Supermajority Rules as a Constitutional Solution

John O. McGinnis
Michael B. Rappaport

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SUPERMAJORITY RULES AS A CONSTITUTIONAL SOLUTION

JOHN O. McGINNIS*
MICHAEL B. RAPPAPORT**

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INTRODUCTION

The primary purpose of a constitution is to establish a government that operates in the public interest. Unfortunately, in fiscal matters, the United States Constitution has become progressively less effective in realizing this goal. One problem is that the federal government appears to have lost the ability to limit its spending. Since the early part of the twentieth century, federal expenditures have grown consistently in both good and bad economic times and under both Republican and Democratic leadership, with domestic federal spending now consuming over seventeen times the percentage of national income than it did in 1910.¹ A second problem is that the goals of federal spending

¹ In 1910, the federal government budget for domestic spending was 1.1% of the gross national product. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 224, 1114 (1975) [hereinafter HISTORICAL STATISTICS] (providing data for calculation). In 1995, it was 17.3% of the gross domestic product. See ECONOMIC REPORT OF THE PRESIDENT 390 (1997) (providing data for calculation). We chose 1910 as a baseline because it marks the decade immediately before the passage of the Sixteenth and Seventeenth Amendments—when the process of centralizing the government began. See infra notes 110-19 and accompanying text. (Our 1910 figure is based on gross national product while our 1995 figure is based on gross domestic product because the government recently changed the way it measured national income. Fortunately, the quantitative differences between gross national product and gross domestic product generally are not significant, see Alex Y. Seita, Globalization and the Convergence of Values, 30 CORNELL INT'L L.J.
have changed radically. In the last several decades, expenditures on public interest goods—goods that the public desires but the market cannot supply adequately—are being crowded out by spending on private interest goods—goods that merely transfer resources from one group to another.\(^2\) The federal government thus spends ever more money and is ever less focused on promoting the public interest in its spending decisions.

Under current law, these changes in the size and composition of federal spending are destined to continue. The Social Security and Medicare programs are likely to expand dramatically in the next several decades as baby boomers retire.\(^3\) At that time, government spending will balloon to unprecedented levels and include an even greater percentage of transfer payments.\(^4\)

This transformation of federal spending from a modest budget devoted to public interest goods into a vast engine for the production of private interest goods has had several harmful consequences. First, there has been a surge in inefficient spending that has reduced the size of the economic pie.\(^5\) Second, taxes have increased to sustain that spending, which has depressed personal income and hindered economic growth.\(^6\) Finally, the

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429, 475 n.141 (1997), and certainly not significant enough to affect the broad historical trends on which we rely in this Article).


5. See infra notes 9-18 and accompanying text.

6. See Robert W. McGee, Principles of Taxation for Emerging Economies: Lessons From the U.S. Experience, 12 DICK. J. INT'L L. 29, 50 (1993) (discussing a Cato Institute study that found that "tax increases President Bush signed into law in 1990 ha[d] retarded economic growth by 0.7%, destroyed 400,000 jobs, caused the unem-
rise in government spending has resulted in the creation of excessive government debt as politicians have sought to shift the costs of increased spending onto future generations.⁷

Excessive spending on private interests has not merely produced financial disarray; it also has contributed to the decline in our political culture. A regime structured to produce public goods unites the community by encouraging citizens to consider what they have in common, but one that countenances large scale transfer payments continuously pits citizens against one another and saps public spiritedness.⁸ Although political theorists and politicians call for a dialogue of reasoned deliberation and decry today's factious politics, none addresses the most basic cause of divisiveness—a government structured to be a dynamo of private interest spending.⁹

Despite a series of much publicized efforts, Congress has failed to halt, let alone reverse, the growing percentage of national income that the federal government spends. For example, the Congressional Budget Act of 1974¹⁰ was supposed to establish legislative procedures that would restrain unnecessary spending, but spending and debt mounted instead.¹¹ The Gramm-

7. The national debt has reached 5.2 trillion dollars and there were 28 consecutive unbalanced budgets before the recent surplus. See U.S. GENERAL ACCOUNTING OFFICE, FEDERAL DEBT: ANSWERS TO FREQUENTLY ASKED QUESTIONS 7-8, 12-15 (1996); infra note 150.


9. For support for the proposition that the ideal of reasoned deliberation is the object of government, see Frank I. Michelman, The Supreme Court, 1985 Term—Foreword: Traces of Self-Government, 100 HARV. L. REV. 4, 73-77 (1986). For one of the many complaints regarding the divisive nature of our politics, see Tyrone Beason, Panetta Hits "Loud Voices Tearing This Country Apart," SEATTLE TIMES, May 14, 1995, at B1, available in LEXIS, News Library, Seattle File. Despite these complaints, politicians in the short term may actually benefit from a regime that divides people into interest groups because such groups will help the politicians stay in office. See infra notes 40-66 and accompanying text.


Rudman Act\textsuperscript{12} created a mechanism that would impose automatic spending cuts to reduce the deficit, but when the pressure to choose among programs became too great, the only automatic aspect of Gramm-Rudman proved to be Congress's decision to eviscerate the statute.\textsuperscript{13} The Budget Enforcement Act of 1990\textsuperscript{14} attempted to restrain spending through mandatory caps,\textsuperscript{15} but Congress now has chosen to spend at levels that exceed those caps.\textsuperscript{16} For all the self-congratulations of its creators, the 1997 budget agreement followed this same pattern. The agreement did not halt the growth in spending. In fact, the agreement explicitly abrogated spending limits that Congress had previously imposed.\textsuperscript{17} Consistent with past practice, in 1998 politicians appear


\textsuperscript{13}See James W. Bowen, Enforcing the Balanced Budget Amendment, 4 SETON HALL CONST. L.J. 565, 619 (1994).


\textsuperscript{15}See id.

\textsuperscript{16}Congress has consistently attempted to camouflage its fiscal failures. When Congress abandoned the Gramm-Rudman restrictions, it promised to conform to new spending restrictions in the Budget Enforcement Act. See id. Similarly, when Congress displaced the Budget Enforcement Act limitations, it did so as part of the current budget agreement that pledged to reduce spending growth and debt in the future. See George Hager, GOP, Clinton Snip Away at Spending Corps, ROCKY MOUNTAIN NEWS, May 25, 1997, at 2A, available in LEXIS, News Library, Rmtnew File. In short, Congress has repeatedly announced a new solution to our fiscal problem at the same time that it has repudiated its prior solution. The public choice theories discussed in Part I of this paper would predict this pattern because the elimination of past restraints wins favor with special interest groups, while the announcement of new restraints pleases the general public who are too rationally ignorant of politics to appreciate that these restraints will be eliminated in due course. See infra notes 40-66 and accompanying text.

\textsuperscript{17}See Hager, supra note 16, at 2A (noting that the drafters of the current balanced budget agreement consciously exceeded the fiscal 1998 cap on discretionary outlays outlined in the 1990 budget agreement). Moreover, the budget agreement balances the budget only for a few years, after which entitlement spending will create substantially larger deficits than we now have. See Adam Clymer, After Tax Bills, Congress Faces The Long Haul, N.Y. TIMES, June 29, 1997, at A1 (describing the results of the budget agreement between the President and the Republican lead-
already to have exceeded the new spending limits in the agreement.¹⁸

This persistent failure to restrain the growth in private interest spending suggests that our fiscal problems result not from a passing failure of political leadership, but instead from the inherent tendency of our constitutional structure to encourage excessive spending.¹⁹ To address these structural problems, a growing number of constitutional amendments have been proposed and voted upon. Both the Balanced Budget Amendment²⁰ and an amendment to require a two-thirds vote to raise taxes have received the support of a substantial majority of legislators in the Senate or the House.²¹ At the heart of both of these proposals is the same mechanism—a requirement that certain kinds of fiscal legislation attain the vote of a supermajority of legislators. Despite the growing political support for supermajority rules, no one has offered a theory of the

ership in Congress).

¹⁸. In this past budget cycle, despite protestations to the contrary, Congress went over the budget limits with various devices. For instance, "emergency spending" was made exempt from spending caps. See Robert J. Samuelson, This Year's Double-Speak, NEWSWEEK, Nov. 2, 1998, at 34. This "emergency spending" included spending on fixing Y2K computer problems that obviously could have been foreseen as occurring in 2000 and spending on natural disasters, much of which could have been budgeted for, even if the specific disasters were unknowable in advance. See id.

¹⁹. The percentage of the GNP devoted to domestic spending in 1970, four years prior to the beginning of the budgetary reform process, was 12.1%. See HISTORICAL STATISTICS, supra note 1, at 224, 1114 (providing data for calculation). In 1995, it was 17.3%. See ECONOMIC REPORT OF THE PRESIDENT, supra note 1, at 390 (providing data for calculation).


²¹. The Balanced Budget Amendment failed to secure the two-thirds majority in the Senate necessary for a constitutional amendment by a margin of 65 to 35 in favor of adoption. See 141 CONG. REC. S3314 (daily ed., Mar. 2, 1995). The amendment effectively lost by only one vote because Senator Robert Dole voted against it as a parliamentary maneuver to preserve his ability to bring the amendment forward for reconsideration. See id. The House defeated the amendment requiring a two-thirds vote to increase taxes by a vote of 233 to 199 in favor of adoption. See 143 CONG. REC. H1491, H1506 (daily ed., Apr. 15, 1997). Similar proposals are finding renewed interest at the state level; anti-tax constitutional amendments have been adopted by referenda in several states. See, e.g., FLA. CONST. art. XI, § 7 (requiring that legislative bills to raise taxes obtain a two-thirds majority); NEV. CONST. art. IV, § 18 (same).
supermajority mechanism or a defense of its efficacy. This Article attempts to fill this analytic void by proposing a theory of supermajority rules that explains the distinctive advantages of such rules as a method of government decisionmaking. In particular, we argue that supermajority rules often will be the best decisionmaking rule when Congress should be restrained and the courts cannot be trusted or are not equipped to enforce a constitutional limitation.

We illustrate the utility of supermajority rules by considering the appropriate governance of fiscal matters. Fiscal supermajority rules have the prospect of restraining both the amount of government spending and the percentage of private interest spending. In addition to economic goals, these rules also may promote a more harmonious political existence by making it harder for interest groups to acquire other people's resources for themselves. Although critics of fiscal supermajority rules, including the Balanced Budget Amendment and the tax amendments, view them as radical innovations, we argue that such rules are better seen as the first drafts of a blueprint to restore the Framers' vision of a limited government. This Article builds on the ideas underlying these rules to describe the theory and operation of optimal fiscal supermajority rules. Such rules apply to government spending rather than to taxes or debt.

This Article will proceed in four sections. Section I suggests that the fundamental pathology of modern spending patterns stems from the superior influence that concentrated interest groups wield with legislators, even though such groups are far less than a numerical majority. This process creates a prisoner's dilemma for a modern citizenry, almost all of whom are members of some special interest group benefitting from some particular redistribution. Although most would be better off with a smaller government, it would be irrational for members of any interest group to surrender their subsidies unless members of other groups agree to do the same. The present budget crisis is in large measure a result of repeated iterations of this dynamic.

22. See infra text accompanying notes 180-222.
Section I also explains how the provisions of the original Constitution largely restrained such expropriation for over 150 years. Under the system of federalism, the federal government could not undertake large-scale redistribution because it had limited fiscal powers. The states also were prevented from such governmental excesses because they competed for capital in the interstate marketplace.

Unfortunately, the Framers' solution did not last. The original Constitution, paradoxically, was undermined by its very success: because it promoted a relatively stable society, interest groups grew and prospered. Changes in economic circumstances also diminished the effectiveness of the Constitution in restraining interest groups. These forces culminated in the New Deal's retreat from constitutional federalism, which essentially permitted the federal government plenary taxing and spending authority. The dissolution of constitutional restraints transformed a limited government that was designed to deliver public goods into today's special interest state.

Our description of the defects of the current constitutional regime sets the stage for Section II of the Article, which presents a theory of how appropriate supermajority rules may resolve the prisoner's dilemma that has caused excessive spending. We compare supermajority rules both to majority rules and to absolute constitutional limitations—such as those created by individual rights and the limitations that federalism places on the central government.

We maintain that supermajority rules can be preferable to majoritarian rules for categories of legislation over which special interests have particular leverage. Specifically, we describe how applying supermajority rules to spending bills can improve the balance between public interest goods and private interest goods. If a supermajority rule were applied to all spending legislation, Congress would enact only spending bills that command a substantial consensus. Because private interest spending tends to result in a substantial number of individuals who are net losers, such spending often will fail to command the support of a supermajority. Thus, fiscal supermajority rules should act as a filter, posing a stronger barrier to the enactment of private interest spending than to the passage of public interest spending.
Supermajority rules in some areas also are superior to absolute limitations, in part because they assign to the judiciary a more limited role that comports better with the judicial function. For instance, a supermajority rule applicable to spending legislation does not require the judiciary to decide whether legislation is ultimately good or bad. That decision is left to the legislature. Courts need not determine any fact about the legislation except that it spends money. Supermajority rules therefore minimize judicial discretion, giving the courts only the authority to make judgments according to determinate rules.

Supermajority rules are also better than absolute limitations in that they are likely to prove more enduring. When absolute limitations prohibit legislation that is sought by a powerful political movement, the judiciary often comes under great pressure to eviscerate these limitations through misinterpretation. Supermajority rules, however, do not prevent the enactment of measures supported by a broad popular consensus. Judges therefore are under less pressure to misinterpret the categories of legislation to which the supermajority rules apply. By bending under the gusts of popular passions, supermajority rules are less likely to break.

Section III describes the substantial social advantages that supermajority spending rules will engender. We argue that such rules will promote a polity that has more of the republican virtues that the Framers sought. Because such rules make it harder for citizens to use the government for their own narrow advantage, they help constitute a national citizenry that is more likely to use the government for the common good and to support beneficial civic associations. Finally, supermajority rules at the national level would revive federalism by restraining the federal government and thereby inducing citizens to look more to the states to resolve their problems.

Section IV addresses the most important objections to supermajority rules. First, we argue that a fiscal supermajority rule can be crafted in a manner that will not provide undue discretion to the judiciary. We then show that the appropriate use of supermajority rules is wholly consistent with democratic theory, because it can lead to more equal political influence among citizens. We also rebut the contention that supermajority rules
will harm the poor by making it harder to redistribute resources to them. We argue that a majority rule does not especially benefit the poor because the poor are less likely than other groups to be members of the coalition to which politicians tend to redistribute resources. Finally, we show that a fiscal supermajority rule is superior to campaign finance reform, the constitutional innovation currently touted in the academy and the press as the most effective solution to the problem of special interests.

I. THE DISSOLUTION OF THE ORIGINAL CONSTITUTION AND THE RISE OF THE SPECIAL INTEREST STATE

In this section, we discuss the nature of the Framers' charter of limited government and its transformation into the Constitution of today's special interest state. This history has important lessons that support the argument for constitutional reform. Among other things, it shows that constitutive rules can operate to constrain private interest spending, although there is a consistent danger that these rules will be transformed into ones that favor special interests.

A. The Dilemma of Politics and the Goal of Constitutionalism

The central dilemma of politics is that a government sufficiently powerful to supply public interest goods also has enough power to expropriate the property of its citizens. The science of constitutions attempts to develop mechanisms that will empower the government to provide public interest goods, but discourage it from supplying goods that merely satisfy a particular group's private interests. The best mechanisms for obtaining a high

23. See The Federalist No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself."); see also Barry R. Weingast, The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development, 11 J.L. ECON. & ORG. 1, 24-28 (1995) (arguing that a government that is powerful enough to protect private markets is powerful enough to seize the wealth of the citizenry).

24. See infra notes 74-109 and accompanying text. Good government requires more than the provision of public goods. Even organized crime syndicates typically limit some kinds of violence and theft in their neighborhood, thus providing a public good.
ratio of public interest to private interest goods will depend on the culture and technology of the time.  

1. Distinguishing Public Interest Goods from Private Interest Goods

Public interest goods are goods that the government can supply more efficiently than the market. Most goods are private interest goods as a result of the benefits of the market and the defects of government. The market provides incentives for producing quality goods and services at the lowest prices, and those prices in turn allocate the goods and services to the highest valuing buyers. In contrast, even with the best of intentions, government cannot produce as efficient a result because it lacks the information the price system provides. Moreover, in practice, government action often is distorted by powerful special interest groups rather than guided by the public interest.

The most important category of public interest goods is what economists refer to as a “public good”—one that must be supplied jointly and from the enjoyment of which it is impossible or impractical to exclude people. The paradigmatic example is national defense; because a private defense system necessarily benefits all but cannot arise spontaneously through private con-

25. While we use economic terms to describe the norms by which our constitutional regime should be judged, we think this conception is broadly consistent with the measures that other utilitarian and rights-based political theories would suggest. See infra notes 110-43 and accompanying text.

26. In this Article, we employ the Kaldor-Hicks definition of efficiency. Under Kaldor-Hicks efficiency, one state of affairs, S2, is more efficient than another, S1, if in going from S1 to S2, the people who benefit from the change could compensate the people who lose and still remain better off. See JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 186 (rev. ed. 1990).


29. For further discussion of this point, see infra notes 40-66 and accompanying text.

tracts, it is best provided through taxes and government spending.\textsuperscript{31} The government may also supply regulations to address externalities, such as air pollution, more efficiently than the market because transaction costs make it impractical for the large number of people affected by pollution to negotiate a contractual solution.\textsuperscript{32} Other public interest goods include the rule of law and the prevention of monopoly.\textsuperscript{33}

In contrast, legislation that simply benefits a particular group provides a private interest good. Subsidies allocated to sugar producers are an example. Such governmental assistance obviously does not qualify as a public interest good because there is no need for the government to intervene; anyone who desires to donate to sugar producers can easily do so. Moreover, government subsidies are targeted at specific groups and therefore do not meet the requirement that all citizens should benefit from a public good.

Under certain conditions, however, some legislative transfer payments may be deemed public interest goods. For instance, it is conceivable that virtually everyone would be willing to pay in order to reduce poverty.\textsuperscript{34} But even a citizenry with such a universal preference may not be able to produce sufficient private charitable resources because it would lack the power to coerce free riders—those who would prefer that others pay for charity to satisfy their own preference for a society with reduced poverty.\textsuperscript{35}

\textsuperscript{31} See Peter H. Aranson et al., \textit{A Theory of Legislative Delegation}, 68 CORNELL L. REV. 1, 28 (1982).

\textsuperscript{32} See MUELLER, supra note 30, at 35 (showing that externalities and traditional public goods provide the same rationale for government existence—"to economize on the transactions and bargaining costs of obtaining information on individual preferences regarding public goods and externalities when the number of individuals is large").

\textsuperscript{33} See Aranson et al., supra note 31, at 28-29.

\textsuperscript{34} For these citizens, it would not be enough to see individual poor people helped; their preference would be satisfied only if poverty as a whole was reduced.

\textsuperscript{35} See DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 53-55 (1996). This argument assumes that what people care about is solving the entire poverty problem rather than simply helping as many people out of poverty as possible. Cf. RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? 38-39 (1997) (arguing that charity can be provided successfully through voluntary associations).
Under such conditions, curtailing poverty would be a good requiring joint support, the benefits of which citizens cannot be excluded from enjoying. The difference between legislation enacted on behalf of sugar growers and legislation enacted on behalf of the poor is that there is no plausible reason to believe that all or most people would want to benefit sugar growers. It therefore is always fair to characterize benefits to sugar growers as private interest goods.

2. How Special Interests Skew Spending in a Democracy

One of the measures of a constitution's success is its ability to prevent groups from using the government to obtain private interest goods. In a democracy, one group that can succeed in obtaining such redistributions is the majority. Other groups, however, may also be able to expropriate resources.

Public choice theory has demonstrated that groups with certain characteristics may be able to exercise significant political

36. See MUELLER, supra note 35, at 55.

37. This free rider argument for governmental assistance to the poor assumes that people are willing to pay to help the poor. Another argument for assisting the poor, however, suggests that willingness to pay should not be the exclusive standard in this area; under this view, even if people would not want to assist the poor, we may still be confident, based on our ability to make basic interpersonal utility comparisons, that transferring resources to the poor would increase utility. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 463-66 (4th ed. 1992) (explaining the economic arguments in favor of government efforts aimed at reducing poverty).

38. We recognize that the borderline between public interest goods and private interest goods will be disputed. Groups that seek benefits from the government almost always provide "public" justifications for their programs, although to most informed observers outside the group the programs would appear to be private interest goods. See John O. McGinnis, The Partial Republican, 35 WM. & MARY L. REV. 1751, 1794 (1994) (book review) (describing the justifications that interest groups create to rationalize their redistributive schemes). Marginal disputes concerning the application of a distinction, however, do not mean that the disputed concept cannot function as a useful criterion. See H.L.A. HART, THE CONCEPT OF LAW 4 (2d ed. 1994) (noting that many useful concepts have disputed areas of application).

39. We consider transfer payments private interest goods unless they command the support of a large number of citizens. We believe that nearly all transfer payments, other than those involving the poor, would be classified as private rather than public interest goods. To be sure, we observe many kinds of transfer payments in a modern democracy but, as we discuss below, they are the product of rational ignorance by most citizens and the power of special interest groups. See infra notes 40-52 and accompanying text.
power even though they constitute a numerical minority. One characteristic of such groups is that each member receives a large amount of money from the government.\textsuperscript{40} It therefore makes sense for each member to spend time and resources attempting to secure and protect these subsidies. Second, such groups tend to have low organizational costs.\textsuperscript{41} This often means that a group has a small number of members, allowing the members to reach decisions and monitor one another cheaply.\textsuperscript{42} Groups also may have low organizational costs if they can constrain free riders, preventing those who do not contribute from benefitting from the group's political activities.\textsuperscript{43} Finally, these minority groups can often obtain sizeable subsidies without provoking significant opposition.\textsuperscript{44} If the group has few members, each member can receive a significant amount individually, even though the total cost to the public is relatively modest. By contrast, groups with a large number of members, such as consumers or taxpayers, each of whom is affected only slightly by legislation, will form effective political organizations only with great difficulty.\textsuperscript{45}

Special interest groups exert their influence in the political process in a variety of ways. First, they are able to monitor what is actually transpiring in the political process, such as what legislation is voted on and how it affects their interests.\textsuperscript{46} Second, special interests can often use experts to persuade legislators of their position.\textsuperscript{47} Third, special interests are able to conduct a coordinated and coherent campaign to publicize their position in the media.\textsuperscript{48} Finally, special interests also may exercise greater

\textsuperscript{40} See Olson, supra note 8, at 144.
\textsuperscript{41} See id. at 143.
\textsuperscript{42} See id.
\textsuperscript{43} See id. at 137-41.
\textsuperscript{44} See id. at 144.
\textsuperscript{45} See id. at 143.
\textsuperscript{46} See, e.g., Michael A. Andrews, Tax Simplification, 47 SMU L. REV. 37, 42 (1993).
leverage over legislators through campaign contributions or independent political expenditures. By contrast, citizens who are not members of special interest groups not only have less influence in the political process, but also remain "rationally ignorant" of much that occurs in that arena because their individual votes are unlikely to affect political outcomes.

Due to these advantages, special interest groups often secure disproportionate benefits. The power of a special interest group may enable it to persuade a majority of the legislature to support its legislation, even though a majority of voters would not support the legislation if those voters considered the issue. Observations confirm that politicians often favor legislative programs that provide concentrated benefits to a small group and diffuse their costs over the public at large.

Although both majorities and small, cohesive groups can exercise leverage in the political process, groups that combine features of these two kinds of groups also may exert tremendous power in the political process. The best example of such a group is the elderly, who combine the voting strength of a large faction with the organizational advantages of a small one to secure more funds from the federal budget than any other interest. The power of the elderly is attributable to several factors. First, elderly persons receive a large portion of their income from Social Security and Medicare, and therefore have an incentive to

50. Rational ignorance describes the systematic tendency of diffuse citizens to pay little attention to political information. The phenomenon occurs because acquiring political information is both costly and unproductive. It is costly because to acquire such information, individuals must invest time that they could be using in other more lucrative or pleasurable enterprises. It is unproductive because the principal instrumental use of such information is to guide voting, but the vote of any individual is unlikely to influence the outcome of an election. See MUELLER, supra note 30, at 205-06.
52. See id.
invest resources to protect these entitlements. Second, the elderly exercise tremendous voting power because they are a large group with high voter participation rates and appear willing to vote based primarily on the issue of protecting Social Security and Medicare benefits.

Finally, the structure of Social Security and Medicare enhances the leverage of the elderly. Because the elderly are such a large group, one might expect that the increase in taxes necessary to finance higher Social Security and Medicare benefits would decrease significantly the net benefits the elderly derive from increases in benefits. These programs, however, are funded by payroll taxes that the current elderly will not pay unless they are presently employed. Moreover, even if they are employed, this increase in taxes will affect them only for the relatively short period of their employment, compared to the lifetimes for which it will apply to younger workers.

54. See id. at 2243-44 (observing that enormous entitlement programs for the elderly have given them disproportionate incentives to get involved in politics). The effect of Social Security and Medicare on the elderly is an example of the manner in which government programs themselves may provide incentives for interest groups to coalesce.


56. Those over sixty-five years old vote at three times the rate of those eighteen to twenty-four, and at a higher rate than any other age group. See Cohen, supra note 53, at 2244. The high voter participation rates appear to be attributable at least in part to the additional leisure time the elderly possess. See POSNER, supra note 55, at 148-50.

57. See POSNER, supra note 55, at 150, 290.

58. See id. at 289-90.

59. See Jonathan Barry Forman, Reconsidering the Income Tax Treatment of the Elderly: It's Time for the Elderly to Pay Their Fair Share, 56 U. PITT. L. REV. 589, 609 (1995) (noting that few retired elderly pay Social Security taxes). Social Security is not funded from general revenues, but Medicare is partially funded from such revenues. See PETER J. FERRARA, SOCIAL SECURITY: THE INHERENT CONTRADICTION 52 (1980). The prospect of increased income taxes necessary to fund general revenues also is limited to the elderly, because Social Security benefits are not taxed unless high thresholds are reached. See Forman, supra, at 609-10.

60. See POSNER, supra note 55, at 289-90. The opposition from the elderly to the program for catastrophic insurance, which was funded largely by the elderly, strongly suggests that there would be much less support for increased spending for the elderly if Social Security were structured on a fully-funded basis, rather than on a pay-as-you-go basis. See Elaine S. Povich, Congress Kills Catastrophic Medicare Plan, REC. (N.J.), Nov. 23, 1989, at A18, available in 1989 WL 5546118 (noting that Congress repealed catastrophic health plan after opposition from the elderly, who were
One important feature of special interests is that they almost always cause an increase in government spending by persuading the government to subsidize their activities. Special interests normally attempt to secure private interest goods through spending programs that are narrowly directed toward them. Earmarked spending programs exist for farmers, particular industries, and other groups. Special interests receive a comparatively large proportion of the money spent on these programs. By contrast, special interests benefit much less from a reduction in spending because the benefits that a special interest derives from these reductions must be shared with the rest of the public.

3. Noneconomic Motivations for Spending Legislation

Although we maintain that citizens often take political actions based on their narrow self-interest, we also believe, along with the Framers, that citizens sometimes act out of moral and other noneconomic sentiments. Each election confirms the broader motivations of citizens when they vote even though they are required to fund it with a surtax.

61. See HAYES, supra note 51, at 38.

62. See id.


65. See Jim Abrams, Legislative Ax Poised Over Corporate Welfare Programs: Broad-based Coalition Wants to Cut a Dozen Federal Subsidies, FORT WORTH STAR-TELEGRAM, July 5, 1997, at 3, available in 1997 WL 11891587 ("The Congressional Budget Office has estimated direct federal support for business at $30 billion a year. The Cato Institute, a private think tank that promotes a smaller federal government, has identified programs that subsidize industry at $85 billion a year.").

66. See OLSON, supra note 8, at 166.

67. See THE FEDERALIST No. 55, at 378 (James Madison) (Jacob E. Cooke ed., 1961) ("As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust: So there are other qualities in human nature which justify a certain portion of esteem and confidence."). For further discussion of the provisions that reflect the Framers' vision of the admixture of human motivation, see infra notes 74-109 and accompanying text.
very unlikely to influence the election and thus to obtain a return on the time they spend in voting.68 Indeed, precisely because the results of elections do not depend on their votes, we would expect that citizens will not vote only for narrowly instrumental reasons of acquiring more resources for themselves.69 Instead, they will use their vote for various other purposes, including expressing their moral convictions or making a symbolic gesture that they are the type of person who supports certain programs.70

Expressive voting of this sort can have both positive and negative influences on government spending. It can lead to excessive spending on untested or ineffective policies because citizens may vote for a program based on symbolism rather than its actual operation.71 But expressive voting also can lead citizens to support spending on actual public goods, such as defense and law enforcement, based on moral conviction or symbolism. Indeed, such spending is often the most popular component of political programs.72

68. See MUELLER, supra note 30, at 348-69 (discussing the paradox of voting).
69. Professors Geoffrey Brennan and Loren Lomasky offer a comprehensive framework for the relation between instrumental reasons and expressive reasons in voting. See GEOFFREY BRENNAN & LOREN LOMASKY, DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PROCEDURE 19-53 (1993). They postulate that individuals seek both monetary and expressive returns from their acts. See id. In markets, individuals are more likely to decide on the basis of monetary returns than expressive returns because their decisions will have direct monetary effects. See id. at 19-31. In politics, however, because no vote is likely to affect the outcome of the election, the monetary return from a vote is likely to be small. See id. at 32-37. The expressive return (i.e., feeling that you voted for the best candidate) does not depend on the outcome. See id. Accordingly, even accepting the view that individuals have the same basic motivations in politics and markets, one would predict that voters weigh expressive returns more in political decisions than in economic decisions. See id. at 32-53.
70. Of course, all expressive sentiments are not high minded. Individuals also can vote to express envy or resentments. See id. at 48-49.
71. The rational ignorance of the citizenry can exacerbate this effect. Large spending programs may gain the attention and approbation of voters because of their symbolic value. See DANIEL SHAHRO, DO DEFICIT$ MATTER? 228 (1997). Many such programs thus will be proposed with much fanfare but little attention to their "real merits and likely empirical effects." Id.
Our inquiry into the efficacy of supermajority rules will proceed on the common-sense view that both narrow self-interest and expressive sentiments motivate people. Consequently, the best constitutional provisions are Janus-like, with one side inhibiting groups that pursue their own private interests and the other nurturing and harnessing people's sentiments for the common good. We hope to show that supermajority rules serve both functions.

B. The Framers' Solution

The Framers' Constitution was successful precisely because it created a panoply of mechanisms, suitable for its time, that encouraged the creation of public goods and constrained the production of private interest goods. Indeed, the Framers' genius was their recognition that although representative democracy obtains a better balance of public interest goods to private interest goods than either monarchy or oligarchy, it does not dissolve the dangers of expropriation. In a democracy, as in other governmental forms, government may be used to unfairly benefit some groups at the expense of others. Consequently, the Framers' Constitution contains several mechanisms that limit the governmental production of private interest goods.

Perhaps the most important of these mechanisms historically was that of constitutional federalism. The happy paradox of racies, citizens appear willing to spend more money on fighting crimes as shown by their support for longer incarceration of criminals. See Germans Want Judges to Get Tough on Crime: Poll, AGENCE FR. PRESSE, July 2, 1997, available in LEXIS, Europe Library, AFP File (finding that 80% of Germans want tougher sentences); Dick Williams, A Different Approach Is Needed: Voters' Message Was Clear, ATLANTA J.-CONST., Nov. 29, 1994, at A24, available in 1994 WL 8918234 (finding that a very large majority of Americans want truth in sentencing laws and more prisons).

73. In Roman mythology, the god Janus was represented by a two-faced head. See 6 THE NEW ENCYCLOPEDIA BRITANNICA 496 (15th ed. 1993).

74. For a discussion of the superiority of democracy over such systems in this respect, see Mancur Olson, Dictatorship, Democracy, and Development, 87 AM. POL. SCI. REV. 567 (1993).

75. See Weingast, supra note 23, at 8-9, 18-21 (arguing that constitutional federalism was historically the mechanism most influential in leading to substantial economic growth with minimal redistribution). Federalism similarly has benefitted other economies, such as contemporary China. See id. at 21-24.
federalism is that a constitutional structure with two governments can result in less private interest spending than a structure with one. Under federalism, the national government may exercise only circumscribed powers that limit its ability to enact private interest spending. Moreover, state governments are forced to compete with one another for capital, including human capital, because the constitutional structure keeps open the free movement of goods and people across state lines. This competition limits the power of states to spend for private interests.

In the original Constitution, the enumerated powers constrained the federal government from undertaking redistribution by confining its powers of taxation, regulation, and spending. First, the Constitution carefully circumscribed the taxing authority of the federal government, which limited the resources available for redistribution. As Alexander Hamilton recognized, the indirect taxes that the original Constitution permitted to be levied without formal limitation, such as duties and excises on articles of commerce, "prescribe[d] their own limit." If such indirect taxes became too high, people would stop buying the article that was taxed. By contrast, direct taxes, such as taxes on property, had weaker natural limits, but were constrained effectively by the constitutional requirement that their revenue be proportionate to the population in each state.

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76. See generally U.S. CONST. art. I, § 8 (describing powers granted to Congress).
77. See Richard A. Epstein, Exit Rights for Federalism, 55 LAW & CONTEMP. PROBS. 147, 149 (1992) (stating that federalism is a check on the monopoly power of state governments because individuals and capital can migrate from state to state).
81. See id.
82. See U.S. CONST. art. I, § 9, cl. 4 (requiring that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census"). Under the apportionment rule, it was impossible to impose nationally uniform direct taxes (unless the subject being taxed was distributed among the states in proportion to population). See Erik M. Jenson, The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?, 97 Colum. L. Rev. 2334, 2342 (1997). Before the Sixteenth Amendment, the scope of direct taxes was a matter of dispute. Although property taxes consistently were thought to be direct taxes, Supreme Court decisions varied as to
the regulatory power of the government was circumscribed, it offered limited opportunities for spending money. The government’s authority under the Commerce Clause to eliminate barriers to free trade among the former colonies was not a blank check for spending. Other ancillary powers, such as the authority to provide uniform bankruptcy laws and to operate a post office, also provided little justification for substantial spending. The only other possible authority to spend money was the Spending Clause, but this authority was understood to be so narrow in scope that it was not used to justify substantial spending for the first 150 years after the Constitution’s ratification.

which other taxes were direct. In 1895, the Supreme Court held that a tax on income from property was a direct tax. See Pollack v. Farmers Loan & Trust Co., 157 U.S. 429, 582 (1895). See generally DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986, at 24-26 (1990) (summarizing the Court’s holding in Pollack). This interpretation made it politically much harder to impose a national income tax, because much of the income of the rich derived from their property rather than their labor.

See U.S. CONST. art. I, § 8, cl. 3 (providing Congress with power to regulate interstate commerce).


See U.S. CONST. art. I, § 8, cl. 4.

See id. art. I, § 8, cl. 7.

See Tom Stacy, What’s Wrong with Lopez, 44 U. KAN. L. REV. 243, 245-46 (1996) (stating that such ancillary powers have the same purpose as the Commerce Clause in sustaining interstate economy).

The spending power generally is located in Article I, Section 8, clause 8 of the Constitution, which states that “[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” U.S. CONST. art. I, § 8, cl. 1.

It is beyond the scope of this Article to catalog all the possible ways that the original constitutional settlement confined the spending power, but the following are three of the most plausible. The first was embraced originally by James Madison, who contended that the spending power could be used only to carry out some other enumerated power. See Richard A. Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 12 HARV. L. REV. 5, 6 n.3 (1988). A second was the requirement that the spending be on behalf of the general welfare. See Engdahl, supra note 79, at 16-17. Judicial application of this criterion would invalidate a large amount of current spending undertaken on behalf of special interests. A third theory suggests that the spending authority can be used only for legitimate regulatory purposes, and requires a close fit between the goals of the spending program and
The Constitution left the remainder of domestic taxation, regulation, and spending authority to the states. Although the states were thus potential large-scale distributors of private interest goods, the free movement of goods and people among the states restrained the ability of state governments to extract wealth from their citizens. If the states exercised their authority unwisely, people could take themselves or their capital elsewhere. Thus, while the federal government was restrained by its constitutionally enumerated powers, the states were restrained by competition.

Historic federalism was remarkably successful in restraining the production of private interest goods. In the nineteenth century, when the states rather than the federal government were responsible for general economic and social regulation, the states did not enact large entitlement programs. Medicare and Social Security, in their current form as vast intergenerational transfers, would not have been possible then because no state could have afforded to impose high payroll taxes on its productive workers and businesses; they would have moved elsewhere to avoid payment.

Bicameralism is a second constitutional mechanism that makes it harder for special interests to obtain private interest spending. Intuitively, the manner in which bicameralism achieves this objective is clear: those seeking private interest spending conditions imposed on the state. See Lynn A. Baker, Conditional Federal Spending After Lopez, 95 COLUM. L. REV. 1911, 1916 (1995) (distinguishing between regulatory conditions and reimbursement conditions imposed by Congress pursuant to its spending power).

90. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

91. Many of the prohibitions on the states also were designed to prevent them from interfering with vibrant trade. See, e.g., id. art. I, § 10, cl. 1 (preventing states from coining money or making paper money).


94. See Weingast, supra note 23, at 25.

95. See id. at 9.
spending have to obtain a majority in not one but two legislative bodies. At least where representatives are elected from districts that are not coextensive, bicameralism raises the effective majority necessary to pass legislation.

The third mechanism for restraining rent-seeking—the separation of powers—performs this function in several ways. The presidential veto limits rent-seeking in the same way that bicameralism does—proponents of legislation must secure the support not merely of both houses of Congress, but also of the President, who is elected by a different constituency than either house. The existence of three branches also makes it hard for a current majority to control the entire apparatus of the federal government at one time. One source of constraint is the different methods used to select the officeholders of each branch and the different timing of their appointments. For instance, the judiciary of any given era largely represents the choices of past presidents and therefore reflects past majorities more than current ones. Another source of constraint is the difference in the functions exercised by the branches. For example, recognizing that the President has the preeminent responsibility for military matters, the voters who elect him may choose members of Congress with views on domestic matters different from those held by the President. This may lead to a divided government in which the governing coalition possesses less power.

97. See MUeller, supra note 35, at 195.
98. See Macey, supra note 96, at 76.
100. See John C. Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 CAL. L. REV. 167, 295 (1996) (asserting that the constitution is structured to give the President the initiative in military affairs).
101. Given these differences in function, the branches themselves acquire different institutional interests even when controlled by similar majorities, thus ensuring a perpetual struggle in a kind of state of nature at the heart of Leviathan—a struggle that also impedes a regime of permanent or tyrannical majoritarian control. See John O. McGinnis, Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers, 56 LAW
The fourth mechanism for restraining the production of private interest goods is the establishment of a large national republic. In the famous theory of *Federalist No. 10*, Madison argued that a large republic would contain a sufficient number of factions so that no single faction could use the government to oppress the others.\(^\text{102}\) Democracy on a large scale constrains the power of majorities more than democracy on a small scale because the insecure and shifting ground of ever-changing and multiple coalitions tends to frustrate any long term scheme in favor of producing private interest goods for the current majority.\(^\text{103}\) Significantly, however, the Framers designed this last mechanism more to restrain the power of the majority than the power of special interest groups.\(^\text{104}\)

Many of these mechanisms also achieved the second objective of constitutionalism—facilitating the production of public interest goods. For instance, by giving governmental powers to smaller units with diverse populations, federalism makes it easier to create the public goods that will satisfy the distinctive preferences of different populations.\(^\text{105}\) Because the spirit of human benevolence is more likely to be expressed at shorter distances,\(^\text{106}\) federalism creates communities in which bonds of common acquaintance and local tradition provide a larger scope for the expression of fellow feeling. Such sentiments make it easier to reach decisions regarding appropriate public interest goods.

Bicameralism\(^\text{107}\) and the presidential veto power\(^\text{108}\) also tend to focus citizens more on the common good. By making it harder

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\(^{103}\) For further discussion of the importance of an extended democratic sphere in limiting the endurance of any single majority faction's control, see David F. Epstein, *The Political Theory of the Federalist* 99-107 (1984).

\(^{104}\) Although *Federalist No. 10* began by addressing the problem of factions generally, it went on to advocate the creation of a national republic as a specific means to restrain a faction that constitutes a majority. See *The Federalist No. 10* (James Madison).


\(^{106}\) See id. at 1510.

\(^{107}\) See U.S. Const. art. I, § 1.

\(^{108}\) See id. art. I, § 7.
for special interests to work their will, these two constitutional procedures screen out many divisive proposals from serious consideration. To be successful, politicians must promote an agenda that attracts a more substantial consensus. Civic action therefore comes to focus on what unites the polity rather than what divides it, generating a spirit more favorable to the creation of public interest goods than to the acquisition of private interest goods.\(^{109}\)

Because we view supermajority rules as a replacement for some of the mechanisms in the original Constitution, we will inquire into the capacity of supermajority rules both to restrain the production of private interest goods and to promote the sentiments that underpin public interest goods.

C. The Rise of the Special Interest State

The Constitution of today does not restrain the production of private interest goods by the government as successfully as did the original Constitution. The causes of the dissolution of the restraints are endogenous and exogenous—deriving from within and without the system of constitutional law. First, many of these constitutional restraints, from federalism to the separation of powers, have been weakened or eviscerated through amendment and judicial abnegation. Second, various changes in culture and technology, such as a rise in the division of labor, have made it easier for interest groups to form in order to acquire private interest goods from the government. The result has been the simultaneous establishment of a powerful centralized state liable to exploitation by special interests and the emergence of a multitude of special interests with an enlarged capacity to exploit that state.

1. The Dissolution of Constitutional Restraints

The Constitution's centralization of power in the federal government had its genesis in the Progressive Era.\(^{110}\) In 1913, the

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109. For further discussion of the manner in which our constitutional system is constitutive of political discourse, see infra notes 110-28 and accompanying text.
110. Although some might contend that the centralization of power began with the
nation enacted both the Sixteenth Amendment, which permitted federal taxes on income, and the Seventeenth Amendment, which mandated the direct election of senators. After their passage, the percentage of national wealth spent by the federal government on domestic expenditures immediately began to rise. Even more importantly, these amendments set the stage for the collapse of federalism and the expansion of the federal government's powers.

The Sixteenth Amendment removed the original Constitution's careful limitations on the federal government's taxing power by permitting unrestricted taxes on income. With greater resources at its disposal, the federal government became more of a target for interest groups that wanted to use the government to secure private interest goods.

At the same time, the Seventeenth Amendment weakened the restraints on the federal government's production of private interest goods in two ways. First, because senators became independent of state legislatures, they no longer had an incentive to protect state sovereignty. To the contrary, after adoption of the amendment, senators possessed a natural inclination to encroach on state sovereignty; after all, states were a competing power center for servicing constituents and interest groups. As a result, the protection of the enumerated powers on which federalism depended lost a crucial institutional defense within the

enactment of the Civil War Amendments, we argue that the original purposes of these amendments were consonant with the limited government established by the Framers' Constitution. See Phillip Bobbit, Constitutional Fate 147 (1982) (suggesting that the Fourteenth Amendment was designed to require the states to maintain a limited government based on the model of the federal government).

111. See U.S. Const. amend. XVI.
112. See id. amend. XVII.
113. Federal domestic spending increased from less than 1% of GNP in 1913 to 4.4% in 1920. See Historical Statistics, supra note 1, at 224, 1114 (providing data for the preceding calculations).
114. For a discussion of these restrictions on the government's taxing power under the original Constitution, see supra notes 78-82 and accompanying text.
115. See Engdahl, supra note 79, at 33.
federal government.\(^{117}\) Second, because state legislators were superior to the general public at monitoring the behavior of senators, the amendment increased monitoring costs, making it easier for senators to prefer special interests to the interests of their constituents.\(^{118}\) The increase in average tenure in the Senate that followed the amendment also made it easier for interest groups to strike long term deals and made redistributive legislation more valuable.\(^{119}\)

As the federal government acquired greater resources and cast off many institutional restraints, interest groups found themselves in a better position to obtain the passage of new federal spending initiatives.\(^{120}\) The only remaining limitation on such programs was the willingness of the Supreme Court to prevent Congress from exceeding the enumerated powers outlined in the Constitution.\(^{121}\) Although the Court initially resisted some of the new programs and assertions of powers,\(^{122}\) it came under political attack for doing so.\(^{123}\) By the early 1940s, it had relented


\(^{118}\) See Todd J. Zywicki, Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment, 73 OR. L. REV. 1007, 1041-42 (1994).

\(^{119}\) See David N. Laband, Transactions Costs and Production in a Legislative Setting, 57 PUB. CHOICE 183 (1988) (observing that longer tenure may assist legislators in getting their bills passed more rapidly); Zywicki, supra note 118, at 1048-52.

\(^{120}\) See David E. Kyvig, Refining or Resisting Modern Government? The Balanced Budget Amendment to the U.S. Constitution, 28 AKRON L. REV. 97, 101 (1995) (noting that the huge increase in federal government spending began with the New Deal).

\(^{121}\) For a discussion of these restrictions, see supra notes 78-82 and accompanying text.


\(^{123}\) The view that the Supreme Court in the New Deal abandoned its previous constitutional doctrine because of immediate political pressure is the traditional one. See, e.g., WILLIAM LEUCHTENBURG, THE SUPREME COURT REBORN 236 (1995). Recently, however, in an important revisionist account, Barry Cushman has persuasively argued that the swing voters on the Court, Chief Justice Charles Evans Hughes and Justice Owen Roberts chosen by the progressive Republican President Herbert Hoover, were motivated in their decisions by their own progressive Republican views. See BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 3 (1998). This new version of the New Deal Court's
and essentially eliminated any federalism restrictions on national power. First, the Court expanded the scope of the Commerce Clause, which conferred enormous power on the federal government to regulate and to spend funds. Second, the Court abandoned its effort to limit Congress's spending power, essentially giving the federal government plenary spending authority.

Without effective limitations on the spending power of the federal government, constitutional federalism—the keystone of the structure that restrained private interest spending—all but disappeared. To be sure, some restraints on private interest spending have remained, such as the large republic and bicameralism. But the large republic was designed mainly to restrain the majority from providing private interest goods to itself. It therefore is unsurprising that the size of the republic has failed to prevent the huge growth in spending on behalf of numerically smaller interests. The strongest remaining limitation, bicameralism, is nonetheless a fairly modest restraint on special interests. It alone cannot be expected to do the work of the Constitution's original limiting mechanisms.

One important lesson of this constitutional transformation over the last 200 years is that absolute constitutional limitations on national majoritarianism have not been able to withstand the dynamics does not detract from our basic point: over the long run, absolute limitations are not able to endure in defiance of popular will, whether that will is the result of short-term changes in partisan politics or longer-term changes in commonly held political ideals.


126. Recent years have witnessed a much discussed revival of federalism. Even in the areas of the Commerce Clause and state sovereignty, however, constitutional federalism has been expanded at the margins and does not yet represent an effective check on spending. The federal government continues to enjoy almost plenary taxing and spending powers. See Baker, supra note 89, at 1937 n.134. For a discussion of the so-called “revival” of federalism and the reasons why it is unlikely to be restored to anything approaching its former importance, see John O. McGinnis, Disciplining Congress: The Boundaries of Legislative Power, 13 J.L. & Pol. 588 (1997) (panel discussion).

test of time. Whatever the form of such absolute limitations, the Court often has not been willing to defend them against popular pressure. By contrast, qualified restrictions on national majoritarianism have fared better. Bicameralism and the presidential veto, which limit the power of simple majorities but do not prevent the enactment of legislation with a substantial consensus, have survived. This history supports the argument advanced below that the qualified nature of fiscal supermajority rules is an important virtue of their structure.

2. Exogenous Change and the Red Queen Problem of Constitutionalism

These significant changes in the structure of the Constitution are not, however, the only reason for the rise of the special interest state. Changes in technology and modes of production that are exogenous to the Constitution also have strengthened interest groups.

First, economic development has extended the division and specialization of labor. When the country was formed, the polity was divided largely between farmers and merchants, but now it consists of corporate executives, clerical workers, laborers, government bureaucrats, academics, and journalists, to name just a few of the more salient classifications. As the number of occupations with distinct interests increases, the number of interest groups that have an incentive to lobby for subsidies from the government grows.

Second, the declining costs of information transmission also have increased the ability of interest groups to extract subsidies from the government. Costs of information transmission have

128. To be sure, these constitutional restrictions have been tempered in the regulatory area by the decline of the nondelegation doctrine, which has allowed Congress to vest substantial legal authority in administrative agencies whose rules are not subject to bicameralism. See Aranson et al., supra note 31, at 63.
130. See id.
131. See id.
decreased due to the revolution in both computers and communications.\textsuperscript{133} As a result of these changes, interest groups are more effective because they are better able to organize, to keep track of changes in their benefits, and to monitor the behavior of members of Congress.\textsuperscript{134}

Third, government bureaucracies, which have grown tremendously over the past several decades, have become a powerful special interest group.\textsuperscript{135} Whatever their particular objectives, government bureaucrats generally have an incentive to support larger bureaus and enhanced government powers.\textsuperscript{136} Moreover, once government programs are established, they provide an impetus for interest groups, such as the elderly, to organize.\textsuperscript{137} Taken together, the technological and cultural changes that facilitate private interest spending strengthen the argument that new constitutional barriers against such spending are imperative if we are to restore the Framers' vision of limited government.

One particularly important explanation of the increasing power of special interests should help overcome our natural reluctance to amend the Constitution, whether from veneration of the Framers' work or respect for tradition. Mancur Olson has shown that relatively stable societies like ours inevitably accumulate special interest organizations.\textsuperscript{138} Olson maintains that it generally is difficult for individuals to circumvent free riding problems and to organize groups that can influence governmental decisionmaking.\textsuperscript{139} Nevertheless, over time, favorable circumstances sometimes arise that permit an inchoate group to overcome free riding through a variety of means, including the creation of organizations that can effectively restrict rewards from

\begin{thebibliography}{99}
\bibitem{134} See Easterbrook, supra note 127, at 1334-35; Schuck, supra note 132, at 580-83.
\bibitem{136} See id. at 618-33.
\bibitem{137} For further discussion of this principle, see supra notes 40-45 and accompanying text.
\bibitem{139} See id.
\end{thebibliography}
government influence to its members.\textsuperscript{140} Once such organizations are created, they have staying power, and thus the number of special interest groups will grow over time until a social upheaval cleanses society of their negative impact.\textsuperscript{141}

Olson's theory suggests that a successful constitution must periodically update its restraints on interest groups to remain successful, because its very success in generating political order will breed interest groups and thereby create pressure to eviscerate its restraints.\textsuperscript{142} As the "Red Queen" in \textit{Through the Looking Glass} must run to remain in place,\textsuperscript{143} so must a constitution change over time if it is to continue to promote the public interest rather than private interests. Paradoxically, constitutional inertia can be a recipe for the radical transformation of society.

\textbf{D. The Operation of the Special Interest State}

With the leveling of the restraints that the Framers placed on government, the years since the New Deal have seen the rise of the special interest state. This era has been open season for interest groups seeking to use the government to acquire resources. The resulting transformation has had four lasting consequences that are relevant to our argument for fiscal supermajority rules.

First, since the passage of the amendments permitting income taxation and mandating the direct elections of senators began the movement to a powerful centralized state,\textsuperscript{144} the percentage of the gross national product devoted to domestic spending has increased steadily.\textsuperscript{145} Second, an increasing percentage of budget

\begin{itemize}
\item \textsuperscript{140} See \textit{id.} at 40.
\item \textsuperscript{141} See \textit{id.} at 69-74.
\item \textsuperscript{142} See \textit{id.}
\item \textsuperscript{143} See Lewis Carroll, \textit{Through the Looking-Glass} 43 (miniature ed. 1924) (1871).
\item \textsuperscript{144} See supra notes 110-19 and accompanying text.
\item \textsuperscript{145} See \textit{Economic Report of the President, supra} note 1, at 390; \textit{Historical Statistics, supra} note 1, at 224, 1114. The following matrix summarizes this rise in spending:
outlays now constitute transfer payments to individuals rather than funding for public interest goods. Most of these transfers should be understood as private interest spending because they are directed not only to the poor, but also to the middle class and the wealthy.

Third, some powerful interest groups like the elderly have succeeded in structuring their programs as entitlements. The result is that they are insulated from reconsideration in the annual budget process. Such entitlements are so entrenched that statutory attempts to establish structural limitations to budget deficits—such as the Gramm-Rudman Act—have been forced largely to exempt entitlements from their strictures. As a re-

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</tr>
<tr>
<td>1995</td>
<td>21.4</td>
<td>17.3</td>
</tr>
</tbody>
</table>

146. The latest GAO report lays out this trend:

During the last 25 years, changes in outlay patterns have also documented shifts in the mission priorities of the federal government. For example, as a share of total spending, only outlays for human services and interest payments grew during this period; outlays for defense, economic affairs, natural resources, and central government operations all declined as shares of overall spending. Also, outlay patterns disclose a change in federal government activity from principally providing goods or services (directly or via contract) to principally providing payments to individuals. PAUL L. POSNER, FISCAL TRENDS-FISCAL YEARS 1971-1995 (GAO Rep. AIMD-97-3, 1996).


148. Even so-called "cost of living increases" that in reality are more generous than necessary to keep up with inflation are allowed automatically each year. See Statement by Alan Greenspan, Chairman, Bd. of Governors of the Fed. Reserve Sys., Before the Comm. on the Budget, U.S. Senate, Jan. 21, 1997, reprinted in 83 FED. RESERVE BULL. 195, 197 (1997) (noting several studies that suggested that the Consumer Price Index on which cost of living increases were based overstates inflation).

149. See Kate Stith, Rewriting the Fiscal Constitution: The Case of Gramm-
sult, the growth in spending proceeds on automatic pilot, creating a sclerotic politics that is unable to respond to new social problems.

Fourth, the decrease in restraints on special interests has resulted in excessive debt. Politicians often finance spending programs with debt, rather than taxes, because this shifts the costs onto future generations and reduces the political opposition to special interest spending. This debt in turn has its own distinctively bad effects on economic growth. It raises interest rates and crowds out private investment. It also encourages increased current consumption at the expense of saving. Apart from these economic effects, it also raises serious questions of intergenerational equity.

These characteristics of the special interest state have led to a widespread, if inchoate, sense across the ideological spectrum that constitutional amendments are necessary to address the private interest spending spurred by the growth in power of special interests. Proponents of campaign finance reform attempt to restrain special interests by limiting campaign contributions.

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150. After 28 years of federal deficits, the United States enjoyed a small budget surplus for the year 1998 of approximately $63 billion in a budget of $1.7 trillion. See George Hager, End of Deficit Era Marks Beginning of Battle over Surpluses, WASH. POST, Sept. 30, 1998, at C10. Government spending eventually will balloon, however, because of government transfers to baby boomers. See supra text accompanying notes 3-4. Debt therefore may mount again unless Congress imposes politically unpalatable tax increases.

151. See Theodore P. Seto, Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed to Do (And No More), 106 YALE L.J. 1449, 1462 (1997) (stating that debt allows more spending than tax revenue alone because the incidence may fall on unrepresented individuals); see also SHAVIRO, supra note 71, at 222 (rejecting the hypothesis that the method of funding government does not effect the level of spending).

152. See S. REP. NO. 104-5, at 7 (1995) ("By consuming such an overwhelming part of the capital in the economy, the Government 'crowds out' private sector investment. Thus, when government spending rises unchecked by fiscal responsibility, it chokes off the primary engines of economic growth and risks our long-term security.").

153. See SHAVIRO, supra note 71, at 203-05.

154. See E. Donald Elliott, Constitutional Conventions and the Deficit, 1985 DUKE L.J. 1077, 1091-92 (arguing that a major factor in deficit spending is the ability of legislators to shift the cost of today's programs to the politically unrepresented generations of tomorrow).

155. This is the left of center solution offered by Democrats in Congress. See The
Proponents of term limits try to solve the problem by curtailing the power of long-term politicians who are likely to be beholden to special interests. Supporters of the Balanced Budget Amendment attempt to constrain the power of special interests by making it more difficult to pay for their programs through debt. Whatever the merits of these proposals, we believe that the best way of addressing the problem of the special interest state is by attempting to curtail directly and comprehensively the primary evil—excessive spending on special interests. It is to the theory and operation of such rules that we now turn.

II. SUPERMAJORITY RULES AS A THIRD DECISIONMAKING RULE

Many constitutions, including the United States Constitution, employ two basic mechanisms to govern which laws may be enacted. In most cases, the legislature decides which bills to pass under a system of majority rule. Rule by legislative majority has many virtues, but in certain areas—as discussed previously—it produces undesirable results. As a result, the Constitution employs a second method to determine which laws may be enacted. Under this method, laws may be enforced only if they do not violate certain absolute constitutional limitations on legislative power. Administered principally by the courts, these limitations may take the form of either individual rights or restrictions on the power of the federal government.
This two-part constitutional regime is best understood as a means of promoting the public interest. When the legislature is more likely than the courts to make a decision in the public interest, the Constitution employs rule by legislative majority. When the legislature cannot be trusted to legislate well, and when the courts can be relied upon to enforce a constitutional provision, the Constitution uses absolute limitations. Under this system, a well-structured constitution employs an institution—either the legislature or the courts—only when it will perform better than the alternative institution.\textsuperscript{160}

Although this matching of decisionmaking rules with the type of decision to be made improves the operation of our political system, the system is relatively crude in that it relies largely on only two decisionmaking rules.\textsuperscript{161} It is our thesis that supermajority rules are a third type of decisionmaking rule and that, for certain kinds of decisions, supermajority rules are superior to both absolute limitations and rule by legislative majority. In particular, we believe that supermajority rules are a superior decisionmaking tool regarding various fiscal decisions. Such rules would allow government to act more in the public interest and less at the behest of private interests.

Supermajority rules combine features of both majority rules and absolute limitations to create a distinctive decisionmaking

\textsuperscript{160} This constitutional regime can be analogized to a basic result in transactions costs economics. \textit{See generally} OLIVER E. WILLIAMSON, \textit{THE ECONOMIC INSTITUTIONS OF CAPITALISM} 68-84 (1985) (discussing transactions costs theory). In transactions costs economics, transactions are structured by choosing a governance structure, such as a particular contractual or organizational form, that is appropriate to the type of transaction to be conducted. \textit{See id.} Some governance structures will be appropriate for certain types of transactions, while other governance structures will be appropriate for other types of transactions. \textit{See id.} Similarly, the superior political governance structure—whether rule by legislative majority or an absolute constitutional limitation—will depend on the type of decision that the government is required to make.

\textsuperscript{161} The Constitution does employ explicit supermajority rules in certain limited circumstances. \textit{See, e.g.,} U.S. \textsc{const.} art. I, § 3, cl. 6 (requiring two-thirds of the Senate to convict for impeachment); \textit{id.} art. II, § 2, cl. 2 (requiring two-thirds of the Senate to concur on treaties); \textit{id.} art. V (requiring various supermajority schemes to amend the Constitution). \textit{See also supra} text accompanying notes 96-97 (arguing that majority rule under a bicameral legislature can be understood as a type of supermajority rule).
rule. Supermajority rules resemble rule by legislative majority in that they permit the legislature to enact certain forms of legislation with limited review by the courts.162 Supermajority rules also resemble absolute limitations because they restrict the ability of the legislature to pass laws in certain areas. This restriction, however, is not imposed principally by the courts, but by requiring an additional number of legislators to pass a bill.163 Given these characteristics, supermajority rules may function better than either rule by legislative majority or absolute limitations in areas in which the legislature should be constrained, but in which courts cannot be trusted to enforce an absolute limitation.164

This section of the Article illustrates the utility of supermajority rules by developing the argument that, for fiscal legislation, supermajority rules are superior to rule by legislative majority and absolute limitations. First, the section compares supermajority rules to rule by legislative majority. It shows that rule by legislative majority functions poorly as to spending decisions because special interests can influence the

162. We discuss the duties of courts under supermajority rules below. See infra notes 275-78, 286-87 and accompanying text.

163. For a more precise formulation of the division of labor between courts and legislatures in supermajority rules, see infra notes 275-78, 286-87 and accompanying text.


legislature to secure private interest spending programs. It then shows that a supermajority rule that constrains spending decisions would help to reduce the power of special interests.

After concluding that supermajority rules are superior to rule by legislative majority regarding spending decisions, supermajority rules then are compared to absolute limitations. Although absolute limitations function better than supermajority rules in protecting certain individual rights, we contend that supermajority rules are superior in the context of spending decisions. Supermajority rules would constrain the legislature without requiring the judiciary to undertake functions for which it is ill-suited.

A. Supermajority Rules Function Better Than Majority Rule as to Fiscal Legislation

1. The Circumstances When Rule by Legislative Majority and Supermajority Rules Function Well

This section explores the different circumstances in which rule by legislative majority and supermajority rules function well. As argued below, majority rule performs better when legislators and citizens have relatively equal influence on the passage of legislation. When some citizens have disproportionate influence on legislation, however, supermajority rules may perform better than majority rule.

Majority rule is the voting rule most often associated with democracy. Majority voting rules generally are employed in the legislative assembly and in popular elections. Perhaps the most important normative argument for majority rule is that it reflects the principle that all citizens are equal. This point is captured in the statement "one person, one vote."

165. Supermajority rules are particularly useful in restraining spending decisions, but they also may improve other areas of governance if those areas meet the criteria proposed by this Article.
166. See Anthony Downs, An Economic Theory of Democracy 24 (1957) (defining democracy in terms of majority rule); Baker & Dinkin, supra note 164, at 57 (arguing that majority rule occupies a central place in democratic theory).
Majority voting functions well when the equality of citizenship principle is reflected in reality. It is not enough that all citizens and representatives should have one vote. It also is necessary that each citizen has a relatively equal influence on his representative and each representative has a relatively equal influence on legislation. Under these conditions, legislative decisions should actually reflect the desires of a majority of the public.

By contrast, if some citizens are able to influence the political process more than others, their interests may prevail even though only a minority of citizens supports their position. We have argued that under modern conditions, special interest groups have disproportionate power to influence the political process and to secure additional benefits for themselves. As a result, majority rule functions poorly.

In these circumstances, supermajority rules may function better than majority rule. While special interests may be able to secure private goods for themselves under majority rule, supermajority rules may operate to constrain such undesirable legislation. A supermajority rule will require a greater percentage of legislators to support a bill. This will increase the costs

168. It is important to emphasize that the argument for majority voting in a legislative assembly based on the one person, one vote theory does not derive its force from the inherent equality of legislators. Rather, it is based on the view that each legislator represents an equal number of citizens who express their votes through their representative. See MUELLER, supra note 35, at 102.

169. If some citizens or representatives have disproportionate influence, this is functionally equivalent to allowing some citizens or representatives more votes than others.

170. Many other circumstances, of course, will affect the performance of majority rule. One such factor is the intensity of preferences of different voters. Some argue that majority rule will function well when the preferences of voters are of equal intensity. See BUCHANAN & TULLOCK, supra note 164, at 126. This condition is satisfied when the benefits to be gained by each citizen who benefits from legislation are roughly equal to the costs that are borne by each citizen who is harmed by the legislation. See id. If this condition is violated because the benefits to each citizen in the majority are small compared to the costs to each citizen in the minority, then legislation might pass, even though the total benefits are smaller than the total costs. See id. at 126-27. Because the violation of this condition is not an important cause of Congress's poor performance in the fiscal area, this Article focuses instead on the equal influence condition discussed in the text.

171. See supra notes 40-66 and accompanying text.
special interests bear in securing private interest legislation, which should reduce the amount of such legislation that is enacted.

A supermajority rule also will impede the passage of public interest legislation by requiring it to obtain more legislative support. To determine whether a supermajority rule is beneficial, one therefore must look at both the desirable and undesirable legislation that it prevents from being enacted. A supermajority rule will be beneficial only if the benefits it produces by blocking undesirable legislation outweigh the harm it imposes by blocking desirable legislation. Supermajority rules therefore will work best where majority rule tends to produce a large percentage of harmful legislation. In these instances, supermajority rules are more likely to prevent the passage of more harmful legislation than beneficial legislation.

The effects of supermajority rules are not limited to merely preventing the passage of certain legislation. Supermajority rules also increase holdout costs. Holdouts occur when legislators who would otherwise support a bill refuse to do so in order to extract additional benefits. Holdout costs include the private interest provisions that must be inserted to secure the support of holdouts as well as the time necessary to negotiate an agreement with the holdouts.

Under supermajority rules, holdouts have more leverage because there are fewer other legislators with whom the majority can bargain to form a supermajority coalition. For example, under majority rule, if forty-nine senators support a bill, then a single holdout will have relatively little leverage, because the proponents of the bill can attempt to secure the additional vote from any one of the other fifty senators. By contrast, under a

172. See MUELLER, supra note 30, at 50-52 (discussing incentives to engage in strategic behavior under unanimity rules); POSNER, supra note 37, at 65, 67, 416 (discussing holdouts in other contexts).
173. Supermajority rules also increase the decisionmaking costs of passing legislation. Decisionmaking costs are the costs of securing the support of the requisite number of legislators to pass a bill through negotiation and persuasion. See BUCHANAN & TULLOCK, supra note 164, at 68. These costs increase as the number of legislators required to pass a bill increases, because it takes more time and more effort to secure an agreement between a larger number of parties. See id.
three-fifths supermajority rule, if fifty-nine senators support a bill, a single holdout will have more leverage, because the proponents must now secure the additional vote from one of the remaining forty senators. Although supermajority rules therefore increase holdout costs, the moderate supermajority rules of three-fifths or two-thirds that this Article advocates are unlikely to increase holdout costs significantly because a large group of legislators remains available as a potential source of additional votes. It is only when the percentage of legislators required to pass a bill approaches extremely high levels, such as over ninety percent, that a small number of legislators has significant leverage or monopoly power. Still, holdout costs are one factor to consider when evaluating all supermajority rules.174

2. Spending Supermajority Rules

As special interest groups can secure financial benefits for themselves at the expense of the public, it makes sense to constrain their activities through a fiscal supermajority rule. We therefore propose such a rule as a practical example of how supermajority rules can improve government decisionmaking. Our discussion of this specific topic, however, also will illuminate general issues in the theory of supermajority rules.

Although supermajority rules for debt and for taxes have been proposed, we believe that the best fiscal supermajority rule would apply to government spending. There are two basic reasons why a spending supermajority rule would perform better than other rules. First, a spending supermajority rule provides a comprehensive method of limiting the financial costs of government. These costs are primarily the costs of funding government programs through taxes, debt, or the printing of money.175 Many proposed supermajority rules do not limit these costs comprehensively and thereby run the risk that Congress will evade

174. This Article adopts a two-part supermajority rule in part because it reduces holdout costs for appropriation laws. Holdout costs are particularly high as to such laws because failure to enact them may force the government to shut down. See infra notes 223-24 and accompanying text.
their restrictions. For example, because a Balanced Budget Amendment restrains only debt, it does not prevent Congress from raising taxes or printing money. A spending supermajority rule, by contrast, imposes a more global restraint on the costs of government. Because government only taxes, borrows, or prints money to finance spending, a reduction of government spending also will reduce the need to finance such spending.

Second, spending supermajority rules are also simpler to implement than other supermajority rules. The financial costs of government could be comprehensively constrained by a supermajority rule that applies to taxes, debt, and the printing of money, but it is far more complicated to apply a supermajority to three variables than to one. Moreover, a spending supermajority rule also would be simpler to implement than less comprehensive supermajority rules, such as the Balanced Budget Amendment. 176

There are various spending supermajority rules that could be imposed. In our view, the optimal rule would require supermajorities in two situations. First, the rule would require that Congress secure a supermajority to authorize total government spending that is greater than some large percentage of the total amount spent in the previous year. We select ninety percent as the appropriate percentage. 177 Second, the rule would require a supermajority to create or expand entitlement programs. Of course, simpler spending supermajority rules than this two-part rule do exist. Perhaps the simplest rule would require a supermajority to pass all spending bills. This rule, however, would be subject to significant holdout problems, which the two-part rule would avoid. 178 Moreover, a supermajority rule for all spending bills would restrain entitlement spending and ordinary

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176. As discussed below, it is easier to define the meaning of spending than that of debt. See infra notes 330-32 and accompanying text. In addition, while a Balanced Budget Amendment would often require precise determinations of how much debt had been issued, spending supermajority rules generally would avoid the need to determine exactly how much spending had occurred. See infra notes 333-40 and accompanying text.

177. See infra note 236 (explaining considerations that determine the appropriate percentage).

178. See infra notes 223-33 and accompanying text.
appropriations equally. This would be a mistake, because entitlement spending has lower holdout costs in its enactment process and yet is harder to control once enacted. Therefore, entitlement spending requires a more stringent restraint.

3. A Supermajority Rule for All Spending Bills

The argument for the two-part spending supermajority rule can be understood most easily if it is presented in two stages. The first stage explores a supermajority rule for all spending bills. After discussing the advantages and disadvantages of that rule, we then will be in a position to describe the arguments for the two-part rule described above.

a. Impeding Private Interest Spending

This section argues that in the absence of holdout costs, a supermajority rule for all spending bills would improve the content of federal spending by preventing the passage of some private interest spending bills. Supermajority rules, however, will not merely prevent the passage of private interest spending bills, but also of public interest spending bills. Thus, to determine the net effect of the supermajority rule, one must compare the benefits it produces by blocking private interest spending with the costs it imposes by preventing the passage of public interest spending. Supermajority rules will be beneficial only if the benefits outweigh the costs.

In determining whether a spending supermajority rule is likely to be beneficial, it is useful to employ the theory of economic efficiency, because it permits a weighing of the benefits and costs of the legislation that the supermajority rule will block. The language of the theory also permits a precise expression of many of the issues involved.

179. See infra notes 227-33 and accompanying text.
180. For a definition of economic efficiency, see supra note 26.
181. Although this Article uses the value of efficiency to argue that supermajority rules on balance will be more desirable than spending bills, it does not rely entirely on efficiency as the normative basis of its argument. Thus, after making the argument based on efficiency, the Article reaches the same conclusion using other normative standards. See infra notes 215-22 and accompanying text.
Under the theory of economic efficiency, the efficiency of a supermajority rule will turn on the efficiency of the spending that majority rule would allow but the supermajority rule would prevent. If the spending that is blocked by a supermajority rule produces net benefits—that is, if its total benefits exceed its total costs—then a supermajority rule will be inefficient. If this spending produces net costs—that is, if its total costs exceed its total benefits—then a supermajority rule will be efficient. Thus, the key issue is whether spending blocked by the supermajority rule will produce net benefits or net costs.

The efficiency of the spending that is blocked by a supermajority rule will turn on at least two factors.\(^{182}\) First, it will depend on how inefficient is total federal spending under majority rule. The spending that a supermajority rule blocks is a subset of the total spending that would be passed under majority rule. Thus, the more inefficient that total federal spending under majority rule is, the more likely that the spending blocked by the supermajority rule will produce net costs.

Second, the efficiency of the spending blocked by a supermajority rule also will depend on the extent to which increasing the percentage of legislators required to pass legislation will improve the efficiency of spending legislation. We argue that as the percentage of legislators required to pass a bill increases, the percentage of efficient spending bills that are enacted also should increase. Thus, one would expect there to be a higher percentage of efficient spending from bills supported by more

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182. The most direct way to determine whether or not a supermajority rule blocks spending that produces net costs would be to observe the number of votes that different pieces of legislation receive. Unfortunately, the number of votes received by legislation under majority rule is not a good indicator of whether legislation could have passed under a supermajority rule. First, simply because legislation receives more than 60% of the votes does not necessarily mean it would have received the same number of votes under a supermajority rule. Many legislators may vote for legislation once they know it will pass, even though they would have voted against it had their vote made a difference. Similarly, legislation that receives only 51% of the votes might have received more votes under a supermajority rule because these votes would have been necessary to pass the legislation. Second, different legislation may be proposed under majority rule as opposed to supermajority rule. For example, certain legislation that is not controversial and supported by large numbers might be proposed under a supermajority rule, even though it attracts little attention under majority rule.
than sixty percent of the legislature than from bills supported by between fifty and sixty percent. Because a sixty percent supermajority rule will block spending that only can secure the support of between fifty and sixty percent of the legislature, it will block the least efficient spending enacted under majority rule and therefore should result in a higher percentage of efficient spending being passed. Because supermajority rules increase the percentage of spending that is efficient, they filter out inefficient legislation.\textsuperscript{183}

Moreover, the stronger the filtering effect, the more likely that supermajority rules will be efficient. As the filtering effect becomes stronger, legislation passed by a supermajority will be more efficient and legislation passed by a mere majority will be less efficient. Thus, the stronger the filtering effect, the more likely that legislation passed by a mere majority will produce negative net benefits and that the supermajority rule therefore will be efficient.\textsuperscript{184}

Consequently, a supermajority rule is more likely to be efficient the more inefficient spending under majority rule is and the more filtering there is. The extent to which one of these conditions must hold in order for a supermajority rule to be efficient will depend on the extent to which the other condition holds. The more inefficient the federal spending passed under majority rule is, the less a supermajority rule needs to filter inefficient legislation. Similarly, the more a supermajority rule filters out inefficient legislation, the less inefficient total federal spending must be. These two conditions therefore operate on a sliding scale. Two points on this scale are worth discussing.

First, if total federal spending under majority rule were sufficiently inefficient, a supermajority rule will be efficient even if it

\textsuperscript{183} We refer to this phenomenon as the "filtering effect."

\textsuperscript{184} Although a supermajority rule is more likely to be efficient if there is a strong filtering effect, it nonetheless is true that the existence of filtering does not guarantee that a supermajority rule will produce net benefits. For example, filtering probably occurs even when majority rule functions well. In these cases, legislation that passes with a mere majority will produce net benefits, although legislation that passes with greater majorities will produce even greater net benefits. Whether the filtering effect is sufficient to make a supermajority rule efficient depends on various considerations, including the percentage of legislation passed that is inefficient.
does not filter out inefficient spending at all. A supermajority rule that does not filter out inefficient spending simply will block a representative subset of the total federal spending passed under majority rule. If total federal spending under majority rule produces net costs, a representative subset of this spending should also on average produce net costs. Thus, in a world in which total spending produces net costs, a supermajority rule will, over time, be efficient.

Second, even if federal spending does produce net benefits, a supermajority rule will block spending that produces net costs if the filtering effect is sufficiently strong. For example, if two-thirds of the spending that is passed under majority rule is efficient, a supermajority rule still may be efficient if a sufficiently large percentage of the inefficient spending is enacted only with a mere majority.

If either of these two conditions hold, a spending supermajority rule will be efficient. We believe that both of these conditions hold and therefore the case for the efficiency of the spending supermajority rule is especially strong. First, we maintain there are strong reasons to believe that total federal spending passed under majority rule is more inefficient than efficient. Second, we contend that a supermajority rule is likely to have a strong filtering effect.

(1) The Degree of Inefficient Spending Under Majority Rule

A strong argument exists that total federal spending under majority rule produces net costs. We already have set the groundwork for this argument in Section I, where we demonstrated that federal spending has grown enormously in recent generations and that this spending has increasingly occurred

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185. Our analysis assumes the supermajority rule either permits or prevents a spending program's enactment, but does not cause a spending program to be revised. Although actual supermajority rules would cause spending programs to be revised, this assumption simplifies the analysis without altering the substantive conclusions.

186. The degree of filtering required will depend on the percentage of efficient and inefficient spending, as well as other factors, such as the percentage of legislation that could pass only with a mere majority.
outside of the area of traditional public interest goods.\textsuperscript{187} We also presented a theory of special interests that helps to explain these changes.\textsuperscript{188}

In this section, we plan to show in the broadest outlines why one might believe that there are net costs from total federal spending under majority rule. We cannot, in an article of this scope, present a detailed assessment of the efficiency of federal spending, nor can we hope that all readers will agree with our assessment of every federal program.\textsuperscript{189} Instead, we seek only to explain how one can arrive at the conclusion that overall federal spending produces net costs, by attempting to show that a large number of federal programs in different areas produce net costs. These programs fall into two classes. First, there are programs that clearly are not public interest goods, such as subsidies for farmers or small businesses. There is a strong presumption that such spending is inefficient.\textsuperscript{190} Second, there are programs that potentially could be public interest goods if they were designed appropriately, but which in fact are structured inefficiently—programs such as unnecessary weapons systems.

There are many federal programs that clearly are not public goods. Indeed, the largest area of federal spending, entitlements for the elderly such as Social Security and Medicare, fall into this category.\textsuperscript{191} These programs operate to redistribute income from the younger generation to current retirees,\textsuperscript{192} but such redistribution cannot be considered a traditional public good.

\begin{itemize}
\item \textsuperscript{187} See supra notes 144-57 and accompanying text.
\item \textsuperscript{188} See supra notes 40-66, 74-143.
\item \textsuperscript{189} Even if the reader disagrees with our assessment of one or more of the federal programs, such disagreement over individual programs does not undermine our more general point that there are a large number of inefficient federal programs throughout the federal budget.
\item \textsuperscript{190} See Hayek, supra note 28, at 518-19, 523, 525.
\item \textsuperscript{191} In 1994, expenditures on Social Security and Medicare comprised 38\% of total federal expenditures, exclusive of net interest on the debt. For the figures from which this calculation was computed, see \textsc{Congressional Budget Office}, \textsc{U.S. Congress, The Economic and Budget Outlook: Fiscal Years 1996-2000}, at 40-41 (1995).
\item \textsuperscript{192} See Epstein, supra note 35, at 150; Ferrara, supra note 59, at 52; Robertson, supra note 4, at 121, 154; Peter J. Ferrara & John R. Lott, Jr., \textit{Rates of Return Promised by Social Security to Today's Young Workers}, in \textsc{Social Security, Prospects for Real Reform} 13, 13 (Peter J. Ferrara ed., 1985).
\end{itemize}
elderly are not the poor. As with any other demographic group, the elderly consist of people from all economic classes. Although the elderly are disadvantaged in certain respects, they are also among the wealthiest groups in society. Thus, one cannot justify redistributing income to the elderly on the ground that virtually all people would choose to transfer funds to the elderly if there were no free rider problem.

The redistributions that Social Security and Medicare effect also cannot be justified as necessary to providing retirement

193. See JOHN C. GOODMAN & GERALD L. MUSGRAVE, PATIENT POWER 426-27 (1992) (stating that "although the elderly constitute only 12 percent of the population, they hold about 40 percent of all the capital assets in the United States").

194. See supra notes 34-39 and accompanying text (discussing the free rider argument for redistribution to the poor). One might argue that the tremendous political strength of Social Security disproves our claim that many people would not choose to transfer funds to the elderly. This argument, however, confuses political strength with genuine beliefs about the public interest and the desire to transfer money. To conclude that the public wants to redistribute wealth to the elderly because Social Security is strong politically, one must make two inferences: first, that the political strength reflects the genuine beliefs of the public that there should be a redistribution to the elderly and, second, that those who vote for transfers to the elderly based on their genuine beliefs would also individually transfer money from their bank accounts if there were no free rider problem.

Both inferences are problematic. First, the political strength of a program is a function of at least three types of support: (1) support based on voters' beliefs about the public interest; (2) support based on individual voters' assessment of the benefits and costs of the program to them; and (3) support generated by a group's influence over legislators and the public through lobbying and other political activities. It is true that some people view Social Security as furthering the public interest and that the program therefore does have some of the first type of support. Social Security has far more of the second and third types of support, however, stemming from the fact that the elderly have the characteristics of a special interest and constitute a large voting block.

Second, even those people who vote for Social Security based on their genuine beliefs would not individually choose to contribute charity to the elderly as a general group if they were not required to do so. People who support Social Security out of a genuine belief act largely out of rational ignorance. Because they have no incentive to study the issue, these voters mistake being disadvantaged in one respect (elderliness) with being disadvantaged generally. See Michael B. Reppaport, The Private Provision of Unemployment Insurance, 1992 WIS. L. REV. 61, 118 (describing the mistake of focusing on one characteristic rather than on an entire situation as common). If these individuals actually had to decide to whom they would contribute charity, they might not focus their charity on the elderly generally, but instead target truly disadvantaged groups, such as the poor or the sick (including the truly disadvantaged elderly). Thus, one cannot justify Social Security as enforcing the desires of people to transfer funds to the elderly.
pensions or health insurance to the elderly. Individuals could secure income after retirement by saving money over a lifetime and then purchasing an annuity at retirement. To ensure that people actually save money during their working years, the government could require them to save a certain amount each year. Under this arrangement, workers could accumulate retirement funds without the government either running the program or redistributing income.

A similar arrangement also could be established that would provide the elderly with access to health insurance without Medicare. To mention just one possible arrangement, the elderly could be required to purchase a long-term health insurance policy at age sixty-five. To ensure that workers can afford the insurance, the government could require them to set aside a specified amount each year before retirement. These arrangements would make private health insurance available to the elderly without redistributing income between generations.

Because Social Security and Medicare do not provide traditional public interest goods, these programs should be regarded as substantial. These inefficiencies, moreover, are substantial. First, the redistribution from one generation to another imposes significant costs, including the decreased incentive to work for both the generation that receives the subsidy and the generation that must pay for it. Apart from the redistribution, the structure of these programs is also inefficient. Commentators have criti-

195. See FERRARA, supra note 59, at 340-44.
196. To prevent people from investing their savings recklessly, regulations could limit investment of these savings to diversified funds. See, e.g., id. at 341 (explaining a proposal that would require contributions to certain funds and close governmental regulation).
197. A system of compulsory private health insurance would, of course, have to address various practical problems—issues that are beyond the scope of an article on supermajority rules. It may be useful to note, however, that a private system would offer a variety of methods to address one of the most important problems: providing access to health insurance for those with preexisting conditions while avoiding serious adverse selection. Such methods include permitting insureds to use a combination of catastrophic insurance and medical savings accounts, establishing an assigned risk pool for persons who cannot obtain insurance, and prohibiting insurers from considering preexisting conditions. For a general discussion of these issues, see EPSTEIN, supra note 35; GOODMAN & MUSGRAVE, supra note 193, at 440.
198. See GOODMAN & MUSGRAVE, supra note 193, at 440.
cized many features of both Social Security and Medicare, including the government's investment of retirement savings in government bonds rather than the stock market\textsuperscript{199} and the methods Medicare uses to reimburse health care providers\textsuperscript{200}

Many other government programs also are not traditional public goods. These programs range from the numerous examples of "corporate welfare,"\textsuperscript{201} such as farm programs or programs for small businesses, to the post office,\textsuperscript{202} which easily could be privatized.\textsuperscript{203}

Other government programs operate in areas that are at least potentially traditional public goods. Although these programs could be efficient, nothing guarantees that they are structured or operate efficiently. Indeed, there are several areas where such programs seem to produce net costs. We mention only three of these areas. First, substantial parts of defense spending are hard to justify. These activities include unnecessary military bases that are maintained to distribute federal defense dollars to the local economy, and weapons systems that either are not needed or are produced at excessive cost.\textsuperscript{204} Second, many have referred to federal spending on infrastructure, such as highway construction, and transportation, such as Amtrak, as unnec-

\textsuperscript{201} The federal government currently spends more than $65 billion on more than 100 programs that provide subsidies to American businesses. See DEAN STANSEL & STEPHEN MOORE, FEDERAL AID TO DEPENDENT CORPORATIONS: CLINTON AND CONGRESS FAIL TO ELIMINATE BUSINESS SUBSIDIES (Cato Institute Briefing Papers No. 28, 1997) (discussing 55 of the most visible, expensive, and unjustified programs).
\textsuperscript{202} See J. GREGORY SIDAK & DANIEL F. SPULBER, PROTECTING COMPETITION FROM THE POSTAL MONOPOLY 60 (1996).
\textsuperscript{203} See id. at 151-53.
sary "pork barrel" spending. \(^{205}\) Finally, critics have argued that significant abuses exist under welfare spending programs. \(^{206}\)

This short discussion provides some indication of the extent of inefficiency in federal spending. Much federal spending is not devoted to traditional public goods, and a significant portion of spending on activities that potentially could constitute public goods appears to be seriously inefficient. Thus, it is plausible that a majority of federal spending, possibly even a large majority, is wasteful.

Another factor supports this conclusion. People tend to judge whether a spending program is justified by examining the benefits and costs of the program in isolation from other considerations. But for two reasons, this method often assesses federal spending programs too favorably.

First, examining a program in isolation from other considerations ignores the burdens that are imposed on taxpayers by other inefficient government programs. When examined in isolation, some programs appear to be traditional public interest goods and therefore to produce net benefits. Although these programs have the potential to produce net benefits, they often will do so only if government spending were at the low level that would exist if there were little inefficient spending. At this level, taxes would be low and the economic pie would be large. Because citizens would be richer, they would be able to afford additional goods from the government. By contrast, under a government with large amounts of inefficient spending, citizens are poorer and less able to afford government spending. As a result, programs that would have produced net benefits if taxes were low produce net costs because taxes are high. Thus, at the current level of spending, citizens might be better off if a supermajority rule blocked programs like the space program. These programs might make sense if taxes were low, but do not when they are high.

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Second, examining a program in isolation from other considerations ignores the question of whether that program should be conducted at the national or state level. A federal spending program that appears to produce net benefits might operate even more favorably at the state or local level. In that case, citizens benefit when the supermajority rule blocks the program and the spending instead is enacted at the state level.

(2) The Degree of Filtering

The second condition that affects the efficiency of a supermajority rule is the extent of the filtering effect. We believe that supermajority rules are likely to have a strong filtering effect on inefficient spending for several reasons. First, it is normally assumed that the more votes a piece of legislation receives, the better the legislation. Thus, a belief in filtering is really part of the conventional wisdom. Our Constitution also

207. Some examples of federal spending programs that may generate net benefits at the federal level but would operate better at the state level are the various means-tested welfare programs, including cash assistance and food stamps. See Murray, supra note 206, at 227-30 (advocating that all federal welfare programs be repealed and that the responsibility for welfare be left to the states).

208. One might argue that even if a large percentage of federal spending results in net costs, this does not demonstrate that total federal spending has net costs. For instance, federal spending includes all national defense spending. Although one might argue over how much national defense spending is needed, it is clear that a small core of such spending—that necessary to defend against invasion and to deter nuclear attacks—is extremely beneficial and produces overwhelming net benefits. Under this view, however inefficient federal defense spending is, it can never be beneficial to eliminate all of it because that also would eliminate the overwhelming benefits derived from the small core of necessary programs.

Fortunately, this hypothetical issue need not be a distraction. The main reason we argue that total federal spending likely produces negative net benefits is heuristic. In this way, it can be shown that a supermajority rule does not have to filter out inefficient legislation for the rule to be efficient. Furthermore, we can maintain our heuristic point even if the small core of national defense spending does render the benefits of total federal spending to be positive. In that event, our argument would change slightly. We simply would assume that Congress knows not to cut the small core of national defense spending. Thus, we would argue that if the supermajority rule causes Congress to cut a random sample of federal spending, other than the small core of defense spending, this will be efficient.

makes such an assumption.\textsuperscript{210} If legislation that passes with a supermajority is no better on average than that which passes with a mere majority, there is little reason to require a supermajority to amend the Constitution.

Second, a strong argument exists that the greater the net benefits produced by a bill, the more votes it will be able to secure. Assume that voters evaluate a bill based on the net benefits that it confers on them and that legislators support a bill because of its popularity with the voters. Under these assumptions, bills with the largest net benefits should on average be the most popular with both voters and legislators.

Moreover, the argument that a bill with more net benefits will be more popular holds regardless of whether the legislation broadly diffuses benefits throughout the population or confers concentrated benefits on special interest groups. As to both types of legislation, the bills that will pass with a supermajority will confer greater net benefits than those that would secure a mere majority and therefore would not pass. Clearly, legislation that broadly diffuses benefits throughout the population will be more popular and therefore will secure more legislative support if the net benefits are large than if they are small. But this is also true of legislation that confers concentrated benefits on special interest groups. To secure the support of a supermajority rather than a majority, a special interest group must expend additional amounts on lobbying and other political activities. These additional expenditures will only make economic sense for legislation that provides the largest net benefits for the group.\textsuperscript{211}

\textsuperscript{210} A belief in filtering is also one basis for majority rule. It generally is believed that legislation supported by a majority is better than any legislation supported by the minority. \textit{See} MUELLER, \textit{supra} note 35, at 158. In supporting supermajority rules, we do not disagree with the claim that the more votes, the better the legislation. We simply believe that because special interests create a one-way bias in favor of spending, a mere majority is not enough to justify federal spending. We continue to believe, however, that legislation supported by a supermajority is better than that supported by a majority, which in turn is better than that supported by a minority.

\textsuperscript{211} This argument assumes, of course, that special interests cannot cheaply increase the support for their programs through additional rent seeking. Rent seeking is generally expensive. By increasing the majority required to pass spending legislation, a supermajority rule increases the costs of obtaining special interest spending. We therefore predict that special interests would respond to this increase in price by
fits this large to be available, however, the legislation generally would need to have large overall benefits. Therefore, even special interests will tend to secure supermajority support for only the special interest legislation that produces the biggest overall net benefits.

There is not, of course, a perfect correlation between legislative support and net benefits. Consequently, supermajority rules sometimes will block efficient spending and at other times will permit inefficient spending to be enacted. Perfect filtering should not be expected, but neither is it required. A supermajority rule still will filter if the spending that it permits to pass is merely more efficient on average than the spending that it blocks.

There is one last argument for the existence of filtering. Although we assumed previously that voters evaluate legislation based on the net benefits they derive from it, we also believe that people vote, in part, based on their genuine convictions about what programs are in the public interest. We believe that the legislation that has the most support because the public perceives that it promotes the public interest, however, also tends to be the most efficient legislation. Such legislation includes traditional public goods, such as national defense, police, courts, infrastructure, assistance for the truly poor, and other traditional public interest spending. Thus, it is unlikely that a supermajority rule will eliminate core public interest goods.

(3) Values Other than Efficiency

Although we have argued that a supermajority rule for spending would be efficient, the case for the rule does not require that one accept efficiency as the measure of a political institution's value. Other normative approaches, including utilitarianism and individual rights theories, also support supermajority rules.
Utilitarianism is very similar to efficiency theory. Under both theories, the appropriate action depends on a summation of its benefits and costs. The two theories, however, measure benefits (and costs) differently. Efficiency weighs an individual's willingness and ability to pay for a benefit.\textsuperscript{215} Utilitarianism, by contrast, measures benefits according to the effect on an individual's interest without considering the individual's ability to pay.\textsuperscript{216} This difference has its biggest impact with regard to actions that affect poor people. Although an efficiency theory might measure the benefits from a program that provides services to poor people as small, because poor people can pay only a small amount for the services, utilitarianism might assess the benefit from the services as much larger if it significantly improves the poor people's lives.\textsuperscript{217}

Thus, in determining whether the efficiency of supermajority rules also shows that such rules are justified under utilitarianism, the main question is whether supermajority rules adequately protect the poor. We argue below that supermajority rules treat the poor quite favorably. Here, we can state only that programs that benefit the poor often are deemed to be public goods,\textsuperscript{218} and those programs therefore should pass under supermajority rules. Moreover, supermajority rules also protect the poor from legislation that unfairly benefits other groups. Thus, both efficiency theory and utilitarianism justify supermajority rules.

Individual rights theories differ significantly from both utilitarianism and efficiency theory. Individual rights theories do not attempt to aggregate benefits and costs but instead hold that one should respect certain rights or principles regardless of the consequences.\textsuperscript{219} Although there are significant distinctions

\textsuperscript{215} See Posner, supra note 37, at 12-16.


\textsuperscript{217} See Posner, supra note 37, at 14; Rappaport, supra note 216, at 251.


among different individual rights theories, the effects of supermajority rules are congenial to the majority of such theories. Supermajority rules tend to promote spending for public interest goods and to constrain spending for private goods. Virtually all individual rights theories allow or require the government to provide traditional public interest goods. These theories also generally condemn actions that redistribute resources because of political power rather than public purpose.

b. Holdout Costs

Although a supermajority rule for all new spending bills would likely prevent more harmful spending than beneficial spending, that rule also would increase significantly the holdout costs incident to the passage of ordinary appropriations bills. Thus, we do not advocate a supermajority rule for all new spending bills. Instead, we propose a two-tiered supermajority rule that would reduce holdout costs substantially.

As we discussed previously, supermajority rules increase holdout costs, and one therefore must be careful about applying them to legislation that is prone to such costs. The thirteen annual appropriation acts, which authorize government spending for the following year, involve significant holdout costs under majority rule. At the year's end, the spending authority conferred by these laws terminates. Unless Congress passes new appropriation acts, the government cannot conduct ordinary business and must shut down, thereby imposing enormous costs on the public that relies on the government for a range of bene-

220. See, e.g., RONALD DWORKIN, LAW'S EMPIRE 193 (1986); RICHARD A. EPSTEIN, TAKINGS 335 (1985); ROBERT NOZICK, ANARCHY, STATE, & UTOPIA 183-89 (1974); RAWLS, supra note 219, at 30-31.

221. For example, Dworkin, Epstein, and Rawls all generally permit public interest goods. Nozick, however, would only permit one type of public interest good—protective services. See NOZICK, supra note 220, at 52-53.

222. It is true, of course, that the persons who subscribe to these theories might not advocate supermajority rules. In most cases, we believe the primary reason is that they operate from different factual premises. For example, they may not believe there is bias towards excessive private interest spending. Our point is that, given our factual premises, supermajority rules are amenable to these theories.

The threat of a government shutdown gives significant leverage to holdouts. Unless the majority coalition can secure the support of some of the minority, a government shutdown will result and the entire Congress likely will be held responsible.

Because supermajority rules confer additional leverage on holdouts, holdout costs are even higher under supermajority rules. A supermajority rule that applied to appropriation acts might cause government shutdowns and the inclusion of inefficient provisions. Because of the high holdout costs already involved in passing ordinary appropriation bills, we do not recommend a rule that would require a supermajority to pass such bills.

In contrast, we would require a supermajority to pass bills that establish or expand entitlement programs for two reasons. First, holdout costs are much lower for entitlement spending. Under an entitlement program, Congress usually passes a permanent appropriation that allocates whatever funds the program requires. Consequently, entitlement programs do not require annual appropriations in order to operate and therefore are not exposed to holdouts in the appropriations process.

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225. It is even possible, although not likely, that such a supermajority rule could increase the amount of private interest spending. If members who seek increases in such spending act as holdouts, they might force Congress to pass spending that is as large as—or even larger than—that which would have been enacted under majority rule.

226. Decisionmaking costs are also higher under supermajority rules, but we do not believe that such costs argue against requiring a supermajority to pass appropriation bills. Although it would take more effort and time to secure a supermajority for each appropriations bill, we do not believe that would present a difficult problem for Congress. Holdout costs are the major problem.

227. See Stith, supra note 149, at 607. Some entitlement programs do require that Congress pass an annual appropriation. See id. at 607 n.92. Under these programs, however, Congress feels obligated to pass the appropriation so long as the law that establishes the entitlement is in place, and some commentators have argued that benefits might be paid even if the annual appropriation were not passed. See Staff of the House Comm. on the Budget, 103d Cong., The Congressional Budget Process: 1974-1993, at 11 (Comm. Print 1994); Allen Schick, The Capacity to Budget 41 (1990). Thus, even entitlement programs that require annual appropriations are not subject to the normal annual appropriations process.
though bills that establish or expand entitlement programs are subject to holdouts, they are far less vulnerable than appropriation bills. Because the entitlement program or its expansion is not yet in existence, the public does not yet rely on the program, and there is much less pressure to enact it by a specific date. If holdouts demand unreasonable concessions, Congress simply can postpone the establishment or expansion of the program until a more convenient time. Therefore, application of a supermajority rule to entitlement programs would create only minor holdout costs.

The second reason to require a supermajority to establish or expand entitlement programs is that entitlement programs are more difficult to eliminate or reduce than programs funded through the ordinary appropriations process. Because entitlement programs are funded by permanent appropriations, eliminating or reducing such programs requires passing a law that otherwise would not be necessary. In contrast, programs funded through ordinary appropriations can be effectively eliminated simply by failing to pass a new appropriation and can be cut merely by reducing funding in an appropriation bill that would have to be passed anyway. Moreover, benefits under entitlement programs often are represented as rights rather than simply subsidies, in part because the programs are not subject to the appropriations process. Eliminating or cutting such programs is difficult because Congress then appears to be violating the rights of the beneficiaries.

4. The Ninety Percent Supermajority Rule

Instead of a supermajority rule that applies to individual appropriation bills, we propose a supermajority rule that applies to

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228. See, e.g., SCHICK, supra note 227, at 41.
229. See supra note 227 and accompanying text.
231. See, e.g., Stith, supra note 149, at 604-05 nn.70-72 (stating that programs that are not obligated or appropriated expire at the end of the year).
232. See SCHICK, supra note 227, at 41.
233. See id.
the total amount of government spending enacted by Congress for a particular year. Under our rule, a supermajority would be required to authorize total government spending in excess of a specified percentage of the previous year's spending. As explained below, we estimate that ninety percent is the appropriate percentage. Thus, if Congress wanted to spend more than ninety percent of the total amount spent last year, a supermajority of each house of Congress would have to pass a resolution authorizing it to do so. So long as the resolution was passed, Congress would not be required to pass individual spending bills with a supermajority. If Congress were willing to spend ninety percent or less than the amount spent in the previous year, no resolution would be required and it could simply pass spending bills with a mere majority vote.

a. Holdout Costs

This ninety percent supermajority rule would avoid the holdout problems that would arise under a supermajority rule for all spending bills. Under the ninety percent rule, holdouts would have much less leverage. If some members attempted to obtain unreasonable concessions by threatening to prevent the passage of spending bills and cause a government shutdown, a majority of each house could simply enact spending at ninety percent of the previous year's amount. With the threat of a government shutdown eliminated, Congress would be in a far better position to bargain with holdouts and pass additional spending.

234. One difference between a supermajority rule for increases in total spending and such a rule for individual spending bills is that the former would limit existing entitlement programs. Increases in spending under entitlement legislation would be counted in the amount of total spending, even though such increases would have been provided for under existing law. See, e.g., id. at 41-42 (stating that spending has increased significantly under existing entitlements).


236. The percentage of the previous year's total spending that should require a supermajority vote depends on a balance between two considerations that point in opposite directions. First, the percentage should be high enough so that a majority of Congress is willing to enact temporary spending at this level while it negotiates
b. Impeding Private Interest Spending

A ninety percent supermajority rule also would result in more efficient spending. Like the supermajority rule for all spending bills, the ninety percent rule would require Congress to secure additional support for the spending that it enacts. Although the ninety percent rule differs from a supermajority rule for all spending bills, the differences would not prevent the ninety percent rule from also improving the efficiency of federal spending.

The most important distinction between the two rules is that the ninety percent rule does not guarantee that a supermajority will approve the individual spending bills. One might therefore question whether the ninety percent rule will limit federal spending. Nonetheless, the rule is likely to constrain federal spending because the members of the minority would attempt to use their leverage over the spending resolution to acquire some power over the content of individual spending bills. They could do this by refusing to approve spending resolutions until the budget process was structured to confer some credible information on them about the content of federal spending. Under this type of budget process, the minority could use its leverage over the spending resolution to ensure that Congress takes its desires into account when determining the content of federal spending.

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238. The minority could argue persuasively that the decision on whether to pass the spending resolution cannot be made intelligently without this information.

239. There are two basic approaches to structuring the budget process that would provide the minority with credible information. First, Congress might vote on the spending resolution towards the end of the budget process, after the spending bills were enacted (or at least were reported out of committee). This would enable the minority to evaluate the spending bills that actually were passed. It would have the disadvantage, however, of requiring the minority to vote on the spending resolution at the end of the budget process. If the minority considered the spending bills to be seriously deficient and refused to pass the spending resolution, it would be costly and difficult to revise the spending bills. See generally Krishnakumar, supra note 235, at 603-09 (demonstrating that the impact of evaluating major spending legisla-
Although the minority would be able to influence the content of federal spending, it would exercise this influence differently than it would under a supermajority rule for all spending bills. Under that rule, the minority would decide whether to support each spending bill separately. By contrast, under the ninety percent rule, the minority would decide whether to support the spending resolution based on the total package of spending bills that Congress is likely to pass.

Although the minority will evaluate spending bills as a package rather than individually, its influence still is likely to improve the efficiency of federal spending. When evaluating whether the spending package promotes their legislative goals, members of the minority probably would evaluate the package as the sum of the individual spending bills that it contained. Thus, action at the end of the budget process can be very costly, as evidenced by the budget battle of 1995 and the subsequent government shutdown).

Second, Congress might structure the budget process to require passage of the spending resolution at an early stage, but include rules and instructions on the level and content of spending within the resolution, including the total amount of spending, the amounts allocated to different budget functions, and significant changes in spending decisions from the prior year. These rules and instructions would be binding on Congress, but could be changed by a supermajority vote. One problem with this approach is that past experience suggests that Congress may be hesitant to make these difficult decisions early in the budget process. See STANLEY E. COLLENDER, THE GUIDE TO THE FEDERAL BUDGET: FISCAL 1997, at 54-56 (1996).

Many intermediate approaches also could be devised that would ameliorate the defects of either approach. We describe just one such approach as an illustration. Under this procedure, Congress attempts, at an early stage in the process, to pass a spending resolution that contains binding rules and instructions with a supermajority. If Congress is unable to schedule or pass the resolution, congressional rules would provide it with two choices. First, Congress can pass a spending resolution with only majority support. Then, any spending bill that passes with a supermajority and conforms to the resolution would be deemed passed under congressional rules and would be authorized under the 90% rule. In this way, Congress could authorize its total spending on a statute-by-statute basis. Second, if Congress did not pass the spending resolution with even a mere majority, a default rule applies that uses the previous year's spending resolution, but at 90% of the previous year's spending levels. The default rule would force Congress to act as if it will be unable to pass the spending resolution. Because this will force committees to report unattractive spending bills, it may pressure members to reach an early compromise. See generally Garrett, supra note 230, at 390 (discussing that the current budget structure considers programs funded through annual appropriations bills as one package).
the popularity of the package would be a function of the popularity of the individual spending bills that it contained. If the package primarily contained spending bills that individually could secure the support of only a majority, the total package would be unlikely to secure a supermajority. By contrast, if the package mainly contained bills that individually could pass with a supermajority, the entire package would be likely to be supported by a supermajority. The effect of the ninety percent rule therefore should be similar to that of the supermajority rule for individual spending bills—the promotion of efficiency in federal spending.

There are other ways in which the ninety percent supermajority rule would function differently from a supermajority rule for individual spending bills, but these differences would not prevent the ninety percent rule from promoting efficiency. First, the minority has less leverage to restrain actions by the majority under the ninety percent rule. Under a supermajority rule for individual spending bills, no spending could be enacted without the support of a supermajority. Thus, a minority that prevented the passage of an inefficient spending bill would know that its approval would be needed to pass any subsequent spending bill in that area. By contrast, under the ninety percent rule a simple majority could always choose to avoid the supermajority requirement and pass spending bills that totalled less than ninety percent of the amount spent in the previous year. The existence of this option, however, is unlikely to reduce the leverage of the antispending minority significantly because the majority generally would deem a reduction in total spending of more than ten percent to be extremely undesirable. 241

241. Although a majority would find it unattractive to enact spending for the year at 90% of the level in the previous year, it would not necessarily consider it undesirable to enact temporary spending at that level to deal with holdouts. The principal leverage that holdouts have is that they can force a government shutdown by preventing the passage of appropriation bills. See, e.g., Krishnakumar, supra note 235, at 606-09. A majority's ability to enact temporary spending at 90% of the level of the previous year thus would significantly reduce the power of holdouts. A majority would not deem the passage of such temporary spending unattractive because the public would understand that it was done only to prevent the government from shutting down and was likely to be revised upward soon.
A final distinction between the two types of supermajority rules is that the ninety percent rule is more prone to logrolling. Under a supermajority for all spending bills, members vote on each spending bill separately. Although one member may agree to vote for bill A in exchange for another member's agreement to vote for bill B, the transactions costs of such arrangements are high. There is no enforcement mechanism that prevents one of the members from breaking his promise. By contrast, under the ninety percent rule, members would decide whether to pass the spending resolution on the basis of the entire package of spending bills. When an entire package of bills is voted on, exchanges can be built into the package. Thus, by voting for the entire package one member would agree to vote for bill A because his vote also would help bill B to pass. Because no separate agreements need to be defined or enforced, the transactions costs of logrolling are reduced.

It is possible that the additional logrolling produced by the ninety percent rule may cause more private interest spending by furnishing legislators with the opportunity to pass pork-barrel legislation. Any such tendency of the ninety percent rule, however, could be remedied by increasing the supermajority required to pass the spending resolution.

We conclude that the ninety percent rule would improve the efficiency of federal spending. Although the rule would differ from a supermajority for all spending bills in several respects, it would still share the essential feature of constraining private interest spending.

242. See MUELLER, supra note 30, at 82-85.
243. See id. at 85 (arguing that the lack of any enforcement mechanism prevents any credible assurance that individual members will not break their promises). Moreover, because the promise is likely to be oral, there may be genuine misunderstandings about the terms of the agreement.
244. See Garrett, supra note 230, at 397-98.
245. See BUCHANAN & TULLOCK, supra note 164, at 134-35 (describing this process as "implicit logrolling"); MUELLER, supra note 30, at 84-86 (describing transaction costs involved in ordinary logrolling).
246. This effect of logrolling is uncertain. While logrolling can produce local, pork-barrel spending, it also may cause efficient spending, as when a small group receives large benefits from a spending provision that could not pass without vote trading. See MUELLER, supra note 30, at 83-84 (describing efficient and inefficient uses of logrolling).
5. Circumventing Restrictions on Spending with Tax Preferences and Regulations

Although the two-part spending supermajority rule would restrict private interest spending by Congress, one might argue that the rule will not reduce the overall amount of special interest legislation. Special interests might secure benefits through other types of legislation that would not require a supermajority. First, instead of obtaining a spending subsidy, special interests might secure benefits through regulatory legislation. For example, rather than providing workers with Social Security retirement benefits, Congress might require employers to provide pensions. Second, special interests might also secure benefits through a tax preference. A reduction in taxes could be structured to equal the subsidy that the special interest would have received.

Although Congress is likely to substitute some special interest regulatory or tax legislation for special interest spending legislation, a spending supermajority rule would still result in a substantial reduction of the total amount of special interest legislation because it would force special interests to pursue their benefits with methods that incur greater political opposition. Regulatory and tax legislation are not perfect substitutes for spending legislation. Although regulatory and tax legislation can mimic spending legislation, they often differ in terms of public perceptions, the routes they must follow in the legislative process, and the groups that they affect. Thus, the opposition that a special interest would incur in securing a benefit under regulatory or tax legislation often will differ from the opposition it would face under spending legislation.

Under the existing regime of majority rule, each special interest will choose to obtain benefits through the method that incurs

248. See Garrett, supra note 230, at 397-401.
249. See generally BUCHANAN & TULLOCK, supra note 164; MUELLER, supra note 30.
250. See generally Shaviro, supra note 247, at 61-64 (indicating that special interests are treated much differently by Congress with respect to tax legislation, than they are with other types of legislation).
the least opposition. Special interests seek benefits under spending legislation only when it is easier than obtaining benefits under regulatory or tax legislation. If a spending supermajority rule forces a special interest to seek regulatory or tax benefits rather than spending benefits, it will have forced the special interest to incur additional opposition. Consequently, some special interests that would have received spending benefits would not be able to secure regulatory or tax benefits. The total amount of special interest legislation should therefore be reduced.

Although a supermajority rule would lead to less special interest legislation, the magnitude of the reduction remains to be determined. We contend that there are important reasons why special interests often find tax or regulatory legislation less attractive than spending legislation. Given the relative unattractiveness of these substitutes, a supermajority rule applied to spending would lead to a substantial net reduction in special interest legislation.

We begin with the relative unattractiveness of regulatory legislation. There are various ways that regulatory legislation can be designed to provide the same benefits that spending legislation would confer. A regulation might impose an obligation on private parties to transfer funds to a special interest. Alternatively, a regulation might require the public to pay higher prices for a good sold by a special interest. Finally, a regulation might confer a monopoly on, or restrict the competition with, a special interest.

251. See McGinnis & Rappaport, Constitutionality, supra note 164, at 509-10 nn.124-25 (arguing that public choice theory suggests that Congress will choose to enact programs in a way that minimizes the opposition to them).
252. See id. at 510 n.125.
253. See generally Jonathan R. Macey, Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory, 74 VA. L. Rev. 471, 478 (1988) (arguing that third parties suffer significant social costs when they attempt to block legislation that would transfer wealth from them to special interests).
254. See generally id. at 478-79 (indicating that regulations can impose great costs upon competing firms by requiring them to expend resources in order to comply with regulations, thereby driving consumer prices higher).
255. See id. at 479.
These types of regulatory legislation often will be more difficult to enact than spending legislation. First, the private entities who bear the burden of these regulations often will be better organized than taxpayers generally. For example, the consumers of a specific industry, especially where the industry sells to other large businesses, generally will be more concentrated and politically effective than diffused and unorganized taxpayers. Second, regulatory benefits also may be more vulnerable to criticism from the public. Often, it is not difficult to view a government spending program as promoting a public purpose. Transfers of funds from one private entity to another, however, often appear as naked redistributions for private purposes. Such private transfers also are more visible than government subsidies funded out of general tax revenues, and therefore are more likely to be the object of criticism.

Consider now the ability of special interests to secure benefits through tax preference legislation. Special interests often obtain benefits through spending subsidies rather than tax preferences because it is often easier to garner support for subsidies. First, subsidies generally can be portrayed as solving a problem and therefore as a legitimate expenditure. Thus, subsidies to small business can be characterized as promoting the economy, subsidies to farmers as preserving traditional lifestyles and promoting an industry, subsidies to the arts as promoting cultural life, and subsidies to the elderly, unemployed, poor, or disabled as

256. For a discussion of other reasons why it will be difficult to substitute regulatory and tax preference legislation for spending legislation, see John O. McGinnis & Michael B. Rappaport, Still a Solution: In Further Support of Spending Supermajority Rules, 40 WM. & MARY L. REV. 527, 530-35 (1999).

257. See generally Anthony S. McCaskey, Comment, Thesis and Antithesis of Liberty of Contract: Excess in Lochner and Johnson, 3 SETON HALL CONST. L.J. 409, 461-63 (1998) (concluding that regulatory legislation imposes significant costs upon wealthier private entities and therefore will receive more opposition because of the private entities’ capacity to influence legislation with financial and political support).

258. See id.


260. But see Shaviro, supra note 247, at 63.
aiding a needy group. Subsidies also can be provided in the form of government services, such as building roads, providing insurance, or generating electricity, which also can be portrayed as solving a social problem. By contrast, tax preferences to particular groups often are seen as special privileges rather than as attempts to solve a problem. Consequently, it is easier for special interests to obtain ideological and common sense support for spending increases and avoid significant opposition to them.

Another difficulty in obtaining benefits through tax preferences is that they limit the size of the benefit that a special interest can obtain: the special interest cannot receive more than it pays in taxes. Moreover, even tax preferences that represent merely a significant portion of a recipient's taxes may create public image problems. Legislation that reduces a firm's income taxes by one-third still may create a significant stir if publicized.

262. See generally Gerald E. Frug, City Services, 73 N.Y.U. L. REV. 23, 54 (1998) (indicating that government services can often be portrayed as solving a social problem).
263. See, e.g., Shaviro, supra note 247, at 61-64 (demonstrating that people often resent tax preferences to particular groups because the preferences are perceived to benefit the wealthy).
264. When special interests do rely on tax preferences, they often do so by sneaking them through the political process as part of a larger bill rather than as a means of solving a problem. There are, however, limits on how much can be accomplished through such clandestine methods. When large and publicized tax preferences are enacted, as with the home mortgage interest deduction or the health insurance exclusion, they are likely to benefit large portions of the population and to be justified as promoting important goals, such as home ownership or health care.
265. Our claim that the amount that a special interest pays in taxes limits the value of tax preferences is only strictly true of traditional tax preferences. Recent tax legislation established refundable tax credits, which require cash to be paid to persons if the credit exceeds the taxes they owe. If such credits become more common, they may come to be viewed simply as subsidies. See Karen Tumulty, Hey, Bill, That's Ours, TIME, July 14, 1997, at 49 (arguing that the five hundred dollars per child tax credit is a subsidy rather than a tax reduction).
266. See Miriam Galston, Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities, 71 TEx. L. REV. 1269, 1289 (1993) (showing that tax preferences given to businesses for lobbying expenses, representing a significant portion of those businesses' taxes, are viewed as problematic).
267. The structure of administrative agencies also may make it easier for special
Finally, the legislative process also may make it easier for a special interest to secure subsidies than to secure tax preferences. Because Congress typically enacts legislation through the committee system, special interests can influence legislation by controlling committees that are important to them.\textsuperscript{268} It is often easier for a special interest to influence a committee with jurisdiction over a few industries than one with authority over many industries.\textsuperscript{269} Authorization and appropriation committees control spending legislation, and authorization committees have jurisdiction over relatively few industries.\textsuperscript{270} Tax legislation, by contrast, is controlled by tax committees that have jurisdiction over taxes for all industries.\textsuperscript{271} Thus, because some of the committees that control spending are focused more narrowly than the tax committees, special interests are able to exercise more influence over those committees.\textsuperscript{272}

For these reasons, regulatory benefits and tax preferences are ineffective substitutes for spending programs.\textsuperscript{273} Although these interests to obtain benefits through spending rather than tax preferences. One method of providing special interest subsidies is for Congress to pass a spending program that appears to promote the general interest, but then to allow the special interest to control the agency administering the program. This method makes it more difficult for the public to determine that the program is benefitting the special interest rather than the public. See Peter H. Aranson et al., \textit{A Theory of Legislative Delegation}, 68 CORNELL L. REV. 1, 34-39 (1982). This method, however, can be used only if the special interest can influence the agency. It is easier for a special interest to control an agency limited to a specific industry rather than one that has jurisdiction over many industries. See Jonathan R. Macey, \textit{The Political Science of Regulating Bank Risk}, 49 OHIO ST. L.J. 1277, 1284-85 (1989). Although many agencies that implement spending programs are limited to one industry, such as the Small Business Administration and the Department of Agriculture, the Internal Revenue Service has authority over every industry. See Carl D. Liggio, \textit{The Changing Role of Corporate Counsel}, 46 EMORY L.J. 1201, 1203-04 (1997).

268. \textit{See} Macey, \textit{supra} note 253, at 512.

269. \textit{See} Macey, \textit{supra} note 267, at 1285 (asserting that special interests that attempt to influence committees with jurisdiction over a few industries generally have fewer special interests to compete with than special interests who attempt to influence committees with jurisdiction over many industries).


271. \textit{See} \textit{id}.


273. If special interests do prove more successful in substituting tax preference and
forms of special interest legislation probably would increase after the passage of a supermajority rule for spending, that increase would be considerably smaller than the reduction in special interest spending caused by the supermajority rule. The supermajority rule thus would reduce special interest legislation substantially.

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regulatory legislation for spending legislation than we think they would be, we would consider applying supermajority rules to those categories of legislation as well. We would not begin constitutional reform with these more sweeping supermajority rules for two reasons. First, there is a strong argument for incrementalism in constitutional reform: begin with the least radical constitutional change arguably sufficient to solve the problem of governance at issue. See Ernest Young, Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation, 72 N.C. L. REV. 619, 688-97 (1994). Second, supermajority rules for regulations and tax preferences are, in certain respects, more problematic than supermajority rules for spending. See infra notes 302-09 and accompanying text (arguing that a supermajority rule should not be applied to regulation).

274. More generally, the argument might be made that spending supermajority rules will lead to greater social costs by forcing rent-seekers to obtain transfers in the form of regulations, or tax preferences that are more costly to society. See Jim Chen & Daniel J. Gifford, Law as Industrial Policy: Economic Analysis of Law in a New Key, 25 U. MEM. L. REV. 1315, 1347 (1995). The effect of any constitutional restraints on rent-seeking is ultimately an empirical one, turning in part on “how much the total level of transfers falls relative to the increased costs of creating transfers.” John R. Lott, Jr., Does Political Reform Increase Wealth?: or, Why the Difference between the Chicago and Virginia Schools is Really an Elasticity Question, 91 PUB. CHOICE 219, 220 (1997). We have offered strong reasons supporting the proposition that the total level of transfers will fall under a spending supermajority rule because spending transfers will decrease and their likely substitutes—transfers in the forms of regulation or tax preferences—will not be as easy to obtain from the legislature. See supra notes 247-73 and accompanying text. Moreover, there is little evidence that transfers through regulation or tax preferences are more costly than spending subsidies, but even if they were, the fact that transfers with greater social costs generate more substantial opposition would limit their use. See Erin A. O’Hara & William R. Dougan, Redistribution Through Discriminatory Taxes: A Contractarian Explanation of the Rule of the Courts, 6 GEO. MASON L. REV. 869, 917 (1998).

Further, we should not expect individuals to react to constitutional reform only by substituting other forms of rent-seeking. Insofar as it becomes more expensive to obtain transfers, individuals also will substitute productive methods of obtaining resources such as labor and invention. See Macey, supra note 253, at 475. Indeed, our previous discussion of American history provides evidence that constitutional structures that cabin excessive spending have in the past led to economic growth rather than to costly transfers. See supra notes 74-109 and accompanying text.
We thus conclude that a supermajority rule for spending would improve the character of federal spending compared to that enacted under majority rule. Next we explain that supermajority rules also are superior to absolute constitutional limitations as a method of controlling spending.

B. Supermajority Rules Function Better than Absolute Constitutional Limitations as to Fiscal Legislation

Although absolute limitations and supermajority rules are both mechanisms for constraining the legislature, they differ significantly in at least two important respects. First, absolute limitations protect a right or principle irrespective of how strongly Congress seeks to pass legislation that violates that right. Supermajority rules, by contrast, allow Congress to pass any legislation it chooses. They merely require that Congress secure additional support to pass certain types of legislation.

Second, absolute limitations primarily rely on decisions by courts whereas supermajority rules attempt to divide responsibility between the courts and Congress. Under absolute limitations, courts decide whether a law violates the limitation. Under supermajority rules, by contrast, courts determine whether a bill is the type that requires a supermajority to pass, but Congress ultimately decides whether to pass it.

These characteristics of supermajority rules make it possible to frame supermajority rules that place more modest responsibilities on the courts than do absolute limitations. Under a regime comprised of absolute limitations, courts alone determine whether an activity is protected. Thus, to ensure that only the right activities are protected, the courts must consider many factors. For example, under relevant First Amendment jurisprudence, courts must determine not only whether an action, such as flag burning, is speech, but also what reasons justify a restraint on speech and whether these reasons justify a restraint in a particular case.\(^{275}\) By contrast, supermajority rules may place far less responsibility on courts because courts do not make the entire decision as to whether an activity is protected but instead share

Supermajority rules therefore can assign simpler and less controversial decisions to the courts. For example, under a rule requiring a supermajority for all spending bills, courts merely would determine whether a statute constitutes "spending legislation." A court would not have to decide the type of reasons that justify the spending at issue or whether it is justified in a particular case. These decisions are not assigned to the courts under supermajority rules because Congress makes them.

Given these differences, it should be no surprise that absolute limitations and supermajority rules function well in different circumstances. The next section discusses the circumstances under which each of these two decisionmaking rules performs best. We then argue that supermajority rules function better to govern fiscal legislation than do absolute limitations.

1. Circumstances When Absolute Limitations and Supermajority Rules Function Well

Absolute limitations and supermajority rules work best under different circumstances. Absolute constitutional limitations perform well when courts can be relied upon to apply a principle that precisely captures the activity that the nation wants to protect. There are three conditions for the success of absolute limi-

276. Not all supermajority rules, however, will assign the courts more modest responsibilities than absolute limitations. For example, if one adopted a rule that required Congress to pass any legislation that violates the First Amendment by a supermajority vote, that rule would assign the same responsibilities to the courts as they now exercise under the First Amendment. In this Article, however, we focus our attention on supermajority rules that place fewer duties on the courts than do absolute limitations, because such rules allow the Constitution to assign tasks to courts and legislatures for which they are particularly suited.

277. Under absolute limitations, Congress is not allowed to make these decisions and therefore it is necessary for the courts to make them.

278. Under both absolute limitations and supermajority rules, courts are responsible for the enforcement of the supermajority rule. If the legislature attempts to authorize spending without a supermajority, and the executive seeks to spend that money, how should the courts respond? We will postpone a discussion of this important issue regarding supermajority rules until Section IV. Enforcement of a constitutional limitation on spending is necessary under a regime utilizing either absolute limitations or supermajority rules, therefore enforcement issues will not help decide between these two decisionmaking rules.
tations. First, there must be a category of activity that society wants to protect absolutely. For example, some individual rights are plausible candidates for such protection. Second, a determinate principle must be available to carve out the category for protection. Freedom of speech has turned out to be a relatively determinate principle.

Third, no matter how determinate a principle is as an abstract matter, it also must be one that courts are capable of enforcing neutrally. Thus, it also must be the kind of principle that courts can apply using distinctive jurisprudential methods, including interpretation through text, structure, purpose, history, and reasoned elaboration. Courts also must have the incentives to apply the principle neutrally. History reveals that there is a serious risk that the Supreme Court may extend or restrict the application of constitutional principles. In particular, when a powerful political movement strongly desires to enact legislation, courts may narrow the constitutional provision to avoid the wrath of these groups and the loss of political capital. For

279. See infra note 288.
280. When there is not a determinate principle and interpreting the principle requires the exercise of substantial amounts of discretion, the courts have more of an opportunity to distort the principle. See John O. McGinnis, The Spontaneous Order of War Powers, 47 CASE W. RES. L. REV. 1317, 1320 (1997).
281. See 1 WILLIAM BLACKSTONE, COMMENTARIES *59-62 (stating that courts interpret laws through structure, purpose, and history); William N. Eskridge, Jr. & Philip P. Frickey, An Historical and Critical Introduction to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at xci, 1374-80 (1994) (advocating reasoned elaboration as the method for interpreting laws); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 41-51 (rev. ed. 1994) (discussing interpretation through structure, purpose and history); Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 368-69 (1978). If the principle is interpreted better through other methods, such as compromise or negotiation, the courts will be poorly suited to interpret it.
282. See generally WOLFE, supra note 281 (discussing changes in constitutional interpretation over time).
283. See Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 VA. L. REV. 1, 7-18 (1996) (arguing that the Supreme Court rarely, if ever, protects a group or interest that has no support in the political process). Moreover, if the courts persist in defying the political branches, the President may appoint and the Senate may confirm new judges who will interpret the provision narrowly.
284. Alternatively, judges might choose to depart from a constitutional provision
instance, the Supreme Court greatly expanded the Commerce and Spending Clauses during the New Deal in response to popular support for the President's initiatives.285

By contrast, the successful operation of supermajority rules mandates that Congress, rather than the judiciary, be the right kind of final decisionmaker for the issues covered by the supermajority rule. Supermajority rules thus are best applied in areas in which the distinctive strengths of legislatures are useful—strengths such as democratic accountability, expertise about public policy, and the ability to negotiate compromise solutions. By placing the ultimate decisionmaking responsibility on Congress, supermajority rules do not require that courts exercise as much responsibility as do absolute limitations. Thus, the courts are more likely to perform their function well under supermajority rules.

The greater congressional role means that a supermajority rule would not require a guiding legal principle that the nation wants to enforce absolutely, but only a category of legislation that the nation wants to subject to greater legislative consensus. Moreover, while that category must be capable of definition, it is easier to find such a category because one need not worry that Congress will be prohibited absolutely from passing legislation in that category. Thus, one can choose a category that is overinclusive but simple for the courts to administer.

Moreover, supermajority rules not only make it easier to find a well-defined category but also help the judiciary to apply this category neutrally. Supermajority rules relieve the judiciary of much of the political pressure that impedes its faithful interpretation of absolute limitations. Under a supermajority rule, courts will never need to decide cases in opposition to a truly powerful political consensus. If particular legislation is supported by such a consensus, that legislation will be able to secure the requisite


285. See WOLFE, supra note 281, at 164-80; Richard A. Epstein, The Proper Scope of the Commerce Power, 73 Va. L. Rev. 1387, 1443-54 (1987); see also supra note 123 (discussing an alternative interpretation of the reasons why the Supreme Court did not enforce the Commerce and Spending Clauses after 1937).
supermajority to pass Congress. Courts therefore will face much less pressure to distort the categories of supermajority rules than to distort absolute limitations.

Further, if the proposed legislation is less popular and cannot obtain the support of a supermajority, the courts cannot be assigned the primary responsibility for the failure of the legislation to pass. If Congress fails to obtain a supermajority, people will view the legislation's defeat as largely Congress's fault. When enforcing absolute limitations, the courts are isolated and politically exposed, but in determining the applicability of supermajority rules the courts are simply part of a larger democratic process.\(^{286}\)

The greater stability of supermajority rules suggests that absolute limitations such as the Commerce and Spending Clauses might have had a longer life if they had been drafted as supermajority rules. Congress then could have passed national regulatory and spending laws during the New Deal because of the overwhelming support for such legislation. Yet, the content of these clauses would have remained unchanged and continued to limit the federal government when the sense of national crisis had abated and popular support for the legislation had waned. In this way, supermajority rules permit the Constitution to bend so that it does not break.\(^{287}\)

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286. Another reason why courts would be more likely to enforce supermajority rules is that these rules provide the courts with fewer decisions, and thus, less discretion than absolute limitations. It is therefore more difficult for the courts to deviate from the supermajority rule.

287. A second reason why judges sometimes narrow a constitutional provision is to make it conform to their own values. See ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 129-32 (1990). Many of the reasons that should cause judges to resist political pressure to narrow supermajority rules more than absolute limitations also should cause judges to consider their own values less when interpreting a supermajority rule. First, judges have less incentive to narrow provisions under supermajority rules because a supermajority rule is less likely to restrain the legislature than an absolute limitation. Congress can still pass legislation under the supermajority rule if it secures the requisite number of votes, but cannot do so under the absolute limitation. Second, supermajority rules provide judges with less discretion. Finally, judges are likely to be criticized by a stronger group for narrowing a supermajority than for narrowing an absolute limitation. Judges will have an opportunity to narrow a supermajority rule only if a bill passes with a mere majority; if the bill passes with a supermajority, there is no need for a judicial
Having identified the circumstances when absolute limitations and supermajority rules work best, we are now in a position to show that supermajority rules are better at governing fiscal legislation.

2. Fiscal Legislation Is Best Governed by Supermajority Rules

a. Absolute Limitations Govern Fiscal Legislation Poorly

Although absolute limitations perform better than supermajority rules in some circumstances, absolute limitations would not function well to constrain fiscal legislation. Instead, supermajority rules are much better adapted towards this end.

Resolution. When judges narrow a supermajority rule, therefore, the opponents of the narrowing will always be a large minority of the Congress. By contrast, under an absolute limitation, judges may narrow a provision when a large percentage of members favor the legislation that the absolute limitation would prohibit. Thus, in some cases, judges may narrow an absolute limitation when there are very few opponents of such an action.

288. One area in which absolute limitations may function well is the protection of individual constitutional rights. Absolute limitations protect individual rights more completely than do supermajority rules because Congress cannot override absolute limitations. See John R. Vile, Contemporary Questions Surrounding the Constitutional Amending Process 38-39 (1993). Moreover, the courts might be able to exercise adequately the extraordinary power of judicial review as to individual rights. First, when the interpretation of individual rights provisions requires the exercise of discretion, the distinct methodology employed by courts is an appropriate way of deciding the issue. The judicial practice of interpreting constitutional provisions by considering text, structure, history, and purpose is a suitable method for determining the actual meaning of the constitutional provision. See supra note 281 and accompanying text. Moreover, reasoned elaboration of principles is an appropriate method for giving content to individual rights. See Vile, supra, at 37-38.

Second, when undertaking the task of interpreting individual rights, there is less chance that the courts will unduly narrow a provision because they are intimidated by either the political branches or a political movement. The courts will be able to defend controversial decisions regarding individual rights because there is a general belief that the special role of the courts is to enforce individual rights. See Lane V. Sunderland, Popular Government and the Supreme Court: Securing the Public Good and Private Rights 92-95 (1996). The principal concerns of the political branches also do not lie with the definition of individual rights, but instead with other areas such as foreign and defense matters as well as taxation and spending. Thus, the political branches generally are less likely to object vigorously to judicial decisions regarding individual rights than to decisions in these other areas.
There are few, if any, determinate principles in the fiscal area that society would want to enforce as absolute limitations. Regarding debt, one might prohibit all government borrowing, but history suggests and most observers believe that such an absolute prohibition would be too restrictive.\(^{289}\) It likewise is difficult to construct an absolute limit on spending or taxes. One might prohibit spending or tax increases above some percentage of the gross domestic product (GDP), but such caps would be too restrictive during times of war or economic emergency.\(^{290}\) It is hard to imagine any plausible absolute limitation that does not confer excessive discretion on the courts. For example, although many people might believe that debt should not be issued unless necessary for the attainment of an important public purpose, such a standard would let the courts define the highly malleable concept of "important public purpose."

Moreover, even if an absolute limitation were enacted, the courts are unlikely to interpret the limitation effectively. First, the courts are best at interpreting principles that require limited discretion, but, as we have indicated, there are no nondiscretionary principles that deserve absolute protection.\(^{291}\) Second, even if the courts can competently exercise discretion in some areas, they are not well-equipped to exercise discretion in the fiscal area. The courts generally are believed to lack expertise on fiscal matters because historically such matters have not been the subject of judicial action.\(^{292}\) The judicial ideal is to decide cases on enduring, neutral principles. This aim—admirable as it is on the level of meting out justice—is hardly workable when it comes to hammering out budgets.\(^{293}\) Moreover, judges

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289. The ability to raise debt, for example, has proved decisive in fighting major wars, see GORDON, supra note 3, at 11, 67, and has been important for major infrastructure improvements, see, e.g., id. at 123. Arbitrary limits on borrowing, such as restricting borrowing to two percent of the sales tax revenues, are thus problematic for the same reasons.

290. See id. at 11, 67.

291. See supra note 289 and accompanying text.


293. See Elizabeth Garrett, Harnessing Politics: The Dynamics of Offset Require-
are insulated from politics. Fiscal issues, however, are largely political issues, where compromises and political deals are inevitable, if not desirable.  

For similar reasons, courts also are not likely to have popular support in enforcing absolute limitations in the fiscal area. While there is a belief arising out of our constitutional tradition that the courts have a special responsibility in enforcing individual rights, there is no such tradition in fiscal matters. Thus, the courts are likely simultaneously to face enormous pressure to interpret fiscal limitations narrowly and to possess little ability to resist such pressure.

b. Supermajority Rules Govern Fiscal Legislation Well

In contrast to absolute limitations, supermajority rules function quite well when limiting fiscal legislation. Indeed, supermajority rules are superior to absolute limitations in virtually every category. First, there are many plausible supermajority rules that can be applied to the fiscal powers of the federal government. The most politically visible of these rules is the Balanced Budget Amendment, which would require a supermajority to borrow money. Other supermajority rules include those that require a supermajority to raise taxes, to pass spending bills, or to authorize total spending beyond a limited amount. The abundance of fiscal supermajority rules results because there is no single constitutional principle that we seek to enforce. Instead, people want to restrain borrowing, spending, and taxing, which tend to become excessive in representative democracies.

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ments in the Tax Legislative Process, 65 U. CHI. L. REV. 501, 502 (1998) (“The question of how to allocate scarce governmental resources is political; neutral principles will not provide answers.”).
294. See Frug, supra note 292, at 716, 740; Fuller, supra note 281, at 400-01 (arguing that the allocation of resources, such as through spending decisions, is a polycentric task that cannot be decided through adjudication but can be addressed in the legislature through political deals and negotiations).
295. See Frug, supra note 292, at 740 (asserting that courts typically do not question legislative decisions on taxes or the allocation of revenues).
296. See, e.g., Seto, supra note 151, at 1468-69.
Second, the division of responsibility between the legislature and the courts functions well in the fiscal area. Allowing Congress to decide whether and how much to spend, borrow, or tax is entirely appropriate. Fiscal decisions are legitimately based on negotiation and compromise, and should be made by those accountable to the public. Moreover, Congress has expertise in fiscal matters.

The courts also are well-suited to performing their assigned role under supermajority rules. Under such rules, the courts simply decide whether legislation is of the type that requires a supermajority. Although it occasionally may be hard to identify precisely what constitutes debt, spending, or taxation, these decisions can be appropriately decided with judicial methods.

Indeed, the courts have far less discretion in making decisions under supermajority rules than they do when they decide traditional individual rights cases. As discussed above, when interpreting an absolute limitation such as the First Amendment, the courts make virtually all of the important substantive decisions as to whether speech may be restrained. By contrast, under a supermajority rule for spending, for example, the courts simply would decide whether the legislation authorizes spending and therefore requires a supermajority to pass. The courts do not decide when or whether such spending is justified.

Finally, the courts also have less incentive to depart from the actual meaning of a supermajority rule than that of an absolute limitation. As noted above, under an absolute limitation, there is

297. See Frug, supra note 292, at 740; Fuller, supra note 281, at 400-01.
298. See Frug, supra note 292, at 740.
299. By contrast, under absolute constitutional limitations, courts would be asked to interpret provisions governing, for example, the type of reasons why debt could be issued or whether debt could be issued at a particular time. These decisions might require the court to make sophisticated economic and political judgments about the need for debt. Such decisions are not normally thought to be appropriate areas for the application of legal principles and reasoned elaborations. See, e.g., Laurence H. Tribe, A Constitution We Are Amending: In Defense of a Restrained Judicial Role, 97 HARV. L. REV. 433, 441-42 (1983) (arguing that extremely detailed amendments, such as the proposed Balanced Budget Amendment, are ill-suited for the Constitution as it imposes certain functional constraints). Rather, these decisions are based on weighing competing values and the state of the economy.
300. See supra note 275 and accompanying text.
a danger that a strong political consensus may develop in support of legislation that the limitation prohibits.\textsuperscript{301} This would be an especially serious problem in the fiscal area, where constitutional provisions impinge on the core activities of the political branches and the courts are not viewed as having an important role. Fiscal supermajority rules blunt attacks on the courts because Congress has the final say.

C. A Supermajority Rule for Regulatory Legislation

Another category for possible application of supermajority rules is regulatory law. Like government spending, regulatory legislation can promote the public interest, as when it corrects an externality, or it can further private interests, as when it redistributes productive opportunities from one group to another.\textsuperscript{302} Moreover, just as concentrated interest groups have an advantage over the diffuse public in obtaining spending for themselves, they have a similar advantage in securing regulatory legislation that provides them with rents.\textsuperscript{303} A supermajority rule for all regulatory legislation would not, however, filter public interest legislation from private interest legislation as well as a supermajority rule for spending. The reasons for this conclusion provide a checklist of the considerations necessary for deciding whether to adopt supermajority rules.

First, public interest regulatory legislation is more likely to have concentrated special interest opponents than public interest spending legislation.\textsuperscript{304} For instance, consider legislation seeking to regulate the pollution caused by a production process.\textsuperscript{305} The producing companies are a concentrated interest

\textsuperscript{301} See supra text accompanying notes 283-87.
\textsuperscript{302} For a discussion of government action that corrects externalities, see MUELLER, supra note 30, at 25, and government action that simply redistributes under the guise of such correction, see id. at 235-38.
\textsuperscript{303} For a discussion of the advantages concentrated interest groups enjoy over diffuse interest groups in the political process, see supra notes 40-66 and accompanying text.
group ready to resist any effort to make them internalize their costs. Those suffering the widespread effects of pollution, on the other hand, are a classic instance of a diffuse group that is less effective at defending its interests in the political process. Thus, supermajority rules for regulatory legislation often would have the perverse effect of strengthening the hand of the special interests.

Second, as noted above, special interests more often face substantial opposition in obtaining private interest regulatory legislation than in obtaining private interest spending legislation because such regulatory legislation often harms more concentrated interest groups. As the public arena is not as skewed in favor of rent-seeking regulatory legislation as it is in favor of special interest spending, supermajority rules are less necessary to correct an imbalance.

One response to these objections might be to apply supermajority rules only to classes of legislation that make it easier for special interests to redistribute resources or opportunities to themselves. For instance, the supermajority rule could be applied only to regulatory laws that have disproportionate interest group support. The difficulty of clearly defining what constitutes disproportionate support, however, would make such a supermajority rule less effective because of the greater possibility of error when judges interpret an ambiguous rule. This underscores a general point: supermajority rules work best when they apply to well-defined categories.

306. See, e.g., Robert L. Glicksman, Federal Preemption and Private Legal Remedies for Pollution, 134 U. PA. L. Rev. 121, 123 (1985) (suggests that pollution-producing companies should be forced to internalize costs and harms imposed on others).


308. See supra notes 247-52 and accompanying text.

III. SUPERMAJORITY RULES AND THE CIVIC LIFE OF CITIZENS

In addition to leading to more efficient spending, our proposed fiscal supermajority rules also would advance important social goals. In this section, we argue that these supermajority rules would improve the moral and political life of citizens as well as promoting federalism, freedom, and private associations.

First, one of the greatest benefits of supermajority rules is the positive moral and political values that they help to instill in politicians and citizens. Under the existing regime of rule by legislative majority, because special interests can use the state to acquire private interest goods for themselves, each citizen naturally will regard his fellow citizens either as sources of wealth that he can seize or as threats to his wealth. The result is a political world of suspicion and division as citizens are pitted directly against one another in a litany of spending decisions that benefit some at the expense of others. In fact, the current political system provides incentives for politicians to encourage the formation of more divisive special interest groups because these groups may become a source of additional political support.310

In sharp contrast, supermajority rules make it harder to create a legislative agenda based on either satisfying merely parochial interests or obtaining transfer payments for particular groups.311 The requirement of greater consensus to pass legislation leads to a legislative agenda that appeals to a wide range of citizens.312 The search for this agenda in turn encourages citizens and politicians to ponder the aspirations and needs they

have in common. Such a political process would unite the citizenry because, in a world with consensus spending, citizens are more likely to identify with the polity as a whole rather than see themselves as part of an embattled minority struggling to obtain its share of government spoils.\footnote{313}

Indeed, the supermajority process for spending ultimately has the capacity to improve citizens' views of one another. Under supermajority rules, we would less often see each other as targets or threats in a zero-sum game of resource redistribution. Instead, we would more often treat one another as ends rather than as means, an ideal liberalism has sought since the Enlightenment.\footnote{314}

A second benefit of supermajority rules is that they promote federalism. By making it more difficult for Congress to pass legislation, supermajority rules would constrain the powers of the federal government and help to preserve the authority of the states to take actions without congressional interference. It is true, of course, that supermajority rules would not guarantee that any particular area would be entirely free of federal interferences, as the Framers' original design based on enumerated powers sought to do. Nonetheless, supermajority rules would reduce the amount of federal legislation in general. Moreover, because supermajority rules filter out bad legislation, they should also tend to block laws disproportionately in areas where the states legislate well, but to allow federal laws in areas where national legislation is needed.

Another benefit of fiscal supermajority rules is the increased freedom they bring to individuals.\footnote{315} The current excessive spending by the government leaves individuals with less money to spend on individual enterprises and projects of their own choosing. Additional government spending also results in a larger and more powerful bureaucratic state.\footnote{316} Such states provide

\footnote{313. See id.; see also MATT RIDLEY, THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION 262-65 (1996) (asserting that a less intrusive government—such as one bound by supermajority rules—creates greater civic virtue).}

\footnote{314. See, e.g., IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 46-48 (Lewis White Beck trans., Bobbs-Merrill Co. 1959) (1785).}

\footnote{315. See JOHN STUART MILL, ON LIBERTY 8 (Oxford University Press, 1963) (1859).}

\footnote{316. See Niskanen, supra note 135, at 630-35.
more opportunities for the exercise of arbitrary interference with freedom. Supermajority rules would reduce the size and intrusiveness of government, allowing individuals a greater measure of freedom.

Finally, supermajority rules also promote the growth of private associations. The large government produced by the special interest state has tended to crowd out many kinds of private associations. Because of the higher taxes necessary to pay for increased spending, citizens have fewer resources to create and sustain civic associations than they would otherwise. Moreover, because citizens see the government as responsible for addressing social issues, they are motivated less to organize privately to tackle those issues. In the latter half of this century, mediating institutions therefore have declined in power.

In contrast, by providing a civic world in which private citizens have more resources and more responsibility for solving social problems, supermajority rules have the potential to reinvigorate private associations and thereby create a social fabric richer in mutual aid and trust. First, such associations often perform functions, such as providing charity to the poor, more efficiently than government because they have information and initiative that government bureaucracies cannot replicate. Second, such associations have the capacity to mediate between the individual and the state, reducing the discrepancy in power between the citizen and government in a manner that reduces governmental arbitrariness and abuse of power. Third, private

318. Government spending is only likely to increase the number of associations whose primary purpose is to influence the direction of government spending. We already have discussed the unfortunate effects of such special interest groups. See supra Section I.A.2.
321. For a discussion of the manner in which civic associations create trust among citizens, see Ridley, supra note 313, at 247-65.
322. See Marvin Olasky, The Tragedy of American Compassion 222-24 (1992) (arguing that private assistance has helped the poor to help themselves, whereas public assistance has been structured to create a culture of dependency).
323. See Marshall J. Breger, Government Accountability in the Twenty-First Century,
associations offer the opportunity for individuals to become part of networks of trust and succor that unlock altruism and fellow-feeling. Finally, private associations allow individuals to develop talents and affections that they cannot nurture as easily at home or in the political realm. Of course, no system will eliminate conflict, dispel all alienation and cynicism, and bring about utopia; but at the heart of our case for supermajority rules, there is a moral vision of social harmony and cooperation.

IV. ANSWERS TO OBJECTIONS

This section answers the most common objections to fiscal supermajority rules. First, we address the major practical objections that have been made against fiscal supermajority rules—that realistic legal standards are both not available in fiscal matters and not susceptible of judicial enforcement. Second, we rebut the theoretical objection that fiscal supermajority rules are inconsistent with democracy. Third, we consider a recurring policy complaint—that supermajority rules are unfair to the poor by making it difficult to pass programs that benefit them. Finally, we argue that fiscal supermajority rules are superior to campaign finance reform—the structural change to our political system that is touted most often as the way to curb the special interest state.

A. Enforcement Objections to Fiscal Supermajority Rules

There have been two practical objections to supermajority rules, that have been made often in the context of discussing the Balanced Budget Amendment. The first is that legal stan-

57 U. PIT. L. REV. 423, 430 (1996) (discussing the need for mediating institutions to protect individuals against the power of the state).
324. See ALEXIS DE TOCQUEVILLE, THE OLD REGIME AND THE FRENCH REVOLUTION xiii (Stuart Gilbert trans., Doubleday Anchor 1955) (1856); Bruce C. Hafen, Schools as Intellectual and Moral Associations, 1993 BYU L. REV. 605, 615 (discussing the manner in which mediating institutions create social stability by nurturing communitarian feelings).
325. See OLASKY, supra note 322, at 219-20 (discussing compassionate groups that "emphasized personal contact with the poor, even when some of their members were stunned by the firsthand experience").
326. See supra note 20 and accompanying text.
dards concerning fiscal matters cannot be framed to capture fis-
cal realities. The second is that such standards would offer ex-
cessive discretion to the judiciary, providing it with too much un-
constrained authority over the budgetary affairs of the na-
tion. 327

Both objections may be put in the form of a dilemma. First, if
the rules were made simple and straightforward, the legislature
would be able to manipulate them through creative accounting
of revenue and debt; but if the rules were made sufficiently com-
plex to constrain the legislature, they would be too complicated
to enforce neutrally. 328 Second, if the rules were not enforced by
the judiciary, they would become a hollow promise, threatening
the credibility of the entire Constitution. But, if the judiciary
were authorized to enforce fiscal restraints, this authority would
aggrandize the courts and entangle them in tasks to which they
are inherently unsuited. 329 These dilemmas have a certain de-
structive synergy. Insofar as the rules are complex enough to re-
strain the legislature’s decisionmaking, they provide additional
discretion to the judiciary and make its role even more inappro-
priate.

We believe that the two-part supermajority rules that we pro-
pose can be crafted to resolve these dilemmas. First, our rules
require the definition of only two fiscal concepts—expenditures
and entitlements—and we are able to define those concepts
through the simplest of accounting rules, cash accounting. Sec-
ond, by authorizing the President to sequester funds that are
spent in violation of the rules, we minimize the need for judicial
intervention.

1. Standards That Capture Fiscal Reality

Unlike the Balanced Budget Amendment, the rules proposed
here require only relatively simple concepts to be defined. The
current version of the Balanced Budget Amendment requires the

327. See Tribe, supra note 299, at 441 n.38 (arguing against a Balanced Budget
Amendment because the judicial role would be too intrusive).
328. See Bruce H. Kobayashi, Game Theory and Antitrust: A Post-Mortem, 5 GEO.
329. See Tribe, supra note 299, at 441.
definition of debt, revenues, and expenditures. Debt, in particular, is a complex concept, as corporate finance has demonstrated.

In contrast, our spending supermajority rule limits government expenditures in the current year whenever they exceed ninety percent of the previous year's expenditures. We thus need to define only the concept of expenditures. Moreover, we can define expenditures in a very simple way—through cash basis accounting. Under cash accounting, a government expenditure is recognized in the year in which the government actually makes the cash payments. Accordingly, there should be little dispute over whether there was an expenditure, or the year in which it occurred.

We acknowledge that, in the context of the Balanced Budget Amendment, cash accounting has been criticized strongly as failing to take account of the complex fiscal realities of government spending. For instance, on a cash accounting basis, current Social Security obligations would not be recognized until cash expenditures are made generations later. If obligations are not recognized in the year incurred, Congress can avoid limitations on issuing debt.

If a fiscal rule requires a precise yearly measurement of debt or expenditures, a strong argument can be made that accrual accounting should be used because it more accurately reflects fiscal reality. Accrual accounting records expenditures as actual

330. See Seto, supra note 151, at 1478-83.
331. See id. at 1489-92 (discussing the difficulties of defining debt). For instance, it is not easy to determine whether the issuance of stock by government agencies should be understood as debt. See id. at 1491.
333. See Seto, supra note 151, at 1479-82 (discussing the accounting question as the major drafting issue for the Balanced Budget Amendment).
334. See id. at 1480. Some versions of the Balanced Budget Amendment therefore would allow the legislature to engage in covert spending without having those expenditures counted against the deficit. See id. at 1490.
335. See id. at 1486.
336. See, e.g., id. at 1463 (arguing that accrual accounting rules are superior to the cash method in supporting the conclusion that some deficit spending is beneficial in a formulaic balanced budget test).
obligations when those obligations are incurred. Thus, a Social Security obligation would be recorded when Congress created the entitlement rather than when the cash was paid out. A significant defect of such rules is that they require more judicial discretion in their application because the marker of a cash payout is absent. For instance, calculating the cost of Medicare under accrual accounting would require a complex set of assumptions and projections regarding the future.

Our ninety percent rule, however, does not require a precise measurement of expenditures to perform its function and therefore does not require accrual accounting. The primary purpose of the ninety percent rule is to ensure that total spending is authorized by a supermajority while mitigating holdout problems. The rule can accomplish this purpose without precisely measuring actual spending because ninety percent of the previous year’s spending will always be much less than Congress actually desires to spend. Even if Congress can manipulate spending under cost accounting to a certain extent, it is unlikely to be able to manipulate it enough to make spending at ninety percent of the previous year appear desirable. Consequently, manipulation will not allow Congress to avoid having to secure a supermajority to authorize the total amount of spending that it seeks to enact. Simple cost accounting standards, which give little discretion to the judiciary, therefore will be sufficient to police the ninety percent rule.

337. See CUNNINGHAM, supra note 332, at 34-35 (describing accrual based accounting).
338. See Kenneth R. Wing, American Health Policy in the 1980’s, 36 CASE W. RES. L. REV. 608, 618-28 (1986) (discussing the many variables on which future Medicare costs depend, such as longevity and frequency of utilization of health services).
339. See supra Section II.A.3.
340. In modern history, government spending has never declined by 10%. See supra note 145.
341. Even if Congress could manipulate enough big programs in a single year to avoid the supermajority requirement, this would be a one-year phenomenon. In the next year, the amount that Congress could spend without a supermajority would be even lower, because spending in the previous year, under cost accounting, would have been very low.
342. If manipulation will not allow Congress to avoid the supermajority requirement, it is unlikely that the rule will induce Congress to engage in any manipulation.
Similarly, a cash accounting method may police the rule requiring a supermajority to enact new entitlement spending.\textsuperscript{343} Almost any entitlement requires some spending on a cash basis in its first year even if its obligations balloon for future generations. Thus, the hair-trigger on the rule makes complex calculations unnecessary and its simplicity makes it difficult to circumvent.

2. Minimizing Judicial Discretion

The two-part supermajority rules that we advocate also can be structured to minimize the judicial intervention necessary for successful enforcement.\textsuperscript{344} We propose to make the President,

\begin{itemize}
\item \textbf{343.} We propose a two-part definition of entitlement. The first part would define an entitlement program as a law that purports to establish an entitlement to benefits to all persons who satisfy certain conditions. See General Accounting Office, A Glossary of Terms Used in the Federal Budget Process: Exposure Draft 44 (1993). This definition would cover virtually all existing entitlements programs. If the Constitution defined the term entitlement in this manner, however, we would predict that Congress would attempt to restructure the programs to avoid the supermajority requirement. We anticipate two such maneuvers.

First, Congress might pass an otherwise ordinary entitlement program that nevertheless explicitly allows Congress to eliminate the permanent appropriation that pays for the program. In the event of such a congressional decision, the law would instruct the executive to eliminate all program benefits. A program so structured would not meet the above definition of an entitlement, because the right to benefits would be contingent on the congressional decision. The program would effectively function like an entitlement program, however, because like ordinary entitlements, it would require payment of predetermined benefits unless Congress chooses to pass a law that has the effect of reducing benefits.

Second, Congress might pass an otherwise ordinary entitlement program with one modification: the executive has discretion to eliminate all benefits if it concludes it would be in the public interest. This program also would not meet the above definition of an entitlement, because it would not necessarily entitle given individuals to benefits. A program so structured would nevertheless function like an entitlement, because it is unlikely that the executive would choose to take the political heat for ending the program.

Extending the definition of entitlement as follows can impede these maneuvers around the entitlement supermajority rule: An entitlement also includes a law that otherwise would be an entitlement except that (1) it grants discretion to the executive to eliminate benefits or appropriations, or (2) it grants discretion to the legislature to eliminate appropriations by amending the existing appropriation.

\item \textbf{344.} It is a common assumption that fiscal provisions require more judicial interpretation than other constitutional provisions. We do not believe this assumption is necessarily true. Certainly "debt," "outlays," and "revenues" are terms with at least a
rather than the judiciary, the initial monitor of whether the legislature has complied with the supermajority rules. The ninety percent rule would state that the initial remedy for spending that exceeds the ninety percent level without being authorized by a supermajority vote is a proportional sequester of outlays by the President. That is, the President would be able to order a reduction of expenditures by an equal percentage in all areas (other than interest on the debt). Similarly, the initial remedy for the creation of an entitlement without a supermajority vote would be to prohibit the President from enforcing the entitlement legislation. This feature of our supermajority rules reduces judicial involvement in two important ways. First, it places the initial responsibility on the executive rather than the judiciary for enforcement of the rule. The judiciary thus will become involved only if both political branches fail in their role—Congress must enact more than ninety percent of the previous year’s budget without the resolution of a supermajority, and the President must fail to sequester. Moreover, if the matter had to be adjudicated, the courts simply would order the executive to implement a proportional sequester. Under this arrangement, the courts could make use of the executive’s budget expertise in determining the amount of the sequester.

Second, a presidential sequester would deter congressional violations of the rule. The sequester inevitably would provide the President with some discretion over spending reductions clear, technocratic core. There is no reason that the judiciary could not gain expertise in applying them as rapidly as it gained expertise in applying the terms of the Administrative Procedure Act. The authority to determine their meaning confers less wide-ranging power on the courts than disputes concerning more philosophically laden terms like “equal protection” or “freedom of speech.” See Sheldon D. Pollack, Constitutional Interpretation as Political Choice, 48 U. Pitt. L. Rev. 989, 1018-19 (1987) (noting the potentially open-ended nature of terms such as “equal protection”).

345. If a sequester failed to remedy overspending in violation of the supermajority rule, the amendment would require Congress to authorize retroactively that excess spending in the next year. Congress, therefore, would be required in the next year to authorize spending not simply in the amount that it intends to spend, but also the excess from the previous year. Failure to authorize this amount would require another sequester.

346. See Stith, supra note 149, at 601-02 (discussing the history behind placing budgetary expertise and power within the executive branch of government).
(even though these reductions should be proportional in principle). Lodging this discretion in the President would provide an additional incentive to Congress to comply with the amendment because Congress would not want to provide its political rival with the opportunity to exercise such power.\textsuperscript{347}

Finally, in order to ensure that the judiciary has an opportunity to enforce the supermajority rule as a last resort, the constitutional amendment establishing the supermajority rule also should provide for a particular cause of action. This action would enable any taxpayer to challenge expenditures that exceeded ninety percent of the previous year's budget but were not authorized by the requisite supermajority. Without such an action, it is possible that no one would have standing to enforce the amendment because the Constitution generally forbids taxpayer standing.\textsuperscript{348} This constitutional cause of action, however, would be circumscribed carefully to avoid excessive judicial intervention; it would not extend to taxpayer suits claiming that a sequester by the executive was excessive or disproportionate. Because the supermajority rule is designed to correct excessive spending, the constitutional amendment need not create an action to review other issues.\textsuperscript{349} Of course, Congress can establish statutory causes of actions for these other issues to the extent permitted by traditional standing principles.

\textsuperscript{347} Nevertheless, we do not believe that this feature of the rule is open to the objection that it is so unfavorable to Congress that Congress would never propose a constitutional amendment establishing a supermajority rule. Because the 90\% rule almost always would be satisfied, see supra notes 242-45 and accompanying text, the presidential sequester would be invoked rarely.

\textsuperscript{348} Taxpayer standing has been recognized only in a narrow class of individual rights cases. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) (viewing taxpayer standing for certain Establishment Clause claims as a narrow exception to the general rule precluding taxpayer standing).

\textsuperscript{349} As we have explained, the political system gives Congress and the President an incentive to spend excessively. It therefore is unlikely that the President would sequester excessive amounts, especially when he knows that many members of Congress will publicly criticize him if he does.
B. The Democracy Objection

This section responds to the argument that supermajority rules are antidemocratic. First, we show that this argument conflicts with American constitutionalism because the Constitution is full of provisions that restrain national majorities. In addition, we show that this argument exalts form over substance. Majority rule provides disproportionate leverage to certain groups in spending determinations because of the presence of special interests. Supermajority rules actually would promote more equal influence to the average citizen in the political process.

1. Democracy and Constitutionalism

The democratic objection to supermajority rules cannot be squared with the central premise of American constitutionalism that, to prevent tyranny, it is essential for a majority to precommit to institutions that constrain the majority in the future. Examples of such precommitments include the keystones of the Bill of Rights and the structure of federalism, both of which have frustrated the power of national majorities. In the United States, substantial majorities have been willing to enter into such precommitments both at the time of the framing and through enactment of subsequent constitutional amendments. These actions over the course of American history reveal a paradox at the core of any objection to supermajority rules based on simple democracy—to implement legislative majority rule, one would need to ignore the consistent wishes of popular majorities throughout American history to restrain legislative minorities. A supermajority rule for spending decisions would be, in this regard, no different than previous constitutional limitations. If adopted by a constitutional amendment, a supermajority rule

350. See supra Section I.A.2.
352. Other examples include the separation of powers and bicameralism. See supra notes 96-101 and accompanying text.
will have been adopted by a consensus that represents more than a majority of voters.\textsuperscript{354}

2. Democracy and Equal Influence

Even if one ignores the limits that constitutionalism places on democracy, the claim that supermajority rules are inconsistent with democracy is still mistaken. In its most general conception, democracy since its invention in ancient Greece has had two fundamental goals. First, under democracy, the people or their representatives rather than any fixed class or individual make major governmental decisions. Both classical and renaissance political theorists contrasted democracy in this respect with oligarchy and monarchy.\textsuperscript{355} Second, it has been a hallmark of democracy since Aristotle that government decisions are to be taken after discussion.\textsuperscript{356}

\textsuperscript{354} Under Article V, a supermajority rule could be incorporated into the Constitution only by an amendment proposed by two-thirds of the House or Senate, or by a constitutional convention called by two-thirds of the states, and then adopted by majorities of legislatures in three-quarters of the states. See U.S. Const. art. V.


\textsuperscript{356} See Aristotle, supra note 355, at 123, 126. As Ernest Barker noted:

The people at large have the merit of a good collective judgement not as a static mass, but when they are dynamic—in other words when they assemble, and when the process of debate begins. It is thus not an unfair gloss to suggest that Aristotle by implication assumes that the dialectic of debate is the final foundation of the principle of popular government . . . . In other words, democracy is based upon discussion.

\textit{Id.} at 126 n.1. Deliberation is valued because it helps those assembled reach decisions that are measured and considered rather than impulsive. See George F. Will, Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy 122-28 (1992). Deliberation also encourages individuals to make arguments appealing to shared interests, thus creating a greater focus on the common good. See Thomas Gais & Gerald Benjamin, Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform, 68 Temp. L. Rev. 1291, 1301 (1995). Finally, deliberation sometimes is claimed to be a good, independent of any improvement in decisionmaking, because it connects us to others, allowing us to flourish collectively in a way we could not individually. See Aristotle, supra note 355, at 5; Michael J. Perry, Morality, Politics and Law: A Bicentennial Essay 11 (1988); Miriam Galston, Taking Aristotle Seriously: Republican-Oriented Legal Theory and
Legislative supermajority rules of a modest degree (from three-fifths to two-thirds) do not in any way contravene this broad conception of democracy. Like majority rule, supermajority rule entrusts government to the representatives of people rather than to a fixed class and requires that decisions be made after discussion. A supermajority rule would offend democracy only if one added the requirement that each legislator possess formally equal voting influence on each piece of legislation.

We believe that this formal principle cannot be considered part of the historic core of democracy. Before we offer reasons for rejecting it, however, we observe that the supermajority rules that we advocate detract from the principle of formal equal influence only to a limited degree. Under supermajority rules, each legislator continues to have only a single vote. It is true that a supermajority rule will advantage some legislators and the voters they represent by making it easier for them to block spending legislation of which they disapprove. Over time, however, these same legislators and voters may be disadvantaged as the supermajority rule makes it harder for them to enact spending legislation they desire. Thus, a supermajority rule may create a diffuse equality of influence. Although one might attack this point as merely theoretical if representatives of the same individuals were advantaged repeatedly by the supermajority rule, the conditions of modern society assure that it is a prac-

357. Supermajority rules may also promote more deliberation. Jury deliberations provide some relevant evidence. It is well known that jurors deliberate more as the percentage of jurors required for decision is increased: unanimity rules engender more deliberation than supermajority rules, and supermajority rules engender more deliberation than majority rules. See Saul M. Kassin, The American Jury: Handicapped in the Pursuit of Justice, 51 OHIO ST. L.J. 687, 708-09 (1990).
358. This principle might be thought necessary if we were to infuse democracy with an equality principle. An emphasis on equality in a democracy, however, could lead as logically to a unanimity requirement as to a majority requirement; citizens are treated equally only if nothing is exacted from any citizen without his consent (or that of his representative in a representative democracy). Under that version of the equality principle, legislation therefore must receive the universal consent of everyone affected.
360. See id. This objection, however, can also be made against simple majority rule, which, as we have shown, also provides different degrees of power to differently sit-
tical truth.\textsuperscript{361} Because everyone has special interests regarding some kinds of legislation and is a member of the diffuse public for other kinds, everyone is advantaged and disadvantaged by the rule in a fairly unpredictable manner.

In any event, the formal equality of influence principle must be rejected because it exalts form over substance.\textsuperscript{362} Because of the power of special interests, a formal rule of equal influence when applied to legislative bodies may lead in practice to unequal influence among citizens.\textsuperscript{363} Under formal legislative equality, members of special interests have more leverage over legislation than members of the population as a whole.\textsuperscript{364}

Indeed, if democracy is to encompass an equality of influence principle, it should focus on substance rather than form, requiring rules that equalize actual influence. Supermajority rules then would be mandated when they counteract the power of special interests.\textsuperscript{365} In fact, by reducing the power of special in-

\textsuperscript{361} See Jaconelli, supra note 359, at 609 ("Over a sufficient span of time, a pattern could emerge under which a special majority provision . . . might work to the advantage in turn of each group within society.").

\textsuperscript{362} See Raymond Ku, Consensus of the Governed: The Legitimacy of Constitutional Change, 64 Fordham L. Rev. 535, 562 (1995) ("Simple majority rule may be legitimate in one context while not in another. Its legitimacy depends upon the circumstances in which the voting protocol is meant to operate and the principles that govern the political system.").

\textsuperscript{363} See supra Section I.A.2.

\textsuperscript{364} For a description of this leverage, see id.

\textsuperscript{365} The connection between supermajority rules and majority rule without special interests is illustrated by the following informal model. In the model, legislators vote for bills based on two kinds of popular support from voters. Most support derives from individuals and diffuse, unorganized groups. Some support for bills, however, derives from special interests, which are able to exercise significant influence beyond their numbers. In this simple model, special interests always seek to benefit themselves through additional spending. All spending legislation is supported by a single special interest, and each special interest has equal influence. In particular, each special interest has the ability to influence 10% of the members of a legislative body; thus, in a legislature with 100 members, a special interest can obtain 10 additional votes for spending programs that it supports.

If there were no special interests, legislation would pass under majority rule only if it were popular enough with ordinary voters to receive the votes of 51 legislators. Special interests, however, can use their influence to secure the passage of legislation that would receive only 41 votes due to the support of ordinary voters. Thus, special interest legislation passes only because of the disproportionate power of special interests.
terests, supermajority rules could cause the legislative process to function as an idealized majoritarian process with no special interests. Supermajority rules in a world with special interests may thus mimic majority rule in a world with no special interests.

Finally, the fundamental premise of the democracy objection—that supermajority rules constitute a sharp departure from

Under this model, a supermajority rule requiring the votes of 61 legislators to pass legislation can eliminate the power of special interests entirely. Under a supermajority rule, special interests will be able to secure the passage of legislation that only has ordinary voter support from 51 legislators. This legislation would pass under majority rule if there were no special interests. A supermajority rule therefore can function to neutralize the power of special interests and promote an ideal version of majority rule.

366. One might question the ability of any supermajority rule to mimic majority rule perfectly in a world without special interests. First, it might be argued that not all spending is supported by special interests. If there is some spending that is supported only by ordinary voters, the supermajority rule will impede this spending, even though it receives 51 votes entirely from ordinary voters in the model discussed above. We would argue, however, that virtually all spending has the support of special interests. For instance, a new prison may be a legitimate public interest good, but that does not mean that construction companies or prison guards will not support legislation to erect the prison. Even if there were some spending bills that special interests did not support, the question is how many bills qualify for this distinction. To conclude that a supermajority rule would move us away from idealized majority rule, one must determine that there are more spending bills that are supported entirely by ordinary voters than there are spending bills that receive special interest support.

A second criticism might focus on the model's assumption that one special interest supports each spending bill and that all special interests have equal influence. In reality, spending bills are supported by more than one special interest and some special interests are stronger than others. The influence of these special interests therefore may vary significantly with different kinds of spending. Nonetheless, even if no supermajority rule can mimic majority rule perfectly in a world without special interests, supermajority rules still can be designed that move us closer to the results produced by a system of majority rule in a world without special interests.

367. Supermajority rules also may help solve some of the difficulties in determining who is to count among those deserving of equal treatment. Society has been understood as "a partnership not only between those who are living, but between those who are living, those who are dead and those who are to be born." EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 110 (Arlington House 1966) (1790). In fact, much legislation in modern democracies—particularly legislation that creates government debt—pervasively affects the interests of those who do not vote, such as those under the voting age and those yet unborn. In the right circumstances, supermajority rules (such as one applied to raising debt) therefore may protect the interests of those not formally represented, promoting rather than undercutting the substance of the equal influence principle.
the tradition of majority rule—displays another fundamental misunderstanding of the American constitutional system. All rules that govern the legislature—whether majority rules, supermajority rules, or absolute limitations—are in essence supermajority rules. Legislative majority rule in the United States is bicameral, and bicameralism in some forms has been shown to approximate a mild form of supermajority rule.\textsuperscript{368} Absolute constitutional limitations can be changed by a supermajority through a constitutional amendment. In an abstract sense, therefore, the Constitution is pervasively supermajoritarian. The question is not whether we should adopt supermajority rules, but rather what type of supermajority rules we should employ.\textsuperscript{369}

\textsuperscript{368} See supra note 97.

\textsuperscript{369} Supermajority rules are also a mechanism for stabilizing legislative decisions without detracting from democratic decisionmaking. Theorists have shown that majoritarian procedures are subject to cycling. Cycling in a legislature can occur when more than two outcomes are possible and legislators do not rank the outcomes in a consistent fashion. See KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 3 (2d ed. 1963). For instance, consider three legislators A, B, and C and three proposals a, b, and c. A prefers proposal a to proposal b, and proposal b to proposal c. B prefers proposal b to proposal c, and proposal c to proposal a. C prefers proposal c to proposal a, and proposal a to proposal b. Thus, proposal a gains a majority over proposal b, and proposal b gains a majority over proposal c. But proposal c gains a majority over proposal a. Because of this cycle, the proposal to be ultimately adopted by the legislature is indeterminate and will depend on the sequence in which the proposals are considered in the legislative process. This is obviously not a desirable feature in a democratic system since it generates arbitrary and fluctuating outcomes. Political scientists have noted that such cycling is most likely to be present in an omnibus bill that makes redistributionist transfers, such as spending bills. See MUELLER, supra note 35, at 156-57. To prevent cycling, our legislatures give substantial power to agenda setters, such as committee chairmen. See Daniel A. Farber & Philip R. Frickey, The Jurisprudence of Public Choice, 65 TEX. L. REV. 873, 903 (1987). But strong agenda setters detract from the equal participation in legislation that may be thought important to democratic values.

Supermajority rules decrease cycling without the need for powerful agenda setters. The proof of this fact is quite complicated, but intuitively the reasons are clear. A unanimity rule prevents all cycling because any inconsistent preferences would operate to prevent passage of any alternative. For instance, under a unanimity rule neither proposal a, proposal b, or proposal c would be adopted. Supermajority rules require a greater consensus for passage and thus make inconsistent preferences count against enactment, thus reducing cycling. At some point, this effect is so powerful that a supermajority rule prevents cycling. See MUELLER, supra note 35, at 157; Andrew Caplin & Barry Nalebuff, On a Sixty-Four Percent Majority Rule, 56 ECONOMETRICA 787 (1988) (proving, under certain assumptions, that a 64%
C. The Claim That Supermajority Rules Hurt the Poor

Another objection to fiscal supermajority rules is that they make it harder to redistribute resources to the poor. But even assuming that such redistribution is a legitimate function of government, we question the factual premise of this argument. Majority rule does not particularly benefit the poor and, on certain realistic factual assumptions, actually harms the poor.

Politicians tend to redistribute resources to members of their electoral majorities and especially to organized special interest groups that support them. The question whether majority rules help the poor therefore depends on whether the poor are organized as a special interest group or are likely to be part of the electoral majority of the politicians who gain office.

The poor are not more likely than other groups to support politicians who win elections. If we define the poor as the lowest decile in income, a priori this decile is no more likely to be in the majority than any other decile. Indeed, because the poor vote less in percentage terms than other groups, those in the

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lowest decile will have less political influence than wealthier voters.

The poor are even less likely to organize as a special interest group. The poor are a diffuse group and have few resources to spend in becoming organized. Moreover, even if the poor did form an organized group, they would be relatively ineffective because they have little other than their votes to contribute to the support of politicians. The consequences of this fact seem apparent in the federal budget: the programs that are the largest and have the most political support are not programs for the poor, but instead are middle-class entitlements such as Social Security.

There are two possible objections to our argument that the poor are unlikely to be successful in the world of interest group politics. First, one might argue that some of the legislation intended to benefit other groups also benefits the poor: redistributions from the wealthy to the middle class arguably reach the poor eventually. One might describe this as the trickle-down theory of the welfare state.

This proposition, however, is unsupported by the evidence. For instance, although the war on poverty created benefits for middle-class bureaucrats, there is substantial evidence that it actually hurt the poor. Similarly, legislation that benefits teachers' unions seems to increase the drop-out rate in public high schools, disproportionately hurting the poor. These results


373. See Louis Kaplow, Fiscal Federalism and the Deductibility of State and Local Taxes Under the Federal Income Tax, 82 VA. L. REV. 413, 479 (1996) (stating that the poor, unlike the middle class, may lack the power to obtain redistributions).

374. See Ben W. Heineman, Jr., The Law Schools' Failing Grade on Federalism, 92 YALE L.J. 1349, 1353 (1983) (pointing out that middle-class entitlements crowd out programs for the poor).


376. See Caroline Minter Hoxby, How Teachers' Unions Affect Education Produc-
should not be surprising; there is no reason to believe that legislation intended to help majoritarian interests or special interest groups will systematically help other diffuse groups.

Moreover, the share of general resources shaken loose by such legislation and incidentally shifted to the poor may be outweighed by the disincentives or other bad effects that the legislation has on the poor.\textsuperscript{377} Welfare programs offer a prime example. Powerful public service unions support welfare because it requires a structure that provides jobs to their members.\textsuperscript{378} The disincentives to work caused by welfare are at best irrelevant to the interests of union members. Thus, the members oppose programs to alleviate such disincentives whenever such programs would threaten their interests even mildly, as when welfare recipients are given jobs that conceivably could be given to union members.\textsuperscript{379} Even worse, unions may benefit from these disincentives because the permanence of poverty assures their members' stable employment.

Second, one might argue that even if the poor are unlikely to be part of the winning coalition that confers government benefits, they have few resources to lose when they are in the minority. The net benefits over time are therefore positive for the poor, because they are immune from redistributive losses but sometimes are part of the winning coalition and receive benefits. Once again, this proposition is open to substantial doubt. It is true that the poor possess fewer assets and opportunities to lose than the rich. But legislation that deprives the poor of the limited resources they do have may harm them disproportionately.


\textsuperscript{378} See Leo Troy, \textit{The New Unionism in the New Society: Public Sector Unions in the Redistributive State} 136 (1994) ("To make further gains in membership, influence and power, public sector unions would naturally return to that well-spring and demand more government intervention on their behalf.").

For example, the flat Social Security payroll tax may harm the poor significantly because the money that they forego might have been used for necessities. Moreover, characteristics that correlate with poverty, such as a limited education, also may make it harder for the poor to circumvent legislation that restricts their opportunities. Thus, the adverse effects of redistributive legislation on the poor are likely to be longer lasting.

D. Supermajority Rules Are Superior to Campaign Finance Reform

Another argument against supermajority rules is that some other reform will better restrain the power of special interests. The alternative proposed most often is campaign finance reform. Although campaign finance proposals come in many varieties, they generally include a ceiling on the total amount of money that a candidate may spend to be elected, together with strict limitations on how much any individual or corporate entity can contribute to a campaign. In their strongest form, such proposals argue that Buckley v. Valeo should be overruled so that such limitations are immune from searching scrutiny under the First Amendment.

380. Similarly, legislation requiring only union workers on construction projects may have a very large effect on the unskilled workers who do not belong to unions precisely because they have few opportunities. Indeed, Professor Bernstein has shown that the purpose of Davis-Bacon legislation was to help unions avoid competition from lower wage workers, particularly ethnic minorities. See David E. Bernstein, Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation, 43 AM. U. L. REV. 85, 113-18 (1993).

381. The poor are on average less well educated. See Jane E. Larson, Free Markets Deep in the Heart of Texas, 84 GEO. L.J. 179, 219 n.216 (1995) (citing BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, THE EARNINGS LADDER 2-3 (1994)). The poor's lack of education also may make it difficult for them to adjust as quickly as other groups.

382. Moreover, if supermajority rules increase economic growth, the poor will benefit as well.


384. 424 U.S. 1 (1976). The Supreme Court in Buckley held that limits on campaign expenditures violated the First Amendment. See id. at 51.

385. For an argument that Buckley should be overruled, see Vincent Blasi, Free
Advocates of campaign finance reform suggest that their proposals would reduce the power of special interests in the political process by diminishing the leverage that special interests derive from their donations. Limitations on contributions are designed to prevent any single group from gaining undue leverage. A ceiling on spending by candidates reduces the aggregate influence of special interests, thereby increasing the influence of ordinary citizens.

Campaign finance reform, however, is inferior to supermajority rules in dissolving the special interest state. First, it is unlikely that campaign finance reform can be enacted in a way that applies neutrally to the contributions of all special interest groups. Enacting any reform in its theoretically pristine form through a democratic process, including our own, is difficult. Campaign finance proposals, however, face peculiar problems. Constitutional reform is most likely to be successful when politicians can only faintly see its adverse consequences on their careers. As we have noted, however, rent-seeking by rulers is a bane of all governmental structures and, in a democracy, one of the prime concerns of rulers is to construct a system that will keep them in office. Allowing legislators to write rules for campaign finance is to invite their regulation of the single matter that most directly affects their self-interest. The effect of a


388. See id. (postulating that campaign finance reform will open up the political process to average citizens).

389. See Cass R. Sunstein, Political Equality and Unintended Consequences, 94 COLUM. L. REV. 1390, 1414 (1994) (noting that there is good reason “to distrust any campaign finance system enacted by Congress, whose institutional self-interest makes this an especially worrisome area for national legislation”).

390. It therefore is hardly surprising that the most touted reforms, such as ceilings on spending, are likely to help incumbents. See Larry Sabato, Real and Imagined Corruption in Campaign Financing, in ELECTIONS AMERICAN STYLE 155, 169 (A. James Reichley ed., 1987).
supermajority rule on politicians' political careers depends on unpredictable future issues, while the effect of campaign finance rules can be predicted more accurately.

Campaign finance reform that is neither neutral nor comprehensive is unlikely to reduce special interest spending. Applied selectively, limitations on campaign contributions and spending will empower some special interests at the expense of those who are barred from contributing, and may in fact increase the incidence of redistributive legislation by removing countervailing interests. Thus, if the likelihood of obtaining comprehensive and neutral campaign finance reform from a self-interested legislature is very low, the cost of bungled reform is likely to be peculiarly high.

Even if reform measures were enacted neutrally among contributing interest groups, they would not reduce many sources of special interest power. The ability to avoid free rider problems creates the leverage of special interest groups and makes it more cost-effective for their members to expend effort and energy to influence the process. Monetary contributions are only one means of influence. As long as such groups can advance the electoral prospects of candidates through means other than monetary contributions, they may continue to exercise disproportionate influence.

One of the means that interest groups can use to exercise influence is to induce their constituents to vote for particular candidates based on narrow issues. For instance, unions are well-positioned to publicize issues to their members and to get them

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391. See Smith, supra note 383, at 1078 (noting that limitations on the influence of the wealthy have the sum effect of benefitting those with access to other forms of political power).
392. See id. at 1051.
393. See supra notes 40-44 and accompanying text.
394. See supra notes 46-50 and accompanying text (discussing various ways special interest groups can influence the government disproportionately through their organizational networks).
395. See Don M. Millis, Comment, The Best Laid Schemes of Mice and Men: Campaign Finance Reform Gone Awry, 1989 Wis. L. REV. 1465, 1485-93 (noting that special interest groups will use other means, including covert ones, to influence the political process if they are denied the opportunity to make campaign contributions).
396. See id. at 1492 n.130.
out to vote. Similarly, the American Association of Retired Persons wields more influence through its issue and mobilization network than through campaign contributions. Supermajority rules are superior to campaign finance proposals precisely because they erect a barrier to the success of all special interest proposals rather than a barrier to one means of special interest influence.

Further, campaign finance reform, however structured, would give substantial power to a single group: to those who express themselves for a living, including journalists, academics, and artists. Members of this "new class" have distinctive views on issues by virtue of the kind of work they do and the kind of education they received. Campaign finance reform would increase further the constitutional power of this class. Such reform restrains those who make their living in material production from expressing themselves in the political process by contributing to political candidates with whom they agree. It does not, however, limit those who make their living by manipulating symbols from communicating their political views. In seeking to resolve the problem of special interests, campaign finance reform perversely creates another group with disproportionate influence in the political process.

Finally, unlike supermajority rules, campaign finance reforms are likely to reduce the amount of information and deliberation in the political process. The special interest state is a threat to

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397. See id.
398. Some have suggested that campaign finance reform in fact disadvantages diffuse groups more than concentrated interest groups because the ability of diffuse groups to set up such networks and engage in other kinds of influence is in fact less than their ability to make campaign contributions. See THOMAS GAIS, IMPROPER INFLUENCE: CAMPAIGN FINANCE LAW, POLITICAL INTEREST GROUPS, AND THE PROBLEM OF EQUALITY 46-50 (1996).
399. Moreover, campaign finance reform proposals will tend to make it even harder for diffuse groups to engage in the political process. Regulation favors groups with the knowledge and resources to understand and manipulate the rules at the expense of newcomers to the political process and grassroots campaigners. See id. at 181-82. 400. See Smith, supra note 383, at 1077-78. Unsurprisingly, the new class largely favors campaign finance reform because such reform will increase its power. See id. at 1049 nn.2-3.
401. See id. at 1081-82 (criticizing many campaign finance reform proposals because of their tendency to limit the number of viable candidates).
our welfare, but so is a state driven by the passions of an ignorant citizenry. Political scientists have shown that rational ignorance is a structural feature of democracy; the average citizen lacks the incentive to acquire political information because individual inputs into the political process are unlikely to affect the outcomes reached by government.\textsuperscript{402} The danger of political ignorance among the citizenry is exacerbated by mass entertainment and advertising, in which political messages must compete with many other well-crafted messages on subjects most people find more amusing or useful than politics.\textsuperscript{403} Accordingly, politicians and advocates need substantial sums of money to shape messages that can be heard over the hubbub of modernity. Currently, less is spent on political campaigns than on such inconsequential goods as potato chips, and the public is remarkably ill-informed.\textsuperscript{404} Reducing the money spent on elections is likely to create an even less informed citizenry. In contrast, supermajority rules will not reduce, and may even enhance, democratic deliberation.\textsuperscript{405}

**CONCLUSION**

Edmund Burke defended the Glorious Revolution on the grounds that even revolution could be necessary to "preserve . . . that antient constitution of government which is our only security for law and liberty."\textsuperscript{406} He cautioned that the resulting reformation should proceed "upon the principle of reference to antiquity" and thus be "carefully formed upon analogical precedent, authority, and example" of prior law.\textsuperscript{407}

In this Article, we have endeavored to describe why fiscal supermajority rules are a conservative innovation of the kind

\textsuperscript{402} For a discussion of rational ignorance, see supra note 50. 
\textsuperscript{403} See John O. McGinnis, The Once and Future Property-Based Vision of the First Amendment, 63 U. CHI. L. REV. 49, 122 (1996) (discussing the problem political messages face in competing with other messages that citizens may find more useful or amusing).

\textsuperscript{404} See Smith, supra note 383, at 1058-60 (comparing expenditures on other goods to take issue with those who contend that too much money is spent on campaigns).

\textsuperscript{405} See supra notes 365-67 and accompanying text.

\textsuperscript{406} BURKE, supra note 367, at 43.

\textsuperscript{407} Id.
that Burke celebrated. Supermajority rules in fact are needed to perform a task analogous to that performed by structures of the original Constitution that either are anachronistic or have fallen into disrepair. Like federalism, supermajority rules can prevent the government from becoming an engine for producing private interest goods. Supermajority rules thus provide a contemporary mechanism for controlling the power of factions to use government for their own ends—the problem Madison considered most central to sustaining republicanism.

We recognize that even beneficial changes in a regime are effectuated only with difficulty. As Machiavelli noted, innovation in regimes "has as enemies all the people who were doing well under the old order, and only halfhearted defenders in those who hope to profit from the new." This halfheartedness "derives partly... from human skepticism, since men don't really believe in anything new till they have solid experience of it." We are optimistic, nevertheless, that supermajority rules can command widespread support. Over time, a regime broadcasts its pathologies so often that even the rationally ignorant become aware of them. The burdens of our special interest state are now so large and so persistent that the many diffuse interests are aware of the need for change. One sign of this need is that all sides of the political spectrum are pressing proposed constitutional amendments that are best understood as proposals to dissolve the special interest state.

Another reason for optimism is that supermajority rules dissolve a prisoner's dilemma that makes society poorer. As we have observed, a substantial majority of individuals would be better off without excessive government spending. But no one will give up their subsidies unless they can be certain that others will give up theirs as well. As a solution to this prisoner's dilemma, supermajority rules are squarely in the tradition of innovative mechanisms that have prohibited similar tragedies of the commons through the ages.

410. Id.
By providing a theoretical framework for fiscal supermajority rules and suggesting their optimal form, we propose substituting for the special interest state an alternative whose specificity and solidity will make it more compelling to those who might otherwise be halfhearted in their attachment to reform. The wide range of beneficial consequences produced by supermajority rules should appeal to an equally wide range of citizens—from those who want politics more centered on the common good to those who want improved prospects for economic growth. As the founding documents of our republic show, it is only on the basis of such a broad appeal that we can accomplish such fundamental change.