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The Balanced Budget Amendment: Will Judges Become Accountants? A Look at State Experiences

*Donald B. Tobin**

The idea that the government should not issue debt and that present generations should not bind future generations has been discussed for over 200 years.[1] Representative Harold Knutson introduced the first constitutional amendment to require a balanced budget in 1936.[2] During the 1980s, as the federal deficit exploded, the idea of adding a constitutional amendment to require a balanced budget became extremely popular. In the ensuing years several balanced budget amendments have been considered by both houses of Congress.[3]

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[1] Thomas Jefferson wrote to John Taylor on November 26, 1798, stating "I wish it were possible to obtain a single amendment to our Constitution. I mean an additional article taking from the Federal Government the power of borrowing." THE WRITINGS OF THOMAS JEFFERSON, 1795-1801, viii, 310 (Paul Leicester Ford ed., 1896). *Cf.* Letter from James Madison to Thomas Jefferson "Debts may be incurred with a direct view to the interests of the unborn, as well as of the living ... all that seems indispensable in stating the account between the dead and the living is, to see that the debts against the latter do not exceed the advances made by the former." THE COMPLETE MADISON, HIS BASIC WRITINGS 30 (Saul K. Padover ed., 1953). Note that Thomas Jefferson did not follow his own advice when as President he advocated that the country borrow $15 million for the purchase of the Louisiana Territories. THIRD ANNUAL MESSAGE, viii, 27. FORD ED., viii, 271 (Oct. 1803).

[2] H.R.J. Res. 579, 74th Cong., 2d Sess. (1936).

[3] For a legislative history of the balanced budget amendment see S. REP. No. 5, 104th Cong., 1st Sess. 3 (1995); SENATE COMMITTEE ON THE BUDGET, PROPOSED CONSTITUTIONAL AMENDMENTS TO BALANCE THE FEDERAL BUDGET—A LEGISLATIVE HISTORY (100th Cong. S. Prt. 103-95, 101st. Cong. S. Prt. 103-94, 102d Cong. S. Prt. 103-92, 103d Cong. S. Prt. 103-112). *See also*, William G. Dauster, *Budget Process Issues of 1993*, 9 J.L. AND POL. 9 (1992). There are several versions of the balanced budget amendment, this paper analyzes H.R.J. Res. 1, which passed the House of Representatives on January 26, 1995. The same amendment was offered in the Senate as S.J. Res. 1. The amendment states:

> SECTION 1. Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote.

The balanced budget amendments considered by Congress would have a dramatic impact on the balance of power between the three branches of government and could increase the role of the judiciary in the budget process.[4] The fear of judicial involvement led one constitutional scholar to claim that the consequences of a balanced budget amendment will be "full employment for lawyers."[5] Limiting judicial involvement, however, introduces a classic "catch 22": If only Congress can enforce the amendment,[6] and Congress already has the constitutional power to balance the budget, the amendment provides no additional power for Congress to balance the budget.[7] Congress could simply change the definition of outlays, receipts, or debt, or deem an almost-balanced budget balanced.[8]

> SECTION 2. The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by rollcall vote.
>
> SECTION 3. Prior to each fiscal year, the President shall transmit to the Congress a proposed budget for the United States Government for that fiscal year, in which total outlays do not exceed total receipts.
>
> SECTION 4. No bill to increase revenue shall become law unless approved by a majority of the whole number of each House by a roll-call vote.
>
> SECTION 5. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. The provisions of this article may be waived for any fiscal year in which the United Sates is engaged in military conflict which causes an imminent and serious military threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law.
>
> SECTION 6. The Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts.
>
> SECTION 7. Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include all outlays of the United States Government except for those for repayment of debt principal.
>
> SECTION 8. This article shall take effect beginning with fiscal year 2002, or with the second fiscal year beginning after ratification, whichever is later.

H.R.J.Res. 1, 104th Cong., 1st Sess., 141 CONG. REC. H753 (Jan. 26, 1995).

[4] In the Federalist Papers No. 78, Alexander Hamilton wrote that the judiciary should have "no influence over either the sword or the purse." THE FEDERALIST No. 78 (Alexander Hamilton).

[5] *Balanced Budget Amendment—S.J. Res. 41: Hearings Before the Senate Comm. on Appropriations*, 103d Cong., 2d Sess. 182 (1994) (statement of Kathleen Sullivan, professor, Stanford University).

[6] Senator Simon, the sponsor of the amendment in the Senate during the 103d Congress, stated that the Courts will not get involved in tax and spending decisions. 140 CONG. REC. S1866 (daily ed. Feb. 24, 1994). Senator Hatch, the Republican sponsor of the amendment in the 104th Congress, stated "I believe, if my colleague looks at facts, he looks at the law, he looks at the Court, there is really no question that the courts cannot enforce this." 141 CONG. REC. S1835 (daily ed. Jan. 31, 1995). *See also, infra* sections II.A and B.

[7] The amendment does include a provision which would require a three-fifths majority of the whole number of each house (i.e., 60 votes in the Senate; 261 in the House) for outlays to exceed receipts and to raise the debt ceiling. The three-fifths majority of the whole number would make it more difficult to take such action and could therefore be seen as an enforcement mechanism. However,

Legislators want to balance the budget, but they also want to fund programs and keep taxes low. The conflict between the desire for a balanced budget and the unwillingness to take the politically dangerous steps to produce one may lead to creative accounting or budget gimmicks to avoid the balanced budget requirement. As the Wisconsin Supreme Court noted regarding the state legislature's willingness to avoid a balanced budget requirement, "The history of the Wisconsin constitutional provision concerning municipal debt manifests both an abhorrence for public debt and a willingness to increase the debt limit, particularly for school purposes."[9]

This paper examines state experiences with balanced budget amendments and asserts that the unintended consequences of a balanced budget amendment will be increased judicial activism regarding fiscal policy. It also discusses the legislative history surrounding the federal balanced budget amendment [hereinafter "Federal Amendment" or "Amendment"], and the current law regarding justiciability to show that these doctrines will not insulate the Amendment from judicial intervention.

I. STATE COURT ADJUDICATION INTERPRETING STATE BALANCED BUDGET AMENDMENTS

Since forty-eight of the fifty states have some type of balanced budget restriction, proponents of the Federal Amendment often point to the state experience as an example of what will happen if there is a Federal Amendment.[10] In both economic and judicial analyses, however, the state example can only provide partial instruction. Although most states claim to balance their budgets, they separate their budgets into capital and operating budgets, and they balance only their operating budgets. Therefore, states can balance their operating budgets while continuing to accrue debt in their capital budgets. The federal government, in comparison, does not have a capital budget, and it does not separate capital and operating expenses for accounting purposes.[11]

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the debt limit provision in the balanced budget amendment could be achieved without a constitutional amendment. *See* Exon Amendment, S. REP. No. 82, 104th Cong., 1st Sess. 296 (1995).

[8] In fact, in the hearing before the Senate Judiciary on S.J. Res. 1, Senator Simon stated that a budget which was two or three percent in deficit would be considered in balance. *Hearings Before the Senate Committee on the Judiciary*, 104th Cong., 1st Sess. (Jan. 5, 1995)(transcript available from the Committee).

[9] Dieck v. Unified School Dist. of Antigo., 477 N.W.2d 613 (Wis. 1991).

[10] S. REP. No. 5, 104th Cong., 1st Sess. 11 (1995).

[11] Debt for state and local governments has increased steadily over the last twenty years. 141 CONG. REC. S2090 (daily ed. Feb. 3, 1995)(statement by Senator Sarbanes)(citing census data—debt of

This section examines state cases to determine the course of state courts regarding the justiciability of balanced budget requirements. The state experience reflects significant judicial involvement in interpreting state balanced budget requirements. In addition, contrary to the contention of many supporters of the Federal Amendment, state and local governments have often evaded balanced budget requirements, sometimes with the consent of the courts. Governors also have used the balanced budget requirements to justify actions and powers that would have been impermissible in the absence of an amendment. State experiences suggest that if the United States Constitution is amended to include a balanced budget requirement, the federal courts will be forced to make judicial determinations regarding budget policy. Furthermore, the state cases provide insight into the problems that courts may confront when interpreting a federal balanced budget amendment.[12]

A. State Courts Have Defined Budgetary Terms in Balanced Budget Amendments

1. Receipts and Outlays

The Federal Amendment requires that "Total outlays for any fiscal year shall not exceed total receipts for that fiscal year...."[13] Although the committee report discusses the terms "outlays" and "receipts,"[14] their specific meaning remains unclear.

In 1949, the Idaho Supreme Court examined the definition of revenue under the Idaho balanced budget amendment.[15] Idaho has a constitutional requirement that prohibits local governments from "exceeding in that year, the income and revenue provided for it for such year...."[16] Thus, local governments in Idaho essentially must keep their accounts on a cash basis.

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state and local government). *See also* G. Robert Morris, Jr, *Evading Debt Limitations With Public Building Authorities: The Costly Subversion of State Constitutions*, 68 YALE L.J. 234 (1958)(citing methods States use to evade their Constitutional requirements). *See also, The Balanced Budget Amendment: Hearings Before the Joint Economic Committee*, 104th Cong., 1st Sess. 41-42 (Pt. 1) (1995)(Governor Allen acknowledged that Virginia's balanced budget requirement allows for debt to be issued as long as interest on the debt does not exceed five percent of general revenues.).

[12] For a contrary view that state examples show that the courts will not get involved with the amendment, *see* David Lubecky, Note, *The Proposed Federal Balanced Budget Amendment: The Lesson From State Experience*, 55 U. CIN. L. REV. 563 (1986). *See also* Letter from Walter Dellinger, Assistant Attorney General, to Senator Hatch (Jan. 9, 1995)(letter available from the Senate Committee on the Judiciary)("[t]here has not been a significant amount of litigation in the states interpreting their balanced budget provisions, and that is a factor that weighs against the argument that there would be an avalanche of litigation under a federal balanced budget amendment.").

[13] *See supra*, note 3.

[14] S. REP. No. 163, 103d Cong., 2d Sess. 11-12 (1994).

[15] Iverson v. Canyon County, 204 P.2d 259 (Idaho 1949).

[16] IDAHO CONST. art. VIII, § 3.

Canyon County levied a tax to prospectively budget for the construction of a new jail. The revenues from the tax were accumulated in the current expense account. Once sufficient funds existed, the county started construction.[17] The county was sued for violating the Idaho Constitution, since in the year the county was spending the surplus, expenditures exceeded income. Finding the situation counter-intuitive, the *Iverson* court held that surplus funds in one fiscal year may be treated as revenue in the next fiscal year.[18] Thus, the definition of revenue now includes surplus funds from past fiscal years; accordingly, Canyon County's revenues and expenditures were deemed balanced in *that* year. By expanding the definition of revenue, the Idaho Court allowed the county to budget prospectively even with the balanced budget requirement.

Iverson exemplifies one of the many problems that might arise at the federal level and highlights why the federal courts might intervene in budget policy. For example, an *Iverson* scenario could arise when the government utilizes surplus funds from the Unemployment Insurance Trust Fund.[19] The Unemployment Insurance Trust Fund is designed to build up surpluses during times of positive economic growth and low unemployment, and pay out these surpluses during recessions. The Federal Amendment would require that revenues not exceed expenditures in *that* fiscal year. So in the year that the economy went into a downturn and the payments from the unemployment trust fund were expended, the budget would not be in balance—in violation of the Constitution. However, just as in *Iverson*, disbursing the expenditures from the trust fund is prudent.

The United States Supreme Court might hear such a case and determine, as did the Idaho Supreme Court, that surplus funds may be treated as revenue. Alternatively, the Court might determine that the legislative history of the Federal Amendment reveals that Congress was aware of this problem and chose not to resolve it. Thus, the Court could find that Congress must have expected that unemployment insurance, Social Security and other trust funds would be funded on a pay-as-you go basis.

2. Expenditures

The Federal Amendment requires that outlays not exceed receipts. North Carolina has a similar provision which requires that "total expenditures ... shall not exceed the total of receipts."[20] In *Boneno v.*

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[17] *Iverson*, 204 P.2d at 261.

[18] *Id.*

[19] The same logic of this paragraph would apply to all federal trust funds.

[20] N.C. CONST. art. III, § 5(3).

State,[21] the North Carolina Court of Appeals was faced with determining the definition of an expenditure. Plaintiffs argued that entering into a contractual obligation was an expenditure under the balanced budget amendment.[22] However, the court held that an "expenditure occurs only when funds are disbursed."[23]

The issue regarding contractual obligations also arises in determining whether contractual obligations may be considered debt under balanced budget amendments.[24] The North Carolina method takes a very limited view of expenditure. If such a definition is followed at the federal level and only disbursed funds are considered expenditures, then the government will have far more flexibility in designing schemes to subvert the Amendment. Borrowing authorities, loan guarantees, lease arrangements, and trust funds would all be valid mechanisms for balancing the budget.

3. Appropriations

In *Karcher v. Kean,*[25] the New Jersey Governor, Thomas Kean, deleted monetary and legislative language from an appropriations bill.[26] Alan Karcher, Speaker of the General Assembly of New Jersey, sued claiming that Kean had exceeded his line-item veto authority by expanding the veto to cover nonmonetary provisions included in the appropriations bill.[27] The court was thus faced with determining what was, in fact, an appropriation. The lower court held that the line-item veto was limited to pure appropriations of money and did not extend to other subject matter.[28] The Supreme Court of New Jersey reversed this decision and held that the Governor has veto power over any subject matter in an appropriations bill as long as it is "broadly related to the [s]tate's fiscal affairs."[29]

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[21] 284 S.E.2d 170 (N.C. Ct. App. 1981).

[22] *Id.*

[23] *Id.* at 171.

[24] *See infra*, section I.B.3.

[25] 479 A.2d 403 (N.J. 1984).

[26] *Id.* at 405. Line-Item Veto authority is granted to the Governor under the New Jersey Constitution. N.J. CONST. art. V, § 1.

[27] *Karcher*, 479 A.2d at 405.

[28] *In re* Karcher, 462 A.2d 1273, 1278 (N.J. Super Ct. App. Div. 1983); *see also* State *ex rel* Stephan v. Carlin, 631 P.2d 668, 672 (Kan. 1981)(defining an appropriation as "the designation of specific sums of money which the legislature authorizes may be spent for specific purposes."); Cenarrusa v. Andrus, 582 P.2d 1082, 1090 (Idaho 1978)(holding that the governor can only veto appropriations and defining appropriations as items that actually dedicated sums of money to a specific purpose); Jessen Associates, Inc. v. Bullock, 531 S.W.2d 593, 599 (Tex. 1975)("if the language is intended to set aside funds for a specified purpose, it is an 'item of appropriation' and is therefore subject to veto by the Governor.").

[29] *Karcher*, 479 A.2d at 416; *but cf. Cenarrusa*, 582 P.2d at 1090 (Idaho 1978)(governor only can veto appropriations and define them as items that actually dedicate sums of money to a specific purpose); *Jessen Associates, Inc.*, 531 S.W.2d at 599 (Tex. 1976)("the Governor must veto the entire bill or let the objectionable part stand.").

In *Karcher,* the court was forced to interpret the scope of a constitutional provision. Specifically, the court examined the question of whether a provision becomes an appropriation whenever such provision is included in an appropriations bill. A similar problem may arise under proposed balanced budget amendments.

The Federal Amendment requires that all revenue bills must pass by a majority of the whole number of each House.[30] Under the scoring rules used by the Congressional Budget Office, nonbudgetary legislation often has a revenue effect. If a piece of legislation is designed for a nonrevenue raising purpose, but the effect of the legislation will be to raise revenue, Section 4 of the balanced budget amendment would require that the legislation be passed by the whole number of each body.[31]

For example, if Congress passed legislation to change the rules regarding the Community Reinvestment Act (CRA)[32] and further limited the reach of regulations under the Act, the nonbudgetary legislative change would have a revenue impact.[33] Under the Federal Amendment, any piece of legislation which included changes to the CRA would require a constitutional majority because it is "a bill to increase revenues."

Just as the *Karcher* court had to become actively involved in determining what provisions of the Budget Bill were appropriations, the judiciary might have to become equally involved in deciding which provisions of each bill increase revenue and, therefore, require a constitutional majority. The judiciary also may have to interpret whether the Federal Amendment applies to all bills which raise any amount of revenue, or only to "classic" revenue bills which originate in the House of Representatives.

B. State Attempts to Evade Balanced Budget Requirement by Redefining Debt

As noted earlier, state and local government debt has been growing steadily since 1972. If forty-eight states have balanced budget

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[30] H. R. J. Res. 1, *supra* note 3.

[31] Super or special majorities such as those found in Section 4 can have a significant impact on the passage of legislation. One famous example involves a vote in the House of Representatives in 1941 to extend the draft just prior to World War II. The vote in favor of extending the draft was 204 to 201. Such a margin was sufficient to extend the draft but would not have been sufficient to meet the Section 4 requirement (i.e., 218 votes). *See,* John G. Leyden, *How Mr. Sam Saved the Draft,* WASH. POST, Aug. 18, 1991, at C5.

[32] 12 U.S.C. §§ 2901-2907 (1988 & Supp. 1995).

[33] If Congress eliminates CRA regulations, the Federal Reserve will need less regulators and will therefore increase its profits. Profits from the Federal Reserve are paid to the Treasury. These payments are considered revenue for budgetary purposes.

requirements, and debt is rising, then most states cannot actually be balancing their budgets. State and local governments have been very creative in their financing methods and, as a result, several court cases have been brought to question these maneuvers.[34]

1. Anticipatory Notes

New York State courts have reviewed several cases regarding the State's issuance of debt.[35] In *Wein v. State*,[36] the New York Court of Appeals examined the question of whether appropriations at an extraordinary session of the legislature in mid-fiscal year financed by short-term notes are a gift or loan in violation of the New York Constitution.[37] The *Wein I* court determined that such borrowing is neither a gift nor a loan and is proper in a limited fashion as long as the notes are issued in anticipation of future revenues from taxes.[38] The court also concluded, however, that although this action was proper, the State drove "to the brink of a valid practice."[39] Finally, the court found that short-term borrowing, which must be repaid within one year, "imposes no burden upon our children."[40]

Wein I created a loophole for New York State. The State can balance the budget by short-term notes in one year, and, in the next year, issue new notes to cover a new shortfall. In effect, the entire debt can simply be reissued every year. The court recognized this problem and said that it would be a violation of the "spirit" of this provision if anticipatory notes were issued in the next year and there was a rollover of past notes.[41]

In *Wein II*,[42] the court's fears were, in fact, realized. New York issued tax anticipatory notes for two successive years.[43] To determine if the

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[34] The federal government might follow the states' example and obfuscate the Amendment by redefining debt. *See* Letter from Assistant Attorney General Sheila Anthony, 141 CONG. REC. S2706 (daily ed. Feb 15, 1995)(The Amendment requires that "any increase in the limit on the debt must be passed by a three-fifths roll call vote of the whole number of each House of Congress." The Office of Management and Budget has no such definition.).

[35] Wein v. State, 347 N.E.2d 586 (N.Y. 1976) [hereinafter *Wein I*]; Wein v. Carey, 362 N.E.2d 587 (N.Y. 1977) [hereinafter *Wein II*].

[36] 347 N.E.2d 586 (1976).

[37] *Id.* at 586-587. Under the New York State Constitution, "money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or assocation, or private undertaking...." N.Y. CONST. art VII, § 8, subd. 1.

[38] *Wein I*, 347 N.E.2d at 587. *See also* Hovey v. Foster, 21 N.E. 39 (Ind. 1889)(approving the temporary loan of $700,000 to pay unexpected deficiencies in the budget).

[39] *Wein I*, 347 N.E.2d at 590.

[40] *Id.* at 591.

[41] *Id.* at 593.

[42] *Wein II*, 362 N.E.2d 587 (1977).

[43] *Id.* at 590-91.

issuance was constitutional, the court looked to the intent of the budgeters.[44] If the notes were issued with the dishonest knowledge that there was no anticipated, authentic balance, there could be no authority to issue the notes,[45] but the court placed the burden on the plaintiff to prove improper budget manipulation.[46] By setting such a high burden of proof, the court essentially allowed New York to continue to issue short-term bonds and to reissue those bonds if necessary in succeeding fiscal years.

Some commentators have used the *Wein* cases to predict that taxpayers will have very limited access to the courts on the federal level[47] and that courts may be unwilling to make specific budgetary decisions.[48] The *Wein* cases also show, however, a very active court. In both cases the New York court was willing to get actively involved in the budgetary process and make decisions about what the state could and could not do regarding bonding authority. If the *Wein* activism were applied at the federal level, courts would monitor the borrowing decisions of the federal government.

2. Development Authorities

One way state and local governments have increased their borrowing potential is through development authorities. These quasi-governmental agencies have authority to borrow funds to build capital projects, and this indebtedness is usually not considered debt for the purpose of balanced budget requirements.

In *Nations v. Downtown Development Authority*,[49] the Georgia Supreme Court reviewed a development authority financing arrangement for consistency with the Georgia Constitution. The constitution fixes a limit on the debt that may be incurred and requires any debt to be approved by a majority of the voters.[50] However, the financial arrangement, which

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[44] *Id.* at 591.

[45] *Id.*

[46] *Id.* at 592.

[47] *See* Lubecky, *supra* note 12, at 563, 574-577; *see also* Wein v. Comptroller of New York, 386 N.E.2d 242 (N.Y. 1979)(holding taxpayer did not have standing to challenge the issuance of municipal bonds).

[48] *Wein I*, 347 N.E. 2d at 591. Assuming it were feasible to convert a courtroom into a super-auditing office to receive and criticize the budget estimates of a state with an $11 billion budget, the idea is not only a practical monstrosity but would duplicate exactly what the Legislature and the Governor do together, in harmony or in conflict, most often in conflict for several months of each year.

[49] 338 S.E.2d 240 (Ga. 1985)[hereinafter *Nations I*], 345 S.E.2d 581 (Ga. 1986)[hereinafter *Nations II*].

[50] GEORGIA CONST. art. IX, § V, para. I.

> (a) The debt incurred by any county, municipality, or other political subdivision of this state, including debt incurred on behalf of any special district, shall never exceed 10 percent of the assessed value of all taxable property within such county, municipality, or political subdivision; and no such county, municipality, or other political subdivision shall incur any new debt without the assent of a majority of the

involved a complex lease scheme, was not submitted to the voters. Although this was a highly technical case regarding indebtedness, the court heard the case and found the action permissible since the payments were not considered to be debt under Georgia law.[51]

This case arose when the City of Atlanta wanted to build a marketplace downtown. In order to avoid the state bonding requirement, it borrowed through the Downtown Development Authority (DDA).[52] However, the city also needed to take the property by eminent domain, and the DDA did not have the necessary authority.[53] The city thus developed a complicated process whereby the city would acquire the property by eminent domain.[54] The DDA would then issue bonds, the proceeds of which would reimburse the city.[55] Once the property was acquired, the city would lease the property to the DDA, and the DDA would sublease it to a private developer who would sublease to private companies.[56] The developer would pay the DDA a percentage of the rent and the DDA would pay as rent to the city all projected revenues, which would then be used by the city to pay the principal and interest on the bonds.[57]

Property owners who were going to lose their property by eminent domain brought suit claiming that this action violated the Georgia Constitution.[58] The Georgia court approved the arrangement.[59]

The federal budget process could be influenced significantly by these types of arrangements. Congress could pay nongovernmental agencies to build government buildings. The developers would borrow to build the buildings and the government would pay the debt service plus a fee as rent. The government would sign a long-term contract for the approximate life of the building. The fee to the government and our national indebtedness

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qualified voters of such county, municipality, or political subdivision voting in an election held for that purpose as provided by law.

[51] *Nations I*, 338 S.E.2d at 241.

[52] *Id.* at 243.

[53] *Id.* at 241.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] In *Nations I*, the court rejected the city's lease arrangement because the city was guaranteeing to make up 90 percent of any shortfall which existed because projected revenues were inadequate. The court in *Nations I* found this to be a loan of credit of the city in violation of the Constitution. The city renegotiated the lease requirements and the court approved the arrangement in *Nations II*, 345 S.E.2d 581 (1986). *See also*, Dieck v. Unified School District of Antigo, 477 N.W. 2d 613 (Wis. 1991)(Plaintiff's argued that the lease purchase agreement was expressly designed to create indebtedness without giving voters an opportunity to vote. The court held that since the school district had the right to terminate the lease, the lease did not constitute indebtedness.).

would be the same as if the government had borrowed the money. The builder would be able to secure a reasonable interest rate because he would have a long-term contract from the government, though the rate would be higher than that charged the government. The government could use this type of contractual arrangement to avoid the restrictions under the Amendment.[60]

Another way the United States government could avoid the balanced budget requirement is through loan guarantees. The President recently submitted a plan to Congress which would have provided loan guarantees to Mexico.[61] These loan guarantees would have provided the full faith and credit of the United States to Mexico and allowed the Mexican government to obtain loans it might otherwise have been unable to obtain. These guarantees have a budget cost for the federal government depending on the riskiness of the guarantee, but the entire guarantee is not considered debt.[62]

The United States could guarantee a loan for forty billion dollars to a private corporation set up for this purpose. The private corporation could then borrow on the credit of the United States. The debt would be used for public education, road construction, or for any other purpose. The United States budget would have to account for a portion of the risk of the loan in its yearly budget,[63] but the forty billion dollars would not be charged against the United States Treasury. The debt service for these loans would be paid as payments to the private corporation who would in turn pay the debt. The United States would thus be able to borrow without incurring "debt," but it would still have to pay the interest costs associated with this plan.

This type of financing arrangement is probably legal under the Federal Amendment. There would be some cost as a result of the imputed value of the risk of the loan. The United States would be using a nongovernment corporation as its financing mechanisms, but otherwise it would be similar to the current actions of the U.S. Treasury. The government would not run

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[60] This example highlights that a balanced budget requirement may cost the government money in the long run. In order to take on capital projects, the government may have to contract with outside parties. Since outside parties cannot borrow on the full faith and credit of the United States, they will pay higher interest rates, and the federal government will have higher "rent" costs for the project.

[61] *See* George Graham, et al., *Mexican Rescue: Bitter Legacy of Battle to Bail out Mexico*, FIN. TIMES, Feb. 16, 1995, at 4.

[62] Under the Federal Credit Reform Act of 1990, the government is required to account for a percentage of loan guarantees in the operating budget. These fees are determined by the amount and risk of the loan. 2 U.S.C. § 661 (1994). *See* WILLIAM G. DAUSTER, BUDGET PROCESS LAW ANNOTATED 273-298 (1993 ed.).

[63] 2 U.S.C. § 661 (1994).

up debt as such but would, instead, run up "rents" that it would owe to private corporations.

The legislative history does not address this issue nor does it contemplate these arrangements. The drafters attempted to prevent this type of borrowing by defining receipts to exclude those derived from borrowing.[64] However, if the government uses loan guarantees, it does not spend the money; the private corporation does under contracts with the government. If the Supreme Court considers the state cases or the plain text of the amendment as a guide, then these arrangements would be permissible.[65]

3. Lease Arrangements

Another method used by states to avoid balanced budget amendments is to create lease arrangements with third parties. In *Dieck v. Unified School District of Antigo*,[66] a school board entered into a lease contract with a not-for-profit organization to build a high school. The agreement included both a purchase option and a termination provision which allowed the school district to terminate the lease by nonpayment of rent.[67] Plaintiff brought suit claiming that the school district incurred unlawful indebtedness when it entered into the lease arrangement.[68]

The court held that since the termination clause in the lease eliminated future obligations, it did not violate the Wisconsin Constitution.[69] Debt is incurred when a "municipal body is under an obligation to pay and the creditor has a right to enforce payment against the municipal body."[70] Under this definition, a lease arrangement would be considered "debt" if there was no termination clause.

Dieck has major ramifications at the federal level. The federal government enters into lease arrangements on a regular basis. For example, the government often rents office space instead of building a federal building. Under the *Dieck* logic, all of these contracts would have to have cancellation clauses or they would be considered debt. Such a requirement would be unrealistic and expensive at the federal level.

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[64] S. REP. No. 163, 103d Cong., 1st Sess. 12 (1993).

[65] In order to prevent these types of arrangements, the Amendment would need to include a prohibition on granting the full faith and credit of the United States to other parties. If such a prohibition was included in the Amendment, the government could not use loan guarantees to circumvent the Amendment.

[66] 477 N.W.2d 613, 616 (Wis. 1991).

[67] *Id.*

[68] *Id.* at 617.

[69] *Id.* at 618-19.

[70] *Id.* at 618.

4. Accounting for Future Obligations

In addition to lease arrangements, states have several other methods which use future obligation to pay for present expenditures. Since these methods often create obligations for future generations, they may be deemed debt under the Federal Amendment.

In *Prudential Property and Casualty Co. v. Grimes*,[71] the State of Oklahoma attempted to use funds collected in a reserve account to pay for current expenses. Oklahoma had instituted a tax on out-of-state insurance companies. Subsequently, the companies challenged the levy based on the Equal Protection Clause.[72] While the challenge was pending, the insurance companies continued to pay the levy under protest, and the protest payments were collected in the Insurance Commissioner's Protest Fund.[73] From 1981 to 1986 over fifty-five million dollars was paid into the fund.[74] The State of Oklahoma transferred thirteen million dollars in interest from the insurance fund to the general fund and proposed transferring another forty-two million dollars.[75] The insurance companies sued to enjoin the transfer of funds.[76] The majority granted the injunction based upon statutory interpretation[77], but the concurrence raised several questions regarding whether the transfer violated Oklahoma's balanced budget amendment.[78]

The concurrence argued that there is a constitutional obligation for a balanced budget and that part of the purpose of this provision was to ensure that one legislative assembly does not bind future assemblies financially.[79] By allocating the money in the protest fund for the current budget, the legislature was incurring a possible future obligation to return those funds if Prudential Property and Casualty was successful in their suit.[80]

While the majority of the Oklahoma court determined that the transfer of funds from one fund to the other violated Oklahoma statutory provisions, the concurrence raised a question which may have a significant implication at the federal level—how should future obligations be counted for purposes of the Amendment?

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[71] 725 P.2d 1246, 1247 (Okla. 1986).
[72] *Id.* at 1247.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* at 1248.
[77] *Id.* at 1247-51.
[78] *Id.* at 1251-52 (Wilson, J., concurring specially).
[79] *Id.*
[80] *Id.* at 1251.

This issue was raised several times during the debate on the Amendment. For instance, should the IOUs to the Social Security system be treated as future obligations or should they be accounted for in the current budget? Should the United States be required to create "protest funds" for pending legislation? Should revenues paid to the Federal Treasury under protest be considered revenues for purposes of the Amendment prior to a final judgment on the merits of the case? The judiciary may not have to get involved in every one of these cases; however, *Grimes* shows that there is some support among state judges to count future obligations as debt. This same question may come before the Supreme Court under the Federal Amendment with significant consequences.[81]

C. Increased Executive Power

1. Executive Authority to Impound Funds

The opponents of the Federal Amendment fear that it will increase the President's power to impound funds.[82] Both the President and Congress take an oath to uphold the Constitution; consequently, if the President believes that spending would violate the Constitution, he may have a duty to impound funds.[83]

Many state governors already have the power of a line item veto, but there are several state cases where governors or legislators have either tried to impound, or withhold funds that they would otherwise be obligated to spend. The passage of the Federal Amendment may shift the balance of power and give the President more power over spending decisions.

In *Judy v. Schaefer*,[84] people on public assistance sued the State of Maryland, challenging the Governor's reduction in benefits. The plaintiffs argued that the grant of impoundment authority to the Governor violated the principle of separation of powers inherent in the Maryland Constitution

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[81] If the Court held that the future obligations to Social Security were debt and thus needed to be accounted for in the present budget, then it would be far more difficult for Congress to achieve a balanced budget under the Amendment. Without specifically doing so, the Court would be requiring Congress to raise taxes or drastically cut spending to meet this requirement.

[82] President Nixon asserted his right to impound funds, but courts found that his action violated the Constitution. AFGE v. Phillips, 358 F. Supp. 60, 75 (1973). In response to Nixon's action, Congress passed the Federal Impoundment and Information Act, Pub. L. No. 82-599, 86 Stat. 1325 (1972)(codified as amended at 31 U.S.C. § 581c-1 (1970 & Supp. II 1972)); repealed by, Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 291 (1974)(codified as amended at 2 U.S.C. §§ 601-688 (1988 & Supp. IV 1992)).

[83] *See Balanced Budget Amendment—S.J. Res. 41: Hearings Before the Senate Comm. on Appropriations*, 103d Cong., 2d Sess. 142-44 (1994)(statement of Walter Dellinger, Assistant Attorney General)(Hereinafter "Dellinger Statement").

[84] 627 A.2d. 1039, 1040 (Md. 1993).

because it failed to set forth a standard sufficient to guide the Governor's discretion.[85] The court upheld the Governor's action, explaining that the balance of power had shifted due to the constitutional amendment.[86] However, it stated that the "trend of the cases ... 'is toward greater liberality in permitting grants of discretion to [executive branch] officials ... in order to facilitate the administration of the laws as the complexity of governmental and economic conditions increase.'"[87] The court further determined that these provisions were necessary to carry out the balanced budget requirement.[88]

The addition of the balanced budget amendment to the Maryland Constitution and the duty to balance the budget increased the Maryland court's willingness to allow increased executive authority.[89] Similar logic could be used by the President in asserting authority to impound funds.[90]

2. Executive Authority Regarding Military Action

Although there are no state experiences on point, the Federal Amendment might decrease the President's authority regarding military action. Under the current constitutional framework, the President has the ability and the authority to react to a military crisis. However, under the Federal Amendment, should a crisis arise when the budget is in balance, the President could allocate additional funds only if there were a congressionally declared military emergency, a declaration of war or a three-fifths vote to waive the Amendment. If Congress was out of session and there was a need to send troops abroad, the President would have to choose amongst violating the Constitution by unbalancing the budget and sending troops, exercising increased impoundment authority or allowing national interests to be damaged.[91]

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[85] *Id.* at 1041.

[86] *Id.* at 1050-51.

[87] *Id.* at 1051 (quoting Dept. of Transp. v. Armacost, 532 A.2d 1056, 1060 (Md. 1987)).

[88] *Id.* at 1052.

[89] *Cf.* County of Oneida v. Berle, 404 N.E.2d 133, 135-36 (N.Y. 1980). Separation of powers barred impoundment of funds by the executive in an attempt to maintain a balanced budget. Interestingly, the New York Governor chose not to use his line item veto authority. The budget director decided to impound $7 million and claimed the authority was based upon the balanced budget amendment. The court found that the Governor had no right to impound.

[90] Some of President George Bush's advisors urged him to assert that the Constitution provided the President with line item veto authority prior to the passage of a balanced budget amendment. This assertion would have been strengthened if there was a constitutional requirement to balance the budget.

[91] Proponents respond that the Congress would declare an emergency when it came back in session. The President, however, would have no guarantee that Congress would approve the measure. If it did not, the money already would have been spent and the budget would be unbalanced. The President would then need the authority to impound funds in other areas. *But see*, 141 CONG. REC. S2934 (daily ed. Feb 22, 1995)(statement by Sen. Sarbanes)(noting that national emergencies do not always receive constitutional majorities, and citing provisions to extend the draft for World War II which passed the House of Representatives by less than a constitutional majority); *see supra* note 31.

3. Executive Officers' Refusal to Issue Debt

The Federal Amendment places the burden of balancing the budget on both Congress and the Executive. Therefore the executive branch could conceivably refuse to issue debt authorized by the legislature because it believes that such an issuance would violate the Amendment. The Illinois Court addressed this situation in *People ex. rel. Ogilivie v. Lewis.*[92]

In *Ogilivie*,[93] a dispute arose between the Governor and the Secretary of State regarding the sale of transportation bonds. The State of Illinois ratified a new constitution in 1970 which allowed the State to issue transportation bonds.[94] In reliance on the passage of this new constitution, the Illinois legislature passed a law allowing the sale of $900,000,000 worth of transportation bonds.[95] The Governor determined that $100,000,000 of the $900,000,000 authorized should be issued.[96] The Secretary of State refused to issue the bonds claiming that the bonding measure violated the constitution since it was vague, indefinite, and a violation of separation of powers.[97] The Governor sought a writ of mandamus directing respondent to act.[98] The court held that the statute was constitutional and ordered the issuance of the bonds.[99]

A similar situation might occur at the federal level. The executive and the legislature may differ regarding Section 2 of the Amendment and what constitutes "debt held by the public." Congress could modify the term or assert that debt held by a borrowing authority was not "debt held by the public," or Congress could create a capital budget and assert that bonds sold for purposes of the capital budget not be considered "debt held by the public." The executive branch might refuse to issue these bonds based on its belief that the statute is unconstitutional and the issuance of debt would violate the Constitution. The judiciary would then have to determine the constitutionality of the legislation and the validity of the Executive's action.[100]

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[92] 274 N.E.2d 87 (Ill. 1971).

[93] *Id.*

[94] ILL. CONST. art. XIII, § 7.

[95] *People ex. rel. Ogilivie*, 274 N.E.2d at 89.

[96] *Id.*

[97] *Id.* at 96.

[98] *Id.*

[99] *Id.*

[100] This scenario may arise in other instances when the Congress tries to find creative ways to obfuscate the Amendment, and the Executive objects to those actions.

D. Impact of the Federal Amendment on other Constitutional Provisions

1. Limitation on a Citizen's Right of Redress

The balanced budget requirement also may change the way courts interpret other provisions of the Constitution.[101] In *Nicholson v. Cooney*, the Montana Supreme Court used the state's balanced budget amendment to limit the referendum power granted in other parts of the Montana Constitution.[102] Under the Montana Constitution, if enough signatures are placed on a referendum, legislation will be held invalid until the provision is voted on by the people.[103]

In *Nicholson*, voters in Montana obtained enough signatures to temporarily invalidate a revenue measure.[104] The temporary invalidation forced the legislature to come back into session to try to balance the budget.[105] The court held that the referendum provision could not be read in isolation and that the balanced budget provision requires a conclusion that general revenue bills are off limits to the referendum process.[106] Thus, the amendment eliminated a power generally available to the people.

It is impossible to determine how the Federal Amendment will affect the interpretation of other provisions of the Constitution. It may give the President increased authority over taxing and spending decisions, or it may be used to justify increased delegation of congressional authority to the President or other officers. The judicial consequences are uncertain, but what is certain is that the federal courts will have to grapple with these questions just as the state courts have been required to do.

2. Greater Congressional Delegation of Budgetary Authority to the President.

The Federal Amendment may influence traditional analysis regarding the separation of powers. The Florida Supreme Court addressed this issue in *Chiles v. Children A, B, C, D, E, & F.*[107] The Governor determined that the Florida budget was out of balance and ordered all agencies to prepare a revised fiscal plan.[108] An administrative commission then adopted the Governor's recommendation.[109] The court needed to determine if the legislature's assignment to the executive branch of the authority to reduce

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[101] Nicholson v. Cooney, 877 P.2d 486 (Mont. 1994).
[102] *Id.* at 491.
[103] *Id.* at 488.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 491.
[107] 589 So. 2d 260 (Fla. 1991).
[108] *Id.* at 262.
[109] *Id.*

the budget during a shortfall violated Florida's separation-of-powers doctrine.[110] The court found this statutory provision to be an unconstitutional delegation of legislative power to the executive branch.[111]

However, this case highlights that some members of the judiciary may believe that a balanced budget amendment is of such import that it expands the authority of the executive branch. For example, the dissent in *Chiles* argued:

> It cannot be denied that the balanced budget provision of the Florida Constitution is a state law of great weight and importance. It necessarily follows that the Governor, acting with the Commission, is both obligated and empowered by the Constitution itself to assure that the balanced budget mandate of the Constitution is faithfully executed. If the legislature were to refuse to adopt measures necessary to balance an unbalanced budget, the Governor would not be relieved of the constitutional obligation to employ the supreme executive power of the State to assure the budget was balanced.[112]

The dissent believed that the need to maintain a balanced budget was paramount. The balanced budget requirement is deeply routed in Florida's legislative system and is designed to protect the public and future generations. The dissent argues that this provision must be guaranteed to the greatest extent possible.[113]

If the Supreme Court followed the logic of the dissent in *Chiles*, the federal separation-of-powers doctrine might be weakened and the Court might allow Congress to delegate budgetary decisions to the executive.

E. State Court's Have Not Always Adjudicated Balanced Budget Disputes

State courts often prefer not to be involved in budgetary decisions and dismiss balanced budget cases as either moot or nonjusticiable. In *Bishop v. Governor*,[114] taxpayers and Members of the General Assembly sued the Governor of Maryland, claiming his budget was unconstitutional.[115] The Governor had submitted a budget that included estimated revenues based on the assumption that the General Assembly would enact a lottery provision and the federal government would extend the revenue sharing

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[110] *Id.* at 263.
[111] *Id.* at 265-66.
[112] *Id.* at 270 (McDonald, J., dissenting).
[113] *Id.*
[114] 380 A.2d 220, 222 (Md. 1977).
[115] *Id.* at 220.

program.[116] The plaintiff argued that since the revenues were contingent revenues, they could not be included as part of estimated revenues in the Governor's budget.[117] The court would not pass on the controversy because the point was moot.[118] The fiscal year had ended and the necessary legislation had been enacted. The court, however, noted that it would hear such a case in the future if extraordinary circumstances existed.[119]

In *Board of Education of the Township of Fairfield v. Kean*,[120] a local school district challenged a law which reduced the General Formula Aid for Education in the state.[121] The Board of Education challenged the action and argued that prior decisions in New Jersey guaranteed a certain level of funding for education.[122] The Board sought a court order requiring higher funding levels for education.[123] The court rejected the Board's challenge, stating: "It is a rare case—and the present case is most certainly not one of them—in which the judiciary has any proper constitutional role in making budget allocations."[124]

These cases point out that state courts have often exercised judicial restraint regarding budgetary matters, and, perhaps, the federal judiciary will exercise similar restraint. However, the consequences of complete restraint at the federal level are far more severe than at the state level. Specifically, the super majority requirements may lead to continued gridlock. The implied impoundment power to the President may raise serious balance of power questions. The definition of receipts, outlays and debt may gridlock budget debates for years.

Budget gridlock, not balanced budgets may be the result of a balanced budget amendment. A federal government in continued gridlock over the enforcement of the balanced budget amendment will have a severe impact on the economy and on the citizenry's faith in the national government.

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[116] *Id.* at 221-22.

[117] *Id.* at 222.

[118] *Id.* at 223.

[119] *Id.*

[120] 457 A.2d 59 (N.J. Super. Ct. 1982).

[121] *Id.* at 59.

[122] *Id.* at 60-63. *See* Robinson v. Cahill, 62 N.J. 473 (1973), 63 N.J. 196 (1973), 67 N.J. 35 (1975), 69 N.J. 133 (1975), 69 N.J. 449 (1976).

[123] 457 A.2d at 63.

[124] *Id.* at 63.

II. THE LEGISLATIVE HISTORY DOES NOT PRECLUDE JUDICIAL INVOLVEMENT

Proponents of the Federal Amendment have attempted to use its legislative history to clarify the role of the judiciary and to avoid some of the problems encountered by state courts. However, due to the controversial nature of the Federal Amendment, the need to secure enough votes for passage, and the conflicting views even among proponents, the legislative history does not provide a safeguard against judicial activism.

Both sides agree that the courts will be involved in interpreting the Federal Amendment, but they disagree as to the extent of court involvement.[125] Furthermore, the sponsors themselves often do not agree regarding the interpretation of various provisions of the Federal Amendment. This section analyzes the legislative history regarding the Amendment to determine congressional intent with respect to judicial involvement.

A. The Committee Report and Statements by Members do not Clarify Congressional Intent

The Judiciary Committee report in the 103rd Congress attempted to address concerns regarding the role of the judiciary under the Amendment. One concern addressed by the opponents of the legislation is that the Amendment will increase the President's power regarding impoundment.[126] Section 1 of the Amendment requires that "total outlays for any fiscal year shall not exceed total receipts for that fiscal year unless waived by three-fifths vote."[127] The report states the Committee's belief that "the Congress and the President ... will exercise their powers under the first and second articles of the [A]mendment to ensure that outlays do

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[125] *See* 141 CONG. REC. H758 (daily ed. Jan. 26, 1995)(statement by Rep. Schaefer) ("There is no need—and arguably it would be a bad idea—explicitly to foreclose the possibility of judicial interpretation or enforcement."); *See also* 132 CONG. REC. 4027 (1986)(statement by Sen. Hatch). Senator Hatch stated "any Member of Congress would have standing to sue to enforce the explicit provisions of the [A]mendment itself." *Id.* He further stated that "the authors have chosen consciously not to prohibit judicial review altogether of cases and controversies arising in the context of the proposed [A]mendment in the belief that the most serious and unambiguous violations of its provisions ought to be subject to external check." *Id.* at 4028. *See also* statement by Senator Simon: "We know we have to act and, if we do not act, ultimately the courts will force either us to act or hand the authority over to the executive branch." *Id.* at 3949; 141 CONG. REC. S3039 (daily ed. Feb. 23, 1995)(statement by Sen. Nunn) ("[A] balanced budget amendment ... would radically alter the balance of power among the three branches of [g]overnment."); 141 CONG. REC. S2694 (daily ed. Feb. 15, 1995)(statement of Sen. Johnston).

[126] *See supra*, section I.C.1.

[127] S. Rep. No. 163, 103d Cong., 2d Sess. 7 (1993).

not exceed receipts and thus no balance of power problem will arise."[128] The report's basic premise is that Congress will pass a budget and increase the debt limit so that there will be no occasion for the President to claim additional budgetary powers.

The sponsors of the Amendment believe that Members of Congress will take their constitutional responsibilities seriously and will enforce the constitutional provisions because all Members take an oath to uphold the Constitution. This fails to recognize the possibility that Members can faithfully attempt to execute their responsibilities seriously as legislators and still not be able to agree on a budget or on debt ceiling legislation. During the 1995 budget cycle, a Republican Congress and a Democratic President could not agree on a budget. The government was shut down on several occasions.[129] Both the Republican plan and the Democratic plan balanced the budget, but neither plan had sufficient votes for passage. Balancing the budget was not the issue that caused the gridlock, the gridlock was due to conflicting policy choices on how to reach a balanced budget. The balanced budget amendment does nothing to rectify this problem, and, in fact, the super majority requirements in the Amendment may make gridlock more likely. Thus, the assertion that Congress will balance the budget and that, therefore, there is no need to worry about presidential impoundment is unrealistic.

The second problem is that the language attempts to resolve the conflict regarding the balance of power between the branches by saying that there will be no problem. The sponsors believe that Congress and the President will balance the budget. However, if the case is before the judiciary, and the judiciary is being asked to settle a balance of power question that arises under the Amendment, then it is likely that Congress and the President were unable, or unwilling to fulfill the responsibilities of Section 1 or 2. Simply saying that Congress expects there not to be a problem provides no guidance to the courts, if in fact, a problem arises.

The report in the 104th Congress cites Section 6 as assurance that the Amendment will not end up in the courts.[130] Section 6 requires "Congress [to] enforce and implement this article by appropriate legislation, which

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[128] *Id.*

[129] *See, e.g.*, Rajiv Chandrasekaran, *Shutdown Casts Pall on Washington Area's Holiday Cheer*, WASH .POST, Dec. 25, 1995, at A1; R.A. Zaldivar, *Budget Stalemate Drags On; Both Sides are Pointing Fingers*, ARIZ. REP., Dec. 17, 1995, at A1; Brian E. Albrecht, *People Pay the Price of Budget Gridlock*, THE PLAIN DEALER, Nov. 17, 1995, at A1; Leon Hadar, Clinton, *Congress in Game of Bluff Over U.S. Budget*, BUSINESS TIMES, Sept. 19, 1995, at 15; Carol Byrne, Congress, *Clinton on Track for Budget 'Wreck'*, THE STAR TRIBUNE, Sept. 3, 1995, at A1.

[130] S. REP. No. 5, 104th Cong., 1st Sess. 18 (1995).

may rely on estimates of outlays and receipts."[131] The report claims, "[t]his section makes explicit what is implicit, that Congress has a positive obligation to fashion legislation to enforce this article.... [This] provision precludes any interpretation of the [A]mendment that would result in a shift in the balance of powers among the branches of government."[132]

The Amendment creates an affirmative duty upon Congress to implement the Amendment through legislation, but it does not preclude others from implementing the Amendment through other means. For instance Section 6 does not explicitly preclude the President from enforcing the Amendment through impoundment authority, nor does it prevent the courts from ordering remedies.[133] The Fourteenth Amendment includes language similar to Section 6, and the courts have been involved in Fourteenth Amendment litigation since its inception.

In fact, Senator Simon was asked on the Senate floor what would happen if the Congress did not enact implementing legislation. Senator Simon stated:

> Any citizen could go into the courts and the courts would probably tell us, 'You have 60 days to work something out, Congress....'
>
> We know we have to act and, if we do not act, ultimately the courts will force either us to act or hand the authority over to the executive branch.[134]

Other proponents of the Amendment have argued for court involvement. At a hearing of the Joint Economic Committee, Senator Mack stated, "I hope that the times the courts are involved in these decisions are very, very, very few. But because the issue is so significant, if they have to be involved to help force us along the way then so be it."[135] Congressman Schaefer, one of the lead sponsors of the Amendment in the House, claimed "the courts could make only a limited range of decisions on a limited number of issues. They could invalidate an individual appropriation or tax act. They could rule as to whether a given Act of

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[131] *Id.*

[132] *Id.*

[133] Senator Hatch, the primary Senate sponsor of the Amendment, stated: "the [A]mendment does not grant to the President any additional authority, and, in fact, is intended only to circumscribe Congress' taxing, borrowing and spending powers." 140 CONG. REC. S1972 (daily ed. Feb. 28, 1994). *See also* S. REP. NO. 5, 104th Cong., 1st Sess. 11 (1995)("[I]t is not the intent of the committee to grant the President any impoundment authority under S.J. Res. 1.").

[134] 132 CONG. REC. S3949 (1986).

[135] *The Balanced Budget Amendment: Hearings Before the Joint Economic Committee*, Pt. 2, 104th Cong., 1st Sess. 38 (1995)(statement by Senator Mack).

Congress or action by the executive violated the requirement of this [A]mendment."[136]

Although some proponents discourage court involvement, others believe that the judiciary plays an important role in enforcing the Amendment. In their view, ambiguous congressional intent allows the judiciary to define its own role in interpreting the Amendment.

Proponents of the Amendment claim that it is self-enforcing because Congress cannot extend the debt limit unless three-fifths of each body agrees.[137] However, this language directly conflicts with the report language regarding Section 1 and the text of Section 6. Both Section 1 and Section 6 indicate that Congress may use estimates of receipts and outlays. Therefore, Congress could pass, and the President could sign, a budget which, in good faith, relied on estimates for receipts and outlays. In the middle of the year, the economic situation could change, and the estimates could no longer be accurate. Revenues could be less than expected due to a recession and slower income growth and spending might increase due to additional expenditures for unemployment insurance. These changes would unbalance the balanced budget.

The proponents of the Amendment argue that this would not be a problem because a negligible deviation from the balanced budget would not represent a violation of Section 1.[138] In the current federal budget, a two or three percent error, which would be considered "negligible" would equal thirty to forty-five billion dollars. An error of this magnitude, which would be permissible under Section 1, would cause the federal government to exceed the debt limit in violation of Section 2. Congress would thus need a three-fifths vote to extend the debt limit. If Members did not vote to extend the debt limit, then some debt obligations of the United States would not be paid. If this occurred at the end of the fiscal year, Congress could not raise taxes or cut spending. Thus, the United States would be faced with either an economic crisis, a constitutional crisis, or a situation where a minority of Members of one House could extort legislation from other Members in exchange for their votes on the debt limit.

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[136] 141 CONG. REC. H754 (daily ed. Jan. 26, 1995).

[137] This provision has been highly criticized for creating minority rule in the Congress. *See* Statement by Sen. Byrd, 141 CONG. REC. S3150-53 (daily ed. Feb. 27, 1995) *citing* THE FEDERALIST No. 58 (James Madison); *see supra* note 4.

[138] Senator Simon has stated that an error of two or three percent would not be a violation. *Hearings Before the Senate Committee on the Judiciary*, 104th Cong., 1st Sess. 11 (Jan. 5, 1995)(transcript available from the Committee).

B. Amendments to the Balanced Budget Amendment do not Clarify the Judiciary's Role

During the 103rd and 104th Congresses, several amendments to the balanced budget amendment were offered to clarify the role of the courts. Senators on both sides of the aisle were concerned that if the role of the judiciary was not clarified, judges might order remedies that included specific tax increases or spending cuts.

1. The Danforth Amendment and the Reid Substitute.

In the wake of the Supreme Court's decision in *Missouri v. Jenkins*,[139] Senator Danforth expressed tremendous concern regarding a court's ability to order tax increases under a balanced budget amendment. In *Jenkins*, the Supreme Court upheld a lower court ruling that imposed an increase in property taxes for the Kansas City School District to ensure funding for the desegregation of the public schools.[140] The Court held that a court can direct a local government body to levy its own taxes.[141]

Opponents of the Federal Amendment rely on *Jenkins* to conclude that the judiciary could order tax increases or spending cuts if the Amendment was violated. Opponents postulate that if a court can order a municipality to raise its taxes for violating the Constitution, the federal government may be required to do so as well.[142]

Due to his concern over the *Jenkins* holding, Senator Danforth offered an amendment which provided that the courts could order only declaratory judgments as a remedy for violations of the Amendment.[143] The Danforth amendment was included in the final version of the balanced budget amendment considered in the 103rd Congress.[144]

The debate regarding the Danforth amendment and its inclusion in the balanced budget amendment illustrates the concern of some proponents about judicial activism in interpreting and enforcing the Amendment. The

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[139] 495 U.S. 33 (1990).

[140] *Id.* at 37.

[141] *Id.* at 55-57.

[142] Opponents of the Danforth amendment argue that *Missouri v. Jenkins* would not apply to cases under the balanced budget amendment. In *Missouri v. Jenkins* the Court ordered a locality to redress past discrimination. Thus a federal court was ordering a local authority to raise taxes due to a federal constitutional violation. The Court might not be willing to apply *Missouri v. Jenkins* to violations by a coordinate branch of the government.

[143] The Danforth amendment would amend Section 6 by adding the following:

> The power of any court to order relief pursuant to any case or controversy arising under this article shall not extend to ordering any remedies other than a declaratory judgment or such remedies as are specifically authorized in implementing legislation pursuant to this section.

140 CONG. REC. S1824 (daily ed. Feb. 24, 1994).

[144] The balanced budget amendment, which included the Danforth amendment, was defeated by a vote of 63 to 37. 140 CONG. REC. D170 (daily ed. Mar. 1, 1994).

Danforth amendment did not eliminate a court's ability to adjudicate disputes; only its ability to order tax increases or spending cuts. Nevertheless, the Danforth amendment was a clear signal that Congress did not intend the judiciary to take an activist posture in interpreting the Amendment.

Senator Reid also expressed concern regarding judicial activism and the balanced budget amendment. Senator Reid offered a substitute amendment which made clear that the courts would not be involved in budget policy. Section 5 of the Reid amendment required that the Amendment "shall be enforced *only* in accordance with appropriate legislation enacted by Congress"[145] The Reid amendment clarified that Congress would be the only branch to enforce the Amendment, and it specifically provided for an enforcement mechanism in the Amendment.[146] If, in fact, the proponents of the balanced budget amendment intended to exclude court involvement, it is unclear why they did not include the Reid or the Danforth language in their revised Amendment.[147]

Senator Danforth retired after the 103d Congress, and neither the language from his amendment nor the language from the Reid amendment was included in the version of the Amendment introduced in the 104th Congress. The absence of the Danforth language in the version of the balanced budget amendment considered in the 104th Congress, after the inclusion of such language in the 103rd Congress, may be interpreted by the judiciary as an indication that Congress no longer intended to limit the judiciary's involvement.[148] At the very least, the absence of the Danforth amendment may be a sign to the courts that no clear consensus existed regarding judicial involvement.[149] Because of this ambiguity and the

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[145] (Emphasis added). The Reid amendment was a substitute constitutional amendment. It included several provisions in addition to the provision limiting court involvement. 140 CONG. REC. S1826 (daily ed. Feb. 24, 1994). The Reid amendment also exempted Social Security, created a capital budget, and provided an exemption for recessions.

[146] The remainder of Section 5 provides that "[t]he Congress may by appropriate legislation, delegate to an officer of Congress the power to order uniform cuts." This provision of the Amendment was designed to address the separation of powers problems raised in Bowsher v. Synar, 478 U.S. 714 (1986).

[147] Some of the suggestions from opponents of the measure could improve the Amendment. In past years, however, the strategy of the proponents has been to refuse any amendments to the bill. By doing so, they may have actually increased the possibility of confusion regarding the Amendment and encouraged court involvement.

[148] *See* 141 CONG. REC. S1742 (daily ed. Jan. 31, 1995)(statement by Sen. Kennedy).

[149] The drafter's refusal to include either the Danforth or the Reid language in the 104th Congress emphasizes the point that many of the proponents support judicial involvement. The proponents included the Danforth language when it was necessary to secure his vote, however, they clearly did not strongly support its inclusion because after his retirement the language was dropped.

exclusion of the language in the Amendment in the 104th Congress, the issue resurfaced during consideration of the Amendment in 1995.

2. The Senate's Attempt during the 104th Congress to Clarify the Role of the Judiciary

Two amendments were offered during consideration of the balanced budget amendment in the 104th Congress. The first, offered by Senator Johnston, prohibited the judiciary from ordering any remedy except declaratory judgments. This amendment was similar to the Danforth amendment which was accepted in the 103rd Congress; however, the Johnston amendment was rejected in the 104th Congress by a vote of fifty-two to forty-seven.[150]

After the rejection of the Johnston amendment, supporters of the balanced budget amendment were two votes short of the two-thirds necessary for passage. Senator Nunn spoke on the Senator floor and informed his colleagues that he would vote for the balanced budget amendment if language regarding the role of the judiciary was included in the Amendment. In their search for votes, proponents agreed to Senator Nunn's demands, and the Nunn language was included in the Amendment by a vote of ninety-two to eight.[151] Thus, in a period of a week, the Senate both rejected and accepted almost identical language regarding the role of the judiciary.

i. The Johnston Amendment would have Limited the Role of the Judiciary

The Johnston amendment prohibited any court from having the power to order relief under the Amendment except when specifically authorized by Congress.[152] Senator Johnston thought the amendment was necessary to avoid past ambiguity and to address the concerns of legal scholars regarding the role of the judiciary.[153]

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[150] 141 CONG. REC. S2732 (daily ed. Feb. 15, 1995).

[151] 141 CONG. REC. S3276 (daily ed. Feb. 28, 1995).

[152] The Johnston amendment stated: "No court shall have the power to order relief pursuant to any case or controversy arising under this article, except as may be specifically authorized in implementing legislation pursuant to this section." 141 CONG. REC. S2694 (daily ed. Feb. 15, 1995).

[153] *See, e.g., Constitutional Amendment to Balance the Budget*, 102d Cong., 2d Sess. 693 at 10 (statement by Laurence Tribe, professor, Harvard University "So that one way or another, Members of Congress, a House of Congress, someone who has been cut off from a program, a taxpayer, these people will be able to go to court; no question about it.") Robert H. Bork, *On Constitutional Economics*, AEI J. ON GOV'T AND SOC'Y, at 18 (Sept-Oct. 1983), *reprinted in Proposed Balanced Budget Constitutional Amendments: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 645, 649 (1987)("The result would likely be hundreds, if not thousands, of lawsuits around the country, many of them on inconsistent theories and providing inconsistent results.") *Balanced Budget Amendment—Senate Joint Resolution 41*, 103d Cong., 2d Sess. 423 at 186 (statement of Kathleen Sullivan, professor, Stanford University "enforcement of the [b]alanced [b]udget [a]mendment would inevitably wind up on the doorsteps of the state and federal courts, and ultimately at the Supreme Court." *Balanced Budget Amendment—Senate*

The Johnston amendment explicitly stated that the judiciary could not order relief under the Amendment. The judiciary could still determine if budgets were constitutional or if Congress was acting within the restrictions of the Amendment, but the judiciary could not order relief or order Congress to take any specific action.

The Johnston amendment was not as exclusive as the Nunn amendment, which was ultimately passed by the Senate. The Johnston amendment limited relief except if Congress authorized otherwise, but it still permitted the judiciary to make important decisions regarding how the Amendment would be implemented and how the terms of the Amendment were defined.

For example, there was a question raised during the debate on the Federal Amendment regarding the power of the Vice President to vote to break a tie.[154] Under the Johnston amendment, the Court could clarify this provision; however, it could not order any specific remedy. But, under the Nunn amendment, the Court could not make a determination regarding the constitutionality of the Vice President's vote unless specific legislation authorized the court to do so. Furthermore, under the Johnston amendment, the judiciary could also decide cases regarding the definition of "revenue," "outlays," "debt" and other terms used in either the Amendment or the implementing legislation, while the Nunn amendment would eliminate the Court's jurisdiction to hear these cases.

The Johnston amendment struck a more proper balance. It allowed the judiciary to be involved in interpreting the meaning of the Amendment and the implementing legislation while prohibiting the judiciary from ordering specific remedies. The judiciary would thus be able to interpret the Amendment and ensure clarity in its interpretation while only having the power to order those remedies specifically authorized by Congress in implementing legislation.

ii. The Nunn Amendment Limits Federal Court Involvement Even Further than the Johnston Amendment

The original version of the Nunn amendment was very similar to the Johnston amendment, but in its final form the Nunn amendment restricts

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Joint Resolution 41, 103d Cong., 2d Sess. 423 at 193 (statement of Burke Marshall, professor, Yale University: "I have little doubt that the courts ultimately would, however reluctantly, exercise the power of judicial review over such questions as the meaning of the language."); *Hearings Before the Senate Committee on the Judiciary*, 104th Cong., 1st Sess. (Jan. 5, 1995)(statement of Former Attorney General Barr)(transcript available from the Committee)("I would be the last to say that the standing doctrine is an ironclad shield against judicial activism. The doctrine is malleable and it has been manipulated by the courts in the past." *but cf.* "In my view, though it is always difficult to predict the course of future constitutional law development, the courts' role in enforcing the balanced budget amendment will be quite limited.")

[154] *See infra* section III.A.

judicial involvement even more radically than the Johnston amendment. The original Nunn amendment prohibited the judiciary from ordering relief other than a declaratory judgment or "such remedies as are specifically authorized in implementing legislation pursuant to this section."[155]

Senator Hatch, the lead sponsor of the Amendment, opposed the Nunn amendment. He pointed out that a declaratory judgment can be just as intrusive as an injunction. "When a court declares a statute unconstitutional, it has the same effect as enjoining the Constitution."[156] Senator Hatch then argued that the Nunn amendment was unnecessary because the role of the judiciary could be determined in implementing legislation.

Senator Nunn then modified his amendment which stated, "[T]he judicial power of the United State shall not extend to any case or controversy arising under this article except as may be specifically authorized by legislation adopted pursuant to this section."[157] This language was more restrictive than previous amendments which attempted to limit the remedies which the judiciary could impose. The Nunn amendment limited the judiciary's power to hear *any* cases under the balanced budget amendment unless that power was specifically authorized by the Congress in implementing legislation.

Under Senator Nunn's amendment, the judiciary would be prohibited from interpreting the Amendment and would only be empowered to do so by implementing legislation. Senator Nunn's amendment, in effect, codified Senator Hatch's approach, but started from the premise of no judicial involvement unless specifically authorized in implementing legislation, while Senator Hatch started from the premise that the Congress could limit the judiciary's power in implementing legislation if that became necessary.

In addition, passage of the Nunn amendment might increase the states' role in interpreting the Amendment. Although the Nunn amendment will eliminate federal jurisdiction regarding the Amendment, it does nothing to prohibit state courts from hearing these cases. Under that scenario, final

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[155] The Nunn Amendment would have added to Section 6 the following language:

> The power of any court to order relief pursuant to any case or controversy arising under this article shall not extend to ordering any remedies other than a declaratory judgment or such remedies as are specifically authorized in implementing legislation pursuant to this section.

141 CONG. REC. S3038 (daily ed. Feb 23, 1995).

[156] Although Senator Hatch spoke against the Nunn amendment, in the search for additional votes, he later agreed to include the Nunn language and voted in favor of the Nunn amendment. 141 CONG. REC. 3042 (daily ed. Feb. 23, 1995)(Hatch's opposition); 141 CONG. REC. S3276 (daily ed. Feb. 28, 1995)(vote on Nunn amendment).

[157] 141 CONG. REC. S3044 (daily ed. Feb. 23, 1995)(Statements by Sen. Hatch and Sen. Nunn).

determinations under the Federal Amendment might be determined at the state level.

The Nunn amendment shifts the balance regarding judicial involvement. It assumes that the judiciary will not be involved unless Congress specifically authorizes its involvement, and under the Nunn amendment the Congress could completely prohibit any review of the Amendment by the Supreme Court. Thus, the balanced budget amendment, with the inclusion of the Nunn language, could be one of the only amendments in the Constitution that could not be enforced by the judiciary.[158]

If the judiciary is prohibited from reviewing or enforcing the Amendment, and Congress already has the statutory ability to balance the budget, then the benefits of the balanced budget amendment are severely limited. If the Amendment provides no greater enforcement power than that which Congress has already under current law, the Amendment no longer provides a "way to balance the budget." If Congress determines when the judiciary will have authority to review cases under the balanced budget amendment, it will do so in implementing legislation which must be passed by a majority vote and signed by the President. If Congress passed a statutory balanced budget requirement, the same majority vote would be needed to exceed statutory rules regarding a balanced budget. Thus, while the balanced budget amendment with the Nunn language may provide some psychological impetus for balancing the budget, with the inclusion of the Nunn language, a statutory approach may be as effective as a constitutional one.[159]

The legislative history surrounding the Nunn, Johnston, Reid and Danforth amendments indicates the reluctance of proponents to completely rule out judicial involvement in interpreting the Amendment. Amendments to restrict the judiciary's role are accepted only as a last resort. This

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[158] Alexander Hamilton expressed concern about "fettering" the Constitution with unenforceable principles.

> Wise politicians will be cautious about fettering the [g]overnment with restrictions that cannot be observed; because they know, that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the Constitution of a country, and forms a precedent for other breaches, where the same plea of necessity does not exist at all, or is less urgent and palpable.

THE FEDERALIST No. 25 (Alexander Hamilton).

[159] The balanced budget amendment would still require that three-fifths of the full House vote to extend the debt limit. A violation of that provision would not be reviewable under the Nunn amendment. Since a simple majority could exclude the judiciary from ruling on such an extension, a majority could undermine the purpose of the Amendment. This ability would be somewhat limited if the implementing legislation already included the authority for the judiciary to review such cases since passage in both Houses of Congress, though by a majority vote, and the signature of the President would be necessary to change the implementing legislation. The debt limit provision in the balanced budget amendment, however, could be achieved equally well without a constitutional amendment. *See* Exon amendment, S. REP. No. 82, 104th Cong., 1st Sess. 296 (1995).

indicates, that at least to the proponents of the balanced budget amendment, amendments limiting the role of the judiciary have some meaning. They must change the balance of court involvement or the proponents would not consistently try to avoid including such language. Limiting language is excluded whenever possible and included only when necessary. Because of this continual reject-accept approach, the legislative history is muddled. If, as some of the proponents assert, the intent of Congress is that the judiciary not be involved in the interpretation of this Amendment, then the proponents should make the judiciary's role clear and include specific language in the Amendment.[160]

Supporters of the Amendment are relying on the legislative history to clarify the role of the judiciary under the Amendment. However, this reliance may be unwarranted. First, as discussed in this section, the legislative history is extremely confusing. There is no guarantee that the Court will interpret the legislative history to limit judicial involvement.

Secondly, the Court may never look to the legislative history surrounding the Amendment. The Court often only looks at the legislative history surrounding a statute when the wording of the statute itself is ambiguous.[161] In this case, the judiciary might determine that without the Nunn amendment, or some other clarifying language, the intent of Congress was clear—Congress did not intend to limit the Court's involvement. If Congress had intended to do so, they would have explicitly done so in the Amendment itself. Although Congress explicitly granted themselves the responsibility to enforce the Amendment through implementing legislation, the Amendment clearly does not give the Congress the sole power to enforce the Amendment. Without the Nunn or Johnston language, the judiciary might never consider the legislative history which was laid out by Senator Hatch.[162]

The ambiguity in the legislative history, and the reluctance on the part of many Members of Congress to legislatively clarify the role of the

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[160] *See* 141 CONG. REC. S2723 (daily ed. Feb. 15, 1995) (statement by Sen. Specter) (Sen. Specter, a supporter of the Amendment, suggested that it was "advisable for this body to face the jurisdictional issue squarely.").

[161] W. Va Univ. Hosp. v. Casey, 499 U.S. 83, 98-99 (1991) (holding that when a statute "contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989).

[162] Senator Hatch strongly believed that the Court would limit its involvement voluntarily through standing and the political question doctrine. On several occasions, Senator Hatch stressed this point in the Congressional Record. He was doing everything that he could to communicate to the Court that they should limit their involvement to only extreme cases under the Amendment. *See* 141 Cong. Rec. S3044 (daily ed. Feb. 23, 1995); 141 Cong. Rec. S2149 (daily ed. Feb. 22, 1995); 141 Cong. Rec. S2697 (daily ed. Feb. 15, 1995); *Id.* at S2718; 141 Cong. Rec. S1830 (daily ed. Jan. 30, 1995).

judiciary regarding the balanced budget amendment, may in itself indicate that the underlying matter is not appropriate for constitutional treatment. The Nunn amendment clearly limited the judiciary's role in interpreting the Amendment, but it further raises the question of why the Amendment is necessary if only the Congress can enforce the Amendment. Congress already has the constitutional power to balance the budget, and this Amendment would give the Congress no additional power or incentive. Since the Nunn amendment eliminates the major non-legislative enforcement mechanism, a constitutional amendment to balance the budget may be only slightly more effective than a statute. If that is the case, Congress should seriously consider statutory deficit reduction measures before amending the Constitution.[163]

C. Clarification of Congressional Intent

Congress's elaboration of the balanced budget amendment has been purposefully vague in order to ensure enough votes for passage. Since some supporters believe that the Amendment will not be enforced by the judiciary and others believe that it will, the judiciary is left with no clear communication on the issue.

In addition, whenever a problem arises with the Amendment, proponents claim that it can be solved through implementing legislation.[164] They argue that implementing legislation can be used to limit court involvement, to limit standing, and to ensure that the budget is balanced. There is no guarantee, however, that implementing legislation will be

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[163] *See* Kathleen M. Sullivan, *Constitutional Amendmentitis*, 23 THE AMERICAN PROSPECT 20 (1995).

[164] For a list of the problems with the balanced budget amendment that proponents argue can be solved through implementing legislation; *see* statement and questions of Sen. Levin to Sen. Simon, 141 CONG. REC. S2179 (daily ed. Feb. 6, 1995).

> Sen. Levin: How would the monitoring of the flow of receipts and outlays be done to determine whether the budget for any fiscal year is on the track of being balanced?
>
> Sen. Simon: There would have to be monitoring and future legislation would have to take care of the implementation of that monitoring.
>
> Sen. Levin: What exactly is the definition of receipts and outlays?
>
> Sen. Simon: Implementing legislation will be needed on some of these peripheral questions.
>
> Sen. Levin: What if the Congressional Budget Office and the Office of Management and Budget disagree with each other on what a level of outlays is?
>
> Sen. Simon: Future legislation will have to take care of this.
>
> Sen. Levin: Who will determine the level of receipts and whether a revenue bill is "a bill to increase revenues?"
>
> Sen. Simon: That will have to be determined through future legislation.

passed and certainly no guarantee that the implementing legislation will include provisions to clarify these problems.

Congress should consider implementing legislation concurrently with consideration of the Amendment to ensure clarity regarding judicial intervention and presidential authority.[165] As the state cases point out, the definition of receipts and outlays, the role of the judiciary, the definition of a "balanced budget," the definition of fiscal year, might all be litigated in federal court. It would be far clearer to the judiciary and the nation if Congress considered implementing legislation concurrently with the consideration of the balanced budget amendment.

Congress rarely passes implementing legislation concurrently with the passage of a constitutional amendment. Congress did consider implementing legislation concurrently with the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. Although war and the freeing of millions of slaves may have made concurrent implementing legislation necessary, the important structural constitutional change also made concurrent implementing legislation beneficial. In this respect, the balanced budget amendment is very similar to the Thirteenth, Fourteenth, and Fifteenth Amendments. The balanced budget amendment makes a very significant structural change in the way the United States government operates. Due to the significant structural change, and the complicated nature of the subject matter, Congress should pass implementing legislation concurrently with the Amendment so that the proposed effects of the measure will be clearly understood.

Passage of implementing legislation concurrently with the Amendment would not preclude Congress from amending or modifying the implementing legislation in the future. The budget process is complex and Congress will certainly not pass perfect implementing legislation. Nevertheless, concurrent passage of implementing legislation and the balanced budget amendment will clarify congressional intent regarding the Amendment.

Supporters of the Amendment may fear that this approach would reduce the Amendment's chances of passage. Yet, when dealing with the Constitution, Congress should strive for clarity regarding the implications of the Amendment.

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[165] During the 104th Congress, several members promoted a "Right to Know Amendment." 141 CONG. REC. S2277-S2307 (daily ed. Feb. 8 1995). This amendment would have required the proponents to set out a balanced budget plan before the Amendment was considered. Americans have the right to know not only how the budget will be balanced, but also what role the judiciary will have in enforcing the amendment. If Congress were to pass a balanced budget amendment, it should concurrently pass implementing legislation.

III. WILL THE STANDING OR THE POLITICAL QUESTION DOCTRINE LIMIT JUDICIAL INVOLVEMENT?

Proponents of the balanced budget amendment argue that the state examples are not instructive since federal courts have judicial constructs that would limit the judiciary's involvement.[166] They mainly cite the federal judiciary's strict standing rules, or the political question doctrine.[167]

A. Standing Limitations may not Prevent Judicial Involvement[168]

What would happen if the government did not balance the budget, or the President asserted additional powers to balance the budget, or Congress passed a budget that evaded the intent of the Amendment? Who could sue to enforce the constitutional amendment?

The Constitution requires that the power of the judiciary extends to cases and controversies.[169] One component of this requirement is that a plaintiff must have standing to invoke the jurisdiction of the court. The Court held that the standing doctrine includes both self-imposed limits on the judiciary's power and a "core [c]onstitutional" component.[170] The core constitutional component requires that "a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[171] Therefore, for an individual to have standing in a federal court, he must show: 1) injury in

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[166] 141 CONG. REC. S1835-36 (daily ed. Jan. 31, 1995)(Statement by Sen. Hatch); *but see*, Letter from Walter Dellinger, Assistant Attorney General, to Senator Hatch (Jan. 9, 1995)(letter available from the Senate Committee on the Judiciary)

"However, none of the commentators, including former Attorney General Barr himself, believe that the Amendment, as currently written, would bar courts from at least occasional intrusion into the budget process. Accordingly, whether we face an 'avalanche' of litigation or fewer cases alleging 'serious and clear cut violations,' there is clearly a consensus that the Amendment creates the potential for the invovlement of courts in issues arising under the balanced budget amendment, and that these issues are plainly inappropriate subjects for judical resolution."

Id.; see also, Letter from Law School Deans quoted in CONG REC. S7759 (daily ed. June 10, 1992). "Under this Amendment, the responsibility for enforcing a balanced budget will fall upon the judiciary. We are gravely concerned with the harm certain to be done to the judiciary by requiring the courts to address fiscal and budgetary questions for which they are completely unsuitable—questions ranging from the interpretation of the Amendment to the reliability of estimates of future revenues." *Id.*

[167] It is ironic that proponents of the Amendment, who believe so strongly in a balanced budget, take comfort in citizens' lack of standing to sue to enforce a balanced budget.

[168] Because the proponents argue that the standing and political question doctrines will eliminate judicial involvement, this paper discusses the issues briefly. For a more thorough discussion, see Gay Aynesworth Crosthwait, Note, *Article III Problems in Enforcing the Balanced Budget Amendment*, 83 COLUM. L. REV. 1065 (1983).

[169] U.S. CONST. art. III, § 2.

[170] Allen v. Wright, 468 U.S. 737 (1984).

[171] *Id.*

fact; 2) causation; and 3) redressability.[172] Proponents of the Amendment argue that it will be impossible for plaintiffs to satisfy these requirements and the judiciary will therefore not be presented with any cases or controversies regarding the Amendment. However, there are several ways that plaintiffs may be able to satisfy this requirement.

The Court has granted taxpayers standing to sue under the Taxing and Spending Clause if the congressional action violates an exercise of that power.[173] In *Flast v. Cohen*, a taxpayer filed suit to enjoin the allegedly unconstitutional expenditure of federal funds under Titles I and II of the Elementary and Secondary Education Act of 1965.[174] The Court held that if a taxpayer can show that an action "exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power."[175] the court may grant the taxpayer standing to sue.[176] Since the balanced budget amendment limits the taxing and spending power, the *Flast* decision might provide the basis for taxpayer standing to bring suits challenging violations of the Amendment.[177]

Thus, if Congress failed to balance the budget and receipts exceeded outlays, a taxpayer might have standing to sue to enforce the Amendment. A court could then order relief to remedy violations of the Amendment.

Even if courts do not recognize standing for taxpayers generally, there will be cases when individuals will have standing to sue. The standing requirements are not insurmountable for individuals harmed under the balanced budget amendment.[178]

If the President or Congress claimed additional authority pursuant to the balanced budget amendment, either to impound funds or to withhold specific benefits, individuals might have standing to raise the constitutionality of those actions. An individual who failed to receive a benefit due to the President's impoundment of funds would be able to show both injury in fact and causation. Redressability also would not be a

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[172] *Id.*; Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992).

[173] Flast v. Cohen, 392 U.S. 83 (1967); U.S. CONST. ART. I, § 8.

[174] *Flast*, 392 U.S. at 85.

[175] *Id.* at 102-103.

[176] The *Flast* Court held that a taxpayer must establish a logical link between his status as a taxpayer and the type of legislative enactment attacked. The taxpayer must also establish a nexus between that status and the precise nature of the constitutional infringement. *Id.* at 102.

[177] *See Balanced Budget Amendment—S.J. Res. 41: Hearings Before the Senate Comm. on Appropriations*, 103d Cong, 2d Sess. 182 (1994) (statements of Kathleen Sullivan, professor, Stanford University; Walter Dellinger, Assistant Attorney General; Archibald Cox, professor, Harvard University).

[178] For the view that there will be individuals with standing, see Dellinger, Sullivan, Cox, *supra* note 177. *Cf. Hearings Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (Jan. 5, 1995)(transcript available from the Committee)(statement of former Attorney General William Barr).

problem, since the taxpayer could seek an injunction against the President's action.

A similar scenario to the above would be very likely under the balanced budget amendment. In fact, many of the state court cases involving state balanced budget amendments are brought because either the legislature or the executive has exceeded its constitutional authority in trying to balance the budget.[179]

Individual taxpayers might also adjudicate cases regarding the balanced budget amendment in state courts, where the standing rules are far more liberal. The state courts are accustomed to litigating issues regarding state balanced budget restrictions, and they may be willing to hear federal cases at the state level.

In *ASARCO v. Kadish*,[180] the Court held that state courts could hear federal questions even if standing would not have been available in federal court.[181] In *ASARCO*, taxpayers and a teachers' union brought suit against ASARCO, a mining company, claiming that Arizona's statute governing mineral leases on state lands violated federal laws.[182] The teachers claimed that the State's leasing arrangement "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes."[183] The Court held that the teachers and the taxpayer would not have had standing in federal court, but since "the [s]tate courts are not bound to adhere to federal standing requirements, they posses the authority absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of [f]ederal law."[184] Once the state court has heard a case, the Supreme Court would have jurisdiction to review the case even though it would not have conferred standing on the plaintiff in the original action.[185]

A suit brought to enforce the balanced budget amendment might follow the pattern established in *ASARCO*. A taxpayer might bring suit in state court claiming violations of both the state and federal constitutions. As in

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[179] *See supra* section I.

[180] 490 U.S. 605 (1988).

[181] *Id.* at 617. "We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute." *Id. (emphasis added).*

[182] *Id.* at 610.

[183] *Id.* at 614.

[184] *Id.* at 617.

[185] *Id.* at 618. Once a person has gained standing in state court, any decision for the plaintiff creates a harm to the defendant. Once the state court judgment creates a specific legal obligation upon the defendant, that obligation creates a direct injury and the federal court has jurisdiction to hear the case.

ASARCO, the complaint could very generally allege that an action caused higher taxes, or that the unbalanced budget caused an increase in interest rates for businesses that needed capital. Once state courts made a final determination regarding the case, the decision would stand unless overturned by the Supreme Court.[186]

In addition to individual taxpayer standing, Members of Congress may at times have standing in their capacity as Members. Although various circuit court decisions have limited this doctrine, the Supreme Court has yet to provide a clear doctrine of congressional standing.[187] In debate regarding the constitutional amendment, several proponents of the measure have suggested that in some circumstances Members of Congress should have standing to challenge violations of the Amendment.[188]

There have been several cases in the circuit courts regarding the doctrine of congressional standing; however, the Supreme Court has not ruled on the proper scope of congressional standing. A series of decisions grant Members of Congress standing when they have suffered injuries in their capacity as legislators. In *Kennedy v. Sampson*,[189] the D.C. Circuit held that Senator Kennedy had standing to sue regarding President Nixon's use of the pocket veto because his vote in favor of the legislation had been nullified by the President's action.[190] Courts in other cases, while rejecting Member standing, have indicated a willingness to confer standing to Members in certain situations.[191]

A second line of cases, however, has required not only that the individual Congressman suffer a specific injury, but also that the legislators

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[186] This problem would not exist if the plaintiff was suing a federal official, since the federal official could have the case removed to federal court. 28 U.S.C. 1442 (1994). This does not eliminate the ASARCO problem since suits may arise under the Amendment which do not involve federal officials. If Congress was trying to subvert the Amendment, it might create quasi-government or private companies to borrow for the government. A suit against these agencies would not be removable under §1442.

[187] Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977)(Member of Congress lacked standing to sue the CIA since there was no injury in fact); Riegle v. FOMC, 656 F.2d. 873 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981)(Sen. Riegle did not have standing to seek injunctive relief against the current appointment process for Federal Reserve Governors even though he suffered personal injury.); Goldwater v. Carter, 444 U.S. 996 (1979); Melcher v. FOMC, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1042 (1981). *But cf.* Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974)(Sen. Kennedy had standing to challenge the constitutionality of President Nixon's improper "pocket veto."); Coleman v. Miller, 307 U.S. 433, 438 (1939)(State Senators had standing regarding the constitutionality of the Lieutenant Governor's right to break a tie vote).

[188] 128 CONG. REC. 18502 (statement by Sen. Hatch); 141 CONG. REC. H754 (daily ed. Jan. 26, 1995)(statement by Rep. Schaefer). "A member of Congress, or an appropriate administration official, probably would have standing to file suit challenging legislation that subverted the [A]mendment."

[189] 511 F.2d at 430.

[190] *Id.* at 433.

[191] Harrington v. Bush, 553 F.2d 190, 210 (D.C. Cir. 1977)("We do not hold that a Congressman may never seek a declaratory judgment of executive illegality, but that such a request must be accompanied by allegations of a particular concrete injury.").

have no ability to redress their problem in the legislative field. In *Riegle v. FOMC*,[192] Senator Riegle sought an injunction against the appointment of Federal Reserve Board members who were appointed by the Federal Reserve Banks without the advice and consent of the Senate. The court held that Senator Riegle's inability to exercise his right under the Appointments Clause is an injury sufficiently personal to constitute an injury in fact,[193] but the court held that before a Member will be able to seek a judicial remedy, he must lack collegial or "in home" remedies.[194]

These doctrines have not yet been reconciled and the most recent cases in circuit courts suggest that Members of Congress will have standing only in extreme situations. However, there are situations where Members of Congress may meet these requirements. Section 2 of the balanced budget amendment requires that there be a three-fifths vote to increase the debt held by the public. If Congress redefines debt by the public or creates off-budget entities to avoid the debt limit, a Member might be able to claim that his vote has been diluted and that he has suffered a harm. Under the *Kennedy v. Sampson* line of cases, a Member in such a situation might be found to have standing to enforce the constitutional violation.

Problems might also arise under Section 4 which requires a majority of the whole body to increase revenues. First, Members might disagree on what constituted a revenue increase. If an increase occurred without a majority of the whole number, a Member might successfully argue that his vote was diluted and the Court might find that the Member had standing to sue.

A second problem might arise under Section 4 regarding the Vice President's right to break a tie vote. The legislative history regarding this issue is in direct conflict—the House of Representatives claims that the Vice President will still cast the deciding vote regarding revenue increases while the Senate claims that the Vice President will have no such authority.[195] A Member of Congress will likely have standing to bring

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[192] 656 F.2d at 873.

[193] *Id.* at 878.

[194] *Id.* at 881.

[195] *See* statement by Rep. Schaefer, 141 CONG. REC. H758 (daily ed. Jan. 26, 1995) ("This language is not intended to preclude the Vice President, in his or her constitutional capacity as President of the Senate, from casting a tie-breaking vote that would produce a 51-50 result.") *But see* statement by Sen. Hatch, 141 CONG. REC. S2929 (daily ed. Feb. 22, 1995) ("I personally believe that the Vice President's vote will not count in this situation because we will have to have 51 Senators of the whole number of 100 actually vote.") Super or special majorities such as this one do not always work to decrease the budget deficit. President Clinton's economic plan, the Omnibus Reconciliation Act of 1993 (OBRA), decreased the deficit by over $500 billion and passed by a vote of 51 to 50 with the Vice President casting the tie vote. 139 CONG. REC. S10764 (1993). Since OBRA raised revenue, the Act would have failed under the Senate interpretation of the balanced budget amendment. The

such an action claiming that his vote was diluted by the Vice President's vote.[196]

The doctrine of Member standing is still uncertain; however, it is possible that Members of Congress will have standing to sue when questions regarding the balanced budget amendment specifically harm them in their capacity as Members.[197]

The standing doctrine may, in fact, limit a citizen's ability to bring suits under the Amendment, however, Congress' sole reliance on the standing doctrine as a means for limiting judicial interference is extremely risky. The Court may determine that citizens, Members of Congress, or specific aggrieved parties have standing to sue. In addition, individuals may bring their claims to state courts which are not bound by the Article III standing requirements. These cases would then reach the Supreme Court on appeal and the individuals would then have standing in federal court. Finally, Congress might statutorily grant standing to aggrieved parties and the statutory grant might survive constitutional challenge. With the very real possibility that the standing doctrine will not be a complete bar to litigation, it should not be relied upon as the main defense against judicial involvement.[198]

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defeat of OBRA would have stopped a tax increase, but it would have also hampered attempts to reduce the deficit and balance the budget.

[196] The issue of the Vice President's right to vote as President of the Senate has arisen recently in the Commonwealth of Virginia. The Virginia Senate is currently in a 20 to 20 split between Republicans and Democrats. The Lieutenant Governor, as presiding officer, has the authority to break ties. However, the Virginia Constitution also requires a "majority of the members elected" for issues concerning taxes, debt, and constitutional amendments. The Lieutenant Governor cast his vote in favor of the amendment. The opponents have argued that the Lieutenant Governor is not a member of the Senate and therefore cannot vote on measures related to debt, taxes, or the constitution. The opposition party has decided to file suit against the Lieutenant Governor. This same argument will likely arise at the federal level if the balanced budget amendment is enacted. Peter Baker, *Beyer's Tiebreaker Plunges Va. Senate Into Fight on Rules*, WASH. POST, Feb. 6, 1996, at B1, B3.

[197] Members of Congress could legislatively resolve the standing issue. Their failure to do so even after the consideration of this Amendment highlights the conflict within the Congress regarding this Amendment. Some members do not want constitutional violations to go unchecked and therefore would like Members to have standing, but others do not want the courts to impinge on the basic budgetary decisions of the Nation. *See* statement by Sen. Johnston, 141 CONG REC. S2694 (daily ed. Feb. 15, 1995).

[198] Some legal commentators argue that the standing doctrine has been selectively employed to restrict or deny access to litigants who previously would have enjoyed such access. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 110 (1988). Others have argued that the Court has manipulated the standing doctrine to advance its views of the merits. Gene Nichol Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 649-59. What is clear is that the standing doctrine has dramatically changed over the last thirty years. The political question doctrine and the standing doctrine were both used to limit the Court's involvement in specific cases. As the composition of the Court has changed, the Court's willingness to dismiss suits for political question reasons has diminished, and the Court's willingness to limit suits based on the standing doctrine have increased. As time passes, the standing doctrine may prove to be an insufficient method for limiting suits under the balanced budget amendment.

B. The Political Question Doctrine may not Prevent Judicial Interference

If the courts determine that an individual has standing to bring a suit under the Amendment, they may further limit the judiciary's involvement by holding that these issues are nonjusticiable political questions. A court does not hold an issue nonjusticiable as a political question simply because the issue is political. Alexis de Toqueville observed that "[t]here is hardly a political question in the United States that does not sooner or later turn into a judicial one."[199] A nonjusticiable political question is one in which no judicially cognizable standard exists by which the court can judge the constitutionality of a specific action.[200]

In *Baker v. Carr*,[201] the Court set out the standard by which a case may be considered a political question.[202] The court, however, has rarely invoked the political question doctrine since deciding *Baker v. Carr*.[203] In fact, the Supreme Court has been willing to get involved in some very "political" questions and ones which observers thought the Court might hold to be political questions.[204]

In *Department of Commerce v. Montana*,[205] Montana voters, and Members of Congress brought suit challenging the constitutionality of the federal government's allocation of congressional seats. Under *Baker v. Carr*, this might have been a political question, but the Supreme Court held that "the interpretation of the apportionment provisions of the Constitution is well within the competence of the judiciary."[206]

The courts also have been willing to hear cases regarding budget policy, and specifically overturned provisions of the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings).[207] In

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[199] DEMOCRACY IN AMERICA 270 (J.P. Mayer ed. 1969)(vol. 1, part ii, Chap. 8). *See also* Louis Henkin, *Is there a Political Question Doctrine?*, 85 Yale L.J. 597 (1976).

[200] STONE, ET AL., CONSTITUTIONAL LAW 114 (1991).

[201] 369 U.S. 186 (1962).

[202] To be considered a political question, the case must 1) lack satisfactory criteria for judicial determination; or 2) be textually and demonstrably committed to a coordinate political department. *Id.* at 210-211.

[203] *See* Gilligan v. Morgan, 413 U.S. 1 (1973).

[204] Department of Commerce v. Montana, 112 S.Ct. 1415 (1992); Bowsher v. Synar, 478 U.S. 714 (1986); *see* Dellinger Statement, *supra* note 83, at 140. It should be noted that one possible rationale for the scarcity of political question use is tougher standing requirements.

[205] 112 S. Ct. 1415 (1992).

[206] *Id.* at 1426.

[207] *Bowsher v. Synar* was a major intervention by the courts in federal budget policy. It indicates that the Supreme Court is willing to delve into the details of budget policy when it believes the Constitution so requires. For a discussion of Gramm-Rudman-Hollings and the Congressional Budget Act, see WILLIAM G. DAUSTER, BUDGET PROCESS LAW ANNOTATED, Sections103-49 (ed. 1993).

Bowsher v. Synar,[208] the Supreme Court held that the Congress could not assign authority to order spending cuts to the Comptroller of the United States, because the Comptroller was an officer removable by Congress and was exercising an executive function under the act. *Bowsher v. Synar* was a balance of power case dealing with specific budget questions in a highly political atmosphere. The Supreme Court held this case to be justiciable and analyzed the constitutionality of very complicated legislation regarding budget procedure.

It is unclear if this case would be decided the same way if the Constitution included a specific provision that required a balanced budget. The Gramm-Rudman-Hollings Act was specifically designed to reduce the deficit, and just this type of enforcement legislation will be necessary to reduce the deficit under a balanced budget requirement. The balanced budget amendment—especially Section 6, which gives enforcement powers to Congress—might provide additional powers to Congress to achieve deficit reduction. If Congress must enforce the Amendment then a congressionally appointed officer might have the power to issue sequesters to ensure compliance with the Amendment.

Although it is unclear to whom the judiciary will provide standing and in what instances the Court will hold issues to be political questions, it is probable that in some cases the Court will find standing and justiciability regarding the balanced budget amendment. These doctrines, therefore, should not be seen as a sufficient safeguard to prevent judicial activism in budgetary policy.

IV. CONCLUSION

A majority in Congress advocates the passage of a constitutional amendment to balance the budget. The proponents believe that this Amendment will force Congress to make the tough decisions and balance the budget. The Amendment, however, is either unnecessary or a significant intrusion on the separation of powers. The judiciary will either become a "super-auditing" office and enforce the Amendment, or it will sit on the sidelines and allow Congress to be the sole arbitrator of the Amendment. If Congress is the sole arbitrator, then the Amendment itself provides no restriction on Congress that they could not place on themselves without an Amendment. If the judiciary does become involved in

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[208] 478 U.S. 714 (1986).

interpreting the Amendment, then an unelected judiciary will have tremendous power over both the sword and the purse.

Judicial involvement at the state level provides some insight into the level of involvement that the federal judiciary may undertake in interpreting the Amendment. State courts have been very willing to enter into budgetary decisions and to decide cases based on state balanced budget requirements. Some state courts have interpreted words such as "outlays" and "receipts," others have determined what kind of borrowing is permitted, while still others have examined the separation-of-powers concerns raised by the Amendment. The fiscal straightjacket that these fiscal restrictions place on governments requires them to seek alternative methods for dealing with budgets in order to function. The alternative methods will surely be adjudicated in the courts forcing the judiciary's involvement in fiscal policy.

The debate over the constitutional amendment for a balanced budget has been a political one, and the consequences of the Amendment only have been a secondary concern. The legislative history of the Amendment has been purposely left vague so that it can be interpreted however each supporter would like to interpret it. Some supporters feel strongly that the Amendment should be enforced by the courts, and others believe that the courts should not get involved in budgetary policy. By leaving the Amendment vague and not clarifying its enforcement mechanism, the supporters are able to appeal to both groups.

As a consequence of this intentional ambiguity, there is really no indication of the intended level of judicial involvement. If the courts choose, they will be able to find legislative history that supports either court action or inaction, but the state experience suggests that the courts at the federal level will be drawn into interpreting the Amendment.