RECONCILING CONGRESS TO TAX REFORM

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Tax law constantly churns, somehow avoiding the molasses of the legislative process. A common critique levied against tax law is that there is too much legislative action, resulting in ever-changing rules. This Essay argues that, in reality, congressional gridlock, the theme of the symposium for which this piece is written, is ever-present in the tax context. Although Congress increasingly enacts a high volume of temporary, patchwork tax provisions, it fails to accomplish fundamental tax reform, which is a necessary part of any solution to the looming budgetary crisis. As a result, recent proposals to enact tax reform through an existing fast-track framework, the reconciliation process, or through an entirely new process aimed specifically at tax reform, have gained popularity.

Despite the growing flexibility of existing fast-track processes, however, their truncated timelines and production of polarizing, unstable policies are antithetical to fundamental tax reform. A simple majority's ability to shape such processes to its ends also threatens the precarious Senate truce over the filibuster. From an institutional perspective, this nontransparent, piecemeal approach to filibuster reform destabilizes Senate practices and contributes to partisan politics that make the achievement of tax reform and other policies even more remote. For these reasons, existing fast-track processes should primarily be relegated to meeting annual deficit targets once tax reform is achieved. Learning from the undesirable features of these processes, this Essay proposes a set of framework procedures that have the potential to assist Congress in achieving fundamental tax reform over the next two years. In the near-term, a commitment to such a process may also help bridge impasses over future budgetary and fiscal conflicts.

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INTRODUCTION

Congressional gridlock, the theme of this symposium, has long been a part of American politics.[1] Central features of constitutional design and the legislative process, such as bicameralism and the filibuster, encourage it. Yet escalating partisanship and the heightened use of the filibuster, some argue, has now crippled Congress, resulting in a new and troubling degree of political stalemate.[2]

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1 SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 1 (2003) ("Gridlock is not a modern legislative condition. Although the term is said to have entered the American political lexicon after the 1980 elections, Alexander Hamilton complained more than two centuries ago about stalemate, at the time rooted in the design of the Continental Congress. In the very first *Federalist*, Hamilton bemoaned the 'unequivocal experience of the inefficacy of the subsisting federal government' . . . .").

2 In 2011, our political system, plagued by irreconcilability over issues necessary to staving off a fiscal crisis, ground to a halt. The brinksmanship resulted in the credit rating for American bonds being downgraded for the first time in history and volatility in the markets. *United States of America Long-Term Rating Lowered to 'AA+' Due to Political Risks, Rising Debt Burden; Outlook Negative*, STANDARD & POOR'S (Aug. 5, 2011), *http://www.standardandpoors.com/ratings/articles/en/us/?assetID=1245316529563* (citing the failure of the 2011 debt ceiling agreement to stabilize "medium-term debt dynamics" and the "view that the effectiveness, stability, and predictability of American policymaking and political institutions have weakened at a time of ongoing fiscal and economic challenges" as contributing factors to the downgrade). Congress's inertia continues to threaten budgetary catastrophe. Although an agreement to increase the debt-ceiling between the President and the leaders of congressional parties was eventually reached, thus avoiding immediate default, the solution was temporary. The Budget Control Act of 2011 left the debt reduction details to be ironed out by a special joint committee, referred to as the supercommittee. Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 239. Because the supercommit-

Tax law, on the other hand, constantly churns, somehow avoiding the molasses of the legislative process.[3] A common critique levied against tax law is that there is *too much* legislative action, resulting in ever-changing rules. This Essay argues that, in reality, gridlock is ever-present in the tax context. Although Congress increasingly enacts a high volume of temporary, patchwork tax provisions, it fails to accomplish fundamental tax reform, which is a necessary part of any solution to the looming budgetary crisis.[4] Simply put, there is too much of the wrong *kind* of tax legislative action. Counter-intuitively, congressional gridlock can exist in an area of high legislative activity.

Recent proposals to enact tax reform through an existing fast-track framework, the reconciliation process, or through an entirely new process aimed specifically at tax reform, have gained popularity.[5] Reconciliation began as a modest tool that would align autumn legislation with revenue and spending targets that had been adjusted from the spring budget resolution.[6]

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tee did not reach an agreement to produce debt reduction legislation within the time limits imposed in the Budget Control Act, in early 2013 the government faced the legislatively imposed consequences—sequestration, or automatic, across-the-board cuts in the amount of $1.2 trillion of spending programs. Of even greater concern are mounting budget deficits, which raise the specter of further economic downturns and risk of unprecedented fiscal and budgetary crises.

3 This phenomenon has been noted in the literature. *See, e.g.*, Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 952–53 (1987) (theorizing that increased tax legislation results from congressional members' desire to capture rents); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 3 (1990) (discussing the "perpetual income tax legislation" of the 1980s). The widespread use of temporary legislation in the tax context in the last two decades has further decreased the durability of tax legislation. Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1026–37 (2011) [hereinafter Kysar, *Lasting Legislation*]; Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 337 (2006) [hereinafter Kysar, *The Sun Also Rises*].

4 *See* Peter Orszag, Op-Ed., *One Nation, Two Deficits*, N.Y. TIMES (Sept. 6, 2010), http://www.nytimes.com/2010/09/07/opinion/07orszag.html?pagewanted=all ("Although hardly anyone wants to admit it, we're not going to solve our budget problem over the next decade unless revenue is part of the equation.").

5 The Senate's budget resolution for fiscal year 2014 contemplates tax reform through the reconciliation process. S. Con. Res. 8, 113th Cong. (Mar. 23, 2013); *see also* Pathway to Job Creation Through a Simpler, Fairer Tax Code Act of 2012, H.R. 6169, 112th Cong. (passed by the House on August 2, 2012) (creating a special fast-track process for tax reform); Sam Goldfarb, *GOP Operatives Eye Special Tactics to Pass Tax Overhaul Under a Romney Victory*, CONG. Q. (Nov. 1, 2012), http://public.cq.com/docs/news/news-000004171079.html (discussing the use of reconciliation to pass Romney's tax reform plan); Erik Wasson, *Few Details on Senate Dem Budget Plan*, THE HILL (Jan. 21, 2013), http://thehill.com/blogs/on-the-money/budget/278275-dems-agree-to-do-budget-but-details-are-sketchy (discussing Democrats' plan to use the budget reconciliation process to "lift" tax reform); Jonathan Weisman, *Obama's New Offer on Fiscal Crisis Could Lead to Deal*, N.Y. TIMES (Dec. 17, 2012), http://www.nytimes.com/2012/12/18/us/politics/president-delivers-a-new-offer-on-the-fiscal-crisis-to-boehner.html (discussing Obama's proposal of "fast-track procedures" to assist in reform of the individual and corporate tax code).

6 *See infra* notes 22–28 and accompanying discussion.

It quickly evolved, however, into a forceful method of enacting major policy changes. The benefits of utilizing fast-track processes like reconciliation are obvious. Because fast-track processes generally limit debate upon tax reform legislation, they obviate the need to invoke cloture in the Senate, thus creating a simple majority regime in both houses.[7] By lifting the filibuster or offering quick time frames for consideration, fast-track processes have the potential to help achieve tax reform for the first time in over a quarter of a decade. They will likely, however, fall short of this promise.

Reconciliation is increasingly flexible as a procedural matter in the tax context. Its intrinsic features, however, are not conducive to enacting ambitious tax legislation. Contrary to popular thought, fast-track processes produce dynamics that are antithetical to fundamental tax reform. Majority voting, reduced committee power, and a truncated timeline—features of existing fast-track processes—engender fragile and narrow tax legislation rather than complex, long-lasting tax reform. Moreover, the contested boundaries of such processes create further instability since lawmakers perceive their products to be born from illegitimate means. The constant threat to undo recent reconciliation acts, such as healthcare reform and the Bush tax cuts, exemplifies these phenomena.[8]

In addition to fast-track being a poor vehicle for tax reform, over-reliance upon it has actually contributed to the dearth of tax reform in recent decades. This is because reconciliation creates polarized laws and, at times, sunset provisions. These unstable agreements demand constant attention from Congress, allowing members to fulfill their duty to do *something* about national tax policy even though they remain gridlocked regarding the fundamental trajectory of that policy. Although legislative flexibility is appropriate in some areas of tax law, a short-term, one-sided approach to resolving the nation's grave budgetary ills is unlikely to be curative.

Prior critiques of the reconciliation process in the tax context have focused upon the process's privileging of revenue concerns over traditional

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7 Reconciliation removes the threat of the filibuster entirely. A new proposed fast-track process would remove cloture votes upon amendments and motions to proceed but would maintain the possibility of a cloture vote on the final consideration of the bill. *See infra* notes 82–88 and accompanying text.

8 Although such instability may not pose problems for certain policy objectives, it is undesirable when the objective is a decades-long plan towards fiscal sustainability. For instance, a short-term stimulus may be necessary to increase demand in a weak economy. However, long-term fiscal discipline is necessary to reign in deficits. *See, e.g.*, Robert E. Rubin, Peter R. Orszag, & Allen Sinai, *Sustained Budget Deficits: Longer-Run U.S. Economic Performance and the Risk of Financial and Fiscal Disarray* 11 (Jan. 4, 2004) (paper presented at the AEA-NAEFA Joint Session, Allied Social Science Associations Annual Meetings, The Andrew Brimmer Policy Forum, "National Economic and Financial Policies for Growth and Stability"), *available at* http://www.brookings.edu/~/media/research/files/papers/2004/1/05budgetdeficit%20orszag/20040105.pdf. This uncertainty also thwarts the goal of signaling legislative commitment to budgetary responsibility at a level demanded by investors.

tax policy criteria.[9] This Essay departs from that literature by assuming that tax reform *must* address revenue concerns in light of the budget crisis; revenue-neutral tax reform simply has no place in today's policy landscape. Yet despite the ability of the reconciliation process to set revenue targets, it is not the key to achieving revenue-increasing tax reform. Instead, reconciliation would be better harnessed to tweak revenues, on an annual basis, to the desired level of the federal deficit or surplus once tax reform is achieved.

The congressional fight over the parameters of the reconciliation process has increased strife between parties, making bipartisan agreement less likely. Current efforts to create a new fast-track process for tax reform will likewise prove controversial. In recent years, the scope of reconciliation has become the subject of much controversy, expanding and contracting in accordance with party preferences, particularly in the tax context. This is because a simple majority can alter budget-related Senate rules through the budget resolution, which in turn is not subject to a filibuster. Thus, when Republicans are in charge, reconciliation can be used to enact tax cuts, but once Democrats regain power, reconciliation can only be used for tax increases. When it comes to virtually all tax law, the filibuster has become elective.

This procedural struggle over the scope of fast-track illuminates important aspects of today's legislative process. Although, in the past, reconciliation has served as a release valve for the pressure of strict supermajority rule in the Senate, its increasingly contested boundaries expose the fundamental fragility of the filibuster. A simple majority's ability to decide the scope of the reconciliation process in the tax area will have ramifications far beyond that context by threatening the filibuster and the legitimacy of Senate rules generally. Less reliance upon reconciliation in producing major tax legislation may thus help to preserve the filibuster, or at least channel filibuster reform through transparent, unified means, rather than the current covert, fragmentary approach of reconciliation.

On a more hopeful note, learning from the undesirable features of fast-track legislation, it is possible to design a set of framework procedures that *do* have the potential to assist Congress in achieving fundamental tax reform. In the near-term, a commitment to such a process has the added benefit of providing a way forward through budgetary and fiscal conflicts. Although the American Taxpayer Relief Act of 2012 partially resolved the fiscal cliff,[10] the threat of sequestration and the ongoing necessity of providing a federal budget and raising the debt ceiling makes future stalemates inevitable. Tax

9 *See, e.g.*, Charles E. McLure, Jr., *The Budget Process and Tax Simplification/Complication*, 45 TAX L. REV. 25, 79 (1989) (arguing that the tax system is more complicated due to reconciliation); Charles Tiefer, *How to Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & POL. 409, 414, 455 (2001) ("[R]econciliation facilitated enormous and skewed tax cuts . . . ."); Donald B. Tobin, *Less is More: A Move Toward Sanity in the Budget Process*, 16 ST. LOUIS U. PUB. L. REV. 115, 128–31 (1996) (discussing how reconciliation has changed the budget process).

10 American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313.

reform is an essential part of any long-term deficit reduction plan, and thus providing a process in which it can be achieved may pave the way for agreement over these issues.

In Part I of this Essay, I discuss the history and rather remarkable rise of the most well-known fast-track process, reconciliation, updating the extant literature to include recent developments of that process.[11] Despite reconciliation's potential application to almost any tax legislative context, in Part II, I contend that its features are hostile to fundamental tax reform, conclusions which can be extended to other fast-track processes. In Part III of this Essay, I caution against the overuse of fast-track processes, which may derail tax reform efforts, instead suggesting that fast-track be primarily used to achieve annual budgetary goals post-tax reform. As an alternative, I propose a set of framework procedures that are aimed to help achieve tax reform over a two-year period and that avoid some of the pitfalls of existing fast-track processes. In this Part, I also contend that a simple majority's constant redefinition of the scope of fast-track processes threatens the legitimacy of Senate rules generally, suggesting that filibuster reform would be better achieved through more transparent and bipartisan means.

I. THE WAYWARD PATH OF RECONCILIATION

A. Background of the Budgetary Process: The Congressional Budget Act and the Budget Resolution

The Congressional Budget Act of 1974 (the "Budget Act") established the congressional budget process, of which reconciliation began as a modest part.[12] The Budget Act created the use of the congressional budget resolution, which sets forth a budget of congressional policies for the fiscal year and budget totals for the budget window period.[13] Prior to the Budget Act,

11 On the spending side, Anita Krishnakumar has also explored significant shortcomings in using the reconciliation process to produce budgetary reform. Anita S. Krishnakumar, Note, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995–96 Budget "Train Wreck,"* 35 HARV. J. ON LEGIS. 589, 589 (1998). For general scholarly examinations of the reconciliation process, see JOHN B. GILMOUR, RECONCILABLE DIFFERENCES? 93–138 (1990); Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387 (1998); Philip G. Joyce & Robert D. Reischauer, *Deficit Budgeting: The Federal Budget Process and Budget Reform*, 29 HARV. J. ON LEGIS. 429 (1992); James A. Miller & James D. Range, *Reconciling an Irreconcilable Budget: The New Politics of the Budget Process*, 20 HARV. J. ON LEGIS. 4 (1983); Tiefer, *supra* note 9. For a historical overview of the process, see ALLEN SCHICK, THE FEDERAL BUDGET 142–49 (3d ed. 2007) and Allen Schick, *A History of Reconciliation*, 49 CONG. Q. ALMANAC 116 (1993).

12 Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297.

13 The budget window is the period of time covered by the budget resolution. The budget resolution is required to cover at a minimum five fiscal years, beginning with the fiscal year in the session that the resolution is adopted (the "budget year"). Historically, the period has covered up to eleven years, starting with the year preceding the budget year. ROBERT KEITH, CONG. RESEARCH SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" 2 (2010), *available at* http://assets.opencrs.com/rpts/RL30862_20100702.pdf.

Congress operated on budget-related measures in piecemeal fashion, relying on the President's budget as a coordination device. Wishing to wrest control from the President after political conflicts regarding the executive's impoundment power, Congress initiated the budget resolution to set cohesive, independent budgetary policy.[14] Although the President still enjoys the first-mover advantages of setting his budget priorities at the beginning of the year, the congressional budget resolution offers a more efficient mechanism for Congress to respond in a unified manner (as opposed to proposing thirteen individual annual appropriations bills).

Along with optional reconciliation instructions, the budget resolution usually includes budget aggregates (revenues, debt, spending-budget authority and outlays, and deficit/surplus) and functional allocations (for sectors of the budget such as defense and agriculture), changes in House or Senate procedural rules governing the budgetary process, and other nonbinding sentiments.[15] The advisory nature of the budget resolution was designed to allow Congress to maintain its traditionally decentralized revenue and spending decisions across existing committees through the lawmaking function. To assist Congress in meeting the targets in the budget resolution, the Budget Act also created the Congressional Budget Office (the "CBO"), which is a nonpartisan agency within the legislative branch that provides cost estimates for legislative proposals and values the budgetary effects of existing legislation.

The Budget Act also formed the budget committees, which are responsible for drafting the resolution.[16] Because the budget resolution essentially sets forth the budget policy of Congress and encompasses most major legislation, the majority party leaders have largely controlled the budget committees. This dynamic has shifted a great deal of power unto majority party leaders since they essentially initiate the reconciliation process. Indeed, the reconciliation process is viewed as a contributing cause of the recent congressional era of majoritarian politics, at the expense of committee power.[17]

Conflicts over the budget resolution have become "one of the most partisan matters Congress takes up each year."[18] Moreover, because the budget resolution carries no legal consequences, failure to enact it does not necessarily derail substantive legislation. It is thus not surprising that the process, at times, breaks down.[19] From fiscal years 1976–1998, Congress passed the

14 SCHICK, *supra* note 11, at 119–20.

15 Congressional Budget Act of 1974 § 301, 88 Stat. at 306–08 (codified as amended at 2 U.S.C. § 632); SCHICK, *supra* note 11, at 122–23.

16 Congressional Budget Act of 1974 § 301.

17 Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 COLUM. L. REV. 702 (2000). Others have portrayed this shift as moving from a committee-centered dynamic to a "floor-centered" one. GILMOUR, *supra* note 11, at 112, 135–37.

18 SCHICK, *supra* note 11, at 132.

19 Congressional rules limiting debate on the resolution, thereby foreclosing the possibility of a filibuster, do ease the passage of the budget resolution. Id. at 138. Nonetheless, stalemate still occurs.

budget resolution within a month or two of the April 15 deadline.[20] For fiscal year 1999, however, a Republican-controlled Congress warred with President Clinton over the spending of the surplus and failed to pass a resolution. Several more recent Congresses have been deadlocked due to a very different problem—disagreement over how to deal with an increasing deficit.[21]

B. The Origins of Reconciliation

The Budget Act originally commanded Congress to revise targets in a second budget resolution just prior to the beginning of the fiscal year.[22] The reconciliation process was created as an optional procedure to help Congress pass tax and entitlement legislation in order to meet these new targets, which were binding (unlike those in the first resolution).[23] Under the Budget Act, the budget committees could write into this second resolution "reconciliation instructions" directing committees to draft such legislation to bring the budget in line with the binding targets.[24] If the legislation came from more than one committee, the budget committees would package their "recommendations" into one omnibus reconciliation bill.[25] Otherwise, a committee could directly report reconciliation legislation to the chamber without involvement from the budget committees.[26]

In order to assist swift passage of legislation to meet the resolution's targets, reconciliation bills are not subject to filibusters or non-germane amendments.[27] Because of these expedited procedures, the importance of the reconciliation process has risen dramatically. Since its first use in 1980, reconciliation has been used in most years, resulting in the passage of 23 reconciliation bills (three of which were vetoed).[28]

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20 Id. at 123.

21 Congress did not complete action on budget resolutions for fiscal years 2003, 2005, 2007, 2011, 2012, and 2013. BILL HENIFF, JR. & JUSTIN MURRAY, CONG. RESEARCH SERV., RL30297, CONGRESSIONAL BUDGET RESOLUTIONS: HISTORICAL INFORMATION 3–4 (2012), *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0E%2C*PLS2%23%20%20%20%0A.

22 *See* Congressional Budget Act of 1974, Pub. L. No. 93-344, § 201(a)–(b), 88 Stat. 297, 302–03. This provision was later repealed by the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13210(2), 104 Stat. 1388, 1388–620.

23 *See* Congressional Budget Act of 1974 § 310(c), 88 Stat. at 315; Krishnakumar, *supra* note 11, at 592.

24 *See* Congressional Budget Act of 1974 § 310(a), 88 Stat. at 315; Krishnakumar, *supra* note 11, at 592–93.

25 *See* Congressional Budget Act of 1974 § 310(c), 88 Stat. at 315; Krishnakumar, *supra* note 11, at 593.

26 ROBERT KEITH & BILL HENIFF, JR., CONG. RESEARCH SERV., RL33030, THE BUDGET RECONCILIATION PROCESS: HOUSE AND SENATE PROCEDURES 2 (2005), *available at* http://assets.opencrs.com/rpts/RL33030_20050810.pdf.

27 *See* Congressional Budget Act of 1974 § 310(e)(2), 88 Stat. at 315; Krishnakumar, *supra* note 11, at 593.

28 For an overview of reconciliation measures, see MEGAN SUZANNE LYNCH, CONG. RESEARCH SERV., R40480, BUDGET RECONCILIATION MEASURES ENACTED INTO LAW: 1980–2010 (2010), *available at* http://assets.opencrs.com/rpts/R40480_20100902.pdf.

C. Reconciliation as a Deficit-Reducing Tool

For the first years following the enactment of the Budget Act, Congress did not write reconciliation instructions. Instead, in a practice called "assumed legislative savings," the budget committees trusted that the subject matter committees would voluntarily comply with the goals set forth in the budget resolution, which prescribed a reduction of spending.[29]

During this era of voluntary compliance, budget resolutions easily passed Congress but, unsurprisingly, the committees failed to comply with the suggested levels of spending.[30] In light of this, other alternatives became necessary.[31] In the spring of 1980, Democratic leaders and the President boldly decided to use the first budget resolution, rather than the second as prescribed in the Budget Act, to initiate reconciliation procedures for consideration of legislation that would balance the budget and alleviate inflation.[32]

The legal authority for this development was the "elastic clause" of the Budget Act, which authorized the House and Senate to include in the budget resolution "any other procedure which is considered appropriate to carry out the purposes of this Act."[33] The Budget committees argued that early reconciliation was necessary to give the authorizing committees sufficient time to consider the legislation prior to the fiscal year.[34] In the end, the reconciliation process enabled Congress to reduce spending, including entitlements that were previously excluded by the Budget Act, and to raise revenues, resulting in $8.2 billion in savings.[35] The use of reconciliation in the spring resolution set a precedent to which Congress has adhered. By the early 1980s, the House and Senate decided to eliminate the second budget resolution altogether, a practice that would be codified in 1985.[36]

In 1981, Republican leaders in the Senate and newly elected Ronald Reagan developed a plan to take advantage of the precedent set in 1980 to use the first resolution for reconciliation instructions. This allowed the coordination and passage of an ambitious policy initiative achieving $130.6 billion in savings early in Reagan's presidency. Such remarkable savings were achieved solely through cuts in entitlements and discretionary spending.[37] The 1981 reconciliation legislation would disprove naysayers who thought the process would ultimately fail due to its conflict with the decentralized

29 GILMOUR, *supra* note 11, at 105 (internal quotation marks omitted).

30 Id. at 106.

31 KEITH & HENIFF, *supra* note 26, at 3.

32 GILMOUR, *supra* note 11, at 108–09.

33 *See* Congressional Budget Act of 1974, Pub. L. No. 93-344, § 301(b)(2), 88 Stat. 297, 307. Later this clause was re-designated as § 310(b)(4).

34 COMM. ON THE BUDGET, 98TH CONG., REVIEW OF THE RECONCILIATION PROCESS 17 (Comm. Print 1984).

35 Omnibus Budget Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2599. For an overview of this historic use of reconciliation, see Miller & Range, *supra* note 11.

36 Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037; KEITH & HENIFF, *supra* note 26, at 6.

37 Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357.

traditions of Congress.[38] Instead, by essentially bypassing the necessity of obtaining several hundred subcommittee and committee votes to cut over a hundred programs, reconciliation provided a powerful means to enact the preferences of the legislative majority.[39] The scope of reconciliation, however, was not yet all-encompassing but was instead limited to deficit reduction. Also enacted in 1981 was a $37.7 billion tax cut that moved outside of the reconciliation process despite sufficient savings from the spending cuts to offset the lost revenue from the cuts.[40] As discussed below, Congress has since discovered methods of passing tax cuts through reconciliation even where their costs are not offset.[41]

In 1982, Congress again used reconciliation to reduce a growing deficit, enacting two reconciliation bills to cut spending in entitlements and to raise taxes.[42] Over the next several years, party leaders repeatedly used reconciliation to enact tax increases and spending reductions, establishing a pattern of reducing the deficit through the fast-track process.[43]

D. Reconciliation as a Catalyst

Despite reconciliation legislation aimed at deficit reduction, a ballooning deficit in the mid-1980s caused Congress to reexamine the budget process. In 1985, the Gramm-Rudman-Hollings Act (GRH) was enacted. Unlike the neutrality of the original Budget Act, GRH imposed rules to impede enactment of deficit-increasing legislation. GRH promised to balance the budget by 1991 and, to achieve this goal, mandated that the deficit fall by $36 billion a year. GRH required that the Comptroller General decline to spend, or sequester spending, if Congress and the President failed to meet these annual targets for deficit reduction.[44]

Two years later, the Supreme Court struck down this structure as unconstitutional, reasoning that GRH vested executive power in an officer removable by the legislative branch, thereby violating separation of powers

38 GILMOUR, *supra* note 11, at 135–37 (explaining that reconciliation forces action on policies that were previously bottled up in committee).

39 *Id.* at 122–23.

40 Demetrios Caraley, *Changing Conceptions of Federalism*, 101 POL. SCI. Q. 289, 303 (1986).

41 *See infra* notes 65–81 and accompanying text.

42 Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, 96 Stat. 763; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.

43 Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312; Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388; Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106; Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330; Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874; Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82; Omnibus Budget Reconciliation Act of 1983, Pub. L. No. 98-270, 98 Stat. 157.

44 Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037; *see* GILMOUR, *supra* note 11, at 185–86.

principles.[45] In response, GRH was amended to grant the power of sequestration to the Office of Management and Budget and set 1993 as the new deadline for a balanced budget.[46]

During the period that GRH was in effect, Congress continued to use reconciliation for deficit reduction. The hope was that the process would help avoid sequestration. A highly divided and partisan government, however, either led to legislation that achieved the GRH targets through budget gimmicks or only a modest reduction in the deficit following contentious, protracted budget negotiations.[47]

By the early 1990s, it became clear that the harsh sequestration mechanism of GRH failed to significantly reduce the deficit. This was largely due to the unrealistic assumptions underlying the budget resolutions and presidential budgets.[48] The tough annual targets set by GRH eventually gave way to pay-as-you-go rules and discretionary spending caps as Congress and the President once again reformulated the budget process in the Budget Enforcement Act of 1990 (BEA).[49]

During the months Congress was debating GRH, concern over the use of the reconciliation process also arose. The process had evolved such that congressional members added unrelated amendments to the reconciliation bill to secure their passage under the expedited process. One of the original drafters of the Budget Act, West Virginia Senator Robert Byrd, led the charge towards reformation of the process and secured a safeguard, called the "Byrd Rule," that prevented the Senate from considering a reconciliation bill with "extraneous provisions" or those unrelated to the budget. In so doing, Byrd intended to protect the efficiency of the reconciliation process and the deliberative character of the Senate.[50] The Byrd Rule was codified in 1985 and defines such forbidden provisions to include those not producing any change in revenues or outlays.[51] The inclusion of extraneous material is subject to a point of order that, once raised, can be waived only by a three-fifths vote of the Senate.[52]

Congress has expanded and revised the Byrd Rule over the years. For instance, in 1987, a controversy arose as to reconciliation legislation that, although deficit decreasing in immediate years, produced deficits beyond the

45 Bowsher v. Synar, 478 U.S. 714, 736 (1986).

46 The Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754. The pay-as-you go rules required that, under threat of sequester, increases in entitlement spending or decreases in revenues be deficit-neutral, hence requiring offsets from tax increases or spending decreases. The statutory rules expired in 2002 but were reinstated in 2010 by the Statutory Pay-As-You-Go Act, Pub. L. No. 111-139, 124 Stat. 8 (2010).

47 *See A History of Reconciliation*, 49 CONG. Q. ALMANAC 116 (1993).

48 ROBERT D. LEE ET AL., PUBLIC BUDGETING SYSTEMS 289 (2008).

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

50 KEITH, *supra* note 13, at 2.

51 Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 20,001, 100 Stat. 82, 390–91 (1986).

52 KEITH, *supra* note 13, at 4.

budget window period. In response, the Byrd Rule was amended to prevent the Senate from considering reconciliation legislation or resolutions causing spending increases or revenue decreases in fiscal years not covered by the budget window period.[53]

The Byrd Rule would prove valuable to minority rights in the early 1990s as President Clinton seized upon the reconciliation process to enact substantial policy changes. The Omnibus Budget Reconciliation Act of 1993 contained large tax increases on the wealthy and cuts in Medicare, defense, and other spending. These deficit-reducers were somewhat offset, however, by new spending on items in the President's political agenda, such as healthcare and education.[54] The controversial bill squeaked by Congress, failing to receive a vote from a single Republican.[55] Still, minority influence substantially changed the shape of the bill. In conference, Senate leaders ordered removal of over 150 extraneous provisions to comply with the Byrd Rule.[56]

When Republicans regained control of Congress in 1995, they too would pursue fulfillment of their campaign promises through the reconciliation process. Republicans presented a reconciliation bill dramatically scaling back entitlement programs in fulfillment of their Contract with America campaign pledge and cutting $245 billion in taxes, producing overall deficit neutrality.[57] The Republicans also included in the bill the annual appropriations and an increase in the debt limit, which was necessary to avoid federal default, in hopes of forcing the President's hand.[58] The game of chicken produced no immediate winners; instead, President Clinton vetoed the bill, leading to a government shutdown.[59]

During the 1990s, the Byrd Rule would be invoked over eighty-one times, as opposed to just five times in the 1980s.[60] The intrepid use of the reconciliation process by executive and congressional leadership to enact social policy (rather than mere implementation of the annual budget), cou-

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

54 Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

55 *Deficit-Reduction Bill Narrowly Passed*, 49 CONG. Q. ALMANAC 107, 107 (1993).

56 139 CONG. REC. S19,767 (daily ed. Aug. 6, 1993) (remarks of Sen. Jim Sasser) ("As the distinguished ranking member indicated, I think over 150 items were removed from the reconciliation instrument here, because it was felt that they would be subject to the Byrd rule.").

57 H.R. 2491, 104th Cong. (1995) (as received in the Senate).

58 *Id.* § 13801.

59 Krishnakumar, *supra* note 11, at 607; *see also* SHARON S. GRESSLE, CONG. RESEARCH SERV., SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, EFFECTS, AND PROCESS 2–3 (2001) (recounting the shutdown). Public opinion would later indict Congress as the culprit for the stalemate. Richard S. Conley, *President Clinton and the Republican Congress, 1995–2000: Political and Policy Dimensions of Veto Politics in Divided Government*, 31 CONG. & PRESIDENCY 133, 151 (2004).

60 KEITH, *supra* note 13, at 10.

pled with increased partisanship, led to the minority's heavy reliance on the rule's protections during the Clinton era.[61]

E. Reconciliation as a Deficit-Increasing Tool

The bold invocation of reconciliation by the Democrats in 1993 and the failed attempt by the Republicans in 1995 paved the way for other expansive uses of the process. After the budget breakdown, in 1996 the Republicans would try to dramatically cut taxes and decrease spending through reconciliation, the first test at passing deficit-increasing legislation through the process.[62] Heated debate over the practice ensued in the Senate, with the Democrats charging that the reconciliation process existed only to enforce deficit reduction while Republicans argued that a tax cut did not violate any of reconciliation's requirements.[63] Because the Balanced Budget Act of 1997 supplanted the reconciliation bill, the issue was not resolved that year. In subsequent years, Senate Republicans continued to push for reconciliation tax cuts.[64]

In 1999, Congress passed a budget resolution instructing the tax committees to report a reconciliation bill that *reduced* revenues.[65] To comply with the Byrd Rule, the Senate Finance Committee sunsetted the tax cut in 2009 so its costs would be within the ten-year budget window. This exploited the letter of the Byrd Rule, which only required that reconciliation legislation not decrease revenues or increase spending *beyond* the budget window period (as opposed to within it). The 1999 bill technically sunsetted; however, its drafters reinstated the tax cut one day later.[66] This gimmick was not enough to waive the Byrd Rule point of order against the bill, and the Senate ultimately struck the provision that reinstated the cuts.[67] Although the Republicans lost the battle, they won the war. The 1999 reconciliation bill was ultimately vetoed but laid a precedent by which reconciliation tax cuts could be enacted, albeit with a true sunset date. After the waiver vote was cast, Senator Breaux (D-LA) decried the result:

> [T]his is terrible policy. We literally are telling all the businesspeople . . . and employees in this country [that] . . . no matter what the law is today, it is going to fall off a cliff and go poof in 10 years. . . .

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61 For example, in 1995, the Byrd Rule was used by Democrats to remove from the reconciliation bill provisions limiting entitlement programs. KEITH, *supra* note 13, at 25–26 tbl.4.

62 H.R. Con. Res. 178, 104th Cong. (1996); Kysar, *The Sun Also Rises*, *supra* note 3, at 372.

63 Kysar, *The Sun Also Rises*, *supra* note 3, at 373.

64 *Id.*

65 H.R. Con. Res. 68, 106th Cong. §§ 104–105 (1999).

66 *Id.*

67 Michael W. Evans, *The Budget Process and the 'Sunset' Provision of the 2001 Tax Law*, 99 TAX NOTES 405, 411 (2003).

> That is not good public policy; it is not good tax policy, and it points to the problem: the fact that we are bringing up tax legislation in this reconciliation scenario . . . .[68]

The issue erupted again in 2001 when Senate Republicans wished to enact the nation's largest tax cut in history through the reconciliation process. Reconciliation was necessary because the Senate, at the time, was evenly split. Byrd lamented the Senate's abuse of the process, arguing that despite the original Budget Act's failure to distinguish between tax increases and tax cuts, "several amendments to the . . . Act have made it quite clear that the purpose of reconciliation was for deficit reduction."[69] The Republicans eventually won the procedural fight after garnering support from the Senate Parliamentarian, the nonpartisan arbiter of Senate rules.[70] Beginning in 2001 and continuing in 2003 and 2006, reconciliation was used to enact several of the nation's largest tax cuts, all of which were sunsetted to comply with the Byrd Rule and to reduce costs to win the support of key centrists.[71]

Examining whether reconciliation should have accommodated tax cuts requires a discussion of the origins and evolution of the process. During the floor debates over the Budget Act, reconciliation received very little attention since, as originally enacted, it was only a minor provision.[72] Thus, its original purpose has been hotly debated. It is fair to say that the drafters intended for reconciliation to assist Congress in changing current law in order to meet the policies of the budget resolution, and thus it certainly had the *potential* to assist Congress in deficit reduction. But given the Budget Act's neutrality towards deficit spending, there is no clear evidence that the drafters of the Act intended reconciliation to be used only in a deficit-reducing manner. Although the ability of the budget committees to seek lower deficits through the targets set in the budget resolution arguably suggested "a small bias toward deficit reduction," the lack of "constitutional spending caps and revenue floors" in the Act indicated that the process was not designed to produce major budgetary reform.[73]

Indeed, some liberals supported the Budget Act as a transparent means to *justify* deficits as necessary to combating unemployment, while conservatives applauded the Act's ability to help Congress reduce deficits.[74] To confuse matters more, the Act was also envisioned as a way to stop presidential impoundments, a goal somewhat paradoxical to limiting spending. Because the procedures ultimately embraced by the Act were neutral towards substan-

68 145 CONG. REC. S18,178–79 (daily ed. July 28, 1999) (remarks of Sen. John Breaux).

69 147 CONG. REC. S5651–52 (daily ed. Apr. 5, 2001) (remarks of Sen. Robert Byrd).

70 SCHICK, *supra* note 11, at 142–49.

71 Kysar, *The Sun Also Rises*, *supra* note 3, at 375–81.

72 Miller & Range, *supra* note 11, at 6.

73 Roy T. Meyers & Philip G. Joyce, *Congressional Budgeting at Age 30: Is It Worth Saving?*, 25 PUB. BUDGETING & FIN. 68, 71 (2005).

74 GILMOUR, *supra* note 11, at 80–85.

tive policies, these various factions of supporters could simultaneously hold contradictory views of its purposes.[75]

Although a single, original purpose of reconciliation cannot be stated definitively, when congressional members began to use the reconciliation process in a manner that would sweep in policies that were non-budget related or increased deficits in the years beyond the budget window, Congress as a whole responded by enacting the Byrd Rule. Indeed, the fact that the Byrd Rule only prevented deficit increases in outer budget years meant that its drafters did not even contemplate the ability to have deficit increases *within* the budget window period. It could thus fairly be stated that congressional members limited the scope of reconciliation early on, and that its leanings quickly evolved towards deficit reduction. Indeed, from its inception through the 1990s, reconciliation was exclusively employed to reduce the deficit.[76] It was only as the deficits lifted in the mid-1990s that controversy began to arise over whether the reconciliation process could be used to enact tax cuts.[77]

Lamenting over reconciliation's deviation from its deficit-reducing past at this late date is nonetheless likely futile. The original purpose behind reconciliation has long ceased to cabin it; Congress has even used reconciliation to enact arguably non-budget-related legislation.[78] Instead, an examination of the policy and political ramifications of its use in different contexts is more worthwhile and a topic I take up in Parts II and III. Such an endeavor is particularly valuable given recent developments, discussed below, demonstrating that the scope of the reconciliation process is ever more fluid and contested.

F. Reconciliation in Flux

1. The Continued Controversy over Tax Cuts

When Congress changed hands in 2007, the majority party once again altered the reconciliation process in accordance with its policy preferences. Still outraged at the use of reconciliation for tax cuts, the House and Senate each imposed new points of order against reconciliation bills that increased the deficit or reduced the surplus over Republican opposition.[79] Specifically, the rules provided that the houses could not consider a budget resolution containing reconciliation instructions (in the case of the House) or reconcili-

75 *Id.* at 84.

76 ROBERT KEITH, CONG. RESEARCH SERV., RL30458, THE BUDGET RECONCILIATION PROCESS: TIMING OF LEGISLATIVE ACTION 4 (2005).

77 Kysar, *The Sun Also Rises*, *supra* note 3, at 372.

78 For instance, in 2007, Congress enacted the College Cost Reduction and Access Act, Pub. L. No. 110-84, 121 Stat. 784 (2007), which reduced government subsidies to student loan lenders, lowered interest rates on subsidized loans, and provided funding for Pell Grants. No Byrd Rule point of order was made. KEITH, *supra* note 13, at 23 tbl.4.

79 H.R. Res. 6, 110th Cong. (2007); S. Con. Res. 21, 110th Cong. (submitted as amended on May 8, 2007).

ation legislation itself (in the case of the Senate) that reduced the surplus or increased the deficit for either (a) the period comprising the current fiscal year and the next five fiscal years or (b) the period comprising the fiscal year and the next ten fiscal years. Unlike the Senate, the House renews its rules at the start of each Congress. Although the House renewed the point of order in 2009,[80] it promptly reversed itself in 2011 when it changed hands to the Republicans. Current House rules delete the prohibition against deficit-increasing reconciliation, replacing it instead with a rule that forbids use of the reconciliation process if legislation increases net spending.[81]

2. The Debate over Health Care

In 2009, in perhaps the most contentious use of the process, Democrats seized upon reconciliation as a means to enact major health care reform.[82] Although Senate Budget chairman, Kent Conrad (D-ND) originally opposed the use of reconciliation as an unrealistic process for handling such a major initiative, he changed course under pressure from the White House and drafted the reconciliation instructions for the 2010 budget resolution to include healthcare reform.[83] In an unexpected turn of events, the preservation of the use of reconciliation for health care reform proved essential to its success when, on January 19, 2010, the Democrats lost their sixtieth vote in the Senate before key differences between the initial House and Senate bills had been ironed out.[84]

Many aspects of the reform plan fell outside the scope of reconciliation. A strategy developed such that the House would vote on the Senate bill, which the Senate had already passed on December 24, 2009, but also on a reconciliation bill that contained certain legislative compromises as well as an overhaul of the college loan program. The strategy was risky in that the House had to trust the Senate to pass the reconciliation bill, but it paid off. The Byrd Rule was employed to strike only two minor provisions when the reconciliation bill reached the Senate. Senator Byrd even voted for the reconciliation bill, despite the fact that he had previously thwarted attempts by President Clinton to pass healthcare reform using reconciliation in 1993.[85]

Reconciliation as a vehicle for health care reform proved divisive, with Republicans strongly rejecting its propriety. The issue became one of national public debate. The Republicans' aggressive use of reconciliation for the Bush tax cuts emboldened the Democrats to make cunning use of the

80 H.R. Res. 5, 111th Cong. (2009).

81 H.R. Res. 5, 112th Cong. (2011).

82 Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. Other parts of the healthcare reform plan are enacted under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

83 BARBARA SINCLAIR, UNORTHODOX LAWMAKING 187 (2012).

84 *Id.* at 208. Scott Brown (R-MA) won the seat vacated upon Ted Kennedy's death. Id. at 211–13.

85 Carl Hulse, *A Health Legislation Fail-Safe Works, but Not as Expected*, N.Y. TIMES (Mar. 27, 2010), http://www.nytimes.com/2010/03/28/us/politics/28cong.html.

process, finally delivering on a promise to constituents that had been unfulfilled for decades. But the victory may be short-lived. Just as past "abuses" of reconciliation justified pushing its boundaries in this context, Republicans will no doubt use this precedent to do the same in the future. Indeed, a day after the Supreme Court upheld the individual mandate as within Congress's power to tax,[86] Senate Minority Leader Mitch McConnell (R-KY) used the Court's ruling as justification for moving a repeal of the health care act through the reconciliation process, stating "[T]he Chief Justice said it is a tax, and taxes are clearly what we call reconcilable."[87] Republicans have more recently invoked the Democrats' bold enactment of health care reform through reconciliation to justify using the process to enact *permanent* tax cuts, as discussed below.[88]

3. Fast-Track Tax Reform

Before the December 2012 deal was reached to permanently extend most of the Bush tax cuts,[89] Republican strategists contemplated repeal of the Byrd Rule, a possibility that is increasingly less fanciful, in order to pass permanent tax cuts through this process.[90] Republicans have previously adhered to the confines of the Byrd Rule, but it appears they are less willing to do so subsequent to the Democrats' passage of health care reform through reconciliation.[91] Although the Byrd Rule is codified into law, the houses have ultimate purview over their own rules and can thus change, modify, or waive them as a constitutional matter.[92] In order to alter the rule, Republicans could invoke the "nuclear option" or simply repeal the Byrd Rule within the context of the budget resolution, which is not subject to the filibuster.[93]

86 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

87 Eric Pianin, *GOP Eyes Arcane Budget Rule to Help Crush Obamacare*, THE FISCAL TIMES (July 3, 2012), http://www.thefiscaltimes.com/Articles/2012/07/03/GOP-Eyes-Arcane-Budget-Rule-to-Help-Crush-Obamacare.aspx#page1 (internal quotation marks omitted). Although many policy provisions in the health care law would fall outside the scope of reconciliation, reconciliation could be used to repeal many of the law's most contentious provisions, such as the individual mandate and Medicare/Medicaid funding provisions since these are budget-related.

88 *See infra* notes 89–105 and accompanying text.

89 *See* American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313.

90 Goldfarb, *supra* note 5.

91 *Id.* ("Although Republicans previously have worked within the constraints of the Byrd Rule, their appetite for pushing the limits of majority rule appears to have grown since Democrats managed to reshape the health care system without a single Republican vote.").

92 Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 525 (2009).

93 *See, e.g.*, Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205, 219–27 (2004) (describing the constitutional option as the Senate choosing rules governing its procedure by majority vote); David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51, 60 (2006) (describing the nuclear option as the "ruling of the chair sustained by simple

They could also invoke the aforementioned "elastic clause" of the Budget Act to justify permanent tax cuts, as was done to dramatically expand the scope of reconciliation in 1981.[94]

Although Congress resolved the immediate uncertainty over the expiring tax cuts, tax reform remains a necessary goal in controlling the deficit and increasing economic efficiency. Without specifying details, President Obama took the position that a "fast-track" process for tax reform should be part of any deal surrounding the fiscal cliff,[95] and the Senate's FY 2014 Budget Resolution contemplates using reconciliation for tax reform that would raise revenues by nearly $1 trillion.[96] House Republicans have also recently championed and passed a new fast-track legislative process for tax reform.[97] The proposed process has features similar to the reconciliation process. Fast-track tax reform would, like reconciliation, require the relevant committees to report tax reform legislation by a certain deadline and would provide for expedited consideration in both the House and Senate.

Specifically, under the new House bill, the House Ways and Means Committee is charged with introducing tax reform legislation not later than April 30th of 2013.[98] In the House, the fast-track tax reform bill then would receive expedited placement on the calendar and is subject to limited debate and amendments.[99] For instance, after introduction of the tax reform bill by Ways and Means, the House Rules Committee has only fifteen days to move the bill to floor consideration, at which point the bill would automatically be placed on the calendar. After the bill proceeds to the Senate, it must be reported out of the Senate Finance Committee within fifteen days, at which point it also receives expedited consideration on the Senate floor.[100] During consideration in the Senate, a cloture vote would not be necessary for a motion to proceed or on amendments but would still be required to end consideration of the bill.[101] In this manner, the filibuster is irrelevant for certain preliminary votes of fast-track tax reform but is still a possible obstacle to final passage of the bill.

Tax reform is defined in the bill in a partisan fashion, encompassing only those proposals that would accomplish one of the following: (a) flatten the rate structure to two rates between 10% and 25%; (b) reduce the corpo-

majority . . . [in order] to achieve cloture"); Tom Udall, *The Constitutional Option: Reforming the Rules of the Senate to Restore Accountability and Reduce Gridlock*, 5 HARV. L. & POL'Y REV. 115, 115 (2011) (arguing Senate has right to exercise constitutional option).

94 *See supra* notes 32–35 and accompanying text.

95 *See* Weisman, *supra* note 5.

96 S. Con. Res. 8, 113th Cong. (2013).

97 Pathway to Job Creation Through a Simpler, Fairer Tax Code Act of 2012, H.R. 6169, 112th Cong. (as reported in House, Aug. 2, 2012).

98 *Id.* § 3(a). The legislation must begin in the House due to the Origination Clause of the Constitution. U.S. CONST. art. I, § 7, cl. 2.

99 H.R. 6169 § 3(c).

100 *Id.* § 3(d).

101 Michael M. Gleeson, *House Passes Fast-Track Tax Reform Bill*, TAX NOTES TODAY, Aug. 3, 2012, *available at* 2012 TNT 150-4 (LEXIS).

rate tax rate to 25% or below; (c) repeal the Alternative Minimum Tax; (d) broaden the base to maintain revenue between 18% and 19% of the economy; and (e) change from a worldwide to a territorial system of taxation.[102] Accordingly, some have dismissed the procedural reform efforts as merely symbolic.[103] We can expect, however, that measures aimed at modifying the tax legislative process to facilitate legislative action will continue to be a part of congressional dialogue. As one former Senate aide has expressed about the House's fast-track tax reform proposal, "[g]etting the process is as important as getting to yes."[104] Some of these measures will succeed in the future, although most likely in a less partisan version.

II. Reconciling Tax Reform

As the above discussion illustrates, reconciliation has evolved into a powerful, flexible tool that can apply to virtually any tax measure. Yet continual reliance upon the reconciliation process, or other fast-track processes, to enact tax legislation entails unexpected costs both to the nation's fiscal health and to tax policy. For reasons I explain below, fast-track processes are unlikely to produce fundamental tax reform and indeed create conditions where it is less likely to develop.

A. The Need for Fundamental Tax Reform

Current tax reform efforts seek to protect the tax base by reducing the leakiness of our worldwide international tax system,[105] to reduce existing tax incentives that distort behavior,[106] to broaden the base by eliminating tax expenditures, such as the home mortgage interest deduction,[107] to eliminate the inconsistent taxation of complicated financial instruments, and to reassess the taxation of investment income through mark-to-market rules,[108] car-

102 H.R. 6169 § 3(a).

103 *See, e.g.*, Meg Shreve, *Proposed Expedited Tax Reform Raises Questions*, Tax Notes Today, July 27, 2012, *available at* 2012 TNT 145-4 (LEXIS) (quoting House Rules minority member Louise McIntosh Slaughter as stating that the bill "is something shiny to waive in front of the American people to distract them from the fact that Republicans have no actual plan to achieve the lofty goals listed in th[e] bill.").

104 *Id.* (quoting a former Senate aide as stating that the proposal offers an early idea of what the tax reform process looks like, but ultimately the parameters of the process will be negotiated between the House and Senate).

105 *See, e.g.*, Alison Bennett, *Administration Budget Intended to Stop Firms from Shifting Jobs, Profits Overseas*, BNA Daily Tax Report (Feb. 14, 2012).

106 In the corporate tax area, for instance, debt-financing is tax-advantaged largely because of the double-taxation of equity-financed corporate income.

107 Daniel Shaviro, *Tax Reform Implications of the Risk of a U.S. Budget Catastrophe*, 50 U. Louisville L. Rev. 577, 581 (2012) (describing base-broadening as "[t]he most obvious and appealing way to achieve budgetary improvement through the existing income tax").

108 *See* David S. Miller, Op-Ed., *The Zuckerberg Tax*, N.Y. Times (Feb. 7, 2012), http://www.nytimes.com/2012/02/08/opinion/the-zuckerberg-tax.html (proposing a tax on the appreciation of publicly traded securities, regardless of whether they have been sold).

ried interest reform efforts,[109] and consumption tax initiatives,[110] among other goals. Exploring these various options is necessary because it appears increasingly unlikely that our current tax base is robust enough to sustain a sufficient level of government revenues without inhibiting economic growth. As one model illustrates, "politically feasible tax increases within the current tax structure cannot generate sufficient revenues to bring federal budget deficits under control."[111] Unlike in 1986, when tax reform was revenue-neutral, there is a much stronger argument today that revenue concerns must shape tax reform.[112] In order to achieve a sustainable level of revenue, lawmakers must either broaden the existing tax base[113] or consider new sources of revenue, such as value added taxes.[114]

Additionally, since the United States tax system must compete on an international level to retain investment domestically, reliance on corporate tax revenues will inevitably recede. The United States currently has the highest corporate tax rate in the world[115] and yet depends on an outdated, out-

109 *See* Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1, 49 (2008) (advocating a "baseline rule that would treat carried interest distributions as ordinary income").

110 *See* MICHAEL J. GRAETZ, 100 MILLION UNNECESSARY RETURNS, at ix (2008) (proposing a value-added tax, in combination with a payroll tax offset and an income tax on households earning over $100,000); Daniel N. Shaviro, *Replacing the Income Tax With a Progressive Consumption Tax*, 103 TAX NOTES 91, 93–96 (2004) (describing the two main models of a progressive consumption tax).

111 Roseanne Altshuler, Katherine Lim & Roberton Williams, *Desperately Seeking Revenue*, TAX POLICY CENTER, at i (2010), *available at* http://www.urban.org/UploadedPDF/412018_seeking_revenue.pdf.

112 *See generally* Daniel N. Shaviro, *1986-Style Tax Reform: A Good Idea Whose Time Has Passed*, 131 TAX NOTES 817 (2011) (arguing against 1986-style tax reform). In addition to budgetary concerns, revenue-neutral base broadening will likely have unfavorable distributional consequences. *See* Samuel Brown, William G. Gale, & Adam Looney, *On the Distributional Effects of Base-Broadening Income Tax Reform*, TAX POLICY CENTER (Aug. 1, 2012), *available at* http://www.taxpolicycenter.org/UploadedPDF/1001628-Base-Broadening-Tax-Reform.pdf.

113 *See, e.g.*, Edward D. Kleinbard, *The Role of Tax Reform in Deficit Reduction*, TAX NOTES 1105 (Nov. 28, 2011) (emphasizing the role of base-broadening through the removal of tax expenditures in addressing the fiscal crisis).

114 Many tax analysts believe that adoption of a VAT is a necessary component to averting a fiscal crisis. *See, e.g.*, Reuven S. Avi-Yonah, *The Political Pathway: When Will the U.S. Adopt a VAT?*, *in* THE VAT READER 334 (2011) (arguing for VAT option); Michael J. Graetz, *VAT as the Key to Real Tax Reform*, *in* THE VAT READER, *supra*, at 112 (same); Rudolph G. Penner, *Do We Need a VAT to Solve Our Long-Run Budget Problems?*, 63 TAX L. REV. 301 (2010) (same). Both liberal and conservative commentators have supported the idea that value-added taxes are crucial to meeting revenue demands. *See, e.g.*, Bruce Bartlett, *A New Money Machine for the U.S.*, L.A. TIMES (Aug. 29, 2004), http://articles.latimes.com/2004/aug/29/opinion/op-bartlet29 (arguing that value-added tax is the best way of raising needed revenue); William G. Gale and Benjamin H. Harris, *A Value-Added Tax for the United States: Part of the Solution*, BROOKINGS INST. & TAX POL'Y CENTER 1 (July 2010), *available at* http://www.taxpolicycenter.org/uploadedpdf/1001418_vat_solution.pdf (same).

115 WHITE HOUSE & THE U.S. DEP'T OF THE TREASURY, THE PRESIDENT'S FRAMEWORK FOR BUSINESS TAX REFORM 2 (2012); Barack Obama, President of the United States of America,

gunned international tax system to tax the foreign income of domestic multinational corporations.[116] To secure economic growth, policymakers must also ensure that taxation of our multinational corporations is globally competitive, perhaps by lowering corporate tax rates or reforming our international tax system. In terms of tax policy, the United States has become an outlier among developed nations, as it stands alone in not yet embracing many of tax reform developments.[117] Tax reform is thus vital in today's budgetary and global environment.[118]

B. Truncated Timelines as an Obstacle to Reform

So how should Congress go about formulating the sweeping tax reform necessary to avert a budgetary crisis or loss of economic competitiveness? Despite recent calls for its use in this context, Congress would be ill-advised to resort to the reconciliation process or similar fast-track processes. Although reconciliation's primary aim is to enact deficit-reducing legislation, its procedural limitations hinder its use even for revenue-increasing tax reform. Recall the humble beginnings of the reconciliation process as a negligible, fallback procedure to align the spending priorities in a given year with overall budgetary targets.[119] Although it has since developed into a powerful instrument to effectuate legislative change, especially on the revenue side, the legacy of its origins limit its capacity to produce ambitious tax reform for several reasons.

First, major tax reform will likely require many months, possibly years, of drafting and negotiating. All of the aforementioned tax reform proposals

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The State of The Union Address (Jan. 25, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address.

116 Michael J. Graetz, *The David R. Tillinghast Lecture—Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261, 320 (2001).

117 *See* HOUSE COMM. ON WAYS & MEANS, TESTIMONY OF MR. ROBERT A. MCDONALD, CHAIRMAN, FISCAL POLICY INITIATIVE BUS. ROUNDTABLE BEFORE THE HOUSE COMM. ON WAYS AND MEANS HEARING ON TAX REFORM 7 (Jan. 20, 2011), *available at* http://waysandmeans.house.gov/uploadedfiles/brt_written_testimony.pdf; Sijbren Cnossen, *A VAT Primer for Lawyers, Economists, and Accountants*, *in* THE VAT READER, *supra* note 114, at 23 (noting that the U.S. is the only major country without a value-added tax, with more than 150 countries adopting such a tax).

118 Some might contend that economic stimulus, rather than tax reform, is the appropriate course until full economic recovery has begun. Delay, however, may mean deep spending cuts and tax increases in response to the onset of a crisis, a result that is inefficient compared with spreading these painful policies over time. *See generally* Daniel Shaviro, *The Long-Term U.S. Fiscal Gap: Is the Main Problem Generational Inequity?*, 77 GEO. WASH. L. REV. 1298 (2009) (describing the phenomenon whereby tax rate increases and spending cuts have rising marginal disutility in discrete periods as support for smoothing those increases and cuts over time). To ensure that economic recovery is not disrupted, policymakers could employ phased-in or delayed effective dates for reform. *See* Shaviro, *supra* note 107, at 582; *see also* Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 87 (1977) (recommending phased-in or delayed effective dates where politically expedient to alleviate large losses from changes in law).

119 *See supra* notes 22–28 and accompanying text.

would necessitate sophisticated and complex changes to the tax code, which would be difficult to achieve within reconciliation's budget cycle or the truncated timeline contemplated by the House's recently proposed fast-track tax reform process. Although health care reform was an obviously complicated piece of legislation, the major policy initiatives were formulated outside of the reconciliation process over a long period of time.[120] Tax reform will be no different.

The Tax Reform Act of 1986, for instance, evolved over the course of two years.[121] Prior tax reform efforts took years and extensive debate.[122] The House's proposed fast-track tax reform process would require legislation to be reported out of committee by April 30, 2013, an unrealistic timeline.[123] Similarly, because the reconciliation process typically allows only a few short months between the adoption of the budget resolution, which often does not occur until after the April 15th deadline,[124] and the October 1st deadline for reporting the legislation prior to the start of the next fiscal year, it is very difficult to push complex changes to the Tax Code through the reconciliation process.[125] Although Congress often passes reconciliation legislation subsequent to this deadline, it typically does so before the end of the calendar year, still operating on a truncated timeline.[126] Also, while Congress considers reconciliation legislation in an abbreviated fashion, its attention towards the annual appropriations suffers, resulting in breakdowns in the budget process.[127] One can expect that sweeping reform efforts through reconciliation amplify this effect.

Because of the shortened process, reconciliation proposals produced by both tax committees are usually considered simultaneously in the first week of October. This has two effects. Simultaneous action exerts pressure on the

120 Even the pieces of health care that moved through the reconciliation process did so a few months after the typical deadline for reconciliation legislation. SINCLAIR, *supra* note 83, at 215–17, 227–30.

121 JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM (1987) (chronicling the 1986 tax overhaul).

122 For example, the Bankruptcy Tax Act of 1980, in which the tax treatment of bankrupt taxpayers was clarified, took nearly four years after "extensive debate and comment." Harold R. Handler, *Budget Reconciliation and the Tax Law: Legislative History or Legislative Hysteria?*, 37 TAX NOTES 1259, 1262–63 (1987). The Subchapter S Revision Act of 1982, which eliminated the double taxation of closely-held corporations on an elective basis, was enacted after two and a half years of consideration. *Id.*

123 *See* Shreve, *supra* note 103 at 145-4 (quoting a former House aide as stating that although groundwork efforts at tax reform have been laid, an April 2013 deadline was ambitious).

124 BINDER, *supra* note 1, at 76.

125 McLure, *supra* note 9, at 79.

126 *See* CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS, THE BUDGET RECONCILIATION PROCESS: HOUSE AND SENATE PROCEDURES 69–74 (2005), *available at* http://assets.opencrs.com/rpts/RL33030_20050810.pdf.

127 *See* Krishnakumar, *supra* note 11, at 614 ("Reconciliation thus draws Congress's focus away from the annual appropriations process . . . .").

resources of the committees and the houses, making deliberation less careful.[128] Additionally, it interferes with the classical model for the enactment of tax legislation as designated by the Constitution.[129] The Origination Clause requires that revenue legislation begin its path through the legislative process in the House, the part of Congress "closest to the people" because of its proportional representation.[130] The Senate Finance Committee staff has observed this dynamic as a problematic aspect of reconciliation, requesting the Budget Committee to set reconciliation dates so that they "can see the actual handiwork of the House before we reach our final decision . . . or structure the dates so that [they] can return to a system when [they] are not marking up two bills during one week in October."[131] With consequences I have explored in other contexts, the reconciliation process problematically reduces the House's purview over revenue legislation.[132] As a result, it tends to reduce the democratic character of tax laws, produces negative political economy consequences, and fails to leverage the tax expertise of the Ways and Means Committee.[133]

The harried pace of fast-track may also lessen the impact of two sources of expert information critical to tax reform efforts—the Treasury Department and the Joint Committee of Taxation.[134] Because comprehensive tax reform will involve substantial policy changes, the legislature will require extensive analysis from these entities. Fast-track can, in theory, be utilized to steamroll sweeping changes through the legislature; however, it also takes away the time necessary to design and effectuate such change in a careful manner.

Finally, the aforementioned tendency of the reconciliation process to displace committee power in favor of party leadership is problematic for achieving true tax reform because it reduces the power of key sources of organization and specialization in creating a complex tax bill—the members of the tax-writing committees.[135] Although these committees determine the details of a reconciliation bill, the process removes their discretion to report

128 Federal Bar Ass'n, *The Condition of the Tax Legislative Process*, 39 TAX NOTES 1581, 1587 (June 27, 1988).

129 *See* McLure, *supra* note 9, at 74–75 (describing the enactment of the 1982 reconciliation bill as in tension with the Origination Clause due to the minimal role of the House).

130 U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."); *see* Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT'L L. 1 (2013).

131 Federal Bar Ass'n, *supra* note 128, at 1587.

132 For background on the clause as well as policy reasons supporting its enforcement in the tax treaty context, see Kysar, *supra* note 130.

133 *Id.*

134 *See* Michael J. Graetz, *Reflections on the Tax Legislative Process: Prelude to Reform*, 58 VA. L. REV. 1389, 1408–09 (1972) (identifying the input from Treasury and the JCT as central to tax reform).

135 Notably, the tax-writing committees appear opposed to using reconciliation for tax reform. Goldfarb, *supra* note 5.

a bill and also mandates certain parameters for the bill. Although committees themselves have been blamed for congressional gridlock,[136] their expertise is indispensable to the design of tax reform.[137] Indeed, in a complex field like tax, subcommittees formed around specialized areas of the law might be advisory to effectuate legislative action.[138]

These features of reconciliation may thwart massive reform in other legislative areas, but an area as intricate as tax will be particularly challenged by the fast-track limitations of the process.[139] Former Assistant Treasury Secretary John Nolan has noted the general impact of reconciliation on tax legislation, stating that "we have departed from an orderly and predictable process for identifying the legislative issues in advance and dealing with them in some well-organized way."[140] These shortcomings may be overcome by reconciliation's capacity to break stalemate if change is accomplished by simple means such as rate changes. Complex tax reform, however, likely requires more congressional resources than reconciliation can offer.

C. Immoderate, Unstable Policy

1. The Polarizing Influence of the Reconciliation Process

One consequence to circumventing the filibuster through the reconciliation process is the production of less moderate legislation, which has a greater likelihood of being vetoed or overturned by a later Congress. These consequences present an obvious challenge to the formulation of a long-term solution to the nation's fiscal crisis.

The observation that a supermajority rule counter-intuitively leads to more moderate decision-making has been observed primarily in the judicial filibuster context.[141] Using positive political theory, John McGinnis and

136 *See* BARBARA SINCLAIR, PARTY WARS 67–109 (2006) (describing the House committee structure as a source of gridlock).

137 *See* George K. Yin, *Is the Tax System Beyond Reform?*, 58 U. FLA. L. REV. 977, 1034 (2006) (noting that the loss of the subject matter expertise of committees "may be felt most acutely in connection with more involved legislative efforts, such as fundamental reform initiatives, which are likely to raise many interrelated issues for legislative consideration and decision making.") .

138 *See* Graetz, *supra* note 134, at 1405.

139 Handler, *supra* note 122, at 1266 (observing that because "the Internal Revenue Code is an incredibly complex document dealing with vast areas that require considerable correlation and coordination[,] [i]t is virtually impossible to imagine that any kind of sensible tax reform can be effected in a helter-skelter fashion under circumstances where the only rationale for developing any reform is the revenue-raising function of the budget reconciliation process.").

140 Federal Bar Ass'n, *supra* note 128, at 1583

141 *See* Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331, 342–43 (2005) (defending the filibuster as a check on immoderate judicial appointments); John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons From Europe*, 82 TEX. L. REV. 1671, 1681 (2004) (arguing that supermajority rules for European justices lead to a judiciary dominated by judicial moderates); John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, the Median Senator,*

Michael Rappaport have modeled this tendency, illustrating that a supermajoritarian voting rule produces more moderate judicial nominations than a majoritarian rule. This is due to the need to appease the "pivotal Senator," or the senator whose ideology is closest to the President and whose support the President needs to secure a supermajority vote, rather than simply the median, or fifty-first, senator.[142] Rather than producing a compromise at some point between the President and the median senator, as would be the case under majoritarianism, supermajority rules lead to an agreement closer to the median senator.[143]

This analysis can be extended to the legislative context, where we can expect that supermajority rules will produce legislation that is more moderate, or closer to the ideology of the median senator.[144] Where fast-track processes remove the supermajority rules, they produce more controversial legislation.

Additionally, it may be the case that fast-track processes are less likely to lead to fundamental tax reform that is desirable from a policy perspective. The tax-writing committees have expressed concern over using the reconciliation process for tax reform for this reason, arguing that "a measure advanced only by Republicans would be less popular and perhaps even less substantive than one that wins significant support from Democrats."[145] Additionally, a lack of bipartisan compromise will lead to legislation that fails to produce the requisite level of revenues. This is because no one party wants to be blamed for hardships caused by increased taxes and decreased spend-

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and the Countermajoritarian Difficulty, 2005 SUP. CT. REV. 257 (2005) [hereinafter McGinnis & Rappaport, *The Judicial Filibuster*]; John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543, 557 (2005); Judith Resnick, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 637–38 (2005) (positing that a supermajority rule in judicial selection produces "movement towards a middle ground"); Lee Epstein, *A Better Way to Appoint Justices*, CHRISTIAN SCI. MONITOR (Mar. 17, 1992), http://www.csmonitor.com/1992/0317/17191.html (arguing that a supermajority rule results in judges being chosen for their "legal credentials" to gain "bipartisan support").

142 *See* McGinnis & Rappaport, *The Judicial Filibuster*, *supra* note 141, at 261–81.

143 *Id.*

144 A possible circumstance where this would not be true is where the pivotal senator had disproportionate bargaining power with the President, thus producing a result closer to her view rather than that of the median senator. In the tax context, however, the President has strong agenda-setting ability due to being the first-mover in budgetary politics. Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 589 (2008); *see also* Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715 (2012) (discussing the President's first-mover advantage in the appropriations context). This would likely translate to greater leverage in the formulation of budget-related legislation.

145 Goldfarb, *supra* note 5 (also quoting a former Senate Republican leadership aide as stating that reconciliation "drives you to starker decision making" thus undermining the creation of "clear lines of communication, mutual understanding of each chamber's priorities and an appreciation of the general outline of what could look like the best way to proceed" (internal quotation marks omitted)).

ing, but if the parties together took on such blame, the total burdens become much more tolerable from a political perspective.

Reconciliation will also tend to produce disagreement between Congress and the executive. Although fast-track processes may hasten agreement over budget policy within Congress, they lack procedural mechanisms to harmonize congressional and executive budget priorities.[146] The lack of a coordinating device with the President is problematic in times of divided government. Not only is immoderate legislation more likely to attract a presidential veto, when the President vetoes legislation, Congress is less likely to have sufficient support to override the veto.[147] Reconciliation thus produces legislation that is more likely to create a budgetary stalemate.[148] It is not surprising, then, that reconciliation bills initiated without executive support tend to fail in times of divided government.[149] Thus, although reconciliation is often held out as a solution to stalemate in the tax area, it may ironically increase the risk for legislative inaction when the preferences of the President and Congress do not align.

In contrast, the past three tax reform acts occurred during times of divided government but notably were enacted outside of the reconciliation process.[150] The Tax Reform Act of 1969 was enacted during the Republican Nixon era with substantial input from congressional Democrats, using proposals from the prior Democratic Treasury Department as a template. The Tax Reform Act of 1976 was enacted thanks to a partnership between the Republican Ford administration and a Democratically-controlled Congress. Finally, the Tax Reform Act of 1986 was engineered by the Republican Reagan administration and a divided Congress.[151] Party competition during the 1986 tax reform efforts jump-started the process at several critical points and eventually gave way to bipartisan compromise.[152]

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146 *See* Krishnakumar, *supra* note 11, at 610–13. *See generally* Tiefer, *supra* note 9 (noting the benefits of the checks and balances of the normal lawmaking process). Although Congress has no mechanism internal to the reconciliation process to pressure the President to sign reconciliation bills, Congress may try to withhold continuing resolutions for appropriations or debt limit extensions. This tactic may backfire, however, if government shutdowns occur. Krishnakumar, *supra* note 11, at 610–13.

147 DAVID W. BRADY & CRAIG VOLDEN, REVOLVING GRIDLOCK 15–16 (1998). If, for instance, legislative preferences are ranked on a scale of one to one hundred on a liberal-conservative continuum, legislation during divided government must accord with the preferences of the 40th through 66th senators to override a presidential veto. *Id.*

148 An example of this tendency is the 1995 reconciliation bill, which produced major changes to welfare and Medicaid. Reconciliation conferees removed much of the moderates' changes that might have placated the president. Doing so arguably triggered the presidential veto. Krishnakumar, *supra* note 11, at 620.

149 *Id.* at 610–13.

150 *See* Yin, *supra* note 137, at 1031 ("[I]t may not be coincidental that the three tax acts that have garnered the 'tax reform' label have all occurred during periods of divided government when bipartisan compromise was necessary.").

151 *See id.* at 1031–32.

152 *See id.* at 1032 n.213. Political scientists debate whether important legislative reform is more or less likely to be enacted during periods of divided government. *Compare* DAVID

2. Reconciliation as Destabilizing

Another consequence of this failure to cater to the median voter is fast-track's tendency to destabilize tax policies.[153] The current debate over the repeal of health care illustrates the contestability of legislation enacted through the reconciliation process, as do the Bush tax cuts, the repeal of which has been threatened since their enactment. Some would contend that tax legislation must adapt to changing economic conditions, and this is certainly true. Less durable tax legislation is not always a problem. Yet to the extent that the legislature is simply shifting tax policy in accordance with ideology rather than fluctuations in economic conditions, less durable legislation may harm the fiscal health of the nation by failing to secure efficient levels of investment and other activity.[154] This is especially true in the context of fundamental tax reform, the pillars of which should be long-lasting to be effective. Less durable legislation may also produce serious social costs in the form of rent-seeking.[155]

For these reasons, "[s]tability is a key goal of tax reformers."[156] Although some contemporary legal thinking often fetishizes legislative flexibility, it does not fully account for its costs.[157] As decision-makers delay decisions in order to obtain information, the costs of obtaining that information may increase due to decreasing resources that can be allocated to decision-

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R. MAYHEW, DIVIDED WE GOVERN 7 (2d ed. 2005) (concluding that unified government does not produce more landmark legislation than divided government), *with* BINDER, *supra* note 1, at 71–75, 86–87 (challenging some of Mayhew's findings). A reasonable hypothesis might be that legislation that shifts costs to future generations requires less bilateral support than legislation, like responsible tax reform, that imposes costs on members of the present constituency. *See* Yin, *supra* note 137, at 1033; *see also* BRUCE R. BARTLETT, IMPOSTER: HOW GEORGE W. BUSH BANKRUPTED AMERICA AND BETRAYED THE REAGAN LEGACY 134 (2006) (noting correlation between rises in spending and unified government). *But see* DANIEL SHAVIRO, DO DEFICIT$ MATTER? 298–99 (1997) (contending that a divided government may not lead to deficit reduction since each party will engage in a game of chicken, leaving the task of painful spending cuts to the other).

153 *See, e.g.*, Barry Cushman, *The Limits of the New Deal Analogy*, 15 GREEN BAG 2D 139, 145–46 (2012) (discussing the role of bipartisan congressional support in the durability of New Deal legislation, in contrast with its absence in health care reform).

154 For instance, the temporary nature of the research and development tax credit has substantially reduced its efficacy. Bronwyn H. Hall, *R&D Tax Policy During the Eighties: Success or Failure?* 15 (Nat'l Bureau of Econ. Research, Working Paper No. 4240, 1994) ("[T]he typical manufacturing firm has an enormous incentive to smooth the acquisition of R&D capital and this greatly inhibits the effectiveness of *temporary* tax instruments.").

155 *See* Seth H. Giertz & Jacob Feldman, *The Costs of Tax Policy Uncertainty and the Need for Tax Reform*, 138 TAX NOTES 951, 959–960 (Feb. 25, 2013) (discussing rent-seeking costs of short-term tax policy); Jason S. Oh, *The Social Cost of Fundamental Tax Reform*, 65 TAX L. REV. (forthcoming 2013) (discussing the rent-seeking social costs of transitory tax reform).

156 Yin, *supra* note 137, at 1030.

157 David A. Super, *Against Legislative Flexibility*, 96 CORNELL L. REV. 1377, 1454–56 (2011).

making, the need for decision-makers to relearn problems, and opportunity costs.[158]

Flexibility also drives down the ultimate value of a policy if it leads to the achievement of fewer of the intended policy goals.[159] Social Security, for instance, would fail as a retirement vehicle if its continued existence was not assured and instead varied between generations.[160] Similarly, America's unsustainable fiscal trajectory necessitates a long-term strategy. As the federal deficit climbs to $1.5 trillion, any economic plan to close that gap must prioritize revenue-raising and must span decades. Polarizing tax legislation enacted through fast-track is unlikely to fill that role. Future repeal efforts would tend to destabilize revenues and send poor signals to investors in the American economic system.

Reconciliation, or any fast-track effort that limits the filibuster, thus leads to an approach to the fiscal crisis that is both unlikely to produce sufficient revenues and is likely to be challenged when congressional majorities change. Other more narrow aims of the tax law may benefit from a short time horizon. A temporary tax credit for hurricane victims, for instance, may be effective.[161] Major instability on the revenue side of any solution to the looming budget crisis, however, jeopardizes its success. Because of its tendency to produce short-term legislation, fast-track is not the appropriate vehicle for structural tax reform efforts, especially those aimed at the goal of long-term deficit reduction.

3. The Contested Scope of Fast-Track

In the tax context, fast-track's capacity to expand and contract along party lines further destabilizes fast-track legislation by engendering distrust between the parties. As discussed above, the edges of reconciliation have changed substantially since the new millennium.[162] Republicans used it to enact massive tax cuts. Now Democrats have forbidden the use of reconciliation for tax cuts but used it to enact aspects of major health care reform. Each of these procedural moves has proven controversial and has resulted in distrust between the parties. The tug-of-war is likely to continue and current efforts to create an entirely new fast-track tax reform process will create further areas of controversy. As each party questions the legitimacy of the other's use of fast-track, the policies borne out of the process will also be questioned.

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158 *Id.*

159 Super, *supra* note 157, at 1454–56.

160 Kysar, *Lasting Legislation*, *supra* note 3, at 1061.

161 *Id.* at 1065–67 (critiquing temporary legislation except in the case of emergency situations); *cf.* Super, *supra* note 157, at 1455 (critiquing legislative flexibility even in the context of emergency situations due to the pressure on resources at the time of crisis).

162 *See supra* notes 69–78 and accompanying discussion.

III. The Future of Fast-Track, Tax Reform, and the Filibuster

A. A Framework for Tax Reform

The above discussion shows how the procedural rules of fast-track and its failure to produce immoderate policies make it an unlikely vehicle for reform in an area as complex and contested as tax. Yet so long as Congress tinkers with tax policy through procedures such as the reconciliation process, it may appease voters who expect to see some policy adjustments in light of sky-rocketing deficits and economic turmoil. So long as the party in government moves the ball by passing a tax bill, voter expectations for real tax reform will be dampened.

Fast-track increases the likelihood that some tax bill passes but decreases the likelihood of complex tax reform. A reconciliation tax bill might contain deep tax cuts, for instance, but not base-broadening efforts. Sunset provisions, another aspect of some tax reconciliation bills, worsen the tendency of the reconciliation process to stave off true tax reform. As discussed above, beginning in 2001, Republicans were able to push major tax cuts through an evenly divided Senate using the reconciliation process.[163] The Byrd Rule forced the tax cuts to sunset so that they would not increase the deficit beyond the budget window period. In the ensuing decade, the continued question of whether to repeal, extend, or partially extend those tax cuts took precious legislative resources away from tax reform discussions. Congress's use of temporary legislation also allowed it to continually "kick the can" through repeated extensions. So long as Congress has sunset provisions at its disposal, it can put off the question of tax reform. Meanwhile, it gets credit for acting, albeit in an ineffectual capacity.

With the above analysis in mind, how might fast-track processes be reformed in order to improve the quality of tax legislation? It could be argued that much of the limitations of the reconciliation process can be traced to its modest origins as a fallback measure for aligning policies with annual targets. The difficulty with enacting tax reform through reconciliation is that it simply was not designed to enact legislation of such magnitude and sophistication but was instead to apply to spending cuts.

It might be worth considering, then, a proposal that would recalibrate the subject of fast-track to relatively modest, simple changes to the Internal Revenue Code. Resurrecting an idea from the 1980s, perhaps fast-track should be limited to changing rates rather than the tax base.[164] Automatic rate decreases or increases might even kick in if revenue targets were not met.[165] This would make rate adjustment rather than substantive reform the default option, preserving the ability of committees to opt-out if they wished to pursue the latter. Such an approach might also provide political cover to accomplish the difficult task of raising rates. Automatic rate adjustments,

163 *See supra* notes 69–71 and accompanying text.

164 *See* Handler, *supra* note 122, at 1267; McLure, *supra* note 9, at 87–89; Federal Bar Ass'n, *supra* note 128, at 1583.

165 McLure, *supra* note 9, at 87.

however, would pose implementation difficulties. The rate changes would have to be carefully calibrated upfront in light of the goals of the annual budget resolution, taking into account not only revenue needs but redistribution concerns as well.

A rates-only rule for reconciliation legislation may also be overly broad since minor substantive tax legislation can withstand the hurried process of fast-track. For instance, an approach to fixing the fiscal crisis and the tax code in the *medium* term might involve relatively simple changes such as limiting personal itemized deductions.[166] Rather than an explicit bar on substantive reconciliation legislation in the tax context, perhaps it is enough to recommend to congressional members that reconciliation is best used to annually tweak revenues to meet the targeted level of the federal deficit or surplus or to employ stopgap reform efforts as the first phase of larger reform efforts.

The long-term economic picture, however, necessitates an overhaul of the individual and corporate tax codes, which will be much more complex than the aforementioned medium-term efforts and therefore ill-suited to existing fast-track frameworks. Indeed, use of reconciliation prior to such reform may impede its achievement. Many have observed that tax reform is long overdue, with the last major changes enacted in 1986. Others have noted that tax legislation is increasingly "thin," lacking major structural changes and focusing on rate changes, as was the case with the Bush tax cuts.[167] A divided Congress is a culprit of stagnation in the tax area, yet fast-track widens the division. The reconciliation process contributes to partisanship in several ways. By strengthening the party leaders, fast-track moves Congress away from its decentralized origins.[168] Fast-track also tends to produce partisan legislation that creates discord. Each party's attempt to redefine the scope of fast-track in the tax area sows further disharmony.

Although features of existing fast-track processes are problematic for tax reform, procedural frameworks aimed at achieving such reform should not be generally eschewed. Indeed, procedural frameworks are often employed in the budgetary context as precommitment devices so that lawmakers stay the course of a primary goal of deficit reduction in the face of competing desires to satisfy conflicting subordinate preferences.[169] A procedural framework may thus assist Congress's commitment to revenue-raising tax reform[170]

166 For suggestions of what medium-term tax reform might look like, see Edward D. Kleinbard & Joseph Rosenberg, *The Better Base Case*, 135 TAX NOTES 1237 (June 4, 2012).

167 Michael Doran, *Tax Legislation in the Contemporary U.S. Congress* (draft on file with author).

168 *See supra* notes 17–18 and accompanying text.

169 *See* Elizabeth Garrett, *A Fiscal Constitution with Supermajority Voting Rules*, 40 WM. & MARY L. REV. 471, 473–74 (1999).

170 The possibility of revenue-raising, rather than revenue-neutral, tax reform became much more likely after Representative Boehner announced House Republicans were open to such efforts in November 2012. Jeanne Sahadi, *Fiscal Cliff: Boehner's Opening Gambit*, CNN MONEY (Nov. 8, 2012), http://money.cnn.com/2012/11/07/news/economy/boehner-fiscal-cliff/index.html.

so that it does not deviate from that goal in working out the details of such reform. Additionally, a framework may also alleviate prisoners' dilemmas by coordinating action among congressional members so that an individual member is not tempted to defect from the larger goal in fear that one of her colleagues will do so first.[171]

A viable framework for tax reform must first contain agreement among congressional and executive party leaders upon the amount of revenues such reform will raise. Such an agreement will most likely be formulated in the context of an overall deficit reduction plan, which should consist of a mix of spending cuts and tax reform. Any set of procedures for tax reform will likely fail if this common goal has not yet been formulated. The achievement of tax reform will be more likely if there is agreement among the party leaders as to distributional goals. A compromise position, for instance, might be to maintain distributional neutrality, although the recent willingness of Republicans to limit tax deductions suggests they might be amenable to some level of heavier taxation on the wealthy, even if not through an increase in rates.

Once the revenue and distributional targets are in place, the question arises as to the desired level of specification of the details of tax reform. The House fast-track proposal discussed above specifies, albeit in partisan terms, the goals of tax reform, such as flattening rates.[172] Although upfront agreement between congressional party leaders and the President on the contours of tax reform will make reform more likely to occur, this would remove power from the tax-writing committees, the Joint Committee on Taxation, and Treasury, which might result in poorly formulated tax policy.[173] An approach that would mediate between these concerns would be to identify, through bipartisan agreement, areas of concern and opportunities for reform within the tax code, without specifying outcomes. This exercise would generate guideposts within which the tax entities could work without also eliminating their expertise. It would also reflect the reality that the achievement of any fine-grained detail as to the shape of tax reform would take many months to achieve, removing one of the primary advantages that a framework procedure offers. Additionally, the ability to bifurcate the budgetary negotiations and the committee markup sessions means that secrecy could be provided to encourage success of the former without sacrificing an open, collaborative approach for the latter.[174]

The formulation of a Committee on Tax Reform to coordinate and elaborate the details of tax reform would also be a positive development. Such a

171 Garrett, *supra* note 11, at 412.

172 *See supra* notes 106–11.

173 *See supra* notes 125–41; *see also* Garrett, *supra* note 11, at 439–40 ("[T]he tax law could suffer if lawmakers (and staffs) with less expertise took on more responsibility for drafting revenue laws.").

174 It is likely that congressional leaders will prefer a closed approach to budget negotiations while committee leaders will desire a transparent discussion in shaping the bill. *See* James C. Gould, *Not Your Father's Tax Reform: 2013 v. 1986*, 137 TAX NOTES 1097, 1099–100 (Dec. 3, 2012).

committee might consist of tax policy experts from the Joint Committee on Taxation, Treasury, academic institutions and think tanks, former congressional members, business and public interest representatives, and members of the tax-writing committees. The Committee on Tax Reform might be further subdivided into areas of expertise, such as corporate tax, international tax, and individual tax expenditures. A two-stage process could be employed, such that the Committee produces a discussion draft bill, which could then be modified by the Ways and Means Committee before being reported to the House.[175]

The failure of the "supercommittee" in resolving the budget crisis does not doom such an approach. One difficulty with the task set out for the supercommittee was its vastness.[176] By focusing on tax reform alone, the task becomes more feasible. Additionally, the supercommittee lacked allocation among spending, tax rates, and tax reforms to achieve the deficit reduction goal of $1.5 trillion and did not have a strong enough mandate to make such an allocation. This shortcoming could be overcome by having party leaders and the President decide upon such an allocation upfront, as discussed above.

As mentioned above, the truncated timelines of existing fast-track processes do not lend themselves to complex changes in the law and instead were designed to effectuate simple modifications to spending. Any framework for tax reform should instead look to history in setting a feasible timeline that reflects the pressures of reality without wasting valuable momentum or stretching across multiple Congresses. A one to two-year time horizon would likely meet these goals. Furthermore, if the framework utilizes a multistage approach, it would be beneficial to specify the time horizon for each stage.

Thus, to provide an example assuming a two-year time frame, a deadline for the discussion draft to be reported out of the Committee on Tax Reform might occur at the one-year mark. Ways and Means might have another three months before having to report the bill to the House. Any framework for tax reform should also set forth procedures to govern once the bill is reported out of the Ways and Means Committee. Because sufficient time has

175 This compromise approach would ensure compliance with the Origination Clause and would stave off accusations from the tax-writing committee that the process curtailed its jurisdiction. *See* ALLEN SCHICK, CONGRESS AND MONEY 78 (1980) ("In Congress, as in other institutions, it is very difficult to reform by taking power away from those who hold it. If provoked by over-reaching change, powerful interests can block not only intrusions on their own position but overall reform as well. The surer way to institute change, therefore, is to accept existing arrangements and not try to divest powerholders of their special advantages."). This phenomenon also motivates the inclusion of members of the tax-writing committees in the proposed Committee on Tax Reform.

176 Peter Diamond, Op-Ed., *Down with Supercommittees*, N.Y. TIMES, Nov. 19, 2012, at A27, *available at* http://www.nytimes.com/2012/11/20/opinion/down-with-supercommittees.html?_r=0 (discussing the supercommittee's task of addressing "a vast overhaul of the federal budget, a range so wide there was no hope of sufficiently addressing government inefficiencies").

been devoted in formulating the tax reform bill, expedited consideration, as is seen in existing fast-track frameworks, is not as problematic. Additionally, if party leaders and the executive have achieved broad bipartisan agreement over the revenue and distributional effects of tax reform, the concerns outlined above regarding majority voting largely fall away.[177] Thus, a framework for tax reform might limit debate in the House to forty hours and require the House to consider such legislation within thirty days of being placed on the calendar. After the bill is received in the Senate, the Senate Committee on Finance then could have two months to report the bill out of Committee. Instead of resorting completely to majority voting in the Senate, the framework might foreclose cloture votes upon amendments and motions to proceed while preserving a cloture vote on the final consideration of the bill.[178] The framework for tax reform could also provide for expedited conference proceedings, if necessary, in order to achieve passage by both houses and signature by the President before the end of the designated two-year period.

This proposed framework aims to draw upon existing processes without also importing those features that are harmful to the achievement of tax reform. Its success is predicated upon initial agreement among congressional leaders and the President as to the revenue and distributional impacts of tax reform. Although such a goal is challenging, its ability to avoid vague, nonbinding aspirations without also necessitating enumeration of the particularities of reform makes it achievable. Guided by this broad agreement, the framework may thus avoid pitfalls of prior procedural solutions.

B. Implications for the Filibuster

The evolution of reconciliation also provides valuable insight into the current state of the filibuster. In the latter quarter of the twenty-first century, most contemporary acts receive three-fifths of senatorial support, the number necessary to invoke cloture.[179] Moreover, the incidence of filibustering has dramatically increased in the last several decades.[180] Yet, the filibuster, a once unwavering hallmark in the Senate, has never been more tenuous than today, perhaps due to its constant invocation. Consistent threats of a "nuclear" or "constitutional" option lay bare that the filibuster can likely be eliminated by a simple majority vote of the Senate.[181] The fragility of the filibuster is thus well known.

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177 *See supra* notes 141–45 and accompanying text.

178 These features are similar to those in the recently passed House proposal to provide for expedited consideration of a tax reform bill. *See supra* notes 95–104 and accompanying text.

179 *See* GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER 28 (2006) (finding that, between 1975 and 1994, approximately 95% of major legislation not subject to limited debated passed with at least a three-fifths voting majority).

180 Sarah A. Binder & Thomas E. Mann, *Slaying the Dinosaur: The Case for Reforming the Senate Filibuster*, 13 BROOKINGS REV. 42, 42–45 (1995) (using the number of cloture votes to document a dramatic increase in filibustering since the 1950s).

181 *See supra* note 93 and accompanying text.

In the context of tax legislation, however, the filibuster has suffered a perhaps fatal blow. The high political costs of eliminating the filibuster outright have led the Senate to seek other ways to diminish minority rights. By functioning as an escape valve from strict supermajority requirements, the reconciliation process has perhaps given the filibuster the flexibility necessary to its survival. Paradoxically, getting rid of this safety valve could lead to the filibuster's demise.

The increasing expansion of the reconciliation process thus underscores the precariousness of strict supermajority rule but also its persistence (in an albeit weakened form). Which dynamic will prevail remains to be seen. In the past decade, vast amounts of legislation, including massive health care reform and several of our nation's largest tax cuts, have passed through the reconciliation process without supermajority support. Reconciliation's application will extend to wider contexts in the coming years, as procedural mavericks exploit its power to move legislation quickly without the crippling need to maintain supermajority support. Nonetheless, drafters' careful, almost artful, conformity to the highly specific and arcane requirements of the fast-track process indicate that supermajority norms are still very much alive in the Senate.

Still, the optionality of the filibuster in the tax context presents a new dimension to the debate over the filibuster's constitutionality and wisdom. Obscure yet paramount developments in the reconciliation process mean that a simple majority can now invoke or eliminate the filibuster in the context of tax increases and decreases, in accordance with party preferences. One of the justifications for the current Senate supermajority rules, and indeed for procedural rules in general, is the "veil of ignorance" behind which they stand—winners now may later be losers. With that knowledge, it is thought that the legislature will create fair and just rules.[182]

In the context of the filibuster, its threat to future, unknown minorities causes known majorities to abide by it. In contrast, the perception of gamesmanship over the contested boundaries of the reconciliation process sows distrust among congressional members. This dynamic destabilizes those policies pushed through fast-track in an aggressive manner and also creates bad blood that makes future bipartisan efforts less likely. In so doing, it may also ultimately cause the precariousness of strict supermajority rule to trump its persistence, thus leading to the demise of the filibuster.[183] More broadly, it

182 *See* JOHN RAWLS, A THEORY OF JUSTICE 12, 136–42 (1971); Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 400 (2001) (arguing that the Federal Constitution contains a number of rules that may be analyzed as veil rules, such as the Ex Post Facto and Bill of Attainder Clauses, among others).

183 I do not take a position here as to whether this is a positive development. Proponents of the filibuster support its deliberative effects and ability to protect the minority whereas opponents would attack it as a source of congressional gridlock. I will note, however, that recent empirical evidence does not strongly support the latter proposition. *See* BINDER, *supra* note 1, at 82 ("The severity of the filibuster threat showed little effect on the frequency of deadlock once bicameral differences and party polarization and control were taken into account.").

may destabilize Senate rules. Although some may ultimately welcome eradication of the filibuster, in order to avoid unfavorable consequences for the Senate as an institution, filibuster reform should occur through transparent, bipartisan efforts, rather than the backdoor, piecemeal approach through reconciliation currently being pursued by simple majorities.

Conclusion

To return to the subject of this symposium, we must ask whether we would face less stalemate over tax policy with fast-track as an option than without it. The fast-track process, due to features antithetical to tax reform, will tend to produce shallow tax legislation instead of deep reform, but perhaps such legislation is better than none at all. Reliance on an increasingly flexible reconciliation process, however, has contributed to a legislative environment hostile to tax reform. Although fast-track may produce more churning of the Tax Code, it does not move our tax policy forward to meet the grave challenges of the twenty-first century and indeed impedes our ability to do so.

Yet the forecast for tax reform need not be dire. The unfathomable growth of the deficit necessitates raising substantial revenue. The growing consensus among economists and other tax experts is that this will require significant alteration to, or broadening of, the tax base. Although reconciliation may have contributed to the stymied growth of our tax system for the past three decades, the exigency of tax reform may prevent Congress from continuing to kick the can. In order to accomplish lasting tax reform that also addresses structural problems in the current tax system, however, congressional members will likely have to develop new procedural frameworks. I have suggested what such processes might look like, and the ways in which they depart from existing fast-track processes or proposals.

Turning to the legislative process in general, the parameters of reconciliation have proven so controversial as to contribute to the general destabilization of Senate supermajority rules. The ability of a simple majority to essentially curb or invoke the filibuster through the budget resolution has created Senate rules that no longer seem to operate behind a veil of ignorance. Separate and apart from one's normative view of the filibuster, this dynamic threatens the legitimacy of Senate practices. It is unlikely that reconciliation will again be relegated to the sidelines as its drafters originally intended, yet true filibuster reform should come from coordinated agreement across party lines in order to avoid inflicting damage upon the institution and further charging an already partisan atmosphere.