

# **PATHOLOGIES AT THE INTERSECTION OF THE BUDGET AND TAX LEGISLATIVE PROCESSES**

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**Abstract:** Recently, Congress utilized a new gimmick in its budget legislative process. Under “pay as you go” (PAYGO) budget rules, Congress had used the repeal of installment sale reporting for certain taxpayers to “pay for” revenue-losing provisions in its budget deal with the administration; the following year, however, Congress “repealed the repeal” of the installment sale provision, enabling new spending and tax cuts not included in the earlier budget deal and not paid for with appropriate offsets. Although such gimmicks are not uncommon, the installment sale episode reflected pathologies engrained at the intersection of the current federal budget and tax legislative processes. This Article examines those pathologies, their origins, and their effects on federal tax and budget policy. The Article then reviews the installment sale episode as a breach of Congress’s contract with itself, emblematic of the pathologies and the harm they cause to genuine policy considerations. As Congress considers the future of its budget offset rules, this Article also suggests reforms that would re-emphasize the democracy-oriented goals of the budget legislative process.

## **INTRODUCTION**

Gimmicks are an unfortunate reality of a modern federal budget legislative process that offers participants opportunities to play games with numbers. Whenever a new legislative program is considered, lawmakers must assess its budgetary impact. To do so, they must adopt certain economic assumptions. As an initial matter, lawmakers look at

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*baseline projections*—the amount of revenue “that would be raised or spent *without* new legislation.”<sup>1</sup> Next, legislators calculate a *score*—“the amounts by which the legislation would change projected future revenue or spending.”<sup>2</sup> Because the Office of Management and Budget (OMB), the Congressional Budget Office (CBO), and the Joint Committee on Taxation (JCT) all prepare official sets of numbers on budgetary impact, participants in the process have at least three sets of numbers to work (or play) with.<sup>3</sup> According to budget expert Allen Schick, “The assumptions are where political opportunism and manipulation thrive.”<sup>4</sup> He adds, “When an interest group lobbies Congress for a tax cut or spending increase, it no longer suffices that the proposal be palatable to members of Congress; it is also necessary that the proposal get a favorable score. Quite a few former budget or appropriations committees’ staff members now provide expert advice on how to structure legislative proposals to influence the score.”<sup>5</sup>

Other gimmicks include timing and accounting tricks. For example, proponents may suggest a delay in the imposition of costs imposed by new legislation to future years outside the budget window so that the costs are technically outside the time frame requiring an offsetting increase in revenue.<sup>6</sup> With regard to accounting, Congress uses

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<sup>1</sup> ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 56 (rev. ed. 2000) (emphasis added).

<sup>2</sup> *Id.*

<sup>3</sup> The OMB prepares the President’s budget, complete with its analysis of revenue impact and revenue projections. Given its mistrust of economic budget information prepared by OMB for the President, Congress initially established the CBO to provide Congress with its own set of budgetary figures. “The CBO was set up to provide a congressional counterpart to the OMB and the President’s economic staff, the Council of Economic Advisors (CEA). . . . The CBO was to provide a bastion of neutral analysis, loyal to the institution of Congress, rather than to committees or to parties.” AARON WILDAVSKY & NAOMI CAIDEN, *THE NEW POLITICS OF THE BUDGETARY PROCESS* 78 (4th ed. 2001). The CBO provides information and assistance to the Budget and Appropriations Committees of the House and Senate and otherwise assists the Senate Finance and House Ways and Means Committees. 2 U.S.C. § 602(a), (b) (2000). Among its other duties, the JCT is to “investigate the operation and effects of the Federal system of the internal revenue taxes.” 26 U.S.C. § 8022(1)(A) (2000). The JCT provides revenue estimates of considered or enacted tax legislation to the CBO. 2 U.S.C. § 601(f) (2000). Professor Michael Graetz laments the tax policy considerations lost when legislators play games with numbers from these three different entities. See Michael J. Graetz, *Paint-By-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609, 614–18 (1995).

<sup>4</sup> SCHICK, *supra* note 1, at 54.

<sup>5</sup> *Id.* at 61–62.

<sup>6</sup> See, e.g., *id.* at 68 (“The easiest way to remove a spending increase from the score is to schedule it to take effect beyond the period covered by the baseline.”); Elizabeth Garrett,

cash-flow, rather than present value accounting. This permits Congress not to take future costs into account until they are actually paid-out, as opposed to assessing the present value of anticipated future costs.<sup>7</sup> Finally, proponents may get around the congressional budget rules altogether by convincing the executive branch to adopt new spending programs through agency regulations.<sup>8</sup>

Regrettably, the by-product of this budget gamesmanship is a dramatic reduction in genuine tax policy consideration. Because much major tax legislation is now routinely included in omnibus budget legislation,<sup>9</sup> the tax and budget legislative processes are increasingly linked. In 1995, Professor Michael Graetz lamented that "[t]he political focus on balancing traditional tax policymaking concerns for improving equity and economic efficiency has been subordinated in recent legislation to reflect the overriding goal of insuring specific annual revenue effects of proposed tax policy changes over the 'budget period.'"<sup>10</sup> If anything, the problem has worsened since 1995. Lawmakers are more driven to get the budget numbers to "come out right" than they are to satisfy any traditional tax policy objectives of horizontal or vertical equity, efficiency, economic efficiency, or simplicity.

Not long ago, the participants in the budget and tax legislative processes played a new and different game. Unlike the gimmicks with numbers just described, the players this time followed all the technical rules. When the budget numbers didn't work out the way Congress wanted them to, Congress simply changed them. Through blatant manipulation of formal rules, the players effectively unraveled part of an omnibus budget deal altogether after the fact. Both budget and tax policy suffered as a result.

In this recent episode, Congress first enacted an amendment to the Internal Revenue Code that disallowed installment sale reporting

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*Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 527 (1998) ("delaying revenue loss until the 'out-years' is not an uncommon strategy for advocates of new programs").

<sup>7</sup> See Garrett, *supra* note 6, at 529-30.

<sup>8</sup> This is a process that Professor Garrett refers to as "downstreaming." *Id.* at 530-36.

<sup>9</sup> GLEN S. KRUTZ, *HITCHING A RIDE: OMNIBUS LEGISLATING IN THE U.S. CONGRESS* 52-57 (2001) (documenting the increasing use of omnibus packaging from 1949 through 1994); BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* 70 (2d ed. 2000) ("The contemporary Congress now often legislates through enormous omnibus bills, something it rarely did in the past.").

<sup>10</sup> Graetz, *supra* note 3, at 612.

to certain accrual method taxpayers.<sup>11</sup> This repeal of installment reporting for accrual method taxpayers was projected to increase federal revenues over a ten-year period from 1999 through 2010 by over \$2 billion.<sup>12</sup> In turn, this revenue increase was explicitly used under "pay as you go" (PAYGO) budget rules to "pay for" numerous extensions of expired and expiring tax provisions.<sup>13</sup> Under PAYGO rules, any new legislation calling for increases in direct spending or tax cuts must be paid for by new legislation with offsetting decreases in direct spending or tax increases.<sup>14</sup>

Almost before the ink was dry on the President's signature enacting the new installment sale provision into law, Congressman Bill Archer, Chairman of the House Ways and Means Committee introduced legislation to override it.<sup>15</sup> Congress voted to repeal the new provision retroactively, instructing that the Internal Revenue Code should be applied and administered as if the installment provision had never been enacted in the first place.<sup>16</sup> Under PAYGO rules, the retroactive repeal of the installment sale provision lost federal revenue and, absent an offsetting revenue increase, should have triggered a mandatory sequester of government funds. No problem. Congress simply directed the OMB, responsible for the sequester, to change the sequester balance to zero.<sup>17</sup> When the dust settled, Congress had agreed to use the repeal of installment reporting for accrual method taxpayers to pay for the cost of other tax cuts, but when the invoice arrived to pay for the tax cuts, Congress never paid the bill.

Although the Nielsen ratings surely would not have jumped, this legislative move might well have been incorporated into an episode of the old "Twilight Zone" television series. To be sure, the provision in-

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<sup>11</sup> Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, § 536, 113 Stat. 1860, 1936 (adding a new § 453(a)(2) to the Internal Revenue Code, which disallowed installment reporting for most accrual basis taxpayers).

<sup>12</sup> JOINT COMM. ON TAX., 106TH CONGRESS, GENERAL EXPLANATION OF TAX LEGISLATION (JCS-2-01) app. 184 (Apr. 19, 2001).

<sup>13</sup> Thus, the repeal of installment reporting for accrual method taxpayers was included in Subtitle C, specifically entitled, "Revenue Offsets," of the Tax Relief and Extension Act of 1999, which, in turn, was included in the Ticket to Work and Work Incentives Improvement Act. See 113 Stat. 1860, tit. V, subtit. C.

<sup>14</sup> A discussion of the PAYGO rules and their relationship with other budgetary offset rules follows at *infra* notes 91-116 and accompanying text.

<sup>15</sup> H.R. 3594, 106th Cong. (2000).

<sup>16</sup> Installment Tax Correction Act of 2000, Pub. L. No. 106-573, § 2(b), 2000 U.S.C.A.N. (114 Stat.) 3061 (instructing that the Internal Revenue Code "shall be applied and administered as if [§ 453(a)(2)] . . . had not been enacted").

<sup>17</sup> Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 2(b), 2000 U.S.C.A.N. (114 Stat.) 2763, 2763-64.

volved was relatively minor and, therefore, received little public attention. Nevertheless, the legislative process resulted in a new law. Congress and the administration had agreed to a budget deal, which included new spending and accompanying offsets to pay for the spending. Part of the budget deal was that this installment change would be used under the budget rules as an offset to pay for other provisions in the bill scored as revenue losers. Early in the year following the overall budget "deal," Congress repealed the installment sale provision as a stand-alone measure. Moreover, the President went along and signed the stand-alone repeal measure. The Internal Revenue Service and the public were told to pretend that it never happened. In the end, proponents of the new spending and tax cuts got their pet programs through without paying for them with an appropriate offset.<sup>18</sup>

This recent episode leaves one wondering just what went wrong. Literature regarding interest group influence suggests that lobbying efforts to block legislation in the first place are more likely to succeed than efforts to repeal legislation already enacted.<sup>19</sup> If the tax consequences were so adverse to taxpayers, where were the small interest group lobbies during initial consideration of the controversial provision and why didn't they block its passage? Were the interest groups simply asleep at the wheel? Why did President Clinton sign the bill, retroactively repealing the provision he had so recently signed into law?

In fairness to the affected interest groups, Congress, and the President, short provisions contained in a long and complex piece of tax legislation might easily slip through the cracks unnoticed. Moreover, Congress sometimes does make honest mistakes. It is not unusual for Congress to enact technical corrections legislation shortly after enacting complex tax legislation. On the other hand, one of the major functions of interest groups in the tax legislative process is to pore over proposed legislation and to uncover provisions, however small, that would adversely affect interest group members.

The recent episode offers important lessons regarding the process through which Congress works out differences in statutory language that emerge from the House and the Senate at conference. In addition, it offers valuable lessons about the legislative budget proc-

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<sup>18</sup> For a detailed discussion of the installment sale repeal story, see *infra* notes 117-163 and accompanying text.

<sup>19</sup> See, e.g., KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 314-15 (1986).

ess. It should come as no surprise that politicians will manipulate procedural and other rules in order to achieve desired results. At the same time, the results achieved in the recent installment sale method episode, at least, made a mockery of legislative budget process revenue offset requirements.<sup>20</sup>

One explanation for the recent installment sale episode may be that the strict legislative rules regarding the budget process were adopted in response to periods of dramatic federal deficits. The rules were designed to impose systematic fiscal restraints upon a Congress that otherwise seemed unable to control itself, believing that it could continue to lower taxes and to increase spending without significant economic consequence. Some have suggested that such fiscal constraints are not as important in periods of budget surplus. The installment sale episode occurred during a surplus period in which Congress might not have felt as compelled as it otherwise would to live by its strict budget rules. If strict offsets are necessary in times of budget deficits, but not in times of budget surplus, perhaps some fine-tuning of the rules is necessary to take these differences into account.

As of this writing, the statutory PAYGO rules have "sunset," or expired, as applied to new legislation enacted for fiscal year 2003 and thereafter.<sup>21</sup> The Senate recently agreed to a temporary renewal of PAYGO rules until April, 2003, and several other bills have been introduced that provide for longer extensions and strengthening of PAYGO rules.<sup>22</sup> The President's budget documents for fiscal year 2003 indicate a willingness to continue to work within the confines of

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<sup>20</sup> See SINCLAIR, *supra* note 9, at 77-79; see also Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 COLUM. L. REV. 702, 724-29 (2000) (describing changes in the budget and tax legislative processes that tend to alter the balance of power in favor of political party leaders).

<sup>21</sup> For sequestration purposes, however, the PAYGO rules continue to apply through 2006. See U.S. GEN. ACCOUNTING OFFICE, BUDGET ISSUES: BUDGET ENFORCEMENT COMPLIANCE REPORT, GAO-02-794, at 11 (2002) [hereinafter 2002 GAO BUDGET REPORT] ("Although BEA expires in 2002, the sequestration procedure applies through 2006 to eliminate any projected net costs stemming from PAYGO legislation enacted through fiscal year 2002.").

<sup>22</sup> S. Res. 304, § 2(b), 107th Cong. (2002) (enacted) (extending Senate PAYGO point-of-order rule to April 15, 2003); S. 2791, 107th Cong. § 2 (2002) (would extend statutory PAYGO rules through 2011, with exceptions for on-budget surplus years), *id.* § 3(d) (would extend Senate PAYGO point of order); Budget Enforcement Act of 2002, S. 2465, 107th Cong. § 3 (would extend PAYGO through 2007, with exception that there be no sequestration for fiscal years in which a surplus exists); Budget Fraud Elimination Act of 2002, H.R. 5259, 107th Cong. §§ 261, 271 (would extend PAYGO through 2007 and include provisions to reduce sequester amounts to the extent of budget surplus); Assuring Honesty and Accountability Act of 2002, H.R. 4593, 107th Cong. § 3 (would extend PAYGO indefinitely).

PAYGO.<sup>23</sup> In the meantime, Congress has been unable to pass a concurrent budget resolution for 2003.<sup>24</sup>

In the installment sale episode, Congress bypassed PAYGO sequester requirements simply by directing the OMB to set mandatory sequester amounts to zero. This is a congressional process sometimes referred to as "directed scorekeeping." One purpose of this Article is to use the recent installment sale reporting episode to expose devices, including directed scorekeeping, which I consider pathologies at the intersections of the current rules for the budget and tax legislative processes. Budget and tax matters are among the most important political choices that legislators make on behalf of the voting and taxpaying public. In a democratic government, it is important for such decisions to be transparent and open and for legislators to be fully accountable. Although there was nothing illegal or technically improper about the process used in the installment sale episode, much of it consisted of deals worked out behind closed doors. The process was far from open and transparent. Indeed, it took me weeks wearing the hat of an investigative reporter simply to reconstruct the events that transpired. Quite simply, this is not the way to make budget and tax laws. The process is badly flawed in many ways. As Congress rethinks the budget offset rules in general and PAYGO in particular, this is an especially appropriate time to consider reforms.

Part I of this Article provides a brief background on the applicable budget and budget offset rules.<sup>25</sup> Part II describes the manipulation of the process involved in the recent installment sale reporting amendments.<sup>26</sup> Part III seeks to identify the process pathologies that

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<sup>23</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRES., BUDGET OF THE U.S. GOVERNMENT FISCAL YEAR 2003: ANALYTICAL PERSPECTIVES 284 (2002) [hereinafter 2003 ANALYTICAL PERSPECTIVES] (President's budget concedes in advance that his administration would support "PAYGO requirements that would carry out the 2003 budget's proposals for mandatory spending and receipts.").

<sup>24</sup> The House has passed its own budget resolution for fiscal year 2003 and is moving forward under its own guidelines. H.R. Con. Res. 353, 107th Cong. (2002) (enacted). The Senate Budget Committee adopted its own budget resolution, S. Con. Res. 100, 107th Cong. (2002), but the resolution never made it to the floor. The Senate is moving directly to appropriations without a resolution. Although the failure to adopt a concurrent budget resolution is highly unusual and contrary to statutory budget requirements, *see infra* note 50, this would not be the first time Congress proceeded without a budget. As budget observer Allen Schick described, "In 1998, for the first time since Congress established its own budget process a quarter of a century earlier, it failed to adopt the annual resolution. But this failure did not stop other legislative actions related to the budget." SCHICK, *supra* note 1, at 106.

<sup>25</sup> *See infra* notes 28–116.

<sup>26</sup> *See infra* notes 117–163.

led to the problem and to suggest some reforms related to the PAYGO process.<sup>27</sup>

## I. BUDGET RULES

### A. *Tax Legislation and the Budget*

In general, the legal academy in the taxation area tends to focus more on the substance of tax laws than on the legislative process that created them. Perhaps the explanation lies in a fundamental fear of stomach distress.<sup>28</sup> More likely, however, the tax academy simply has not regarded the tax legislative process as sufficiently distinct from the legislative process more generally to warrant close inspection. That said, a number of legal scholars have focused on the tax legislative process. Some scholars have used a public choice analysis to explore the role of interest groups in the development of tax legislation.<sup>29</sup> Others have focused on doctrines of statutory interpretation, many of which look back to the legislative process underlying the statute at issue, particularly as applied to tax legislation.<sup>30</sup> Remarkably few, how-

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<sup>27</sup> See *infra* notes 164–268. The entire budget process, particularly the scoring methodology, has been the subject of intense scrutiny in recent years. See, e.g., U.S. GEN. ACCOUNTING OFFICE, BUDGET ISSUES: BUDGET ENFORCEMENT COMPLIANCE REPORT, GAO-01-777 (2001) [hereinafter 2001 GAO BUDGET REPORT]. For a good overview on the current need for reforms, see *Issues in Budget Reform: Hearings Before the House Comm. on the Budget*, 107th Cong. (May 2, 2002) (statement of William G. Gale, Brookings Institute). Larger budget reform issues, however, are beyond the scope of this Article, which generally is limited to the discussion of PAYGO and related budget offset procedures used in connection with enactment of new tax legislation.

<sup>28</sup> The classic old quip attributed to Otto von Bismark was that “legislation is like sausage: it’s better not to watch it being made.” More recently, Professor Eustice added, “It has been said that there are three events one should never observe close up: the making of sausages, fudgsicles, and tax legislation.” James E. Eustice, *Tax Complexity and the Tax Practitioner*, 45 TAX L. REV. 7, 14 (1989) (emphasis added). My children would surely beg to differ with regard to the fudgsicles.

<sup>29</sup> See, e.g., Paul L. Caron, *Tax Myopia, Or Mamas Don’t Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 547–54 (1994) (“Legislative Process Theory”); Julie A. Roin, *United They Stand, Divided They Fall: Public Choice Theory and the Tax Code*, 74 CORNELL L. REV. 62 (1988); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990); Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165 (1993).

<sup>30</sup> See, e.g., Caron, *supra* note 29, at 539–47 (“Statutory Construction Theory”); John F. Coverdale, *Text as Limit: A Plea for a Decent Respect for the Tax Code*, 71 TUL. L. REV. 1501 (1997); Mary L. Heen, *Plain Meaning, the Tax Code and Doctrinal Incoherence*, 48 HASTINGS L.J. 771 (1997); Michael Livingston, *Practical Reason, ‘Purposivism,’ and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677 (1996); Michael Livingston, *Congress, the Courts and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819 (1991); Dan-

ever, have written about the intersections between the budget and tax legislative processes.<sup>31</sup> This is somewhat surprising given the increasing dominance of the budget process in determining the outcome of major tax initiatives.

The President now routinely uses the State of the Union address each January and his presentation of the executive budget to Congress each February to showcase major tax initiatives. Although tax legislation can still be enacted in the course of normal legislative affairs, most major tax legislation now appears in response to the President's budget as part of an omnibus budget reconciliation package. As a consequence, tax bills must comply with reconciliation procedures. Moreover, even if the budget resolution does not contain reconciliation instructions, through fiscal year 2002, tax legislation was required to comply with PAYGO offset procedures included within statutory budget rules. Some version of these rules is almost certain to be extended into the future.<sup>32</sup> In this budget world, lobbyists advocating tax benefits for their clients can no longer simply argue the merits of their particular programs. They must be prepared to look at *all* of the proposed revenue raisers and losers. They must fend off competing predators seeking the same scarce revenue resources allocated to the tax-writing committees and/or find weak groups with existing benefits that can be eliminated.

The Internal Revenue Code has a reputation for being excessively complex. Virtually all major calls for tax reform pursue the elusive goal of simplicity. As a relative newcomer to the legislative budget process, it strikes me that the budget rules are even more complex than the Tax Code. As one budget observer noted, "Congress has . . . created a massive piece of legislation which is understood by almost no one, and which can be interpreted and manipulated by the majority to its political advantage."<sup>33</sup> In the course of my research, I have found precious little that provides an accessible explanation of the

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iel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325 (2001).

<sup>31</sup> The most dramatic exception is Elizabeth Garrett. See Garrett, *supra* note 6, at 502-04; Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387 (1998); see also Graetz, *supra* note 3; Mary L. Heen, *Reinventing Tax Expenditure Reform: Improving Program Oversight Under the Government Performance and Results Act*, 35 WAKE FOREST L. REV. 751 (2000).

<sup>32</sup> For enacted and pending legislation as of the publication of this article, see *supra* note 22.

<sup>33</sup> Donald B. Tobin, *Less is More: A Move Toward Sanity in the Budget Process*, 16 ST. LOUIS U. PUB. L. REV. 115, 117 (1996).

interplay among the component parts of the rules for the tax and budget legislative processes. One of the goals for this Article is simply to provide an accessible explanation of the basic budget rules as they apply to tax legislation. Having struggled in my own research to sort out the differences among the use of the reconciliation process, internal point-of-order rules, and the statutory PAYGO rules, I believe I can provide a service by offering a basic account of the interplay of these rules. I hope to do so by focusing on the major aspects of the provisions without getting lost in the minutia. Moreover, without such an initial account, it will be difficult to meet my larger objectives of describing what is wrong with the process, and how it might be improved. The sections that immediately follow discuss the congressional budget rules, with a particular focus on those relevant to tax legislation.

### B. Dueling Budgets

The complex modern budget process, which began with the Congressional Budget and Impoundment Act of 1974 (CBA),<sup>34</sup> represents one of an increasing number of new and innovative procedures for enacting major legislation.<sup>35</sup> The first step in the congressional budget process is for the President to submit a budget for the next fiscal year to Congress on or before the first Monday in February.<sup>36</sup> In a sense, this executive budget operates simply as the first move in a complex chess match with Congress. Congress need not adopt the President's recommendations. Nevertheless, the President's budget serves as an important starting point for negotiations and ultimate congressional action on the budget.<sup>37</sup> The President's budget frequently includes proposals for major tax initiatives, either to cut or to

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<sup>34</sup> Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. §§ 602-692 (2000)).

<sup>35</sup> For example, Congress increasingly has come to rely on combining numerous pieces of legislation together as part of an "omnibus" package. KRUTZ, *supra* note 9, at 52-57 (documenting the increasing use of omnibus packaging from 1949 through 1994). Legislative deals are more frequently hammered out through "summits" involving high-level negotiations between high-ranking executive branch officials and congressional leaders. SINCLAIR, *supra* note 9, at 77-79; Garrett, *supra* note 20, at 724-29. Political scientist Barbara Sinclair describes these as developments of "unorthodox lawmaking," and argues that the old traditional textbook diagram of the legislative process describes fewer and fewer pieces of major legislation. SINCLAIR, *supra* note 9, at 4; see also *id.* at 70-81 (ch. 5, "Omnibus Legislation, the Budget Process, and Summits").

<sup>36</sup> § 300, 88 Stat. at 306 (codified at 2 U.S.C. § 631) (timetable with respect to the congressional budget process for any fiscal year).

<sup>37</sup> See SCHICK, *supra* note 1, at 74-104 (ch. 5, "The President's Budget").

increase taxes. For example, shortly after taking office in 1981, President Reagan managed to push through a major set of tax and spending cuts.<sup>38</sup> President Reagan's budget for fiscal year 1982 called for further major tax and spending cuts.<sup>39</sup> President Clinton's fiscal year 1994 budget, on the other hand, called for major tax increases to reduce the deficit.<sup>40</sup> Tax legislative proposals in the President's budget generally are quite specific and detailed. As one budget expert observed, however, "[o]nce Congress becomes involved, it usually exercises considerable independence, altering the volume or composition of taxes to suit its preferences. Even when it meets the President's revenue target, Congress does so in its own manner."<sup>41</sup>

Prior to 1974, Congress did not formally prepare a budget of its own, but simply responded to proposals set forth in the presidential budget. In its first major budget act, the CBA,<sup>42</sup> Congress established its current House and Senate budget committees along with the CBO.<sup>43</sup> The CBO was to serve as a neutral counterpoint to the executive branch's OMB.<sup>44</sup> "The major purposes of this Act were to reassert

<sup>38</sup> The Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 101, 95 Stat. 172, 176-85 (phased-in an approximately twenty-three percent reduction in individual tax rates over four years).

<sup>39</sup> In this budget message, President Reagan boasted,

Our package includes a proposal to reduce substantially the personal income tax rates levied on our people and to accelerate the recovery of business with capital investment. These rate reductions are essential to restoring strength and growth to the economy by reducing the existing tax barriers that discourage work, saving, and investment.

*Message to the Congress Transmitting Fiscal Year 1982 Budget Revisions* (Mar. 10, 1981), 1981 PUB. PAPERS OF RONALD REAGAN 222. Congress didn't go along, however, and actually cut back some of the earlier tax and spending cuts. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.

<sup>40</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRES., BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 1994, at 5, 12 (1994).

<sup>41</sup> SCHICK, *supra* note 1, at 140.

<sup>42</sup> Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. §§ 602-692 (2000)).

<sup>43</sup> Although the CBO provides Congress with general budget numbers and baselines, the JCT has its own staff of revenue estimators who provide information to the tax-writing committees on the revenue and distributional effects of proposed tax legislation. 2 U.S.C. § 601(f) (2000). The CBO is directed to use the JCT revenue estimates provided by the JCT for any revenue legislation considered or enacted by Congress.

<sup>44</sup> See WILDAVSKY & CAIDEN, *supra* note 3, at 78; see also Philip G. Joyce & Robert D. Reischauer, *Deficit Budgeting: The Federal Budget Process and Budget Reform*, 29 HARV. J. ON LEGIS. 429, 432 (1992) (The CBO was "intended to be a source of non-partisan analysis and information relating to the budget and the economy. Indeed, perhaps the most important early role for the CBO was providing alternative economic forecasts to Congress.").

the congressional role into budgeting, to add some centralizing influence to the federal budget process, and to constrain the use of impoundments."<sup>45</sup> The Act provided timetables for budgetary action and, most important, established procedures for Congress to generate a budget of its own. The budget timetables call for both chambers of Congress to complete action on a concurrent budget resolution by April 15th,<sup>46</sup> although the deadline is virtually never met.<sup>47</sup> The concurrent budget resolution is not law and does not provide specific details regarding how money is to be raised or spent. Rather, the budget resolution serves as a fiscal blueprint or framework within which Congress makes its substantive decisions on revenue and spending. "As a blueprint, the status of the budget resolution varies from year to year. In some years it strongly influences budgetary decisions; in others it has very little impact."<sup>48</sup>

The modern federal budget process is essentially broken into two large budget "packages."<sup>49</sup> One deals with discretionary spending programs, which require annual appropriations. The other deals with permanent direct or mandatory spending programs. Tax legislation and entitlements fall within the latter category. Once tax laws are enacted, they remain in place until Congress chooses to amend or repeal them. Another increasingly common technique in tax legislation is to build in sunset provisions, under which a substantive tax law will expire at a specified date unless it is reenacted.<sup>50</sup> Taxation, then, is a fundamental part of the direct or mandatory budget process. Because

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<sup>45</sup> Joyce & Reischauer, *supra* note 44, at 431-32. In part, the Act was a direct response to President Nixon's impoundments of billions of congressionally-appropriated funds. For a discussion of the Nixon impoundments in 1972 and 1973, see ALLEN SCHICK, CONGRESS AND MONEY: BUDGETING, SPENDING AND TAXING 45-49 (1980); see also WILDAVSKY & CAIDEN, *supra* note 3, at 75-77.

<sup>46</sup> 2 U.S.C. § 631.

<sup>47</sup> For explanations as to why budget resolutions are rarely on schedule, see SCHICK, *supra* note 1, at 123-25.

<sup>48</sup> SCHICK, *supra* note 1, at 32-33.

<sup>49</sup> Naomi Caiden, *The New Rules of the Federal Budget Game*, 44 PUB. ADMIN. REV. 109, 112-14 (Mar.-Apr. 1984); see also Garrett, *supra* note 31, at 388-89 (discussing the possible advantages of changing from our current bifurcated budget "packaging" to a budget that would use a more systematic functional approach, dividing the budget into packages based upon missions or objectives of the federal government).

<sup>50</sup> For example, I.R.C. § 127 grants a limited exclusion for certain educational assistance programs provided by an employer. The exclusion was set to expire as of December 31, 2001. I.R.C. § 127(d) (2000). Congress recently eliminated the sunset provision, however, making the education assistance exclusion permanent. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 411, 2001 U.S.C.C.A.N. (115 Stat.) 38, 63.

tax legislation falls under the direct spending part of the budget, the discussion that follows will focus primarily on that portion of the budget, rather than on discretionary spending or annual appropriations.

Statutory rules call for a concurrent budget resolution setting appropriate revenue and spending levels for the next fiscal year and *at least* four ensuing fiscal years.<sup>51</sup> Historically, budget resolutions have covered five-year periods. More recently, however, Congress has exercised its authority to adopt a longer, usually ten-year, budget.<sup>52</sup> The congressional budget resolution itself first includes aggregate total revenues and spending and the amounts by which the totals should be changed. In major deficit years, for example, the budget resolution might call for a particular increase in revenues over a period of ten years.<sup>53</sup> In surplus years, the resolution might call for decreased revenues. The budget resolution also includes aggregate total new budget authority and outlays.<sup>54</sup>

Another required part of the congressional budget is a "tax expenditure" analysis. Professor Stanley Surrey was the first to identify the concept of a "tax expenditure." He observed that the federal tax system really consisted of two parts, the first of which was the basic structure necessary to implement the individual and corporate income tax.<sup>55</sup> The second part of the tax system was actually a series of government expenditures "grafted on to the structure of the income tax proper."<sup>56</sup> The tax expenditure concept recognizes that any tax deduction or credit really is a *cost* to the federal government. When the government provides these tax breaks, it effectively "spends" federal money. This spending should be taken into account in the budget process. Put slightly differently, the tax expenditure idea is

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<sup>51</sup> 2 U.S.C. § 632(a) (2000).

<sup>52</sup> See, e.g., Concurrent Resolution on the Budget for Fiscal Year 2000, H.R. Con. Res. 68, 106th Cong. (1999) (enacted). The report accompanying the 2000 budget noted that "[b]udget resolutions have traditionally included 5-year allocations . . . . This budget resolution provides for 10-year allocations . . . . The flexibility to provide 10-year allocations is found in section 302 of the Budget Act . . . ." H.R. REP. NO. 106-73, at 73 (1999).

<sup>53</sup> The increases in revenue are measured from an economic baseline established by the CBO.

<sup>54</sup> "Budget authority" is "the permission granted to an agency or department to make commitments to spend money . . . [whereas] outlays . . . are the actual dollars that either have been or will be spent on a particular activity." STANLEY E. COLLENDER, *THE GUIDE TO THE FEDERAL BUDGET FISCAL 2000*, at 2 (1999).

<sup>55</sup> STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 6 (1973).

<sup>56</sup> *Id.*

that "certain provisions of the tax laws are not really tax provisions, but are actually government spending programs disguised in tax language."<sup>57</sup> Although the concept itself is not especially controversial, arriving at a mutually acceptable definition of what constitutes a tax expenditure has proven quite intractable. Congress now recognizes the tax expenditure concept to the point of requiring that estimated levels of tax expenditures be reported in the congressional budget resolution.<sup>58</sup> Perhaps as a result of the disagreements over the proper definition of a "tax expenditure," however, the statute says nothing further about the role that the tax expenditure budget should play. For the moment, some suggest that the list is largely useful to "funding predators" looking for offsets to pay for new tax breaks. If a lobbying group can convince Congress to repeal or cut back someone else's tax expenditure, they can make room for their own pet provision.<sup>59</sup>

In addition to stating aggregate spending, the budget allocates total budget authority and outlays among twenty functional categories with respect to both discretionary and direct spending.<sup>60</sup> A joint explanatory statement accompanying the conference report on the budget resolution is required to allocate spending totals to congressional appropriations committees.<sup>61</sup> The appropriations committees then suballocate amounts within their subcommittees with authorizing or spending jurisdiction.<sup>62</sup> Because most of the allocated budget authority with regard to direct or mandatory spending goes to fund existing programs, entitlements, and tax breaks, most direct spending will occur without any further legislative action from authorizing committees.<sup>63</sup> To the extent that the budget resolution calls for increases or decreases in direct spending, the authorizing committees will report new legislation recommending changes to existing programs, entitlements, or tax laws. The budget resolution provides no

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<sup>57</sup> Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1155.

<sup>58</sup> 2 U.S.C. § 632(e)(2)(E) (2000).

<sup>59</sup> See, e.g., Garrett, *supra* note 6, at 517. Later in her article, Garrett suggests that this may not necessarily be a bad thing. She says that careful analysis of existing tax expenditures by lobbyists, albeit for self-serving reasons, may provide more information and may serve to institutionalize tax expenditure analysis in ways that Congress otherwise could not. *Id.* at 561-66.

<sup>60</sup> 2 U.S.C. § 632.

<sup>61</sup> This is commonly known in the budget world as the "section 302 allocation" process, referring to § 632 of the CBA. See Congressional Budget Act of 1974, Pub. L. No. 93-344, § 302(a), 88 Stat. 297, 308 (codified at 2 U.S.C. § 633(a)).

<sup>62</sup> This is usually done through a "section 302(b) report," as provided in the CBA. § 302(b), 88 Stat. at 308-09 (codified at 2 U.S.C. § 633(b)).

<sup>63</sup> See, e.g., H.R. REP. NO. 105-555, at 54 (1998).

details regarding how revenues are to be raised or how the new budget authority or outlays are to be spent.

### C. Budget Reconciliation

#### 1. Reconciliation Instructions

Once Congress has decided on its overall objectives in the budget resolution, the reconciliation process is designed to provide an enforcement mechanism and impose some self-discipline to assure that committees responsible for the various pieces of the overall plan follow through by developing substantive legislation that comports with the plan. Under the CBA, Congress *may*, but is not *required* to include reconciliation instructions with the concurrent budget resolution.<sup>64</sup> Although the budget reconciliation rules were included in the original CBA in 1974, they have only come to be used with frequency in more recent years.<sup>65</sup> If the budget resolution simply calls for continuing revenues and spending programs at the same levels as in the prior fiscal year, no changes in substantive legislation and, therefore, no reconciliation instructions are necessary. Reconciliation instructions generally are used only when the budget resolution calls for *changes* in existing revenue or spending laws. As one budget expert noted:

The extent to which the budget resolution seeks change can be measured by the scope of its reconciliation instructions. A resolution that does not contain reconciliation merely accommodates the status quo; one that has such instructions seeks to change existing law. The broader the scope of reconciliation—the more committees subjected to it and the more dollars involved—the greater the importance of the resolution in setting Congress's agenda and revising budget policy.<sup>66</sup>

Reconciliation instructions give deadlines by which specific committees are directed to come up with proposed legislative changes

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<sup>64</sup> § 301(b), 88 Stat. at 306–07 (codified at 2 U.S.C. § 633(b) (2000)).

<sup>65</sup> See Garrett, *supra* note 20, at 718 (“Surprisingly, the framers of the 1974 Act did not foresee the rise of reconciliation acts; only in the early 1980s did party leaders and other congressional actors realize the importance of this legislative vehicle.”).

<sup>66</sup> SCHICK, *supra* note 1, at 108; see also COLLENDER, *supra* note 54, at 56 (“It [reconciliation] is used only if Congress wants to make changes in mandatory spending and revenues. But because such changes are not required each year, it is up to Congress to decide whether it wants to proceed.”).

that accomplish objectives provided for in the budget resolution. Failing such deadlines, the budget committees themselves are authorized to draft legislation that complies with reconciliation instructions. Not surprisingly, authorizing committees almost never fail to meet the deadlines. Because revenue laws virtually always are involved in the budget process, the House Ways and Means Committee and the Senate Finance Committee likewise are virtually always subject to reconciliation instructions. These two committees will sometimes be the *only* committees involved in the reconciliation process. For example, the concurrent budget resolution for fiscal year 2000 directed the Republican-controlled Senate Finance Committee to report a reconciliation bill proposing legislative changes necessary to reduce revenues by \$765 billion for the period of fiscal years 2000 through 2009.<sup>67</sup> The Republican-controlled House Ways and Means Committee was subject to similar directives.<sup>68</sup> Thus, the committees were given the happy task of spending federal dollars, something lawmakers love to do. On the other hand, the lawmakers were not given a free ride. Unfortunately, other budget offset rules required them to find spending cuts or tax increases to pay for their compliance with the happy reconciliation instructions.

Whether they are directed to one or to multiple committees, reconciliation instructions provide no specific instructions as to how the budget objectives are to be achieved. Committees simply are instructed that their proposed legislative changes must increase or decrease revenues by specified amounts. Thus, committees are free to make trade-offs among programs within their jurisdictions to meet their reconciliation obligations. Although budget offset rules offer more latitude, the tax-writing committees generally have operated under a "rule requiring that every reduction in tax be offset by a matching revenue raiser *in the same bill*."<sup>69</sup>

Once the authorizing committees have drafted substantive legislation pursuant to reconciliation instructions, they then submit the legislation to the budget committees. House and Senate budget

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<sup>67</sup> Concurrent Resolution on the Budget for Fiscal Year 2000, H.R. CON. RES. 68, 106th Cong. § 104 (1999) (enacted).

<sup>68</sup> *Id.* § 105. By contrast, the prior year's budget resolution included reconciliation instructions to nine different authorizing committees "to submit to the Budget Committee changes in law necessary to achieve the specified levels of direct spending and/or revenue." H.R. REP. NO. 105-555, at 61 (1998).

<sup>69</sup> Sheldon D. Pollack, *PAYGO and the Politics of the Surplus*, 82 TAX NOTES 1035, 1049 (1999) (emphasis added).

committees are responsible for compiling the legislation submitted by all committees that were subject to the instructions into a reconciliation bill. The budget committees, however, are not permitted to make any substantive changes in the legislation reported from the authorizing committees. The respective budget committees in the House and Senate will then report the reconciliation bills to the House and Senate floors for consideration. These bills are referred to simply as reconciliation bills, or sometimes as "omnibus" reconciliation bills. The term "omnibus" can be somewhat arbitrary and lacks a precise definition.<sup>70</sup> One widely used definition is simply "[l]egislation that addresses numerous and not necessarily related subjects, issues, and programs, and therefore is usually highly complex and long . . . ."<sup>71</sup> Budget reconciliation bills are among the most common omnibus packages.<sup>72</sup>

## 2. Procedural Rules

### a. *Points of Order*

The instincts of the American public and lawmakers in Congress are always to want more spending for particular programs without increasing taxes to pay for them. The concurrent budget resolution sets macrobudgetary objectives, but it is not law and is not binding. Given the natural inclination of lawmakers to want to provide programs to constituents, it might be easy for legislators to ignore their previous decisions on macrobudgetary objectives when the time comes to consider microbudgetary considerations on individual programs. Congress attempts to keep itself honest through a complex series of procedural points of order.

For example, once Congress has completed action on a concurrent budget resolution, it is not in order to consider any legislation that would cause total or aggregate budget authority or outlays to exceed amounts provided for in the budget resolution or for revenues

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<sup>70</sup> See, e.g., KRUTZ, *supra* note 9, at 45 ("The term *omnibus* can be used arbitrarily. At the introduction stage of the process, members of Congress may call a bill whatever they choose. Members may simply label a bill 'omnibus' to make it sound more important.").

<sup>71</sup> SINCLAIR, *supra* note 9, at 71.

<sup>72</sup> *Id.* Krutz attempts a more systematic definition, including an element of scope and size. He defines an omnibus bill as one that "(1) spans three or more major topic policy areas or 10 or more subtopic policy areas and (2) is greater than the mean plus one standard deviation of major bills in words." See KRUTZ, *supra* note 9, at 46.

to be less than that called for in the resolution.<sup>73</sup> Any legislation that would cause a particular committee to exceed amounts allocated to it under the budget resolution is similarly subject to a point of order.<sup>74</sup> With respect to reconciliation legislation in particular, statutory budget rules provide that any amendment that would increase outlays or decrease revenues is out of order *unless* the amendment simultaneously includes offsetting provisions that would cause the amendment overall to be revenue neutral.<sup>75</sup>

Constraints imposed by the budget resolution, reconciliation instructions, and the point-of-order enforcement rules can severely limit committee flexibility. For example, proposed legislation to increase revenues above the aggregate amount permitted in the budget resolution would be subject to a point of order even if it was designed to offset increases in direct spending and was, thereby, revenue neutral in its overall effect. To avoid these problems, budget resolutions often include specific provisions for *reserve funds*. Creation of a reserve fund generally grants authority to the Budget Committee Chair to change a legislative committee's budget allocation under specified conditions.<sup>76</sup> For example, the congressional budget resolution for fiscal year 2000 included a reserve fund permitting the Budget Committee Chair to reduce spending and revenue aggregates and revise committee allocations for legislation that reduced revenues as long as the legislation would not increase the deficit or decrease the surplus.<sup>77</sup>

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<sup>73</sup> 2 U.S.C. § 641(d)(1) (House of Representatives), (2) (Senate) (2000).

<sup>74</sup> *Id.* § 633(f)(1) (House of Representatives), (2) (Senate).

<sup>75</sup> *Id.* § 641(d)(1) (House of Representatives), (2) (Senate).

<sup>76</sup> SENATE COMM. ON THE BUDGET, THE CONGRESSIONAL BUDGET PROCESS: AN EXPLANATION, S. REP. NO. 105-67, at 13, 57 (1998). In the past, reserve funds have been used primarily in the Senate. Somewhat similar flexibility is provided in the House through statutory exceptions to certain points of order. *See, e.g.*, 2 U.S.C. § 633(g)(1). In its most recent budget resolution, however, the House also used the reserve fund technique. *See* H.R. Con. Res. 353, 107th Cong., tit. II, Reserve and Contingency Funds (2002). Because the House and Senate did not agree on a concurrent budget resolution for FY 2003, this resolution serves as the budget only for purposes of the House of Representatives.

<sup>77</sup> H.R. Con. Res. 68, 106th Cong. § 202 (1999) (enacted) (Tax Reduction Reserve Fund in the Senate). Other examples of reserve funds tie changes in Budget Committee authority to changes in budget and economic outlook. *See, e.g.*, H.R. Con. Res. 83, 107th Cong. § 214 (2001) (Reserve Fund for Additional Tax Cuts and Debt Reduction). Still other reserve funds are tied to the passage of specific legislation. *See id.* § 211 (Reserve Fund for Medicare) ("If the Committee on Finance of the Senate or the Committee on Ways and Means of the House of Representatives . . . reports on a bill . . . which reforms the Medicare program . . . and improves the access of beneficiaries under that program to prescription drugs, the appropriate chairman . . . may revise committee allocations . . .").

### b. *Point-of-Order Waivers*

Despite the bite of the numerous budget point-of-order rules, their potency is diminished to the extent that the rules can be waived. In the House, a budget point of order can be waived by simple majority vote. In addition, the House may consider budget legislation under a rule from the Rules Committee that waives budget points of order. In other words, the House may decide in advance that it will debate the budget legislation under a procedural rule that disallows budget points of order.<sup>78</sup> Such House rules must pass by simple majority vote.<sup>79</sup> Point-of-order enforcement rules prove to be far more cumbersome in the Senate, where most can only be waived by a three-fifths vote or sixty members of the Senate.<sup>80</sup> This supermajority requirement for waiving Senate points of order obviously makes it harder for the Senate to unravel the budget deal worked out through the budget reconciliation process.

### c. *Special Procedural Rules in the Senate*

Reconciliation bills in the Senate are privileged in numerous other ways also designed to ease and speed up passage of the budget. Unlike other legislation in the Senate, which is subject to unlimited debate and, therefore, the threat of potential filibuster, both budget resolutions and budget reconciliation bills in the Senate are subject to statutory time limits. Debate on the concurrent budget resolution is limited to no more than fifty hours<sup>81</sup> and debate on reconciliation bills is limited to twenty hours.<sup>82</sup>

Statutory budget rules also alter another unique feature of the Senate. In the normal course of legislative affairs, senators are free to offer nongermane amendments to any pending legislation. Unique to the Senate, this nongermaneness privilege is used to strategic advantage, particularly by minority members who would otherwise have

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<sup>78</sup> For a general discussion of special Rules Committee rules that preemptively waive points of order, see WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 126–27 (5th ed. 2001).

<sup>79</sup> CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED AND SEVENTH CONGRESS, H.R. Doc. No. 106–320, House Rule XXVII, cl. 1 (2001) (providing that the voice of the majority decides as to general matters, compare with § 509); see also OLESZEK, *supra* note 78.

<sup>80</sup> JAMES V. SATURNO, *POINTS OF ORDER IN THE CONGRESSIONAL BUDGET PROCESS*, CRS REPORT FOR CONGRESS, No. 97–865 GOV (Apr. 15, 1999).

<sup>81</sup> 2 U.S.C. § 636(b)(1) (2000).

<sup>82</sup> *Id.* § 641(e)(2).

difficulty getting their legislation to the floor. For example, any individual senator can introduce a huge piece of major legislation as a nongermane amendment to a completely unrelated bill. Special procedural rules applicable in the Senate with regard to the concurrent budget resolutions and reconciliation bills, however, provide that "[n]o amendment that is not germane to the provisions . . . shall be received."<sup>83</sup>

A somewhat related procedural rule applies during Senate floor consideration of reconciliation bills. Known as the "Byrd Rule," after Senator Byrd who first proposed it, the rule creates a point of order challenging material "extraneous" to the reconciliation instructions. As budget observer Allen Schick observed,

Because there is a strong possibility that a reconciliation bill will pass once it is initiated, it is an attractive vehicle for provisions that are unrelated to the budget. In response to this problem, the Senate adopted the "Byrd Rule," which restricts the inclusion of extraneous matter in a reconciliation bill.<sup>84</sup>

The meaning of "extraneous" can be complex, ambiguous, and often depends on controversial rulings from the Chair. Included among the definitions of extraneous is any amendment or provision that would increase the deficit without an offsetting provision in the same title.<sup>85</sup> As with the other Senate points of order, the Byrd Rule can be waived only by a three-fifths vote.

#### D. Additional Fiscal Constraints

##### 1. Background

The original budget rules of the CBA were *process* rules that were outcome-neutral. Over time, the reconciliation process came to be used to force Congress to stick to the macrobudgetary decisions made

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<sup>83</sup> *Id.* § 636(b)(2) (as applied to concurrent budget resolutions); *id.* § 641(e)(1) (as applied to reconciliation bills).

<sup>84</sup> SCHICK, *supra* note 1, at 128; *see also* Tobin, *supra* note 33, at 132 ("Some Senators recognized the potential for abuse of the reconciliation process and were concerned that individuals would attempt to use the reconciliation process as a way to circumvent the filibuster requirement in the Senate. . . . In order to stop the abuse of the reconciliation process, the Senate passed the 'Byrd Rule,' which was designed to stop the Senate from considering extraneous matters on the reconciliation bill.") (footnotes omitted).

<sup>85</sup> 2 U.S.C. § 644(b)(1); *see* SENATE COMM. ON THE BUDGET, THE CONGRESSIONAL BUDGET PROCESS: AN EXPLANATION, S. REP. NO. 105-67, at 22 (1998).

in the budget resolution. Still, as budget deficits grew, Congress found these rules to be inadequate. The shift from process-oriented rules to more outcome-oriented rules began with the Balanced Budget and Emergency Control Act of 1985, commonly known as Gramm-Rudman-Hollings ("GRH").<sup>86</sup> GRH included strict targets for reducing the deficit. Automatic procedures for meeting the targets were declared unconstitutional<sup>87</sup> and Congress responded by amending the statute to ensure its constitutionality.<sup>88</sup> If Congress failed to meet deficit targets, GRH triggered across-the-board sequestrations, dramatically reducing congressional discretion and threatening severe impact on major government programs. As Wildavsky and Caiden noted about GRH, "Here we have a procedure that almost every member of Congress believed was foolish, if not stupid; that everyone who knew anything about it thought could be improved upon in five minutes; yet it received majority support in both Houses and was signed by the President."<sup>89</sup> Not surprisingly, GRH was a failure. In 1990, Congress shifted from dreams of balancing the budget to the more manageable self-imposed expenditure controls. Again, Wildavsky and Caiden colorfully described the shift:

The journey from GRH to the Budget Enforcement Act (BEA) evokes the grand themes of budgeting in our time—ideological dissensus so deep the opposing sides make minute measurements of outcomes, a deficit octopus so entangling that its grip can be loosened but not cut through, and a temporary truce based on the common desire of politicians to create a process that will not automatically stigmatize them as failures. Thus they moved from budget balance, which they could not achieve, to expenditure control, which they had a fighting chance to attain.<sup>90</sup>

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<sup>86</sup> Pub. L. No. 99-177, tit. II, Part C, 99 Stat. 1037, 1063-93 (1985).

<sup>87</sup> *Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>88</sup> Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754. For a comprehensive discussion of developments leading to Gramm-Rudman-Hollings and a discussion of its provisions and impact, see Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 595 (1988).

<sup>89</sup> WILDAVSKY & CAIDEN, *supra* note 3, at 127.

<sup>90</sup> *Id.* at 133-34.

## 2. PAYGO Requirements

### a. Introduction

PAYGO fiscal constraints built into the budget process were originally designed to control federal spending and reduce federal deficits. The rules apply broadly to revenue and entitlement laws,<sup>91</sup> seeking to ensure that *new* legislation will, on net, be deficit neutral.<sup>92</sup> PAYGO rules do not require reexamination of past policy decisions.

The PAYGO rules require that new tax legislation be "revenue neutral." In other words, new tax or entitlement legislation cannot increase costs to the government. Although the 1990 Budget Enforcement Act first codified and mandated the "neutrality" principle, this was not the first time that Congress operated under such a principle. In fact, the landmark Tax Reform Act of 1986 was developed around the principle that the legislation would be both revenue neutral and distributionally neutral. In other words, the 1986 Act was designed to raise no more revenue than it cost, but was also designed so that the burden or incidence of taxation remained neutral with regard to taxpayers at different income levels. Codification of the PAYGO rules in 1990 was an indication that Congress did not trust itself to comply with the "revenue neutrality" principles voluntarily established in earlier years. The PAYGO rules included apparently harsh sequestration devices to force Congress to do the right thing.<sup>93</sup> Although the Joint Committee on Taxation regularly provides distribution tables to tax-writing committees concerning the distributional impact of proposed legislation, the PAYGO rules apply only to *revenue*

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<sup>91</sup> Because the tax-writing committees also have jurisdiction over several entitlement programs, such as Medicare, they could technically raid those entitlement programs to pay for tax cuts under PAYGO rules. Nevertheless, the tax-writing committees generally have operated under a rule whereby every tax reduction must be matched with an equivalent revenue raiser within the same bill. SHELDON D. POLLACK, *THE FAILURE OF U.S. TAX POLICY: REVENUE AND POLITICS* 188 (1996) ("The PAYGO rule for annual offsets of revenue was translated by Chairman Rostenkowski and Bensten into a practice within both tax committees whereby any legislative proposal that costs revenue must be coupled with an offsetting revenue raiser *in the same bill*. This procedure is still followed in the 104th Congress, even though both Rostenkowski and Bensten are no longer members."). The procedure apparently continues to the present.

<sup>92</sup> BILL HENIFF, JR., *PAY-AS-YOU-GO RULES IN THE FEDERAL BUDGET PROCESS*, Congressional Research Service Report, RS20006, at 1 (Mar. 5, 2001); Garrett, *supra* note 6, at 510.

<sup>93</sup> Although sequestration sounds rather harsh, the sting is diminished through numerous exemptions. Social Security is exempt from PAYGO sequestration. In addition, 2 U.S.C. § 905 includes an extensive list of other programs also exempt from mandatory sequestration. 2 U.S.C. § 905 (2000).

neutrality and do not also demand that legislation be distributionally neutral.

b. *Internal Senate Rule: PAYGO Point of Order*

Although the emphasis of most discussion on PAYGO rules is on the statutory requirements adopted by the 1990 Budget Enforcement Act, the Senate also has internal PAYGO mechanisms. Since 1994, the Senate has imposed internal PAYGO requirements on itself through point-of-order rules incorporated into yearly budget resolutions.<sup>94</sup> The internal PAYGO point-of-order rule in the Senate can only be waived by a three-fifths vote.<sup>95</sup>

c. *Statutory PAYGO Rules*

The Budget Enforcement Act of 1990 imposed statutory spending caps with regard to discretionary spending, and statutory PAYGO budget offset rules applicable to tax legislation and other direct spending legislation.<sup>96</sup> Unlike the reconciliation rules and the Senate's internal PAYGO procedure, which are merely internal rules enforceable only through procedural points of order, the *statutory* PAYGO rules are enforceable through mandatory sequestration provisions.<sup>97</sup> The OMB maintains a PAYGO "scorecard," keeping track of the cumulative effect of all new legislation subject to PAYGO require-

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<sup>94</sup> See, e.g., H.R. Con. Res. 68, 106th Cong. § 207 (1999) (enacted) (Pay-As-You-Go Point of Order in the Senate). The Senate PAYGO point-of-order rules sunset in 2002 along with the statutory PAYGO rules, *id.* § 207(g), but they have been temporarily extended until April 15, 2003. S. Res. 304, § 2(b), 107th Cong. (2002) (enacted).

<sup>95</sup> See SENATE COMM. ON THE BUDGET, THE CONGRESSIONAL BUDGET PROCESS: AN EXPLANATION, S. REP. NO. 105-67, at 19 (1998). Unless otherwise indicated, references in this Article to "PAYGO" are to the *statutory* rules leading to sequestration, rather than to the Senate internal point of order rules.

<sup>96</sup> Pub. L. No. 101-508, tit. XIII, 104 Stat. 1388-573 (codified as amended at 2 U.S.C. § 902 (2000)).

<sup>97</sup> PAYGO enforcement provisions are codified in 2 U.S.C. § 902(b). The OMB is required to calculate any net increase to the deficit caused by direct spending and revenue bills at the close of each legislative session. Within fifteen days after the close of the session, the President is required to issue a sequestration order reducing non-exempt spending by a uniform percentage in order to eliminate the net deficit increase. Although the sequestration rules sound harsh, "[m]ost direct spending is either exempt from a sequestration order or operates under special rules that minimize the reduction that can be made in direct spending. Social Security is exempt from pay-as-you-go sequester and Medicare cannot be reduced by more than 4 percent." SENATE COMM. ON THE BUDGET, THE CONGRESSIONAL BUDGET PROCESS: AN EXPLANATION, S. REP. NO. 105-67, at 57 (1998).

ments. If the result at the end of a congressional session is a net cost, OMB must sequester nonexempt direct spending to offset the cost.<sup>98</sup>

The PAYGO rules initially applied only through fiscal year 1995, but were extended through fiscal year 1998 by the Omnibus Budget Reconciliation Act of 1993.<sup>99</sup> PAYGO was again extended through fiscal year 2002 by the Budget Enforcement Act of 1997.<sup>100</sup> Prior to the terrorist tragedies of September 11, 2001, it appeared that the previously unthought of federal budget surpluses would continue. During that period, some Republicans were calling for repeal of PAYGO rules.<sup>101</sup> As of this writing, the United States is again facing deficits as Congress considers whether to extend PAYGO. An extension of PAYGO rules in some form now appears likely.<sup>102</sup> Even administration officials have publicly announced that President Bush would accept an extension of PAYGO requirements.<sup>103</sup>

President Bush's preference, as expressed in the Fiscal Year 2003 Budget, would be to substitute the existing *concurrent* budget resolution with a *joint* budget resolution that would have the force of law and would set overall levels for discretionary spending, mandatory spending, receipts, and debt.<sup>104</sup> Congress is unlikely, however, to yield budgetary authority to the President to such a dramatic extent. After

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<sup>98</sup> 2002 GAO BUDGET REPORT, *supra* note 21, at 11. As the 2002 GAO Report notes, "[e]ffective on its enactment, [the 1997 PAYGO extension, *see infra* note 100], set the scorecard balance to zero for the then-current year and for each subsequent year through fiscal year 2002. This prevented any net savings achieved by legislation enacted prior to enactment of [the 1997 PAYGO extension] from being used to offset deficit-increasing legislation enacted through 2002." *Id.* The CBO also provides a PAYGO "scorecard" and there are often disparities in the way specific pieces of legislation are scored by CBO and OMB for PAYGO purposes. See, for example, the discussion of scoring differences for 2001-02 legislation. *Id.* at 14-31. In the event of discrepancies, however, OMB figures are controlling for purposes of sequestration orders. 2 U.S.C. § 902(b).

<sup>99</sup> Pub. L. No. 103-66, tit. XIV, 107 Stat. 312, 683-85.

<sup>100</sup> Pub. L. No. 105-33, tit. X, 111 Stat. 251, 677-712. Because Congress is now considering the budget for fiscal year 2003, the PAYGO rules are not applicable unless Congress chooses to extend them as part of its current budget activity. The Senate has extended its PAYGO point-of-order rule until April 15, 2003. *See supra* note 22 and accompanying text.

<sup>101</sup> For example, Rep. Kasich proposed a repeal of PAYGO. *See* discussion in Pollack, *supra* note 69, at 1040-41.

<sup>102</sup> *See* enacted and proposed legislation, *supra* note 22.

<sup>103</sup> *Biennial Budgeting: Hearing Before the House Comm. on Rules*, 106th Cong. (Jul. 25, 2001) (statement of Mitchell E. Daniels, Jr., Director of OMB) ("the President . . . supports . . . the extension of . . . the PAYGO requirement"). In other testimony the OMB Director made clear, however, the administration's position that the rules "should be modernized in order to guide budget decisions in an era of surplus." *Proposed Budget Process Revisions: Hearing Before the House Budget Comm.*, 106th Cong. (June 27, 2001) (statement of Mitchell E. Daniels, Jr., Director of OMB) [hereinafter *Federal Budget Process Hearings*].

<sup>104</sup> 2003 ANALYTICAL PERSPECTIVES, *supra* note 23, at 283.

all, the very point of the first major budget act in 1974 was for Congress to assert its independence in a budget process that had been disproportionately controlled by the executive branch.<sup>105</sup> In fact, Allen Schick went so far as to describe the 1966–1973 period of difficult congressional-presidential relations leading up to the CBA in 1974 as the “Seven-Year Budget War”<sup>106</sup> and the CBA itself as the “Congressional Budget Treaty of 1974.”<sup>107</sup> Given this history, congressional approval of a joint budget agreement with the force of law would be surprising.

As an alternative, the President’s budget concedes in advance that his administration would support “PAYGO requirements that would carry out the 2003 budget’s proposals for mandatory spending and receipts.”<sup>108</sup> Testimony on budget policy uniformly seems to support an extension of PAYGO-type fiscal disciplines.<sup>109</sup> Even Republican members of Congress have testified in favor of maintaining the PAYGO rules.<sup>110</sup>

#### d. *Operation of PAYGO in Times of Surplus*

The technical language of the PAYGO statute states that “[t]he purpose of this section is to assure that any legislation . . . affecting direct spending or receipts that *increases the deficit* in any fiscal year covered by this Act will trigger an offsetting sequestration.”<sup>111</sup> Given that the statutory language makes no specific reference to surplus, debate has ensued over whether PAYGO rules apply in budget surplus

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<sup>105</sup> For a description of the period of presidential dominance that led to the CBA in 1974, see SCHICK, *supra* note 1, at 14–18.

<sup>106</sup> SCHICK, *supra* note 45, at 17. For a brief discussion of the Nixon impoundments in 1972 and 1973, see *id.* at 45–49.

<sup>107</sup> *Id.* at 51.

<sup>108</sup> 2003 ANALYTICAL PERSPECTIVES, *supra* note 23, at 284. Budget documents also notified Congress that “[t]he Administration will work with the Congress during the next session to develop budget enforcement mechanisms, including . . . a PAYGO requirement for entitlement spending and tax legislation that are consistent with the needs of the country.” *Id.* at 283.

<sup>109</sup> *Federal Budget Process Structure: Hearing Before the House Comm. on the Budget*, 106th Cong. (July 19, 2001) (statement of Barry B. Anderson, Deputy Dir. of the CBO) [hereinafter *Federal Budget Process Structure Hearing*].

<sup>110</sup> *Id.* (statement of Rep. Bill Frenzel) (“PAYGO discipline should be maintained. . . . Legislation that would commit surpluses in excess of the amounts contained in the budget should be subject to PAYGO rules and, if enacted, trigger sequestration.”).

<sup>111</sup> 2 U.S.C. § 902(a) (2000) (emphasis added).

years.<sup>112</sup> Most commentators believe that the PAYGO rules do apply to surplus years as well as deficit years.<sup>113</sup>

When Congress began to work with its first surpluses under PAYGO in the late 1990s, then-OMB Director Jacob Lew announced the OMB position that "PAYGO does apply when there is an on-budget surplus."<sup>114</sup> As noted by the General Accounting Office (GAO) in its recent report on budget enforcement, Congress should clarify the issue of PAYGO's application to surplus years in the event that PAYGO is extended.<sup>115</sup> Whether or not PAYGO *should* apply to budget surplus years is a normative question, which will be considered further in the final section of this Article.<sup>116</sup>

## II. THE TAX LEGISLATION THAT WASN'T: A CASE STUDY IN PATHOLOGICAL TAX LEGISLATION THROUGH THE BUDGET PROCESS

### A. Introduction

Along with many other things, the modern presidential budget generally includes an extensive package of revenue proposals, some of which raise and others which lose revenue. The Treasury Department often publishes a voluminous document to accompany the budget. With respect to each proposed change, the Treasury Department describes current tax provisions, explains the reasons for changing them, and describes the President's tax legislation proposal.<sup>117</sup> In a

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<sup>112</sup> H.R. REP. NO. 106-73, at 87 (1999) ("The law is somewhat unclear whether PAYGO lapses when there is an on-budget surplus."); *see also* 2002 GAO BUDGET REPORT, *supra* note 21, at 43 ("During the nation's few years of surpluses, questions were raised about whether the prohibition on increasing the deficit also applied to reducing the surplus.").

<sup>113</sup> *See, e.g.*, COLLENDER, *supra* note 54, at 38 n.14 ("There is some controversy about whether PAYGO continues if there is a surplus. A literal reading of the statutory language seems to indicate that it can only be used if there is a deficit. However, the Congressional Budget Office and House and Senate Budget Committees have all stated that they will continue to apply PAYGO if the deficit would be increased or surplus reduced."); HENIFF, *supra* note 92, at 1 ("Even with a budget surplus, the PAYGO process is applicable."); SCHICK, *supra* note 1, at 153-54 ("PAYGO does not distinguish between a surplus and a deficit; in both situations revenue losses must be offset.").

<sup>114</sup> Letter from OMB Director Jacob Lew to Honorable John Spratt, ranking minority member of the House Budget Committee (Apr. 6, 1999), *cited in* ROBERT KEITH, PAY-AS-YOU-GO REQUIREMENT FOR FY 2002: A PROCEDURAL ASSESSMENT, CRS Report for Congress, No. RL 31194 (Nov. 23, 2001).

<sup>115</sup> 2002 GAO BUDGET REPORT, *supra* note 21, at 43.

<sup>116</sup> *See infra* notes 247-253 and accompanying text.

<sup>117</sup> *See, e.g.*, DEP'T OF TREAS., GENERAL EXPLANATION OF THE ADMINISTRATION'S REVENUE PROPOSALS (Feb. 1999).

similar vein, one should start with a basic understanding of the state of existing law before the events began in order to understand the budget game that was played out in connection with the recent installment sale provision episode. The section that follows offers a very brief description of the state of the law before the first coin toss.

*B. The Law Prior to FY 2000 Budget Tinkering—Installment Method Reporting for Accrual Method Taxpayers*

When a taxpayer engages in a sale or exchange of property, the Internal Revenue Code<sup>118</sup> requires that the *entire* gain or loss be reported, unless otherwise provided in Subtitle A.<sup>119</sup> Absent a special exception, a taxpayer who sells property in exchange for an installment or promissory note would be required to report the full gain in the taxable year of the sale, computed as the full face value of the note minus the adjusted basis in the property sold.<sup>120</sup> The installment sale provisions of § 453 recognize the potential hardship imposed upon installment sellers who would otherwise be required to report the entire gain from a sale of property even though receipt of some or all of the proceeds from the sale was delayed. Installment reporting under § 453 permits these sellers to include a *portion* of the taxable gain as each payment is received, thus spreading the taxable gain over the life of the note.<sup>121</sup>

Installment reporting seems eminently sensible for cash method taxpayers, who generally report their income when it is "actually or constructively received."<sup>122</sup> In fact, some may wonder why a special provision permitting installment reporting was necessary for cash method taxpayers in the first place. After all, if cash method taxpayers report income when it is actually received, one might think the cash method taxpayer *should* be taxed as payments are received. Under our tax system, however, income is defined as an economic benefit or an accession to wealth.<sup>123</sup> The economic benefit or accession to wealth

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<sup>118</sup> Unless otherwise stated, all references to the Internal Revenue Code are to the Internal Revenue Code of 1986, codified at I.R.C. §§ 1-9833 (2000).

<sup>119</sup> I.R.C. § 1001(c). Subtitle A of the Internal Revenue Code refers to I.R.C. §§ 1-1563, which govern federal *income* taxes.

<sup>120</sup> *Id.* § 1001(a).

<sup>121</sup> Under this method, "the income recognized for any taxable year . . . is that proportion of the payments received in that year which the gross profit (realized or to be realized when payment is completed) bears to the total contract price." *Id.* § 453(c).

<sup>122</sup> Treas. Reg. § 1.446-1(c)(1)(i) (as amended in 2001).

<sup>123</sup> The Internal Revenue Code defines gross income as "all income from whatever source derived." I.R.C. § 61(a). The courts have clarified the definition of income some-

from an installment sale is *not* the receipt of payments on the note. Rather, receipt of the installment note *itself* is the economic benefit, triggering a full recognition of gain or loss. Thus, absent the special anti-hardship rules in § 453, a cash method taxpayer would be required to report the full gain from the sale upon receipt of the note.

Consider now the taxpayer who uses an accrual method of accounting. This includes most business taxpayers. In fact, many business taxpayers effectively are *required* to use the accrual method of accounting by § 448, which disallows use of the cash method to C corporations and partnerships that have a C corporation as a partner, among others.<sup>124</sup> Under the accrual method of accounting, "income is to be included for the taxable year when all events have occurred that fix the right to receive the income and the amount of the income can be determined with reasonable accuracy."<sup>125</sup> Under this definition, the accrual method effectively is an *accelerated* method of accounting. Instead of reporting income when it is *received*, as a cash method taxpayer would, the accrual method taxpayer reports income in the year in which the taxpayer becomes entitled to receive it. Unlike cash method taxpayers, accrual method taxpayers routinely report income in advance, even though their actual receipt of income is delayed.

The use of installment reporting upon a sale of property arguably is inconsistent with the accrual method, which requires taxpayers to report income when they are *entitled to receive* it, regardless of when they *actually* receive it. The buyer's signature on an installment contract, along with the buyer's delivery of a promissory or installment note, presumably is the event that fixes the seller's right to be paid under the accrual method.<sup>126</sup> Nevertheless, accrual method taxpayers had been using the installment method without interference, until Congress enacted the § 453(a)(2) in 1999.

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what more usefully. See, e.g., *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) ("undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion"); *United States v. Drescher*, 179 F.2d 863, 866 (2d Cir. 1950) ("present economic benefit").

<sup>124</sup> I.R.C. § 448(a) (2000). Certain exceptions are provided for farming businesses, qualified personal service corporations, and entities with gross receipts of not more than \$5 million. *Id.* § 448(b).

<sup>125</sup> Treas. Reg. § 1.446-1(c)(1)(ii) (as amended in 2001).

<sup>126</sup> See, e.g., *Cash v. Accrual Methods of Accounting: Hearing Before the House Comm. on Small Business*, 106th Cong. (Apr. 5, 2000) (statement of Joseph Mikrut, Treasury Tax Legislative Counsel) [hereinafter Mikrut testimony] ("The installment method is inconsistent with an accrual method of accounting, which generally requires a taxpayer to pay tax on a realized gain, regardless of whether the taxpayer has received the related cash.").

*C. 1999 Amendments to the Installment Method Rules for  
Accrual Method Taxpayers*

President Clinton's budget proposals for fiscal year 2000 included a proposal to disallow installment reporting for accrual method taxpayers.<sup>127</sup> In support of his position, the President argued that "[t]he installment method is inconsistent with an accrual method of accounting and effectively allows an accrual method taxpayer to recognize income from certain property using the cash receipts and disbursements method. Consequently, the method fails to reflect the economic results of a taxpayer's business during the taxable year."<sup>128</sup> Treasury Department testimony before the Senate Finance Committee further portrayed the installment sale provision as one among several proposed "measures that are principally designed to improve measurement of income by eliminating methods of accounting that result in a mismeasurement of economic income or provide disparate treatment among similarly situated taxpayers."<sup>129</sup> This description portrays the measure as a correction or loophole closer. As a correct interpretation of tax policy and tax accounting principles, accrual method taxpayers theoretically should not have been reporting installment payments under the installment method in the first place. Thus, the administration simply was advocating reparation of a flawed Tax Code provision.<sup>130</sup> It also happens that the administration projected that the repeal or "correction" would increase federal revenue.<sup>131</sup>

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<sup>127</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRES., BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2000: ANALYTICAL PERSPECTIVES 77 (1999) [hereinafter 2000 ANALYTICAL PERSPECTIVES]; see also DEP'T OF TREAS., GENERAL EXPLANATIONS OF THE ADMINISTRATION'S REVENUE PROPOSALS 146 (Feb. 1999). In addition, the President's budget included proposed changes to pledging rules, which require the holder of an installment note to recognize income upon pledging the note as collateral for a loan. The proposed rules were designed to correct perceived inadequacies in existing laws. See DEP'T OF TREAS., GENERAL EXPLANATIONS OF THE ADMINISTRATION'S REVENUE PROPOSALS 14. This Article focuses only on the repeal of installment sale reporting for accrual basis taxpayers.

<sup>128</sup> 2000 ANALYTICAL PERSPECTIVES, *supra* note 127, at 77.

<sup>129</sup> *The President's Fiscal Year 2000 Budget: Hearing Before the Senate Comm. on Finance*, 106th Cong. (Apr. 27, 1999) (statement of Donald Lubick, Ass't Treas. Sec. (Tax Policy)) [hereinafter Lubick testimony].

<sup>130</sup> Interestingly, in the first round of fiscal year 2000 tax legislation, the Senate included the repeal of the installment reporting for accrual method taxpayers in a category labeled "loophole closers." See S. REP. NO. 106-120, at 200-01 (1999).

<sup>131</sup> According to the President's budget estimates, repeal of installment reporting for accrual method taxpayers would increase total federal revenues by approximately \$2 billion for years 2000-2004. 2000 ANALYTICAL PERSPECTIVES, *supra* note 127, at 88 tbl.3-3.

From this point on, the proposed repeal of installment reporting for accrual method taxpayers took some interesting twists and turns and ultimately became a pawn in complex negotiations over the budget for fiscal year 2000. The story begins with the Republican leadership's efforts to enact \$792 billion in tax cuts, largely through extensions or expansions of existing tax breaks. The House and Senate both passed the \$792 billion legislation extending the tax breaks despite President Clinton's announced intentions to veto it.<sup>132</sup> In the first round, both the House and Senate versions of the bill, as well as the ultimate version after conference, included Clinton's proposed repeal of installment method reporting for accrual method taxpayers.<sup>133</sup> In fact, the Republican Congress expressly used the installment sale provision as one of several revenue offsets to pay for their tax cuts.<sup>134</sup>

Although Congress presented the President with a bill including numerous provisions that he favored, the Republican tax cuts included in the bill were simply too bloated for him to accept. Backed by a five-piece brass band playing taps, the President vetoed the legislation as promised.<sup>135</sup> In his veto message, Clinton lamented that Republicans were using a risky tax cut to undermine the fiscal discipline that had helped create recent budget surpluses. More significantly, he complained that the

bill would not meet the Budget Act's existing pay-as-you-go requirements, which have helped provide the discipline necessary to bring us from an era of large and growing budget deficits to the potential for substantial surpluses. It would

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<sup>132</sup> The text of the installment sale repeal clause from Senate Bill 1429, The Taxpayer Refund and Relief Act of 1999 (106th Cong. § 1313 (1999)), was inserted into House Bill 2488 (106th Cong. (1999)), and sent to the President for his signature.

<sup>133</sup> H.R. 2488, 106th Cong. (1999). Congressman Archer reports that he reluctantly agreed to include the measure in the first bill only after assurances from the White House and Treasury Department that the provision was non-controversial. Telephone interview with Bill Archer, former Chair, House Ways and Means Comm. (Mar. 26, 2002) (notes on file with the author).

<sup>134</sup> H.R. 2488, at tit. XV ("Revenue Offset Provisions").

<sup>135</sup> Ryan J. Donmoyer & Heidi Glenn, *After Veto, White House Dismisses GOP Extenders Bill*, TAX NOTES TODAY (Sept. 24, 1999) ("At a Rose Garden veto ceremony attended by key economic advisers and cabinet members as well as the brass band, Clinton complained the GOP tax bill was 'too big, too bloated, [and] places too great a burden on America's economy.'").

also automatically trigger across-the-board cuts (or sequesters) in a number of Federal programs.<sup>136</sup>

The President did, however, suggest that he was willing to negotiate on a smaller bill that he might be willing to sign.<sup>137</sup>

In symbolic tit-for-tat shortly after the presidential veto, the Republicans sponsored a vote unanimously rejecting President Clinton's proposed revenue-raising provisions.<sup>138</sup> In a second vote, a motion to bring the vetoed legislation to the Senate floor to force a vote to sustain or override the veto was successfully tabled.<sup>139</sup> Now on the second time around, Senate Finance Committee Chair William Roth and House Ways and Means Committee Chair Bill Archer immediately began work on a smaller package of tax break "extenders."<sup>140</sup> In order to comply with the mandates of the budget reconciliation process and PAYGO, however, any tax breaks had to be offset with revenue-raising provisions to "pay for" the extenders. Again, one of the largest revenue-raising offsets included in the Senate bill was the repeal of the installment method for most accrual method taxpayers, expected to raise approximately \$2 billion over ten years. The challenge for the Senate, however, was that the offsets were likely to be "vehemently opposed by House Ways and Means Committee Chair Bill Archer."<sup>141</sup> The Senate ultimately passed The Tax Relief Extension Act of 1999, including the installment method repeal in Title II, along with other revenue offset provisions.<sup>142</sup> The original House tax bill, on the other hand, did not include the installment provision.<sup>143</sup> The administration was heavily involved in last-minute negotiations on the final confer-

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<sup>136</sup> MESSAGE FROM THE PRESIDENT OF THE U.S. TRANSMITTING HIS VETO OF H.R. 2488, THE TAXPAYER REFUND AND RELIEF ACT OF 1999, H.R. DOC. NO. 106-130.

<sup>137</sup> *Id.*

<sup>138</sup> Heidi Glenn, *Politics on Display in Tax Bill Votes*, TAX NOTES TODAY (Oct. 20, 1999).

<sup>139</sup> *Id.*

<sup>140</sup> These were tax deductions or credits that were otherwise due to sunset. Among the largest of the "extender" provisions pushed by Republicans was the research credit. See H.R. 2923, 106th Cong. (1999) ("Extension of Expiring Provisions"); see also discussion in Ryan J. Donmoyer & Heidi Glenn, *Roth, Moynihan Pare Extenders to 18 Months, Aides Say*, TAX NOTES TODAY (Oct. 13, 1999).

<sup>141</sup> Ryan J. Donmoyer, *Finance Prepares to Mark Up Extended Extenders Bill*, TAX NOTES TODAY (Oct. 20, 1999). Archer reports that by the second time around, his staff began to get concerned about the impact of the proposed repeal of the installment method for accrual method taxpayers. Telephone interview with Bill Archer, *supra* note 133.

<sup>142</sup> S. 1792, 106th Cong. § 210 (1999).

<sup>143</sup> Extension of Expiring Provisions, H.R. 2923, 106th Cong. (1999); The Ticket to Work and Work Incentives Improvement Act of 1999, H.R. 1180, 106th Cong. (1999).

ence package that went back to both chambers.<sup>144</sup> White House negotiators apparently convinced House Republicans to leave the Senate installment sale repeal provision in the final bill as a revenue offset in exchange for some of the revenue-losing tax extenders the Republicans wanted.<sup>145</sup> In the final conference, the House ultimately agreed to include the installment sale repeal, which ultimately became § 536 of the Ticket to Work and Work Incentives Improvement Act of 1999.<sup>146</sup> This provision was clearly part of the PAYGO offset package necessary to pay for the revenue-losing tax extenders.

Almost before the ink was dry on the President's signature on the Ticket to Work and Work Incentives Improvement Act, efforts were underway to repeal the installment sale repeal provision. Complaints quickly developed from small businesses, which argued that requiring them to report immediate taxable income from an installment sale would adversely affect their ability to sell business assets. Lobbying groups came crawling out of the woodwork to complain on behalf of the small businesses.<sup>147</sup> Interest groups began extensive letter-writing campaigns, a bill was introduced to repeal the provisions, and hearings were scheduled.<sup>148</sup> Congressman Bill Archer wrote a letter to President Clinton asking him to "direct the Treasury to issue immedi-

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<sup>144</sup> The last-minute negotiations with the Treasury Department and the White House were informal negotiations over the telephone. Congressman Archer recalls speaking with Treasury Secretary Lawrence Summers from the cloakroom off the House floor about adding the installment sale repeal provision from the Senate bill to the House bill as part of the conference agreement. Telephone interview with Bill Archer, *supra* note 133.

<sup>145</sup> Telephone interview with Rachel Sage, House Ways and Means Committee tax staff (Mar. 7, 2001) (notes on file with the author); Telephone interview with Paul Potete, Tax Legislative Assistant to Congressman Wally Herger (Mar. 7, 2001) (confirming that he heard that Treasury people were really pushing the original installment provision at conference) (notes on file with the author).

<sup>146</sup> H.R. 1180; H.R. REP. NO. 106-478 (1999).

<sup>147</sup> Included among these groups were the National Federation of Independent Businesses (NFIB), *NFIB Release Endorsing Installment Correction Act*, TAX NOTES TODAY (Feb. 10, 2000); the National Association of Manufacturers (NAM), *NAM Release Praising Archer Action on Installment Sales Method*, TAX NOTES TODAY (Jan. 31, 2000) [hereinafter *NAM Release*]; the American Institute of Certified Public Accountants (AICPA), *AICPA Release Urging Repeal of Installment Sales Tax Rule*, TAX NOTES TODAY (Mar. 1, 2000); and broker associations, *Brokers Oppose Repeal of Installment Method for Accrual Taxpayers*, TAX NOTES TODAY (Feb. 10, 2000).

<sup>148</sup> *Hearings on H.R. 3594 Before the House Comm on Small Business*, 106th Cong. (Apr. 5, 2000) (testimony of Pamela F. Olson on behalf of the American Bar Association Tax Section); *id.* (testimony of John S. Satagaj on behalf of the Small Business Legislative Council). U.S. Chamber of Commerce representatives also testified in favor of repealing the recent installment sale provision. *Repeal of the Installment Method of Accounting for Accrual Basis Taxpayers: Hearing Before the Subcomm. on Oversight, House Comm. on Ways and Means*, 106th Cong. (Feb. 29, 2000) (statement of Darryl A. Hill, U.S. Chamber of Commerce).

ate guidance providing relief for small businesses and include a legislative relief provision in [the] fiscal 2001 budget proposal."<sup>149</sup>

At hearings on the proposed retroactive repeal, even the Treasury Department conceded that the new provision would impose harsh burdens on some small businesses. Although the Treasury Department did not support outright repeal of the controversial provision, Treasury representatives agreed to work with Congress toward "a legislative solution to alleviate this unforeseen impact of the provision."<sup>150</sup> The Treasury Department ultimately did respond with a Revenue Procedure announcing that "the Commissioner of Internal Revenue will exercise his discretion to except a qualifying taxpayer with average annual gross receipts of \$1 million or less from the requirements . . . to use an accrual method of accounting for purposes of purchases and sales of merchandise."<sup>151</sup>

In the Installment Tax Correction Act of 2000, Congress ultimately voted to "repeal the repeal" of installment accounting for accrual method taxpayers retroactively. In sharp contrast to the huge budget legislation of which the original repeal was a part, the Act is remarkably brief:

#### SECTION 1. SHORT TITLE

This Act may be cited as the "Installment Tax Correction Act of 2000."

#### SECTION 2. REPEAL OF MODIFICATION OF INSTALLMENT METHOD

(a) In General.—Subsection (a) of section 536 of the Ticket to Work and Work Incentives Improvement Act of 1999 (relating to modification of installment method and repeal of installment method for accrual method taxpayers) is repealed effective with respect to sales and other dispositions occurring on or after the date of enactment of such Act.

(b) Applicability.—The Internal Revenue Code of 1986 shall be applied and administered as if that subsection (and the amendments made by that subsection) had not been enacted.<sup>152</sup>

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<sup>149</sup> *NAM Release*, *supra* note 147.

<sup>150</sup> Mikrut testimony, *supra* note 126.

<sup>151</sup> Rev. Proc. 2000-22, 2000-1 C.B. 1008.

<sup>152</sup> Pub. L. No. 106-573, 2000 U.S.C.A.N. (114 Stat.) 3061.

This legislative language is really quite remarkable. Congress is essentially saying, "We were just kidding, folks. Let's just pretend it never happened." What makes this all the more remarkable is that the retroactive repeal of § 453(a)(2) passed in the House on December 15, 2000, under a suspension-of-the-rules procedure, without ever having been reported by committee, and passed in the Senate on the same date by unanimous consent.<sup>153</sup> The House suspension of the rules procedure generally enables the House "to act quickly on bills that enjoy overwhelming but not unanimous support."<sup>154</sup> In addition to the formal House Manual rules, however, the Speaker of the House generally is guided by party rules. Both the Democratic Caucus and the Republican Conference have adopted party rules under which bills should be bipartisan, have strong committee support, and cost less than \$100 million before being considered under suspension-of-the-rules procedures. The Republican Conference, for example, provides that "[t]he Speaker shall not schedule any bill or resolution for consideration under suspension of the Rules which . . . has not been cleared by the minority, was opposed by more than one-third of the committee members reporting the bill, or exceeds \$100 million in authorizations, appropriations, or direct spending."<sup>155</sup> The House apparently waived this rule in considering the over \$1 billion "Correction Act" under a suspension-of-the-rules procedure. Moreover, President Clinton, who had originally proposed the installment sale reporting change, quickly and quietly signed the repeal into law on

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<sup>153</sup> STAFF OF JOINT COMM. ON TAX., 107TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 106TH CONGRESS, JCS-2-01, at 176 n.196 (Comm. Print 2001) [hereinafter JOINT COMM. GEN. EXPLANATION].

<sup>154</sup> STANLEY BACH, THE LEGISLATIVE PROCESS ON THE HOUSE FLOOR: AN INTRODUCTION, CRS Rep. 95-563, at 3 (July 30, 1996). A motion to suspend the rules permits a bill to bypass the general calendar rules and be brought directly to the floor of the House of Representatives for a vote. The Speaker of the House may entertain such motions only on Mondays and Tuesdays during the last six days of a session of Congress. The motion requires a two-thirds vote for passage. RULES OF THE HOUSE OF REPRESENTATIVES R. XV, cl. 1(a). It may not be amended from the floor and is debatable for only forty minutes. *Id.* at cl. 1(c).

<sup>155</sup> Rules of the Republican Conference, U.S. House of Representatives, 107th Cong., R. 28 (Guidelines on Suspensions of House Rules) (on file with the author). The Democratic Caucus uses a similar rule under which the Democratic Leadership will not consent to consideration of a measure under suspension of the Rules that was "opposed by more than one-third of any committee reporting it," Rules of the Democratic Caucus, U.S. House of Representatives, 107th Congress, R. 38(A)(4), or "contains a cost estimate in excess of \$100,000,000 in any fiscal year," *id.* at R. 38(C). Similar party rules were in effect for the 106th Congress.

December 28, 2000.<sup>156</sup> The Joint Committee on Taxation projected revenue loss from the "Correction Act" at \$1.1 billion for 2001, with total revenue losses over the period 2000–2010 projected to be over \$2 billion.<sup>157</sup>

#### D. *The Aftermath*

The final results represent a troubling end-run around the rules of the budget and tax legislative processes. Under PAYGO rules, any revenue losses must be offset.<sup>158</sup> Tax-writing committees generally operate under rules that match revenue losers with revenue offsets in the same bill. The 1999 Ticket to Work Act was no exception, including one Title of "Tax Extenders" and another Title of "Revenue Offsets." To be sure, manipulative devices to get around PAYGO are nothing new. The devices used this time around, however, would make even the Mad Hatter from *Alice in Wonderland* proud. Within fifteen days after the close of the legislative session, OMB is required to issue a final sequestration report including sequester requirements from PAYGO violations.<sup>159</sup> In compliance with this obligation, OMB estimated that the Installment Sale Correction Act repeal would reduce receipts by \$2.3 billion over the period 2001–2005, which would ordinarily mandate a sequester.<sup>160</sup>

Congress, however, had beaten OMB to the punch. By legislative fiat, Congress had already declared that "the Director of the Office of Management and Budget shall change any balance of direct spending and receipts legislation for fiscal year 2001 . . . to zero."<sup>161</sup> This is a

<sup>156</sup> See *supra* note 146.

<sup>157</sup> JOINT COMM. ON TAX., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED BY THE 106TH CONGRESS (JCS-2-01) app. 191 (Apr. 19, 2001) (Appendix: Estimated Budget Effects of Tax Legislation Enacted in the 106th Congress). There is some discrepancy in the budget numbers here, since the figures reported earlier were the President's budget numbers reported by OMB over a five-year period, see *supra* note 131, while the revenue estimates quoted here are Joint Committee on Taxation estimates over a ten-year period.

<sup>158</sup> See *supra* notes 91–110 and accompanying text.

<sup>159</sup> 2 U.S.C. § 904(f)(3) (2000).

<sup>160</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFF. OF THE PRES., OMB COST ESTIMATE FOR PAY-AS-YOU-GO CALCULATIONS, OMB REP. NO. 550 (Jan. 1, 2001) [hereinafter OMB REP. NO. 550].

<sup>161</sup> Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 2(b), 2000 U.S.C.A.N. (114 Stat.) 2763, 2763–64. The Consolidated Appropriations Act, 2001, H.R. 4577, 106th Cong., was first enacted by the House and Senate in June 2000 and ultimately signed into law by the President on December 21, 2000, thus *pre-dating* the installment sale repeal provision by seven days. The only cry of foul came from Senator Kerry in the Senate, who objected that

congressional move known as "directed scorekeeping." Congress first said, "We were just kidding, folks. We never did enact that revenue offset provision even though it paid for over \$2 billion in tax cuts." Here it said, "We'll just call that \$2.3 billion a zero for PAYGO purposes and go home for the holidays."<sup>162</sup> Ever compliant, OMB ended its sequester report with the following: "NOTE: Pursuant to P.L. 106-554, the pay-as-you-go balances that would result in a sequester for FY 2001 will be set to zero in OMB's final sequestration report."<sup>163</sup> Because the directed scorekeeping that set OMB's PAYGO scorecard to zero *predated* the stand-alone installment repeal measure, Congress was able to vote for the stand-alone repeal with assurance that it would not be required to offset the cost under PAYGO rules. The stand-alone Installment Tax Correction Act *should* have triggered a PAYGO sequestration, but never did. In other words, Congress truly got its tax cuts without ever having to pay for them.

### III. PATHOLOGIES IN THE BUDGET AND TAX LEGISLATIVE PROCESS

#### A. Budget Policy Principles

The federal budget process serves two major functions. First, it serves as a *promoter* of government missions that are high on the government agenda. Second, the budget process operates as a *constraint* upon spending.<sup>164</sup> At any given time, the focus of budget policy concern may shift between its promoter and constraint functions depending upon economic conditions and the views of the political party in

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[a]ll the way through the 1990s when we had this PAYGO provision in there, we were able to maintain our fiscal discipline in spite of great pressure to do the contrary. Whether it was tax cuts or spending increases that were being proposed, we could maintain that discipline because every time we brought an amendment down to the floor that spent more money or cut somebody's taxes, we had to have an offset. That is the PAYGO provision. And we are going to throw it out the window, it seems to me, and we are going to abandon a principle that has enabled us not just to balance our budget but to help produce the growth in our economy . . . .

146 CONG. REC. S11279 (2000) (statement of Sen. Kerry).

<sup>162</sup> In fact, the directed scorekeeping here was not limited to the Installment Sale Correction Act, but was part of a larger bill setting the *entire* PAYGO scorecard for all direct spending and receipts legislation for FY 2001 to zero. For further discussion, see *infra* note 235-236 and accompanying text.

<sup>163</sup> OMB REP. NO. 550, *supra* note 160.

<sup>164</sup> See JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 106 (2d ed. 1995).

power. As a general rule, however, most policy debate about the budget process seems to focus upon its constraint functions.

The power of the purse is so momentous that, unlike other legislation, the Constitution requires that all revenue bills originate in the House.<sup>165</sup> The Founders thought of the House of Representatives as closer to the People, more representative of their views, and thus, as the more "democratic" of the two chambers of Congress.<sup>166</sup> Federalist Paper No. 58 observed, "This power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."<sup>167</sup>

Given the importance of the budget as a matter of national policy, I was surprised to discover that most of the literature on the budget process jumps right into the process itself with precious little consideration of larger policy objectives. The material that follows seeks to fill that gap by offering a brief examination of background budget policy principles before turning to a specific analysis of what made the recent installment sale episode so troubling.

The GAO annual budget reports are among the few sources I have uncovered that discuss background policy objectives. With very little elaboration, the GAO reports submit that the budget process should:

1. provide information on long-term budget impact;
2. provide information on important macro trade-offs;
3. provide information to make trade-offs among different national policy needs or missions;
4. provide for enforceability, accountability, and transparency.<sup>168</sup>

The first three of these goals can be grouped together, for my purposes at least, as "information-related" goals. The fourth criterion listed above actually contains a number of discrete policy objectives

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<sup>165</sup> U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

<sup>166</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 553 (1969).

<sup>167</sup> *THE FEDERALIST* NO. 58 (James Madison).

<sup>168</sup> See 2002 GAO BUDGET REPORT, *supra* note 21, at 37; 2001 GAO BUDGET REPORT, *supra* note 27, at 34.

that should be broken into distinct components. As a group, I will refer to these criteria as "democracy-oriented" goals. In practical terms, the information-related goals may be the most important concerns for budget policy analysts. For purposes of this Article, however, my primary concern is with the democracy-oriented goals. The following sections of the Article consider the importance of these latter goals as applied to the budget process generally and examine the ways in which these goals were violated in connection with the installment sale case study in particular.

### B. *Democracy-Oriented Goals of the Budget Process*

#### 1. Budget Formation as a Democratic Exercise

One of the major milestones in federal budgeting over the past two centuries<sup>169</sup> was the President's Commission on Budget Concepts, which introduced the notion of a unified budget in 1967.<sup>170</sup> In its chapter on Purposes of the Budget, the Commission pronounced:

The budget is the key instrument in national policymaking. It is through the budget that the Nation chooses what areas it wishes to leave to private choice and what services it wants to provide through government. When enacted, the budget expresses the decisions of the Nation's elected representatives . . . .

. . . .

Budget formulation is a highly political exercise in the American democratic system, and it should not be otherwise. It is therefore essential that the budget be understandable, at least in broad outline, to as many of the public and their elected representatives as possible. Wise fiscal policy and wise choices for individual federal programs depend, in the final analysis, on public and congressional understanding of the budget.

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While the public cannot be expected to become familiar with all the details and intricacies of the budget, it must be

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<sup>169</sup> See SCHICK, *supra* note 1, at 15, box 2-1.

<sup>170</sup> PRESIDENT'S COMMISSION ON BUDGET CONCEPTS, REPORT OF THE PRESIDENT'S COMMISSION ON BUDGET CONCEPTS 11-18 (1967) [hereinafter 1967 COMMISSION REPORT].

able to participate intelligently in the big decisions that come to focus there . . . .<sup>171</sup>

My focus in this Article is on the democracy-oriented goals that will best serve the public in understanding and participating in the budget process. In addition to the goals identified by the GAO, I add the goals of openness and durability. By isolating the democracy-oriented goals from the information-related goals, I do not mean to suggest that information is unrelated to the democracy function. For the most part, however, I see the information-related goals as important to budget analysts and policymakers dealing with the day-to-day creation of the budget. That said, however, simplified versions of this information must be available to the public as well so that the democracy-oriented goals can be fulfilled.<sup>172</sup>

## 2. Enforceability

According to the GAO, enforcement is simply "a mechanism to enforce decisions once they are made" and "requires a system for tracking outcomes and tying them to actions."<sup>173</sup> Once Congress has agreed to a budget resolution, these are the mechanisms such as points of order, spending caps, and PAYGO rules that hold it to its word. Congress has committed itself to these enforcement mechanisms either by internal rules or statute.<sup>174</sup> I consider the proper functioning of these enforcement tools as one of the democracy-oriented goals of the budget process. Once Congress has promulgated a concurrent budget resolution, the electorate can and should expect its representatives to stick to that budget according to the budget enforcement rules.

## 3. Accountability

Those responsible for the federal budget should ideally account on two dimensions: (1) for the cost of budget commitments and enforcement actions taken; and (2) for the cost of unexpected events.<sup>175</sup> Because the power of the purse is given to the People, they should

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<sup>171</sup> *Id.* at 11.

<sup>172</sup> This will be especially relevant with respect to the goal of transparency. See *infra* notes 177–184 and accompanying text.

<sup>173</sup> U.S. GEN. ACCOUNTING OFFICE, BUDGET PROCESS: EVOLUTION AND CHALLENGES, GAO/T-AIMD-96-129, at 12 (1996) [hereinafter 1996 GAO BUDGET PROCESS REPORT].

<sup>174</sup> See *supra* notes 64–116 and accompanying text.

<sup>175</sup> 1996 GAO BUDGET PROCESS REPORT, *supra* note 173, at 12.

expect a reasonable accounting from Congress. Scoring and costing rules, projections on revenue impact, and similar rules are designed to provide such accountability. These two dimensions of accountability, referred to by the GAO, might more accurately be labeled *economic* accountability. In effect, our legislators act as our bookkeepers and we expect them to keep faithful accounts.

Another notion of accountability should be distinguished as *political* accountability. This concept focuses on legislators' responsiveness to the electorate. Thus, "accountable decisionmakers pay attention to the wishes of the people because they can be held responsible for policy outcomes at election time. Furthermore, the decisions of an accountable political entity are more legitimate and thus more deserving of respect by the governed."<sup>176</sup>

#### 4. Transparency

A final key goal mentioned by the GAO is that the budget should be transparent, that is, it should be "understandable to those outside the process."<sup>177</sup> This can be a complex goal, sometimes requiring simplicity, but at other times demanding "no hidden costs" or "few surprises."<sup>178</sup> The GAO language on transparency bears quoting in full:

Transparency is important because the budget debate is critically important—not because of the numbers in it but because it represents a statement about collective priorities and collective action. In a democracy, the debate about these priorities should be made as understandable as possible. If even reasonably dedicated citizens cannot understand the budget document or the budget debate, there is little accountability.

If the budget debate is to be accessible to the American people—or to any significant subset of the population—consideration will have to be given to simplifying the structure of the budget, streamlining the process, and reducing the number of translations required to get from one part of the process to another. . . .

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<sup>176</sup> Elizabeth Garrett, *Accountability and Restraint, The Federal Budget Process and the Line Item Veto Act*, 20 CARDOZO L. REV. 871, 923 (1999).

<sup>177</sup> 1996 GAO BUDGET PROCESS REPORT, *supra* note 173, at 12.

<sup>178</sup> U.S. GEN. ACCOUNTING OFFICE, BUDGET PROCESS: COMMENTS ON H.R. 853, GAO/T-AIMD-99-188, at 8 (1999).

Citizens cannot be expected to feel a stake in the budget debate—a debate that will affect all our lives and our national future—or to accept decisions made by others without basic information. At a minimum citizens need to know how much money the federal government takes in—and how—and on what funds are spent.<sup>179</sup>

The notion of transparency reflected here includes several components. At a minimum, it incorporates the right of the public to *information* about the budget process in general and to information about the specifics regarding any particular budget. Moreover, that information should be offered in a *simple format* so that citizens who choose to do so are able to engage in *informed debate* about the collective policy choices reflected in the budget debate.

Transparency goals clearly overlap or intersect with several others. Although the primary focus of my discussion is democracy-oriented goals, transparency surely requires that information be available to the public. The first of the specific GAO information-related budget goals was that the budget process should provide information on long-term budget impact.<sup>180</sup> This information is important to budget analysts and some understandable version of the same information should also be available to the public.<sup>181</sup> As the GAO suggests,

The President, the Congress, and the public need to think about the longer term when making choices about the composition of federal activity. This is true for at least two reasons: (1) each generation is in part custodian for the economy it hands the next and (2) some changes must be phased in over long periods of time.<sup>182</sup>

Thus, the public is entitled to information about the long-term implications of budget decisions. In addition, the public should have access to information enabling it to understand and consider the trade-offs

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<sup>179</sup> See 1996 GAO BUDGET PROCESS REPORT, *supra* note 173, at 14–15.

<sup>180</sup> See *supra* note 168 and accompanying text.

<sup>181</sup> The 1967 President's Commission on Budget Concepts made a similar observation: "Not only does the public need more up-to-date information about how the budget is shaping up but it needs a further look ahead on the way Government expenditures and tax receipts are likely to develop in future years." 1967 COMMISSION REPORT, *supra* note 170, at 76.

<sup>182</sup> 1996 GAO BUDGET PROCESS REPORT, *supra* note 173, at 9. Although the current budget already provides for a ten-year projection, see discussion *supra* notes 52–54 and accompanying text, the GAO suggests looking at implications of budget decisions for as long as thirty years. See *id.* at 9.

between the appropriate amounts of investment and consumption and the relative priority of competing national policy missions.<sup>183</sup>

Transparency goals also overlap with accountability goals. If citizens cannot even understand the budget, their legislators have not been very responsive. As Professor Garrett also points out, "In the budget context, transparency is particularly important because individual decisions can be lost in the midst of detailed and obscurely worded omnibus bills. In the absence of visibility, accountability is virtually impossible."<sup>184</sup>

## 5. Openness and Durability

To the goals mentioned in the GAO reports, I would like to add two related democracy-oriented goals. First, and related to the goal of transparency, the budget process should be open. If the public is to understand fully and to participate in its power of the purse, it stands to reason that decisions should be made openly and not behind closed doors.

Second, the federal budget is the fundamental process through which the nation makes its decisions about taxing and spending. It is important for stability and for public morale that the budget process rules be reasonably durable. Of course, Congress can change budget process rules by amending the statutory provisions addressing budget process and by internal amendments to House or Senate rules relating to the budget process. I refer to these as *formal* budget process changes, which can, and should, be carefully considered through a system of periodic reforms in which the public fully participates. Even here, durability concerns mandate that major reforms not be considered too frequently.

A second type of budget process change involves congressional use of different procedural rules from one annual concurrent budget resolution to the next or congressional waiver of budget process requirements. I refer to these as *informal* budget process changes. I contend that frequent use of such devices violates democratic principles of durability, and thus, such devices should rarely be used. Once Congress has settled into a procedural pattern with respect to its concurrent budget resolutions, it should continue that pattern absent strong reasons to depart from it.

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<sup>183</sup> *Id.* at 10; see *supra* note 168 and accompanying text (discussing GAO goals).

<sup>184</sup> Garrett, *supra* note 176, at 924.

### C. Assessing the Installment Sale Episode

#### 1. Application of the Democracy-Oriented Criteria

##### a. *Enforceability*

The installment sale episode violated the goal of proper democratic use of budget process enforcement tools in numerous ways. By enacting the Installment Tax Correction Act as a stand-alone measure, the Senate effectively bypassed point-of-order rules that would ordinarily apply in the consideration of reconciliation legislation, particularly rules applicable to changes that would cause the legislation to violate principles of revenue neutrality. Overcoming these points of order typically requires a three-fifths vote in the Senate. On the other hand, because the stand-alone Installment Tax Correction Act was presented to the Senate as an ordinary piece of legislation, it required only a majority vote.<sup>185</sup> Whatever one may think of the Senate supermajority vote requirements as a general principle, I contend that an end run around the existing requirements for isolated pieces of legislation in this fashion is unacceptable.

In addition to violating its own *internal* budget enforcement rules, Congress also effectively broke *statutory* budget law. When Congress set the PAYGO scorecard to zero, thus avoiding an otherwise mandatory sequester of funds under the federal budget process rules, it violated its own statutory budget enforcement rules. My argument here is not that Congress acted illegally. Congress created the PAYGO regime *by statute* and it apparently "violated" the same regime *by statute*. Congress here enacted a bizarre and wacky, but still legitimate, statute in which it used directed scorekeeping to instruct OMB to ignore the mandatory PAYGO sequestration rules and to pretend that the figure to be used for sequestration purposes was zero. If Congress can make the law, it can repeal it. In effect, and in a very indirect manner, Congress repealed mandatory PAYGO rules for fiscal year 2000. My contention is that as a matter of democratic principle, the legislators have not stuck to the terms of their original bargain. They changed the terms of the deal at the last minute and they did not en-

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<sup>185</sup> Although the measure did, in fact, pass the Senate with a greater than three-fifths vote, my concern here is with the precedent established by this maneuver around the budget rules. In fact, the motion on the bill passed by a voice vote in the House, 146 Cong. Rec. H12097 (2000), and by unanimous consent in the Senate, 146 Cong. Rec. S11940 (2000).

force the concurrent budget resolution as it was written. The public can and should expect more from their elected representatives.<sup>186</sup>

b. *Economic Accountability*

The cost of the stand-alone installment sale provision in terms of projected revenue loss was actually \$2.3 billion. By directing the OMB to set the PAYGO scorecard to zero, this cost was eliminated from the budget.<sup>187</sup> I expended considerable effort, with the assistance of a reference librarian, to trace the steps through which this accounting device occurred. Clearly, the ordinary citizen would not easily have had access to this information. The installment sale episode thus illustrates a significant violation of economic accountability.

c. *Political Accountability*

The installment sale provision raises interesting questions about accountability to the electorate in the budget and tax processes. Interest groups surely play a major role in both of these legislative processes. The initial repeal of installment reporting for accrual method taxpayers was intended to close a perceived loophole and, theoretically, was in the interest of the taxpaying public at large. The measure was viewed as horizontally equitable;<sup>188</sup> it also happened to raise federal revenue. Arguably, then, Congress was most responsive to the taxpaying public when it first repealed the installment reporting for accrual taxpayers. In the end, when Congress eliminated the repeal, it was responding to heavy lobbying pressure from small business interests. The repeal of the repeal ultimately can be viewed as a special interest measure that ultimately lost revenue from the budget. Congress violated the goal of political accountability.

d. *Transparency*

Perhaps the key violation reflected in the installment sale case study is in the principle of transparency. The installment sale provision was a small piece of a large omnibus budget package and did not receive much attention. Many legislators themselves were unaware

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<sup>186</sup> See *infra* notes 239–246 and accompanying text.

<sup>187</sup> See *supra* notes 161–163 and accompanying text.

<sup>188</sup> For tax purposes, the principle of horizontal equity generally demands that similarly situated taxpayers should pay the same tax. Put slightly differently, those with equal incomes should pay equal tax. See DAVID F. BRADFORD, *UNTANGLING THE INCOME TAX* 151 (1986).

that the installment sale provision was even in the omnibus legislation in the first place.<sup>189</sup> Even with my years of personal expertise in teaching and researching in the tax area, it took me days of research and "investigative reporting" to track down the events that transpired in connection with the Installment Sale Correction Act.<sup>190</sup> Contrary to GAO's description of the transparency goal, the installment sale story included several surprises and hidden costs.<sup>191</sup> Obviously, understandable information was not available to permit the public to engage in debate on the installment sale measure.

e. *Openness*

A related major concern with the installment sale episode is its lack of openness. As just mentioned, the provision was a small piece of legislation buried, and probably lost from view, in a large omnibus budget package. More significant to the democracy-oriented principle of openness, however, most number gimmicks are out on the table for all to see at the outset. For example, lawmakers have increasingly used techniques to delay the imposition of costs so that they are outside the relevant budget window while speeding up receipts so that they are within the budget window. Also, because several different staffs prepare budget numbers, lawmakers often play the numbers game, using the numbers that best serve their case.<sup>192</sup> In each of these cases, however, the gimmicks are used from the start and open to public scrutiny and challenge.

In contrast, the installment sale case study was closed from beginning to end. The installment sale provision that was initially included in the omnibus budget bill was inserted at the last minute behind closed doors as part of a compromise between negotiators for the administration and House Republicans.<sup>193</sup> The subsequent Installment Sale Correction Act was a stand-alone measure done after

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<sup>189</sup> Telephone interview with Paul Potete, *supra* note 145.

<sup>190</sup> In fact, the inspiration for this Article began as I was working on a new edition for a book on corporate taxation. My editorial changes for the book got caught in the middle of the budgetary process. I had changed all of the problems in my book to reflect the repeal of the installment method for accrual method taxpayers, only to discover that the repeal had been repealed. We were too late in the editorial process to do anything but place a notice in the front of the book. CHERYL D. BLOCK, *CORPORATE TAXATION: EXAMPLES & EXPLANATIONS* viii (2d ed. 2001).

<sup>191</sup> See GAO language quoted *supra* in text accompanying note 179.

<sup>192</sup> For a useful description of the disagreements in methodology and the problems these disagreements can create, see, for example, Graetz, *supra* note 3.

<sup>193</sup> See *supra* notes 143–146 and accompanying text.

the entire budget deal had already been worked out. This stand-alone measure unraveled part of the budget deal after the fact. In addition, the separate measure through which Congress directed OMB to set the PAYGO scorecard to zero was also arranged after the budget deal had already been worked out. Neither of these deals was on the table at the outset available for public scrutiny. Moreover, the directed scorekeeping legislation makes no specific reference to the installment sale provision. It would be difficult for the general public to put the pieces together and figure out that the offsets agreed to as part of the budget deal to cover the cost of tax cuts had never been paid.

f. *Durability*

The installment sale episode raises two durability issues. First, as to the tax provision itself, Congress passed a law, which the public thought would be effective, and then retroactively repealed it as if it had never existed.<sup>194</sup> This circumstance is obviously confusing and difficult for taxpayers and should be avoided. Congress passed a law that lived but for a brief moment and then disappeared.

Second, whenever Congress directs the OMB to set the PAYGO scorecard to zero, it is repealing PAYGO as a practical matter without technically repealing PAYGO from the statute. This permits Congress to have its cake and eat it too. It can comply with PAYGO when it suits its purposes to do so and simply direct OMB to set the scorecard to zero, thus avoiding the PAYGO sequester, when it wants to avoid PAYGO. Although Congress sets the scorecard to zero through a proper statute presented to the President and signed into law, I contend that such actions violate democratic principles of durability, transparency, and openness.

g. *Unified Budget*

A final concern with the stand-alone installment sale provision is that it is inconsistent with the fundamental logic of the budget process in the first instance. The idea of the congressional budget process as it was established by the CBA in 1974 was to set up a comprehensive, unified budget process and to encourage coordination and centralization.<sup>195</sup> As a former director of the CBO and his co-author described it, "[I]t is not clear that the procedures of the pre-1974 era

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<sup>194</sup> See *supra* notes 147–157 and accompanying text.

<sup>195</sup> OLESZEK, *supra* note 78, at 56.

should be dignified with the label 'process.'"<sup>196</sup> The CBA was designed to eliminate the old fragmented, piecemeal approach, which constrained Congress's ability to make comprehensive policy. The stand-alone Installment Tax Correction Act harkens back to the old piecemeal approach and is entirely inconsistent with fundamental underlying notions of the federal budget process.<sup>197</sup>

## 2. Power to Party Leaders at the Expense of Rank-and-File Members

Over different periods in congressional history, the relative power of individual rank-and-file members, committees, committee chairs, and party leaders has varied. Particularly since the 1994 sweep when Republicans took control over the House of Representatives, the balance of power has shifted to party leaders.<sup>198</sup> The Republicans incorporated numerous changes, such as allowing the Speaker to handpick committee chairs, rather than basing chairs on seniority.<sup>199</sup> Internal reforms frequently permit party leaders to bypass committees to move legislation directly to the floor.<sup>200</sup> Scholars have suggested that the budget process will continue and strengthen the shift in power away from the rank-and-file members to the party leaders. The installment sale case study confirms this view.

With respect to the budget process in particular, Professor Garrett identifies three features that strengthen the power of the majority party. First, she argues that the centralized framework of the budget process gives increased power to the political party, another centralizing institution.<sup>201</sup> Second, she argues that the reconciliation process shifts power away from committees and allows leaders to manipulate the process.<sup>202</sup> Finally, she contends that the budget rules set the stage for stalemates, which are often resolved through summit negotiations. Summit negotiations typically involve party leaders at the expense of individual members of Congress or committee chairs.<sup>203</sup> Reconciliation procedures that severely limit floor activity in the Senate<sup>204</sup> may reduce the autonomy and power of substantive committees,

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<sup>196</sup> Joyce & Reischauer, *supra* note 44, at 430.

<sup>197</sup> See, e.g., 1967 COMMISSION REPORT, *supra* note 170.

<sup>198</sup> See, e.g., BURDETT LOOMIS, *THE CONTEMPORARY CONGRESS* 128–29 (1996).

<sup>199</sup> See discussion in OLESZEK, *supra* note 78, at 301.

<sup>200</sup> See SINCLAIR, *supra* note 9, at 94.

<sup>201</sup> Garrett, *supra* note 20, at 707.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> See *supra* notes 82–85 and accompanying text.

causing those committees to report legislation different from what they would have chosen if they had the power to shape the legislation themselves. "[T]he majority party and the President . . . exert greater control over the shape of the budget resolution and overall fiscal policy than any other entities."<sup>205</sup> Naomi Caiden observed these tendencies even earlier in a 1984 article describing the budget as broken into two large packages dealing with discretionary and mandatory spending. She noted that "[t]he trend toward budget packages also has a marked effect on budgetary politics in Congress. It strengthens the hand of the congressional leadership which sets the agenda for debate through its construction of viable packages."<sup>206</sup>

If all of these observations are true about the budget process generally, they are all the more true with respect to the negotiations leading to the last-minute inclusion in conference of the repeal of the installment sale method for accrual method taxpayers as part of the Ticket to Work and Work Incentive Improvement Act of 1999, which led to the almost immediate repeal of the repeal in the Installment Tax Correction Act. Although most rank-and-file members of Congress probably were unaware of the events leading up to the Installment Tax Correction Act, one suspects that party leaders were well aware of all developments. Thus, the installment sale story is consistent with literature suggesting that power has increasingly shifted away from individual members of the House and Senate and even away from committee chairs to the party leadership. Most observers view this shift in power with some alarm.<sup>207</sup> In the recent installment sale episode, it appears that the party leadership was well aware of what was going on, and participated actively in the conference negotiations and negotiations with the President. This might not all be so troubling, if the original provision hadn't been used to offset tax cuts that the rank-and-file *were* probably well aware of.

### 3. Losing Tax Policy in the Shuffle

Many pieces of tax legislation, both large and small, are enacted as part of the budget process. The repeal of the installment sale reporting for accrual method taxpayers was no exception. Tax policy-

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<sup>205</sup> Garrett, *supra* note 20, at 723.

<sup>206</sup> Caiden, *supra* note 49, at 113.

<sup>207</sup> But see Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917 (1990) [hereinafter *Can Ignorance Be Bliss?*]; Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988).

makers generally assess tax legislation according to three major policy norms: fairness, simplicity, and efficiency.<sup>208</sup> Fairness, or equity, is based upon the notion that tax burdens should be distributed according to one's ability to pay. It is, of course, the most critical tax policy norm. The notion of ability to pay usually is further broken into two distinct concepts. The first, horizontal equity, demands that those with equal incomes pay equal tax.<sup>209</sup> If certain items are omitted from the tax base, taxpayers with those receipts are treated preferentially and the ideal of horizontal equity is violated. Tax policy issues regarding horizontal equity generally relate to the *tax base*—debates over receipts that are, or should be, subject to tax. Vertical equity, on the other hand, demands that those with higher incomes pay higher tax. Although most agree with vertical equity as a matter of principle, controversy continues over the *extent* to which those with higher incomes should pay more tax. Tax policy issues regarding vertical equity generally relate to *tax rates* and tend to be far more controversial.

As initially proposed in the President's budget, the repeal of installment reporting for accrual method taxpayers was allegedly intended to close a loophole.<sup>210</sup> The idea was to improve the measurement of income and to incorporate a tax change that would increase the horizontal equity of the Tax Code. As Treasury Department representatives testified, the measure was, in part, designed to eliminate a method of accounting that was providing "disparate treatment among similarly situated taxpayers."<sup>211</sup> The provision also turned out to be a useful negotiating device from the budget perspective; revenue estimates projected an approximately \$2.3 billion revenue increase.<sup>212</sup>

Soon thereafter, however, tax principles were abandoned as the executive and congressional branches alike used the provision as a revenue-raising offset in the budget game to pay for tax cuts. No one cared much about tax policy. One of the key pathologies at the intersection of the budget and tax legislative processes is that any semblance of tax policy has gotten completely lost. Tax provisions have become a mere pawn in the processes. Professor Graetz complains that the budget process has elevated the significance of estimated

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<sup>208</sup> See, e.g., OFFICE OF THE SEC., DEP'T OF THE TREAS., *TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH: THE TREASURY DEPARTMENT REPORT TO THE PRESIDENT* (1984). This major report on tax reform ultimately led to the Tax Reform Act of 1986.

<sup>209</sup> See *supra* note 188 and accompanying text.

<sup>210</sup> See *supra* notes 128–130 and accompanying text.

<sup>211</sup> See *supra* note 129 and accompanying text.

<sup>212</sup> See *supra* note 131 and accompanying text.

revenue impacts of proposed tax legislation and points out that "[a] politician . . . is behaving quite reasonably . . . when her dominant concern in considering tax legislation is making the revenue numbers 'come out right.' The diminished capacity of the traditional normative concerns of taxation—fairness, economic efficiency, and simplicity—to influence legislation in this context is not surprising."<sup>213</sup> Economists have raised similar complaints. Gene Steuerle, for example, protests that because Congress started focusing on deficit reduction, it has

operated under a set of rules that typically require increased revenue to accompany expenditure increases, or some amount of tax increase to accompany a deficit reduction package. As a matter of budget policy, these rules have succeeded in gradually reducing the budget deficit, although not as much as desired. *As a matter of tax policy, however, the rules have not worked well, and the tax code is again being made more complex and more unfair with the passage of each new act.*

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What the new methods have implied is scant attention to tax policy principles. In many cases there is not even time for hearings on the tax changes being considered.<sup>214</sup>

The installment sale case is a good illustration of this particular pathology at work.

#### D. *Two Possible Explanations for the Retroactive Repeal of the Repeal Episode*

##### 1. The Honest Mistake

The most innocent explanation for the retroactive repeal of the repeal episode is simply that the players were genuinely unaware of the magnitude of the impact of the repeal with respect to small business owners. Many rank-and-file members of Congress were caught unaware by the controversy over the installment sale reporting provision. They apparently had no idea of the tax burden that would be imposed by § 536 of the Ticket to Work and Work Incentives Improvement Act. Many lobbyists also claim to have been caught com-

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<sup>213</sup> Graetz, *supra* note 3, at 763.

<sup>214</sup> Gene Steuerle, *Fair Budget Policy, Bad Tax Policy*, 44 TAX NOTES 455, 455 (1989) (emphasis added).

pletely by surprise.<sup>215</sup> For example, in a letter to the Secretary of the Treasury, a small business lobbyist wrote, "Simply put, if the full impact of this provision had been known, it would never have become law in the first place."<sup>216</sup> Bill Archer, then-Chair of the House Ways and Means Committee, reports that in the first round of legislation, the House bill included the installment sale provision because he and his staff were unaware of the impact on small businesses. It was only in considering the second bill after the President's veto that his staff began to raise questions and he had second thoughts, causing him to insist on deleting the measure from the House bill in the second round.<sup>217</sup>

Oddly enough, even the Treasury Department itself claims to have been caught somewhat off-guard. After the 1999 Act was passed, lobbying groups began a simultaneous assault on Congress and the Treasury Department. Although the Treasury Department continued to claim that installment reporting was inconsistent with accrual method reporting, Treasury Department representatives conceded that

the extent of the impact of the provision on the sales of small businesses apparently was unforeseen by policymakers and potentially affected taxpayers and their advisors during the legislative process. We now understand that the legislation has imposed financial burdens on small businesses that override the basic tax policy concern. As such, we are eager to work with Congress to provide a legislative solution to alleviate this unforeseen impact of the provision.<sup>218</sup>

Even if one accepts the "honest mistake" explanation of events, the installment sale episode potentially reveals flaws in the current

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<sup>215</sup> One lobbyist explained that they were not even aware that the installment sale provision had been incorporated into the bill until after the President had signed it. It was only then that they "got busy." Telephone interview with Dan Blankenberg, lobbyist for the National Federation of Independent Businesses (Mar. 7, 2001) (notes on file with the author).

<sup>216</sup> Letter to Lawrence H. Summers, Secretary of the Treasury, from D. Scot Bowers, Live Oak Capital Advisors, Inc., reprinted in *Brokers Oppose Repeal of Installment Method for Accrual Taxpayers*, TAX NOTES TODAY (Feb. 10, 2000) (letter written on behalf of a long list of business lobbying organizations, including National Federation of Independent Businesses, Small Business Legislative Council, National Association of Manufacturers, National Association of Realtors, Small Business Council of America, et. al).

<sup>217</sup> Telephone interview with Bill Archer, *supra* note 133; see also *supra* notes 141-143 and accompanying text.

<sup>218</sup> Mikrut testimony, *supra* note 126.

budget and tax legislative processes that warrant attention. First, in and of itself, the fact that a piece of legislation with such an apparently large impact on a particular interest group could slip quietly through is troubling. Those with an active interest in particular legislation should have an opportunity to participate in the process. At a minimum, legislative efficiency concerns suggest that mechanisms should be in place to insure that interested groups are aware of pending legislation that might affect them and should have an opportunity to speak in advance rather than being forced to lobby for repeal of legislation after it is enacted. Interestingly, the installment sale episode is contrary to expectations from the political science literature, which generally suggests that it is much easier to *block* legislation from passage than it is to repeal legislation once enacted.<sup>219</sup>

The installment sale story should raise particular concerns for those who adhere to a deliberative model of the legislative process.<sup>220</sup> The installment sale provision squeaked quietly by with virtually no attention at all.<sup>221</sup> One might argue that this is a concern with respect to omnibus and reconciliation legislation generally, which incorporates such a large volume of material covering so many different areas of law that it would be virtually impossible for any single member of Congress to be fully informed on the entire bill. Many political scientists and others have made such observations. For example, Barbara Sinclair notes:

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<sup>219</sup> See SCHLOZMAN & TIERNEY, *supra* note 19, at 314–15. Moreover, as a general rule, groups generally work harder to preserve what they have than to gain a new benefit. See, e.g., Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1179–81 (1997). Here, however, the group “benefiting” from the installment sale repeal in the first place was arguably the broad general public. The subsequent retroactive repeal of the repeal was advocated by a small, concentrated group of small business lobbyists with little or no opposition from the general public, which would have to overcome massive collective action problems to mount a serious campaign to block the effort. For a wonderful book on the difficulties of large, diffuse groups overcoming collective action problems, see MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

<sup>220</sup> See, e.g., AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996) (discussing the moral dimensions of deliberative democracy); *Symposium on Republicanism*, 97 YALE L.J. 1539, 1493–1723 (1988); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

<sup>221</sup> Although many claim to have known nothing about the provision at the time, there were apparently hearings on the overall budget, at which the installment sale provision was briefly discussed. See, e.g., *Hearings on the FY 2000 Budget: House Ways and Means Comm.*, 106th Cong. (Mar. 10, 1999) (testimony of William T. Sinclair, Senior Tax Counsel & Dir. of Tax Policy, U.S. Chamber of Commerce) [hereinafter Sinclair testimony].

Reconciliation bills make a multitude of policy decisions through an abbreviated legislative process in which many provisions receive limited scrutiny. No committee hearings may have been held on the changes included in the legislation. With the committees operating under time constraints, many provisions may have received only perfunctory attention during committee markup; as part of a much larger package, they may have been altogether ignored during the floor debate. In fact, most members may not have been aware of many of them. Yet the provisions in a reconciliation bill are very likely to become law. Simply the size of the package tends to take attention away from any but the most major provisions.<sup>222</sup>

Although these observations generally are true of all reconciliation or omnibus bills, they are particularly troubling in the installment sale repeal story. As part of a large reconciliation package, the individual installment sale repeal provision was easily overlooked by many, if not most, individual members of Congress. At the same time, however, the measure was used to pay for popular tax cuts. Members didn't much care how they were getting the desired tax cuts as long as they were assured that they were being paid for by appropriate revenue offsets under the PAYGO provisions. After the fact, however, when they were able to focus their attention on the installment sale provision in isolation, they realized what had been done and happily voted for the stand-alone repeal.

## 2. A "Wink and a Nod" and the Art of the Deal

The "honest mistake" explanation of the events that transpired in connection with the installment sale repeal story is likely to be met with a healthy degree of skepticism.<sup>223</sup> Given the speed with which the

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<sup>222</sup> SINCLAIR, *supra* note 9, at 76.

<sup>223</sup> In any event, the presence of the installment sale repeal proposal for accrual method taxpayers in the President's budget was not completely lost on all interest groups. Although very little attention was paid to the provision in initial consideration of the President's budget, the U.S. Chamber of Commerce did devote two sentences of its early testimony on the budget to this provision, calling it one of the administration's "objectionable" revenue raisers. Sinclair testimony, *supra* note 221 (before the House Ways and Means Committee). Moreover, Bill Archer, then-Chair of the House Ways and Means Committee, was sufficiently concerned to leave the repeal measure out of the House version of the second bill before it went to conference. Telephone interview with Bill Archer, *supra* note 133.

lobbyists and Congressman Archer began their efforts to repeal the provision, it appears that at least the Republican leadership was fully aware of the provision and its impact. The game was simply too skillfully played for most observers to believe that the inclusion of the installment sale repeal provision in the first place was a mere oversight.

Moreover, there were ongoing reports that the installment sale repeal provision was among the largest of the revenue raisers being targeted for use as a revenue offset to pay for the numerous tax cuts included in the form of "extenders."<sup>224</sup> Given these reports, it is also surprising that lobbyists were so quiet until after the bill was passed. There is some suggestion that lobbyists were assured that the provision would be deleted and that they had nothing to worry about.<sup>225</sup> Worse still, lobbyists may have been in on the whole complex scheme to let the bill go through and use the provision as a revenue offset, with the assurance that the Republicans had the votes to repeal the provision immediately as a stand-alone measure. Moreover, it appears that party leaders in the end believed that they could comfortably vote for the bill without worrying about PAYGO sequesters. In addition to repealing the installment sale provision, Republicans also knew that they had the votes to bypass the PAYGO rules through a direction to OMB setting the PAYGO scorecard to zero.

As opposed to the honest mistake explanation, the "wink and a nod" explanation suggests that Republican leaders probably knew all along that when they *did* draw attention to the cost impact of the installment sale repeal on small businesses, they had the votes to repeal the provision retroactively. They may have even told the lobbyists to keep quiet. How wonderful it would be not only to repeal the unwanted installment sale targeted offset retroactively, but get away without ever being required to pay for over \$2 billion of the tax extenders. One mysterious question is why President Clinton went along so willingly with his signature at the end of the day. One suspects that

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<sup>224</sup> See, for example, reports that "Roth proposed more than 20 revenue-raisers, all of which have been seen before. The biggest, raising \$2 billion over 10 years, would repeal the installment method for most accrual-basis taxpayers . . ." Ryan J. Donmoyer, *Finance Prepares to Mark Up Extended Extenders Bill*, TAX NOTES TODAY (Oct. 20, 1999). Another article looking at available offsets to pay for tax cuts specifically referred to the installment sale repeal as already "eaten up." Ryan J. Donmoyer & Heidi Glenn, *Revenue Offset Leftovers May Give K Street Indigestion*, TAX NOTES TODAY (Nov. 24, 1999).

<sup>225</sup> One lobbyist reported that interest groups never took the threat of the installment sale repeal for accrual basis taxpayers proposal seriously because they believed the Republicans would never pass it. They believed that "Congress would take care of it." Telephone interview with Dan Blankenberg, *supra* note 215.

additional deals were cut there as well—deals we may never know about.

Some may argue that the installment sale story is a unique and unusual incident. In certain respects, of course, this is true. We are unlikely to see statutes regularly that appear and then disappear like fairy dust as if they had never existed. If this was simply a bizarre aberration, it would not be worthwhile as a case study. Despite some of its unusual characteristics, however, the events that transpired reflect deeper pathologies in the tax and budget legislative processes, particularly with regard to dealmaking that goes into the budget. Tax policy often gets lost along the way as these budget deals are made. The sections that follow consider these pathologies.

### E. *Dealmaking and the Budget*

#### 1. The Costs of PAYGO

Although observers might disagree about whether the costs outweigh the benefits, any observer of the modern budget process would agree that the fiscal constraints imposed by the enforcement of revenue neutrality principles have increased the costs of enacting new tax legislation and have dramatically altered the dynamics of the process.<sup>226</sup>

Legislative procedural innovations, especially the various offset provisions built into the reconciliation and PAYGO process, dramatically altered the dynamics of interest group activity and conflict. Lobbyists advocating new spending programs or tax cuts have become "funding predators," each in search of target programs to cut or alternative taxes to increase so as to pay for their new proposals.<sup>227</sup> Players in the budget and tax legislative processes cut deals, each laboring to keep the proposed legislation within the confines of complicated budget requirements, while advocating their own interests. The players here are not limited to private interest groups, but include individual members of Congress, congressional party leaders, the President, and high-level administrative officials. Particularly in the context of larger pieces of legislation, more powerful players may be able to slip in offsets to pay for their pet programs, catching the target group off-guard.

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<sup>226</sup> See, e.g., Garrett, *supra* note 6, at 515–21.

<sup>227</sup> *Id.* at 515.

Even before PAYGO, Congress agreed in its 1986 tax reform debate that it would enact revenue and distributionally-neutral legislation. This new approach to tax legislation altered the tax-writing process:

Prior revenue bills were often constructed through political logrolling, whereby special interest provisions were added, one to the next, until a winning coalition was achieved. As intended, revenue neutrality converted this process into a "zero-sum game": each interest was in competition with all others, because "spending" limited tax expenditure revenues to benefit one interest precluded using them to aid another. The fierce competition for available revenues in the tax-reform debate jeopardized any interest that lacked an aggressive inside spokesman for its cause.<sup>228</sup>

PAYGO, adopted as part of the 1990 Budget Act, simply codified the revenue neutrality principle that Congress informally began in 1986.

All of the players in the PAYGO process are on the hunt for targets that can be used for revenue offset purposes; none of the players is exempt. Testimony from the executive branch and lobbyists routinely refers to the need to look for offsets. For example, in the year of the installment sale story, the Assistant Treasury Department Secretary for Tax Policy began his testimony on the budget by noting, "I believe it is helpful to understand the framework of the President's FY 2000 budget and the need for revenue offsets."<sup>229</sup> Virtually every group testifying for favored spending programs or tax breaks refers to the need for finding an appropriate offset.<sup>230</sup> Increased PAYGO costs are borne not only by those advocating new tax benefits for themselves, but also by beneficiaries of existing tax legislation who must fight to keep their programs off the target lists to be used for revenue offsets. This whole process raises questions about the durability of tax legislation in general. Having succeeded in fighting a particular provi-

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<sup>228</sup> TIMOTHY J. CONLAN, ET AL., *TAXING CHOICES: THE POLITICS OF TAX REFORM* 101 (1990).

<sup>229</sup> Lubick testimony, *supra* note 129.

<sup>230</sup> For example, an official testifying in favor of a continued payment of monthly educational assistance benefits to veterans commented that as to costs subject to PAYGO, "we would need to work with you to identify necessary offsets for proposals we were to support." *Hearing Before the Subcomm. on Benefits, House Comm. on Veterans' Affairs*, 106th Cong. (1999) (statement of Celia P. Dollarhide, Director, Education Service, Veterans' Benefits Administration, Dep't of Veterans' Affairs).

sion through the process, one can never be sure that it won't be targeted as an offset later on.

Despite the gimmicks, most commentators agree that the modern legislative budget process generally has provided valuable restraints and has successfully imposed an element of self-discipline on a Congress that might otherwise be inclined to continue spending the country deep into deficits.<sup>231</sup> After all, it's always politically easier to spend more money for constituents than to restrict spending or take benefits away. In order for the process to provide stability and to retain credibility, it is important that deals struck by the participants in the process be maintained. Most budget observers seem to believe that the advantages outweigh the costs. In general, the advantage is thought to be at least some modicum of fiscal constraint.<sup>232</sup> Others have found more subtle advantages. For example, Professor Garrett argues that the increased interest group conflict generated by PAYGO may be useful to Congress in providing more information about programs that Congress would otherwise not be able to scrutinize adequately.<sup>233</sup> She also argues that this information might be helpful in providing a more systematic review of tax expenditures, which are frequently targets for revenue offsets.<sup>234</sup>

## 2. Bypassing PAYGO

Despite the apparent costs of PAYGO, it appears that Congress can easily buy its way out of the fiscal constraints as it did so brazenly with the retroactive repeal of the installment sale provision. Surely, there can be no fiscal constraint if a revenue neutral deal is arranged for one budget year and then undone in the following year by a stand-alone measure, which repeals one of the necessary revenue offsets

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<sup>231</sup> See, e.g., SCHICK, *supra* note 1, at 69 ("PAYGO contributed to the liquidation of budget deficits by hampering enactment of new direct spending legislation and making it easier for the government to hold onto its revenue dividend."); Pollack, *supra* note 69, at 1050 ("PAYGO checks the natural instincts of Democrats to over-spend and Republicans to slash taxes for their constituents. The result has been a dose of fiscal constraint for the budget process; budget surpluses, and consequently, paying down some portion of the national debt, are now a real possibility.").

<sup>232</sup> One early observation was that "[t]he PAYGO process seems to have discouraged major efforts to increase entitlement spending or cut taxes or both." Joyce & Reischauer, *supra* note 44, at 438. Richard May observed that "PAYGO has provided some sense of fiscal discipline and has worked ninety to ninety-five percent of the time." Telephone interview with Richard May, Staff Director of the House Budget Comm., 1993-1997 (Mar. 26, 2002) (notes on file with the author).

<sup>233</sup> Garrett, *supra* note 6, at 556-60.

<sup>234</sup> *Id.* at 564-69.

from the prior year. Congress has found numerous ways to avoid the sting of PAYGO rules. For example, it can bypass PAYGO enforcement mechanisms entirely by classifying legislation as "emergency" legislation, effectively removing it from the PAYGO scorecard.<sup>235</sup> More significantly, Congress increasingly has used directed scorekeeping to avoid PAYGO constraints. In fact, in each fiscal year since 2000, Congress has bypassed PAYGO simply by directing OMB to set yearly amounts subject to PAYGO sequester to zero.<sup>236</sup>

My contention in this Article is that when Congress uses techniques such as those used in the installment method case study or those being used more generally to bypass PAYGO requirements, it is breaching a contract or precommitment made with the public.<sup>237</sup> The budget is a complex deal presumably negotiated on behalf of and in the interests of the country's citizens. The citizens have a right to expect that the deal be enforced.

### 3. The "Statute as Contract"

Beginning in about the 1980s, political scientists began to explore the idea that legislatures were really markets for wealth transfers and that politicians were simply brokers selling legislative goods.<sup>238</sup> The theory developed into a more sophisticated body of scholarship in the economic and political science literature known as "public choice."<sup>239</sup> Although it is not the dominant mode of statutory interpretation, many impressive legal scholars borrowed from the economics model, using contract-like principles to interpret statutes. Perhaps

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<sup>235</sup> 2 U.S.C. § 902(d), (e) (2000).

<sup>236</sup> Dep't of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the U.S. Act, 2002, Pub. L. No. 107-117, div. C, § 102, 2001 U.S.C.C.A.N. (115 Stat.) 2330, 2342 (setting PAYGO sequester to zero for 2001 and 2002); Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 2(b), 2000 U.S.C.C.A.N. (114 Stat.) 2763 (setting PAYGO sequester to zero for 2001); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, div. B, § 1001(c), 113 Stat. 1501, 1537 (setting PAYGO sequester to zero for FY 2000).

<sup>237</sup> For a discussion of the notion of government precommitment and its analogy to government contracts in the tax setting, see Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129 (1996).

<sup>238</sup> Among the first, basic approaches along these lines was ROBERT E. MCCORMICK & ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* (1981); see also MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* (1981).

<sup>239</sup> Perhaps the best definition of "public choice" is simply the "economic study of nonmarket decision making." DENNIS MUELLER, *PUBLIC CHOICE II*, at 1 (1989). In the legislative context, quite simply, public choice is the application of economic principles to the legislative process.

the most well-known is Judge Easterbrook, who argued that certain statutes represent bargains among special interests and should be interpreted under a "statute as contract" model.<sup>240</sup>

Major budget reconciliation and omnibus legislation packages involve complex negotiations with lobbyists and members of Congress, between members within each of the chambers of Congress, between members of the two chambers of Congress, between Congress and the President, between Congress and executive agencies, and more. If any statute can be described as a "contract" or "deal," the budget reconciliation package surely must be it. Moreover, the deal must be among the most complex statutory deals that Congress makes.

Virtually all of the literature that has considered the "statute as contract" or "statute as deal" analogy has been in the context of statutory interpretation. In each case, scholars have been concerned with the appropriate methodology to be used in interpreting the meaning of the text. My concern here is not with statutory interpretation or the meaning of text. In fact, the text of the Installment Tax Correction Act of 2000 is extraordinarily straightforward, brief, and unambiguous.<sup>241</sup> Even the text of the Ticket to Work and Work Incentives Improvement Act that was retroactively repealed by the Installment Tax Correction Act is not especially complicated.<sup>242</sup> The question I wish to raise in the context of legislative deals is somewhat unusual: can a statutory contract effectively be breached and, if so, what is the significance of such a breach?

In his important article on legislative deals, Professor Dan Farber noted that he was deliberately not addressing the "aspect of contract

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<sup>240</sup> Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 18 (1984); Daniel A. Farber, *Legislative Deals and Statutory Bequests*, 75 MINN. L. REV. 667 (1991). An extensive article advocating the strong analogy between legislation and contracts and specifying positive canons of statutory construction based upon the contract analogy is McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992) (the author "McNollgast" is actually short for Matthew McCubbins, Roger Noll, and Barry Weingast). But see Mark L. Movsesian, *Are Statutes Really 'Legislative Bargains'? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145 (1998). For application of the "statute as contract" model particularly in the tax context, see Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913 (1987). But see Shaviro, *supra* note 29, at 63-80 (critiquing the statute-as-contract model).

<sup>241</sup> The statutory language is quoted at *supra* note 152 and accompanying text.

<sup>242</sup> Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, § 536, 113 Stat. 1860, 1936.

law involving the dynamics of renegotiation."<sup>243</sup> He went on to observe:

The possibility of strategic breach or threats to breach is an important factor in contract law. Although statutes may in some sense be "deals," they do not share this feature. Legislators cannot breach a statute in the way that businesses breach a contract. Legislators can, of course, breach various side-agreements, such as logrolling deals. But they don't have the option of violating a statute and risking a damage payment to other legislators. Because they can't threaten to unilaterally halt performance of the statute, the dynamics of renegotiation are also quite different. . . . I will simply assume, rather arbitrarily, that the parties will not seek to better their situation through opportunistic conduct during the performance of the contract.<sup>244</sup>

I disagree with Professor Farber's suggestion that contract analogy doesn't hold up when it comes to the potential for strategic breach or threats to breach a contract. In fact, I believe that this is precisely what transpired in the installment sale retroactive repeal story. Congress as a whole reached a deal on a reconciliation bill. That deal involved using a repeal of installment sale reporting for accrual method taxpayers as a revenue offset to pay for tax breaks desired by Republicans. Party leaders and special interest groups then engaged in an opportunistic side deal by which they agreed to repeal the repeal that had just been used for revenue offset purposes. I consider this analogous to a breach of contract.<sup>245</sup>

One obvious objection to the contract analogy is that Congress did not formally violate any rules. Congressional instructions directing OMB effectively to ignore the PAYGO rules were done through proper constitutional enactment of a statute followed by presentment

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<sup>243</sup> Farber, *supra* note 240, at 678.

<sup>244</sup> *Id.*

<sup>245</sup> I would not be the first to analogize a statute to breach of contract in the legislative setting. In a different context, Professor Logue has argued that repeal of a tax subsidy is analogous to a breach of contract for which the affected taxpayer is entitled to relief. He argues that taxpayers who engage in certain investment behavior relying upon, for example, a tax deduction designed as an incentive to engage in that activity have something akin to a contractual right to that deduction. See Logue, *supra* note 237, at 1143-49. To be sure, I am extending Professor Logue's analogy well beyond the case of reliance interests of particular taxpayers. At the same time, unlike Professor Logue, I am not arguing for any particularized relief to taxpayers.

of the statute to the President for signature. If there was a contract at all, one might simply say that Congress revoked the old contract and substituted a new one.<sup>246</sup> Surely, it cannot be that a breach of contract arises whenever a successor statute changes a former statute. Moreover, it is a well-settled principle of constitutional law that one Congress cannot bind another. Any subsequent Congress is free to alter the law enacted by an earlier Congress.

My argument, of course, differs from the classical contract argument. The very reason that Congress imposed upon itself the fiscal disciplines beginning with the 1990 Budget Act was its understanding that members would too easily succumb to natural inclinations to want it all. Like the public at large, lawmakers would like to keep spending under control, manage the deficit, and assure themselves that they will not squander a surplus. At the same time, they know that human nature makes it easy to agree to these lofty principles, yet to go on spending in violation of these principles when specific programs seem attractive or when they are pressured by constituents. Thus, they agreed to bind themselves to a contract—a contract of self-discipline.

If I go to a weight loss center and sign a “contract” with the center, and with myself, to maintain a certain regimen, have I broken the contract if I fail to comply with the regimen? Technically speaking, I could say that I did nothing of the sort. Because I made the agreement and paid with my own funds, there is no reason that I couldn’t later decide to make a different agreement. Similarly, because Congress wrote the contract to bind itself in the first place, why can’t it agree to a different contract? For one thing, the situations are very different. My diet contract is a personal one with the diet center. I certainly don’t purport to represent anyone else. Congress, on the other hand, represents the public. Although it has made a contract with itself, the contract reflects commitments which the public expects to be maintained.

In any event, even when I fail to comply with my own weight loss regimen, I think of myself as breaking the contract or even as “cheat-

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<sup>246</sup> In any event, even in cases where Congress *has* formally violated its own rules, courts have been reluctant to intervene, generally upholding congressional action against challenges to the legitimacy of statutes enacted in violation of statutory or internal House or Senate rules. *See, e.g., Metzenbaum v. Fed. Energy Regulatory Comm.*, 675 F.2d 1282 (D.C. Cir. 1982). For a good general discussion of the issues, see Michael B. Miller, *The Justiciability of Legislative Rules and the ‘Political’ Political Question Doctrine*, 78 CAL. L. REV. 1341 (1990).

ing." One can cheat on different levels. I can cheat by hiding in a dark closet with my ice cream or by eating it openly with abandon, admitting to the world that I am breaking the rules. Similarly, when Congress engages in behavior as it did in the retroactive repeal of the installment sale repeal, I think of Congress as "cheating" or breaching its contract with itself. Rather than cheating openly, however, Congress was hiding in the closet with its ice cream. When I hide my violation, I arguably hurt no one but myself. Congress, on the other hand, does far more damage by using gimmicks to break its self-imposed rules.

The contract here is really a political contract with the voters. The issues are the democratically-oriented issues of political accountability, transparency, durability, openness, and durability. If Congress *consistently* violates the same fiscal constraint rules in the budget process, one might argue that such acts constitute some type of implied repeal or contract revocation. In the budget world, however, the violations have been somewhat random. Such random changes leave voters so confused that it would be difficult to penalize legislators at the polls. The recent yearly congressional directions to OMB to set the PAYGO scorecard to zero repealed PAYGO for the years in question without repealing PAYGO outright. Was Congress repealing PAYGO or not? Transparency and openness principles demand fulfillment of the public's right to be better informed. In addition, durability and consistency concerns require more than a year-to-year, ad-hoc response to enforcement of budget process rules. The public has a right to expect that the budget process set forth in the statutory budget process rules generally will be observed. Once an omnibus budget deal is worked out, the public should expect that the deal will be kept. Finally, the deal that is negotiated should be negotiated openly, giving the public a fair chance to assess whether the deal has been kept or not.

### *F. Budget Reforms to Continue Fiscal Constraints and Respond to Pathologies of the Current Process*

#### 1. PAYGO Reforms

##### *a. PAYGO in Times of Surplus*

Perhaps the installment sale episode simply reflects Congress's apathetic attitude towards fiscal constraints in a period of budget surplus. As budget surpluses began to appear in the mid-to-late 1990s, Congress became less concerned with the strictures of budget rules.

As former CBO Director Robert Reischauer recently observed, the effectiveness of PAYGO deteriorated after 1998: "Congress flouted the restraints of the Budget Enforcement Act."<sup>247</sup> Although some members of Congress seem to believe that PAYGO fiscal constraints are less important, or perhaps even unnecessary, in times of surplus, this is far from the uniform view. Prior to the recent and dramatic turn-around from surplus to deficit, the Deputy Director of the CBO testified that PAYGO offset rules "could continue to be an important component of budget discipline. Even in a period of surpluses, maintaining an effective framework of budget discipline is an important hedge against uncertain budget projections and political pressure to increase spending."<sup>248</sup> Even Republican members of Congress have testified in favor of maintaining PAYGO, in periods of budget surplus as well as deficit.<sup>249</sup> Assuming that PAYGO fiscal discipline works, it seems shortsighted to use it only in deficit years and to abandon it completely in surplus years.

Most lawmakers and budget observers still believe that the fiscal constraints imposed by the Budget Act of 1990, with all their faults and limitations, have done some good and should be extended in some fashion. Because the primary concern driving the initial constraints was huge budget deficits, one may question the need for major constraints in periods of budget surplus. Surely fiscal constraints should not be abandoned simply because Congress happens to be operating in a moment of budget surplus. Budget projections are notoriously uncertain and become increasingly so the further out in time such projections extend. Moreover, recent events in the United States show how quickly and dramatically economic circumstances can change from surplus to deficit. In any event, even in times of surplus, Congress has an obligation to future Congresses and to future generations to leave the surplus available to cover unforeseen costs, such as those of social security and the like.

That said, it may make sense to have a different set of disciplinary rules that apply in times of surplus. Through its actions, Congress has

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<sup>247</sup> *Framing the Budget Debate for the Future: Hearing Before the Senate Comm. on the Budget*, 107th Cong. (Jan. 24, 2002) (statement of Robert D. Reischauer, Urban Institute). Richard May, former Staff Director of the House Budget Committee and observer of the budget process, also reports that Congress violated PAYGO rules much more frequently in times of surplus than in times of deficit. Telephone interview with Richard May, *supra* note 232.

<sup>248</sup> *Federal Budget Process Structure Hearing*, *supra* note 109.

<sup>249</sup> *Id.* (statement of Rep. Bill Frenzel) ("PAYGO discipline should be maintained. . . . Legislation that would commit surpluses in excess of the amounts contained in the budget should be subject to PAYGO rules and, if enacted, trigger sequestration.").

clearly shown that it will behave differently during surplus periods than it will during deficit periods. Far better, it seems to me, to have the rules of engagement spelled out in advance than to have all the gimmicks and hidden loopholes that Congress now uses to get around the technical PAYGO rules in surplus years when it's feeling more free to ignore them. As it is, budget rules are complex enough to explain to the public, and even to many members of Congress who work with them, without the hidden gimmicks of fancy accounting and "directed scorekeeping." It would be better simply to have a different, perhaps more relaxed, set of rules on the budget books for surplus years in the first place.

There have been earlier proposals for changes in the PAYGO rules in an era of surplus. For example, the failed Comprehensive Budget Process Reform Act of 1999<sup>250</sup> would have permitted tax cuts without offsets as long as the government was running on an on-budget surplus. Then-CBO Director Dan Crippen testified that

such a change would make it possible to enact legislation increasing mandatory spending or cutting taxes without offsets up to the amount of a projected on-budget surplus for the year. That change would add some flexibility to the PAYGO rules without jettisoning the overall budgetary discipline that they now impose, since legislation causing an on-budget deficit would still have to be offset.<sup>251</sup>

To my mind, this is far too much flexibility. If the idea is to impose any serious fiscal constraint, Congress should limit its ability to cut taxes or increase mandatory spending more significantly than by simply promising not to use up the surplus. A more promising reform would be something like that advocated by former CBO Director Robert Reischauer, who proposed a "budget process reform which would allow each new Congress to encumber only a declining fraction of the resources that exceed the fiscal goal under the baseline projection."<sup>252</sup> The system would be enforced through some variation of the current PAYGO system.

Whatever the mechanism, Congress should think in advance through a sort of "partial veil of ignorance," a differential set of rules

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<sup>250</sup> H.R. 853, 106th Cong. (1999).

<sup>251</sup> *Improving Efficiency of the Budget Process, Hearings on H.R. 853: Hearing Before the House Budget Comm.*, 106th Cong. (May 20, 1999) (statement of Dan L. Crippen, Dir., CBO).

<sup>252</sup> *Federal Budget Process Hearings*, *supra* note 103 (statement of Robert D. Reischauer, Pres., Urban Institute).

as to how it wishes to exercise fiscal discipline in times of deficit as well as surplus.<sup>253</sup> Given that it has recently had a taste of surplus, but has returned to deficits, now would be an ideal time for Congress to design a revised set of PAYGO-like rules with *some* flexibility, similar to those suggested by Reischauer, in which part, but not all, of a projected surplus could be used for tax cuts and increased spending without offsets.

#### b. *Other PAYGO Reforms*

Another concern with existing PAYGO rules is that they look only at growth in mandatory or entitlement spending from *new* legislation, but leave "completely unconstrained any growth in these programs that results from economic or demographic factors."<sup>254</sup> One possible solution would be to add some kind of "lookback" rule to the current PAYGO enforcement scheme that would take such growth into account.<sup>255</sup> This type of reform would, of course, strengthen PAYGO enforcement.

From a very different perspective others have suggested reforms to weaken PAYGO enforcement. A recently commissioned report by the Republican Chair of the Joint Economic Committee complains that PAYGO rules have a perverse effect on tax and expenditure policy.<sup>256</sup> The report contends that PAYGO rules are biased against tax cuts and new spending that would encourage savings and investment.<sup>257</sup> Included among the reform proposals in the report is a switch to dynamic scoring that would take into account how changes in tax policy will affect the overall economy.<sup>258</sup> Such scoring is difficult and often unreliable, but does often lead to more optimistic forecasts. Thus, it would more often permit tax cuts without imposing large PAYGO offsets.

Another proposal would be to exempt from PAYGO any tax legislation that would merely *defer* the collection of tax rather than exempt the collection of tax altogether.<sup>259</sup> Interestingly, under this approach,

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<sup>253</sup> For the suggestion of applying a "veil of ignorance" type approach in budgeting matters, see *Can Ignorance Be Bliss?*, *supra* note 207, at 971-72.

<sup>254</sup> 1996 GAO BUDGET PROCESS REPORT, *supra* note 173, at 14.

<sup>255</sup> *Id.* at 13-14.

<sup>256</sup> JOINT ECON. COMM., 107TH CONG., EXTENDING THE BUDGET ENFORCEMENT ACT: REVISION OF PAYGO RULES NECESSARY FOR BETTER TAX POLICY 2 (2002).

<sup>257</sup> *Id.* at 4, 14.

<sup>258</sup> *Id.* at 11-13.

<sup>259</sup> *Id.* at 13.

the installment sale provision that is the subject of this Article would not have been subject to PAYGO rules at all. The issue in tax collection for an installment sale is whether the government collects the entire tax due at the time of the sale or, instead, collects the tax over the period of installment payments. Installment reporting simply *defers* collection of the tax, but does not exempt it altogether. The government and taxpayers alike know the tremendous advantage of "float," or the time value of money. In fact, a significant number of the tax policy debates in Congress are not about *whether* to tax, but about *when* to tax. To my mind, exempting from PAYGO any tax legislation that defers the collection of tax would take almost all the bite out of an already toothless enforcement provision, and would not be a wise reform.

## 2. Abandon Directed Scorekeeping

Although the installment sale story is striking and unusual, the use of directed scorekeeping is far more common than one would ever expect. Oddly enough, although the term is widely used in budget circles in Congress, it does not appear in the index to any of the major books on the budget process.<sup>260</sup> The term can be used in two different contexts. First, although Congress generally uses the economic assumptions and projections provided by the CBO, it sometimes directs the CBO to use alternate figures provided by the executive branch OMB when the latter's figures are more favorable to congressional purposes. Schick's treatise on the budget does briefly refer in the text to this practice of "directed scoring."<sup>261</sup> Although this type of direct scoring is troublesome, the direct scorekeeping I refer to here is far more flagrant and almost never addressed in the literature.

This second type of directed scorekeeping is simply the use of a huge congressional eraser. To keep the two distinct, I'll refer to the first type as "directed scoring" and the second as "directed scorekeeping." Directed scorekeeping seems almost common practice with regard to spending and appropriations and is becoming more common in the PAYGO setting as well. To use one example, when CBO Director Dan Crippen was asked by ranking Democrats on the House

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<sup>260</sup> See, e.g., COLLENDER, *supra* note 54, at 202, 214; SCHICK, *supra* note 45, at 597; SCHICK, *supra* note 1, at 302; WILDAVSKY & CAIDEN, *supra* note 3.

<sup>261</sup> SCHICK, *supra* note 1, at 63 ("In some cases, Congress picks and chooses between OMB and CBO assumptions, taking from each those that score its appropriations as less costly.")

Budget Committee to compute the on-budget surplus for fiscal year 2000, he replied rather routinely that "we include the effects of various scorekeeping directives and adjustments made by the budget committees, which would have the effect of reducing the outlays attributed to appropriations bills. . . . In total, these adjustments come to about \$17 billion for the House and \$16 billion for the Senate."<sup>262</sup>

Rather dramatically, for each fiscal year since 2000, Congress has directed the OMB in preparing its final PAYGO sequestration report to change any balance of direct spending and receipts legislation to zero.<sup>263</sup> It seems that Congress has a big magic number eraser that it feels increasingly comfortable using when other gimmicks fail in the budget process. This approach to budgeting is simply irresponsible.<sup>264</sup> If the budget process is to have any meaning and the hard work of all the participants is to be given any respect, the use of the magic eraser must be curtailed.

Congress has previously attempted without success to restrict itself with regard to directed scorekeeping. For example, its concurrent budget resolution for fiscal year 2001 included an explicit provision making it out of order in the House to consider "any reported bill or joint resolution, or amendment thereto or conference report thereon, that contains a directed scorekeeping provision."<sup>265</sup> Despite this provision in the budget resolution, Congress continues to use directed scorekeeping.

Congress must get more serious about abandoning directed scorekeeping. Thus far, provisions incorporated into the annual concurrent budget resolution have not been effective. Since the budget resolution is not presented to the President for signature, it does not carry the force of law. I suggest that Congress amend the statutory budget rules by adding a provision that prohibits the use of directed scorekeeping. Although Congress has been known to break its own statutory budget laws, statutory budget laws do carry the force of law

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<sup>262</sup> Letter from Congressional Budget Office Director Dan L. Crippen, to Hon. John M. Spratt, Jr., Ranking Dem. Member, House Budget Comm. (Aug. 26, 1999), *reprinted in* TAX NOTES TODAY (Sept. 14, 1999).

<sup>263</sup> See *supra* note 236.

<sup>264</sup> As long ago as 1991, OMB Director Richard Darman complained that bills containing directed scorekeeping provisions violate the Budget Enforcement Act, which designates "OMB as the 'scorekeeper' of the budget effect of legislation for purposes of calculating whether a spending limit has been exceeded or the pay-as-you-go requirement has been violated." *Mid-Session Review of the Budget: Hearing Before the House Comm. on the Budget*, 102d Cong. (1991) (introductory statement of Richard G. Darman, Director, OMB).

<sup>265</sup> H.R. Con. Res. 290, 106th Cong. § 203 (2000) (enacted).

and have been more effective fiscal restraint devices than internal procedural rules.

### 3. Information Failures

Whether the explanation of events is honest mistake or the art of the deal, one message that comes through clearly from the installment sale story is the extent to which the budget-making process is complex and hidden from view. To some extent, particular provisions get obscured by the sheer complexity of the process. Simplicity is often near or at the top of the list on the tax reform agenda, yet appears hardly at all in budget reform discussion. To be sure, there is at least one good explanation for this difference. Taxpayers have regular contact with the tax system and are expected to comply with it by filing regular tax returns. Every taxpaying citizen must be able to understand the system sufficiently well to comply with these obligations. Moreover, our tax system depends heavily on voluntary compliance. The greater the level of simplicity, the higher the levels of compliance.

In contrast, the ordinary citizen can get by perfectly well knowing little or nothing about the budget process. In that sense, perhaps, simplicity is less critical. At the same time, however, the budget rules have become so complex that even many members of Congress don't understand them. Although most individual citizens may not be interested in watching the budget process, the process *ought* to be accessible to the small number of citizens who are interested and the watch-dog groups that follow the budget on behalf of a larger society that does not pay close attention.

One striking detail of the repeal of the installment sale reporting story is the eerie silence of the small business interest lobby throughout the two separate rounds of budget bills that ultimately led to the Ticket to Work and Work Incentives Act of 1999.<sup>266</sup> Even though the provision was included in both the House and Senate versions of the first bill that was ultimately vetoed by President Clinton and was in the Senate version of the second bill, the lobby claimed to know nothing about the provision until the President signed the second bill. It was only at that point that they became extremely busy. One wonders where they were throughout the budget process. Lobbyists are paid—often extraordinary salaries—for pouring over voluminous legislation

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<sup>266</sup> Pub. L. No. 106-170, § 536, 113 Stat. 1860, 1936.

on the lookout for provisions that impact their clients. Could they have missed this one? Were they simply asleep at the wheel?

One interesting issue here is the extent to which Congress has some obligation to highlight particular provisions that should be of interest to certain groups or even alert particular interest groups that remain silent at moments when their silence seems surprising. Congressman Archer, for example, expressed surprise that the small business interest groups were so quiet with regard to the installment sale provision.<sup>267</sup> Some might object that this is what lobbyists are paid to do and that Congress should not be doing the work for them. On the other hand, there are many small interests that are not represented by high-powered lobbyists who could benefit from at least being alerted to the existence of provisions that might impact them that are buried in large omnibus or reconciliation packages.

Surprisingly enough, it is not only the interest groups that suffer from lack of information, but also many members of Congress themselves. Rank-and-file members of Congress also claimed to be completely unaware of the installment sale repeal provision and its impact until after the second round of legislation and after the President signed the bill. Although members receive reports about large bills, the reports are long and the details of provisions such as the installment sale repeal tend to get buried and lost. Particularly with regard to reconciliation and omnibus legislation, it seems that individual members of Congress need to have the information provided to them in a different format.

Rather than simply present provisions in a long reconciliation bill and accompanying report on an item-by-item basis with a paragraph explanation for each provision, the report should break provisions down by subject matter and by potentially impacted parties. Even providing a detailed index would be useful. Congress should also create a public information office specifically designed to answer questions from the public and reporters interested in detailed information on tax legislation and the budget.

#### 4. The Formal and Informal Summit

Another concern is the extent to which individual members of Congress are completely left out of last-minute budget negotiations. Budget and tax legislation is increasingly decided by formal summits

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<sup>267</sup> Telephone interview with Bill Archer, *supra* note 133.

among party leaders and White House and Treasury Department negotiators. The installment sale story involved a more informal process conducted at the last minute by telephone between party leaders and Treasury Department officials. Much to the surprise of many in the House, where the installment sale repeal for accrual method taxpayers had been left out of the legislation, Bill Archer agreed to a last-minute deal with Treasury Department Secretary Lawrence Summers to put the provision back in the bill.<sup>268</sup> Many House members did not even realize that they were voting for legislation that included the installment sale provision.

Some regularization of the formal and informal "summit" process is clearly necessary. One hesitates even to use the term "reform" here, given that the summit process has developed in an ad hoc fashion and there essentially are no rules. The time has come to develop them. At a minimum, these sessions should not be closed to public view and should not be limited to a handful of select party leaders. Perhaps some mandatory waiting period should be built in so that the details of a deal can be processed rather than worked out over the telephone in a five-minute conversation and then quickly incorporated into a massive piece of legislation. If nothing else, stand-alone repeals of individual pieces of a larger legislative package are legislatively inefficient.

## 5. Tax Policy Reforms

As the need to meet deadlines for budgets and appropriations as well as the inevitability of dealmaking have taken over, discussions of tax policy have become almost nonexistent in the budget process. Many pieces of tax legislation are included in omnibus budget legislation without any hearings at all on the tax issues. As a matter of budget reform, separate tax hearings should be held with regard to any tax legislation incorporated in the budget. In addition, a "Tax Policy Compliance Report" should be published by the appropriate committee. The report should include an assessment of the relevant tax policy norms balanced against any competing budget policy objectives. This report should be made available to members of Congress and to the public before any votes are taken on budget legislation.

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<sup>268</sup> *Id.*

## CONCLUSION

In the end, the success of PAYGO as an enforcement mechanism is only as good as the congressional will to abide by it. Reforms may be enacted, but pathologies will continue until the public decides to hold congressional feet to the fire. At the end of the day, no amount of fiscal constraint can keep Congress from breaching its contracts with itself. For example, as Professor Kate Stith observed with respect to Gramm-Rudman-Hollings:

[A]lthough these new procedures have been enacted by statute, passed by each House and signed by the President, either House may, pursuant to its own rules, modify them in the future. Because GRH's budget process requirements are only internal rule changes, they cannot constitutionally bind future congresses. They are binding only so long as each House chooses to uphold them as a matter of institutional integrity and political will.<sup>269</sup>

That said, there still are some reforms that could prevent, or at least minimize, the likelihood of blatant end-runs around the fiscal disciplines imposed by budget. For one thing, there should be disclosure rules which assure that revenue offsets being used as part of a bill are sufficiently highlighted that they receive the appropriate attention from interested parties. As noted above, this might take the form of required notice to affected interest groups during the legislative process, invitations to such groups to appear at legislative hearings and the like. The main purpose here would be to devise rules that would prevent surprise backroom deals that catch interested groups, as well as rank-and-file members of Congress, unaware.

Most importantly, it should not be permissible for Congress to avoid the revenue offset procedures required by PAYGO through stand-alone measures in subsequent years. Budget rules should be altered to clarify that all revenue-raising and offsetting provisions must occur in the same year and independent pieces of the package should not be altered in subsequent years unless the entire package is up for review. To be sure, virtually all of the budget process rules can be waived. In the Senate, however, most rules require a three-fifths vote. Although some question the cumbersome nature of these supermajority rules, if they are to be applied, they should be applied consis-

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<sup>269</sup> Stith, *supra* note 88, at 667 (footnotes omitted).

tently. Budget process rules should be designed to prevent easy end-runs around point-of-order rules in the Senate so as to avoid the supermajority voting requirements.

To be sure, reading on the proposed repeal of installment method reporting for accrual method taxpayers was not on the *New York Times* bestseller lists. In fact, the provision did not even garner much attention in the financial press. The impact was felt only by an intense small business lobby. From a research point of view, simply tracking down the legislative events that transpired was the closest thing to investigative reporting that I have ever done. Many of the relevant documents were obscure and hard to find. Some details I was able to uncover only by making phone calls to knowledgeable staff at the Ways and Means and Joint Tax Committees and to Congressman Archer himself. This, in itself, speaks volumes. Given how bizarre the events were, I suppose the major participants did not want the documents to be easily found and the gimmicks to be exposed.

When the dust settles, the important message here is not the particular story of installment sale reporting and accrual method taxpayers. The much larger concern is the pathologies reflected in the violations of the democratic budget principles of enforceability, accountability, transparency, openness, and durability. At the same time, important tax policy objectives are lost in the process. My hope is that as Congress considers extending the fiscal constraints of the 1990 Budget Act, it will demonstrate respect for democracy-oriented principles along with a sincere dual concern for fiscal discipline and tax equity.