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# A BALANCED BUDGET AMENDMENT FIT FOR THE CONSTITUTION: THE ELIMINATION OF PARTISANSHIP AND SUBSTANTIVE PROVISIONS

SHANE NICHOLS\*

## I. INTRODUCTION

One Senate report warns that the government's persistent budget deficits and unwillingness to act in a fiscally responsible manner threatens America's long-term prosperity.<sup>1</sup> It warns that the interest payments on the swelling national debt, three times what it was ten years ago, is draining funding for education and healthcare, and suggests that a balanced budget amendment is needed to constrain further debt increases.<sup>2</sup> Likewise, a report in the House of Representatives states that the amendment is needed to end the era of deficit spending and protect future generations, which have no formal representation in the political process, from having to bear the costs of the current culture of fiscal irresponsibility.<sup>3</sup> One Congressman warns that, "in the very near future . . . we will have financial collapse [because] . . . [e]ven a country as wealthy and powerful as the United States of America cannot continue to pile debt after debt after debt upon the head of its people."<sup>4</sup>

These comments were not made in the wake of the current economic crisis now plaguing the United States; they were made in 1995, when the national debt was \$10 trillion lower and the United States was entering into an economic boom, which led to a budget surplus.<sup>5</sup> As they have many times before, politicians are

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1. S. REP. NO. 104-5, at 6 (1995).

2. *Id.*

3. H.R. REP. NO. 104-3, at 4-5 (1995).

4. Joe Barton, *The Balanced Budget Amendment: Ending the Federal Spending Binge*, HERITAGE FOUND. (Jan. 15, 1995), <http://www.heritage.org/research/lecture/the-balanced-budget-amendment-ending-the-federal-spending-binge-bar>.

5. See OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2012 350 (2011) available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/hist.pdf> [hereinafter BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2012] (showing a budget surplus

now driving for a balanced budget amendment (“BBA”) to the Constitution.<sup>6</sup> To this end, the proposals that have been offered in the past must be reexamined, keeping in mind that an unprecedented amount of debt incurred in the last decade and the ever-changing global economy demands a fresh perspective on how to ensure the fiscal responsibility that has eluded the country for decades.

### *Laying the Foundation*

This Comment proposes a BBA that is consistent with traditional constitutional principles, free from partisan fiscal ideology, and effective in mandating a balanced budget free from any political “maneuvering”<sup>7</sup> meant to circumvent the provision’s requirements. This Comment does not aim to enter the debate as to whether the United States should enact such an amendment. Rather, it is written under the presumption that public sentiment will demand such an amendment in the near future.<sup>8</sup> It is of the utmost importance that the enacted amendment be viewed as legitimate by the American public and all major political groups.<sup>9</sup> This is because enacting a balanced budget amendment that includes partisan policy or ideology would inevitably delegitimize the constitutional provision in the eyes of many citizens and politicians, leading to significant political, social, and economic

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for the years 1998-2001).

6. See Alan Greenblatt, *After 15 Years, GOP Revives Balanced Budget Idea*, NPR (Aug. 2, 2011), <http://www.npr.org/2011/08/02/138900281/after-15-years-gop-revives-balanced-budget-idea> (reporting on a renewed effort by Republicans in particular to get a BBA enacted in an effort to curb the extreme deficit spending that has become central to political discourse in the United States).

7. See Theodore P. Seto, *Drafting a Federal Balanced Budget that Does What It Is Supposed to Do*, 106 YALE L.J. 1449, 1453-55 (1997) (explaining that while some proponents want to simply require a balanced federal budget, others are intent on enacting an “antifederalist” amendment that would limit the size and power of the federal government). Also, a poorly drafted BBA that would allow Congress to remove certain debts or expenses from the budget calculations could result in budgets that are balanced on paper, but make few real changes. *Id.* at 1493. The author suggests a well-drafted BBA should be enforceable, allow enough flexibility to accommodate necessary changes in the budget, be politically neutral, and should not disrupt the balance of power in the existing constitutional system. *Id.* at 1469.

8. See Greenblatt, *supra* note 6 (stating how public opinion polls show that the public generally supports such an amendment). However, when informed that the amendment might cut entitlements or education, support drops off significantly. *Id.*

9. See Brendon Troy Ishikawa, *The Stealth Amendment: The Impending Ratification and Repeal of a Federal Budget Amendment*, 35 TULSA L.J. 353, 382 (2000) (stating that “constitutional change . . . must rest on the widespread public approval if we continue to claim to be a democracy”).

stress to the country.<sup>10</sup>

This issue is particularly salient in light of the financial problems currently plaguing the United States<sup>11</sup> and Europe.<sup>12</sup> In response to this unparalleled economic crisis, the ever-present calls to enact a balanced budget amendment have gained momentum not seen since the middle of the 1990s, culminating in votes for BBA proposals in both the House and Senate in 2011.<sup>13</sup>

The European Union already put forth such a provision. Germany, which added a “debt brake” to its constitution in 2009,<sup>14</sup>

10. See *id.* at 353-54, 370-71, 382 (predicting that a BBA will inevitably be ratified, only to be repealed shortly thereafter due to misuse by politicians, unworkable provisions, and eroding public support). The author also states that “[w]aivers and accounting tricks will further erode respect for the amendment to the extent that Congress and the public consider the amendment ineffective.” *Id.* at 370.

11. See U.S. SENATE PERMANENT SUBCOMM. ON INVESTIGATIONS, U.S. SENATE, WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 1-11 (2011), available at [http://www.levin.senate.gov/imo/media/doc/supporting/2011/PSI\\_WallStreetCrisis\\_041311.pdf](http://www.levin.senate.gov/imo/media/doc/supporting/2011/PSI_WallStreetCrisis_041311.pdf) (explaining how in fall 2008, America suffered a tremendous economic collapse where debt markets froze, stock markets plunged, and storied financial firms failed). This collapse plunged the country into a recession in which it is still mired. *Id.* The report cites a number of factors that led to the fall, including high-risk lending, regulatory failures, inflated credit ratings, and investment bank abuses. *Id.*

12. See *Economic Crisis: Europe on the Brink*, THE WEEK (Sept. 30, 2011), <http://theweek.com/article/index/219731/europe-on-the-brink> (exploring the current state of the crisis in Europe and the events that led to it). The crisis started when Greece, which had accumulated debt equal to 160 percent of its GDP, was unable to meet its debt payments and required a \$140 billion bailout from other euro zone members. *Id.* Fear then spread among investors and creditors that other heavily indebted EU countries, such as Spain, Ireland, Portugal, and Italy, would be unable to pay their debts in the future as well. *Id.* These worries have caused the price of borrowing to increase, making a default even more likely. *Id.*; see also Nicholas Kulish, *Germany Approves Bailout Expansion, Leaving Slovakia as Main Hurdle*, N.Y. TIMES (Sept. 29, 2011), <http://www.nytimes.com/2011/09/30/world/europe/with-germany-in-fold-slovakia-is-next-to-vote-on-euro-fund.html> (reporting that Germany has agreed to increase their bailout funds to \$287 billion, subject to approval by all seventeen EU countries, which is viewed as a significant step in avoiding a Greek default that would have a significant negative ramifications for the EU economy).

13. See Budget Control Act of 2011, Pub. L. No. 112-25, § 201, 125 Stat. 240, 250-51 (mandating a vote in the House and Senate on a “[j]oint resolution proposing a balanced budget amendment” sometime between Sept. 30, 2011 and Dec. 31, 2011).

14. See Derek Scally, *Debt Brakes and Sustainable Fiscal Reforms Berlin’s Price to Support Euro*, IRISH TIMES (Jan. 29, 2011), <http://www.irishtimes.com/newspaper/ireland/2011/0129/1224288526685.html> (explaining how the German balanced budget provision works and why it was enacted). The provision limits deficit spending to .35 percent of the government’s GDP after 2016, and requires a completely balanced budget after 2020. *Id.* The provision allows for additional borrowing in times of

has called for all other European Union<sup>15</sup> members to adopt balanced budget measures to their own constitutions in a drive to curb the fiscal irresponsibility that placed Union members in their current predicament.<sup>16</sup> The Union listened, and a new treaty that requires governments to run balanced budgets or face sanctions was signed by nearly all of its members.<sup>17</sup> What was once regarded as a proposal suited more for political rhetoric than actual economic policy is rapidly becoming a popular approach to tackling the debt issues that have encumbered the global economy.<sup>18</sup> The political landscape of the United States, however, presents obstacles far different than those in Europe.

Once the context of the BBA issue is properly established,<sup>19</sup> Section II of the Comment identifies the general constitutional

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emergency and over the course of an economic cycle, but mandates that the borrowing be accompanied by a repayment plan. *Id.*

15. *Map of Euro Area 1999-2011*, EUROPEAN CENTRAL BANK, <http://www.ecb.int/euro/intro/html/map.en.html> (last visited Feb. 6, 2013). The European Union is a group of twenty-seven European countries. *Id.* This is not to be confused with the euro zone, which is a group of seventeen countries within the European Union that share the euro as their currency. *Id.* The euro zone members include Belgium, Germany, Estonia, Finland, Ireland, Greece, Spain, France, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovakia, and Slovenia. *Id.*

16. See Nicola Clark, *Sarkozy and Merkel Vow Fiscal Unity for Euro Nations*, N.Y. TIMES (Aug. 16, 2011), <http://www.nytimes.com/2011/08/17/business/global/merkel-arrives-in-paris-to-begin-economic-talks-with-sarkozy.html> (reporting that the German chancellor and French president have proposed that all seventeen EU countries implement balanced budget provision to their own constitutions).

17. See Paul Taylor & Julien Toyer, *Europe Signs Up to German-Led Fiscal Pact*, REUTERS (Jan. 31, 2012), <http://www.reuters.com/article/2012/01/31/us-eu-summit-idUSTRE80S0SR20120131> (explaining how twenty-five of twenty-seven European Union states have agreed to the pact, which centers around budget discipline and contains provisions that require members to adhere to EU budget deficit limits and enshrine balanced budget rules into their laws).

18. See Chye-Ching Huang & Hannah Shaw, *Proposed Balanced Budget Amendment Is Extreme by International Standards*, CENTER ON BUDGET AND POLY PRIORITIES 2-3 (Dec. 12, 2011), <http://www.cbpp.org/files/12-6-11bud.pdf> (explaining that Switzerland, Germany, Italy, and Spain have all adopted BBAs in light of the European Union public debt crisis, and European leaders expect all member nations to enshrine similar BBAs into their own constitutions in the near future). The article goes on to explore the difference between the proposals in the United States compared to those in Europe. *Id.* at 1-3, 7-8.

19. A brief synopsis of the United States' amendment process may be appropriate. An amendment to the Constitution requires two-thirds of both Houses to approve the measure, which then gets sent to the states for ratification. U.S. CONST. art. V. Either the legislatures of three-fourths of the states or ratifying conventions in three-fourths of the states must then approve the amendment for it to become part of the Constitution. *Id.* The amendment may also originate in the states, but this Comment focuses on proposals that originate within Congress. *Id.*

principles an amendment must adhere to, and why they differ from that of ordinary legislation.<sup>20</sup> Section III analyzes past and current BBA proposals, as well as those currently enacted in Europe, to identify the elements common to such proposals and the goals they seek to effectuate. These elements will then be evaluated according to the constitutional considerations discussed in Section II. The potential consequences of enacting these proposals will also be discussed. Section IV synthesizes Sections II and III of this Comment to propose a purely “procedural” BBA that would achieve the fiscal goals of the United States government without being burdened by political partisanship or overly constraining guidelines that would make the amendment unworkable or ineffective.

## II. BACKGROUND

### A. *The Return of the Balanced Budget Amendment*

In the face of a global financial crisis and the federal government hitting its debt ceiling of over \$14 trillion, many politicians refused to authorize any additional borrowing unless cost-saving measures were enacted.<sup>21</sup> These often contemptuous debates between politicians culminated in The Budget Control Act of 2011,<sup>22</sup> which raised the debt ceiling while implementing spending cuts achieved through various means.<sup>23</sup> The legislation

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20. See James M. Buchanan, *Clarifying Confusion About the Balanced Budget Amendment*, 48 NAT'L TAX J. 347, 349-50 (1995) (defining constitutional politics as “choices among rules” and ordinary politics as “choices within rules”); see also David E. Kyvig, *Refining or Resisting Modern Government? The Balanced Budget Amendment to the U.S. Constitution*, 28 AKRON L. REV. 97, 124 (1995) (paraphrasing John Marshall in saying “[t]hose supporting or opposing a balanced budget amendment should never forget it is a constitution they are amending”). This is offered as a reminder that there is a permanency to an amendment not present in ordinary legislation, and society is stuck with the consequences of whatever decision it makes. *Id.*

21. See Paul Davidson, *A Primer on the Debt-Ceiling Debate*, USA TODAY, [http://www.usatoday.com/news/washington/2011-07-28-debt-ceiling-questions\\_n.htm](http://www.usatoday.com/news/washington/2011-07-28-debt-ceiling-questions_n.htm) (last updated July 29, 2011) (explaining how Republicans are using the debt-ceiling vote as a way to demand cuts in the federal deficit and examining the potential ramifications of defaulting on debt payments because no funds are available); see also Mark Sappenfield, *Debt-Ceiling Crisis: Why Won't Republicans Compromise?*, CHRISTIAN SCI. MONITOR (July 30, 2011), <http://www.csmonitor.com/USA/Politics/The-Vote/2011/0730/Debt-ceiling-crisis-Why-won-t-Republicans-compromise> (explaining how President Reagan and President H.W. Bush agreed to tax hikes in 1982 and 1990 in exchange for spending cuts that never materialized, and how Republicans are now requiring guaranteed cuts before voting to raise the ceiling). The BBA proposal is way for Republicans to ensure future cuts are made. *Id.*

22. § 201, 125 Stat. at 250-51.

23. The law increases the debt ceiling somewhere between \$2.1 and \$2.4 trillion and mirrors that in spending cuts. Jeanne Sahadi, *Debt Ceiling: What*

also contained a provision mandating votes on a BBA proposal in both the House and Senate.<sup>24</sup> But, the vote failed in both houses.<sup>25</sup>

Republicans in particular have had a BBA on their agenda for decades,<sup>26</sup> but the global financial crisis and the tremendous deficit spending of the United States government has given the proposal a particularly potent resurgence. Save for a few examples, the BBA proposals that have circulated Congress on a yearly basis typically have too little support to be debated seriously.<sup>27</sup> But in 1982,<sup>28</sup> 1995, and 1997, the amendment came particularly close to being sent to the states for ratification. In 1995 the amendment passed in the House with the required two-thirds vote, but was defeated in the Senate 66-34, only a single vote shy of the necessary super-majority.<sup>29</sup> In 1997, the measure

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*the Deal Will Do*, CNNMONEY (Aug. 2, 2011), [http://money.cnn.com/2011/08/01/news/economy/debt\\_ceiling\\_breakdown\\_of\\_deal/index.htm?iid=EL](http://money.cnn.com/2011/08/01/news/economy/debt_ceiling_breakdown_of_deal/index.htm?iid=EL). The initial \$917 billion in cuts are achieved by capping domestic and defense spending over ten years. *Id.* A bipartisan committee will then propose another \$1.2 to \$1.5 trillion in cuts over the next ten years, and the debt ceiling will be raised in direct proportion. *Id.* If the committee cannot agree on a spending cut plan, or Congress votes down the proposal, \$1.2 trillion in cuts equally across defense and non-defense spending will automatically initiate. *Id.* However, programs that help low-income citizens such as food stamps, Social Security, Medicaid, and others will be exempt from the cuts. *Id.*

24. § 201, 125 Stat. at 250-51.

25. *See House Rejects Balanced Budget Amendment*, USA TODAY (Nov. 18, 2011), <http://www.usatoday.com/news/washington/story/2011-11-18/balanced-budget-amendment-house-vote/51297960/1> (reporting that the first House vote on a BBA in sixteen years failed to garner the required two-thirds votes ending in a 261-165 vote in favor of the BBA). The measure fell twenty-three votes short of passing. *Id.*; *Senate Rejects Two Balanced Budget Amendments*, USA TODAY (Dec. 14, 2011), <http://www.usatoday.com/news/washington/story/2011-12-14/senate-balanced-budget-amendment-votes/51914134/1> (reporting that both the Democrat and Republican proposals failed to garner a two-thirds vote, with all but a single Republican voting against the Democratic proposal and all Democrats voting against the Republican proposal).

26. Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1107-08 (1998). “Federal legislators have considered the merits of balanced budgets in congressional hearings every year for almost two decades . . .” *Id.*

27. *Id.* at 1108.

28. *See* S.J. Res. 58, 97th Cong. (1982) (proposing an amendment that would require Congress to adopt a budget each year in which total outlays do not exceed total receipts unless Congress reaches a three-fifths vote to allow otherwise, and also requiring tax increase limitations, and a cap on the debt ceiling); *see also* Ernest Istook, *Considering a Balanced Budget Amendment: Lesson from History*, HERITAGE FOUND. (July 14, 2011), <http://www.heritage.org/research/reports/2011/07/considering-a-balanced-budget-amendment-lessons-from-history> (discussing how the 1982 BBA proposal passed the Senate 69-31, the first time such a proposal has ever passed either body of Congress, but was never passed in the House).

29. *See* H.J. Res. 1, 104th Cong. (1995) (proposing a BBA that forbids total

was defeated in the Senate by the same margin.<sup>30</sup> Proponents of these amendments aimed to curb the constant deficit spending and stop the accumulation of debt, the same reasons cited by today's advocates.<sup>31</sup> The context, however, has changed drastically.

At the end of 1995, the total federal deficit stood at almost \$5 trillion after the deficit for the year reached \$163.9 billion.<sup>32</sup> A strong economy and increased tax revenue brought the deficit down to \$22 billion in 1997, before four straight years of a budget surplus.<sup>33</sup> Support for the amendment faded from the political forefront as the nation prospered.<sup>34</sup> Now, the modern debate has returned in the wake of a struggling economy, four straight years with deficits over \$1 trillion, and a total national debt of over \$15 trillion.<sup>35</sup> These unprecedented circumstances compel a fresh evaluation of the arguments and rationales offered in past discussions.

However, the United States is not alone in their debt troubles,

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outlays from exceeding total receipts in a fiscal year unless three-fifths of each house of Congress votes to allow a specific excess). The other provisions in the bill include a prohibition on increases of the public debt limit unless three-fifths of each House approves, a prohibition on bills that increase revenue unless approved by a majority in each House, and the allowance of a waiver to the amendment when there is a declaration of war in effect or the country faces military threat. *Id.*; see also Istook, *supra* note 28 (recounting how this was the only BBA proposal the House had ever given super-majority approval for, and how it ultimately failed in the Senate by a single vote).

30. See S.J. Res. 1, 105th Cong. (1997) (proposing a BBA that parallels the 1995 version that passed the house); see also Helen Dewar & Eric Pianin, *Budget Amendment Barely Loses in Senate*, WASH. POST (Mar. 5, 1997), <http://www.washingtonpost.com/wp-srv/politics/special/budget/stories/030597.htm> (highlighting how the BBA proposal lost by a single vote in the Senate for the second time in three years, and examining the political discourse surrounding the final vote).

31. See, e.g., *Balanced Budget Amendment Fails to Clear House Vote*, FOXNEWS.COM (Nov. 18, 2011), <http://www.foxnews.com/politics/2011/11/18/house-rejects-balanced-budget-amendment/> (reporting that the proponents of the current proposal, a mirror of the 1995 version, argue that the amendment is needed to stop Congress from overspending and overtaxing, which is hurting the economy); JAMES V. SATURNO & MEGAN SUZANNE LYNCH, CONG. RESEARCH SERV., R41907, A BALANCED BUDGET CONSTITUTIONAL AMENDMENT: BACKGROUND AND CONGRESSIONAL OPTIONS 5-6, 9-10 (2011) (citing the arguments of BBA proponents from the 1980s and 1990s as support for proponents' platform in the current debate).

32. BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2012, *supra* note 5, at 22, 140.

33. *Id.* at 5, 22.

34. See Dewar & Pianin, *supra* note 30 (describing how "the amendment has lost much of its punch as the federal deficit has declined sharply in recent years and White House and GOP negotiators inch toward a possible balanced budget deal this year").

35. BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2012, *supra* note 5, at 140.



as the European Union also struggles with its own financial crisis.<sup>36</sup> To ensure the Union's future stability and fight the debt that has wreaked havoc upon its economy, Germany led the way in creating a treaty that requires all member countries to implement balanced budget provisions into their constitutions or laws.<sup>37</sup> This pact will go into effect when twelve of the seventeen euro zone members ratify the agreement.<sup>38</sup> Two members, Germany and Switzerland,<sup>39</sup> previously enacted balanced budget provisions in an effort to curb their own debt levels.<sup>40</sup> Several others, Italy, Spain, and France, have already initiated the process and have started to move amendments through their own political systems.<sup>41</sup> These European models provide valuable insight on

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36. *Economic Crisis: Europe on the Brink*, *supra* note 12.

37. Taylor & Toyer, *supra* note 17.

38. See John Irish & Elizabeth Pineau, *France Gives Initial Green Light to EU Fiscal Pact*, REUTERS (Sept. 19, 2012), <http://www.reuters.com/article/2012/09/19/us-eu-france-idUSBRE88IOL920120919> (explaining how Prime Minister Jean-Marc Ayrault's cabinet has approved of the compact and is set for an official ratification in parliament soon). If twelve of the countries ratify the agreement, it will go into effect January 1, 2013. *Id.*

39. Switzerland is not a euro zone member; it uses its own currency, the Swiss Franc. *Switzerland and the EU*, INT'L SERVICE OF THE SWISS BROADCASTING CORP. (Nov. 17, 2009), [http://www.swissinfo.ch/eng/country\\_information/country\\_profile/Switzerland\\_and\\_the\\_EU.html?cid=5764106](http://www.swissinfo.ch/eng/country_information/country_profile/Switzerland_and_the_EU.html?cid=5764106).

40. Scally, *supra* note 14; see Alain Grier, *The Debt Brake – The Swiss Fiscal Rule at the Federal Level*, SWISS FED. FIN. ADMIN. (2011), available at [http://www.efv.admin.ch/e/downloads/grundlagenpapiere\\_berichte/arbeiten\\_oekonomenteam/workingpapers/Working\\_Paper\\_15\\_e.pdf](http://www.efv.admin.ch/e/downloads/grundlagenpapiere_berichte/arbeiten_oekonomenteam/workingpapers/Working_Paper_15_e.pdf) (examining the reasons for enacting the 2003 Swiss debt brake, how the measure works, and the implications of the rule on public debt and deficits). The Swiss debt brake requires that the budget be balanced each year, limiting expenditures “to the amount of structural (or cyclically adjusted) revenues.” *Id.* at 12. This adjustment takes into consideration the country's current economic position, allowing deficits during recessions and requiring surpluses during times of economic strength. *Id.* at 12-14. Any deficits incurred must be factored into future expenditure calculations so that income and expenditure maintains balance over time. *Id.* at 12-15.

41. See Daria Contrada, *Italian Government Proposes Bill on Balanced Budgets*, WALL ST. J. (Sept. 8, 2011), <http://online.wsj.com/article/BT-CO-20110908-705597.html> (reporting that in response to the country's dangerous levels of debt, the Italian Senate has approved a bill that would implement a balanced budget amendment to the constitution). The plan aims to balance the budget in 2013, subject to its approval by the lower house. *Id.*; see also David Roman, *Spain Cements Deficit-Cap Deal*, WALL ST. J. (Aug. 27, 2011), <http://online.wsj.com/article/SB10001424053111904787404576531570603579998.html> (reporting that the Spanish government has agreed on a plan to implement an amendment to their constitution that would include a budget-deficit cap, and pass a separate law limiting deficits to 0.4 percent of GDP starting in 2020); see also Clark, *supra* note 16 (reporting French president Nicolas Sarkozy's support of the plan to enact BBAs for all EU

what specific provisions a BBA may contain, and how the American proposals compare. In addition, the experiences of Germany and Switzerland provide actual empirical evidence to analyze, something not available in previous BBA discussions.

### B. *The Great Debate*

In light of the recent BBA vote in Congress, American politicians are again debating the controversial topic of what a proposed amendment should look like. The term “balanced budget amendment” is a generic term that does not prescribe any particular method of operation.<sup>42</sup> It merely represents the idea that the government should be constitutionally bound to spend no more than it takes in.<sup>43</sup>

Typical proposals include provisions that go beyond simply requiring that government outlays not exceed government receipts. They include provisions that attempt to guide fiscal policy.<sup>44</sup> The leading BBA proposals of the past and present are widely viewed as vehicles to not only achieve a balanced budget, but to also limit the overall size of government and make it substantially more difficult for Congress to increase taxes.<sup>45</sup> These partisan-based goals are typically enacted through “substantive” BBA provisions,<sup>46</sup> which dictate the means by which the

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members).

42. See Jeffrey A. Needelman, *Deconstructing the Balanced Budget Amendment: Fiscal Folly, Monetary Madness*, 44 UCLA L. REV. 1289, 1294 (1997) (stating “[t]he Balanced Budget Amendment conceptualizes government’s role in the economy as a metaphoric ledger of outlays and receipts. Absent from this picture, however, is an adequate image of the unit upon which this ‘balancing’ of taxing and spending is to take place”).

43. The amendments being proposed typically define a balanced budget as one where outlays, payments being made, do not exceed receipts, money paid to the government. See e.g., H.J. Res. 10, 112th Cong. (2011) (requiring a balanced budget where “[t]otal outlays for any fiscal year shall not exceed total receipts for that fiscal year”).

44. See e.g., H.J. Res. 1, 104th Cong. (1995) (requiring a three-fifths majority vote to raise the debt ceiling and majority approval in each house to allow any bill containing revenue increases to become law); see also S.J. Res. 1, 105th Cong. (1997) (requiring majority vote of each house to increase revenue); see also S.J. Res. 4, 112th Cong. (2011) (implementing a provision that caps spending at 20 percent of the prior year’s GDP); see also H.J. Res. 1, 112th Cong. (2011) (requiring a three-fifths vote in each house to approve any bill that imposes new taxes, increases tax rates, or increases total revenue).

45. See Staudt, *supra* note 26, at 1148 (explaining that “[m]any . . . balanced budget advocates have expressed deep discontent with the growth in the size of the national government . . . [and] [i]n hope of constraining the federal government . . . have zealously pursued a balanced budget amendment as a means for taming the leviathan”). *Id.*

46. See *The Balanced Budget Amendment: An Inquiry into Appropriateness*, 96 HARV. L. REV. 1600, 1603-05 (1983) [hereinafter *Appropriateness*] (criticizing S.J. Res. 58, *supra* note 28, because the

government is to achieve a balanced budget.<sup>47</sup> For example, a requirement that the government cannot raise taxes without three-fifths approval in both the House and Senate is an example of a substantive provision.<sup>48</sup> Where, on the other hand, a requirement that the government must enact a balanced budget by 2020 is “procedural,” in that it sets an overall constraint by limiting spending, but does not dictate how money will be spent.<sup>49</sup> The difference between a “substantive” and “procedural” provision is central to this Comment’s proposal, as it will ultimately show that a purely procedural BBA would be in the country’s best interest.<sup>50</sup>

Because a BBA must adhere to constitutional principles, it must go beyond the requirements of an ordinary piece of legislation.<sup>51</sup> A constitutional amendment must embody an ideal that is common to the American public as a whole, not just a certain political group.<sup>52</sup> If instead, a BBA rooted in some sort of partisan ideology were enacted, it would risk being delegitimized

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amendment’s requirements—a balanced budget, tax limitations, and a fixed debt ceiling—are substantive provisions that “follow from a particular economic theory”). The author does not propose any alternatives, he simply offers a critique on the legislation at issue. *See generally id.*

47. *Id.*

48. Buchanan, *supra* note 20, at 351. The author was referring to a version of a BBA debated in the House, but not passed, in 1995. *Id.*

49. *See id.* at 350-51 (distinguishing a procedural rule as one that mandates the “procedures through which participants are allowed to reach and to carry out decisions,” from a substantive one that “acts directly on the outcomes”).

50. *See generally id.* (offering a response to the common criticisms of requiring a BBA rather than achieving such through existing legislative means). The author, a Nobel Prize-winning economist and BBA proponent, frames his article by explaining the problems deficit spending cause for future generations, and how politicians ignore these costs in order to satisfy the current electorate. *Id.* He argues that politicians are unwilling to take on unpopular deficit reduction because there is no way to ensure the measures will stay in place and not be overturned by future politicians who take power. *Id.* He suggests an amendment is needed to bind legislators to a balanced budget and eliminate the electoral rotation that makes enduring fiscal policy impossible. *Id.* However, the amendment must not include “substantive direction as to how the federal budget [is] to achieve and maintain balance . . . [as] any such rule would amount to constitutionalizing a specific economic philosophy. *Id.*

51. *See Seto, supra* note 7, at 1177 (stating that “a well-drafted balanced budget amendment should preserve existing constitutional provisions and doctrines whenever possible”); *Appropriateness, supra* note 46, at 1601, 1603, 1606 (describing constitutional amendments as things that address flaws in the process or structure of government and embody a lasting principal, not a particular economic theory). “Economic policy is entirely alien to the enduring principles defined in the Constitution.” *Id.* at 1606.

52. *See Seto, supra* note 7, at 1475-76 (proposing that a BBA should not attempt to further any political goals, like the “antifederalist” provisions of proposed BBAs that have been circulated through Congress previously).

in the eyes of the American citizens and politicians who are politically opposed to it.<sup>53</sup> This type of fundamental disagreement is suited for the legislative process, not the realm of constitutional debate.<sup>54</sup> Much of the BBA discourse of the past and present focuses on the economic merits of the proposals themselves, but fails to take these critical concerns into consideration.<sup>55</sup>

The fragile current state of the country and the world at large make it imperative that if a BBA is enacted, it needs to be done right.

### III. ANALYSIS

In order to define what a BBA should look like, this Comment first identifies the principles to which an amendment must adhere, so it does not run afoul of the Constitution and delegitimize the provision. Once this is established, the Comment draws upon historical and current BBA proposals to pinpoint the characteristics common to BBAs and evaluate them according to constitutional considerations. This analysis results in a BBA proposal that both respects the Constitution and is an effective framework for achieving a balanced budget.

#### A. Constitutional Considerations

The Constitution is a rare entity that commands the respect of the nation as a whole and is not typically subject to the partisanship that divides the country in traditional politics. The

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53. See *id.* at 1476 (explaining that “[a]n amendment that is viewed in part as an attempt by a temporary antifederalist majority to legislate in constitutional stone is more likely to be circumvented and less likely to command continuing popular support when the political winds shift, as they always do”).

54. See *Appropriateness*, *supra* note 46, at 1609 (suggesting that the goals of the politicians who try to enact a BBA can be done within the existing governmental powers, and a constitutional amendment to do such is inappropriate). The author argues that amendments in the past have been used to achieve objectives not attainable through existing governmental powers, and it should stay that way. *Id.* While this does not support this Comment’s position, it is an apt illustration of the commonly cited worry that typical legislative discourse has no place in constitutional arguments, and it should remain as such.

55. While researching this Comment, it became apparent that the unique characteristics of a constitutional amendment requires one to evaluate how the proposal would work in the context of the Constitution and its framework, in addition to how it would work within the country’s economic framework. Much of the commentary on the subject, and nearly all of the legislation proposed by politicians, ignores this issue and seeks only to engage in economics. This Comment draws upon this realization and attempts to connect the logical nexus between how the Constitution works and how it can embody an *economic* principle.

stringent requirements of an amendment ratification<sup>56</sup> reflects the Framers' intent to protect the document from being altered by groups that are only temporarily in power and seek to impose their ideology on future factions.<sup>57</sup> To be accepted by both politicians and the public, an amendment must adhere to certain principles that transcend the ordinary legislative process and can be backed by the collective conscious of the country.<sup>58</sup> An amendment differs from legislation in that it contains an aspirational statement rather than a rigid rule of law,<sup>59</sup> is flexible enough to conform to modern trends,<sup>60</sup> and is free from one particular group's ideology.<sup>61</sup> A BBA without these characteristics is destined to be repealed, circumvented, or rendered ineffective.<sup>62</sup>

Most important, amendments are not the constitutional equivalents of statutory law.<sup>63</sup> Instead, amendments are enacted because society has designated a certain value as one that should

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56. See *supra* text accompanying note 19 (providing an overview of Article V's amendment ratification process).

57. See *Great and Extraordinary Occasions*, CENTURY FOUND. 10 (May 13, 2009), <http://www.constitutionproject.org/pdf/32.pdf> (stating that "legislators have an obligation to do their best to avoid amendments that are no more part of a momentary political bargain, likely to become obsolete as the social and political premises underlying their passage wither or collapse").

58. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 7-8 (Vicki Been et al. eds., 3d ed. 2006) (proposing that one of the main reasons for the Constitution's survival has been the American people's respect for the document and their desire to be governed by its principles).

59. See *id.* at 8 (articulating that the Constitution is written in "general and abstract terms" that almost everyone in society can agree with). The author cites freedom of speech embodied in the First Amendment as an example of an aspirational value that everyone can stand behind, even if they disagree over what exactly it should protect. *Id.*

60. See *id.* at 8 (citing interpretation as a reason a document written in the eighteenth century can govern the "technological world of the late-twentieth and twenty-first centuries"); see also William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1985) (holding that "[i]nterpretation must account for the transformative purpose of the text"). Justice Brennan also said that the Constitution has no "static meaning," it adopts its principles to current needs and issues. *Id.*; *Great and Extraordinary Expectations*, *supra* note 57, at 10 (arguing that constitutional amendments need to be cast in general terms to be enduring).

61. See *id.* at 4-5 (arguing that the "Constitution's unifying force would be destroyed if it came to be seen as embodying the views of any temporarily dominant group . . . [and that] it would be a cardinal mistake . . . to effectively 'read out' of our foundational charter any segment of our society").

62. See *id.* at 10-11 (using a proposed amendment banning flag desecrations to illustrate how an amendment not consistent with constitutional principles could "trivialize and undermine" respect for the document). The authors say that if future generations who do not understand or revere an amendment may view it as "the political victory of one faction in a particular historical moment." *Id.* at 11. The amendment would therefore be delegitimized in the eyes of those citizens. *Id.*

63. 16 AM. JUR. 2D CONST. LAW § 2 (2011).

transcend the mutable laws of the country and be permanently emboldened in the nation's framework.<sup>64</sup> This framework should contain only general principles, not specific guidelines that govern the subject as a statute would.<sup>65</sup> As Justice Marshall stated in *McCulloch v. Maryland*, “[the Constitution’s] nature . . . requires, that only great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.”<sup>66</sup>

A BBA must observe this rule by stating an overall aspiration that reflects a societal change in attitude.<sup>67</sup> In this case, a BBA would symbolize that Americans want to ensure future economic stability by keeping the government’s budget balanced. This goal should be distinguished from the means that can be used to achieve that end.

Also, an amendment must be flexible enough to adapt to unforeseen developments.<sup>68</sup> This flexibility is achieved through language that is open to interpretation, which allows the government to enact whatever constitutional means are necessary to further the principle at the heart of the amendment.<sup>69</sup> As Justice Brennan explained:

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64. *Id.*

65. See *Great and Extraordinary Occasions*, *supra* note 57, at 10 (stating “[i]n general, the nature of our Constitution is violated if amendments are too specific in the sense that they reflect only the immediate concerns of one generation, or if they set forth specifics more appropriate in implementing a statute”).

66. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). One of the issues in this landmark case was whether the Constitution granted Congress the authority to establish a bank. *McCulloch v. Maryland*, THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW, [http://www.oyez.org/cases/1792-1850/1819/1819\\_0](http://www.oyez.org/cases/1792-1850/1819/1819_0) (last visited Feb. 17, 2012). In holding that it did, Justice Marshall articulated that the Constitution granted powers to Congress that are not specifically enumerated in its text. *Id.* The quote explains how the Constitution designates major objectives, but allows Congress to decide how to achieve those ends.

67. See CHEMERINSKY, *supra* note 58, at 12-14 (explaining how amendments that reflect these societal changes are the most common of the three types of amendments enacted subsequent to the Bill of Rights). Chemerinsky cites the Thirteenth, Fourteenth, and Fifteenth Amendments as examples. *Id.* at 13. The other categories are amendments that overruled specific Supreme Court decisions and those adopted to correct problems in the original Constitution. *Id.*

68. See *Id.* at 8 (stating that “[i]nterpretation is crucial to allow a document written for an eighteenth-century agrarian slave society to govern in the technological world of the late twentieth and twenty-first centuries”).

69. See *McCulloch*, 17 U.S. at 421 (stating “[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional”).

Our amended constitution is the lodestar for our aspirations. Like every text worth reading, it is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure. This ambiguity, of course, calls forth interpretation, the interaction of reader and text.<sup>70</sup>

This principle can be seen with the Ninth Amendment, which states that “[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”<sup>71</sup> This language is not viewed as containing any particular right, but holds that there are rights not enumerated in the Constitution which are still protected.<sup>72</sup> The United States Supreme Court rarely engaged in interpreting the amendment until *Griswold v. Connecticut*<sup>73</sup> in 1965, when Justice Goldberg’s concurring opinion found that the Ninth Amendment granted the authority to protect non-textual rights.<sup>74</sup> The Court found that the right to privacy was such a right and should be protected under the Due Process Clause of the Fourteenth Amendment.<sup>75</sup> Broad language, like that in the Ninth Amendment, allows the Court to continually reinterpret the text and recognize additional implicit rights as society continues to evolve.<sup>76</sup>

This sort of flexibility must be included in any amendment if it is to progress with our mutable society. In the case of a BBA, it must be able to account for unforeseen events like recessions and wars that cannot be accounted for in advance.<sup>77</sup> To achieve this, the language of the amendment must be written broad enough to allow the government to decide what means are best used to combat these events, so long as they are within the framework of the BBA.

An amendment must also be free from partisan ideology. By its very definition, being partisan is being partial to a particular person, party, or idea.<sup>78</sup> An amendment must reflect the will of American society as a *whole*, not a particular group. Again, Justice Brennan is particularly insightful here: “[i]t is the very purpose of

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70. Brennan, Jr., *supra* note 60, at 433.

71. U.S. CONST. amend. IX.

72. See CHEMERINSKY, *supra* note 58, at 298 (stating that “[t]he Ninth Amendment is a clear and open invitation for government to provide more rights than the Constitution accords”).

73. See *generally* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

74. CHEMERINSKY, *supra* note 58, at 794.

75. *Id.* at 815-16.

76. *Id.*

77. See SATURNO & LYNCH, *supra* note 31, at 35 (explaining that most BBA proposals contain an exception that allows deficit spending in times of war or emergency).

78. *Partisan*, [DICTIONARY.COM, http://dictionary.reference.com/browse/partisan](http://dictionary.reference.com/browse/partisan) (last visited Feb. 17, 2013).

our Constitution . . . to declare certain values transcendent, beyond the reach of temporary political majorities. The majoritarian process cannot be expected to rectify claims of minority right that arise as a response to the outcomes of that very majoritarian process.”<sup>79</sup> A partisan-laced BBA would be repugnant to the Constitution as well as to the portion of society that does not agree with those views. Such discontent would inevitably lead to friction and call for the amendment’s repeal.<sup>80</sup> For example, such a situation is similar to the ratification and repeal of the Eighteenth Amendment.<sup>81</sup> To the dismay of many Americans, Prohibition was enacted after years of lobbying from various groups.<sup>82</sup> However, because the amendment was not backed by the whole of society<sup>83</sup> problems with enforcement and public sentiment resulted in its repeal.<sup>84</sup> Like Prohibition, a partisan BBA would leave a unified group of citizens and politicians who disfavor the amendment and demand its repeal. These types of disagreements are suited for the legislative process, not constitutional politics.

### B. BBAs and Their Compatibility with the Constitution

The BBAs proposed in the United States and the BBAs enacted in Europe vary in their approach. The German

79. Brennan, Jr., *supra* note 60, at 436-37.

80. See generally Ishikawa, *supra* note 9, at 370-71 (predicting that in the near future a BBA will have enough political momentum to be ratified, only to be repealed once the amendment proves to be unworkable).

81. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

82. See *Prohibition*, HISTORY.COM, <http://www.history.com/topics/prohibition> (last visited Feb. 17, 2013) (recalling how by the beginning of the twentieth century, temperance societies calling for the prohibition of alcohol had become common and were continuing to spread their influence across the country). Among those playing strong roles in the movement were women who believed alcohol to be destructive to families, religious groups who viewed the saloon culture as “ungodly,” and factory owners who were interested in increasing efficiency and preventing accidents. *Id.* The amendment was ratified on January 29, 1919, and went into effect one year later. *Id.*

83. See, e.g., William Howard Doughty, Jr., *The Case Against the Prohibition Amendment*, N.Y. TIMES (Mar. 10, 1918), <http://query.nytimes.com/mem/archive-free/pdf?res=F60F12F63E5C1B728DDDA90994DB405B888DF1D3> (arguing against the amendment because even if there are enough votes to get the amendment passed, “there will be a very considerable proportion of the people opposed to it”). The author goes on to predict that enforcing the amendment would be near impossible without widespread support, and those hostile to the cause would unite together and get it repealed. *Id.* He was correct.

84. See *Prohibition*, *supra* note 82 (noting that as the Great Depression wore on, criminal activity linked to bootlegging continued to rise, and support for Prohibition began to wane). Many people viewed legalizing alcohol as a way to create jobs and raise tax revenue. *Id.* Franklin D. Roosevelt ran for president on a platform that included Prohibition’s repeal. *Id.* Roosevelt won, and the amendment repealing Prohibition was ratified in December 1933. *Id.*



amendment, called a “debt brake,” was enacted in 2009 and requires the federal government to run a deficit of no more than 0.35 percent of its gross domestic product.<sup>85</sup> In addition, a special account is set up to track any incidental deficit spending.<sup>86</sup> Under the “debt brake,” the government must balance this account over the course of the business cycle<sup>87</sup> by repaying any debts it incurs.<sup>88</sup> This method allows the government to run a debt in emergency situations with a simple majority vote in Parliament, so long as there is a schedule outlining how the debt will be repaid.<sup>89</sup> The “debt brake” is a mainly procedural BBA.<sup>90</sup> It sets an overall constraint on spending, but does not address how it is to be done.<sup>91</sup>

The Swiss version of the “debt brake,” approved in 2001, is similar to Germany’s.<sup>92</sup> Switzerland, however, limits yearly government expenditures to an estimate of the coming year’s revenue.<sup>93</sup> If the government overspends, it must reduce spending in subsequent years to make up for the deficit.<sup>94</sup> In addition, the rule also requires a surplus when the economy is booming, so these excess expenditures may already be covered by a previous year’s

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85. Klaus Dieter John, *A System Dynamics Approach to Macroeconomic Policy Evaluation – The Case of the German Debt Brake*, CHEMNITZ U. TECH. 12,

<http://www.systemdynamics.org/conferences/2011/proceed/papers/P1335.pdf> (last visited Feb. 17, 2013); *see also* Thushyanthan Baskaran & Lars P. Feld, *Federalism Commission II – Recent Reforms of Federal-Länder Financial Relationships in Germany*, RUPRECHT-KARLS-U. HEIDELBERG 1-4, 17-18, <http://www.forumfed.org/en/pubs/2009-10-26-feld.pdf> (last visited Feb. 17, 2013) (exploring the German debt problems that led to the BBA and whether the author believes it will achieve its purpose). The author concludes that the new regulations will help solve the country’s public debt problem, but they should have required more than a qualified majority to allow debt spending and had the debt brake sufficiently cover “communities, Social Security systems, and special purpose funds.” *Id.* at 17.

86. John, *supra* note 85, at 12.

87. *See* Kimberly Amadeo, *Business Cycle*, ABOUT.COM, [http://useconomy.about.com/od/glossary/g/business\\_cycle.htm](http://useconomy.about.com/od/glossary/g/business_cycle.htm) (last updated Oct. 28, 2011) (defining the business cycle as “periods of growth and decline as an economy”). The cycle contains four stages: contraction, trough, expansion, and peak. *Id.* This is appropriate for a BBA as it allows the government to adjust budgets over time, rather than scramble to alter the budget when there are unforeseeable yearly fluctuations.

88. John, *supra* note 85, at 12.

89. *Id.*

90. *See* Buchanan, *supra* note 20, at 350-51 (describing what a “procedural,” rather than substantive, rule is).

91. *Id.*

92. *See generally* Frank Bodmer, *The Swiss Debt Brake: How It Works and What Can Go Wrong*, 142 SWISS J. ECON. STAT. 307, 307 (2006), available at <http://www.sjes.ch/papers/2006-III-1.pdf>; *see also* *Tie Your Hands, Please*, ECONOMIST (Dec. 10, 2011), <http://www.economist.com/node/21541459> (noting that Switzerland already passed a similar “debt brake”).

93. *Id.* at 308, 317-18.

94. *Id.*

surplus.<sup>95</sup> Excess spending does not need to be accounted for if both chambers of Parliament vote to allow it.<sup>96</sup> Like Germany, the Swiss amendment does not contain substantive provisions. Under this BBA, the Swiss government has been running a surplus since 2006.<sup>97</sup>

The German and Swiss BBAs adhere to two of the three constitutional considerations outlined above. First, neither of the plans contain any partisan ideology. The legislators in the country still control exactly how they spend, they are just limited to a mathematically produced limit that can be overruled by a supermajority vote.<sup>98</sup> The scheme is also designed to be flexible, as the governments can still run deficits or surpluses as they please if they make a plan to balance the budget over the course of the business cycle or vote on an increase.<sup>99</sup> However, the specificity of these foreign provisions would conflict with the United States' Constitution's history of broadly worded, aspirational statements.<sup>100</sup> Certainly, the United States cannot amend its Constitution nearly as easily as many European nations.<sup>101</sup>

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95. *Id.* at 308.

96. *Id.* at 309.

97. *See Government at a Glance 2011 Country Note: Switzerland*, ORG. FOR ECON. CO-OPERATION AND DEV. 1 (June 24, 2011), <http://www.oecd.org/dataoecd/60/32/47876643.pdf> (mentioning that Switzerland has maintained a budget surplus since 2006, even through a recession in 2009). The document also provides various indicators on the government's performance and a survey of its structure and economic system. *Id.*

98. *See supra* notes 85-96 and accompanying text (describing how the European BBA models function).

99. *Id.*

100. *See supra* notes 58-60 and accompanying text (illustrating how the broadly worded, aspirational statements of the Constitution ensures that it garners support with the majority of citizens and allows it to adapt to societal changes).

101. *See* Patrick Bahners, *What Distinguishes Germany's Basic Law from the United States Constitution?*, NOTRE DAME NEWS (May 18, 2009), <http://newsinfo.nd.edu/news/11779-human-dignity-and-freedom-rights/> (explaining that the United States Constitution is designed to be a framework that does not require much change). Germany's Constitution, on the other hand, is a cross between a legal code and a constitution that requires constant amendments. *Id.* The analogy to the legal code comes from the fact that it must cover a large range of topics in great detail that necessitates continual growth. *Id.* The American Constitution has been changed only twenty-seven times throughout its history while the German Constitution has been altered fifty-five times in sixty-one years. *Id.*; *see also* BJØRN ERIK RASCH & ROGER D. CONGLETON, *Amendment Procedures and Constitutional Stability*, in DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY, ANALYSIS AND EVIDENCE 536, 536-37 (Roger D. Congleton & Birgitta Swedenborg eds., 2005), *available at* [http://rdc1.net/forthcoming/DCD%20\(Chap%2012,%20Amendment%20Procedures,%20Congleton%20and%20Rausch\).pdf](http://rdc1.net/forthcoming/DCD%20(Chap%2012,%20Amendment%20Procedures,%20Congleton%20and%20Rausch).pdf) (discussing whether there is a correlation between the stringency of amendment procedures and constitutional stability). The authors

Therefore, a mathematically produced spending limit requiring occasional adjustment over time is not feasible for the United States.<sup>102</sup>

American BBA proposals differ significantly in their approach. Besides mandating that the government pass a balanced budget,<sup>103</sup> they contain various substantive provisions meant to limit how and when money can be spent.<sup>104</sup> The most common methods employed to achieve this are to limit spending as a percentage of GDP and require more than a simple majority vote to increase tax revenues, both of which conflict with well-established Constitutional principles.<sup>105</sup>

First, these proposals are not broad, aspirational statements. They specifically address rules that govern how the government achieves an end.<sup>106</sup> If public sentiment is conceptually behind a *balanced budget*, then a BBA should reflect just that. The additional substantive provisions transform the proposal from a reflection of societal aspirations to an ordinary piece of partisan legislation. This has no place in the Constitution.<sup>107</sup>

Second, these American proposals are not flexible enough to

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conclude that in general, tougher amendment procedures affect the “frequency of formal changes to modern democratic constitutions” and create more “predictable” politics. *Id.* at 536-37, 548-49. The chapter also contains a chart comparing the amendment procedures of the world’s major democracies. *Id.* at 551-52.

102. For instance, if the United States adopted a plan similar to Germany’s and wanted to later change their deficit limit from 0.35 percent of GDP to 0.40 percent of GDP, the nominal change would require the government to go through the entire constitutional amendment process all over again. U.S. CONST. art. V. No provision in the Constitution suggests minor amendments may bypass the Article V process. *Id.*

103. See e.g., H.J. Res. 1, 104th Cong. (1995) (proposing that “[t]otal outlays for any fiscal year shall not exceed total receipts or that fiscal year”); see also H.J. Res. 10, 112th Cong. (2011) (requiring a balanced budget where “[t]otal outlays for any fiscal year shall not exceed total receipts for that fiscal year”).

104. See *supra* note 43-44 and accompanying text (showing examples of substantive provisions that establish spending caps and require super-majority approval for bills containing revenue increases or an increase in the debt ceiling).

105. See *supra* note 28-30 and accompanying text (explaining the provisions of the 1982, 1995, and 1997 BBA proposals containing substantive provisions); see also H.R.J. Res. 1, 112th Congress (2011) (requiring a three-fifths vote of each house to increase the public debt limit, a majority vote in each house before any bill increasing revenue can become law, and a two-thirds vote in each house to spend more than twenty percent of GDP).

106. See SATURNO & LYNCH, *supra* note 31, at 29-40 (analyzing typical BBA provisions, some of which specifically govern how the government is to achieve an overall balanced budget). For instance, some provisions seek to exempt specific expenses or activities, limit the government’s ability to tax or spend, or require a specific method of budgetary estimates. *Id.* at 30-31, 34, 36.

107. See *supra* text accompanying note 67 (discussing how amendments are drafted to reflect a societal change in attitude).

work over time. Articulating a specific spending limit as a percentage of GDP may reduce spending, but changes in the size of the economy could unnecessarily constrain Congress from using their enumerated spending power. For instance, if Congress is limited to spending no more than eighteen percent of GDP, and it can produce a budget surplus by doing so, it would be barred from spending that additional money.<sup>108</sup> In the case of prohibiting revenue increases without a supermajority vote, it simply takes away a viable means to achieve the goal of a balanced budget.<sup>109</sup>

Finally, and perhaps most importantly, the proposals being offered include specific partisan ideology, namely attempts to limit the size of the federal government and hinder any new tax legislation.<sup>110</sup> These issues have been constantly debated since the United States' inception and remain a significant point of contention between opposing political and societal factions.<sup>111</sup> Enacting such an amendment would alienate a significant portion of the population and immediately create debates best kept to the legislative process.

These typical BBA proposals would conflict with the Constitution in varying degrees, even if they achieved a balanced budget. Any adopted BBA must be stripped of any substantive provisions because they would inevitably be partisan, therefore alienating the sponsors' opponents and the opponent's supporters.

#### IV. PROPOSAL

Having identified the typical characteristics of a BBA and the constitutional considerations they must adhere to, this Comment now proposes a purely procedural BBA<sup>112</sup> that is fit for the Constitution. This section also discusses some of the issues the government will face during the amendment's implementation,

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108. If the eighteen percent of GDP was, for example, \$1 trillion and revenue reached \$1.3 trillion, the government would not be allowed to spend the \$300 billion surplus.

109. In effect, this makes it exceedingly difficult to raise any revenue to close budget deficits, so legislators are limited to cutting spending and finding savings.

110. See *supra* text accompanying note 45 (discussing that some politicians see a BBA amendment as a way to limit the federal government and limit Congress's ability to collect taxes).

111. See Jennifer Steinhauer, *Appetite for Budget Bill, but Success Is in Doubt*, N.Y. TIMES (Nov. 10, 2011), [http://www.nytimes.com/2011/11/11/us/politics/competing-balanced-budget-proposals-headed-for-votes.html?\\_r=2&hp](http://www.nytimes.com/2011/11/11/us/politics/competing-balanced-budget-proposals-headed-for-votes.html?_r=2&hp) (reporting the fundamental partisan difference present in the BBA debate, particularly the battle over how much restrictions it should place on spending and taxing). The article also points out that this debate has been in place since Thomas Jefferson suggested removing the government's ability to incur debt. *Id.*

112. See *supra* note 49 and accompanying text (explaining what a "procedural," rather than a "substantive," amendment entails).

and give a brief synopsis on how it will work.

*A. An Aspirational BBA Mandating Fiscal Responsibility*

The text of an adopted BBA must be a broad, aspirational statement.<sup>113</sup> The language must be flexible enough to adapt to changes in society<sup>114</sup> and be free from partisan ideology. The best way to achieve this is through a procedural BBA open to interpretation and free from any provisions that mandate how the government is to achieve a balanced budget. The amendment should read:

*Section 1.* Congress shall pass no budget in which total governmental expenditures exceed total governmental receipts. During times of war or emergency, Congress may waive this provision subject to a majority vote in each House of Congress and a signature by the President.

*Section 2.* Any expenditures in excess of receipts for a given year must be accounted for in subsequent budgets, bringing balance to the federal budget over time.

This broad language reflects society's aspirations of achieving a balanced budget without limiting any of the means available to politicians through the ordinary legislative process. The amendment simply requires that a balanced budget be passed each year, the budget stay in balance over time, and waiver only be permitted if the legislative and executive branches agree to do so. The process of deciding how to allocate funds is left completely unchanged.

The proposed language of the amendment is also flexible enough to adapt to unforeseen developments. For example, the provision may be waived in times of war or emergency, when deficit spending may be appropriate.<sup>115</sup> Also, if the government engages in deficit spending due to a shortfall in revenue or increased expenses, it does not need to drastically alter spending the very next year to make up for the deficit. Section 2 requires that the budget remain balanced over time, similar to the business

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113. See Staudt, *supra* note 26, at 1151-52 (describing how BBA proposals "carry symbolic meaning beyond mere political rhetoric" in the eyes of its supporters). Some view the movement to amend the Constitution as a reflection "of a fundamental change in the public's viewpoint" and an assertion that the government should conduct itself in accordance with a certain fundamental value. *Id.*

114. See *supra* text accompanying note 59-60 (articulating the necessity for an amendment to remain flexible so that it may adapt to changes in society and stay relevant).

115. See BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2012, *supra* note 5, at 5 (recounting how until the 1980s, large deficits were only present during times of war or recession, where it is seen as necessary to avoid further hardships).

cycle provisions of the European models.<sup>116</sup> But, unlike the business cycle provision, the flexibility of the proposed provision allows the government to make up for the deficits when it is capable of doing so, rather than requiring sudden spending cuts or revenue increases.<sup>117</sup>

The proposed amendment language is purposely broad so words like “time,” “expenditures,” “receipts,” and “emergency” are open for interpretation.<sup>118</sup> For instance, the requirement of a balanced budget over “time” can conform to the state of the economy. Where an overrun is minor, the legislature may act the very next year to account for the deficit, or it may have a surplus from a previous year that can account for the deficit immediately.<sup>119</sup> However, if the economy is in a prolonged economic slump or recession where deficits are uncontrollable due to the circumstances, then the government may allow itself to account for the deficits at the appropriate time in the future.<sup>120</sup> In opposite, a stringent requirement that demands a balanced budget over a set period of time unnecessarily constrains the government’s ability to alter spending when it may be inappropriate or harmful to the country.<sup>121</sup>

Similarly, sentence two of Section 1 allows the legislature to decide what events constitute times of “war” or “emergency” by approving the waiver with a majority vote in each House, rather than having it rely on an enumerated list of exceptions or strict

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116. *See supra* notes 85-96 and accompanying text (explaining how the European BBAs require that spending be balanced over the course of the business cycle, allowing deficits incurred to be paid over time).

117. *Id.*

118. The BBA proposal uses the terms “time,” “expenditures,” and “receipts,” as used in the Appropriations Clause. U.S. CONST. art. I, § 9, cl. 7. The Appropriations Clause commands that a record of all government receipts and expenditures be “published from time to time.” *Id.* The court could have specified a specific term, but evidently found it appropriate to allow other entities to designate the appropriate timeframe. This BBA proposal adopts this notion in allowing the government to define what duration of “time” the budget should be balanced over. *Id.* Similarly, the government is free to decide what constitutes a “receipt” or “expenditure,” as it does in relation to the Appropriations Clause. *Id.*

119. *See, e.g.,* Bodmer, *supra* note 92, at 308-10 (explaining how the Swiss BBA aims for a budget surplus of two percent over the course of the business cycle and mandates a surplus during strong economic periods). This allows for the possibility of deficit spending in a given year without the need for repayment. *Id.*

120. *Id.*

121. *See, e.g.,* KEITH BEA, CONG. RESEARCH SERV., RS22239, EMERGENCY SUPPLEMENTAL APPROPRIATIONS FOR HURRICANE KATRINA RELIEF CRS-1 (2006) (summarizing the two emergency appropriation bills passed in Congress in 2005 that allocated \$62.3 billion to the Hurricane Katrina relief effort). A strict balanced budget would hinder necessary expenditures such as this.

definition of the terms. The legislative and executive bodies in power are in the best position to determine when extraordinary circumstances demand governmental action. Some BBA critics opine that a strict BBA will limit the government's ability to act decisively,<sup>122</sup> but this amendment's language is broad enough to ensure that it will never do so. Only a failure to garner a majority vote in both Houses of Congress or the President's refusal to sign off on the waiver can prevent action.<sup>123</sup>

Finally, the purely procedural amendment is free from any partisan ideology in that it mandates Congress to not spend more than it takes in, but does not dictate how. It does not prescribe nor proscribe Congress from using any particular means of achieving a balanced budget, as many of the BBA proposals do in a brazen attempt to have their party's philosophy embedded in the Constitution.<sup>124</sup> The amendment is designed so the legislative process already in place is responsible for any spending decisions.

### B. Implementation and the Effect of the Amendment

The implementation of the BBA will require Congress to make some difficult decisions.<sup>125</sup> The most important of these being how long the government has to reach the initial balanced budget, which accounting procedures are going to be used in calculating the budget,<sup>126</sup> and how the current budget deficits are

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122. See *A Balanced Budget Amendment Isn't the Answer*, WASH. POST (July 14, 2011), [http://www.washingtonpost.com/opinions/a-balanced-budget-amendment-isnt-the-answer/2011/07/12/gIQACyhzEI\\_story.html](http://www.washingtonpost.com/opinions/a-balanced-budget-amendment-isnt-the-answer/2011/07/12/gIQACyhzEI_story.html) (arguing that a BBA that caps spending at a certain percent will prevent legislatures from spending in times of emergency, hurting the economy). The editorial hypothesizes that if a BBA was in effect during the 2008 economic crash, Congress would have been unable to provide stimulus and stabilize banks. *Id.*

123. The text of the amendment purposely does not include a provision that would allow Congress to override the President's refusal to sign off on a waiver. This is because the President is in the best position to act as a check to Congress in the event it tries to circumvent the amendment. If a President attempts to circumvent the amendment by granting unnecessary waivers, American citizens may easily voice their displeasure by voting for someone else. If Congress could override the President and was unnecessarily authorizing deficit spending, it would be difficult for citizens to identify all the Congressmen who were at fault and vote them out of office.

124. See *supra* note 28-30, 93 and accompanying text (outlining BBA proposals that try to limit the size of government, a partisan ideology, by requiring such things as supermajority votes to raise taxes and spending caps as a percentage of GDP).

125. See Seto, *supra* note 7, at 1472, 1478, 1493, 1507-16 (exploring some of the concerns present in a BBA implementation, including what transitional period is appropriate, which programs will be included in the federal budget, which particular accounting method should be used, and who should judge and enforce compliance with the amendment).

126. See *id.* at 1478-91 (analyzing the complex set of accounting issues that would have to be determined in implementing a BBA). For instance, the

to be closed.

Unlike this Comment's proposed BBA, most American BBA proposals contain express provisions governing how this is to be done.<sup>127</sup> However, if the text of these amendments needed even a slight adjustment in the future, an additional amendment would have to be ratified.<sup>128</sup> The United States has never attempted to restrict its spending in this manner, and for the country to be shackled by a BBA that contains a misjudgment would prove disastrous.<sup>129</sup> This proposal avoids such a pitfall by leaving the decisions to the traditional legislative process, which allows trial and error to take place.<sup>130</sup> The government will be free to debate and explore all implementation options knowing they will be able to adjust any errors in the future with relative ease.

Congress already has extensive experience making many of these implementation decisions. Adjustments on how the federal budget is calculated, for instance, are already made frequently.<sup>131</sup> Congress is free to continue using the current budget calculation

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government must decide how future obligations should factor into the yearly budget. *Id.* at 1483. If one large payment of \$5 billion is due in five years, should the government account for that amount slowly over that time period or simply be saddled with it the year it comes due? *Id.* Similarly, Social Security currently has a minimal impact on our budget, but will balloon as the baby boomer generation begins to collect benefits. *Id.* at 1484. Congress must decide if those future payments should be accounted for in the current budget or factor in the payments as they come due. *Id.* It would be difficult to believe all these scenarios could be accounted for with express provisions in a BBA.

127. See H.J. Res. 10, 112th Cong. (2011) (taking effect "beginning with the later of the second fiscal year beginning after its ratification or the first fiscal year beginning after December 31, 2020."); see also H.J. Res. 4 112th Cong. (2011) (excluding borrowed money from receipt calculations and debt payments from outlay calculations); H.J. Res. 41, 112th Cong. (2011) (mandating a balanced budget without reducing disbursements of the Federal Disability Trust Fund or the Federal Old-Age and Survivors Insurance Trust Fund).

128. See *supra* note 102 and accompanying text (providing a practical example of how this would be difficult in effect).

129. See *supra* note 58, 82-83 and accompanying text (showing that respect for the Constitution has survived so long because people respect its provisions and illustrating how an unpopular amendment that proves difficult to enforce, like Prohibition, can lead to its repeal).

130. Legislators are free to pass and repeal legislation with a majority vote in each House of Congress and the signature of the President. U.S. CONST. art. I, § 7. There is no limitation on how often this power may be used. *Id.*

131. See Larry DeWitt, *Research Note #20: The Social Security Trust Funds and the Federal Budget*, SOC. SEC. (Mar. 4, 2005), <http://www.ssa.gov/history/BudgetTreatment.html> (updated June 18, 2007) (recounting how Social Security was off budget from its inception to 1968, back on budget until 1985, then back off budget from 1986-1990, except for deficit computation purposes, and now off budget again for all purposes); see also *Introduction to the Federal Budget Process*, CENTER ON BUDGET AND POLY PRIORITIES (Dec. 6, 2010), <http://www.cbpp.org/files/3-7-03bud.pdf> (explaining the process of how a budget is passed).



model or alter it to better conform to the necessities of a successful BBA. Projected revenues for the coming year are also already determined in the budget process.<sup>132</sup> Congress only needs to debate how it will stay within that figure or change how it is calculated. As shown, the legislative process in place is designed to make these difficult decisions, and this BBA utilizes that proven process.<sup>133</sup>

Once these implementation decisions are made and the transitional period has elapsed, Congress will be required to create a balanced budget using the same process it has used since its inception. Debates will ensue, compromises will be made, and the government will continue to function. In subsequent years, the health of the economy will dictate whether legislators decide to build a surplus for future years, pay off unforeseen deficits from previous years, or just pass a balanced budget. Inevitably, there will be unanticipated events that will require the government to interpret the amendment in deciding how to act in accordance with it. But this uncertainty should not be feared. Instead, it should be embraced as an opportunity to apply the brilliant framework that is the Constitution and develop a solution that will strengthen the United States.

#### V. CONCLUSION

If a BBA is passed, it needs to use the framework of the Constitution itself to be successful. Politicians are mistaken to believe that they can draft a *specific* economic blueprint that can be enshrined in the Constitution and withstand the test of time. An amendment that reflects an overall aspiration of our society, is free from divisive partisanship, and is flexible enough to conform to the ever-changing landscape of our country will demand respect and truly reflect the spirit of the Constitution of the United States of America.

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132. See BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2012, *supra* note 5, at 23 (projecting government receipts of \$2.627 billion for 2012). The budget also projects receipts through 2016. *Id.*

133. See *Great and Extraordinary Occasions*, *supra* note 57, at vii (stating that the Constitution is durable because the broad language of the document allows a society a wide range of policy choice). Decisions are left to members of the democracy who are free to debate and judge ideas without fearing that they will have to be locked “into a policy choice for all time.” *Id.*