

St. John's University School of Law

St. John's Law Scholarship Repository

Faculty Publications

1998

Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget "Train Wreck"

Anita S. Krishnakumar

St. John's University School of Law

Follow this and additional works at: https://scholarship.law.stjohns.edu/faculty_publications



Part of the [Constitutional Law Commons](#)

This Article is brought to you for free and open access by St. John's Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

NOTE

RECONCILIATION AND THE FISCAL CONSTITUTION: THE ANATOMY OF THE 1995-96 BUDGET “TRAIN WRECK”

ANITA S. KRISHNAKUMAR*

Congress originally conceived of the budget reconciliation process as a minor fallback mechanism for bringing one year's tax and spending policy in line with overall budget targets. Reconciliation has since become central to congressional efforts to reduce the federal budget deficit. This Note argues, however, that reconciliation is limited in its capacity to impel significant budgetary reform. The author demonstrates how, in 1995-96, reconciliation caused repeated breakdowns in governmental budget-making, undermining the entire budget process. The author concludes that the legal, institutional, and political constraints inherent in the reconciliation process will continue to constitute powerful obstacles to congressional efforts to implement sweeping national reform via the annual budget.

For months Washington had been obsessed with the notion of a train wreck coming down the line: Gingrich and his budget-cutting revolutionaries steaming in from one direction, Clinton and his veto rolling in from the other. Perhaps the fact that it was so visible for so long made few people believe that it would actually happen in the end. Certainly one side would stop, or both would move off to a track of compromise. But the train wreck did happen. Many times, in fact. A series of train wrecks began that day in mid-November and continued into the first two weeks of 1996.¹

In 1995, Congress tried to use the budget reconciliation process to enact an ambitious fiscal agenda that would restructure the federal government, implement a mammoth tax cut, *and* balance the budget in seven years. Its efforts led to two historic federal government shutdowns, thirteen stopgap spending measures, several presidential vetoes, and ultimately failed to produce a meaningful fiscal agreement with the White House.²

* Law clerk designate to the Honorable José A. Cabranes, Second Circuit Court of Appeals. A.B., Stanford University, 1996; member, Class of 1999, Yale Law School. I would like to thank Professor Kate Stith for her encouragement, valuable comments, and suggestions.

¹ DAVID MARANISS & MICHAEL WEISSKOPF, “TELL NEWT TO SHUT UP!” 149 (1996).

² See James A. Thurber, *Centralization, Devolution, and Turf Protection in the Congressional Budget Process*, in CONGRESS RECONSIDERED 325, 325 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1997).

This extraordinary breakdown in budget-making, while unprecedented in scope and degree, was not the first, nor is it likely to be the last "train wreck" of its kind. In accounting for the breakdown, legal and political commentators have focused on specific political differences over issues such as health entitlements³ and the pride and ambition of individuals such as Representative Newt Gingrich (R-Ga.).⁴ The repeated incidence of smaller-scale budget breakdowns over the past decade and a half,⁵ however, suggests a more fundamental and enduring structural explanation for such episodes: Congress's failure to work within the limitations of the budget "reconciliation" process. Reconciliation is a procedure that allows Congress to alter tax and entitlement laws in order to raise or reduce both revenues and federal spending. Conceived in 1974 as a minor fallback mechanism for bringing one year's tax and spending policy in line with overall budget targets, reconciliation has since evolved into Congress's most powerful deficit-reduction tool, and has become an integral part of the government's implicit "fiscal constitution."⁶ In recent years particularly, reconciliation has become the centerpiece of the congressional budget process, as both Congress and the President have made it the cornerstone for comprehensive fiscal packages aimed at reining in the deficit.

Yet reconciliation still bears the procedural marks of its modest origins, and is limited in its capacity to impel sweeping budgetary reform. First, reconciliation is an optional budgetary measure that provides Congress with almost no procedural leverage to force the President to accept or cooperate in its reforms. Second, reconciliation's late timing in the budget process, and restrictive rules governing the amendment of and debate on reconciliation legislation, make it an inapt vehicle for setting the year's fiscal agenda. Third, and related to the second, reconcili-

³ See, e.g., Charles Tiefer, *Budgetized Health Entitlements and the Fiscal Constitution in Congress's 1995-1996 Budget Battle*, 33 HARV. J. ON LEGIS. 411 (1996).

⁴ See, e.g., ELIZABETH DREW, *SHOWDOWN: THE STRUGGLE BETWEEN THE GINGRICH CONGRESS AND THE CLINTON WHITE HOUSE* (1996).

⁵ Budget breakdowns between Congress and the President had engendered federal government shutdowns nine times before 1995, although none had lasted longer than three days. See George Hager, *Budget Battle Came Sooner Than Either Side Expected*, 53 CONG. Q. WKLY. REP. 3503, 3503 (1995).

⁶ The fiscal constitution is the legal framework that governs the federal budget process. It includes the constitutional provisions, statutes, and informal procedures followed by Congress in conducting federal spending, borrowing, and taxation. For a more detailed description of how the fiscal constitution operates, see Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

ation does not involve annual appropriations for federal departments (which are handled by the appropriations subcommittees); thus, when Congress attempts reconciliation, its work on annual appropriations often becomes derailed and remains unfinished at the October 1st start of the fiscal year. Congress must then pass one or more stopgap spending measures known as "continuing resolutions" ("CRs") in order to avoid a government shutdown while it continues to work on the budget. Finally, in situations of divided government, the partisan politics required to pass reconciliation legislation often conflicts with the compromises necessary to prevent a presidential veto. All of these limitations have played a significant role in engendering recent budget breakdowns, particularly that of 1995-96.

In order to appreciate the effect of the institutional limitations of the reconciliation process, it is necessary to understand the legal and political norms that govern the budget process generally, and reconciliation in particular. Part I of this Note analyzes reconciliation's place in the fiscal constitution, exploring how the process has evolved in the twenty-some years since its conception in the Congressional Budget Act of 1974 ("Budget Act").⁷ Part II examines the 1995-96 budget battle, illustrating how Congress's attempt to use the reconciliation process as a tool for comprehensive governmental reform engendered that year's breakdown in budget-making. Part III assesses the legal and institutional limitations inherent in the budget reconciliation process, drawing lessons from 1995 and other recent budget battles between Congress and the President.

I. THE EVOLUTION OF RECONCILIATION IN THE CONSTITUTIONAL BUDGET PROCESS

A. *Reconciliation at First Blush*

Neither the federal Constitution nor our implicit "fiscal constitution" requires that federal spending be balanced against federal revenues.⁸ In fact, prior to the passage of the Budget Act,

⁷ Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 1, 2, & 31 U.S.C.).

⁸ See U.S. CONST. art. I, § 9, cl. 7 (requiring only legislative approval, not adequate revenue, before money may be drawn from the Federal Treasury); see also Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L.

Congress traditionally considered tax and spending legislation as separate measures,⁹ and had no mechanism for combining all federal spending proposals into one comprehensive budget.¹⁰ Moreover, social insurance and other “backdoor” entitlement spending lay entirely outside the budget process.¹¹ Thus, congressional budget policy was essentially the “accidental” aggregate of independent spending and revenue decisions made by different committees at different times. The Budget Act changed this by establishing budget committees and requiring Congress to pass a budget resolution setting forth congressional priorities and aggregate annual targets for new budget authority (appropriations), outlays (actual spending), revenues, the deficit, and the total public debt.¹² These targets were to be revised and enacted as “binding ceilings” in a second budget resolution two weeks before the start of the fiscal year.¹³ Further, the Act created a reconciliation process through which Congress could direct changes in existing tax and entitlement legislation to bring the overall budget in line with the second resolution’s targets.¹⁴

The Budget Act conceived of reconciliation as a wrap-up procedure to be conducted at the tail end of the budget process. If the second budget resolution called for an increase or decrease in either tax revenues or spending levels for statutory entitlements, the Act authorized Congress to write into the resolution “reconciliation instructions” directing the relevant committee(s)¹⁵ to draft legislation to produce revenue and entitlement spending

REV. 593, 600 (1988) (noting that the Constitution does not limit annual federal spending to available tax revenues).

⁹ See V. BROWNE, *THE CONTROL OF THE PUBLIC BUDGET 11–17* (1949), cited in Stith, *supra* note 8, at 601 n.43; L. LABAREE, *ROYAL GOVERNMENT IN AMERICA 269–339* (1930), cited in Stith, *supra* note 8, at 601 n.43.

¹⁰ But see Stith, *supra* note 8, at 600 n.42 (noting that the Legislative Reorganization Act of 1946 called for Congress to adopt an annual “legislative budget,” but the call was ignored and the legislation repealed in 1970).

¹¹ See Alice M. Rivlin, *The Need for a Better Budget Process*, 4 BROOKINGS REV. 3, 5 (1986).

¹² See Congressional Budget Act of 1974 § 301, 88 Stat. at 306–08 (codified as amended at 2 U.S.C. § 632 (Supp. II 1996)); STITH, *supra* note 8, at 617.

¹³ See Congressional Budget Act of 1974 § 310(a) & (b), 88 Stat. at 315 (codified as amended at 2 U.S.C. § 641(a) (1994)). The provision in the Budget Act requiring action by September 15 was repealed in 1985 with one requiring action by June 15. In 1990, this provision was deleted altogether by Pub. L. No. 101-508, § 13210(2).

¹⁴ See Congressional Budget Act of 1974 § 310(c), 88 Stat. at 315 (codified as amended in scattered portions of 2 U.S.C. § 641 (1994)).

¹⁵ For example, reconciliation instructions concerning tax laws go to the House Ways and Means Committee and the Senate Finance Committee, while instructions to reduce farm subsidy entitlements are sent to the Agriculture Committees.

in line with the resolution's ceilings.¹⁶ Should these reconciliation instructions pertain to only one committee, that committee would then report its reconciliation legislation directly to the House or Senate floor for a vote.¹⁷ Should the budget resolution direct more than one committee to write reconciliation legislation, however, the committees would report their recommendations to the budget committees, which would then combine the various committee reports into a single, omnibus reconciliation bill¹⁸ without any substantive revision.¹⁹ The packaged reconciliation bill would subsequently be reported to the floor of each chamber to be debated, possibly amended, and voted upon.²⁰ Any section of the bill failing to meet the responsible committee's deficit target would be subject to a floor amendment altering it to meet such targets or to a motion to recommit, requiring the committee to report back a new proposal that does meet the target.

The Budget Act also established special rules to expedite the consideration of reconciliation bills on the Senate floor.²¹ In particular, it placed strict restrictions on the consideration of non-germane amendments²² and limited debate on reconciliation bills to twenty hours, insulating them from filibusters.²³

¹⁶ See Congressional Budget Act of 1974 § 310(a), 88 Stat. at 315 (codified as amended at 2 U.S.C. § 641(a) (1994)).

¹⁷ See *id.* § 310(c)(1), 88 Stat. at 315 (codified as amended at 2 U.S.C. § 641(b)(1) (1994)).

¹⁸ See *id.* § 310(c)(2), 88 Stat. at 315 (codified as amended at 2 U.S.C. § 641(b)(2) (1994)).

¹⁹ While the Budget Act gives committees wide latitude in deciding how to reach their target levels, if they do not comply with these levels, Congress can amend their legislation on the floor to achieve the levels set out in the budget resolution. See CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 890 (1989). This procedure was codified by the Gramm-Rudman-Hollings Deficit Reduction Act § 310(d)(5), 2 U.S.C. § 641(d)(5) (1994) (permitting the House Rules Committee to authorize such amendments).

²⁰ See JOHN B. GILMOUR, RECONCILABLE DIFFERENCES? 97 (1990).

²¹ With regard to both the House and the Senate, the Budget Act has been amended to sanction explicitly points of order against any amendment that would have the effect of increasing total outlays or decreasing total revenues, see 2 U.S.C. § 641(d)(1) & (2) (1994), and to bar reconciliation bills from altering Social Security in any manner. See 2 U.S.C. § 641(g) (1994).

²² See Congressional Budget Act of 1974 §§ 305(b)(2), 310(e)(1), 88 Stat. at 311, 316 (codified as amended at 2 U.S.C. §§ 636(b)(2), 641(e)(1) (1994)).

²³ See *id.* § 310(e)(2), 88 Stat. at 316 (codified as amended at 2 U.S.C. § 641 (e)(2) (1994)).

1. Initial Implementation: Assumed Legislative Savings

From 1976 to 1979, the newly created budget committees attempted a voluntary form of reconciliation called "assumed legislative savings."²⁴ Essentially, the budget committees wrote the first budget resolution based on the *assumption* that the relevant committees would report legislation reducing spending on their entitlements.²⁵ These assumptions were in no way binding or enforceable; if the committees failed to produce the necessary savings, spending would exceed the targets set forth in the resolution.²⁶ Committees, however, consistently ignored the budget resolution's assumptions, and efforts to reduce federal spending via legislative savings were largely unsuccessful.²⁷

2. Reinventing Reconciliation

The failure to achieve legislative savings combined with national economic decline spurred experimentation with the reconciliation process.²⁸ In 1980, in an effort to balance the budget and stem inflation,²⁹ the House Budget Committee, for the first time, included mandatory reconciliation instructions in its budget resolution.³⁰ This inaugural use of reconciliation set two important precedents. First, it initiated the use of reconciliation in the *first* budget resolution rather than the second, as envisioned by the Budget Act.³¹ The Budget Committee defended its authority to amend the process in this manner by citing a provision in the Budget Act that states that the first budget resolution may require any procedure "which is considered appropriate to carry out the purpose of this Act."³² Including reconciliation in the first resolution was necessary, the Budget Committee argued, to give the

²⁴ See COMMITTEE ON THE BUDGET, 98TH CONG., 2D SESS., A REVIEW OF THE RECONCILIATION PROCESS 8 (Comm. Print 1984) [hereinafter *Reconciliation Review*]; GILMOUR, *supra* note 20, at 105.

²⁵ See GILMOUR, *supra* note 20, at 105.

²⁶ See *id.*

²⁷ See *Reconciliation Review*, *supra* note 24, at 9.

²⁸ See *id.* at 16.

²⁹ See GILMOUR, *supra* note 20, at 108-09.

³⁰ Specifically, the resolution contained instructions to eight House and eight Senate authorizing committees to report legislation saving \$9.059 billion in outlays in fiscal year 1981. See *Reconciliation Review*, *supra* note 24, at 16.

³¹ See Congressional Budget Act of 1974, Pub. L. No. 93-344, § 310, 88 Stat. 297, 315-16 (codified as amended at 2 U.S.C. § 641 (1994)).

³² *Reconciliation Review*, *supra* note 24, at 17 (citing the Budget Committee Report explaining the source of its authority).

authorizing committees enough time to consider and propose the required savings legislation.³³

Second, the 1980 reconciliation effort ushered in an era of top-down party leadership control over the budget process.³⁴ Before 1980, the budget committees negotiated and wrote the budget resolutions. In 1980, however, the budget committees performed an essentially ministerial function, drafting the resolution from an agreement negotiated by the Democratic party leadership and the White House.³⁵ Since then, party leaders have continued to mastermind the budget resolution, as well as control and engineer the passage of reconciliation legislation through Congress.³⁶

In 1981, the newly elected Reagan administration redefined reconciliation once again by using the process to implement a sweeping reorientation of the federal budget.³⁷ Republican party leaders formulated a reconciliation bill that included the central elements of President Reagan's economic agenda: large tax cuts, increased defense spending, and reduced domestic spending.³⁸ Congress approved the bill essentially along party lines, with the

³³ Representative Leon Panetta (D-Cal.), then HBC chairman, explained the need for reconciliation in the first budget resolution as follows:

The Committee took the approach of including reconciliation in the first resolution because it believes that this method is fairer to the committees and fairer to the budget process than using reconciliation in the second resolution. With this approach, committees can be given more than the 10 days provided in the Budget Act for second resolution reconciliation to act on proposals. The reported resolution sets June 15 as the deadline for action, giving committees substantial leadtime to have hearings, consider alternatives, and report legislation. In addition, it insures that the changes in mandatory spending law are made sufficiently before the start of the fiscal year so that agencies can issue regulations or make other programmatic changes to be sure the savings begin on October 1. Under the second resolution approach, legislation may be enacted days or a few weeks before the start of the fiscal year, thus undercutting potential savings. Finally, too, the first resolution approach allows the Budget Committee time to fully evaluate the legislative actions that have been taken and incorporate this information into their second resolution marks. Under the second resolution method, the Committees on the Budget have no idea at the time of markup whether or how reconciliation will finally be implemented and what precise savings figures will be, leading almost certainly to a third resolution to adjust estimates after action is completed. The approach the committee took this year is a far more responsible one.

Reconciliation Review, *supra* note 24, at 17.

³⁴ See GILMOUR, *supra* note 20, at 109.

³⁵ See *id.* Although the final reconciliation bill failed actually to balance the budget, it did achieve \$8.2 billion in deficit reduction savings. See *A History of Reconciliation*, 53 CONG. Q. WKLY. REP. 2714, 2714 (1995) [hereinafter *History*].

³⁶ See *infra* Part II.B.

³⁷ See Howard Baker, Jr., *An Introduction to the Politics of Reconciliation*, 20 HARV. J. ON LEGIS. 1, 2 (1983).

³⁸ See James A. Miller & James D. Range, *Reconciling an Irreconcilable Budget: The New Politics of the Budget Process*, 20 HARV. J. ON LEGIS. 10, 11 (1983).

support of conservative Southern Democrats in the House.³⁹ Reconciliation was the favored vehicle for Reagan's economic program because it allowed substantial spending reductions to be "packaged" into one bill, enabling party leaders to claim that all government programs would bear equally the brunt of budgetary sacrifices. More importantly, a single omnibus reconciliation bill facing a single vote in Congress was more likely to pass because dissatisfied congressmen would be unlikely to kill an entire budget agenda over a few disagreeable provisions.⁴⁰ Finally, unlike any other revenue or appropriation measure, reconciliation could originate in the then Republican Senate.⁴¹

The 1981 reconciliation process also involved two significant procedural innovations: multi-year reconciliation and instructions requiring alterations in authorization legislation.⁴² Congress instituted multi-year reconciliation to prevent committees from fiddling with the books to achieve spending reductions⁴³ and to facilitate its own efforts at long-term deficit reduction. This innovation has since become a permanent part of the budget reconciliation process.⁴⁴ Congress implemented reconciliation instructions requiring changes in authorization legislation because they were essential to the success of Reagan's economic program (which relied almost exclusively on spending cuts to achieve deficit reduction).⁴⁵ Such instructions, however, have since been disfavored for usurping too much power from the authorization committees.⁴⁶

³⁹ Professor Charles Tiefer notes that although the House of Representatives had a nominal Democratic majority in 1981, on budget matters, the Republicans had a functional majority due to the support of Southern Democrats. *See* Tiefer *supra* note 3, at 430 n.67.

⁴⁰ *See* Miller & Range, *supra* note 38, at 12.

⁴¹ *See id.* at 13. Article I, section 7, clause 1 of the Constitution mandates that all bills proposing to "raise revenues" must originate in the House. Based on this Taxation Clause, Congress has established a tradition that appropriation bills must originate in the House as well. *See* TIEFER, *supra* note 19, at 924. Reagan's reconciliation bill circumvented this constitutional provision because it sought to *reduce* revenues.

⁴² In contrast to appropriations, entitlements, and other forms of direct spending, authorizations do not provide an agency with funds. Rather, authorization laws create programs and sanction future appropriations for specified purposes. *See* Miller & Range, *supra* note 38, at 16-18.

⁴³ Prior to the introduction of multi-year reconciliation, committees often "achieved" savings by shifting government payments due in September to October; this did not reduce total spending but gave the appearance of reducing spending in a given fiscal year. *See* GILMOUR, *supra* note 20, at 111 n.23.

⁴⁴ *See id.*

⁴⁵ *See* Miller & Range, *supra* note 38, at 18.

⁴⁶ *See* GILMOUR, *supra* note 20, at 96 n.3.

B. Amending Reconciliation

1. The Byrd Rule

The special rules governing reconciliation made the process an attractive tool for pursuing deficit reduction. However, these same rules also invited committees to attach extraneous, non-budgetary proposals to reconciliation legislation in order to insulate them from ordinary debate, filibuster, and amendment.⁴⁷ After several struggles between committees and other senators seeking to strip such extraneous proposals from reconciliation bills,⁴⁸ the Senate in 1985 adopted a budget procedure known as the "Byrd Rule."⁴⁹

The Byrd Rule enables any senator to raise a point of order against provisions or amendments to the reconciliation bill or its conference report that are "extraneous to the instructions to a committee."⁵⁰ A provision or amendment is considered extraneous if it: does not produce a change in outlays or revenues, increases outlays or cuts revenues and the relevant committee fails to meet its target level, is outside the jurisdiction of the committee responsible for that section of the bill, produces changes in outlays or revenues that are "merely incidental" to the provision, leads to a net increase in outlays or decrease in revenues beyond the years covered by the bill, or changes Social Security.⁵¹ When a senator raises a point of order against a provision, the presiding officer of the Senate decides whether it is extraneous under the Byrd Rule. Once he sanctions a Byrd Rule point of order, the provision must be stricken from the bill unless a three-fifths Senate supermajority votes to waive the Rule.⁵² Although the Byrd Rule formally applies only to the Senate, in practice it governs the House as well because the two chambers

⁴⁷ See, e.g., TIEFER, *supra* note 19, at 891 n.117 (noting Senator Byrd's complaint about the Senate Commerce Committee's inclusion of seven extraneous provisions and the Banking, Housing, and Urban Affairs Committee's attachment of several more).

⁴⁸ For a more detailed account of these battles, see TIEFER, *supra* note 19, at 891-93.

⁴⁹ Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 20001, 100 Stat. 390, 390-91 (codified as amended at 2 U.S.C.A. § 644 (West 1998)). For a discussion of the specific considerations that motivated the Byrd Rule, see *The Budget Reconciliation Process: The Inclusion of Unrelated Matters: Hearings Before the Subcomm. on the Legislative Process of the House Comm. on Rules*, 99th Cong. 40-47 (1986) [hereinafter *Hearings*].

⁵⁰ 2 U.S.C. § 644(a) (1994).

⁵¹ See 2 U.S.C. § 644(b)(1)(A) (1994).

⁵² See TIEFER, *supra* note 19, at 908.

must approve identical conference reports for the reconciliation bill to pass.

The Byrd Rule was a significant innovation in the evolution of the budget process. It not only elevated the importance of the budget resolution, but also instituted a formal emphasis on deficit reduction (or at least curbing deficit growth) as the ultimate goal of reconciliation.

2. Gramm-Rudman-Hollings

In the years immediately following 1981, additional attempts to accomplish deficit reduction through reconciliation met with only limited success. Despite numerous negotiations, Congress and the President could not agree on specific tax or spending policies that would significantly reduce deficit growth.⁵³ By 1985, the nation faced a federal "budget crisis,"⁵⁴ to which Congress responded by passing the Gramm-Rudman-Hollings Deficit Reduction Act ("GRH").⁵⁵ GRH prescribed predetermined deficit maximums for the next five years. If Congress and the President failed to produce the deficit reductions necessary to comply with these maximums, GRH relied on a procedure called "sequestration" to impose across-the-board federal spending cuts that forced such reductions.⁵⁶ Congress enacted GRH with the belief that sequestration would never occur; the logic behind GRH was to use the threat of sequestration to scare both Congress and the President into working together to pass a deficit-reducing budget.⁵⁷ GRH

⁵³ Although Republican Senate leaders persuaded the Reagan administration to support reconciliation bills in 1982 and 1984, both bills involved key compromises and failed to produce enough savings to control the deficit. *See History, supra* note 35, at 2714. In 1983, attempts to produce a reconciliation bill stalled due to a congressional-presidential impasse over increasing taxes. *See id.*

⁵⁴ Stith, *supra* note 8, at 595-96 (noting that members of Congress, scholars, and political observers widely recognized a budget crisis).

⁵⁵ Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (codified as amended in scattered sections of 2, 31 & 42 U.S.C.) [hereinafter *GRH*]. GRH was enacted as an amendment to a bill providing urgent supplemental appropriations and a critical increase in the statutory limit on the public debt.

⁵⁶ For a more thorough explanation of how GRH operated, see Stith, *supra* note 8, at 633-52. Notably, the original act empowered the Comptroller General of the United States to activate the cuts if and when sequestration became necessary. In 1986, however, the Supreme Court held that Congress's assignment of this function to the Comptroller General violated the separation of powers doctrine. *See Bowsher v. Synar*, 478 U.S. 714 (1986). Congress subsequently amended GRH to remove this unconstitutional delegation of power, but the rest of the Act survived in its original form.

⁵⁷ *See id.* at 624.

thus sought, in essence, to compel reconciliation—for the only practical way to achieve the deficit maximums set by GRH without across-the-board domestic spending cuts was to increase revenues or reduce entitlement spending.

GRH also accelerated the budget schedule within which reconciliation takes place⁵⁸ and set a precedent for employing five-year, rather than three-year, deficit projections. Indeed, although GRH itself was not part of a reconciliation bill, the five-year timetable it inaugurated has become the standard for subsequent reconciliation legislation.

C. *Recent Innovations*

GRH did force Congress and the President to pass some kind of reconciliation bill in subsequent years, though not in the manner Congress had envisioned. In 1987, for instance, a Democratic Congress and Republican President deadlocked over taxes and nearly accepted sequestration cuts rather than produce a reconciliation bill.⁵⁹ It was only the historic stock market crash in October, which many attributed to Wall Street malaise about impending GRH cuts, that impelled both sides to convene an economic summit and ultimately pass a two-year reconciliation bill.⁶⁰ A similar impasse over President Bush's proposed capital gains tax cut stalled attempts at reconciliation in 1989, triggering across-the-board GRH cuts. Rather than accept these cuts permanently, Congress and the President eventually enacted a reconciliation bill in late November.⁶¹

A bitter budget battle in 1990 culminated in an omnibus reconciliation bill that amended the budget process one more time, through the Budget Enforcement Act of 1990 ("BEA").⁶² The BEA built on GRH's five-year deficit maximums by instituting a five-year budget process, discretionary spending caps, and pay-as-you-go ("PAYGO") rules for taxes and entitlements.⁶³ The

⁵⁸ See Balanced Budget and Emergency Deficit Control Act of 1985 § 201(b), 99 Stat. at 1040 (codified as amended at 2 U.S.C. § 631 (1994)).

⁵⁹ See *History*, *supra* note 35, at 2715.

⁶⁰ See *id.*

⁶¹ The reconciliation bill did, however, retain \$4 billion of GRH cuts as part of the bill. See *id.*

⁶² Pub. L. No. 101-508, §§ 13101–13501, 104 Stat. 1388, 1388-1573 to 1388-1630 (codified as amended in scattered sections of 2 & 13 U.S.C.).

⁶³ For a more detailed analysis of the innovative mechanisms introduced by the BEA, see James A. Thurber, *Congressional-Presidential Battles to Balance the Budget*, in

PAYGO rules require Congress to offset fully any legislation that increases statutory entitlement spending or decreases revenues with legislation that cuts other statutory entitlements or raises revenues elsewhere.⁶⁴ Although PAYGO does not mandate reconciliation, it changes the way reconciliation operates because Congress must now pay for any provisions that reduce revenues or increase entitlements with other provisions that either increase taxes or reduce entitlements. This feature makes it politically difficult both to cut taxes and to increase entitlement spending. Thus, under PAYGO, Congress is unlikely to be able to pass economic packages like Reagan's 1981 plan, which simultaneously instituted large tax cuts and reduced appropriations spending; for such tax cuts would have to be paid for either with other tax increases or with reductions in entitlement spending. In 1993, Congress and the Clinton administration extended the discretionary spending caps and PAYGO rules set forth in the BEA through 1998, via the Omnibus Budget Reconciliation Act of 1993 ("OBRA").⁶⁵

II. RECONCILIATION AND CONGRESSIONAL AMBITION IN 1995-96

A. *The Congressional Agenda*

Congressional Republicans in 1995 sought to use the budget process, and reconciliation in particular, to enact sweeping governmental reform on the scale of a presidential national agenda. Their \$894 billion reconciliation bill dwarfed President Reagan's \$130.6 billion 1981 budget package, and more than doubled President Clinton's \$433 billion budget reforms in 1993.⁶⁶ The Republican bill simultaneously attempted two monumental initiatives: the institution of an elaborate fiscal blueprint to balance the budget in seven years, and a massive restructuring of the size and scope of the federal government within one year.

RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS 191, 196-99 (James A. Thurber ed., 1996).

⁶⁴ See *id.* at 197; see also Dennis S. Ippolito, *The Budget Process and Budget Policy: Resolving the Mismatch*, in CURRENT ISSUES IN PUBLIC ADMINISTRATION 297, 301 (Frederick S. Lane ed., 1987).

⁶⁵ Pub. L. No. 103-66, §§ 14001-14004, 107 Stat. 312, 683-85 (codified as amended in 2 U.S.C. §§ 665, 900-902, 904).

⁶⁶ See *Reconciliation Now a Major Tool*, 53 CONG. Q. WKLY. REP. 3286, 3286 (1995).

1. Fiscal Reform

The 104th Congress's fiscal agenda was more ambitious in its deficit reduction goals than any attempted by preceding Congresses or Presidents. The agenda was driven by three main priorities set forth in the House's "Contract With America" platform: cutting taxes, cutting spending without touching defense or Social Security, and balancing the budget by 2002. The decision not to cut defense (16% of federal spending) or Social Security (22%), combined with the inability to cut interest payments on the federal debt (16%), took more than half of all federal spending off the table.⁶⁷ Congress thus sought to cut extensively from the other half: non-defense programs and statutory entitlements.⁶⁸

Congress planned to produce the non-defense spending reductions by lowering and extending the five-year discretionary spending caps set by the BEA and amended by OBRA, creating new seven-year caps for fiscal 1996 through fiscal 2002.⁶⁹ The bulk of the savings were to come from the reconciliation bill, which proposed unprecedentedly deep cuts in health insurance and welfare entitlements.⁷⁰ The reconciliation bill also proposed \$245 billion in tax cuts, primarily corporate and capital gains.⁷¹ This combination of cuts in entitlements and taxes prompted congressional Democrats to charge, in PAYGO terms, that Republicans were cutting Medicare to pay for tax savings for the wealthy.⁷²

The 104th Congress further sought to entrench its priorities in the long-term fiscal blueprint through two structural amendments to the fiscal constitution: the line-item veto and a three-fifths tax rule in the House. The line-item veto enables the President to strike from the budget individual appropriations,

⁶⁷ See *No Winners in Budget Showdown*, 51 CONG. Q. ALMANAC 2-44, 2-44 (1995) [hereinafter *No Winners*].

⁶⁸ See *id.*

⁶⁹ See *GOP Throws Down Budget Gauntlet*, 51 CONG. Q. ALMANAC 2-20, 2-22 (1995) [hereinafter *Budget Gauntlet*]. These spending cuts were projected to save \$213 billion over the next seven years. See *No Winners*, *supra* note 67, at 2-47.

⁷⁰ The bill proposed to cut Medicare spending by \$270 billion, Medicaid spending by \$163.4 billion, and welfare spending by \$81.5 billion. See *No Winners*, *supra* note 67, at 2-58.

⁷¹ See *id.* at 2-44.

⁷² Republicans responded by amending PAYGO rules to prohibit such an explicit tradeoff; however, the amendment did not prevent them from cutting Medicare and taxes at the same time, and thus was largely ineffectual. See *id.* at 2-47.

new entitlements, and entitlement expansion provisions.⁷³ Although it does not empower the President to veto automatic increases in entitlement spending caused by inflation or demographic changes, the line-item veto illustrated where Congress intended future deficit reduction to come from.⁷⁴ The second structural amendment, the three-fifths tax rule, erects a procedural barrier against tax increases by requiring more than a simple majority to initiate revenue-raising proposals.⁷⁵ In simultaneously enacting these two reforms the 104th Congress sought to impose legal and institutional constraints on future legislators to balance the budget on its terms—via deep cuts in discretionary spending and entitlements absent offsetting tax increases.

2. The New Federal Government

Congressional Republicans in 1995 sought to restructure the federal government in two ways. First, they would shift control over several aspects of federal spending to the states. Second, they would abolish or “zero-out” several components of the federal bureaucracy.⁷⁶ Congress’s goal, in essence, was to create a smaller, less expensive, and less powerful federal government.⁷⁷

The drive to transfer control over spending to the states was related to the resolve to cut entitlements. Congress planned to use reconciliation legislation to convert many federal statutory entitlements into block grants operated by the states, who would in turn be free to design their own benefit packages and formulas for determining who was eligible for aid. Further, Congress sought to end the designation of such programs as “entitlements,” eliminating the long-standing guarantee of minimum government as-

⁷³ See Line Item Veto Act, Pub. L. No. 104-130, §§ 2–3, 110 Stat. 1200 (1996) (codified as amended in 2 U.S.C. §§ 691–692); see also Tiefer, *supra* note 3, at 442.

⁷⁴ Several members of Congress attempted to challenge the constitutionality of the line-item veto, but were ultimately turned away by the Supreme Court for lack of Article III standing, since the President had not yet utilized the veto. See *Raines v. Byrd*, 117 S. Ct. 2312 (1997).

⁷⁵ The three-fifths tax provision generated a great deal of criticism from constitutional scholars, see Bruce Ackerman et al., *An Open Letter to Congressman Newt Gingrich*, 104 YALE L.J. 1539 (1995), and House Democrats, who argued that it violates the Constitution. The latter filed a lawsuit challenging the provision but lost, as with the line-item veto, on the ground that they lacked standing. See *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997).

⁷⁶ See H.R. Con. Res. 67, 104th Cong. (1995); see also *Budget Gauntlet*, *supra* note 69, at 2-20, 2-23.

⁷⁷ See *Budget Gauntlet*, *supra* note 69, at 2-20.

sistance for the nation's poor and needy.⁷⁸ Congress's plan to use the budget process in this manner was unprecedented; although there had been other conservative proposals seeking to decrease entitlement spending, none attempted to use the budget reconciliation process to undo entirely the concept of entitlements.⁷⁹

Congress planned to reduce the size of the federal government by eliminating the federal Departments of Commerce, Education, and Energy, which the majority regarded as unnecessary.⁸⁰ In addition, Congress proposed to abolish several sub-departmental federal agencies, such as the National Endowment for the Arts, the Corporation for Public Broadcasting, and the National Endowment for the Humanities.⁸¹ Finally, the majority sought to terminate more than 170 federal programs including the President's National Service Initiative, Goals 2000, Head Start, and family planning counseling.⁸² Republican leaders' crusade to do away with numerous governmental agencies and programs would prove extremely exacting and time-consuming, as Democrats and Republicans alike fought to preserve programs important to their constituencies.⁸³

B. *Implementation: The 1995-96 Budget Battle*

The 1995-96 budget battle was precipitated both by the substantive breadth of Congress's agenda and by the majority's refusal to compromise on its fiscal tenets. From the outset, the congressional majority demonstrated an unwillingness to compromise on the terms of its balanced-budget agenda. Rather than attempt a budget summit with the President, as prior Congresses in divided governments had done, the 104th Congress planned to assemble a reconciliation bill which ignored the President's priorities, and then use strategic budgetary maneuvers to *force* him to sign the bill.

⁷⁸ See H.R. Con. Res. 67, 104th Cong. (1995); see also *No Winners*, *supra* note 67, at 2-44.

⁷⁹ See Tiefer, *supra* note 3, at 445 (noting Reagan's proposals for changing Medicaid in 1981 and congressional Republicans' call for Medicaid reform at the start of the 1985 budget process, but explaining that in both years the budget process itself was used to "ameliorat[e] ideological thrusts" rather than to enact them).

⁸⁰ See *Budget Gauntlet*, *supra* note 69, at 2-20, 2-23.

⁸¹ See H.R. Con. Res. 67, 104th Cong. (1995); see also DREW, *supra* note 4, at 263.

⁸² See DREW, *supra* note 4, at 269.

⁸³ See *id.* at 264.

To this end, Republican leaders crafted the budget resolution behind closed doors with the Republican Governor's Association,⁸⁴ eschewing input from congressional Democrats and the White House. Moreover, it contained a subtle procedural maneuver designed to enhance Congress's leverage vis-à-vis the President. The maneuver concerned the statutory limit on the public debt; because the federal government was scheduled to reach the limit of its borrowing authority by the end of November, it would require an extension of the statutory debt limit to continue operating without defaulting on its loan obligations.⁸⁵ A House procedure known as the "Gephardt Rule" traditionally operated to facilitate the passage of debt limit bills by deeming them automatically authorized as soon as the chamber adopted the final version of the budget resolution.⁸⁶ However, the fiscal 1996 budget resolution waived the Gephardt Rule, enabling the House to hold the debt limit extension in reserve until the President accepted a reconciliation bill on its terms.⁸⁷

In keeping with Congress's "Contract With America" agenda, the budget resolution contained reconciliation instructions directing twelve House and eleven Senate committees to produce \$894 billion in deficit reduction and \$245 billion in tax cuts.⁸⁸ The sheer number and magnitude of these cuts guaranteed long and extensive debate in drafting reconciliation legislation, thus slowing down the entire budget process. The committees in charge of cutting health care entitlements, for instance, did not finish drafting their reconciliation legislation until several weeks into the new fiscal year.⁸⁹ Committee rebellion against cuts in farm

⁸⁴ See Tiefer, *supra* note 3, at 431; see also Colette Fraley, *Republicans are Standing Firm on Giving Medicaid to States*, 53 CONG. Q. WKLY. REP. 2901, 2901 (1995).

⁸⁵ See *Debt Limit 'Weapon' Lacks Force*, 51 CONG. Q. ALMANAC 2-63, 2-63 (1995) [hereinafter *Debt Limit*]. The debt limit at the time was \$4.9 trillion; the last time that it had been increased was in 1993, as part of Clinton's budget-reconciliation bill. See *id.*

⁸⁶ Under the Gephardt Rule, the bills then went automatically to the Senate for consideration, effectively putting control over debt limit increases in the Senate's hands. See *id.* at 2-64.

⁸⁷ House Speaker Newt Gingrich (R-Ga.) told Clinton in a meeting at the White House that "he and his fellow Republicans were prepared to use the continuing resolution and debt limit to get their way." DREW, *supra* note 4, at 336. The Speaker also made his party's strategy clear in remarks delivered to the Public Securities Association, stating that: "I don't care what the price is. I don't care if we have no executive offices, no bonds for 60 days . . . What we are saying to Clinton is: Do not assume that we will flinch, because we won't." Newt Gingrich, *quoted in Debt Limit*, *supra* note 85, at 2-64.

⁸⁸ See H.R. Con. Res. 67, 104th Cong. (1995).

⁸⁹ The House Ways and Means Committee took its Medicare proposal to the House

subsidies and federal employee pensions similarly delayed, and even jeopardized, reconciliation.⁹⁰ The House Budget Committee ultimately restored the farm subsidy reductions dropped by the Agriculture Committee, but only after several rounds of negotiations and arm-twisting between party leaders and committee members.⁹¹ When the bill finally passed the House, it contained numerous ideological provisions indicative of Republicans' broad national agenda but no concessions to House Democrats or to the President.⁹²

Senate action on the bill highlighted the magnitude of the reforms the reconciliation bill sought to achieve. First, Senate moderates pushed to pare back some of the most drastic cuts instituted by the House.⁹³ An amendment by Senator John Chafee (R-R.I.), for example, expanded aid to disabled persons, pregnant women, and children.⁹⁴ Second, the Senate used the Byrd Rule to strike out forty-six ideological provisions passed by the House,⁹⁵ the most significant of which were related to welfare and health entitlements.⁹⁶ Finally, senators offered more than seventy-nine amendments to the reconciliation bill in only two days of floor debate, setting a chamber record.⁹⁷ Several senators decried the inadequacies of a process that provided so little time to consider legislation with such potentially deep and enduring consequences. An exchange on the Senate floor between Senator Robert Byrd (D-W.Va.), author of the procedural rules in the original Budget Act, and Senator Pete Domenici (R-N.M.), is instructive:

MR. BYRD: This [budget-reconciliation] is a historic bill But we are down to the point now where we have only 30 seconds to the side for debate on an amendment

floor on October 19, 1995, and the Senate Finance Committee did not report its version until close to October 23. See *No Winners*, *supra* note 67, at 2-47, 2-50.

⁹⁰ See *id.* at 2-44, 2-46; see also David Hosanky, *Panel Rejects Farm Overhaul in a Rebuke to Leadership*, 53 CONG. Q. WKLY. REP. 2875 (1995).

⁹¹ See *No Winners*, *supra* note 67, at 2-48.

⁹² See *id.* at 2-44, 2-49.

⁹³ Specifically, Senate moderates ameliorated cuts made in the following areas: student loans, health programs, nursing homes, and programs for the disabled. See *id.* at 2-51.

⁹⁴ See Tiefer, *supra* note 3, at 437; *No Winners*, *supra* note 67, at 2-51.

⁹⁵ See *No Winners*, *supra* note 68, at 2-57.

⁹⁶ For example, the Byrd Rule was used to eliminate a provision that placed a five-year limit on the number of years that a family could receive welfare assistance, as well as a provision prohibiting Medicare reimbursements for assisted suicide. See *id.*

⁹⁷ See *id.* at 2-51, 2-57.

[W]e have gone from 103 days on a massive bill to 20 hours . . . I am concerned with what we are doing to the Senate, what we are doing to the legislative process. We are inhibited from calling up amendments. We have had a very insufficient time for debate on this massive, comprehensive bill, a bill that may be even more far-reaching, in some respects, than was the civil rights bill of 1964 . . . I do not think it is in the best interests of the institution. I do not think it is in the best interests of the American people, because we Senators do not know—to a very considerable degree—what we are voting for. There is not a Senator in this body—not one—who knows everything that is in this bill. Not one. And so that is the situation we are in. It troubles me.⁹⁸

MR. DOMENICI: [I]f you had not helped us put this kind of process together, we could never change the country . . . [I]f we did not have a reconciliation process, what we wanted to change would take 30 years.⁹⁹

This exchange, and particularly Senator Byrd's remarks, constitutes striking evidence of how far the 104th Congress's reconciliation agenda deviated from Congress's original conception of the process as a relatively minor mechanism for maintaining budgetary targets.

Despite such reproaches, congressional leaders remained unwilling to compromise. Rather than use the House-Senate conference to make the bill more palatable to congressional moderates and to the President, the reconciliation conferees dismantled many of the Senate moderates' modifications. Senator Chafee's expanded aid for the disabled was, for instance, effaced, as were matching fund requirements inserted by other moderates.¹⁰⁰

The conference report passed both Houses, as had the original reconciliation bill, on a partisan vote.¹⁰¹ Congress had missed its October 1st deadline by more than a month, inducing two impending fiscal crises: the need to appropriate funds to keep the government operating and the need to raise the statutory limit on the public debt. Congress's emphasis on reconciliation,¹⁰²

⁹⁸ 141 CONG. REC. S16,034 (daily ed. Oct. 27, 1995) (statement of Sen. Byrd).

⁹⁹ 141 CONG. REC. S16,035 (daily ed. Oct. 27, 1995) (statement of Sen. Domenici).

¹⁰⁰ See Collete Fraley, *Scaled-Back Medicaid Savings Plan Emerges from Conference*, 57 CONG. Q. WKLY. REP. 3539 (1995); H.R. CONF. REP. NO. 104-350, pt. 2, at 1064-65 (1995).

¹⁰¹ The final House vote, which took place three days after the Senate vote, was 235-192, with only one Republican, Christopher H. Smith of New Jersey, voting against the bill, and five Democrats voting for it. In the Senate, the 52-47 vote was even more partisan, with moderate William Cohen of Maine as the only Republican dissident, and no Democrats voting for the bill. See *No Winners*, *supra* note 67, at 2-59.

¹⁰² The House-Senate conference on the reconciliation bill alone took more than two

coupled with its determination to restructure the federal government through funding decisions,¹⁰³ pushed the thirteen annual appropriations bills far behind schedule. More than one month after the start of the new fiscal year, only two appropriations bills had been signed into law.¹⁰⁴ Congress had passed one temporary stopgap spending measure, or CR,¹⁰⁵ on September 29, but it was to expire on November 13.¹⁰⁶ With reconciliation behind schedule, Congress decided to use a second CR and a short-term debt limit extension as leverage to gain concessions from the President. It attached to the interim legislation several controversial measures, including a plan to increase Medicare premiums and several restrictive rules that would seriously limit the Treasury Department's ability to stave off default if a long-term debt limit increase were not enacted shortly thereafter.¹⁰⁷ The President immediately vetoed both measures,¹⁰⁸ precipitating the first of two historic federal government shut-downs¹⁰⁹ and a series of ex-

weeks. *See id.* at 2-44, 2-57 (noting Senate approval of the reconciliation bill on October 28, and the filing of the completed conference report on November 15).

¹⁰³ Congress persisted in attaching numerous policy riders to ordinary appropriations legislation. Many of the policy riders were abortion-restricting initiatives, which provoked contentious debate. The Labor-Health and Human Services appropriations bill, for example, contained a provision that would end the federal mandate on states to pay for abortions for poor women in cases of rape or incest. The appropriations bill for Veterans' Affairs, Housing and Urban Development, and independent agencies was particularly remarkable, carrying 17 riders prohibiting the enforcement of pending and existing EPA policies, the Fair Housing Act, and other core agency policies. *See* Jackie Koszczuk, *Gingrich's Abortion Strategies*, 53 CONG. Q. WKLY. REP. 3376, 3376 (1995).

¹⁰⁴ *See* Andrew Taylor, *GOP Rifts Delay Spending Bills*, 53 CONG. Q. WKLY. REP. 3356, 3356 (1995).

¹⁰⁵ Continuing resolutions traditionally continue funding at the lowest of three levels: current spending, the level set by the House-passed appropriations bill, or the level set by the Senate-passed bill. *See* George Hager, *THE BUDGET: Avoiding a Shutdown*, 53 CONG. Q. WKLY. REP. 2782, 2782 (1995).

¹⁰⁶ *See No Winners*, *supra* note 67, at 2-57.

¹⁰⁷ Specifically, the debt limit would rise to \$4.967 trillion up to December 12, and then revert to \$4.8 trillion, which was less than the existing ceiling. Further, the bill prevented the Treasury Department from juggling federal trust fund dollars to raise money to keep the government from defaulting on its loan obligations. *See id.* at 2-65. Also included in the short-term bill were a measure overhauling habeas corpus laws, a regulatory reform bill that had fallen to a Senate filibuster earlier that year, and a requirement that the President agree to pass a seven-year budget-balancing plan using Congressional Budget Office accounting methods. *See id.*

¹⁰⁸ Congress passed the debt limit bill on November 10, and the CR on November 13; President Clinton vetoed both bills on November 13. *See* Hager, *supra* note 5, at 3508.

¹⁰⁹ As discussed *supra* note 5, the federal government had shut down nine times before, but never for more than three days. The first 1995 shutdown, by contrast, lasted six full days. *See* Hager, *supra* note 5, at 3503. The shutdown sent home nearly 800,000 "non-essential" federal workers and indefinitely suspended numerous federally funded activities, from medical research to the processing of Social Security applications. *See id.*

traordinary fiscal maneuvers by the Treasury Department.¹¹⁰ Congressional leaders' inclusion of the Medicare proposal in the CR provided the President, ever-conscious of the polls, with important political ammunition with which to criticize and blame Republicans.¹¹¹

Five days later, Congress and the President enacted a promising CR, ending the government shutdown and extending federal funding through the middle of December. This CR ostensibly committed the President to work towards an agreement that would balance the budget in seven years, using Congressional Budget Office ("CBO") projections, while requiring Congress to accept the President's priorities respecting, *inter alia*, Medicaid, education, and the environment.¹¹² Negotiations between congressional leaders and the White House quickly broke down, however, as the two branches deadlocked over differing interpretations of the CR, particularly concerning whether the CBO's or the Office of Management and Budget's ("OMB") economic assumptions should be used to estimate the budget plan's savings projections.¹¹³ Contrary to Republicans' expectations,¹¹⁴ the President's approval

¹¹⁰ On November 15, 1995, for example, Treasury Secretary Robert Rubin "disinvested" two government-retirement funds for civil service employees, converting them, in form, from government-issued securities (debt) to non-interest-paying IOUs. On paper, the transaction created an additional \$61.3 billion in borrowing authority without exceeding the \$4.9 trillion statutory debt limit. *See id.* at 3508.

¹¹¹ *See DREW, supra* note 4, at 323.

¹¹² Specifically, the continuing resolution provided that:

(a) The President and the Congress shall enact legislation . . . to achieve a balanced budget not later than fiscal year 2002 as estimated by the Congressional Budget Office, and the President and the Congress agree that the balanced budget must . . . ensure Medicare solvency, reform welfare, and provide adequate funding for Medicaid, education, agriculture, national defense, veterans and the environment . . . and (b) the balanced-budget agreement shall be estimated by the Congressional Budget Office . . . following a thorough consultation and review with the Office of Management and Budget . . .

H.R.J. Res. 122, 104th Cong. (1995).

¹¹³ The economic assumptions that govern GDP growth, unemployment, inflation, and interest rate predictions used in budget projections are the central features of a budget proposal, as even minuscule (*i.e.*, less than one percentage point) differences in such predictions make billions of dollars of difference when dealing with debts and expenditures in the billions and trillions. In 1995, OMB's assumptions were slightly more optimistic than CBO's, enabling the President to offer a counter proposal with fewer entitlement cuts than the Republicans', but still claim to achieve balance in seven years. CBO calculated that the President's plan produced \$365 billion less in cuts than did Congress's. Thus, Congress was adamant that any budget agreement it reached with the President be scored by CBO, while the President insisted that OMB's calculations were more accurate. *See No Winners, supra* note 67, at 2-59.

¹¹⁴ Republicans believed that a shutdown would hurt Clinton more than it would them, largely because the shutdown in 1990 had hurt President Bush. *See DREW, supra* note 4, at 324.

ratings soared throughout the shutdown, while congressional Republicans' declined.¹¹⁵

Almost one month after the first government shutdown, the President vetoed the budget reconciliation bill,¹¹⁶ and offered in its stead his own proposal to balance the budget in seven years—based on OMB's economic assumptions and projections.¹¹⁷ Congressional Republicans denounced the plan as “an insult” and stormed out of the recently resumed negotiations.¹¹⁸ The President proposed a new plan on December 15, the day the first CR was scheduled to expire, but Congress quickly rejected it.¹¹⁹ With no CR and six of the annual appropriations bills still to be enacted, a significant portion of the federal government shut down once more on December 16.¹²⁰ After several additional weeks of negotiations and little headway, the two branches ultimately abandoned the balanced-budget goal and passed an omnibus appropriations bill covering the remainder of fiscal 1996 instead.¹²¹

III. REDEFINING RECONCILIATION: LEGAL AND INSTITUTIONAL LIMITATIONS ON CONGRESS'S POWER OF THE PURSE

Despite its enormous power as a budget integration and deficit reduction tool, the reconciliation process does not give Congress unfettered control over the federal budget or the budget process. Nor does it render Congress commensurate with the President in his capacity to impel comprehensive national reform. As Section A explains, the fiscal constitution contemplates a significant role for the President in the budget process; although reconcili-

¹¹⁵For a more detailed discussion about public perceptions and poll ratings, see MARANISS & WEISSKOPF, *supra* note 1, at 146–49, 152–53; and DREW, *supra* note 4, at 324–26.

¹¹⁶The President's veto, delivered on December 6, 1995, criticized congressional Republicans for taking an “extreme” approach that would “hurt average Americans and help special interests.” *‘Profound Differences’ Cited in Veto of Budget Plan*, 51 CONG. Q. ALMANAC D-37, D-37 to D-38 (1996) (full text of the President's message to Congress vetoing the reconciliation bill).

¹¹⁷*See id.*

¹¹⁸For a colorful journalistic account of Republicans' reactions to the plan, see MARANISS & WEISSKOPF, *supra* note 1, at 159–65.

¹¹⁹*See No Winners*, *supra* note 67, at 2–62.

¹²⁰The second shutdown lasted 21 days and furloughed some 260,000 federal employees from work. *See* MARANISS & WEISSKOPF, *supra* note 1, at 161; *No Winners*, *supra* note 67, at 2–62.

¹²¹*See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-34, 1996 U.S.C.C.A.N. (110 Stat.) 1321.

ation gives Congress considerable power to shape the budget's ultimate form, it cannot circumvent the President's priorities in the process.

Section B demonstrates how the legal rules governing the reconciliation process make it an ill-suited vehicle for implementing sweeping legislative agendas. First, because reconciliation is scheduled late in the budget process and does not cover annual appropriations, congressional attempts at reconciliation push the entire budget process behind schedule and (almost) always lead to stopgap spending measures or government shut-downs. Second, the Byrd Rule operates as a check on the extent of reform Congress can achieve through the budget reconciliation process. Third, the special rules and limited debate time allotted to reconciliation legislation raise serious questions about the desirability of implementing far-reaching governmental reform through this process.

Section C examines the politics of reconciliation and concludes that, at least during divided government, there is an inherent tension between the partisan politics necessary to propel a reconciliation bill through Congress and the considerable compromise required to induce the President to sign it.

A. The Separation of Powers and the Presidential Role in the Constitutional Budget Process

The modern fiscal constitution is built on a blueprint that envisions the President as the central figure in the budget process. The Budget and Accounting Act of 1921 ("1921 Act"),¹²² for instance, makes the President responsible for initiating the budget process by requiring him to submit a budget proposal to Congress at the start of each year.¹²³ This procedural feature empowers the President to frame the budget discourse, and casts Congress in the role of respondent to his agenda. Further, the 1921 Act gives the President significant power in budget formulation and deliberation by establishing the executive Bureau of the Budget (now OMB) to assist him with budget calculations.¹²⁴ As

¹²² Pub. L. No. 67-13, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.).

¹²³ See *id.* § 201, 42 Stat. at 20-21 (codified as amended at 31 U.S.C. § 1105 (1994)).

¹²⁴ See *id.* § 207, 42 Stat. at 22 (codified as amended in scattered sections of 31 U.S.C.).

a result, the President is well-equipped to translate his political agenda into budget proposals.

Recent innovations in the budget process have adapted to, rather than altered, this basic framework. Although the Congressional Budget Act of 1974 centralizes the legislative budget process and increases Congress's control over the budget as a unit,¹²⁵ it does so within the structure established by the 1921 Act.¹²⁶ The congressional budget resolution is basically an integrated response to the President's budget proposal, and CBO merely a legislative version of OMB. Moreover, Congress must still await the President's proposal before it begins work on its own resolution. Finally, even if Congress decides to reject some or all of the President's proposal, it must keep in mind his priorities in order to produce a budget he will sign. Thus, presidential priorities remain of paramount importance in the constitutional budget process.

Reconciliation does not change this fundamental feature of the fiscal constitution. Notably, reconciliation is not a necessary component of the annual budget process, which requires only the passage of the thirteen annual appropriations bills responsible for funding the federal government. Further, reconciliation rules—such as time limits on debate and prohibitions on non-germane amendments—which operate against traditional political inertia to expedite reconciliation in Congress, do not affect the President. Absent a reconciliation bill, the government's tax and entitlement policies automatically continue in their current vein; thus, a President who prefers the status quo to proposed reconciliation legislation faces no legal or institutional obligation to sign such a bill into law.¹²⁷ Recent history illustrates the impact of this institutional limitation: throughout much of the 1980s Presidents Reagan and Bush effectively hampered congressional reconciliation efforts with pledges to veto any legislation proposing a tax increase.¹²⁸

¹²⁵ See *supra* Part I.A.

¹²⁶ Cf. LOUIS FISHER, *THE POLITICS OF SHARED POWER* 189 (3d ed. 1993) (maintaining that the congressional budget process created by the Congressional Budget Act of 1974 was modeled on the executive budget established by the Budget and Accounting Act of 1921).

¹²⁷ See Tiefer, *supra* note 3, at 439.

¹²⁸ See *History*, *supra* note 35, at 2714–15; Tiefer, *supra* note 3, at 439. President Bush eventually backed off on his tax stance in order to avoid GRH cuts. See *supra* Part I.C.

Because the reconciliation process leaves Congress with no procedural leverage to force the President's cooperation in its budget reform efforts, Congress must either compromise part of its agenda or resort to strategic manipulations—such as tying reconciliation legislation to some required component of the budget process—in order to induce the President to sign it. The 1995-96 government shutdowns were the direct result of the latter tactic: faced with a President who preferred the status quo to its reform agenda, Congress tried to coerce the Executive's cooperation by refusing to pass a CR or a debt limit extension unless he agreed to some of its most controversial proposals.¹²⁹ This tactic, of course, ultimately failed—suggesting that compromise may be the only way for Congress to gain the President's cooperation in passing reconciliation legislation.

Indeed, as Part I discusses, GRH was the only budget innovation that somewhat successfully operated against this institutional limitation by giving the President an incentive (the fear of sequestration) to cooperate with Congress in passing deficit-reducing reconciliation legislation.¹³⁰ In 1987, for instance, an historic stock market crash in the face of impending GRH cuts brought President Reagan to the table to negotiate a bipartisan budget reconciliation deal.¹³¹ Similarly, in 1990, the fear of sequestration under GRH drove President Bush to break the congressional-presidential impasse and accept a reconciliation package that violated his “no new taxes” pledge.¹³² Even GRH, however, could not ultimately force the nation's leaders to produce reconciliation legislation that would balance the budget, let alone within a given number of years.

In fact, most Congress-initiated attempts to reorient the budget via reconciliation have failed.¹³³ Those that have succeeded typi-

¹²⁹House majority whip Tom DeLay (R-Tex.) explained congressional Republicans' strategy as follows: “If [the President] shuts the government down we'll keep it shut down until he signs a bill or an agreement in writing about what he will do.” DREW, *supra* note 4, at 322.

¹³⁰See *supra* Part I.B.2.

¹³¹See *History*, *supra* note 35, at 2714–15; see also GILMOUR, *supra* note 20, at 217–20.

¹³²See *History*, *supra* note 35, at 2714–15; GILMOUR, *supra* note 20, at 217–20. See also *Budget Adopted After Long Battle*, 46 CONG. Q. ALMANAC 111, 111–12 (1990).

¹³³Congress attempted to initiate sizable reconciliation packages in 1980, 1982, 1983, 1985, 1987, and 1995; all but the second attempt ultimately collapsed due to inter-congressional or congressional-presidential deadlock. Rising inflation in 1980 did prompt congressional-presidential budget meetings and reconciliation legislation, but this was wholly independent of the Senate's original attempts to initiate reconciliation (which failed due to disagreement with the House). Similarly, the GRH-inspired stock market

cally have occurred during unified (or functionally unified)¹³⁴ government, with party leaders putting pressure on the President,¹³⁵ or have been driven by the threat of dire economic consequences, such as those imposed by GRH. In either case, congressionally driven reconciliation bills have been passed only as a result of special meetings, external to the traditional budget process, between Congress and the President.¹³⁶

B. *The Legal Limitations on Reconciliation as a Vehicle for Legislative Reform*

Reconciliation was designed to play an integrative, harmonizing role in the budget process, not to serve as its impetus. Despite the expansion of its role over the past twenty years, the process is not procedurally equipped to implement national congressional agendas. Specifically, when Congress tries to use reconciliation to this end, it runs into three legal limitations: timing, the Byrd Rule, and the twenty-hour cap on debate.

1. Timing and the Appropriations Dilemma

The timing of the budget process is not conducive to the use of the reconciliation process to achieve substantial legislative change. As Part I explains, reconciliation originally took place on the heels of the second budget resolution, within the ten-day window between September 15 and September 25.¹³⁷ Since Congress informally amended this rule to allow reconciliation instructions in the first budget resolution,¹³⁸ reconciliation has be-

crash in 1987 prodded an economic summit between Congressional and presidential budget-makers, which in turn produced a reconciliation bill, but this second effort at reconciliation (and its results) differed significantly from Congress's original plan. *See History, supra* note 35, at 2714–15.

¹³⁴By “functionally unified” I mean where one party has a working majority on budget issues, even though it may not control both houses (e.g., 1981, when the Senate and President were both GOP-controlled, and the House had a conservative majority on budget matters). *See* discussion *supra* note 39 on “boll weevil” Democrats in the House.

¹³⁵Both the 1982 and 1984 attempts occurred while the Senate was controlled by the President's party. This enabled Senate leaders to rely on party politics and special Rose Garden meetings to gain the President's cooperation. *See* GILMOUR, *supra* note 20, at 116.

¹³⁶The 1982, 1987, and 1990 reconciliation bills were all passed after congressional-presidential budget summits. *See* GILMOUR, *supra* note 20, at 123; *History, supra* note 35, at 2714–15.

¹³⁷*See supra* note 13; GILMOUR, *supra* note 20, at 108.

¹³⁸*See supra* Part I.A.

gun immediately after the passage of the first resolution, and committees have been scheduled to report reconciliation bills by mid-June.¹³⁹ While this innovation gives Congress more time to craft and consider reconciliation measures, it is still insufficient. With the notable exception of 1984, when Congress reversed its traditional budget process and approved deficit reduction legislation before passing a budget resolution,¹⁴⁰ reconciliation bills have passed Congress long past schedule.¹⁴¹ As a result, their capacity to realize savings has been greatly reduced.¹⁴²

Further, congressional attempts at reconciliation interfere with other aspects of the budget process. Notably, both annual appropriations and reconciliation bills are scheduled to be reported out of committee in June.¹⁴³ Thus, when Congress attempts reconciliation, it must work on both types of legislation simultaneously. Although different committees are responsible for drafting reconciliation and appropriations legislation, both processes tend to consume the attention of the legislature, and the majority party leadership. Reconciliation thus draws Congress's focus away from the annual appropriations process, precipitating delays in the passage of funding necessary to keep the federal government running. Indeed, not once in the twelve times that Congress has attempted reconciliation has it managed to complete all, or even most, of the thirteen annual appropriations bills on time.¹⁴⁴ Such repeated breakdowns in the budget process have necessitated the passage of numerous CRs over the past several years.¹⁴⁵ The use of CRs peaked during the 1980s, when Congress often gave up on passing annual appropriations and allowed the stopgap spend-

¹³⁹ See GILMOUR, *supra* note 20, at 111; Christopher Cox, *Capitol Offenders: A Budget Reform to Stop Congress from Breaking the Law*, POL'Y REV., Fall 1990, at 41.

¹⁴⁰ See *History*, *supra* note 35, at 2714.

¹⁴¹ In the years preceding 1995 when Congress passed reconciliation bills, delays occurred five times: 1980 (Dec. 3); 1986 (Oct. 17); 1987 (Dec. 22); 1989 (Nov. 22); and 1990 (Oct. 27). See *id.* at 2714-15.

¹⁴² This is because by the time a reconciliation bill's savings provisions take effect, a considerable portion of the fiscal year has already elapsed. See GILMOUR, *supra* note 20, at 112.

¹⁴³ The annual appropriations bills are due from committees by June 30, and reconciliation legislation is due June 15. See Cox, *supra* note 139, at 41.

¹⁴⁴ See *History*, *supra* note 35, at 2714-15 (summarizing congressional attempts at reconciliation in each of the eight years from 1980-87, as well as 1989, 1990, and 1993).

¹⁴⁵ See Jackie Calmes, *Congress Misses Oct. 1 Deadline; Short-Term Measure Fills Gap*, 47 CONG. Q. WKLY. REP. 2538, 2538 (1989) (noting the passage of a CR in 1989); *Another CR*, 48 CONG. Q. WKLY. REP. 3477, 3477 (1990) (discussing the passage of a third CR in 1990); *Status of Appropriations*, 51 CONG. Q. WKLY. REP. 3345, 3345 (1993) (reporting Congress's passage of a CR in 1993).

ing measures to supply federal funding for the entire year.¹⁴⁶ Significantly, Congress attempted reconciliation in every one of those years, with the exception of 1988;¹⁴⁷ in the few recent years when Congress has not attempted reconciliation, as in 1988 and 1994, appropriations have been completed on time and without any CRs.¹⁴⁸

In general, the larger and more ambitious a reconciliation bill, the longer it will take Congress to complete,¹⁴⁹ and the more it will interfere with the appropriations process. Thus, when Congress seeks to achieve massive reforms through the reconciliation process, as it did in 1995-96, the entire budget process can suffer.

2. The Byrd Rule Revisited

Reconciliation's aptness as a tool for enacting a comprehensive agenda of legislative reform is further limited by the procedural restrictions of the Byrd Rule. As Part I describes, the Byrd Rule operates as a check on congressional efforts to use reconciliation to implement sweeping legislative agendas that are only indirectly related to budget concerns (e.g., restrictions on abortion and assisted suicide). While the Byrd Rule technically may be waived by a three-fifths Senate majority,¹⁵⁰ this has never occurred in practice.

Recent reconciliation efforts illustrate the power that the Byrd Rule has to restrict the scope of reconciliation's accomplishments. In 1993, for instance, the Byrd Rule forced Congress to drop several significant reforms from President Clinton's sweeping reconciliation bill,¹⁵¹ including a review mechanism to limit

¹⁴⁶ See Neal E. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389, 392 n.19. (1988).

¹⁴⁷ See *History*, *supra* note 35, at 2714.

¹⁴⁸ See *id.* (no reconciliation legislation attempted in 1988 or 1994); Jackie Calmes, *Hopes Grow Dim for Meeting Fiscal 1990 Deadline*, 47 CONG. Q. WKLY. REP. 2441, 2442 (1989) (observing that 1988 was the first time since 1954 that no CR had been passed).

¹⁴⁹ Several members of Congress have argued in favor of restrictive House rules limiting the scope of the reconciliation bill for just this reason. See, e.g., *Hearings*, *supra* note 49, at 28 (prepared statement of Trent Lott, (R-Miss.)) ("[T]he inclusion of such [unrelated] matters only complicates, confuses and *delays* efforts by the two Houses and the White House to hammer-out a final reconciliation bill.") (emphasis added).

¹⁵⁰ See *supra* Part I.B.1.

¹⁵¹ While the reforms were not literally forced out of the reconciliation bill by the Byrd Rule, conferees removed them in advance in response to Byrd Rule threats from the minority party. See *Deficit-Reduction Bill Narrowly Passes*, 49 CONG. Q. ALMANAC 107, 119 (1993).

entitlement spending as well as several provisions that would have raised the threshold for paying Social Security taxes on domestic employees.¹⁵² Similarly, in 1995, congressional Democrats used the Byrd Rule to gut several ideological provisions central to Republicans' "Contract With America" agenda; eliminated were measures ending welfare and Medicaid as entitlements, providing a bonus for states that reduced the number of out-of-wedlock births, and giving states the option to deny higher welfare checks to recipients who continue to have children.¹⁵³ Most of these provisions, while consistent with the Republicans' campaign platform, would have had little or no effect on aggregate entitlement expenditures.

The institution of the Byrd Rule stemmed from congressional concern over the use of the reconciliation bill as a substitute for the traditional legislative process.¹⁵⁴ What Congress may not have realized, however, is that in emphasizing budget resolution targets and the relationship between revenues and outlays, it was not only restricting committee chairmen's ability to sneak pet projects onto reconciliation legislation; it was also significantly constraining its own ability to use reconciliation to effect sweeping legislative reform.

3. Restrictive Rules and the Quality of Deliberation

Finally, restrictive rules and time limits capping debate on reconciliation legislation make it extraordinarily difficult for members of Congress to know or understand the effect that individual components of the bill will ultimately have. Indeed, the rules and debate time allotted for consideration of reconciliation legislation seem inversely proportional to the magnitude and consequence of the policy changes such legislation entails. While this facet of reconciliation is often embraced by those who wish to railroad sweeping changes past an unprepared legislature, it ultimately constrains even majority leaders' ability to discern how to achieve the reforms they desire, or evaluate the impact of the policies they eventually choose.

¹⁵² See *id.*

¹⁵³ See *No Winners*, *supra* note 67, at 2-57.

¹⁵⁴ See, e.g., TIEFER, *supra* note 19, at 893 n.121 (discussing Senator Byrd's complaints that a particular rider to a reconciliation bill had not received consideration in the relevant committee).

The passage of the fiscal 1996 budget reconciliation bill is instructive. Few, if any, members of Congress could have read the bill's nearly 2000 page text before voting on it, yet no hearings were held on the impact or merits of the bill.¹⁵⁵ Even majority party leaders had trouble understanding and explaining the projected impact of specific portions of the bill and of proposed amendments.¹⁵⁶ One episode illustrates particularly well the level of confusion surrounding the passage of the bill. Senator Christopher Bond (R-Mo.) had proposed to increase the tax deduction for health-insurance premiums paid by self-employed workers from thirty percent to fifty-five percent.¹⁵⁷ Another senator asked how Bond proposed to pay for the amendment, which was expected to cost more than \$3.8 billion over seven years.¹⁵⁸ Senator Bond looked to majority leader Bob Dole (R-Kan.), who had been bargaining off the floor with lobbyists. The majority leader ambiguously responded that "we found another area where they overestimated or underestimated, or whatever it is."¹⁵⁹ Based on this information, the Senate proceeded to vote for the amendment, 99-0.¹⁶⁰

Over the years, many members of Congress have echoed Senator Byrd's concerns¹⁶¹ about implementing far-reaching national reforms in this manner. For instance, Leon Panetta (D-Cal.), former House Budget Committee chairman and White House Chief of Staff during the 1995-96 budget battle, once remarked that:

The legislative product of the Congress is best when it has received proper scrutiny in both Houses. Because reconciliation bills involve hundreds of provisions, we do not always have a proper debate on each and every item in the bill. If reconciliation is limited to spending cuts and tax increases alone, this is less of a problem. But when reconciliation includes complicated reauthorizations and extensive policy changes, we

¹⁵⁵ See *supra* note 98 and accompanying text.

¹⁵⁶ Similar problems plagued the omnibus continuing resolutions of the 1980s. See generally Devins, *supra* note 146, at 396-400 (relating not only that the 1988 CR was passed on extraordinarily limited legislative debate and amendment and without the benefit of review by committees with appropriate expertise, but also that members did not have an opportunity to read the more than 2100-page amended bill). While such resolutions certainly present difficulties, the problem is only magnified by reconciliation bills, such as that passed in 1995, which seek to effect wholesale reformation of the nation's fiscal landscape.

¹⁵⁷ See *No Winners*, *supra* note 67, at 2-51 (citing Senate vote 515).

¹⁵⁸ See *id.*

¹⁵⁹ *Id.*

¹⁶⁰ See *id.*

¹⁶¹ See *supra* note 98 and accompanying text.

run the risk of enacting laws which have not faced the give and take of the traditional legislative process.¹⁶²

In other words, the more Congress tries to accomplish through reconciliation, the less it thinks through what it is doing, and the less accurate its predictions about the impact of proposed reforms are likely to be.¹⁶³ Given the far-reaching national significance of the reforms at stake, the expedited reconciliation process thus seems an injudicious and "undemocratic"¹⁶⁴ vehicle through which to institute sweeping legislative agendas.

C. *The Politics of Reconciliation*

Federal spending is difficult to control in large part because it stems from established political programs and funding obligations made in prior years. It is politically much easier for Congress to continue funding programs at existing levels than to redesign or eliminate long-standing policies with entrenched constituencies. Reconciliation requires Congress to overcome this inherent political inertia and make unpopular policy changes. Moreover, in a nod to congressional committees, it delegates the task of implementing these changes to those with the most interest in preserving the status quo.

Despite these political complexities, the process has survived because it facilitates centralized majority-party control. Members of the congressional majority are loathe to let down their party on one of its most crucial initiatives of the year.¹⁶⁵ In addition, restrictive rules on the House and Senate floor operate against the political inertia that would otherwise impede the passage of reconciliation legislation.¹⁶⁶

¹⁶² *Hearings*, *supra* note 49, at 12 (statement of Leon Panetta).

¹⁶³ For instance, the 1981 reconciliation package, which sped through Congress on the strength of restrictive rules and limited time for debate, generated a string of colossal deficits that doubled the national debt within five years. *See FISHER, supra* note 126, at 191. In retrospect, David Stockman, the OMB director who had pushed for the 1981 agenda, admitted that "a plan for radical and abrupt changes required deep comprehension—and we had none of it." DAVID A. STOCKMAN, *THE TRIUMPH OF POLITICS* 91 (1986).

¹⁶⁴ *Cf. Devins, supra* note 145, at 399 (labeling the 1987 omnibus continuing resolution "undemocratic" for similar reasons).

¹⁶⁵ *See* David S. Cloud, *GOP Moderates Refusing to Get in Line*, 53 CONG. Q. WKLY. REP. 2963, 2963 (1995) (noting that GOP moderates "have a definite political stake in seeing their party succeed in its quest to pass a balanced-budget plan . . .").

¹⁶⁶ For instance, time limits on the debate accompanying reconciliation legislation prevent senators from using filibuster tactics to delay key votes on reconciliation.

Paradoxically, however, the same features that facilitate the passage of reconciliation in Congress jeopardize its chances for ultimate enactment under divided government. As the history of reconciliation demonstrates, in order to achieve reconciliation during divided government, Congress must invite minority party and presidential input almost from the outset.¹⁶⁷ Budget summits, not closed-door intra-party sessions, must take place prior to or during the preparation of reconciliation legislation in order for Congress to produce a reconciliation bill that the President will sign.¹⁶⁸

Positive political theory provides a useful tool for understanding the political paradox inherent in the reconciliation process. According to a political science theory known as the median voter model, legislative policymaking is inherently incremental and hostile to radical or sweeping changes.¹⁶⁹ Specifically, the model proffers that legislative preferences, rather than party-line voting, determine policy outcomes. Thus, if legislative preferences are ranked from 1 to 100 (or 1 to 435) on a conservative-liberal continuum, only those policy initiatives that reflect the preferences of a majority¹⁷⁰ of either house will pass successfully.¹⁷¹ Further, the model predicts that successful policy initiatives must cater disproportionately to the preferences of median voters—i.e., moderate legislators whose preferences fall in the middle of the continuum—because these legislators' votes are crucial to achieving the requisite majority.¹⁷² Moreover, under divided government, the model holds that successful policy initiatives must reflect a broader range of preferences, so as to attract enough votes to overcome a presidential veto.¹⁷³ Ultimately, this need to temper proposals to suit the preferences of median voters is hypothesized to keep legislative policies from

¹⁶⁷ See *supra* Part III.A.

¹⁶⁸ See, e.g., *supra* note 136.

¹⁶⁹ See, e.g., DAVID W. BRADY & CRAIG VOLDEN, *REVOLVING GRIDLOCK: POLITICS AND POLICY FROM CARTER TO CLINTON* 2–3 (1998).

¹⁷⁰ In the case of the Senate, policies must actually reflect the preferences of at least 60 members in order to avoid becoming casualties of the filibuster. See *id.* at 16–17.

¹⁷¹ See *id.* at 7.

¹⁷² See *id.* See also Mathew McCubbins et al., *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 *LAW & CONTEMP. PROBS.* 3, 19 (1994).

¹⁷³ See BRADY & VOLDEN, *supra* note 169, at 15–16. Specifically, Professors Brady and Volden maintain that policy made during divided government must comport with the preferences of the 40th through the 66th Senators (and presumably the 174th through the 287th or 288th Representatives), while policy enacted during unified government need only reflect the preferences of the 34th to the 60th Senator (and presumably the 147th or 148th to the 261st Representatives). See *id.*

swinging from one end of the continuum to the other within relatively short periods of time.

As Part I describes, however, budget reconciliation does not cater to the median voter. Rather than inspire moderate legislation that reflects the preferences of median congressional voters—and is thus capable of overriding a presidential veto—reconciliation often reflects the preferences of the majority party leadership and can produce radical, uncompromising proposals which boast the support of only the barest congressional majorities. In 1995, for instance, the special rules and procedures governing the reconciliation process enabled the party leadership to attempt sweeping welfare and Medicare reforms that ignored the preferences of moderate legislators. Notably, while Senate moderates managed to temper several of the leadership's more controversial proposals, reconciliation conferees used their power to eradicate most of the moderates' palliative amendments from the bill's final version.¹⁷⁴ In so doing, they eliminated those provisions that might have made the reconciliation bill tolerable to President Clinton,¹⁷⁵ thereby effectively guaranteeing a presidential veto with little chance of an override.

There is, then, an inherent tension, during divided government, between the legislative centralization and partisan politics required to pass reconciliation legislation through both Houses of Congress, and the considerable concession and moderation necessary to get it past the President's desk. While this tension has been overcome a few times during the past decade, it has led more often to budget breakdowns and shutdowns.

D. *Conclusion: Reconciliation and the Balanced Budget Amendment*¹⁷⁶

For years, revenues and entitlements remained outside the reach of Congress's annual budget calculus. Reconciliation created a mechanism for integrating these crucial fiscal elements with the rest of the budget process, and thus appeared to increase Congress's aggregate control over the nation's purse strings.

¹⁷⁴ See Tiefer, *supra* note 3, at 440.

¹⁷⁵ See *id.*

¹⁷⁶ Although the most recent version of the balanced budget amendment failed to pass Congress in February 1997, see S.J. Res. 1, 105th Cong. (1997), discussions of its probable effect remain worthwhile because the amendment continues to enjoy a good deal of support and is likely to resurface.

However, congressional efforts at reconciliation over the past decade and a half evince lingering constraints on Congress's efficient exercise of its power of the purse. In particular, this Note has argued that the isolation of revenues and entitlements from the annual appropriations process limits Congress's control over the budget and engenders several conflicts. Missed deadlines, omnibus CRs, and the inevitable threat of government shutdown are only the most apparent casualties caused by this procedural constraint. More fundamentally, the automatic year-to-year continuation of revenue and entitlement legislation, and the attendant optional nature of reconciliation, constitute powerful obstacles in the way of congressional efforts to control the budget.

Indeed, recent congressional attempts at reconciliation illustrate what some commentators have recognized for some time: constitutional provisions notwithstanding, the power of the purse does not belong exclusively to Congress, but is shared with the Executive.¹⁷⁷ Despite the constitutional requisite of legislative approval for the appropriation of federal funds, it is difficult for Congress to restrain federal spending without the President's cooperation. As evinced by the 104th Congress's efforts to cut Medicare, Congress is powerless to reduce automatic entitlement "appropriations" absent presidential approval. Moreover, as reconciliation efforts during the Reagan and Bush Administrations illustrate, Congress's power to initiate taxation is relatively meaningless when countered with a presidential veto (or threat thereof).¹⁷⁸

In light of these constraints, congressional proposals that seek to compel deficit reduction—most notably the Balanced Budget Amendment—appear misguided and, if enacted, are likely to have little practical effect on budget outcomes. Like GRH, an amendment mandating budgetary balance would alter the President's political incentives to join congressional efforts at passing reconciliation legislation. However, inducing Congress and the President to attempt reconciliation is not sufficient; as reconciliation efforts under GRH demonstrated, the process is not a panacea and cannot force the political concessions necessary to produce a balanced budget.

¹⁷⁷This is true even independent of the President's new line-item veto authority, which of course shifts considerable additional budgetary power to the Executive.

¹⁷⁸Congress, of course, retains the power to override the President's veto, but again, experience during the Reagan and Bush years demonstrates that the two-thirds majority required for an override is extremely difficult to obtain. In addition, it remains to be seen what effect the new three-fifths rule will have on Congress's power of taxation.

On the contrary, as illustrated in Sections A to C, the reconciliation process is fraught with inherent tensions, many of which a balanced budget amendment would exacerbate. For instance, an amendment requiring that the federal budget balance outlays against receipts would escalate the importance of economic assumptions and projections, thereby magnifying the likelihood of estimation conflicts between CBO and OMB—such as the one that stalled the 1995-96 budget negotiations. Further, in making a balanced budget “must-pass” legislation, such an amendment might increase the incidence of individual attempts—such as Newt Gingrich’s in the infamous Air Force One incident¹⁷⁹—to hold the budget hostage to personal concerns or political demands on other matters.¹⁸⁰ In addition, a requirement that Congress pass a balanced budget would reduce the amount of funds available for federal programs, thereby intensifying legislative conflict over favorite projects and prolonging the formulation of both reconciliation and appropriations legislation. Accordingly, legislators would almost certainly miss the annual appropriations deadline, creating the need to enact a CR. As the 1995-96 budget battle demonstrated, passing such a continuing resolution would likely entail its own set of complications. Thus, in all but the most conciliatory of political climates—a phenomenon that has eluded Washington since World War II—the conflation of the reconciliation process and a balanced budget amendment seems destined to provoke congressional-presidential conflict, and consequently, produce another government shutdown.

This Note has argued that reconciliation’s fortification of the congressional budget process is not as absolute as Congress seems to think. Indeed, far from facilitating congressional budget-making, or consummating Congress’s power of the purse, the reconciliation process suffers from political and procedural tensions of its own. The challenge before Congress is to recognize these tensions and work to limit, rather than intensify, their impact.

¹⁷⁹ See MARANISS & WEISSKOPF, *supra* note 1, at 152.

¹⁸⁰ Cf. *The Balanced Budget Amendment: Hearings on H.R.J. Res. 1 Before the House Comm. on the Budget*, 105th Cong. 244 (1997) (statement of Allen Schick, Professor of Public Policy, University of Maryland) (noting that a balanced budget amendment proposal requiring a three-fifths supermajority for various budgetary measures would mean that even if a majority agrees on budget policy, “the minority will be able to extort concessions from the majority before it agrees to vote for the budget”).