

BALANCED BUDGET CONSTITUTIONAL AMENDMENT

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JUNE 23, 2011.—Referred to the House Calendar and ordered to be printed

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Mr. SMITH of Texas, from the Committee on the Judiciary,  
submitted the following

R E P O R T

together with

DISSENTING VIEWS AND  
ADDITIONAL DISSENTING VIEWS

[To accompany H.J. Res. 1]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the joint resolution (H.J. Res. 1) proposing a balanced budget amendment to the Constitution of the United States, having considered the same, reports favorably thereon with an amendment and recommends that the joint resolution as amended do pass.

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## Dissenting Views

### I. INTRODUCTION

The Balanced Budget Amendment to the U.S. Constitution (BBA or Amendment) ostensibly mandates a balanced budget in each fiscal year beginning as soon as 2018. In reality, however, this Amendment does a great deal more, much of which is inimical to the fundamental tenets of a republican form of government. It may, in fact, actually undermine the goal of a balanced budget. The BBA threatens the survival of such critical programs as Social Security and Medicare, which serve as fundamental safety nets for millions of hardworking Americans. It undermines other important priorities including national security, veterans' health care, aid to education and the poor, support for family farmers, a vital national infrastructure, and all manner of government functions that are necessary to the needs of a western industrialized democracy. The Amendment skews all future budget debates in favor of deep spending cuts while virtually taking any additional revenues, or tax reforms, off the table. Its shortsighted restrictions threaten the standing of the dollar as a stable, reliable global reserve currency by undermining confidence in the full faith and credit of the United States in a manner unprecedented in the Nation's history.

And, the BBA could hobble the ability of the Federal Government to promote growth during economic downturns and to invest in future needs, thereby threatening to condemn America to permanent status as a second rate economy.

The BBA is opposed by numerous organizations committed to the economic well being of the United States as well as organizations concerned with the needs of the elderly, the middle class, our children, and other basic needs of national importance. These groups include a coalition of 123 religious, labor, education, civil rights, child advocacy, and other organizations;<sup>1</sup> a coalition of six national

<sup>1</sup> Letter from 9to5 National Association of Working Women, AFL-CIO; All Education Matters; Alliance for Retired Americans; American Association of People with Disabilities; American Association of University Women; American Federation of Government Employees; American Federation of State, County, and Municipal Employees; American Federation of Teachers; American Network of Community Options and Resources; The Arc of the United States; Asian American Justice Center; Association of Women's Health, Obstetric and Neonatal Nurses; Bazelon Center for Mental Health Law; Campaign for America's Future; Campaign for Community Change; CenterLink; The Community of LGBT Centers; Central Conference of American Rabbis; Corporation for Enterprise Development; Children Now; Children's Defense Fund; Cities for Progress, Institute for Policy Studies; the City Project, CLASP; Coalition on Human Needs; Commission on Social Action of Reform Judaism; Committee for Education Funding; Communications Workers of America; Community Action Partnership; Demos; Direct Care Alliance; Disability Rights and Education and Defense Fund; Easter Seals; Equal Justice Society; Families USA, Family Equality Council; Farmworker Justice; Food Research and Action Center; Friends of the Earth; Gay, Lesbian and Straight Education Network; Health & Disability Advocates; Health Care for America Now; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW); Japanese American Citizens League; Jewish Funds for Justice; Jewish Labor Committee; Latinos for a Secure Retirement; Lawyers' Committee for Civil Rights Under Law; Leadership Conference on Civil and Human Rights; League of Women Voters of the U.S.; Legal Momentum; Mental Health America; Minority Business Enterprise Legal Defense and Education Fund; NAACP; NAACP Legal Defense and Educational Fund; National Advocacy Center of the Sisters of the Good Shepherd; National African American Drug Policy Coalition; National AIDS Housing Coalition; National Alliance on Mental Illness; National Asian Pacific American Women's Forum; National Association for Children's Behavioral Health; National Association for Hispanic Elderly; National Association of Colored Women's Clubs; National Association of Human Rights Workers; National Association of Social Workers; National Center for Lesbian Rights; National Center for Transgender Equality; National Coalition for Asian Pacific Americans Community Development; National/Community Reinvestment Coalition; National Congress of American Indians; National Congress of Black Women; National Council of Jewish Women; National Council on Independent Living; National Disability Rights Network; National Education Association; National Employment Law Project; National

environmental organizations representing more than one million members and activists;<sup>2</sup> OMB Watch;<sup>3</sup> AFL-CIO;<sup>4</sup> Service Employees International Union;<sup>5</sup> the American Federation of State, County, and Municipal Employees;<sup>6</sup> the National Education Association;<sup>7</sup> the National Women’s Law Center;<sup>8</sup> Committee for Education Funding;<sup>9</sup> and the Coalition on Human Needs.<sup>10</sup>

For these reasons, and those discussed below, we respectfully dissent and urge our colleagues to reject this dangerous and destructive constitutional amendment.

## II. THERE IS NO NEED FOR A CONSTITUTIONAL AMENDMENT TO BALANCE THE BUDGET

During the 1990’s, Congress was able to eliminate the deficit and run surpluses without the aid of a balanced budget amendment. It took the reckless fiscal policies of President George W. Bush and a Republican Congress to turn that record surplus into record deficits in record time. That “accomplishment” is not evidence that our Constitution is in need of amendment. Rather, it demonstrates the result of disastrous choices made by those in power. The record calls not for a constitutional amendment, but for greater political

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Fair Housing Alliance; National Focus on Gender Education; National Gay and Lesbian Task Force Action Fund; National Health Law Program; National Immigration Law Center; National Korean American Service & Education Consortium; National Latina Institute for Reproductive Health; National Legal Aid & Defender Association; National Low Income Housing Coalition; National Organization for Women; National Partnership for Women & Families; National Priorities Project; National Senior Citizens Law Center; National Skills Coalition; National Urban League; National Women’s Law Center; NETWORK, A National Catholic Social Justice Lobby; Not Dead Yet; Office of Gender and Racial Justice, RE&WM, GAMC, Presbyterian Church (USA); OMB Watch; Paralyzed Veterans of America; PHI—Quality Care Through Quality Jobs; Physicians for Social Responsibility; PolicyLink; Poverty & Race Research Action Council; ProgressNow; Racial and Ethnic Health Disparities Coalition; RESULTS: The Power to End Poverty; SER—Jobs for Progress National; Service Employees International Union; Sexuality Information and Education Council of the U.S.; Sisters of Mercy Institute Justice Team; Social Security Works; South Asian Americans Leading Together; Southeast Asia Resource Action Center; Southern Poverty Law Center; Unitarian Universalist Association of Congregations; United Church of Christ, Justice and Witness Ministries; United Food and Commercial Workers International Union; United for a Fair Economy; United States Student Association; United Steelworkers; U.S. Psychiatric Rehabilitation Association; USAction; Voices for Progress; Wider Opportunities for Women; Women’s Missionary Society of the African Methodist Episcopal Church to Members of the House Judiciary Committee (June 1, 2011) (on file with the Subcommittee on the Constitution).

<sup>2</sup>Letter from Defenders of Wildlife, Friends of the Earth; National Resources Defense Council, Population Action International, Public Citizen, Wilderness Society, Voices for Progress to House Judiciary Committee Chairman Lamar Smith and Ranking Member John Conyers, Jr. (June 15, 2011) (on file with the Subcommittee on the Constitution).

<sup>3</sup>Letter from Craig Jennings, Director, Federal Fiscal Policy, OMB Watch, to House Judiciary Committee Chairman Lamar Smith and Ranking Member John Conyers, Jr. (June 1, 2011) (on file with the Subcommittee on the Constitution).

<sup>4</sup>Letter from William Samuel, Director, Government Affairs Department, AFL-CIO, to House Judiciary Committee Chairman Lamar Smith and Ranking Member John Conyers, Jr. (June 2, 2011) (on file with the Subcommittee on the Constitution).

<sup>5</sup>Letter from Michelle Nawar, Director of Legislation, Service Employees International Union, to House Judiciary Committee Chairman Lamar Smith and Ranking Member John Conyers, Jr. (June 3, 2011) (on file with the Subcommittee on the Constitution).

<sup>6</sup>Letter from Charles M. Loveless, Director of Legislation, AFSCME, to Members of the U.S. House of Representative (June 1, 2011) (on file with the Subcommittee on the Constitution).

<sup>7</sup>Letter from Kim Anderson, Director of Government Relations, and Mary Kusler, Manager of Federal Advocacy, National Education Association, to Members of the U.S. House of Representatives (June 2, 2011) (on file with the Subcommittee on the Constitution).

<sup>8</sup>Letter from Nancy Duff Campbell, Co-President, and Joan Entmacher, Vice President for Family Economic Security, National Women’s Law Center, to House Judiciary Committee Chairman Lamar Smith and Ranking Member John Conyers, Jr. (June 1, 2011) (on file with the Subcommittee on the Constitution).

<sup>9</sup>Letter from Abigail Evans, President, and Joel Packer, Executive Director, Committee for Education Funding, to Members of the House Judiciary Committee (June 14, 2011) (on file with the Subcommittee on the Constitution).

<sup>10</sup>Letter from Deborah Weinstein, Executive Director, Coalition on Human Needs, to House Judiciary Committee Chairman Lamar Smith and Ranking Member John Conyers, Jr. (June 3, 2011) (on file with the Subcommittee on the Constitution).

courage, accountability, prudence, foresight, and restraint by our elected officials, including some of those who now support this Amendment.

While waging war on two fronts, the Bush Administration championed tax cuts for the wealthy and increases in defense spending as well as new expenditures for such salutary programs as Medicare Part D. These were among the significant contributors to the resulting deficit in the Federal budget. In particular, tax cuts in 2001 and 2003 caused revenue to fall as of 2004 by more than 4 percentage points of GDP. At the same time, Federal spending rose from 18.2 percent of GDP in 2000 to 19.6 percent of GDP in 2007, all while the economy was showing signs of weakness, leading to its near collapse just a year later.<sup>11</sup>

From 2001 to 2010, the Bush Administration's tax cuts added \$2.6 trillion to the public debt,<sup>12</sup> nearly fifty percent of the total debt accrued during this period.<sup>13</sup> Congressional Budget Office (CBO) and Joint Committee on Taxation (JCT) projections estimate that maintaining the tax cuts of 2001 and 2003 (which were to sunset in 2010) for the wealthiest 2 percent of Americans will reduce revenues by about \$690 billion over the next 10 years.<sup>14</sup> When the interest payments are factored in to these numbers, the true price of maintaining the tax cuts for the wealthy jumps by almost \$140 billion.<sup>15</sup> In total, keeping the cuts for the richest 2 percent of Americans will cost almost \$830 billion over the next 10 years.<sup>16</sup>

While revenues were decreasing as a result of the Bush tax cuts, defense spending jumped dramatically to fund both the Iraq and Afghanistan Wars. There were also substantial spending increases for enhanced security measures necessitated by the Global War on Terror, including the creation of the Department of Homeland Security. During the 7 years President Bush was in office after the terrorist attacks of September 11, 2001, nearly \$800 billion was spent on these two wars and enhanced security measures.<sup>17</sup>

Among the Bush Administration's other initiatives was the creation of Medicare Part D in 2003. This worthwhile program, unfor-

<sup>11</sup>Mindy R. Levit, *The Federal Debt: An Analysis of Movements from World War II to the Present*, Congressional Research Service, Congressional Research Service Report RL34712 (Sept. 17, 2010).

<sup>12</sup>James Horney & Kathy Ruffing, *Economic Downturn and Bush Policies Continue to Drive Large Projected Deficits*, Center on Budget and Policy Priorities, (May 10, 2011), available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=3490>.

<sup>13</sup>OMB, *Historical Tables: Table 7.1—Federal Debt at the End of the Year: 1940–2016*, (2011), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/hist07z1.xls> (last visited June 20, 2011).

<sup>14</sup>In a January 2010 report, "The Budget and Economic Outlook: Fiscal Years 2010 to 2020," the CBO projects that a full extension of Pres. Bush's tax cuts, plus a permanent fix to the alternative minimum tax, will cost \$3.7 trillion over 10 years, not including debt service costs. The JCT estimated in a March 2010 report, "Present Law and The President's Fiscal Year 2011 Budget Proposals Related to Selected Individual Income Tax Provisions Scheduled to Expire Under the Sunset Provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001," that the cost of extending just those cuts that affect people making less than \$250,000 and permanently fixing the alternative minimum tax will cost \$3 trillion. The difference—a bit less than \$700 billion—is the cost of extending just those cuts for the wealthiest. See Michael Linden & Michael Ettlinger, *Three Good Reasons to Let the High-End Bush Tax Cuts Disappear This Year*, (July, 29, 2010) available at [http://www.americanprogress.org/issues/2010/07/let\\_cuts\\_expire.html](http://www.americanprogress.org/issues/2010/07/let_cuts_expire.html).

<sup>15</sup>The interest rates implied in the CBO's baseline budget projection used in the March 2010 report entitled, "An Analysis of the President's Budgetary Proposals for Fiscal Year 2011," were used to calculate the additional debt service cost. *Id.*

<sup>16</sup>*Id.*

<sup>17</sup>Amy Belasco, *The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations Since 9/11*, Congressional Research Service Report RL33110, at 3 Table 1: Estimated War Funding by Operations: FY2001-FY2012 War Request (Mar. 29, 2011).

tunately, was unfunded. Its cost has been estimated by the Congressional Budget Office at \$395 billion over its first 10 years.<sup>18</sup>

### III. THE BALANCED BUDGET AMENDMENT IS ANTI-DEMOCRATIC

Apart from its economic weaknesses, the proposed BBA undercuts the very principle upon which our Nation was founded, namely, majority rule. By requiring a supermajority to pass certain legislation, the Amendment would shift power away from the majority of the American people to a determined minority.

The framers of the Constitution wisely rejected the principle of requiring a supermajority for basic government functions.<sup>19</sup> James Madison vehemently argued against supermajorities. He stated:

That some advantages might have resulted from such a precaution cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or, in particular emergencies to extort unreasonable indulgences.<sup>20</sup>

At a Constitution Subcommittee hearing during the 104th Congress, Rep. Henry J. Hyde (R-IL), then-Chair of the House Committee on the Judiciary, echoed similar concerns:

I am troubled by the concept of divesting a Member of the full import of his or her vote. You are diluting the vote of Members by requiring a supermajority of them to do something as basic to government as acquire the revenue to run government. It is a diminution. It is a disparagement. It is a reduction of the impact, the import, of one man, one vote.<sup>21</sup>

Supporters of the BBA have sought to justify the departure from majority rule by pointing to other provisions in the Constitution that require a two-thirds vote, such as approving a treaty or obtaining a conviction in a congressional impeachment trial.<sup>22</sup> This

<sup>18</sup>Marc Labonte & Margot L. Crandall-Hollick, *The Impact of Major Legislation on Budget Deficits: 2001 to 2010*, CRS Report R41134 (May 20, 2011).

<sup>19</sup>It is significant to note that, because of population patterns, Senators representing some 7.5 percent of the population could prevent a bill from obtaining a two-thirds majority. U.S. Census Bureau, *available at* <http://2010.census.gov/2010census/data/apportionment-pop-text.php> (last visited June 20, 2011).

<sup>20</sup>THE FEDERALIST NO. 58, at 361 (James Madison).

<sup>21</sup>*Proposing An Amendment to the Constitution of the United States to Require Two-Thirds Majorities for Bills Increasing Taxes: Hearing on H.J. Res. 159, Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 2d Sess. 107 (1996).

<sup>22</sup>There are 9 matters for which a supermajority vote is required under the Constitution: art. I, § 3, cl. 6 (conviction in impeachment trials); art. I, § 5, cl. 2 (expulsion of a Member of Congress); art. 1, § 7, cl. 2 (override a Presidential veto); art. II, § 1, cl. 3 (quorum shall consist of one or more members from two-thirds of the States to elect the President); art. II, § 2, cl. 2 (consent to a treaty); art. V (proposing amendments to the Constitution); amend. XII (quorum of

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argument, however, overlooks the fact that not one of these supermajority requirements pertain to the day-to-day operations of the government. Limiting such congressional authority is an invitation to gridlock.

Rep. Melvin L. Watt (D–NC) offered an amendment that would have struck the supermajority requirements to increase revenues and to raise the debt limit. The amendment was rejected on a party line vote.<sup>23</sup>

The BBA would also open the possibility of life-tenured Federal judges making decisions on taxing and spending policy instead of directly-elected and accountable Members of Congress and the President. This concern has long-dogged proposals that would place budgetary decisions in the Constitution, but which has consistently been dismissed by proponents as not worthy of consideration. For example, when the BBA was being considered by Congress in 1990, former U.S. Court of Appeals Judge Robert Bork issued the following warning:

Scores or hundreds of suits might be filed in Federal district courts around the country. Many of these suits would be founded on different theories of how the amendment had been violated. The confusion, not to mention the burden on the court system, would be enormous. Nothing would be settled, moreover, until one or more of such actions finally reached the Supreme Court. That means we could expect a decision [about a given fiscal year 5 years after it has passed]. Nor is it at all clear what could be done if the Court found that the amendment had been violated 5 years earlier.<sup>24</sup>

The BBA clearly presents the possibility that courts would be asked to determine whether legislation did in fact increase revenues, whether outlays did in fact exceed receipts, and any number of other complex budgetary issues that would acquire a constitutional dimension. It also begs the question whether a court, in crafting a remedy for a violation, could order cuts to spending or increases in taxes in order to meet the requirements of the BBA.

#### IV. THE AMENDMENT IS NOT LIMITED TO A BALANCED BUDGET REQUIREMENT

While the BBA purports to require a balanced budget and to provide the tools necessary to facilitate and enforce that requirement, several provisions are either unrelated to that goal, or would make a balanced budget more difficult to attain.

##### A. *Supermajority Requirements Will Promote Greater Deficits.*

While the ostensible purpose of the supermajority requirements in the Amendment are intended to make it more difficult for Congress to exceed the balanced budget requirement, as Rep. Robert C. “Bobby” Scott (D–VA) argues, the need to obtain a three-fifths

members representing two-thirds of the States to elect the President and the Vice President); amend. XIV, § 3 (to remove disability); and amend. XXV, § 4 (removal of President for disability).

<sup>23</sup> Unofficial Tr. of Markup of H.J. Res. 1, Proposing a Balanced Budget Amendment to the Constitution of the United States, Before the H. Comm. on the Judiciary, 112th Cong. at 6–39 (June 3, 2011).

<sup>24</sup> Letter from Robert H. Bork to Thomas S. Foley, Speaker of the House, (July 10, 1990), reprinted in Op. Ed., Robert H. Bork, *A Seasoned Argument*, Wash. Post, at A23 (June 10, 1992).

vote to run a deficit may require a great deal more legislative “horse-trading” in order to secure the necessary number of votes.<sup>25</sup> We have all been involved in the legislative process generally, and the budgetary process in particular, long enough to have witnessed the extent to which legislative leaders have had to accede to individual members’ demands for specific pork-barrel projects, in order to gather the needed votes to pass legislation, raising the overall cost.

The need to obtain supermajorities—especially in times of economic distress when revenues decline, demands for government services increase, and deficits grow—would likely increase the power of individual holdouts, resulting in increased, rather than decreased spending. Thus, the multiple supermajority requirements in the Amendment would have the tendency to increase, rather than decrease the deficit.

#### *B. Tax Limitation Amendment Would Promote Deficits*

Section 5 of the BBA provides that a “bill to increase revenue shall not become law unless three-fifths of the whole number of each House shall provide by law for such an increase by a roll-call vote.” An amendment offered by Rep. Jim Jordan (R–OH) and passed by the Committee further exacerbated this requirement by raising the threshold to two-thirds.<sup>26</sup> It should be noted, however that during past Republican-controlled Congresses, beginning with the Republican “Contract with America,” a separate tax limitation constitutional amendment was routinely considered, and just as routinely rejected.<sup>27</sup>

Adopting a supermajority tax requirement would repeat the very mistakes made in the 1780’s under the Articles of Confederation, which required a vote of nine of the 13 States to raise revenue. It is because this system worked so poorly that the founding fathers

<sup>25</sup> During the markup of H.J. Res. 1, Rep. Scott made the following remarks:

The fact of the matter is the core provision of this underlying constitutional amendment will make it impossible to ever balance the budget from a practical point of view. If you need 60 percent to pass the budget—and you are going to need 60 percent. Any budget on the table requires 60 percent. Now, are you more likely to pass the Republican Study Group and explain to your constituents 70 percent cuts or, since you need 60 percent anyway, are you more likely to have more tax cuts and more spending increases? When you get to the last couple of votes to pass a tough bill like a tough budget, the last couple of votes you pick up are not—and I am not going to vote for it unless you increase some more taxes or unless you do some more spending cuts. The last few votes are bought with spending increases and tax cuts. And so the core provision of the bill will make it less likely that we can achieve the goals that my colleagues from Virginia have spoken of.

Unofficial Tr. of Markup of H.J. Res. 1, Proposing a Balanced Budget Amendment to the Constitution of the United States, Before the H. Comm. on the Judiciary, 112th Cong. at 53 (June 2, 2011) (statement of Rep. Robert C. “Bobby” Scott (D–VA)).

<sup>26</sup> Unofficial Tr. of Markup of H.J. Res. 1, Proposing a Balanced Budget Amendment to the Constitution of the United States, Before the H. Comm. on the Judiciary, 112th Cong. at 157–67 (June 3, 2011).

<sup>27</sup> In 2001, a similar measure, H.J. Res. 41, failed by a vote of 232–189. 147 CONG. REC. H1582 (daily ed. Apr. 25, 2001) (Roll no. 87). Its predecessor, H.J. Res. 94, was taken straight to the floor and failed by a vote of 234–192 in 2000. 146 CONG. REC. H2146 (daily ed. Apr. 12, 2000) (Roll no. 119). In 1999, H.J. Res. 37 was taken straight to the floor and failed by a vote of 229–199. 145 CONG. REC. H2097 (daily ed. Apr. 15, 1999) (Roll no. 90). In 1998, H.J. Res. 111 was taken straight to the floor and failed by a vote of 238–186. 144 CONG. REC. H2170 (daily ed. Apr. 22, 1998) (Roll no. 102). In 1997, H.J. Res. 62 passed the Committee by a vote of 18–10, but failed in the full House by a vote of 233–190. 143 CONG. REC. H1506 (daily ed. Apr. 15, 1997) (Roll no. 78). In 1996, H.J. Res. 159 was taken straight to the floor and failed by a vote of 243–177. 142 CONG. REC. H3304 (daily ed. Apr. 15, 1996) (Roll no. 117).

sought to fashion a national government that could operate through majority rule.<sup>28</sup>

While some may believe that a tax limitation is a desirable policy, this requirement will make it more difficult to balance the budget by making increased revenues difficult, if not impossible, to obtain. Although the imposition of new taxes or increased taxes may be a policy some would prefer to reject, it is by no means the case that the Constitution should place the option beyond reach for all time.

In addition, the language of the BBA is not clear and could present difficult implementation problems, possibly placing tax policy, in the final analysis, in the hands of Federal judges. For example, it is unclear from the text what a “bill to increase revenue” would include. While it would likely apply to a new tax or an increase in a tax rate, it could also include a repeal of a special interest tax loophole. As a result, the BBA could allow a special interest tax loophole, even one that was the result of clear corruption, to pass by a simple majority, or even a voice vote, but would impose a constitutional requirement of a two-thirds roll call vote of each house to repeal it. The BBA would essentially enshrine in the Constitution some of the most unfair and—in some circumstances—corrupt features of our tax code and thereby undermine the widely accepted goal of removing such special interest provisions from law and simplifying compliance.

As the National Commission on Fiscal Responsibility and Reform recently observed:

In the quarter century since the last comprehensive tax reform, Washington has riddled the system with countless tax expenditures, which are simply sending by another name. These tax earmarks—amounting to \$1.1 *trillion* a year of spending in the tax code—not only increase the deficit, but cause tax rates to be too high. Instead of promoting economic growth and competitiveness, our current code drives up health care costs and provided special treatment to special interests. The code presents individuals and businesses with perverse economic incentives instead of a level playing field.<sup>29</sup>

Rep. Scott offered an amendment to strike this section.<sup>30</sup> Rep. Jerrold Nadler (D–NY) offered an amendment that would allow special interest tax breaks for large producers of oil or natural gas to be repealed by a simple majority vote.<sup>31</sup> Both amendments were rejected on a party line vote.

The BBA presents various questions of interpretation. Would the Amendment’s restriction apply to a 1, 5, or 10-year budget window? Would a bill resulting in increased revenues in years 1 and 2, but lower revenues thereafter require a two-thirds vote? The Amend-

<sup>28</sup> *Proposing An Amendment to the Constitution with Respect to Tax Limitations on H. J. Res. 62, Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 1st Sess. (1997) [hereinafter 1997 Judiciary Committee Hearing] (statement of Robert Greenstein, Executive Director, Center on Budget and Policy Priorities).

<sup>29</sup> National Commission on Fiscal Responsibility and Reform, *The Moment of Truth*, at 28 (Dec. 2010) (emphasis in original).

<sup>30</sup> Unofficial Tr. of Markup of H.J. Res. 1, *Proposing a Balanced Budget Amendment to the Constitution of the United States*, Before the H. Comm. on the Judiciary, 112th Cong. at 77–109; 39–49 (June 3, 2011).

<sup>31</sup> *Id.* at 39–49.

ment is also silent on when the revenue impact would be assessed. Would it, as provided in section 7, rely solely on estimates of outlays and receipts, or would an error in an estimate of the impact of the tax measure that in fact resulted in an increase in revenues require a retroactive change—and court ordered refunds—based on actual receipts? If this is not the case, could estimates be used to circumvent the two-thirds requirement? If an adjustment and tax refund were necessary, would the loss in revenues and existing assets trigger the other requirements of the Amendment, necessitating either offsetting budget cuts or a three-fifths vote to permit the resulting imbalance?

### *C. A Cap on Outlays Is a New and Dangerous Innovation*

The BBA includes a provision that would cap total Federal outlays at 18 percent of “economic output of the United States, unless two-thirds of each House of Congress shall provide for a specific increase of outlays above this amount.”<sup>32</sup> We assume that by “economic output of the United States” the resolution’s authors mean “gross domestic product,” which is defined as the “market value of goods and services produced by labor and property in the United States, regardless of nationality.”<sup>33</sup>

This cap, however, appears to be arbitrary. No arguments supporting the idea that 18 percent is an economically ideal rate have been put forward any more than for the 20 percent cap in the bill as introduced, or the 19 percent cap in an amendment filed by Rep. Louie Gohmert (R–TX), but not considered by the Committee. The sole argument was to appeal to historical experience which by no means supports the 18 percent figure. It is, as with other parts of the BBA, merely a policy preference posing as a constitutional principle. In reality, the historical record indicates that outlays, as a percentage of GDP, have varied significantly.

Federal outlays have not dropped below 18 percent since FY 1967, and have not dropped below 17 percent since FY 1957.<sup>34</sup> According to the Congressional Budget Office:

Spending by the Federal Government grew from approximately 3 percent of GDP in 1925 to 15.6 percent in 1950. Following the Depression, World War II abruptly boosted Federal spending to approximately 42 percent of GDP, but afterward it dropped and resumed a less volatile trend.”<sup>35</sup>

### *D. BBA’s Debt Ceiling Is Arbitrary*

The Amendment would impose a three-fifths vote requirement in order to increase the debt ceiling.<sup>36</sup> Recent experience demonstrates, however, that even obtaining a simple majority vote can

<sup>32</sup>H.J.Res 1, 112th Cong. §2 (2011). The bill, as introduced capped outlays at “one-fifth.” An amendment offered by Rep. Louie Gohmert (R–TX) changed this to 18 percent.

<sup>33</sup>Bureau of Economic Analysis, U.S. Department of Commerce, Glossary, available at [http://www.bea.gov/glossary/glossary\\_g.htm](http://www.bea.gov/glossary/glossary_g.htm) (Last visited: June 20, 2011).

<sup>34</sup>Office of Management and Budget, Table 15.3 Total Government Expenditures as Percentages of GDP: 1948–2010, at 344–5, Fiscal Year 2012 Historical Tables Budget of the United States (2010).

<sup>35</sup>Congressional Budget Office, A 125-Year Picture of the Federal Government’s Share of the Economy, 1950–2075, at 2 (July 3, 2002).

<sup>36</sup>H.J. Res. 1, 112th Cong. §3 (2011).

be elusive.<sup>37</sup> The current budgetary deadlock has placed the creditworthiness of the United States in question for the first time since the adoption of the 14th Amendment to the Constitution.<sup>38</sup>

The consequences of a default by the United States on its obligations, or even the growing concern in the world markets about the risk of such a default, could be catastrophic. Recently, Moody's Investors Service warned that it might soon downgrade the credit rating of the United States because of mounting concerns that the government will default on its obligations.<sup>39</sup> Moody's stated, "The heightened polarization over the debt limit has increased the odds of a short-lived default."<sup>40</sup> In April, Standard & Poor's, citing continued gridlock in budget negotiations, lowered its outlook on the Federal debt position from "stable" to "negative."<sup>41</sup> Similarly, Fitch Ratings warned of a downgrading of our national debt obligations in the event of a technical default.<sup>42</sup>

Regrettably, Republican leaders seem to be unaware of, or indifferent to, the dangers of this brinkmanship over the debt ceiling. Republican Budget Committee Chairman Paul Ryan appears not to grasp the gravity of the situation. For example, he recently opined, "If a bondholder misses a payment for a day or two or three or four—what is more important is you are putting the government in a materially better position to better pay its bills going forward."<sup>43</sup> This is precisely the "technical default" about which Fitch has recently warned. When an individual goes into technical default, as described by Rep. Ryan, he or she pays substantial penalties in the form of penalties and in ballooning interest rates. The same fate does befall nations, and the consequences are uniformly catastrophic.

The debt, while a substantial problem, is not the cause of our current precarious position in the eyes of the bond market. As Bloomberg News reports, "For all the debate about the deficit in Washington, bond market yields in the U.S. are lower now than

<sup>37</sup> See, e.g., 157 Cong. Rec. H 3783 (daily ed. May 31, 2011) (vote on A Bill to Implement the President's Request to Increase the Statutory Limit on the Public Debt, H.R. 1954, 112th Cong. (2011)).

<sup>38</sup> Section 4 of the 14th Amendment states, "The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void." Although section 4 "was undoubtedly inspired by the desire to put beyond question the obligations of the Government issued during the Civil War, its language indicates a broader connotation. . . . [T]he validity of the public debt' . . . [embraces] whatever concerns the integrity of the public obligations," and applies to government bonds issued after as well as before adoption of the Amendment. *Perry v. United States*, 294 U.S. 330, 354 (1935). In *Perry*, the Court concluded that the Joint Resolution of June 5, 1933, insofar as it attempted to override the gold-clause obligation in a Fourth Liberty Loan Gold Bond "went beyond the congressional power." *Id.* On a Confederate bond problem, see *Branch v. Haas*, 16 F. 53 (C.C.M.D. Ala. 1883) (citing *Hanauer v. Woodruff*, 82 U.S. (15 Wall.) 439 (1873), and *Thorington v. Smith*, 75 U.S. (8 Wall.) 1 (1869)); see also *The Pietro Campanella*, 73 F. Supp. 18 (D. Md. 1947).

<sup>39</sup> Zachary A. Goldfarb & Felicia Sonmez, *Moody's Warns of Downgrade*, WALL ST. J. (June 3, 2011), at A11.

<sup>40</sup> *Id.*

<sup>41</sup> Clifford Marks & Humberto Sanchez, S&P Lowers U.S. Debt Outlook from 'Stable' to 'Negative'—Ratings Agency Reaffirms 'AAA' Rating, but Worries Policymakers Will Fail to Agree on Deficit Reduction, National Journal.com (Apr. 19, 2011), available at <http://nationaljournal.com/economy/s-amp-p-lowers-u-s-debt-outlook-from-stable-to-negative-20110418>.

<sup>42</sup> Peter Schroeder, *Fitch Warns US Would eDanger AAA Rating With Even 'Technical' Default*, The Hill (June 8, 2011), available at <http://thehill.com/blogs/on-the-money/budget/165365-fitch-warns-against-default-of-any-length>.

<sup>43</sup> Amy Scott, Some Republicans OK with short-lived debt default, Marketplace Morning Report (June 8, 2011), available at <http://marketplace.publicradio.org/display/web/2011/06/08/some-republicans-ok-with-shortlived-debt-default/?refid=0>.

when the government was running a budget surplus a decade ago, even though Treasury Department data show that the amount of marketable debt outstanding has risen to \$9.13 trillion from \$4.34 trillion in mid-2007.”<sup>44</sup>

*E. The Amendment recognizes only military emergencies*

Although there are many reasons why a nation might need to run a deficit, section 6 of the BBA permits such to occur only during “any fiscal year in which the United States is engaged in a 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.”

Interestingly, while the BBA’s waiver only applies if the United States is at war, any military necessity that might require a build-up in preparation for hostilities is not recognized. It is also not clear whether the Global War on Terror would be covered by the waiver. If the waiver does apply, then—at least for the foreseeable future—it could be argued that the United States will always be in a conflict “which causes an imminent and serious military threat to the national security,” and therefore render this proposed constitutional amendment a nullity. Rep. Sheila Jackson Lee (D–TX) offered an amendment that would have clarified that the exception applied to all military conflicts. The amendment was rejected.<sup>45</sup>

There are, however, other types of emergencies in which deficit spending may be needed. Periods of depression or serious recession sometimes call for deficit spending. It would be a mistake for the Constitution—as proposed to be amended by the BBA—to prohibit, categorically, this type of stimulus spending absent the concurrence of a supermajority.

For example, the CBO, in its most recent periodic report, estimates that in the first quarter of calendar year 2011, the American Recovery and Reinvestment Act of 2009 raised real GDP by between 1.1 and 3.1 percent, lowered the unemployment rate by between .06 and 1.8 percent, increased the number of people employed by between 1.2 million and 3.3 million, and increased the number of full time equivalent jobs by 1.6 million to 4.6 million compared with what would have occurred otherwise. CBO estimates that the effects of ARRA on output peaked in the first half of 2010 and have since diminished.<sup>46</sup> Rep. Nadler offered an amendment that would have allowed Congress, by a majority vote of both Houses, to suspend the application of the BBA if economic growth has been, or will be, negative for 2 consecutive quarters. While there is disagreement among members of the Committee on the utility of deficit spending during a recession or a depression, it is a matter of economic policy, and the people’s elected represent-

<sup>44</sup> David Lerman, Ryan, Geithner Offer Different Views on Agreement to Increase Debt Ceiling, Bloomberg News (Apr. 18, 2011). <http://www.bloomberg.com/news/2011-04-17/ryan-geithner-offer-different-views-of-agreement-to-increase-debt-ceiling.html>.

<sup>45</sup> Unofficial Tr. of Markup of H.J. Res. 1, Proposing a Balanced Budget Amendment to the Constitution of the United States, Before the H. Comm. on the Judiciary, 112th Cong. at 125–138 (June 3, 2011).

<sup>46</sup> Congressional Budget Office, Estimated Impact of ARRA on Employment and Economic Output from January 2011 through March 2011 at 3 (May 2011).

atives, not the Constitution, should make that judgment. The Nadler amendment was rejected on a party line vote.<sup>47</sup>

#### V. THE AMENDMENT WOULD DESTROY MEDICARE AND SOCIAL SECURITY

The BBA requires a balanced budget by as soon as fiscal year 2018. Given the current deficit, it is fair to ask how the proponents foresee this objective being attained. Rep. Nadler asked the sponsor, Rep. Bob Goodlatte (R-VA) that precise question. And, Rep. Nadler pointed out that the recently passed Republican Budget projected balance only by fiscal year 2040. Rep. Goodlatte responded, “I would direct to you the House Republican Study Committee Budget which balances it in 9 years.”<sup>48</sup>

It should be noted that what the Republican Study Committee (RSC) proposed in its budget was rejected by House. It is also important to understand what the consequences of meeting this deadline would be. Under the RSC plan, which would require the Nation’s budget to achieve balance in 2020, Federal expenditures would be cut by more than \$9 trillion over the coming decade, compared with current amounts. And, it would cut total non-defense discretionary programs by approximately 70 percent by 2021, and by more than \$3 trillion over the next 10 years. It contains deeper Medicare cuts than the Ryan budget, which recently passed the House. The RSC budget includes the Ryan budget proposal to convert Medicare to vouchers and raise its eligibility age from 65 to 67, but it raises the eligibility age sooner than the Ryan budget would. It would raise the Social Security retirement age to 70. In 2021, Medicaid, the Supplemental Nutrition Assistance Program (SNAP, formerly known as food stamps), and Supplemental Security Income would be cut in half.<sup>49</sup> Given the size of projected shortfalls, and the proposed constitutional impediment to increasing revenues, these cuts, or ones very much like them, would be necessitated by the BBA.

Ranking Member John Conyers, Jr. (D-MI), Rep. Ted Deutch (D-FL), and Rep. Jackson Lee offered amendments that would have protected Medicare and Social Security, by removing them from the budget calculations. The amendments were rejected on party line votes.<sup>50</sup>

#### VI. CONCLUSION

Never before, with the exception of the disastrous experiment of Prohibition, has this Nation written specific policy preferences into

<sup>47</sup> Unofficial Tr. of Markup of H.J. Res. 1, Proposing a Balanced Budget Amendment to the Constitution of the United States, Before the H. Comm. on the Judiciary, 112th Cong. at 49–75 (June 3, 2011).

<sup>48</sup> *Whether the Constitution Should be Amended to Address the Federal Deficit?: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Rep. Bob Goodlatte (R-VA)).

<sup>49</sup> Robert Greenstein, James R. Horney & Kelsey Merrick, Balanced Budget Amendment Would Require More Extreme Cuts than Ryan Plan: Chief Sponsor Cites Republican Study Committee Budget, Which Would Cut \$9 Trillion Over Next Decade, as Model, Center for Budget and Policy Priorities (June 6, 2011), available at <http://www.cbpp.org/files/6-6-11bud.pdf> (Last visited: June 21, 2011).

<sup>50</sup> Unofficial Tr. of Markup of H.J. Res. 1, Proposing a Balanced Budget Amendment to the Constitution of the United States, Before the H. Comm. on the Judiciary, 112th Cong. at 36–79 (June 2, 2011); 138–157 (June 3, 2011); 41–51 (June 15, 2011).

the Constitution.<sup>51</sup> The Constitution is a document intended to lay out policies to allow Americans to express their preferences in a political system that safeguards the rights of all, and to permit the popular will to find expression in law. Amending the Constitution to settle certain economic and policy questions for all time not only violates the underlying purpose of that document, but risks economic catastrophe and hardship for the middle class, the poor, the very young, and the elderly. It would forever consign the concept of one person one vote to the dustbin of history. It would represent a catastrophic historic turning point for this country, and we urge our colleagues to reject it.

JOHN CONYERS, JR.  
 HOWARD L. BERMAN.  
 JERROLD NADLER.  
 ROBERT C. "BOBBY" SCOTT.  
 SHEILA JACKSON LEE.  
 MAXINE WATERS.  
 STEVE COHEN.  
 HENRY C. "HANK" JOHNSON, JR.  
 PEDRO R. PIERLUISI.  
 MIKE QUIGLEY.  
 JUDY CHU.  
 TED DEUTCH.  
 LINDA T. SÁNCHEZ.

### **Additional Dissenting Views**

The discussion about this proposed amendment to the Constitution has totally been about the title of the amendment and not about its provisions. Incredibly, the provisions of this amendment do not require a balanced budget and actually will make it more difficult for future Congresses to balance the budget.

Every budget considered by the House earlier this year, and in fact nearly every budget over the last decade, was not balanced in the first fiscal year. Each of these budgets would have required a three-fifths majority to pass the House and the Senate under the provisions of this amendment. Commonsense would suggest that a meaningful deficit reduction plan would be more difficult to pass with a supermajority rather than a simple majority, and therefore the enactment of the Balanced Budget Amendment would make it more difficult to the balance budget. Other than the title, there is nothing in this amendment which makes it more likely that Congress will pass a fiscally responsible budget instead of a fiscally irresponsible budget. In fact the supermajority requirement to raise revenues will obviously make it more difficult to balance the budget. The December 2010 extension of the Bush-era tax cuts added \$800 billion to the deficit and easily passed both houses of Congress. If this amendment had been in effect, its provisions would not have prevented Congress from adding \$800 billion to our deficit, because tax cuts could be passed with a simple majority.

Furthermore, a two-thirds requirement to pass a spending plan over 18% of our nation's Gross Domestic Product (GDP) would jeop-

<sup>51</sup>Justice Holmes, in his famous dissent, warned against using the Constitution as a tool of economic policy. He wrote, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statistics." *Lochner v. People of the State of New York*, 198 U.S. 45, 75 (1905).