 (1994)).

[59] *See History*, *supra* note 35, at 2715.

[60] *See id.*

[61] The reconciliation bill did, however, retain $4 billion of GRH cuts as part of the bill. *See id.*

[62] Pub. L. No. 101-508, §§ 13101–13501, 104 Stat. 1388, 1388-1573 to 1388-1630 (codified as amended in scattered sections of 2 & 13 U.S.C).

[63] For a more detailed analysis of the innovative mechanisms introduced by the BEA, see James A. Thurber, *Congressional-Presidential Battles to Balance the Budget, in*

PAYGO rules require Congress to offset fully any legislation that increases statutory entitlement spending or decreases revenues with legislation that cuts other statutory entitlements or raises revenues elsewhere.[64] Although PAYGO does not mandate reconciliation, it changes the way reconciliation operates because Congress must now pay for any provisions that reduce revenues or increase entitlements with other provisions that either increase taxes or reduce entitlements. This feature makes it politically difficult both to cut taxes and to increase entitlement spending. Thus, under PAYGO, Congress is unlikely to be able to pass economic packages like Reagan's 1981 plan, which simultaneously instituted large tax cuts and reduced appropriations spending; for such tax cuts would have to be paid for either with other tax increases or with reductions in entitlement spending. In 1993, Congress and the Clinton administration extended the discretionary spending caps and PAYGO rules set forth in the BEA through 1998, via the Omnibus Budget Reconciliation Act of 1993 ("OBRA").[65]

II. Reconciliation and Congressional Ambition in 1995-96

A. *The Congressional Agenda*

Congressional Republicans in 1995 sought to use the budget process, and reconciliation in particular, to enact sweeping governmental reform on the scale of a presidential national agenda. Their $894 billion reconciliation bill dwarfed President Reagan's $130.6 billion 1981 budget package, and more than doubled President Clinton's $433 billion budget reforms in 1993.[66] The Republican bill simultaneously attempted two monumental initiatives: the institution of an elaborate fiscal blueprint to balance the budget in seven years, and a massive restructuring of the size and scope of the federal government within one year.

Rivals for Power: Presidential-Congressional Relations 191, 196–99 (James A. Thurber ed., 1996).

[64] *See id.* at 197; *see also* Dennis S. Ippolito, *The Budget Process and Budget Policy: Resolving the Mismatch*, *in* Current Issues in Public Administration 297, 301 (Frederick S. Lane ed., 1987).

[65] Pub. L. No. 103-66, §§ 14001–14004, 107 Stat. 312, 683–85 (codified as amended in 2 U.S.C. §§ 665, 900–902, 904).

[66] *See Reconciliation Now a Major Tool*, 53 Cong. Q. Wkly. Rep. 3286, 3286 (1995).

1. Fiscal Reform

The 104th Congress's fiscal agenda was more ambitious in its deficit reduction goals than any attempted by preceding Congresses or Presidents. The agenda was driven by three main priorities set forth in the House's "Contract With America" platform: cutting taxes, cutting spending without touching defense or Social Security, and balancing the budget by 2002. The decision not to cut defense (16% of federal spending) or Social Security (22%), combined with the inability to cut interest payments on the federal debt (16%), took more than half of all federal spending off the table.[67] Congress thus sought to cut extensively from the other half: non-defense programs and statutory entitlements.[68]

Congress planned to produce the non-defense spending reductions by lowering and extending the five-year discretionary spending caps set by the BEA and amended by OBRA, creating new seven-year caps for fiscal 1996 through fiscal 2002.[69] The bulk of the savings were to come from the reconciliation bill, which proposed unprecedentedly deep cuts in health insurance and welfare entitlements.[70] The reconciliation bill also proposed $245 billion in tax cuts, primarily corporate and capital gains.[71] This combination of cuts in entitlements and taxes prompted congressional Democrats to charge, in PAYGO terms, that Republicans were cutting Medicare to pay for tax savings for the wealthy.[72]

The 104th Congress further sought to entrench its priorities in the long-term fiscal blueprint through two structural amendments to the fiscal constitution: the line-item veto and a three-fifths tax rule in the House. The line-item veto enables the President to strike from the budget individual appropriations,

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[67] *See No Winners in Budget Showdown*, 51 CONG. Q. ALMANAC 2-44, 2-44 (1995) [hereinafter *No Winners*].

[68] *See id.*

[69] *See GOP Throws Down Budget Gauntlet*, 51 CONG. Q. ALMANAC 2-20, 2-22 (1995) [hereinafter *Budget Gauntlet*]. These spending cuts were projected to save $213 billion over the next seven years. *See No Winners*, *supra* note 67, at 2-47.

[70] The bill proposed to cut Medicare spending by $270 billion, Medicaid spending by $163.4 billion, and welfare spending by $81.5 billion. *See No Winners*, *supra* note 67, at 2-58.

[71] *See id.* at 2-44.

[72] Republicans responded by amending PAYGO rules to prohibit such an explicit tradeoff; however, the amendment did not prevent them from cutting Medicare and taxes at the same time, and thus was largely ineffectual. *See id.* at 2-47.

new entitlements, and entitlement expansion provisions.[73] Although it does not empower the President to veto automatic increases in entitlement spending caused by inflation or demographic changes, the line-item veto illustrated where Congress intended future deficit reduction to come from.[74] The second structural amendment, the three-fifths tax rule, erects a procedural barrier against tax increases by requiring more than a simple majority to initiate revenue-raising proposals.[75] In simultaneously enacting these two reforms the 104th Congress sought to impose legal and institutional constraints on future legislators to balance the budget on its terms—via deep cuts in discretionary spending and entitlements absent offsetting tax increases.

2. The New Federal Government

Congressional Republicans in 1995 sought to restructure the federal government in two ways. First, they would shift control over several aspects of federal spending to the states. Second, they would abolish or "zero-out" several components of the federal bureaucracy.[76] Congress's goal, in essence, was to create a smaller, less expensive, and less powerful federal government.[77]

The drive to transfer control over spending to the states was related to the resolve to cut entitlements. Congress planned to use reconciliation legislation to convert many federal statutory entitlements into block grants operated by the states, who would in turn be free to design their own benefit packages and formulas for determining who was eligible for aid. Further, Congress sought to end the designation of such programs as "entitlements," eliminating the long-standing guarantee of minimum government as-

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[73] *See* Line Item Veto Act, Pub. L. No. 104-130, §§ 2–3, 110 Stat. 1200 (1996) (codified as amended in 2 U.S.C. §§ 691–692); *see also* Tiefer, *supra* note 3, at 442.

[74] Several members of Congress attempted to challenge the constitutionality of the line-item veto, but were ultimately turned away by the Supreme Court for lack of Article III standing, since the President had not yet utilized the veto. *See* Raines v. Byrd, 117 S. Ct. 2312 (1997).

[75] The three-fifths tax provision generated a great deal of criticism from constitutional scholars, *see* Bruce Ackerman et al., *An Open Letter to Congressman Newt Gingrich*, 104 YALE L.J. 1539 (1995), and House Democrats, who argued that it violates the Constitution. The latter filed a lawsuit challenging the provision but lost, as with the line-item veto, on the ground that they lacked standing. *See* Skaggs v. Carle, 110 F.3d 831 (D.C. Cir. 1997).

[76] *See* H.R. Con. Res. 67, 104th Cong. (1995); *see also Budget Gauntlet*, *supra* note 69, at 2-20, 2-23.

[77] *See Budget Gauntlet*, *supra* note 69, at 2-20.

sistance for the nation's poor and needy.[78] Congress's plan to use the budget process in this manner was unprecedented; although there had been other conservative proposals seeking to decrease entitlement spending, none attempted to use the budget reconciliation process to undo entirely the concept of entitlements.[79]

Congress planned to reduce the size of the federal government by eliminating the federal Departments of Commerce, Education, and Energy, which the majority regarded as unnecessary.[80] In addition, Congress proposed to abolish several sub-departmental federal agencies, such as the National Endowment for the Arts, the Corporation for Public Broadcasting, and the National Endowment for the Humanities.[81] Finally, the majority sought to terminate more than 170 federal programs including the President's National Service Initiative, Goals 2000, Head Start, and family planning counseling.[82] Republican leaders' crusade to do away with numerous governmental agencies and programs would prove extremely exacting and time-consuming, as Democrats and Republicans alike fought to preserve programs important to their constituencies.[83]

B. *Implementation: The 1995-96 Budget Battle*

The 1995-96 budget battle was precipitated both by the substantive breadth of Congress's agenda and by the majority's refusal to compromise on its fiscal tenets. From the outset, the congressional majority demonstrated an unwillingness to compromise on the terms of its balanced-budget agenda. Rather than attempt a budget summit with the President, as prior Congresses in divided governments had done, the 104th Congress planned to assemble a reconciliation bill which ignored the President's priorities, and then use strategic budgetary maneuvers to *force* him to sign the bill.

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[78] See H.R. Con. Res. 67, 104th Cong. (1995); *see also No Winners*, *supra* note 67, at 2-44.

[79] *See* Tiefer, *supra* note 3, at 445 (noting Reagan's proposals for changing Medicaid in 1981 and congressional Republicans' call for Medicaid reform at the start of the 1985 budget process, but explaining that in both years the budget process itself was used to "ameliorat[e] ideological thrusts" rather than to enact them).

[80] *See Budget Gauntlet*, *supra* note 69, at 2-20, 2-23.

[81] *See* H.R. Con. Res. 67, 104th Cong. (1995); *see also* DREW, *supra* note 4, at 263.

[82] *See* DREW, *supra* note 4, at 269.

[83] *See id.* at 264.

To this end, Republican leaders crafted the budget resolution behind closed doors with the Republican Governor's Association,[84] eschewing input from congressional Democrats and the White House. Moreover, it contained a subtle procedural maneuver designed to enhance Congress's leverage vis-à-vis the President. The maneuver concerned the statutory limit on the public debt; because the federal government was scheduled to reach the limit of its borrowing authority by the end of November, it would require an extension of the statutory debt limit to continue operating without defaulting on its loan obligations.[85] A House procedure known as the "Gephardt Rule" traditionally operated to facilitate the passage of debt limit bills by deeming them automatically authorized as soon as the chamber adopted the final version of the budget resolution.[86] However, the fiscal 1996 budget resolution waived the Gephardt Rule, enabling the House to hold the debt limit extension in reserve until the President accepted a reconciliation bill on its terms.[87]

In keeping with Congress's "Contract With America" agenda, the budget resolution contained reconciliation instructions directing twelve House and eleven Senate committees to produce $894 billion in deficit reduction and $245 billion in tax cuts.[88] The sheer number and magnitude of these cuts guaranteed long and extensive debate in drafting reconciliation legislation, thus slowing down the entire budget process. The committees in charge of cutting health care entitlements, for instance, did not finish drafting their reconciliation legislation until several weeks into the new fiscal year.[89] Committee rebellion against cuts in farm

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[84] *See* Tiefer, *supra* note 3, at 431; *see also* Colette Fraley, *Republicans are Standing Firm on Giving Medicaid to States*, 53 CONG. Q. WKLY. REP. 2901, 2901 (1995).

[85] *See Debt Limit 'Weapon' Lacks Force*, 51 CONG.Q. ALMANAC 2-63, 2-63 (1995) [hereinafter *Debt Limit*]. The debt limit at the time was $4.9 trillion; the last time that it had been increased was in 1993, as part of Clinton's budget-reconciliation bill. *See id.*

[86] Under the Gephardt Rule, the bills then went automatically to the Senate for consideration, effectively putting control over debt limit increases in the Senate's hands. *See id.* at 2-64.

[87] House Speaker Newt Gingrich (R-Ga.) told Clinton in a meeting at the White House that "he and his fellow Republicans were prepared to use the continuing resolution and debt limit to get their way." DREW, *supra* note 4, at 336. The Speaker also made his party's strategy clear in remarks delivered to the Public Securities Association, stating that: "I don't care what the price is. I don't care if we have no executive offices, no bonds for 60 days . . . . What we are saying to Clinton is: Do not assume that we will flinch, because we won't." Newt Gingrich, *quoted in Debt Limit*, *supra* note 85, at 2-64.

[88] *See* H.R. Con. Res. 67, 104th Cong. (1995).

[89] The House Ways and Means Committee took its Medicare proposal to the House

subsidies and federal employee pensions similarly delayed, and even jeopardized, reconciliation.[90] The House Budget Committee ultimately restored the farm subsidy reductions dropped by the Agriculture Committee, but only after several rounds of negotiations and arm-twisting between party leaders and committee members.[91] When the bill finally passed the House, it contained numerous ideological provisions indicative of Republicans' broad national agenda but no concessions to House Democrats or to the President.[92]

Senate action on the bill highlighted the magnitude of the reforms the reconciliation bill sought to achieve. First, Senate moderates pushed to pare back some of the most drastic cuts instituted by the House.[93] An amendment by Senator John Chafee (R-R.I.), for example, expanded aid to disabled persons, pregnant women, and children.[94] Second, the Senate used the Byrd Rule to strike out forty-six ideological provisions passed by the House,[95] the most significant of which were related to welfare and health entitlements.[96] Finally, senators offered more than seventy-nine amendments to the reconciliation bill in only two days of floor debate, setting a chamber record.[97] Several senators decried the inadequacies of a process that provided so little time to consider legislation with such potentially deep and enduring consequences. An exchange on the Senate floor between Senator Robert Byrd (D-W.Va.), author of the procedural rules in the original Budget Act, and Senator Pete Domenici (R-N.M.), is instructive:

> MR. BYRD: This [budget-reconciliation] is a historic bill . . . . But we are down to the point now where we have only 30 seconds to the side for debate on an amendment . . . .

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floor on October 19, 1995, and the Senate Finance Committee did not report its version until close to October 23. *See No Winners*, *supra* note 67, at 2-47, 2-50.

[90] *See id.* at 2-44, 2-46; *see also* David Hosanky, *Panel Rejects Farm Overhaul in a Rebuke to Leadership*, 53 CONG. Q. WKLY. REP. 2875 (1995).

[91] *See No Winners*, *supra* note 67, at 2-48.

[92] *See id.* at 2-44, 2-49.

[93] Specifically, Senate moderates ameliorated cuts made in the following areas: student loans, health programs, nursing homes, and programs for the disabled. *See id.* at 2-51.

[94] *See* Tiefer, *supra* note 3, at 437; *No Winners*, *supra* note 67, at 2-51.

[95] *See No Winners*, *supra* note 68, at 2-57.

[96] For example, the Byrd Rule was used to eliminate a provision that placed a five-year limit on the number of years that a family could receive welfare assistance, as well as a provision prohibiting Medicare reimbursements for assisted suicide. *See id.*

[97] *See id.* at 2-51, 2-57.

> [W]e have gone from 103 days on a massive bill to 20 hours . . . . I am concerned with what we are doing to the Senate, what we are doing to the legislative process. We are inhibited from calling up amendments. We have had a very insufficient time for debate on this massive, comprehensive bill, a bill that may be even more far-reaching, in some respects, than was the civil rights bill of 1964 . . . I do not think it is in the best interests of the institution. I do not think it is in the best interests of the American people, because we Senators do not know—to a very considerable degree—what we are voting for. There is not a Senator in this body—not one—who knows everything that is in this bill. Not one. And so that is the situation we are in. It troubles me.[98]
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> MR. DOMENICI: [I]f you had not helped us put this kind of process together, we could never change the country . . . . [I]f we did not have a reconciliation process, what we wanted to change would take 30 years.[99]

This exchange, and particularly Senator Byrd's remarks, constitutes striking evidence of how far the 104th Congress's reconciliation agenda deviated from Congress's original conception of the process as a relatively minor mechanism for maintaining budgetary targets.

Despite such reproaches, congressional leaders remained unwilling to compromise. Rather than use the House-Senate conference to make the bill more palatable to congressional moderates and to the President, the reconciliation conferees dismantled many of the Senate moderates' modifications. Senator Chafee's expanded aid for the disabled was, for instance, effaced, as were matching fund requirements inserted by other moderates.[100]

The conference report passed both Houses, as had the original reconciliation bill, on a partisan vote.[101] Congress had missed its October 1st deadline by more than a month, inducing two impending fiscal crises: the need to appropriate funds to keep the government operating and the need to raise the statutory limit on the public debt. Congress's emphasis on reconciliation,[102]

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[98] 141 CONG. REC. S16,034 (daily ed. Oct. 27, 1995) (statement of Sen. Byrd).

[99] 141 CONG. REC. S16,035 (daily ed. Oct. 27, 1995) (statement of Sen. Domenici).

[100] *See* Collete Fraley, *Scaled-Back Medicaid Savings Plan Emerges from Conference*, 57 CONG. Q. WKLY. REP. 3539 (1995); H.R. CONF. REP. NO. 104-350, pt. 2, at 1064–65 (1995).

[101] The final House vote, which took place three days after the Senate vote, was 235-192, with only one Republican, Christopher H. Smith of New Jersey, voting against the bill, and five Democrats voting for it. In the Senate, the 52-47 vote was even more partisan, with moderate William Cohen of Maine as the only Republican dissident, and no Democrats voting for the bill. *See No Winners*, *supra* note 67, at 2-59.

[102] The House-Senate conference on the reconciliation bill alone took more than two

coupled with its determination to restructure the federal government through funding decisions,[103] pushed the thirteen annual appropriations bills far behind schedule. More than one month after the start of the new fiscal year, only two appropriations bills had been signed into law.[104] Congress had passed one temporary stopgap spending measure, or CR,[105] on September 29, but it was to expire on November 13.[106] With reconciliation behind schedule, Congress decided to use a second CR and a short-term debt limit extension as leverage to gain concessions from the President. It attached to the interim legislation several controversial measures, including a plan to increase Medicare premiums and several restrictive rules that would seriously limit the Treasury Department's ability to stave off default if a long-term debt limit increase were not enacted shortly thereafter.[107] The President immediately vetoed both measures,[108] precipitating the first of two historic federal government shut-downs[109] and a series of ex-

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weeks. *See id.* at 2-44, 2-57 (noting Senate approval of the reconciliation bill on October 28, and the filing of the completed conference report on November 15).

[103] Congress persisted in attaching numerous policy riders to ordinary appropriations legislation. Many of the policy riders were abortion-restricting initiatives, which provoked contentious debate. The Labor-Health and Human Services appropriations bill, for example, contained a provision that would end the federal mandate on states to pay for abortions for poor women in cases of rape or incest. The appropriations bill for Veterans' Affairs, Housing and Urban Development, and independent agencies was particularly remarkable, carrying 17 riders prohibiting the enforcement of pending and existing EPA policies, the Fair Housing Act, and other core agency policies. *See* Jackie Koszczuk, *Gingrich's Abortion Strategies*, 53 CONG. Q. WKLY. REP. 3376, 3376 (1995).

[104] *See* Andrew Taylor, *GOP Rifts Delay Spending Bills*, 53 CONG. Q. WKLY. REP. 3356, 3356 (1995).

[105] Continuing resolutions traditionally continue funding at the lowest of three levels: current spending, the level set by the House-passed appropriations bill, or the level set by the Senate-passed bill. *See* George Hager, *THE BUDGET: Avoiding a Shutdown*, 53 CONG. Q. WKLY. REP. 2782, 2782 (1995).

[106] *See No Winners*, *supra* note 67, at 2-57.

[107] Specifically, the debt limit would rise to $4.967 trillion up to December 12, and then revert to $4.8 trillion, which was less than the existing ceiling. Further, the bill prevented the Treasury Department from juggling federal trust fund dollars to raise money to keep the government from defaulting on its loan obligations. *See id.* at 2-65. Also included in the short-term bill were a measure overhauling habeas corpus laws, a regulatory reform bill that had fallen to a Senate filibuster earlier that year, and a requirement that the President agree to pass a seven-year budget-balancing plan using Congressional Budget Office accounting methods. *See id.*

[108] Congress passed the debt limit bill on November 10, and the CR on November 13; President Clinton vetoed both bills on November 13. *See* Hager, *supra* note 5, at 3508.

[109] As discussed *supra* note 5, the federal government had shut down nine times before, but never for more than three days. The first 1995 shutdown, by contrast, lasted six full days. *See* Hager, *supra* note 5, at 3503. The shutdown sent home nearly 800,000 "non-essential" federal workers and indefinitely suspended numerous federally funded activities, from medical research to the processing of Social Security applications. *See id.*

traordinary fiscal maneuvers by the Treasury Department.[110] Congressional leaders' inclusion of the Medicare proposal in the CR provided the President, ever-conscious of the polls, with important political ammunition with which to criticize and blame Republicans.[111]

Five days later, Congress and the President enacted a promising CR, ending the government shutdown and extending federal funding through the middle of December. This CR ostensibly committed the President to work towards an agreement that would balance the budget in seven years, using Congressional Budget Office ("CBO") projections, while requiring Congress to accept the President's priorities respecting, inter alia, Medicaid, education, and the environment.[112] Negotiations between congressional leaders and the White House quickly broke down, however, as the two branches deadlocked over differing interpretations of the CR, particularly concerning whether the CBO's or the Office of Management and Budget's ("OMB") economic assumptions should be used to estimate the budget plan's savings projections.[113] Contrary to Republicans' expectations,[114] the President's approval

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[110] On November 15, 1995, for example, Treasury Secretary Robert Rubin "disinvested" two government-retirement funds for civil service employees, converting them, in form, from government-issued securities (debt) to non-interest-paying IOUs. On paper, the transaction created an additional $61.3 billion in borrowing authority without exceeding the $4.9 trillion statutory debt limit. *See id.* at 3508.

[111] *See* DREW, *supra* note 4, at 323.

[112] Specifically, the continuing resolution provided that:

> (a) The President and the Congress shall enact legislation . . . to achieve a balanced budget not later than fiscal year 2002 as estimated by the Congressional Budget Office, and the President and the Congress agree that the balanced budget must . . . ensure Medicare solvency, reform welfare, and provide adequate funding for Medicaid, education, agriculture, national defense, veterans and the environment . . . and (b) the balanced-budget agreement shall be estimated by the Congressional Budget Office . . . following a thorough consultation and review with the Office of Management and Budget . . . .

H.R.J. Res. 122, 104th Cong. (1995).

[113] The economic assumptions that govern GDP growth, unemployment, inflation, and interest rate predictions used in budget projections are the central features of a budget proposal, as even minuscule (i.e., less that one percentage point) differences in such predictions make billions of dollars of difference when dealing with debts and expenditures in the billions and trillions. In 1995, OMB's assumptions were slightly more optimistic than CBO's, enabling the President to offer a counter proposal with fewer entitlement cuts than the Republicans', but still claim to achieve balance in seven years. CBO calculated that the President's plan produced $365 billion less in cuts than did Congress's. Thus, Congress was adamant that any budget agreement it reached with the President be scored by CBO, while the President insisted that OMB's calculations were more accurate. *See No Winners*, *supra* note 67, at 2-59.

[114] Republicans believed that a shutdown would hurt Clinton more than it would them, largely because the shutdown in 1990 had hurt President Bush. *See* DREW, *supra* note 4, at 324.

ratings soared throughout the shutdown, while congressional Republicans' declined.[115]

Almost one month after the first government shutdown, the President vetoed the budget reconciliation bill,[116] and offered in its stead his own proposal to balance the budget in seven years—based on OMB's economic assumptions and projections.[117] Congressional Republicans denounced the plan as "an insult" and stormed out of the recently resumed negotiations.[118] The President proposed a new plan on December 15, the day the first CR was scheduled to expire, but Congress quickly rejected it.[119] With no CR and six of the annual appropriations bills still to be enacted, a significant portion of the federal government shut down once more on December 16.[120] After several additional weeks of negotiations and little headway, the two branches ultimately abandoned the balanced-budget goal and passed an omnibus appropriations bill covering the remainder of fiscal 1996 instead.[121]

III. REDEFINING RECONCILIATION: LEGAL AND INSTITUTIONAL LIMITATIONS ON CONGRESS'S POWER OF THE PURSE

Despite its enormous power as a budget integration and deficit reduction tool, the reconciliation process does not give Congress unfettered control over the federal budget or the budget process. Nor does it render Congress commensurate with the President in his capacity to impel comprehensive national reform. As Section A explains, the fiscal constitution contemplates a significant role for the President in the budget process; although reconcili-

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[115] For a more detailed discussion about public perceptions and poll ratings, see MARANISS & WEISSKOPF, *supra* note 1, at 146–49, 152–53; and DREW, *supra* note 4, at 324–26.

[116] The President's veto, delivered on December 6, 1995, criticized congressional Republicans for taking an "extreme" approach that would "hurt average Americans and help special interests." *'Profound Differences' Cited in Veto of Budget Plan*, 51 CONG. Q. ALMANAC D-37, D-37 to D-38 (1996) (full text of the President's message to Congress vetoing the reconciliation bill).

[117] *See id.*

[118] For a colorful journalistic account of Republicans' reactions to the plan, see MARANISS & WEISSKOPF, *supra* note 1, at 159–65.

[119] *See No Winners*, *supra* note 67, at 2-62.

[120] The second shutdown lasted 21 days and furloughed some 260,000 federal employees from work. *See* MARANISS & WEISSKOPF, *supra* note 1, at 161; *No Winners*, *supra* note 67, at 2-62.

[121] *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-34, 1996 U.S.C.C.A.N. (110 Stat.) 1321.

ation gives Congress considerable power to shape the budget's ultimate form, it cannot circumvent the President's priorities in the process.

Section B demonstrates how the legal rules governing the reconciliation process make it an ill-suited vehicle for implementing sweeping legislative agendas. First, because reconciliation is scheduled late in the budget process and does not cover annual appropriations, congressional attempts at reconciliation push the entire budget process behind schedule and (almost) always lead to stopgap spending measures or government shutdowns. Second, the Byrd Rule operates as a check on the extent of reform Congress can achieve through the budget reconciliation process. Third, the special rules and limited debate time allotted to reconciliation legislation raise serious questions about the desirability of implementing far-reaching governmental reform through this process.

Section C examines the politics of reconciliation and concludes that, at least during divided government, there is an inherent tension between the partisan politics necessary to propel a reconciliation bill through Congress and the considerable compromise required to induce the President to sign it.

A. *The Separation of Powers and the Presidential Role in the Constitutional Budget Process*

The modern fiscal constitution is built on a blueprint that envisions the President as the central figure in the budget process. The Budget and Accounting Act of 1921 ("1921 Act"),[122] for instance, makes the President responsible for initiating the budget process by requiring him to submit a budget proposal to Congress at the start of each year.[123] This procedural feature empowers the President to frame the budget discourse, and casts Congress in the role of respondent to his agenda. Further, the 1921 Act gives the President significant power in budget formulation and deliberation by establishing the executive Bureau of the Budget (now OMB) to assist him with budget calculations.[124] As

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[122] Pub. L. No. 67-13, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.).

[123] *See id.* § 201, 42 Stat. at 20–21 (codified as amended at 31 U.S.C. § 1105 (1994)).

[124] *See id.* § 207, 42 Stat. at 22 (codified as amended in scattered sections of 31 U.S.C.).

a result, the President is well-equipped to translate his political agenda into budget proposals.

Recent innovations in the budget process have adapted to, rather than altered, this basic framework. Although the Congressional Budget Act of 1974 centralizes the legislative budget process and increases Congress's control over the budget as a unit,[125] it does so within the structure established by the 1921 Act.[126] The congressional budget resolution is basically an integrated response to the President's budget proposal, and CBO merely a legislative version of OMB. Moreover, Congress must still await the President's proposal before it begins work on its own resolution. Finally, even if Congress decides to reject some or all of the President's proposal, it must keep in mind his priorities in order to produce a budget he will sign. Thus, presidential priorities remain of paramount importance in the constitutional budget process.

Reconciliation does not change this fundamental feature of the fiscal constitution. Notably, reconciliation is not a necessary component of the annual budget process, which requires only the passage of the thirteen annual appropriations bills responsible for funding the federal government. Further, reconciliation rules—such as time limits on debate and prohibitions on non-germane amendments—which operate against traditional political inertia to expedite reconciliation in Congress, do not affect the President. Absent a reconciliation bill, the government's tax and entitlement policies automatically continue in their current vein; thus, a President who prefers the status quo to proposed reconciliation legislation faces no legal or institutional obligation to sign such a bill into law.[127] Recent history illustrates the impact of this institutional limitation: throughout much of the 1980s Presidents Reagan and Bush effectively hampered congressional reconciliation efforts with pledges to veto any legislation proposing a tax increase.[128]

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[125] *See supra* Part I.A.

[126] *Cf.* LOUIS FISHER, THE POLITICS OF SHARED POWER 189 (3d ed. 1993) (maintaining that the congressional budget process created by the Congressional Budget Act of 1974 was modeled on the executive budget established by the Budget and Accounting Act of 1921).

[127] *See* Tiefer, *supra* note 3, at 439.

[128] *See History*, *supra* note 35, at 2714–15; Tiefer, *supra* note 3, at 439. President Bush eventually backed off on his tax stance in order to avoid GRH cuts. *See supra* Part I.C.

Because the reconciliation process leaves Congress with no procedural leverage to force the President's cooperation in its budget reform efforts, Congress must either compromise part of its agenda or resort to strategic manipulations—such as tying reconciliation legislation to some required component of the budget process—in order to induce the President to sign it. The 1995-96 government shutdowns were the direct result of the latter tactic: faced with a President who preferred the status quo to its reform agenda, Congress tried to coerce the Executive's cooperation by refusing to pass a CR or a debt limit extension unless he agreed to some of its most controversial proposals.[129] This tactic, of course, ultimately failed—suggesting that compromise may be the only way for Congress to gain the President's cooperation in passing reconciliation legislation.

Indeed, as Part I discusses, GRH was the only budget innovation that somewhat successfully operated against this institutional limitation by giving the President an incentive (the fear of sequestration) to cooperate with Congress in passing deficit-reducing reconciliation legislation.[130] In 1987, for instance, an historic stock market crash in the face of impending GRH cuts brought President Reagan to the table to negotiate a bipartisan budget reconciliation deal.[131] Similarly, in 1990, the fear of sequestration under GRH drove President Bush to break the congressional-presidential impasse and accept a reconciliation package that violated his "no new taxes" pledge.[132] Even GRH, however, could not ultimately force the nation's leaders to produce reconciliation legislation that would balance the budget, let alone within a given number of years.

In fact, most Congress-initiated attempts to reorient the budget via reconciliation have failed.[133] Those that have succeeded typi-

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[129] House majority whip Tom DeLay (R-Tex.) explained congressional Republicans' strategy as follows: "If [the President] shuts the government down we'll keep it shut down until he signs a bill or an agreement in writing about what he will do." DREW, *supra* note 4, at 322.

[130] *See supra* Part I.B.2.

[131] *See History*, *supra* note 35, at 2714–15; *see also* GILMOUR, *supra* note 20, at 217–20.

[132] *See History*, *supra* note 35, at 2714–15; GILMOUR, *supra* note 20, at 217–20. *See also Budget Adopted After Long Battle*, 46 CONG. Q. ALMANAC 111, 111–12 (1990).

[133] Congress attempted to initiate sizable reconciliation packages in 1980, 1982, 1983, 1985, 1987, and 1995; all but the second attempt ultimately collapsed due to inter-congressional or congressional-presidential deadlock. Rising inflation in 1980 did prompt congressional-presidential budget meetings and reconciliation legislation, but this was wholly independent of the Senate's original attempts to initiate reconciliation (which failed due to disagreement with the House). Similarly, the GRH-inspired stock market

cally have occurred during unified (or functionally unified)[134] government, with party leaders putting pressure on the President,[135] or have been driven by the threat of dire economic consequences, such as those imposed by GRH. In either case, congressionally driven reconciliation bills have been passed only as a result of special meetings, external to the traditional budget process, between Congress and the President.[136]

B. *The Legal Limitations on Reconciliation as a Vehicle for Legislative Reform*

Reconciliation was designed to play an integrative, harmonizing role in the budget process, not to serve as its impetus. Despite the expansion of its role over the past twenty years, the process is not procedurally equipped to implement national congressional agendas. Specifically, when Congress tries to use reconciliation to this end, it runs into three legal limitations: timing, the Byrd Rule, and the twenty-hour cap on debate.

1. Timing and the Appropriations Dilemma

The timing of the budget process is not conducive to the use of the reconciliation process to achieve substantial legislative change. As Part I explains, reconciliation originally took place on the heels of the second budget resolution, within the ten-day window between September 15 and September 25.[137] Since Congress informally amended this rule to allow reconciliation instructions in the first budget resolution,[138] reconciliation has be-

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crash in 1987 prodded an economic summit between Congressional and presidential budget-makers, which in turn produced a reconciliation bill, but this second effort at reconciliation (and its results) differed significantly from Congress's original plan. *See History*, *supra* note 35, at 2714–15.

[134] By "functionally unified" I mean where one party has a working majority on budget issues, even though it may not control both houses (e.g., 1981, when the Senate and President were both GOP-controlled, and the House had a conservative majority on budget matters). *See* discussion *supra* note 39 on "boll weevil" Democrats in the House.

[135] Both the 1982 and 1984 attempts occurred while the Senate was controlled by the President's party. This enabled Senate leaders to rely on party politics and special Rose Garden meetings to gain the President's cooperation. *See* GILMOUR, *supra* note 20, at 116.

[136] The 1982, 1987, and 1990 reconciliation bills were all passed after congressional-presidential budget summits. *See* GILMOUR, *supra* note 20, at 123; *History*, *supra* note 35, at 2714–15.

[137] *See supra* note 13; GILMOUR, *supra* note 20, at 108.

[138] *See supra* Part I.A.

gun immediately after the passage of the first resolution, and committees have been scheduled to report reconciliation bills by mid-June.[139] While this innovation gives Congress more time to craft and consider reconciliation measures, it is still insufficient. With the notable exception of 1984, when Congress reversed its traditional budget process and approved deficit reduction legislation before passing a budget resolution,[140] reconciliation bills have passed Congress long past schedule.[141] As a result, their capacity to realize savings has been greatly reduced.[142]

Further, congressional attempts at reconciliation interfere with other aspects of the budget process. Notably, both annual appropriations and reconciliation bills are scheduled to be reported out of committee in June.[143] Thus, when Congress attempts reconciliation, it must work on both types of legislation simultaneously. Although different committees are responsible for drafting reconciliation and appropriations legislation, both processes tend to consume the attention of the legislature, and the majority party leadership. Reconciliation thus draws Congress's focus away from the annual appropriations process, precipitating delays in the passage of funding necessary to keep the federal government running. Indeed, not once in the twelve times that Congress has attempted reconciliation has it managed to complete all, or even most, of the thirteen annual appropriations bills on time.[144] Such repeated breakdowns in the budget process have necessitated the passage of numerous CRs over the past several years.[145] The use of CRs peaked during the 1980s, when Congress often gave up on passing annual appropriations and allowed the stopgap spend-

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[139] *See* GILMOUR, *supra* note 20, at 111; Christopher Cox, *Capitol Offenders: A Budget Reform to Stop Congress from Breaking the Law*, POL'Y REV., Fall 1990, at 41.

[140] *See History*, *supra* note 35, at 2714.

[141] In the years preceding 1995 when Congress passed reconciliation bills, delays occurred five times: 1980 (Dec. 3); 1986 (Oct. 17); 1987 (Dec. 22); 1989 (Nov. 22); and 1990 (Oct. 27). *See id.* at 2714–15.

[142] This is because by the time a reconciliation bill's savings provisions take effect, a considerable portion of the fiscal year has already elapsed. *See* GILMOUR, *supra* note 20, at 112.

[143] The annual appropriations bills are due from committees by June 30, and reconciliation legislation is due June 15. *See* Cox, *supra* note 139, at 41.

[144] *See History*, *supra* note 35, at 2714–15 (summarizing congressional attempts at reconciliation in each of the eight years from 1980–87, as well as 1989, 1990, and 1993).

[145] *See* Jackie Calmes, *Congress Misses Oct. 1 Deadline; Short-Term Measure Fills Gap*, 47 CONG. Q. WKLY. REP. 2538, 2538 (1989) (noting the passage of a CR in 1989); *Another CR*, 48 CONG. Q. WKLY. REP. 3477, 3477 (1990) (discussing the passage of a third CR in 1990); *Status of Appropriations*, 51 CONG. Q. WKLY. REP. 3345, 3345 (1993) (reporting Congress's passage of a CR in 1993).

ing measures to supply federal funding for the entire year.[146] Significantly, Congress attempted reconciliation in every one of those years, with the exception of 1988;[147] in the few recent years when Congress has not attempted reconciliation, as in 1988 and 1994, appropriations have been completed on time and without any CRs.[148]

In general, the larger and more ambitious a reconciliation bill, the longer it will take Congress to complete,[149] and the more it will interfere with the appropriations process. Thus, when Congress seeks to achieve massive reforms through the reconciliation process, as it did in 1995-96, the entire budget process can suffer.

2. The Byrd Rule Revisited

Reconciliation's aptness as a tool for enacting a comprehensive agenda of legislative reform is further limited by the procedural restrictions of the Byrd Rule. As Part I describes, the Byrd Rule operates as a check on congressional efforts to use reconciliation to implement sweeping legislative agendas that are only indirectly related to budget concerns (e.g., restrictions on abortion and assisted suicide). While the Byrd Rule technically may be waived by a three-fifths Senate majority,[150] this has never occurred in practice.

Recent reconciliation efforts illustrate the power that the Byrd Rule has to restrict the scope of reconciliation's accomplishments. In 1993, for instance, the Byrd Rule forced Congress to drop several significant reforms from President Clinton's sweeping reconciliation bill,[151] including a review mechanism to limit

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[146] *See* Neal E. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389, 392 n.19. (1988).

[147] *See History*, *supra* note 35, at 2714.

[148] *See id.* (no reconciliation legislation attempted in 1988 or 1994); Jackie Calmes, *Hopes Grow Dim for Meeting Fiscal 1990 Deadline*, 47 CONG. Q. WKLY. REP. 2441, 2442 (1989) (observing that 1988 was the first time since 1954 that no CR had been passed).

[149] Several members of Congress have argued in favor of restrictive House rules limiting the scope of the reconciliation bill for just this reason. *See, e.g.*, *Hearings*, *supra* note 49, at 28 (prepared statement of Trent Lott, (R-Miss.)) ("[T]he inclusion of such [unrelated] matters only complicates, confuses and *delays* efforts by the two Houses and the White House to hammer-out a final reconciliation bill.") (emphasis added).

[150] *See supra* Part I.B.1.

[151] While the reforms were not literally forced out of the reconciliation bill by the Byrd Rule, conferees removed them in advance in response to Byrd Rule threats from the minority party. *See Deficit-Reduction Bill Narrowly Passes*, 49 CONG. Q. ALMANAC 107, 119 (1993).

entitlement spending as well as several provisions that would have raised the threshold for paying Social Security taxes on domestic employees.[152] Similarly, in 1995, congressional Democrats used the Byrd Rule to gut several ideological provisions central to Republicans' "Contract With America" agenda; eliminated were measures ending welfare and Medicaid as entitlements, providing a bonus for states that reduced the number of out-of-wedlock births, and giving states the option to deny higher welfare checks to recipients who continue to have children.[153] Most of these provisions, while consistent with the Republicans' campaign platform, would have had little or no effect on aggregate entitlement expenditures.

The institution of the Byrd Rule stemmed from congressional concern over the use of the reconciliation bill as a substitute for the traditional legislative process.[154] What Congress may not have realized, however, is that in emphasizing budget resolution targets and the relationship between revenues and outlays, it was not only restricting committee chairmen's ability to sneak pet projects onto reconciliation legislation; it was also significantly constraining its own ability to use reconciliation to effect sweeping legislative reform.

3. Restrictive Rules and the Quality of Deliberation

Finally, restrictive rules and time limits capping debate on reconciliation legislation make it extraordinarily difficult for members of Congress to know or understand the effect that individual components of the bill will ultimately have. Indeed, the rules and debate time allotted for consideration of reconciliation legislation seem inversely proportional to the magnitude and consequence of the policy changes such legislation entails. While this facet of reconciliation is often embraced by those who wish to railroad sweeping changes past an unprepared legislature, it ultimately constrains even majority leaders' ability to discern how to achieve the reforms they desire, or evaluate the impact of the policies they eventually choose.

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[152] *See id.*

[153] *See No Winners*, *supra* note 67, at 2-57.

[154] *See, e.g.*, TIEFER, *supra* note 19, at 893 n.121 (discussing Senator Byrd's complaints that a particular rider to a reconciliation bill had not received consideration in the relevant committee).

The passage of the fiscal 1996 budget reconciliation bill is instructive. Few, if any, members of Congress could have read the bill's nearly 2000 page text before voting on it, yet no hearings were held on the impact or merits of the bill.[155] Even majority party leaders had trouble understanding and explaining the projected impact of specific portions of the bill and of proposed amendments.[156] One episode illustrates particularly well the level of confusion surrounding the passage of the bill. Senator Christopher Bond (R-Mo.) had proposed to increase the tax deduction for health-insurance premiums paid by self-employed workers from thirty percent to fifty-five percent.[157] Another senator asked how Bond proposed to pay for the amendment, which was expected to cost more than $3.8 billion over seven years.[158] Senator Bond looked to majority leader Bob Dole (R-Kan.), who had been bargaining off the floor with lobbyists. The majority leader ambiguously responded that "we found another area where they overestimated or underestimated, or whatever it is."[159] Based on this information, the Senate proceeded to vote for the amendment, 99–0.[160]

Over the years, many members of Congress have echoed Senator Byrd's concerns[161] about implementing far-reaching national reforms in this manner. For instance, Leon Panetta (D-Cal.), former House Budget Committee chairman and White House Chief of Staff during the 1995–96 budget battle, once remarked that:

> The legislative product of the Congress is best when it has received proper scrutiny in both Houses. Because reconciliation bills involve hundreds of provisions, we do not always have a proper debate on each and every item in the bill. If reconciliation is limited to spending cuts and tax increases alone, this is less of a problem. But when reconciliation includes complicated reauthorizations and extensive policy changes, we

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[155] *See supra* note 98 and accompanying text.

[156] Similar problems plagued the omnibus continuing resolutions of the 1980s. *See generally* Devins, *supra* note 146, at 396–400 (relating not only that the 1988 CR was passed on extraordinarily limited legislative debate and amendment and without the benefit of review by committees with appropriate expertise, but also that members did not have an opportunity to read the more than 2100-page amended bill). While such resolutions certainly present difficulties, the problem is only magnified by reconciliation bills, such as that passed in 1995, which seek to effect wholesale reformation of the nation's fiscal landscape.

[157] *See No Winners*, *supra* note 67, at 2-51 (citing Senate vote 515).

[158] *See id.*

[159] *Id.*

[160] *See id.*

[161] *See supra* note 98 and accompanying text.

> run the risk of enacting laws which have not faced the give and take of the traditional legislative process.[162]

In other words, the more Congress tries to accomplish through reconciliation, the less it thinks through what it is doing, and the less accurate its predictions about the impact of proposed reforms are likely to be.[163] Given the far-reaching national significance of the reforms at stake, the expedited reconciliation process thus seems an injudicious and "undemocratic"[164] vehicle through which to institute sweeping legislative agendas.

C. *The Politics of Reconciliation*

Federal spending is difficult to control in large part because it stems from established political programs and funding obligations made in prior years. It is politically much easier for Congress to continue funding programs at existing levels than to redesign or eliminate long-standing policies with entrenched constituencies. Reconciliation requires Congress to overcome this inherent political inertia and make unpopular policy changes. Moreover, in a nod to congressional committees, it delegates the task of implementing these changes to those with the most interest in preserving the status quo.

Despite these political complexities, the process has survived because it facilitates centralized majority-party control. Members of the congressional majority are loathe to let down their party on one of its most crucial initiatives of the year.[165] In addition, restrictive rules on the House and Senate floor operate against the political inertia that would otherwise impede the passage of reconciliation legislation.[166]

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[162] *Hearings*, *supra* note 49, at 12 (statement of Leon Panetta).

[163] For instance, the 1981 reconciliation package, which sped through Congress on the strength of restrictive rules and limited time for debate, generated a string of colossal deficits that doubled the national debt within five years. *See* FISHER, *supra* note 126, at 191. In retrospect, David Stockman, the OMB director who had pushed for the 1981 agenda, admitted that "a plan for radical and abrupt changes required deep comprehension—and we had none of it." DAVID A. STOCKMAN, THE TRIUMPH OF POLITICS 91 (1986).

[164] *Cf.* Devins, *supra* note 145, at 399 (labeling the 1987 omnibus continuing resolution "undemocratic" for similar reasons).

[165] *See* David S. Cloud, *GOP Moderates Refusing to Get in Line*, 53 CONG. Q. WKLY. REP. 2963, 2963 (1995) (noting that GOP moderates "have a definite political stake in seeing their party succeed in its quest to pass a balanced-budget plan . . .").

[166] For instance, time limits on the debate accompanying reconciliation legislation prevent senators from using filibuster tactics to delay key votes on reconciliation.

Paradoxically, however, the same features that facilitate the passage of reconciliation in Congress jeopardize its chances for ultimate enactment under divided government. As the history of reconciliation demonstrates, in order to achieve reconciliation during divided government, Congress must invite minority party and presidential input almost from the outset.[167] Budget summits, not closed-door intra-party sessions, must take place prior to or during the preparation of reconciliation legislation in order for Congress to produce a reconciliation bill that the President will sign.[168]

Positive political theory provides a useful tool for understanding the political paradox inherent in the reconciliation process. According to a political science theory known as the median voter model, legislative policymaking is inherently incremental and hostile to radical or sweeping changes.[169] Specifically, the model proffers that legislative preferences, rather than party-line voting, determine policy outcomes. Thus, if legislative preferences are ranked from 1 to 100 (or 1 to 435) on a conservative-liberal continuum, only those policy initiatives that reflect the preferences of a majority[170] of either house will pass successfully.[171] Further, the model predicts that successful policy initiatives must cater disproportionately to the preferences of median voters—i.e., moderate legislators whose preferences fall in the middle of the continuum—because these legislators' votes are crucial to achieving the requisite majority.[172] Moreover, under divided government, the model holds that successful policy initiatives must reflect a broader range of preferences, so as to attract enough votes to overcome a presidential veto.[173] Ultimately, this need to temper proposals to suit the preferences of median voters is hypothesized to keep legislative policies from

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[167] *See supra* Part III.A.

[168] *See, e.g.*, *supra* note 136.

[169] *See, e.g.*, DAVID W. BRADY & CRAIG VOLDEN, REVOLVING GRIDLOCK: POLITICS AND POLICY FROM CARTER TO CLINTON 2–3 (1998).

[170] In the case of the Senate, policies must actually reflect the preferences of at least 60 members in order to avoid becoming casualties of the filibuster. *See id.* at 16–17.

[171] *See id.* at 7.

[172] *See id. See also* Mathew McCubbins et al., *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 19 (1994).

[173] *See* BRADY & VOLDEN, *supra* note 169, at 15–16. Specifically, Professors Brady and Volden maintain that policy made during divided government must comport with the preferences of the 40th through the 66th Senators (and presumably the 174th through the 287th or 288th Representatives), while policy enacted during unified government need only reflect the preferences of the 34th to the 60th Senator (and presumably the 147th or 148th to the 261st Representatives). *See id.*

swinging from one end of the continuum to the other within relatively short periods of time.

As Part I describes, however, budget reconciliation does not cater to the median voter. Rather than inspire moderate legislation that reflects the preferences of median congressional voters—and is thus capable of overriding a presidential veto—reconciliation often reflects the preferences of the majority party leadership and can produce radical, uncompromising proposals which boast the support of only the barest congressional majorities. In 1995, for instance, the special rules and procedures governing the reconciliation process enabled the party leadership to attempt sweeping welfare and Medicare reforms that ignored the preferences of moderate legislators. Notably, while Senate moderates managed to temper several of the leadership's more controversial proposals, reconciliation conferees used their power to eradicate most of the moderates' palliative amendments from the bill's final version.[174] In so doing, they eliminated those provisions that might have made the reconciliation bill tolerable to President Clinton,[175] thereby effectively guaranteeing a presidential veto with little chance of an override.

There is, then, an inherent tension, during divided government, between the legislative centralization and partisan politics required to pass reconciliation legislation through both Houses of Congress, and the considerable concession and moderation necessary to get it past the President's desk. While this tension has been overcome a few times during the past decade, it has led more often to budget breakdowns and shutdowns.

D. *Conclusion: Reconciliation and the Balanced Budget Amendment*[176]

For years, revenues and entitlements remained outside the reach of Congress's annual budget calculus. Reconciliation created a mechanism for integrating these crucial fiscal elements with the rest of the budget process, and thus appeared to increase Congress's aggregate control over the nation's purse strings.

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[174] *See* Tiefer, *supra* note 3, at 440.

[175] *See id.*

[176] Although the most recent version of the balanced budget amendment failed to pass Congress in February 1997, *see* S.J. Res. 1, 105th Cong. (1997), discussions of its probable effect remain worthwhile because the amendment continues to enjoy a good deal of support and is likely to resurface.

However, congressional efforts at reconciliation over the past decade and a half evince lingering constraints on Congress's efficient exercise of its power of the purse. In particular, this Note has argued that the isolation of revenues and entitlements from the annual appropriations process limits Congress's control over the budget and engenders several conflicts. Missed deadlines, omnibus CRs, and the inevitable threat of government shutdown are only the most apparent casualties caused by this procedural constraint. More fundamentally, the automatic year-to-year continuation of revenue and entitlement legislation, and the attendant optional nature of reconciliation, constitute powerful obstacles in the way of congressional efforts to control the budget.

Indeed, recent congressional attempts at reconciliation illustrate what some commentators have recognized for some time: constitutional provisions notwithstanding, the power of the purse does not belong exclusively to Congress, but is shared with the Executive.[177] Despite the constitutional requisite of legislative approval for the appropriation of federal funds, it is difficult for Congress to restrain federal spending without the President's cooperation. As evinced by the 104th Congress's efforts to cut Medicare, Congress is powerless to reduce automatic entitlement "appropriations" absent presidential approval. Moreover, as reconciliation efforts during the Reagan and Bush Administrations illustrate, Congress's power to initiate taxation is relatively meaningless when countered with a presidential veto (or threat thereof).[178]

In light of these constraints, congressional proposals that seek to compel deficit reduction—most notably the Balanced Budget Amendment—appear misguided and, if enacted, are likely to have little practical effect on budget outcomes. Like GRH, an amendment mandating budgetary balance would alter the President's political incentives to join congressional efforts at passing reconciliation legislation. However, inducing Congress and the President to attempt reconciliation is not sufficient; as reconciliation efforts under GRH demonstrated, the process is not a panacea and cannot force the political concessions necessary to produce a balanced budget.

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[177] This is true even independent of the President's new line-item veto authority, which of course shifts considerable additional budgetary power to the Executive.

[178] Congress, of course, retains the power to override the President's veto, but again, experience during the Reagan and Bush years demonstrates that the two-thirds majority required for an override is extremely difficult to obtain. In addition, it remains to be seen what effect the new three-fifths rule will have on Congress's power of taxation.

On the contrary, as illustrated in Sections A to C, the reconciliation process is fraught with inherent tensions, many of which a balanced budget amendment would exacerbate. For instance, an amendment requiring that the federal budget balance outlays against receipts would escalate the importance of economic assumptions and projections, thereby magnifying the likelihood of estimation conflicts between CBO and OMB—such as the one that stalled the 1995-96 budget negotiations. Further, in making a balanced budget "must-pass" legislation, such an amendment might increase the incidence of individual attempts—such as Newt Gingrich's in the infamous Air Force One incident[179]—to hold the budget hostage to personal concerns or political demands on other matters.[180] In addition, a requirement that Congress pass a balanced budget would reduce the amount of funds available for federal programs, thereby intensifying legislative conflict over favorite projects and prolonging the formulation of both reconciliation and appropriations legislation. Accordingly, legislators would almost certainly miss the annual appropriations deadline, creating the need to enact a CR. As the 1995-96 budget battle demonstrated, passing such a continuing resolution would likely entail its own set of complications. Thus, in all but the most conciliatory of political climates—a phenomenon that has eluded Washington since World War II—the conflation of the reconciliation process and a balanced budget amendment seems destined to provoke congressional-presidential conflict, and consequently, produce another government shutdown.

This Note has argued that reconciliation's fortification of the congressional budget process is not as absolute as Congress seems to think. Indeed, far from facilitating congressional budget-making, or consummating Congress's power of the purse, the reconciliation process suffers from political and procedural tensions of its own. The challenge before Congress is to recognize these tensions and work to limit, rather than intensify, their impact.

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[179] *See* MARANISS & WEISSKOPF, *supra* note 1, at 152.

[180] *Cf. The Balanced Budget Amendment: Hearings on H.R.J. Res. 1 Before the House Comm. on the Budget*, 105th Cong. 244 (1997) (statement of Allen Schick, Professor of Public Policy, University of Maryland) (noting that a balanced budget amendment proposal requiring a three-fifths supermajority for various budgetary measures would mean that even if a majority agrees on budget policy, "the minority will be able to extort concessions from the majority before it agrees to vote for the budget").

RECENT DEVELOPMENTS

THE FATE OF ENDA IN THE WAKE OF MAINE: A WAKE-UP CALL TO MODERATE REPUBLICANS

The right to obtain employment free from discrimination has been a staple of American jurisprudence since the passage of the Fourteenth Amendment in 1868. Our understanding of the scope of Fourteenth Amendment guarantees,[1] however, has been the subject of heated debate. Even after defending the right to choose one's profession freely as essential to liberty,[2] Justice Joseph Bradley in 1872 refused to support the extension of this protection to women, declaring, "It certainly cannot be affirmed, as an historical fact, that [the right to engage in any and every profession, occupation, or employment in civil life] has ever been established as one of the fundamental privileges and immunities of the sex."[3] A century later, Congress disavowed Justice Bradley's view, passing the Civil Rights Act of 1964,[4] which codified the right to be free from employment discrimination based on race, sex, and religious affiliation. The Age Discrimination in Employment Act of 1967[5] prohibits employment discrimination on the basis of age. Enacted in 1991, the Americans with Disabilities Act[6] extends similar protections to those with "real or perceived" disabilities.

For millions of Americans, this panoply of civil rights legislation does not adequately counteract the discrimination that permeates their places of employment. Gay men, lesbians, and bisexuals do not have a federal cause of action to contest workplace discrimination based on sexual orientation.[7] Heterosexual

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[1] U.S. CONST. amend. XIV, § 1 (". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

[2] With magnanimous rhetoric, Justice Bradley exalted this freedom as follows:

> For the preservation, exercise and enjoyment of these [fundamental] rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him the most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

The Slaughterhouse Cases, 83 U.S. 36, 116 (1872) (Bradley, J., dissenting).

[3] Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

[4] 42 U.S.C. § 2000(e) (1964).

[5] 29 U.S.C. § 621 (1967).

[6] 42 U.S.C. § 12102(2) (1991).

[7] *But see* Romer v. Evans, 116 S. Ct. 1620, 1628 (1996) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.").

supporters of gay equality also are unable to seek redress if their employers fire them for being outspoken supporters of gay rights. Although some litigants have attempted to prove that discrimination based on sexual orientation falls under the rubric of sex discrimination, the courts thus far have been unwilling to read Title VII protections to include sexual orientation.[8]

The climate of hostility toward gay men, lesbians, bisexuals, and their allies makes passage of the Employment Non-Discrimination Act ("ENDA") even more pivotal in the journey toward full equality for all American citizens. In the state of Colorado and the city of Cincinnati, Ohio, popular initiatives have attempted to limit access to the courts for those who have experienced discrimination based on sexual orientation, whether real or perceived.[9] Most recently, an anti-gay coalition survived a judicial challenge and succeeded at the polls in repealing Maine's Act to Prevent Discrimination, which would have included sexual orientation in the state's nondiscrimination policy.[10] The passage of ENDA would preempt the backlash against gay men, lesbians, and bisexuals, preserve the fundamental right to work in an environment free from discrimination, and serve as a cornerstone for the gay civil rights movement. Passage of ENDA will be a mere fantasy, however, until moderate Republican voters speak up and support candidates who support equality irrespective of sexual orientation, and until Republican legislators take a stand against the extremist elements within their party. Until moderate Republicans reassert their right to speak on behalf of Americans with the same fervor as do their more conservative counterparts, passage of ENDA is highly unlikely.

Recognizing this fundamental gap in the protection accorded to American workers, Senator Edward Kennedy (D-Mass.) introduced in the 104th Congress the Employment Non-Discrimination Act,[11] which would have included sexual orientation among

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[8] *See, e.g.*, Williamson v. A.G. Edwards & Sons, Inc. 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329–30 (9th Cir. 1979) ("[W]e conclude that Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."); *but see* Oncale v. Sundowner Offshore Serv., 118 S. Ct. 998, 1001–02 (1998) (holding that Title VII does not bar claim of discrimination "because of sex" merely because plaintiff and defendant, or person charged with acting on behalf of defendant, are of the same sex).

[9] *See infra* notes 74–79 and accompanying text.

[10] *See infra* notes 44–50 and accompanying text.

[11] S. 2056, 104th Cong. (1996).

the list of proscribed categories covered under Title VII. ENDA originally was proposed as an amendment to the controversial Defense of Marriage Act ("DOMA"),[12] in an attempt to defeat the anti-gay marriage bill. Even though the supporters of DOMA were able to pass the bill without conceding an ENDA amendment, Senator Kennedy forced a vote on the employment provision by threatening to tie up the Senate with delaying legislative tactics.[13] Many expected ENDA to suffer a resounding defeat in the eleventh hour before the 1996 Presidential election.[14] Yet the 49–50 vote was miraculously close, with Senator David Pryor (D-Ark.) being the only Senator unable to vote.[15] As Senator Pryor had voted with President Clinton to end the prohibition on gays in the military in 1994, it is likely that he would have voted in favor of ENDA, giving Vice-President Gore the responsibility for breaking the stalemate and potentially approving ENDA.

Inspired by their near success, Senators Kennedy and James Jeffords (R-Vt.)[16] have reintroduced ENDA in the 105th Congress with thirty-three co-sponsors,[17] as opposed to the four Senators[18] who had sponsored the bill in the previous session. In his opening statement before the ENDA hearings, which commenced on October 23, 1997, Senator Jeffords remarked, "In the 104th

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[12] 1 U.S.C. § 7 (West 1997) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as a husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

[13] *See* Carolyn Lochhead, *Gay Marriage Bill Scheduled for Vote In Senate Tuesday—Democrats Change Course*, S.F. CHRON., Sept. 7, 1996, at A2.

[14] *See infra* note 61 and accompanying text.

[15] Pryor was in Arkansas with his son, who was recovering from cancer surgery. *See* Elaine S. Povich, *Gay Bias Bill Fails Senate, Passes 2nd Measure to Restrict Same-Sex Marriage*, PITTSBURGH POST-GAZETTE, Sept. 11, 1996, at A1.

[16] Senator Jeffords's ability to support ENDA likely has been enhanced by his promotion to Chair of the Senate Labor and Human Resources Committee. *See* Annys Shin, *Capitol Hill Watch: Gay Activists View Hill Changes*, NAT'L J., Jan. 4, 1997, *available in* 1997 WL 7227939.

[17] The following 33 Senators co-sponsored ENDA: Toricelli (D-N.J.), Bingaman (D-N.M.), Wellstone (D-Minn.), Lieberman (D-Conn.), Harkin (D-Iowa), Kerry (D-Mass.), Wyden (D-Or.), Feingold (D-Wis.), Boxer (D-Cal.), Landrieu (D-La.), Murray (D-Wash.), Levin (D-Mich.), Akaka (D-Haw.), Durbin (D-Ill.), Kohl (D-Wis.), Mikulski (D-MD), Sarbanes (D-Md.), Lautenberg (D-N.J.), Chafee (R-R.I.), Inouye (D-Haw.), Robb (D-Va.), Feinstein (D-Cal.), Reid (D-Nev.), Moynihan (D-N.Y.), Dodd (D-Conn.), Leahy (D-Vt.), Moseley-Braun (D-Ill.), Kerrey (D-Neb.), D'Amato (R-N.Y.), Bryan (D-Nev.), Glenn (D-Ohio), Cleland (D-Ga.), Reed (D-R.I.). *See* S. 869, 105th Cong. (1997).

[18] Senators Kennedy, Jeffords, Lieberman, and Bryan sponsored the bill in the 104th Congress. *See* S. 2056, 104th Cong. (1996).

Congress, we came very close to accomplishing our goal of passing ENDA. Although I was disappointed that we were unable to, I was encouraged that ENDA was only narrowly defeated . . . ."[19] Senator Kennedy,[20] Representative Barney Frank (D-Mass.),[21] and former Representative Gerry Studds (D-Mass.),[22] co-sponsor of the 1996 version of ENDA in the House of Representatives, all expressed surprise at the number of votes that ENDA won in the Senate.

The ENDA legislation introduced in the 105th Congress is essentially the same as the bill from the 104th Congress. Section four contains the core of ENDA, which provides:

> A covered entity shall not, with respect to the employment or an employment opportunity of an individual:
> 1. subject the individual to a different standard or different treatment, or otherwise discriminate against the individual, on the basis of sexual orientation; or
> 2. discriminate against the individual based on the sexual orientation of a person with whom the individual is believed to associate or have associated.[23]

Senator Jeffords did note some minor changes in the legislation during his opening remarks. ENDA now would prohibit the Equal Employment Opportunity Commission ("EEOC") from collecting statistics about the sexual orientation of employees and further prevents the EEOC from compelling employers to do so.[24] In her testimony, Professor Chai Feldblum emphasized that, just as the EEOC currently does not mandate reporting of employees' religious affiliations, under ENDA, the EEOC

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[19] *Employment Non-Discrimination Act of 1997: Hearings on S. 869 Before the Senate Comm. On Labor and Human Relations*, 105th Cong. 1–2 (1997) [hereinafter *Hearings*] (opening statement of Sen. James M. Jeffords, Chairman, Senate Committee on Labor and Human Resources).

[20] Telephone Interview with Melody Barnes, Senior Aide to Senator Kennedy—Judiciary Committee (Feb. 24, 1998) [hereinafter Kennedy].

[21] Telephone Interview with Rep. Barney Frank (D-Mass.) (Mar. 5, 1998) [hereinafter Frank].

[22] Telephone Interview with Gerry Studds, former Congressman (D-Mass.) (Mar. 4, 1998) [hereinafter Studds].

[23] S. 869, 105th Cong. § 4 (1997).

[24] S. 869, 105th Cong. § 7(b) (1997) ("COLLECTION OF STATISTICS- The Commission shall not collect statistics on sexual orientation from covered entities, or compel the collection of such statistics by covered entities."). The drafters of ENDA included this provision to allay concerns such as those expressed by Senator Hatch in 1996: "Mr. President, I respectfully submit that a vote for this bill is a vote to give the Equal Employment Opportunity Commission the power to require employers to provide the Government with data on the sexual orientation of their employees." *See Hearings*, *supra* note 19, at 40 n.46.

would not require the reporting of employees' sexual orientations.[25]

Professor Feldblum, who served as a legal expert to Congress in the drafting of the "second version" of ENDA, emphasized that "there was no intention for ENDA to have a different, or broader, scope of anti-discrimination protection than exists in Title VII."[26] In fact, it is a more narrowly tailored provision, explicitly excluding disparate impact claims[27] and domestic partner benefits.[28] The entities covered under ENDA mirror other employment bills—employers with more than fifteen employees,[29] labor unions,[30] and government employees.[31] By copying this language directly from the Civil Rights Act of 1964, the drafters hoped to avoid claims that gay men, lesbians, and bisexuals would, in fact, secure "special rights" through this legislation, rather than safeguarding the same protections awarded to other minority groups. As Feldblum explains,

> [T]he bill's language (that individuals should not be subjected to "a different standard or different treatment") was designed to clarify that gay people were seeking the right to the same equal treatment that all other individuals enjoy in the workplace. That is, as a legal matter, ENDA was designed to offer the same protection currently offered by Title VII to individuals on the basis of race, sex, religion and national origin.[32]

Accordingly, ENDA includes a religious exemption,[33] except for positions within religious organizations that "pertain solely to activities . . . that generate unrelate business taxable income."[34] There is also a section specifying that ENDA does not apply to

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[25] *See Hearings*, *supra* note 19, at 40–41 (statement of Chai Feldblum, Associate Professor of Law and Director of Director of the Federal Legislation Clinic, Georgetown University Law Center).

[26] *Id.* at 37.

[27] *See* S. 869, 105th Cong. § 7 (1997); *see also Hearings*, *supra* note 19, at 38–39.

[28] *See* S. 869, 105th Cong. § 6 (1997); *see also Hearings*, *supra* note 19, at 38.

[29] *See* S. 869, 105th Cong. § 3 (3) (1997) ("The term 'employer' means a person engaged in an industry affecting commerce (as defined in section 701(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(h))) who has 15 or more employees . . . .").

[30] *See* S. 869, 105th Cong. § 3 (6) (1997) ("The term 'labor organization' has the meaning given the term in section 701(d) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(d)).").

[31] *See* S. 869, 105th Cong. § 3 (10) (1997) ("The term 'State' has the meaning given the term in section 701(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(i)).").

[32] *Hearings*, *supra* note 19, at 36 (statement of Chai Feldblum).

[33] *See* S. 869, 105th Cong. § 9(a) (1997).

[34] *See* S. 869, 105th Cong. § 9(b) (1997).

members of the armed forces or laws creating special rights based on veterans' status.[35]

Despite attempts by the bill's authors to deflate the "special rights" argument, opponents of ENDA have learned from the Christian Coalition's success in places like Maine[36] and have emphasized the notion of "special rights." A full-page advertisement in the *Washington Times* charged that ENDA would be "just the beginning of special rights for homosexuals" and that it would "effectively outlaw the expression of traditional morality in the workplace."[37] Robert Knight, director of the Family Research Council ("FRC"), posits that ENDA "would be a major expansion of federal power. It would be an unprecedented intrusion in the workplace, and it would put the U.S. government in the position of favoring promiscuity, since the measure protects bisexuality."[38] Senators Jeffords and Kennedy attempted to include organizations opposed to ENDA, such as the FRC and the Rutherford Institute, on the agenda for the October hearings, but none of these groups agreed to participate. In his opening statement, Senator Jeffords explained that despite the best efforts of his staff to include in the hearings those opposed to the bill, all of the parties contacted either declined to testify or changed their position.[39] Opponents of ENDA have had a mixed, yet unanimously negative, response to Senator Jeffords's attempts at inclusiveness, ranging from accusations of being ignored[40] to calls for a boycott of the hearings.[41]

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[35] *See* S. 869, 105th Cong. § 10 (1997).

[36] The "special rights" argument has been a central element of anti-gay rhetoric for over a decade. *See, e.g.*, *Across the Nation*, SAN DIEGO UNION-TRIB., June 7, 1984, *available in* 1984 WL 2341142 ("New Right leaders urged Democrats and Republicans to adopt platforms at their party conventions opposing abortion and rejecting special rights for homosexuals.").

[37] Joyce Price, *Activists Shun Hearings on Hill But Fight "Gay Bill" Behind the Scenes*, WASH. TIMES, Oct. 25, 1997, at A4.

[38] *Id.*

[39] *See Hearings*, *supra* note 19, at 1–2 (statement of Sen. Jeffords). Senator Kennedy corroborated the efforts of Senator Jeffords's staff. *See* Kennedy, *supra* note 20.

[40] Robert Knight from FRC claims that no one from the committee called his organization. And "as for the extent of the panel's search for bill opponents, he charged, 'One of Jeffords' own gay quota appointees probably really looked hard in Key West, Provincetown [Massachusetts] and West Hollywood'—all homosexual strongholds." Price, *supra* note 37, at A4.

[41] Andrea Sheldon, executive director of the Traditional Values Coalition, insists, "This is not a legitimate hearing. We're not attending. This is not a serious issue." Dan Freedman, *Gay Job-Protection Bill Still Faces Uphill Battle*, NEW ORLEANS TIMES-PICAYUNE, Oct. 23, 1997, at A18.

Senator Jeffords's gushing optimism, however, masks his undoubted realization that the prospects for passage of ENDA, as difficult as they were in 1996, are even worse in 1998. Republican control of the Senate is stronger now than it was in 1996, and two key Republican allies have left Congress.[42] Senators Alan Simpson (R-Wyo.) and William Cohen (R-Me.), who voted in favor of ENDA in 1996, have been replaced by Senator Mike Enzi (R-Wyo.) and Susan Collins (R-Me.). The election of Senator Collins should have been a victory for proponents of ENDA, considering her support for gay rights on the local level.[43] Any inclination she may have had to support anti-discrimination legislation on behalf of gay men and lesbians, however, has been severely undermined. The conservative backlash in her own state of Maine, while making her support of ENDA even more pivotal, renders it even more unlikely.

On February 10, 1998, a special election in Maine resulted in a "people's veto"[44] of legislation known as "An Act to Prevent Discrimination."[45] Despite concerns about the validity of signatures required to bring the referendum and the mandate that signatures be collected within ten days after the end of the legislative session,[46] the Maine Superior Court allowed the petitions to stand, and authorized a special election on the issue. The Christian Civic League, among others, commanded enough support from participating voters[47] to defeat the Act by 51.6%

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[42] On a positive note, however, Senator Sam Nunn, who voted against ENDA in 1996, has been replaced by ENDA-ally Max Cleland (D-Ga.), who has signed on as one of the bill's co-sponsors.

[43] Political observers identified Collins as "[one] of the newly elected Members [of Congress] to whom the gay community will be looking for support." *See* Shin, *supra* note 16.

[44] *See* ME. CONST. art. IV, pt. 3, § 17 (proceeding for people's veto).

[45] L.D. 1116 (118th Legis. 1997).

[46] The plaintiffs insisted that "within ten days" marked the beginning and ending point of the period where signatures could be gathered, in order to ensure that all bills, no matter at what point they were passed during the legislative session, would be subject to the ten day requirement. Defendants, on the other hand, asserted that "within" only marked the absolute outer limits, after which the petition could no longer be handed in. *See* Remmel v. Gwadosky (Maine Nov. 1997) (on file with author).

[47] Reports estimated voter turnout at 30%, or 270,000 voters. *See* Gordon Bonin, *Maine Gay Rights Rejected*, FOSTER'S ONLINE (visited Mar. 11, 1998) <http://207.180.37.11/news98/feb/11/xau0211a.html>. Richard Maiman, professor of political science at the University of Southern Maine, attributes the Christian Civic League's victory to the fact that they "still had a campaign intact from the petition drive [to get the issue on a special ballot]," knew who their core supporters were, and could focus on getting them out to the polls. *Id.* Others, like Dr. Christian Potholm of Bowdoin College, suggest that an overwhelming majority of Maine residents believe that the state has no problem with discrimination against gays and lesbians, and, while sympathetic, were

to 48.4%.[48] Had the Act survived, it would have achieved on the state level what ENDA is designed to do at the federal level—including sexual orientation among the list of attributes for which one is protected against discrimination. Defeat of the Act was an even greater set-back in Maine, however, because this legislation would have extended state-wide protections to housing and public accommodations as well.[49] Representative Barney Frank suggests that proponents of gay rights are learning a lesson that other civil rights advocates learned years ago—that popular votes cannot be counted on to vindicate minority rights.[50]

The political controversy surrounding the referendum in Maine contributed to the emergence of a gay rights litmus test during the critical Republican primary to fill retired Senator Cohen's seat. As a candidate in the primary, Susan Collins was criticized as "out of the mainstream of the emerging conservative movement within the Republican party here in Maine."[51] Collins had opposed a 1995 initiative to limit state and municipal gay rights, and was the only candidate to support a state gay rights law.[52] However, in the Republican primary, gay rights became an important issue. As a result, Collins needed to articulate a harder line regarding gay issues in order to appease the more conservative element in the party. During a Republican town meeting in Lincoln, Maine, "[g]ay rights continued to set the candidates apart, and questions on the issue seemed to be aimed at Collins."[53] In response to these criticisms, Collins promised "[to] oppose any effort to enact national legislation that includes sexual orientation as a protected human right."[54] Although her vow to oppose any national gay-rights legislation did not satisfy the most conservative elements of her party,[55] she managed to win

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not sufficiently motivated to go to the polls for a one-issue vote. *See* Carey Goldberg, *Maine Voters Repeal Law on Gay Rights*, N.Y. TIMES, Feb. 12, 1998, at A1.

[48] *See* Bonin, *supra* note 47.

[49] L.D. 1116 (118th Legis. 1997).

[50] Frank, *supra* note 21.

[51] *Collins County Native Pushes Organizational, Leadership Skills*, BANGOR DAILY NEWS, June 8, 1996, *available in* 1996 WL 2193560 [hereinafter *Collins County Native*].

[52] A. Jay Higgins, *Hathaway Takes 3-Way GOP Straw Poll: Abortion, Gay Rights Hot Topics at Lincoln Gathering*, BANGOR DAILY NEWS, May 20, 1996, *available in* 1996 WL 2192275.

[53] *Id.* ("Although her views were shared by other GOP candidates two years ago, Collins alone was targeted by conservative Republican during her gubernatorial campaign for asserting that homosexuals should be protected by state law against discrimination in employment, housing and credit.").

[54] *Id.*

[55] *See Collins County Native*, *supra* note 51. When asked about Collins's candidacy,

the election and become the only moderate Republican to win election to the Senate in 1996.[56]

Senators Collins and Olympia Snowe (R-Me.) both have made names for themselves as moderates, breaking ranks with the Republican leadership in the Senate on eleven issues in 1997, including votes against the ban on partial birth abortions and in favor of federal funding for the National Endowment of the Arts.[57] Yet the two Senators from Maine appear to have broken their lock step when it comes to ENDA. Senator Snowe supported ENDA in 1996 and remains "a solid yes"[58] concerning the legislation. Collins, however, already has gone on record against any national legislation that would protect sexual orientation as a fundamental human right, which ENDA arguably does. Even though public opinion polls demonstrate that the citizens of Maine support nondiscrimination legislation against gays and lesbians in the workplace,[59] the repeal of Maine's Act to Prevent Discrimination likely will prevent Collins from reconsidering her position on ENDA.

The loss of two key Republican allies in the Senate (Cohen and Simpson) and the increasing shift of the Republican party to the right render it unlikely that ENDA will survive a Senate vote during the 105th Congress. In 1996, seven of fifty-three Republicans voted in favor of ENDA.[60] Now, ENDA only has five supporters from a pool of fifty-five Republicans. Despite these numbers, ENDA should not be considered a lost cause just yet. Senator Kennedy, Representative Frank, and former Congressman Studds all expressed surprise at how well the vote went in 1996,[61] and further surprises in 1998 remain a possibility. Senator Kennedy's staff insists that no one has "backed off" as a result of the vote in Maine[62] and that there is still a "window of opportunity" for ENDA's passage this ses-

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Lincoln businessman Lee Rand said, "I can't support her stands on abortion and gay rights." *Id.*

[56] Steve Campbell, *Dwindling GOP Moderates Get Maine Boost in an Increasingly Conservative Republican Party, Sens. Olympia Snowe and Susan Collins Stand Out*, PORTLAND PRESS HERALD, Nov. 2, 1997, at 1A.

[57] *Id.*

[58] Frank, *supra* note 21.

[59] Polls have reported support for gay rights in Maine as hovering around 55 to 60%. *See* Bonin, *supra* note 47; Goldberg, *supra* note 47, at A32.

[60] Six Republicans co-sponsored the 1996 version of ENDA: Senators Cohen (R-Me.), Snowe (R-Me.), D'Amato (R-N.Y.), Specter (R-Pa.), Chafee (R-R.I.), Jeffords (R-Vt.), Simpson (R-Wyo.).

[61] *See* Kennedy, *supra* note 20; Frank, *supra* note 21; Studds, *supra* note 22.

[62] *See* Kennedy, *supra* note 20.

sion.[63] Representative Frank reiterated that hopeful sentiment by pointing out that, with the departure of Senator Nunn, a perennial opponent of gay rights, supporters of ENDA "appear to be only one vote down."[64] The goal is to reach those Senators "who are still movable, particularly those who have made supportive statements to gay and lesbian groups, or to their constituents."[65] While Senator Kennedy does not see the referendum in Maine as a "turning of the tide," he does note that there is "a different dynamic."[66] He recognizes, however, that "in the wake of events in Maine, however, we are really going to have to make the case to the people" and demonstrate why issues of employment discrimination are important for all Americans, not just "special interest" groups.[67]

The campaign in Maine demonstrates the importance of couching the discussion regarding employment discrimination based on sexual orientation in general terms of fairness, rather than "gay rights." Defenders of the Maine Act tried to circumvent this argument by focusing on discrimination as an abstract concept, rather than on personal stories of discrimination. Nevertheless, opponents of anti-discrimination statutes have been successful in presenting the issue as one about special rights,[68] in part because many people do not realize that discrimination based on sexual orientation is legally permissible.[69] Former Congressman Studds insists that "most people think that it is already illegal to fire someone just because of their sexual orientation . . . [As a result,] the average soul doesn't see why this bill is necessary."[70] Unlike previous initiatives meant to eliminate discrimination in public accommodations, the right to be judged purely on merit in the workplace is a concept that Representative Frank believes is "the easiest for people to accept."[71] Senator Kennedy agrees, and insists that ENDA was crafted to address an area, employ-

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[63] *See id.*

[64] *See* Frank, *supra* note 21.

[65] *See* Kennedy, *supra* note 20.

[66] *See id.*

[67] *See id.*

[68] Randy Tate, executive director of the national Christian Coalition, asserted that the victory in Maine represented "the American people reject[ing] the notion of special rights based on sexual activity behind closed doors." Goldberg, *supra* note 47, at A32.

[69] According to a poll conducted in November 1996 by Greenberg Research, Inc., 85% of American voters are unaware that federal civil rights laws do not prohibit firing a person solely on the basis of his or her sexual orientation. *See Hearings*, *supra* note 19, at 25 n.2 (statement of Chai Feldblum).

[70] Studds, *supra* note 22.

[71] Frank, *supra* note 21.

ment discrimination, that the American public is comfortable with addressing, and that it will be effective enough to make a difference, while incorporating exceptions that reflect the limits on how far the public is willing to go.[72]

On one level, the repeal of the anti-discrimination statute in Maine magnifies the importance of federal legislation. Senator Kennedy insists that these recent events "have demonstrated the increased need for federal legislation, both for states where there is no legislation in place or where recently non-discrimination statutes have been rescinded . . . . The problem hasn't gone away. There are simply fewer people getting the protection they deserve."[73] In the absence of a clear federal mandate prohibiting employment discrimination based on sexual orientation, proponents of gay rights will need to fight on multiple fronts—counteracting anti-gay legislation, struggling state-by-state and municipality-by-municipality to pass employment anti-discrimination ordinances, and then working to prevent their repeal through voter referendum or recall.

The battle on the first front is still under way, and will severely undermine the ability of the queer community and heterosexual allies to achieve positive gains. Gay rights activists currently are struggling in Cincinnati, where opponents of anti-discrimination statutes have succeeded in passing Issue 3.[74] With language very similar to Colorado's Amendment 2, Issue 3 amended Cincinnati's charter to prohibit the use of the city's human rights ordinance in cases of anti-gay discrimination and prohibited the city from taking any action that would accord civil rights protection to individuals based on their homosexuality.[75] The Supreme Court struck down Colorado's version of the amendment in *Romer v. Evans*.[76] Subsequently, the Court vacated

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[72] *See* Kennedy, *supra* note 20.

[73] *Id.*

[74] *See, e.g.*, Camilla Warwick, *Voters Repeal Gay Rights Law—Issue 3 Could Reach Court Within a Week*, CINCINNATI POST, Nov. 3, 1993, at 1A.

[75] *See* Cincinnati's Issue 3, which proposed the following amendment to the City Charter:

> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.

Quoted in Equality Found. of Greater Cincinnati Inc. v. City of Cincinnati, 860 F. Supp. 417, 422 (S.D. Ohio (1994)).

[76] 116 S. Ct. 1620, 1629 (1996).

a 6th Circuit decision upholding the constitutionality of the Cincinnati ordinance, citing *Romer*.[77] Nevertheless, when reconsidering the case on remand, the 6th Circuit once again found the ordinance constitutional,[78] Apparently, even Supreme Court precedents are not sufficient to stem the tide of anti-gay legislation.

The events in Maine also highlight the fact that moderate Republicans have not adequately balanced the more extreme elements of their party. An anti-discrimination statute, passed by the legislature and publicly endorsed by the Governor of Maine, fell in a special election with only 30% voter participation.[79] A moderate senator, who had been a proponent of gay rights, chose to abandon her gay-friendly position in the primaries because only the anti-gay voices could be heard. Senator Collins's predicament demonstrates the effect of an unchecked, ultra-conservative party leadership. Collins admitted that "primaries tend to attract ideological members of the party, so the [voters] who are determining the nominees in the Republican Party are more conservative,"[80] yet claimed that Maine was an exception to this rule. However, this assertion is belied by the extent to which Collins has needed to apologize for and modify her position on gay rights.

The Log Cabin Republicans ("LCR"), in particular, have shirked their responsibility to gay men, lesbians, bisexuals, and their allies by claiming greater success within the Republican party than actually has occurred. Congressman Frank laments the fact that the organization tells Senators and Representatives "to vote Republican before voting pro-gay" and continues "to reward Republicans, even while they are homophobic."[81] In particular, Frank characterizes LCR's endorsement of Bob Dole in the 1996 presidential campaign, even after he returned their money, as "degrading."[82] Executive Director Rich Tafel insists that the success of his organization in raising money for Republicans has "earned the Log Cabin Republicans a greater share of trust within the GOP."[83] Yet the homophobic backlash against Susan Collins in Maine undermines Tafel's bold assertions of progress.

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[77] Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 116 S. Ct. 2519 (1996).

[78] Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997).

[79] Bonin, *supra* note 47.

[80] Campbell, *supra* note 56.

[81] Frank, *supra* note 21.

[82] *Id.*

[83] Shin, *supra* note 16.

Two years ago, the *Portland Press Herald* declared that "the U.S. Senate should take its cue from Portland, Maine, when it considers the Employment Non-Discrimination Act."[84] The Senate nearly performed its role perfectly, falling only one vote short of passing ENDA. The question is whether the Senate once again will take its cue from Maine, or whether the defeat in Maine can be contained as a special-election anomaly. The financial and (real or perceived) societal power of the conservative elements in the Republican Party probably will succeed in disciplining Republicans who might otherwise dare to support ENDA. Mr. Studds, however, is not totally discouraged:

> This is the last major chapter in the history of civil rights in this country. The gay civil rights movement is still in its infancy. By any date that you use to mark the beginning of the movement—we are still very young. Things have happened very quickly. Compare our progress to the amount of time it took between the Emancipation Proclamation and the Civil Rights Act of 1964.[85]

Mr. Frank shares this optimism, in part because Minority Whip Richard Gephardt (D-Mo.) has assured him that ENDA will be high on the agenda once the Democrats retake the House.[86]

Yet, why should it take a change in the control of Congress? Mainstream polls consistently have shown that the American people oppose discrimination against gay men and lesbians in the workplace. In June 1996, a Newsweek poll found that 84% of Americans support the principles embodied in ENDA.[87] A year later, Newsweek reported the level of support for equal job opportunity for gay men and lesbians remained at 84%, and that support for nondiscrimination in housing was at an equally impressive 80%.[88] An April 1997 poll conducted by the Tarrance Group and Lake Sosin Snell & Associates found that 68% of the 1000 voters it surveyed supported ENDA.[89] Frank insists that the

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[84] *End Discrimination in the Workplace: Sexual Orientation Should Have Nothing to Do with Job Security*, PORTLAND PRESS HERALD, Sept. 10, 1996, at 6A.

[85] Studds, *supra* note 22.

[86] Frank, *supra* note 21.

[87] David A. Kaplan & Daniel Klaidman, *A Battle, Not the War*, NEWSWEEK, June 3, 1996, at 24–25.

[88] *See* Tom Morganthau, *Baptists vs. Mickey: Why the Boycott Against Disney Faces Steep Odds*, NEWSWEEK, June 30, 1997, at 51. *But see* Linda V. Mapes, *GOP Agenda Stalls in Olympia—Politics as Usual Prevails*, SEATTLE TIMES, Mar. 15, 1998, at B1 ("Lawmakers heard the thunder of an overwhelming, 60-40 rejection of a gay-employment-rights initiative at the polls last November.").

[89] *See Hearings*, *supra* note 19, at 53 n.76 (statement of Chai Feldblum).

Log Cabin Republicans are the ones making ENDA a partisan issue—"Are we supposed to tell Democrats to vote no?"[90] Who is the Republican Party claiming to represent?

It is time for moderate Republicans, gay and straight, to speak up and give a voice back to those within the GOP who do not espouse the fundamentalist politics of the extreme conservative elements of the party. They have an affirmative responsibility to the American public, and in particular to their constituents, to counter the homophobia within their party, and start defending the principles of hard work and fair play embraced by the American people. Supporting the ENDA would be the first step in reclaiming the Grand Old Party.

—*Sharon M. McGowan**

[90] Frank, *supra* note 21.

* The author would like to thank Mary Bonauto for her helpful comments on an earlier draft of this Recent Development.

THE HUMAN CLONING PROHIBITION ACT: DID CONGRESS GO TOO FAR?

Human cloning is a prospect no longer left to the fantastic realm of science fiction novels; rather, it is a modern possibility. In 1997, embryologists in Scotland cloned the first mammal, a sheep named Dolly.[1] Shortly thereafter, scientists in the United States cloned a set of monkeys.[2] These scientific advancements and the ethical dilemmas they pose quickly grabbed the attention of the President, Congress, and the American public. Somatic cell nuclear transfer,[3] the process used to clone Dolly, is a complex procedure that raises several ethical concerns. In its desire to allay anxieties raised by human cloning, Congress proposed the Human Cloning Prohibition Act (S. 1601, or the "Bill").[4]

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[1] *See* Katheleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 195 (1997).

[2] *See id.*

[3] In somatic cell nuclear transfer:

> [G]enetic material is isolated from cells taken from a donor. This genetic material is then introduced into the nucleus of an egg/ovum whose own nucleic genetic material has been destroyed, so as to produce an egg/ovum that contains a full set of genetic material identical to the nucleic genetic material of the donor. Through the stimulation of that egg/ovum, it is induced to behave like a fertilized egg and it then starts the process of cellular division that leads it to behave as if it is a newly fertilized egg with genetic materials from a mother and a father. It divides and reproduces, and when implanted into the uterus of a gestational mother, the zygote will grow and develop into a fully formed fetus that will eventually be born from the uterus of its gestational mother.

Michael Broyde, *Cloning People: A Jewish Law Analysis of the Issues*, 30 CONN. L. REV. 503, 510 (1998).

[4] S. 1601, 105th Cong. (1998). The Human Cloning Prohibition Act provides, in relevant part, the following:

> (a) IN GENERAL—Title 18, United States Code, is amended by inserting after chapter 15, the following:
> CHAPTER 16—CLONING
> Sec. 301. Prohibition on cloning.
> (a) IN GENERAL—It shall be unlawful for any person or entity, public or private, in or affecting interstate commerce, to use human somatic cell nuclear transfer technology.
> (c) PENALTIES—
> (1) IN GENERAL—Any person or entity who is convicted of violating any provision of this section shall be fined according to the provisions of this title or sentenced to up to 10 years in prison, or both.
> (2) CIVIL PENALTY—Any person or entity who is convicted of violating any provision of this section shall be subject to, in the case of a violation that involves the derivation of a pecuniary gain, a civil penalty of not more than an amount equal to the amount of the gross gain multiplied by 2.
> (d) DEFINITION—The term 'human somatic cell nuclear transfer technology' means taking the nuclear material of a human somatic cell and incorporating it into an oocyte from which the nucleus has been removed or rendered inert and producing an embryo (including a preimplantation embryo).

Unfortunately, in their haste to pass federal legislation, the Bill's drafters ignored important procedural safeguards, employed vague statutory language, and created a bill with significantly adverse implications. After exploring the ethical dilemmas associated with human cloning, this Recent Development critiques S. 1601 and concludes that Congress should craft more suitable legislation.

One of the ethical concerns prompting anti-cloning legislation is that human individuality may be undermined if parents can custom order the traits and characteristics of their children. President Clinton fears that human cloning "could lead to misguided and malevolent attempts to select certain traits, even to create certain kinds of children—to make children objects instead of cherished individuals."[5] Commentators arguing for a ban on human cloning have explored this fear of a loss of individuality and the coinciding commodification of children. One critic of cloning, for example, posits that there is a slippery slope that begins with enabling parents to discover major genetic anomalies such as Down's Syndrome and "ends with encouraging parents to choose the sex, IQ, coloring, and athletic propensities of their offspring."[6] Because it benefits from diversity, society rightly is concerned with activities, such as cloning, that may undermine that pluralistic virtue.

Another ethically questionable possibility is the prospect of cloning a human solely for the purpose of harvesting organs.[7] One potential scenario would be parents cloning their child in need of a kidney transplant in order to guarantee that the ill child's body would not reject a donated organ. Not only might society be troubled by this possibility, but the cloned child also may suffer psychologically when she realizes that she was born not because her parents wanted another child, but because they needed a kidney. Underlying this concern is the moral belief that children should be created for who they will be as individuals, and not for providing parents with spare parts.

The possibility of cloning a human being raises ethical concerns related not only to the product generated thereby, but also to the procedure itself. Prior to the successful birth of Dolly,

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[5] Christopher Wills, *A Sheep in Sheep's Clothing*, DISCOVERY, Jan. 1998, at 22.

[6] Dena S. Davis, *What's Wrong with Cloning?*, 38 JURIMETRICS J. 83, 88 (1997).

[7] *See* George J. Annas, *Human Cloning: Should the United States Legislate Against It? Yes: Individual Dignity Demands Nothing Less*, A.B.A. J., May 1997, at 80 ("Nor, of course, should one have an 'extra' child for organs or other spare parts.").

scientists failed at their cloning attempt over 200 times.[8] Therefore, "the technical obstacles to cloning create ethical ones: one reason not to try to clone a human now is that the job would most likely be botched."[9] According to Dr. Ian Wilmut, Dolly's creator, "In previous work with cells from embryos, three out of five lambs died soon after birth and showed developmental abnormalities. Similar experiments with humans would be totally unacceptable."[10] Attempting to clone a child would be a premature experiment that would expose the fetus, and subsequently the child, to an inappropriate level of risk. This in itself might be sufficient to justify a prohibition on human cloning, at least at this stage of scientific and technological development. These ethical concerns provide a compelling basis for government action.

In 1997, within days of the announcement of Dolly's successful birth, President Clinton instituted a ban on federal funding of human cloning research.[11] President Clinton further ordered the National Bioethics Advisory Commission ("NBAC") to report on whether the United States should either regulate human cloning or completely ban it with laws similar to those passed in Belgium, Britain, Denmark, Germany, the Netherlands, and Spain.[12] Soon thereafter, Congress attempted to pass federal legislation.

The Bill, as proposed by Senators Christopher Bond (R-Mo.), Bill Frist (R-Tenn.), and Trent Lott (R-Miss.), prohibits "any person or entity . . . from using human somatic cell transfer technology and from importing an embryo produced through such technology."[13] The Bill sanctions violators with up to ten years in prison, a fine of up to twice the pecuniary gain achieved by violating the ban, or both.[14] Senator Lott first introduced S. 1601 on February 3, 1998.[15] Instead of sending it to the Senate Judiciary Committee—the normal procedure for legislation that imposes new criminal penalties—the Bill's proponents pushed for a vote to close debate on February 11, 1998.[16] This motion

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[8] *See* Wills, *supra* note 5, at 22.
[9] *Id.* at 23.
[10] *Id.*
[11] *See* 143 CONG. REC. E607 (statement of Honorable Lee H. Hamilton) (1997).
[12] *See* Sharon Begley, *Little Lamb, Who Made Thee?*, NEWSWEEK, Mar. 10, 1997, at 52.
[13] S. 1601, *supra* note 4.
[14] *See* S. 1601, *supra* note 4.
[15] *See* 144 CONG. REC. S330 (daily ed. Feb. 3, 1998).
[16] *See* 144 CONG. REC. D82 (daily ed. Feb. 11, 1998).

failed, however, by a 42-54 vote.[17] As a result, further action on the Bill has been at least temporarily delayed. Although it is commendable that Congress is attempting to address this complex issue quickly, a substantial delay may be in the country's best interest given that the Bill's repercussions are not yet fully understood.

Congress should have held hearings with experts in science, medicine, and bioethics to develop a comprehensive approach to the issue of cloning. Unfortunately, proponents of S. 1601 attempted to rush it through Congress without properly assigning it to a committee for hearings. In fact, proponents of the Bill brought a motion to close debate when the legislation was only eight days old. Chicago physicist Richard Seed's announcement of his intention to clone children for infertile couples probably induced members of Congress imprudently to hasten efforts to ban human cloning.[18] According to Senator Frist, Congress needed to pass the Bill expediently to stop scientists like Dr. Seed "dead in their tracks."[19] Dr. Seed's threats were not a valid reason for foregoing hearings because it is doubtful that he currently possesses the necessary cloning technology. Even if he does, federal legislation will not stop his research, for he could conduct his experiments abroad.[20] In short, Dr. Seed's threat was not credible. Representative Bill Luther (D-Minn.), along with other members of Congress, justifiably worries about rushing bills through the legislative process in reaction to an individual with questionable credibility.[21] Instead of reacting to the short-term threats of an unreliable scientist, Congress should have arranged hearings to consider the long-term effects of human cloning legislation on the mainstream scientific/medical communities, and society at large.

A potentially legitimate explanation for Congress's haste is the public's negative opinion of cloning. In a *Time*/CNN survey, 93% of individuals disapproved of human cloning.[22] While con-

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[17] *See id.*

[18] *See* Helen Dewar & Rick Weiss, *Senate Blocks GOP Drive to Quickly Ban Human Cloning*, WASH. POST, Feb. 12, 1998, at A12.

[19] 144 CONG. REC. S599, S602 (daily ed. Feb. 11, 1998) (statement of Sen. Frist).

[20] *See* Sharon Schmickle, *Vote in Senate Delays Action to Ban Human Cloning*, STAR TRIB. (Minneapolis-St. Paul), Feb. 12, 1998, at 5A.

[21] *Id.* Representative Luther asserted, "It is important that we deal with cloning, but I think it has to be done very thoughtfully, addressing legitimate concerns while not impeding scientific development." *Id.*

[22] *See* Tom Brazaitis, *Amid the Cloning Debate, We'll Repeat Ourselves*, PLAIN DEALER (Cleveland), Mar. 9, 1997, at 3E.

gressional responsiveness to public opinion is commendable, in this situation, legislative action is not immediately necessary. The fact that the Food and Drug Administration ("FDA") has claimed jurisdiction over human cloning and has promised to prevent any attempt to clone a human being makes the need to enact legislation less urgent.[23] Furthermore, private professional organizations representing more than 64,000 scientists have established a self-imposed, five-year moratorium on human cloning.[24] The public check by the FDA and the private check by the scientific community diminish the need for Congress hastily to implement a criminal deterrent on human cloning. Congress should take this opportunity to deliberate further on the issue and craft legislation that more clearly delineates acceptable and unacceptable areas of research.

As a result of its refusal to hold hearings, Congress drafted a bill that, if enacted, would chill legitimate research due both to its vague definition of the technique at issue and its severe criminal sanctions.[25] By criminalizing research in somatic cell nuclear transfer, the Bill might foreclose medical treatments yet to be discovered. The reason for this is that, as written, S. 1601 "is not focused on the production of a cloned human being but is instead focused on closing down an entire line of human genetic research and research into the understanding of human cells."[26] The technique:

> [I]s at the centerpiece of a whole bunch of genetic research that relates to how do human genes work, how do the genes work with the cell machinery to produce disease . . . and so forth, all of which is essential to understanding both human genetics and how congenital abnormalities are produced.[27]

Proponents of the Bill discount this argument because they believe that the human embryo that results from this procedure is a human being and, therefore, that the research is rightly outlawed. However, this concern should be balanced against the

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[23] *See* 144 CONG. REC. S561 (daily ed. Feb. 10, 1998) (statement of Sen. Kennedy (D-Mass.)).

[24] *See* 144 CONG. REC. S788 (daily ed. Feb. 12, 1998) (statement of Sen. Dorgan (D-N.D.)).

[25] *See* Schmickle, *supra* note 20, at 5A. Dr. Steven Miles, of the University of Minnesota's Center for Bioethics, said "[T]he bill would inhibit research, partly because it doesn't clearly define the technique at issue and scientists could face 10 years in prison for inadvertently violating it." *Id.*

[26] *Id.*

[27] *Id.*

potential benefit that society could receive from cloning research. Congress should hold hearings in order to weigh these competing concerns and develop clearer definitions.

Senators Bond and Frist assert that the Bill's only aim is permanently to outlaw the creation of human embryos with the technique that the Scottish scientists used to make Dolly.[28] One reason that an agreement is so difficult is that the two sides are working from different conceptions of when human life begins. Proponents of S. 1601, including pro-life groups, believe that human life starts when an egg is fertilized. They would ban any research that results in a fertilized egg, regardless of the intention later to implant the egg and create a child. The majority of the Bill's opponents, on the other hand, believe that a human life does not begin until some point after implantation of the fertilized egg in a viable womb. Thus, they would allow research that results in a fertilized egg, so long as that egg is not implanted. Although fundamental religious and moral beliefs animate this divide, the two sides might reach an agreement if they were to devote more time to fully comprehending the Bill's ramifications.

Opponents of the Bill, including Senators Tom Harkin (D-Iowa) and Byron Dorgan (D-N.D.), agree that Congress should place restrictions on human cloning, but believe that the Bill strokes too broadly.[29] Under one possible interpretation, the Bill not only would prevent the cloning of a human child, but also would hinder scientific attempts to generate stem cells that could treat a wide variety of disabling and/or deadly diseases.[30] If Congress were to enact the Bill as written, Senator Harkin, among others, fears that Congress would effectively ban (1) blood cell therapies for diseases such as leukemia and sickle cell anemia, and (2) nerve cell therapies for Alzheimer's disease, Parkinson's disease, Lou Gehrig's disease, and multiple sclerosis.[31] Critics claim that S. 1601 effectively would ban cells for use in procedures that treat up to 5000 different genetic diseases.[32] The thought of halting future genetic research gives rise to a whole

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[28] *See id.*

[29] *See* 144 CONG. REC. S788 (daily ed. Feb. 12, 1998) (statement of Sen. Dorgan); 144 CONG. REC. S507 (daily ed. Feb. 9, 1998) (statement of Sen. Harkin).

[30] *See* 144 CONG. REC. S507, S508 (daily ed. Feb. 9, 1998) (statement of Sen. Harkin).

[31] *See id.*

[32] *See id.*

new set of ethical considerations.[33] Given the potential benefit of such research, Congress ought to explore alternatives to S. 1601.

Congress already has been presented with other possible options. For example, NBAC recommended that:

> Federal legislation should be enacted to prohibit anyone from attempting, whether in a research or clinical setting, to create a child through somatic cell nuclear transfer cloning. It is critical, however, that such legislation include a sunset clause to ensure that Congress will review the issue after a specified time period (three to five years) in order to decide whether the prohibition continues to be needed.[34]

NBAC suggested further that Congress appoint an appropriate oversight committee to "evaluate and report on the current status of somatic cell nuclear transfer technology and on the ethical and social issues that its potential use to create human beings would raise in light of public understandings at that time."[35] Essentially, NBAC focused its legislative recommendations on the inclusion of a "sunset clause" and the prevention of cloning a human child.

In focusing legislation on preventing the cloning of a human child, Congress should be careful not to restrict research seeking medical and agricultural developments.[36] To clone a human being, scientists must implant the fertilized egg created from the cloning process into the uterus of a gestational mother. Once there, the egg could grow and develop into a fully formed fetus that could be born.[37] Therefore, legislation banning cloning should focus on the implantation aspect of the process so as sufficiently to address the ethical concerns of cloning a human being, without cutting off important avenues of scientific inquiry.

This proposal, however, may not satisfy the proponents of S. 1601 because one of the key areas of contention is what constitutes a human being. Pro-life groups, including the National Right to Life Committee and the Christian Coalition, have en-

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[33] *See* J. Madeleine Nash, *The Case for Cloning—The Benefits of this Bold Technique Outweigh the Risks, and the Danger is Not What You Think*, TIME, Feb. 9, 1998, at 81 ("'Given its potential benefit,' says Dr. Robert Winston, a fertility expert at London's Hammersmith Hospital, 'I would argue that it would be unethical not to continue with this line of research.'").

[34] *Cloning Human Beings: Report and Recommendations of the National Bioethics Advisory Commission*, 38 JURIMETRICS J. 3, 6 (1997).

[35] *Id.* at 7.

[36] *See The Clone Age*, A.B.A. J., July 1997, at 68, 69.

[37] *See* Broyde, *supra* note 3, at 510.

dorsed the Bill primarily because it prohibits the creation of a human embryo through somatic cell nuclear transfer, regardless of whether it is implanted and has the potential to become a human being.[38] Their more conservative approach defines the beginning of life as the creation of an embryo, whereas the scientific community regards the embryo's implantation into the womb as the defining moment of human life.[39] When the scientific community asserts that it has no intention of cloning a human being, it is talking about something substantially different than are the supporters of S. 1601. Hence, scientists' promises not to clone a human being have not allayed the concerns of the Bill's proponents.

One bill currently on the Senate calendar that allows the creation of an embryo through cloning technology—provided that it is not implanted in a womb—is the Prohibition of Cloning of Human Beings Act (S. 1611) sponsored by Senators Diane Feinstein (D-Cal.) and Ted Kennedy (D-Mass.).[40] The Feinstein-

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[38] *See* Schmickle, *supra* note 20, at 5A.

[39] *See* Ruth Larson, *Scientists Oppose Ban on Cloning Humans*, WASH. TIMES, Feb. 3, 1998, at A4.

[40] S. 1611, 105th Cong. (1998). The Prohibition of Cloning of Human Beings Act provides, in relevant part, as follows:

(a) DEFINITIONS—In this section:

(5) SOMATIC CELL NUCLEAR TRANSFER—The term 'somatic cell nuclear transfer' means transferring the nucleus of a somatic cell of an existing or deceased human child or adult into an oocyte from which the nucleus or all chromosomes have been or will be removed or rendered inert.

(b) PROHIBITIONS—It shall be unlawful for any person or other legal entity, public or private—

(1) to implant or attempt to implant the product of somatic cell nuclear transfer into a woman's uterus; . . .

(c) PROTECTED RESEARCH AND PRACTICES—Nothing in this section shall be construed to restrict areas of biomedical and agricultural research or practices not expressly prohibited in this section, including research or practices that involve the use of—

(1) somatic cell nuclear transfer or other cloning technologies to clone molecules, DNA, cells, and tissues;

(2) mitochondrial, cytoplasmic or gene therapy; . . .

(d) NATIONAL BIOETHICS ADVISORY COMMISSION REPORT—

(1) IN GENERAL—Not later than 4 1/2 years, and subsequently, 9 1/2 years, after the date of enactment of this section, the National Bioethics Advisory Commission shall prepare and submit to the President and Congress a report concerning—

(C) the advisability of continuing the prohibition established under this section.

(e) PENALTIES—

(1) IN GENERAL—Any person who intentionally violates the provisions of subsection (b) shall be fined the greater of $1,000,000 or 3 times the gross pecuniary gain or loss resulting from the violation.

Kennedy bill prohibits the use of somatic cell nuclear transfer to create a human being but allows embryo cloning for research into infertility and other problems.[41] Two other important differences exist between S. 1601 and S. 1611. The drafters of S. 1611 incorporated NBAC's recommended sunset clause.[42] Also, S. 1611 does not threaten violators with possible imprisonment; it imposes only monetary fines.[43] The Feinstein-Kennedy bill probably will satisfy the scientific community because it allows the use of somatic cell transfer technology so long as the completed product is not implanted into a womb. However, the pro-life constituency, which favored S. 1601, probably will not be satisfied because S. 1611 does not codify their belief that life begins upon creation of an embryo.

While Congress has yet to pass either S. 1601 or S. 1611, these bills provide a solid foundation for continued debate. Congress should take seriously its role as a deliberative body and not enact any anti-cloning legislation until its ramifications are more fully understood. Before it passes a new law with such far-reaching impacts, Congress must reach some sort of consensus on what constitutes the beginning of human life. So long as this basic definition is in dispute, Congress will have difficulty achieving its goal of preventing "rogue" scientists from cloning a human being.

—Jennifer Cannon
Michelle Haas

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[41] *See* Scmickle, *supra* note 20, at 5A.
[42] *See* S. 1611, *supra* note 40.
[43] *Id.*