

# DOOMED TO REPEAT: WHY SEQUESTRATION AND THE BUDGET CONTROL ACT OF 2011 ARE UNLIKELY TO SOLVE OUR SOLVENCY WOES

*Christopher D. Dodge\**

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\* J.D. Candidate 2013, New York University School of Law; B.S.F.S. 2010, Georgetown University. Thank you to the staff of the *New York University Journal of Legislation and Public Policy*, particularly Tamara Marshall, Arielle Borsos, and Julia Bell. Thank you as well to Judge Robert A. Katzmman for his advice and a special thanks to Mark Jia and Josh Pierson for their edits and suggestions.

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## INTRODUCTION

This “is about as dumb an idea as Washington has come up with in my lifetime.”<sup>1</sup> This was the declaration of former House Speaker Newt Gingrich, long considered one of the shrewdest tacticians when it comes to inside-the-beltway politics, at an August 2011 Republican Primary debate in Ames, Iowa.<sup>2</sup> To thunderous applause, the former Speaker further claimed that Congress was presenting a Hobson’s choice to the American people, suggesting the government would “shoot you in the head or cut off your right leg . . . . which do you prefer?”<sup>3</sup> Mr. Gingrich’s target was the Budget Control Act of 2011 (BCA).<sup>4</sup> The BCA, which raised the national debt ceiling, was the result of a grudging compromise reached only after several weeks of heated and partisan debate between the two political parties.<sup>5</sup>

1. Andrew Malcolm, *The Ames Republican Debate Transcript: Everything They Said That You Missed*, L.A. TIMES (Aug. 13, 2011, 6:36 AM), <http://latimesblogs.latimes.com/washington/2011/08/ames-debate-romney-bachmann-paul-huntsman-santorum-gingrich-pawlenty-cain.html> [hereinafter *Ames Transcript*] (containing a transcript of the Ames Republican Debate).

2. See, e.g., THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS 33–43 (2012) (describing in detail Gingrich’s sixteen year-long campaign to overturn the Democratic Party’s longstanding control of the House of Representatives); David Brooks, *Welcome to ‘Newtworld’*, NEWSWEEK, Aug. 4, 1997, at 30 (describing Gingrich as “a tactician along the lines of Wellington”); Dana Milbank, Editorial, *The Winner of the GOP Campaign: Washington*, WASH. POST, Dec. 4, 2011, at A27 (describing Gingrich as the “consummate Washington-insider”).

3. *Ames Transcript*, *supra* note 1.

4. See generally Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (2011).

5. Paul Kane & Lori Montgomery, *House Passes Debt-Limit Measure*, WASH. POST, Aug. 2, 2011, at A1 (describing the debate as a “grueling battle” during “weeks of acrimonious debate”); see also Jackie Calmes, *Debt Ceiling Talks Collapse as Boehner Walks Out*, N.Y. TIMES, July 22, 2011, <http://www.nytimes.com/2011/07/23/us/politics/23fiscal.html> (describing the debate as an “epic clash between the White House and Congressional Republicans”). The Washington Post even seemed to compare the debate to a historical epic, dubbing it “The great debt-ceiling battle of 2011.”

The BCA compromise sketches out a plan to increase the debt ceiling in exchange for a two-stage attack on the federal budget deficit. In stage one, the BCA tasks Congress with finding \$1.2 trillion in potential spending cuts from 2012 through 2021 and imposes caps to reduce funding for discretionary programs by more than \$1 trillion over that same decade.<sup>6</sup> If Congress does not comply with the first stage, the second stage is triggered. The second stage is sequestration: predetermined across-the-board cuts in program expenditures.<sup>7</sup>

Sequestration is a budgetary mechanism used by legislatures to restrain their own future spending.<sup>8</sup> During sequestration, predetermined spending caps are imposed on specified programs and expenditures. Any spending above these caps is automatically removed, or sequestered, in order to bring actual spending into line with the caps.<sup>9</sup> The sequestered funds can be drawn equally across all public spending, or can be sequestered according to formulas that privilege some spending above others.<sup>10</sup>

The BCA's sequestration device consists of automatic, annual, predetermined across-the-board cuts in program expenditures totaling \$1.2 trillion from 2013 to 2021, split nearly equally between "defense" and "non-defense" spending.<sup>11</sup> Often dubbed the "doomsday device,"<sup>12</sup> the BCA's sequestration stage was deliberately structured to be so equally abhorrent to both political camps that it would offer

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Steve Brodner, *Scenes from a Showdown: The Making of Washington's Debt Ceiling Obsession*, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/opinions/outlook/debt-ceiling-deal-timeline/index.html?hpid=z2> (last visited Sep. 6, 2012). CBS News described the debate as containing "unusually blunt and combative language." *Inflexible Rhetoric Bogs Down Debt Talks*, CBS NEWS (July 12, 2011, 7:04 AM), [http://www.cbsnews.com/2100-250\\_162-20078684.html](http://www.cbsnews.com/2100-250_162-20078684.html).

6. RICHARD KOGAN, CTR. ON BUDGET & POL'Y PRIORITIES, HOW THE ACROSS-THE-BOARD CUTS IN THE BUDGET CONTROL ACT WILL WORK 1 (2012), available at <http://www.cbpp.org/files/12-2-11bud2.pdf>.

7. See KAREN SPAR, CONG. RESEARCH SERV., R42050, BUDGET "SEQUESTRATION" AND SELECTED PROGRAM EXEMPTIONS AND SPECIAL RULES 1 (2012).

8. *What is Sequestration?*, POLITICO (July 19, 2012, 2:19 PM), <http://www.politico.com/blogs/on-congress/2012/07/what-is-sequestration-129488.html>.

9. See SPAR, *supra* note 7, at 2.

10. *Id.* at 1.

11. U.S. HOUSE OF REPRESENTATIVES COMM. ON THE BUDGET, FREQUENTLY ASKED QUESTIONS ABOUT SEQUESTRATION UNDER THE BUDGET CONTROL ACT OF 2011 4 (2011), available at <http://democrats.budget.house.gov/sites/democrats.budget.house.gov/files/documents/12.13.11%20FAQ%20about%20sequestration.pdf>.

12. Allan Sloan, 'Supercommittee' Failure is Something We Could Have Avoided, CNNMONEY (Nov. 10, 2011, 6:09 AM), <http://finance.fortune.cnn.com/2011/11/10/supercommittee-failure/>.

them a “significant incentive to succeed.”<sup>13</sup> The compromise antagonized commentators of all stripes.<sup>14</sup>

Congress did not comply with the first stage of the BCA compromise, as it failed to find \$1.2 trillion in savings by January 15, 2012, which triggered, the second stage of the BCA, sequestration. Pursuant to the BCA, a ten year sequestration program was automatically implemented and is set to take effect in January 2013.<sup>15</sup>

This paper will address (1) whether the sequestration mechanism in the BCA can serve its intended purpose of effectuating a long-term policy of deficit reduction through the constraint of future Congresses; and, (2) if sequestration is as ineffective as it appears, why Congress keeps using this budgetary mechanism. Part I sketches out a history of sequestration as a policy tool, primarily by looking at the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985 (GRH), which used sequestration to attempt to force deficit reduction.<sup>16</sup> Part II identifies the flaws in the GRH that prevented the sequestration mechanism from being effective. Part III describes the BCA in greater detail, compares the BCA to the GRH, identifies the similarities and differences between the two acts, and concludes that the inherent flaws in sequestration will ensure that the mechanism, in any form, will fail. Considering these flaws, Part IV seeks to understand why Congress would opt to reuse a widely disparaged policy tool through the lens of public choice theory, classical republicanism, and economic theories related to asymmetric information.

## I.

### THE BIRTH OF SEQUESTRATION:

#### THE GRAMM-RUDMAN-HOLLINGS ACT OF 1985

By the end of 1984, total federal debt stood at \$1.82 trillion (nearly \$3.7 trillion in 2010 dollars), having risen by eighty percent alone during President Reagan’s first term.<sup>17</sup> By 1985 policymakers

13. Ezra Klein, *The Debt-Ceiling Deal in One Flowchart*, WASH. POST (Aug. 1, 2011, 11:31 AM), [http://www.washingtonpost.com/blogs/ezra-klein/post/the-debt-ceiling-deal-in-one-flowchart/2011/07/11/gIQADgeTnI\\_blog.html](http://www.washingtonpost.com/blogs/ezra-klein/post/the-debt-ceiling-deal-in-one-flowchart/2011/07/11/gIQADgeTnI_blog.html).

14. On the left, commentators were dismayed that excess spending would be addressed through spending cuts impacting the disadvantaged, rather than through raising additional revenue. On the right, critics contended that the cuts were too modest in amount. See Carl Hulse, *House Passes Deal to Raise Debt Cap and Defuse Crisis*, N.Y. TIMES, Aug. 2, 2011, at A1.

15. See SPAR, *supra* note 7, at 3.

16. See generally Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037, 1039 (1985).

17. See Raphael Thelwell, *Gramm-Rudman-Hollings Four Years Later: A Dangerous Illusion*, 50 PUB. ADMIN. REV. 190, 190 (1990).

had tried, and spectacularly failed, to use traditional budget deficit reduction negotiation tactics to reduce the deficit for the previous five years.<sup>18</sup> Congress seemed incapable of restraining deficit spending,<sup>19</sup> despite the fact that the Treasury would hit its peak borrowing capacity in October 1985.<sup>20</sup> At the outset of that year, a compromise initially appeared within reach: the Senate narrowly passed a measure that capped defense spending increases at three percent over inflation and simultaneously eliminated the cost of living allowance for programs such as Social Security for a single year.<sup>21</sup> Yet President Reagan immediately balked at the restrictions on defense spending, which, in turn, led Speaker Tip O'Neill to rally House Democrats against a unilateral cut from Social Security.<sup>22</sup> Ultimately, the divide between a Democrat-held House and a Republican-held Senate made the prospects for substantive near-term deficit reduction dim.<sup>23</sup>

In response, a coalition of legislators emerged, seeking to resolve the institutional deadlock. Because traditional negotiations had failed, legislators sought to impose a legal and institutional constraint against deficit growth to produce a permanent solution to the problem, rather than annual attempts at fix-ups.<sup>24</sup> The proposed solution was the GRH,<sup>25</sup> a bill designed to force Congress to reach a compromise on the deficit or face unpleasant automatic cuts. The sequestration cuts were to serve "as a forcing mechanism, creating such an unattractive alternative that Congress would reach deficit targets on their own."<sup>26</sup>

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18. See John W. Ellwood, *The Politics of the Enactment and Implementation of Gramm-Rudman-Hollings: Why Congress Cannot Address the Deficit Dilemma*, 25 HARV. J. ON LEGIS. 553, 553 (1988). OMB statistics show that the budget deficit, as a percentage of GNP, was higher from fiscal years 1981 to 1986 than at any other time in American history, save during World War II. See *id.* at 553 n.2.

19. See Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 593, 621 (1988) [hereinafter *Rewriting the Fiscal Constitution*]. This Note later argues that, institutionally, Congress suffers from a moral hazard that incentivizes the implementation of budget policies that obfuscate the issue, appearing to take bold action when in reality only providing the mirage of fiscal reform. *Id.*

20. See JOHN B. GILMOUR, RECONCILABLE DIFFERENCES? CONGRESS, THE BUDGET PROCESS, AND THE DEFICIT 199 (1990).

21. Ellwood, *supra* note 18, at 562.

22. *Id.*

23. *Id.*

24. See *Rewriting the Fiscal Constitution*, *supra* note 19, at 623.

25. *Id.*

26. Lance T. LeLoup et al., *Deficit Politics and Constitutional Government: The Impact of Gramm-Rudman-Hollings*, 7 PUB. BUDGETING & FIN. 83, 87 (1987).

### A. *Structure of the GRH*

The GRH was structured in two stages. First, a series of caps were created to limit the maximum budget deficit for a given year. However, if Congress failed to meet the caps, the second stage, sequestration, would be triggered. The idea was that Congress would honor the initial deficit caps and not engage in excess spending; if it did not, then Congress would have to face the unsavory consequences of sequestration.

For fiscal year (FY) 1986, the drafters set a cap of \$171.9 billion on the budget deficit.<sup>27</sup> The cap would have required significant cuts, as initial estimates anticipated a budget deficit of approximately \$220 billion, nearly \$50 billion more than GRH allowed.<sup>28</sup> GRH would then have reduced the cap annually for the next five years in order to slowly wean Congress off of deficit spending, resulting, ultimately, in a complete elimination of the annual budget deficit and a balanced budget for FY 1991.<sup>29</sup>

To reach its targets, the GRH required the directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) to make an annual report to the Comptroller General, the head of the Government Accountability Office (GAO), with three primary findings:<sup>30</sup> first, the directors had to estimate the expected spending and annual revenue for the upcoming fiscal year;<sup>31</sup> second, they were required to report if the anticipated deficit would exceed the caps mandated by the act;<sup>32</sup> third, the directors needed to estimate projected annual and quarterly growth for the coming fiscal year.<sup>33</sup> The Comptroller General averaged the two reports and determined whether sequestration was necessary in a given year. If the directors estimated that Congress's spending would exceed the mandated caps by \$10 billion or more, sequestration, the second stage of the act, was triggered.<sup>34</sup> This \$10 billion "buffer" added an extra incentive for Congress to compromise—if legislators managed to reach an agree-

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27. Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 201(a)(7)(A), 99 Stat. 1037, 1056 (1985).

28. GILMOUR, *supra* note 20, at 208.

29. Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act § 201(a)(7)(F).

30. *Id.* § 251(a).

31. *Id.* § 251(a)(1)(A).

32. *Id.* § 251(a)(1)(B).

33. *Id.* § 251(a)(1)(C).

34. If the directors calculated that Congress's spending would exceed the caps by less than \$10 billion, then the sequestration device was not triggered. *Id.* § 251(a)(2)–(3)(A).

ment that exceeded the mandates by no more than \$10 billion, not only was this “excess” spending permitted, but also the unpleasantness of sequestration would be avoided entirely.

If the Comptroller General determined sequestration was necessary, the GAO was tasked with reducing all outlays on a “uniform percentage basis.”<sup>35</sup> The Comptroller General had two tasks: first, calculating the outlay reduction percentage necessary to meet the mandated budget deficit cap; in other words, deciding how much of Congress’s desired spending had to be denied; and second, using that percentage to calculate a raw number that needed to be reduced from each program.<sup>36</sup> Sequestration did not, however, apply to the entire budget. The act exempted nearly all annually appropriated entitlement programs and all permanently appropriated entitlement programs including, most notably, Social Security.<sup>37</sup> Other major, primarily health-related, programs (such as Medicare), and a wide range of other federal expenditures, had stringent caps governing the portion of their outlays that could be sequestered.<sup>38</sup> In the end, sequestration applied primarily to discretionary funds, a limited pool of revenue that Congress allocates on an annual basis.<sup>39</sup>

### B. Safety Valves in the GRH

Even when its proposed budget exceeded the budget deficit caps imposed by the GRH, Congress could still avoid sequestration in two specific scenarios: (1) a major recession, or (2) military conflict. In the case of a recession, a forced reduction in federal expenditure would tamp down domestic consumption, thereby exacerbating problems in an already weak economy. The House wanted a trigger whereby, if

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35. *Id.* § 251(a)(3)(F)(iv).

36. *See Rewriting the Fiscal Constitution*, *supra* note 19, at 631–32.

37. Other notable programs excluded include Medicaid, food stamps, veterans benefits, and Indian Affairs. *See* Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act § 255.

38. For the year 1986, sequestration from Medicare couldn’t exceed one percent and was only increased to two percent for the subsequent four years. The same percentages governed veterans health, Indian health, migrant worker health, and community health programs. *Id.* § 256(d). Additionally, a long list of “prior legal obligations,” consisting primarily of outstanding contract obligations held by the federal government, were set out as inviolable. *Id.* § 255(g)(2). Student loans disbursed prior to enactment were also unaffected by the bill. *Id.* § 256(c). Special rules forbade any reduction in pay for federal employees whose salaries were set by statute or military regulation. *Id.* § 256(g). Funds set aside in special or trust funds could not be sequestered, *id.* § 256(a)(2), nor could interest payments on the federal debt be reduced. *Id.* § 255(c).

39. Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387, 396 (1998).

Gross National Product (GNP) growth was (or was projected to be) low or negative, or if the average rate of unemployment was one percent above the prior year, the sequestration of funds would cease for the remainder of that fiscal year, the next, or both, depending on a joint resolution from Congress.<sup>40</sup> However, the Senate secured a stricter mechanism for halting sequestration that excluded any consideration of the unemployment rate. The final bill included two instances where economic forecasts could halt sequestration: first, if the CBO or OMB anticipated two consecutive quarters of negative economic growth; second, if the Department of Commerce reported actual growth of less than one percent for two consecutive quarters. In those cases, Congress could by joint resolution suspend sequestration for the remainder of the fiscal year, the following fiscal year, or both.<sup>41</sup>

In the case of military conflict, the bill made clear that sequestration did “not apply if a declaration of war by the Congress is in effect.”<sup>42</sup>

The fact that the enacting Congress explicitly rejected broader alternatives to the narrowly constructed “outs” indicates that legisla-

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40. Victor Zarnowitz & Geoffrey H. Moore, *Forecasting Recessions Under The Gramm-Rudman-Hollings Law* 3 (Nat'l Bureau Econ. Research, Working Paper No. 2066, 1986).

41. Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act §§ 254, 251(g).

42. Setting the line here, however, seems an interesting choice on the part of the drafters, given that the United States has “not declared war in any of its many post-World War II conflicts,” and that “Congress need not declare war in order to provide its full authorization to the President to prosecute a war.” Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2054 (2005). Given the explicit language used in the act referring to Congress’s constitutional power to declare war, it is unlikely that legislative action meant to supplement a major military campaign, for instance the various “Authorizations for the Use of Military Force” (AUMFs) passed in reference to the two Gulf Wars and the war in Afghanistan, would qualify as congressional declarations. J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 50 (1991) (contending AUMF for Gulf War did not satisfy constitutional requirements for declaration of war); see also Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1273 (2002) (similarly contending current U.S. engagement in Afghanistan and global operations against terrorists do not constitute a declared war). Indeed, even if the AUMFs are considered by some to be functional equivalents to declarations of war, for purposes of statutory interpretation it is at least ambiguous that a plain reading of the text would be inclusive of the AUMFs. Given this ambiguity and the rarity with which Congress has, in the modern era, explicitly declared war, it seems likely that Congress would have provided more explicit guidance if it desired the sequestration procedures to be halted in cases where the United States was involved in a military conflict falling short of full-scale war.



tors sincerely intended to minimize the wiggle room for future Congresses to avoid the GRH's sequestration procedures.

### C. *Aftermath of the GRH*

In *Bowsher v. Synar*, the Supreme Court declared that the sequestration function of the GRH was invalid because the GRH initially delegated the ultimate sequestration powers to the Comptroller General, the head of the GAO, which is an entity of Congress, in violation of the separation of powers.<sup>43</sup> In the wake of *Bowsher*, Congress passed the Budget and Emergency Deficit Control Reaffirmation Act of 1987 (Reaffirmation Act),<sup>44</sup> which retained the sequestration procedure by shifting the execution of the cuts to OMB, thus addressing the original act's constitutional shortcomings.<sup>45</sup> Congress also granted itself an additional "out" to the sequestration procedure by providing for "Modification of Presidential Order," which allowed Congress to modify the sequestration order.<sup>46</sup> It could only be introduced by the majority leaders of either House of Congress, but once introduced did not have to be approved by a committee, faced limited debate time, and was guaranteed immediate consideration in both chambers. Along with the less ambitious deficit reduction caps implemented in the Reaffirmation Act,<sup>47</sup> this out tended to loosen the sequestration straight jacket Congress had attempted to place upon itself.<sup>48</sup>

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43. 478 U.S. 714 (1986). Because the Comptroller General was a part of the GAO (a legislative office) but had power to compel the Executive to act in a law making capacity without first going through the bicameral and presentment requirements of the Constitution, the Supreme Court found that the power given to the Comptroller General under the GRH was unconstitutional. Supporters of the act argued that the Comptroller General was sufficiently independent of Congress to either be considered part of the Executive or to exist in some quasi-legislative middle ground. However, because Congress ultimately held removal power over the Comptroller General, the Supreme Court held that it was a part of the legislative branch. *Id.* at 727.

44. Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754 (1987).

45. *Id.* § 251(a)(2)(B). The act also made the CBO's sequestration reports purely advisory. The act, however, still sought to check OMB's power by granting the CBO the power to issue initial reports supplying OMB with much of its data and then requiring OMB to account for any discrepancy between its own calculations and the CBO's. *Id.*

46. *Id.* § 258.

47. *See infra* note 97.

48. The extent to which this truly constitutes an "out" is somewhat ambiguous. As discussed later in this Note, Congress always retains the power to counteract a piece of legislation with new legislation. This "out" may be meaningful, however, insofar as it proscribes particular rules limiting debate, bypassing committee consideration, and

The budgeting process laid out in the GRH and its progeny was eventually overhauled by the Budget Enforcement Act of 1990 (BEA), which used both sequestration to enforce pre-set caps on annually appropriated spending, and “pay-as-you-go” (PAYGO) rules for entitlements and taxes.<sup>49</sup> The PAYGO rules required that any legislative proposal that would expand the anticipated budget deficit had to be offset by spending reductions elsewhere in the budget.<sup>50</sup> Thus, the BEA primarily sought to manage the growth of the deficit by restricting the rate at which spending increases rather than proactively seeking to slow the growth of the national debt or eliminating the budget deficit altogether.<sup>51</sup>

## II.

### ASSESSING SEQUESTRATION’S FIRST ROUND

While the verdict on the GRH has by no means been unanimous,<sup>52</sup> the overwhelming consensus of the academic community is

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providing for expedited voting procedures, thus allowing Congress greater leeway in circumscribing sequestration.

49. See Budget Enforcement Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990).

50. *Id.* § 252. The Budget Enforcement Act would become the cornerstone of American budgeting procedure for over a decade. Originally intended to last only through 1995, it would be extended in 1993 and again in 1997 before expiring in 2002. It scrapped targets eliminating the budget deficit over time, instead using economic estimates to set discretionary spending caps, which would be enforced by means of sequestration. Similar to the GRH, the funds vulnerable to sequestration were severely limited and excluded political “third rails” such as Social Security. Additionally, it implemented the PAYGO rule, which required that all changes in the tax code or direct spending be “deficit-neutral” over both one- and five-year horizons, so as to protect against budget gimmickry that increased outlays over time, but appeared initially to be deficit neutral. An exception to PAYGO is if outlays increase as a result of economic growth or inflation. PAYGO, by virtue of restraining increases in spending, may help minimize budget deficits, but it is not the equivalent of affirmatively legislating a balanced budget. Other significant changes included an expanded role for OMB in making economic projections, further empowering the executive branch in the budgeting process. See ALAN J. AUERBACH, *FEDERAL BUDGET RULES: THE U.S. EXPERIENCE* 3–5 (2008).

51. See Philip G. Joyce, *Congressional Budget Reform, The Unanticipated Implications for Federal Policymaking*, 56 *PUB. ADMIN. REV.* 317, 320 (1996).

52. Note, however, that most of the prominent dissenting voices are public officials who had a hand in enacting the legislation. See, e.g., Pete V. Domenici, *The Gramm-Rudman-Hollings Budget Process: An Act In Legislative Futility?*, 25 *HARV. J. ON LEGIS.* 537, 537 (1988) (“[W]e can see immediately that Gramm-Rudman-Hollings . . . was not a futile act simply by observing that the result its authors were looking for . . . was accomplished.”); Robert W. Kasten, Jr., *Gramm-Rudman-Hollings: An Imperfect Law That Works*, 25 *HARV. J. ON LEGIS.* 577, 577 (1988) (“Yet despite its weaknesses, the Gramm-Rudman-Hollings Act has worked.”); Dan Quayle, *Is Gramm-Rudman-Hollings an Exercise in Legislative Futility?*, 25 *HARV. J. ON*

that the GRH was a “colossal failure,”<sup>53</sup> both in terms of actually reducing the deficit and introducing procedures capable of doing so.<sup>54</sup> Simply put, in 1990, when the budget deficit was supposed to have progressively shrunk to zero, it was actually at a record high and hopes of the GRH eliminating the budget deficit were altogether tarnished.<sup>55</sup> This section seeks first to conceptualize the functional mechanism behind the GRH and then to explore the substantive and procedural flaws that made the GRH “doomed to failure.”<sup>56</sup>

### A. Conceptualizing the GRH

Upon facial examination, the GRH appears to be a clever, logically-sound, and self-contained package of rules, reasonably likely to effectuate its intended end of winnowing the budget deficit regardless of congressional action or inaction. Fundamentally it seeks to create a process that will funnel out undesirable outcomes likely to occur in the absence of a superstructure—here, failing to reduce the annual budget deficit—and leave behind a socially desirable result. This creation of a legal superstructure to limit the discretion of individual decision makers is a recurring theme in all sorts of legal structures, whether it be

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LEGIS. 587, 587 (1988) (“The evidence to date indicates that Gramm-Rudman-Hollings has succeeded.”). Robert Kasten was a Congressman from Wisconsin at the time of the Act’s passage, while Dan Quayle and Pete Domenici were Senators from Indiana and New Mexico, respectively.

53. DAVID M. PRIMO, RULES AND RESTRAINT 3–4 (2007).

54. See, e.g., Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 TULSA L.J. 561, 574 (1997); Thomas J. Downey, *The Futility of Gramm-Rudman-Hollings*, 25 HARV. J. ON LEGIS. 545, 546–47 (1988); Philip G. Joyce & Robert D. Reischauer, *Deficit Budgeting: The Federal Budget Process and Budget Reform*, 29 HARV. J. ON LEGIS. 429, 435 (1992) (noting that, while the GRH might have prevented further deficit “hemorrhaging,” it did not result in the desired deficit reduction); Gary A. Loxley & Thomas F. Mitola, *The Congressional Budget and Impoundment Control Act of 1974: Gramm-Rudman and Beyond*, 14 OHIO N.U. L. REV. 329, 360 (1987); Eric M. Patashnik, *Can Rules Stop A Fiscal Train Wreck?*, 7 ELECTION L.J. 361, 362 (2008); Theodore P. Seto, *Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed to Do (and No More)*, 106 YALE L.J. 1449, 1465 (1997); Thelwell, *supra* note 17, at 191; Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L.J. 1555, 1563 (2007); Howard Levkowitz, Note, *The Gramm-Rudman-Hollings Act: A Styrofoam Damocles’ Sword?*, 2 S. CAL. INTERDISC. L.J. 367, 367–68 (1993); John E. Yang, *Fiscal Follies: Ever-Growing Deficits Establish the Failure of Gramm-Rudman—Accounting Gimmicks Permit Congress to Spend Freely, Cutting Only Projections—A Sponsor Wants a ‘Divorce’*, WALL ST. J., Oct. 3, 1989 (discussing Sen. Hollings’s desire to disassociate himself with the bill).

55. *Gramm-Rudman Is Failure as Deficit Nears a Record*, DESERT NEWS (Aug. 27, 1990, 12:00 AM), <http://www.deseretnews.com/article/119254/GRAMM-RUDMAN-IS-FAILURE-AS-DEFICIT-NEARS-A-RECORD.html>.

56. Levkowitz, *supra* note 54, at 391 n.192.

the common law's deference to *stare decisis* and custom,<sup>57</sup> foreign policy disputes between the branches of government,<sup>58</sup> or modern criminal sentencing statutes which curtail judicial discretion.<sup>59</sup> Perhaps most apropos, constitutions themselves are fundamentally legal superstructures meant to constrain the future actions of those who will seek to circumvent certain fundamental rules.<sup>60</sup> Ultimately, "constitutions represent an attempt by 'the people' to bind 'themselves' against their own future decision-making pathologies."<sup>61</sup> The GRH, and indeed the BCA, are best seen as different manifestations of Congress's repeated attempts to carve out a "fiscal constitution" capable of ordering the nation's fiscal affairs. A fiscal constitution can be thought of as "several statutes that are so far-reaching in their implications for year-by-year fiscal decisions that they deserve to be thought of as quasi-constitutional."<sup>62</sup> While these sorts of statutes possess no especially reserved spot in the constitutional scheme, "they are increasing in importance"<sup>63</sup> and are inherently different than ordinary legislation.<sup>64</sup>

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57. See Jonathan T. Molot, *An Old Judicial Role for A New Litigation Era*, 113 YALE L.J. 27, 72 (2003) ("English judges did not simply make law as they deemed fit, but rather were guided by prior decisions and well-established canons of construction. Indeed, the Federalists repeatedly emphasized these powerful constraints on judicial discretion. They observed that *stare decisis* binds judges in most cases, and that in cases of first impression, where *stare decisis* has no influence, judges nonetheless must follow well-established interpretive practices.").

58. See Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 481–82, 482, n.69 (1976) (defining the War Powers Act as a type of "constitutional 'framework legislation' which interprets the Constitution by providing a legal framework for the governmental decision-making process" and further noting that the Congressional Budget and Impoundment Control Act of 1974 is "quasi-constitutional").

59. See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1428 (2008) (noting that the original Federal Sentencing Guidelines were meant to limit inter-judge discrepancies in sentencing, lessen judicial discretion, and ultimately get a consistently "right" outcome in sentencing).

60. STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* 241 (1995) ("Liberal constitutions . . . are designed . . . to force officeholders . . . to act against their own immediate interests in order to promote the general interest."); see also Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 980 (2009) ("Viewed from an internal perspective, the Constitution furnishes standards of legally required and forbidden conduct that guide at least some officials' judgments that they have obligations trumping or displacing what they otherwise might wish to do. Insofar as officials regard the Constitution from an internal point of view, they will be constrained by constitutional norms or be subject to normative constraints.").

61. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 137 (2011).

62. Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 272 (1977).

63. *Id.*

64. *Id.* at 273.

The shortcomings in the GRH highlight the failure of the “fiscal constitution” to create a workable solution to the nation’s debt. The GRH’s inability to sufficiently bind future Congresses to specified deficit reduction targets ultimately resulted in no major progress in reining in the debt or eliminating the budget deficit. This flaw is pervasive in all self-applied superstructures. Hence, when Congress uses legislation to restrain itself, its efficacy must be severely doubted—a lesson Congress failed to heed when passing the BCA. This section will highlight numerous provisions in the GRH that evince the inherent ineffectiveness of self-applied superstructures.

### *B. Shortcomings of the GRH*

#### *1. Limited Application of Sequestration*

Many of the shortcomings of the GRH are apparent at first blush. Most apparent is the drawback of exempting wide swathes of the federal budget, including entitlement programs. Exempting the most sensitive elements of the budget from sequestration disincentivized legislators from finding deficit-reducing compromises and ruined an opportunity for Congress to demand cost-reducing efficiency upgrades from expensive entitlement programs.

Sequestration was not intended to be an end unto itself. It was instead designed to encourage political compromise to reduce deficit spending during the first stage of the GRH in order to avoid the second stage of the GRH, the doomsday sequestration option. The act restricted the actual uniform reduction sequestration to fourteen percent of the domestic budget, with an additional twelve percent subject to partial sequestration, usually due to a cap on how much money the program could lose to sequestration.<sup>65</sup> In total, seventy-four percent of the budget was exempt from sequestration, including those portions of the budget that were fastest growing.<sup>66</sup>

Limiting the applicability of sequestration to a small portion of the budget reduced the doomsday character of sequestration (and the subsequent incentive to avoid it), hence diminishing its effectiveness as a threat to encourage political compromise in stage one. Sequestration could only incentivize politicians to make pre-sequestration compromises on spending cuts if the stage one cuts were more politically

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65. See *Rewriting the Fiscal Constitution*, *supra* note 19, at 668 n.345.

66. See STAFF OF H. COMM. ON THE BUDGET, 100TH CONG., *THE WHOLE AND THE PARTS: PIECEMEAL AND INTEGRATED APPROACHES TO CONGRESSIONAL BUDGETING*, 18 (Comm. Print 1987) (report prepared for Task Force on the Budget Process by Allen Schick) (noting that entitlement spending constituted the fastest growing portion of the federal budget).

palatable than the sequestration cuts themselves. However, the sequestration cuts were fairly palatable due to the careful balance struck in the GRH, splitting the cuts equally between domestic and defense spending.<sup>67</sup> Hence, both parties had an equally strong incentive to go directly to sequestration rather than attempt to reach a potentially controversial political compromise on spending cuts in stage one. Legislators could please their constituents by defending their preferred federal spending plans during stage one negotiations, and then later in the year blame their partisan opposites for the failed stage one negotiations when sequestration went into effect. Strong anecdotal evidence is found for this proposition, as Congress, in every year but one,<sup>68</sup> did not seriously attempt to meet the specified deficit caps in the first stage of the GRH, and instead, opted to use sequestration as a “rhetorical weapon . . . in the political battle over the budget.”<sup>69</sup> Incentivizing legislators to go straight to sequestration eliminated any attempts to find new or creative solutions to reduce deficit spending in a manner other than through sequestration cuts. The sequestration function simply provided lawmakers of all persuasions an easy, if not completely desirable, branch to fall back upon, rather than risk flying too far from the political birds nest by attacking substantive spending problems.

Furthermore, limiting the applicability of the sequestration cuts eliminated any incentive to address expensive entitlement programs, which were portions of the budget that were the most troublesome in regards to the deficit, and also sequestration-exempt.<sup>70</sup> As sequestration posed no threat to exempted entitlement programs, their congressional advocates were in a strong position to loudly protest any stage one budget agreement that reduced select entitlement funding, and “[s]upporters of such [exempted] programs ha[d] less reason to accept a marginally unfavorable legislative budget than [ ] supporters of pro-

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67. See *Rewriting the Fiscal Constitution*, *supra* note 19, at 631–32 (noting that, while the split between security and nonsecurity spending was meant to make the sequestration threat credible, it was also put in place to keep relative spending priorities intact and ensure widespread legislative support).

68. Congress was able to avoid sequestration in FY 1989 partly because the Reaffirmation Act deliberately set unambitious reduction goals for that year. STEVEN E. SCHIER, *A DECADE OF DEFICITS: CONGRESSIONAL THOUGHT AND FISCAL ACTION* 127 (1992).

69. Levkowitz, *supra* note 54, at 380.

70. See *Rewriting the Fiscal Constitution*, *supra* note 19, at 664 (“Indeed, the fastest growing component of federal expenditures in recent years has been the most overt legacy of past political choices—payment of interest on the national debt. ‘Entitlement’ payments have grown nearly as fast.”).

grams that [we]re vulnerable to sequestration.”<sup>71</sup> Thus, Congress further privileged those programs likely to be the source of future budget problems.<sup>72</sup>

Summed up, the GRH “was intended to end a logjam, to break an impasse, and to encourage compromise,”<sup>73</sup> but with preferred projects already exempted from sequestration and a fifty-fifty split between security and nonsecurity programs giving both sides equal political ammunition, Congress “happily accept[ed] the ‘train wreck’ in order to blame it on the opposition.”<sup>74</sup> The end result was that Congress never addressed the underlying increase in spending and expensive entitlement programs that were contributing significantly to the growing deficit; but everyone got political credit for passing the GRH and no one lost political points for cutting popular programs. Indeed, it is no surprise that Congress followed effectively the same pattern with the BCA.

## 2. *Exclusion of Revenue-Increasing Options*

While Congress went to great lengths to make the GRH framework politically neutral towards various *expenditure* preferences, one significant bias remained. Namely, by refusing to include any sort of automatic surtax to ameliorate Congress’s inability to meet the deficit caps, the GRH “set up lower spending as the default.”<sup>75</sup> Such a surtax could have been included, for instance, by providing that in a year where the deficit exceeded the specified cap, income taxes would automatically increase by a small percentage calibrated by the extent of the breach. Such a move would not only have raised revenue to help close the budget gap, it would have also provided legislators with a strong incentive to avoid excessive spending.

While Congress could conceivably use tax increases *ex ante* to avoid sequestration of funds, the sequestration compromise itself, which was already reflective of pre-existing preferences, further indicates that Congress utilized the sequestration framework to avoid tax

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71. See *Rewriting the Fiscal Constitution*, *supra* note 19, at 657.

72. Professor Stith further observes that, “Although it is not surprising that entitlement programs, even those nominally subject to annual appropriations, are exempted from sequestration under GRH, their exemption reveals the ultimate weakness of sequestration as a strategy for redesigning the federal budget.” *Id.* In other words, this portion of the GRH may not have undermined the ability to meet the specified deficit caps, but it disincentivized addressing the most troublesome spots in the budget.

73. GILMOUR, *supra* note 20, at 215.

74. *Id.* at 217.

75. Philip G. Joyce, *Congressional Budget Reform: The Unanticipated Implications for Federal Policymaking*, 56 PUB. ADMIN. REV. 317, 320 (1996).

hikes. In effect, the GRH framework put an additional onus on legislators interested in revenue-increasing measures, because of both the public scrutiny that attends any significant increase in federal taxes and because of the path-of-least-resistance offered by sequestration, which allowed members to throw their hands in the air and inform “aggrieved constituents that ‘the law made me do it.’”<sup>76</sup> Not including tax increases in the enforcement mechanism did not *inherently* undermine the act’s theoretical ability to meet the deficit caps, however, it did so in reality by discouraging the use of revenue increases to address deficits.<sup>77</sup> The GRH was an attempt to push the budget negotiations forward, yet, creating a default sequestration scheme that excluded revenue-increasing options reflects the act’s tendency to lock in and strengthen pre-existing legislative prejudices, including a dislike of tax increases.<sup>78</sup>

### 3. *Using Loopholes to Manipulate Sequestration*

The complexity of the formula used to prospectively calculate the sequestration for a fiscal year meant that Congress could, and did, manipulate projected outlay rates and spread costs over time.<sup>79</sup> The GRH was rife with opportunity for gimmickry to make it look like Congress had reduced the amount of expenditures in a given year and, thus, eliminate or reduce the size of the sequestration cuts. Congress would shift the costs of various initiatives over time to reduce the cuts under sequestration in a specific year. Other tricks included relabeling an expenditure as a tax cut<sup>80</sup> or paying for programs through more expensive bond auctions.<sup>81</sup>

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76. *Id.*

77. E. Donald Elliott, *Regulating the Deficit After Bowsher v. Synar*, 4 YALE J. ON REG. 317, 358 (1987) (“By creating a mechanism for automatic spending reductions, but requiring a very visible vote to raise taxes, Gramm-Rudman-Hollings biased the outcome toward reducing spending rather than increasing taxes to meet the targets.”).

78. *See Rewriting the Fiscal Constitution*, *supra* note 19, at 622 (“There is no prevailing constituency for taxation.”).

79. *Id.* at 637.

80. By creating a hierarchy of federal spending, the legislation allowed interest groups to simply advocate for preferred tax incentives or rates, rather than discretionary spending, to receive the same sort of federal largesse without fearing that it might fall under the axe of sequestration. *See* Garrett, *supra* note 39, at 396.

81. Levkowitz, *supra* note 58, at 383–85. Indeed, by the early 1990s, off-budget spending reached an all-time high. *Id.* at 383. A major government bailout responding to the Savings and Loan Crisis dramatically raised the stakes associated with sequestration, because “entire government departments, scores of programs, hundreds of thousands of employees and millions of recipients of government assistance” landed on the chopping block. *See* Steven Mufson, *How to Budget Costs of S&L Cleanup Poses Vexing Problem*, WASH. POST, July 21, 1990, at D11. As a result, the Bush



Congress engaged in the most blatant form of budget gimmickry—cost shifting—in two ways. First, Congress could hide its shortcomings by pushing back the cost of a program to a subsequent fiscal year, thereby minimizing sequestration's bite in the current year. For example, in FY 1989 Congress pushed back a military payday by a single day to shift the cost into a new fiscal year and claimed to have cut outlays by \$2.9 billion.<sup>82</sup> That same year, Congress claimed another \$850 million in savings by similarly shifting agricultural subsidy payments.<sup>83</sup> Second, Congress regularly avoided sequestration by announcing major spending bills after the October 15 sequester deadline. Because the GRH sequestration framework hinged on a series of complicated estimates and projections, the act never required that the sequestration amounts match the *actual* budget deficit and stated deficit cap, but only the *projected* budget deficit. Once the *projected* budget deficit was addressed through sequestration, Congress could continue spending and increasing the *actual* budget deficit.<sup>84</sup> While the sequestration would eventually occur, it tackled only a hypothetical budget deficit, not a real one.

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Administration asked Congress to “create a loophole in the *Gramm-Rudman-Hollings* deficit reduction law to accommodate the RTC financing.” Terry Atlas, *\$44 Billion Deficit Jolt in S&L Rescuer's Plan*, CHI. TRIB., Feb. 16, 1990, at 1 (emphasis added). In the end, the financing for much of the bailout was placed off-budget, which resulted in a delayed and more costly bailout scheme, while simultaneously making an end-run around the GRH. See Levkowitz, *supra* note 58, at 385.

82. DANIEL SHAVIRO, DO DEFICITS MATTER? 254 (1997).

83. Thelwell, *supra* note 17, at 193. Such maneuvers were the rule, and not the exception. A Washington Post editorial laid out various modes of budget manipulation favored by Congress, namely taking items off-budget for periods of time, one-off asset sales, timing manipulation, and relying on claims that “the Internal Revenue Service will be more vigorous in enforcing the tax code next year” to justify taking credits. Editorial, *Paper Cuts*, WASH. POST, Apr. 16, 1989, at B6. Additionally, because the GRH calculates the deficit as *annual* net outlays, it “creates incentives to cut items with high outlay rates and to change outlay timing in budget estimates—‘pushing’ outlays into future years.” *Rewriting the Fiscal Constitution*, *supra* note 19, at 639. The Budget Enforcement Act of 1990 fixed this problem by broadening the window for considering budget outlays to a “five-year budget window,” making it difficult for Congress to evade the law through timing manipulations. ELIZABETH GARRETT ET AL., FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 12–13 (2008).

84. See *Rewriting the Fiscal Constitution*, *supra* note 19, at 662–63. Even if a sequestration was implemented, Congress retained the prerogative to simply pass a supplemental spending bill which, while ostensibly not allowable under the GRH, could easily be passed with a 60 vote “waiver” in the Senate. Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 301(i)(1)(B), 99 Stat. 1037, 1043–44 (1985).

#### 4. *Difficulties in Calculating the Appropriate Sequestration Amount*

Apart from the more blatant manipulations that allowed legislators to neuter sequestration in any given year, the technical calculations upon which sequestration relied were vulnerable to less visible problems. The sequestration function was highly reliant on two different complex economic forecasts: the annual budget estimates and the annual deficit cap. Each year OMB and CBO would make independent assessments of the expected budget deficit, based on projections of revenue and the outlay rate (the rate at which budget authority is expended).<sup>85</sup> Post-*Bowsher*, OMB would then determine whether sequestration cuts were necessary to meet the deficit cap, and if so, how large those cuts would be.

The first obstacle posed by this system was that both of these estimates were based on a range of economic assumptions and guesswork.<sup>86</sup> Yet, more important than the “inherent potential for error in estimates”<sup>87</sup> was that government agencies are naturally pre-disposed to prefer, and deliver, rosy economic predictions over negative ones. The result was that the government often anticipated higher revenues and lower demands for social services than ultimately came to be, which further compromised the accuracy of the sequestration procedure.<sup>88</sup> Moreover, this problem became more pronounced post-*Bowsher*, which essentially left all of the sequestration powers in the hands of the President and OMB, an office viewed by Congress as “an explicitly political arm of the President in budget politics whose analysis could not be trusted.”<sup>89</sup> In comparison with the CBO, the OMB is “necessarily partisan”<sup>90</sup> due to its close relationship with the President, whereas the CBO was established with the explicit purpose of

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85. See *Rewriting the Fiscal Constitution*, *supra* note 19, at 635.

86. For instance, the outlay rate of many federal programs are tied to “assumptions about GNP growth, inflation, and what budget analysts refer to as ‘technical’ assumptions regarding program utilization.” *Id.* at 636. Similarly, revenue projections are tied to estimates of economic growth, which by the years 1989 and 1990 had stalled beyond expectation, causing worse than projected revenue.

87. See *id.* at 637.

88. Thelwell describes *The Washington Post* critiques that the GRH allowed Congress to consistently underestimate the deficit (and thus the size of any corresponding sequestration) due to “credits [ ] taken on the strength of little more than assertions that the Internal Revenue Service will be more vigorous in enforcing the tax code next year, that assorted benefit rolls will be better policed and that the payout of civil service pensions will not be accelerated.” Editorial, *Paper Cuts*, WASH. POST, Apr. 16, 1989, at B6, *cited in* Thelwell, *supra* note 17, at 193.

89. See SCHIER, *supra* note 68, at 47.

90. See Thelwell, *supra* note 17, at 197.

providing “independent, nonpartisan analytical capability.”<sup>91</sup> In fact, a comprehensive study of OMB estimates over several decades found that, during the 1980s, OMB “seem[s] to have used the budget as a vehicle to advocate lower total outlays . . . . resulting in biased outlay and deficit proposals.”<sup>92</sup> For example, for FY 1990, OMB anticipated GNP growth of 2.3%, whereas CBO anticipated 1.7%.<sup>93</sup> Accordingly, OMB anticipated a federal budget deficit of \$126.1 billion, whereas CBO estimated \$146.2 billion. Unsurprisingly, the President used OMB’s analysis and instantly spared \$23.1 billion of federal spending from sequestration.<sup>94</sup> Between natural miscalculations by OMB and CBO and manipulation of the available information by Congress, OMB and CBO underestimated the *actual* deficit every year the GRH was in place.<sup>95</sup>

### 5. *Unrealistic and Politically-Motivated Annual Deficit Caps*

Congress was forced to play a delicate balancing game with the annual deficit caps set out by the GRH, as amended by the Reaffirmation Act of 1987. On the one hand the cap needed to be low enough that the sequestration cuts would be bad enough to incentivize Congress to reach a compromise, however, if the cap was too low, the sequestration cuts would be so huge that they would not be considered realistic.<sup>96</sup> This balancing act was so intricate that scholars are split

91. *Id.*

92. Paul R. Blackley & Larry DeBoer, *Bias in OMB’s Economic Forecasts and Budget Proposals*, 76 PUB. CHOICE 215, 230 (1993).

93. See Thelwell, *supra* note 17, at 193.

94. *Id.* Indeed, the previous year, FY 1989, he had chosen to follow OMB’s sequestration report as well, which estimated a deficit of \$116.1 billion, significantly smaller than CBO’s estimate of \$141.3 billion. *Id.* Differences between CBO and OMB estimates were so radical that Congress, forced to grant OMB greater power after *Bowsher*, nonetheless went to great lengths to try and micromanage the agency. For FY 1987, the gap between CBO and OMB estimates stood at \$33.1 billion. See Ellwood, *supra* note 18, at 569. Ellwood notes that this caused so much distrust between Congress and OMB that “the initial Senate rewriting of Gramm-Rudman-Hollings in 1986 attempted to specify the values of individual economic variables, in effect tying the Administration’s hands.” *Id.* Not surprisingly, both agencies ultimately underestimated the debt, with a total government budget deficit of \$220.4 billion in FY 1990. *Bailout Raises Federal Deficit*, N.Y. TIMES, Aug. 21, 1991, at D2. The total in FY 1989 came to \$152.1 billion. Tom Redburn, *Budget Deficit for 1989 Is Put at \$152.1 Billion*, L.A. TIMES, Oct. 28, 1989, [http://articles.latimes.com/1989-10-28/news/mn-697\\_1\\_capital-gains-tax-cut](http://articles.latimes.com/1989-10-28/news/mn-697_1_capital-gains-tax-cut).

95. See Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1696 (2002); see also *infra* note 104 and accompanying text.

96. See STEVEN M. SHEFFRIN, *MARKETS AND MAJORITIES* 241 (1993).

over whether the pre-set caps were too severe or too minimal. Either way, it is clear that Congress set caps that they could not meet.<sup>97</sup>

Lastly, instead of meeting the GRH goals when faced with the need to reduce spending by a little over \$60 billion in 1987, Congress, in the Reaffirmation Act, simply made the targets less ambitious and deemed the move an “improvement” of the GRH framework.<sup>98</sup> Ultimately, the deficit caps lost credibility in the eyes of legislators, because it was clear that numerous forms of budget gimmickry could circumvent the caps, and, if economic realities made sequestration too severe, Congress could simply scrap them. The GRH thus suffered from the reality “that no one [was] able to devise a solution that would dictate the appropriate sequestration size [to] bring all the reluctant parties to the table.”<sup>99</sup>

## 6. *Insufficient Safety Valves*

Legislators recognized that in certain scenarios, specifically in the case of a recession or military conflict, sequestration could do more harm than good. The “outs” only envisioned very specific scenarios.<sup>100</sup> On the one hand, narrowly drawn “outs” evinced Congress’s intent to adhere to the act’s goals; however, on the other hand, the “outs” were not dynamic enough to anticipate and accommodate the unexpected: the 1987 stock market crash, the Savings and Loan crisis, and drastic increases in the cost of Medicare.<sup>101</sup> Moreover, because the recession provisions were never triggered,<sup>102</sup> these unforeseen events simply spurred Congress to reassess its deficit goals in the Reaffirmation Act, pushing back the goal of a balanced budget by several years, and, ultimately, scrapping the GRH with the Budget Enforcement Act of 1990.

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97. Thelwell contends that “there is reason to doubt that GRH sequesters are sufficient to force Congress and the President to express their priorities in cutting outlays. . . .” Thelwell, *supra* note 17, at 196. Conversely, others note that when it appeared that sequestrations as large as \$100 billion might have been necessary to meet the specified caps, political consensus quickly coalesced to avoid the cuts and, indeed, eliminate them altogether under the Budget Enforcement Act of 1990. *See* Westmoreland, *supra* note 54, at 1563.

98. *See* SCHIER, *supra* note 68, at 124–25.

99. Ellwood, *supra* note 18, at 575.

100. *See supra* Section I.B.

101. Bernard M. Shapiro, *Presidential Politics and Deficit Reduction: The Landscape of Tax Policy in the 1980s and 1990s*, 50 WASH. & LEE L. REV. 441, 444 (1993).

102. The economy never went into a full recession or dipped below GNP growth of 1%. *See* Ellwood, *supra* note 18, at 554 (explaining how the new caps in the 1987 act were set to avoid a contentious high stakes budget debate during the final years of the Reagan Administration).

### 7. *The Lack of Entrenchment*

Even under optimal circumstances, with loopholes closed and Congress willing to rise above self-interested politicking, the sequestration function of the GRH faced institutional shortcomings. First, and most importantly, the GRH, as a statute, was not the appropriate mechanism to impose a “legal superstructure.” Because it sought to restrict the institutional decision making discretion of future legislators, the GRH appeared to seek the power of a “legal superstructure” or, similarly, a constitution. Yet, the statute, as drafted, could not impose the type of superstructure it needed to be effective. The GRH lacked any mechanism that would stop future Congresses from avoiding sequestration by amending the act to raise deficit caps or repeal the caps altogether.<sup>103</sup> Indeed, while its creators viewed the GRH as a unique piece of legislation, it was nonetheless a statute, without the hierarchical superiority possessed by the Constitution. As Eric Posner notes, the “brute fact . . . is that Gramm-Rudman did not entrench itself. A simple majority vote of any later Congress sufficed to raise the deficit caps or repeal them pro tanto, and in fact Congress has done just that on several occasions.”<sup>104</sup> Posner deems the GRH “pseudo-entrenchment” and notes that Congress could have more deeply entrenched the scheme by including a clause that required the act to be explicitly, rather than implicitly, overruled.<sup>105</sup> However, the strongest entrenching aspect of any ambitious statutory scheme is the political cost—the cost of either renegeing on the promise to reduce the deficit or maintaining the act—it places upon future Congresses.<sup>106</sup> Even though legislators attempted to entrench the GRH by framing the GRH as a legal superstructure that was too important to repeal and setting up complex mechanisms to dissuade future Congresses from avoiding its mandates, the GRH was nonetheless defunct within six years. Given the importance of budgetary decision-making,<sup>107</sup> any act, even one that is somewhat “entrenched,” will likely clash with the underlying politics that guide congressional decision-making. Therefore, a statute, which can ultimately be overturned, will succumb to the political balancing that undergirds congressional action.

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103. Posner & Vermeule, *supra* note 95, at 1696.

104. *Id.*

105. *Id.* at 1696–97.

106. *Id.*

107. Indeed, the Taxing and Spending Clause constitutes the first of Congress’s enumerated powers under the Constitution. U.S. CONST. art. I, § 8, cl. 1; *see also*, Abner J. Mikva, *Congress: The Purse, the Purpose, and the Power*, 21 GA. L. REV. 1, 14 (1986) (explaining that by granting Congress the power of the purse, the Framers intended for it to become the preminent branch of government).

### 8. *Lack of Entrenchment Results in a Weak Enforcement Mechanism*

Regardless of its policy merits or workability, an enforceable balanced budget amendment is far more likely to ensure desired congressional behavior than a statute, campaign pledge, or informal agreement among voters.<sup>108</sup> Constitutional rules, unlike statutory rules, possess a high level of permanence and are unlikely to be overturned based on the latest political fad.<sup>109</sup> Additionally, if the amendment contains enforcement provisions, it may allow for a third party, most likely a court, to step into the fray and the enforce the amendment's provisions against the legislature—even if the legislature no longer finds a balanced budget desirable.<sup>110</sup> While this route poses its own set of problems, such as meeting Article V's difficult amendment requirements,<sup>111</sup> it is, in the abstract, the most effective enforcement mechanism available to a party interested in constraining congressional spending.<sup>112</sup>

The long-term efficacy of such an amendment would hinge on its enforceability. An unenforceable constitutional amendment would suffer from the same shortcoming as legislation that seeks to ensure predetermined conduct on the part of legislators—while it might serve a normative role as a statement of values, it would fail to act as a prudent stick to excess spending's appealing carrot. As Theodore Seto notes:

Acceding to arguments that a balanced budget amendment need not be enforceable would undermine both that amendment and the Constitution as a whole. . . . [T]he institutional dynamics contemplated by the amendment reasonably should be expected to lead to routine compliance with defined budgetary targets notwithstanding political pressures to the contrary. A mere statement of principles will not suffice.<sup>113</sup>

Seto's criticism of an amendment without enforcement provisions holds equally true for statutory attempts *with* enforcement mech-

108. Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 622 (1996) (noting that where precommitments suffer from collective action problems, constitutional amendments offer a "resort" to enforce these precommitments).

109. Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1115–16 (1998) (discussing the arguments proponents of a constitutional balanced budget amendment make concerning its efficacy).

110. *Id.* at 1117.

111. *Id.* at 1118.

112. See James W. Bowen, *Enforcing the Balanced Budget Amendment*, 4 SETON HALL CONST. L.J. 565, 567 (1994).

113. Seto, *supra* note 54, at 1470.

anisms, because both lack a meaningful external enforcement mechanism to ensure compliance. While the aura of the Constitution disinclines Congress to pass blatantly unconstitutional measures, and indeed creates a judicial presumption that Congress has acted constitutionally, history is littered with congressional acts that have run afoul of the Constitution.<sup>114</sup> Judicial review helps to check this excess and serves to both contravene and deter unconstitutional congressional behavior.<sup>115</sup> While statutes may create cognizable claims against individuals, by their very nature they can provide no such check on Congress—what Congress giveth, it taketh away.

Given the centrality that raising revenue and the disbursement of federal tax dollars play in Congress,<sup>116</sup> any act, even one of a “quasi-constitutional” nature, will likely run afoul at some point of the political calculus that guides congressional action. Without an external enforcement mechanism that checks Congress’s ambitions, the fact that statutes can ultimately be overturned will always be a factor in that political calculus, draining legitimacy from self-imposed threats like sequestration. The GRH attempted to create a politically insulated enforcement mechanism, but because this mechanism could never be fully divorced from Congress itself, it ultimately lacked the power to compel congressional action.

The GRH’s failure is evident: between 1986 and 1991 the nation’s debt rose by \$1.2 trillion and during the same period the *actual* budget deficit exceeded the statutory deficit caps by more than \$400 billion.<sup>117</sup> Not surprisingly, each year the *actual* deficit outstripped the specified deficit cap. For example, the deficit in 1989 was \$152 billion, despite the fact that the statutorily imposed deficit cap was \$136 billion.<sup>118</sup> However, in spite of the GRH’s lack of success, Congress

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114. Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 893 (2003) (“Before 1995, the Supreme Court struck down acts of Congress 134 times. Since 1995, the Court has struck down thirty-three more.”).

115. Jesse H. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1600 (1977) (“The argument holds that, were it not for the deterrent effect of potential judicial invalidation, the federal political branches would have long since engaged in the process of self-arrogation of power or, at the very least, would have been much more generous to the central government in interpreting the breadth of its authority.”).

116. Posner & Vermeule, *supra* note 95, at 1696–97.

117. Neal E. Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. RES. L. REV. 1605, 1616 (1997).

118. See DANIEL J. MITCHELL, *SAVE THE GRAMM-RUDMAN SEQUESTER* 763, 769 (1990), available at <http://www.policyarchive.org/handle/10207/bitstreams/9470.pdf>.

has once again sought to use sequestration to attempt to rein in the nation's budget and debt.

### III.

#### TAKE TWO: THE BUDGET CONTROL ACT OF 2011

The creation of the BCA followed a pattern quite similar to its predecessor. The Treasury Department anticipated that on August 2, 2011, the country would reach the maximum extent of its borrowing authority under existing legislation, requiring an extension of the debt ceiling in order for the federal government to meet its financial obligations.<sup>119</sup> While the debt ceiling had previously been raised three times in President Obama's first term without much political incident,<sup>120</sup> the 2010 midterm elections saw the rise of a staunchly anti-deficit crop of conservative Republicans. In early 2011, Treasury Secretary Timothy Geithner warned that failure to raise the debt ceiling would result in a "catastrophe,"<sup>121</sup> but an intense partisan divide in Congress meant that no actual increase was achieved until July 31, just slightly before the anticipated deadline.<sup>122</sup> The negotiations in the run-up to the deal faced a series of false starts and intense recriminations between the parties that unsurprisingly resulted in the failure to achieve comprehensive reform.<sup>123</sup> When a comprehensive deal became unachievable, Congress, rather than squarely address the intense ideological divide

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119. Jim Puzanghera, *Debt Ceiling Drop-Dead Date Remains Aug. 2, Treasury Says*, L.A. TIMES (June 1, 2011, 8:41 AM), [http://latimesblogs.latimes.com/money\\_co/2011/06/debt-ceiling-treasury-obama-geithner-republicans-deficit-spending-august.html](http://latimesblogs.latimes.com/money_co/2011/06/debt-ceiling-treasury-obama-geithner-republicans-deficit-spending-august.html).

120. See D. ANDREW AUSTIN & MINDY R. LEVIT, CONG. RESEARCH SERV., RL 31967, *THE DEBT LIMIT: HISTORY AND RECENT INCREASES* 18 (2012).

121. Lori Montgomery, *Raise Debt Limit to Avoid National Catastrophe, Geithner Warns Congress*, WASH. POST (Jan. 6, 2011, 8:07 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010603244.html>.

122. *Obama: Debt Limit Agreement Has Been Reached*, WASH. POST POLITICS (July 31, 2011), [http://www.washingtonpost.com/politics/obama-debt-limit-agreement-has-been-reached/2011/07/31/gIQAkPImI\\_video.html](http://www.washingtonpost.com/politics/obama-debt-limit-agreement-has-been-reached/2011/07/31/gIQAkPImI_video.html).

123. See Joe Klein, *The Trouble with Simpson-Bowles*, TIME (Aug. 20, 2012), <http://www.time.com/time/magazine/article/0,9171,2121647,00.html> ("The Obama-Boehner deal collapsed in a blizzard of recriminations. The Boehner folks said, accurately, that Obama had moved the goal posts, raising the revenue target to \$1.2 trillion after the initial deal was done, to appease Senate Democrats, who'd been cut out of the process. The Obama folks said Boehner couldn't have delivered even on the \$800 billion, given the rantings of the Tea Partiers. 'He couldn't deliver a pizza,' an Administration aide said."); see also Matt Bai, *Obama v. Boehner: Who Killed the Debt Deal?*, N.Y. TIMES MAGAZINE (Mar. 28, 2012), <http://www.nytimes.com/2012/04/01/magazine/obama-vs-boehner-who-killed-the-debt-deal.html>; Russell Berman, *Boehner Cuts off Debt Talks with Obama*, THE HILL (July 22, 2011, 9:20 PM), <http://thehill.com/homenews/house/173091-boehner-cuts-off-debt-talks-with-obama>.



responsible for the impasse, opted to revive the GRH, amending its provisions through the BCA, most notably with the addition of the so-called “Super Committee.” Observers were quick to note that the BCA was in many ways a rehashed GRH and offered little reason for optimism.<sup>124</sup> While the BCA borrows generously from the GRH, there are differences. Fundamentally, whereas the GRH sought to control the national debt primarily by slowly eliminating the annual budget deficit over a set period of time, the BCA seeks to achieve a lump sum of savings, specifically \$1.2 trillion,<sup>125</sup> over a ten-year period.

#### A. Structure of the BCA

In 2011, Congress enacted the BCA with the intent to reduce deficit spending and incentivize *ex ante* compromise. Taking its lead from the GRH and its progeny, the BCA took effect in two stages. In the first stage, the BCA imposed spending caps on discretionary programs that would reduce their funding by more than \$1 trillion from 2012 through 2021. The BCA also created the “Joint Selection Committee on Deficit Reduction,”<sup>126</sup> a bi-partisan committee of twelve legislators, drawn equally from both houses of Congress and the Republican and Democratic parties, tasked with proposing legislation by the end of 2012 that would reduce the deficit by an additional \$1.2 trillion over that same decade.<sup>127</sup> If the Special Committee failed to propose such legislation, the BCA triggered a sequestration procedure that would begin in 2013 and last until 2021.<sup>128</sup> The BCA, likely due to concerns from *Bowsher*, granted OMB the responsibility of crafting the sequestration reports for the President to use when effectuating sequestration.<sup>129</sup>

The BCA contains two sequestration functions, the “discretionary sequester” and the “deficit reduction” sequester. The discretionary sequester is triggered when Congress exceeds any of the annual discretionary spending caps set by the act and requires an equal amount to

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124. See *In Our Opinion: Back to the Future: The Return of Gramm-Rudman*, DESERET NEWS (Aug. 1, 2011 12:01 AM), <http://www.deseretnews.com/article/700167466/Back-to-the-future-The-return-of-Gramm-Rudman.html?pg=all>; Jackie Calmes, *Idea Rebounds: Automatics Cuts to Curb Deficits*, N.Y. TIMES, May 15, 2001, <http://www.nytimes.com/2011/05/16/us/politics/16fiscal.html>; Walter Shapiro, *The Utter Meaninglessness of the Debt Ceiling Deal*, THE NEW REPUBLIC (Aug. 1, 2011, 12:00 AM), <http://www.tnr.com/article/politics/92962/debt-ceiling-deal-worthless>.

125. Budget Control Act of 2011, Pub. L. No. 112-25, § 251A(3)(A), 125 Stat. 240, 257 (2011).

126. *Id.* § 401(b)(1).

127. *Id.* § 402(b)(2).

128. *Id.* § 251A; KOGAN, *supra* note 6, at 1.

129. See *supra* notes 43–48 and accompanying text.

be sequestered from all non-exempt discretionary programs.<sup>130</sup> The deficit reduction sequestration draws inspiration from and expands upon the GRH. Upon the failure of the Super Committee to achieve \$1.2 trillion in savings, the deficit reduction sequestration function is triggered in order to find those savings. The cuts were to be taken in an equal ratio from both discretionary and direct spending in defense (“security”) and domestic (“nonsecurity”) categories.<sup>131</sup> The BCA then automatically calibrates the mandated caps to resolve any excess between the spending choices of future Congresses and the pre-set caps chosen by the enacting Congress.<sup>132</sup>

The deficit sequestration procedure is more complex than that implemented by the GRH. First, upon failure of the Super Committee, the existing discretionary spending caps are altered, though they retain the \$1.2 trillion of estimated net savings.<sup>133</sup> Instead of altering the net totals, the definitions of “nonsecurity” and “security” spending are amended; security spending will only include a narrow category of defense spending, which will require some of the spending reductions to come from the Department of Defense.<sup>134</sup> Next, OMB implements an equation that determines the amounts to be sequestered to achieve the \$1.2 trillion savings: it begins with a base of \$1.2 trillion, subtracts the savings from the Super Committee (zero), subtracts an additional eighteen percent to account for debt service, and then divides that sum by nine to distribute across FYs 2013-2021.<sup>135</sup> That sum is then divided fifty-fifty between the new nonsecurity and security categories.<sup>136</sup> An even more complex equation, articulated in sections 251A(5) and 251A(6) is then used to subdivide savings between discretionary and direct spending within both revised categories.<sup>137</sup> FY

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130. Budget Control Act § 251A(3).

131. *Id.* § 251A.

132. *Id.* § 251A(3).

133. *Id.* § 251A(2).

134. *Id.* § 251A(1); *Major Budget Functions*, U.S. HOUSE OF REPRESENTATIVES COMM. ON THE BUDGET, <http://budget.house.gov/BudgetProcess/BudgetFunctions.htm#function050> (last visited Sept. 18, 2012) (defining the discretionary appropriations in budget function 050).

135. Budget Control Act § 251A(3)(A)–(D).

136. *Id.* § 251A(4).

137. *Id.* § 251A(5)–(6). To calculate the discretionary spending reduction for both categories, OMB takes the net reduction required by part (4), multiplies it by the new discretionary limit set upon failure of the Super Committee in part (2), and then divides it by that same discretionary limit *plus* an OMB baseline estimate of nonexempt outlays for direct spending within that category for that year. An illustration of the whole equation follows: \$1.2 trillion minus \$0 (amount saved by Super Committee) = \$1.2 trillion. \$1.2 trillion multiplied by .82 (debt service reduction) = \$984 billion. \$984 billion divided by 9 (number of fiscal years) = \$109.3 billion. \$109.3 billion

2013 is a unique case—rather than reduce the discretionary caps created by the BCA, an across the board sequestration of discretionary spending will occur regardless of how Congress appropriated discretionary funds relative to the caps.<sup>138</sup> However, the budgets in FYs 2014–2021 will have their particular discretionary caps reduced by the amount calculated in sections 251A(5) and 251A(6), with sequestration used to mitigate any spending in excess of the new cap.<sup>139</sup> Finally, direct spending is sequestered by order of the President upon a report from OMB specifying the amounts calculated in sections 251A(5) and 251A(6).<sup>140</sup> Similar to the GRH, the BCA sequesters a mixture of discretionary funds, rather than purely discretionary funds as under the Budget Enforcement Act. Additionally, under the BCA, the entire budget is not subject to sequestration—because it is technically an amendment to the 1985 law it contains the *exact* same exemptions and special rules for certain programs,<sup>141</sup> such as Medicare, leaving approximately seventy percent of the budget immune from sequestration.

### B. Assessing The BCA's Shortcomings

This section will address the similarities and differences between the BCA and the GRH and evaluate whether the BCA has sufficiently addressed the GRH's shortcomings. As an initial matter, it is important to note that the GRH sought a more ambitious goal of balancing

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divided by 2 (even shares given to nonsecurity and security categories) = \$54.7 billion. \$54.7 billion multiplied by \$510 billion (spending cap for that year; \$510 billion is the nonsecurity spending cap for FY 2014) = \$27,880 billion. \$27,880 billion divided by \$510 billion *plus* \$206 billion (the non-defense spending cap *plus* OMB Watch's estimate for nonexempt, non-defense mandatory outlays) = \$38.9 billion. \$38.9 billion is the reduced expenditure level required in non-security discretionary spending for FY 2014. The direct spending reduction required is simply the difference between the nonsecurity cap and the nonsecurity discretionary reduction requirement (i.e. \$54.7 billion minus \$38.9 billion, or \$15.7 billion). See *The Budget Control Act of 2011 (Debt Ceiling Deal) Frequently Asked Questions*, OMB WATCH, <http://www.ombwatch.org/files/budget/debtceilingfaq.pdf> (last visited Oct. 19, 2012).

138. Budget Control Act § 251A(7)(A).

139. *Id.* § 251A(7)(B).

140. *Id.* § 251A(8).

141. See Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, §§ 255–56, 99 Stat. 1037, 1080–92 (1985); see also KOGAN, *supra* note 6, at n.2 (“The Budget Control Act is drafted as a portion of the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA, also known as Gramm-Rudman-Hollings), which contains a list of exemptions in section 255 and a list of special rules in section 256. Those two provisions of BBEDCA were most recently updated by the Statutory PAYGO Act of 2010, and are not changed by the Budget Control Act.”).

the budget,<sup>142</sup> while the BCA sequestration is only meant to offset the expansion in the national debt ceiling.<sup>143</sup> Thus, it is important to estimate the success of the BCA relative to its more modest ambitions. While the BCA has made some significant changes, ultimately, the BCA will fail to achieve its goals.

### 1. *Limited Application of Sequestering*

Similar to the GRH, the BCA exempts tremendous swathes of the federal budget, including those programs that are most politically sensitive and therefore most likely to incentivize legislators to remain within spending limits if threatened with being cut. As noted above, the exemptions from the BCA, while updated slightly by Congress over the past two decades, nonetheless almost exactly mirror those in the GRH,<sup>144</sup> containing the same exemptions and special rules for certain programs and leaving most of the budget immune from sequestration. Regardless of the BCA's more modest budgeting goals, the numerous exemptions have the same effect of disproportionately punishing a small subsection of politically vulnerable programs while privileging the most troublesome causes of the debt. Similarly, the incentive structure under the BCA encourages legislators to claim initial credit for passing the BCA and then avoid difficult compromises down the road. The BCA attempts to improve the opportunities for *ex ante* negotiation with the creation of the Super Committee. The Super Committee provided a high profile opportunity to put political and media pressure on those negotiating deficit reduction prior to sequestration. However, the Super Committee excluded most members and heightened power for congressional leaders.<sup>145</sup> Regardless of the

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142. Michael Linden, *Going Forward Is More Important Than 'Going Big'*, CENTER FOR AMERICAN PROGRESS (Oct. 5, 2011), [http://www.americanprogress.org/issues/2011/10/going\\_big.html](http://www.americanprogress.org/issues/2011/10/going_big.html).

143. Phil Gramm & Mike Solon, *The Budget Sequester's Silver Lining*, WALL ST. J., Nov. 18, 2011, at A15.

144. *See supra* note 141.

145. *See* Budget Control Act § 401(b)(4). Section 401(b)(4) granted the power to choose the twelve members of the committee to the Senate Majority Leader, the Senate Minority Leader, the Speaker of the House, and the House Minority Leader. Unsurprisingly most of the members selected for the committee were relatively high profile, such as Senators John Kerry (former Democratic nominee for President and Chairman of the Senate Committee on Foreign Relations), Max Baucus (Chairman of the Senate Committee on Finance and Chairman of the Joint Committee on Taxation), Jon Kyl (Senate Minority Whip), and Rob Portman (former Director of OMB and former U.S. Trade Representative), and Representatives Jim Clyburn (Assistant Democratic Leader and former House Majority Whip), Chris Van Hollen (former chair of the DCCC and former Assistant to House Speaker Nancy Pelosi), Fred Upton (Chairman of the House Committee on Energy and Commerce), and Dave Camp (Chairman

Super Committee's good faith attempts to negotiate, they lacked any incentive to strike a compromise in stage-one because it would upset the stage-two balance already struck by the BCA. Because sequestration cuts are still split equally between domestic and defense spending, both parties still had an equal incentive to go directly to sequestration rather than attempt to reach a potentially unpalatable political compromise on spending cuts. The BCA has already undermined its own stated preference for *ex ante* bargaining (i.e. the Super Committee) by dividing sequestration cuts equally between defense and domestic spending. This division creates a form of political trench warfare, as evinced under the GRH, which incentivizes stasis.

The limited application of the BCA's sequestering function is exacerbated by the BCA's extended timeline and the maintenance of the GRH's bias against new revenue (i.e. the exclusion of revenue-raising options). Congress will have a longer amount of time to defer decisions that should address the most troublesome parts of the budget. Additionally, because the BCA similarly creates budget cuts as the default, Congress will be able to defer important, but difficult, political decisions for longer periods of time regarding the reform of federal expenditures, including the need for increasing revenues or reforming the tax code. While legislators ostensibly had the ability to raise taxes *ex ante* through the Super Committee, they would have needed to consider that option under intense public scrutiny. Sequestration, even under the BCA, still allows Congress to avoid blame for spending cuts. Thus, similar to the GRH, the BCA generally discourages the use of revenue increases to address deficits.<sup>146</sup>

## 2. *Issues Related to Economic Forecasting*

The BCA's decade-long operation compounds the problem of economic forecasting. The BCA has circumvented some of the GRH's shortcomings related to economic forecasting because the BCA does not need to prospectively estimate the budget deficit—it only requires actual spending to be brought in line with the statutory caps retrospectively. By tying sequestration to raw number reductions in both deficit and discretionary spending, the BCA avoids the problem the GRH

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of the House Ways and Means Committee). Charles Riley, *Super Committee: Who Are These Guys?*, CNN (Aug. 11, 2011), [http://money.cnn.com/2011/08/11/news/economy/debt\\_committee\\_members/index.htm](http://money.cnn.com/2011/08/11/news/economy/debt_committee_members/index.htm) (containing biographies of all members of the committee).

146. E. Donald Elliott, *Regulating the Deficit After Bowers v. Synar*, 4 YALE J. ON REG. 317, 358 (1987) ("By creating a mechanism for automatic spending reductions, but requiring a very visible vote to raise taxes, Gramm-Rudman-Hollings biased the outcome toward reducing spending rather than increasing taxes to meet the targets.").

faced by using flimsy economic estimates and malleable deficit caps to come up with a dollar sum that needed sequestering. Moreover, because the calculation is retrospective under the BCA, it will likely be both easier to calculate and more readily verifiable by third parties.

However, the BCA still utilizes some aspects of economic forecasting, which diminishes the reliability of the deficit reduction plan. For example, legislators, when drafting the act, had to estimate a rate at which the caps increase annually, arriving at roughly two percent.<sup>147</sup> Similarly, the CBO estimated in its review of the act that, after the BCA is completed, the discretionary cap for FY 2021 will be nine percent lower than the spending that would have occurred under the pre-BCA projected path.<sup>148</sup> This estimate required a slew of caveats related to inflation and political considerations, namely Congress's subjective determination of what an appropriate rate of increase in the discretionary spending allowance ought to be. However, such a rough determination cannot fully account for changes in economic growth or unforeseen economic events (and the subsequent effect on revenue). Ultimately, these economic estimates become less reliable over longer periods of time.

In addition to allowing the same inherent economic forecasting errors, the BCA also enables familiar forms of budget gimmickry to avoid sequestration. As in the case of the GRH, clever legislators can find ways to see their preferred projects implemented by framing them in a way that does not fall under the specter of sequestration, such as through some form of tax credit. Similarly, Congress could conceivably hit the annual caps and avoid sequestration simply by pushing spending off-budget, into tax breaks, or into programs not covered by sequestration. Even though some of the most blatant manipulations seen under the GRH, like cost-shifting, will become impossible to execute because the BCA uses actual budget data to sequester excessive spending, the ingenious legislator will still find ways to meet the letter, but not the spirit of the law.

### 3. *Weak Enforcement*

The BCA faces similar enforcement problems as the GRH, which will likely be exacerbated over its decade-long operation. The BCA still places the sequestration function in the hands of OMB, a politically biased office. As with the GRH, leaving these calculations in the

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147. See *Discretionary Spending Under the Budget Control Act of 2011*, CONG. BUDGET OFFICE (Aug. 8, 2011), <http://www.cbo.gov/publication/42214>.

148. *Id.*

hands of OMB and the President might lead to similar problems regarding the amount to be sequestered. Because the BCA does not hinge on speculative calculations of the budget deficit, however, it minimizes the extent to which a potentially biased executive agency, such as OMB, may enable Congress to bypass the strictures of the act. Under the GRH, sequestration could be manipulated by underreporting actual federal spending, but, because the calculation is reflective under the BCA, it will likely both be easier to calculate and more readily verifiable by third parties.

#### 4. *No Entrenchment Mechanism*

The BCA, as with the GRH, is a statute and therefore has similar, if not more severe, entrenchment weaknesses. As noted above, the goals of the act (and sequestration in general) mirror those embedded in various legal superstructures.<sup>149</sup> Yet, the BCA makes no additional attempts to entrench itself or make itself a more legitimate, long-term institutional restraint. Its more complicated sequestration procedure, while perhaps more nuanced than the GRH, does not further entrench it, because when the BCA sequestrations run up against congressional will, Congress will always retain the power to do away with them. Fundamentally, the BCA suffers from the same flaws as the GRH: a statute, even a statute with enforcement mechanisms, does not provide an effective means of restraining the discretion of future Congresses.

The BCA's entrenchment flaw has already undermined the bill's credibility in the eyes of Congress and other parties. For example, not long after passage of the bill, the Department of Defense was reportedly ignoring the potential for sequestration when making budget requests.<sup>150</sup> Additionally, insiders, likely based on the fate of the GRH, were skeptical of sequestration's bite: most believed that sequestration was unlikely to happen.<sup>151</sup> Whether by "building a bipartisan coalition"<sup>152</sup> to avoid sequestration or by proposing legislation to amend, or completely nix, parts of sequestration, legislators have already evinced their confidence that sequestration is easily avoidable.<sup>153</sup> No-

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149. *See supra* Section II.A.

150. Zachary Fryer-Biggs, *2013 Plan Ignores Sequestration*, DEFENSE NEWS (Dec. 5, 2011), <http://www.defensenews.com/article/20111205/DEFPEAT04/112050310/2013-Plan-Ignores-Sequestration>.

151. *Id.*

152. Kate Brannen, *U.S. Senators Planning Sequestration Alternative*, DEFENSE NEWS (Dec. 13, 2011, 6:00 AM), <http://www.defensenews.com/article/20111213/DEFSECT05/112130303/U-S-Senators-Planning-Sequestration-Alternative>.

153. *Id.*

tably, many of the BCA's primary sponsors were among the individuals attempting to amend it a mere three and a half months later.<sup>154</sup>

Moreover, the decade-long timeframe of the BCA merely increases the likelihood that subsequent Congresses will become untethered from the initial enactment and more inclined to ignore or overturn it. As the composition of Congress changes and as the political circumstances giving rise to the act fade to the back of the public's mind, Congress will have less of a reason to try to abide by the BCA.

The BCA's inclusion of a required vote on a balanced budget amendment<sup>155</sup> is a tacit recognition that such an amendment, regardless of its merits, would at least be a more effective enforcement mechanism for creating lasting budget rules, political infeasibility aside. Unsurprisingly, however, when the mandatory vote occurred, the amendment failed.<sup>156</sup>

Therefore, absent any entrenchment mechanism, sequestration has limited viability and is reduced down to a convenient political compromise, entirely subject to changes in the political dynamic and a realignment of political interests.

### C. *Consequences of the BCA*

The BCA's superstructure is already bending, if not breaking, under partisan sparring. When Republican Congressman Paul Ryan, Chairman of the House Committee on the Budget, proposed a FY 2013 budget with discretionary caps \$19 billion below the caps agreed upon in the BCA, Democrats cried foul and accused the GOP of back-

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154. *Id.*; David M. Drucker, *GOP Senators to Unveil Alternatives to Mandated Defense Cuts*, ROLL CALL (Feb. 1, 2012), [http://www.rollcall.com/news/gop\\_senators\\_to\\_unveil\\_alternatives\\_to\\_mandated\\_defense\\_cuts-212044-1.html?zkMobileView=true](http://www.rollcall.com/news/gop_senators_to_unveil_alternatives_to_mandated_defense_cuts-212044-1.html?zkMobileView=true) (noting support of Rubio); Jeremy Herb, *GOP Senators to Release Plan to Stop Triggered Defense Cuts*, THE HILL (Feb. 1, 2012), <http://thehill.com/blogs/defcon-hill/budget-appropriations/208121-gop-senators-to-release-sequestration-alternative-on-thursday> (noting the support of Cornyn and McKeon); *see also* U.S. Senate Roll Call Votes 112th Cong., [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=112&session=1&vote=00123](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00123); U.S. House of Representatives Final Vote Results for Roll Call 690, <http://clerk.house.gov/evs/2011/roll690.xml>.

155. Budget Control Act of 2011, Pub. L. No. 112-25, tit. II, 125 Stat. 240, 250–51 (2011).

156. U.S. House of Representatives Final Vote Results for Roll Call 858, <http://clerk.house.gov/evs/2011/roll858.xml>; *see also* Ashley Southall, *Balanced Budget Amendments Fall Short in the Senate*, THE CAUCUS (Dec. 14, 2011, 9:04 PM), <http://thecaucus.blogs.nytimes.com/2011/12/14/balanced-budget-amendments-fall-short-in-the-senate/> (noting that during prior attempts, some Democrats crossed the aisle to support a balanced budget amendment, but that in 2011 not a single Democrat backed the Republican-sponsored amendment).



ing out of the deal.<sup>157</sup> Minority Whip Steny Hoyer stated bluntly, “They made a deal and they can’t keep a deal.”<sup>158</sup> House Speaker John Boehner defended the proposal by arguing that the BCA caps merely set the upper limit of what Congress could spend and if Congress elected to spend less, it would not amount to undermining the deal.<sup>159</sup> The flaw in this logic is that it conflates forcing Congress to spend less with allowing them to choose to spend less. Congressman Ryan’s proposal would *alter* the cap itself, *forbidding* Congress from spending the sum agreed upon during the intense and delicate negotiations over the BCA. That is highly distinct from maintaining the agreed upon cap, allowing Congress to spend the full amount, but also still granting them to discretion to spend a net sum beneath the cap. It stands to reason that if one Congress wishes to move the goal posts forward, a subsequent Congress could opt to move the goal posts backwards once the political headwinds have changed. In other words, Representatives Boehner and Ryan overlook the fact that one of the perceived virtues of the caps are their permanence—if they can be moved at will, then Congress’s spending discretion is not inhibited by them. What is clear is that within a single year, the BCA has already come under several serious attempts to alter its framework, a phenomenon likely to increase over time as the political cost of upsetting the bargain lessens.

#### D. *Final Thoughts on the BCA: Does it Represent Progress?*

As the previous sections have shown, the BCA largely failed to make significant and lasting improvements upon the initial GRH framework. While the BCA contained some improvements, such as retrospective economic forecasting and seeking out a raw sum of annual savings rather than complete elimination of the budget deficit, it retained almost all of the flaws that made the GRH an unworkable scheme. The BCA was passed under a similar political arrangement, also exempts large swathes of the budget from its provisions, and retains the GRH’s inherent bias against raising revenue. Most impor-

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157. Mike Lillis, *Hoyer: GOP ‘Can’t Keep a Deal’*, THE HILL (Mar. 20, 2012, 1:19 PM), <http://thehill.com/blogs/on-the-money/budget/217021-hoyer-gop-cant-keep-a-deal>.

158. *Id.*

159. Lori Montgomery, *Ryan Introduces GOP Budget Plan, Slashing Social Programs and Tax Rates*, WASH. POST, Mar. 20, 2012, [http://www.washingtonpost.com/business/economy/ryan-introduces-gop-budget-plan-slashing-social-programs-and-tax-rates/2012/03/20/gIQASVksQS\\_story.html](http://www.washingtonpost.com/business/economy/ryan-introduces-gop-budget-plan-slashing-social-programs-and-tax-rates/2012/03/20/gIQASVksQS_story.html) (“‘People have limits on credit cards. That doesn’t mean that you’re required to spend up to the limit,’ Boehner told reporters. ‘It just says you can’t spend any more than that.’”).

tantly, the BCA failed to entrench itself or establish a sufficient enforcement mechanism, permanently casting the act under the specter of subsequent legislation that can alter the terms of the sequestration or eliminate it altogether. Indeed, it took no more than a few months for members of Congress, including supporters of the act, to begin sparing preferred spending from the sequestration act. However, in spite of the fact that the BCA will likely meet the same ignominious fate as the GRH, it is not improbable that Congress will once again reach for sequestration when faced with a budget battle impasse. The question of the next section is: “Why?”

#### IV.

##### WHY LEGISLATORS OPT TO USE SEQUESTRATION

Despite its historical failures, Congress determined that sequestration would be the best remedy to resolve its budget standoff in 2011. This Part acknowledges why sequestration, in the abstract, is such an appealing mechanism, and further explains that sequestration’s appeal is actually inapposite to the goals of a balanced budget act in general. Thus, in any form, sequestration is doomed to fail because the mechanism itself is not meant to legitimately resolve Congress’s inability to compromise.

Several theories contextualize sequestration’s inherent problem and explain why legislators continue to use this flawed mechanism. First, public choice theory explains that all humans act in a rational manner and seek to maximize their own self-interest. This theory is frequently used to explain congressional behavior, and, in fact, GRH was passed in an attempt to avoid such behavior. This Part explains how GRH attempted to eliminate legislators’ self-interested behavior and critiques the effectiveness of sequestration as a means to minimize the negative consequences of public choice theory. In the end, sequestration, as a self-imposed rule, could never eliminate the effects of public choice theory because, as public choice theory itself posits, legislators allow the ability to maximize their own welfare, and can do so by structuring the legislation accordingly. Second, classical republicanism, the notion that public institutions are efficient representatives of the virtues and values of the civil society they represent, explains a different aspect of the sequestration phenomena and why Congress continues to use it as a budget mechanism. Classical republicanism helps reinforce the inherent contradiction between the sequestration threat and the act’s overall goals: the public may actually *want* large deficits, even though they criticize deficit spending. This Part then discusses principal-agent issues that emerge from institutional rela-

tionship between the public and Congress and how those issues contribute to the continued use of sequestration. Finally, the section considers possible solutions to the flaws in sequestration, but ultimately concludes that they are insufficient to completely overcome the problems of sequestration.

### A. *Public Choice Theory*

Public choice theory, the notion that all humans beings act to maximize their own utility,<sup>160</sup> is often used to understand congressional behavior and is helpful in understanding why legislators may choose to use sequestration. For example, a legislator's personal political incentives, namely reelection, often drive that incumbent to make decisions that benefit their own interest over the interests of their constituency. Therefore, the self-interested legislator would always choose to increase spending and defer difficult budgetary compromises to ensure his reelection. Interestingly, Senator Gramm, the primary sponsor of the GRH, was an adherent of public choice theory and believed that the enlargement of the national debt was due largely to the conduct of self-interested legislators.<sup>161</sup> His primary purpose in creating the GRH was to overcome the incentives that cause legislators to act in their own interest at the public's expense.<sup>162</sup> Gramm wanted to eliminate the political motivations, namely reelection, which drove incumbent legislators to increase government benefits for their chosen constituency in the short-term and defer payment until a later time—a self-reinforcing phenomenon that increases public demand for government spending over time.<sup>163</sup> The GRH was intended to put restraints in place that would remove this mal-incentive for legislators.

There are clear problems with using a self-imposed rule to overcome the actions of the self-interested legislator. The rational self-interest phenomenon observed by public choice theory is *inherent* in institutions and can't simply be overcome by a stated desire to realign incentives. Internally created rules will inherently be subject to this bias. If legislators are rational, vote-maximizing actors, then *any* political conduct on their part must ultimately relate back to their own

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160. Lionel Orchard & Hugh Stretton, *Critical Survey: Public Choice*, 21 CAMBRIDGE J. ECON. 409, 409 (1997).

161. See John J. Pitney Jr., *Grand Gramm: Phil Gramm Retires*, NAT. REV. (Sept. 5, 2001) <http://old.nationalreview.com/comment/comment-pitney090501.shtml> (noting Gramm's professional work as an economist and adherence to the public choice school, which led him to believe that legislators have incentives to overspend).

162. See SCHIER, *supra* note 68, at 110.

163. *Id.*

narrowly defined rational self-interest (reelection), rather than capitulate to the common welfare (budget cuts). Thus, when political pressure builds to a point where it is necessary to give the appearance of addressing the deficit, the rules that legislators place upon themselves cannot so strictly bind them that they lack freedom of action in the future. For a self-interested legislator under pressure to address the budget, the ideal set of rules would, in the short-term, create the impression that the legislator was serious about tackling the deficit, and, in the long-term, give him the choice of either continuing to appear fiscally responsible *or* grant him the freedom to revert to his earlier conduct depending on future public demand. Public choice theory can envision a situation where an actor applies rules to himself only if those rules coincide with the actor's self-interest. Thus, in the case of the self-interested legislator, the public's election power will always drive congressional decision-making.

Although Senator Gramm sought to overcome public choice theory with the GRH, it is evident that self-imposed rules are incapable of overcoming the rational actor theory. Only an external source of authority with the power to enforce the rules upon the actor will alter the actor's behavior. Therefore, some public choice theorists advocate for a constitutional amendment as the only truly effective means of reining in the budget.<sup>164</sup>

Despite the intuition that limiting their access to funds contradicts the legislator's self-interest, public choice analysts have concluded that "[s]enators were maximizing their own welfare when they voted on Gramm-Rudman."<sup>165</sup> There can be little doubt they were doing the same with the BCA. In effect, sequestration maximizes the legislator's welfare because it allows him to claim credit for a policy's perceived quality or benefits—bold deficit-related action—and simultaneously avoid blame for its costs—sequestering popular public expenditures—or its failure.<sup>166</sup> Officials tasked with sequestering funds are "simply following a mandated formula" which leaves "no one directly to blame."<sup>167</sup> When the process fails to have a significant impact on the deficit, sequestration allows the legislators to simply blame the sequestration mechanism itself rather than admit that they failed to reach

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164. See James M. Buchanan, *Clarifying Confusion About the Balanced Budget Amendment*, 48 NAT'L TAX J. 347, 347 (1995).

165. Robert E. Lloyd & Joseph P. McGarrity, *A Probit Analysis of the Senate Vote on Gramm-Rudman*, 85 PUB. CHOICE 81, 89 (1995).

166. *Id.*

167. R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 371, 387 (1986).

a solution.<sup>168</sup> In the end, sequestration maximizes legislators' opportunities for reelection because it allows them to satisfy the public conscience regarding the budget deficit problem and avoid the blame for, or avoid entirely, difficult future decisions.<sup>169</sup>

None of this necessarily implies that legislators act in bad faith or are nefariously attempting to deceive the public regarding the true state of the budget and the deficit. Instead, public choice theory presumes legislators to be highly responsive to changes in political dynamics and thus severely disinclined to obey rules which prevent them from reaching the proper political equilibrium. Sequestration thus reinforces public choice theory's belief that "the powerful incentives for congressional spending on private goods are not easily checked by internal constraints."<sup>170</sup>

### B. Classical Republicanism

As noted above, classical republicanism represents the notion that public institutions are dutiful representatives of a politically engaged and virtuous society.<sup>171</sup> Classical republicanism assumes that citizens

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168. *Id.* at 387.

169. *Id.* at 373 ("In short, voters are more sensitive to what has [been] done to them than to what has been done *for* them."). The importance of satisfying the public consciousness with regards to the budget deficit also helps explain why Congress often enacts major budget reform simultaneously with significant increases in the national debt ceiling. When the need to raise the debt ceiling focuses public attention on the cost side of the ledger, Congress wants to deflect attention from that issue without seriously preventing themselves from returning to the status quo as the debt ceiling issue recedes in public consciousness. Satisfying public awareness of the rising debt problem may also help to explain why Congress maintains the practice of periodic votes to increase the debt ceiling at all. There is no constitutional requirement for a debt ceiling; it is entirely a creature of statute. Yet, Congress has frequently resisted calls by the Treasury to simply eliminate the practice. Linda K. Kowalcky & Lance T. LeLoup, *Congress and the Politics of Statutory Debt Limitation*, 53 PUB. ADMIN. REV. 1, 25 (1993). In addition, some of Congress's reluctance to eliminate the debt ceiling likely comes from the perceived individual political cost of eliminating what is seen as a check on profligate spending, even if it has proved ineffective over history. As votes on the debt ceiling have become more frequent and politically fraught, however, legislators have used these votes as an expressive medium to crystallize political and ideological distinctions, a further self-interested use. *Id.*

170. Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403, 414 (1988).

171. JOHN RAWLS, *POLITICAL LIBERALISM* 205 (1993) ("Classical republicanism I take to be the view that if the citizens of a democratic society are to preserve their basic rights and liberties, including the civil liberties which secure the freedoms of private life, they must also have to sufficient degree the 'political virtues' (as I have called them) and be willing to take part in public life. The idea is that without a widespread participation in a democratic politics by a vigorous and informed citizen body, and certainly with a general retreat into private life, even the most well-designed political institutions will fall into the hands of those who seem to dominate and

are active, virtuous and informed, and will “engage . . . in the discourse of politics” to help “the republic reach[ ] decisions and sustain[ ] its vitality as a community.”<sup>172</sup> Thus, the decisions of legislators are generally aligned with public opinion because of the polity’s high level of input towards political decisions.<sup>173</sup> Classical republicanism explains that Congress acts in relation to the budget as they do because their conduct generally maps the public view on the matter. Because public opinion on the deficit is highly contradictory, Congress’s approach to the budget deficit is bound to be contradictory as well. Thus, the classical republicanism reason why Congress continues to use the futile sequestration mechanism is that sequestration allows Congress to reflect the contradictory will of the people by theoretically addressing the budget deficit without actually cutting its deficit spending.

It is well documented that popular opinion regarding the deficit is highly contradictory. For instance, eighty-one percent of Americans find the deficit to be “a major problem” that needs to be addressed immediately, rather than in a time of greater economic health.<sup>174</sup> Americans of all political parties blame the deficit primarily on wasteful government spending.<sup>175</sup> At the same time, a majority of Americans oppose cuts to elements of the budget ranging from the large (Medicare, Social Security, anti-poverty programs, the military and defense, homeland security, education) to the more modest (funding for the arts and sciences, aid to farmers).<sup>176</sup> The only area of the budget for which a majority exists in favor of reduced spending is foreign aid,<sup>177</sup> an area of expenditure which, according to polls, the

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impose their will through the state apparatus either for the sake of power and military glory, or for the reasons of class and economic interest.”)

172. Daniel Walker Howe, *Anti-Federalist/Federalist Dialogue and its Implications for Constitutional Understanding*, 84 NW. U. L. REV. 1, 2 (1989).

173. As David R. Mayhew has argued, American political institutions are uniquely devised to create majoritarian outcomes that are “microcosms of the national electorate,” which results in no significant partisan bias. See DANIEL R. MAYHEW, *PARTISAN BALANCE: WHY POLITICAL PARTIES DON’T KILL THE U.S. CONSTITUTIONAL SYSTEM* 14 (2011).

174. *Deficit: More Concern, Less Optimism*, PEW RESEARCH CTR. (Apr. 27, 2011), <http://pewresearch.org/pubs/1974/poll-address-federa-budget-deficit-now>.

175. Frank Newport, *Americans Blame Wasteful Government Spending for Deficit*, GALLUP (Apr. 29, 2011), <http://www.gallup.com/poll/147338/americans-blame-wasteful-government-spending-deficit.aspx> (noting that 91% of Republicans, 73% of Independents, and 56% of Democrats blame the deficit on irresponsible government spending).

176. Frank Newport, *Americans Oppose Cuts in Education, Social Security, and Defense*, GALLUP (Jan. 26, 2011), <http://www.gallup.com/poll/145790/americans-oppose-cuts-education-social-security-defense.aspx>.

177. *Id.*

average citizen estimates to consist of twenty-five percent of the federal budget and would be comfortable taking up only ten percent of the federal budget.<sup>178</sup> In reality, foreign aid constitutes barely one percent of the budget.<sup>179</sup> On a similar note, while Americans favor government spending and disfavor deficit spending, they also oppose taxes—one of the main ways to finance government spending without also increasing the deficit.<sup>180</sup> Returning to public choice theory, legislators have little incentive to dissuade voters of their contradictory views of the budget—that spending can be maintained without increasing taxes<sup>181</sup>—because such attempts will do little to increase their chances for reelection.

Thus, while Americans might like the idea of cutting spending *in theory*, in practice, cuts to entitlement spending are a nonstarter.<sup>182</sup> Congress's reoccurring use of sequestration, a policy that refuses to take a harder stance on the budget, is a sign that Congress is the well-functioning agent of the people, reflecting their "inconsistent attitudes toward taxes and public spending."<sup>183</sup> Classical republicanism also explains Congress's decisions to exempt nearly identical swathes of government spending—most notably entitlement spending—from the sequestration procedure in both the GRH and the BCA.<sup>184</sup> Americans like the idea of eliminating deficit spending, but simultaneously wish

178. John Norris, Op-Ed., *Five Myths About Foreign Aid*, WASH. POST, Apr. 28, 2011, [http://www.washingtonpost.com/opinions/five-myths-about-foreign-aid/2011/04/25/AF00z05E\\_story.html](http://www.washingtonpost.com/opinions/five-myths-about-foreign-aid/2011/04/25/AF00z05E_story.html).

179. *Id.*

180. Survey, *Study # 101731 NBC News/Wall Street Journal Survey*, WALL ST. J., Nov. 15, 2011, <http://online.wsj.com/public/resources/documents/WSJpoll111710.pdf> (majority supporting higher tax rates for those earning over \$250,000 annually, but opposing them for everyone else).

181. See Ellwood, *supra* note 18, at 559 (explaining that this view largely hinges on grossly exaggerated beliefs in the existence of government waste).

182. Jon Cohen & Dan Balz, *Poll Shows Americans Oppose Entitlement Cuts to Deal with Debt Problem*, WASH. POST, Apr. 20, 2011, [http://www.washingtonpost.com/politics/poll-shows-americans-oppose-entitlement-cuts-to-deal-with-debt-problem/2011/04/19/AFOiAH9D\\_story.html](http://www.washingtonpost.com/politics/poll-shows-americans-oppose-entitlement-cuts-to-deal-with-debt-problem/2011/04/19/AFOiAH9D_story.html) (seventy-eight percent oppose cuts to Medicare, sixty-nine percent oppose cuts to Medicaid).

183. See Ellwood, *supra* note 18, at 559.

184. In their survey of the "California tax revolt" of the late 1970s, David O. Sears and Jack Citrin observed the following phenomenon: "[S]ubstantial majorities of the California electorate wanted cutbacks in government spending and taxes, and expressed strong preferences for a smaller or less powerful government bureaucracy, while at the same time (and by equally strong majorities) requesting additional services in most areas of government responsibility. On the face of it, the public seemed to want something for nothing. This paradoxical mixture of attitudes prevailed throughout the period of the California tax revolt. And the same mentality is evident in the attitudes of Americans nationwide." DAVID O. SEARS & JACK CITRIN, *TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA* 44 (1982).

to keep their entitlements intact. Sequestration allows Congress to perpetuate an inconsistent deficit policy that tracks with inconsistent public demands.<sup>185</sup>

Ultimately, classical republicanism posits that Congress's failure to meaningfully address the deficit is reflective of a Congress that puts the garbled will of the polity into effect. Sequestration allows legislators to quell the public dismay over deficit spending in the short term without meaningfully reducing deficit spending (which could risk eliminating popular entitlement programs) in the long term. The primary distinction between classical republicanism and public choice theory is that the latter assumes legislators act out of self-interest, while the former sees Congress as the dutiful servant of the public master. It is ultimately speculative, and beyond the scope of this Note, to try to decide conclusively which better captures the motivation of the legislature; however, both help explain why Congress keeps using sequestration, an essentially ineffective tool, by recognizing a key truth: regardless of opinion polling, Americans do not *really* want meaningful deficit reduction. If they did, then, regardless of motivation, members of Congress would either be cajoled into reducing the deficit or risk losing their next election.

### C. *Additional Issues*

There are several additional overarching problems inherent in the principal-agent relationship between the public and the enacting Congress—including information asymmetry, moral hazard, and a prisoner's dilemma—that help explain why Congress keeps using the largely ineffective sequestration mechanism.

There is an apparent principal-agent problem between the public and its agent, the enacting Congress. Effectively summarized:

*A principal enlists an agent to carry out the principal's goals . . . . Inevitably, however, the agent's interests diverge from the principal's . . . . Notably, the risk that such a conflict . . . will impair the principal [ ] increases when an asymmetry of information tilts in the agent's favor, i.e., in those situations where the agent holds much more information than the principal, or when a particularly robust "moral hazard" lures the agent from the principal's ends.*<sup>186</sup>

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185. Aaron Task, 'Americans are Overtaxed' and Other Federal Budget "Myths", YAHOO! FINANCE DAILY TICKER (Aug. 1, 2012, 1:13 PM), <http://finance.yahoo.com/blogs/daily-ticker/americans-overtaxed-other-federal-budget-myths-171349674.html>.

186. Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 PUB. CONT. L.J. 63, 64 (2010) (emphasis added).



The asymmetric information in this relationship is reasonably clear. It is generally accepted, regardless of potentially countervailing costs of transparency and accountability, that “[b]ecause of information asymmetries between voters and representatives, the latter have scope to take unobservable actions that detract from voter welfare.”<sup>187</sup> The average voter usually lacks the will and means to effectively oversee the conduct of her elected officials, especially relative to the ability of third party groups such as unions or business associations, which are able to pool resources in pursuit of a narrower group of goals. The complexity of sequestration adds an additional barrier to a citizen seeking to understand the implications of budget policy, while simultaneously granting a significant advantage to the legislator, who possesses greater knowledge about budgeting procedures and thus is greater able to navigate the legalese of sequestration to her advantage. Principal-agent theory assumes that both the principal and the agent will act to maximize their own welfare.<sup>188</sup> As the public does not have the capacity to monitor its agent (the enacting Congress), legislators will take advantage of their unscrutinized position to act to maximize their own welfare, even if it is not in the public’s best interest.

Moral hazard arises when one party is able to pursue an interest while shifting the associated risk to another interested party.<sup>189</sup> As a result, the party that is pursuing the interest but bearing no risk for their actions will behave differently than that party would if they were bearing the risk associated with their actions.<sup>190</sup> Moral hazard often arises in cases where there is an information asymmetry, discussed above, as the principal cannot adequately monitor the actions of their agent.<sup>191</sup> Within the relationship between the public and their agent,

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187. Adrian Vermeule, *Congress and the Costs of Information: A Response to Jane Schacter*, 89 B.U. L. REV. 677, 679 (2009).

188. Jonathan D. McPike, *Merit Pay and Pain: Linking Congressional Pay to Performance*, 86 IND. L.J. 335, 339 (2011).

189. The concept of moral hazard originally arose in the context of insurance: the risk-spreading effect of certain insurance contracts discouraged individuals from avoiding costly behavior. Michael H. LeRoy, *Do Courts Create Moral Hazard?: When Judges Nullify Employer Liability in Arbitrations*, 93 MINN. L. REV. 998, 1003 (2009).

190. Troy S. Brown, *Legal Political Moral Hazard: Does the Dodd-Frank Act End Too Big to Fail?*, 3 ALA. C.R. & C.L.L. REV. 1, 15 (2012) (“[M]oral hazard is the prospect that a party, once insulated from risk, may behave differently from the way it would behave if fully exposed to that risk.”).

191. Simone M. Sepe, *Making Sense of Executive Compensation*, 36 DEL. J. CORP. L. 189, 197 (2011) (“Within the principal-agent economic framework . . . an agency problem may arise . . . because the principal . . . cannot adequately monitor the actions taken by the agent False.”) (citations omitted).

the enacting Congress, the only potential risk for legislators is that they may not be reelected; however, there is no personal ramification for legislators if the deficit is not reduced (or continues to grow), unless the deficit problems have an effect on their prospects for reelection.

Under either of the proposed views of congressional conduct, the existence of significant information asymmetry and moral hazard encourages a sequestration-based budget scheme aimed at reducing the deficit, barring the existence of an external enforcement mechanism. Sequestration allows legislators to give voters the impression that they are undertaking significant systemic reform, thus eliminating any risk of harming their chances of reelection, when they are in fact seeking to push difficult decisions down the road, thus failing to actually address the deficit problems. Furthermore, sequestration provides several opportunities for legislators to deflect blame onto other legislators or another branch without sacrificing their own ability to acquire funds for, and popularity with, their own constituency.<sup>192</sup> If sequestration included an external enforcement mechanism forcing legislators to actually take the unpopular action of cutting expenditures, which could harm their chances of reelection (thus forcing legislators to internalize the risk of their actions and eliminating the moral hazard problem) there is a high likelihood that sequestration would be a significantly less popular budgetary tool in Congress.

Sequestration without an external enforcement mechanism allows legislators to have their cake and eat it too—they can claim credit for taking action in the short term, while feedback on the efficacy of the legislation will only occur in the long run. If a legislator cuts spending or raises taxes, the effect will be felt more immediately by the electorate and, in turn, generate political backlash for the legislator. On the other hand, legislators can use sequestration like a parlor trick, giving their audience the impression that something is being done when in fact the status quo is only being reinforced.

Lastly, while citizens might want Congress, as an institution, to tackle the deficit, they face a prisoner's dilemma problem<sup>193</sup> if they demand that their individual legislator stop bringing home federal dollars without knowing that other legislators will act similarly. A member of Congress that acts to reduce the debt by refusing pork-barrel

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192. See Ellwood, *supra* note 18, at 560–62.

193. PAUL KRUGMAN & ROBIN WELLS, *ECONOMICS* 397 (2009) (describing a prisoner's dilemma as a situation in which each actor has an incentive to take a self-interested action at the other actor's expense, even though cooperation yields a socially superior outcome).

spending for his district will face the risk that his colleagues will fail to follow suit, harming his constituents (who lose dollars to rival districts), and ultimately doing very little to tackle the deficit.<sup>194</sup> This creates an imposing coordination problem for legislator's seeking to bring down the national debt—unless they can coordinate with a critical mass of their colleagues, they have no incentive to individually pursue the belt-tightening and tax hiking that creates political opprobrium. This coordination problem may exacerbate the contradictory signals that lawmakers receive from their constituents: voters, in the abstract, may want reductions in the deficit, but only if it can be done on fair terms. Sequestration thus offers an appealing choice to the legislator stuck between a rock and a hard place, who otherwise must choose between fruitlessly tackling the debt alone or appearing to do nothing about it at all. Sequestration appears to overcome the coordination issue of the prisoner's dilemma, because it employs uniform cuts that appear to apply fair terms across the board while reducing the deficit. In theory it presents legislators the choice of negotiating at gunpoint or having to share painful cuts across the board.

#### D. *Salvaging Sequestration*

Finally, this Note very briefly highlights three possible improvements to the sequestration procedure which may be of some value to policymakers committed to the use of sequestration, in spite of this Note's conclusion that sequestration is generally an ineffective tool for deficit reduction. All three hinge on what this Note considers to be the greatest mutable shortcoming of the current manifestation of the sequestration function: namely the fact that setting sequestration along contemporary political battle lines offers no incentive for *ex ante* negotiation about budget reform.

The first proposal is to drastically cut the percentage of the budget exempted from sequestration and, to compromise with political necessity, implement staggered tiers of sequestration that provide some protection for the most politically sensitive and vital programs. In some ways both acts already do this, namely, in regard to Medicare, which when faced with cuts from sequestration that “would exceed 2 percent for a fiscal year” causes OMB to “increase the reduction for all other discretionary appropriations and direct spending . . . by a uniform percentage to a level sufficient to achieve the reduction re-

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194. See Joyce & Reischauer, *supra* note 54, at 443 (“The deficit is a performance measure for the whole Congress, but the performance measure for an individual member is tied-up in bringing benefits home to the district, which often means resisting deficit reduction.”).

quired.”<sup>195</sup> The GRH contained a similar provision, which set the maximum sequestration from Medicare at two percent, save for FY 1986, where it was capped at one percent.<sup>196</sup> Future attempts at using sequestration should scrap broad exemptions and instead use reasonable caps on certain programs, such as Medicare or Social Security, to insulate them from highly damaging cuts. By forcing the most politically sensitive programs to put some skin in the game, Congress will force itself to more earnestly discuss substantive, rather than politically convenient, deficit reduction plans.

This plan has the significant downside of forcing Congress to make significant judgment calls in the context of an already highly sensitive political environment. By forcing legislators to create a series of staggered tiers covering the entirety of the budget, Congress’s final determination will be seen not only as technical number crunching, but also as expressing the core political values of the country. This sort of high stakes proposition is part of the reason prior Congresses have been so willing to exempt large swathes of the budget; it allows them to dodge responsibility for controlling highly sensitive parts of the budget. But there could be a potential upside to these thorny political determinations. By including the entirety of the budget in the sequestration process, Congress is telling the public that the country as a whole must make sacrifices in order to bring our fiscal house into order. Sequestration would cease to be a forum for horse trading where individual constituencies seek out special treatment at the expense of others. By including everything in the budget, a staggered tier form of sequestration would emphasize unity and shared sacrifice, while still allowing political leaders to make clear that certain federal expenditures are particularly important to society.

Second, future Congresses considering sequestration must attach some increase in revenues to sequestration. Making tax increases part of the default provisions of sequestration will create an added incentive to reach a comprehensive agreement on deficit reduction. Congress’s prior attempts at sequestration failed in large part because their default position is to simply punish the most politically vulnerable programs. On top of the politically bitter pill of facing cuts to entitlement spending, tax increases would offer policymakers an increasingly unattractive default position to fall back upon. Legislators, however, would face a serious collective action problem in accom-

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195. Budget Control Act of 2011, Pub. L. No. 112-25, § 251A(9), 125 Stat. 240, 258–59 (2011).

196. Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 256(d), 99 Stat. 1037, 1087 (1985).

plishing this, either through inclusion in the sequestration function or through negotiations to meet caps, because of the political costs typically associated with tax hikes.

Finally, and perhaps most radically, Congress could consider randomizing where the sequestration axe would fall, perhaps within some broader framework (i.e. exempting some programs, but not setting a precise formula to evenly allocate cuts among different programs). As Elizabeth Garrett writes, “The specter of random federal resource allocation might be so distasteful to interest groups, constituents, and lawmakers that they would face up to difficult budget choices to avoid meeting budget targets through such a default method.”<sup>197</sup> While this was the exact same motivation the *pro rata* cuts were supposed to provide under the GRH, the element of chaos serves as a much stronger motivator to lawmakers than a carefully crafted political compromise which does not disproportionately punish one partisan group and thus offers a more neutral default position.

The shortcomings of such a procedure are obvious and numerous. On the one hand, in its purest form such a random sequestration could, without prior warning, cause catastrophic harm to one particular part of the government. Conversely, if this threat were to be minimized by limiting the random sequestration to a select part of the budget or capping the reduction a single agency or program might face, it would drain the procedure of its increased motivational value. Furthermore, such a harsh mechanism might make the already unpopular sequestration function even more unpalatable to the public. The notion of random cuts also flies directly in the face of the notion that political and administrative decision making is meant to be deliberative, reflective of society’s values and needs, and, in many areas, highly technocratic. Ultimately this sort of radical regime is better reserved for the faculty lounge than for real world application, where its impacts could be draconian and grossly inequitable.

#### CONCLUSION

In conclusion, regardless of form, sequestration is unlikely to be successful. While this Note analyzed many of the substantive shortcomings of the GRH and the BCA, it also recognized that there are certain inherent difficulties in using budget processes rooted in statute to control future congressional action. This ultimately is the major conclusion policymakers must draw from the country’s experience with sequestration. Internally applied rules will breakdown over time

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197. See Garrett, *supra* note 39, at 395 n.26.

as incentives and circumstances change. If the will to obey the rules existed in fact, then the very rules would likely be unnecessary to begin with.

It thus appears that Mr. Gingrich's bold proclamation was right in one regard, but wrong in another. He is right in thinking that sequestration is unlikely to work, but he is wrong in thinking that it is akin to a choice between losing one body part or another. Instead, it is perhaps most similar to an initially eager dieter, who upon making their New Year's resolution signs up for a sure-fire weight loss system with tough rules for eating right and exercising. The problem is, no matter how good the rules are, come February the dieter's enthusiasm has waned and his sweet tooth has returned. Dieting and budget reform are thus remarkably similar: there are no shortcuts and both require some old fashioned belt tightening.