The Balanced Budget Amendment and Social Security: An Alternative Means of Judicial Enforcement

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I. Introduction: Have We Really Seen the Last of the Balanced Budget Amendment?

On January 5, 1998, President Clinton announced that he was submitting to Congress the first balanced federal budget in thirty years. Within two months, the Congressional Budget Office...
announced even better news for the Administration; specifically, the government was projected to run an eight billion dollar surplus in 1998.\(^2\) Republicans and Democrats alike reveled in the thought that for the first time in a generation, they could finally claim to be keeping the American economy afloat without burdening future generations of taxpayers. According to some members of Congress, the successful enactment of a balanced budget would finally lay to rest the haunting specter of a constitutional amendment requiring a balanced federal budget.\(^3\)

While the enactment of a balanced budget obviously diminishes the likelihood that Congress will pass a constitutional Balanced Budget Amendment any time soon, reports of the Amendment’s death have been greatly exaggerated. Even in the wake of the President’s announcement that a balanced budget was imminent, a number of congressional candidates continued to trumpet their continued support for a Balanced Budget Amendment.\(^4\) Prominent leaders in the Republican Party have repeatedly expressed their continued support for the Amendment, even in the wake of the bipartisan balanced budget


\(^3\) See, e.g., David Espo, *Clinton, GOP Meet Halfway on Fiscal Plan*, Star-Ledger (Newark), May 3, 1997, at 1 (quoting Senator Toricelli’s statement that the budget compromise proves that the budget can be balanced without resorting to a constitutional amendment).

While it may be true that the passage of a balanced budget agreement has quieted the public's cries for a constitutional amendment, the GOP can still score political points through its support of the Balanced Budget Amendment. Now that most Democratic elected officials have voted for a balanced budget, the Republicans need an issue that will allow them to demonstrate that they are more fiscally responsible than their Democratic counterparts. The Balanced Budget Amendment, which is still opposed by most Democrats, may be the best way of drawing that distinction. Because the Balanced Budget Amendment can be cast as an effort to permanently require fiscal discipline, it is the best way for Republicans to trump the Democrats and their newfound fiscal conservative credentials.

Finally, the Balanced Budget Amendment will remain an attractive option for Congress due to the minimal political costs of voting in its favor. In previous Congresses, Democratic opposition to the Amendment was buttressed by arguments that actually balancing the budget would require politically unpopular spending cuts or tax increases. However, now that Congress has successfully committed itself to such actions, that argument has lost all salience. Thus, it is possible that the Balanced Budget Amendment will remain high on the Republican agenda during the next Congress.

Though it might seem like ancient history in the era of balanced budgets, it is worth recalling that during the first term of the 105th Congress, Senate Republicans introduced a Balanced Budget Amendment to the Constitution as Senate Joint Resolution 1 with the support of every Republican Senator and a

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5 See, e.g., Neville Nankivell, Combined Support from the Right Might Spur Balanced-Budget Law, FIN. POST, Sept. 13, 1997, at 19 (quoting Senate Majority leader Trent Lott's statement that "it's an issue that will not go away"); Ron Fournier, Texas Governor a Rising Star for GOP, FRESNO BEE, Aug. 24, 1997, at A13 (citing George W. Bush's continued support for the Amendment); William F. Weld, GOP Itself Bound for Failure on Abortion Litmus Test, HOUSTON CHRON., Jan. 15, 1998, at 29 (containing a statement by a prominent Republican that opposition to a Balanced Budget Amendment is "outside the current mainstream of Republican orthodoxy").

6 See Darlene Superville, Gingrich Says House to Vote Again on Balanced Budget Amendment, AP, May 5, 1997, available in 1997 WL 2522716 (quoting the House Speaker's argument that the successful passage of a balanced budget agreement will improve the Amendment's prospects for success).
substantial number of Democrats.\textsuperscript{7} When the votes were counted, the Amendment (Hatch Amendment)\textsuperscript{8} fell one vote short of the necessary two-thirds majority, just as it had in the previous Congress.\textsuperscript{9}

The most important obstacle standing in the way of the Balanced Budget Amendment's passage was concern over the Amendment's impact on Social Security. In both the 104th and 105th Congresses, Democratic Senators who had campaigned on a pro-Balanced Budget Amendment platform subsequently opposed the Hatch Amendment. Overwhelmingly, they justified their apparent "flip-flops" by arguing that the inclusion of the Old Age Survivors and Disability Insurance (OASDI)\textsuperscript{10} trust funds in the balanced budget calculation would tempt subsequent Congresses to trim Social Security benefits.\textsuperscript{11} Recently, these Senators have correctly pointed out that a constitutional provision requiring annual balance would prevent Congress from relying on accumulated surpluses in the Social Security trust fund to finance the baby boomers' benefits without securing super-majority approval in Congress.\textsuperscript{12} To address this concern, Senator Byron Dorgan has offered an alternative Balanced Budget Amendment (Dorgan Amendment) that excludes the Social Security trust fund

\begin{footnotes}
\item[7]\textit{See} S.J. Res. 1, 105th Cong. (1997). Sixty-two original sponsors were listed on the resolution. \textit{See id.}
\item[8] The Amendment is named for its primary sponsor, Senator Hatch.
\item[9] During the 104th Congress, however, the Amendment easily secured the two-thirds necessary in the House. The Amendment also came within a few votes of passage in 1986 and 1990. \textit{See S. REP. NO. 105-3}, at 4-6 (1997).
\item[10] This is more commonly known as Social Security.
\item[12] \textit{See} Chait, \textit{supra} note 11, at 13. Of course, the Social Security Trust Fund does not exist as an unused "pot of money." Rather, its funds are being used to finance current government borrowing, and the trust fund consists of Treasury obligations to repay those loans. A Balanced Budget Amendment would, if enforced, eliminate the need for such loans. However, because it would also prohibit government outlays in excess of that year's receipts, it would treat the expenditure of accumulated surpluses of the OASDI trust fund as ordinary outlays, which would have to be offset by increased taxes or reduced spending elsewhere in the budget.
\end{footnotes}
from the balanced budget calculation.\textsuperscript{13}

Assuming that the Balanced Budget Amendment will one day secure congressional passage and is ratified by the states,\textsuperscript{14} the major issue to be resolved will be whether or not the Social Security trust funds' surpluses or deficits should be counted towards budgetary balance. There is reason to believe that an amendment that exempts Social Security from the balance is most likely to secure passage. This was clearly the more popular option in public opinion polls.\textsuperscript{15} On the other hand, only an amendment that is silent on Social Security has ever won majority approval in Congress. Accordingly, this article will examine the impact of a Balanced Budget Amendment on the Social Security program in each of two possible scenarios. The first scenario is that a Balanced Budget Amendment that excludes Social Security is ratified. The second scenario is that the existing Amendment, which apparently counts Social Security surpluses towards balance, is ratified. In either case, ratification would fundamentally alter the nature of the Social Security program. Moreover, the legislative history that has accumulated in the debate over its enactment could help frame subsequent judicial enforcement of the Amendment.\textsuperscript{16}

\textsuperscript{13} See, e.g., S.J. Res. 12, 105th Cong. § 7 (1997); S.J. Res. 54, 104th Cong. § 7 (1996).

\textsuperscript{14} In 1997, ratification by the states appeared likely, but not without a fight. According to a study by the Center for the Study of the States, 31 states were leaning in favor of ratification, and only New York's legislature was solidly in opposition. Seven of the remaining 18 states would need to ratify the Amendment in order to win its passage. \textit{See} Jim Gallagher, \textit{State's Side: Approval of Budget Amendment Doesn't Stop at Congress}, ST. LOUIS POST-DISPATCH, Mar. 2, 1997, at 5B.

\textsuperscript{15} See Balanced Budget Amendment: Hearings Before the House Judiciary Committee, 105th Cong. 8 (1997) (statement of Eugene Lehrmann, American Association of Retired Persons) (citing a December 1996 NBC/WALL STREET J. poll). In a recent poll, 71\% of Americans said that they felt the Balanced Budget Amendment should include a provision prohibiting Congress from using the Social Security Trust Funds to balance the budget.

\textsuperscript{16} There are a number of scholars who question whether judges should examine legislative history when interpreting statutes. The current consensus appears to be that legislative history remains a relevant, but not definitive, tool, although there is ample disagreement. A fuller discussion is beyond the scope of this article, but for an interesting contrast, compare ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (arguing that the use of legislative history in interpreting statutes may be unconstitutional) with Stephen Breyer, \textit{On the Uses of Legislative History in Interpreting Statutes}, 65 S. CAL. L. REV. 845 (1992) (articulating a rigorous defense of the use of legislative history). There is arguably still greater
II. The Nature of the Judicial Process: Two Models of Judicial Enforcement

Judicial enforcement is one of the few aspects of the Balanced Budget Amendment that has received significant attention from legal scholars. Unfortunately, all of the literature discussing judicial involvement in the Balanced Budget Amendment focuses on a case paradigm in which Congress violates the spirit of the Amendment, and someone subsequently files suit so as to prompt court-ordered compliance. These types of hypothetical cases, interesting though they may be, are unlikely to be heard by the federal courts. Courts reluctant to delve into the realm of budgetary policy could concoct a number of convincing rationales for refusing to decide such cases on the merits.

On the other hand, scholars have devoted almost no attention to cases that would arise from government reliance on controversy over whether legislative history is relevant in interpreting constitutional amendments. The problem is that in interpreting the legislative intent of constitutional amendments judges must look not only at Congress' intentions, but also at the intentions of the state legislatures that ratified them. Opponents of legislative history argue that attempting to analyze all this information is likely to be more confusing than helpful. See, e.g., Kenneth Starr, Observations About the Use of Legislative History, 1987 DUKE L.J. 371. The most persuasive response to this argument is that when a court interprets the Constitution, it had better do so correctly. Unlike a judicial error in construing a statute's intent, which can be corrected by clarifying legislation, a judicial error in construing the Constitution's meaning can only be corrected by a subsequent constitutional amendment. Therefore, courts can devote extra time and energy to assimilating the mountains of evidence that speak to the framers' intent in the rare instances where they are called upon to interpret a new amendment. See, e.g., Abner Mikva, A Reply to Judge Starr's Observations, 1987 DUKE L.J. 380.


18 See infra Part II.B.
Balanced Budget Amendment-induced fiscal pressures resulting from specific reductions or procedural changes that adversely affect beneficiaries of government programs. This category of cases would almost certainly prompt judicial interpretation of the Amendment, as there would be little or no way for the courts to consistently avoid reaching the constitutional questions. This article shall refer to the initial category of cases as "macro-enforcement" cases, because they would prompt the judiciary to tackle the big fiscal picture, and the latter class as "micro-enforcement" cases, because they would allow the judiciary to decide the meaning of the Balanced Budget Amendment one localized dispute at a time. This article will fill a gap in the existing literature by discussing how the federal courts are likely to deal with micro-enforcement cases, particularly those that might arise in response to reductions in Social Security benefits.

A. BBA as a Sword: Macro-Enforcement and the Lack Thereof

Early efforts at examining judicial enforcement of the Balanced Budget Amendment were limited to macro-enforcement litigation. This analysis has framed not only subsequent scholarship, but Congress' understanding of the Amendment's judicial enforcement as well. Three barriers to judicial enforcement have been identified: lack of plaintiff standing; the political question doctrine; and problems in crafting judicial remedies.

Any plaintiff seeking to enforce the Balanced Budget Amendment against congressional circumvention would have to overcome daunting barriers in order to gain standing. For the courts to enforce the Balanced Budget Amendment, a plaintiff would need to bring suit against a government official, alleging non-compliance. To gain standing in federal courts, that plaintiff would have to demonstrate 1) injury in fact, 2) causation, and 3) redressability.

19 See, e.g., S. REP. NO. 105-3, at 11 (1997) (discussing the same three limitations on justiciability that Crosthwait articulated in her 1983 article).
20 See Crosthwait, supra note 17, at 1073–82.
21 See Crosthwait, supra note 17, at 1083–89.
22 See Crosthwait, supra note 17, at 1090–04.
If a Balanced Budget Amendment were ratified, and Congress attempted to circumvent it, several types of plaintiffs might file macro-enforcement suits. A suit by a citizen with a generalized interest in preventing the nonobservance of the Constitution would not meet the standing threshold, because a court would deem such an injury too abstract and attenuated. Suits by individual members of Congress would also fail to establish standing, because the Supreme Court has recently demonstrated its reluctance to grant standing in such cases due to concerns that it might be drawn into a politicized dispute that forces it to take sides among factions in a co-equal branch. A suit by a special interest group with a traditional commitment to balanced budgets would be no more likely to pass the standing threshold than a lawsuit filed by its individual, tax-paying members. A class action lawsuit, filed on behalf of children, would also probably fail to pass the standing threshold. A suit by

25 See Raines v. Byrd, 117 S. Ct. 2312, 2324–25 (1997) (Souter, J., concurring) (cautioning against judicial intervention in a dispute between the President and a minority in Congress over the constitutionality of the line item veto).
26 See Sierra Club v. Morton, 405 U.S. 727, 740 (1972). An example of such a special interest group is the Concord Coalition.
27 See R. George Wright, The Interests of Posterity in the Constitutional Scheme, 59 U. Cin. L. Rev. 113, 144–46 (1990). Children, in the aggregate, could probably demonstrate to a court's satisfaction that deficit spending adversely affected their economic interests, disproportionately to the harm that would be inflicted upon all taxpayers. For an analysis of the burdens that "deficit" spending places on younger cohorts, see Laurence Kotlikoff and Jagadeesh Gokhale, Passing the Generational Buck: Government Policy for Children, THE PUBLIC INTEREST, Jan. 1994, at 73. However, some children such as those who are severely disabled or destined to become severely disabled, would probably be harmed more by the spending cuts necessary to reach budgetary balance than by any savings resulting from decreased national debt. In certifying a class action for litigation purposes, courts must decide that "the representative parties will fairly and adequately protect the interests of the class." See FED. R. CIV. P. 23(a)(4). Thus, predicted future divergent interests among children could dissuade a judge from certifying a class of children, even if, in the aggregate, reducing the debt would improve their lives. This uncertainty about whether individual children would benefit from or be burdened by an unbalanced budget may also prevent a judge from giving standing to a single child plaintiff. Finally, the courts could decide that the potential injuries to children resulting from deficit spending would occur so far in the future that such cases were not yet ripe for judicial intervention. See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 81 (1978); see also National Treasury Employees Union v. United States, 101 F.3d 1423, 1431 (D.C. Cir. 1996) (holding that ripeness doctrine required dismissal
taxpayers would have a somewhat higher likelihood of success, but under the Supreme Court's standing precedents, a court could easily justify a denial of standing.28

In deciding whether to grant standing, the courts could supplement their survey of case law by exploring the legislative history of the Balanced Budget Amendment.29 While the congressional attitude towards standing is rather murky, courts would probably glean that the legislature foresaw limited judicial enforcement. The Senate Committee Report speaks repeatedly of preventing "undue involve[ment]" by the courts, while preserving the courts' responsibility to say "what the law is."30 On the standing issue, however, the Committee Report suggests that under the Lujan test, it would be a heavy burden for a litigant to demonstrate something more concrete than simply a "generalized grievance" reflective of the burden shared by all taxpayers.31 However, this analysis does not encapsulate Congress' understanding of the Supreme Court's jurisprudence, more of challenge by federal employees union to constitutionality of line item veto act because the effects of the congressional act were not yet felt in a concrete way by the challenging parties).

28 See, e.g., Flast v. Cohen, 392 U.S. 83, 102-03 (1968). Taxpayer standing is appropriate where a logical link exists between the plaintiff's status as a taxpayer and the type of legislative enactment challenged, and where the taxpayer can establish a "nexus between that status and the precise nature of constitutional infringement alleged." Id. Where the Constitution prescribes a specific limit on federal spending, as it would under the Balanced Budget Amendment, the taxpayer might gain standing. See Crosthwait, supra note 17, at 1079. But see S. Rep. No. 105-3, at 12 (1997) (containing the Senate Judiciary Committee's assessment of taxpayer suits as unlikely to surpass the standing threshold); cf Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) (suggesting that taxpayer standing is only appropriate when a spending law is enacted pursuant to the Taxing and Spending Clause of the Constitution).

29 The other contextual resource that courts might look to -- experience in the states -- suggests that state courts have been reluctant to grant plaintiff standing in macro-enforcement suits. See infra text accompanying note 71. This is so even though state courts frequently have more lenient standing requirements than their federal counterparts. See, e.g., Nicholl v. E-470 Pub. Highway Auth., 896 P.2d 859, 866 (Colo. 1995) (en banc) (holding that taxpayers have standing to enjoin an unlawful expenditure of public funds).


31 Id. at 11.

32 In hearings held on the justiciability of the Balanced Budget Amendment, the Judiciary Committee heard from a number of prominent constitutional scholars who argued that the Amendment would inevitably find its way into the federal courts. See, e.g., Balanced Budget Amendment Senate Joint Resolution 41, 103rd Cong., 2d
likely, it is a suggestion of how the Judiciary Committee thinks the courts should address standing concerns. Additionally, while the Committee Report suggests coldness towards active judicial enforcement, other types of legislative history give the opposite indication. For example, during the 103rd Congress, the Balanced Budget Amendment that was narrowly rejected by the Senate included the Danforth Amendment, which limited the Court's role in enforcement to issuing declaratory judgments. However, the subsequent Congress' equivalent to the Danforth Amendment was dropped from the bill when it failed by a vote of fifty-two to forty-seven. Further, there are signs in the legislative history that a few sponsors of the Balanced Budget Amendment envisioned active enforcement of the Amendment by the courts, rather than the use of standing restrictions as a means of avoiding Balanced Budget Amendment-related issues. The result of this conflicting legislative history is a constitutional delegation to future decision makers. Congress either does not have the votes to pass an Amendment that takes a position on judicial enforcement, or feels it presently does not have sufficient information to judge whether such enforcement is desirable, and would prefer to address the matter later through legislation implementing the Amendment or jurisdiction-stripping.

Sess. 423 at 186 (statement of Kathleen Sullivan, Professor, Stanford Law School); id. at 193 (statement of Burke Marshall, Professor, Yale Law School); Constitutional Amendment to Balance the Budget, 102d Cong., 2d Sess. 693, at 5 (statement of Laurence Tribe, Professor, Harvard Law School).

While it might find Congress' anticipation of subsequent judicial involvement relevant, the Supreme Court would by no means defer to a committee's understanding of case law.

For a more elaborate discussion of the Danforth Amendment and its indications of legislative intent, see Tobin, supra note 17, at 176–78.

See Tobin, supra note 17, at 178. The 105th Congress has also chosen not to incorporate Danforth's language. At a minimum, this decision means that Congress wants to give the courts or future Congresses leeway to decide the nature of judicial enforcement. Alternatively, it could be viewed as an implicit approval of the courts' use of injunctive relief in enforcing the Amendment.

See Tobin, supra note 17, at 174 (citing Senators Simon and Mack and Representative Schaefer as influential proponents of judicial involvement).


Section 6 of the Hatch Amendment provides that "[t]he Congress shall enforce and implement this article by appropriate legislation." See S.J. Res. 1, 105th
Alternatively, a future Congress could, by statute, create standing for certain plaintiffs to file suit to enforce the Amendment.

One alternative that has not been discussed in the case law, academic literature or legislative history is a suit by the Social Security trustees to protect the trust funds from being used to offset the deficit. If standing obstacles were the only impediments to a federal court’s consideration of a macro-enforcement claim, the trustees would have a strong case. Perhaps the framers of the Balanced Budget Amendment would consider a suit by the trustees of a federal trust fund to be consistent with the notion of limited judicial involvement in the Amendment’s enforcement. Given their fiduciary duty to maintain the trust fund’s solvency, the trustees would have the most logical claim among all possible plaintiffs to gain standing. A decision to use trust fund monies for non-Social Security purposes would surely cause an “injury in fact” to the fund. On the other hand, prudential factors could still allow the courts to avoid reaching the constitutional merits of the case. The Social Security Trustees consist of three Cabinet Members sitting ex

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40 The Constitution provides that Congress may limit the jurisdiction of the courts by statute, thereby preventing them from hearing certain types of cases. See U.S. CONST. art. III, § 2, cl. 2. Whether this power could allow the Congress to withdraw all jurisdiction over the Balanced Budget Amendment from the federal courts is an open question. See generally Laurence Tribe, Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts, 16 HARV. C.R.-C.L. L. REV. 129 (1981).

41 Such a suit could also be brought by the Medicare Trustees or the trustees of another federal trust fund. However, as I shall later argue, those suits would be unlikely to succeed on the merits because of the Hatch Amendment’s framers’ decision to include all expenditures in the budget calculation. Similarly, a suit by the Social Security Trustees would probably not succeed if the Hatch Amendment were to pass. Therefore, because a suit by the Social Security Trustees after the ratification of the Dorgan Amendment is the case that presents the strongest justification for judicial macro-enforcement, that is the situation I consider here.

42 Indeed, on an analogous set of facts, Arizona’s Supreme Court agreed to hear a case filed by the trustees of the state’s worker’s compensation fund, challenging a special tax that the legislature assessed against the fund in order to balance the budget. See generally State Compensation Fund v. Symington, 848 P.2d 273 (Ariz. 1993) (en banc). In that case, the court ruled that the tax was unconstitutional “special legislation,” something akin to a bill of attainder that singled out a single entity for taxation. See id. at 279.
officio,\textsuperscript{43} and two Presidential appointees.\textsuperscript{44} Thus, a lawsuit filed by the trustees would likely take on the dimensions of a political conflict between the President and Congress. Given this possibility, the political question doctrine would figure prominently in the minds of potential judicial enforcers.

Indeed, even if a court were to grant standing, it could still refuse to reach the merits of a macro-enforcement case because of the political question doctrine. The court may decline a case under the political question doctrine if: (1) the issue is constitutionally committed to a coordinate political department; or (2) there are a lack of judicially manageable standards for resolving it; or (3) the issue is impossible to decide without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the courts may not resolve the issue without expressing disrespect for a coordinate political branch; or (5) the unquestioning adherence to a political decision already made is required; or (6) potential embarrassment may arise from multifarious pronouncements by various departments on one question.\textsuperscript{45} In the case of enforcing a Balanced Budget Amendment, all these factors, save perhaps the fifth, could pose particularly forbidding barriers to judicial intervention. Only the most confident of courts would dare to limit Congress' power of the purse. Also, a court might feel it lacks the institutional competence to analyze competing estimates concerning revenue and outlays and determine which is most accurate.\textsuperscript{46} Finally, many of the decisions a court would have to make in macro-enforcing the Amendment would be of the type best settled by a body designed to facilitate a consensus, rather than by an institution.

\textsuperscript{43} See Social Security Act \textsection{} 201(c)(2), 42 U.S.C. \textsection{} 401(c) (1997). These Cabinet Members are the Secretaries of Labor, Health and Human Services, and the Treasury. See id.

\textsuperscript{44} See id. The President is to appoint two members of the public, who serve four-year terms after Senate confirmation. These two members are to be from different political parties. See id. As a practical matter, this means that one of the two will be from the President's party. The result is that when combined with the three Cabinet Members, at least four-fifths of the Trustees will be perceived as loyal to the President.


\textsuperscript{46} See John Patrick Hagan, \textit{Judicial Enforcement of a Balanced-Budget Amendment: Legal and Institutional Constraints}, 15 POL'Y STUDIES J. 247, 250 (1986); see also Bowen, \textit{supra} note 17, at 600-08.
that aspires to administer impartial justice.

Federal courts might also turn to state case law precedents to determine whether macro-enforcement of the Balanced Budget Amendment is consistent with the political question doctrine. Forty-nine states have some sort of balanced budget requirement, either by statute or constitutional provision. In trying to understand the context in which the Balanced Budget Amendment would have been ratified, federal courts would likely supplement their analysis of congressional history with a survey of state experiences. After all, thirty-eight state legislatures would need to ratify the Amendment, and it is likely that in envisioning how a federal amendment would operate, state legislators' views would be framed by their own states' experiences with enforcing balanced budget provisions.

Recently, the Connecticut Supreme Court declined to become involved in the macro-enforcement of a constitutional balanced budget provision. In *Nielsen v. State*, a group of concerned citizens sued the legislature, seeking to force its compliance with a balanced budget constitutional amendment that had been approved by the state's voters. The Connecticut Constitution provides for strict guidelines concerning budget expenditure increases by the state legislature. Moreover, the constitution also provides that the legislature is to define the terms "increase in personal income," "increase in inflation," and "general budget expenditures" for the purposes of these guidelines. Three years after the voters' ratification of the

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47 See Lubecky, supra note 17, at 564. Vermont is the single state with no balance requirement. See id.

48 Federal courts could conceivably examine the state legislatures' debates on ratification, but poring over such a vast amount of material might prove prohibitively burdensome. Because many states' courts have never heard macro-enforcement suits, an examination of state case law is relatively manageable.

49 670 A.2d 1288 (Conn. 1996).

50 See *CONN. CONST.* art. III, § 18.

51 See id. The constitution provides that the "general assembly shall not authorize an increase in general budget expenditures for any fiscal year above the amount of general budget expenditures authorized for the previous fiscal year by a percentage which exceeds the greater of the percentage increase in personal income or the percentage increase in inflation, ..." unless the governor and three-fifths of the members of each house agree to exceed the limit. *Id.* § 18(b).

52 Id.
amendment, the legislature had still not defined the three terms, effectively rendering the balanced budget provision impotent.\(^5\)

The court held that the amendment contained a textual commitment giving the General Assembly exclusive authority to define its terms.\(^5\) Accordingly, the court refused to define those terms, even though doing so would give immediate operative effect to the constitutional provision. The court held that defining such terms was an act requiring political judgment rather than judicial scrutiny.\(^5\) Moreover, the court refused to order the legislature to define those terms, because doing so would create a conflict with a coequal branch of government.\(^5\) The court explicitly held that the political question doctrine rendered enforcement of the state constitution's balanced budget amendment nonjusticiable.\(^5\)

In sharp contrast, the Alaska Supreme Court has adopted an interventionist approach in defining the terms of the state's constitutional balanced budget provision. In *Hickel v. Cowper*,\(^5\) the court heard a suit filed by the state's former governor against his successor, charging that the new governor and legislature had passed a statute that incorrectly defined the terms "amount available for appropriation" and "amount appropriated for the previous fiscal year."\(^5\) Inexplicably, the state's Attorney General did not argue that the court should decline to hear the case because of standing limitations or the political question
The court then rejected both parties’ proposed definitions, and delved into the text of the constitution, debates on its enactment, voter pamphlets from the constitutional referendum, and a number of dictionaries to discern what the terms “objectively” meant.

Other state courts that have been asked to enforce their state balanced budget requirements against legislative circumvention have ruled in a manner more consistent with Connecticut’s view than with Alaska’s. The New York Court of Appeals confronted a question regarding redefinition of debt in Wein v. Carey. The New York legislature was authorized to balance the budget by issuing short-term notes to cover shortfalls incurred mid-year. In Wein, a taxpayer sued to prevent the legislature from employing this practice year after year, by re-defining previously incurred debts as a mid-year shortfall, and annually issuing new notes to cover the gap. The court unanimously declared that it could prohibit the legislature from issuing the debt, but only if the plaintiff could prove that the legislature acted with an improper intent to manipulate the budget process. In this instance, it found that the legislature’s conduct did not amount to such manipulation. This choice of standards, while less deferential to the legislature than that adopted by the Connecticut court, meant that New York courts would intervene in only the most egregious of circumstances, such as where the legislature predicted a tripling of personal income tax revenue estimates, in the absence of a tax rate change, during a recession. Otherwise, the courts would shy away from the “practical monstrosity” of judicially reviewing the accuracy of an eleven billion dollar budget.

While the state did not argue that the court should have refused to hear the case on prudential grounds, it did assert that the court should adopt a “strong presumption” in favor of the legislature’s interpretations. Id. at 925. This the court refused to do, arguing that despite the legislature’s greater familiarity with appropriations, it was “not institutionally competent to issue opinions as to what a statute passed by an earlier legislature meant.” Id. at 927 n.7.
A similar taxpayer suit in Maryland sought to question the legislature's authority to rely on allegedly optimistic forecasts to create a balanced budget. The trial court refused to second-guess the legislature as to whether estimated revenues resulting from contingent events could be counted as revenues for the sake of balance. A few months later, the appellate court dismissed the case as moot after the projected revenue estimates turned out not to be optimistic. Most instructively, even in Massachusetts, where the state's balanced budget law specifically provides a mechanism for judicial enforcement, the high court has declined to engage in judicial review. Furthermore, it is important to note that the cases discussed herein are among the few in which courts have allowed plaintiffs to pass beyond the initial standing barriers in order to make an argument for judicial enforcement. The overwhelming majority of instances of objectionable budget balancing do not result in any level of judicial intervention.

Thus, a holistic analysis of these cases suggests that the Alaska decision is merely an interesting, albeit misguided, aberration, and that most courts view macro-enforcement of balanced budget provisions as an opening shot in an unwelcome turf war with the legislature over the power of the purse. Thus, it can be safely presumed that most of the state legislators who would ratify any federal Balanced Budget Amendment would perceive it as a mechanism not susceptible to judicial macro-enforcement, absent any clear language to the contrary in the text of the Amendment.

Finally, even if the Court found a macro-enforcement claim to be consistent with the standing and political question doctrines, the case could still be doomed because of remedial problems. Perhaps simple declaratory relief emerging from the Supreme Court would be enough to convince Congress to enforce the Constitution. Such was the case in a previous separation of powers case in which the two branches might have engaged in an

69 See id. at 222.
71 See BRIFFAULT, supra note 17, at 39.
72 Indeed, even if the Federal Amendment does contain authorization for judicial enforcement, the Massachusetts legislature probably still would believe that the federal courts would choose not to enforce the Amendment. See supra text accompanying note 70.
inter-branch showdown. However, in an area as dear to Congress as its spending authority, congressional resistance to a court's declaratory decree could force a court to grant an injunction enjoining any executive official from spending funds. Such an injunction could create serious logistical difficulties for the courts, which would then be responsible for overseeing the massive federal fiscal apparatus. As for forcing a legislature to raise taxes, the Supreme Court has declared that this remedy offends the Constitution. Alternatively, it is conceivable that Congress would simply ignore judicial meddling in fiscal affairs via injunctive relief, precipitating a constitutional crisis. The risk of precipitating either unfortunate outcome might convince the judiciary to take a "hands off" approach to the Balanced Budget Amendment.

Given this remedial nightmare, as well as the standing and political question doctrine issues, there is good reason to doubt whether these types of Balanced Budget Amendment cases would ever be adjudicated in the federal courts. Courts would be unsympathetic to cases in which they would be called upon to craft complex remedies, because such cases would require ongoing judicial supervision of a coordinate branch. Macro-enforcement litigation would most likely focus on deciding narrow, technical questions that are unlikely to precipitate a serious separation of powers conflict. Judicial involvement in

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73 See Powell v. McCormack, 395 U.S. 486, 550 (1969) (holding that congressional exclusion of one of its members was unconstitutional).
74 See Crosthwait, supra note 17, at 1098-1100.
75 See Missouri v. Jenkins, 495 U.S. 33, 55 (1990) (holding that District Court could not impose a tax increase itself, but it could require a state legislature to raise additional revenues to fulfill a constitutional mandate if the legislature was allowed flexibility in selecting the means of doing so).
76 This would render unlikely a situation where Congress passed an unbalanced budget, and a court ordered it to try again.
77 Such technical judgments could relate to issues such as whether the President could submit two budgets (one balanced, the other not) to Congress under Section Three of the Balanced Budget Amendment. Section Three reads: "Prior to each fiscal year, the President shall submit to the Congress a proposed budget for the United States Government for that fiscal year, in which total outlays do not exceed total receipts." S.J. Res. 1, 105th Cong. § 3 (1997). Another technical dispute could arise over whether Section Four's requirement that "no bill to increase revenue shall become law unless approved by a majority of the whole number of each house by a rollcall vote" applied to relatively innocuous revenue increases such as increased user fees and postage hikes. Id. § 4. This hypothesized judicial preference for cases
these types of cases would be consistent with the Senate Committee Report's statement that the judiciary would have limited involvement in enforcing the Amendment. 78

B. **BBA as a Shield: Micro-Enforcement**

While Congress has in its legislative history devoted significant attention to the macro-enforcement of the Balanced Budget Amendment, it has given almost no consideration to micro-enforcement contexts in which the Amendment could affect litigation. Specifically, this refers to cases not involving congressional circumvention in which judges would nevertheless be called upon to interpret the Amendment. A non-government plaintiff would for the reasons previously discussed have a difficult time convincing the courts to force Congress to cut spending or raise taxes in order to balance the budget. On the other hand, the courts would be willing to entertain an argument by government defendants that they were forced by the Hatch Balanced Budget Amendment to cut Mr. Nestor's Social Security benefits or Mr. Eldridge's disability insurance benefits. 79 Similarly, if the Dorgan Balanced Budget Amendment were ratified, plaintiffs Nestor and Eldridge could assert that they were denied payments in violation of their due process rights under the Fourteenth Amendment and the Dorgan Amendment's... of less than earth-shaking import would lead one to predict that judicial intervention might not be forthcoming in a dispute over whether Social Security was included in the deficit under the Hatch Amendment. On the other hand, in cases of egregious congressional behavior, the courts would feel pressured to intervene. For example, assume that the Congress decided to count the Social Security surpluses towards reducing the deficit until the year 2018. Then assume that Congress decided by statute that the Social Security deficit that would appear in 2019 would not be counted towards balance. Such an action would so clearly violate the spirit and legislative intent of the Amendment that the courts might set aside the political question doctrine. Moreover, the Supreme Court's declaratory judgment, combined with public sentiment, would probably convince Congress to reverse its previous decision, thereby mitigating remedial conflicts. Under these circumstances, if a plaintiff could successfully gain standing in the federal courts, the judiciary might vigilantly enforce the Amendment. However, these cases would hopefully be few and far between.


79 The reference here is to the plaintiffs in the landmark *Flemming v. Nestor* and *Mathews v. Eldridge* decisions, discussed infra at notes 135-148 and accompanying text.
pursued additional protections of those property rights. Faced with these kinds of cases, the courts would have a difficult time avoiding a decision on the merits of the Balanced Budget Amendment claims. Certainly, the court could not avoid these cases by using standing, political question, or remedial concerns, any more than they could when these plaintiffs brought their cases.

It is precisely in these types of cases that most state courts have intervened and adjudicated issues relating to the state balanced budget provisions. What many writers have failed to realize is that these sword and shield cases actually represent two distinct models of judicial enforcement, with entirely different incentives, political realities, and doctrinal frameworks. This article will now proceed to extrapolate these state law developments to the federal level.

If either version of the Balanced Budget Amendment is ratified, the government will eventually make significant spending cuts. Whether those reductions are made through legislative decisions to modify benefit levels for certain classes of beneficiaries, or through administrative decisions to deny or reduce benefits to the “least deserving,” some of those recipients will file suit, seeking a restoration of benefits. Inevitably, government lawyers representing coordinate branches will begin making powerful arguments about the constitutional significance

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80 See infra text accompanying notes 180–184.

81 The plaintiffs have standing by virtue of their suffering a real and direct loss, i.e., losing benefits. The cases do not run afoul of the political question doctrine because they involve basic, localized decisions about what the Constitution means and whether someone is entitled, as a matter of right, to specific benefits. Courts have a long history of making these decisions. Finally, the remedy demanded—the restoration of benefits—would easily fall within the power of even the lowliest of administrative law courts.

82 See Briffault, supra note 17, at 36-37. Richard Briffault notes this trend in state adjudication:

In all of these cases, the balanced budget language has been cited as a justification for a cutback, nonpayment, or transfer of funds. In other words, the balanced budget requirement has been a shield, used by a governor or state to defend against a claim that a belt-tightening action violates some legal right of persons affected by it. . . . But constitutional mandates have only rarely been deployed as a sword to compel a state to balance its budget or force a state to defend its assertion that its budget is balanced.

Id.
of fiscal discipline. Once that process begins and those lawyers begin asking the courts to interpret the Balanced Budget Amendment, the political question doctrine will no longer constrain judicial interpretation. Deferring to the wishes of a coordinate branch will entail judicial intervention. Since standing and remedial difficulties will simply not come into play in these types of cases, a body of law relating to the meaning of the Amendment will begin to develop. 83

One can imagine several types of micro-enforcement actions that could arise under the Hatch Amendment. For example, Congress could pass implementing legislation that establishes a sequestration process, whereby certain categories of appropriated spending are subject to automatic, across-the-board cuts if mid-year adjustments are required to keep the budget balanced. Congress adopted such a mechanism in the Gramm-Rudman-Hollings Act. 84 Such sequestration might prompt reduced payments to a number of parties. This article will compare three hypothetical cases: disputes involving a missed payment that the government was contractually bound to make to a third party; a lower-than-anticipated payment to a state that is expecting block grant reimbursement for a welfare program; and a reduction in Social Security benefits. 85

If the Balanced Budget Amendment caused the government to fail to make a payment to a contractor, the federal courts would likely be quite sympathetic to a suit brought by that contractor. 86 In three recent state court cases, governors have unsuccessfully invoked balanced budget requirement-related fiscal pressures as a

83 This raises an interesting question: if the courts begin to wet their feet on the Balanced Budget Amendment by interpreting it in micro-enforcement entitlement cases, would they then be more likely to "progress" to macro-enforcement decisions? An affirmative answer certainly seems plausible, although plaintiff standing constraints would remain a significant barrier to such suits.


85 Other cases could arise in which the federal government might seek to use the Balanced Budget Amendment as a shield against individual claims for damages. For example, it could use the Balanced Budget Amendment to justify capping the government's tort liability. See, e.g., Pfost v. State, 713 P.2d 495, 504 (Mont. 1986).

86 See Bowsher v. Synar, 478 U.S. 714, 721 (1986). The Supreme Court has already held that such an injury forms an adequate basis for a plaintiff to gain standing in a suit challenging the sequestration. See id.
defense against suits for breach of contract. The Florida Supreme Court held that while the state constitution's balanced budget requirement gives the legislature a great deal of leeway to deal with budgetary shortfalls, the legislature may only breach contracts if it can demonstrate a compelling interest.\(^{87}\) In order to do so, the state must be able to show that the funds are not available from a more "reasonable" source, such as the reduction of a non-contractual appropriation or a revenue-increasing measure.\(^{88}\) Distinguishing this type of case from a macro-enforcement case, the court held that separation of powers concerns would not prevent the courts from enforcing a valid contract entered into by the legislature.\(^{89}\) Similarly, the Iowa Supreme Court has rejected an assertion by the governor that the existence of a balanced budget statute means that the state's power to withhold appropriations must be read into every contract.\(^{90}\) Finally, in a Washington case involving an economic emergency precipitated by a recession, the state supreme court ruled that the government's cancellation of teacher salary increases required by a collective bargaining agreement was an unconstitutional impairment of contract.\(^{91}\) The court held that economic emergency may in fact be considered, but that it is just another factor within the overall determination of reasonableness.\(^{92}\) Thus, the consensus among the few jurisdictions that have considered the issue is that a constitutional obligation to balance the budget will not trump the government's contractual obligations unless the government has no alternative.\(^{93}\) Because the federal government has so many

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\(^{87}\) See Chiles v. United Faculty of Fla., 615 So. 2d 671, 673 (Fla. 1993).

\(^{88}\) See id. at 674 (Grimes, J., concurring).

\(^{89}\) See id. at 673. Specifically, the separation of powers concern referred to here is the political question doctrine.


\(^{91}\) See Carlstrom v. State, 694 P.2d 1, 7 (Wash. 1985).

\(^{92}\) See id. at 5. "Financial necessity, though superficially compelling, has never been sufficient of itself to permit states to abrogate contracts." Id.

\(^{93}\) The only jurisdiction that apparently has adopted a conflicting ruling has done so by declaring the government's collective bargaining agreement with public employees to be essentially non-contractual. The Rhode Island Supreme Court held that the Governor had the ability to shut down the government for ten days in order to comply with a balanced budget requirement. See In re State Employees' Unions, 587 A.2d 919, 924 (R.I. 1991). However, the Court did this because it assumed that the shutdown did not conflict with the public employees' contract. See id.
potential sources of revenue at its disposal, including the powers to tax, sell assets, and even print more money, the federal courts seem unlikely to rule that the Balanced Budget Amendment is an adequate shield against contractual breaches.

There is little state case law analogous to a situation that might arise if the federal government used the Balanced Budget Amendment to justify a sequestration of funds that were to be used for block grants to the states. The relationship between municipal governments and state governments do not completely correspond to that between the federal and state governments, but it remains the closest comparison available. In a notable example of fiscal conflict between state and local governments, the New Jersey Supreme Court refused to force the governor to comply with statutory provisions requiring that he allocate funds to county and municipal governments. The court held that a constitutional balanced budget requirement took precedence over a statutory obligation to provide certain funds to local governments. Similarly, the Michigan Supreme Court held that the governor could reduce aid to local governments in order to fulfill a constitutional obligation to balance the budget. This case law suggests that federal courts might give serious consideration to an argument made by the federal government that the Balanced Budget Amendment forced it to reduce block grant aid to the states. State plaintiffs might try to cast the commitment of funds for block grants as contractual relationships, but they would face an uphill battle. Especially if the federal courts adopted the state courts' skepticism towards governmental breach of contract, the courts would not be prone to hold that reducing block grants was also an unreasonable way of reaching balance. After all, were the opposite true, then the

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94 See Camden v. Byrne, 411 A.2d 462, 464–66, 474 (N.J. 1980); see also Lubecky, supra note 17, at 576-77 (detailing how the court held that the determination of the amount of state funds to be appropriated to local governments was the obligation of the legislature rather than the judiciary).

95 See Byrne, 411 A.2d at 464–74.

96 See Michigan Ass'n of Counties v. Department of Management and Budget, 345 N.W.2d 584, 593 (Mich. 1984). "The distribution schedule of the State Revenue Sharing Act must give way to constitutional mandates and efforts to preserve the fiscal integrity of the state." Id. at 589 (citing White v. Dep't of Soc. Serv., 174 N.W. 2d 315 (Mich. Ct. App. 1969)).

97 Cf. id. at 591.
federal government could plausibly argue that it had been left only with the options of cutting entitlements or raising taxes, and thus be able to blame the courts for forcing it to choose between such unpopular options.

This analysis raises this article's principal issue of how the federal courts would respond to micro-enforcement suits by plaintiffs seeking to bar the government from reducing their Social Security benefits or weakening the procedural requirements that protect those benefits. To a great degree, the answer depends on which version of the Balanced Budget Amendment is ratified, and how the courts interpret the language of that Amendment. Therefore, in order to give a satisfactory response, it will be necessary to broaden the inquiry, exploring the historical context of the relationship between Social Security and the balanced budget, the legislative history looming behind the dueling proposed Amendments, and the experience of the state courts in confronting similar problems.

III. The Odd Couple: Social Security and the Balanced Budget

Theodore Seto aptly characterizes the Balanced Budget Amendment as a strange marriage of accounting and constitutional law. By this he means that few scholars are comfortable discussing both fields, resulting in a fragmented understanding of how the Amendment would operate. The joining of the Social Security (OASDI) trust fund with the rest of the federal budget is a similarly difficult relationship. By nearly unanimous consensus, it is agreed that the two should be kept separate, and yet they keep finding their way back to each other. The Hatch Balanced Budget Amendment proposal, which would

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To adopt the reasoning of the plaintiffs and the minority [that assistance to local governments could not be reduced to meet the balance requirement] would mean that the Governor would have to reduce expenditures from less than half of the revenue sources, doubling the financial burden on the reduced areas.

Id.

98 Technically, the government could also run inflationary monetary policies or sell assets to balance the budget. However, the former would be widely viewed as economically and politically counter-productive, while the latter could only be sustained for a short while. Therefore, as a practical matter, only two options would remain.

99 See Seto, supra note 17, at 1453.
re-unify the budget, represents yet another volley in a tennis match that has occupied the last two decades of congressional budgetary history.

Prior to 1969, the federal government's trust funds, of which OASDI is the largest, were accounted for separately from the official, "administrative" budget. However, a Presidential Commission on Budget Concepts was concerned that the exclusion of the trust funds prevented the budget from accurately reflecting the scope of government activity. As a result, beginning in 1969, the President began including the trust funds in the budget. Five years later, Congress also moved to a unified budget. However, when Congress subsequently voted to trim the Social Security minimum benefit in order to reduce the deficit, Social Security advocates began to believe that continued inclusion in the budget would prompt further benefit reductions. The Social Security Amendments of 1983 removed Social Security, as well as Medicare, from the unified budget, effective in 1993. In the interim, the Gramm-Rudman-Hollings Deficit Reduction Act modified that arrangement. Social Security was removed from the budget, but its surpluses were used to offset the deficit. Within five years, the relationship would be altered yet again. The Budget Enforcement Act prohibited the President and Congress from including Social Security in the federal budget deficit or surplus. However, in his budget proposals to Congress, the President generally ignored this statute, and included the Social Security surplus in his more prominent displays of the budget deficit. By 1996, congressional leaders had followed suit, and proposed a balanced budget that was only balanced if Social Security surpluses were included.

The treatment of Social Security has an enormous effect on

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100 Dauster, supra note 11, at 487.
102 See Dauster, supra note 11, at 488.
103 See Dauster, supra note 11, at 489.
105 See Budget Enforcement Act of 1990, § 13301(a), 104 Stat. 1388; see also Dauster, supra note 11, at 494.
106 See Dauster, supra note 11, at 495.
the size of the reported deficit. For example, in 1996, the Senate Republicans proposed a budget that would achieve "balance" by 2002. However, the projected 2002 Social Security surplus of $104 billion was included in the zero-deficit calculation. In the abstract, Congress probably favors taking Social Security off budget, so as to please constituents who fear it will otherwise be cut. But in practice, the majority in Congress is not presently willing to confront the kind of spending cuts or tax increases necessary to balance the budget without the aid of Social Security.

IV. The Hatch Amendment

Although there are reasons to suspect that a Balanced Budget Amendment that excludes Social Security from the balance calculation is ultimately more likely to win congressional approval and subsequent ratification, the passage of such an amendment is inherently speculative. In contrast, Balanced Budget Amendments substantially similar to the Hatch version have already won the approval of two-thirds of each house, albeit in different years. Thus, most legal scholars who have considered the public policy implications of the ratification of a Balanced Budget Amendment have used the Hatch Amendment as their paradigm.

The primary motivation of the Hatch Amendment's would-be framers is to inscribe a principle of fiscal discipline into the Constitution. The framers see the government's decision to carry a permanent deficit as an affront to intergenerational equity, because such an approach saddles future generations with high levels of debt. The Balanced Budget Amendment is seen by its proponents as the only way of re-establishing intergenerational

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108 See S. REP. No. 105-3, at 4-6 (1997). Very similar Balanced Budget Amendments passed the Senate in 1982 and the House in 1995. The 1982 Senate version did not include a clause relating to the debt limit, and did contain a provision that total receipts could not increase in a given year "by a rate greater than the rate of increase in national income in the . . . [preceding] year" without the enactment of a resolution permitting such an increase by a majority in each house. S.J. Res. 58, 97th Cong., 2d Sess. § 2 (1982).
equity in a political milieu in which the traditional norm of balance has fallen by the wayside. The framers argue that while the federal government has expanded into so many areas that have traditionally been the responsibilities of the states, Congress has not adjusted taxes to keep pace with its "voracious appetite" for new spending. The Senate Committee Report even brushes gently against the third rail, contemplating Social Security cuts in order to help balance the budget. While the Committee goes to great lengths to say that its members do not want to cut Social Security benefits, they refuse to rule out such a move. The proponents of the Hatch Amendment envision Social Security competing on an equal footing with other budgetary priorities. Social Security will be protected not by institutional factors, or by entitlement status, but by its lasting popularity and importance to voters.

If a court were to thoroughly examine the legislative history of the Hatch Amendment it could settle the otherwise highly contentious issue of whether to include Social Security's balances in the deficit calculation. Other potential judicial resources would be less helpful. The text of the Hatch Amendment says nothing about whether Social Security outlays and receipts should be included in the budgetary balance calculation.

110 S. REP. NO. 105-3, at 2.

111 See id. at 3.

112 See id. at 14.

The motivation for exempting Social Security from the Balanced-Budget Amendment is to ensure that Social Security benefits will not be cut. The Committee understands this concern, but believes it to be misplaced. Passage of S.J. Res. 1 does not in any way mean Social Security benefits will be reduced. It only requires Congress to choose among competing programs in allocating budget cuts. There is every reason to believe the power of the electorate will continue to ensure that Social Security will compete very well.

Id.

113 Even if a judge refused to examine legislative history as a matter of principle, she would still be likely to take note of legislative practice. For example, if the same Congress ratified the Amendment and passed a budget that was projected to balance in 2002 only after taking the Social Security surpluses into account, this would send a clear message to judicial interpreters that Congress understood the Amendment to include the OASDI trust funds in the budget calculation.

here. Many of the state balanced budget requirements do not specify which, if any, funds are included in the balance calculation.115 In these states, legislatures themselves often doctor the reported deficits by modifying the funds that are included in the operating budget. Learning from this, the Hatch Amendment’s sponsors sought to prevent this type of circumvention by ensuring that all forms of expenditures counted towards budgetary balance.116 At first glance, this divergence of views suggests a conflict between the interpretations of Congress and the state legislatures about whether Social Security would be counted towards the deficit under the Hatch Amendment. However, Section 6 of the Amendment provides that Congress will implement the Amendment by appropriate legislation.117 Accordingly, even if state legislators suspect that Congress would not include Social Security in the deficit, they would almost certainly recognize that it would be up to Congress to define revenues and expenditures through implementing legislation.

The defeat of the Dorgan Amendment alone would not render the legislative history unequivocal on the question of whether Social Security receipts and outlays are to be included in the deficit calculation. As was previously stated, the Dorgan Balanced Budget Amendment consists of the Hatch Amendment, verbatim, plus the Social Security exclusion.118 Accordingly, its failure to achieve passage can be thought of as a clear indication that Congress chose not to exclude Social Security from the deficit calculation. However, this is not equivalent to an explicit, affirmative vote by Congress to include Social Security outlays and receipts in the deficit calculation. After all, amendments to legislation can be rejected because the majority disagrees with their substance or sees the amendment as a “spurious or unnecessary attempt to clarify” what is already clear.119 Alternatively, Congress can reject an amendment because it

117 See S.J. Res. 1, 105th Cong. § 6 (1997). This section states that “the Congress shall enforce and implement this article by appropriate legislation. . . .” Id.
prefers to delegate the decision of whether to clarify the textual meaning to future Congresses. Only by ruling out these alternative explanations for Congress’ rejection of the Dorgan Amendment and subsequent approval of the Hatch Amendment could a court find a definitive answer to the Social Security question in the legislative history.

Apparently, no one in Congress thought that the Hatch Amendment already excluded Social Security from the balanced budget calculation. Certainly, that is the message the majority articulated in the Senate Committee Report, which states that “[c]ontributions to social insurance programs . . . should be included in receipts.” Moreover, at no time during the 105th Congress did a Republican Senator take issue with Senator Dorgan’s allegations that the Hatch Balanced Budget Amendment did not exclude Social Security, even though public opinion polls show that the electorate overwhelmingly supports a Social Security exclusion. Clearly, Republicans could have gained political advantages, and possibly assembled a winning coalition, by arguing that Social Security would already be exempted under the Hatch Amendment. Their decision not to do so can be interpreted as a coordinated effort not to muddle the legislative history, and to ensure that if courts ever delved into the history of the Amendment, they would find that Social Security receipts and outlays were unequivocally to be counted towards balance. The

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120 See Komesar, supra note 37, at 195.

121 While courts generally find committee reports more reliable than the record of accepted and rejected amendments in determining legislative intent, they still assign the latter a reasonably high degree of credibility. See Patricia Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195, 202 (1983).

122 S. REP. NO. 105-3, at 24 (1997). “The primary thrust of the letter is the contention that the Social Security Program will be harmed if it is included within the scope of S.J. Res. 1. . . . There is nothing to suggest that Social Security will be harmed by its inclusion within the Balanced-Budget Amendment.” Id. at 15. “[N]ot including or exempting the present day [Social Security] surplus in budgetary calculations, the Committee believes, will both harm the future viability of the trust funds and require more cuts than necessary in other Federal programs.” Id. at 13.

123 This statement is rather categorical. However, I conducted exhaustive keyword searches of hearings, floor debates, and testimony and determined with a high degree of certainty that no Republican Senator deviated from the party line.

124 See Hearings, supra note 15.
Committee Report language cited previously\textsuperscript{125} also shows that the Hatch Amendment's backers did not wish to leave the definition of balance to future Congresses.\textsuperscript{126} Indeed, they feared that those future Congresses would circumvent the Amendment by making expedient decisions to count or not count budgetary items towards balance.\textsuperscript{127} Thus, in this case, the Senate majority's decision to reject the Dorgan Amendment should be interpreted as a clear signal to future constitutional interpreters that Social Security must be included in the budget for the purposes of calculating balance.

Seen in this light, a court would likely interpret the Balanced Budget Amendment as a sweeping effort to make fiscal responsibility a compelling constitutional obligation. While the framers of the Hatch Amendment were careful to articulate their support for the Social Security program, they made the goal of preserving Social Security secondary to the goal of achieving fiscal discipline and intergenerational equity.\textsuperscript{128} The norm of balanced budgets was enshrined as an affirmative, permanent constitutional imperative.\textsuperscript{129} As for Social Security, it would fend for itself in the budgetary process. While backers of the Hatch Amendment betrayed no desire to tear down at least one of Social Security's

\textsuperscript{125} See supra note 122 and accompanying text.

\textsuperscript{126} Paul Kahn questions the constitutional legitimacy of acts in which a Congress seeks to establish statutory rules that decrease the fiscal discretion of future Congresses. See Paul W. Kahn, Gramm-Rudman and the Capacity of Congress to Control the Future, 13 Hastings Const. L.Q. 185 (1986). Although this concern might not be relevant in the case of a Balanced Budget Amendment Kahn's critique appears quite damaging as applied to the Amendment's implementing legislation. One might legitimately ask whether a committee report and subsequent judicial interpretation thereof ought to prevent future Congresses from concluding that the Hatch Amendment allows Congress to exclude the OASDI Trust Funds from the deficit calculation. On the other hand, to answer this question in the negative is to invite circumvention of the Constitution.


\textsuperscript{128} In contrast, the framers did not wish to favor fiscal discipline over military spending during wartime. See S.J. Res. 1, 105th Cong. § 5 (1997). "The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect." Id.

\textsuperscript{129} Admittedly, it is an imperative that Congress can ignore for a year by attaining the approval of a supermajority in each house. Nevertheless, fiscal discipline remains an imperative in the sense that unless Congress has significant leeway to make spending reductions, it is unlikely to be able to achieve balance during any fiscal year.
institutional safeguards, they wanted to put the program on an equal playing field with other government functions. They see fiscal discipline as a method of ensuring that the government will be able to return to the Social Security Administration the billions of dollars it is currently borrowing from the trust fund each year. The philosophical perspective held by the Hatch Amendment's proponents is that fiscal discipline is the fundamental goal, and Social Security's continued viability is a positive consequence. This ranking of priorities, evident in the legislative history, could have profound implications for how the courts think about Social Security benefits in a post-Balanced Budget Amendment world.

By embedding the principle of fiscal discipline into the Constitution, the Hatch Amendment could enable Congress to make almost any change in Social Security that would help promote that goal. Section 6 of the Amendment directs Congress to enforce the Amendment through legislation. Thus, any sequestration measure, and probably every annual budget bill, would be enacted pursuant to this explicit constitutional grant of authority to achieve balance.

To illustrate the effect of this new authority, imagine that in

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150 See S. Rep. 105-3, at 13 (maintaining that Social Security's statutory “firewall” protections—requiring that any increases in Social Security spending or decreases in Social Security payroll contributions be completely offset so as not to worsen the Trust Funds' balance—would remain in force under the Hatch Amendment). The firewall provisions are codified at 2 U.S.C. §§ 633(f)(2), 642(a)(2) (1994); see also Budget Enforcement Act of 1990, § 13301-02.


152 The ratification of a Balanced Budget Amendment would transfer the source of Congress' freedom to modify entitlements from prudential separation of powers doctrines to the Constitution's text. Under present case law, Congress has a great deal of freedom to modify an individual's statutory entitlement to benefits. See Atkins v. Parker, 472 U.S. 115 (1985). The Supreme Court distinguished between judicial review of congressional programmatic changes in the food-stamp program, in which the courts would focus on compliance with substantive limitations on the power of Congress, and administrative determinations about whether individuals were eligible for food stamps, in which the courts would invalidate any procedure that did not comport with due process protections. See id. at 129. Legislative decisions to alter benefit levels cannot violate the Due Process Clause, because “the legislative determination provides all the process that is due.” Id. at 130. However, administrative regulations can implement those reductions in a way that violates due process rights. The Equal Protection Clause, rather than the Due Process Clause, operates as the primary constraint on Congress' ability to modify entitlement programs.

2010, Congress eliminates entitlement benefits for all Americans who are dual citizens. A hypothetical dual American and Austrian citizen named Mr. Schmidt, who has lived in America since age twenty-five, brings suit seeking a restoration of his Social Security benefits. Under current law, a court might adopt the U.S. Supreme Court’s approach in *Flemming v. Nestor*, which held that noncontractual interests of employees covered by the Social Security Act are not analogous to those of the holder of an annuity, whose rights are based on payments arranged by contract. The *Flemming* decision stressed that Social Security was designed to maintain “flexibility and boldness in adjustment to everchanging conditions.” The federal government therefore can reduce or deny an individual’s Social Security benefits, subject to the Fifth Amendment’s due process provisions. Under *Flemming*, without a Balanced Budget Amendment, the elimination of Schmidt’s Social Security benefits would be unconstitutional only if the deprivation of benefits was based on a “patently arbitrary classification, utterly lacking in rational justification.” Schmidt would probably not prevail, since the government could argue that dual citizens are, as a group, more likely to be eligible to receive old age benefits from another national government. In this context, the ratification of Hatch Amendment would merely make the government’s case even stronger.

However, it has been argued that Supreme Court cases subsequent to *Flemming* laid the groundwork for a serious reevaluation of the Court’s stance towards Social Security as a property interest. Most prominently, in *Weinberger v. Weisenfeld*, the Supreme Court struck down a provision of the Social Security Act that provided female wage earners with lower survivor benefits.

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134 363 U.S. 603 (1960)
135 See id. at 610 (permitting the termination of Social Security benefits for individuals who had previously been members of the American Communist Party).
136 Id.
137 See id. at 611; U.S. CONST. amend. V.
138 *Flemming*, 363 U.S. at 611.
for their widowers relative to the benefits that widows of male wage earners would receive. The majority opinion was premised on the idea that female workers had earned the right to survivor benefits that were commensurate with their contributions to the system — a property rights framework that Flemming rejected. Justice Brennan's opinion tried to push Social Security recipients' property rights as far as they could go towards vested rights without overruling Flemming. If it is in fact correct that the law is slowly moving towards a recognition of accrued property rights in Social Security, then the Balanced Budget Amendment would reverse that trend. By enshrining fiscal discipline as a goal of constitutional import, it would strengthen the government's argument that lowering the deficit by denying benefits to a class of recipients furthers a compelling government interest. To buttress this claim, the government could argue that by rejecting the Dorgan Amendment, Congress had considered and rejected the idea of protecting Social Security from benefit reductions that might arise out of congressional efforts to balance the budget. Thus, if the Hatch Amendment were enacted, it appears that lawsuits filed to prevent the reduction of an individual's Social Security benefits, already rendered unlikely to succeed under Flemming, would be summarily rejected by the courts.

In the context of Social Security Disability Insurance, where procedural disputes are likely to arise in response to administrative determinations that individuals are not eligible for benefits, the ratification of the Balanced Budget Amendment

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141 See id. at 645.
142 See id. at 647 (citing Flemming, 363 U.S. at 610).
143 See id.

It is true that social security benefits are not necessarily related directly to tax contributions, since the OASDI system is structured to provide benefits in part according to presumed need. For this reason, Flemming held that the position of a covered employee "cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments." But the fact remains that the statutory right to benefits is directly related to years worked and amount earned by a covered employee, and not to the need of the beneficiaries directly.

Id. (quoting Flemming, 363 U.S. at 610).
would likely have a more profound effect. In *Mathews v. Eldridge*, the Supreme Court held that the courts would conduct "utilitarian" due process review of administrative procedures that deprived individuals of disability benefits based on a weighing of three factors: (1) the private interest that may be affected by the government action; (2) the risk of wrongful deprivation of such interest through the procedures used; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the procedural requirement would entail. Among the government interests that the court would weigh is its interest in conserving scarce financial resources. After the ratification of the Hatch Amendment, a court would presumably assign more weight to the conservation of these resources, resulting in a weakening of due process protections for those cut off from the Disability Insurance program. Again, in defending itself against future suits filed by those cut off from the program, the government's lawyers could point to the legislative history of the Balanced Budget Amendment and show that Congress, in rejecting the Dorgan Amendment, made a conscious effort not to provide the Disability Insurance program's clientele with special protections against fiscal pressures created by the need for budgetary balance.

There is a significant possibility that an enhanced constitutional interest in fiscal discipline resulting from the ratification of the Hatch Amendment would make it easier for the federal government to deny individuals other types of welfare and social insurance payments as well. The result could be something akin to the constitutional disentitlement of these programs, a step beyond the statutory disentitlement that recently occurred with respect to the former Aid to Families with Dependent Children program. It has been suggested that the current Supreme Court is interested in excising from due process jurisprudence the last

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147 See *Eldridge*, 424 U.S. at 335.
148 See id.
vestiges of the "New Property" theory\textsuperscript{150} that provided the basis for the \textit{Goldberg v. Kelly}\textsuperscript{151} decision.\textsuperscript{152} In passing the Hatch Amendment, Congress might be doing just that. Faced with competing claims by an individual with a statutory right to receive a benefit, and a government with a constitutional obligation to eliminate an unexpected deficit without reneging on contractual agreements, the courts would be almost obligated to set aside any statutory entitlement to welfare payments.

\textbf{V. The Dorgan Amendment}

A number of Democratic legislators have proposed Balanced Budget Amendments that do not include outlays or receipts to or from the OASDI trust fund in the deficit. The primary Senate version of the bill in the 105th Congress is the Dorgan Amendment, which is identical to the Wyden Amendment introduced in the 104th Congress.\textsuperscript{153} The most notable provision of the Dorgan Amendment is Section 7, which states:

\begin{quote}
Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include outlays of the United States Government except for those for repayment of debt principle. The receipts\textsuperscript{154} (including attributable interest) and outlays of the Federal Old-Age and Survivors Insurance and the Federal Disability Insurance Trust Funds (as and if modified to preserve the solvency of the Funds) used to provide old age, survivors, and disabilities benefits shall not be counted as receipts or outlays for purposes of this article.
\end{quote}

The italicized sentence in Section Seven is the only difference between the Dorgan Amendment and the Hatch version of the

\textsuperscript{151} 397 U.S. 254 (1970) (stating that welfare recipients who had their benefits terminated without a pre-termination adjudicatory hearing were deprived of their property without due process of law).
\textsuperscript{153} See S.J. Res. 12, 105th Cong. (1997) and S.J. Res. 54, 104th Cong. (1996), respectively; see also H.J. Res. 45, 105th Cong. (1997) (House version of the Amendment, containing different wording from that proposed in the Dorgan Amendment).
\textsuperscript{154} S.J. Res. 12, 105th Cong. § 7 (1997) (emphasis added).
Balanced Budget Amendment. Assuming that none of the original sponsors of the Hatch Amendment would have voted against Dorgan's proposal, the bill would have won more than seventy votes in the Senate. However, the Senate rejected the Dorgan Amendment by a party-line vote of fifty-five to forty-five. This occurred despite the fact that exclusion of the Social Security trust fund from the deficit calculation is popular with the public. The best explanation for this is that the Senate Republicans are waiting for what they see as the better Balanced Budget Amendment and prefer to try to secure its passage after the next election rather than compromising on Social Security. However, for the purposes of this discussion we will assume that a sufficient number of Republicans see this as the country's best chance to pass some form of a Balanced Budget Amendment, and agree to support the Dorgan wording.

The congressional legislative history suggests that the primary purpose of the Dorgan Amendment is to prevent the budget balancing process from resulting in reductions in Social Security benefits or increases in payroll taxes. By removing the Social Security trust funds from the base used for deficit calculations, the Dorgan Amendment would prevent Social Security reductions proposed for the purpose of reducing the deficit. Indeed, the reason Congress originally established a separate trust fund for Social Security was to give the program added protection against those who would be tempted to raid such a large revenue source. It seems rather clear that ratification of the Dorgan version of the Balanced Budget Amendment would strengthen that program against attacks by deficit hawks. Legislators who propose reducing the size of government by means testing Social Security benefits, for example, would have no ability to use those savings to lower the reported deficit. Given the popularity of the program with beneficiaries, such a reduction would anger a powerful constituency without producing tangible benefits that the public could appreciate. In light of these realities, it is hard to

157 See supra note 15.
159 See supra text accompanying note 102.
imagine that anything but a desire to preserve the trust fund’s solvency or lower payroll taxes would motivate Congress to cut Social Security benefits.

Under the Dorgan Amendment, there would still be significant oversight of the Social Security program, but the Social Security trustees, and not Congress, would most likely be the group involved in that oversight. This shift would constitute a radical redefinition of the trustees’ job description, since their most significant duty under the present system is to make reports to Congress on the financial health of the funds.\(^\text{160}\) As is the case in states that have off-budget public employee pension programs,\(^\text{161}\) oversight would focus on the program’s solvency, not on its contribution to a potential deficit crisis.

The Dorgan Amendment would have another important short-term effect. Like the Hatch alternative, the Dorgan Amendment requires a reduction of the deficit to zero by 2002 or the second fiscal year after the Amendment’s ratification, whichever is later.\(^\text{162}\) In order to achieve that target by 2002, the Dorgan Amendment would require some combination of tax increases and draconian cuts in non-Social Security spending. With Social Security currently running surpluses of approximately sixty-five billion dollars annually, even the more fiscally conservative Republicans seem unwilling to swallow the cuts necessary to balance the budget without those extra revenues.\(^\text{163}\)

\(^{160}\) See Social Security Act § 201(c)(2), 42 U.S.C. § 401(c)(2).

\(^{161}\) See, e.g., 7 HAW. REV. STAT. ANN. § 87-21 to 29 (Michie 1996); 4 MASS. GEN. LAWS. ANN. ch. 32, § 23 (West 1996).

\(^{162}\) See S.J. Res. 12 § 8. Presently, the sponsors of the Dorgan Amendment do not appear to expect it to pass. If they did, they might be tempted to delay the date by which balance had to be achieved. This would allow Congress to phase in the sacrifices necessary to achieve balance. However, such a hypothetical is so far removed from the status quo as to render its implications beyond the scope of this article. Such a change would radically alter the cuts-now-versus-cuts-later theory of the Hatch-Dorgan debate, discussed infra at notes 176-77 and accompanying text.


In 2002 alone, Congress would have to first balance the unified budget, and then save an additional $104 billion to balance the budget exempting Social Security. Over the years 2002 to 2007, these amendments would require that Congress either cut spending, raise
To an astute observer, this appears paradoxical. Moderate and liberal Democrats are willing to make deep cuts in government spending that frighten even the most fiscally conservative Republicans. In attempting to explain such behavior, several possibilities come to mind: (1) Democrats could be bluffing, providing themselves with political cover by backing an Amendment that they know the Republicans will never adopt; (2) Democrats might believe that they can achieve the necessary deficit reductions through tax increases; or (3) Democrats may be less concerned about the short-term cuts necessary to achieve balance if the trust fund is excluded, than with the long-term cuts that will be necessary if the trust fund is included, once the Baby Boomers retire and the Social Security program begins causing enormous annual deficits.164

The first possible motivation for the Democratic attitude raises interesting—but not unique—questions for subsequent judicial interpretation. If the Amendment were truly introduced as a killer amendment that did not have the votes to pass, but subsequently gained majority support, the courts would almost be obligated to disregard the actual original intent. Such was the case with the gender discrimination component of Title VII, which was an addition designed to defeat a bill that combated discrimination based on race, religion, and national origin.165 In interpreting the congressional intent of Title VII's gender discrimination provisions, the courts have not regarded it as a provision intended to weaken protections against racial discrimination. Similarly, even if Senator Dorgan's intention was to sabotage the Balanced Budget Amendment, by the time the measure won the approval of two-thirds of each house, the "legislative intent" must have changed. In the days leading up to a final vote on the Dorgan Amendment, the head counters on the

taxes, or both, by an additional $706 billion.

Id. at 31.

165 See Patti Buchman, Note, Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance, 85 COLUM. L. REV. 190 (1985). The insertion of the word "gender" was a last-minute measure by Representative Howard Smith of Virginia to kill the bill by inserting a controversial provision. Its late addition left a shortage of legislative history. "For this reason, the aims of Title VII's proscription of gender discrimination must be pieced together from its subsequent legislative history...." Id. at 193 n.14.
Democratic side would have seen that they had enough votes to win passage of their Amendment. Arriving at this juncture, they would then be faced with a difficult choice: drop their support for the Amendment, thereby weakening their political credibility, or vote for an Amendment that they do not really support. Presumably, however, there would have been a substantial faction of Senators who supported the Amendment for less cynical reasons. In subsequent judicial interpretation of the Dorgan Amendment’s legislative history, the courts would probably take Dorgan’s public explanations of the Amendment’s rationale at face value, or focus on this latter faction of Senators. After all, absent some statement by Dorgan supporters that their intention is merely to kill the Hatch Amendment, reading such intentions into the Amendment would express profound disrespect for a coordinate political, which the courts are loathe to do.\(^{166}\)

The second hypothesized explanation for the Democrats’ support of the Dorgan Amendment, a desire to raise taxes, seems highly implausible given the current political climate. Today, most Democrats are unlikely to support highly visible tax increases, given the country’s present anti-tax sentiments. Moreover, even those Democrats who would support tax increases probably have very low confidence that higher taxes would win majority approval in Congress.

The third possible explanation for the paradox is worth exploring in more detail, because it is rarely noticed. Under Section One of the Hatch Amendment, assuming that it is interpreted to include Social Security in the deficit calculation, Congress is prohibited from allowing for an excess of outlays over receipts without the approval of a three-fifths supermajority in each house.\(^{167}\) However, the Social Security program is currently projected to begin spending more than it takes in after 2018, and to exhaust any surplus in the OASDI trust fund by 2030.\(^{168}\) Thus,

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\(^{166}\) Compare the discussion of the political question doctrine in the text accompanying notes 45, 49–57.

\(^{167}\) See S.J. Res. 1, 105th Cong. § 1 (1997). According to Section 5 of the Amendment, however, a simple majority would allow such an excess during years in which a declaration of war is in effect or in which the United States is engaged in a “military conflict which causes an imminent and serious military threat to national security.” Id. § 5.

\(^{168}\) See Robert J. Myers, Will Social Security be There for Me?, in SOCIAL SECURITY IN
the Hatch Amendment would make it difficult to use these surpluses for their intended purpose. Presented with Senator Feingold's reasonable Amendment, which would have allowed Congress to "permit the use of an accumulated surplus to balance the budget during any fiscal year," the majority balked. Accordingly, in order to run the Social Security program during the 2020's, Congress would either have to secure a three-fifths majority approving such an excess, reduce benefits, raise FICA taxes, or run an offsetting surplus in the rest of the budget. In order to achieve an offsetting surplus, hundreds of billions of dollars of spending cuts or tax increases would be required each year. Of course, the Dorgan Amendment avoids these difficulties by failing to include Social Security in the deficit picture.

The rationale for the majority's rejection of the Feingold Amendment may be difficult to fathom, but the legislative history points overwhelmingly to one justification for opposing the Dorgan version. The sponsors of the Hatch Amendment are concerned that exempting Social Security from the deficit would allow future Congresses to circumvent the Balanced Budget Amendment. They fear that their successors could redefine other types of spending programs as Social Security, thereby creating a loophole in the Amendment. Indeed, such a scenario is not difficult to imagine. For example, Congress could merge the Social Security and Supplemental Security Income (SSI) programs, and call the new program Social Security, thereby taking SSI off-budget. A bolder Congress could try to do the same thing with veterans' benefits, or even some entirely new entitlement. Realistically, however, doing so would likely be opposed by a huge constituency of Social Security recipients, who would understand such a move as a threat to the program's solvency. More damaging to the Republican argument is the


170 See Chait, supra note 11, at 13.
172 The Republican argument is persuasive as it relates to Medicare. Medicare and Social Security have, by and large, the same beneficiaries. Therefore, political opposition to a merger of the separate trust funds might never materialize. For that reason, Congress has been able to use one trust fund to bail out the other on several occasions. There are relatively minor areas of beneficiary disjunction. For example, many state and local government employees, as well as the chronically unemployed,
fact that the Dorgan Amendment, as worded, might preclude Congress from just such creative redefinition of Social Security by making such actions unconstitutional. Section Seven may prohibit Congress from making changes to the OASI and DI trust funds that do not preserve the funds' solvency. Because packing a new entitlement into Social Security would probably not be intended to preserve Social Security's solvency, the program's trustees might consequently have a macro-enforcement cause of action.

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are covered by Medicare Part A, but not by Social Security. Some Americans in the 62-64 age range are covered by Social Security but not Medicare. Of course, in a very real sense, the constituency for a social insurance program consists of those who are soon to receive benefits, as well as those whose loved ones receive benefits.

173 Provided that a plaintiff such as the Social Security Trustees could overcome the barriers to judicial macro-enforcement discussed in Section II-A, supra.


175 This would not always be the case. For example, if in the future the Medicare trust fund were running enormous long-term surpluses, the merger of that trust fund with OASI would promote the OASI fund's long-term solvency. Nevertheless, Section Seven's language, stating that the OASDI trust funds may be modified to preserve the solvency of the Funds, raises the provocative question of whether the intent of any modification must be to further the goal of preserving the solvency of the funds, or whether any change is appropriate so long as the funds remain solvent. In determining which of two reasonable readings of the "preserve the solvency" language in the Dorgan Amendment is appropriate, the federal courts could adopt a framework similar to the one adopted by the West Virginia's highest court in Dadisman v. Moore. 384 S.E.2d 816 (W. Va. 1989). That case involved the ability of the legislature and governor to underfund the state's pension program for retired state employees. See id. The court determined that the governor had a nondiscretionary, statutory duty to adequately fund the pension in his budget proposal. See id. at 824.

This gubernatorial duty was subject to judicial review so as to provide protection for the contractually vested property rights of the retired employees, in the form of their pensions. See id. at 824, 827. In reviewing the governor's actions, the court adopted a reasonableness test. See id. Legislative modifications to a pension plan were reasonable if "the alteration to the pension scheme serves to keep the system sound and flexible." Id. at 827. The governor had argued that as long as the pension system continued to pay benefits, the system remained sound. See id. However, in rejecting that argument, the West Virginia court held that any reduction in government funding for the pension scheme below what the pension's trustees had requested was an unreasonable reduction. See id. The opinion contained strong language stating that the trust funds were not "state funds for expropriation or use for any purpose other than that for which the moneys were entrusted." Id. at 819-20. Subsequent to that decision, the governor began adequately funding the pension. See id. However, the state refused to compensate the fund for the four years during which the state underfunded the pension. See id. In subsequent litigation, the Supreme Court upheld this underfunding, because the
There is another way of understanding the present debate between the supporters of the Hatch and Dorgan Amendments. It may be that the proponents of the Hatch Amendment believe that the budget must be balanced immediately. They recognize that it is not politically feasible to reach short-term budgetary balance if the Social Security surpluses are not used to offset the deficit. They understand that this will necessitate enormous spending cuts or tax increases in the long run, once the Social Security program begins causing annual deficits. However, such an event is so far in the future that it extends beyond their political time horizons. More charitably, they may feel that federal expenditures can be radically reduced, but that achieving such a goal will take decades. There are only a few hints of this sentiment in the Balanced Budget Amendment's legislative history, however, that should not surprise one who accepts this view of the legislative intent. Republicans who are sponsoring a constitutional amendment that purports to promote intergenerational equity in fiscal policy would be sensitive to attacks that they are leaving future taxpayers to make the major sacrifices necessary for achieving real budgetary balance. If this factor, rather than fears about circumvention, is the primary motivation for the majority's rejection of the Dorgan Amendment, then two possible explanations for the Democrats' behavior emerge: either they are sponsoring the Dorgan Amendment as a killer amendment, or they are more concerned with potential long-term damage to Social Security than with short-term cuts to other government programs.  

176 See, e.g., S. REP. NO. 105-3, at 13 (“[N]ot including or exempting the present day surplus in budgetary calculations, the Committee believes, will . . . require more cuts than necessary in other Federal programs”); President Clinton's FY '98 Budget Proposal: Hearings Before the House of Representatives Ways and Means Committee, 105th Cong. 52 (1997) (statement of Rep. Bunning).  

177 I could not find any statements in the legislative history in which sponsors of the Dorgan Amendment extolled the virtues of making immediate cuts.
Even if this debate over immediate versus future cuts is driving the dispute between Hatch and Dorgan, the courts are unlikely to want to read such motivations into the Amendment, as such a reading could make for bad law. For illustrative purposes, we will assume that the Dorgan Amendment is ratified, and a judge who is deferential to legislative intent suspects that the Hatch Amendment was rejected because Congress wanted to make immediate and dramatic cuts in federal spending so as to avoid deeper cuts in the future. What follows if our dual citizen, Mr. Schmidt, loses his entitlement benefits and files a micro-enforcement suit? If he files the suit two years after the ratification of the Amendment, he would not prevail. After all, the 105th Congress recognized the need for immediate, painful cuts in spending, to avoid even harsher cuts in the future. Though disappointed, Schmidt renounces his loyalty to Austria, and is able to reclaim his benefits. Fast forward to 2020. Mr. Schmidt has lived to a ripe old age when, unexpectedly, he is once again stripped of his benefits. It seems Congress has been forced by the Balanced Budget Amendment to reduce spending, and has passed a law eliminating entitlement payments to all persons who previously fought in armed conflicts against the United States. Schmidt’s past as an Austrian soldier in World War II leaves him susceptible. He again files a micro-enforcement suit, and appears before the same judge. The judge believes that the 105th Congress wished to protect those who were scheduled to receive benefits in 2020. This makes him inclined to rule in Schmidt’s favor. However, the judge also believes in stare decisis, and he is reluctant to render a ruling that blatantly conflicts with the one he handed down in a virtually identical case two decades ago.178

This example indicates that even if judges believe that the Dorgan-Hatch dispute is about the timing of spending cuts or tax

178 In one sense, finding in Mr. Schmidt’s favor would not be an inconsistent ruling, as long as his original opinion contained wording to the effect of, “Let it be plainly understood that this ruling does not permanently weaken the rights of beneficiaries. It merely recognizes the intent of Congress to allow for immediate cuts in spending so as to reach budgetary balance in the short term. If anything, it will strengthen the case of beneficiaries who, years from now, allege that the government used the Balanced Budget Amendment as an improper excuse for unfairly reducing their benefits.” Of course, such wording would run into the problems of judicially delineating between the long and short term, alluded to at infra note 179.
increases, they might not give effect to such intentions in construing the Balanced Budget Amendment. Judges cannot comfortably create a bright-line division between the long term and the short term, and even if they could, such lines would likely be attacked as arbitrary.\(^{179}\) They would feel very nervous about writing an opinion that advocated a \textit{de facto} disentitlement of benefits, and a re-entitlement of those same benefits several decades in the future. It is more likely that given the perfectly plausible interpretation that the Dorgan-Hatch dispute revolved around the degree of protection to give Social Security and fears over subsequent congressional circumvention of the Balanced Budget Amendment, the judge would probably decide to reject the long-term-versus-short-term understanding of the Amendment.

\textbf{VI. Micro-Enforcement and Social Security Claims}

The foregoing analysis suggests that passage of the Dorgan Amendment might do far more to protect Social Security than merely remove incentives for Congress to reduce spending on the program in order to shrink the deficit.\(^{180}\) The Amendment’s ratification would also buttress Social Security relative to other programs. Under either Balanced Budget Amendment, fiscal prudence becomes a more compelling government justification for spending reductions.\(^{181}\) However, by explicitly excluding the Social Security trust funds from the Balanced Budget Amendment, the Dorgan Amendment would make that compelling justification inapplicable to Social Security. In a micro-enforcement claim by a Social Security recipient, the federal courts could well use the reasoning that the state courts adopted in the breach of contract cases.\(^{182}\) Namely, they could decide that the federal government should turn to more

\(^{179}\) \textit{Cf.} Planned Parenthood v. Casey, 505 U.S. 833, 872–73 (1992) (rejecting rigid trimester framework that previously governed abortion rights because of the framework’s seemingly arbitrary character).

\(^{180}\) \textit{See supra} notes 159–73 and accompanying text.

\(^{181}\) This would be true regardless of whether the legislature is statutorily defining eligibility, or an administrative agency is straining to function within the constraints of reduced appropriations, by scaling back procedural protections or removing borderline recipients from the rolls.

\(^{182}\) \textit{See supra} notes 86–93 and accompanying text.
"reasonable" resources to balance the budget, such as tax increases or reductions in funds committed for block grants, Medicare, SSI, or foreign aid. Therefore, even if the Dorgan Amendment does not strengthen Social Security protections relative to what they were prior to ratification, as a practical matter it could accomplish exactly that, by strengthening Social Security relative to other government obligations. Such a change would place Social Security benefits just below contracts in the hierarchy of individual property rights vis a vis the government.

Thus arises the question whether this elevation of individual rights to receive Social Security benefits comports with the legislative intent of the Dorgan Amendment's backers. The congressional legislative history suggests an answer in the affirmative. The proponents view the long-term preservation of the program as a contractual obligation made by the government to the program's beneficiaries. They see it as a program so fundamentally important that it must be fully funded, regardless of budgetary constraints. They wish to protect Social Security's separate status precisely because it is, in their minds, a contract.

In order to determine how the federal courts might deal with relatively stronger micro-enforcement actions to protect Social Security benefits, state litigation is again instructive. The closest state case law analogies are instances in which retired public employees sued to prevent the state from reducing or eliminating their pensions. In these cases, the rights of retirees eligible for pensions to receive those pensions were not quite absolute. For example, in the case of Weed v. Board of Trustees of Police Pension and Retirement System, Oklahoma attempted to divest a retired police officer of his pension based on a subsequent felony conviction. The Oklahoma Supreme Court held that where a public employee had contributed to a state pension plan during his employment, his rights to receive a pension became contractually vested at the time of his retirement. Therefore, while his right to receive the

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183 See, e.g., Hearings, supra note 107, at 1 (statement of Senator Conrad).
185 See also State Compensation Fund v. Symington, 848 P.2d 273, 279 (Ariz. 1993) (en banc) (adjudicating a micro-enforcement suit to prevent state taxation of a worker's compensation fund), discussed at supra note 42.
186 719 P.2d 1276 (Okla. 1986)
187 See id. at 1277.
pension was not absolute and a felony conviction during his employment could cost him his benefits, the state could not divest him of that property right for any crimes committed subsequent to his retirement. Instead, other states that have tackled cases dealing with attempts to reduce state employee pensions have followed the same approach. Moreover, even where there was doubt as to whether the legislature intended to confer pension rights upon a class of recipients, those rights similarly were held to become vested once an individual employee retired. Of course, in order to reach these cases, a federal court would first have to declare that ratification of the Dorgan Amendment, combined with an evolving public and congressional understanding of Social Security benefits as contractually guaranteed property rights, rendered the Supreme Court's holding in Flemming obsolete. However, if the court did so, it might very well adopt the approach taken by the states in the public employee pension cases, namely, that anticipated Social Security benefit levels could be adjusted for those who had not yet begun receiving them, but became guaranteed once an eligible individual began collecting checks. Such a judicial ruling would not only be consistent with successful state approaches, but would also make political and economic sense. It seems more sensible to reduce the benefits of those individuals who still have the capacity to work than of those who are no longer able to adjust their behavior so as to compensate for lost income resulting from reduced retirement benefits.

In contrast, if the Hatch Amendment is ratified, Social Security micro-enforcement claims would not benefit from special constitutional protection. Rather, they would be placed on the same plane as claims by individuals who were denied Medicare benefits, states that were denied expected block grant assistance, and international organizations that did not receive promised contributions from the United States Government. Moreover, passage of the Balanced Budget Amendment would actually strengthen the government's position in such cases relative to the

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188 See id. at 1278.
190 See Johnson v. Utah State Retirement Bd., 770 P.2d 93, 95 (Utah 1988).
191 See supra notes 139–151 and accompanying text.
current situation. Government flexibility in dealing with a mid-year shortfall could be enhanced such that a weak form of rational basis review might be the only judicial protection for those harmed by sequestration. The rational basis test in such instances might very well boil down to an examination of whether the legislature could have rationally concluded that the measure would save money. Of course, where the government chose to apportion the costs of sequestration on the basis of race, gender, or some other suspect classification, a higher level of judicial scrutiny would still apply. But in the vast majority of cases, the relative vigor of judicial review would be noticeably diminished.

VII. Conclusion

The federal Balanced Budget Amendment has figured prominently on the congressional agenda for eighteen years. While the recent enactment of a balanced budget takes the wind out of the Amendment’s sails for the moment, it is within the realm of possibility that the Amendment could receive serious consideration in the next few years. The foregoing analysis reveals that although much law review ink has been spilled, and the halls of Congress have been filled with lofty speeches for over a decade, there remains a tremendous amount of uncertainty about how the federal courts would deal with the Balanced Budget Amendment. A major reason for that uncertainty has been the inability of scholars to stop writing about the glamorous macro-enforcement cases and focus on comparatively mundane micro-enforcement cases that, if the states’ experiences are any indication, will be widely adjudicated.

One of the major shortcomings of the constitutional analysis of the Balanced Budget Amendment has been the failure of

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192 In 1979 Senator Hatch introduced S.J. Res. 126, but the Amendment was defeated in the Judiciary Committee by a vote of eight to nine. Actually, the Balanced Budget Amendment concept has its origins in the political thought of Thomas Jefferson (who, as President, nevertheless borrowed unprecedented sums to pay for the Louisiana Purchase). The first time Congress considered the matter was in 1936, when Representative Harold Knutson introduced a bill that would have established a per capita limitation on the Federal public debt. See H. Res. 579, 74th Cong. (1936). Needless to say, such an Amendment would have made it difficult for the United States to finance its preparation for World War II, with potentially catastrophic consequences.
scholars to recognize that such an Amendment would not exist in a constitutional vacuum. Simply looking at the text of the Fourteenth Amendment, or even the text supplemented by its legislative history, does not provide a complete picture of its importance in a developing system of constitutional thought. Much of the Fourteenth Amendment’s power arises from its incorporation of the Bill of Rights. The lesson provided by Fourteenth Amendment jurisprudence is that in thinking about a Balanced Budget Amendment, legal scholars must explore how such an Amendment would interact with the rest of the Constitution. In this instance the Amendment could very well imbue the rest of the Constitution with a philosophy of fiscal discipline, with far-reaching implications for property rights and due process protections. In considering whether to adopt a Balanced Budget Amendment, Congress should consider not only the programmatic effects of excluding Social Security but the procedural effects that such a decision might have on individual claimants.

This article intentionally takes no position on the underlying issue of whether Congress should, as a matter of fiscal policy, exempt Social Security from the Balanced Budget Amendment. The federal deficit that includes Social Security more accurately reflects the government’s current effect on national saving than does a deficit without Social Security. However, the linkage between national saving and the deficit, even there, is rather tenuous. On the other hand, there is, at best, a minimal non-political rationale for excluding Social Security’s outlays and receipts, but not Medicare’s. The two programs’ deficits are both going to fluctuate wildly as a result of demographics, and both programs are intended to be pre-funded. Ultimately, the decision whether to exclude Social Security should be made based on normative, political factors rather than on any allegedly neutral public policy rationale. Elected politicians rather than judges or legal scholars are best able to make those kinds of decisions.

Finally, this article suggests that Congress must be wary of believing either of two tempting fallacies. First, Congress must recognize that the Dorgan-Hatch debate is not about choosing between a sincere and a fraudulent way of balancing the budget. The debate is about what degree of protection Social Security will have relative to other programs, and the timing of necessary
sacrifices. Second, Congress should understand that any Balanced Budget Amendment is likely to find its way into the federal courts through micro-enforcement actions. When it does, it will probably be used by government lawyers to combat individual claims on the government's resources, and fiscal conservatives should not be shocked to find themselves cheering on the sidelines as unelected federal judges enforce the Amendment in the decades ahead.