Standard Errors: How Budget Rules Distort Lawmaking

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"The mark of a civilized human is the capacity to read a column of numbers and weep."

—attributed to Bertrand Russell[1]

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1. DAVID G. MYERS, THE AMERICAN PARADOX: SPIRITUAL HUNGER IN AN AGE OF PLENTY 6 (2000), *available at* http://www.davidmyers.org/Brix?pageID=71.

INTRODUCTION

Without a background in the federal budget process, one might find many recent legislative choices truly inexplicable. Why, for example, would the Congress enact a Medicare drug plan that provides to the same beneficiary, sequentially in the same year, first-dollar coverage, then no coverage, and then full coverage?[2] Not for health or medical reasons. Why would the Congress enact a tax bill that starts and stops tax rates multiple times within the same law and provides for the repeal of a provision in the first year after it is to be fully phased-in?[3] Not for economic or business reasons.

Unseen forces are at work. Attempting to understand these laws without understanding the internal budget processes of the Congress will be as confusing as attempting psychoanalysis without a theory of the unconscious or attempting astronomy without a theory of gravity. Only with an appreciation of the budget rules that the Congress has imposed on itself can an observer begin to see any basis for many of its choices.

Unfortunately, the "budget process" is both arcane and under-appreciated. Since its initial enactment in 1974, its basic accounting measures have been amended to steer budgets to center stage and to reflect a public choice theory skepticism of government spending and deficits. The procedures are not widely known and even less evaluated. But an explication of the budget process can

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2. This is the so-called "doughnut hole" of the new Medicare prescription drug benefit. *See* Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066; Christopher Lee & Susan Devine, *Millions of Seniors Facing Medicare 'Doughnut Hole,'* WASH. POST, Sept. 25, 2006, at A3.

3. Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752.

demonstrate that it creates a systemic skewing of congressional choices in legislation that has gone largely unnoted. The policies that the Congress selects are directly dependent on the manner in which the questions to be voted on are framed, and the budget process has had much to do with this framing—and not in an even-handed way. To a large extent, many legislative decisions are pre-ordained by their mode of congressional consideration.[4] With apologies to Marshall McLuhan, the process is the policy.[5]

Unquestionably, budgetary aspects of a policy are a legitimate concern. Anyone who cares about individual entitlements to Social Security, Medicare, and Medicaid and about the adequacy of their benefits must also be interested in the costs and funding of these programs. Moreover, anyone who looks at the increasing size of the debt and the government resources that go to service it should be very, very troubled.[6] But the budgetary structure and tools as they affect lawmaking are largely unanalyzed. Until they are widely appreciated, they may often continue to be random, inefficient, unrepresentative, and even deceptive. Review, critique, and change are overdue.

Such review is particularly needed now. After a period of budget anarchy, the Congress has recently renewed its former budget rules (and invented some new ones) in order to make budgets again central to its decision-making process.[7] As

4. Garrett says that "the structure that lawmakers adopt will affect both the shape and the size of the budget." Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387, 389–90 (1998). That statement, while interesting and true, does not go far enough. As discussed below, the substance of questions that are many levels of specificity below the "shape and size of the budget" are also decided by the procedural structures chosen for the budget.

5. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1965) ("In a culture like ours, long accustomed to splitting and dividing all things as a means of control, it is sometimes a bit of a shock to be reminded that, in operational and practical fact, the medium is the message.").

6. For a projection that spending on the interest of the national debt will outpace spending on Social Security in 2030 (under a high spending, low revenue scenario), see CONG. BUDGET OFFICE, THE LONG-TERM BUDGET OUTLOOK 10, 12 (2005), *available at* http://www.cbo.gov/ftpdocs/69xx/doc6982/12-15-LongTermOutlook.pdf. The Social Security Trust Fund is projected to be exhausted by the year 2042. *See* THE BD. OF TRS. OF THE FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TRUST FUNDS, 2006 ANNUAL REPORT, H.R. DOC. NO. 109-103, at 2 (2006), *available at* http://www.ssa.gov/OACT/TR/TR06/tr06.pdf.

7. *See* H.R. Res. 6, 110th Cong. § 405 (2007), *available at* http://www.rules.house.gov/110/text/110_Hres6.pdf; 153 CONG. REC. S3308-3312 (daily ed. Mar. 20, 2007) (statement of Sen. Dorgan) (describing the inclusion of budget process provisions in the Rules of the Senate for the 110th Congress); S. Con. Res. 21, 110th Cong. Title II (2007); JAMES HORNEY, CTR. BUDGET & POLICY PRIORITIES, THE SENATE BUDGET COMMITTEE'S BUDGET PLAN: A BRIEF ANALYSIS (2007), *available at* http://www.cbpp.org/3-16-07bud.pdf; *see also* 153 CONG. REC. H14–15 (daily ed. Jan. 4, 2007) (statement of Rep. Spratt) (describing the inclusion of budget process provisions in the Rules of the House of Representatives for the 110th Congress); RICHARD KOGAN, CTR. ON BUDGET & POLICY PRIORITIES, THE NEW PAY-AS-YOU-GO RULE IN THE HOUSE OF REPRESENTATIVES 1 & n.1 (2007), *available at* http://www.cbpp.org/1-12-07bud.pdf. And what a difference a year makes. *See* discussion *infra* notes 126–32 (describing the changes in budget rules between 2006 and 2007); c*f.* S. REP. NO. 109-283 (2006) (accompanying The Stop Over Spending Act of 2006, S. 3521, 109th Cong. (2006)); JOEL FRIEDMAN ET AL., CTR. ON BUDGET & POLICY PRIORITIES, A PAY-AS-YOU GO RULE THAT WOULD EXEMPT ALL TAX CUTS WOULD MAKE A MOCKERY OF EFFORTS TO RESTORE FISCAL DISCIPLINE (2006), *available at* http://www.cbpp.org/3-20-06bud.pdf; ROBERT GREENSTEIN, JAMES HORNEY & RICHARD KOGAN, CTR. ON BUDGET

this era begins, we should develop an appreciation of what distortions the old rules have brought us and be alert to what we might anticipate from new ones.

We should also consider additional structures to "counter-balance" both the skewing that results from the current rules and the sheer centrality of the budget in policymaking. Simple realignments of ends and means would suffice in some instances, such as using budget structures to keep statutory promises rather than undermine them. But in a much more fundamental way, the Congress should also review its simplistic focus on the restraint of monetary deficits alone. The Congress should supply itself with routine measures of value, not in lieu of cost but in addition to it. With such measures as, for example, the reduction of morbidity and mortality, the Congress could know not only the price but also the worth of its legislative changes.

Moreover, just as the budgetary "pay-as-you-go" (PAYGO) requirement restrains the creation of new fiscal deficits, a parallel PAYGO requirement of non-monetary measures could restrain the Congress from making the quality of life of the Nation worse. In the long run, future generations may be equally or better served by the creation of budget-like restraints on the intergenerational transfer of non-monetary deficits, such as increased disability, diminished public health, or permanent environmental damage. The procedural structures that have shaped Congressional financial decisions may offer help in solving these problems, too.

This Article is laid out in four parts. Part I provides a brief historical background of the congressional budget process. Part II consists of an explanation of four non-obvious concepts essential to understanding the basics of the once-and-future budget process. Part III is a series of observations of some serious effects of the process on lawmaking. Part IV lays out suggestions for "counter-balancing" the budget process. In all Parts, I have chosen illustrative examples generally from health policy simply because it is the substantive area of the law that I know best, but all areas of the law—from tax to criminal justice to education—have been affected by budget process at some point.

It may also be appropriate at this point to say what this Article is not. First, it is not a discussion of the intentional activities that are generally referred to as "gimmicks."[8] It is not an Article about whether to balance the federal budget or about the good or evil that deficit-spending can do for employment, inflation, or the business cycle. Finally, I do not take sides in the discussions about whether

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& POLICY PRIORITIES, GREGG BILL WOULD MAKE FAR-REACHING CHANGES IN BUDGET RULES 1 (2006), *available at* http://www.cbpp.org/6-19-06bud.pdf (disputing the claim that the bill offered "commonsense and fiscally responsible solutions" because it would cause cuts in domestic programs while protecting tax cuts).

8. For example, if the Congress postpones an expenditure from the last day of one year to the first day of the next one, it may appear to achieve "savings" in the earlier year. Compare this with section 5203 of the so-called Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, 47–48 (2006), postponing payment of all Medicare claims from September 22 through September 30, 2006, until October 2, 2006, thus "saving" $5.2 billion in fiscal year 2006. *See* Associated Press, *Medicare to Hold Nine Days' Worth of Providers' Pay*, WASH. TIMES, Aug. 25, 2006, at A10.

statutory structures can balance budgets or whether a constitutional amendment would be more successful.

Whatever the outcome of these theoretical debates on budget goals (and their political parallels), the tools necessary to impose abstract limits on budgets do themselves produce important side-effects in lawmaking: They subordinate policy and lawmaking to numbers in a variety of unexpected—and sometimes unacceptable—ways. That is what this Article is about.

I. A BRIEF HISTORY OF CONGRESSIONAL BUDGETING[9]

For much of American history, a balanced federal budget has been assumed to be the norm, violated only in times of war and emergency.[10] Even when war and emergency forced the government to create a deficit, it was the norm to repay borrowed funds after the problem had ended.[11] The founding father of public choice theory,[12] James M. Buchanan, goes so far as to characterize this norm as a "fiscal constitution"[13] that he maintains governed government from the time of Adam Smith to that of John Maynard Keynes.[14] But since World War II, this norm has been replaced by a general pattern (with some notable exceptions) of government spending in excess of government revenue and thus the creation of annual deficits and an ongoing cumulative debt.[15]

Buchanan blames this squarely on the Keynesian theories that transmogrified economists' views of deficit-spending from a sometimes-necessary evil to a

9. For an introduction to congressional budgeting activities from the founding of the Nation through the Johnson Administration, see Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 LAW & CONTEMP. PROBS. 135 (1972). For a more comprehensive and up to date history, see AARON B. WILDAVSKY & NAOMI CAIDEN, THE NEW POLITICS OF THE BUDGETARY PROCESS (5th ed. 2003).

10. *See* Robert Sahr, National Debt in Billions of Current and Constant (2002) Dollars and as Percent of GDP, 1792 to 2002, http://oregonstate.edu/Dept/pol_sci/fac/sahr/ntdt.htm (last visited Jan. 11, 2007).

11. *See id.*

12. "Public choice theory is a branch of economics that developed from the study of taxation and public spending. It emerged in the fifties and received widespread public attention in 1986, when James Buchanan, one of its two leading architects (the other was his colleague Gordon Tullock), was awarded the Nobel Prize in economics." Jane S. Shaw, *Public Choice Theory*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS ¶ 1, http://www.econlib.org/library/Enc/PublicChoiceTheory.html (last visited Jan. 11, 2007). "The term 'public choice' refers to a body of scholarship in economics and political science that tries to explain public policy as the outcome of rationally self-interested behavior." RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE 133 (2004).

13. "Before the Keynesian challenge, an effective 'fiscal constitution' did exist, even if this was not embodied in a written document. This 'constitution' included the precept for budget balance, and this rule served as an important constraint on the natural proclivities of politicians." JAMES M. BUCHANAN & RICHARD E. WAGNER, DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES (Academic Press 1977), *reprinted in* 8 THE COLLECTED WORKS OF JAMES M. BUCHANAN 32 (Liberty Fund 2000) [hereinafter DEMOCRACY IN DEFICIT], *available at* http://www.econlib.org/library/Buchanan/buchCv8c3.html. Buchanan also refers to it as the more colorful "Old Time Fiscal Religion." *Id.* at 10.

14. *Id.* at 12.

15. Sahr, *supra* note 10.

frequently-needed tool for good.[16] By 1972, Nixon is quoted as saying that "we are all Keynesians now,"[17] and deficits had become a semi-respectable way of government life.[18] This was compounded with what the public choice theorists identify as the tendency of consumers/voters to want to consume now and have someone else pay later and with the corollary tendency of self-interested politicians to help consumers do so by spending more than they tax.[19] This, Buchanan claims, amounts to a conclusive diagnosis of a flaw in democratic politics as a system, a structural fiscal imbalance that rationalizes and perpetuates itself.[20]

At the time that Buchanan was making his diagnosis, the formal Congressional budget process had barely begun. Prior to 1974, Congressional budgeting was something of an ad hoc activity. While the New Deal and the Great Society had created programs with long-term financial commitments from the federal government, most spending was done through annual appropriations laws, each of which had a relatively narrow focus (for example, defense in one bill, foreign affairs in another). A formal framework for considering revenues, spending, and relative priorities did not exist in the legislative branch.[21]

In the early 1970s, however, a constitutional showdown catalyzed a new budget law. Then-President Nixon asserted that he had the constitutional prerogative to refuse to spend appropriations that had been enacted into law.[22] The

16. Assigning the blame for deficits to Keynes is not a consensus view. For example, one economist has suggested that it was the establishment of long-term social insurance programs that "meant that budget balance became a more intricate affair," especially as time passed. E-mail from Sherry Glied, Professor & Chair of the Dep't of Health Policy & Mgmt., Mailman Sch. of Pub. Health, Columbia Univ., to Timothy M. Westmoreland, Visiting Professor of Law, Georgetown Univ. Law Ctr. (May 9, 2005) (on file with author).

17. David C. Barker & Stephanie T. Muraca, *"We're all Keynesians Now"?: Understanding Public Attitudes Toward the Federal Budget*, 31 AM. POL. RES. 485, 485 (2003) ("The first part of our title has been attributed to former president Richard Nixon, whose comment, to be fair, was a bit tongue in cheek—more a reflection of political reality as he saw it than an expression of commitment to progressive economic theory.").

18. It is, however, only "semi-respectable" because few want to acknowledge that it is done on purpose. *Cf. id.* at 491 ("Although . . . some might consider the outcome of the so-called Reagan Revolution to exemplify Keynesian theory, the mere mention of the name *Keynes* is enough to send many a Republican intellectual into a prolonged diatribe. Certainly, budget deficits to the contrary, Republican rhetoric maintains an allegiance to budgetary thrift.").

19. DEMOCRACY IN DEFICIT, *supra* note 13, at 190 ("Politicians naturally want to spend and to avoid taxing.").

20. The actual symptoms that concerned Buchanan seem mild now. "A two-year deficit of more than $100 billion" in fiscal years 1975–1976 appears quaint in the current era in which the government runs a higher deficit each month. *Id.* at 51. The acute manifestation of the problem only arrived with the record-setting peacetime deficits and debt of the Reagan years. *See* Sahr, *supra* note 10.

21. Note that such a framework was imposed on the annual executive branch budget proposals by the Congress fifty years earlier, but that the Congress continued its ad hoc response to the President's budget. *See* Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.).

22. In part, Nixon claimed this prerogative to keep the entire federal budget below the now modest level of $250 billion. It should also be noted that although he was the subject of the constitutional fight and although his impoundments were of a size and quality quite different than previous presidents,

Congress disagreed and passed legislation to delimit this authority, legislation that Nixon signed less than a month before resigning from office. In addition to these highly visible limitations on the President's authority to impound appropriated funds,[23] this law, the Congressional Budget and Impoundment Control Act of 1974,[24] (more commonly referred to simply as "the Budget Act"), provided the springboard for the creation of a deliberate and comprehensive Congressional budget process.[25]

At its outset, the Budget Act was a series of measures that were neutral about substantive areas of law and policy, but were expected to provide some transparency, order, and priority-setting to the Congress's actions regarding revenues and spending. Despite massive changes in federal funding since 1974, most of the basic elements of that law govern the process that is still used today. It specified a budget schedule for each fiscal year,[26] created a non-partisan budget review and analysis agency of the Congress (the Congressional Budget Office (CBO)),[27] and created standing committees on the budget in both the House and Senate.[28] It contained definitions, specifications, and accounting rules.[29] While conflict existed over some types of spending and over committee jurisdictions,[30] and while contemporary accounts made much of it,[31] the Budget Act was generally a bookkeeping measure that was impartial about specific subject matters or budget policy.

The public choice budget-balancers were unimpressed:

Nixon was not the first President to impound appropriated funds. *See* Wm. Bradford Middlekauff, *Twisting the President's Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure*, 100 YALE L.J. 209, 211 (1990) ("Presidential impoundment dates back at least to the administration of Thomas Jefferson.").

23. Impoundments like Nixon's are now illegal. The tools left to the President for dealing with already appropriated funds that he does not want to spend are deferrals and rescissions. Deferrals are actions that effectively withhold or delay the expenditure of budget within the fiscal year that are either to provide for contingencies, achieve certain savings, or specifically provided by law. 2 U.S.C. §§682(1), 684(b) (2000). Rescissions are permanent cancellations of budget authority for a given fiscal year. To go into effect, the rescission must be approved by the Congress within a prescribed forty-five-day period. *Id.* §683(b).

24. Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 and 31 U.S.C.).

25. For a contemporary view of the enactment of the Budget Act of 1974, see Allen Schick, *Budget Reform Legislation: Reorganizing Congressional Centers of Fiscal Power*, 11 HARV. J. ON LEGIS. 303 (1974). For an early review of its effects, see Louis Fisher, *Congressional Budget Reform: The First Two Years*, 14 HARV. J. ON LEGIS. 413 (1977).

26. *See* 2 U.S.C. §§ 631–32 (2000).

27. *Id.* §§ 601–11.

28. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§101–102, 88 Stat. 297, 299–302 (codified as amended in scattered sections of 2 and 31 U.S.C.).

29. *See* 2 U.S.C. § 622 (2000).

30. Conflict in the Congress was most notable about the rise of what was then known as "backdoor appropriations," a reference to funding outside of the appropriations process, most notably what is now generally regarded as "mandatory spending." *See* Fisher, *supra* note 25; Schick, *supra* note 25; *see also* discussion *infra* Part II.A.

31. DEMOCRACY IN DEFICIT, *supra* note 13, at 162 (quoting a *U.S. News and World Report* article describing the Budget Act as "a revolutionary budget reform").

> [T]here is nothing in the 1974 legislation, or in its subsequent institutional changes, that imposes a norm for relating the two sides of the fiscal account, nothing that acts as a putative replacement for budget balance in the old-time or pre-Keynesian fiscal constitution. After 1976, if the intentions of the Budget Reform Act are to be followed, Congress will be somewhat more explicit in the creation of budget deficits. Such explicitness may reduce somewhat the size of the deficits, although the possibility that deficits could become larger cannot be ruled out. Regardless of particular direction, however, it seems beyond the limits of plausibility to suggest that explicitness alone will literally transform the behavior of modern politicians.[32]

Their critique now seems prescient: By the early 1980s, tax reductions in tandem with spending increases created deficits that were—and remain—historic records for a non-wartime period.[33]

Subsequent changes to the budget process were not so impartial about fiscal policy and substantive program content.[34] The Gramm-Rudman-Hollings Act (GRH)[35] and the Budget Enforcement Act (BEA) of 1990[36] were overtly structured to reduce the annual deficit. They changed the primary goal of the budget process from one of neutral transparency about revenues and spending to one creating pre-commitments to legislative structures that limit deficits. These actions were undertaken to provide a counterweight to the perceived intrinsic predilection for legislators to spend now and ask others to pay later. The nature of the new structures and the special treatment they received under procedural rules also ensured that the budget would receive regular attention and become the framework for setting the legislative agenda.[37]

GRH had the simply stated goal of eliminating the annual deficit over a five-year period. Its method was direct: the law set a maximum deficit level that declined by twenty percent annually over five years, aiming toward a balanced budget. To enforce these levels, it also established a sequester (an automatic across-the-board cut in programs[38]) to make the projected deficit fit that tar-

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32. *Id.* at 181.

33. *See* Sahr, *supra* note 10 (measuring deficits in both inflation-adjusted dollars and as a percentage of GDP).

34. Garrett, *supra* note 4, at 409 ("At least since 1985 and the adoption of Gramm-Rudman-Hollings, many budget rules have instead been outcome oriented—the Congress has intended them to work to reduce the deficit by placing additional hurdles in the way of new spending programs.").

35. Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings), Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended in scattered sections of 2, 31 & 42 U.S.C.).

36. Pub. L. No. 101-508, §§ 13001–13501, 104 Stat. 1388-573 to -630 (codified as amended in scattered sections of 2, 15, 31 & 42 U.S.C.).

37. *See* discussion *infra* note 243 and accompanying text (discussing protection of budget legislation from the filibuster in the Senate); *cf.* JOEL FRIEDMAN & JAMES HORNEY, CONGRESS USING THE "RECONCILIATION" PROCESS AGAIN TO MAKE IT EASIER TO PASS DEFICIT-INCREASING TAX CUTS (2005), *available at* http://www.cbpp.org/3-14-05bud2.htm.

38. Note, however, the sequester was not evenhanded between raising new revenue or cutting spending: it included neither an automatic increase in general revenues nor, as Garrett notes, a comparable across-the-board cut in tax expenditures. Garrett, *supra* note 4, at 397, 400 n.43.

get.[39] It is startling how directly this structure is lifted from Buchanan's 1977 proposal,[40] albeit in statutory form rather than the constitutional amendment that he had strongly recommended.[41]

But in the late 1980s, neither politics nor the economy was accommodating, and these deficit targets proved hard to hit. The subsequent threatened sequester of as much as $100 billion proved so unsupportable that it resulted in the effective elimination of the binding deficit targets and in the eventual undoing of then-President George H.W. Bush's explicit pledge of "no new taxes." Faced with a sequester so large, he and the leaders of the Congress came together for a summit that resulted in legislation containing some spending cuts, some revenue increases, and a new means of controlling budgets.[42]

This new means made up the core of the BEA as enacted. The BEA moved the process's attention and limits away from the deficit and toward directly constraining the actions of the Congress itself. The BEA created pre-set limits on amounts that Congress could appropriate annually, as well as significant restraints on the Congress's ability to enact new spending commitments or new revenue reductions.[43] On top of the original framework of the 1974 Act, this is the shape of the budget process that has been in most recent use by the Congress and of most proposals to renew it. Those constraints (plus an extremely cooperative economy, political interest in deficit-reduction, and two tax increases) had effects: deficits declined, surpluses appeared, and there was even

39. GRH, as enacted, created a complex mechanism for a sequester that relied in large part on decisions of the Comptroller General for its execution. That engendered a significant constitutional debate about the separation of powers and was ultimately struck down. *See* Bowsher v. Synar, 478 U.S. 714, 734 (1986). The Office of Management and Budget (OMB) was later given the final responsibility to implement the sequestration of the necessary funds. The Balanced Budget and Emergency Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754; *see also* Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 595, 597–98 (1988).

40. *See* DEMOCRACY IN DEFICIT, *supra* note 13, at 187–89. The degree of book-to-statute parallelism is perhaps less surprising when one remembers that then-Senator Gramm is a former economics professor, schooled in public choice theory and, apparently, familiar with Buchanan's work. *See* John J. Pitney Jr., *Grand Gramm: Phil Gramm Retires*, NAT'L. REV. ONLINE, Sept. 5, 2001, http://www.nationalreview.com/comment/comment-pitney090501.shtml. Moreover, the Reagan Administration's OMB Director, James C. Miller, is also a public choice scholar and is credited with helping to pass the Gramm-Rudman-Hollings Act. *See* Shaw, *supra* note 12, ¶ 10.

41. Buchanan and others long argued that a constitutional amendment was necessary for success. *But cf.* Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1109 (arguing that an amendment was unlikely to succeed for the very reasons that public choice theorists used to criticize statutory efforts).

42. Had the senior President Bush been operating under the Congressional budget process that now governs his son's administration, he might never have been forced to renege on his pledge because the resulting structures no longer force sequesters on the basis of deficits. Other interesting contrasts on the budget treatment and associated foreign policy between the two wars in Iraq can also be made. *See* Christian M.L. Bonat, What a Difference a (Financial) Coalition Makes: A Budgetary Analysis of Desert Shield and Desert Storm (Mar. 30, 2003) (unpublished student paper, on file with author).

43. See discussion of caps on discretionary spending and of the Pay-As-You-Go requirements, *infra* Part II.

talk of retiring large parts of the cumulative debt.[44]

By the end of fiscal year 2002, most of the limits of the BEA had been allowed to expire altogether and, freed from any structural restraints, the President and the Congress cut taxes and increased spending aggressively.[45] These actions (plus a once-again uncooperative economy, little interest in deficit-reduction, and several tax reductions) have also had effects: surpluses have disappeared and deficits have climbed dramatically.[46]

Recently the Congress has reinstated and revised some of the basic structures of the BEA. Numerous changes were proposed, both technical and substantive. Consideration was given to altering the treatment of tax legislation, making tax reductions—whether across-the-board rate reductions or targeted tax breaks—procedurally much simpler than under the BEA. This proposal was not adopted.[47] As of this writing, implementation of the structures is only beginning.

II. THE BASICS OF THE CURRENT BUDGET PROCESS[48]

Without confounding the reader with details, of necessity I must lay out a few of the basic terms and boundaries of the process as it exists before looking at the effect of the process on legislation. There are, at a minimum, four essential concepts:

- Two—maybe three—kinds of money
- Baselines
- Scorekeeping
- Limits

A. TWO—MAYBE THREE—KINDS OF MONEY

The cosmology of the federal budget generally recognizes two types of money: discretionary spending and mandatory spending.[49] They are treated

44. S. REP. NO. 106-27, at 8, 10 (1999), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_reports&docid=f:sr027.106.pdf.

45. It must be said that the politicians of the 1990s endured an era of fiscal discipline only to produce a surplus that the politicians of the early 2000s gave away. Such a precedent of budgetary prisoners' dilemma may make it increasingly difficult for future politicians to find the will to discipline themselves. Indeed, one might conclude that public choice theory is not just descriptive of fiscally undisciplined politicians but also a strong cautionary tale for those who would consider being disciplined: the first President Bush was defeated after negotiating a deficit-reduction package, and President Clinton lost control of both Houses of Congress when he did so.

46. In terms of dollars, current deficits are at historic highs; in terms of percentages of the gross domestic product, the current deficits are still smaller than those of the 1980s and early 1990s. *Cf.* CONG. BUDGET OFFICE, *supra* note 6; Sahr, *supra* note 10.

47. *See* sources cited *supra* note 7.

48. For a clear and detailed discussion of the budget process through the end of the twentieth century, see the very helpful book, ALLEN SCHICK & FELIX LOSTRACCO, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS (rev. ed. 2000).

49. "Discretionary spending" is also commonly known as "appropriated spending." "Mandatory spending" is also commonly known as "direct spending."

differently in almost all respects, and they cannot easily be transmuted from one into the other. Sometimes tax spending is regarded as yet another kind of money, sometimes not.

As the name implies, discretionary spending is money that is allocated among programs at the discretion of the Congress. It generally takes the form of annual appropriations and, while the funding may sit in Treasury accounts to be obligated over a period of years, for most purposes it is counted in the budget for the year in which it is enacted.[50] Most government programs of grants and contracts (from highway construction to armed forces salaries to biomedical research grants) take the form of discretionary spending.

The legal presumption for discretionary spending is that it will not be renewed unless the Congress takes affirmative steps to do so.[51] Every year, supporters of program spending must act to assure new money. If the Congress in any one year chooses not to provide funds, no legal or procedural consequences result. The program simply ceases to operate. In a more abstract fashion, discretionary spending can be thought of as budgeting by *dollars*. Under a discretionary spending program for purchasing widgets, $100 million may be provided in any one year, and the actual number of widgets purchased will depend on their price.

By contrast, mandatory spending is money that the law has promised will be provided when needed.[52] The legal consequences for a failure by the Congress to do so may vary,[53] but the presumption is that necessary money will be available unless the Congress takes action to change the promise in the law.[54] In the abstract, mandatory spending can be thought of as budgeting by *goods and services*. Under a mandatory spending program for widgets, in any one year the law commands that all needed widgets be provided to a defined group of people and also promises that the money required to do so will be made available.[55]

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50. The different usage of budget authority and outlay numbers is beyond the scope of this brief description. I am describing budget authority, or funding, here.

51. This may not be the political presumption, inasmuch as programs that are funded develop an inertial force and often continue to be funded, but this is not a legal obligation. For instance, the Congress is highly unlikely to disband the armed forces, the Internal Revenue Service, or veterans' hospitals, but legally these programs continue to operate only because the Congress chooses to renew their funding every year.

52. A subset of mandatory spending is referred to as "entitlement spending," usually when describing funds spent for benefits to individuals. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006, at 370 (2005), *available at* http://www.whitehouse.gov/omb/budget/fy2006/pdf/budget/glossary.pdf.

53. Private rights of action for payment before the U.S. Court of Claims are the consequences usually contemplated. *See* E-mail from Richard Kogan, Senior Fellow, Ctr. on Budget & Policy Priorities, to Timothy M. Westmoreland, Visiting Professor of Law, Georgetown Univ. Law Ctr. (June 1, 2005) (on file with author). See, for instance, litigation brought to enforce an individual entitlement to Medicaid that is predicated on the Equal Rights Under the Law statute, 42 U.S.C. § 1983 (2000).

54. The obverse is true for permanent tax laws. For budget purposes, the presumption is that revenues will continue to be collected unless the Congress takes action to change the law.

55. Variations on the theme of mandatory spending have begun to proliferate. For example, the State Children's Health Insurance Program is a program of capped mandatory spending, that is, one that

The relative proportions of discretionary and mandatory spending have reversed over the past forty years. In 1964, the year before the enactment of Medicaid and Medicare, about two-thirds of the unified federal budget was made up of discretionary spending, most of it for defense.[56] By 2004, about two-thirds of the unified budget was made up of mandatory spending, most of it for Social Security, Medicare, and Medicaid.[57] Projections of future spending show this trend continuing, with significant additional growth in mandatory spending for payment of interest on the debt.[58] Longer term projections indeed suggest that mandatory spending programs that are currently predicated on distinct revenue sources (most notably Medicare and Social Security) will begin to outstrip their funding, forcing them to provide only partial benefits or to turn to the Congress to allow them to pay out of borrowed funds.[59]

As a historical and legal matter, what makes a program discretionary or mandatory has not always been obvious. Certain hallmarks of discretionary spending are clear on first reading an enabling statute, such as "subject to the availability of appropriations," or "there are authorized to be appropriated funds for." Conversely, unless accompanied by such a discretionary indicator, the general statement that an officer of the federal government "shall" do something has been taken to signify that the command is for mandatory spending. But the distinction has not always been clear. For instance, the Maternal and Child Health (MCH) program (Title V of the Social Security Act)[60] and the Medicaid statute (Title XIX of the Social Security Act)[61] contain some very similar

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provides an ongoing commitment for a *fixed* amount of money to states. 42 U.S.C. § 1397cc(a) (2000). Such a variation has the value of the presumed continuity of mandatory spending but does not obligate the federal government to open-ended funding. The same legislation also set aside $60 million in mandatory spending for diabetes research and treatment grants. 42 U.S.C. §§ 254c-2, 254c-3 (2000 & Supp. II 2002). Since 1998, some abstinence education programs have also been funded by mandatory spending. 42 U.S.C. § 710 (2000 & Supp. III 2003).

56. CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2006 TO 2015 app. F at 138 tbl.F-5, 140 tbl.F-7 (2005), *available at* http://www.cbo.gov/ftpdocs/60xx/doc6060/01-25-BudgetOutlook.pdf.

57. *Id.*

58. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006, at 362 tbl.S-10 (2005), *available at* http://www.whitehouse.gov/omb/budget/fy2006/pdf/budget/tables.pdf (projecting spending through 2010). Note that the CBO distinguishes payment of interest on the debt from all other forms of mandatory spending. *See* CONG. BUDGET OFFICE, *supra* note 56, app. F at 138 tbl.F-5.

59. *See* sources cited *supra* notes 6 and 8; THE BDS. OF TRS. OF THE FED. HOSP. INS. & FED. SUPPLEMENTARY MED. INS. TRUST FUNDS, 2005 ANNUAL REPORT, 9 fig.II.D1 (2005), *available at* http://www.cms.hhs.gov/reportstrustfunds/downloads/tr2005.pdf; *see also* THE BD. OF TRS. OF THE FED. HOSP. INS. & FED. SUPPLEMENTARY MED. INS. TRUST FUNDS, 2005 ANNUAL REPORT, H.R. DOC. NO. 109-18 (2005); Jonathan Weisman, *Report Emphasizes Shortfall in Medicare*, WASH. POST, Mar. 24, 2005, at A1.

60. 42 U.S.C.A. §§ 701–710 (West, Westlaw through Pub. L. No. 109-473).

61. 42 U.S.C.A. §§ 1396–1396v (West, Westlaw through Pub. L. No. 109-473).

language about funding,[62] but the former has been treated as discretionary spending since its enactment and the latter as mandatory since its enactment.

More recently, conference reports accompanying amendments to the Budget Act have simply gone through the catalogue of existing federal programs and separated the discretionary sheep from the mandatory goats.[63] Thus, by fiat issued well after the enabling statute, the MCH program is clearly discretionary spending and Medicaid is clearly mandatory; veterans' health care is clearly discretionary spending while veterans' disability payments are clearly mandatory. As discussed below, in some cases this decision was made in a manner inconsistent with the programs' ostensible missions, and the implications are large.

Even more recently, new enactments are overtly designated as one type of money or the other. There are newfound textual formulae to assure treatment as mandatory spending (for example, "this constitutes budget authority in advance of appropriations acts") that are a clear alternative to the usual text of discretionary spending. If nothing else, the budget process now sets different procedures for enactment of legislation, depending on the type of money, so the process used will likely make the type of money clear.[64]

In addition to these two types of money, a third, less obvious type is increasingly common: revenues forgone, that is, tax spending or tax expenditures.[65] There has long been serious academic debate about whether special tax treatments should be considered "spending" and about whether the lines between revenue-raising and spending can ever be objective,[66] in part because, it is argued, "'taxes' and 'spending' are not coherent categories to begin with."[67] Somewhat sidestepping this debate,[68] however, tax expenditures are defined in the Budget Act as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral

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62. Compare the language of MCH authority under 42 U.S.C. § 701a ("there are authorized to be appropriated") with that of Medicaid authority under 42 U.S.C. § 1396 ("there is hereby authorized to be appropriated").

63. *See, e.g.*, H.R. REP. NO. 105-217, at 1014–53 (1997).

64. *See* discussion *infra* Part II.D.

65. *See generally* Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970); Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155.

66. This debate is usually encapsulated as a disagreement between Boris Bittker and Stanley Surrey. *See* Daniel N. Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187, 203 (2004).

67. *Id.* at 188.

68. The debate is only somewhat sidestepped, however, inasmuch as there are still a number of complex definitional questions, judgment calls, and baseline issues involved in applying the Budget Act's definition. *See generally* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2007, at 317 (2006), *available at* http://www.whitehouse.gov/omb/budget/fy2007/pdf/spec.pdf [hereinafter OFFICE OF MGMT. & BUDGET, FY 2007 PERSPECTIVES].

of tax liability."[69] Generally applicable changes in tax rates (for example, reductions in personal income tax brackets) are not regarded as tax expenditures; they are simply reductions in revenues. In contrast, targeted tax "breaks" that subsidize a specific activity or source of money (for example, tax deductions or credits for money spent on a designated purpose) are regarded as something other than simple revenue measures.

For deficit-calculation and budgeting purposes, failing to bring money into the Treasury is the same as sending money out of it.[70] There may be differences in efficiency[71] or in distribution of the benefits,[72] but whether taxes are collected and spent on widgets or whether widget-purchasers can deduct widget costs from their taxes, federal money is used to reduce or pay the cost of widgets. However, I list tax spending here as only an occasional type of money because the amount of such spending is very rarely added in or highlighted as part of the budget, even though it makes up almost a trillion dollars a year. So, for example, in the discussion of how much of the budget is made up of discretionary spending and how much of mandatory, the denominator includes only money that comes into the government and goes out again. When the federal budget is calculated, it virtually never includes the money that went missing before it made it to the Treasury.[73]

Under the budget practices that were in place through 2002 and that are now being revived, legislative tax change—whether a change in general rates or the creation or deletion of tax spending—was generally treated as the obverse of mandatory spending. Increased taxes show up as positive numbers (that is, revenues), and decreased taxes show up as negative numbers (that is, spending). More recently, proposals have been made to treat tax spending in a manner altogether different from mandatory spending, but they have not been adopted.[74]

As with mandatory spending, tax expenditures have grown significantly in recent history. The Congress makes periodic efforts to "simplify" the tax code and remove many (but never all) special exceptions,[75] but these efforts have

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69. 2 U.S.C. § 622(3) (2000).

70. For political and rhetorical purposes the two actions may be quite different. *See* Thuronyi, *supra* note 65, at 1178 n.140 ("[S]ome personal tax deductions including interest paid on home mortgages are being referred to as tax expenditures. . .indicating the idea, it's the government's money that they are expending on you—a pretty scarey prospect for a country that believes in free enterprise and democracy." (quoting H. Wells, Remarks at the Meeting of the Business and Commerce Political Action Committee (Feb. 20, 1986) (made upon receiving Business Leader of the Year Award)); *see also* GEN. ACCOUNTING OFFICE, TAX POLICY: TAX EXPENDITURES DESERVE MORE SCRUTINY, GAO/GGD/AIMD-94-122, at 2 (1994), *available at* http://archive.gao.gov/t2pbat3/151813.pdf ("Some observers believe that labeling these provisions tax 'expenditures' implies that all forms of income inherently belong to the government.").

71. *See* David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 957–960 (2004).

72. *See* discussion *infra* Part II.D.

73. *See* discussion *infra* Part III.B.

74. *See* discussion *infra* Part II.D.

75. This is most notably demonstrated by the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C.).

been followed by a new surge of special treatments for special interests. In some areas of policy, tax spending is much higher than discretionary and mandatory spending combined.[76] Indeed, in recent estimates for 2006, tax spending was expected to exceed all of discretionary spending for the first time, both because of automatic growth in the value of the special treatment (for example, home mortgage interest deductions rise as the size of mortgages rise) and because of newly enacted tax spending measures (for example, the phase-out of limitations on deductions for high-income taxpayers).[77]

Tax spending has also changed in its nature. Analyses of twenty-year trends show that, "[t]ax incentives to promote business investment have declined relative to the size of the economy, while tax incentives to promote social policy goals have expanded,"[78] and that, in total, social tax expenditures are now four times the size of business tax expenditures.[79]

B. BASELINES

In all aspects of budgeting, the first and most important question is, "Compared to what?"[80] In its most basic application, the question should be asked of every assertion that an amount of money is "new" or "large" or "generous" or "fair."

The more technical use of the question is to follow a stream of mandatory spending. If a statutory promise is to be fulfilled, the amount of money made available must be adequate for the purpose, but adequate *compared to what*? Adequate when compared to the *current* costs of the promise.

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76. *Cf.* STAFF OF THE JOINT COMM. ON TAXATION, 109TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2005–2009 30–40 (Comm. Print 2005), *available at* http://www.house.gov/jct/s-1-05.pdf, *with* OFFICE OF MGMT. & BUDGET, *supra* note 58, at 527.

77. *See* John Cranford, *Political Economy: Follow the Money*, 63 CQ WKLY. 814, 814 (2005). *Compare* CONG. BUDGET OFFICE, *supra* note 56, at 68 (revealing discretionary outlays totaling $914 billion), *with* STAFF OF THE JOINT COMM. ON TAXATION, *supra* note 76, at 30–40 tbl.1 (outlining corporate and individual tax expenditures totaling over $915 billion). Note, however, that in general, experts on tax expenditures are reluctant to add them up to make a total, because they may have interactive effects that render the total either larger or smaller than the sum of the parts. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006, at 315 (2005), *available at* http://www.whitehouse.gov/omb/budget/fy2006/pdf/spec.pdf [hereinafter OFFICE OF MGMT & BUDGET, FY 2006 PERSPECTIVES].

78. Eric Toder, *The Changing Composition of Tax Incentives: 1980–99*, *in* PROCEEDINGS: 91ST ANNUAL CONFERENCE ON TAXATION 411, 415 (Howard Chernick ed., 1999), *available at* http://www.urban.org/url.cfm?ID=410329, *updated in* TAX REFORM AND FAIRNESS FOR FAMILIES: PRESENTATION TO THE PRESIDENT'S ADVISORY PANEL ON TAX REFORM (2005), *available at* http://www.urban.org/UploadedPDF/900795_Steuerle_032305.pdf (testimony of Eugene Steuerle, Co-Director, Urban-Brookings Tax Policy Center).

79. *See* Toder, *supra* note 78.

80. In my own course on Federal Money, I discuss three questions for all budgets: "Compared to what?"; "Or else what?"; and "Says who?". An instance of "Or else what?" has already been noted in the discussion of legal remedies for assuring the payment of mandatory spending or, conversely, the lack of legal remedies for unfunded discretionary programs. "Says who?" relates to who calculates the budget numbers (CBO, OMB, or another party), a topic of great importance because the CBO is nominally nonpartisan and the OMB is an agent of the President.

For a variety of reasons, providing the identical amount of money from one year to the next will likely be inadequate to keep the statutory promise. Spending for Medicare in 1967, the first year of its full implementation, was $3.2 billion; spending in 2004 was $297.4 billion.[81] Much has changed in the Medicare statute over that period, but the basic promise of payment for medically necessary hospital and physician care has not. Clearly, a promise to continue paying for these services could not be fulfilled by simply providing the previous year's funding.

The most obvious reason for change over time is inflation.[82] Since the enactment of Medicare and Medicaid, the cost of all goods and services has risen. The cost of health and medical goods and services has risen dramatically in both the public and the private sectors.

Another obvious reason for the need for increased spending to maintain a statute's promise is the growth in the number of beneficiaries. As the "Baby Boom" generation ages, more people are eligible for such programs. Likewise, in a recession, more people become eligible for means-tested programs and, in an epidemic, more people become eligible for and actually use health and disability programs.[83]

Yet another reason for the need for additional money is the advent of new drugs and technologies into the mix of covered goods and services that are to be financed. For example, in 1965, standard diagnostics included x-rays; by 2004, such diagnostics necessarily included much more sophisticated—and expensive—devices, such as CAT scans and PET scans. Similarly, in 1994, when the drug AZT was the standard of medical care, the medications for AIDS cost approximately $2,700 per person per year; only one year later, when protease inhibitors were approved, the cost of the standard of care rose immediately to between $8,000 and $20,000 per person per year.[84]

Thus, to keep the statutory promises in Medicare and Medicaid to pay for

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81. CONG. BUDGET OFFICE, *supra* note 56, app. F at 142 tbl.F-9. Medicaid spending has also risen dramatically during the same period, growing from under $1 billion in 1966 to more than $175 billion today. *Id.* But because Medicaid programs are administered by the states, the federal statute was not uniformly implemented on enactment, and even today the required state financing of the program is subject to occasional waxing and waning. *See* John Klemm, *Medicaid Spending: A Brief History*, 22 HEALTH CARE FIN. REV. 105, 106 (2000), *available at* http://www.cms.hhs.gov/apps/review/00fall/00Fallpg105.pdf.

82. The most familiar aspect of adjusting government spending to keep pace with inflation is the Cost of Living Adjustment (COLA) made to Social Security payments. COLAs were initially dependent on periodic congressional actions (some of which were actually above inflation). In 1972, the COLA was made both automatic and permanent. Pub. L. No. 92-336, §202, 86 Stat. 406, 412 (1972) (codified as amended in 42 U.S.C. § 415(i) (2000)); *see* Social Security Online: History, http://www.ssa.gov/history/briefhistory3.html (last visited June 15, 2005).

83. Making this even more complex, however, is that many people who are covered by Medicaid are "optional" beneficiaries under federal law and, in times of economic downturn, may have their eligibility eliminated by the states.

84. *See* KATHERINE FLOYD & CHARLES GILKS, COST AND FINANCING OF PROVIDING ANTI-RETROVIRAL THERAPY: A BACKGROUND PAPER 3–4, *available at* http://www.worldbank.org/aids-econ/arv/floyd/whoarv-let.pdf (last visited Feb. 27, 2007). Although Medicare has just begun to cover outpatient prescription

health services, mandatory spending must grow to reflect, at a minimum, the amount of money spent in the previous year *plus* medical inflation *plus* costs associated with increases in beneficiaries *plus* costs associated with new drugs and technologies. Failure to grow by this amount would erode the purchasing power of the program and incrementally break the underlying legal promises.

To project and plan for these streams of mandatory spending, the CBO and the OMB create models that take these and many other variables into account.[85] These estimates of what the current law will require to be spent in the future are called the "baseline." The baseline represents the budget for mandatory spending programs if they are presumed to be unamended and to remain on statutory automatic pilot. It assumes that Executive Branch agencies continue to interpret the statute reasonably (allowing payment for CAT scans as their use becomes generally accepted, adding protease inhibitors to the drug formularies, etc.), but that the Congress makes no further change to the statute. It also assumes that, to the extent that existing statutes contain changes in the promises (of coverage, benefits, tax rates, etc.) that are scheduled to take place in future years, those enacted changes will occur as scheduled.[86] Baselines are used to project spending, annual deficits, the accumulated national debt, and payments of interest on the debt.

Baselines, while essential to budgeting, may be counterintuitive, sometimes with dramatic political results. In the presidential campaign of 1996, President Clinton accused Senator Dole of leading a Senate campaign to slash Medicare. Senator Dole responded that, under the terms of his legislation, the program would be bigger than it ever had been in history.[87]

To some extent, they were both right, depending on the chosen baseline. The Medicare baseline for 1997 projected an incremental increase in spending over the 1996 level. Through various changes in the Medicare statute, it was estimated that the Dole proposal would have slowed that growth; this restriction and its aftermath would have reduced the Medicare baseline by $168 billion over the course of the succeeding six years.[88] Thus, Medicare would have been "cut" by $168 billion and, presumably, would have been able to purchase fewer goods and services for its beneficiaries. But Medicare would also have continued to grow over the years in nominal terms and would certainly have been

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drugs, *see* Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (2003), Medicaid has for some time. *See* 42 U.S.C. § 1396d(a)(12) (2000).

85. *E.g.*, CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: AN UPDATE 7 (Aug. 2006) (projecting that Medicare spending will grow by almost 12% while Medicaid spending will remain flat).

86. It also assumes that if a provision of an existing statute is scheduled to expire, then spending under that statute (or revenue raised) will end. *See infra* note 270.

87. *See* Concord Coalition, Op-Ed., *Medi-scare: The Parties Abdicate Responsibility*, BALT. SUN, Oct. 2, 1996, at 7A; Laura Kellman, *Clinton Peddling Fear, Dole Tells Floridians*, WASH. TIMES, Sept. 27, 1996, at A8.

88. RICHARD KOGAN, CTR. ON BUDGET & POLICY PRIORITIES, BUDGET REDUCTIONS UNDER THE DOLE TAX PLAN: WHERE AND HOW MUCH? (1996), http://www.cbpp.org/Dole2.htm.

bigger than it ever had been in history.[89]

Few people among the electorate likely understood the budgetary non-sequiturs of this debate, but many did care about it. Indeed, some political observers have claimed that this argument, labeled "Mediscare" by the Republicans, actually made President Clinton successful in carrying Florida in the election.[90]

The obverse situation occurred with revenues in 2002. The 2001 tax cuts were constructed to be phased in over several years. In 2002, after the September 11 attacks and a dramatic slowdown in the economy, Senator Kennedy proposed that the rate of taxes be "frozen" at the planned 2004 levels and that anticipated further tax cuts be postponed or eliminated.[91] Both the President and the Treasury Secretary immediately characterized the proposal as "raising taxes."[92] Again, to some extent, the Administration and the Senator were both right, depending on the chosen baseline. As one budget advocacy group noted, "under [the Kennedy] proposal, no tax rates would be raised above their current level. Rather, he called for rolling back future tax cuts . . . ."[93] But anti-tax groups called on members of Congress who had signed no-new-tax pledges to oppose the Kennedy proposal as a tax hike, and it did not prevail.

In these instances, both Presidents Clinton and Bush were using baselines to make their arguments. Inasmuch as the CBO's practice is to project baselines to include enacted laws whose provisions are to change in the future, both were also following accepted budget practice. But it is unlikely that most listeners understood these definitional distinctions.

Baselines do not generally enter into legislation regarding discretionary spending, although that in itself is significant.[94] Because comparisons in discretionary spending are made only on the basis of actual dollar levels and without a

89. For Dole's campaign response, see Adam Nagourney, *Clinton Forecasts Budget Cuts to Scare Elderly, Dole Asserts*, N.Y. TIMES, Aug. 25, 1996, at 32.

90. *See* Cragg Hines, *Clinton Rolls to 2nd Term; Republican Grip on House, Senate Appears Secure*, HOUSTON CHRON., Nov. 6, 1996, at A1; Charles Krauthammer, Op-Ed., *Don't Bail Out Clinton on Medicare*, WASH. POST, Nov. 08, 1996, at A31; John MacDonald, *Problem of Solving Medicare's Future Will Only Get Tougher*, HARTFORD COURANT, Nov. 9, 1996, at A12; Vic Ostrowidzi & Dan Freedman, *Medicare's Financial Woes Cast Doubts on Long-term Viability*, TIMES UNION (Albany), Dec. 22, 1996, at F1; Dan Thomasson, Editorial, *Young Workers Will Pay for Campaign Demagoguery*, ROCKY MOUNTAIN NEWS (Denver), Nov. 14, 1996, at 56A.

91. *See* CITIZENS FOR TAX JUSTICE, KENNEDY TAX FREEZE KEEPS BUSH TAX CUTS FOR ALL BUT RICHEST (2002), http://www.ctj.org/pdf/kenn0102.pdf.

92. *See* Scott Shepard, *Kennedy Calls for Delay of Tax Cuts, Kicking Off Tax Debate*, COX NEWS SERV., Jan. 16, 2002.

93. JOEL FRIEDMAN ET AL., CTR. ON BUDGET & POLICY PRIORITIES, CRITICISMS OF KENNEDY TAX PROPOSAL IGNORE ITS SUBSTANCE AND DISTORT ITS IMPACT 1 (2002), *available at* http://www.cbpp.org/1-22-02tax.pdf.

94. Both the CBO and the OMB do publish estimates of how much discretionary spending will be needed in coming years to preserve the purchasing power of programs funded in this manner, but these estimates have no legal or budgeting effect. Of course advocates for programs may use them to make their cases to the appropriations committees that additional funds are needed, but the committees may choose to disregard them.

measure to preserve purchasing power, appropriations for discretionary spending may rise year after year but nonetheless fall further and further behind the true need for spending. So, for example, in a discretionary grants program for drugs for uninsured people with AIDS, if the price of drugs or the number of people who need them grows faster than the available discretionary funds, a progressively smaller proportion of people in need can be assisted.[95]

The CBO and the OMB recalculate and correct their baselines twice each fiscal year.[96] This recalculation of baseline is obviously a complex task, including many variables that often interact. If, for example, a new pediatric vaccine is approved, then the CBO's next recalculation of the baseline will include both the projected cost of the vaccine to Medicaid and the expected savings from reductions in treatment costs. Once these adjustments are done, all future projections will be made from this corrected baseline until it, too, is later recalculated.

C. SCOREKEEPING

Baselines are primarily used as the basis for comparison in estimating the impact of proposed legislation. The projection of such incremental costs or savings is referred to as "scorekeeping." For most purposes in the Congress, the CBO is the official scorekeeper.[97] The costs of any proposed expansions—or savings from any proposed cuts—in mandatory spending programs are measured against the baseline. Thus, if legislation were proposed to make a new group of people eligible for Medicaid, the CBO would estimate the incremental increased costs of this proposal over and above the year-to-year spending increases that would be automatically incurred for the current group of Medicaid-eligible people. Conversely, if legislation were proposed to close Medicaid to a group of people currently eligible under the law, the CBO would estimate the incremental "savings" that would result in projected spending if the proposal were enacted.[98]

The scorekeeping of proposed legislation, like the calculation of the baseline,

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95. *See* KAISER FAMILY FOUND., WAITING FOR AIDS MEDICATIONS IN THE UNITED STATES: AN ANALYSIS OF ADAP WAITING LISTS (2004), http://www.kff.org/hivaids/7230.cfm (follow "Fact Sheet" hyperlink).

96. *E.g.*, CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2007 TO 2016 (Jan. 2006), *available at* http://cbo.gov/ftpdoc.cfm?index=7027&type=1; CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2007 TO 2016: AN UPDATE (Aug. 2006), *available at* http://cbo.gov/ftpdocs/74xx/doc7492/08-17-BudgetUpdate.pdf. *Compare* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, THE BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2007 (Feb. 2006), *available at* http://www.whitehouse.gov/omb/budget/fy2007/budget.html, *with* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MID-SESSION REVIEW: THE BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2007 (July 2006), *available at* http://www.whitehouse.gov/omb/budget/fy2007/pdf/07msr.pdf.

97. The OMB also has some scoring responsibilities, but they are beyond the scope of this brief introduction.

98. Likewise, in scoring tax legislation, the CBO estimates the increase or decrease in expected revenues as compared to the baseline of existing tax law. For an amusing and generally accurate discussion of scorekeeping, see Dave Barry, *Getting a Grip on (or a Taste of) the Budget Deficit*, CHI.

is complex. For example, the CBO was recently called upon to estimate the costs of detailed legislation to provide a prescription drug benefit in Medicare. In a published description of its methodology,[99] the CBO identified six complex "key assumptions"[100] and myriad subsidiary ones used simply to construct the model. Almost any one of the assumptions could keep an army of health economists busy debating and fine-tuning. The data sources used in the model could also employ surveyors, demographers, and marketers for years. And, of course, the legislative language that is being used as the basis for the model is open to statutory interpretation.[101] But, in a variant on the show business motto "I don't want it good, I want it Tuesday,"[102] the CBO diligently cranks out estimates on Congressional demand under these extremely adverse circumstances.

Although the work done by the CBO is credible and subject to intense review and criticism by interested parties, no one is under any illusion that the score produced will prove to be correct.[103] Rather, it is an educated best guess, and, more important, a number that all congressional actors have committed in advance to accept for purposes of lawmaking. The near-constant carping by dissatisfied members of Congress, interest groups, or journalists that the CBO estimates are "wrong" misses the point of the exercise. The CBO score is *deemed* to be correct by the agreements on how the budget process is to work, and all legislative rules and actions follow from it. This deemed-correct score is both made up and uncertain, but some version of it is a necessary fiction for

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TRIB., Apr. 7, 1991, at 31 ("This is exactly how our leaders 'reduce' the pesky budget deficit—by not increasing it as much as they thought they were going to.").

99. CONG. BUDGET OFFICE, ISSUES IN DESIGNING A PRESCRIPTION DRUG BENEFIT FOR MEDICARE (2002), *available at* http://cbo.gov//ftpdocs/39xx/doc3960/10-30-prescriptiondrug.pdf.

100. *Id.* at 36–37 (identifying its key assumptions as beneficiary participation rate, price effect, cost-management factor, induced demand, marketing costs, and risk-premium costs).

101. Consider, for instance, the statutory interpretation issues implicit in the estimation of the impact of an amendment to the Medicaid law banning services to undocumented aliens except when "such care and services are necessary for the treatment of an emergency medical condition." 42 U.S.C. § 1396b(v)(2)(A) (2000).

102. In my own experience, I was once asked by a scorekeeper (not from the CBO) in 1992 to estimate the costs of AIDS drugs over the next ten years. My first question was, "Give me some guidance: Will we stop the epidemic or not?" Similar exercises in science fiction are common in scorekeeping lore.

103. *See* CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2004–2013: TESTIMONY OF BARRY B. ANDERSON, ACTING DIRECTOR, BEFORE THE SENATE COMMITTEE ON THE BUDGET 7 fig.2 (2003), *available at* http://www.cbo.gov/ftpdocs/40xx/doc4031/01-30-03-SenateTestimony.pdf (statement of Barry B. Anderson, showing the uncertainty of estimates by the CBO); CONG. BUDGET OFFICE, THE UNCERTAINTY OF BUDGET PROJECTIONS: A DISCUSSION OF DATA AND METHODS (2005), *available at* http://www.cbo.gov/ftpdocs/61xx/doc6119/02-25-Uncertainty.pdf. It should be noted that in other settings, forecasters and modelers rarely come up with a single number, a so-called "point estimate." They consider a range of probabilities to be a much preferable method that gives some notice of the uncertainties and interactive effects implicit in estimation. But the Budget Act asks them for a number, and the CBO produces one. *See* Sherry Glied et al., *Health Policy Roundtable–Policy by Numbers: The Role of Estimates and Scoring in Health Care Reform*, 40 HEALTH SERVS. RES. 347, 349 (2005) (discussing changes in the use of estimates resulting from the Budget and Impoundment Control Act).

budgeting and legislating.

D. LIMITS

As noted above, after the crisis created by Gramm-Rudman-Hollings in 1990, the Budget Act no longer contains legal limits on deficits per se. Instead, under the Budget Enforcement Act, different limits were imposed on Congressional actions regarding the three types of money. For discretionary spending a global cap, that is, an amount specified by statute, often set years in advance, became the limit for all annual appropriations legislation. The total of all discretionary funds for such disparate activities as defense, agriculture, and education could not exceed this limit.[104] Any legislation (or any amendment to legislation) that would violate this cap would trigger a sequester.

This overall cap obviously created a true zero-sum game for any new funding initiatives. To fund a new program, its proponents had to find an existing program to cut. In broad terms, this forced choice meant that to create a federally-funded education initiative, defense funds had to be cut (or vice versa).[105] In narrower terms, it may be that a budget would increase basic biomedical research funding at the expense of activities to apply research to public health.[106]

Less obviously, the caps also created a problem for existing programs. For years, as a means of gradually reducing spending, the caps were deliberately set *below* the projected rate of inflation.[107] This pre-set limit in itself meant that the purchasing power of discretionary spending eroded over time, and that a

104. As part of the annual appropriations process, this discretionary spending total (the so-called 302(a) level in the budget resolution) is subdivided by the appropriations committees among their various subcommittees as subsidiary totals (the so-called 302(b) levels). Any legislation that would violate either the 302(b) total or the overall 302(a) level is subject to a point of order and generally cannot be considered by the House or the Senate. These subsidiary amounts are not divided clearly by subject matter but rather by the jurisdiction of the appropriations subcommittee that will produce the legislation. This, too, creates some strange artifacts. One subcommittee, for example, has jurisdiction over programs administered by the Departments of Labor, Health and Human Services, and Education. Thus, an education initiative may jeopardize funds for public health programs or the enforcement of labor standards. Other subcommittees have more straightforward jurisdictions, such as foreign operations, that may not produce such unexpected crosscurrents. *See* Garrett, *supra* note 4, at 401 (describing increases in funding for law enforcement programs funded by cutting funds for Departments of State, Justice, and Commerce). A discussion of these artifacts, a longstanding feature of appropriations process and not created by the Budget Act, is beyond the scope of this general introductory paper.

105. Compare mid-nineties budgets with early twenty-first century ones for exactly this dynamic.

106. *See Priorities of the U.S. Department of Health and Human Services Reflected in the Fiscal Year 2002 Budget, Hearing Before the H. Energy and Commerce Comm.*, 107th Cong. 30, 31 (2001) (statement of Tommy G. Thompson, Secretary of U.S. Department of Health and Human Services) (explaining that funding for the Centers for Disease Control and Prevention (CDC) was cut so that funding for the National Institutes of Health (NIH) could be increased).

107. Note also that, while inflation for the purpose of assessing caps is a single number across all fields of endeavor, inflation is not a simple measure in program spending. Inflation in health care prices, for example, has steadily been high, even while inflation in wages and the general consumer price index have been low. Thus, an inflator that may be generous for activities that consist largely of personnel will be quite constrictive of activities that consist largely of health care.

proponent of an activity constantly had to seek cuts in other programs simply to keep the favored activity at the same purchasing power.

Compounding these effects, of course, were the very same issues described above in the discussion of baselines. Changes, particularly those in demographics and in epidemiology and expensive innovation in technology, could sharply erode the purchasing power of even an inflation-adjusted amount.[108] Again, underneath a global cap, a proponent of an ongoing activity had to find other programs to cannibalize simply to continue to provide the same goods and services as the previous year. This dynamic created a lamb-eat-lamb[109] atmosphere in most discretionary spending deliberations, sometimes leading to unexpected results, such as the American Heart Association's advertising and lobbying that research into HIV/AIDS was over-funded.[110]

In contrast, under the BEA, mandatory spending was not governed by an annual spending cap. For all the reasons outlined in the discussion of baselines, above, annual caps would erode or nullify the legal promises of mandatory spending statutes.[111] Under current budget process, mandatory spending is allowed to grow over time, as the internal dictates of the enabling statute require.[112]

Through 2002, however, the BEA restricted any new legislation to expand mandatory spending or to reduce revenues. This restriction took the form of a requirement for the Congress to "Pay-as-You-Go" (or PAYGO) when considering such legislation.[113] In essence, the PAYGO rules required that the Congress not pass mandatory spending or tax legislation that had an estimated net cost greater than zero; in other words, laws that would have increased the deficit above the level anticipated in the baseline. If a bill would have increased mandatory spending above the baseline, then the Congress also would have had to enact legislation that would provide for offsetting reductions in another area of mandatory spending. The Congress also could have increased revenues by an

108. Consider, for example, a discretionary spending program intended to distribute prescription drugs to low-income people. Increases in rates of poverty, of illness, or of drug prices would all diminish the value of funding that remains exactly the same from one year to the next.

109. Garrett memorably describes the situation as requiring that "those seeking federal funds must also adopt the role of funding predator." Garrett, *supra* note 4, at 400.

110. *See* Esther Kaplan, *The Attack of the Killer Causes*, POZ, May 2000, http://www.poz.com/articles/201_1355.shtml.

111. This is not to say that caps on mandatory spending have not been proposed. *See, e.g.*, BRIAN M. RIEDL, THE HERITAGE FOUND., THE FEDERAL BUDGET: GETTING SPENDING UNDER CONTROL 5 (2003), http://www.heritage.org/Research/Features/upload/33969_1.pdf (proposing "OmniCaps—caps that cover both discretionary and mandatory spending—as a way to control spending and allow for trade-offs across all programs). Also note that GRH, though not focusing on spending, had a similar effect by focusing on annual deficits.

112. Likewise, federal revenues wax and wane over time, as the internal dictates of the tax law require.

113. *See* Congressional Budget Act, 2 U.S.C. §§632(b), 633(g) (2000); *see also* BILL HENIFF, JR., PAY-AS-YOU-GO RULES IN THE FEDERAL BUDGET PROCESS 1 (Cong. Research Serv., Report No. RS20006, Mar. 5, 2001), *available at* http://rules.house.gov/archives/RS20006.pdf.

offsetting amount to pay for the new mandatory spending.[114]

Under the PAYGO rules as first enacted, the total scores of all such bills passed by the Congress were required to balance annually; failure to do so would trigger a sequester.[115] Under the more recent requirements (referred to as "Soft PAYGO"), effective from 2002 until 2007 and only in the Senate, the two scores were required to add up to a pre-set total (which may have been greater than zero, that is, may have been additional new spending or revenue loss) within a "snapshot" period of five years—that is, the year for which the budget was being written and the four years that follow it—as well as a second "snapshot" of the five years after that.[116] Failure to do so would have subjected the bill to a point of order;[117] the budget point of order could have been waived, but only by a supermajority of sixty senators.[118]

In the past, these PAYGO requirements have acted as substantial brakes on new initiatives.[119] The Congress has been very reluctant to raise new revenues over the past decade.[120] Consequently, the source of all offsets was generally limited to cutting existing programs. Because the beneficiaries of existing

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114. Again, revenues were treated in the same manner: If a proposed change was estimated to lower revenues, it had to comply with the PAYGO requirements and be matched with either a corresponding cut in spending or an offsetting increase in another area of revenues.

115. Robert Keith & Bill Heniff, Jr., *PAYGO Rules for Budget Enforcement in the House and Senate* 2 (Cong. Research Serv. Report No. RL32835, updated May 3, 2005), *available at* http://www.llsdc.org/sourcebook/docs/CRS-RL32835.pdf.

116. *See id*. This second five-year snapshot was added as an attempt to control manipulation of legislation to have its major effects outside the period being scored. A long (and occasionally colorful) history exists of efforts to dodge scorekeeping through delayed effective dates.

117. 2 U.S.C. §633(f) (2000). Note that points of order can be procedurally fatal to the consideration of legislation.

118. Waivers and Suspensions in the Senate, Pub. L. No. 99-177 §271(b), 99 Stat. 1037, 1094, *amended by* Pub. L. No. 100-119, tit. II, §211, 101 Stat. 787 (1987) ("Sections 301(i), 302(c), 302(f), 304(b), 310(d), 310(g), and 311(a) of the Congressional Budget Act of 1974 [sections 632 (i), 633 (c), 633 (f), former 635(b), 641(d), 641(g), and 642(a) of this title] may be waived or suspended in the Senate only by the affirmative vote of three-fifths of the Members, duly chosen and sworn. This subsection shall not apply to any joint resolution reported or discharged pursuant to section 254(a) of this joint resolution [section 904 (a) of this title]."). The constitutionality and appropriateness of legislative supermajority rules has been debated. *Compare* Bruce Ackerman et al., Comment, *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1995) (arguing that supermajority rules are against the original intent of the Framers of the Constitution and the measure is not supported by the Constitution or congressional practice), *with* John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995).

119. But they are not a complete barrier. Note, for instance, that PAYGO was in force during the creation of the State Children's Health Insurance Program (SCHIP) within the Balanced Budget Act of 1997, an addition of new mandatory spending that was offset by new tobacco excise taxes, cuts in the Medicare program, and the auction of licenses to parts of the electromagnetic spectrum. CONG. BUDGET OFFICE, BUDGETARY IMPLICATIONS OF THE BALANCED BUDGET ACT OF 1997 (1997), http://www.cbo.gov/ftpdocs/3xx/doc302/bba-97.pdf.

120. Indeed, a House rule now requires a supermajority to raise income tax rates. *See* RULES OF THE HOUSE OF REPRESENTATIVES, R. XXI(5)(b), at 34 (2007), *available at* http://www.rules.house.gov/ruleprec/110th.pdf ("A bill or joint resolution, amendment, or conference report carrying a federal income tax rate increase may not be considered as passed or agreed to unless so determined by a vote of not less than three-fifths of the Members voting, a quorum being present.").

programs are usually strong advocates for the continuation of those programs, meeting the requirements was usually difficult or impossible.

Of course, any proposal to do so had to go through scorekeeping. At this point, the score became much more than an illustrative projection by the CBO. The score of the cost of the proposal against baseline and the score of the cost of the offsets against baseline generally became the threshold issue of whether the proposal could even be considered. As with violations of the discretionary spending caps, any legislation (or any amendment to legislation) that would have violated the PAYGO limits was subject to (in one incarnation) a sequester or (in a later incarnation) points of order and generally could not be considered.[121] Again, the sequester and the points of order could be stopped or waived under some circumstances, but only by a supermajority of three-fifths of the Senate.

The legislative outcome of PAYGO was, therefore, that a proposal to expand mandatory spending might have had the support of a majority of members of Congress but still would have been prohibited from being considered. This outcome is certainly not unprecedented in legislation: with stubborn committees or leaders in either body or filibusters in the Senate, many bills have been bottled up that had the votes to pass.[122]

It was, however, unprecedented for the Congress to delegate this power to make or break legislation to a body of unelected staff people who are nominally carrying out a formulaic estimating activity.[123] In principle, Budget Committee chairmen could ignore the CBO score or the Congress could amend its own rules or the Budget Act to allow the legislative amendment of a CBO score or to allow a PAYGO-violating measure to proceed without a supermajority. But in practice the CBO usually had more authority over mandatory spending measures than any Member of the House and as much as any filibustering Senator.[124]

At this point, a special historical note is merited for 2001 to 2002. The BEA was still in effect and sequesters for any excess discretionary spending or any new non-neutral mandatory or tax spending were supposed to be triggered. But the Congress and the President played by improvised rules. Having made

121. Under previous rules, discussed *supra* note 115 and accompanying text, if the Congress exceeded the PAYGO limits, there were to be across-the-board sequestrations in non-exempt direct spending programs. *See* 2 U.S.C. § 902 (2000). Such enforcement of the PAYGO limits was limited to legislation enacted before October 1, 2002.

122. *Cf.* McGinnis & Rappaport, *supra* note 118, at 507.

123. It could be argued that a similar delegation has been made to the parliamentarians of each body; indeed, their decisions may be as functionally decisive as the CBO's. But the parliamentarians are interpreting rules of the Congress's own making, while the CBO is arguably interpreting some often unarticulated vision of economic theory and fact.

124. Stopping a filibuster also requires a supermajority of sixty votes in the Senate. STANDING RULES OF THE SENATE, R. XXII (2000), *available at* http://rules.senate.gov/senaterules/standingrules.txt. Additionally, as noted *infra* at note 243 and accompanying text, because of changes in the Senate rules regarding the budget process, certain legislation implementing the budget may not be filibustered; in these instances, the CBO score is more protected than a Senator's right to filibuster.

massive tax cuts and massive increases in spending, they passed legislation to set the sequesters aside.[125] Different rationalizations were employed (future surpluses should count as PAYGO offsets, emergency spending was required, etc.), but because a supermajority of the House and the Senate, as well as the President, supported the bills, the limits were violated. This does not mean that these limits generally have had no effect; the entirety of the 1990s budgeting demonstrates the contrary. But a stampede is a stampede—unusual but unstoppable. And, for good or ill, few pieces of legislation have the political momentum of the early Bush tax cuts or the emergency spending measures of that time.

Between 2002 and 2007, the budget process was in flux. No true discretionary spending caps or true PAYGO limits were in place. There were frequent plans laid out and the Senate retained a much-weakened form of PAYGO in its own rules, but no statutory changes analogous to GRH or the BEA were enacted. During this time, the Congress considered changing the reach of PAYGO from what it once was, treating tax expenditures differently than other forms of mandatory spending. Under the terms of a measure passed by the House Budget Committee (but defeated in the House), PAYGO would still have applied for legislation containing new affirmative mandatory spending, but it would no longer have applied to legislation that would reduce taxes.[126] Thus, legislation to expand spending in Medicare would have been required to be offset by concomitant cuts in other mandatory programs, but reductions in taxes (whether as overall rate changes or as specific tax expenditures), even if they were intended to accomplish the same exact policy, would not have been. Reconciling this approach with an ostensible goal of deficit-reduction is difficult; it was apparently an attempt to facilitate the tax cuts, whatever the deficit.[127] As noted, this proposal was defeated, but the debate still continues.[128]

Most recently, the House of Representatives and the Senate have enacted changes in their Rules that revive and expand some of the old PAYGO process as an internal procedural measure.[129] The House Rules now provide clearly that:

> It shall not be in order to consider any bill, joint resolution, amendment, or conference report if the provisions of such measure affecting direct spending

125. *See* Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, Pub. L. No. 107-117, 115 Stat. 2230 (2002); *see also* An Act to Reduce Preexisting PAYGO Balances and For Other Purposes, Pub. L. No. 107-312, 116 Stat. (2002); *cf. Forthcoming Extension/Modification of the Budget Enforcement Act: Hearing Before the H. Comm. on the Budget*, 107th Cong. 5 (2001) (statement of Mitchell E. Daniels, Director, Office of Management and Budget).

126. Spending Control Act of 2004, H.R. 3973, 108th Cong. §3 (2004), accompanied by H.R. REP. NO. 108-442, at 11 (2004), subsequently considered and defeated by the House in the form of H.R. 4663, 108th Cong. (2004).

127. *Cf.* 150 CONG. REC. H4967–68 (2004) (statement of Rep. Berkley); RICHARD KOGAN, CTR. ON BUDGET & POLICY PRIORITIES, THE NEED TO RESTORE PAY-AS-YOU-GO BUDGET ENFORCEMENT FOR TAX CUTS AND ENTITLEMENTS (2005), *available at* http://www.cbpp.org/3-14-05bud.pdf.

128. *See* Editorial, *Tax as You Go*, WALL ST. J., Jan. 5, 2007, at A12.

129. *See supra* note 7.

> and revenues have the net effect of increasing the deficit or reducing the surplus for either the period comprising the current fiscal year and the five fiscal years beginning with the fiscal year that ends in the following calendar year or the period comprising the current fiscal year and the ten fiscal years beginning with the fiscal year that ends in the following calendar year.[130]

This rule applies evenhandedly to spending increases or revenue reductions. It also creates snapshots of five years and ten years. It does not, however, include a sequester. For enforcement, it relies on a point of order, denying entry to the House floor for any measure that violates PAYGO.[131] The Senate provisions are similar.[132]

III. INVISIBLE EFFECTS OF THE BUDGET PROCESS

Public choice theorists argue that the very structure of American politics tends toward the rule that "[p]oliticians naturally want to spend and to avoid taxing."[133] They go on to argue that, when this structure is combined with Keynesian theories of macroeconomics, the pull toward deficit spending is almost irresistible.[134] They conclude by arguing that the creation of massive deficits is an intergenerational[135] transfer that is "fiscal folly"[136] and "fiscal irresponsibility."[137] At base, the opposition to deficit spending is made almost as a moral argument that future generations ought not to be burdened with the cost of the consumption of present ones.

Since the 1980s, the federal budget process has evolved in large part in

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130. Pay-as-You-Go Point of Order, H.R. Res. 6, 110th Cong. §405 (2007) (enacted) (codified at RULES OF THE HOUSE OF REPRESENTATIVES, R. XXI(10), *supra* note 120, at 35).

131. Again, as mentioned in note 117, *supra*, procedural points of order can be fatal to the consideration of legislation, but in the House, such points of order can be waived by adopting an ad hoc rule to do so on a specific bill. That rule only requires a simple majority vote. *See* 153 CONG. REC. H71–72 (daily ed. Jan. 4, 2007) (statement of Rep. Spratt); *id.* at H77 (statement of Rep. Ryan).

132. *See* S. Con. Res. 21, *supra* note 7; HORNEY, *supra* note 7.

133. DEMOCRACY IN DEFICIT, *supra* note 13, at 190.

134. *See* JAMES N. BUCHANAN, PUBLIC PRINCIPLES OF PUBLIC DEBT: A DEFENSE AND RESTATEMENT (Richard D. Irwin 1958), *reprinted in* 2 THE COLLECTED WORKS OF JAMES M. BUCHANAN (Liberty Fund 1999), *available at* http://www.econlib.org/library/buchanan/buchcv2c4.html [hereinafter PUBLIC DEBT].

135. *Id.* While I use the word "intergenerational" to have its common meaning (as in "an intergenerational transfer that mortgages the future of our children"), Buchanan uses the term "intergenerational" in a very far-reaching way. He regards

> a "future generation" as any set of individuals living in any time period following that in which the debt is created. The actual length of the time periods may be arbitrarily designated, and the analysis may be conducted in terms of weeks, months, years, decades, or centuries. The length of the period *per se* is not relevant. . . . In other words, I shall not be concerned as to whether a public debt burden is transferred to our children or grandchildren as such. I shall be concerned with whether or not the debt burden can be postponed.

Id. at 27–28. Either use of the term makes the point.

136. DEMOCRACY IN DEFICIT, *supra* note 13, at 10.

137. *Id.* at 36.

response to these arguments and their more political parallels.[138] In an effort to provide a counterbalance to the perceived structural tendency toward deficit spending, GRH and the BEA created the significant pre-commitment devices of global caps on discretionary spending, PAYGO rules for mandatory spending, supermajorities to waive them, and sequesters.

These devices appear to have worked, at least for a while: federal surpluses emerged for four consecutive fiscal years (1998–2001). But so many confounding variables are at work that the case for the effectiveness of the budget rules is unclear even during this period. Caps and PAYGO existed largely during an economic and revenue boom, during a period of divided government that often produced legislative deadlocks, and during a time in which the President had espoused the goal of cutting the deficit in half. The surplus can be explained by any or all.[139]

Recent years have been quite different. The budget limits expired at the end of 2002; the boom is gone. The legislative and executive branches came together to cut revenues and increase spending dramatically.[140] The President concluded that the vanishing surplus was "'incredibly positive news' because it would halt the growth of the federal government"[141] and the Vice President said that "deficits don't matter."[142]

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138. *See, e.g.*, President Ronald Reagan, Remarks to Business Leaders During a White House Briefing on the Federal Budget and Deficit Reduction (Oct. 18, 1985), *available at* http://www.reagan.utexas.edu/archives/speeches/1985/101885a.htm ("[T]he American people want us to end this deficit spending that has been mortgaging the future of our children."); President George Bush, Remarks to Industrial League of Orange County in Irvine, California (June 19, 1992), *available at* http://bushlibrary.tamu.edu/research/papers/1992/92061900.html ("[T]he American people want and are properly demanding [] the elimination of these deficits that are mortgaging the future of our children."); *see also* DEMOCRACY IN DEFICIT, *supra* note 13, at 3 ("[G]overnment should not place future generations in bondage by deficit financing . . . .").

139. *Compare National and Homeland Security: Meeting Our Needs, Hearing on Homeland Security and Defense Spending Before the H. Budget Comm.*, 109th Cong. 18 (2005) (statement of James Jay Carafano, Senior Research Fellow, The Heritage Foundation), *available at* http://www.gpoaccess.gov/chearings/109hcat1.html (follow "National and Homeland Security: Meeting Our Needs" hyperlink) (attributing the budget surplus to reduced defense spending, the economic boom, and the divided government), *with* Robert L. Borosage, *Clinton's Budget Legacy Lives On*, L.A. TIMES, Sept. 2, 2001, at M2 (suggesting that Democrats attribute the budget surplus to President Bill Clinton's political discipline), *and The Truth about Entitlements and The Budget*, FACING FACTS Q., Sept. 8, 1997, *available at* http://www.concordcoalition.org/facing-facts/ff_fax40.html (stating that spending restraint is the key to having a budget surplus).

140. *See* RICHARD KOGAN & ROBERT GREENSTEIN, CTR. ON BUDGET & POLICY PRIORITIES, THE NEW CONGRESSIONAL BUDGET OFFICE FORECAST AND THE REMARKABLE DETERIORATION OF THE SURPLUS (2002), *available at* http://www.cbpp.org/3-30-05bud.pdf. Self-described fiscal conservatives have joined the cutting and spending, too, arguing (perversely) that they are accelerating the deficit because only a deficit will make them stop. *See* David Firestone, *Conservatives Now See Deficits as a Tool to Fight Spending*, N.Y. TIMES, Feb. 11, 2003, at 24 ("Anything that will help us stop spending money, I'm in favor of . . . . And if there's a deficit, that may help us." (quoting Rep. Susan Myrick)); Paul Krugman, *The Tax-Cut Con*, N.Y. TIMES, Sept. 14, 2003, at 54 (discussing "Starve-the-Beast" arguments).

141. David Sanger, *President Asserts Shrunken Surplus May Curb Congress*, N.Y. TIMES, Aug. 25, 2001, at 1.

142. John Cassidy, *Taxing*, NEW YORKER, Jan. 26, 2004, at 23, 24 (quoting Richard Cheney as quoted by Paul O'Neil).

But the budget process is coming back. In a virtual call to "stop me before I spend again,"[143] the Republican Congressional majority and the President, who together ran up near-record deficits, discussed (but did not adopt) new versions of PAYGO[144] and discretionary caps and suggested a goal of reducing the deficit in half within four years.[145] Now, the Democratic Congressional majority has actually imposed PAYGO, albeit with the Republican minority saying the new rules were not strict enough.[146]

So the time has come to look at the invisible effects that this process has created. As the Congress applies the ostensible cures, their side-effects should be studied. While focusing on the deficit and debt as a whole, both the theorists and the practitioners have overlooked the many distortions that their own structures have created in other parts of lawmaking. Buchanan says that the effect of these structures will be to "require only that the costs and benefits of public-spending programs be taken more explicitly into account"[147] and "[t]he rule will have the effect of bringing the real costs of public outlays to the awareness of decision makers."[148] But the details of how the Congress takes "into account" and assesses "the real costs" conceal many values and decisions. I hope to reveal some of them now.

The budget process has myriad arbitrary effects on policy and legislation. As noted, the juxtaposition of discretionary spending within a subcommittee's jurisdiction can force choices between two worthy subcommittee priorities while leaving less worthy programs outside the jurisdiction unscathed.[149] Likewise, a politician's need to find a PAYGO offset may lead to the extinction of a mandatory program that is performing well. Close observation of the Congress will find such outcomes every legislative day, and, while the result may sometimes seem arbitrary, it is not unclear or unexpected.

But the process also has more systemic skewing effects on legislation that are largely unexplored. Untangling some of these effects may lead to a clearer understanding of the legislative process and to the possibility of assessment of policy through a different lens. Some effects are historical artifacts. Some are intrinsic to the chosen systems of control. And some are intrinsic to all estima-

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143. *Marketplace: Putting a Stop to Government Overspending?* (American Public Media radio broadcast June 19, 2006), *available at* http://marketplace.publicradio.org/shows/2006/06/19/PM200606193.html; *cf.* 140 CONG. REC. S2045, 2074 (1994) (statement of Sen. Robb).

144. It should be noted that the PAYGO process that was being considered was dramatically different than the one in the BEA. *See supra* text accompanying notes 126 and 127.

145. David Broder, Editorial, *Haste Makes Waste*, WASH. POST, May 5, 2005, at A25; *Marketplace*, *supra* note 143.

146. *See supra* text accompanying note 129. Democratic Majority Leader Hoyer, responding to Republican criticism of the waiving of points of order on legislation, said "I am constrained to say with all the charity in my heart that, of course, you [referring to the former Republican Majority of the previous Congress] didn't violate the PAYGO rule, you eliminated the PAYGO rule. So it was not an issue on your side." 153 CONG. REC. H489, 491 (daily ed. Jan. 12, 2007).

147. DEMOCRACY IN DEFICIT, *supra* note 13, at 188–89.

148. *Id.* at 185.

149. *Cf. supra* note 104.

tion. They are generally invisible. They may exist alone or may compound each other. But they all undermine the validity of the process as it has been implemented and they make some laws counterintuitive, inefficient, and unfair.

A. "TYPE OF MONEY" EFFECTS: DISCRETIONARY SPENDING BREAKS PROMISES

As has been noted, the formal congressional budget process is a relative innovation. Many statutes were written and many programs were created well before it was adopted, and the process by which they were incorporated into it was not uniform.

For example, from at least the early nineteenth century, the federal government has expressed responsibility for providing health care for Indian peoples.[150] Whether expressed in terms of "wards and guardians" or of "aid and subsistence," various treaties, statutes, and court holdings indicated some basic obligation of the federal government to Native American peoples. The major modern embodiment of that obligation today is the Indian Health Service (IHS).[151]

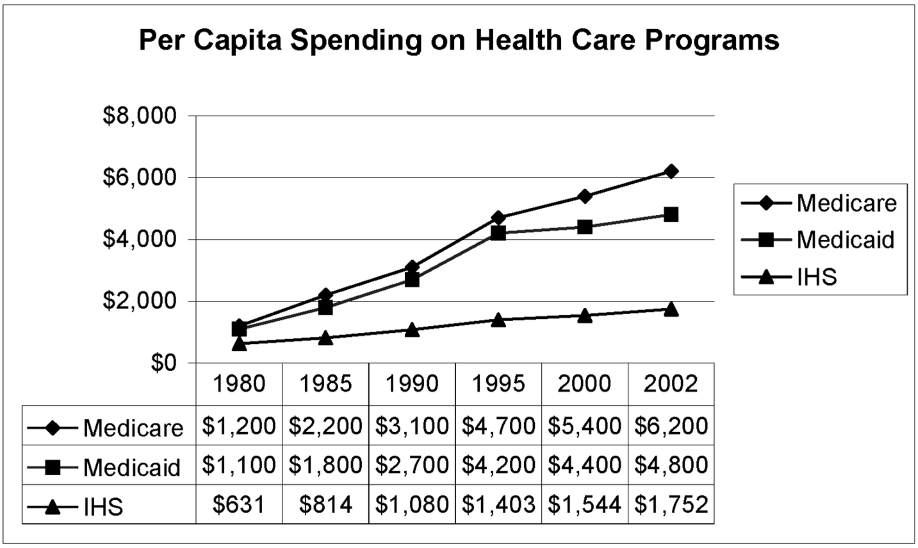
When the catalogue of programs was divided into discretionary and mandatory spending categories for budget purposes, however, the IHS was deemed discretionary, notwithstanding previous statements of legal obligation. As a result, this health care program has been placed into competition with other discretionary spending activities, many of which have much stronger popular support. IHS's growth in spending was limited to the Congress's generosity and not tied to increases in need or the cost of care.

For a demonstration of the significance of this categorization, one need only compare the per beneficiary growth in the IHS programs and those in the mandatory spending programs of Medicare and Medicaid.[152] Between 1980 and 2002, Medicare per capita spending grew at an average of 7.8% per year, Medicaid at 6.9% per year, and IHS at only 4.8% per year. Had IHS per capita appropriations grown at the Medicare rate during this period, the IHS per capita

150. *E.g.*, Treaty between the United States of America and the Eastern Band of Shoshonees and the Bannack Tribe of Indians art. 10, July 3, 1868, 15 Stat. 673; Treaty between the United States of America and the Northern Cheyenne and Northern Arapahoe Tribe of Indians art. 7, May 10, 1868, 15 Stat. 655; Treaty between the United States of America and the Crow Tribe of Indians art. 10, May 7, 1868, 15 Stat. 649; Treaty between the United States of America and the Kiowa and Comanche Tribes of Indians art. 14, Oct. 21, 1867, 15 Stat. 581; *see also* Exec. Order No. 13,084, 3 C.F.R. §150 (1998), *reprinted in* 25 U.S.C. §450 (2000); Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000), *reprinted in* 25 U.S.C. §450 (2000). *See generally* Steven Kunitz, *The History and Politics of U.S. Health Care Policy for American Indians and Alaskan Natives*, 86 AM. J. PUB. HEALTH 1464 (1996).

151. If they meet the criteria of the programs, Native Americans are also eligible for Medicaid and Medicare, and the IHS is reimbursed for services rendered to beneficiaries of those programs. Thus, some Indians receive health benefits financed by mandatory spending. *See* 42 U.S.C. §1396j (2000); *see also* Bonnie M. Duran, *American Indian/Alaska Native Health Policy*, 95 AM. J. PUB. HEALTH 758 (2005).

152. A more complete discussion of this problem as well as a series of proposals to remedy it can be found in Timothy M. Westmoreland & Kathryn R. Watson, *Redeeming Hollow Promises: The Case for Mandatory Spending on Health Care for American Indians and Alaska Natives*, 96 AM. J. PUB. HEALTH 600 (2006).



	1980	1985	1990	1995	2000	2002
Medicare	$1,200	$2,200	$3,100	$4,700	$5,400	$6,200
Medicaid	$1,100	$1,800	$2,700	$4,200	$4,400	$4,800
IHS	$631	$814	$1,080	$1,403	$1,544	$1,752

spending would have been almost double ($3,260 per capita rather than $1,752). Any pretense that IHS can purchase an adequate package of health services becomes less credible as time proceeds. Even as appropriations for IHS increase, they fall further and further behind a Medicare benchmark on a per beneficiary basis.[153]

These funding shortfalls are not simply abstractions. The age-adjusted death rate for Indians is 50% higher than for non-Indians, and the number of years of potential life lost (another measure of premature mortality) is 70% higher.[154] It is likely that these disparities in health status are related to the health care funding available to them, funding that started at a lower level than other programs and that has lagged behind more and more over time.

The Congress could have chosen to appropriate dollars at an adequate level for the IHS, but the political process of annual appropriations is heavy lifting. The fixed-sum nature of the discretionary spending caps compounded by the high inflation in health care costs makes it even more so. Had the historical promises of goods and services been recognized as requiring treatment of IHS as mandatory spending, the increases in funding would have occurred automatically over the years—without heavy lifting—as they do for Medicare and Medicaid.

Another example of a budgetary mismatch between type of spending and a promise is the correctional health budget of the Department of Justice. The

153. *Id.*

154. *See* PROGRAM STATISTICS TEAM, U.S. DEP'T OF HEALTH & HUMAN SERVS., TRENDS IN INDIAN HEALTH: 1998–99, at 161–62 (1999), *available at* http://www.ihs.gov/PublicInfo/Publications/trends98/part4.pdf.

provision of health care services to federal prisoners is, at some constitutional level, an enforceable obligation on the federal government.[155] Correctional health budgets are, however, designated as discretionary spending and must compete with such politically popular Justice Department line items as the FBI and the DEA.[156] It is not surprising that correctional health services are often underfunded and inadequately staffed.[157]

Similar mismatches of history and taxonomy can be found throughout the federal budget. Wherever a promise was made but then subordinated to the limits of discretionary spending, the effect in any time of federal fiscal restraint or of dramatic increase in costs was to undermine the promise.[158]

B. "TYPE OF MONEY" EFFECTS: TAX SPENDING IS OPAQUE

While those programs assigned to discretionary spending may be disadvantaged by the competition for funds and the heavy lifting of annual renewals, those activities supported by tax spending enjoy clear advantages over those supported by either of the other types of money. As noted above, tax spending is not counted as an overt part of the budget. The President's budget proposal annually includes a chapter in its appendix on tax expenditures[159] and the Congressional Joint Committee on Taxation publishes an annual staff report on them,[160] but when the President announces his budget totals, the "spending" categories include only those programs that are outlays from the Treasury and omit those activities that are subsidized by revenues forgone.

Moreover, the popular understanding of the budget does not include tax spending. When the press covers the size and reach of the government's activities, it discusses the total outlays, not the unreceived taxes. The tax expenditures are implicitly in the budget, represented by a lower baseline for revenues than would be projected if they did not exist, but they are not part of the idea of programmatic spending. For instance, the President's budget for

155. *See* Estelle v. Gamble, 429 U.S. 97, 105 (1976); *cf.* C.G. Carrabba, *Prisoners' Constitutional Right to Medical Treatment: A Right Without Substance?*, 7 NEW ENG. J. ON PRISON L. 341 (1981).

156. The idiosyncratic division of jurisdiction of appropriations subcommittees has also resulted in competition for resources with programs administered by the State Department and the Commerce Department. Note also that neither federal nor state prisoners can have Medicaid pay for their care, thus depriving correctional health programs of the cross-subsidy of mandatory spending that benefits the IHS. *See* 42 U.S.C.A. §1396d(a)(28)(A) (West Supp. 2006) ("[S]uch term does not include . . . any such payments with respect to care or services for any individual who is an inmate of a public institution . . ..").

157. ERIC MONTAGUE, WASH. POLICY CTR., PRISON HEALTH CARE: HEALING A SICK SYSTEM THROUGH PRIVATE COMPETITION (2003), http://www.washingtonpolicy.org/ConOutPrivatization/PNPrisonHealthCare03-08.html.

158. A particularly farcical problem recently arose because the constitutional provision for a census was and still is subject to discretionary spending limits and vagaries. FY 2000 was a bad year under the cap, and spending for the Year 2000 census was, in fact, denominated an "unexpected emergency" in order to allow for funding outside the caps. *See generally* U.S. CONST. art. I, §2, cl. 3; Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, 113 Stat. 1501 (1999).

159. *E.g.*, OFFICE OF MGMT. & BUDGET, FY 2007 PERSPECTIVES, *supra* note 68, at 285.

160. *E.g.*, STAFF OF THE JOINT COMM. ON TAXATION, *supra* note 76.

Fiscal Year 2006 was almost universally described as a "$2.57 trillion budget;"[161] this was the total of discretionary and mandatory spending. Had the tax spending been included in the total, it would have been a $3.49 trillion budget, a 36% increase or almost a trillion dollars more.[162]

This absence from the budget is significant in two ways. First, tax spending is generally "out-of-sight, out-of-mind."[163] Most tax provisions have no fixed expiration date,[164] and, thus, like mandatory spending programs, they continue to cost money unless the Congress takes action to change the statute.[165] But unlike mandatory spending programs, they are invisible and "do not overtly compete in the annual budget process."[166] So, in the annual budget fights, the competition is among those programs that overtly expend money from the Treasury and usually does not include those enacted laws that keep money out of it in the first place. The Government Accountability Office (GAO) has concluded that, "[a]s a result, policymakers have few opportunities to make explicit comparisons or trade-offs between tax expenditures and federal spending programs."[167]

The second effect of this absence from annual estimation and competition is that tax spending is rarely—certainly not annually—evaluated for its reach or effectiveness. "[R]eviews . . . are not conducted systematically and may not explicitly consider possible trade-offs between tax expenditures and federal outlay programs and mandates."[168] Or, as one observer of the Congress has recently written,

> [I]n the case of appropriations, where every dime can be counted by the Treasury and the recipients identified, it is at least possible for Congress to see where its money goes. That's not true for tax code goodies. By law, IRS auditors are about the only people who might get a whiff of who's claiming tax credits for solar energy production or low-income housing. And unless the

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161. *See, e.g.*, Jim VandeHei, *Bush Begins Push for Budget; President Talks of Discipline, Sacrifice*, WASH. POST, Feb. 9, 2005, at A06. *But see* Gail R. Chaddock, *Why This Budget Battle Has an Epic Tone*, CHRISTIAN SCI. MONITOR, Feb. 9, 2005, at 2 (describing the budget as $2.57 trillion, but also mentioning certain tax expenditures).

162. *See* DAVID L. BRUMBAUGH ET AL., CONG. RESEARCH SERV., OVERVIEW OF THE FEDERAL TAX SYSTEM, 14 tbl.6 (2005) (stating the sum of tax expenditures estimated for 2006 as $921 billion, a simple addition of all separate provisions); OFFICE OF MGMT. & BUDGET, FY 2006 PERSPECTIVES, *supra* note 77 and accompanying text.

163. Cranford, *supra* note 77, at 814.

164. Although, as budget gimmicks, many recent tax changes have been enacted with their own repeals in order to make the change artificially appear to be inexpensive. *See* JOEL FRIEDMAN & ROBERT GREENSTEIN, CTR. ON BUDGET & POLICY PRIORITIES, ADMINISTRATION PROPOSALS TO HIDE TAX-CUT COSTS 2 (2006), *available at* www.cbpp.org/2-14-06tax.pdf ("This gimmick worked because CBO is required under the rules to assume that tax cuts that are slated to expire will, in fact, expire and thus will not have costs after they sunset."); discussion *infra* note 270.

165. *See* Cranford, *supra* note 77, at 814 ("[Tax spending] is a gift that just keeps on giving.").

166. GEN. ACCOUNTING OFFICE, *supra* note 70, at 3.

167. *Id.*

168. *Id.*

> IRS smells a rat, it is unlikely to ask questions that reveal fraud or abuse. It might seem efficient to use the tax code to encourage social goals, and the economic effect of giving someone a tax break is little different from handing him a check. But the real question is who's minding the store.[169]

Another reviewer recently testified to the President's Advisory Panel on Tax Reform that "[m]any tax subsidies are complex, unfair, inefficient, non-transparent, and corrupting . . .. [There is] almost no monitoring for effectiveness for almost all subsidies."[170] Without periodic budget review, oversight and public airing, such spending is likely to continue to be so.

C. "TYPE OF MONEY" EFFECTS: TAX SPENDING IS OF UNEVEN BENEFIT[171]

Many discretionary and mandatory spending items provide eligible beneficiaries with roughly equivalent benefit, regardless of the beneficiaries' current economic status;[172] others provide value in inverse relation to the beneficiaries' status, helping lower-income people more.[173] Most tax spending does neither.

Tax spending comes in many varieties—deductions, credits, exemptions, adjustments, etc.[174] But virtually all of them are valuable to a taxpayer only in proportion to the amount of tax she would otherwise owe. A deduction (that is, an exclusion from income counted for taxation) generally saves someone in the 10% bracket only 10% of the cost of the deductible spending, while someone in the 35% bracket saves 35%. A $10,000 credit (that is, a dollar-for-dollar reduction in tax liability) saves someone who owes $1,000 in tax a maximum of $1,000, whereas someone who owes $10,000 in tax may save up to $10,000. Only a refundable credit (that is, a dollar-for-dollar reduction in tax liability through which the government pays the taxpayer if the credit exceeds liability, such as the Earned Income Tax Credit or the Child Tax Credit) comes close to being relatively equal in value across groups,[175] but refundable credits are few and far between and increasingly under attack.[176]

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169. Cranford, *supra* note 77, at 814.

170. TAX REFORM AND FAIRNESS FOR FAMILIES, *supra* note 78, at 2, 19.

171. *Cf.* Surrey, *supra* note 65, at 720–25.

172. See, for example, Medicare or the programs for general disease prevention and control.

173. See, for example, Medicaid or the programs for community health centers for low-income people.

174. *See* STAFF OF THE JOINT COMM. ON TAXATION, 109TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2005–2009 30–40 (Comm. Print 2005), *available at* http://www.house.gov/jct/s-1-05.pdf.

175. However, it should be noted that even refundable credits "are limited to people with positive earnings. . .[and] largely exclude both the nonworking poor and many working poor without children; these groups will continue to depend on direct spending programs for assistance." URBAN INST., SOCIAL POLICY AND THE TAX SYSTEM 5 (2001), *available at* http://www.urban.org/UploadedPDF/310418_TaxSystem.pdf. Moreover, even refundable credits for favored activities or purchase require that the taxpayers have the cash flow to pay the costs up front and wait for the refund. *Id.*

176. *See* SHARON PARROTT ET AL., CTR. ON BUDGET & POLICY PRIORITIES, HOUSE BUDGET RESOLUTION WOULD REQUIRE MUCH DEEPER CUTS IN KEY LOW-INCOME PROGRAMS THAN SENATE BUDGET PLAN 2 (2005), *available at* http://www.cbpp.org/3-30-05bud.pdf.

The beneficiaries of most tax spending are, thus, disproportionately affluent and, the more affluent they are, the more they benefit. For example, using data from the Joint Committee on Taxation, it can be calculated that of persons filing taxes in 2004, 5% of those with incomes under $10,000 will have claimed a mortgage interest deduction, 41% of those with incomes between $50,000 and $75,000, and 76% of those with incomes between $100,000 and $200,000. The average value of that deduction can be calculated to be $154 for the first group, $957 for the second group, and $2,603 for the third group.[177] The total spending through the mortgage interest deduction was estimated to be $70 billion in 2004. Of that, 66% was expected to go to taxpayers with income over $100,000, a group that made up 12% of those who file tax returns.[178]

This is a counterintuitive income re-distribution program or "an 'upside-down' subsidy."[179] Tax spending gives government money to a person in a manner "little different from handing him/her a check,"[180] but in direct proportion to the income she already has.[181] An affirmative spending program of this type "would be laughed out of Congress,"[182] but, cloaked as tax spending, it and many like it continue.

Indeed, recent proposals have been made to carry out more government programs through tax spending. The President has recently proposed to reform health insurance altogether through the tax code.[183] In the past he has also suggested using tax expenditures to subsidize long-term care insurance premiums,[184] to aid with education expenses,[185] and to assist with retirement invest-

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> The House Budget Resolution would require the House Ways and Means Committee to cut $18.7 billion from programs under its jurisdiction. When asked how the Budget Committee assumed the Ways and Means Committee would achieve this cut, Budget Committee Chairman Jim Nussle mentioned only one program: the EITC, a refundable tax credit that provides tax relief and wage supplements to low-income working families.

Id.; *cf.* Brian Riedl, *Examples of Government Waste*, The Heritage Foundation WebMemo, Sept. 14, 2005, http://www.heritage.org/Research/Budget/wm839-list.cfm.

177. *See* STAFF OF THE JOINT COMM. ON TAXATION, *supra* note 76, at 41 tbl.2 (listing numbers of returns by income class); STAFF OF THE JOINT COMM. ON TAXATION, CORRECTION OF ERROR IN TABLE 3 OF JCS-1-05, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2005–2009, at 6 tbl.3 (2005), *available at* http://www.house.gov/jct/x-13-05.pdf (listing total dollar amounts of deductions by income class). The calculation of percentages and values are my own.

178. STAFF OF THE JOINT COMM. ON TAXATION, *supra* note 76, at 41 tbl.2.

179. Thuronyi, *supra* note 65, at 1159.

180. Cranford, *supra* note 77, at 814.

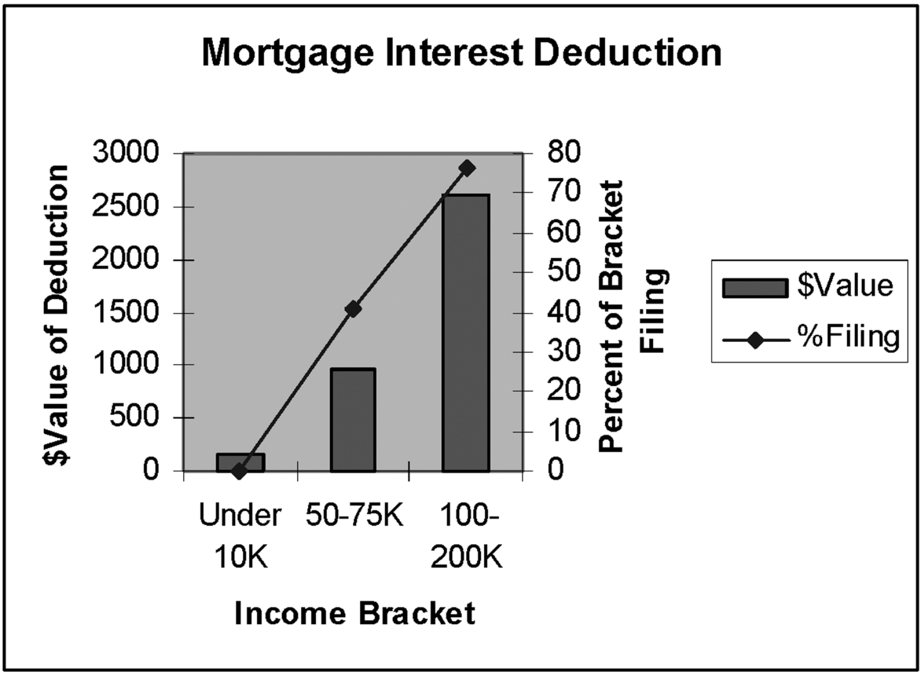
181. *Cf.* BILLIE HOLIDAY & ARTHUR HERZOG JR., *God Bless the Child*, *on* GOD BLESS THE CHILD (Columbia Records 1936) ("Them that's got shall get/Them that's not shall lose . . . .").

182. Surrey, *supra* note 65, at 722.

183. Sheryl Gay Stolberg & Robert Pear, *Bush Urges Tax to Help Cover the Uninsured*, N.Y. TIMES, Jan. 21, 2007, at A1.

184. EDWIN PARK, CTR. ON BUDGET & POLICY PRIORITIES, ADMINISTRATION'S BUDGET INCLUDES ADDITIONAL HEALTH TAX CUTS THAT PRIMARILY BENEFIT HIGHER-INCOME INDIVIDUALS 1 (2002), *available at* http://www.cbpp.org/2-5-02health.pdf.

185. COUNCIL OF ECON. ADVISORS, PRESIDENT BUSH'S 2001 TAX RELIEF SOFTENS THE RECESSION 2 (2002), *available at* http://www.whitehouse.gov/cea/TaxReliefActUpdate_Feb02wp.pdf.



ments.[186] Most of these proposals are not for refundable credits, so they will likely be skewed in their distribution in a manner similar to other such measures.[187]

The budget process has already facilitated this. Tax rate increases require a supermajority in the House of Representatives,[188] but tax cuts require only a simple majority and (as discussed below) are, if included in certain budget

186. *Id.*

187. *See* Robert H. Frank, *A Health Care Plan So Simple, Even Stephen Colbert Couldn't Simplify It*, N.Y. TIMES, Feb. 15, 2007, at C3 (quoting Stephen Colbert's summary of the President's recent proposal to use tax spending to promote health insurance: "It's so simple. Most people who can't afford health insurance also are too poor to owe taxes. But if you give them a deduction from the taxes they don't owe, they can use the money they're not getting back from what they haven't given to buy the health care they can't afford.").

188. RULES OF THE HOUSE OF REPRESENTATIVES, R.XXI(5)(b), *supra* note 120 ("A bill or joint resolution, amendment, or conference report carrying a federal income tax rate increase may not be considered as passed or agreed to unless so determined by a vote of not less than three-fifths of the Members voting, a quorum being present."). The Senate has no such rule. McGinnis and Rappaport argue that a supermajority requirement to raise taxes is good policy because it "functions as a modest precommitment by the majority not to go down a road that will make everyone worse off in the end as concentrated interest groups demand expenditures that beggar the nation as a whole." McGinnis & Rappaport, *supra* note 118, at 510. While this public choice argument is understandable when dealing with general taxes and affirmative spending, it refutes itself when dealing with tax expenditures, inasmuch as it is the interest group that benefits by the special tax treatment, leaving the nation as a whole to take up the slack.

legislation, even protected from filibuster in the Senate.[189] Some budget process proposals, defeated last year but still discussed, would have facilitated this even more. As discussed above,[190] the House Budget Committee passed a proposal that would have reinstated PAYGO on mandatory spending but would have exempted future tax cut legislation (except refundable tax credits[191]) from PAYGO requirements. If this were to be enacted, it would subject policy that would be accomplished through new mandatory spending (for example, an expansion in Medicaid to cover the uninsured) to all PAYGO requirements, but it would allow policy accomplished through tax spending (for example, providing tax deductions for health savings accounts) to be enacted without doing so. This would structurally encourage vastly more policy to be conducted through tax spending. Any such tax-spending measure would almost certainly be distorted toward the affluent in its distribution of assistance.

D. TIMING EFFECTS: THE BUDGET PROCESS DISCOURAGES LONG-TERM INVESTMENTS

Intrinsically, any budget is for a defined period of time. The most common federal budget is for a federal fiscal year, running from October 1 to September 30.[192] For purposes of scorekeeping, however, the Budget Act requires the projection of budgetary effects of proposed legislation be over a five-year snapshot.[193]

Such short time frames are not demanded by the moral claims of the public choice underpinnings of the policy. One could budget for much longer than five years without creating an intergenerational transfer. Such budgets would be, for all practical purposes, imposing the costs of a policy on the beneficiaries of it.[194]

Rather, the time frames are so limited because forecasting is a science of frequent doubts and occasional chaos. Scorekeepers and other actuaries have noted discomfort with extended projections. Uncertainty inevitably rises with each year added to a snapshot.[195] For a very dramatic instance, one need only compare the projections for surpluses made in 2001 with those made in 2002—an

189. *See* discussion *infra* note 243.

190. *See supra* notes 126 and 128.

191. The proposal would treat the refundable tax credits, to the extent that they create refunds beyond a taxpayer's liability, in a manner analogous to mandatory spending, that is, subject to PAYGO.

192. The development of a budget, however, may span two or more calendar years. Agencies typically begin development of their proposals eighteen months before the beginning of the fiscal year. The President edits and combines these proposals and submits his proposed budget eight months before the beginning of the fiscal year. The Congress deliberates on the budget over the next eight months and, if successful, enacts spending measures by September 30 for the fiscal year that commences October 1. Following the close of the fiscal year, it may take as much as another full year (much longer for mandatory spending programs) to account for the spending and close the books.

193. *See* sources cited *supra* notes 113 and 116.

194. Some purists, though, insist on a moral claim of virtually instantaneous assignment of costs.

195. *See* CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2002–2011, at 94 fig.5-1 (2001), *available at* http://www.cbo.gov/ftpdocs/27xx/doc2727/entire-report.pdf (illustrating the range of budget uncertainty, sometimes called the "CBO garden hose").

overall decline of $4 trillion from one year's report to the next;[196] less volatile changes occur regularly.

The length of this snapshot can make a crucial difference in lawmaking. The shorter the snapshot, the lower the chance of enacting long-term investments. A snapshot of five years may, for instance, fail to recognize offsetting benefits of investments in the longer run.

This simple problem has, in fact, been the major hurdle for delivering medically appropriate care for people with HIV under the Medicaid program.[197] Medicaid eligibility is limited to very-low-income individuals who also fit into one or more categories. The major categories are families with dependent children, people over the age of sixty-five, and people who are totally disabled.[198] Childless adults under the age of sixty-five who are not disabled are generally not eligible for Medicaid. From the outset of the AIDS epidemic, most people with AIDS who have gained eligibility for Medicaid have done so by meeting the criteria of being totally disabled.[199]

Since 1988, however, a number of drugs have been licensed that slow the onset of disability among people infected with HIV and, beginning in 1995, a new series of drugs has been approved that seems to prevent the progression from infection to total disability altogether, at least for a substantial length of time for a substantial number of people. But the Catch-22 of Medicaid eligibility means that people with HIV cannot be admitted (and have their medications paid for) until after they become disabled—that is, after the new drugs have lost a substantial amount of their potential value to the patients' health.

Since 1990, legislation has been introduced regularly in the Congress to amend the Medicaid statute to address this problem. But in each Congress, the legislation has encountered fatal PAYGO problems. Estimation of the probable time for progression from HIV infection to AIDS requires a complex epidemiological model, but most untreated infected people do not become disabled within the first five years. Thus, the provision of health-preserving pharmaceuticals produces few offsetting savings of forgone health costs within the five-year snapshot period. Scorekeepers project that the costs of the drugs would be incurred from the first day of implementation of the proposal but that significant

196. The reader will remember that, during the time between these two estimates, a large tax reduction package was enacted, the technology bubble in the stock market burst, and the attacks on the World Trade Center occurred. *See* CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2003–2012, at xiii (2002), *available at* http://cbo.gov/ftpdocs/32xx/doc3277/EntireReport.pdf.

197. For a fuller discussion of the Medicaid eligibility for people with HIV/AIDS, see TIMOTHY M. WESTMORELAND, *Medicaid Eligibility*, ch. 2 *of* MEDICAID AND HIV/AIDS POLICY: A BASIC PRIMER (1999), *available at* www.kff.org/hivaids/upload/Medicaid-and-HIV-AIDS-Policy-A-Basic-Primer-Report.pdf.

198. Note that the Social Security Act definition (as contrasted with the Americans with Disabilities Act definition) of "disabled" is "unable to maintain substantial gainful activity,"—for example, unable to work. Medicaid relies upon this definition also. *Compare* 42 U.S.C. §423(d) (2000) (definition of disability under the Social Security Act), *with* 42 U.S.C. §12102(2) (2000) (definition of disability under the Americans with Disabilities Act).

199. *See* WESTMORELAND, *supra* note 197, at 106.

offsetting savings from the reduced need for other care would not accrue until well after. By contrast, a ten-year snapshot produces more than ten times the offsetting savings, an amount twenty percent more than the total estimated five-year costs.[200] Were the period between initial infection and illness more compressed than it is, the legislation would meet the PAYGO requirements and likely would have been enacted. Instead, a substantial number of childless adults with HIV remain ineligible for Medicaid and altogether uninsured.[201]

Similar snapshot conundrums can be found throughout Medicaid and Medicare and throughout the budget.[202] Within the context of the five-year snapshot under the Budget Act, shorter snapshots produce a need for more immediate returns on spending. This tacit procedural bias discourages long-term investments with large payoffs and may direct government spending to areas that are, in fact, less productive in the long run.[203]

E. SOLIPSISM EFFECTS: ONLY FEDERAL SAVINGS COUNT

While many theories of the role of government concentrate on the common good, the compensation for market failures, or redistribution of wealth and opportunity, the budget process directs federal focus inward, resulting in an under-appreciation of public value and public improvement. The baseline, scorekeeping, and Budget Act structure all focus on the net cost of an activity to

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200. PRICEWATERHOUSE COOPERS, AN ANALYSIS OF THE EARLY TREATMENT FOR HIV ACT, PREPARED FOR THE TREATMENT ACCESS EXPANSION PROJECT (TAEP) tbl. 4 (2003), *available at* http://www.taepusa.org/documents/PWC%20%20-%20Final%20PDF.pdf. This timing effect is exacerbated by making Medicaid eligibility for people with HIV on an ongoing basis. People who enroll in the tenth year of the snapshot will create expenses within the snapshot that will, in turn produce offsetting reductions in other health costs *twenty* years after the policy change is made, in effect creating a rolling snapshot problem. This can be seen clearly in a model that looks only at a cohort of people who enroll in the first year after the policy change. *See* PWC, tbl. 6.

201. Programs of discretionary spending have been created to provide HIV care to people without other sources of payment. Recent reports, however, show that increased drug prices and limited state and federal support for such programs have led to shortfalls in many states and some programs have standing waiting lists. *See* KAISER FAMILY FOUND., *supra* note 95.

202. *Cf.* JUDITH A. JOHNSON, CONG. RESEARCH SERV., MAMMOGRAPHY QUALITY STANDARDS ACT: BACKGROUND AND ISSUES 4 (Rep. No. 98-809, Oct. 22, 1998) (explaining that Medicare did not provide for mammography screenings); Robert J. Clark, Individuals with Disabilities Education Act (May 2005) (unpublished student paper) (on file with author) (explaining that there are no savings estimated from an attempt to make education for children with disabilities mandatory spending). It is interesting to note that both the Social Security program and the Medicare program employ seventy-five-year forecasts for estimating the solvency of their trust funds, although they do so with a long list of disclaimers about uncertainty and possible changes.

203. There is an increasingly common practice of drafting legislation with a slow phase-in or an artificial termination of a statutory provision (for example, tax reductions) within a snapshot period in order to reduce its score. This is, in some ways, the obverse of the timing problem discussed here, but I do not believe it is a true structural problem because it could be remedied by making the provision coterminous with the snapshot, requiring reauthorization. Rather, this practice is one of many gimmicks and, as mentioned above, will not be discussed in this paper. For a clear discussion of such timing gimmicks, see Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 527 (1998).

the federal fisc and place no value on non-federal savings.[204]

For example, a congressional initiative to use mandatory spending to provide a new vaccine against the newly arising pandemic avian influenza would be scored for its purchase price multiplied by the number of eligible and willing recipients, both projected over five years. Every dose provided with federal funds would be designated as a cost. But the offsetting savings of forgone hospital costs would be taken into account only to the extent that the federal government would have been liable for mandatory payment of such costs. Thus, savings from prevented illnesses of beneficiaries of the Medicare and Medicaid programs would count.[205] Savings from prevented illnesses of the public at large—whether privately insured or uninsured—would not count. The even more widely dispersed benefits of preventing an epidemic would also remain unscored.[206]

This sealed system is perhaps an accurate reflection of the budget itself. The prevention of an epidemic among people without a claim on federal health care is a matter of no significance to federal accounting. But this fiscal solipsism skews legislative action away from interventions of general application that may be the most productive of all government investments.

It takes little imagination to expand on this avian flu example to develop the likely political and legislative response to this budget problem. To contain the score, a proponent of legislation would move toward providing the vaccine only to those persons whose hospital bills would be a federal responsibility. Even if the screening and eligibility process for finding these persons were only marginally less costly—and vastly less helpful—than general distribution of the vaccine to the public, no budgetary incentive exists to purchase broadly or to prevent epidemics generally.

In a more abstract manner, some combination of history and this problem has produced exactly such a skewed approach when it comes to federal funding for public health (or population-based) services as contrasted with insurance (or

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204. By contrast, the Unfunded Mandates Reform Act requires evaluation by the CBO of *costs* imposed upon state and local government and the private sector. *See* Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4 §202, 109 Stat. 48, 64 (codified as amended in scattered sections of 2 U.S.C.).

205. Savings for veterans and for federal employees would not count toward spending allocations and limits because those programs are funded with discretionary spending. The operating assumption is that all discretionary savings will be spent on other purposes.

206. An important and largely unexplored corollary of such scorekeeping is that it would be possible to accrue mandatory spending savings or costs for *regulatory* legislation that does not itself directly authorize the spending of federal money. For instance, extension of FDA market protections of brand-name drugs against generic competition has been scored as an increase in mandatory spending because of its effects on federal mandatory spending purchasers. *See* CONG. BUDGET OFFICE, PAY-AS-YOU-GO ESTIMATE: S. 1789, BEST PHARMACEUTICALS FOR CHILDREN ACT OF 2001 (2002), *available at* http://cbo.gov/ftpdocs/32xx/doc3271/s1789.pdf. The solipsism problem is also true in this instance: Regulatory legislation that requires increased non-federal spending (for example, the costs to non-federal payers of extending the protection of brand-name drugs against generic competition) goes unrecognized.

individual treatment) services. Virtually all federal support of public health is from discretionary spending.[207] By contrast, a great majority of insured health care provided by the federal government is from mandatory spending.[208] In general, public health programs predate the insurance programs, but that tradition has kept them in less advantageous funding streams.[209]

This results in some strange public policy. At its acme, federal support for fluoridation of water was authorized to receive $5 million per year,[210] although the discrete program no longer exists, having been repealed in 1981.[211] The most recent direct federal funding for fluoridation activities was a total of $2.6 million in FY 2003.[212] By contrast, Medicaid does pay for dentistry for children, and mandatory spending for that service exceeds $2 billion per year.[213] The American Dental Association estimates that the lifetime cost of fluoridated water for one person is less than the cost of filling one cavity,[214] but, like the hypothetical avian flu vaccine example, the savings to be accrued from the intervention would be counted only for federal beneficiaries. Equally paradoxically, just as the federal government recognized that it spends billions in

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207. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FY 2007, at 129–30 (2006), *available at* http://www.whitehouse.gov/omb/budget/fy2007/pdf/budget/hhs.pdf.

208. *Id.*

209. There is also something of a pattern of providing mandatory spending only for programs that assist individuals (for example, Medicare, Medicaid, Social Security, AFDC, veteran's disability payments, etc.). A study of the historical and legal intertwining of the concept of "individual entitlement" and mandatory spending would be illuminating. But recent laws have provided mandatory spending to states rather than to individual beneficiaries (for example, TANF, SCHIP) and, as discussed, *supra* note 55, mandatory spending has also been directed to other grantees. Proposals have even been made to provide mandatory spending authority to the Secretary of HHS to make contracts with pharmaceutical companies ("Project Bioshield"). *See generally* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, PRESIDENT'S BUDGET PROPOSAL FOR FISCAL YEAR 2005 (2005), *available at* http://www.whitehouse.gov/omb/budget/fy2005/pdf/appendix/hhs.pdf.

210. S.J. Res. 14, 96th Cong. (1979), P.L. 96-32, sec. (6)(i)(4).

211. States can still choose to use discretionary funds from the Federal Preventive Health and Health Services Block Grant (Title XIX of the Public Health Service Act), but funding in that program is used for a wide range of activities, data gathered are not sufficient to determine the extent of fluoridation funding, and the purchasing power of that block grant has eroded dramatically over the last twenty years. *See, e.g.*, 42 U.S.C. §300w-3(a)(1)(B) (2000). Moreover, the President's Budget for 2006 proposed that even this successor program also be repealed. *See generally* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006—APPENDIX, at 439 (2006), *available at* http://www.whitehouse.gov/omb/budget/fy2006/pdf/appendix/hhs.pdf.

212. Chronic Disease Prevention and Health Promotion Programs (Program Announcement 03022), 68 Fed. Reg. 3326, 3343 (Jan. 23, 2003).

213. Data are insufficient to determine how much of this spending would be preventable if water were universally fluoridated. *See* CTRS. FOR MEDICARE & MEDICAID SERVS., NATIONAL HEALTH EXPENDITURES BY TYPE OF SERVICE AND SOURCE OF FUNDS, CY 1960–2005, *available at* http://cms.hhs.gov/NationalHealthExpendData/02_NationalHealthAccountsHistorical.asp#TopOfPage (last visited Apr. 4, 2007).

214. AM. DENTAL ASS'N, FLUORIDATION FACTS 56 (2002), *available at* http://www.ada.org/public/topics/fluoride/facts/fluoridation_facts.pdf.

insurance on health problems associated with obesity and sedentary life styles,[215] the President's budget recently included elimination of programs for in-school exercise and for a range of fitness activities.[216]

This problem of focus could, in theory, be addressed by following the benefits of any broad public intervention through the economy all the way back to federal revenues. A publicly available avian flu vaccine, fluoridation program, or childhood exercise effort could, for instance, lower the number of sick-days, lower health care premiums for employer-based insurance, and increase the size of the economy. In turn, this could increase profits, payrolls, and wages, resulting in higher revenues for the federal government from corporate and individual taxes.

No public scorekeepers have been willing to estimate such attenuated effects. To the extent that they are uncomfortable estimating five- or ten-year snapshots of direct costs and savings, they are even more uncomfortable estimating such revenue changes as a result of any but the most targeted legislation that links services to federal beneficiaries' costs.[217]

F. ACCEPTABILITY EFFECTS: THE BUDGET PROCESS FAVORS EUTHANASIA AND INSTITUTIONALIZATION

Cost analyses, especially in health policy, have a difficult bottom line: It is almost always cheaper for very sick people to die.[218] This is basically true for analyses conducted for the federal budget process as well. For example, early discussions of covering preventive services in Medicare explicitly discussed such issues. At its inception, Medicare paid for no preventive care. Pneumonia was a widespread and frequently fatal illness among the elderly and disabled, especially those who were frail and those who were in nursing homes (and who, consequently, used many expensive services). In the late 1970s, the licensure of a highly effective vaccine against pneumonia prompted legislation to expand

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215. CTRS. FOR DISEASE CONTROL & PREVENTION, OVERWEIGHT AND OBESITY: ECONOMIC CONSEQUENCES (CDC, Sept. 29, 2006), *available at* http://www.cdc.gov/nccdphp/dnpa/obesity/economic_consequences.htm.

216. John Briley, *Does Bush Put His Budget Where His BMI Is?*, WASH. POST, Mar. 8, 2005, at HE03.

217. Note that some private scorekeepers have made such extended estimates when projecting effects of tax legislation. *See* Lawrence Whitman, Making the Tax Cuts Permanent and Fully Effective Now (Nov. 22, 2002), http://www.heritage.org/Research/Taxes/BG1614.cfm; *see also* Daniel J. Mitchell, How to Measure the Revenue Impact of Changes in Tax Rates (Aug. 9, 2006), http://www.heritage.org/Research/Taxes/BG1090.cfm. Note also that some nongovernmental economists are now projecting the costs of private health insurance into the costs of produced goods and, therefore, competitiveness of U.S. industries. For instance, General Motors has estimated that the costs of health insurance alone add $1,500 to the price of each car made in the United States. *See* David Leonhardt, *The Choice: A Longer Life or More Stuff*, N.Y. TIMES, Sept. 27, 2006, at C1.

218. For a general discussion of a range of difficult bottom lines in cost analyses, see FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

Medicare's coverage to include it.[219]

This legislation was introduced at the time of the initial ascendancy of the budget process in the Congress,[220] and analyses of the legislation were among the first comprehensive projections made of budget consequences. One congressional review described the issues to be considered in doing such studies and concluded, counter-intuitively, that the vaccine would represent a *net cost* to the Medicare program of $4.40 per beneficiary vaccinated, even after accounting for the savings from the medical costs that would not be incurred because pneumonia was prevented.[221] A major reason the proposal was estimated to have a cost was an explicit calculation of the "costs . . . for the treatment of illnesses [*other than pneumonia*] not prevented by vaccination in *extended years of life*."[222] The study goes on to describe the reason for the "high figure in positive net costs" for the elderly and the even higher costs for other "high risk" groups of chronically ill or disabled persons:

> [A] vaccination program becomes more costly, apparently because, as more deaths are averted, the cost of medical care in extended years of life increases. . . . Pneumococcal vaccination may or may not be cost-effective for those in high risk groups other than the elderly. Although these groups would experience benefits from vaccination in reduced treatment costs for pneumococcal pneumonia and gains in life expectancy, these benefits might be offset by high costs for treatment of other illnesses and poor general health in extended years of life.[223]

A later analysis of the more general topic of the possible inclusion of a range of preventive services as covered benefits in Medicare discouraged the use of such calculations because, if appraised in this manner, a highly effective preventive service could also fail the test of being cost-saving to Medicare if by prolonging life it induces future Medicare expenditures for unrelated illness.[224]

The effect of increased costs to the Medicare program for extending the life of its beneficiaries (known as "survivors' costs"[225]) is undoubtedly true in many cases. If a vaccine changes the baseline of the number of people who are

219. Now codified at 42 U.S.C.A. §1395x(s) (West, Westlaw through Pub. L. No. 109-481).

220. Because this proposal was made (and enacted) before the introduction of PAYGO rules, the budget estimates that were made were for information only; they did not serve as procedural limits to the Congressional consideration of the proposal.

221. *See* OFFICE OF TECH. ASSESSMENT, A REVIEW OF SELECTED FEDERAL VACCINE AND IMMUNIZATION POLICIES 72 tbl.12 (1979), *available at* http://www.wws.princeton.edu/ota/disk3/1979/7915/7915.PDF.

222. *Id.* at 78 (emphasis added).

223. *Id.* at 78–79.

224. OFFICE OF TECH. ASSESSMENT, PREVENTIVE HEALTH SERVICES FOR MEDICARE BENEFICIARIES: POLICY AND RESEARCH ISSUES 12 (1990).

225. *See* M. A. Riddiough et al., *Influenza Vaccination*, 249 J. AM. MED. ASSN. 3189 (1983); E-mail from Jane Sisk, Professor of Health Policy & Dir., Div. of Health Care Statistics, Nat'l Ctr. for Health Statistics, to Timothy M. Westmoreland, Visiting Professor of Law, Georgetown Univ. Law Ctr. (June 9, 2003) (on file with author).

actuarially projected to die from pneumonia and if those people then receive other Medicare-covered benefits, the vaccine will increase spending. Any projection used for assessing solvency of the Medicare Trust Fund (or, for that matter, the Social Security Trust Fund) or estimating the federal deficit and debt should take this into account.[226]

But should health law take this into account? Or, more accurately, should this be the threshold decision for enacting the law? Few people are willing to face, much less defend, a scorekeeping policy that is predicated on budgetary euthanasia. It is particularly troubling (although perhaps particularly accurate) when used in the context of programs to help elderly, disabled, and low-income people—the very people aided by most federal mandatory spending.

But, even as recently as the enactment of the new Medicare prescription drug coverage, some version of this method appears to have been used. In describing why its model included costs *but no savings* from new access to pharmaceuticals, the CBO said, *inter alia*, "[T]o the extent that a drug benefit helps people live longer, they may consume more health care over their remaining lifetime than they would have without the benefit."[227] In other words, it is still cheaper for Medicare beneficiaries to die.

Euthanasia by budget is not the only actuarially accurate but publicly unacceptable outcome of scorekeeping rules. These rules also encourage the thwarting of the public's preferences for services—a sort of anti-market. Consider, for example, how the budget rules have ground to a virtual halt a movement to provide health care for people with disabilities in settings other than nursing homes.[228] A comparison of nursing-home care with home care generally shows

226. Or, in contrast, some have argued that if an activity increases mortality it might be seen as a "savings" to some mandatory spending program. *See* John B. Shoven, Jeffrey O. Sundberg & John P. Bunker, *The Social Security Cost of Smoking* 17 (Nat'l Bureau of Econ. Research, Working Paper No. 2234, 1987), *available at* http://papers.nber.org/papers/w2234.v5.pdf (noting British research findings that the short-term savings created by a government anti-smoking campaign will be more than offset by the additional benefits provided to the surviving ex-smokers). *But cf.* Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163 (1998) (arguing that, if such savings are an acceptable goal, a more efficient means to accomplish it exists, that is, suicide contracts). I am unaware of anyone going so far as to propose that anti-smoking efforts be repealed in order to create such savings, either for deficit-reduction or as an offset for new spending. *But cf.* W. Kip Viscusi, *Cigarette Taxation and the Social Consequences of Smoking* 33 (Nat'l Bureau of Econ. Research, Working Paper No. 4891, 1994), *available at* http://papers.nber.org/papers/w4891.v5.pdf (saying that, if economic analysis were "[t]aken at face value . . . cigarette smoking should be subsidized rather than taxed").

227. CONG. BUDGET OFFICE, *supra* note 99, at 33.

228. Legislation to provide universal access to home- and community-based care (known as the "Medicaid Community-Based Attendant Services and Support Act") has been introduced repeatedly in the Congress (for example, H.R. 910, 109th Cong. (2005)). The archived "alerts" list from the disability rights group ADAPT contains its first notice on October 15, 1998, and its most recent one on February 25, 2007. *See generally* ADAPT.com, MICASA Alerts Archive, http://www.adapt.org/micasaalerts/index.php (last visited Feb. 27, 2007). The legislation has not been considered by either House or Senate to date. A limited provision allowing optional coverage of such care at a capped level was recently adopted as part of the Deficit Reduction Act.

that the relative costs per individual are, at worst, equal.[229] But a proposal to expand Medicaid benefits to require that states provide community-care services in addition to nursing-home services is scored not just for the per-person costs but also for the expected increase in the number of people who would use such services. Many people who would never consider a nursing home for themselves or their loved ones would readily use home care. To a budget analyst, beneficiaries who are presently costing nothing for long-term care in institutions (because they do not use it) would "come out of the woodwork" to avail themselves of long-term care at home. (This conundrum is, in fact, widely and unaffectionately known as the CBO "woodwork effect.")[230]

So there is institutionalization by the budget.[231] The legislation to require Medicaid to pay for home and community-care has been introduced for a decade and never moved past hearings and scoring.[232] Legislators can feel confident that they can camouflage their decision to oppose or simply fail to support such legislation as simply "the budget," without confronting the values implicit in that calculation.

Other such actuarial-cum-ethical conundrums can be easily posited. The federal move toward expanding care for premature infants undoubtedly kept a number of children with disabilities alive who would otherwise have died. Many, if not most, of those children were automatically eligible for Medicaid and likely posed a significant cost to the program. Should the legislation to

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229. *See, e.g.*, Karen E. Klein, *Ask the Expert; Arranging Home Care*, NEWSDAY, Aug. 6, 2005, at B03 (stating that "Agency-provided home care averages $16 to $18 an hour, while Long Island's nursing home facilities in 2003 averaged $316 a day per patient, according to the New York State Partnership for Long Term Care").

230. *See* CONGRESSIONAL BUDGET OFFICE, FINANCING LONG-TERM CARE FOR THE ELDERLY 37–38 (2004), *available at* http://www.cbo.gov/ftpdocs/54xx/doc5400/04-26-longtermcare.pdf; *see also* Richard Kaplan, *Cracking the Conundrum: Toward a Rational Financing of Long-Term Care*, 2004 U. ILL. L. REV. 47, 85 (2004). A version of the woodwork effect was also used by State government officials as justification for continued institutionalization in arguments before the Supreme Court in a case about the Americans with Disabilities Act. *See* Olmstead v. L.C., 527 U.S. 581, 604 (1999) (noting how the "Court of Appeals' remand order 'mistakenly asks the district court to examine [the fundamental-alteration] defense based on the cost of providing community care to just two individuals, not all Georgia citizens who desire community care'" (quoting Brief of Petitioners at 37–38, Olmstead v. L.C., 527 U.S. 581 (1999) (No. 98-536), 1999 WL 54623 (alteration in original))).

231. A less obvious, but closely related instance of statutory provisions driven by budget scorekeeping is Medicare's limitation of the hospice benefit to people whose physicians certify that they are expected to live for no longer than six months. *See* 42 U.S.C. §1395x(dd)(3) (2000 & Supp. III 2003). There was concern that a large number of beneficiaries might choose the new hospice benefit as an alternative, and the six-months-to-live requirement was added to address these cost concerns. *See* E-mail from Michael M. Hash, former Deputy Adm'r, Health Care Fin. Admin., to Timothy M. Westmoreland, Visiting Professor of Law, Georgetown Univ. Law Ctr. (Apr. 2, 2007) (on file with author).

232. Indeed, court decisions that are otherwise rights-affirming have almost reified the budget to such a degree that actions that would require changes to it are deemed "fundamental alterations of the program" and thus beyond the reach of the law. *See Olmstead*, 527 U.S. at 594 (discussing when costs for non-institutional care constitute a "reasonable accommodation" and when they are a "fundamental alteration" for purposes of the Americans with Disabilities Act). For a fuller discussion of per-person versus statewide costs, see Williams v. Wasserman, 164 F. Supp. 2d 591, 636–37 (D. Md. 2001).

establish these interventions have fallen on a parliamentary point of order that it was too expensive?

Likewise, any legislation to require Medicare to cover implantable cardioverter defibrillators (ICDs)—the device given to Vice President Cheney after his heart attack in 2001—would probably have encountered a double whammy. Unlike vaccines or prenatal care, the device is quite expensive on its own, but it is also apparently quite effective in preventing cardiac death, which should incur significant survivors' costs in Medicare and Social Security. Should this calculation be the basis for refusing to provide the coverage?[233]

These are the horns of the dilemma on which the Congressional budget process is impaled: an actuarial accounting of policy changes will, in some instances, produce results that no one supports. Notably, under any budget pre-commitment, this accounting is used not just for forecasts and prognostication but also for budget enforcement and limitation of legislative options. Today, a proposal to provide pneumococcal vaccination or expand prenatal care or cover ICDs would not make it past the Budget Act—but for reasons that no Member of Congress would be willing to defend in public. Had the recent Medicare Drug bill's[234] overall score been clearly dissected in debates, the modeling decision to add offsetting costs because beneficiaries might live longer could have made for a troubling debate.[235]

This result is in direct contravention of one of the basic Buchanan rules about an ideal budget-balancing structure. "[M]ost importantly," he argues, "the fiscal rule must reflect and express values held by the citizenry, for then adherence to the precepts of the rule may, to some extent, be regarded as sacrosanct."[236] It seems unlikely that the values hidden under the estimation of survivors' costs and the woodwork effect are ones that the public would find appealing, much less sacrosanct.

G. CAMOUFLAGE EFFECTS: THE BUDGET PROCESS CONCEALS POLITICAL DECISIONS

In arguing for a balanced budget amendment to the Constitution, Buchanan lays out other criteria for his ideal. "First of all," he says, "it must be relatively simple and straightforward, capable of being understood by members of the public. Highly sophisticated rules that might be fully understood only by an

233. The Medicare coverage of ICDs did, in fact, dodge this bullet. Once the device was judged non-experimental (four years after Vice President Cheney received it), it was automatically within the reach of the requirements for coverage of the existing Medicare statute. As discussed, *supra* note 84 and accompanying text, using the example of CAT scans being added to Medicare's coverage of X-rays, the baseline automatically includes changes in the mix of goods and services. Because the Budget Act restrictions apply only to new Congressional action, no offsets were required.

234. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066.

235. *See supra* text accompanying note 227.

236. DEMOCRACY IN DEFICIT, *supra* note 13, at 183.

economists' priesthood can hardly qualify on this count alone."[237]

He was likely aiming the sarcasm in the latter part of the comment at the Keynesian business-cycle deficit-spending rules and their ilk. However, the same criticism can be applied to the devices and tools needed to enforce all the ostensibly "simple and straightforward" pre-commitment devices in either a constitutional amendment or in the statutory alternatives. The general goals about deficits may seem clear to the public. Rather than making the subsidiary but nonetheless major choices clear to the public, however, these devices and tools hide their principles in footnotes and assumptions. They camouflage political decisions that would be unsupportable in public. No one would return to her constituents to say that she has voted against legislation so as to ensure that Medicare beneficiaries continue to die according to the actuarial assumptions used in the baseline. But many return regularly to say that they have opposed legislation because it would "bust the budget," without further explanation. Given the intricacies of the process, the variability of its necessary assumptions, and the structural problems implicit in it, the budget rules conceal from voters a multitude of sins—both of omission and commission.

Most basically, this camouflage undermines transparency and representation. Few of the staff, fewer of the Members, and virtually none of the voters comprehend the "sophisticated rules that might be fully understood only by an economists' priesthood."[238] When compounded with the parliamentary procedure and supermajorities necessary to bypass these rules, they insulate political decisions from any but the most general accountability. This insulation, in turn, concentrates influence in those groups that have the wherewithal to dissect the various assumptions, find the available offsets, and maneuver within the process.[239] To that extent, the process exacerbates the very problems of interest group influences that public choice theorists have also identified.[240] Interest groups are the only ones who can afford the means to see past the camouflage of the budget.

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237. *Id.*; *cf.* Garrett, *supra* note 4, at 406 (suggesting that a newly designed budget process should "not obscure allocative decisions from the view of the electorate").

238. DEMOCRACY IN DEFICIT, *supra* note 13, at 183.

239. *See* Garrett, *supra* note 4, at 445 ("[T]his 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. . . . [A] structure for conflict that masks the underlying realities of political decisions is inconsistent with democratic accountability.").

240. *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, *Pressure Groups, Special Interests, and the Constitution*, ch. 19 *of* THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (Univ. of Mich. Press 1962), *reprinted in* 3 THE COLLECTED WORKS OF JAMES M. BUCHANAN (Liberty Fund 1999), *available at* http://www.econlib.org/library/Buchanan/buchCv3Contents.html (explaining that interest groups create external costs contrary to the public interest because their members see differential benefits from proposed legislation as compared with members of the general public).

H. THE BUDGET PRIMACY EFFECT: BUDGETS MATTER MOST

The most basic effect presented by the budget process is also its fundamental premise and the motivation behind all of the structures of the Budget Act, GRH, BEA, and new rules: *Budgets matter most*. Over and above the Solipsism Effect in which only federal costs and savings are counted, even within this inward-looking federal system, budgets count more than anything else.

Most basically, the budget process has been and remains one of the main agenda setters for the Congress. Ever since the Budget Act of 1974, the Congress has committed itself to a schedule that guarantees that the budget will be given attention at least once a year and often more, whether or not the Members and their Leadership want to give it attention. Other substantive legislation, such as health laws, civil rights laws, and environmental laws, are not guaranteed floor time and, indeed, their proponents must compete vigorously to get to the head of the queue.[241] This structural pre-commitment to the budget ensures that debates about deficit spending will have an ongoing review above all other topics.

Moreover, a significant rules change in the Senate has effectively made the budget more of an agenda driver than even its guaranteed annual consideration did. In 1974, as part of the Budget Act, the Senate chose to make the budget resolution and the special concomitant budget legislation package[242] invulnerable to filibuster and subject to a simple majority vote.[243] As such, the budget measures are among the only pieces of legislation that can be passed over the objections of forty-nine senators. In turn, there is an incentive to make the budget carry any freight that has significant opposition. For instance, most major tax measures, which are usually controversial to at least one senator, are done in the context of the budget legislation. In 2005, even controversial legislation to allow oil drilling in the Arctic National Wildlife Refuge was attached to the budget (ostensibly because of the revenue effect of potential user

241. Note that this is different from the longstanding structure of annual appropriations legislation, which also ensures a place in the schedule for discretionary spending.

242. The special concomitant budget legislation package is the "Budget Reconciliation" legislation that makes amendments in substantive statutes (such as the Medicare Act or the Internal Revenue Code) that will lower (or sometimes raise) mandatory spending and revenues so that they match the totals in the budget resolution for the year. *See generally* ROBERT KEITH & BILL HENIFF, JR., THE BUDGET RECONCILIATION PROCESS: HOUSE AND SENATE PROCEDURES 2 (Cong. Research Serv. Report No. RL33030 Aug. 10, 2005), *available at* http://www.opencrs.com/rpts/RL33030_20050810.pdf (explaining the budget reconciliation process, the special procedures in each house of the Congress for considering measures, and presidential approval or disapproval of reconciliation measures).

243. *See* E-mail from Robert Dove, former Senate Parliamentarian, to Timothy M. Westmoreland, Visiting Professor of Law, Georgetown Univ. Law Ctr. (Apr. 8, 2005) (on file with author). There are few other issues in the Senate that are filibuster-proof, such as the War Powers Act. Recent consideration has been given to making judicial nominees filibuster-proof as well. *See* E-mail from Robert Dove, former Senate Parliamentarian, to Timothy M. Westmoreland, Visiting Professor of Law, Georgetown Univ. Law Ctr. (Feb. 21, 2007) (on file with author).

fees) and was thus invulnerable to filibuster.[244] This delay-proof status for passage of the budget is reinforced by the supermajority required to bypass Budget Act restrictions in the Senate. It ensures that the budget will continue to be the spine of the Congressional agenda for every legislative year.

More fundamentally, fiscal impact has become the only universal criterion applied to all legislation.[245] Because this measure is applied as a threshold criterion for entry to the House or Senate floors, it also has come to be an on/off switch for any legislative activity. Under the budget rules, legislation with a net score of zero or a negative net score (that is, savings) can proceed; legislation with a net score greater than zero usually cannot. This structure effectively designates the baseline as the high-water mark of law and any upward change to the baseline as suspect.

Such budget primacy is too shortsighted, especially when it is carried out in the name of protecting future generations. Not all spending is valueless consumption. Some spending adds value that is as transferable to our successors as is a government surplus. Immunization, fluoridation, lead abatement, and virtually all other public health measures pass on intergenerational benefits. Investments in prenatal care improve the health of children. Lowering the rates of HIV infection would improve lives far beyond a five-year snapshot. Helping people with disabilities live in their communities rather than in institutions improves their personal lot and arguably adds to the communities, too. Incrementally lengthening the lives of elderly people may, indeed, add to the costs of Medicare, but all signs indicate that a widely accepted value exists to doing so.

With creative economics, perhaps some of these improvements in health could be monetized as thoroughly as their costs. Many cannot.[246] Even those that can be do not fare well within the short-focused, solipsistic strictures of the budget processes employed in the Congress. These long-term benefits are as appropriate a goal for government as deficit-containment. But the budget structures do not improve the chance that the Congress will adopt them; indeed, they make enactment more difficult.

IV. COUNTERBALANCING THE BUDGET

As the Congress moves to revive and revise its budget rules, it should deal with the ways that they distort substantive legislation. This may be a difficult challenge, inasmuch as the new proposals that were made during the most recent debate involved measures that would create more distortions, not fewer.[247]

244. Sheryl Gay Stolberg, *Senate Supports Arctic Drilling*, N.Y. TIMES, Mar. 17, 2005, at A1. The drilling proposal, however, was ultimately removed from the budget reconciliation package because it proved so controversial that it endangered passage of the entire legislation in the House.

245. Other measures are also nominally applied to legislation, such as the Inflation Impact statement and the Unfunded Mandates review, but none has the reach or the force of the budget rules.

246. *See The $6.1 Million Question*, ch. 4 *of* ACKERMAN & HEINZERLING, *supra* note 218 (discussing the difficulties and confusion of monetization of human life).

247. *See supra* note 126.

But at a minimum, the budget process should be re-tooled to allow the routine and transparent recognition of benefits as well as costs. Only then will the Congress know the value of what it is buying. As they are restraining legislation that creates budget deficits, structural processes should also assure that legislation does not make quantifiable *non-economic factors* worse. By doing so, the effects of actuarial acceptability and camouflage may be mitigated and the complexity of the political debate may be revealed. Rather than blocking all requests from consideration, the Congress should have a navigational tool that allows it to choose among them and to make clear the consequences of its choices.

A. PUTTING THE MONEY WHERE THE PROMISE IS

Classifications of programs as discretionary or mandatory spending should be made more rational. If a clear promise is made in law, it should be financed with mandatory spending. Failure to do so can result in promises that are incrementally broken by time and politics. The erosion of the purchasing power of the Indian Health Service programs is a clear example.

But there are other examples. At a minimum, those federal activities that are guaranteed by the Constitution should be equally guaranteed by the budget. Health care for federal prisoners, the census, the protection of federal voting rights, and the provision of counsel for defendants in federal criminal actions are all compromised if the Congress fails to provide adequate funding. While suits can be brought and courts can order that the constitutional promise be fulfilled, litigation is an unreliable, uneven, and inefficient means of ensuring such guarantees.

Likewise, if a federal statute (or, in the case of American Indians and Alaska Natives, a treaty) provides a pledge of federal action, the funding to provide it should not be contingent on annual appropriations. If, for example, the Americans with Disabilities Act explicitly requires that certain federal facilities be accessible, the funding to make them accessible should be considered mandatory. Making a statutory assurance into a two-step process that requires enactment and then separate appropriations is disingenuous; making a statutory assurance into a multi-step process that requires annual appropriations is effectively allowing the assurance to wither away.[248]

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248. Some might argue that an advocate is better off having a statutory promise, even if not accompanied by mandatory spending, because one can then advocate for funding to fulfill the promise. I understand the value of having such a tool to set future agendas. But in budget terms, I find the outcome (although not the argument) to be disingenuous: the Congress gets away with making a promise that it does not intend to fulfill. Others might argue that requiring that promises be accompanied by funding will mean that fewer promises will be made and that the creation of statutory guarantees will cease. Again, I understand the argument to be about making incremental progress and creating aspirational laws. But in budget terms, I still find this confusing: Yes, it is easier to get promises that the Congress does not intend to keep, but why is that worthwhile? Yet others will point out that it will be very difficult to assess prospectively what is an "adequate" amount to accomplish a promise. This is, indeed, true and the difficulties of maintaining baselines and estimating scores for

Discretionary spending could continue under such a re-ordered system. Those laws that simply provide permission for the appropriations committee to provide funds would have no different status than they do now. But the division between what is promised and what is permitted would be more honest and more clear.

B. SCOREKEEPING HEALTH AND DISABILITY

Under the current process, all legislation is uniformly examined solely through the one-dimensional view of a cost in dollars. Other dimensions should be reviewed as well. Among health care researchers, the most commonly employed indices of public health status and the value of an intervention are morbidity (the relative incidence of getting sick) and mortality (the relative incidence of dying).[249] A calculation of the effects that proposed legislation would have on morbidity and mortality could be done readily by a Congressional agency analogous to the CBO.[250] Thus, if a proposal were made to increase Medicaid spending for child health, nonpartisan scorekeepers could project not just its financial costs during the snapshot but also its effects on morbidity and mortality. The Congress would then have a view of both economic costs and non-economic benefits and could make decisions as a prudent purchaser.

But just as economics has multiple measures, health and public health have also moved beyond such simple calculations as morbidity and mortality. A useful literature has arisen on scales of Years of Potential Life Lost (YPLL) and Quality-Adjusted Life Years (QALYs), measures that are in widespread use in health policy—both domestically and internationally.[251] These measures estimate, respectively, the marginal extension of life (that is, showing that an intervention to save the life of a healthy three-year-old may return more to society than an intervention to save the life of a terminally ill ninety-year-old) and the marginal improvement of life (that is, showing that an intervention to extend functional abilities may return more to society than an intervention to

mandatory spending and revenues illustrate how hard this can be. But if the purpose of the estimation activity is simply to provide the Congress with a deemed-correct estimate of the cost of the promise it is considering making—and not to limit carrying out the promise once it is made in law—the problem can be overcome: if the incurred costs of carrying out a promise turn out to be higher than expected, the Congress can come back and amend the statute, thus transparently reducing the promise rather than letting it wither away in statutory hypocrisy.

249. *See, e.g.*, Morbidity and Mortality Weekly Report (MMWR), http://www.cdc.gov/mmwr/ (last visited Jan. 26, 2007) (reporting on various public health issues).

250. Some may say that such a projection would be speculative, but with modern epidemiology and health services research it certainly is no more so than current forecasts of budget baselines. Others may say that an enormous new agency would be required, but if 230 CBO employees can now model the entire economy, as well as the federal budget and proposed changes to it, surely no larger number would be required to model and forecast health and illness.

251. *See generally* COMM. ON INJURY PREVENTION & CONTROL, INST. OF MED., REDUCING THE BURDEN OF INJURY: ADVANCING PREVENTION AND TREATMENT 53, 57 (Richard J. Bonnie et al. eds., 1999), *available at* http://books.nap.edu/books/0309065666/html (discussing YPLL and QALYs).

prolong ventilator-dependence).[252] Projection of the effects of legislation on these scales would provide an even more nuanced view to aid legislators in orderly decision-making.[253]

Such analyses are not novel. In the world of health services research, the transition from cost-minimization analysis and cost-benefit analysis (which compare only dollars spent to dollars saved) to cost-effectiveness analysis and cost-utility analysis (which compare dollars spent to health measures and extensions of life, respectively)[254] has long ago occurred.[255] The remarkable fact is that the Congress that sets so much of the process in motion with its budget decisions has failed to recognize them.

This is not to say that the original Budget Act structures that set annual spending and revenue targets should be sidestepped altogether.[256] Rather, these additional steps toward improved information and transparency would inform them. Even Buchanan acknowledges that the appropriate government action in some cases—particularly capital investment—is increased spending and increased debt or increased taxation.[257] Inclusion of health measures and other indicia of the value of a public investment will aid in separating those cases from those of plain consumption and those of simple interest-group influence.

Often this added information will not be parallel to the budget numbers. Providing a vaccine may, indeed, cost more than letting people die of pneumonia. Keeping premature babies alive rather than letting nature take its unaided course may add to federal spending. Revealing such policy decisions to be complex is useful, both for politicians and for the public. Camouflaging them as simple choices makes for unaccountable policy.

Such complementary information may also make the decisions more salient to the public. Arcane debates about how legislation affects budget targets or baselines may not generate interest or understanding among constituents. Provid-

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252. *See* ACKERMAN & HEINZERLING, *supra* note 218, at 98–99. But see *id.* at 99–102 for a discussion of the problems of implementing such an evaluation, especially the likelihood of discrimination on the basis of age or disability.

253. The recent report by the Institute of Medicine's Committee on Coverage of HIV Services includes an interesting example of a comparison of costs and QALYs. *See* INST. OF MED., PUBLIC FINANCING AND DELIVERY OF HIV/AIDS CARE: PRESERVING THE LEGACY OF RYAN WHITE app. A at 213–43 (2004). I make no attempt here to describe additional indices for areas of policy other than health and disability. Environment, housing, education, and employment, among others, may have comparable standards of value. For a wide range of measures (some of them surprising), see POSNER, *supra* note 12, at 148 ("I think that the downside of extinction [of all life on Earth] probably does outweigh the upside of faster scientific progress.").

254. MICHAEL F. DRUMMOND ET AL., METHODS FOR THE ECONOMIC VALUATION OF HEALTH PROGRAMMES 2 tbl.1.1 (2d. ed. 1997).

255. These forms of analysis are by no means a panacea. While they provide a different perspective than cost analysis alone, they can have their own set of perverse outcomes when implemented. *See* ACKERMAN & HEINZERLING, *supra* note 218.

256. Although those who are nervous about pre-commitment structures and supermajorities might prefer the altogether simpler model in which the CBO estimates the cost, the new agency estimates the effects, and Congress uses this information to make a decision through normal procedures.

257. DEMOCRACY IN DEFICIT, *supra* note 13, at 18–19.

ing routine, reliable measures of how the same legislation decreases preventable disease or adds years of potential life may make these same constituents more attuned to the issues and give them meaning.[258]

C. PAYGO FOR HEALTH AND DISABILITY

Replicating another pre-commitment structure could also help redirect legislation toward investments of future value rather than purchases of simple current consumption. For instance, imagine a PAYGO device for health standards (rather than dollar standards) that prohibit consideration of any legislation that adds morbidity, mortality, or YPLL, or that reduces QALYs. Thus, if legislation to ease air pollution standards were estimated to increase morbidity and mortality from cancer and asthma, it would have to be accompanied by legislation to provide offsetting benefits, say through increased childhood immunization. If a bill to reduce funding for lead-poisoning screening were scored as increasing developmental disabilities and thus reducing QALYs, it would have to be coupled with a disability-reducing action, such as better containment of toxic chemicals. Such a health and disability PAYGO would at least assure that new laws do not make the Nation's future health and disability status worse, just as a budget PAYGO is meant to assure that new laws do not make the Nation's future finances worse.

Moreover, such a shotgun marriage of causes may ameliorate some of the worst aspects of disparities in group influence in the political process. Put bluntly, using current knowledge, not much more can be done to improve the health status of affluent white Americans as a cohort. The large gains to be made are in remedying the disparities of health status in groups that are unable to represent themselves in politics adequately. A requirement of health PAYGO would bring some powerful political forces to their aid to reinforce them.

For example, because the greatest improvements in years of potential life and reduction of disability generally occur when dealing with infant mortality,[259] such a scenario could create interesting partners. For example, auto-makers who

258. For a very vivid, if off-kilter, example, consider the debate discussed in Jonathan Weisman & Ceci Connolly, *Schiavo Case Puts Face on Rising Medical Costs; GOP Leaders Try to Cut Spending as They Fight to Save One of Program's Patients*, WASH. POST, Mar. 23, 2005, at A13. Opponents of proposed Medicaid cuts noted that the Members of Congress who led the effort to provide federal intervention in the Schiavo case also led efforts to cut Medicaid, the largest government program for people with disabilities. In response, the spokesperson for the House Majority Leader commented, "The fact that they're tying a life issue to the budget process just shows how disconnected Democrats are to reality." *Id.* I believe both sides were pursuing non sequiturs: Ms. Schiavo's feeding tube was not removed because of a specific payment policy or Medicaid shortfall, but the statement that budget process has no bearing on "a life issue" is willfully ignorant. I should also quickly point out that having additional health indicia would likely not make the Schiavo case itself any easier; QALYs and DALYs do not make such end-of-life decisions formulaic. However, the title of the article comes close to the point—such health forecast data put not only a face but a meaning to rising medical costs.

259. *See* Quanhe Yang et al., *Trends and Patterns of Mortality Associated with Birth Defects and Genetic Diseases in the United States, 1979–1992: An Analysis of Multiple-Cause Mortality Data*, 14 GENETIC EPIDEMIOLOGY 493, 494 (1997) ("In the United States, birth defects are the leading cause of

want to lessen tailpipe emission standards might team up with child-health advocates who want improvement in prenatal care. Moreover, because the greatest disparities in current health status (and thus the most room to improve under current technology) are among low-income groups and racial and ethnic minorities,[260] such a no-net-deterioration structure might also result in reinforcement of programs that benefit these groups. For example, the coal-fired power plants that want to slow the reduction of mercury (which increases disability) might be corralled into a coalition with advocates of diabetes screening (which reduces preventable disability, especially among black Americans) or with proponents of transforming Indian Health into mandatory spending.[261] Such coalitions are counter-intuitive, perhaps, but no more so than those who have been forced under budget rules to support federal auction of spectrum airwave rights in order to finance children's health.[262]

D. A FEW FINAL THOUGHTS ON PUBLIC CHOICE AND PUBLIC HEALTH[263]

In considering whether public deficit spending is ever appropriate, Buchanan does allow for "a public expenditure [for] the construction of a public project which is not expected to yield benefits until future periods and [whose] benefits are expected to extend over many periods. A dam might be a good example here."[264] In that circumstance, he acknowledges that

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infant mortality as well as the leading cause of years of potential life lost (YPLL) before age 65 years . . .").

260. *See* UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (Brian Smedley et al. eds., 2003); MARSHA LILLIE-BLANTON ET AL., KEY FACTS: RACE, ETHNICITY, & MEDICAL CARE (2003), http://www.kff.org/minorityhealth/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14366.

261. This could also result in a novel variation on the use of interest groups to generate information about federal spending through competition for limited resources. Describing structures that use funding offset requirements, Garrett notes:

> 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 . . . 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.

Garrett, *supra* note 4, at 423. In the case of a health PAYGO structure, the interest group would be prompted to investigate the value of the public health measure and to seek new interventions that might improve health status.

262. This was done to create the State Children's Health Program, discussed *supra* at note 119.

263. The same thoughts would apply to other policies that affect cost-effectiveness and cost-utility for future generations, such as toxic waste disposal. Solum, for instance, raises troubling questions regarding "disastrous global warming" and "persistent plutonium." Lawrence B. Solum, *To Our Children's Children's Children: The Problems of Intergenerational Ethics*, 35 LOY. L.A. L. REV. 163, 166–67 (2001). Posner also raises such issues in *Catastrophe* and extends them to scientific accidents, exhaustion of natural resources, and loss of biodiversity. POSNER, *supra* note 12, at 21–91.

264. PUBLIC DEBT, *supra* note 134, at 126. It is interesting to note that Buchanan says that his first theoretical breakthroughs about public choice came through his work on an advisory commission on the financing of highways. *Id.* at xvii–xviii.

> [i]f democratic decision making will not produce correct results when debt financing is made available for short-term public expenditure projects, the same must apply to tax financing when this is offered as the means for financing genuinely long-term projects. Individuals will, in this case, take account of the real cost of the expenditure which will be borne, primarily or exclusively, in the present. They will be forced to undergo genuine sacrifice of current enjoyments in order to meet the tax increases necessary to finance the proposed project. On the other hand, they will not estimate the future benefits of the project properly .. . . [B]y and large, individuals will underestimate both future benefits and future tax payments when they are called upon to make social decisions.[265]

Add to this an argument about the value of investing not just in dams but also in human capital.[266] Because health care and public health can be regarded as such an investment,[267] this human capital argument might sufficiently convince even public choice theorists that paying for forward-looking public health programs—*even with deficit financing*—is an acceptable endeavor.[268]

But I intend the argument for the inclusion of health measures as pre-commitment devices in Congressional process to be more fundamental than just a possible argument for investing in capital. These measures deserve the same moral status as those against deficit spending because the public health argument runs exactly parallel to the classical-economic-cum-public-choice message that it is unethical to burden future generations with the cost of current policy. By failing to undertake health activities to reduce morbidity and mortality or to increase QALYs and Disability-Adjusted Life Years (DALYs), we are passing on non-monetary burdens to future generations as surely as when we pass on our financial debt.

These suggested structural additions may sometimes work at cross-purposes with the constraints of the Budget Act. Advocates of the public choice budget structures were generally clear that they were also working for lower spending and smaller government, and these structural additions may not lead to those goals.

However, if the underlying premise of the budget laws and of public choice theory is not simply small government but actually the more fundamental correction of a structural tendency in politics toward deficit spending because of

265. *Id.* at 122.

266. *Cf.* Gary S. Becker, *Human Capital*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 2002), http://www.econlib.org/library/Enc/HumanCapital.html (highlighting the importance of education and training in contributing to economic growth).

267. *Id.*

268. Although admittedly this is an uphill battle, inasmuch as Buchanan hypothesizes "that, within the framework of currently accepted fiscal traditions and practices," deficit financing was acceptable in only a few, non-recurring circumstances (such as building a school) and suggests that recurring circumstances (such as paying teachers' salaries) should be financed by taxes. PUBLIC DEBT, *supra* note 134, at 129. However, because he limits himself to saying this is only a hypothesis and only within that framework, the public health argument might be acceptable.

its easy transfer of intergenerational burdens,[269] these new additions would be quite complementary. During political consideration, measures that are health-enhancing, disability-reducing, or life-saving incur many of the very systemic disadvantages that public choice theory has identified in fiscal policy, that is, that the avoidance of difficult, expensive present action assigns the resulting costs and burdens to future citizens. The improvement of future health and reduction of future disability are as much an appropriate goal for government as the reduction of future interest payments; the failure to make these improvements is as immoral, profligate, and irresponsible as consuming now and asking others to pay later.

To some degree, this argument is an elaborate restating of the proverb that "a stitch in time saves nine," although the proverb is generally advising a single person that she will be *personally* better off if she invests in the stitch. With intergenerational and time changes, that translates to "a stitch *through* time saves nine" and aids the cohorts of future citizens who are unable to represent themselves today. The one stitch that saves nine is a good investment in most circumstances. If the "nine" is, in fact, "nine million" or even "nine billion," it is a very good investment indeed.

CONCLUSION

The Budget Act of 1974, as amended, has had a tremendous influence on a wide range of law and policy. Laws have been stopped, started, and distorted to meet these rules.[270] The Congress has also changed much of its basic method of lawmaking, creating a system that establishes numbers in advance and then retrofits policy to fit them. Small-government budget conservatives[271] created structures that were aimed at limiting federal deficits and slowing federal

269. *See* DEMOCRACY IN DEFICIT, *supra* note 13; PUBLIC DEBT, *supra* note 134, at 119–20.

270. Consider, for instance, the answers to the questions posed at the beginning of this Article. Why would the Congress have enacted a Medicare drug plan that provides to the same beneficiary, sequentially in the same year, first-dollar coverage, then no coverage, and then full coverage? Because the Congress was attempting to stay within a target amount of funding lest it subject the legislation to a PAYGO point of order in the Senate; the doughnut hole was estimated to reduce the overall cost by 15 to 32%. CONG. BUDGET OFFICE, H.R. 1, MEDICARE PRESCRIPTION DRUG AND MODERNIZATION ACT OF 2003, AND S. 1, PRESCRIPTION DRUG AND MEDICARE IMPROVEMENT ACT OF 2003: COST ESTIMATE 29 tbl.7 (2003), *available at* http://cbo.gov/ftpdocs/44xx/doc4438/hr1s1.pdf. And why would the Congress enact a tax bill that starts and stops tax rates multiple times within the same law and provides for the repeal of a provision in the first year after it is to be fully phased in? Because, once again, the Congress was trying to stay within a pre-set total for its legislation (albeit, in this instance, politically arrived at, not pre-set by a structural device). Rather than choosing to enact fewer cuts, the Congress specified artificially short lives for more legislative provisions. This resulted in artificially low estimates of their costs, even if the provisions' eventual extension is very likely, because a specification of a repeal of a tax measure requires the CBO to score the cost for the following year as zero. *See supra* note 164.

271. For example, former Senators Gramm and Rudman, and former Budget Director Stockman. The labels of "conservative" and "liberal," however, are sometimes misleading in a budget context. By many measures, both Presidents Ronald Reagan and George W. Bush could be accurately described as budget liberals (having expanded budget deficits), while President Bill Clinton might be described as a budget conservative (having reduced them). *See* Barker & Muraca, *supra* note 17, at 492–96. I count

spending. But these restrictions are under- and over-inclusive, both too skeptical and not skeptical enough. The Congress has blinded itself with budgets. It has hidden much of its true deficit creation and intergenerational transfers of burden behind opaque special rules. It walked away from some of its most basic promises, thwarted its ability to make long-term investments, or stopped itself from recognizing any value to the future except money.

Because of all these structural problems, the enforcement tools of the current budget process should be supplemented. The problems intrinsic to the existing policy—especially its camouflage of complex decisions as simple ones and its virtual dismissal of non-monetary values—call for change in the budget process and an enlargement of its field of vision. If routine measurements are needed to aid policy, they should include both budgetary and non-budgetary projections. If pre-commitment structures are needed to restrain the creation of fiscal deficits, they are needed to restrain the creation of non-fiscal bad legacies as well. Using new measures in health and disability (and in other fields, to the extent that such measures exist), the Congress should attend to which spending is simple present-day consumption and which is an investment with value for the future. It is not an easy course to steer, but it is the better one.

Oscar Wilde defined a cynic as someone "who knows the price of everything, and the value of nothing."[272] The current budget process allows the Congress to be nothing but cynical. With additional uniform information about value and a framework to encourage prudence, the process might allow for it to be more.

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myself as a large-government budget conservative and have invited my few compatriots to join me in a group of "Liberals Against the Debt."

272. OSCAR WILDE, *Lady Windermere's Fan*, *in* THE PLAYS OF OSCAR WILDE 1, 61 (Vintage Books 1988) (1892).