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Public Debt in the United States and Germany: A Constitutional Perspective

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PUBLIC DEBT IN THE UNITED STATES AND GERMANY: A CONSTITUTIONAL PERSPECTIVE

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INTRODUCTION

This article compares how German and American constitutional frameworks shape alternative approaches for legislative self-discipline regarding public debt. The purpose of the comparison is to identify structural features of the respective constitutional régimes that further or hinder long-term budgetary discipline on the part of a national legislature. The authors believe the devilish details of this globally pressing legislative goal demand a discussion that is sensitive to both constitutional and fiscal challenges.

Many believe that the current fiscal concerns and super-legislative options of Germany and the United States are of both national and international urgency. The USA has 317 million residents, an estimated nominal GDP of \$15.68 trillion for 2012, and public debt of \$11.37 trillion as of December 31, 2012, totaling 72.5% of GDP.¹ Germany has 82 million residents, an estimated nominal GDP of 2.64 trillion Euros (\$3.44 trillion) for 2012, and a public debt of 2.17 trillion Euros (\$2.79 trillion), totaling 81.9% of GDP.² Germany has recently adopted a balanced budget amendment (*Schuldenbremse*). The US Congress has flirted for years with the idea of proposing one, and in the recent showdown over the debt ceiling some members of Congress have argued that congressional approval of a balanced budget amendment should be part of any agreement moving forward. The authors intend to offer clarification, not polemic, concerning how the German balanced

1. *United States*, THE WORLD FACTBOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Oct. 3, 2013); *World Development Indicators*, THE WORLD BANK, <http://data.worldbank.org/data-catalog/world-development-indicators> (last updated Sept. 23, 2013); *United States*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/pubs/ft/weo/2013/01/weodata/weoselco.aspx?g=110&sg=All+countries+%2f+Advanced+economies> (last visited Oct. 3, 2013); *Country Comparison: Public Debt*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2186rank.html> (last visited Oct. 3, 2013) (average of these) ("This entry records the cumulative total of all government borrowings less repayments that are denominated in a country's home currency. Public debt should not be confused with external debt, which reflects the foreign currency liabilities of both the private and public sector and must be financed out of foreign exchange earnings."). A substantial portion of the total federal debt is held by the government itself and represents borrowing from government accounts such as the Social Security Trust Fund.

2. *Germany*, THE WORLD FACTBOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html> (last visited Oct. 3, 2013); *National Accounts: Important Economic Indicators*, STATISTISCHES BUNDESAMT, <https://www.destatis.de/EN/FactsFigures/NationalEconomyEnvironment/NationalAccounts/DomesticProduct/Tables/ImportantEconomicIndicators.html> (last updated Aug. 23, 2013); *Domestic Economic Trends From a Fiscal Policy Perspective*, DEUTSCHES BUNDESFINANZMINISTERIUM, http://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Focus_on_Germany/Articles/Domestic_economic_trends/domestic-economic-trends-2013-09.html (last updated Sept. 20, 2013); WORLD BANK, <http://data.worldbank.org> (last updated Sept. 23, 2013); INTERNATIONAL MONETARY FUND, <http://www.imf.org> (last visited Oct. 3, 2013); *The World FactBook, Germany*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html> (last visited Oct. 3, 2013) (average of these); *Country Comparison: Public Debt: Germany*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/fields/print_2186.html (last visited Oct. 3, 2013).

budget amendment is intended to function and how a similar amendment would require far-reaching adjustment of central features of the US Constitution. This discussion is equally relevant to any long-term budget disciplinary measure that would be enforceable against both Congress and the White House. What follows is not only a sketch of these matters, but an attempt to identify the more particular contours of super-legislative budget discipline in light of the concrete example of Germany's realistic effort to tackle the common problem.

The primary purpose of constitutional law is to set forth a firm, abstractly formulated framework for political deliberation and decision-making that does not preempt concrete, democratically contestable decisions. Concerning the creation and management of public debt, the US Constitution (1787) and of the Federal Republic of Germany (1949) fulfill this function in very different ways. Since 1949, the relevant provisions of the German Constitution (the *Grundgesetz*)³ have been revised twice in conceptually fundamental ways, most recently, in 2009, in light of the European Stability and Growth Pact. It is questionable whether the Pact, with its partly technocratic procedural rules, has the qualities essential to a successful constitutional provision. But Germany has nevertheless gone a long way towards implementing what it has accepted to be both national and European goals of far-sighted budgetary caution. Germany does this within the pre-existing constitutional framework of parliamentary democracy, which gives great but highly vulnerable legislative hegemony to one political party or a coalition of parties. This dictates, in large part, the options available for budget discipline, which include, in Germany's case, a comprehensive system of norms and procedures to address the structural deficits of the federal state and subnational states, with possible court review of the fidelity of the legislature to constitutionally prescribed limits on deficits and repayment of aggregate public debt. The United States has a history of much more limited efforts by the legislature, without constitutional reinforcement, to restrain the growth of deficits and differentiate aspects of these deficits that contribute to the aggregate public debt in more or less structural respects. The constitutions of Germany and the United States, however, set ground rules for public borrowing that pose very different problems for budget discipline. The United States, in contrast with Germany, attempts to protect minority parties and interests in Congress against the majority, and does not require the executive to be aligned with the legislative majority. This approach to potential disagreements over legislative matters elevates incremental decisions about public debt and virtually rules out super-legislative budget discipline; to make the prospects for a constitutional budget constraint more remote, the federal courts have traditionally stayed away from legislative borrowing issues, in order to preserve the Constitution's intended separation of powers. By contrasting the German and US constitutional backgrounds, the authors analyze the problematic of legislative or super-legislative budget discipline as their own two countries experience it, with the goal of identifying lessons that may be of use to other nations.

3. Through this article, the German constitution is referred to simply as the *Grundgesetz*. References to the "Constitution" are to the U.S. Constitution.

But, first things first. We begin with a brief comparison of the two constitutions under discussion.

I. THE TWO CONSTITUTIONS

In contrast with the German and European constitutions, the US Constitution is, as Talleyrand declared a constitution should be, short and open to future events.⁴ Its most important provision concerning public debt, from the point of view of a constitutional lawyer, is Article I, Section 8,⁵ which ostensibly gives Congress exclusive power to borrow money on behalf of the United States. (There is controversy whether the Fourteenth Amendment qualifies this power, giving the President the right to increase the public debt in order to ensure that authorized debts of the United States be paid.⁶) This is what the German constitutional tradition classifies as a norm of competence, in contrast with material norms that would oblige the legislature to adjust or reduce the public debt. Constitutional grants of competence are important, because they ground political power.⁷

The corresponding provision of the German *Grundgesetz* is also a norm of competence: "The preparation of the budget law . . . shall simultaneously be presented to the Bundesrat [the German federal chamber] and the Bundestag [German parliament]."⁸ The passive formulation is understood to mean that the federal government in power has exclusive authority to propose a budget, including the power to propose borrowing on behalf of the state, and that the so-called "budget sovereignty" of the legislature is limited to small corrections of a proposed budget. Large departures from or rejection of the proposed budget would, in a parliamentary democracy, be tantamount to a vote of no-confidence and would deprive the government of its mandate. A budget approved by the *Bundestag* and *Bundesrat* is considered in Germany to be a formal law that is directed only to the government and authorizes but does not obligate it to act accordingly.⁹ The budget law must be distinguished from other legislation that affirmatively directs the government to make expenditures.

The comparable norms of competence within the legal structure of the European Union are a bit more complex. The EU spends less than its member states. The EU Budget of 2013 anticipated revenue and spending of only 132.8 billion Euros, while the corresponding figure for the German federal budget alone

4. JOHN HOLLAND ROSE, NAPOLEON I. 340 n.1 (Ger. 1906).

5. U.S. CONST. art. I, § 8.

6. See *infra* Section 4.2.

7. Eugenio Bulygin, *On Norms of Competence*, 11 L. & PHIL. 201 (1992); HANS Kelsen, PURE THEORY OF LAW 148-49 (Max Knight trans., University of California Press 1970).

8. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW], May 23, 1949, BGBl. I (Ger.) art. 110, § 3.

9. Markus Heintzen, *Staatshaushalt*, in HANDBUCH DES STAATSRICHTS DER BUNDESREPUBLIK DEUTSCHLAND Rn. 53-56 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2007). This legal understanding is the result of a separation of powers conflict between the Prussian King and Parliament from 1862 to 1866. *Id.* at Rn. 9-10.

was 302.0 billion Euros.¹⁰ Further, Article 125 Section 1, Sentence 1, of the Treaty on the Functioning of the European Union (TFEU) provides that: "The [European] Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities governed by law, or other undertakings of any Member State."¹¹ Despite Article 122, Section 2 of the TFEU¹², there was controversy whether this provision of the TFEU (not the EU Treaty itself, but nonetheless the primary law) had been and would continue to be violated by political attempts to deal with the Greek debt crisis and the EU fiscal crisis beyond Greece. The same controversy extended to the prohibition of debt financing arrangements on the part of the European Central Bank (ECB) (Article 123, Section 1 of the TFEU).¹³ On November 27, 2012, however, the European Court of Justice decided that Article 125 of the TFEU forbids financial assistance that might interfere with the incentives for a receiving Member State to maintain a solid budget policy, but that this article does not forbid financial assistance that is mandated for the preservation of the financial stability of the entire Eurozone, and that financial assistance is subject to strict conditions. To support this holding, the ECJ could also have relied on the recently adopted Article 136, Section 3 of the TFEU.¹⁴

Moreover, it cannot be argued that the budgetary autonomy of the parliaments of the EU Member States has been diminished in favor of that of the European Council.¹⁵ Since July 2011, German laws on Greek relief (with potential subvention of 22.4 billion Euros) and on the European Financial Stability Facility (which represents a potential subvention of 147.6 billion Euros, with later expansion not yet specified) have been brought to the German Constitutional Court. The plaintiffs in that proceeding claimed that the budgetary sovereignty of parliament would have been violated, and in particular that it would subvert the dignity of a democracy, to impose on the representatives of the people a decision deadline that depended on the business hours of Far Eastern securities exchanges

10. *Haushalt 2013 in Zahlen*, EUR. COMMISSION, http://ec.europa.eu/budget/figures/2013/2013_de.cfm (last updated Feb. 27, 2013); *Öffentliche Finanzen, Bundeshaushalt 2013*, BUNDESMINISTERIUM DER FINANZEN, http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Oeffentliche_Finanzen/Bundeshaushalt/Bundeshaushalt_2013/2012-04-13-themenschwerpunkt-hh2013.html (last updated Nov. 27, 2012).

11. Consolidated Version of the Treaty on the Functioning of the European Union art. 125, Oct. 10, 2012, 2012 O.J. (C 326) 1 [hereinafter TFEU].

12. Where a Member State is facing difficulties or seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. TFEU art. 122, § 2.

13. Cf. Hanno Kube & Ekkehart Reimer, *Grenzen des Europäischen Stabilisierungsmechanismus*, 27 NEUE JURISTISCHE WOCHENSCHRIFT 1911 (2010).

14. Judgment of November 27, 2012, Case C-370/12, *Pringle v. Ir.*, 2012 E.C.R. I-____, ¶¶ 135-36. Martin Nettesheim, *Europarechtskonformität des Europäischen Stabilitätsmechanismus*, NEUE JURISTISCHE WOCHENSCHRIFT 14, 14-17 (2013).

15. In accordance with Article 15 EU Treaty, the European Council sits with the state and government heads of the Member States, as well as with the President of the European Council and the President of the European Commission.

that happen to be the first to open daily.¹⁶ The Constitutional Court, in the interim, remanded the issue in its judgment on September 7, 2011. None of the challenged measures were held invalid. The Court instead affirmed the budget responsibility of the legislature. Every German federal spending measure for solidarity at the European level must, according to the Court, be approved in detail by the *Bundestag*.¹⁷ This principle has been affirmed in a recent decision of the court.¹⁸ Applications for the issue of a temporary injunction have been refused with the proviso that the Treaty establishing the European Stability Mechanism limits the payment obligations of the Federal Republic of Germany arising out of this treaty to the amount expressly stipulated therein; no provision of this treaty may be interpreted in a way that establishes higher payment obligations for the Federal Republic of Germany without agreement of the German representative. The Court required that the German government could only constitutionally enter into the treaty if this limitation is "ensured by international law."¹⁹ The US Constitution vests the legislative power in Congress and makes no distinction between legislation and treaties, so that a claim like that of the plaintiffs in the German case discussed here might succeed if the requirements of any threat did indeed conflict with congressional budgetary sovereignty.²⁰

16. In the case of the Currency Union/Financial Stabilization Law (Help for Greece), the Bundestag began deliberations on the EU Law as submitted to it by the German government on May 5, 2010, and the Bundestag and the Bundesrat jointly ratified it on May 7, 2010, a Friday, the President prepared the law for immediate adoption and announced it on May 8, 2010, a Saturday. Also compare the tables of contents of the two Constitutional Court decisions, rejecting claims against these laws, viz. the Currency Union/Financial Stabilization Law of May 8, 2010, and against the Euro Stabilization Mechanism Act of May 22, 2010. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court of Germany] May 5, 2010, 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 385 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court of Germany] June 9, 2010, 126 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 158, 163 (Ger.). Cf. Joachim Wieland, *Unter dem Rettungsschirm – Der Euro, die PIIGS und das Recht*, in *ÖFFENTLICHES RECHT IM OFFENEN STAAT Festschrift für Rainer Wahl* 851-855 (2011) (Ger.).

17. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 7, 2011, 2 BvR 987, 2011 (Ger.), available at http://www.bverfg.de/entscheidungen/rs20110907_2bvr098710en.html. The Constitutional Court shows the legislature a strong role with this decision. It does not harmonize well, however, with that which the legislature is said to have in the procedure for budget legislation. The discrepancy can be explained by the fact that the restriction proclaimed here by the Constitutional Court is less in the nature of budget policy than of European policy. Cf. Christian Calliess, *Der Kampf um den Euro: Eine "Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk*, in *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVWZ]* 1-8 (2012); Christian Calliess, *Der ESM zwischen Luxemburg und Karlsruhe: Die Krise der Währungsunion als Bewährungsprobe der Rechtsgemeinschaft*, in *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVWZ]* 97-105 (2013); Wolfgang Kahl, *Bewältigung der Staatsschuldenkrise unter Kontrolle des Bundesverfassungsgerichts – ein Lehrstück zur horizontalen und vertikalen Gewaltenteilung*, in *DEUTSCHES VERWALTUNGSBLATT [DVBL]* 197-207 (2013); Frank Schorkopf, *"Startet die Maschinen" – Das ESM-Urteil des BVerfG vom 12.9.2012*, in *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVWZ]* 1273-77 (2012).

18. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 12, 2012, 2 BvR, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVerfGE] 1390, 2012 (Ger.), available at http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012en.html.

19. *Id.* at Rn. 288.

20. An example is the congressional override of tax treaties during the 1980s under I.R.C. § 7 which amounted to a unilateral renunciation of important provisions in many of those treaties. See

The current interest of the general public in public debt is, of course, a response to the debt crisis in the USA and in Europe, which threatens private wealth accumulated in both countries during unusually long periods of world peace. In particular, the public in both countries shows some interest in permanent constitutional measures.²¹ As we shall see, differences in US, German, and EU constitutional frameworks sharply limit the possibility that the USA and Germany should adopt similar public debt strategies. In the US presidential democracy, Congress has the power to incur debt on behalf of the country; in parliamentary democracy, the power to indebted the state lies with the government in power; and in the EU, that power lies with the EU Council. This disparity has consequences for the details of constitutional restraints on public debt, and is the subject of the following section.

II. THE GERMAN PERSPECTIVE

Given that the power of the US government to borrow lies with Congress, material constitutional debt criteria are less likely to become law. Why should Congress, as gatekeeper of the power to amend the Constitution, impose limits on itself? It is quite different in the German system. A constitutional limitation of the borrowing power of the government and the control of the borrowing power through the Constitutional Court reinforce the separation of powers. To that end, Germany has indeed adopted express, material constitutional limitations on public debt, whereas in the USA the only comparable limitations are statutory. Moreover, German constitutional jurisprudence concerning the exercise of the legislative and executive powers is more elaborate and grows more quickly.

A. Development of the Grundgesetz

1 The Starting Point

The original version of the *Grundgesetz* of 1949 allowed borrowing only in cases of extraordinary necessity and, on the whole, only for articulated goals, based on highly specific statutory principles. Debts had to be listed in an appendix of the full budget plan (Article 115, 110 Section 3 GG). In spite of the enormous financial burden of rebuilding after World War II, the Federal Republic of Germany (i.e., West Germany) remained largely debt-free until the early 1960s.²² The original

STEPHEN G. UTZ, TAX POLICY: AN INTRODUCTION AND SURVEY OF THE PRINCIPAL DEBATES, 198-200 (1993).

21. E.g. Germany: Manfred Schäfers, *Die Selbstfesselung*, FRANKFURTER ALLGEMEINE WIRTSCHAFT, June 12, 2009, <http://www.faz.net/aktuell/wirtschaft/schuldenbremse-die-selbstfesselung-1811715.html>; United States: R. Glenn Hubbard & Tim Kane, *Republicans and Democrats Both Miscalculated*, N.Y. TIMES, Aug. 11, 2013, <http://www.nytimes.com/2013/08/12/opinion/republicans-and-democrats-both-miscalculated.html>.

22. For a brief account of the growth of German public debt, see Markus Heintzen, *Staatsverschuldung*, in GRUNDGESETZ-KOMMENTAR 1307, 1310 at Rn. 4 (Ingo von Münch & Philip Kunig eds., 2012); Hanno Kube, *Kreditbeschaffung*, in GRUNDGESETZ-KOMMENTAR 91, 91 at Rn. 235

Grundgesetz provision on public debt, however, came under heavy criticism in 1967-1969 as based on too statically microeconomic of an approach. It was thereafter replaced by a budgetary policy oriented towards social programs.²³

Furthermore, Article 110, Section 1, Sentence 2 of the *Grundgesetz* contains a balanced budget requirement: "The budget shall be balanced with respect to revenues and expenditures." Because borrowed funds are included in "revenues," this provision has nothing to do with the problem of controlling public debt as long as government outlays can be covered by borrowed funds. This formal understanding of the budget comparison is consistent with recent decisions of the German Constitutional Court.²⁴

2 Keynesianism

Since 1969, the German financial policy paradigm has been anti-cyclical, and based on macroeconomic theory, especially that of John Maynard Keynes, which subordinates the public budget to governmental goals of economic stimulation and intervention.

i. The Basic Idea

Budgetary economics should, according to this paradigm, provide prospectively for the maintenance of general economic equilibrium (especially price stability, higher employment, and economic growth). Government debt is basically legitimate; it is a regular part of the budget, has none of stigma it traditionally did, and is not relegated to extraordinary budget situations. Debt under this paradigm could not, however, exceed annual new investment by the state. Exceptions from this investment ceiling are acceptable only to prevent disturbance of the national economic equilibrium.²⁵ Such a model presupposes a nimble bureaucracy, and for that reason might better have been cast as a norm of competence, as discussed in Section I. above.

ii. An Appraisal

In retrospect, more than forty years later, we can see that it was an undeniably bad idea to write this macroeconomic theory into the *Grundgesetz*. While the theory quickly became controversial and was superseded by later theoretical

(Theodor Maunz & Günter Dürig eds., 2009). See also MARKUS HEINTZEN, DAS NEUE DEUTSCHE STAATSSCHULDENRECHT IN DER BEWÄHRUNGSPROBE (2012); PAUL KIRCHHOF, DEUTSCHLAND IM SCHULDENSOG (2012); KAI A. KONRAD & HOLGER ZSCHÄPITZ, SCHULDEN OHNE SÜHNE? WAS EUROPAS KRISE UNS BÜRGER KOSTET (rev. ed. 2012).

23. Cf. Herbert Fischer-Menshausen, *Kreditaufnahmen, Gewährleistungen*, in GRUNDGESETZ-KOMMENTAR 1209, 1214 at Rn. 3 (Ingo von Münch & Philip Kunig eds., 1996).

24. Christian Hillgruber, *Das Gebot des Haushaltsausgleichs*, in KOMMENTAR ZUM GRUNDGESETZ 1501, 1517 at Rn. 52-55 (Hermann v. Mangoldt et al. eds., 2010).

25. See MICHAEL KLOEPFER, VERFASSUNGSRECHT BAND I § 26, at Rn. 313 (2011).

developments, it remains partly preserved in the *Grundgesetz*. With a focus on the problematic nature of public debt, the Constitutional Court decided in July 2007 that the regulatory concept of Article 115, Section 1, Sentence 2 of the *Grundgesetz* had proven ineffective both as a constitutional means of rational guidance and as a limitation of national debt policy; that much could be said for the proposition that the current version of the *Grundgesetz* was no longer appropriate; and that improved foundations for an effective means of protecting against an erosion of contemporary and future economic efficiency of the social democracy of Germany could be found.²⁶

The German constitutional formulation of an outdated Keynesian program has conceptual and structural weaknesses. Notably, it proved impossible to define the investment limitation on borrowing.²⁷ Furthermore, Article 115, Section 2 of the *Grundgesetz* created a broader exception for so-called special endowments invoked in the 1990s to cover the mountainous costs of German reunification. Finally, the latent debt of social security insurance, and especially the national pension system, was never acknowledged. Above all, the borrowing power limitation was starry-eyed about the frequency of legislation in a democracy.²⁸ A business-cycle-based enlargement of public debt was always easy. But a business-cycle-based retrenchment of the public debt has not occurred in Germany since 1990.²⁹ It is true that the welfare-state goals of this conception have since been added to the EU Treaty, particularly in Article 3, Sections 1 and 3; but contemporary policy has moved away from the proposition that the spending side of the national budget should be for the realization of the intended purpose. Macroeconomic equilibrium has taken second place in the text of Article 109, Section 2, to “budget discipline.”³⁰

iii. Growth of German Public Debt

Welfare program spending made the public debt rise sharply from 1969 through 1982. Since the Great Inflation, after WWI, a higher value on solid public financial matters has become part of the collective political memory in Germany; this rise in public debt was an election campaign issue in 1983. The new conservative-liberal government made a point of curtailing the public debt through 1989. But, this was only a reduction in the pace of new borrowing, never a

26. See generally Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court of Germany] July 9, 2007, 119 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 96 (142) (Ger.).

27. See generally Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court of Germany] Jan. 17, 1989, 79 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 311 (337) (Ger.) (on the problematic of “human capital”).

28. See Wolfram Höfling & Stephan Rixen, Commentary, *Art. 115*, BONNER KOMMENTAR ZUM GRUNDGESETZ [BONNER CONSTITUTIONAL COMMENTARY] Rn. 75 ff (Rudolf Dolzer et al. eds., 2003).

29. See Hanno Kube, Commentary, *Art. 115*, GRUNDGESETZ KOMMENTAR [CONSTITUTIONAL COMMENTARY] Rn. 235 (Maunz & Dürig eds., 2009).

30. See *id.* at art. 109, Rn. 164 ff.

reduction of existing obligations.³¹ With German reunification came a new burst of borrowing that has yet to be reined in. Under the *Grundgesetz*, medium-term government financial planning takes for granted the goal of making progress towards an equal standard of living throughout the enlarged federal union and of achieving that goal in 2020.³² Since October 3, 1990, now a national holiday, there has been a gigantic increase in the public debt.³³ After 1997-1998, in the wake of the Internet Bubble, balanced budgets for a short time seemed to become politically achievable, but throughout much of the Schröder era, 1997-2005, the public budget continued to grow.³⁴ The EU Court of Justice decision of July 13, 2004, signaled the high point of this public debt problem. The court found that Germany, like France, had for the fiscal years 2002-2005 failed to comply with the Maastricht Treaty's criterion for Eurozone Members of keeping annual sovereign deficits below 3% of GDP.³⁵ This remains a political embarrassment of the first order, because Germany had insisted on the firm maintenance of national economic policy as a condition for the foundation of the European economic and currency union.³⁶

A page was turned in 2007, for solely economic reasons. A new government formed by the CDU/CSU and SPD, the "Great Coalition," had the courage to raise the VAT from 16% to 19%; a favorable business cycle did the usual; and in 2007 Germany seemed to be able, for the first time in four decades, to balance the federal budget, with no reduction in accumulated debt but importantly no new debt.³⁷ But, crisis after crisis followed: first the Lehman Brothers and US real estate crash, then the downturn of world-wide financial markets exacerbated by the systematically linked banks and inflated pay scale for management, then Greece's crash, followed by the Euro crisis. The German taxpayer wondered, meanwhile, whether Greece had become the fifty-first US state since Greece's troubles mirrored those of the US.

31. See Markus Heintzen, *German Constitutional Limits on Public Debt*, 59 TAX NOTES INT'L 963 (2010).

32. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG] [Basic Law], May 23, 1949, BGBl. I Art. 72 § 2; Art. 106 § 3,4 (Ger.).

33. Kube, *supra* note 29.

34. DWSTATIS STATISTISCHES BUNDESAMT, http://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/OeffentlicheFinanzenSteuern/OeffentlicheFinanzen/Schulden/Tabellen/SchuldenNichtOeffentlich_Insgesamt.html. (last visited Dec. 8, 2013)

35. TFEU, art. 126 § 2 (a), Sept. 5, 2008 O.J. (C 115) 100; Treaty on the Procedure for Dealing with a Violative Deficit, Protocol no. 12, art. 1, 2010 O.J. (C 83) 1.

36. See *Stopp des Defizitverfahrens Stellt Pakt in Frage*, FRANKFURTER ALLGEMEINE ZEITUNG, Nov. 25, 2003, www.faz.net/aktuell/wirtschaft/stabilitaetspakt-stopp-des-defizitverfahrens-stellt-pakt-in-frage-1135495.html.

37. See *Fast Ausgeglichener Haushalt: Steinbrück Erwartet Nur Noch Mini-Defizit*, SPIEGEL ONLINE (Sept. 25, 2003), www.spiegel.de/wirtschaft/fast-ausgeglichener-haushalt-steinbrueck-erwartet-nur-noch-mini-defizit-a-508523.html.

iv. The Role of the Constitutional Court

The decades-long bulging of the public debt finally persuaded the German Constitutional Court to get into the act. In comparison with similar courts of other countries, the Constitutional Court plays a more active role in budgetary, financial, and tax matters.³⁸ The *Grundgesetz* provides, as has been explained, an ample, explicit basis for the court's position.

The first shoe to fall was a decision of the Constitutional Court concerning the financial balance among the *Länder*, a key feature of German federalism. This balance requirement contemplates the transfer of funds to the budgets of financially weaker *Länder* from stronger *Länder* with a goal of making them "commensurate" ("*angemessen*" is the word used in *Grundgesetz* Article 107, Section 2, Sentence 1). The Constitutional Court held that, because "commensurability" is a normative standard, budgetary transfers are not loans; this holding established the first of several notable principles.³⁹ The Court's next decision in the area concerned *Länder* that are in a situation of extreme budgetary need; for this extreme case, the court postulated a constitutional standard of financial support through solidarity between the federal union and the *Länder*, and among the *Länder*.⁴⁰ As a point of clarification, it should be mentioned that German law unconditionally prohibits the insolvency of the federal union or of individual *Länder*. German federalism, however, has come to rely on transfer payments among its members. Despite these transfers, differences in financial strength among the *Länder* have become more firmly entrenched.⁴¹ This is why the Constitutional Court has refined the principles of its doctrinal development in two further decisions.⁴² Berlin, as the capital city, has had to accept that its debt reduction plea is inferior to that of others in litigation.

With apparent reluctance, the Constitutional Court addressed the relevant material norm concerning public debt. It is a matter for the legislature to give shape to the central investment concept. Furthermore, the legislature, in determining whether the economy has departed from general equilibrium, has a task belonging

38. See generally HILDE NEIDHARDT, STAATSVerschuldung und Verfassung (2010); HILDE NEIDHARDT, DAS BUNDESVERFASSUNGSGERICHT UND SEIN EINFLUSS AUF DIE ENTWICKLUNG DER FÖDERALEN FINANZBEZIEHUNGEN (2009). Cf. Stefan Breinersdoerfer, *Die Gestaltungsfreiheit des Steuergesetzgebers*, STEUER UND WIRTSCHAFT 211 (2009); Michael Droege, *Wie viel Verfassung braucht der Steuerstaat?*, STEUER UND WIRTSCHAFT 105, 105-12 (2011); Clemens Thiele, *Der Einfluss der US-Verfassung auf das US-amerikanische Steuerrecht*, INTERNATIONALES STEUERRECHT 9, 9-11 (1999).

39. Bundesverfassungsgericht [BVerfG][Federal Constitutional Court of Germany] June 24, 1986, 72 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 330 (Ger.).

40. Bundesverfassungsgericht [BVerfG][Federal Constitutional Court of Germany] May 27, 1992, 86 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 148 (Ger.).

41. See *Verfassungsklage: Finanzausgleich entzweit Bundesländer, Länderfinanzausgleich*, SPIEGEL ONLINE (Feb. 5, 2013), www.spiegel.de/politik/deutschland/verfassungsklage-finanzausgleich-entzweit-bundeslaender-a-881662.html.

42. See generally Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Oct. 19, 2006, 116 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 137 (Ger.); Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Nov. 11, 1999, 101 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 158 (Ger.).

to the evaluative and discretionary realm, in which the court should not involve itself.⁴³ The newly elected government of the federal *Land* of North Rhine and Westphalia had to learn, in March 2011, that reluctance is no charter for broad action, when their amendment of the municipal budget was held unconstitutional and void on grounds of local statutory criteria that correspond to those in the national constitution.⁴⁴ Generally, the Constitutional Court interprets the *authority* to interpret the constitutional regulations on public debt as the *duty* to ensure that they are carried out in detail.⁴⁵ The Court concluded that the *Grundgesetz* imposes the duty to establish, *in advance*, normative guidelines for financial policy decisions.⁴⁶ The German legislature, however, had neglected this. The constitutionally-required prospective fiscal policy statute has been in place since 2001, following the Constitutional Court's 1999 decision⁴⁷; but, the statute merely repeats scraps of the Constitutional Court's decision, resulting in an abstract and toothless law.⁴⁸

The Constitutional Court, however, would not be satisfied so lightly. In 2007, the Court bluntly affirmed the insufficiency of the 2001 public debt statutes in force and mandated their fundamental revision.⁴⁹ This decree fell on surprisingly fruitful soil. It accorded well with a routine statutory reform that is part of the tradition of German federalism. The legislature charged with amending the *Grundgesetz* stood ready, and used the impulse provided by the Constitutional Court as an occasion for reviewing the German public debt law in the light of the stability criteria of the Maastricht Treaty. The resulting constitutional change is embodied in the Law of July 29, 2009.⁵⁰ With clear regard to the financial crisis that had triggered the collapse of Lehman Brothers, two-thirds of the legislature voted that Germany, by 2016, and the *Länder* by 2020, must abide by the "close to balance" principle.

43. The distillation in the text derives from Judgment of April 18, 1989, Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Apr. 18, 1989, 79 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 311, (Ger.) (discussing the Budget Law of 1981), and the Judgment of July 9, 2007, Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Jul. 9, 2007, 119 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 96, (di Fabio, J. and Mellinghoff, J., dissenting) (§§ 161-203) (Landau, J., dissenting) (§§ 204-20) (discussing the Budget Law of 2004).

44. See generally VerfGH Mar. 15, 2011, ENTSCHEIDUNGEN DES VERFASSUNGSGERICHTSHOF FÜR DAS LAND NORDRHEIN-WESTFALEN VERFGH 20/10. For the unconstitutionality and nullity of the alternative holdings, see HEINTZEN, *supra* note 31, at Rn. 963 seq.

45. Hanno Kube, Commentary, Art. 109, GRUNDGESETZ-KOMMENTAR, 68 Ergänzungslieferung 2013 Rn. 109 (Theodor Maunz & Günter Dürig eds.).

46. 101 BVERFGE 158 (214) (Ger.) (discussing John Rawls' "veil of ignorance") The Constitutional Court gives binding effect to this holding only for later legislation and does not apply the holding in earlier cases. See generally 101 BVERFGE 158. According to the Court's view, which is not grounded further, these guidelines should bind the legislature prospectively as a legislative rather than a constitutional holding.

47. BGBl. I at 2302.

48. See Kube, *supra* note 45 at Rn. 268.

49. See generally 119 BVERFGE 96 (§ 174), (di Fabio, J. and Mellinghoff, J., dissenting).

50. BGBl. I at 2248.

It is useful at this point to notice three further facets of the Constitutional Court's decisions. (1) An article about the constitutional questions concerning public debt cannot ignore constitutional questions about tax revenue. In June 1995, the Constitutional Court surprisingly recognized that a wealth tax could be added to the usual taxes on income product only as long as the total tax burden on the estimated general income, taking into account typical revenue, extraordinary revenue and expenditures, remained roughly equal when divided between private and public sectors.⁵¹ The Court derived this so-called "halving principle" from Article 14, Section 2 of the *Grundgesetz*, which requires that the use of property serve the general welfare "as well". The Court interpreted "as well" to mean "at most equally", therefore limiting the tax burden on the income to 50%.⁵² In a later decision, a different panel of the Court partially took this back, holding that the halving principle only applied to the wealth tax; the aggregation of income and business taxes could exceed the previous 50% limit.⁵³ (2) The 1990s were an exciting period for the relationship between constitutional law and economic data. The minimum subsistence income for an individual was constitutionally fixed at a specific monetary amount, more than forty years after the misery of the post-war years.⁵⁴ This is a subject that concerned above all the taxation of affluent families with multiple children, and to that extent also the state budget. (3) The ever-greater consolidation of the Constitutional Court's decisions on relations between Germany and the EU, between the German *Grundgesetz* and the EU Treaty, and between the Constitutional Court and the European Court of Justice, belong to a completely different plane. In *Honeywell*, decided July 6, 2010, the Constitutional Court explained that it would consider EU regulations *ultra vires* only if the European Union clearly and substantially exceeds its competence under the EU Treaty. Such classification presupposes three conditions: the openness of the breach, a structurally meaningful shift of jurisdiction to the EU, and a prior acknowledgment thereof by the ECJ. This could be important for legal acts in the framework of the European currency union.⁵⁵

51. Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) June 22, 1995, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 121 (138), (Ger.).

52. *Id.*

53. See generally Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Jan. 18, 2006, 115 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 97 (Ger.).

54. See generally Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Oct. 13, 2009, 124 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 282 (Ger.); Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) May 19, 1990, 82 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 60 (Ger.); Cf. Markus Heintzen, *Die Verschonung des Existenzminimums im deutschen Einkommensteuerrecht*, 26 NIHON UNIV. COMP. L. 55 (2009).

55. Bundesverfassungsgericht [BVERFGE][Federal Constitutional Court] July 6, 2010, 126 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 286 (Ger.). This decision was given after the Lissabon-decision. Bundesverfassungsgericht [BVERFGE][Federal Constitutional Court] June 30, 2009, 123, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 267 (Ger.).

B. The European Stability and Growth Treaty and the Second German Federalism Reform

1. The "Close-to-Balance" Principle

The new German constitutional budget rule⁵⁶ gives a central role to a "close-to-balance" principle. This derives from the European Union's Stability and Growth Pact of 1997, which requires monetary union members to abide by the Maastricht convergence standards for participation in the Eurozone.⁵⁷ Close-to-balance is, in effect, a balanced-budget requirement for governments of Eurozone countries and their subnational units.⁵⁸ The German *Grundgesetz* adopts and imposes this principle on the German federal government as of 2016, and on the already fiscally constrained *Länder* as of 2020.⁵⁹

Regulation of German federal and subnational government borrowing by the Stability and Growth Pact faces an important hurdle, however, which those not familiar with EU processes may find hard to grasp. The budgets of social insurance agencies and municipalities are not subject to the German balanced budget constitutional provision as part of the federal and *Länder* budgets.⁶⁰ On the European level, however, the Maastricht public debt criteria applies to the deficits of lower governmental units and agencies.⁶¹ Hence, the German state was no longer allowed to segregate special funds from the general budget, thereby avoiding constitutional controls.⁶²

56. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG] [BASIC LAW], May 23, 1949, BGBl. I at 1478, art. 109 § 3(1); art. 115 § 2(1).

57. Cf. Ulrich Häde, in EU-VERTRAG, AEU-VERTRAG, Art. 126 AUEUV, Rn. 98-122 (Calliess & Ruffert eds., 4th ed. 2011).

58. The state debt provisions of the federal Grundgesetz are not only applicable to the federation but also to the states. The federal constitution obligates the states to regulate details in their constitutions. For the actual legal situation cf. WOLFGANG FÖRSTER ET AL., *Länderfinanzbericht 2010*, JAHRBUCH FÜR ÖFFENTLICHE FINANZEN, 9-242 (2011). (This indicates that Germany is a more unitary federal state than the United States).

59. Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law] May 23, 1949, Bundesanzeiger [BAnz.] art. 143d § 1.

60. Compare Entwurf eines ... Gesetzes zur Änderung des Grundgesetzes, Mar. 24, 2009, (Draft) Bundestags Drucksache: Drucksachen und Protokolle [BT] 16/12410, at 10-11, (F.R.G.) (the official rationale), with Joachim Wieland, *Schuldenbremse und Kommunalfinanzen*, in GEMEINDEFINANZPOLITIK IN DER KRISE: TEUERREFORM, HAUSHALTSKONSOLIDIERUNG UND ÖFFENTLICHE AUFGABEN, Loccumer Protokolle 67/10, pp. 89-98 (Joachim Lange et al. eds. 2010) (Ger.) (on the meaning of the debt "brake" for local financial policy).

61. Consolidated Version of the Treaty on the Functioning of European Union, Protocol No. 12, On the Excessive Deficit Procedure, art. 2, Mar. 30, 2010, 2010 O.J. (C 83) 279.

62. Compare Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law] May 23, 1949, art. 115 § 2 (Amended Aug. 1, 2009), with Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law] May 23, 1949, art. 115 § 2 (current) (in respect to special trusts of the Federation, exceptions to the provisions of paragraph 1 of this Article may be authorized by a federal law. This exception for special governmental funds was repealed in 2009).

2. Three Exceptions to Close-to-Balance

The German constitutional version of the close-to-balance ideal, however, is tempered by significant exceptions, one exclusively for the federal government and two for both the federal union and the *Länder*. (1) The *Grundgesetz* does not require an exact balance if federal borrowing remains under .35% of GDP; at present, this permits an annual structural deficit of 9.3 billion Euros;⁶³ (2) although the constitutional budget limit permits deficit spending in response to extraordinary business cycle swings, the German *Grundgesetz* now requires that both expansion and contraction must be symmetrically taken into account, with corresponding budget surpluses in good economic times to repay the public debt accumulated during the deficit spending;⁶⁴ and (3) natural catastrophe or highly unusual emergency temporarily excuse both the federal union and the *Länder* from borrowing limits, although legislation violating the close-to-balance principle must include a binding amortization plan for the additional debt.⁶⁵ Whether the current financial crises affecting Euro zone members qualify as emergencies sufficient to meet this standard has not yet been resolved.

For the most part, the new public debt rules have been met with skepticism in Germany because it is not clear that the new deficit restrictions, given the exceptions just described, will produce significantly different results in practice from previous ineffectual debt restrictions, and because the new restrictions resemble those of the European Stability and Growth Pact that have proven inadequate in preventing the member state practices that are responsible for the current Euro zone crisis.

i. Continuation of Earlier Public Debt Policy

The exception to budget balancing in economic downturns, described above, threatens to undermine the purpose of the constitutional brake on debt. Anti-cyclical fiscal policy – the Keynesian approach on which German public debt regulation was initially founded – lives on. The ambitious requirement that budgets produce surpluses when markets turn up hinges on replacing the current trigger for budget relaxation – “disturbance of general economic equilibrium” – with a new trigger – “deviation from normal business activity levels”,⁶⁶ as if the words alone could elicit greater fidelity to the purpose of these budget rules. Moreover, Article 115, Sections 2(4) and (8) of the *Grundgesetz* do not expressly

63. Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law] May 23, 1949, Bundesgesetzblatt, Teil I [BGBl. I], art. 115 § 2 (1); Germany's GDP in 2012 was 2,666.40 billion euros according to Germany's Federal Statistics Agency. Statistics available at www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/VGR/Inlandsprodukt/Tabellen/Gesamtwirtschaft.html (last visited Aug. 23, 2013).

64. Art. 115 § 2, (3), (4) GG.

65. See generally Art. 115 § 2 GG.

66. Art. 115 § 2 (3) GG.

require the amortization of debts validly incurred in response to unusual business cycle swings.

Furthermore, the European Stability and Growth Pact contemplates, and the new German constitutional provisions provide, that a special body of technocrats, using difficult economic criteria and formulas, must establish a specific numerical plan for the variable debt authorization.⁶⁷ The law takes into account the EU Stability and Growth Pact and its cyclical adjustment procedure, but refrains from implementing the statute with the specification of essential details. The task of filling in these details will fall to the federal Ministry of Finance (the German treasury department) in conjunction with the federal Ministry for the Economy and Technology. One of these details is the baseline that makes it possible to distinguish structural and cyclical deficits. A structural deficit is one that arises in a period of economic stability. The determination whether a deficit is structural requires complicated calculations, governed by statute, implemented by administrative officials. Here, let it be noted, briefly, that the bureaucracy to which this task is entrusted in Germany is comparatively larger than the bureaucracy in the US, and it plays a distinctive role in the political process by virtue of its accumulated expertise. The Congressional Budget Office, the US counterpart, has a staff of about 220 people.

ii. Weaknesses of the EU Stability and Growth Pact

In sum, the budget disciplinary rules, described thus far, inhabit a multi-layered legal order, with normative elements derived from various legal authorities within the European Union and from EU member states like Germany, which must coordinate their own borrowing rules and practices at the national and subnational level with European, national constitutional, national legislative, and subnational legislative requirements. Article 126 of the TFEU stands at the top of the hierarchy, subserved, at least aspirationally by the Stability and Growth Pact, which is partly soft law.⁶⁸ Next, the German *Grundgesetz*, responding to European Law in Article 109, Section 2, subordinates the German federal union and the *Länder* to EU law. Article 115, Section 2 of the *Grundgesetz* requires that an operational effect be given at the national level to this subordination by legislation, which may delegate essential issues to a ministerial committee, as described above. The *Länder* must carry out the constitutional balanced budget amendment with implementing legislation and rules established by that ministerial committee. The process of

67. Art. 115 § 2 (5) GG; Begleitgesetz zur zweiten Föderalismusreform [Second Reform of Federalism Act], Aug. 10, 2009, BGBl. I, at 2702-04, No. 53 (F.R.G.). (Act regulating the execution of article 115 of the German *Grundgesetz*).

68. Compare European Council Resolution 97/C, 1997 O.J. (C 236/1) (On Stability and Growth), with Ecofin Council, Resolution on the Specifications on the implementation of the Stability and Growth Pact and Guidelines on the format and content of Stability and Convergence Programmes, Oct. 11, 2005. For the official rationale of the Constitutional Amendment refers to Directive (EC) 1466/97 and 1055/2005 see Entwurf eines ... Gesetzes zur Änderung des Grundgesetzes, Mar. 24, 2009, (Draft) Bundestags Drucksache: Druckesachen und Protokolle [BT] 16/12410, at 6, (F.R.G.).

completing this complex legal structure, needless to say, is ongoing. Since autumn 2011, numerous new legislative measures have been considered, among them eight regulations (now usually called “Sixpack” and “Twopack”) and the European Fiscal Compact.⁶⁹ Meanwhile, there is a ping-pong match between the European and national (especially the German) lawmaking processes. In 2009, in Germany, the *Schuldenbremse* took over the task of the European Growth and Stability Pact. In 2012, this regulatory model, with its general implementation in Germany, supplants the Treaty on Stability, Coordination and Taxation of the Economic and Monetary Union.⁷⁰

In proportion to the ambition that gives rise to this pyramid of norms (three political levels, at each of which constitutional law, statutory law, and administrative action must be coordinated) is the shakiness of the whole. Germany and France were in violation of the Maastricht stability criteria from 2002 through 2005,⁷¹ revealing that the normative power of European legal standards may be somewhat overstated. In 2010, the prohibition against bailouts in Article 125 of the Treaty on the Functioning of the European Union was softened in response to the Greek debt crisis and the crisis of the Euro.⁷² On the other hand, there have also been positive developments: (1) the European Court of Justice, with its decision of September 11, 2004, exercised some legal control over the conduct of European Union institutions in complying with the EU deficit oversight mechanism, though with judicial self-restraint, and (2) Germany adhered to the close-to-balance principle from 2006 through the outbreak of the most recent US real estate crisis. On November 27, 2012, the ECJ confronted the bailout prohibition with surprising specificity in the *Pringle* case, and the German federal government will rely on this judgment in its plans for achieving a substantially balanced budget as early as 2014. The fact that these plans are actually being carried out says much for the political pressure that German constitutional law and European law have exerted. The European Parliament, on the other hand, has been concerned with a contrary position. The budgetary spending it controls will be reduced to 1% of European GDP for the years 2014 through 2020. Against this, the European Parliament counters that it will need more money to simulate growth and job creation. This

69. *Treaty On Stability, Coordination & Governance In The Economic And Monetary Union Between The Kingdom of Belgium, The Republic of Bulgaria, et al.*, EUR. COUNCIL, Mar. 2, 2012, http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf (last visited Oct. 3, 2013). See press releases from the European Union: Eur. Un., *Economic Governance "Six-Pack" Enters Into Force* (Dec. 11, 2011), http://europa.eu/rapid/press-release_MEMO-11-898_en.htm; Eur. Un., *'Two-Pack' Enters Into Force, Completing Budgetary Surveillance Cycle and Further Improving Economic Governance For The Euro Area*, EUROPEAN COMM'N (May 27, 2013), http://europa.eu/rapid/press-release_MEMO-13-457_en.htm.

70. See Christian Calliess & Christopher Schoenfleisch, *Auf dem Weg in die europäische "Fiskalunion"*, 67 JURISTEN ZEITUNG 477 (2012).

71. See *Public Finances in Member States*, EUROPEAN COMM'N, http://europa.eu/legislation_summaries/economic_and_monetary_affairs/stability_and_growth_pact/125080_en.htm (last updated Dec. 19, 2005).

72. TFEU art. 125 (“The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State.”).

argument, however, elicits mistrust in Germany, because, ever higher government borrowing and spending has been justified since 1969 by an identical argument. Additionally, the European Union budget is too small to have any impact on the private economy.

III. THE U.S. PERSPECTIVE

A. Overview

All agree that the current US debt predicament calls for purposive moderation sooner or later.⁷³ The public debt doubled, to approximately \$9 trillion, during President George W. Bush's presidency and has since grown to approximately \$14 trillion.⁷⁴ This rapid growth has begun to disturb markets and worry banking regulators. Assuming that the situation is as unusual as many commentators believe,⁷⁵ more than fiscal restraint may be called for. Deciding whether this is objectively the case is beyond the scope of this article. Here, we are concerned only with the legal alternatives for framing such budgetary discipline. Is a balanced budget amendment or some variant on existing borrowing restrictions the best solution?

The elements of the German constitutional approach to legislation generally, and to the debt-sensitive aspects of legislation in particular, have few analogues in the US Constitution. The three most important of these elements are: (1) the head of the executive branch of government is the leader of the dominant party or coalition of parties in the legislature; (2) courts actively evaluate whether legislation satisfies constitutional requirements, including the balanced budget requirement; and (3) courts permit legislation that they have held unconstitutional

73. Generally, left and right agree that spending at current levels is not sustainable but disagree about the path to sustainability. President Obama now speaks of "stabilizing the deficit," a goal discussed at length in articles by Richard Kogan, *To Stabilize the Debt, Policymakers Should Seek Another \$1.4 Trillion in Deficit Savings*, CTR. ON BUDGET & POLICY PRIORITIES, (Jan. 9, 2013), <http://www.cbpp.org/cms/?fa=view&id=3885>. Professor Gregory Mankiw, former economic advisor to President George W. Bush, recently wrote that: "The bottom line is that President Obama is right that sustainability is a reasonable benchmark for evaluating long-run fiscal policy. But the standard he applies when evaluating it appears too easy. It will leave us too vulnerable when the next catastrophe strikes." Gregory Mankiw, *Economic View: A Sustainable Budget Should Endure Any Storm*, N.Y. TIMES, Mar. 30, 2013.

74. President's Budget 2012, Table 7.1 (Federal Debt at the end of Year 1940-2018) asserts that the gross federal debt and federal debt less debt to federal government accounts were \$9,986,082 million and \$5,803,050 million, respectively, at the end of 2008, and \$16,050,921 million and \$11,281,124 million, respectively, at the end of 2012. *Federal Debt at the end of Year 1940-2018*, OFFICE OF MGMT. & BUDGET, <http://www.whitehouse.gov/omb/budget/historicals> (last visited Oct. 3, 2013).

75. See Kogan, *supra* note 73, and Mankiw, *supra* note 73 (representing left and right partisan views, respectively, both of whom claim that the current situation requires unusual responses, although they differ concerning what is required. For some time, however, advocates of a constitutional solution have usually represented, or have been understood as representing, a right-of-center view). See, e.g., R. Glenn Hubbard & Tim Kane, *Republicans and Democrats Both Miscalculated*, N.Y. TIMES, Aug. 11, 2013, at A17.

to continue to be honored and enforced, pending its repair. In contrast, the US Constitution is consistent with (i.e., permits) different parties being in control of the presidency and Congress, or one of its Houses.⁷⁶ The US federal courts have avoided deciding some, if not all, “political” cases, cases that would require the judicial branch to give specific directives to the legislature.⁷⁷ Related to this hands-off approach is the refusal of US federal courts to set timetables for the repair of unconstitutional laws, declaring them effective in the meantime.⁷⁸ Although in a few instances the federal courts have invalidated legislation that was intended to regulate Congress and the President in matters relating to the public debt, these decisions generally discourage further experiments of the same type without suggesting which, if any, might succeed. Nevertheless, a comparison of German and American approaches sheds some light on what these alternatives must be like in order to accomplish their intended purposes. The very different paths taken by past congressional experiments and by constitutional jurisprudence in Germany throw into high relief the difficulty of public debt control mechanisms under US law.

B. The Constitutional Framework for Government Borrowing

As has been mentioned, Article I, Section 8, of the Constitution gives Congress alone the power to borrow on behalf of the United States. Article I, Section 7, Clause 2, of the Constitution (the “Presentment Clause”) speaks in binary terms of the President’s choice as between accepting and “returning” and vetoing a bill passed by both Houses of Congress. Although this provision is not limited to legislation that concerns spending or borrowing, the Supreme Court has interpreted it, as will be discussed further below, as precluding Congress from giving the President the power to veto part of legislation presented to him while accepting the rest – a “line item veto.”⁷⁹ This limitation of the delegation of power by Congress to the President even more effectively concentrates the borrowing power in the hands of Congress.

Once Congress has exercised its power to borrow, whether it can repudiate a debt to a private lender is not perfectly clear. Repudiation of the debt, arising from the ordinary exercise of the congressional borrowing power, once seemed to the Supreme Court to be incompatible with the borrowing power itself.⁸⁰ On the other

76. SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 133-60 (2012).

77. *Marbury v. Madison*, 5 U.S. 137 (1803); *Nixon v. U.S.*, 506 U.S. 224 (1993).

78. *Marbury*, 5 U.S. 137 (asserting federal courts’ authority to declare federal legislation unconstitutional. In that case, the Court held unconstitutional recent legislation that purported to increase the Court’s power to enforce its decisions by issuing writs of mandamus to federal officials. Thus, the case is understood as barring the federal courts from enforcing their own holdings of unconstitutionality against the other branch of the government.).

79. See *infra* text accompanying notes 110-112.

80. *Perry v. U.S.*, 294 U.S. 330, 350-51 (1935) (dictum that congressional power to borrow implies binding obligation on Congress not to repudiate obligations); *Lynch v. U.S.*, 292 U.S. 571, 579 (1934) (the due process clause prevents the federal government from repudiating private war risk insurance contracts). In Germany such a repudiation is unthinkable, except in the case of highly

hand, the Court has hinted in dictum that Congress has the power to repudiate contractual obligations from contracts that Congress has entered into on behalf of the state with private parties, at least when the action creating the obligation did not make the legislative intent to be bound "unmistakable".⁸¹ Another possible restriction on the power of Congress to repudiate public debt is arguably found in the Fourteenth Amendment, which provides, in Section 4, that "[t]he validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned." During a recent debt-ceiling showdown, commentators suggest that the Fourteenth Amendment would permit the President to honor such obligations, even if Congress acted to repudiate them.⁸² Some combination of these doctrinal elements may exempt budget legislation from future congressional amendment. The issue has yet to be raised before the courts. Balanced budget legislation and even a balanced budget amendment to the Constitution would provide an opportunity for a decision on this and related points.

C. Historical Background

Until 1917, Congress separately authorized every issuance of U.S. debt. In that year, Congress established an aggregate debt limit, so that new debt issuances were authorized if their principal amount plus existing debt did not exceed the limit.⁸³ In 1939 and 1941, Congress enacted new legislation that again created a debt ceiling but provided for methods of comparing current debt with whatever the limit might be.⁸⁴ In September 1995, raising the debt ceiling became a politically disputed question for the first time. Speaker of the House Newt Gingrich guided legislation through the House that would have raised that ceiling and made specific, spending cuts. President Clinton vetoed the bill. The government did not subsequently default on debt instruments issued by the Treasury, but the President furloughed some government employees for about two weeks until the House relented. A similar debt ceiling impasse and government shutdown has just taken place for the second time in seventeen years.⁸⁵

speculative derivative obligations, which private banks have unconscionably induced the financially weak Communes to purchase. Compare Heintzen, *supra* note 31, at 963, 965; with Johanna Wolf, *Parlamentarisches Budgetrecht und Wirksamkeit zivilrechtlicher Verträge*, 2012 NJW -Inhalt 812.

81. Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 52 (1986).

82. See, e.g., *Does the Fourteenth Amendment Impact the Debt Debate?*, NAT'L PUB. RADIO, (July 6, 2011), <http://www.npr.org/2011/07/06/137656171/does-the-14th-amendment-impact-the-debt-debate> (interview with Professor Jeffrey Rosen of George Washington University Law School).

83. Second Liberty Bond Act of 1917, Pub. L. 65-43, 40 Stat. 288 (1917). A statutory limit has restricted total federal debt, since Congress passed the Second Liberty Bond Act in 1917. D. ANDREW AUSTIN, CONG. RESEARCH SERV., RL31967, *Summary to THE DEBT LIMIT: HISTORY AND RECENT INCREASES* (2008).

84. Act of July 20, 1939, ch. 336, 53 Stat. 1071; Act of Feb. 19, 1941, ch. 7, 55 Stat. 7. See AUSTIN, *supra* note 83, at 3.

85. ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROGRESS* 75-79 (rev. ed. 2000); Annie Lowery, Nathaniel Popper & Nelson D. Schwartz, *Gridlock Has Cost U.S. Billions, and Meter is Still*

The Congressional Budget and Impoundment Control Act of 1974⁸⁶ requires that Congress keep track of the costs of new spending and tax programs as it approves them.⁸⁷ Current Senate and House rules require all committee reports to include appropriate cost estimates of committee-approved bills. Since 1974, the congressional budget process has expressly contemplated that Congress and its committees must have available to them comparisons prepared by the Congressional Budget Office (CBO) of the spending and revenue consequences of most legislation. Until recently, members of Congress had rarely questioned the impartiality of the CBO or attempted to influence its projections.⁸⁸

The Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985⁸⁹ and the Budget and Emergency Deficit Control Reaffirmation Act of 1987⁹⁰, usually referred to collectively as Gramm-Rudman-Hollings, required automatic spending cuts (“sequesters”) if the annual deficit exceeded certain amounts set by an appointed commission. *Bowsher v. Synar*⁹¹ held the maximum deficit amount procedure unconstitutional, because it would have allowed Congress to intervene too directly in the execution of the laws, thus violating the constitutionally required separation of powers. The Budget Enforcement Act of 1990,⁹² which was Title XIII of the Omnibus Budget Reconciliation Act of 1990,⁹³ replaced Gramm-Rudman-Hollings. This new budget legislation was intended to provide a separate procedure for enforcing deficit reductions required by the Omnibus Budget Reconciliation Act, which created two budget control mechanisms. It imposed caps on annual appropriations,; the portion of federal spending that is not required by entitlement programs like Medicare and Social Security. It also required a “pay-as-you-go” or “PAYGO” restriction: entitlements and taxes had to balance prospectively.⁹⁴ The law departed from the fixed deficit targets of Gramm-Rudman-Hollings, and imposed no penalty if the

Running, N.Y. TIMES (Oct. 16, 2013), <http://www.nytimes.com/2013/10/17/business/economy/high-cost-to-the-economy-from-the-fiscal-impasse.html>.

86. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 403, 88 Stat. 297, 320 (1974).

87. In Germany, draft legislation is not formally correct unless it contains estimates of its cost.

88. In Germany there is no institution comparable to the CBO. This is in line with the differences in the legislative process set forth in Part 3. The executive branch’s financial planning adopts a multi-year framework. See ROBERT F. HELLER, HAUSHALTSGRUNDSÄTZE FÜR BUND, LÄNDER UND GEMEINDEN, 273-75 (2d ed. 2010); WERNER HEUN, STAATSHAUSHALT UND STAATSLAUF, 236-38 (1989). A working committee tax projection, which forecasts foreseeable revenues in May and November of each fiscal year, is an executive branch body with a strong reputation, because its estimates on the whole are borne out by later events. See CHARLES B. BLANKART, ÖFFENTLICHE FINANZEN IN DER DEMOKRATIE: EINE EINFÜHRUNG IN DIE FINANZWISSENSCHAFT 413 (7th ed. 2008).

89. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 200, 99 Stat. 1038 (1985).

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

91. *Bowsher v. Synar*, 478 U.S. 714, 714 (1986).

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

93. *United States v. Mardis*, 670 F. Supp. 2d 696 (W.D. Tenn. 2009) (refused to apply *Bowsher* so as to make it a constitutional violation for a state legislator to attempt to influence the state’s execution of a statute).

94. § 252, 104 Stat. 1388.

deficit for a given year exceeded the Office of Management and Budget deficit estimate (the so-called deficit "Snapshot"), unless Congress itself was responsible for the excess deficit. The Budget Enforcement Act expired in 2002, but the Democratic Majority in Congress continued to abide by PAYGO, adopting these provisions of the defunct act as a House rule for the 110th Congress.⁹⁵ President Obama signed a Statutory Pay-As-You-Go Act on February 12, 2010.⁹⁶ Like the Budget Enforcement Act, PAYGO required the President to issue a sequester order if Congress should increase mandatory spending or decrease taxes in a way that, would cause a net deficit. Both the House rule and statutory PAYGO placed no caps on discretionary spending and therefore curtailed annual appropriations less severely at best.

Partly in conjunction with rules and statutory requirements like PAYGO, Congress usually adopts annual budget resolutions or *ad hoc* budget agreements that specify the amount by which new legislation for the year will exhaust or increase revenues.⁹⁷ These measures only address the expected cost or revenue over a ten-year period, called the "budget window." Congress has occasionally responded to budget-window figures by significantly adjusting a proposed measure, for example, when, in 2003, the dividend tax rate was cut roughly by half – from ordinary income rates to 15% – instead of reduced to a rate of zero, as President Bush had proposed.⁹⁸ But commentators have complained that permanent legislation enacted on the basis of financial cost or benefit over the budget window period often costs more than expected.⁹⁹ For example, the budget window estimated cost of the Bush tax cuts of 2001 and 2003, which were to expire in 2010, was about \$1.7 trillion. The cost in lost revenue of making the cuts permanent would have been roughly 2% of GDP per year by 2011, an amount that, of course, grows with the economy.¹⁰⁰

In a differently framed effort to manage the cost of legislation, the Senate adopted the so-called Byrd Rule,¹⁰¹ which bars Senate deliberation or passage of a reconciliation bill or conference report deemed to be extraneous to the underlying

95. H.R. Res. 6, 110th Cong. (2007).

96. Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, 124 Stat. 8 (2010).

97. SCHICK, *supra* note 85, at 120.

98. Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (codified at 26 U.S.C. 1 note (2003)). See STAFF OF J. COMM. ON TAX'N, 108TH CONG., ESTIMATED BUDGET EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2004 BUDGET PROPOSAL (Comm. Print 2003), available at <http://www.jct.gov/x-15-03.pdf> (showing \$726 billion estimated cost through FY 2013 for "economic growth" provisions); Alex M. Brill, *Individual Income Taxes After 2010: Post-Permanence-ism*, 60 NAT'L TAX J. 347, 351-52 (2007); George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 190 (2009) (discussing this case of budget-window cost influence).

99. William G. Gale & Peter R. Orszag, *Sunsets in the Tax Code*, 99 TAX NOTES 1553, 1557 (2003).

100. William G. Gale & Peter R. Orszag, *Bush Administration Tax Policy: Revenue and Budget Effects*, 100 TAX NOTES 105, 105-06 (2004).

101. See Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 20001, 100 Stat. 82, 390-91 (1986), amended by Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754, 784-85 (1987).

bill. This was a response to a common practice in the 1980s.¹⁰² A Senator could amend a bill or report to include unrelated provisions, in order to slow down consideration of the main bill or report or to achieve easier approval of the amendment if the main bill or report was overwhelmingly likely to pass. A reconciliation bill is one deemed by the Senate majority leadership to be exempt from the usual rules that permit Senators to prolong the discussion of a bill with the purpose of preventing its passage; this obstructive tactic is called filibuster. The Byrd Rule therefore protects to some extent the ability of a large minority in the Senate to block legislation favored by the majority. Among other things, the Byrd Rule may prevent Senate consideration of spending increases or revenue decreases in a fiscal year immediately following the budget period.

Twice in recent years, Congress has voted down bills that would submit a proposed federal constitutional amendment for ratification by the state legislatures, requiring the federal budget to be balanced year by year.¹⁰³ Other efforts to introduce such an amendment-launching bill failed to reach a vote.¹⁰⁴ Almost all states have such balanced budget requirements, usually as provisions of the state constitutions. The proposed federal constitutional amendment would prohibit Congress from passing legislation during any legislative year that would permit spending to exceed revenues for that year. In the spring of 2011, Republicans in the House proposed such an amendment with the additional provision that annual spending be capped at 18% of the gross domestic product.¹⁰⁵

D. Separation of Powers as Obstacle to Binding Budget Constraints

Against the backdrop of repeated congressional feints at long-term budget planning and *ex post facto* budget reductions, what are the prospects for a binding mechanism? The best known of possible constraints on public debt increases is a balanced budget amendment to the Constitution, which might do for the federal government what the German constitutional amendments of 2009 have done for Germany and what state constitutional balanced budget provisions do for the States. But, as we shall see, other alternatives are more likely to fulfill the purpose

102. See Michael W. Evans, *The Budget Process and the Sunset Provision of the 2001 Tax Law*, 99 TAX NOTES 405, 408 (2003).

103. See generally H.R.J. Res 579, 74th Cong. (2d Sess. 1936); H.R. 105-3, 3-7 105th Cong. (1st Sess. 1997); Adam Clymer, *Constitutional Amendment Drive on Balanced Budget Pushed Anew*, N.Y. TIMES, Mar. 6, 1981, <http://www.nytimes.com/1981/03/06/us/constitutional-amendment-drive-on-balanced-budget-pushed-anew.html> (describing advocacy of a balanced budget amendment by House Republicans during the current congressional term).

104. Governor Jerry Brown of California (then and now) and Congressman Paul Simon called for a balanced budget amendment during Carter's presidency, but Congress did not entertain such a bill. The National Taxpayer's Union, a private lobbying group, pressed unsuccessfully for the amendment again at the beginning of Reagan's administration.

105. See Orrin Hatch et al., *Consensus Balanced Budget Amendment* (one-page handout), available at http://rsc.scalise.house.gov/uploadedfiles/consensus_balanced_budget_amendment_1-pager_032911.pdf (last visited Dec. 14 2013).

of such an amendment without requiring a modification of the constitutional separation of powers.¹⁰⁶

Given the difference between the American and the German constitutional provisions regarding the relationship between the legislative and executive branches, there is a serious question of whether a constitutional restraint on the size of federal budgets is compatible with our non-parliamentary system. In a parliamentary system, the ruling party or a coalition of parties in the legislature directly controls the executive power of the government. For that reason, the chief executive or a member of the cabinet presents budgetary legislation to the legislature for adoption, and in most circumstances the votes needed to enact the budget are those of legislators who give the government its mandate in the first place. If a budget, as proposed, does not command a majority vote, the government has suffered the equivalent of a vote of no confidence.

In contrast, Congress does not select the President or other executive branch officials. It can approve the selection and prevent or require the removal of some members of the executive branch (e.g., the Comptroller of the Currency), but neither the President nor other members of the executive branch normally sit as legislators or have the *de facto* community of purpose that would follow from this normal feature of parliamentary systems.¹⁰⁷

A constitutional budget constraint in a parliamentary system is not addressed expressly to the government official or officials who present or propose a budget to the legislature, but the implication of such a constraint is that a government-proposed budget in violation of the constraint cannot become law without modification. A government that proposes such a budget invites its own supporters to amend the proposal and therefore risks destroying the discipline necessary for maintaining its majority and its mandate for ruling.

In the non-parliamentary US system, the absence of this *de facto* restraint on the President's discretion in framing a budget frees the President to stake out a bargaining position with a proposed budget, instead of presenting something more like a final offer.¹⁰⁸ In the USA, a balanced budget amendment or legislation would therefore be primarily a constraint on the budget gradually shaped in the legislative process.¹⁰⁹ The tentative nature of all spending and revenue items of the budget, pending final passage, is one reason among others for which Congress has chosen the PAYGO mechanism of the BEA and 2010 legislation. Although Congress may take its time to assemble the pieces of spending legislation, it may require the President to cut or "sequester" portions of the legislated spending. A similar

106. See generally *Clinton v. City of N.Y.*, 524 U.S. 417 (1998) (separation of powers is implicit in the affirmative grant of powers to the legislative, executive, and judicial branches of the government, and in safeguards for the independence of each branch from interference by the others).

107. In other words, the principle of separation of powers plays a bigger part in US Supreme Court jurisprudence than in the corresponding jurisprudence of the German Constitutional Court.

108. See SCHICK, *supra* note 85, at 75-80 (Nixon and Clinton strategically used their power to shape the budget debate by proposing contentious budgets that were not binding on Congress).

109. See Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1116-23 (1998).

mechanism would be a natural means of implementing a balanced budget amendment.

One device that might have given the President a role in any balanced budget process is the “line item” veto.¹¹⁰ Long sought by presidents and some members of Congress, the line item veto would the President the option of accepting part of an appropriations bill or other spending legislation, while vetoing the rest. The Line Item Veto Act of 1995¹¹¹ enacted this device. The Supreme Court held, however, that it violated the Presentment Clause of the Constitution, Article I, Section 7, Clause 2, which speaks in binary terms of the President’s role in accepting or “returning” and vetoing a bill passed by both Houses of Congress. Since the line item veto would permit the President to accept only part of a bill, the Supreme Court considered this an unconstitutional intrusion of the executive in the legislative process. Such a recent decision on this aspect of the separation of powers should persuade Congress not to involve the President, or any other officer of the executive branch, in the “finely wrought” procedure the Framers designed.”¹¹²

E. Practical Implementation of a Balanced Budget Amendment or Similar Legislation

What, then, would a balanced budget amendment or statutory constraint in the US, look like? How specific would it be concerning the measurement of deficits? The PAYGO mechanisms of past experience require detailed “scoring” of ongoing government activities and programs and progressive measurement of incoming revenue from taxes and other sources.¹¹³ The scoring process is necessarily a task for members of the executive branch, mid- to low-level bureaucrats. This aspect of a balanced budget process or any other budget planning process-imposing restraints on Congress is discussed below in Section 3.

A balanced budget amendment would permit Congress to enact legislation that a later Congress would be unable to repeal, something it cannot do under the current Constitution.¹¹⁴ But, in order to be effective, such an amendment would also have to require Congress to forbid itself to change key aspects of the scoring process, which would otherwise be vulnerable to legislative subversion.¹¹⁵ From a slightly different perspective, though one related to that of preventing congressional subversion of the balanced budget requirement, the constitutional provision authorizing and requiring Congress to mandate and then keeps its hands

110. See generally *Clinton*, 524 U.S. 417 (invalidating the Line Item Veto Act of 1994).

111. See Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200 (1996), *invalidated by Clinton*, 524 U.S. 417 (1998).

112. *Clinton*, 524 U.S. at 440.

113. See UTZ, *supra* note 20, at 147-64.

114. See *United States v. Winstar Corp.*, 518 U.S. 838, 872 (1996) (citing *Manigault v. Springs*, 199 U.S. 473, 487 (1905)) (Winstar affirms that, in general, one Congress cannot bind another, but a plurality of the Court believed an exception exists if the earlier Congress’s intent to bind a later Congress was “unmistakable.”).

115. This danger exists in Germany as well. See *supra* text accompanying notes 46-48.

off the scoring process would have to permit federal courts to rule on constitutional challenges to budgets.¹¹⁶

The Supreme Court has ruled that Congress cannot retain control of such a scoring process and of any consequent spending reductions that process may call for, by conferring discretion on members of the executive branch whom Congress alone can remove from office.¹¹⁷ Under the current PAYGO legislation, the President is directly required by statute to "sequester" or reduce spending in accordance with statutory guidelines; because the President can only be removed by Congress by impeachment, which is to say, "for cause," it has been assumed that PAYGO does not violate this condition.

Given the disadvantages of a highly detailed constitutional amendment, together with the tradition of succinct amending language, it would be more likely that any balanced budget amendment Congress should ever propose will leave the details of scoring and sequestration to be dealt with in implementing legislation. If, the courts will only be able to rule on the consistency of such legislation with the overall purpose of the balanced budget amendment and will have no bright-line standard by which to invalidate the implementing legislation itself for more subtle subversion of the balanced budget goal. Moreover, if Congress must implement the constitutional amendment with detailed legislation, it must presumably retain the power to amend or repeal earlier legislation. The courts would therefore have the further difficult task of deciding, in a piecemeal fashion, whether and to what extent the implementing legislation is immune to future modification by Congress. The politics of current Court factions aside, one can only conjecture that the "unmistakability" doctrine would come into play in the Court's decision whether to review detailed legislative factual assumptions about revenue and spending.¹¹⁸

An important difference between the US and Germany regarding constitutional jurisprudence is that laws held unconstitutional are never permitted to continue in effect in the US while amending legislation is passed.¹¹⁹ If the federal courts are authorized and required by constitutional amendment to invalidate an unbalanced budget, a budget will be a nullity upon invalidation, the funds appropriated will not have been appropriated, etc. It is difficult to imagine how this currently absolute feature of US constitutional law could be altered unless a balanced budget

116. The federal courts have long invoked the "political question" doctrine, refusing to decide issues they deem to belong to the political arena, subject to democratic rather than to judicial oversight. A balanced budget amendment would presumably override the political question doctrine, insofar as the amendment would authorize and permit courts to decide whether government action violated the amendment. *See, e.g., Coleman v. Miller*, 307 U.S. 433 (1939) for an introduction to the "political question" doctrine.

117. *See generally* *Bowsher v. Synar*, 478 U.S. 714 (1986).

118. *See* *Bowen v. Pub. Agencies Opposed to Social Sec. Entrapment et al.*, 477 U.S. 40, 52 (1986) (we do have the Court's unanimous opinion in *Bowen* to suggest that this doctrine would influence how the Court would assess the immunity of budget legislation to subsequent repeal or subversion by Congress).

119. *See* *Chicago I. & L.R. Co. v. Hackett*, 228 U.S. 559, 584-85 (1913); *Bartlett v. Bowen*, 816 F.2d 695, 706-07 (D.C. Cir. 1987) (quoting at length from *Chicago I. & L.R. Co.* in support of the proposition that a federal statute held unconstitutional cannot be enforced).

amendment *also* directed the Article III courts to make their rulings provisional or time-delayed, at least with regard to budgetary legislation.¹²⁰

Experts on the congressional budget process as it exists today have frequently questioned whether it would be possible for the Constitution to regulate Congress or for Congress to regulate itself so as to require balanced budgets.¹²¹ It is worthwhile, however, to consider the elements of the problem from the perspective of the considerable uncertainty of current constitutional law.

The federal budget process provides several hints concerning the shape of any likely balanced budget mechanism. Congress already uses a scoring process to evaluate proposed appropriations legislation. Both the presidential budget and congressional budget proposals, other than those funded annually, are typically examined against a “baseline” of existing obligations, spending authorization, and expected government revenue, as well as projections of economic performance over the budget period. How government programs may change the performance of the private sector is not usually taken into account. But the baseline must make a host of assumptions concerning uncertain matters. For example, the current baseline projections for new long-term legislation typically assumes that current policy – all other government spending and taxing programs, as well as economically sensitive forms of regulation – will continue in effect for the ten-year period, unless they expire by their own terms (as in the case of the current Bush-era tax cuts).¹²² The baseline also assumes that spending levels will be fully adjusted for inflation.

Proposed legislation is examined for any deviations from the baseline it may be expected to cause. This is the “scoring” process alluded to above. Legislative policy may be projected to result in costs or revenues below or above the baseline.¹²³ The “official cost” of proposed legislation is the net addition, if any, to aggregate costs; of course, there may be gain, if the legislation comes in under the baseline.

Although the Office of Management and Budget (OMB), which is part of President’s domain, also scores proposed legislation, the Congressional Budget Office (CBO), a nonpartisan agency established and overseen by Congress, provides baseline and scoring calculations that have until recently generally commanded the respect of both political parties. Deviations from absolute respect have not destroyed the CBO’s continuing authority. Indeed, CBO scoring continues to be one of the more important discussion points in congressional bargaining.¹²⁴

120. For the state of the law in Germany, see *infra* Section 3.1.2.1.4.

121. SCHICK, *supra* note 85, at 278-81; Yin, *supra* note 105, at 188-92.

122. Yin, *supra* note 98, at 188-92. In Germany a five-year budget window is used. Haushaltsgrundsätzegesetz [HGrG] [Budgetary Principles Act], Aug. 19, 1969, BUNDESGESETZBLATT, TEIL I [BGBL. I] at 1273, as amended Jul. 15, 2013, BGBL. I at 2398, § 50(1) (Ger.), available at www.gesetze-im-internet.de; Stabilitäts und Wachstumsgesetz [StabG] [Stability and Growth of the Economy Act], June 8, 1976, BUNDESGESETZBLATT, TEIL I [BGBL. I] at 582, as amended Oct. 31, 2006, BGBL. I at 2407, §§ 8(1), 14 (Ger.) available at www.gesetze-im-internet.de.

123. Yin, *supra* note 98, at 188-90.

124. The problem of false or exaggerated numbers plays a smaller part in Germany; they would conflict with the constitutional principle of budget truthfulness.

The current approach to scoring nevertheless has its critics. One important current debate focuses on the “budget window” mentioned earlier, the ten-year framework used in CBO scoring. Professor George Yin, who served as the Chief of Staff of the Congress’ Joint Committee on Taxation, argues that all legislation should be subject to a ten-year “sunset” provision, i.e., should be enacted for only ten years in effect without automatic renewal, so that ten-year scoring will not mislead members of Congress and the public as to its fiscal impact.¹²⁵ Currently, permanent legislation is adopted on the basis of time-limited scoring. Professor Yin points out that the Medicare prescription drug legislation of 2003 was passed on a ten-year estimated cost of \$400 billion, but that the Medicare financial administration’s own estimate of its permanent cost was \$17.2 trillion.¹²⁶ Obviously, long-term prediction of such costs is much more hazardous than short-term prediction. In this instance, it has turned out that Medicare prescription drug benefits have not cost as much as anticipated, both because participants have not taken full advantage of the program and because prescription drug costs have not increased at the projected rate.¹²⁷

The contrary view, that all legislation should be permanent or lasting, also has an articulate defender. Professor Rebecca Kysar has argued that sunset provisions are misleading, precisely because low price tags on legislation that is likely to survive its officially limited duration mislead both Congress and the public.¹²⁸ Given recent experience with the expiring Bush tax cuts, Professor Kysar’s argument persuasively indicts the *de facto* inertia of congressional decisions.

Some regard the insensitivity of current scoring practices to change in the private economy as another fundamental weakness. For several years, partisan defenders of the Bush tax cuts have argued that the cuts’ high “official cost,” (i.e., their CBO projected ten-year cost) leaves out the dynamic effects of these tax cuts, which may spur economic activity. Some advocates of “dynamic scoring” offer their own, far more favorable estimates of the net revenue and GDP costs of the tax cuts. The goal of evaluating fiscal policy in the light of predictions based on a general equilibrium model of the economy is not new. Modeling economic causality, however, is not the simple science that the advocates of dynamic scoring pretend that it is. Even its most sophisticated practitioners, such as Shoven and Whalley, express great caution concerning its reliability as a tool of public policy,

125. See generally Yin, *supra* note 98.

126. *Id.* at 190-92.

127. *Medicare Drug Costs Unlikely to Rise*, N.Y. TIMES, Aug. 4, 2011, http://www.nytimes.com/2011/08/05/us/05brfs-Medicare.html?_r=0; *On eve of Medicare Anniversary, over 6.6 million seniors save over \$7 billion on drugs*, News, U.S. DEPT. OF HEALTH & HUMAN SERVICES (July 29, 2013), <http://www.hhs.gov/news/press/2013pres/20130729a.html>.

128. Rebecca M. Kysar, *Lasting Legislation*, 159 U. PENN. L. REV. 1007, 1041 (2011); see also Cheryl D. Block, *Pathologies at the Intersection of the Budget and Legislative Process*, 43 B.C. L. REV. 863 (2002).

although they do not rule out this use altogether.¹²⁹ A further complicating factor for the use of dynamic scoring is the extreme slowness with which Congress deliberates concerning costly or revenue-raising programs.¹³⁰

In light of the scant constitutional jurisprudence, applicable to both constitutional and statutory budget restraint procedures, we may conclude that:

- Given the hazards of calculating costs and revenues over long periods, a balanced budget legislation or constitutional mandate would require Congress to depart from its practice of scoring only annual appropriations and letting permanent programs take care of themselves; appropriations would have to include the entire budget and comply with the constraint.
- Unless the Presentment Clause is also amended, the president could not be authorized to make adjustments necessary to bring the budget into compliance with the budget constraint, using anything like the line-item veto.
- A constitutional amendment would have to leave Congress free to legislate the details of the scoring process, and these details would be subject to congressional backsliding from the purpose of the amendment.
- The courts' role in policing a balanced budget amendment would also have to be spelled out in the Constitution; it would have to be possible for a court to hold the budget invalid provisionally, giving Congress time to repair the invalidity before cancelling the appropriations in the invalid act; but this possibility, available under current German law, is unheard of in US constitutional jurisprudence.

F. Other Possible Budget Control Mechanisms for the US

The implementation of budget constraining standards would, as has been mentioned, pose a greater challenge for judicial review if the courts' were also responsible for determining whether and to what extent Congress could bind itself for the future. Fortunately, congressional experimentation with non-constitutional budget control mechanisms is already reasonably well advanced.¹³¹ These experiments provide at least a shallow foundation for conjecture about the viability of congressional self-control.

1. What is Budget Discipline Anyway?

Balancing the government's budget is only one broad approach to achieving budget discipline, and this approach can be specified in different ways, some of

129. Alan J. Auerbach, *Dynamic Scoring: An Introduction to the Issues*, 95 AM. ECON. REV. 421, 422 (May 2005). See Yin, *supra* note 98, at 214 n. 146 ("The principal problem with such reports is their lack of timeliness and determinacy.").

130. See generally Joseph Minarik, *Countercyclical Fiscal Policy: In Theory, and In Congress*, 44 NAT'L TAX J. 251 (1991).

131. SCHICK, *supra* note 85, at 48-73.

which imply different conceptions of how government spending and revenue should be measured. A constitutional amendment requiring balanced budgets would have to choose among these conceptions. Certainly, current advocates of a balanced budget in the US seem to be thinking of a balance between actual receipts, assuming this to be a straightforward figure, and current year out-the-door spending, again assuming that also to be an unambiguous amount. But these views of spending and revenue do not correspond to traditional accounting methods for private-sector individuals or businesses. A substantial, impartial literature argues that we should *not* measure spending by actual payment or revenue by receipt.¹³²

2. Accounting Methods

In most countries, measuring what may roughly be called outlays and profits or gains for purposes of third-party review of private-sector economic performance and sustainability gives priority to "accrual" accounting standards,¹³³ familiar to tax lawyers as one of the principal methods of accounting taxpayers may elect or have assigned to them by government regulations. On an accrual method outlays are deemed to belong to the accounting period in which, all events have occurred that fix the obligation to make a payment, whether payment itself takes place then or will take place in the future. Outlays for assets that will benefit the individual or business beyond the end of the accounting period in which the obligation becomes fixed are amortized or depreciated over that longer period, which means that the original obligation, though booked when the rights became fixed, is *not* subtracted from revenue right away but is treated as a sequence of outlays over the longer period, so that parts of the total amount are subtracted in future accounting periods instead of being subtracted in the initial period. Revenues are attributed to the individual or business in similar fashion, when all rights to payment by another party become fixed.¹³⁴ Thus, when a contract becomes effective under which one party is to receive payment for some performance in year 1, that party must include revenue in that amount in year 1, even if actual payment occurs in year 3, unless amortization or depreciation is required under the standard discussed earlier in this paragraph. Timing issues concerning revenue and expenditure are also controversial in Germany, with respect to both classification issues and possibilities

132. See, e.g., ROBERT EISNER, *HOW REAL IS THE FEDERAL DEFICIT?* (1986); DANIEL SHAVIRO, *DO DEFICITS MATTER?* (1992); Alan J. Auerbach et al., *Generational Accounting: A Meaningful Way to Evaluate Fiscal Policy*, 8 J. ECON. PERSP. 73 (1994); Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons From the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217 (1995); James Tobin, *How to Think About the Deficit*, 33 N.Y. REV. BOOKS (1986) (reviewing ROBERT EISNER, *HOW REAL IS THE FEDERAL DEFICIT?* (1986); DANIEL BELL & LESTER THUROW, *THE DEFICITS: HOW BIG? HOW LONG? HOW DANGEROUS?* (1985)).

133. SHAVIRO, *supra* note 132, at 105.

134. Treas. Reg. § 1.446-1(c)(ii) (2011). See STEPHEN UTZ, *INSIDE TAX LAW* 149-52 (2011) (discussing judicial doctrines of "constructive receipt," "economic benefit," and "claim of right").

for abuse.¹³⁵ But, as long as the German federal union retains a multi-cameral legislative design, the fundamental principles of commercial double-entry accounting are not applicable.

A different accounting method, the cash method, is typically used by tax authorities in measuring the income of individuals and sometimes of small businesses. Outlays are deemed to be made only when paid, and revenues only credited when received or when all rights to payment have become fixed and payment is actually or constructively received. Actual receipt and actual disbursement are the typical triggers for booking income and tax-deductible expense, but only items to which the subject has a legal right are included when received, and the subtraction of outlays or other expenses is qualified by the spread of the depreciation or amortization of durable assets over the period of service, if that is longer than a year. By long standing tax administrative convention, this method is only suitable for individuals and small businesses, because it can so easily give an inaccurate picture of the subject's income stream. A person can often contrive to pay earlier in order to accelerate a deduction or receive payment late in order to postpone inclusion in income, but arbitrary, uncontrived occurrences also often deflect payment and disbursement to years other than those most closely affected by these events.¹³⁶

Governmental budget analysis must, of course, use some sort of accounting standard for dealing with same problems that accrual and cash accounting methods address. As mentioned above, many US balanced budget advocates speak as if the standard would be something like the cash method of accounting for individuals, but without adjustment for the amortization or depreciation of long-term assets.¹³⁷ For tax and financial accounting purposes, neither individuals nor businesses are allowed or required to include borrowed sums in revenue or income. The goal of budget discipline is more closely analogous to the goals of financial accounting – avoiding overstatement of income is the principal goal – and so the private accounting model serves well to this extent. Even financial accounting standards, however, postpone the inclusion of income until it is “earned,” or more neutrally, until all rights concerning it are settled.¹³⁸ What would this mean for governmental accounting? Tax revenues are a particular problem, because such large sums remain in dispute long after the years to which they will be attributed when the disputes are settled, and audits regularly increase the anticipated revenues from

135. HENNING TAPPE, *DAS HAUSHALTSGESETZ ALS ZEITGESETZ ZUR BEDEUTUNG DER ZEITLICHEN BINDUNGEN FÜR DAS HAUSHALT- UND STAATSSCHULDENRECHT* (2008).

136. Treas. Reg. § 1.446-1(c)(i) (1960). For the difference between accrual and cash method see HUGH J. AULT & BRIAN J. ARNOLD, *COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS* 299-316 (3d ed. 2010).

137. The economist Robert Eisner is perhaps the most prominent critic of this often-encountered fallacy. See EISNER, *supra* note 132; ROBERT EISNER, *THE MISUNDERSTOOD ECONOMY: WHAT COUNTS AND HOW TO COUNT IT* (1994). Daniel Shavero summarizes and makes further contributions to Eisner's critique of accounting issues and the response of others to his critique. SHAVIRO, *supra* note 132, at 104-19; see also SCHICK, *supra* note 85, at 278-81.

138. Technical Notes and Manuals, International Monetary Fund, Abdul Khan & Stephen Mayes, *Transition to Accrual Accounting*, (Sept. 2009), available at www.imf.org/external/pubs/ft/tnm/2009/tnm0902.pdf.

previous years. The “tax gap” in the US, the difference between the tax due on all income of US individuals and businesses and the tax actually collected on that income, poses another problem, especially in light of the fact that tax collection efforts themselves are strengthened or weakened by the level of government spending on tax administration.¹³⁹

As will be discussed further below, another vital requirement for fiscal disciplinary rules is that certain *de facto* “liabilities” of government be taken into account in the assessment of budget integrity. Substantial outlays for infrastructure, prisons, education, national security, and so forth are even more inevitable than outlays for some legislated programs of notionally long duration, because the former are basic to a functioning economy capable of supporting the latter. Similarly, government programs may enable substantial intergenerational wealth transfers, to which we now turn our attention in the next section.

3. Generational Accounting

A barometer of public debt sustainability must be more than mere tabulation of outstanding obligations and future debt service. Demographic factor such as population growth and the age distribution of the population, and anticipated changes in the growth of the economy can ameliorate or worsen the country’s ability to support a continuing and growing debt burden. The “generational accounts” invented by Alan Auerbach, Laurence Kotlikoff and Jagadeesh Gokhale, translate virtually all available data concerning future debt accumulation, assuming that current law including permanent programs such as Social Security and Medicare remain in effect, together with the best estimates of future economic and government revenue growth based on projections about population size and economic activity, into average lifetime effective tax rates *net of government benefits received*, for age groups or “vintages” corresponding to birth years.¹⁴⁰ The average net tax rate of a person born before 1940 is much lower than that of someone born since 1950, in large part because government benefit programs created during the New Deal of the 1930s bestowed large lifetime benefits on the earlier born, who nevertheless on average paid far less in taxes of all kinds. The large majority of middle class individuals paid little or no income tax until after WWII, but old age benefits under Social Security had already been in place then for two decades. Generational accounts for those born after 1990 assign average effective tax rates of more than 80%,¹⁴¹ which will be unsustainable under any but the most extraordinary circumstances. Indeed, recent elaboration of generational

139. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-151, TAX GAP: IRS COULD SIGNIFICANTLY INCREASE REVENUE BY BETTER TARGETING ENFORCEMENT RESOURCES 1 (2012), available at www.gao.gov/assets/660/650521.pdf.

140. Auerbach et al., *supra* note 132; see SHAVIRO, *supra* note 132, at 165-69 (critique of the generational accounts analysis).

141. Auerbach et al., *supra* note 132, at 80-81.

accounts in these and many other countries demonstrate the unsustainability of existing tax and benefit structures.

4. Scoring Public Debt

Actual measures taken to curtail public borrowing in this country and proposals for a balanced budget amendment have never articulated a measure or standard by which public debt should be regarded as excessive. Advocates may assume that government spending during a given period – usually one year because budgets are adopted annually – should not normally exceed government revenues for the same period. Only the most extreme deficit hawks believe that a balanced budget should be required in time of war or national catastrophe;¹⁴² relatively few believe that economic distress cannot justify deficit spending.¹⁴³ But, there has been little public discussion of the extremes that would justify relaxing budget rules, if they existed. Instead, politically charged discussions of budget discipline usually take for granted that the choice is between a “Keynesian” approach, which in colloquial terms is thought to countenance stimulative spending under virtually all circumstances, and a classical or no-deficit approach.¹⁴⁴ To characterize the public debate in these terms obviously suggests that other gradations of discipline are possible, as of course they are.

Much expert discussion of the hazards of public debt attaches primary importance to the ratios of annual deficits to GDP and of gross public debt to GDP,¹⁴⁵ rather than to the absolute size of the debt or the persistence of deficit spending. While these assumptions may seem to represent another aspect of Keynesianism, as that term is popularly understood, they do not imply a belief in stimulative spending. Instead, the ratios of deficits and gross debt to GDP are indicators of the burden of debt service on annual revenues and of the dexterity with which the legislature can respond to extraordinary circumstances by incurring extraordinary deficits. Realistically, these same indicators may affect lenders’ willingness to purchase the government’s debt offerings, market interest rates on those offerings, and even the value of the national currency.

Ratios of total debt and annual deficits to GDP obviously reveal something about government borrowing without revealing specifics about the ratio of

142. Section 4 of the proposed Balanced Budget Amendment almost won congressional approval in 1995, for example, allowed Congress to waive the restriction on deficits altogether for any fiscal year in which a declaration of war was in effect. SHAVIRO, *supra* note 132, at 283; David Lubecky, *The Proposed Federal Balanced Budget Amendment: The Lesson from State Experience*, 55 U. CIN. L. REV. 563, 565-66 (1986).

143. Of eighty-one countries survived by the IMF in 2012, none that had a constitutional balanced budget requirement required a balanced budget without regard to economic cycles. See Andrea Schaechter et al., *Fiscal Rules in Response to the Crisis — Toward the “Next-Generation” Rules: A New Dataset* (Int’l Working Paper WP/12/187, 2012), <http://www.imf.org/external/pubs/ft/wp/2012/wp12187.pdf>.

144. E.g., Chye-Ching Huang & Krista Ruffini, *Proposed Balanced Budget Amendment is Extreme by International Standards*, CTR. ON BUDGET & POLICY PRIORITIES 1-3 (rev. May 3, 2013), available at <http://www.cbpp.org/cms/?fa=view&id=3638>.

145. EISNER, *supra* note 137, at 25-26.

government spending to tax and other revenue. The implication is that whatever those details would tell us concerning the health of a country's public debt is already captured by the GDP ratios, so that further specifics are irrelevant. On the other hand, there are contexts in which fiscal policy must focus on the relationship between spending and revenue. The burden of taxation on a country that does not borrow excessively might nonetheless be unsustainable. A country may also spend too little to keep its economy healthy, neglecting infrastructure, the banking system, investment regulation, and the education, health, and retirement needs of its workforce. Unlike the ratio of annual deficits to GDP, which bears only on a sovereign's ability to maintain its debt service, the ratio of total public debt to GDP has a market significance that is less easily evaluated, depending as it does in today's world on the perception of non-domestic lenders and institutions that attempt to preserve the sovereign credit in transnational financial markets.

The convergence criteria of the Maastricht Treaty¹⁴⁶ are based in part on GDP ratios of the sort described in the last section. EU members that adopt the Euro as their currency must not allow current budget deficits to exceed 3% of GDP (and otherwise must stay as close to that limit as possible) and must not allow aggregate public debt to exceed 60% of GDP. In addition to these criteria, Euro zone members must prevent inflation from rising 1.5 percentage points above the Euro zone member with the lowest inflation rate, and the nominal long-term interest rate must not be more than 2 percentage points higher than the average of the three Euro zone members with the lowest such rates. Ignoring the inflation limits for the moment, the convergence criteria obviously contemplate an ambitiously narrow convergence of public debt characteristics for countries using the Euro, without even referring to the relationship between government *spending* and *revenue*. The convergence criteria do not direct Euro zone members to maintain government regulation and services at any level, thereby leaving them free to spend more or less than each other to keep their economies healthy.

G. Political Reasons for Budget Discipline

A major theme that has surfaced recently, in the US public debate, is that of limiting government spending in order to keep government small.¹⁴⁷ If experts who focus on GDP ratios are right, this theme has nothing to do with the health of the country's level of current and gross public debt.¹⁴⁸ In contrast, spending limits *per se* have some appeal to the German electorate for reasons other than "starving the [governmental] beast," as the US spending critics have urged since the 1970s. The motive for the popularity of spending restraints in Germany is apparently a rejection of the overuse of stimulative spending during prosperous times, when

146. See *supra* text accompanying note 50.

147. See, e.g., JOEL SLEMRD & JON BAKIJA, *TAXING OURSELVES* 106-12 (4th ed. 2008); Bruce Bartlett, *Tax Cuts and 'Starving the Beast'*, FORBES, May 7, 2010, <http://www.forbes.com/2010/05/06/tax-cuts-republicans-starve-the-beast-columnists-bruce-bartlett.html>.

148. SLEMRD & BAKIJA, *supra* note 147, at 108-12.

such spending is neither necessary nor compatible with positive market forces that maintain healthy price levels,¹⁴⁹ stimulative spending that may cause inflation, which Germany has historical, as well as theoretical, reasons to fear. In the words of the German constitutional court, “A disproportionately large public debt, and the associated growing interest burden, impede the long-term growth of the economy, constrain the ongoing freedom of state action and impose future financial burdens on future generations.”¹⁵⁰

1. Public Debt and Spending Limits for the US

A balanced budget amendment to the US Constitution, or any other constitutional public debt limitation, would primarily differ from legislated public debt restraints in that it would have to authorize the courts to determine whether a borrowing or spending measure was constitutionally valid. As Section III3 and .4 explain and as the German experience also suggests, involvement of courts in policing budgetary discipline is a constitutional oddity because it threatens the separation of powers that is characteristic of democratic constitutions. One reason for preferring that constitutional grants and restrictions of legislative power be framed in general language is to permit judicial involvement to be limited to saying “yes” or “no” to legislation that approaches the boundary of constitutionality.¹⁵¹ This is obviously more than a formal or cosmetic concern. *Judex non calculat*¹⁵² is more than a description of past judicial practice; it is a customary norm that reflects the scope of judicial resources and ability. Courts are not administrative agencies; they lack the bureaucracy needed for maintaining consistent oversight; and their procedural safeguards are better suited to deliberating about occasional and highly focused issues than to maintaining a permanent watch on the activities of another governmental branch.

Avoiding the disadvantages of broad judicial involvement, the task assigned to the courts under recent US legislation like the Budget Enforcement Act of 1986 and the PAYGO Act of 2010 is far more limited. Under these statutes, a court is never called upon to investigate budget details but only to determine whether budget legislation has been properly adopted and whether scoring targets have been exceeded, as determined by an agency of the legislative branch (with executive branch assistance). Limited and essentially *negative* judicial involvement of this kind might work out well in practice. So far, there have been no substantial

149. *Id.* at 100-03.

150. 119 BVERFGE 96, 119 (142) (Ger.) (authors' translation).

151. See GORDON SILVERSTEIN, *LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* 188-208 (2009) (vivid analysis of de facto legislative subversion of professed goals and the difficulties that “checks and balances” pose for counter-balancing judicial intervention).

152. The formula *judex non calculat* is found in the Digests of Roman Law (Dig. 49, 8, 1 § 1) as early as the second century B.C.E. On the understanding of the time, calculation was not a task for the court but was for the parties before it to settle. Further, the inclusion of purely calculative details in a judgment was beyond the judicial power, because details of this kind were open to judicial correction at any time. See Markus Heintzen, *Judex non calculat!*, in *FINANZIERUNGSTHEORIE AUF VOLLKOMMENEN UND UNVOLLKOMMENEN KAPITALMÄRKTEN* 21-31 (Jörg Laitenberger & Andreas Löffler eds., 2008).

opportunities for the federal courts to exercise their role under these statutes by approving or disapproving legislation that affected the public debt. Were the courts to stumble at this task, the authorizing legislation could of course be amended either to curtail or end it.¹⁵³

Given the difficulty of accommodating judicial intervention within the US constitutional framework of disparately empowered governmental branches, and the cumbersome process needed for a constitutional amendment, it seems that Congress could more workably impose fashion legislative measures for budgetary discipline on itself by statutory measures than by constitutional mandate. This conclusion is obviously based on a complex assessment of the problems involved. Effective implementation of constitutional *or* statutory legislative budget planning rules would face substantial difficulty in practice. But political impasse could thwart even the constitutional alternative.

2. The Content of Workable Public Debt Limits for the US

Economists and politicians alike now seem to agree, with a broadening recession to encourage them, that future budget planning, and hence, some framework for borrowing discipline is needed. For the reasons discussed above, a constitutional amendment is not the best option. It would take years for state legislatures or the public to ratify such an amendment once Congress has passed legislation proposing it. The amendment could come directly from state legislatures or the public, but this path would probably be just as time-consuming.¹⁵⁴ But even more importantly, structural changes to the Constitution and the institutionalization of a new kind of judicial review would be crucial to the implementation of a genuine constitutional constraint.

Congress might however, achieve budgetary discipline by adopting budget-constraints without constitutional fixity. The potential of the US form of constitutional government for inefficiency, as a safeguard against absolute power, would have to be tolerated. A moderate approach to desirable budget control would not set an absolute amount by which the public debt should be reduced but at a maximum ratio of aggregate public debt to GDP. If the severity of the problem is as great as some nonpartisan experts believe,¹⁵⁵ balanced or surplus budgets might well be required for a decade or longer to restore sustainability and avoid governmental and economic dysfunction in the possible event of adverse future developments. How these balanced or surplus budgets should be structured is of

153. SILVERSTEIN, *supra* note 151, at 190-99 (In-depth discussion of the ultimate importance of the political process in determining the outcome of budget-related and certain other legislative planning problems.).

154. SCHICK, *supra* note 85, at 278-81.

155. See Binyamin Appelbaum, *Fed Chief Says Politics Hurt Markets and Nation*, N.Y. TIMES, Aug. 27, 2011, at A1 (Federal Reserve Chairman Ben S. Bernanke criticizes recent debt ceiling standoff but also said that the agreed spending cuts of \$2.1 trillion would not bring the public debt down to a sustainable level.).

course, a hotly disputed political issue.¹⁵⁶ But if the need is real, the best means of achieving it is not a constitutional amendment, given the nonparliamentary character of US constitutional democracy, the slowness of the process for amending the Constitution, and the likelihood that the amendment process would divert Congress from facing the substance of the public debt problem.

IV. COMPARATIVE SUMMARY

The background of budget policy disputes in both Germany and the US is the longstanding use of public spending to achieve counter-cyclical economic goals. The acceptance by elected officials and the public alike of such “Keynesian” spending has varied. In most countries, spending authorized to overcome economic downturns is rarely reversed when economic prosperity returns. Both Germany and the US have exemplified this pattern until recent financial crises awakened concern that uncontrolled, long-term spending patterns might undermine the possibility of justified governmental borrowing.

The juxtaposition of the German and the US approaches to super-legislative budget discipline inevitably calls attention to structural differences between the constitutions of the two countries. The differences are in part historical: the US Constitution is older and, because of its brevity, sets the stage more simply for legislative and super-legislative options alike; the German constitution is more detailed, flexible, and open to incremental amendment. Beneath the surface, however, another difference is even more important for the question of budgetary self-control. Germany has a parliamentary system that requires the executive branch of government to present a budget for an “up-or-down” vote, a vote that is effectively a vote of confidence in the government. A German government is overwhelmingly unlikely to present a budget to the Bundestag that this body will not approve. By contrast, the US constitutional system effectively leaves the formulation of the budget to Congress, which is likely to accept strong guidance from the executive branch only in the relatively rare circumstance that Congress and the president are not only of the same party but in strong agreement on most policy issues the budget may affect. Thus, the constitutions of the two countries set the stage for strikingly different budget procedure and political dynamics.

Congress prepares and enacts biennial budgets only for “special appropriations” that do not include spending necessary for large public entitlement programs that account for more than half of all federal spending. The President prepares a biennial budget as well, which is required by law not only to forecast necessary spending under existing legislation but also to identify indirect spending in the form of tax expenditures. The German Federal Ministry of Finance prepares annual budgets that must be made available to the Bundestag well in advance of its final deliberations and well in advance of the fiscal year concerned; failure of a budget would bring down the government.

156. See notes 135-139 and accompanying text.

Of the two countries, Germany has already taken the momentous step of controlling prospective public borrowing by means of a constitutional restriction on budget deficits. The restriction is more stringent than that imposed by the EU treaty and directives, but in some respects it is also more flexible. Structural deficits only are limited. In principle, deficits arising from government spending designed to achieve counter-cyclical economic stability are not subject to immediate constraint. The *Bundestag* is required, however, to plan for the rapid reduction of public debt occasioned by non-structural deficit spending.

The US Congress has long imposed a relatively weak constraint on public debt, in the form of a debt ceiling that can cut short spending Congress itself has otherwise approved. Congress binds itself to revise the ceiling by explicit vote before enacting spending legislation that would put total public debt over the ceiling. Recent experience has shown that the debt ceiling can be a bargaining chip in negotiations within the legislature and between it and the executive branch, but, as such, the debt ceiling has a poor record of encouraging productive agreement.¹⁵⁷

The definition of the budget itself, and hence of the portion of anticipated government spending that will be subject to budget discipline, is highly specific in Germany. By constitutional requirement, federal and subnational state and local budgets are combined for this purpose, as are the financial responsibilities of some governmental-surrogate entities. Spending that may be foreseeable but is not yet legislated, is not included. By contrast, the most ambitious of US budget constraints has never included entitlement programs that constitute the majority of the entire federal budget, much less subnational state and local budgets. Neither Germany nor the US yet evaluates non-legislated but foreseeable spending needs (e.g., for public infrastructure and disaster spending beyond government estimates) as budgetary elements.

Expert economic opinion, which influences private financial institutions and others who purchase government debt, pays close attention to the ratio to GDP of annual government deficits as well as to the ratio to GDP of total public debt. Germany, following the EU practice, assigns a central role to these ratios in its budget procedures.¹⁵⁸ Given that the US does not yet have a procedure for evaluating the entire federal annual deficit or cumulative debt, congressional and presidential budget planning refer to these ratios only as factors worthy of consideration.

A common challenge for both parliamentary government and government that more radically separates executive and legislative powers is that of evaluating or scoring the budget or budgets that come before the legislature. The German constitution requires the appointment of a *Stabilitätsrat*, or stability council, to carry out the task of *ex post* evaluation of a budget. Its members, federal and local financial ministers and officials, may represent different partisan views and serve for fixed terms that may overlap, so that the *Stabilitätsrat* is unlikely to reflect

157. SCHICK, *supra* note 85, at 129-38.

158. See notes 145-46 and accompanying text.

partisan views that have not commanded the assent of sitting governments over a long period of time. In any case, however, this German scoring council does not have the power to bind the Bundestag or the government. The *ex ante* determination whether a deficit is structural is, as was previously noted,¹⁵⁹ the task particular to the finance ministry, which also prepares the proposed budget. The German experience has brought to light no fundamental problems with this process. The US Constitution says nothing about budget evaluation, but US constitutional precedent places limits on the delegation of this function. In particular, Congress is not permitted to remove an executive branch official charged with previously legislated spending. Yet, Congress has a stable history of entrusting the scoring of budget proposals to the non-partisan Congressional Budget Office and the non-partisan staff of the Joint Committee on Taxation. The Constitution appears, however, to permit that Congress should direct the president to curtail spending under specified but as yet unfulfilled conditions. The president could not be removed for failing to sequester appropriated funds, but in any case, a failure of political good will might de-rail such statutory budget controls.

Finally, the role of courts in the budget process is very different in the two countries. Germany's Constitutional Court regularly entertains challenges to legislation and has, on several occasions, invalidated central provisions of German tax law on constitutional grounds.¹⁶⁰ As a consequence, the enforcement of German constitutional budget limitations falls to a judicial body with experience in deciding issues akin to budgetary issues, and more importantly, a body whose role in these matters other branches of government and the public are accustomed to accept. US courts, in contrast, rarely entertain constitutional challenges to fiscally sensitive legislation; the few exceptions having been the cases discussed herein that concern the separation of legislative and executive powers. This reluctance of the courts to intervene in fiscal matters is not an accident. It proceeds from deference to legislative power and accommodation of legislative checks and balances on which the US constitution is based.

Briefly, the prospects for super-legislative budgetary constraints are sharply different in the Germany and the US. Germany has in place a constitutional restriction on public deficits and cumulative debt that accords well with the German approach to the separation of powers. Its prospects for practical implementation are not certain, but the legal foundation of the federal state was not antagonistic to these prospects. The US, despite significant legislative experimentation with budget constraints, could not easily accommodate a constitutional exception to the separation of powers.

CONCLUSION

Both in Germany and in the United States, the political aspiration towards fiscal restraint by constitutional or statutory restrictions on the legislative budget

159. See *supra* notes 66-67 and accompanying text.

160. See notes 38-55 and accompanying text.

process faces difficulties of constitutional structure and practicability. Politicians would prefer to hand the policing of their budget decisions to an impartial body or bodies, both because the political process itself cannot deliver impartiality and from a desire to give long-term effect to current legislative choices. Those choices do, of course, remain of the highest importance to politicians and their constituents alike. Thus, the pull towards impartial order and the opposite pull towards retained legislative control and flexibility both influence the range of options.

In order to preserve legislative control, the European Growth and Stability Pact envisages balanced budgets as a norm from which deviations may occur on regular basis, as business cycles reduce government revenues at precisely the moment they call for stimulus spending. The new balanced budget provisions of the *Grundgesetz* attempt to keep a more limited form of this flexibility by requiring budget planning to respond to economic swings, balancing occasional downturn-period deficits with equal upturn-period surpluses. But, this flexibility magnifies the importance of technical data collection and "scoring" of budget items, which only a bureaucracy can carry out. Attributing constitutionally decisive control of budget approval to a non-legislative body of this kind creates a political and judicial danger. Constitutional budget constraints are obviously intended to be enforced by judicial action as a last resort, and it is precisely in the last resort that a constitutional tribunal must approve or disapprove the work of the technical agency responsible for scoring appropriations. In the United States, the structure of the Constitution, on which so much of the functioning of government and the courts depends, makes this allocation of discretion to judges and technocrats impossible in some respects and unworkable, if constitutional, in others.

The following elements of the two federal states' budgetary predicaments deserve to be highlighted and considered basic to both their and perhaps other states' efforts to exercise self-control in public borrowing. First, the manner in which the constitution of a state, whether federal or not,¹⁶¹ separates legislative and executive power dictates the options available for implementing any constraints on the growth of public debt. Second, the adoption of as comprehensive a baseline as possible for measuring that growth is essential, not only for maintaining the integrity of any budget disciplinary measures, but also, obviously, for identifying the goals of those measures; in particular, baselines should include both federal and subnational public obligations, and both legally fixed and economically inevitable obligations. Third, the role of the judiciary in monitoring and enforcing super-legislative budgetary constraints is inevitable, if these constraints are to be capable of resolving conflicts between the legislature and the executive. But, fourth, traditional courts, especially those specifically charged with the oversight of constitutional measures, lack experience in the scoring necessary for implementing budgetary constraints and by their nature decide isolated issues rather than

161. The foregoing comment concentrates on the relationship between the government and parliament. On the relationship between the federation and individual member states, see Hermann-Josef Blanke, *Staatsfinanzen im Föderalismus*, 56 HEIDELBERG J. INT'L L. 71 (2005).

supervise the protracted implementation of even their own decisions. Fifth, genuine super-legislative budget constraints require that the “scoring” function be lodged with an independent constitutional branch of government separate from both the legislative and executive branches. Sixth, if the creation of such an independent branch is ruled out, the legislature and executive must agree to treat some subordinate scoring agency, answerable to both, as authoritative, without actually giving that agency constitutional status equal to their own.

The foregoing reflections on the American and German prospects for successful use of constitutional budget constraints point to the conclusion that legislative self-control, though elusive in practice, remains fundamental to the maintenance of budget discipline within a government based on the unusually strict separation of powers found in the Constitution.

