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FEDERAL BUDGET PROCESS REFORM

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ABSTRACT

AMERICA'S FOUNDERS' REPUBLICAN self-government project was informed by the idea that respect for the moral equivalence of persons implies a number of institutional imperatives. Among these are the government's duty to promote non-discriminatory statutory law and the equal political participation of citizens and their elected representatives. The Founders insisted that trust in government is essential to the stability of government and the security of rights, and that public participation in, and the transparency of, political processes are essential to the cultivation of trust in government.

JEL codes: H10, H11, H20, H50, H60, H61

I. INTRODUCTION

AMERICANS LONG AGO became acclimated to declarations of “fiscal crisis,” “deficit crisis,” and “debt crisis.” The same is true of demands for, and claims of, commitments to “fiscal responsibility.” But if Americans have heard it all before, it is also true that these declarations strike increasingly discordant notes. Americans seem more and more to understand that, whereas the declarations of fiscal crisis have some correspondence to observable reality, the commitments to “fiscal responsibility” are not credible. The result has been a decline in trust in government. Because trust may properly be considered to be one of the necessary lubricants of republican self-government, this decline is a matter of considerable concern. As James Madison noted about the role and importance of public opinion, “All power has been traced up to opinion. The stability of all governments and security of all rights may be traced to the same source.”¹

The decline in public trust in government is both a reflection of the lack of credible commitments to fiscal responsibility and a manifestation of what two nationally recognized congressional scholars, Thomas Mann and Norman Ornstein, have called the “demise of regular order.” One expression of this phenomenon is found in the neglect of, or the decision deliberately to disregard, “the rules, precedents, and norms guaranteeing opportunities for genuine debate and deliberation in the House.”² That abuses of regular order have occurred under majorities of both parties serves only to fuel the perception that the budget process is broken and that “ordinary citizens can have little confidence that their views have any weight in decisions made by Congress.”³

The collapse of the federal budget process and the decline in trust in government threaten the stability of the self-governing republic that we inherited from our nation’s founders. Informed by their moral and political philosophy, we suggest an approach to reforming the budget process aimed at reclaiming that institutional

1. Jack N. Rakove, ed., *James Madison: Writings* (New York: Literary Classics of the United States, 1999), 503.
2. Thomas E. Mann and Norman J. Ornstein, *The Broken Branch* (Oxford: Oxford University Press, 2006), 170, 106.
3. *Ibid.*, 174. Mann and Ornstein are here quoting a *Roll Call* op-ed written by Scott Lilly, a former Appropriations Committee staff member.

trust. We argue that budget process reform must be animated by two related ideas: First, that post-constitutional statutory law must be impartial, and second, that both citizens and their elected representatives have a right to participate in, and to influence, the political process.

The balance of the paper is organized as follows: Section 2 traces the evolution of budget process law and argues that Congress must reclaim its constitutional role as the first among the federal government's equal branches. Section 3 provides an account of the procedural abuses that have effectively disenfranchised both members of Congress and their principals, America's voters. Section 4 argues that federal budget process reform must be procedurally based. Finally, section 5 suggests procedural budget process reforms.

II. CONGRESSIONAL HEGEMONY AND THE EVOLUTION OF BUDGET PROCESS LAW

WE BEGIN OUR analysis by adopting the view that Congress is the first among the equal branches of the federal government. Professors Neal Devins and Keith E. Whittington have noted, for example, that on the one hand,

Congress is the first branch of government established by the Constitution. Its priority within the constitutional text reflects the substantive importance that the founders expected the legislature to have in the political system and its significance within their political theory. It was Congress, armed with the authority provided by popular election, that was expected to enjoy the greatest public support and to dominate national politics. It was Congress that would shoulder the task of making national policy and setting the national political agenda. It was Congress that carried the founders' hopes for the success of the constitutional experiment.⁴

On the other hand,

it was also Congress and its frenetic ambitions that required the most careful attention at the constitutional convention in Philadelphia and the most detailed limitations in the constitutional text. Congress was at the center of the constitutional enterprise.⁵

4. Neal Devins and Keith E. Whittington, *Congress and the Constitution* (Durham, NC: Duke University Press, 2005), 1.

5. *Ibid.*

While the pre-1921 period saw the development of a standing congressional committee system and the emergence of a formal distinction between the authorization and appropriations processes, prior to 1921 “there was no authority for the President to submit a single, coordinated budget proposal, or for Congress to consider one.”⁶ According to at least one account, movement toward presidential involvement in the budget process was pursued by the progressive reformers of the early twentieth century: “These reformers placed little trust in legislative institutions. Legislative corruption . . . led them to place more trust and authority in executive and administrative institutions. This belief manifested itself on the national level in the movement for an executive budget system.”⁷ The movement found expression in the Budget and Accounting Act of 1921. Whereas the Treasury Department had, since 1878, compiled the various executive department budget requests into a comprehensive Book of Estimates, the act required that the president annually submit a consolidated budget proposal for congressional consideration.

The forces that animated the 1921 act centered on the “need for a national budget system,” on a reversal of the “former trend toward . . . independence and self-determination” among the executive branch’s departments and agencies, and on improved administrative planning and management.⁸ Indeed, “in the course of the hearings held in 1919 by the House select committee on the need for a national budget system,”⁹ Treasury secretary Carter Glass averred that “a real budget system would have to be anchored in the President’s power.”¹⁰ Congressman James W. Good of Iowa, “who probably deserves the largest share of credit for making the Budget and Accounting Act what it came to be,”¹¹ appeared to share this view. During House debates on the act, the congressman said, “We do not appropriate money simply for the purpose of making appropriations; we appropriate money to carry out work planned for the Government. The President alone formulates this plan.”¹² It is significant that, given this emphasis on the president’s role in the budget process, “No one disputed the proposition that Congress, in acting on the President’s plan, should treat it as the unified work program presented by the constitutional head of the executive branch. Congress might attempt to improve it, or even alter it in its general structure. But whatever its legislative disposition, the inner consistency of the program would have to be recognized.”¹³

6. Joint Committee on the Organization of Congress, *Organization of the Congress* (Washington, DC: US Government Printing Office [GPO], 1993), 110.

7. *Ibid.*

8. Fritz Morstein Marx, “The Bureau of the Budget: Its Evolution and Present Role, I,” *American Political Science Review* 39, no. 4 (1945): 657, 656, 661.

9. *Ibid.*, 657.

10. *Ibid.*, 660.

11. *Ibid.*, 657.

12. *Ibid.*, 661.

13. *Ibid.*

The locus of power had shifted by the time of the Congressional Budget and Impoundment Control Act of 1974.¹⁴ The “major purposes of this Act were to reassert the congressional role in budgeting, to add some centralizing influence to the Federal budget process, and to constrain the use of impoundments [by the president].”¹⁵ While Title X, Impoundment Control, codifies congressional procedures for consideration of presidential requests to defer expenditures or to cancel budget authority, other provisions of the act are designed to strengthen the congressional role in the budget process. Title I establishes the House and Senate budget committees, Title II establishes the Congressional Budget Office (CBO), and Title III institutionalizes a “Congressional Budget Process.”

Pursuant to a timetable (section 300 of the act), the congressional budget process begins with the submission of the president’s nonbinding budget request. Then, in broad outline, the House and Senate budget committees must resolve any differences and produce the first congressional budget resolution. The resolution, which must be adopted by April 15, sets targets for total spending and receipts, the size of the deficit or surplus, and the debt limit.¹⁶ The work of the budget committees is informed by the views and estimates of all budget matters within the jurisdiction of the House and Senate committees and by CBO “baseline projections” of the federal budget. The baseline projections, required by section 202(e) of the 1974 act,¹⁷ are “a projection of the estimated receipts, outlays, and deficit or surplus that would result from continuing current law or current policies through the period covered by the budget.”¹⁸ Finally, in a report on the budget resolution, the budget committees allocate the total on-budget budget authority and outlays codified in the resolution to the appropriations and other committees with spending jurisdiction.¹⁹ The appropriations committees are then required, under section 302(b) of the 1974 act, to divide the allocations among their subcommittees.

Section 303(b) of the 1974 act provides an “exception” that allows the House of Representatives to begin work on the twelve appropriations bills whether or not the budget resolution has been adopted. After passage by the House, each of the twelve bills is referred to a Senate appropriations subcommittee with parallel jurisdiction.

14. For a discussion of “Congressional Budgeting, 1921–1974,” see Joint Committee on the Organization of Congress, *Organization of the Congress*, 111–112.

15. *Ibid.*, 112. For a definition of “impoundment” see Committee on the Budget, US House of Representatives, *Compilation of Laws and Rules Relating to the Congressional Budget Process* (Washington, DC: GPO, 2008). Reduced to its essentials, “impoundment” is understood to be a presidential “(refusal to spend) appropriated monies.” Joint Committee on the Organization of Congress, *Organization of the Congress*, 112.

16. OMB, *Budget of the U.S. Government, Fiscal Year 2012, Analytical Perspectives* (Washington, DC: GPO, 2011), 116.

17. CBO, “Preface,” in *Budget and Economic Outlook: An Update* (Washington, DC: CBO, August 2011).

18. OMB, *Budget of the U.S. Government, Fiscal Year 2012, Analytical Perspectives*, 133.

19. On-, off-, and off-off-budget concepts are discussed in Section 3.

Appropriations bills, in turn, are influenced by the authorization process. Whereas “authorizations establish government programs, agencies, and duties, as well as use statutory language explicitly to authorize the enactment of appropriations,” the December 1993 *Final Report* of the Joint Committee of the Organization of Congress observed that “convergent trends in modern congressional practice have made the separation between authorizations and appropriations somewhat less clear in recent years. . . . This development has meant that there is sometimes little to distinguish authorizations from appropriations, except that they use the language ‘. . . hereby authorized to be appropriated’ rather than ‘. . . hereby appropriated.’”²⁰

Congress also provides budget authority in laws other than appropriations acts:

While annual appropriations acts fund the majority of Federal programs, they account for only about a third of the total spending in a typical [fiscal] year. Authorizing legislation controls the rest of the spending, which is commonly called ‘mandatory spending’. A distinctive feature of these authorizing laws is that they provide agencies with the authority or requirement to spend money without first requiring the Appropriations Committees to enact funding. This category of spending includes interest the Government pays on the public debt and the spending of several major programs, such as Social Security, Medicare, Medicaid, unemployment insurance, and Federal employee retirement.²¹

Whereas the 1974 budget act did not focus on budgetary balance, a body of budget process law was animated by the size and persistence of unified budget deficits. Setting aside the question of whether respect for the 1974 act’s procedural imperatives might have mitigated the effects of the “concentrated benefit–dispersed cost” phenomenon,²² the Balanced Budget and Emergency Deficit Control Act of 1985 (known more familiarly as the Gramm-Rudman-Hollings Act or GRH) sought “to reduce the size of the [unified budget] deficit by specified amounts each year until expenditures were in balance with revenues.”²³ Failure to meet the annual deficit reduction targets triggered sequestration, or across-the-board spending cuts.

We know, of course, that the fiscal year 1991 balanced budget target date set by GRH was not met. The same is true of the fiscal year 1993 balanced budget target date established by the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987.²⁴ The Budget Enforcement Act of 1990 (BEA) amended

20. Joint Committee on the Organization of Congress, *Organization of the Congress*, 115.

21. OMB, *Budget of the U.S. Government, Fiscal Year 2012, Analytical Perspectives*, 117.

22. See, for example, Senate Committee on the Judiciary, *Balanced Budget – Tax Limitation Constitutional Amendment, Report on S. J. Res. 58*, 97th Congress, 1st sess., 1981, 4–7.

23. Joint Committee on the Organization of Congress, *Organization of the Congress*, 114.

24. *Ibid.*

GRH. It eliminated GRH's annual deficit targets, institutionalized a five-year deficit reduction agreement, and established a new, unified budget convention. It drew a formal distinction between appropriations-act-controlled "discretionary" spending and "mandatory" spending, which, as we have seen, is controlled by permanent laws. Finally, the BEA formalized a new budget enforcement process that sought to ensure that tax and mandatory spending changes were "deficit neutral."²⁵ The BEA's statutory enforcement process, styled pay-as-you-go (PAYGO), expired in 2002, although the Statutory Pay-As-You-Go Act of 2010 reestablished PAYGO with a more limited enforcement mechanism.²⁶ Recently, the budgeting process has further broken down, as Congress has failed to pass a budget for over three years. As David Primo, associate professor of political science and business administration, has noted, "Budget rules . . . are effective when they are designed to account for the larger institutional environment in which they operate and are attached to credible enforcement mechanisms, as state balanced budget rules show. They are ineffective when political compromise produces a rule filled with loopholes or implausible enforcement techniques, as the history of federal budget reform demonstrates."²⁷

III. THE NEED FOR BUDGET PROCESS REFORM

THE BEA DRAWS a formal distinction between "discretionary" and "mandatory" spending. These two budget categories, along with receipts from all sources, define the unified budget.²⁸ While it is significant that, in fiscal year 2011, appropriations acts accounted for "only a third" of total spending, it is important to recognize the trend:

Beginning with the establishment of the Reconstruction Finance Corporation in January 1932, Congress gradually reduced the portion of the budget under the direct control of the Appropriations Committees through the use of "backdoor spending" techniques that bypassed the annual appropriations process. Backdoor spending is created pursuant to legislation reported from authorizing committees and enacted into law. . . . [In 1993], the Appropriations Committees control less than half of all Federal spending.²⁹

It is clear that mandatory spending is not controlled by annual appropriations acts, but it could be. In fact, whereas a past Congress approved the mandatory

25. For a detailed discussion of the Budget Enforcement Act, see OMB, *Budget of the U.S. Government, Fiscal Year 2004, Analytical Perspectives*, 460–461.

26. OMB, *Budget of the U.S. Government, Fiscal Year 2012, Analytical Perspectives*, 119.

27. David M. Primo, *Rules and Restraint: Government Spending and the Design of Institutions* (Chicago: University of Chicago Press, 2007), 123.

28. OMB, *Budget of the U.S. Government, Fiscal Year 2012, Analytical Perspectives*, 136.

29. Joint Committee on the Organization of Congress, *Organization of the Congress*, 111.

spending convention, it cannot “bind a succeeding Congress by a simple statute.”³⁰ It follows that succeeding Congresses *could* pass annual appropriations acts controlling *all* federal spending.

It is important also to recognize that the budget resolution contemplated by the 1974 act may contain “reconciliation directives.” These directives require the authorizing committees to change laws that involve federal receipts and mandatory spending. While a reconciliation instruction “may also specify the total amount by which the statutory limit on the public debt is to be changed,” “reconciliation bills are typically omnibus legislation, combining the legislation submitted by each reconciled committee in a single act.”³¹ Precisely because “such legislation may, for example, change the tax code, revise benefit formulas or eligibility requirements for benefit programs, or authorize Government agencies to charge fees to cover some of their costs,” the justification for omnibus bills is that “such a large and complicated bill would be difficult to enact under normal legislative procedures because it usually involves changes to tax rates or to popular social programs, generally to reduce projected deficits.”³²

We note next that two components of mandatory spending, transactions of the Social Security trust fund and the Postal Service fund, are designated, by statute, as “off-budget.”³³ In practice, this has meant that Social Security trust fund surpluses have financed on-budget, discretionary, and other spending and have reduced on-budget deficits.³⁴

If this budgetary casuistry is problematic, so too is the fact that each of the programmatic mandatory spending components, including Social Security, Means Tested Entitlements, and Other, is controlled by permanent authorizing laws rather than by appropriations acts. As we have seen, spending outside the normal appropriations process accounts for an increasing percentage of total federal outlays. Whereas in fiscal year 1965 Social Security, Means Tested Entitlements, and Other mandatory spending accounted for 27.7 percent of total federal outlays, the comparable estimate for fiscal year 2012 is 60 percent.³⁵

The “Other” mandatory programs include programs that fall under the following budget functions: national defense, international affairs, energy, agriculture, deposit insurance, the Universal Service Fund, other commerce and housing credits, community and regional development, general government, Medicare SGR offset allowance, spectrum auctions and major asset sales, other undistributed offsetting

30. Senate Committee on the Judiciary, *Balanced Budget – Tax Limitation Constitutional Amendment*, 42.

31. OMB, *Budget of the U.S. Government, Fiscal Year 2012, Analytical Perspectives*, 118.

32. *Ibid.* For more on this, see Joint Committee on the Organization of Congress, *Organization of the Congress*, 113.

33. OMB, *Budget of the U.S. Government, Fiscal Year 2012, Analytical Perspectives*, 135.

34. OMB, *Budget of the U.S. Government, Fiscal Year 2012, Historical Tables*, table 1.1.

35. *Ibid.*, table 8.2.

receipts, and all other mandatory programs.³⁶ These “other” programs have grown from 13.4 percent of federal outlays in 1965 to 25.2 percent in 2012.³⁷

Once again, the essential point is that these programs are controlled by permanent authorizing laws. They are, therefore, not subject to the scrutiny that, in principle, attends the annual appropriations process. The comments of Senator David Boren, former co-chairman of the Joint Committee on the Organization of Congress, and former Senator Henry Bellmon are instructive. The former “recommended that mandatory programs be addressed ‘in the [annual] budget resolution,’” and the latter “suggested [that] ‘only interest should be exempt from expenditure limits and sequestration.’”³⁸

We have discussed on- and off-budget activity and spending outside the normal appropriations process. We turn now to off-off-budget activity. At issue are federal credit and insurance programs, tax expenditures, and federal regulation. The Office of Management and Budget (OMB) has provided a convenient summary of the scope and reach of federal credit and insurance programs:

The Federal Government offers direct loans and loan guarantees to support a wide range of activities including home ownership, education, small business, farming, energy, infrastructure investment, and exports. Also, Government Sponsored Enterprises (GSEs) operate under Federal charters for the purpose of enhancing credit availability for *targeted sectors*. Through its insurance programs, the Federal Government insures deposits at depository institutions, guarantees private defined-benefit pensions, and insures against other risks such as flood and terrorism. Recently, in response to severe financing difficulties in private markets, GSEs have been playing more active roles in the secondary market³⁹ [emphasis added].

While a comprehensive discussion of individual federal credit and insurance programs is beyond the scope of this paper, two issues are of immediate interest. We consider, in turn, the rationale employed to justify such programs and their inherently discriminatory nature. In the OMB’s account, federal credit and insurance programs are justified because “credit and insurance markets sometimes fail to function smoothly due to market imperfections.”⁴⁰ In addition, the OMB notes,

36. Ibid., table 8.6.

37. Ibid., table 8.3.

38. Joint Committee on the Organization of Congress, *Organization of the Congress*, 120.

39. OMB, *Budget of the U.S. Government, Fiscal Year 2012, Analytical Perspectives*, 369.

40. Ibid.

“Federal credit programs are often used to provide subsidies that reduce inequalities or extend opportunities to disadvantaged regions or segments of the population.”⁴¹

Turning to another component of federal off-off-budget activity, tax expenditures are defined as “revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax or a deferral of liability.”⁴² While it is recognized that tax expenditures “may be viewed as alternatives to other policy instruments, such as spending or regulatory programs,” that is not our immediate concern. Neither do we address here the problems that attend both the measurement and the interpretation of tax expenditure estimates.⁴³

What is at issue is that by any objective standard, “tax expenditures” are a metaphor for the inherently discriminatory post-constitutional politics that the Founders sought to constrain.⁴⁴ Given the moral equivalency of persons, tax policy should be informed both by Madison’s admonition that “the apportionment of taxes . . . is an act that seems to require the most exact impartiality”⁴⁵ and by John Rawls’s observation that “since the burden of taxation is to be justly shared . . . a proportional expenditure tax may be part of the best tax scheme.”⁴⁶

While a comprehensive discussion of off-off-budget regulatory activity is beyond the scope of this paper,⁴⁷ this much can be said: the relationship between the pace of legislation; the growth in the absolute size of federal on-, off-, and off-off-budget activity; and the lack of congressional oversight activity should be a matter of concern.

Finally, it should be noted that the failure to adhere to “regular order”—“the rules, precedents, and norms guaranteeing opportunities for genuine debate and deliberation in the House”⁴⁸—is a bipartisan enterprise.

From March 4 through April 1, 1993, the Joint Committee on the Organization of Congress heard member testimony on the budget process. The committee’s December 1993 *Final Report* noted that “one of the most often heard complaints was how often budget rules are waived.” The report emphasized that “waivers tend to blur, for instance, the distinctions between authorizations and appropriations. According to the rules of both the House and Senate, the authorization committees legislate, while the appropriations committees recommend funding *in that sequence*”⁴⁹ (emphasis added). The problem, as the committee notes, is that “appro-

41. Ibid., 370.

42. Ibid., 239.

43. Ibid., 240.

44. Ibid., tables 17-1 and 17-2, 241–251.

45. George W. Carey and James McClellan, eds., *The Federalist* (Indianapolis: Liberty Fund, 2001), 45.

46. John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971), 278.

47. For a detailed discussion of the major categories of tax expenditures and their economic effects, see Jeremy Horpedahl and Brandon M. Pizzola, “A Trillion Little Subsidies: The Economic Impact of Tax Expenditures in the Federal Income Tax Code,” Mercatus Center Working Paper Series, forthcoming.

48. Mann and Ornstein, *The Broken Branch*, 106.

49. Joint Committee on the Organization of Congress, *Organization of the Congress*, 118.

priations bills are often passed before or without any authorization; appropriators may also include authorizing legislation.” Indeed, one representative testified, “There are Members in the House who supposedly have jurisdiction in an area and have not passed authorization bills for years, and years, and years, because that has been wrenched away from them in the appropriations process.”⁵⁰

While it is true that the testimony was proffered while Republicans were in the minority, the same propensity to waive procedural rules was exhibited when Republicans were in the majority. Writing in 2006, Mann and Ornstein noted “the demise of regular order” and that “the percentage of open or modified open rules dropped from 44 percent in the 103rd Congress (the last controlled by the Democrats) to 26 percent in the 108th Congress.” Moreover, during the same time period, “the percentage of closed or modified closed rules jumped from 18 percent to 49 percent.” Finally, there has been “an increasing use by the Republican majority of self-executing rules.”⁵¹

The upshot is that *both* parties have aggressively substituted “closed rules” that shut off all attempts to amend legislation on the House floor for “open rules” that allow members to offer amendments to pending legislation. The same is true of “self-executing rules,” or rules “which alter bills automatically when they come to the floor, sometimes for technical corrections but often to accommodate the interests of majority members and leaders.”⁵²

If closed and self-executing rules attenuate member and public participation in the legislative process, so too do other departures from regular order. Mann and Ornstein note, for example, that legislative committee work on controversial legislation is “increasingly . . . being done by the [relevant] committee chair, party leadership, administration officials, and lobbyists”; that conference committees often proceed “without any pretense of a full committee markup”; and that the Rules Committee routinely calls “emergency meeting[s] ‘at any time on any measure or matter.’”⁵³

While Mann and Ornstein’s data and observations characterize the experience of the 103rd through 108th Congresses, the lessons drawn apply to contemporary congressional practice. They observe that “during the 108th Congress the Rules Committee, in structuring consideration of twenty-eight conference reports, almost always in emergency session, in every case waived all points of order against the conference report and against its consideration. *This action made it virtually impossible to discover what was in each conference report before voting on it*”⁵⁴ (emphasis added). If, as Mann and Ornstein suggest, the problem of “unraveling what was in

50. Ibid.

51. Mann and Ornstein draw these data from the work of Donald Wolfensberger, a former member of the Republican Rules Committee staff. Mann and Ornstein, *The Broken Branch*, 172.

52. Ibid., 8.

53. Ibid., 172.

54. Ibid.

the bill that became law” applied to the 2003 Medicare prescription drug bill, the same can be said of the Patient Protection and Affordable Care Act signed into law in 2010.

The House Rules Committee’s practice of waiving points of order, generally in an emergency session, has facilitated the “now-routine process of folding many significant issues into huge omnibus bills and bringing them to the House floor for up-or-down votes without any notice or time for members to read or absorb them.”⁵⁵ In Mann and Ornstein’s account, “This form of legislating . . . results in stealth legislation that has not really passed majority muster and frequently has embarrassing consequences.”⁵⁶ We agree. Closed rules, self-executing rules, “emergency” meetings, omnibus bills, and other departures from “regular order” increase information asymmetry; promote opportunistic, discriminatory behavior; and violate the principle of equal political participation. Our suggested budget process reforms in section 5 reflect this understanding.

IV. PROCESS-BASED VS. OUTCOMES-BASED BUDGET PROCESS REFORM

THE DISTINCTION BETWEEN budget process reforms that are essentially outcomes-based and procedurally detached and those that are procedurally based and outcomes-detached is central to our analysis. Budget process reforms that contemplate particular policy outcomes as goals are, by definition, designed by “individuals with interests.” In the absence of effective external enforcement—in the form, for example, of public outrage or judicial intervention, itself a problematic enterprise—outcomes-based budget reforms are likely to fail.

Consider that absent “exogenous” or external enforcement, “endogenous” or internal budget rule enforcement depends on legislators’ respect for those rules.⁵⁷ The problem is that outcomes-based arguments can always be deployed to rationalize deviations from budget (or other) rules. Legislators who believe that budget rules are justified on utilitarian grounds do not contradict themselves “by supposing that direct utilitarian arguments for deviating from the rules may be entertained.”⁵⁸ These ideas find empirical expression in the fact that “of the two types [of budget process reforms], it is the policy-related reforms that have been particularly unsuccessful at the federal level.”⁵⁹ The legislative interests of their designers can, and do,

55. *Ibid.*, 173.

56. *Ibid.*

57. Enforcement mechanisms may be internal (endogenous) to the institution or external (exogenous) to the institution. Primo, *Rules and Restraint*, 33, 40.

58. David Lyons, “Utility and Rights,” in Jeremy Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1995), 129.

59. Primo, *Rules and Restraint*, 107.

trump outcomes-based budget process rules.⁶⁰ Both logic and experience suggest, then, that desired outcomes are not a suitable guide to institutional design generally, or to budget rule design and enforcement in particular. Something else is needed. What is required is a procedurally based, outcomes-detached approach to budget rule design and enforcement.

These considerations inform our emphasis on process-based budget reform. Given that persons are morally equivalent, institutions must reflect the equal treatment imperative. It follows that equal political participation must be promoted, and fundamental and statutory law must be impartial.

A few empirical examples will help illustrate the idea of justice as impartiality. As indicated earlier, the defining characteristic of “targeted” federal credit programs, whether domestic or international, is in-period discrimination. If in-period discrimination violates the equal treatment imperative, so too does the intergenerational discrimination inherent in credit programs. During calendar year 2010, outstanding direct and guaranteed loans totaled \$828 billion and \$1,867 billion, respectively, and the associated future costs are estimated to total \$132 billion.⁶¹ These costs are imposed on future members of the polity without their consent. Both in-period and intergenerational discrimination violate the equal treatment imperative.

If, as we argue, federal credit programs violate the equal treatment imperative, the same is true of federal insurance programs. We acknowledge that “ex post differentiation is the nature of all true insurance programs,”⁶² because insurance program benefits depend upon the occurrence of random, future events. What is important from the equal treatment perspective is that program benefits be uniformly distributed among members of the polity in an ex ante sense; that is, the requirement is that “each insured contingency is equally likely, and equally valued by *all* within the polity of interest”⁶³ (emphasis added).

If deposit insurance appears, roughly, to satisfy the equal treatment imperative, the same cannot be said of defined-benefit pension guarantees or of flood and crop insurance. Given the increasing reliance on defined-contribution pension plans, the defined-benefit pension guarantees offered by the Pension Benefit Guarantee

60. While it is true that, in principle, rights as enumerated in the Bill of Rights trump utilitarian arguments, the argument developed here is that consequence-based budget rules can always be overcome by utilitarian arguments for deviating from them. That said, it is also true that the body of constitutional jurisprudence includes at least one case in which property rights were trumped by utilitarian considerations. Writing for the 5–4 majority in *Kelo et al. v. City of New London et al.* (545 U.S. [2005]), Justice Stevens finds that “The City [of New London, Connecticut] has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. . . . Because that plan unquestionably serves a *public purpose*, the takings challenged here satisfy the public use requirement of the Fifth Amendment” (Opinion, p. 13; emphasis added).

61. OMB, *Budget of the U.S. Government, Fiscal Year 2012, Analytical Perspectives*, 389.

62. James Buchanan and Roger Congleton, *Politics by Principle, Not Interest: Towards Nondiscriminatory Democracy* (Cambridge: Cambridge University Press, 1998), 132.

63. *Ibid.*

Corporation (PBGC) are, transparently, both anachronistic and inherently discriminatory. Moreover, as of September 30, 2010, “the single-employer and multi-employer programs reported deficits of \$21.6 billion and \$1.4 billion, respectively.” While the PBGC “has \$79 billion in assets and will be able to meet its obligations for a number of years . . . neither program has the resources to fully satisfy PBGC’s obligations in the long-run.”⁶⁴ Given the in-period and intergenerational discrimination inherent in it, the defined-benefit pension benefit program violates the equal treatment imperative.

The National Flood Insurance Program (NFIP) was established in 1968. A catalyst to the program’s creation was the fact that, prior to 1968, “many factors made it cost prohibitive for private insurance companies alone to make affordable flood insurance available.” The program’s administrator, the Federal Emergency Management Agency of the Department of Homeland Security, seeks both to “make affordable [flood] insurance coverage widely available” and to “have property owners be compensated for flood losses through flood insurance, rather than through taxpayer-funded disaster assistance.” The federal flood insurance program had, by the end of 2010, more than 5.6 million policies in force, in 20,200 communities, with over \$1 trillion of insurance in force.⁶⁵ Federal crop insurance “assists farmers in managing yield and revenue shortfalls due to bad weather or other natural disasters.”⁶⁶ While private insurers sell and service crop insurance policies, the federal government reinsures the private insurers for excess insurance losses on all policies, reimburses the private companies for a portion of the administrative expenses associated with providing crop insurance, and subsidizes crop insurance premiums paid by farmers. While it is clear that federal flood and crop insurance programs are inherently discriminatory, it is also clear that the equal treatment imperative cannot be satisfied at the federal level. The problem is that the expected benefits of flood and crop insurance cannot, in the crucial *ex ante* sense, be uniformly distributed among members of the national polity. That said, it is nevertheless true that “a federalized structure of government can provide heterogeneous services while satisfying the strictures of generality.”⁶⁷

The point at issue here that “federal systems may be said to a first-best institutional arrangement that produces outcomes that cannot be replicated by an idealized democratic central government.”⁶⁸ Simply stated, when *ex ante* benefits cannot be uniformly distributed, the provision of programs like flood and crop insurance should be the prerogative of state and local governments, not of the federal government.

64. OMB, *Budget of the U.S. Government, Fiscal Year 2012, Analytical Perspectives*, 384–385.

65. *Ibid.*, 385–386.

66. *Ibid.*, 386.

67. Buchanan and Congleton, *Politics by Principle*, 137.

68. *Ibid.*

V. FEDERAL BUDGET PROCESS REFORM: PROCEDURALLY BASED SOLUTIONS

CHRONIC UNIFIED BUDGET deficits and gross federal debt now in excess of 100 percent of gross domestic product are manifestations of the underlying procedural problem. Recall that 1974 was a watershed year. Passage of the Congressional Budget and Impoundment Control Act of 1974 was important because it sought to reassert the congressional role in the budget process. That role had been significantly diminished by the Budget and Accounting Act of 1921, a law that, for the first time, institutionalized the idea of a *presidential* budget proposal. But the 1974 act was also important because it was a harbinger of a future wave of budget process reforms, laws that focused on the size and persistence of unified budget deficits while leaving the president's role in the budget process intact (see section 2).

Consider, first, the president's role in the budget process. Given that Congress is the first among the equal branches, we take as our point of departure that the 1974 act's attempt to reassert congressional budget authority did not go far enough. In addition to the argument developed in section 2, we note that it is Congress, not the president, that under the Constitution "shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."⁶⁹ It is, in short, Congress's responsibility to write the budget of the federal government. Simply put, the congressional budget calendar should not begin with the phrase "president transmits the budget." Rather than considering, approving, modifying, or disapproving the president's budget request,⁷⁰ Congress should reclaim its budget-writing authority. If asserting its budget authority would represent a welcome reaffirmation of Congress's constitutional duty, it would also affirm the importance of the separation of powers.

Congress's need to reassert its budget-writing authority informs our first procedural response to the federal budget crisis. Because it is Congress's responsibility under the Constitution to write the budget, and because the president's budget proposal adds to the complexity of the budget process, we urge that Congress amend the Congressional Budget and Impoundment Control Act of 1974. The proposed amendment would eliminate the president's budget proposal, but preserve the OMB. Whereas the OMB's current responsibilities include the preparation of the president's budget proposal, after the amendment the OMB would be charged with the responsibility of facilitating the president's response to Congress's budget.

While this budget process reform proposal is animated by respect for the separation of powers, we urge that Congress take account of an imperative discussed in section 3—namely, that government has a duty to promote equal political participation.

69. Article I, Section 8, Clause 1 of the *Constitution of the United States of America*. See also Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*, vol. 2 (Indianapolis: Liberty Fund, 1987), 407–470.

70. OMB, *Budget of the U.S. Government, Fiscal Year 2012, Analytical Perspectives*, 116.

Stated differently, all persons have a right to participate in and to influence the political process. The relevance of this imperative—derivative of a prior ethical commitment to the moral equivalence of persons—is clear, once account is taken of the daunting complexity of the budget process. Other things equal, budget process complexity increases both information asymmetry and the cost of monitoring congressional behavior.⁷¹ This complexity, in turn, invites the opportunistic “factious” behavior that the Founders sought to constrain. In hearings conducted on March 4, 1993, before the Joint Committee on the Organization of Congress, then Joint Committee co-chairman Representative Lee Hamilton remarked that budget issues “are highly complex. Indeed, this is one of the problems with the current budget process. Very few people can understand it . . . the budget process should allow ordinary people, to the extent possible, to discern who is responsible for budgetary policy.”⁷²

The president’s *Fiscal Year 2012 Budget of the U.S. Government* estimates that, during fiscal year 2012, federal outlays and tax receipts will, respectively, exceed \$3.7 and \$2.6 trillion.⁷³ The inherent (and daunting) complexity of a budget process contemplating outlays and receipts totaling 23.6 and 16.6 percent of gross domestic product is apparent.⁷⁴ But it is also apparent that what Mann and Ornstein have called the “demise of regular order” violates the principle of equal political participation.⁷⁵ Hamilton’s remarks, noted above, have basic relevance: “The budget process should allow ordinary people, to the extent possible, to discern who is responsible for budgetary policy.” That said, the congressman’s formulation captures only one part of the problem. It is true that the principle of equal political participation requires that “ordinary people” know “who is responsible for budgetary policy.” But it is also true, as we have repeatedly emphasized, that “ordinary people” must be able to participate in, and to influence, the political process. The point is that the “demise of regular order” militates against the public’s and against members’ ability to participate in, and to influence, the budget process. Part of the problem is the growing propensity of majorities of both parties to substitute “closed rules” for “open rules.” The same is true of “self-executing rules,” or rules “which alter bills automatically when they come to the floor, sometimes for technical corrections but often to accommodate the interests of majority members and leaders.”⁷⁶

The deliberate attenuation of member and public participation in the budget process, and in legislative processes generally, extends beyond closed, modified

71. As former Senator Nancy Kassebaum noted in testimony before the Joint Committee on the Organization of Congress, “We all recognize that entitlements . . . [have] sapped our ability to provide . . . the appropriate monitoring and oversight of programs that need to continually be reviewed.” Joint Committee on the Organization of Congress, *Organization of the Congress*, 120.

72. *Ibid.*, 116.

73. OMB, *Budget of the U.S. Government, Historical Tables*, 27.

74. *Ibid.*, 25.

75. Mann and Ornstein, *The Broken Branch*, 170.

76. *Ibid.*, 8.

open, modified closed, and self-executing rules. As we have emphasized, work on controversial legislation increasingly engages committee chairs, members of party leadership, lobbyists, and administration officials. Noticeably absent are rank-and-file members, the agents who, under the Constitution, are elected to represent their constituents. Moreover, the work of conference committees frequently proceeds without heretofore routine full-committee markups. And, as discussed in section 3, the House Rules Committee exhibits a marked propensity to call “emergency” meetings—meetings that, to the chagrin of minority members, occur without adequate public notice. As Mann and Ornstein have emphasized, actions such as these make it “virtually impossible to discover what [is] in each conference report before voting on it.”⁷⁷ This is particularly true of the increasingly routine process of rolling numerous significant issues into thousand-page omnibus bills. The idea that such bills are generally considered in “emergency” sessions, and are brought to the House floor for up-or-down votes without notice, and without time for members to read them, would have been alien to the Founders’ imagination. The disregard for the duty to promote both member and public political participation is irreconcilable with the Founders’ vision of a constitutionally and morally constrained self-governing republic. Furthermore, departures from regular order facilitate the “rage of legislation” that Thomas Jefferson and James Wilson feared would be a threat to liberty.⁷⁸

If departures from regular order are inconsistent with the government’s duty to promote equal political participation, they also tend to blur the distinction between authorizations and appropriations. The distinction between authorizing legislation and appropriations has, historically, been important: “In making appropriations, the Congress does not vote on the level of outlays (spending) directly, but rather on budget authority, or funding, which is the authority provided by law to incur financial obligations that will result in outlays. In a separate process, before making appropriations, the Congress usually enacts legislation that authorizes an agency to carry out particular programs, authorizes the appropriation of funds to carry out those programs, and, in some cases, limits the amount that can be appropriated for the programs.” It is significant, moreover, that “some authorizing legislation expires after one year, some expires after a specified number of years, and some is permanent.”⁷⁹

We emphasize that “according to the rules of both the House and Senate, the authorization committees legislate, while the appropriations committees recommend funding in that sequence.” The problem is that budget rule waivers “tend to blur . . . the distinctions between authorizations and appropriations.” The “blurred distinction” has been manifested in a number of ways: (1) Appropriations bills

77. Ibid, 172.

78. See Merrill D. Peterson, ed., *Thomas Jefferson: Writings* (New York: Literary Classics of the United States, 1984), 918. See also Kermit L. Hall and Mark David Hall, eds., *Collected Works of James Wilson* (Indianapolis: Liberty Fund, 2007), 1045.

79. OMB, *Budget of the U.S. Government, Fiscal Year 2012, Analytical Perspectives*, 116.

involving so-called “discretionary spending” have regularly been passed before, or without, any authorization. Moreover, appropriators may include authorizing legislation. (2) The budget resolution contemplated by the Congressional Budget and Impoundment Act of 1974 may contain “reconciliation directives” that *require* the authorizing committees to change laws that involve federal tax receipts and “mandatory spending.” Moreover, on the perverse logic that the passage of individual bills intended to change tax law or “popular social programs” would be “difficult to enact under normal legislative procedures,” reconciliation bills are “typically omnibus bills, combining the legislation submitted by each reconciled committee in a single act.” (3) Finally, as we noted in sections 2 and 3, while they fund the majority of federal programs, annual appropriations acts account for only about one-third of total federal spending. Roughly two-thirds of federal spending, characterized as “mandatory spending,” is controlled by authorizing laws that provide agencies with the authority, or requirement, to spend money without requiring that the appropriations committees enact funding. As we have noted, this spending category includes Social Security, Medicare, Medicaid, unemployment insurance, federal employee retirement, and interest on the public debt.

The implications are clear. The distinction between authorizations and appropriations has been lost in a blizzard of budget waivers, reconciliation directives, and what are, effectively, permanent authorizing laws. In addition, spending on social programs is, for practical purposes, on automatic pilot. If all this means that, in practice, the distinction between authorizations and appropriations is specious, it also means that members and their principals, America’s voters, are denied the opportunity fully to participate in, and to influence, the political process. It is because of this logic that we urge Congress to take the following actions:

- impose constraints on the Rules Committee (focusing on the departures from regular order outlined above);
- combine the authorizing and corresponding appropriations subcommittees;
- eliminate the “discretionary” and “mandatory” budget categories, so that the combined authorizing and appropriations subcommittees must authorize *and* enact appropriations for *all* federal programs during each budget cycle; and
- amend the 1974 Congressional Budget and Impoundment Control Act such that the budget resolution may not include reconciliation directives.

The evident failure of budget process laws whose objective was to reduce, and eventually to eliminate, budget deficits, informs our conclusion that budget process law should not be outcomes-based; it should not, in other words, concentrate on the achievement of “deficit reduction” or any other desired outcome (section 4). The alternative, embraced by America’s founders, is a procedurally based approach both to constitutional and post-constitutional statutory law, and to political processes generally. The Founders’ prior ethical commitment to the moral equivalence

of persons found practical expression in federalism and the separation of powers; the Madisonian “auxiliary precautions” sought, by the simple expedient of “setting interest against interest,” to minimize the effect of narrowly self-interested “factious” behavior. Federalism and the separation of powers were, from the Founders’ perspective, representative of a broader commitment to the idea that law, and the processes by which laws are made, must reflect and promote respect for the equal treatment imperative. Madison’s admonition that “the apportionment of taxes . . . is an act which seems to require the most exact impartiality” reflects the Founders’ insistence that post-constitutional statutory law must be impartial. So, too, does Jefferson’s vigorous opposition to the payment of “bounties for the encouragement of particular manufactures.”⁸⁰

We have proffered a set of statutory improvements to the budget process. It is understood, of course, that statutory solutions may be unavailing; that no Congress can bind a subsequent Congress. We acknowledge also that “external” constitutional restraints may provide a more effective solution to the budget process enforcement problem. That said, the “constitutional” solution, involving one or more constitutional amendments, necessarily involves a planning horizon stretching into what can best be characterized as a remote and uncertain future. The budget process crisis must be addressed in the immediate future. Consider also that the intent of a constitutional amendment is one thing; its interpretation is another. Perhaps most important, a set of statutory solutions predicated on a prior ethical commitment to the moral equivalence of persons may cultivate the public support that, in turn, may provide an effective, external constraint on the budget process.

80. Peterson, *Thomas Jefferson*, 677.