

BASING BUDGET BASELINES

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ABSTRACT

Measuring the cost of legislation or even projecting the course of the federal budget requires defining a budget baseline—a starting point capturing the current state of the budget. Budget baselines underlie most measures employed in federal budget debates and enforcement rules. Yet, despite their widespread use, budget baselines engender considerable confusion and abuse.

For instance, when legislators enact temporary tax breaks, the breaks are officially estimated to cost far less than they likely will because of a loophole in federal budget baseline rules. Then, later efforts to extend the tax cuts are counted as increasing deficits when, in fact, by more reasonable metrics, they do nothing of the sort and might even reduce deficits.

In response to such problems and the relative lack of scholarly attention, this Article seeks to ground budget baselines in a theoretical framework and then apply this framework to some of the leading debates involving baselines. For example, after presenting this new framework for understanding budget baselines, the Article proposes a way to fix the official baseline so that temporary tax cuts no longer appear less expensive than they really are and extensions no longer

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appear more expensive. This Article also uses this framework to describe why the long-term fiscal shortfall is smaller than often depicted and why a long-term budget metric now under consideration should be rejected.

By arriving at a better understanding of budget baselines, this Article helps to inform a number of key fiscal debates and makes recommendations for how to improve budget measures going forward.

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INTRODUCTION

It was the end of 2012, and Washington was embroiled in a fiscal standoff. Hundreds of billions per year in tax cuts (collectively known as the “2001 and 2003 tax cuts”) were scheduled to expire.¹ Republicans wanted almost all of them extended,² but Democrats demanded that the high-income tax cuts be pared back.³ The economy was on the line, as projections showed that failing to resolve the standoff and allowing all the tax cuts to expire at once could end the nascent recovery and drive the country back into recession.⁴

This “fiscal cliff” drew plenty of headlines,⁵ but one relatively little-noted aspect of the cliff is that it had largely resulted from a quirk in what is known as a budget baseline. Furthermore, its resolution would be subject to the same quirk, making a final deal best seen as a tax increase appear as a very large tax cut, at least in the official cost estimates.

To quote from Merriam-Webster’s Dictionary, a baseline is “a starting point.”⁶ Or, to offer a somewhat more technical variation

1. *Policy Basics: The 2001 and 2003 Tax Cuts*, CTR. ON BUDGET & POLY PRIORITIES (Mar. 5, 2009), <http://www.cbpp.org/research/policy-basics-the-2001-and-2003-tax-cuts> [<http://perma.cc/Z4PN-BFDG>].

2. For instance, as an opening offer, the House Republicans passed the Job Protection and Recession Prevention Act of 2012, H.R. 8, 112th Cong. § 2 (as passed by House, Aug. 1, 2012). The bill continued almost all the expiring tax cuts for another year (although it did leave out some newly enacted expansions of refundable tax credits that benefited low income Americans). *Id.*

3. President Obama’s administration proposed eliminating about 30 percent of the 2001 and 2003 tax cuts. *See infra* note 67.

4. *See* CONG. BUDGET OFFICE [CBO], ECONOMIC EFFECTS OF REDUCING THE FISCAL RESTRAINT THAT IS SCHEDULED TO OCCUR IN 2013, at 6 tbl.2 (2012) [hereinafter CBO, ECONOMIC EFFECTS 2013] (showing the economy shrinking in the first half of 2013 if the country went over the fiscal cliff, including both the effects of the expiring tax cuts and the sequester on the spending side).

5. The fiscal cliff broke through to mass culture sufficiently enough that “The Simpsons” posted a short segment in which Mr. Burns explains the fiscal cliff. Animation Domination, *The Simpsons: Fiscal Cliff*, YOUTUBE (Dec. 4, 2012), <https://www.youtube.com/watch?v=c91usT4P1u0> [<http://perma.cc/ER8J-Z4QK>].

6. *Baseline Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/baseline> [<http://perma.cc/B4QG-89NK>] (last visited Sept. 27, 2015). This is actually the fifth definition offered by Merriam-Webster. The first three are not directly relevant to this Article (though an article about the tennis baseline might be of interest to a broader audience). The fourth definition is a possible alternative. It defines baseline as “a usually initial set of

on that—and applying it to a legal system—the baseline is the starting point of the legal regime and the reference point against which to measure legal change. The budget baseline is a subset of this: it is the starting point of the legal regime with budgetary effect. Anytime someone cites the cost of new legislation or describes how much a policymaker is increasing (or decreasing) spending, a baseline is at play—since any change must be measured relative to a starting point: the baseline.

The official budget baseline was a central character in the story of the fiscal cliff. Specifically, the official baseline treats expiration of temporary tax cuts as “real,” even as it assumes extension of a number of major spending programs that also regularly expire.⁷ The original authors of the 2001 and 2003 tax cuts took advantage of this loophole and wrote in an expiration to reduce the cost of the tax cut package and avoid budget enforcement rules that could have otherwise made enactment much more difficult.⁸ Further, the same rule would govern in resolving the fiscal cliff. Despite the Democrats winning what some called a tax increase on the highest-income Americans, the Congressional Budget Office (CBO) estimated that the final deal *added* nearly \$4 trillion to the deficit over the coming decade by making most of the tax cuts permanent.⁹

As this illustrates, when it comes to temporary tax changes, the baseline used to judge our current course and changes from it is broken. In this Article, I propose a way to amend the official baseline to close this loophole—which both parties continue to abuse—going forward.¹⁰

At the very same time that baseline manipulation was playing a large (albeit underappreciated) role in the fiscal cliff mess, it also featured in another fiscal debate dividing Washington: the long-term course of the federal budget. Back in 2012, CBO emphasized

critical observations or data used for comparison or a control.” *Id.* However, as I employ the term baseline, it is not simply a random point of comparison but, in some meaningful sense, the starting point against which to compare legal change.

7. For a description of the baseline rules, see *infra* note 158 and accompanying text.

8. See *infra* notes 88-90 and accompanying text for a description of how expiration, in combination with the baseline rules, eased passage of the tax cuts.

9. See CBO, COST: ESTIMATE OF THE BUDGETARY EFFECTS OF H.R. 8, THE AMERICAN TAXPAYER RELIEF ACT OF 2012 (2013).

10. See *infra* Part IV.C.

a long-term scenario—essentially, a baseline capturing our current course—that showed the budget on a track toward fiscal calamity.¹¹ CBO projected debt in excess of 250 percent of GDP by the 2040s.¹² These types of projections set the stage for the deficit-reduction recommendations from entities like the Bowles-Simpson fiscal commission, and helped justify the fiscal austerity that began in 2010.¹³ However, this long-term baseline and others like it were fundamentally flawed and represented not so much a devastating long-term outlook as a fundamental confusion over that outlook—a point this author made at the time.¹⁴

And just one year later in its 2013 report, CBO highlighted a much rosier fiscal future.¹⁵ In this new projection, debt stood at around 100 percent of GDP by 2040¹⁶—not low, but much better than the projection from the year before and probably not deserving of the “fiscal crisis” label. In large part, this radical turnaround reflected different assumptions about the course of future law, *but not anything that policymakers had done in the meantime*.¹⁷

11. CBO, THE 2012 LONG-TERM BUDGET OUTLOOK 2 (2012) [hereinafter CBO, 2012 LONG-TERM BUDGET OUTLOOK].

12. *See id.* In fact, this scenario was prominently shown on the cover of the report (along with the “extended baseline scenario”). *Id.* at 1.

13. *See* Ed O’Keefe, *What Is the Simpson-Bowles Commission? (and Why Does it Still Matter?)*, WASH. POST (Nov. 27, 2012), <http://www.washingtonpost.com/blogs/2chambers/wp/2012/11/27/what-is-the-simpson-bowles-commission-and-why-does-it-still-matter/> [http://perma.cc/6CR4-Q9JK].

14. David Kamin, *Are We There Yet?: On a Path to Closing America’s Long-Run Deficit*, 137 TAX NOTES 53, 59-60 (2012).

15. *See* CBO, THE 2013 LONG-TERM BUDGET OUTLOOK 2 (2013) [hereinafter CBO, 2013 LONG-TERM BUDGET OUTLOOK]. To be clear, the 2013 report also included the same dire “alternative fiscal scenario” as the 2012 report. *See id.* at 4. It was, however, explicitly deemphasized. *See, e.g., id.* at 64 (describing how in its revenue projections the new report focused primarily on the “extended baseline” rather than the “alternative fiscal scenario”).

16. *Id.*

17. While CBO explains that its move to deemphasize the alternative fiscal scenario resulted from congressional action, this in fact does not account for most of the difference in the projections. In particular, Congress did make permanent most of the 2001 and 2003 tax cuts between the 2012 and 2013 projections. *See* American Taxpayer Relief Act of 2012, H.R. 8, 112th Cong. §§ 101-102. According to CBO, Congress’s action meant that CBO no longer had to rely on its “alternative fiscal scenario” to paint a realistic picture of the federal budget’s future course, or at least that was the implication. *See* CBO, 2013 LONG-TERM BUDGET OUTLOOK, *supra* note 15, at 64. The problem with this explanation is that the projection CBO emphasizes in its 2013 report hugely differs from its 2012 alternative fiscal scenario. Very little of this difference can be explained by congressional action on the tax cuts. The 2012 alternative fiscal scenario had assumed extension of all the 2001 and 2003 tax cuts.

The radical change in the long-term trajectory has received less notice than it deserves; this reflects the more fundamental problem that many baselines—and perhaps long-term baselines especially—rely on unexamined assumptions. The inconsistency derives from confusion, even among the official budget agencies, as to what long-term baselines should measure. This Article offers a theory to ground long-term baselines by better describing what they can and should measure, and rejects a long-term metric advocated by some—called generational accounting—that represents an incoherent approach to long-term budgeting and reflects a further misunderstanding of baselines.

In sum, confusion around and abuse of budget baselines have shaped some of the most important fiscal policies of the current century, and failures in budget baselines have undermined political accountability, budget enforcement rules, and a proper understanding of the likely effects of these budget policies. In this Article, I seek to remedy this confusion and abuse.

I start by laying out a historical and theoretical groundwork in Parts I and II. Part I describes the origins of budget baselines in the 1970s and their subsequent widespread use in federal budgeting. Part II then engages in theoretical work that so far has been largely neglected by the literature, identifying how budget baselines can be constructively used in decision making. This is in contrast to some recent scholarship that sees baselines as largely arbitrary¹⁸ and servicing irrational biases.¹⁹

See CBO, 2012 LONG-TERM BUDGET OUTLOOK, *supra* note 11, at 18. Congress had, in fact, made 80 percent of them permanent. Chye-Ching Huang, *Budget Deal Makes Permanent 82 Percent of President Bush's Tax Cuts*, CTR. ON BUDGET & POL'Y PRIORITIES (2013), <http://www.cbpp.org/files/1-3-13tax.pdf> [<http://perma.cc/CA26-MYKA>]. That was the main legislative development. The huge swing in the projections is instead largely explained by assumptions about growth in revenues and discretionary spending after the end of the decade—changes that cannot be reasonably explained by legislative developments in the ensuing year. See *infra* Part IV.D.1.

18. See, e.g., DANIEL N. SHAVIRO, TAXES, SPENDING, AND THE U.S. GOVERNMENT'S MARCH TOWARD BANKRUPTCY 159 (2007) ("The choice of a baseline is inevitably arbitrary, or at least subject to differing interpretations.").

19. See, e.g., W. Mark Crain & Nicole Verrier Crain, *Fiscal Consequences of Budget Baselines*, 67 J. PUB. ECON. 421, 423-24 (1998) (explaining that baselines matter because of the "loss aversion" bias); see also David Gamage, *Preventing State Budget Crises: Managing the Fiscal Volatility Problem*, 98 CALIF. L. REV. 749, 758-60 (2010) (arguing that these irrational mechanisms are one of the key ways that baselines affect decision making).

Part III then brings organization to the jumble of employable baselines by creating a taxonomy of different budget baselines—differentiated by the part of the legal system these baselines hold constant going forward—and recommending which baselines to use and when. I argue that priority should be given to the expectations baseline—reflecting what is actually expected to occur. To give two examples: we should generally expect temporary tax cuts to be continued, and the baselines we use should reflect that expectation. Similarly, we should expect that the unsustainable will not be sustained in fiscal policy and that, one way or another, the budget deficits will be controlled in the coming years. Consequently, some of the predictions of fiscal calamity for future generations are overstated and certainly improperly framed.

With this taxonomy established, Part IV of this Article then applies these conclusions regarding which baselines to use to four separate ongoing debates that prominently feature baselines. First, I engage the longstanding debate over whether we should use baselines at all; I answer this “yes” in light of the considerable information that would be lost in the absence of baselines. Second, I describe why spending in the baseline should grow in nominal terms, despite calls (especially from conservatives) for a nominal freeze. Specifically, I conclude that a nominal freeze is not consistent with any of the constructive purposes of budget baselines, and serves only to misinform decision makers (if anything). Third, I engage how baselines (and cost estimates) should deal with temporary legislation, arguing that expirations should frequently be ignored. Finally, I discuss our long-term fiscal future and detail how baseline confusion is leading to a significant exaggeration of the magnitude and nature of the long-term fiscal shortfall, and should lead us to reject new methods like generational accounting that some are pushing to be officially adopted.

I. HISTORY OF BUDGET BASELINES

A. *The Advent of the Federal Budget Baseline*

The modern system of federal baseline budgeting began to take root in 1974 with the passage of the Congressional Budget Act.²⁰ That Act, which established the framework for the current budget process, included two separate provisions key to the development of budget baselines. First, it required the Office of Management and Budget (OMB) annually to submit to Congress an estimate of the amount of funding needed in the upcoming year to maintain federal programs at “the same level as the fiscal year in progress and without policy changes”²¹—a baseline often referred to as a “current services” or “current policy” baseline. Second, the Act created CBO as a competing counterpart to the executive budget office²² and, among other things, asked CBO to produce each year a projection of the budget over the five years to come.²³

Before 1974, federal budget analysts and policymakers used a baseline—but it was a very simple one, at least when it came to spending programs. In particular, spending levels were often compared to the nominal level (unadjusted for inflation or any other factors) of the prior year.²⁴ This was referred to as the “base” rather

20. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297. For another history of budget baselines (up until the mid-1990s), see Timothy J. Muris, *The Uses and Abuses of Budget Baselines*, in *THE BUDGET PUZZLE: UNDERSTANDING FEDERAL SPENDING* 42 (John F. Cogan et al. eds., 1994). That history provides an especially good overview of the early development of the “current services” baseline, including legislative history and disagreements on methodology. *Id.* Muris is a strong critic of baselines as currently employed, and I address and summarize a number of his arguments. See *infra* Part IV.B.

21. Congressional Budget and Impoundment Control Act § 605. The idea for requiring a current services baseline was first proposed by Senator Ed Muskie, reflecting back on his time as governor of Maine where they used such a baseline to evaluate program changes. *THE BUDGET PUZZLE*, *supra* note 20, at 125.

22. Congressional Budget and Impoundment Control Act § 201.

23. *Id.* § 308(c).

24. See CBO, STATEMENT OF ALICE M. RIVLIN BEFORE THE JOINT ECONOMIC COMMITTEE 1 (Dec. 3, 1975) (“The baseline that most often has been used is last year’s budget level.”); see also Muris, *supra* note 20, at 42 (“Throughout most of U.S. history, the base used to compare alternative budget proposals was either the levels in the previous year’s budget or those proposed by the President.”).

than a “baseline,”²⁵ but the point remains the same. Policymakers and analysts used these figures as the starting point for budgeting for the upcoming fiscal year.

For revenues, the baseline was more sophisticated even in these early years. At least a few presidents’ budgets prior to the Congressional Budget Act compared the proposed revenue level to what would occur under “current law” while taking into account changes in the economy.²⁶ This is akin to the current approach for calculating baseline revenues.

The early use of the current-year nominal figures as a baseline naturally precluded long-term budget projections. As will be discussed further in Part IV.B, the previous year’s nominal funding is of questionable relevance as a “starting point,” even for the upcoming year. Conditions—such as inflation, economic growth, and changes in caseload—mean that \$100 in the current year for a program simply is not the same thing as \$100 in the next year. Over longer periods of time, this becomes even more true. Looking only at what occurred in the previous year makes it difficult—or impossible—to project what will occur years down the road.

Thus, the advent of the new baseline helped policymakers and budget analysts begin to look beyond the ends of their noses, and beyond just the previous year’s funding level. Alice Rivlin, the first director of CBO, made this point in some of her early testimony before Congress responding to OMB’s current services projection.²⁷ In tasking CBO with making a five-year budget projection, Congress, at the time, had not actually given direction as to how that projection should be made. Rivlin made clear that CBO would use a “current services” concept to project spending in its new five-year projections (as it then proceeded to do)²⁸ and she ended her testimony with a strong endorsement of the new baseline. As Rivlin declared, “I believe that the use of such estimates will become wide-

25. Muris, *supra* note 20, at 42.

26. See, e.g., OFFICE OF MGMT. & BUDGET [OMB], EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1970, at 61 (1969) (identifying the effects of legislated and proposed changes in tax rates on receipts, separate from the effects of such factors as economic growth if current law were kept in place).

27. See CBO, *supra* note 24, at 1-4 (describing why a previous year’s funding level is not relevant for analyzing many programs’ future funding levels).

28. *Id.* at 12.

spread, both in the Congress and in the Executive Branch.”²⁹ She was right.

B. Baseline Disagreement and (Some) Consensus

In the early days of the “current services” baseline, there was uncertainty as to how to implement the new baseline, and both budget offices used a variety of assumptions.³⁰ These inconsistencies were temporarily alleviated when two laws—the first in 1985 and the second in 1990 amending the first—established a baseline for purposes of certain budget enforcement rules.³¹ The assumptions

29. *Id.* at 13.

30. Cogan and co-authors describe how three different concepts were seen as potentially consistent with the broad language of the 1974 Act, which required programs to be held at “the same level as the current year without a change in policy.” See THE BUDGET PUZZLE, *supra* note 20, at 125-26 (citation omitted). One concept was something close to a true “current services.” *Id.* at 126. For all federal programs, this meant adjusting for inflation based on individual programmatic needs. *Id.* In addition, phase-ins and expirations—both with regard to taxes and spending—were excluded, so that law was continued consistent with the current year, regardless of what was written on the books. *Id.* at 128. A second concept was “current policy.” *Id.* at 126. Under this concept, a uniform inflation adjustment was used for all “discretionary” programs—those which were annually appropriated—irrespective of individual programmatic needs. *Id.* For mandatory programs (like Social Security), the adjustment was made based on past program performance. *Id.* Phase-ins and expirations were assumed to occur as actually scheduled. *Id.* at 128. Finally, under a “current law” concept, no inflation adjustment was used at all for projecting discretionary programs, and revenues and mandatory programs followed what was actually on the books. *Id.*

Although it is possible to take issue with some of this typology as laid out by Cogan and his co-authors, there was undeniably considerable conceptual confusion as to exactly how to implement the baseline under the 1974 Act. Many of the initial projections from CBO and OMB mixed and matched these concepts, and neither budget office was completely consistent over time. For an example of such inconsistency with CBO, compare CBO, FIVE-YEAR BUDGET PROJECTIONS: FISCAL YEARS 1977-81, at 2-3 (1976) (assuming that discretionary appropriations continue and are increased with inflation over time in the baseline projection), with CBO, FIVE-YEAR BUDGET PROJECTIONS: FISCAL YEARS 1981-1985, at 24-25 (1980) (focusing on a “current law” projection in which discretionary programs are assumed to continue at a nominal freeze, and providing a scenario with inflation adjustments as an alternative). For an example of such inconsistency with OMB, compare OMB, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1980, at 14 (1979) (not adjusting all programs for inflation in the current services projections), with OMB, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1981, at 3-4 (1980) (apparently adjusting all programs for the effects of inflation—or what is here called “rising program costs”—in the current services projection).

31. See Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 251(a)(6), 99 Stat. 1037, 1067-68 (setting out the assumptions to be used in calculating the “budget base”); Budget Enforcement Act of 1990, Pub. L. No. 101-508, § 257, 104 Stat. 1388-

set out in those baselines were then largely adopted in CBO and OMB budget projections.³² That baseline continues to be referenced today, even if not always followed.³³ I refer to the variation now employed by CBO as the “official” baseline. As amended in 1990, the baseline dictated uniform inflation measures to be used for projecting annually appropriated budget authority.³⁴ It established exactly how mandatory programs were to be projected: follow current law—that is, the law on the books going forward—except for any temporary mandatory programs greater than \$50 million per year, which were assumed to be made permanent.³⁵ It also gave the

591 (establishing the baseline and setting out the assumptions to be used). In these two laws, Congress established the baseline (or, as the 1985 law called it, the “budget base”) to help facilitate the new budget enforcement rules. The first law set out deficit targets to be adhered to. *See* Balanced Budget and Emergency Deficit Control Act § 251(a)(6). The second—overriding the first—established a new “pay-as-you-go” (PAYGO) rule that required any new tax cuts or mandatory spending increases to be fully paid for. *See* Budget Enforcement Act § 257. Enforcing these rules required a baseline for two reasons. First, a baseline was needed to determine whether the budget rules had been breached, as the first rule required projecting deficits for the upcoming fiscal year and the second required measuring the magnitude of tax cuts or mandatory spending increases relative to a baseline. Second, a violation of the rules would trigger a sequester (automatic spending cuts on eligible programs), and a baseline was needed to determine what share of the cuts would fall on a given program.

32. *See, e.g.*, CBO, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1992-1996, at 60-62 (1991) (describing how CBO conformed its baseline to that adopted in the 1990 law, with the exception that it would show discretionary levels adjusted for inflation, as under that law, and assume the recently enacted discretionary caps were followed); OMB, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1993, at 13 app. two (1992) (describing the assumptions underlying OMB’s “current services” baseline, which generally adhered to the baseline described in the 1990 law with the exception of discretionary funding levels that were assumed to follow the discretionary caps).

33. *See, e.g.*, OMB, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2015: ANALYTICAL PERSPECTIVES 381 (2014) [hereinafter OMB, FISCAL YEAR 2015] (describing how, throughout the 1990s, the baseline was calculated according to the rules set out in the Budget Enforcement Act, and detailing adjustments to that baseline that OMB now employs in projecting current services).

34. Budget Enforcement Act of 1990 § 257.

35. *Id.* This rule changed in the Balanced Budget Act of 1997. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 10209(a)(1)(A)(i), 111 Stat. 251, 710. The Act gave discretion to the budget committees and OMB to decide how to treat temporary programs in the baseline with annual spending of over \$50 million per year, and tasked the institutions with consulting each other. *Id.* The rule they agreed to is to assume that these programs actually expire if they are explicitly stated to be temporary; otherwise, such programs are assumed to continue in the baseline. For programs enacted before 1997, the original rule (assuming extension) continues to apply. *See* OMB, FISCAL YEAR 2015, *supra* note 33, at 382 n.2 (explaining treatment of temporary mandatory programs enacted after 1997).

projection rule for receipts: follow current law except for temporary excise taxes devoted to trust funds, which were assumed to also be made permanent.³⁶ Further, in the 1990s, CBO expanded its medium-term projection window from five years to ten years.³⁷ OMB followed suit, although the length of OMB's budget window has fluctuated since then.³⁸

The temporary consensus around the medium-term federal budget baseline entirely broke down entering the 2000s. The key turning point was the enactment of the 2001 and 2003 tax cuts.³⁹ As a way to make them both appear less expensive than they likely would be and evade budget rules, these large tax cuts were written into law as temporary measures, even though supporters intended to make them permanent.⁴⁰ The magnitude of these and the other also-expiring tax cuts enacted during the Bush Administration was large—equal to nearly 2 percent of the economy.⁴¹ Under the official baseline rules, these tax cuts were assumed to be temporary, producing a rosy budget outlook based on a scenario (expiration of the

36. Budget Enforcement Act of 1990 § 257.

37. See CBO, *THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1994-1998*, at 35-39 (1993) (showing budget figures projected for an additional five years beyond the traditional five-year window). By 1996, CBO had completed the switch to the now-standard ten-year budget window for its projections. See generally CBO, *THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1997-2006* (1996) (using a ten-year budget window for all of the key budget projections).

38. By the end of the Clinton Administration, OMB was using a ten-year budget window. See OMB, EXEC. OFFICE OF THE PRESIDENT, *BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2001*, at 391-422 (using a ten-year window for budget projections). The Bush Administration then switched to a five-year window in its second budget. See OMB, EXEC. OFFICE OF THE PRESIDENT, *BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2003*, at 395-417 (using a five-year window). Finally, the Obama Administration switched back to a ten-year window in its first budget. See OMB, EXEC. OFFICE OF THE PRESIDENT, *BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2010: UPDATED SUMMARY TABLES 114* (using a ten-year window for budget projections).

39. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38; Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752.

40. See William G. Gale & Peter R. Orszag, *Sunsets in the Tax Code*, 99 TAX NOTES 1553, 1557-58 (2003) (describing how the tax cuts were made temporary as an accounting maneuver to make them appear less expensive and evade budget rules, even as supporters intended to make them permanent).

41. See William G. Gale, Opinion, *Five Myths About the Bush Tax Cuts*, WASH. POST (Aug. 1, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/30/AR2010073002671.html> [<http://perma.cc/7NUY-PTX4>] (noting that the revenue lost because of the Bush tax cuts equals “nearly 2 percent of GDP”).

tax cuts) that supporters of the tax cuts never intended to occur.⁴² The result was a baseline disconnected from any future state of the world that analysts or policymakers thought would actually exist.

With unrealistic assumptions underlying the official baseline, a cottage industry quickly arose among independent budget analysts to produce more “realistic” baselines.⁴³ The industry included outside analysts working from the Brookings Institution,⁴⁴ as well as a coalition of budget-oriented Washington think tanks that, for a time, offered a unified alternative baseline.⁴⁵ These alternative baselines quickly took on a prominent role in fiscal debates as news reports looked to these baselines, rather than the official baseline, for information on the budget’s future.⁴⁶

The official budget offices also got into this game. By the time of the Fiscal Year 2005 Budget, OMB was using a revised version of the current services baseline that assumed extension of some of the temporary tax cuts (arguably, to disguise the full cost of temporary policies the Bush Administration had itself initiated).⁴⁷ When President Obama took office, the new Administration adopted a series of

42. Gale & Orszag, *supra* note 40, at 1557 (“Policymakers supporting sunsets have every intention of trying to make the policies permanent.”).

43. Full disclosure: I joined said cottage industry at the beginning of my career while at the Center on Budget and Policy Priorities. *See, e.g.*, DAVID KAMIN & RICHARD KOGAN, CTR. ON BUDGET & POLY PRIORITIES, DEFICIT PICTURE GRIMMER THAN CBO’S MARCH PROJECTIONS SUGGEST (2004) (detailing deficit projection based on likely policies).

44. *See, e.g.*, William G. Gale & Peter R. Orszag, *The Budget Outlook: Baseline and Adjusted Projections*, 100 TAX NOTES 1595 (2003) (adjusting the CBO baseline to take into account likely policies).

45. The coalition included the Committee for Economic Development, the Concord Coalition, and the Center on Budget and Policy Priorities. *See generally* COMM. FOR ECON. DEV. ET AL., MID-TERM AND LONG-TERM DEFICIT PROJECTIONS (2003).

46. *See, e.g.*, Editorial, *Don’t Count on It*, WASH. POST (Aug. 17, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/16/AR2005081601428.html> [<http://perma.cc/X8Y8-ZUNW>]; Edmund L. Andrews, *Leap in the Deficit Instead of Fall Is Seen for U.S.*, N.Y. TIMES (Aug. 27, 2003), <http://www.nytimes.com/2003/08/27/politics/27BUDG.html> [<http://perma.cc/H97L-TGHM>] (emphasizing an alternative scenario to the official baseline in which the tax cuts are extended, among other additional costs).

47. OMB, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005: ANALYTICAL PERSPECTIVES 358 (2004) (describing how the Administration adopted a current services baseline that extended the Bush tax cuts, which “were clearly not intended to be temporary,” and criticizing the official baseline, which OMB described as appearing identical to a current services baseline until that point, for having serious technical flaws). For a description of how tax-cut supporters effectively manipulated the baseline rules, see *infra* Part IV.C.

different revised baselines against which to gauge the cost of its policies—all of which assumed continuation of most, and sometimes all, of the 2001 and 2003 tax cuts.⁴⁸

As the official baseline projection lost policy relevance, CBO responded. First, CBO began to regularly produce a table showing the cost of various options (relative to the official baseline) that allowed analysts to make their own baseline adjustments.⁴⁹ Eventually, CBO began doing this itself, placing increasing emphasis on its “alternative fiscal scenario,” which reflected extension of the tax cuts, among other adjustments.⁵⁰ To be clear, these adjustments were not without attendant controversy. A number of observers have suggested sticking to the official baseline rules rather than assuming extension of temporary policy, like the 2001 and 2003 tax cuts.⁵¹

48. Sometimes, the Obama Administration assumed extension of nearly all of the Bush tax cuts in the baseline. *See, e.g.*, OMB, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2010: ANALYTICAL PERSPECTIVES 375 (2009) (describing how the Administration’s current services baselines fully extended the 2001 and 2003 tax cuts, except for estate tax repeal for which the Administration assumed extension at the 2009 parameters). At other times, the Administration used a baseline that assumed expiration of the “high income” tax cuts and extension of only the “middle class” Bush tax cuts, as opposed to a baseline that assumed extension of both. *See, e.g.*, OMB, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2012: ANALYTICAL PERSPECTIVES 420 (2011) (adopting a baseline extending only the middle class Bush tax cuts, and notably not explaining why the baseline had shifted as compared to earlier budgets).

49. CBO first produced this table with its budget projections released in 2003. *See* CBO, THE BUDGET AND ECONOMIC OUTLOOK: AN UPDATE, at 12 tbl.1-6 (2003) (showing budget outcomes under alternative baseline assumptions like extension of the Bush tax cuts). Before this, CBO had discussed the effects of some of these alternatives—such as extension of the temporary tax cuts—but not in this more comprehensive fashion. *See, e.g.*, CBO, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2003-2012, at 4 (2002) (showing the effects of extending temporary tax cuts).

50. CBO started by showing a scenario in which certain policies—the most expensive of which were the tax cuts—were continued. *See* CBO, PUB. NO. 4236, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2011 TO 2021, at 16 tbl.1-4 (2011) [hereinafter CBO, FISCAL YEARS 2011 TO 2021]. CBO later began emphasizing what it called the “alternative fiscal scenario,” which also reflected a scenario in which the tax cuts were continued. *See* CBO, PUB. NO. 4474, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2012 TO 2022, at 22 tbl.1-7 (2012).

51. *See infra* notes 189-97 and accompanying text.

C. Long-Term Baselines: Confusion Always Reigns

The long-term budget baseline—extending beyond the traditional ten-year window—perhaps generates even more confusion than the medium-term projections. Economists like Alan Auerbach have led the effort to increase the prominence of such projections in budget debates, developing long-term budget metrics like the fiscal gap and generational accounting,⁵² the latter of which is critiqued in Part IV.D.2. In the mid-1990s, CBO also began calculating such long-term projections, extending its projections decades into the future.⁵³ Since then, CBO has annually produced a report giving its long-term estimates of up to seventy-five years. OMB now also provides such long-term projections under the Obama Administration’s policies.⁵⁴

However, when it comes to long-term projections exceeding the now-standard ten-year window, there was never an “official” set of assumptions that analysts or the budget offices adopted, or even used as a reference point. This translated into pervasive inconsistency in methodology, including internal inconsistency in projections. Take one example: revenues. Projections tend to divide into two camps. The until-recently dominant school assumes that most revenues are frozen as a share of the economy after ten years, unlike in the first ten years when revenues are allowed to vary as a share of the economy.⁵⁵ An alternative assumption—and one now

52. See, e.g., Alan J. Auerbach et al., *Generational Accounting: A Meaningful Way to Evaluate Fiscal Policy*, 8 J. ECON. PERSP. 73, 75-77 (1994) [hereinafter Auerbach et al., *Generational Accounting*] (explaining generational accounting); Alan J. Auerbach, *The U.S. Fiscal Problem: Where We Are, How We Got Here, and Where We’re Going*, 9 NBER MACRO-ECONOMICS ANN. 141, 168-72 (1994) [hereinafter Auerbach, *U.S. Fiscal Problem*] (introducing fiscal gap analysis). Although among the most prominent, Alan Auerbach and co-authors were not the first economists to focus on projected outcomes and develop comprehensive frameworks for evaluating the fiscal status of the government taking into account future cash flows. For earlier work in this vein, see, for example, Willem H. Buiter, *Measurement of the Public Sector Deficit and Its Implications for Policy Evaluation and Design*, 30 INT’L MONETARY FUND STAFF PAPERS 306, 306-46 (1982).

53. CBO first introduced such long-term analysis in its annual *Budget and Economic Outlook* in 1996. See CBO, BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 1997-2006, at 79 (1996). That report included a chapter projecting budget outcomes through 2050. *Id.* at 69-95.

54. See OMB, FISCAL YEAR 2015, *supra* note 33, at 23-32.

55. For instance, this was the assumption used until recently by Alan Auerbach and William Gale—perhaps the leading sources for long-term budget projections outside the government. See, e.g., Alan J. Auerbach & William G. Gale, *The Federal Budget Outlook: No*

being more widely adopted, or at least recognized—assumes that revenues rise over the long-term as factors such as “real bracket creep” (real growth which pushes people into higher tax brackets) drive up receipts.⁵⁶ The difference is considerable; over seventy-five years this reduces the fiscal gap by an amount approaching two percent of GDP.⁵⁷ But there is little consensus as to the proper treatment and why. Still, despite the general confusion with regard to long-term baselines, they are frequently employed in policy debates, and have been helping to drive concern about the track of the federal budget.⁵⁸ As explained in Part IV.D, the confusion has led to considerable exaggeration over the severity of the long-term fiscal challenges facing the country or, at least, a misunderstanding of them.

To summarize, baselines now have a long history in federal budgeting. It is a history not just of widespread use but also of confusion and abuse.

II. THE PURPOSES OF BUDGET BASELINES

Alleviating the confusion and abuse surrounding budget baselines requires both asking why we use baselines to begin with as

News Is Bad News, 136 TAX NOTES 1597, 1602 (2012) (“We assume that after 2022, most categories of spending and revenues remain constant as a share of GDP.”). It is also the method employed in CBO’s long-term alternative fiscal scenario, which was heavily emphasized in past reports. See CBO, 2012 LONG-TERM BUDGET OUTLOOK, *supra* note 11, at 9 tbl.1-1. Until recently, OMB also assumed that revenues stayed constant as a share of the economy. See OMB, EXEC. OFFICE OF THE PRESIDENT, FISCAL YEAR 2013 BUDGET OF THE U.S. GOVERNMENT: ANALYTICAL PERSPECTIVES 60 (2012).

56. For instance, Alan Auerbach and Bill Gale now offer this additional revenue as alternative to their base case. See, e.g., Alan J. Auerbach & William G. Gale, *Forgotten but Not Gone: The Long-Term Fiscal Imbalance*, 23 tbl.1, http://www.brookings.edu/~/media/research/files/papers/2014/03/long-term-fiscal-imbalance-gale/longterm_fiscal_imbalance_gale.pdf [<http://perma.cc/L6D8-LG9U>]. In its long-term projections, CBO now emphasizes a scenario that assumes this revenue growth occurs. See CBO, 2013 LONG-TERM BUDGET OUTLOOK, *supra* note 15, at 68 tbl.5-1 (decomposing the increase in revenues over time among its sources). And OMB has begun to incorporate the additional revenue into its own projections, substantially improving the fiscal outlook. See OMB, FISCAL YEAR 2015, *supra* note 33, at 25 (“The projections take into account the automatic growth in revenues that would result under a continuation of 2015 Budget policies.”).

57. Auerbach & Gale, *supra* note 56, at 23 tbl.1.

58. For examples of how these long-term projections have been employed, see *infra* Parts III.E, IV.D.

well as understanding what purpose they can serve. This Part sets out a number of different ways in which budget baselines can be used to enhance decision making. This is meant to further our understanding of baselines in two different ways. First, scholarship on budget baselines (or any form of legal baseline) has rarely asked *why* we use baselines in decision making. Second, to the extent the purposes of budget baselines are discussed in modern scholarship, they tend to be either dismissed as arbitrary or described as purely preying on (as opposed to helping overcome) human irrationality: namely, a bias toward whatever gets framed as the status quo and an aversion to losing anything relative to that status quo.⁵⁹ I do not deny that baselines may sometimes be used in this fashion, but, as this Part makes clear, baselines can be and are used in ways that are far more constructive.

A. *Setting the Agenda*

A baseline can aid policymakers in determining what should be on the legislative agenda by helping to define and prioritize policy problems that need to be addressed.⁶⁰ This is a task that political scientists have increasingly recognized as central to the policy making process.⁶¹ In particular, recent scholarship emphasizes Congress's limited capacity—both as an institution and in terms of individual members—to focus on particular policy issues and the resulting importance of agenda setting.⁶²

The first step in agenda setting—defining problems that should be addressed—cannot be easily separated from the idea of establishing a baseline. To say that there are problems for policymakers to address assumes that there is a starting point for the legal system—a course that the legal system is on. Conversely, the assumption that there are some areas of policy without problems similarly presumes that policy is on a certain course (in this case, an unproblematic course).

59. *See supra* notes 18-19.

60. *See* BRYAN D. JONES & FRANK R. BAUMGARTNER, *THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS* 4-5 (2005).

61. *Id.* at 5.

62. *See id.* at 247-48 (explaining how, given Congress's limited capacity to focus on particular policy issues, agenda setting is of primary importance).

Return to the case of the “fiscal cliff” invoked at the beginning of this Article. To make the concepts more concrete, I will return to this example repeatedly in the next two Parts. At the end of 2012, the country faced the scheduled expiration of temporary tax cuts equal to roughly 2 percent of GDP (plus other austerity measures).⁶³ The official baseline showed the country metaphorically jumping off the cliff and could have been seen as helping policymakers define the country’s fiscal course as a large problem that needed to be addressed. CBO produced a series of analyses showing the dramatic negative effects of the massive scheduled austerity.⁶⁴

The importance of a baseline to defining policy problems can also be illustrated by imagining the absence of a baseline entirely. Let us say policymakers looked at the world as if it were a *tabula rasa*. In that case, there would not be particular policy problems per se that would require attention, nor other policies that could be left alone. There would be no fiscal cliff because policy would not be on any course at all. *Everything* would have to be addressed because there would be no point from which to start, whether good or bad. Of course, some policy choices would be better or worse than others. Policymakers could create problems with their choices. But there would be no problems at the start that could be identified for future policy, other than the glaring problem that policymakers would have no place from which to start and would have to take on the world as a whole.⁶⁵

This function of budget baselines—helping to set the policy agenda—results from the limited ability of both individuals and institutions to process policy decisions. This is a form of bounded rationality. That is, both individuals and institutions have a limited ability to address issues at any given point in time. Baselines can

63. See *supra* note 41.

64. See CBO, ECONOMIC EFFECTS 2013, *supra* note 4, at 3-10 (projecting economic outcomes under its baseline in which the country went over the fiscal cliff, and comparing those outcomes to a world in which that was avoided).

65. The problem of starting from a true *tabula rasa* is further discussed *infra* Part IV.A. There is a theory of budgeting called zero-base budgeting, which attempts to push budget decisions to be independent of what came before, as if every program were new. See *infra* Part IV. This attempt to fully abandon baselines is inherently problematic given the information that is lost and has been met with limited success as a result. See *id.*

help address that limitation by showing what areas most deserve attention at a given point.

B. Policy Design: Expected Effects

It is one thing to decide that a policy item is a problem that should be on the legislative agenda. It is another thing to actually work toward a resolution of that problem and design a policy response. Here, again, baselines can come into play.

Baselines can show the expected course of policy, and thereby aid in policy design. In other words, baselines can do more than illustrate what would happen if policymakers sat back and did little or nothing; they can illustrate what is actually expected to occur. Whether that course is a good or bad one is an important piece of information for policy making. Policymakers should know whether their actions and the expected results are the right or wrong ones. Unlike the previous function, this does not derive from bounded rationality and the limited ability to process information. Rather, any decision maker, irrespective of such bounds, would probably want to know the expected effects of their actions.

In referring to expected effects, I am referring to a central estimate of the course of policy, around which there is likely to be a considerable range of uncertainty. Of course, different evaluators will have different guesses as to the central estimate. But some of these guesses should be better than others. Some will be more informed than others, and some will have a better record than others in making these predictions. The better guesses are the ones that should be more helpful in illuminating decision making.

At first, this may seem like a difficult function to differentiate from agenda setting. But again, the fiscal cliff can illustrate. In the lead up, it was certain that the cliff would be on the agenda, and there was high confidence that policymakers were going to extend a large share of the tax cuts, even if there was uncertainty as to exactly how that would happen and whether the country might temporarily jump off the cliff as policymakers negotiated.⁶⁶ In fact,

66. Jari Stehn et al., *Fiscal Cliff Scenarios: The Not So Good, the Bad, and the Ugly*, U.S. ECON. ANALYST 1-3 (Oct. 5, 2012), <http://www.goldmansachs.com/our-thinking/archive/fiscal-cliff/fiscal-cliff.pdf> [<http://perma.cc/4D5N-6AXU>].

President Obama had proposed extending roughly 70 percent of the temporary Bush tax cuts,⁶⁷ while the Republicans had proposed extending nearly all of them.⁶⁸ That was the difference in their positions. So judging whether the country was on a good or bad trajectory when it came to these tax cuts—and whether *that* should be changed—required looking not at what would happen if no action were taken but, instead, if the *expected* actions were taken.

C. Policy Design: Using the Status Quo as a Reference Point

Another purpose of baselines is to serve as a reference point in designing policies. By reference point, I mean a marker of where we are now. That marker can then help inform where we want to go.

There are a few reasons we may want such a marker. First, we might have limited information about the world around us, and thus our experience with the starting point may be particularly useful. In other words, amidst an array of different policy choices, we often do not know how different alternatives would turn out, or, at least, we do not know with confidence. We probably have much better information about policies as they exist now simply because we have been able to observe their effects in the world around us. As such, a baseline built on continuation of what we are currently doing can serve as a useful reference point. To the extent one is satisfied with policies as they now exist, the reference point is a

67. In the 2013 Mid-Session Review, OMB reported that allowing the high-income tax cuts to expire, as the Administration proposed, would raise \$952 billion from 2013-2022. See OMB, EXEC. OFFICE OF THE PRESIDENT, FISCAL YEAR 2013 BUDGET OF THE U.S. GOVERNMENT 206 tbl.S-2 (2012) [hereinafter OMB, FISCAL YEAR 2013]. At the same time, OMB stated that the direct cost of continuing all the temporary tax cuts, including the estate tax at its then parameters, was \$2.6 trillion. *Id.* at 216 tbl.S-8. Extending these tax cuts also made fixing the Alternative Minimum Tax (AMT) more expensive. OMB reported that extending the AMT patch would have cost \$1.9 trillion. *Id.* Of this amount, about half was attributable to the extension of the other tax cuts. See CBO, PUB. NO. 4474, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2012 TO 2022, at 19 tbl.1-6 (2012) (showing that the interaction effect between the AMT patch and extension of the other tax cuts amounted to about \$920 billion from 2013-2022). Adding this together with the direct costs of extending the tax cuts suggests that the total cost of extending the tax cuts was about \$3.5 trillion. The projected savings of \$952 billion composes somewhat less than 30 percent of that amount.

68. See, e.g., Job Protection and Recession Prevention Act of 2012, H.R. 8, 112th Cong. § 2 (as passed by House, Aug. 1, 2012) (continuing all of the 2001 and 2003 tax cuts for another year, but not the refundable tax credits expanded in President Obama's stimulus package).

model for future policy. To the extent one is dissatisfied, it serves as a point of departure. To be clear, there does not have to be any preference for the status quo for a focus on the status quo to provide useful information. We need only to have more information about the status quo than about alternatives for this to be the case.

Second, some may have an actual preference for the status quo. Those in this camp use the status quo not only as a means by which to better understand alternative policies, but as a preferred outcome going forward. The desirability of giving priority to the status quo is an old and long-contested idea. It goes to the core of conservative theory. This is the Burkean suspicion of radical change as compared to gradual evolution; namely, the idea that we know so little about our complex world that priority should be given to what we know most—the status quo—and that change should proceed gradually.⁶⁹ In modern times, this same idea has motivated the theory of incrementalism in policy making, a theory that describes (and sometimes advocates) decision making as “continually building out from the current situation, step-by-step and by small degrees.”⁷⁰ These are theories that seek to rationally adapt to human limitations, or what might be thought of as maximizing rational decision making within constraints. For these theories to be operational, though, the status quo must be defined. That is where the baseline comes in, providing information on what represents the status quo.

I do not mean to say that such conservatism is always justified or is a universal description of the way policy making works. Despite Burkean warnings to the contrary, there are situations that may very well justify radical change. And there are times that policy making does shift radically, rather than in small increments.⁷¹

69. As Edmund Burke wrote:

We must all obey the great law of change. It is the most powerful law of nature, and the means perhaps of its conservation. All we can do, and that human wisdom can do, is to provide that the change shall proceed by insensible degrees. This has all the benefits which may be in change, without any of the inconveniences of mutation.

4 EDMUND BURKE, *Letter to Sir Hercules Langrishe, on the Subject of the Roman Catholics of Ireland*, in THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 241, 301 (1866).

70. Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79, 81 (1959).

71. The modern political science literature tends to describe the political system as moving in fits and starts—“a pattern of extreme stability and occasional punctuations, rather

With that said, conservatism and incrementalism cannot be wholly dismissed as decision-making rules (or even as descriptions); they have some value.⁷² But, for them to work at all, there must be a baseline.

Thus, when it comes to the fiscal cliff, policymakers may want to use the tax policies in place just before the cliff as a marker. That is a state of the world with which they are familiar—unlike the world on the other side of the fiscal cliff, which is considerably different from what Americans have experienced. Policymakers might think that marker is a good or bad state of the world, but, either way, the marker allows them to better gauge alternative tax policies by reference to this known set. And, for Burkean conservatives or incrementalists, it might even be a state of the world that is preferred over alternatives. Or, at the least, gradual change from the marker might be preferred, rather than sudden changes (as in going off the fiscal cliff).

D. Facilitating Political Accountability

Baselines can also help establish political accountability in two separate ways. First, baselines can help gauge the degree to which policymakers have *changed* the course that policy is on. Second, a baseline can relatedly be used to project the course that policymakers have put us on. Both of these metrics seem relevant to holding policymakers accountable—though I suspect that the first may be more important as a normative matter.

Take one conception of accountability offered by the political scientist Andreas Schedler: “[T]he notion of political accountability carries two basic connotations: answerability, the obligation of public officials to inform about and to explain what they are doing; and enforcement, the capacity of accounting agencies to impose sanctions on powerholders who have violated their public duties.”⁷³

than either smooth adjustment processes or endless gridlock.” See JONES & BAUMGARTNER, *supra* note 60, at 5.

72. As the political scientists Jones and Baumgartner note in revising the theory of incrementalism: “Incrementalism was not wrong; indeed we show that it was probably understated by its proponents. But it is far from the full story. It must be combined with a theory of punctuated equilibrium to reach its full potential.” *Id.*

73. Andreas Schedler, *Conceptualizing Accountability*, in *THE SELF-RESTRAINING STATE*:

I assume here that political accountability is in fact normatively desirable.

Both prongs of accountability—policymakers reporting on what they have done and the public, or some other body, sanctioning policymakers for violating their duties—require delineating the policies for which the policymakers are responsible.⁷⁴ In reporting their actions to the public, it makes sense for officials to identify the policies *that are theirs* and for the public to then adjudge policymakers based on the policies *of those officials*.⁷⁵ Absent this ownership of policies by the public officials, accountability makes little sense; there is little point in holding officials accountable for policies for which they are not in some sense responsible.⁷⁶

This is why I suspect the first way baselines can help establish accountability is probably more meaningful as a normative matter. By gauging the degree to which policymakers have changed policy, the focus is on outcomes that policymakers can (and have) affected. This is in contrast to simply looking at the course policymakers have set us on, which the policymakers may or may not have been able to change.⁷⁷

Gauging the degree to which policymakers have changed the course of policy requires comparing the course before and after the relevant policymakers took power, in other words, comparing two

POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 13, 14 (Andreas Schedler et al. eds., 1999).

74. *Id.* at 17.

75. *Id.* at 17, 19.

76. To give an extreme (if hopefully evocative) example: even if one might desperately desire everlasting summer, there is no good reason to hold policymakers responsible for the onset of winter. Yes, it has occurred on their watch, but it is not something for which the policymakers are responsible in any sense.

77. To be sure, there are other ways to measure responsibility for policy that could be at least as meaningful for the purposes of political accountability. For instance, one might compare the expected course of policy to possible alternatives that policymakers could have affected, perhaps weighting the possibilities by the relative difficulty of achieving them. This would have the benefit of attributing outcomes to policymakers if they could have changed those outcomes, even if the ultimate policy result was the same course policy was on before they took power. This has the benefit of not attributing outcomes to policymakers to the extent that they had no ability to change course. With that said, this requires imagining states of the world as they could have been and evaluating the relative difficulty of achieving those states of the world—which may be even more difficult (and abstract) than asking what course policy was on before and after a policymaker took power.

baselines.⁷⁸ First, there is a pre-policy baseline: the course that policy was on before the relevant policymakers took the reins. Second, there is a post-policy baseline: the course that policy is on now, with the current policymakers in control.

The difference between these two baselines measures the *change* that occurred while a certain set of policymakers was in charge, and this change is one way of assessing policymakers' impact. From this perspective, policymakers are less responsible for anything in the pre-policy baseline, as compared to the change they have affected from that point.

Again, return to the temporary tax cuts and the fiscal cliff. The idea here is that previous policymakers had put the country on an expected course whereby most, if not all, of the tax cuts would be made permanent, even if the policymakers had not formally enacted their expectations into law.⁷⁹ This would constitute the pre-policy baseline. *Current* policymakers should be held responsible (or at least *more* responsible) for the difference between this pre-policy baseline and the post-policy baseline, rather than responsible for everything that is set to occur, namely, the full cost of the tax cuts and their effects. In this case, current policymakers would not be charged with the cost of extending most of the tax cuts, even as they enacted the law that did so. Importantly, this notion of political accountability requires a starting point from which to measure.

E. Enforcing Budget Targets

Given the chaos that sometimes reigns in federal budget negotiations,⁸⁰ one could be forgiven for thinking that budgeting is a lawless territory of partisan strife. Although at times it might seem that way, policymakers in fact sometimes set targets to help govern the game. These targets—sometimes self-proclaimed and at

78. See, e.g., BILL HENIFF, JR., CONG. RESEARCH SERV. [CRS], *BASelines AND SCOREKEEPING IN THE FEDERAL BUDGET PROCESS 1* (2012).

79. See *supra* notes 9-17 and accompanying text.

80. See, e.g., Jonathan Weisman & Jeremy W. Peters, *Government Shuts Down in Budget Impasse*, N.Y. TIMES (Sept. 30, 2013), http://www.nytimes.com/2013/10/01/us/politics/congress-shutdown-debate.html?_r=0 [<http://perma.cc/5RBX-PEX7>] (describing the “rapid-fire back and forth legislative maneuvers” the two parties engaged in during the waning hours before a government shutdown).

other times formally enacted into congressional rules or statutes—facilitate policy making and political accountability. And a baseline is often needed to get these targets to work.

Before going on, it might be helpful to briefly consider why policymakers set budget targets in the first place. A collective of policymakers (such as Congress or Congress working with the President) can set budget targets to coordinate action. There are multiple actors involved in budget decision making, and communication among those actors can be challenging, especially in divisive political environments.⁸¹ Budget targets can serve as a means for these various actors to agree on a unified framework that guides the budget decisions they will make.⁸²

The economist Alan Auerbach expands on this point and explains specifically how budget targets can coordinate action by serving as a pre-commitment mechanism.⁸³ He describes how a budget rule set up by a majority in Congress—and that could be overturned by a majority—might still change legislative outcomes:

For example, suppose that each legislator prefers a low overall deficit to a higher one, but also wishes to promote his or her own spending priorities. With no budget rule in place, there may be no commitment mechanism in place to facilitate co-operation on keeping spending low.... Thus, the outcome achieved under a budget rule might be consistent with the contemporaneous wishes of the majority, while at the same time representing a different outcome than would occur without the budget rule in place.⁸⁴

In other circumstances, budget targets are used not as a coordinative device, but instead as a means of flagging to the public a

81. See, e.g., Matt Bai, *Obama vs. Boehner: Who Killed the Debt Deal?*, N.Y. TIMES (Mar. 28, 2012), <http://www.nytimes.com/2012/04/01/magazine/obama-vs-boehner-who-killed-the-debt-deal.html> [<http://perma.cc/85RD-VNCJ>] (describing the politically fraught negotiations between President Obama and then-House Speaker John Boehner, which were frequently derailed by the brinkmanship of their respective parties).

82. *Id.* (explaining that, in issuing an initial dollar figure for new government revenue to then-Speaker Boehner, President Obama's negotiators expected to keep crossing out their number, moving down to meet Boehner's rising number, until the two sides met).

83. Alan J. Auerbach, *US Experience with Federal Budget Rules*, CESIFO DICE REPORT 41, 43 (2009).

84. *Id.* at 43-44.

policymaker's fiscal position. This links back to the concept of political accountability.⁸⁵ For instance, a policymaker might unilaterally declare that a piece of legislation, perhaps even legislation that the policymaker is writing, should cost no more than a certain amount of money or that the legislation should not add anything to the deficit.⁸⁶ The idea is to highlight for the public the effects of a policymaker's legislation.

In setting budget targets, baselines come into play in two ways. First, if the target is set in terms of change in spending, revenues, or the deficit (or any other metric of change), there must be a baseline against which to measure.⁸⁷ In other words, there must be a starting point by which to identify and define change. Second, if the target is set in terms of projected outcomes, rather than change, there must again be a baseline set of policies defining the legislated course that underlie the projection.

The temporary tax cuts of the last decade can again serve as an example, as baselines played an important role in the way they were structured. In particular, policymakers set the tax cuts to expire in order to take advantage of the official baseline rules that respected temporary tax measures as actually temporary. First, they wanted to avoid one of the budget enforcement rules. Given the fast-track procedure policymakers were using, they could not increase the deficit outside the ten-year budget window without triggering a super-majority vote.⁸⁸ This would have required them to

85. See *supra* Part II.D.

86. See, e.g., Billy House & Erik Wasson, *Deficit, War Funds at Center of House Republican Budget Fight*, BLOOMBERG (Mar. 19, 2015, 11:37 AM), <http://www.bloomberg.com/politics/articles/2015-03-19/house-republicans-in-standoff-over-deficit-war-funds-in-budget> [<http://perma.cc/G7J7-NBEP>] (describing Republican Senator Trent Franks, a member of the Senate Armed Services Committee, objecting to a bill that would provide \$19.5 billion in military funding because the offsets were not specified, and therefore he could not ensure that they were deficit-neutral).

87. See CTR. ON BUDGET & POL'Y PRIORITIES, INTRODUCTION TO THE FEDERAL BUDGET PROCESS 7 (2014).

88. See William G. Dauster, *The Congressional Budget Process*, in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 4, 26-34 (Elizabeth Garrett et al. eds., 2008) (describing the reconciliation process and restrictions on it). This was a result of the "Byrd rule" governing the reconciliation process. *Id.* The 2001 and 2003 tax cuts were enacted using this fast-track process. *Id.* Among other benefits, the reconciliation process avoided having to break a filibuster in the Senate, and so passage required fifty-one votes rather than sixty votes. *Id.* However, if the legislation increased deficits outside the window of the budget resolution, this would have allowed a motion requiring sixty votes to waive. *Id.*

garner sixty votes rather than just fifty-one votes in the Senate.⁸⁹ Second, separate and apart from this issue of budget enforcement, proponents had set a target for the total cost of the tax cuts to which a number of policymakers were committed.⁹⁰ However, these two constraints were easily manipulated given how the baseline was constructed. The proponents in 2001 could make the tax cuts temporary to avoid a super-majority vote and help hit the publicly-stated cost target.

F. Aiding Private Sector Planning

So far, the uses for baselines I have identified are focused on the decision making of policymakers or the decision making of the voters in electing their policymakers. But baselines also aid the private sector in its own planning.

The tax and spending policies of the government matter to the private sector. That is, the *expected* course of those policies—and uncertainty around that expected course—affect the decisions private actors make. To take a few examples: this might be in the form of an individual planning for her retirement. In that case, the expected Social Security and Medicare benefits should affect how much she chooses to put away for retirement.⁹¹ Or it might be in the form of a person deciding whether to make an investment and assessing the tax rate that the government might impose on the

The tax cuts were enacted as temporary in part to avoid the sixty-vote threshold. See Gale & Orszag, *supra* note 40, at 1554 (describing how tax cuts were sunsetted in part to avoid the Byrd rule); Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1021 (2011) (“For instance, the conference committee sunsetted the entirety of EGTRRA before the end of the budget window to avoid the Byrd Rule.”).

89. Gale & Orszag, *supra* note 40, at 1554.

90. In order to attract moderate Senators, the 2001 tax bill was cut back to hit a target of \$1.35 trillion as scored under the official baseline rules. See, e.g., Fowler W. Martin, *US House-Senate Tax Bill Negotiators Reach Accord*, DOW JONES NEWS SERV., May 26, 2001, Factiva, DOC. NO. dj00000020010711dx5q03vbk (“The Bush administration and conservative Republicans originally wanted \$1.6 trillion in tax cuts, but were forced, during the Congressional budget process, to settle for \$1.35 trillion when centrist Senators from both political parties balked at the larger number.”).

91. See, e.g., Eric M. Engen & William G. Gale, *Effects of Social Security Reform on Private and National Saving*, in SOCIAL SECURITY REFORM: LINKS TO SAVING, INVESTMENT, AND GROWTH, at 115-18 (Fed. Reserve Bank of Bos., Conference Ser. No. 41, 1997), http://www.bostonfed.org/economic/conf/conf41/con41_10.pdf [<http://perma.cc/DE3S-ZBHZ>].

investment's return.⁹² Or it might be in the form of a business assessing how much product to take to the shelves based on a projection of economic activity over the coming months, which will in part be dependent on government policies.⁹³

Not surprisingly, there is, in fact, a market demand for predictions of government fiscal policy. Private analysts such as Goldman Sachs generate nuanced analysis of the course of the federal budget and its effect on the economy.⁹⁴ These analysts create their own budget baselines, projecting the expected course of government policies, and then employ those baselines in their analysis of economic trends.⁹⁵ Again taking the fiscal cliff as an example: in the midst of that debate, private sector analysts released reams of predictions about how that standoff would be resolved and the resultant effects on economic activity.⁹⁶

G. Serving Irrational Biases

Finally, baselines can influence decision making through what can be described as purely “irrational” channels. In recent literature, this is the mechanism that has received, by far, the most attention, often to the complete exclusion of any other purpose for a baseline.⁹⁷

There is now considerable behavioral literature exploring what is sometimes called “loss aversion,” the “endowment effect,” or “status

92. *See, e.g.*, ASWATH DAMODARAN, APPLIED CORPORATE FINANCE 216 (3d ed. 2011) (describing how the hurdle rate—the threshold at which it makes sense to make an investment—is defined in after-tax terms).

93. *See, e.g.*, COUNCIL OF ECON. ADVISERS, ECONOMIC ACTIVITY DURING THE GOVERNMENT SHUTDOWN AND DEBT LIMIT BRINKSMANSHIP 1 (2013), http://www.whitehouse.gov/sites/default/files/docs/weekly_indicators_report_final.pdf [<http://perma.cc/SWZ4-MFXV>] (describing how the shutdown and debt limit brinksmanship in 2013 not only reduced government activity but led businesses to reduce investment and hiring due to the uncertainty).

94. *See, e.g.*, JAN HATZIUS ET AL., GOLDMAN SACHS, THE FEDERAL BUDGET DEFICIT: SHRINKING FASTER 6-7 (2013) (giving updated budget projections through 2023).

95. *See id.* at 5.

96. *See, e.g.*, NEAL SOSS & JAY FELDMAN, CREDIT SUISSE, HOW STEEP IS THE FISCAL CLIFF? 6 (2012) (estimating the fiscal effects of different scenarios and identifying a “most likely” scenario); Stehn et al., *supra* note 66, at 2-3 (describing different scenarios, including their “base case,” for resolution of the fiscal effect, and how they would affect economic performance).

97. *See supra* note 19.

quo bias.”⁹⁸ As scholar David Gamage summarizes, also in the context of baselines: “These three labels refer to related phenomena—that individuals dislike losses more than they like gains, or that individual preferences are biased toward whatever they view as the status quo.”⁹⁹ Importantly, recent behavioral research has questioned the degree to which this phenomenon is a significant force in human decision making.¹⁰⁰ To the degree this phenomenon is not important and other forces are at play, this could give even more reason to focus on the other purposes of budget baselines, as this Article has done.

To the extent they are real, these behavioral phenomena are thought to be driven by the framing of the decision, rather than the underlying substance.¹⁰¹ Importantly, in this context, baselines do not help facilitate a rational decision-making process or constructively overcome problems of limited information or processing capacity.¹⁰² Rather, the baselines potentially play directly into the underlying irrationality.¹⁰³ This distinguishes these behavioral phenomena from the other ways in which people can use baselines to make decisions—either in completely rational decision-making processes or as ways to overcome the limits of our information and rationality.

Take “loss aversion”: Here, the framing of the starting point matters. If a policy is described as a tax increase, the policy might be less popular than if it is described as a tax cut, even if the resulting level of taxation is exactly the same (since the tax increase is framing the policy as a “loss”).¹⁰⁴ Or in terms of programs, benefit cuts may be seen as bad policy compared to maintaining benefits or

98. Gamage, *supra* note 19, at 799-800.

99. *Id.* at 800.

100. See Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L. REV. 2, 30-46 (2013) (cataloguing recent evidence that endowment theory does not explain human behavior and arguing that legal scholarship has ignored this new evidence, to its detriment).

101. Edward J. McCaffery & Jonathan Barron, *The Political Psychology of Redistribution*, 52 UCLA L. REV. 1745, 1751 (2005) (defining these “behavioral” mechanisms as ones that result from people “react[ing] to the *form* of a choice or decision problem, even where the substance is held constant”) (emphasis added).

102. See, e.g., *id.* at 1759.

103. *Id.*

104. *Id.*

increasing them, even if the level of benefits is the same in all cases. And whether a policy represents an increase or decrease in taxes or spending is defined by the baseline—the starting point.

Some baseline battles may be about one side or another trying to take advantage of these irrationalities to achieve their desired policy preferences. Again looking back at the temporary tax cuts: When advocating for extension of the tax cuts, those who wanted to make them permanent tended to describe a failure to do so as a *tax increase*—measuring from a baseline in which the tax cuts were permanent.¹⁰⁵ By contrast, those who wanted some part of the tax cuts to expire would, more often, describe continuing them as a further tax cut.¹⁰⁶ While neither side would say it outright, it seems that both sides were, in part, trying to frame the debate to lead people to their preferred policy outcome. With that said, the use of baselines in the tax debate did not always cleanly align in this way. For instance, the Obama Administration often used a baseline in which expiration of the high-income tax cuts was measured as a tax increase—its preferred policy—in part to claim credit for the deficit reduction.¹⁰⁷

However, it is wrong to see baselines as solely playing into irrational decision making as they have sometimes been described in the past. As explained here, baselines provide useful information in a number of ways for enhancing decision making.

105. See *supra* notes 1-9 and accompanying text.

106. See Adam M. Samaha, *On the Problem of Legal Change*, 103 GEO. L.J. 97, 118 (2014) (“[P]eople who wanted current tax rates extended could say that they opposed a ‘tax increase’ (focusing on resulting rates), while those who supported higher tax rates could say that they opposed another ‘tax cut’ (focusing on current law).”). For an example of a supporter of extending the tax cuts describing the alternative as a tax increase, see Curtis S. Dubay, *Taxmageddon: Massive Tax Increase Coming in 2013*, THE HERITAGE FOUND. (Apr. 4, 2012), <http://www.heritage.org/research/reports/2012/04/taxmageddon-massive-tax-increase-coming-in-2013> [<http://perma.cc/NV5R-L2JV>] (“If President Obama and Congress fail to act this year, an enormous, unprecedented tax increase will fall on American taxpayers starting on January 1, 2013.”). For a voice on the other side describing an extension as a tax cut and expiration as allowing tax cuts to go away, see Ethan Pollock, *Let the Bush Tax Cuts Expire, There Are Better Options*, ECON. POL’Y INST.: WORKING ECON. BLOG (Dec. 20, 2012, 11:30 AM), <http://www.epi.org/blog/bush-tax-cuts-expire-better-options/> [<http://perma.cc/C97D-X8ZE>] (“Republicans want to extend all of the Bush tax cuts, while Democrats generally support extending the tax cuts for only the bottom 98 percent of households.”).

107. See, e.g., OMB, FISCAL YEAR 2013, *supra* note 67, at 206 (showing expiration of the high-income tax cuts as a tax increase).

III. A TAXONOMY OF BASELINES

Even if baselines are useful in the ways described above, this does not tell us how a baseline should be constructed. And, in particular, it does not explain what set of laws should underlie the baseline, or why. This question has also been left largely unexplored, as if different kinds of baselines all answer the same questions.¹⁰⁸

To put it differently, it is not sufficient to say that the baseline is the “starting point” for the legal regime. That is because there are different ways to define the starting point. To borrow Adam Samaha’s new terminology for defining legal change, it in part depends on the “object.”¹⁰⁹ That is, it depends on what particular aspect of the legal regime is being held constant (the object) in defining the baseline.¹¹⁰ Thus, simply casting off a few words describing the baseline without any deeper thought is insufficient and leads to confusion and incoherence.

In answer to this confusion, this Part offers a taxonomy of budget baselines, describing what different baselines can offer, relating

108. To be sure, analysts and academics do explore different sets of assumptions with regard to baselines. But there is rarely, if ever, a serious discussion of the concepts underlying those assumptions, or why some assumptions would be better than others. Take the analysis offered by Alan Auerbach and Bill Gale, two of the leading academics analyzing the long-term fiscal trajectory. They provide what they describe as a “current policy” projection. *See* Auerbach & Gale, *supra* note 56, at 4. And they make various adjustments to the CBO baseline in their projection. *See id.* at 4-5. However, there is never a discussion of the concept underlying the projection other than to call it “current policy.” *See id.* at 4-6. As a result, it is hard to judge the baseline assumptions they make and the alternatives they provide to their base case (like allowing revenues to grow as a share of the economy after ten years, or growing discretionary spending with inflation and population rather than inflation alone). *See id.* at 15 tbl.1. In fact, the baseline they construct is probably something more like an uncertainty baseline as described *infra* Part III.E.

109. Samaha, *supra* note 106, at 104. Specifically, Samaha suggests that measuring legal change requires identifying: (1) an object; (2) a metric; and (3) a timeframe of interest. *Id.* Or, to put this in terms of the baseline, one has to define what the baseline is holding constant (the “object”—as in “current law” or “current services”); the measure in terms of which it is held constant (the “metric”—as in real dollars or share of GDP or some other metric); and, finally, the time point from which the baseline jumps. In my own view, the “object” and “metric” tend to collapse together, but this is still a helpful elucidation of the concept of legal change, and, thus, provides a framework for thinking about baselines.

110. *Id.*

back to the purposes I identified in the previous Part.¹¹¹ Importantly, the labels used in this taxonomy have sometimes been employed in other (and often confusing) ways.¹¹² I differentiate from these earlier definitions. Finally, I conclude by emphasizing which baselines are most meaningful. In my view, priority should be given to variants of what I call the “expectations” baseline, with less important roles for what I describe as “low attention,” “status quo,” and “uncertainty” baselines. I also find that a true “current law” baseline is of only very limited use and simply not viable for most purposes.

A. *Current Law Baseline*

I have defined the baseline as the starting point of the legal regime, and, if that is the case, it seems like there should be a natural and leading candidate for budget baselines—namely, current law. The “object” should be literally the words on the page of the codebooks. Simply crack open the books, and voila, the baseline is there. Yes, it would require interpretation and analysis, which could be challenging, but it should largely avoid deeper questions about what should underlie the baseline. Some intelligent

111. I have found only one other source that offers a basic taxonomy of budget baselines like this. In early testimony as CBO’s first director, Alice Rivlin briefly offered her thoughts on the purposes of baselines (or what she called “budget projections”). See *generally* CBO, STATEMENT OF ALICE M. RIVLIN BEFORE THE JOINT ECONOMIC COMMITTEE (Apr. 3, 1975). She broke those projections into four categories, which are related to the taxonomy I use here: a “current services” projection (the equivalent of my status quo baseline); a “most likely” projection (the equivalent of my expectations baseline); a “most feared” projection (something akin to my policy uncertainty baseline although not conceptualized in the same way); and a “desired course of policy” projection (not a baseline, but rather a proposed set of policies). *Id.* at 5-8. Rivlin offered brief thoughts on each of these options—notably, cautioning against reading too much into the “most feared” projection, *id.* at 7-8, and calling for clarity by asking those doing such projections to specify the kind of projection that they are actually running, *id.* at 10.

Rivlin’s brief testimony, when compared to much of the writing on baselines that would follow, is a paragon of clarity. Unfortunately, it seems to have been lost to the ages, and its lessons along with it. In some sense, the project I take on here builds on these early thoughts that Rivlin offered on baselines, and adds a deeper conceptual layer by discussing in detail the relative *purposes* of these baselines rather than just differentiating the types. I come to somewhat different conclusions (such as giving priority to the expectations baseline over the others), but the idea is the same—to clarify exactly what kinds of information different baselines convey. See *id.* at 4-5.

112. See, e.g., *infra* note 118.

commentators have in fact expressed support for a current law baseline, at least in the context of tax provisions, as a way to minimize budget gimmicks.¹¹³ However, the current law baseline is of only limited interest. In particular, it helps in a certain form of agenda setting but, even in that regard, “low attention” baselines, discussed in the next section, may be more useful.

A true current law baseline—as the name suggests—shows what would happen if no further legislation were enacted. And, in a very literal sense, it aids policymakers setting the calendar to determine what legislation should be considered and enacted. As described earlier, a current law baseline projection of the temporary tax cuts in 2012 showed policymakers that there was trouble on the horizon absent action.¹¹⁴ And, every year, a true current law baseline would show large parts of the government shutting down absent renewal of annual appropriations—again, indicating appropriations should be on the “to do” list.¹¹⁵

Beyond its limited role in setting the legislative calendar, current law can also help to some degree in enforcing fiscal targets. Specifically, at least when it comes to some discrete programmatic areas, current law can serve as a baseline against which to measure costs. But even with regard to discrete areas, the current law baseline can be gamed by enacting temporary, costly legislation that is intended to be permanent, as described earlier and elaborated on in Part IV.C. With that said, the current law baseline *cannot* be used in enforcing overall fiscal goals because such a projection would assume expiration of all annually appropriated programs among other outcomes that no one expects to occur.

The current law baseline supplies little information beyond this, and the above examples illustrate its limitations. Congress was going to address the fiscal cliff one way or other—the only uncertainty was how much of the tax cuts would be made permanent and when. The same is true of annual appropriations; they will get done, even if not always on time. Congress does not need much of a reminder to put these on the legislative agenda. Further, current

113. See *infra* notes 189-94 and accompanying text.

114. See *supra* note 64 and accompanying text.

115. See generally CLINTON T. BRASS, CRS, RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS (2013).

law does not show the expected effects of policies, and therefore cannot help policy making or private sector planning in that way. Nor does the current law baseline hold current service levels constant and so serve as a reference point. Finally, it does little to establish political accountability because it does not indicate the actual expected effect of policy action. Take the 2001 and 2003 tax cuts; they were enacted as temporary, but the Bush Administration seems to deserve some of the blame or credit (depending on your point of view) for their now permanent effects, and current policymakers deserve less of the blame or credit for having made them permanent than a current law baseline would suggest.

The bottom line is that “current law”—although perhaps the obvious candidate for building a baseline—is useful only in limited circumstances as a way of setting the legislative calendar and perhaps helping to enforce budget targets, though with the caution that current law has proven eminently gameable in enforcing budget rules.

B. Low Attention Baseline

Another type of baseline is what I call a “low attention” baseline. In this case, the “object” is law, assuming policymakers pay little attention to it. It is a baseline explicitly showing policymakers what would happen if they do not make a certain area of policy a focus of their agenda.

This is to be distinguished from the current law baseline. Despite the barriers to legislation, sometimes the easiest course of action—the way to pay the least attention to an area—is, in fact, to legislate. Take annual appropriations. Failing to appropriate at all is not the way to pay relatively little attention to the area. That case—a government shutdown—would tend to focus maximal attention on at least some parts of the appropriations process.¹¹⁶

116. The 2013 government shutdown vividly illustrated the degree of attention paid to appropriations in the case of a shutdown. A Lexis search of the *New York Times* database for articles that include the term “government shutdown” indicates that from October 1, 2013 to October 31, 2013—the month of the two-week government shutdown at the start of fiscal year 2014—there were 263 separate articles in the *New York Times* alone that mentioned the phrase.

Rather, “low attention” might look like continuing the same real funding from the previous year.

Like the current law baseline, this baseline can help with agenda setting—and perhaps even more so. It does not simply aid in setting the legislative calendar. It helps indicate what areas actually require substantial focus from lawmakers. In fact, when analysts use projections to show that a certain area needs attention from Congress, it is this low attention baseline, as opposed to a current law baseline, on which they should be focused. To be clear, the low attention baseline may coincide with current law in some cases, but it need not—and in important cases (like appropriations), it will not.

With that said, the low attention baseline does not help much in terms of the other purposes of baselines. It is like the current law baseline in this way. The baseline can serve to set the agenda, but probably not much beyond that. When it comes to some areas (like the 2001 and 2003 tax cuts), there may not even be a plausible “low attention” path. In that case, a political battle was brewing that would garner much attention, and the question was how it would be resolved—not what would happen if policymakers did not put it on the agenda. And, even in serving the purpose of helping to set the agenda, the baseline is highly speculative; in many circumstances, it is not obvious what the path would be if policymakers truly paid little attention to an area.

C. Status Quo Baseline

Yet another type of baseline looks at what we are experiencing at this very moment (the object) and then holds constant what we are experiencing now (the benefits provided by a given government program or the amount of taxes people are paying *right now*) going forward. I will refer to this as a “status quo” baseline. This is meant to capture a concept similar to the Congressional Budget Act’s “current services” baseline, or at least some interpretations of that baseline.¹¹⁷ Notably, I do not mean this baseline to incorporate future changes in law if they differ from what is being experienced now.¹¹⁸

117. See *supra* notes 20-21, 30 and accompanying text.

118. Some interpretations of the Congressional Budget Act’s baseline would incorporate

This baseline can serve the purpose of being a reference point, providing policymakers with a sense of what it means to continue the status quo into the future. As I described in Part II, there is something helpful about knowing what law is in place at this very moment.¹¹⁹ At the least, it is a state of the law we have experienced, and some may see rational reasons to prefer the status quo as a matter of course over alternatives.¹²⁰

However, this status quo baseline comes with limitations on its face. In particular, it does not provide information that would fulfill the other purposes of budget baselines. For instance, a status quo baseline, as defined here, tells us little about the expected course of budget policy. The tax and spending programs in place may be expected to change. Looking back at the fiscal cliff: one of the temporary tax cuts at issue in 2012 was an over-\$100-billion-per-year payroll tax cut which had been enacted two years before,¹²¹ and that most expected to go away. A status quo baseline would have projected it to continue, even as no major political leader was advocating to make it permanent.¹²² Continuing the payroll tax cut

changes in tax and mandatory policy that are scheduled to occur under current law. *See supra* note 30. Such changes may very well be what we expect to occur, but, in my view, including such changes in a status quo baseline confuses this baseline with an expectations baseline, when these baselines are actually conveying different types of information. The status quo baseline illustrates what would occur if current policies were held constant, whereas the expectations baseline shows what would occur based on current expectations. *See infra* Part III.D for further discussion of the expectations baseline.

With that said, there is some question as to what it means to experience a policy *now*. To the extent people are forward-looking and have information about the future, current experience may in some sense incorporate the expectations of the future. For instance, people may spend more or less today incorporating the expected effects of future fiscal policies. Thus, under some assumptions, the status quo baseline may, to a significant degree, collapse into the expectations baseline. The relevance of a status quo baseline therefore largely depends on people differentiating between the policies in place today and those in the future and believing that they have more information about what is happening now.

119. *See supra* Part II.C.

120. *See supra* note 69 and accompanying text.

121. Tax Relief, Unemployment Insurance, and Job Creation Act of 2010, Pub. L. No. 111-312, § 601, 124 Stat. 3296, 3309-3310. For the initial cost estimate, see JOINT COMM. ON TAXATION, ESTIMATED BUDGET EFFECTS OF THE TAX RELIEF, UNEMPLOYMENT INSURANCE, AND JOB CREATION ACT OF 2010, at 4 (2010). The payroll tax cut was scheduled to be in place for only 2011, but it was later extended through 2012. *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 1001, 126 Stat. 156, 158.

122. Neither President Obama nor any of the Republican leadership had proposed to make it permanent.

in the baseline would therefore tell us little about the expected effects of budget policy. A status quo baseline also would not be particularly helpful in establishing political responsibility. It seems odd to blame or credit a policymaker with responsibility for an over-\$100-billion-per-year tax increase for allowing a tax cut to expire that no one ever aimed or expected to make permanent.

In application, the limitations of this type of baseline are even more significant. This is because the baseline is meant to inform policy decisions about the future; although what is happening at this very moment may be descriptively interesting, we cannot change what has already occurred. And what is relevant to the future is not simply what is happening now but what it would mean for the same policies we are experiencing now to continue in the future. However, defining what it means to continue current policies into the future can, at times, seem like a dive down a rabbit hole.

For instance, what does it mean to continue the 2001 and 2003 tax cuts twenty or thirty years down the line when incomes and the economy more broadly are likely to be very different? One could argue that holding policy constant might mean increasing the tax cuts with either inflation or, alternatively, incomes. Over time, these different strategies would produce two very different results. When it comes to government programs, the problems become perhaps even more difficult. For instance, what does it mean to hold defense services constant after September 11th? With the United States facing a new terrorism threat to its security, simply adjusting funding levels for inflation would seem to produce a different kind of service than before. Or what does it mean to hold Social Security constant as the Baby Boomers retire?

This does not mean that a status quo baseline is useless. Especially for relatively short projection periods, a status quo baseline can still provide useful information. It can be possible, or at least easier, to translate what is happening right now to those future circumstances, which are similar to today, even if not exactly the same. We might adjust for inflation and program participation, while recognizing that this estimate of the "status quo" is not quite the literal "status quo." It is an adjusted status quo that reflects some changes but holds a number of meaningful items constant.

However, that information can degrade significantly as the projection continues deeper into the future. How far into the future does it become meaningless? That probably depends on the tax policy or program, but my intuition is that even the current ten-year budget window is pushing the limits for how meaningful a status quo baseline can be. At some point, the world is sufficiently different that trying to hold policy constant becomes a fruitless endeavor.

D. Expectations Baseline

An expectations baseline reflects what is expected to occur in the future. The object here is the law as it is expected to be. The future is not some undifferentiated mass of possibilities. There are more and less likely outcomes. In short, there is an expected path, even if it may be an uncertain one.

When expectations are invoked, this immediately raises the question of *whose* expectations. Here, I mean to refer to what is *objectively* the best central estimate of the future path of the budget. That is, some predictions should be better than others—with smaller errors and less bias relative to what actually occurs. Admittedly, identifying the “best” projection is no small feat. Perhaps it would be delivered by some combination of nonpartisan budget experts, whether at official government agencies like CBO or at independent think tanks, that closely watch budget developments and on which policymakers, the press, and the public rely. But the point is that I do not mean expectations to refer to anyone’s subjective expectations of the course of the budget irrespective of the likely accuracy of the guess.

This expectations baseline has the potential to offer considerable information. As suggested earlier, the expected effects of policies should matter to both policy making and private sector planning.¹²³ The 2001 and 2003 tax cuts were *expected* to have a very different effect than the one actually stated in law.¹²⁴ At the time, they were

123. See *supra* Parts II.B, F.

124. See *supra* text accompanying notes 39-42.

expected to be continued at least in significant part.¹²⁵ Thus, that expectation should have informed the decision to enact them.

Perhaps less obviously, the expectations baseline can prove useful in setting the policy agenda, establishing political accountability, and enforcing budget rules.¹²⁶ In terms of agenda setting, the most relevant information is the question of what would happen if an issue is not brought onto the agenda as of now—information provided by what I call the “low priority” baseline. And the “low priority” baseline can actually be conceptualized as a particular type of expectations baseline. It is what is expected to occur, *contingent* on policymakers not paying much attention to an area. In terms of political accountability, it seems particularly relevant to look at the expected course on which policymakers have set us (what I described earlier as the post-policy baseline) and to compare that with the expected course before policymakers took over (the pre-policy baseline). Finally, in terms of budget enforcement, using a baseline that better reflects expectations can potentially avoid certain kinds of gamesmanship. Whereas a pure current law baseline can lead policymakers to enact temporary legislation and claim that it costs less than its actual expected effect,¹²⁷ an expectations baseline avoids this gaming. Furthermore, the baseline can be used to enforce targets in terms of overall projected budgetary outcomes (deficit and debt levels),¹²⁸ unlike a current law baseline, which is useless for such purposes.

To be clear, setting an expectations baseline involves its own share of speculation. There is the actual technical question of how to estimate the expected policies in the face of uncertainty. The best method would likely be some probabilistically weighted average of various policies, interacted with economic factors. In practice, that may prove complicated across the full range of the budget. Another possibility is a projection of the most likely set of policy outcomes, which is not necessarily the same thing but may still provide similarly useful information.

125. *See supra* note 40.

126. *See supra* Parts II.A, D, E.

127. *See supra* text accompanying note 40.

128. *See supra* Part II.E.

The long-term fiscal challenge generally, and the 2001 and 2003 tax cuts specifically, highlight the issue of uncertainty. The strong expectation of experts and markets is that the government will finance itself without defaulting on its debt.¹²⁹ By this I mean the expectation is that taxes will eventually be raised and spending cut in some combination that is sufficient to balance the government's books—or, more technically, sufficient so that the federal government fits within its long-term budget constraint.¹³⁰ In the case of the 2001 and 2003 tax cuts, this means that, as a matter of budgetary arithmetic, their enactment will eventually lead to offsetting tax increases and spending cuts of equivalent magnitude to finance these tax cuts.¹³¹ To be clear, the long-term fiscal challenge may not be resolved with some combination of policies that people consider optimal—that part is by no means necessary—and the same is true specifically of the policies needed to finance the 2001 and 2003 tax cuts. Nonetheless, an expectations baseline should, over the long-term, reflect whatever combination of policies is expected to close the long-term gap and finance deficit-increasing policies.

129. Market actors certainly do not seem to expect a default on the federal debt. Presently, the federal government can borrow at very low interest rates, even over the long-term. See *Selected Interest Rates (Daily) - H. 15*, FED. RES., <http://www.federalreserve.gov/releases/h15/data.htm> [<http://perma.cc/3L5R-XL4Z>] (last updated Dec. 19, 2013). And commentators note that, while there is a market in credit default swaps on Treasury debt to insure against default, the only value of the credit default swap is probably to protect against a temporary nonpayment—for instance, in the event that Congress is late in raising the debt limit. See Matt Levine, *Why Would Anyone Buy Credit Default Swaps on the U.S.?*, BLOOMBERG VIEW (Sept. 26, 2013, 3:06 PM), <http://www.bloombergvew.com/articles/2013-09-26/why-would-anyone-buy-credit-default-swaps-on-the-u-s-> [<http://perma.cc/3XVZ-WSGB>] (noting that “[i]n U.S. government CDS, the value of the credit protection is more or less zero,” but that there may be some value to the swap in the case of a temporary delay in payment).

130. The federal government faces a budget constraint such that the net present value of the government's future stream of revenues must equal the net present value of future government consumption plus the current value of government debt. See Auerbach et al., *Generational Accounting*, *supra* note 52, at 75. If the government were to violate this “budget constraint,” the government essentially would have defaulted on its debt, taxing resources away from lenders in order to meet its needs. See *id.*

131. William G. Gale et al., *Distribution of the 2001 and 2003 Tax Cuts and Their Financing*, 103 TAX NOTES 1539, 1539 (2004) (“Popular discourse about tax cuts frequently ignores a simple truism: Someone, somewhere, at some time will have to pay for them. The payment may be in the form of increases in other taxes or reductions in government programs; it may occur now or later; it may be transparent or hidden. But iron laws of arithmetic and fiscal solvency imply that the payment has to occur.”).

In previous work, I made an effort to identify what policies might be employed to close the long-term fiscal gap, noting that a combination of policies already proposed, though not enacted, by policymakers could do so.¹³² My approach of projecting “least common denominator” deficit reduction—that is, the least each side had proposed in any given area—was one way to try to identify the expected course of policy.¹³³ There are certainly other ways, but efforts like these are needed to guess the future course of budget policy over the long-term and then assess whether that course is a good or bad one.

E. Policy Uncertainty Baseline

Some might say, though, that an expectations baseline showing no fiscal shortfall—and the 2001 and 2003 tax cuts, and other deficit increasing policies, as financed—assumes away a rather large problem. Perhaps we expect that policymakers will eventually figure out a way to deal with the deficit, but that does not mean they have done so already. It is a rather curious chicken-and-egg problem. Should an expectations baseline show the long-term fiscal problem as solved when we remain uncertain as to how that will actually occur? Should we sit back and relax, secure in the relative certainty of future action?

The answer to this is “no.” We should probably differentiate the fiscal policies that are highly uncertain from those that are less so. At the least, we can try to measure the degree to which policymakers have generated more uncertainty than they would have if they had better specified a sustainable long-term fiscal path.

This brings us to the “policy uncertainty” baseline. While the name might seem exotic, it is a baseline that should be familiar to anyone who follows federal budget debates, even from afar. When you see a projection of the federal budget on an unsustainable trend—as in deficits or debt rising perpetually into the future—you are probably looking at a policy uncertainty baseline, or at least a baseline that is akin to this. And, of course, this is familiar. The many warnings of the unsustainability of the federal budget often

132. See generally Kamin, *supra* note 14.

133. *Id.* at 58-59.

come with just such graphs, with lines ascending into the heavens.¹³⁴

Given how often such baselines get rolled out, it might come as a bit of a surprise that it is rarely (if ever) specified what those baselines are in fact projecting.¹³⁵ Yes—the technical assumptions underlying the projections are given.¹³⁶ But the theoretical framework—as in what all of those assumptions are meant to capture—is not actually specified.¹³⁷ It certainly is not a current law baseline, as it does not reflect the debt limit in place and much of the federal government disappearing as appropriations expire, among other items in current law. It probably is not a low attention baseline or, if it is, it is not a particularly meaningful one—since, even if deficits do not get placed at the top of the agenda today, they seem very likely to be on the agenda if debt rocketed up. Even debt at current levels has sparked negotiation after negotiation.¹³⁸ Further, it probably is not a status quo baseline, as these baselines often incorporate changes in services (like spending cuts or tax increases) that people expect to occur but have not yet happened.¹³⁹ Additionally,

134. See, e.g., GOV'T ACCOUNTABILITY OFFICE [GAO], LONG-TERM FEDERAL BUDGET SIMULATIONS 6 (2014) (showing a graph with skyrocketing debt as a share of the economy under both the “baseline extended” and the “alternative” scenarios); NAT'L COMM'N ON FISCAL RESPONSIBILITY & REFORM, THE MOMENT OF TRUTH 10-11 (2010) (showing debt rising on an unsustainable trajectory, and citing to CBO's then-alternative fiscal scenario and using the figures to build the case for a “looming fiscal crisis”).

135. See, e.g., GAO, *supra* note 134, at 2.

136. See, e.g., *id.* at 2-4, 13-15, 17.

137. This is true for almost any long-term projection. But the Government Accountability Office (GAO) projection provides a good example. In its annual update, GAO usefully clarifies that these projections are not what it expects to occur. *Id.* at 2. As GAO says, “[t]hese simulations are not predictions of what will happen in the future, as policymakers would likely take action to prevent damaging out-year fiscal consequences.” *Id.* But GAO does not say what the projections actually represent as a theoretical matter, other than a bundle of technical assumptions that it specifies. *Id.* at 3, 4, 13-15, 17. Or, to put this in terms of a question, if GAO is not projecting what it expects to occur, what exactly is it projecting?

138. See, e.g., Zachary Goldfarb, *Long Debate over Debt Ceiling Could Harm Economy, Reports Says* [sic], WASH. POST (Oct. 3, 2013), http://www.washingtonpost.com/politics/long-debate-over-debt-ceiling-could-harm-economy-reports-says/2013/10/03/992c482e-2c35-11e3-b139-029811dbb57f_story.html [<http://perma.cc/Q5M8-CPT9>]; Jeanne Sahadi, *Debt Ceiling: 8 Things You Need to Know but Wish You Didn't*, CNN MONEY (Oct. 1, 2013, 11:20 AM), <http://money.cnn.com/2013/09/27/news/economy/debt-ceiling-faqs> [<http://perma.cc/RYG4-5FNR>].

139. See *supra* note 111. For instance, all the long-term baselines that I have seen reflect the scheduled (and gradual) increases in the Social Security normal retirement age that are set to occur under current law and were first enacted in the early 1980s. See, e.g., CBO, 2013

as I discussed, status quo baselines tend to lose coherence as they look further and further into the future.¹⁴⁰ And, finally, it is not an expectations baseline, at least as defined above, because few expect that the United States will actually have a debt load equivalent to several hundred percent of GDP (and rising) at some point in the future.

This brings me to what I am calling the “policy uncertainty” baseline. Based on policymakers’ legislative actions and proposals, we may project a certain minimum level of taxes—a level below which it is unlikely taxes will fall—and a certain maximum level of spending—a level above which spending is unlikely to rise. The gap between these two levels will be closed, but there is substantial uncertainty about the composition of the policies that will fill that gap and the timing. This uncertainty is the focus of the policy uncertainty baseline. To put this in Samaha’s terminology, the “object” in this case is the amount of uncertainty that policymakers generate due to their failure to better specify a path to a fiscally sustainable future.¹⁴¹

This can be conceptualized in terms of the fiscal gap—a metric of the fiscal shortfall popularized by Alan Auerbach.¹⁴² This gauges the size of the tax increases or spending cuts needed to stabilize the debt-to-GDP ratio over given periods of time, which is one metric of fiscal sustainability.¹⁴³ The fiscal gap essentially quantifies the amount of policy uncertainty that exists. Compared to the baseline, spending will have to be cut by a certain amount and taxes raised by a certain amount, and there is confidence that such actions will

LONG-TERM BUDGET OUTLOOK, *supra* note 15, at 50 (describing a gradual increase in the normal retirement age). To give another example, before the payroll tax cut expired in 2012, these long-term projections still incorporated the assumption that the payroll tax cut would expire, as was widely expected. *See, e.g.*, CBO, 2012 LONG-TERM BUDGET OUTLOOK, *supra* note 11, at 9 tbl.1-1 (following current law in both the “extended baseline” scenario and the “extended alternative fiscal” scenario). These examples show how these long-term projections do not capture the status quo.

140. *See supra* Part III.C.

141. *See supra* note 109 and accompanying text.

142. *See* Auerbach, *U.S. Fiscal Problem*, *supra* note 52.

143. William G. Gale & Benjamin H. Harris, *Reforming Taxes and Raising Revenue: Part of the Fiscal Solution*, 27 OXFORD REV. ECON. POLY 563, 564 (2011).

occur;¹⁴⁴ what is uncertain is the timing and composition of that deficit reduction.¹⁴⁵

There are costs to such uncertainty, making the uncertainty worthy of quantifying.¹⁴⁶ For instance, this fiscal gap generates uncertainty about the future structure of the Medicare and Social Security programs, and that makes it difficult for people to plan for retirement.¹⁴⁷ There is also uncertainty about future tax rates, making it more difficult for businesses to make investment decisions.¹⁴⁸ In addition to making people and businesses more uncertain about how government fiscal policies will affect them in the future, the unresolved fiscal gap also increases uncertainty for holders of government debt, and raises the probability that financial markets might change their expectations about the probability of some share of the fiscal gap being resolved through direct default or inflation. In short, because of uncertainty, there is some risk of a fiscal crisis, with costly, sharp changes in market expectations.¹⁴⁹

The policy uncertainty baseline can serve many of the same purposes as the expectations baseline. It can help set the agenda by showing the degree of uncertainty if policymakers do not put deficit reduction on the agenda now; it can help hold policymakers accountable for increasing that uncertainty or reward them for reducing it; and it might even be used to enforce budget targets by not allowing policymakers to increase future uncertainty by enacting unpaid-for policies, for instance.¹⁵⁰ However, it probably provides little information for private sector planning because planners must actually take a best guess at how uncertainty could be resolved.

144. See, e.g., Eduardo Porter, *A Tax Bite Tailored to Help All*, N.Y. TIMES (Jan. 22, 2013), http://www.nytimes.com/2013/01/23/business/higher-taxes-on-everyone-could-ease-spending-cuts.html?_r=0 [<http://perma.cc/B5SB-433H>].

145. See MARC LABONTE, CRS, REDUCING THE BUDGET DEFICIT: OVERVIEW OF POLICY ISSUES 1, 11 (2014).

146. See *id.* at 11.

147. See Craig S. Hakkio & Elisha J. Wiseman, *Social Security and Medicare: The Impending Fiscal Challenge*, 1 ECON. REV. 7, 7-8 (2006).

148. See Sandra Block, *Many Find it Hard to Plan Ahead as Tax Uncertainty Looms*, USA TODAY, <http://usatoday30.usatoday.com/money/perfi/taxes/story/2012-03-22/impact-of-tax-uncertainty-businesses-taxpayers/53708328/1> [<http://perma.cc/V7YH-XKGW>] (last updated Mar. 23, 2012, 9:18 AM).

149. See CBO, FEDERAL DEBT AND THE RISK OF A FISCAL CRISIS 1 (2010) (outlining the risk and potential consequences of a fiscal crisis).

150. See *supra* Part III.D.

With that said, this policy uncertainty baseline is *not* an expectations baseline, and does not convey some of the important information that would be incorporated in such a baseline. It does not show the actual expected effect of policies. In particular, one effect of federal fiscal policy is to shift resources between one generation and another,¹⁵¹ and we do not know the degree to which fiscal policy will do so unless we look at an actual expectations baseline—not an uncertainty baseline.¹⁵² Or, returning to the 2001 and 2003 tax cuts again, we do not know the actual incidence of those tax cuts unless we utilize an expectations baseline to speculate who will end up financing them with either lower spending or higher taxes.¹⁵³ The uncertainty baseline should not be confused with an expectations baseline that conveys such important information.

F. Where Does the Official Baseline Fit?

Finally, there is the official baseline. This is what I am calling the baseline that CBO uses in some of its budget projections and in estimating the cost of legislation. As described in Part I, many of the assumptions underlying this official baseline were written into law in 1985 and then significantly amended in 1990.¹⁵⁴ While that baseline was mandated for only certain budget enforcement purposes, CBO and, to some degree, OMB also adopted it for purposes of baseline budget projections—with both sometimes emphasizing alternative baselines where the “official” one was unrealistic.¹⁵⁵ This baseline is unlike the others I have described here in that there is not a single motivating concept behind it. Rather, it is a mixture of concepts. That is not a problem per se, especially to the extent the baseline is used primarily for budget enforcement. However, this

151. See David N. Weil, *The Concise Encyclopedia of Economics: Fiscal Policy*, LIBR. ECON. & LIBERTY, <http://www.econlib.org/library/Enc/FiscalPolicy.html> [<http://perma.cc/79C5-4VUP>] (last visited Sept. 27, 2015).

152. See *infra* Part IV.D.

153. In fact, one set of analysts attempted to capture the full incidence of the 2001 and 2003 tax cuts by speculating on the financing that would eventually be enacted. See Gale et al., *supra* note 131, at 1544-45.

154. See *supra* notes 31-36 and accompanying text.

155. See *supra* notes 31-32 and accompanying text.

official baseline could be improved, especially when it comes to the treatment of temporary policies.¹⁵⁶

Table 1 summarizes assumptions underlying the official baseline. First, it is important to observe that it is not a true current law baseline. While sometimes described as such,¹⁵⁷ it deviates from current law in a number of key ways. These include assuming: (1) continuation of annually appropriated funding; (2) that the federal government will continue to issue debt above the debt limit; (3) continuation of a number of major mandatory programs, like TANF and farm price supports, that are scheduled to eventually expire; (4) continuation of a number of excise taxes devoted to trust funds (the major one being the gas tax) that are also scheduled to expire.¹⁵⁸ The point is that whatever logic underlies the official baseline, it is *not* strictly adhering to current law.

Rather, it is an assortment of baseline concepts. In some cases, the official baseline *does* follow current law (and none of the other baseline concepts). This was the case with the 2001 and 2003 tax cuts. The baseline assumed that the tax cuts would expire as scheduled. However, in other cases, the official baseline adopts something closer to an expectations or status quo concept. For instance, take the baseline's continuation of major mandatory programs that are scheduled to expire; their continuation is almost certain to occur, and the baseline thus also reflects continuation of the state of the world today. Or, take annual appropriations. Here, CBO largely follows the discretionary caps now in place, reflecting something probably closer to an expectations concept. The assumed funding level is below the status quo—adjusted for measures like inflation—but certainly above current law, in which appropriations are not continued at all.¹⁵⁹ And, in some respects, the baseline

156. See *infra* Part IV.C.

157. See, e.g., CBO, FISCAL YEARS 2011 TO 2021, *supra* note 50 (describing on the cover of the report its debt projection as reflecting “current law”).

158. For the assumptions underlying the baseline, see Budget Enforcement Act of 1990, Pub. L. No. 101-508, § 257, 104 Stat. 1388-573, 591-93 (establishing the baseline and setting out the assumptions to be used).

159. As noted in Table 1, the 1990 Budget Enforcement Act (BEA) requires that discretionary funding grow with inflation for baseline purposes, irrespective of the caps in place. *Id.* CBO has chosen to deviate from the BEA baseline in this case. CBO, BUDGET AND ECONOMIC OUTLOOK: 2014 TO 2024, at 65 (2014).

measures policy uncertainty to the extent it shows the government on an unsustainable trajectory.

Table 1: “Official” Baseline

Budget Category	“Official” Baseline
Debt Limit	Assumed to be increased
Trust Funds	Assumed to continue spending and taxing at scheduled levels even once programs are insolvent (such as the highway trust fund).
Annually Appropriated Spending	Funding at capped levels; uncapped funding grown with inflation from current year.*
Mandatory Spending	Current law except: <ul style="list-style-type: none"> • Temporary programs over \$50 million per year and enacted before 1997 are automatically assumed to continue as in effect in their last year. • Same treatment for programs enacted after 1997 <i>except</i> assumed to expire if explicitly specified as a temporary program.
Revenues	Current law except expiring excise taxes dedicated to a trust fund are assumed to be continued.
* The 1990 Budget Enforcement Act requires that discretionary funding be grown with inflation for baseline purposes, irrespective of whether there are caps in place. CBO has chosen to instead follow the capped levels in its official projection.	

Although the official baseline reflects a mixture of concepts, it still has the potential to be used effectively for budget enforcement. As described in Part IV.C, consistency and clarity are more

important than intellectual coherence when a baseline is used for budget enforcement. With that said, the official baseline could certainly be improved for such purposes. As I explain later, the official baseline has been undermined as an enforcement device by the games policymakers have played with temporary tax policies. This gives reason to try to amend the official baseline to make it more consistent with the actual expected effects of those temporary measures. Not only could that improve budget enforcement, but it also would have the ancillary benefits of making this official baseline more useful for other purposes, such as evaluating the effects of policies and establishing political accountability.

G. Summing Up: A Focus on Clarity and Expectations

There may be other types of baselines that can be imagined, but the categories above should capture the main candidates. From this taxonomy, I take away three main lessons. First, there needs to be a focus on clarity for those building and using baselines. To say that a baseline is “realistic” or some other brief summary phrase is entirely inadequate. There are different ways to define a starting point and, depending on how it is defined, a baseline will be useful in very different ways. Second, “current law” might seem like an obvious and easy way of defining the baseline, but it is inappropriate for most of the purposes for which baselines are used. Finally, other baselines—and perhaps, especially, the expectations baseline—are of greater use for many more purposes. In particular, the expectations baseline is useful for setting the agenda, assessing the expected effects of policies, establishing political accountability, enforcing budget targets, and aiding private sector planning. It is, in other words, the baseline most likely to be useful for a set of important purposes. Table 2 below roughly summarizes the different types of baselines and the purposes for which they are most appropriate.

Table 2: Uses of Budget Baselines

		Types of Baselines					
		Current Law	Low Attention	Status Quo	Expectations	Policy Uncertainty	Official Baseline
Purposes of Baselines	Agenda Setting	X (what should be enacted)	X (what should receive attention)		X (if contingent on "low attention")	X (if contingent on "low attention")	
	Policy Design: Expected Effects				X	X	
	Policy Design: Status Quo as a Reference Point			X			
	Political Accountability				X	X	
	Budget Enforcement	X (manipulable)			X (less manipulable)	X (less manipulable)	X (manipulable)
	Private Sector Planning				X		

IV. LESSONS FOR BASELINE DEBATES

The prior Part attempted to rigorously consider the kinds of baselines we can use and what information they provide. This Part applies this thinking to a number of ongoing debates about federal budget baselines.

I now address four frequent issues that arise in baseline debates: whether we should use a baseline at all, whether the baseline should increase in nominal terms, how to handle policy cliffs, and what to do with (and how to think about) long-term projections.

A. Getting Rid of Baselines Is Not a Viable Option

The question of whether we should use baselines at all has been a long-standing issue in budget circles. At the federal level, that debate has largely been resolved by the now multiple decades of projections and cost estimates from CBO, OMB, and budget analysts that rely on baselines. With that said, there are still proposals to radically deemphasize or eliminate baselines at the federal level,¹⁶⁰ and having now pursued in some depth the question of what different baselines have to offer, it is informative to return to this debate. It is also necessary. This Article has so far engaged the question of the purposes of baselines and how they can be conceptualized, but it has not engaged the issue of whether baselines are necessary at all. If they could be abandoned entirely, then this analysis becomes superfluous; the right baseline is no baseline. Not surprisingly, I conclude that baselines should be used, although I do not argue that they should necessarily be the dominant decision-making tool in all situations.

There is an entire, much-debated theory pinned to the idea of living in a world without baselines called “zero-base budgeting” (ZBB). Peter Pyhrr first developed the theory in the late 1960s for budgeting at Texas Instruments.¹⁶¹ ZBB was later introduced into government budgeting in 1973 by then Georgia Governor Jimmy Carter. And Carter, with considerable fanfare, brought this method to the federal budget process—although it was quickly abandoned and never again used extensively at the federal level.¹⁶² In the broadest strokes, ZBB is meant to budget without relying on what had been done before. Spending, including the “base” (what was

160. See, e.g., Zero-Based Budgeting Ensures Responsible Oversight (ZERO) Act of 2013, H.R. 239, 113th Cong. (requiring, among other things, that OMB issue guidelines telling agencies that they should assume that their baseline budget is zero and justify all spending as if it were a new expenditure).

161. See Peter A. Pyhrr, *The Zero-Base Approach to Government Budgeting*, 37 PUB. ADMIN. REV. 1, 1 (1977) (applying the theory to government budgeting); Peter A. Pyhrr, *Zero-Base Budgeting*, HARV. BUS. REV., Nov.-Dec. 1970, at 111-12 [hereinafter Pyhrr, *Zero-Base Budgeting*] (outlining the theory of ZBB).

162. For a description of this history, see U.S. GEN. ACCOUNTING OFFICE, PERFORMANCE BUDGETING: PAST INITIATIVES OFFER INSIGHTS FOR GPRA IMPLEMENTATION 46-51 (1997) (describing how ZBB was gradually deemphasized by the Carter Administration and then largely abandoned once President Reagan took office).

spent before), is supposed to be fully and regularly evaluated. This is intended to be in contrast to an “incremental” process of budgeting, which focuses evaluation on the increment, as in some percent increase or cut from the base.¹⁶³

I will not delve into detail as to exactly how ZBB was meant to be operationalized. Suffice it to say that, for each program area (or “decision unit” in the parlance of ZBB), budget analysts are tasked with developing “decision packages,” detailing exactly what can be purchased for each level of funding and justifying that particular level of services.¹⁶⁴ The various decision packages—across decision units—then get ranked in terms of priority, and a central unit assigns resources based on these rankings and overall resource constraints.¹⁶⁵

There may be something to be gained by abandoning baselines, or at least trying to. At least some of the intuition behind ZBB was later affirmed by some of the behavioral economics literature discussed earlier.¹⁶⁶ To the extent that anything framed as the status quo leads to irrational decision making (and a bias towards it), then, arguably, we should force ourselves to think outside this frame. If we define nothing as the status quo, and if we abandon any idea of a baseline, then perhaps policy decision making can be improved in this way.

But there is also much information to be lost if we give up baselines entirely—and, in my view, far too much information. This Article has already discussed in some detail what baselines have to offer, but it is still useful to briefly highlight what it means to use no baseline at all, in terms of the two ways that baselines can inform policy design: by showing the expected course of policy, and by defining the status quo as a reference point.

First, in the absence of any kind of expectations baseline, we lose the ability to engage in any kind of long-term planning. Pure ZBB requires us to pretend that the future is something of a blank slate.

163. See Pyhrr, *Zero-Base Budgeting*, *supra* note 161, at 111 (opening his article with a quotation from Arthur Burns, Counsellor to the President, describing a budgeting system in which “every agency ... make[s] a case for its entire appropriation request each year, just as if its program or programs were entirely new”).

164. *See id.* at 112-14.

165. *See id.* at 116 (describing the process of ranking decision packages).

166. *See supra* Part II.G.

Furthermore and relatedly, it would require ignoring the long-term implications of policy decisions—as in the degree to which decisions today affect the likely outcomes in the future.

The political scientist Aaron Wildavsky, in his classic work *The Politics of the Budgetary Process*, makes a similar point and vividly characterizes what it means to be without what I would call an expectations baseline.¹⁶⁷ He compares this to living with the type of instability seen in the developing world.¹⁶⁸ In his words:

Only poor countries come close to Zero Base Budgeting, not because they wish to do so but because their uncertain financial position continually causes them to go back on old commitments. Because past disputes are part of present conflicts, their budgets lack predictive value; little stated in them is likely to occur. Ahistorical practices, which are a dire consequence of extreme instability and from which all who experience them devoutly desire to escape, should not be considered normative.¹⁶⁹

Second, in the absence of any kind of status quo baseline, decision makers would have to shield themselves from information about what we are doing at this moment and could not use that experience as a reference point. It is enough to leave policymakers at sea. Take the Defense Department: each and every time pure ZBB is used would require determining from the ground up how much we need to spend on defense.¹⁷⁰ The question would not be whether we are now spending too much on a given defense system or defense in a certain region, but rather, without reference to any information about current spending levels, how much we should spend to begin with. Without reference to what we are currently doing (and how it is working out), that becomes a difficult—if not impossible—endeavor.

167. See generally AARON WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* (4th ed. 1984).

168. *Id.* at 217.

169. *Id.*

170. To repeat the quote from a presidential advisor that Peter Pyhrr offers in the opening to his article on ZBB, it would be as if “every agency ... make[s] a case for its entire appropriation request each year, just as if its program or programs were entirely new.” Pyhrr, *Zero-Base Budgeting*, *supra* note 161, at 111 (quoting Arthur Burns).

To be clear, keeping baselines as part of budget decision making does not necessarily mean that they must be the focus at every stage. Even though baselines provide important information, there is potentially something to be gained by deemphasizing them at certain stages of decision making so as to destabilize an irrational bias toward the status quo, to the extent one exists. In other words, perhaps there is some way not to throw out the baby with the bathwater.

The failures of ZBB in practice, though, demonstrate how challenging it can be to deemphasize the baseline. First, in application, most versions of ZBB do not actually eliminate use of a baseline. One of the “decision packages” is often some version of the status quo, or at least defined relative to that level.¹⁷¹ Second, ZBB has proved incredibly intensive in terms of administrative resources—and with perhaps little to show for it (though that is a matter of some dispute). This was the federal government’s experience when it dabbled with ZBB under President Carter. It resulted in agencies devoting considerable resources to draw up budget recommendations that looked much like they did before.¹⁷²

The bottom line is that budget baselines should be and are here to stay. Doing away with them simply gives up too much information.

B. Baselines Should Not Be Frozen in Nominal Terms

Even if they may accept the use of some budget baselines, many conservatives harken back to the time when the “base” was simply

171. See, e.g., GOV'T FIN. OFFICERS ASS'N, ZERO-BASE BUDGETING: MODERN EXPERIENCES AND CURRENT PERSPECTIVES 3 (2011) (describing how in zero-base budgeting, at least one of the decision packages should be a “current services” package, essentially setting a status quo baseline); U.S. GEN. ACCOUNTING OFFICE, *supra* note 162, at 48 (describing how, during the Carter Administration’s attempt at zero-base budgeting, many agencies defined minimum funding levels in terms of an arbitrary percentage of current funding—generally between 75 and 90 percent).

172. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 162, at 48-49 (noting how, after the first year of ZBB in the Carter Administration, “[f]ew significant budgetary actions were identified as resulting from ZBB, and some questioned the utility of the many hours spent by program managers, budgeteers, and top managers on ZBB”); see also Allen Schick, *The Road from ZBB*, 38 PUB. ADMIN. REV. 177, 177 (1978) (“The first president to promise a zero base budget has delivered the most incremental financial statement since Wildavsky canonized that form of budget-making more than a dozen years ago.”).

the prior year's nominal spending level. They argue that should be the point of comparison, at least when it comes to annually appropriated spending. However, a baseline in this form seems intended to misinform and, if adopted, could undermine a number of the purposes for which baselines can be employed.

In 2012, and again in 2014, House Republicans passed legislation eliminating any inflation adjustments for annually appropriated programs from the official baseline;¹⁷³ their logic appears to apply to any baseline, whether official or not. Upon the legislation's second introduction, then Budget Committee Chairman Paul Ryan declared: "Families don't get automatic raises every year. Neither should Washington."¹⁷⁴ The sponsor, Representative Louie Gohmert, expanded on that logic, saying that the baseline "has been a trap so when we simply slow the rate of increase, we are accused of making draconian cuts. As reckless deficit spending continues, it is paramount that we be honest about what is an increase and what is a cut."¹⁷⁵

Advocacy for this is not limited to politicians. The scholar Timothy Muris similarly calls for using the previous year's nominal level as the baseline.¹⁷⁶ He would use this for *all* spending (and not just annually appropriated spending), but then would highlight the forces that automatically push up nominal spending on mandatory programs like Social Security (but not annually appropriated ones like Head Start).¹⁷⁷ In his words, "[a]lthough all programs should be measured against the base of the previous year's spending, for those programs that automatically increase the underlying reasons should be understood and evaluated."¹⁷⁸ He argues against other baselines because of the complexity involved and the possibilities for gamesmanship.¹⁷⁹ Muris is right to emphasize some of the

173. Baseline Reform Act of 2012, H.R. 3578, 112th Cong. (as passed by House, Feb. 3, 2012); Baseline Reform Act of 2014, H.R. 1871, 113th Cong. (as passed by House, Apr. 8, 2014).

174. Press Release, Representative Louie Gohmert, Gohmert Praises Baseline Reform Act of 2013 (May 9, 2013), <http://gohmert.house.gov/news/documentsingle.aspx?DocumentID=333177> [<http://perma.cc/7ALL-JA8M>].

175. *Id.*

176. Muris, *supra* note 20, at 77.

177. *Id.* at 77-78.

178. *Id.* at 77.

179. *Id.* at 75.

challenges involved in designing useful, coherent baselines (hence, the discussion in much of this Article). However, he and others are wrong to conclude that the simplicity of a nominal freeze provides a more accurate measure of the course we are on, or the changes from it.

Returning to Samaha's conceptualization of legal change, a frozen baseline sets nominal dollar amounts as the "object." That is what it seeks to hold constant. But a baseline like this does not provide any information actually helpful for decision making. Or, put differently, a baseline of this form does not capture the starting point of the legal regime in any meaningful sense.

It is worth briefly running through the potential purposes of baselines and how this is inconsistent with them. First, to the extent a baseline's purpose is to help set the agenda, assuming a nominal freeze in the absence of attention by policymakers seems likely to provide faulty information. In particular, a nominal freeze requires cutting services over time due to the effects of inflation and growth in population. To the extent policymakers set the budget on automatic pilot and do not focus much attention to it, such cuts seem unlikely, especially over the long-term. In other words, if a policymaker's goal is to cut the budget after taking into account items like inflation, it would require raising the issue as a major agenda item—as was done by Republicans in recent years in attempts to achieve cuts. This means a low attention baseline would include growth in spending, certainly in nominal terms.

Second, if the goal is to use the status quo as a reference point, again, a nominal freeze misinforms. While the figure of \$1 billion in one year has the same number of zeros as \$1 billion in years later, they can buy different things because of inflation and other factors; presumably, it is the amount of services that matters in these comparisons. Long-time budget analyst Richard Kogan illustrates this in arguing against a baseline with a nominal freeze. He notes how, in 2000, defense spending (\$295 billion) was slightly higher *in nominal terms* than in 1987, at the height of the Reagan Cold War

build-up.¹⁸⁰ And yet, the military had been dramatically down-sized over that same period.¹⁸¹ As Kogan reports:

[T]he number of active-duty military personnel fell from 2.2 million to 1.4 million during this period (a 36 percent reduction), the number of Navy ships fell from 569 to 315 (a 45 percent reduction), [and] the number of Air Force fighter wings (active and reserve) fell from 38 to 20 (a 46 percent reduction).¹⁸²

To compare 1987 and 2000 and declare that defense spending in 2000 is higher ignores the reality of the services actually being provided.

Third, a nominal freeze does not reflect the probable course of policy—at least over long periods of time. Because of this, it fails to provide information that is useful for a number of purposes, including policy design, holding policymakers accountable for their actions, budget enforcement, and private sector planning. All major categories of government spending have, over long periods of time, risen in nominal terms,¹⁸³ and that is certainly a reasonable expectation for the future. In fact, even the writers of the Republican House Budget Resolution have assumed that annually appropriated spending keeps up with inflation over the long-term.¹⁸⁴ Thus, any general assumption that spending will be frozen in nominal terms over long periods is highly unrealistic. Kogan notes how this could undermine policy planning by, among other things, resulting in fiscal projections that could wrongly justify tax cuts or entitlement increases.¹⁸⁵ When it comes to political accountability, it seems most reasonable to credit or blame policymakers for how much they change policy relative to the previously *expected* course—and not an

180. RICHARD KOGAN, CTR. ON BUDGET & POL'Y PRIORITIES, "BASELINE REFORM ACT" IS A STEP IN THE WRONG DIRECTION 3 (2012), <http://cbpp.org/files/1-23-12bud3.pdf> [<http://perma.cc/YXK6-5LZN>].

181. *Id.*

182. *Id.*

183. See OMB, HISTORICAL TABLE 3.2 OUTLAYS BY FUNCTION AND SUBFUNCTION: 1962-2020, <http://www.whitehouse.gov/omb/budget/historicals> [<http://perma.cc/KL4U-CU5K>] (last visited Sept. 27, 2015) (showing rise in nominal spending by category over time).

184. CBO, THE LONG-TERM BUDGETARY IMPACT OF PATHS FOR FEDERAL REVENUES AND SPENDING SPECIFIED BY CHAIRMAN RYAN 3-4 (2012), http://cbo.gov/sites/default/files/cbofiles/attachments/03-20-Ryan_Specified_Paths_2.pdf [<http://perma.cc/XLH3-7TTS>].

185. KOGAN, *supra* note 180, at 1-2.

unexpected one (like a nominal freeze). And for enforcing deficit or debt targets, Kogan's critique again rings true. The result would be an unduly rosy forecast that would undermine any such targets. Finally, the private sector should (and likely would) ignore any such baseline, recognizing it as an unlikely course for policy.

Muris offers a half-hearted attempt to justify the nominal freeze in the face of such objections. He argues that issues of realism and the effects of inflation are relevant only over longer periods of time (according to Muris, time periods such as five years).¹⁸⁶ From year-to-year, inflation can be ignored, Muris argues, especially if we are in a low inflation environment.¹⁸⁷ This retort is problematic. It is as if the sum of the parts (the effects of inflation over five years) is completely disconnected from the parts themselves (the effects of inflation from year-to-year). If Muris were to agree that it is realistic for spending to increase with inflation over a five-year period, why should it be any different over a one-year period, even if the increment is smaller? If spending did not increase with inflation from year-to-year, then it would not do so over any longer period either.

The weakness of these justifications reflects the fact that the nominal freeze is probably meant to misinform. Advocates of the frozen baseline want to lower spending. In order to achieve this, they want to shift the status quo reference point and, potentially, not be held fully accountable for the cuts they are advocating. In short, they want to hide budget cuts to the extent possible. To be sure, that is not *necessarily* a bad outcome. To the extent larger budget cuts would be a better policy outcome than the alternative, a skewed baseline could be justified as a means to an end that the political system would not have otherwise generated. In other words, it might be bad information in, but good or better outcomes out.

However, I am doubtful of this (unstated) justification for two reasons. First, I am skeptical of the substantive goal of reducing spending broadly, though that clearly goes to a larger policy debate. Second, and more importantly, I question whether employing budget metrics in this way—as political tools with no necessary

186. Muris, *supra* note 20, at 78.

187. *Id.*

connection to actually accurate information—will end up producing better outcomes. It relies on pulling the wool over people’s eyes and being able to do so again and again. If all institutions engaged in policy making in this way, budget metrics would seem to lose any currency they have. They would not be believed, leaving policymakers and the public blind as to the country’s fiscal path and the effects of fiscal decisions.

In sum, a nominal freeze seems unlikely to be the right baseline for any constructive purpose. This is not to suggest that it is easy to decide on how fast the baseline should grow. That depends on the question being answered—whether the baseline is trying to hold services constant, or the expected course of policy, or something else. And, even after deciding this, it is not necessarily obvious how the baseline should be adjusted. But the frozen baseline seems like the wrong answer in most circumstances.

C. Ignoring Policy Cliffs (Much of the Time)

1. Why We Should Ignore Policy Cliffs

Over the last two decades, perhaps the leading baseline controversy centered around how to account for what I am calling policy cliffs—and, in particular, how to account for the 2001 and 2003 tax cuts. I have already played out the example of the 2001 and 2003 tax cuts through much of this Article, and so it should come as no surprise that I believe baselines should ignore policy cliffs, much of the time, in order to reduce baseline abuse. I consider policy cliffs to be sudden changes in policy compared to what had been experienced up until that point, whether from legislative expirations or otherwise. The expiration of the 2001 and 2003 tax cuts are a quintessential example of policy cliffs. Importantly, the problem of temporary tax legislation and baseline manipulation is not limited to those tax cuts. This is a game that progressives have played as well, even if in smaller magnitude than conservative tax cutters. In recent years, progressives have successfully enacted tens of billions of dollars per year in temporary (deficit-financed) tax cuts that they

intend to make permanent and certainly might, akin to the 2001 and 2003 tax cuts.¹⁸⁸

Some commentators have expressed skepticism about doing anything other than following current law or perhaps the official baseline in the case of such expirations. Ezra Klein, the influential blogger and reporter, wrote in favor of using what he describes as a current law baseline going forward.¹⁸⁹ He argued that adjusted baselines—ones that had assumed extension of the 2001 and 2003 tax cuts—had resulted in fiscal irresponsibility.¹⁹⁰ In his words:

Because everyone was used to a fake baseline that assumed their full extension, a supposedly deficit-obsessed Congress managed to resolve the so-called fiscal cliff in January by passing a huge tax cut that added trillions to deficits while calling it, amazingly, a fiscally responsible tax increase. Now that the fiscal cliff and its attendant uncertainty have been resolved, it's time to retire the irresponsibility scenario and rely simply on the current-law scenario.¹⁹¹

Legal scholar Rebecca Kysar makes something of a similar point—although perhaps with more fatalism—that baselines will end up being manipulated irrespective of their underlying assumptions.¹⁹² After noting that “[t]ypically, the [official] baseline accepts

188. This includes approximately \$25 billion per year in expanded refundable credits for low-income Americans. See OMB, FISCAL YEAR 2015, *supra* note 33, at 158 tbl.12-2. These policies were first enacted as temporary measures in the American Recovery and Reinvestment Tax Act of 2009, Pub. L. No. 111-5, §§ 1002-1004, 123 Stat. 115, 312-15, and the Obama Administration proposed that they be made permanent. Importantly, the Administration then stuck these new refundable credits in the baseline as permanent measures so that their further extension did not count as a cost relative to the Administration's baseline. See OMB, FISCAL YEAR 2015, *supra* note 33, at 157-58. The policies themselves are laudable; the use of baselines probably less so. Progressives similarly have added temporary tax subsidies for energy industries—with the intent yet again of further extending them. See, e.g., Darren Goode, *Energy Incentives to Sweeten Tax Bill?*, POLITICO (Dec. 8, 2010, 4:23 PM), <http://www.politico.com/news/stories/1210/46153.html> [<http://perma.cc/WC5Z-62LC>] (describing efforts by Democrats to extend temporary clean energy tax credits that had been added in the 2009 stimulus).

189. Ezra Klein, *Want to Fix the Deficit? Get Real*, BLOOMBERG VIEW (Mar. 12, 2013, 12:36 PM), <http://www.bloomberg.com/news/articles/2013-03-11/want-to-fix-the-deficit-get-real> [<http://perma.cc/Z4TH-6NHF>].

190. *Id.*

191. *Id.*

192. See generally Kysar, *supra* note 88.

current law as fixed,” she describes critically how baselines used by OMB (under both Presidents Bush and Obama) and others assumed extension of the 2001 and 2003 tax cuts.¹⁹³ From her perspective (and similar to Klein’s argument), this made it easier to extend temporary legislation without facing up to the cost of doing so. Kysar used this to help build her argument against enacting temporary legislation to begin with, but the point about baselines seems to be roughly the same.

While I have a certain amount of sympathy for arguments like those of Klein and Kysar, they ignore the possibility of adjusting the way baselines deal with the initial enactment of temporary legislation in order to address this kind of gamesmanship. In particular, if done from the start, ignoring expirations could be used to *reduce* gamesmanship and improve baselines—rather than the opposite. Not only could adjusting the baseline reduce such gamesmanship, but it could change how we perceive the wisdom of temporary legislation. One of Kysar’s key arguments against temporary tax legislation is that policymakers never face the full costs of their policies because the baseline later gets manipulated.¹⁹⁴ To the extent that changing baseline assumptions could address this fiscal gamesmanship, then the case against using temporary tax legislation—for instance, to force reconsideration of a set of policies at regular intervals—is weakened.

As I mention above, I would give priority to the expectations baseline, and this provides a rule that is simple to state, if not implement: whether to respect a policy cliff should depend on the expected outcome. This certainly requires more judgment than simply cracking open the code, but, unlike current law, it is a viable and meaningful baseline. It would tend to show enactment of temporary tax cuts as more expensive than a current law baseline, and it would show further extension as less expensive—which appropriately aligns with the expected effects of these policy actions.

To be sure, Klein and Kysar are right to be skeptical of how baselines were used in the debate about the 2001 and 2003 tax cuts; it is just that they ignore the misleading baseline treatment *at the*

193. *Id.* at 1028-30.

194. *See id.* at 1026-33.

time of enactment. In particular, the error then was to assume that the country would follow current law. In making that assumption, supporters were able to minimize the actual expected cost of the tax cuts.¹⁹⁵ Many of those same supporters, including the Bush Administration, later flipped over to baselines that assumed the extension of the temporary tax cuts.¹⁹⁶ This harnessed the power of expectations. No one expected most of the tax cuts to go away, and so it was intuitive to use a baseline that came closer to representing the likely course of policy. But because these supporters did not use an expectations baseline from the start, it was a hypocritical maneuver that generated faulty information for decision makers and the voting public at the time the 2001 and 2003 tax cuts were enacted—and then hid the consequences by flipping baselines later.¹⁹⁷

Using an expectations baseline would reduce the opportunity for such gamesmanship *if it was employed consistently*. This would mean that supporters of temporary tax cuts could not toggle between a current law and an expectations baseline to the degree it suited them, since expectations would consistently be the focus. Using an expectations baseline would also come with other benefits. For example, this approach would highlight the actual expected cost of the legislation, better holding supporters accountable.¹⁹⁸ Additionally, an expectations baseline would appropriately reflect the later cost of continuing the tax cuts as largely built into the baseline—meaning that future policymakers would not be described as adding to the deficit by continuing the tax cuts.¹⁹⁹ Rather, they would be described as reducing the deficit if they did not continue them.

This is not to say that all cliffs are fake—though many are. There are truly temporary policies that we expect to be temporary, such as fiscal stimulus in the face of a recession. Some degree of judg-

195. *See supra* notes 89-90 and accompanying text.

196. *See supra* note 47 and accompanying text.

197. To be clear, there were analysts—especially tax cut opponents—emphasizing the cost if the tax cuts were made permanent at the time they were enacted. *See, e.g.*, ROBERT GREENSTEIN ET AL., NEW TAX CUT LAW USES GIMMICKS TO MASK COSTS; ULTIMATE PRICE TAG LIKELY TO BE \$800 BILLION TO \$1 TRILLION: FINAL BILL BOTH MORE COSTLY AND MORE REGRESSIVE THAN ADMINISTRATION PLAN 1 (2003), <http://www.cbpp.org/archiveSite/5-22-03tax.pdf> [<http://perma.cc/S4L9-B7F2>].

198. *See supra* Part III.D.

199. *See supra* Part III.D.

ment is therefore required, with the understanding that many of these cliffs should be ignored in baselines.

I have emphasized how the expectations baseline would approach policy cliffs. Other than a current law baseline, the other baselines I discuss would also tend to ignore such cliffs. For instance, a low attention baseline would show whatever keeps an issue off the agenda—which, often, prevents a dramatic policy change from going into effect (like the fiscal cliff).²⁰⁰ A status quo baseline would simply assume that whatever policy is in place right now would continue, even if that is not expected to be the case.²⁰¹ A policy uncertainty baseline might also assume the cliff is ignored, to the extent that this reflects some additional uncertainty for how our long-term fiscal situation will be resolved (as was certainly the case with the 2001 and 2003 tax cuts).²⁰² Ultimately, just because a policy cliff is written into the law does not mean that a baseline should reflect it; rather, it is often to the contrary.

2. Applying This to the Official Baseline

While the above analysis bears on what rules should be used in building the official baseline employed by CBO and OMB in budget enforcement, the recommendations need to be adjusted in this context. The preceding discussion suggests that policy cliffs should tend to be ignored in budget baselines when we do not expect them to occur—which is often. However, this recommendation requires assessing the specific cliff involved to decide whether we expect it to be respected. When it comes to an official baseline, there is no luxury of wide discretion. Rather, there are a prescribed set of rules that must be clear to both legislators and the budget offices. Still, I believe the above conclusions are relevant in setting those rules; policy cliffs should frequently be ignored there as well.

Perhaps the leading purpose of the official baseline is to act as a mechanism for budgetary enforcement—for informing policymakers and the public whether or not those policymakers have achieved budget targets. As previously noted, some have suggested doubling

200. *See supra* Part III.B.

201. *See supra* Part III.C.

202. *See supra* Part III.E.

down on the current official baseline.²⁰³ From their perspective, the mistake with the 2001 and 2003 tax cuts was not to consistently assume their expiration.²⁰⁴ And others, like scholar George Yin, have even suggested that budget enforcement worked well in the context of the 2001 and 2003 tax cuts.²⁰⁵ In simple terms, these commentators suggest that so long as new laws are fully paid for or properly taken into consideration, budget enforcement should still work using the actual laws as enacted. Although the cliffs may be unrealistic, when Congress inevitably fixes the cliff, the cost of the new legislation would then be taken into account.

To understand why this latter viewpoint is flawed, it is important to consider why we have budget enforcement devices in the first place. These devices are intended as a way for policymakers to restrain themselves or, at least, highlight when they are being irresponsible.²⁰⁶ Given that policymakers can always undo the ties that bind them through later legislation, the efficacy of budget enforcement rules can be rightly questioned, but, as suggested earlier, they do appear to make some real difference in policy making.²⁰⁷ To be successful, however, these rules must be designed in such a way that is not susceptible to gaming. The ties must be binding, at least to some degree. Otherwise, they are useless as commitment mechanisms. Using either a pure current law baseline or the current official baseline has proven insufficient in the context of temporary tax legislation.

As described above, the official baseline has been easily manipulated.²⁰⁸ Those enacting temporary tax cuts will, initially, emphasize the cost estimate using the official baseline, which is too low relative to what is expected to occur. Despite Yin's call for consistency, supporters of temporary tax measures will often flip over to an expectations baseline to estimate the cost of continuing the tax

203. See *supra* notes 189-93 and accompanying text.

204. See *supra* notes 189-93 and accompanying text.

205. See George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 197 (2009) ("Because budget estimating baselines generally take termination dates seriously, Congress will be confronted with additional costs should it decide to extend the scheduled 2010 repeal beyond that time.").

206. See Auerbach, *supra* note 83, at 43-44.

207. See *supra* notes 83-84 and accompanying text.

208. See *supra* Part IV.C.1.

cuts and try to ignore the official baseline for further extensions. To reduce the gamesmanship, the official baseline could simply be made into something closer to an expectations baseline to begin with. This would mean that the initial expected cost of the tax cuts would not be underestimated. There would be no opportunity to later switch (inconsistently) to an expectations baseline, and further extensions would be accounted for properly.

Table 3 suggests ways to reform that baseline.²⁰⁹ In particular, I recommend that any new provisions added to the tax code or to authorizing legislation be treated as permanent in estimating the cost of that legislation if the legislation, on the whole, adds to the deficit.²¹⁰ This treatment, assuming automatic extension, could then be turned off if Congress explicitly designates the provision as temporary in the law. This approach would require Congress to take a step beyond simply writing an expiration into the law for a provision to be treated as temporary in the baseline, and would require Congress to explicitly say that the intent is for the provision to be temporary. To give this somewhat greater teeth, I recommend creating a new budget act point of order—requiring sixty votes in the Senate to override—against the extension of any provision so that it continues in effect in the year after expiration if the

209. See *infra* Table 3.

210. An alternative approach would be to treat *all* temporary provisions as permanent unless explicitly designated as temporary—irrespective of whether the overall legislation adds to the deficit. There is some logic to this, given that these temporary provisions are also often extended. I do not, however, adopt this as the recommended change, since this method would preclude paying for a policy in short increments, as Congress has done in the past. For example, this has been the approach to the automatic cuts scheduled to go into effect in Medicare's physician payment system. See Mark Merlis, *Medicare Payments to Physicians*, HEALTH AFF. (Feb. 13, 2013), http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=83 [<http://perma.cc/3RFN-SMQF>]. In this case, Congress has repeatedly enacted temporary patches to avoid most of the cuts and paid for that cost. See *Actually, the SGR Has Slowed Health Care Cost Growth: 98% of Doc Fixes Since 2004 Have Been Fully Paid For, Resulting in \$140 Billion in Deficit Reduction*, COMM. FOR A RESPONSIBLE FED. BUDGET: THE BOTTOM LINE (Mar. 13, 2014), <http://crfb.org/blogs/actually-sgr-has-slowed-health-care-cost-growth> [<http://perma.cc/Q53C-G73F>]. The concern might be that these temporary provisions could, nevertheless, get incorporated in people's expectations, leading to an unpaid-for extension down the line—sneaking a deficit-increasing policy into the baseline. There is something to this concern; however, until Congress begins abusing the system in this way (which it has not so far), there instead seems to be an expectation that, when Congress has paid for an item in the past, it will do so again.

provision had previously been designated as temporary.²¹¹ The reform is not as radical as it may seem. As I have described, the official baseline already deviates from true current law in a number of ways—and already assumes that a number of major mandatory programs are permanent despite being temporary in law.²¹² So, this proposed reform does not break new ground in that sense. It is simply meant to better align the official baseline with actual expectations, and, thus, enhance budget enforcement. It would also improve the official baseline for other purposes, like holding policymakers accountable for the likely effect of their actions, both when temporary measures are enacted and when they are continued.

This, of course, is not a panacea. Policymakers can find new ways to game the system or override the system entirely. Still, this reform seems likely to improve budget enforcement on the whole, and allow the estimates to be better used for other purposes. This reform is also one that policymakers on both sides of the aisle could potentially accept as one that better binds their hands going forward.

211. Of course, the Senate already has a sixty-vote threshold in the form of a filibuster. Nonetheless, the additional sixty-vote threshold may make some difference. First, it means that no such provision could be incorporated in reconciliation legislation—and so not subject to the filibuster—without triggering a sixty-vote point of order. Second, the additional point of order may change the politics of a vote; whereas a filibuster vote is simply to end debate, this vote could be cast as overriding budget enforcement and fiscally irresponsible. Finally, the filibuster is under some threat in the Senate, and, if it were eliminated, the remaining super-majority vote requirements would carry additional weight.

Some may still question the efficacy of a point of order given that a point of order can be changed. In other words, policymakers may want to bind their hands, but, if it becomes too easy to turn off or on in any particular circumstance, the commitment mechanism may be largely ineffectual. To combat this potential problem, the point of order could be enacted via a law, which requires sixty votes in the Senate, rather than a budget resolution, which requires fifty votes in the Senate. The traditional understanding is that, if created by sixty votes, a point of order would require sixty votes to remove it. The point of order could still be eliminated with sufficient support, but it would be more difficult to change.

212. *See supra* Table 1.

Table 3: Baseline Used for Budget Enforcement: Recommended Changes

Budget Category	Official Baseline	Recommended Change
Mandatory Spending	<p>Current law except:</p> <ul style="list-style-type: none"> • Temporary programs over \$50 million per year and enacted before 1997 are automatically assumed to continue as in effect in their last year. • Same treatment for programs enacted after 1997 <i>except</i> assumed to expire if explicitly specified as a temporary program. • Trust funds assumed to continue spending at scheduled levels even once insolvent. 	<p>Same as BEA except:</p> <ul style="list-style-type: none"> • All temporary provisions in deficit-increasing legislation are continued unless explicitly specified as a temporary provision. • Budget act point of order if temporary provision repeated in the year after it has expired.
Revenues	<p>Current law except expiring excise taxes dedicated to a trust fund are assumed to be continued.</p>	

D. Clarifying Long-Term Baselines

Although one of the more powerful arguments for the existence of baselines is the ability to engage in long-term planning, it turns

out that very long-term planning (as in over a multi-decade period) raises its own unique set of challenges and misconceptions. These long-term projections are often motivated by an understandable desire to evaluate whether the country is on an unsustainable fiscal course, given fiscal pressures such as the retirement of the Baby Boomers and rising health care costs.²¹³ However, as I have discussed, the very concept of projecting an unsustainable fiscal course is conceptually challenging.²¹⁴ This has led to considerable confusion among policymakers and academics, as well as exaggeration of the fiscal challenges we face. To be clear, the fiscal future is not necessarily rosy; there are probably problems to be addressed. But the types of problems and their degree have often been misidentified and exaggerated, in large part because of confusion about the baseline.

1. How the Long-Term Fiscal Challenge Has Been Exaggerated

The long-term fiscal challenge has been misidentified and exaggerated in at least two ways. First, the nature of that challenge is often misconstrued, as analysts and policymakers describe projections of unsustainable fiscal trends as if they were depictions of what we expect to occur—when the projections instead are quantifying uncertainty, not the expected course. Second, the assumptions underlying a number of these projections make little sense and overstate the degree of uncertainty.

To begin, and focusing on how uncertainty gets confused for expectations, I return to a theme explored earlier: the difference between expectations and policy uncertainty baselines.²¹⁵ To repeat, the expectations baseline reflects a best guess of the policy course we will experience.²¹⁶ If what we are focused on are deficits and debt, then this means taking a best guess at the path of these as

213. Some analysts also look to long-term projections because they believe that short-term ones are largely meaningless, or at least easily manipulated. See Auerbach et al., *Generational Accounting*, *supra* note 52, at 74 (“In short, it is *impossible* to measure the debt and the change in the debt—the deficit—in a way which carries a useful underlying economic meaning.”).

214. See *supra* Part III.E.

215. See *supra* Part III.E.

216. See *supra* Part III.D.

time goes on. And, importantly, an expectations baseline would generally abide by the government's intertemporal budget constraint, with the net present value of income approaching the net present value of liabilities (over the infinite horizon).²¹⁷ By contrast, an uncertainty baseline roughly reflects the degree of uncertainty as to how the government will in fact meet that intertemporal budget constraint.²¹⁸

Many, if not most, long-term projections—at least those people pay attention to—are uncertainty baselines;²¹⁹ yet, they are frequently described as if they reflect expectations. Take the introduction to the Bowles-Simpson Commission report. The Commission paints a grim picture:

Debt held by the public will outstrip the entire American economy, growing to as much as 185 percent of GDP by 2035.... Federal debt this high is unsustainable.... By making it more expensive for entrepreneurs and businesses to raise capital, innovate, and create jobs, rising debt could reduce per-capita GDP, each American's share of the nation's economy, by as much as 15 percent by 2035.²²⁰

Most readers would probably be left under the impression that, as of now, we *expect* a debt level of 185 percent of GDP in 2035 (and rising), with very large negative effects on the economy as a result. Yet the actual expectation is probably different from that. Policy-makers are likely to take action before the federal debt reaches 185 percent of GDP.

In confusing uncertainty and expectations baselines, the long-term fiscal problem is misidentified. The implications of taking on vast amounts of debt—thus reducing incomes considerably for future generations and risking a fiscal crisis—is very different from the cost of uncertainty of how we will avoid that fate, even if we are relatively confident that we will. To be clear, neither outcome—high debt or high uncertainty—is good for the country. However, it is a

217. See Auerbach et al., *Generational Accounting*, *supra* note 52, at 75 (describing the government's intertemporal budget constraint).

218. See *supra* Part III.E.

219. See, e.g., *supra* note 134 and accompanying text.

220. NAT'L COMM'N ON FISCAL RESPONSIBILITY & REFORM, *supra* note 134, at 11.

problem of a different magnitude if we really believed that the debt were on track to be 185 percent of GDP as of 2035 (and rising rapidly from there) as opposed to simply being uncertain how that fate will be avoided. Baselines like the one being used by the Bowles-Simpson Commission are roughly measuring the uncertainty of how our long-term fiscal situation will be resolved. They are not actually trying to make a best guess at the track of federal fiscal policy.

Turning to the assumptions underlying those projections: the degree of uncertainty implied by these projections has been exaggerated because some of the assumptions make little sense, and perhaps can be attributed to the fundamental confusion over what these projections are meant to capture. Take CBO's alternative fiscal scenario in its 2012 long-term report,²²¹ a version of which was underlying the figures cited by the Bowles-Simpson Commission.²²² This is a scenario in which CBO does not follow its traditional baseline but instead offers what is meant to be a more realistic take on the budget outlook. Or, in the words of CBO, "[m]any budget analysts believe that the extended alternative fiscal scenario is more representative of the fiscal policies that are now (or have recently been) in effect than is the extended baseline scenario."²²³ In 2012, this CBO projection painted a very dark picture, with a seventy-five-year fiscal shortfall equivalent to 8.7 percent of GDP²²⁴—meaning that some combination of tax increases and spending cuts equivalent to \$1.3 trillion per year (in today's terms) would be necessary to close the long-term shortfall. Even properly interpreted as an uncertainty baseline, that is quite a bit of uncertainty in terms of the timing and composition of deficit reduction.

However, even if correctly framed as measuring policy uncertainty, this CBO scenario exaggerated the extent of the problem because of technical assumptions that did not align well with the unstated conceptual underpinning. I have taken issue with this baseline elsewhere²²⁵ and others followed suit.²²⁶ Most problematically, CBO

221. See CBO, 2012 LONG-TERM BUDGET OUTLOOK, *supra* note 11, at 8-9 tbl.1-1 (outlining assumptions underlying the alternative fiscal scenario).

222. NAT'L COMM'N ON FISCAL RESPONSIBILITY & REFORM, *supra* note 134, at 10-11.

223. CBO, 2012 LONG-TERM BUDGET OUTLOOK, *supra* note 11, at 3.

224. *Id.* at 21 tbl.1-3.

225. See Kamin, *supra* note 14, at 59-60.

226. See Michael Linden & Sasha Post, *The United States' Long-Term Debt Problem Isn't*

assumed a return to historical spending levels as a share of the economy for annually appropriated spending—which is much higher than the track to which policymakers have committed over the current decade. Less problematically, CBO assumed that revenues are frozen as a share of the economy after the end of the ten-year budget window, despite the fact that revenues would continue rising as a share of the economy under current law. Both assumptions—and perhaps especially the first—created something like a treadmill for policymakers. The more policymakers committed to reducing the deficit, the more CBO doubted that the deficit reduction would continue.

Perhaps one could defend the CBO move as fitting into the policy uncertainty framework, but the justifications are relatively weak. The argument is that it is uncertain whether policymakers will maintain their commitment to historically low spending (as a share of the economy) on annually appropriated programs. And it is also uncertain whether policymakers will allow revenues to rise gradually as a share of the economy. However, it is a thin justification since *it is inevitable* that we will have some combination of higher revenues and lower annually-appropriated spending as a share of the economy than we have had in the past in order to address the rising costs of the major entitlement programs. There seems to be relatively little policymakers can do to allay that uncertainty as of now, to the extent bipartisan agreements (such as those reducing annually appropriated spending) fail to do so.

By contrast, in its 2013 report CBO dramatically deemphasized its alternative fiscal scenario.²²⁷ It instead focused on a scenario that, among other things, assumed that annually appropriated funding remained at historically low levels and that revenues continued to grow as a share of the economy after the end of the

as Bad as You Thought, CTR. FOR AM. PROGRESS (Mar. 11, 2013), <http://www.americanprogress.org/issues/budget/news/2013/03/11/56048/the-united-states-long-term-debt-problem-isnt-as-bad-as-you-thought/> [<http://perma.cc/UW8M-34G7>].

227. See generally CBO, 2013 LONG-TERM OUTLOOK, *supra* note 15, at 75-91. Whereas the previous year, the alternative fiscal scenario was prominently displayed on the cover of the report and throughout, see CBO, 2012 LONG-TERM BUDGET OUTLOOK, *supra* note 11, depictions of the alternative fiscal scenario in the new report were largely isolated to one chapter of the report titled “The Economic and Budgetary Effects of Alternative Budget Policies,” see CBO, 2013 LONG-TERM BUDGET OUTLOOK, *supra* note 15, at 75-91.

decade. It reported the seventy-five-year fiscal shortfall as equal to 1.7 percent of GDP—far short of the 8.7 percent of GDP it had previously highlighted.²²⁸ The change in emphasis was done with relatively little explanation,²²⁹ but it represented a needed correction after years of emphasizing a scenario that simply was not particularly meaningful and had a significant effect on the public discourse. The new trajectory could be more justifiable as representing policy uncertainty—uncertainty with regard to how to resolve the fiscal shortfall and to which policymakers have some immediate power to address. And the correction may not have been necessary if CBO had rigorously considered the concepts underlying its report in the years before.

The bottom line is this: first, just because we are uncertain about how we will resolve our fiscal dilemma does not mean that we do not expect to do so. Second, fundamental confusion about the underlying goal of these projections has sometimes considerably exaggerated the degree of uncertainty. The consequences have been real, and have generated faulty information for policymakers. For example, this puts long-term deficits higher on the agenda than they should have been, because if policymakers did not pay much attention to the area now, the fiscal course would probably not have been as bad as it appeared in these projections. This faulty information also attributes a fiscal course to policymakers that is not reflective of what they have done. And it further suggests that more radical action is necessary than is actually the case to resolve the uncertainty.

2. Confusion Compounds: The Curious Case of Generational Accounting

It is important to emphasize the degree to which policymakers, analysts, and academics alike are confused about long-term baselines—often in ways that exaggerate, or at least misstate, our fiscal dilemma. The curious case of “generational accounting” illustrates this in another way. A group of thoughtful and leading public fi-

228. CBO, 2013 LONG-TERM BUDGET OUTLOOK, *supra* note 15, at 117 tbl.B-1; CBO, 2012 LONG-TERM BUDGET OUTLOOK, *supra* note 11, at 21 tbl.1-3.

229. *See supra* note 17.

nance scholars—Alan Auerbach, Jagadeesh Gokhale, and Laurence Kotlikoff—some twenty years ago introduced generational accounting as a way to gauge the effects of fiscal policy across generations.²³⁰ Although it has not been widely adopted, there has been a recent push to formalize this method as part of the budget process, including new legislation introduced in both houses,²³¹ a lobbying campaign by major deficit hawk organizations,²³² and signed support by seventeen winners of the Nobel Prize in Economics.²³³ Yet, this method represents an innovation in confusion. It exaggerates our long-term fiscal challenge by confusing two very different types of baselines: expectations baselines and uncertainty baselines. This results in incoherent fiscal measures that show future generations facing much higher tax burdens than they likely will. Generational accounting should not become an official budget metric and independent analysts should not employ it—at least using the current methodology.

To be clear, generational accounting is a potentially helpful device as a theoretical matter. It is a method for estimating the relative net tax burdens that different generations of taxpayers will

230. See generally Auerbach et al., *Generational Accounting*, *supra* note 52.

231. Intergenerational Financial Obligations Reform Act, H.R. 2967, 113th Cong. (2013); Intergenerational Financial Obligations Reform Act, S. 1351, 113th Cong. (2013). In addition to requiring generational accounting, the INFORM Act also requires OMB and CBO to calculate the “fiscal gap.” See Intergenerational Financial Obligations Reform Act, H.R. 2967, 113th Cong. (2013). By contrast to generational accounting (as applied), this metric is a much more valid way of accounting for the long-term budget outlook. See *infra* note 236 and accompanying text. In fact, both CBO and OMB already annually report the seventy-five-year fiscal position in terms of the fiscal gap. See CBO, 2013 LONG-TERM BUDGET OUTLOOK, *supra* note 15, at 117 tbl.B-1 (showing fiscal gap); OMB, FISCAL YEAR 2015, *supra* note 33, at 26 tbl.3-2 (also showing fiscal gap).

232. See, e.g., Steve Bell, *Economic Policy Project Statement on the INFORM Act*, BIPARTISAN POL’Y CENTER (July 31, 2013), <http://bipartisanpolicy.org/blog/economic-policy-project-statement-inform-act> [<http://perma.cc/NCH7-7XZP>]; *New Life for Generational Accounting*, COMM. FOR RESPONSIBLE FED. BUDGET: THE BOTTOM LINE (July 24, 2013), <http://crfb.org/blogs/new-life-generational-accounting> [<http://perma.cc/UW8K-THFH>]; *Concord Coalition Praises Plan to Focus More Attention on Intergenerational Fairness, Long-Term Impact of Budget Decisions*, CONCORD COALITION (July 24, 2013), <http://concordcoalition.org/press-releases/2013/0724/concord-coalition-praises-plan-focus-more-attention-intergenerational-fairn> [<http://perma.cc/5Q49-LJVZ>]; Maya MacGuinness, *Statement from the Campaign to Fix the Debt*, FIX THE DEBT (July 24, 2013), <http://www.fixthedebt.org/uploads/files/INFORM%20Act%20Statement%207.24.13.pdf> [<http://perma.cc/262Z-TC9C>].

233. *Nobel Laureate Supporters of the Inform Act*, <http://www.theinformact.org/nobel-laureate/supporters> [<http://perma.cc/5WT9-JQH9>] (last visited Sept. 27, 2015).

face on our current fiscal course.²³⁴ By projecting the net tax burden (taxes paid less transfers received), it estimates the fiscal course in terms that could be quite useful as a normative matter. This accounting can, for instance, show how much, as a share of income, each generation must pay to the government. There is some question as to what is the fair pattern of such tax rates, but the point is that this seems relevant to our assessment of whether we are on a good course or not.

Generational accounting, however, is coherent only if it uses an expectations baseline. The basis of the accounting system is the idea that the government will stay within its budget constraint, with it then answering how it will distribute the burden of doing so.²³⁵ So, unlike many other long-term fiscal metrics (including the fiscal gap measure discussed before, also introduced by Auerbach),²³⁶ this baseline is not a measure of the degree of uncertainty involved in how the federal government's budget constraint will be met. Rather, it evaluates how our meeting that long-term budget constraint affects different generations.

But generational accounting as normally operationalized—and as it would be operationalized if adopted officially—uses an incoherent baseline. It essentially follows something akin to the policy uncer-

234. See generally Auerbach et al., *Generational Accounting*, *supra* note 52.

235. See *id.* at 75-76.

236. See generally Auerbach, *U.S. Fiscal Problem*, *supra* note 52. As I have described, the fiscal gap measures the necessary immediate adjustment in spending and taxes to hold the debt-to-GDP ratio constant over a given period. See *supra* notes 142-43 and accompanying text. In contrast to generational accounting, the fiscal gap *is* consistent with an uncertainty baseline. The metric can be understood as capturing the degree of uncertainty as to how policymakers would achieve this fiscal target (stable debt-to-GDP ratio) over certain periods of time. Unlike generational accounting, the fiscal gap does not confuse the expectations baseline with the uncertainty baseline. This measurement has been more widely adopted than generational accounting, as it should be.

Some may respond that the two concepts are not so different after all, and both employ different assumptions about how the fiscal shortfall will eventually be closed. In particular, the fiscal gap metric essentially assumes that the same amount of fiscal consolidation occurs each and every year as a share of the economy, whereas generational accounting assumes fiscal consolidation falls only on unborn generations. Neither is likely to be the actual outcome. However, this undersells the fiscal gap measure and oversells generational accounting. The fiscal gap can be conceptualized as a measure of *average* annual consolidation required, the timing and composition of which is uncertain. This is a helpful way of quantifying the degree of uncertainty in future fiscal consolidation. Generational accounting, by contrast, does not provide that kind of information about uncertainty and instead seems only to present a particular budget scenario that no one expects to occur.

tainty baseline for all living generations (assuming these generations pay relatively little in taxes relative to the benefits they receive), and then presumes that as yet unborn generations (or sometimes unborn generations plus those currently children) will completely pay off the full, resulting fiscal burden. This implies that we will run large deficits up front, to be entirely bailed out in the future. The result is not surprising, with unborn generations paying much higher tax rates than any living generation, raising rather large concerns about the equity of our fiscal policies. And yet it is a scenario that almost certainly will not occur. Current generations can expect to pay higher net taxes than the policy uncertainty baseline suggests.

To put this differently, it would make just as much sense to assume that the entire burden of the long-term fiscal shortfall falls on living generations as it does to assume that it falls on those not yet living. In that case, the future generations would appear to make out rather well. That, too, is not what we expect to occur, and yet, the logic is basically indistinguishable from that driving the analysis in generational accounting as now done, which simply posits that the burden will fall entirely on those not yet born.

Auerbach, Kotlikoff, and Gokhale have offered responses to a similar critique,²³⁷ but their defense still suggests a misunderstanding of the kind of baseline that generational accounting requires in order to be coherent. Auerbach, Kotlikoff, and Gokhale suggest that “in asking what would happen if policy were not to change, we are illustrating the *inevitability* of such policy changes, and offering an analytical framework within which the fiscal policy implications and intergenerational impacts of any changes can be examined.”²³⁸ This response nicely defends metrics gauging what I call the uncertainty baseline, trying to measure the size of the inevitable fiscal adjustments and their effects. But it does not justify mixing an

237. In one of the early evaluations of generational accounting, economist Robert Haveman noted that the apparent generational imbalance in fiscal burdens was largely the result of assuming that unborn generations rather than living ones faced all fiscal consolidation. See Robert Haveman, *Should Generational Accounts Replace Public Budgets and Deficits*, 8 J. ECON. PERSP. 95, 100 (1994). While certainly similar to my own objection, Haveman did not focus on the role of (and confusion around) baselines in generational accounting, which I think goes to the core of the problem.

238. Auerbach et al., *Generational Accounting*, *supra* note 52, at 88.

uncertainty baseline with an expectations baseline and creating a scenario—unborn generations facing all fiscal consolidation (or my hypothetical alternative of current generations bearing all of the burden)—that neither reflects what we expect to occur nor the degree of uncertainty as to how to achieve fiscal balance.

In short, while the basic idea of generational accounting is valid, it has gone astray in application, as its users have employed an uncertainty baseline for living generations in which an expectations baseline is needed. This error has produced measures of net taxes for different generations that are largely meaningless and certainly overstate the degree to which unborn generations will pay more than living ones under any reasonable projection of the current budget.

And, just like CBO's now abandoned "alternative fiscal scenario" projections, generational accounting—if more widely adopted—could misinform the national debate. Among other things, this could lead to the long-term fiscal challenge getting more attention on the national agenda than it deserves, and it could attribute an intergenerationally unfair distribution of the fiscal burden to current and past policymakers when that is neither expected nor intended.

CONCLUSION

This Article will not end abuse and confusion surrounding budget baselines. After all, baseline controversies are often featured in heated and politicized budget fights, in which actors will try to manipulate budget metrics to help achieve their desired outcomes. Moreover, the concepts themselves can be deeply challenging. For instance, it is difficult to define what it means to project and measure the degree to which budget deficits are unsustainable.

Still, despite these challenges, this Article has shown that reducing the manipulation and allaying the confusion is possible. Baselines are not inherently arbitrary or merely creatures of irrational thought. Instead, they have important and constructive purposes for which some baselines are better than others. Moreover, the official budget baseline can be improved to reduce gamesmanship and improve political accountability, among other things.

In sum, this Article provides a framework for understanding what we are doing when we look into the future and ask what course the budget laws are on. It provides a framework for defining our fiscal future.

