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RESPONSES

A FISCAL CONSTITUTION WITH SUPERMAJORITY VOTING RULES

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The objective of *Supermajority Rules as a Constitutional Solution*¹ is a laudable one: eschewing the court-centrism of most legal scholarship, Professors McGinnis and Rappaport emphasize the role of procedures in improving legislative outcomes and enhancing the quality of congressional deliberation.² This perspective is not a new one for these authors. Both have written extensively on supermajority voting rules in Congress,³ and Professor Rappaport has studied other political procedures that implicate structural constitutional issues.⁴ Although their conclusions in *Supermajority Rules* are incomplete because they neither examine supermajority requirements that have operated for years to shape congressional deliberation nor assess the me-

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1. John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999).

2. See, e.g., *id.* at 373-74.

3. See John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 Yale L.J. 483 (1995) [hereinafter McGinnis & Rappaport, *Constitutionality*]; John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327 (1997) [hereinafter McGinnis & Rappaport, *The Rights of Legislators*].

4. See, e.g., Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735 (1993); Michael B. Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 NW. U. L. REV. 771 (1997).

chanics of the modern budget process, their approach is one that other scholars would do well to consider. The work of courts—the traditional focus of legal scholarship and teaching—is only a small part of the work of modern lawyers. The issues addressed by legal scholarship must expand to account for this shift.⁵

Professors McGinnis and Rappaport identify several questions relevant to an institutional analysis that appropriately recognizes the role that all branches of the federal government play in furthering constitutional and policy norms.⁶ First, given the strengths and weaknesses of the various institutions, which one is better situated to vindicate particular constitutional values or to construct solutions to specific policy problems? The authors argue convincingly that certain “political” decisions, such as those concerning the nation’s fiscal policies, are ill-suited for judicial resolution and ought to be left primarily with the democratically accountable branches.⁷ Enhanced procedures may be required, however, to ensure that the legislative and executive branches act consistently with constitutional principles in the absence of aggressive judicial enforcement.

Second, can particular structures of decisionmaking work to ameliorate deliberative failures that we observe in legislatures? The authors identify several problems affecting congressional

5. Even court-centrists would do well to learn more about the legislative process because so much of the judiciary’s work concerns the interpretation of statutes. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 13-14 (1997) (“By far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations. Thus the subject of statutory interpretation deserves study and attention in its own right, as the principal business of judges and (hence) lawyers.”).

6. For other work recognizing the role of entities other than the federal courts in protecting constitutional norms, see Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

7. See McGinnis & Rappaport, *supra* note 1, at 442. Others have made similar arguments, particularly with respect to structural constitutional norms. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

budget process that can be addressed through procedural reforms. First, the influence of interest groups can lead to legislation benefitting a small part of society at great expense to the diffuse mass of taxpayers who pay for the subsidy.⁸ Legislators facilitate such rent-seeking because they can capture some of the rents; lawmakers know that their other constituents are unlikely to discover the existence or magnitude of such deals.⁹ At the least, this kind of interest group activity skews the distribution of public resources away from the public interest. Policymakers can work to devise procedures that either reduce interest group influence, or, more realistically, harness interest group activity to produce more public-regarding outcomes.¹⁰

The authors further contend that multi-member bodies are often subject to collective action problems.¹¹ For example, the budget context is plagued by a prisoners' dilemma. In short, members of Congress who individually think that "the public interest is best served by reduced federal spending" also realize that "most of their colleagues will not resist the temptation to spend."¹² Indeed, it would not be rational for the individual members to resist such a temptation: "The cost of government programs is spread among millions of taxpayers, while the benefits of federal spending can be concentrated on a few who will reward their benefactors."¹³ Even if voters choose to use elections as the appropriate mechanism to solve this problem, these

8. See McGinnis & Rappaport, *supra* note 1, at 378-82.

9. See generally R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 28-34 (1990) (discussing when the public is likely to pay attention to legislative action); MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 172-87 (1964) (analyzing when and how the larger public is likely to respond to legislative and political acts).

10. See AARON WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* 179 (3d ed. 1979) ("The proponents of change might consider ways and means of structuring the budgetary process so that their preferred strategies will turn out to be those which participants find it advantageous to pursue."); see also Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501 (1998) (discussing how interest group activity can be structured to reduce collective action problems, reach better budget outcomes, and provide information available to government officials).

11. See McGinnis & Rappaport, *supra* note 1, at 426-27.

12. Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1133 (1997).

13. *Id.*

"voters are likely to hold all members responsible for increased taxes or a higher deficit—not just the big spenders."¹⁴ Procedural frameworks can provide coordination to solve this dilemma.

Another way to frame this problem is as one of competing priorities. Lawmakers and constituents have preferences concerning the size of the federal budget, the method of financing government programs, and the larger objectives of the government. They may consistently undermine those objectives, however, when they make micro-level decisions about particular programs. Procedural frameworks work as precommitment devices to make it more difficult for lawmakers to defect from their primary preferences to satisfy conflicting subsidiary ones.¹⁵

Finally, procedures can provide legislators an opportunity to deliberate important constitutional and policy issues in a way that is transparent to the electorate. For example, procedures requiring congressional entities to produce particular information before floor debate may highlight issues that lawmakers would otherwise overlook.¹⁶ Of course, procedures cannot guarantee that deliberation will occur, or that the delay they produce will be used solely to improve public discourse rather than to block legislation for other reasons. Procedures may operate to emphasize particular issues and decisions for the electorate,

14. *Id.*

15. For discussions of such precommitment devices, see CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 180-81 (1993); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY: STUDIES IN RATIONALITY AND SOCIAL CHANGE* 195 (Jon Elster & Rune Slagstad eds., 1988). Conflicting preferences abound in the modern budget arena. See JOHN B. GILMOUR, *RECONCILABLE DIFFERENCES? CONGRESS, THE BUDGET PROCESS, AND THE DEFICIT* 19 (1990) ("Congress was constantly of two minds over the budget: supporting the programs and opposing the total. Its conflicted state of mind led Congress to contradict itself repeatedly.").

16. See, e.g., Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 4022, 1998 U.S.C.A.N. (112 Stat.) 685, 785-86 (to be codified at 26 U.S.C. § 8022) (requiring the Joint Tax Committee to disseminate Tax Complexity Analyses for proposed tax laws in an effort to highlight concerns about tax complexity); Garrett, *supra* note 12, at 1163-68 (discussing role of the Unfunded Mandates Reform Act in ensuring that Congress considers the value of federalism). The arguments Professors McGinnis and Rappaport offer concerning deliberation are slightly different and more closely connected to their anti-federalist objectives. See McGinnis & Rappaport, *supra* note 1, at 420-22.

however, and the discussion such procedures spark may lead to policies that are more consistent with public values and priorities.¹⁷

A third question that the authors pose in their institutional analysis, and a question that any study of congressional procedures must consider, is one of fit. If we are to apply enhanced procedures to particular kinds of legislation, perhaps because we believe the consideration of these bills is susceptible to one or more of the pathologies described above, how do we define the universe of laws that such procedures will govern? As the authors note, they are concerned with reducing the amount of private interest legislation; thus, in an ideal world, they would impose greater burdens, perhaps even absolute prohibitions, only on such proposals.¹⁸ But, it is difficult to sort out private interest bills from those serving the public interest, a situation that makes absolute bans unappealing. The authors argue that spending programs, other than those taking the form of tax expenditures, unfunded intergovernmental mandates, or regulations, comprise the set of proposals most likely to fall victim to

17. See Jon Elster, *Strategic Uses of Argument*, in BARRIERS TO CONFLICT RESOLUTION 236, 250 (Kenneth J. Arrow et al. eds., 1995) (calling this the "civilizing force of hypocrisy"); David Miller, *Deliberative Democracy and Social Choice*, XL POL. STUD. 54, 61 (1992) (special issue) ("Preferences that are not so much immoral as narrowly self-regarding will tend to be eliminated by the process of public debate."); see also AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 126 (1996) (arguing that although they are skeptical about the ability of open debate to "transform self-interested claims into public-spirited ones," public discussion does help to "rule out making arguments that one would not accept if others made them"); ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 56 (1996). Unger points out that

[s]ometimes, group selfishness may be tamed by being made to speak the magnanimous rhetoric of social concern. If hypocrisy is the tribute that vice renders virtue, this rhetoric may be usable as the device of a minimalist but realistic political morality. Just as often, however, self-dealing through law may be more effectively controlled by being recognized for what it is.

Id. But see Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1601 (1988) ("It simply is not possible to ensure that people are public-regarding merely because they defend or rationalize their actions on those grounds [of public-regarding verbiage].").

18. See McGinnis & Rappaport, *supra* note 1, at 403-04.

the process failures they list.¹⁹ Thus, they believe that greater procedural hurdles are justified in this context.

We may not be convinced that the authors' definition adequately fits their objectives—indeed, I argue that their category is at least under-inclusive, and they admit it is over-inclusive—but my point here is a more limited one. Their argument that any procedural response should be tailored in part according to the closeness of the fit is persuasive. In fact, their discussion only begins to identify the variety of procedural protections available. They emphasize two procedural responses: absolute prohibitions and constitutional supermajority voting requirements.²⁰ One can think of procedural protections as lying along a spectrum with the two identified by Professors McGinnis and Rappaport as among the strongest. The constitutional supermajority requirement itself can be strengthened or weakened depending on the threshold demanded for passage. Congressional rules that can be changed by the House or Senate with a majority vote offer less durable protection than constitutional provisions.²¹ Such rules can create any number of hurdles for legislation. Congressional rules can directly, or indirectly, require that supermajorities support enactment of particular laws.²² Less stringent rules can require separate majority votes

19. *See id.* at 405-06.

20. *See id.* at 434-35.

21. Virtually all congressional rules can be changed by a majority vote. Some, including myself, have observed that the Senate rules concerning cloture and filibuster can be changed only by a supermajority vote. *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 245-46 (1997); Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623, 678 n.180 (1996). This claim may be overstated. The Senate has imposed limitations on floor debate through proposals adopted by majority vote, such as in the case of budget reconciliation bills that must come up for a vote after a certain number of hours of floor debate. *See* SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE* 23 (1997).

22. There is an ongoing debate about the constitutionality of congressional rules requiring supermajority votes to enact particular kinds of legislation, such as the House rule requiring a three-fifths vote to enact a tax rate increase. For the primary contributions, see Bruce Ackerman et al., *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1995); Susan Low Bloch, *Congressional Self-Discipline: The Constitutionality of Supermajority Rules*, 14 CONST. COMMENTARY 1 (1997); McGinnis & Rappaport, *Constitutionality*, *supra* note 3; McGinnis & Rappaport, *The Rights of Legislators*, *supra* note 3; Jed Rubenfeld, *Rights of Passage: Majority Rule*

on particular provisions in a bill to disaggregate parts of a logrolled deal.²³ Where along the spectrum one locates the amount of procedural protection in a particular case depends, among other things, on the interests at stake, the flexibility required, and the closeness of the fit between the kinds of bills affected and the relevant values. If one is not sure how to calibrate the level of protection with the values, choosing a congressional rule allows for easier modification than is possible with constitutional provisions.

Having applauded the authors' approach, I must take issue with the analysis of their proposed reform of our "fiscal constitution."²⁴ Their application of the analytical framework might have been more convincing had they more closely studied and discussed the myriad supermajority voting rules, as well as other countermajoritarian features, that currently shape congressional decisionmaking, particularly in the budget context. More broadly, a sophisticated awareness of budget rules reveals gaps in their analysis and obstacles that could stand in the way of their proposal's reaching its desired outcomes. In the remainder

in *Congress*, 46 DUKE L.J. 73 (1996). However, even those who argue against supermajority requirements to *pass* legislation seem to suggest that procedural rules with supermajority requirements can be adopted to enhance deliberation or to serve other process values. See Ackerman et al., *supra*, at 1543 (noting, however, that the filibuster rules are "vulnerable to our constitutional objection"); Bloch, *supra*, at 2 (distinguishing filibuster rule from presentment rule); Rubinfeld, *supra*, at 87 (noting, similarly, that procedural rules do not alter the "rules of recognition"). The three-fifths requirement, or a similar procedural rule, however, could always be rephrased as a point of order, such as those that permeate the budget process, and apparently not trigger the constitutional concerns raised by legal scholars. Consider, for example: "Any member can raise a point of order against legislation adding a new tax rate or increasing tax rates. Such a point of order can be waived only by a vote of three-fifths of the body to proceed with consideration of the bill." Furthermore, because supermajority rules can be changed or repealed in virtually all cases by a majority vote, courts have been unwilling to find that lawmakers have standing to challenge them. See *Skaggs v. Carle*, 110 F.3d 831, 835-36 (D.C. Cir. 1997); see also *Raines v. Byrd*, 521 U.S. 811, 824-26 (1997) (articulating a stricter test for congressional standing).

23. See Garrett, *supra* note 12, at 1166 (discussing such a rule in the Unfunded Mandates Reform Act).

24. Professor Dam coined this phrase to refer to the framework governing federal fiscal decisions; some of the rules are in the federal Constitution, some are not. See Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 271-72 (1977).

of this Essay, I will provide more detailed information about supermajority rules and the federal budget process, and I will suggest how this data might affect the authors' conclusions.

I.

The most curious aspect of Professors McGinnis and Rappaport's lengthy treatment of supermajority voting requirements for some spending bills is the virtual absence of discussion of the plethora of supermajority voting rules governing congressional deliberation and the many other countermajoritarian aspects of legislative organization. I will not detail the latter, but they are familiar to even the most casual observer of Congress. For example, in virtually all cases, a committee comprising only a few members must approve bills before floor consideration.²⁵ In the House of Representatives, the Rules Committee must also agree to schedule the bill for consideration.²⁶ Furthermore, as Lynn Baker and Samuel Dinkin have discussed, the current allocation of representation in the Senate essentially results in supermajoritarianism because of the disproportionate power accorded to small states.²⁷

There are more obviously relevant examples of supermajority voting requirements, very similar to the amendment proposed by Professors McGinnis and Rappaport, save for the latter's status as a constitutional provision. The recent academic debate about

25. See McGinnis & Rappaport, *Constitutionality*, *supra* note 3, at 499 ("[L]ike the three-fifths rule, the committee system both promotes deliberation and impedes majoritarian legislative control."); see also Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 143-49 (1988) (explaining why congressional members rely on a committee system).

26. See CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 263 (1989).

27. See Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 24-25 (1997); see also Frank I. Michelman, "Protecting the People From Themselves," or *How Direct Can Democracy Be?*, 45 UCLA L. REV. 1717, 1723-24 (1998) (arguing that inherent in the notion of our democracy is a number of countermajoritarian aspects to allow for deliberation about outcomes and noting that "[t]he entire American constitutional system is primarily a check-and-balance system, and a check-and-balance system is countermajoritarian, designedly, without tears").

such requirements began when the House of Representatives adopted a rule mandating a three-fifths vote to pass a tax rate increase.²⁸ The Senate rules have long required a supermajority vote to cut off a debate and bring a bill to a vote,²⁹ and the ability to filibuster a motion to consider a bill (in addition to the vote on final passage) has given rise to the practice of Senate "holds." Under current practice, one senator can place a hold on the consideration of a nomination or a bill; the identity of the lawmaker who is blocking the floor debate and vote is not revealed publicly by Senate leaders in most cases.³⁰

Most surprisingly, the McGinnis-Rappaport article omits any consideration of the congressional experience with supermajority voting requirements in the federal budget process. Many of the congressional budget rules that structure decisionmaking are enforced through substantive points of order. When a member of either body raises a point of order, that house must vote to waive the objection before it can continue to consider the bill.³¹ Although the House Rules Committee waives most budget points of order through special rules governing floor consideration,³² in the Senate many such objections can be waived only by a vote of sixty senators.³³ For example, if passage of a spending bill would

28. See House Rule XXI(5)(c), H.R. DOC. NO. 103-342, at 652-58 (1995), as amended by H.R. Res. 5, 105th Cong. (1997).

29. See Senate Rule XXII (1998).

30. See Fisk & Chemerinsky, *supra* note 21, at 203-04; see also JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS, 103D CONG., 1ST SESS., BACKGROUND MATERIALS: SUPPLEMENTAL INFORMATION PROVIDED TO MEMBERS OF THE JOINT COMM. ON THE ORGANIZATION OF CONGRESS 1071-78 (Comm. Print 1993) (considering effect of filibusters of motions to proceed and possible reforms); Carroll J. Doherty, *Senate Caught in the Grip of its Own 'Holds' System*, 1998 CONG. Q. 2241, 2241-43 (detailing procedure and efforts to lift secrecy or modify practice).

31. See generally TIEFER, *supra* note 26, at 908-19 (discussing budget points of order and waivers.)

32. The House has waived budget points of order over 600 times since the 1974 Act became effective. See *How Did We Get Here From There: Reform of the Federal Budget Process: Hearings Before the House Committee on the Budget*, 104th Cong., 2d Sess. 93 (1996) (prepared statement of Rep. Charles W. Stenholm); see also TIEFER, *supra* note 26, at 915 (detailing waivers by the Rules Committee in the 97th and 98th Congresses).

33. See ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 91 (1995); TIEFER, *supra* note 26, at 916; see also Anita S. Krishnakumar, Note, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget "Train*

violate the limits set in the concurrent budget resolution, a point of order enforced by the sixty-vote requirement is allowed; the same is true if the budget resolution sets spending limits above those allowed by the applicable federal budget act.³⁴ Although the Senate has met the supermajority requirement to waive budget points of order, many objections have been sustained and resulted in modifications to the underlying spending or revenue bills.³⁵

The congressional experience with these rules provides rich empirical data to test the accuracy of Professors McGinnis and Rappaport's predictions about the fiscal policy that would result from their supermajority proposal. Have these supermajority rules worked to screen out private interest spending more than they have blocked programs serving the public interest? Have they caused members of Congress to abide by their commitments with regard to spending targets and the like? Compared to enforcement mechanisms that can be waived by majority votes or by a special rule in the House,³⁶ have supermajority constraints yielded different outcomes?

In one of the authors' few references to the current budget structure, they write that "when the pressure to choose among programs became too great, the only automatic aspect of Gramm-

Wreck," 35 HARV. J. ON LEGIS. 589, 615 (1998) (noting that the Senate has never mustered the 60 votes required to waive an objection under the Byrd Rule).

34. See SCHICK, *supra* note 33, at 95 box 5-1 (listing some of the most important budget points of order). The spending ceilings in the federal budget acts are enforced through a sequester procedure. See HOWARD E. SHUMAN, *POLITICS AND THE BUDGET: THE STRUGGLE BETWEEN THE PRESIDENT AND CONGRESS* 332-34 (3d ed. 1992) (describing the manner in which sequestration operates). If spending exceeds the cap, the Office of Management and Budget must order uniform cuts in outlays for nonexempt federal programs. See generally STANLEY E. COLLENDER, *THE GUIDE TO THE FEDERAL BUDGET: FISCAL 1994*, at 29-35 (1993) (noting the substantial power of the Office of Management and Budget, in the context of sequestration, given by the Budget Enforcement Act of 1990). Similarly, the statutory PAYGO requirements that apply to revenue and entitlement bills are enforced through a sequester of nonexempt entitlement programs. See Garrett, *supra* note 10, at 510-11.

35. See TIEFER, *supra* note 26, at 916-18 (observing that there were few points of order raised before the late 1980s, but discussing some contests that occurred after adoption of the Gramm-Rudman-Hollings Act).

36. New aspects of the federal budget process prohibit waiver of some points of order through a special rule. See Garrett, *supra* note 12, at 1163 (distinguishing the Unfunded Mandates Reform Act points of order from other budget points of order).

Rudman proved to be Congress's decision to eviscerate the statute.³⁷ Certainly, it is true that Congress backed away from the draconian deficit targets required in the original Gramm-Rudman-Hollings bill and finally, in 1990, chose to control the budget through spending targets rather than deficit measures.³⁸ Congress did not, however, repeal the budget framework; instead, it extended discipline to the revenue and entitlement portion of the federal budget. Moreover, while the authors are certainly correct that Congress fell short of its original objectives,³⁹ they fail to mention another relevant empirical question. Did the revised budget rules, many of which were enforced through supermajority voting requirements in the Senate, improve the fiscal situation relative to what it would have been in the absence of such controls? Most of those who study the federal budget process believe that the rules have had some bite; congressional spending patterns have been altered by this complicated framework.⁴⁰

Such an empirical analysis is warranted before the country embarks on any scheme to change the Constitution in the way the authors advocate. If Professors McGinnis and Rappaport believe that current congressional rules imposing supermajority requirements do not work, they need to explain why these rules fail and why their proposal will succeed. Given their prior work, we know they do not object to congressional supermajority rules on constitutional grounds.⁴¹ Perhaps, as the above-quoted pas-

37. McGinnis & Rappaport, *supra* note 1, at 370.

38. See Budget Enforcement Act of 1990, 2 U.S.C. §§ 900-907 (1994).

39. See McGinnis & Rappaport, *supra* note 1, at 369-70.

40. See, e.g., SCHICK, *supra* note 33 at 41 ("[PAYGO] has had a marked effect on new legislation. . . . Congress has achieved substantial deficit reduction by increasing revenue and cutting direct spending under existing law while also offsetting any deficit increases resulting from new legislation."); Philip G. Joyce & Robert D. Reischauer, *Deficit Budgeting: The Federal Budget Process and Budget Reform*, 29 HARV. J. ON LEGIS. 429, 438 (1992) ("The PAYGO process seems to have discouraged major efforts to increase entitlement spending or cut taxes or both."); James A. Thurber, *Twenty Years of Congressional Budget Reform*, 25 PUB. MANAGER 6, 7 (1996) ("The primary impact of PAYGO [the budget rules applying to tax and entitlement legislation] has been to discourage spending.").

41. See generally McGinnis & Rappaport, *Constitutionality*, *supra* note 3, at 483-512 (defending supermajority requirements as consistent with a textual reading of the Constitution and constitutional history); McGinnis & Rappaport, *The Rights of*

sage suggests, they believe that congressional rules are not sufficiently constraining. As they have argued previously, however, the fact that most congressional rules—even those requiring supermajority votes—can be changed, waived, or repealed by majority vote does not render them toothless.⁴² Why do the authors prefer the greater durability afforded by constitutional rules, and is durability more important than the greater flexibility provided by congressional procedures?

Perhaps current rules have not worked as the authors envision a well-functioning fiscal constitution should because members of Congress have learned how to evade their discipline. Again, understanding the details of such evasive tactics is important to determine whether the McGinnis-Rappaport Amendment is likely to meet its creators' stated objectives. As I will discuss in the second part of this Essay, their proposal contains loopholes that could allow Congress to continue current spending patterns—or, at the least, to fall short of meaningfully addressing the governmental failures the authors identify.

Before turning to a discussion of the federal budget that may provide insight into some of the evasion possible under the McGinnis-Rappaport Amendment, I will demonstrate more concretely what a study of current supermajority rules might have contributed to Professors McGinnis and Rappaport's analysis. Take, for example, the filibuster—a procedure that can operate to impose supermajority voting requirements on much of the Senate's business. It provides a fertile area for empirical analy-

Legislators, *supra* note 3, at 327-49 (defending the three-fifths supermajority requirement for the passage of an income tax rate increase against an attack that the requirement violates the Presentment Clause of the Constitution).

42. See McGinnis & Rappaport, *The Rights of Legislators*, *supra* note 3, at 345-46. McGinnis and Rappaport explain:

Repealable supermajority rules nevertheless perform a useful function and cannot be dismissed as merely hortatory The repeatability of a rule does not in general make it ineffective: for instance, the committee system itself is established by repealable rules but no one doubts its pervasive effects in shaping legislation. Supermajority rules in particular represent a public precommitment by the majority to a policy While the supermajority rule may always be repealed, the public commitment makes it more politically costly to do so than to simply vote [for the underlying legislation].

Id. (footnote omitted).

sis because it has been a feature of Senate debate for nearly 200 years.⁴³ Moreover, Rule 22, which allows the Senate to invoke cloture and limit floor debate, has been changed over the years, and the right to filibuster has been suspended for entire classes of legislation, such as some budget bills and many trade acts.⁴⁴ Comparing the experience under the different procedural regimes could allow the authors to prove their theoretical contention that supermajority voting rules would affect private-regarding bills more harshly than legislation consistent with the public interest.

Although my Essay will not provide the sort of empirical inquiry required to support or disprove this contention, a recent study of the filibuster by Professors Binder and Smith casts doubt on the accuracy of the McGinnis-Rappaport thesis. Binder and Smith dispute the notion that the use of the filibuster "has done little harm to the public welfare and has sometimes done much good."⁴⁵ It is common knowledge that filibusters by southern senators blocked most civil rights legislation in this century, even though many of these public-regarding proposals appear to have had majority support.⁴⁶ The list of all measures killed by the filibuster since 1789 arguably includes at least as many public-regarding proposals (e.g., antilynching bills, a genocide treaty, campaign finance reform, and a lobbying disclosure proposal) as it does private interest bills (e.g., President Clinton's 1993 supplemental appropriations bill and a bill to cut the capital gains tax).⁴⁷ Similarly, recent legislative actions that Binder and Smith cite as having been influenced by the filibuster or the threat to use it cannot fairly be characterized as overwhelmingly or primarily rent-seeking.⁴⁸

Of course, these lists do not disprove the McGinnis-Rappaport conclusion. The authors do not claim that proposals in the public interest will be unaffected by supermajority voting require-

43. See, e.g., BINDER & SMITH, *supra* note 21, at 60-63.

44. See *id.* at 188-95.

45. *Id.* at 127.

46. See *id.* at 154-55.

47. See *id.* at 135 tbl.5-1.

48. See *id.* at 144 tbl.5-2.

ments; their argument is substantially more sophisticated and complex.⁴⁹ Although the data provided by Professors Binder and Smith may give us pause about accepting at face value the theoretical arguments of McGinnis and Rappaport's article, this empirical work may not be sufficient to allow any firm conclusions. For example, the threat of the filibuster has certainly affected the course of more proposals than those that Binder and Smith list. Procedures that come into play on the Senate floor affect legislation in the early stages of drafting and committee consideration—in the Senate and the House.⁵⁰ It may well be impossible to get a sense of the full effect of supermajority voting requirements because of this complex interaction,⁵¹ but a more complete sense than that provided in McGinnis and Rappaport's article is certainly possible with the aid of the congressional record, empirical studies of the filibuster, and interviews with parliamentarians and Senate staff.

Another difficulty with testing the McGinnis-Rappaport theories using past experience with similar rules is the absence of any consensus definition of the public interest or of purely private interest spending. "Pork" is in the eye of the beholder; a private interest bill is often one that the commentator believes to be bad policy.⁵² The difficulty of drawing lines here is one reason questions of allocating federal resources are not susceptible to principled resolution by courts. For example, the labels I ap-

49. See, e.g., McGinnis & Rappaport, *supra* note 1, at 403-04.

50. See BINDER & SMITH, *supra* note 21, at 141-46.

51. See *id.* at 145 ("Because journalistic accounts generally do not address the possibility of a filibuster until a bill emerges from committee, the list includes no measures that were written or modified during initial committee action with a floor filibuster in mind.").

52. See Michael J. Gerhardt, *The Bottom Line on the Line-Item Veto Act of 1996*, 6 CORNELL J.L. & PUB. POL'Y 233, 238 (1997) (noting that pork is just an unattractive example of legislating for diverse interests "which is the very stuff of representative government"); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 89 (1985) ("All legislation and all legislator-constituency relationships are 'pure pork barrel.'"); Mathew D. McCubbins, Note, *Budget Policy-Making and the Appearance of Power*, J.L. ECON. & ORG. 133, 150 (Special Issue 1990) (noting that "pork" is a contested label and the classification is often used as a political device against disfavored spending); James Q. Wilson, *Democracy Needs Pork to Survive*, WALL ST. J., Aug. 14, 1997, at A12 (stating that "pork is the necessary glue that holds political coalitions together").

plied above may be contested—some may not agree that a cut in the capital gains tax rate is undesirable or that all the civil rights laws that were killed by filibusters were in the public interest.

The authors realize that the line between the two kinds of legislation is a tricky one to draw,⁵³ but I think it is even harder than they indicate. Take, for example, transfer payments to the elderly—a program they characterize as spending to benefit a private interest notwithstanding the tremendous popular support enjoyed by programs like Social Security and Medicare.⁵⁴ Certainly, such programs are nearly invincible in part because of the support of interest groups like the AARP.⁵⁵ In addition, however, Americans support some kind of public retirement and health insurance programs both to provide them a guaranteed source of income in the future and to reduce the current financial burden of older relatives.⁵⁶ Moreover, given the cognitive limitations that lead people to undervalue their needs in future years relative to present ones, some sort of mandatory savings program may be necessary to solve an inevitable failure of rationality.⁵⁷ I am not arguing here that subsidies for the elderly are necessarily in the public interest; indeed, I share the authors' concern that these transfer programs, particularly as they are now constructed, may be inefficient in some cases and cause unacceptable inequities across generations. I am merely pointing out the difficulty in characterizing particular programs as supporting or undermining the public interest.

At another point in their article, Professors McGinnis and Rappaport distinguish public-regarding from private-regarding

53. See McGinnis & Rappaport, *supra* note 1, at 378 n.38.

54. See *id.* at 380-81, 411-13.

55. See *id.*

56. See C. EUGENE STEUERLE & JON M. BAKIJA, RETOOLING SOCIAL SECURITY FOR THE 21ST CENTURY: RIGHT & WRONG APPROACHES TO REFORM 27-28 (1994).

57. See RICHARD A. POSNER, AGING & OLD AGE 295 (1995). Posner explains: Compelled savings for retirement . . . may reflect society's unwillingness to treat the current [younger] self as the "owner," for all purposes, of the body of which he is the temporary tenant. . . . This is just another example of the propensity of the young self to weight his own utility much more heavily than that of his future old self.

bills on the basis of their level of support. They suggest that bills serving the public interest are likely to have greater support than rent-seeking legislation and thus are more likely to survive a supermajority vote.⁵⁸ Again, a casual glance at the legislative process might make one skeptical about the accuracy of this assertion. For example, tax and appropriations bills with widely distributed private interest benefits, pejoratively referred to as "Christmas trees" because they provide goodies for so many interest groups, often command nearly unanimous bipartisan support.⁵⁹ Government ethics proposals, on the other hand, take several years, and sometimes decades, to overcome filibusters and other countermajoritarian threats. The most recent example of a proposal loaded with special interest giveaways—the Taxpayer Relief Act of 1997—passed by a substantial margin in both houses.⁶⁰ Although it was not susceptible to the threat of a filibuster in the Senate (because it was passed as a reconciliation bill), proponents would have faced no difficulty getting the necessary votes for cloture.

In the end, the dynamics of the legislative process do not lead me to accept without further proof the rosy picture presented by the authors concerning the effect of supermajority voting requirements. Increasing the hurdles in the way of passing legislation raises the costs of enactment. Such a move will price some interest groups out of the market, but a comparison of the benefits interest groups receive from federal legislation with the money they presently spend to influence Congress strongly suggests that many will be willing to meet the higher costs.⁶¹ In-

58. See, e.g., McGinnis & Rappaport, *supra* note 1, at 416 ("[I]t is normally assumed that the more votes a piece of legislation receives, the better the legislation.").

59. See generally SHUMAN, *supra* note 34, at 144-47 (explaining the meaning of the term "Christmas tree" bills and commenting on the problems they cause).

60. The Taxpayer Relief Act of 1997 passed by a vote of 253 to 197 in the House of Representatives and by a vote of 92 to 8 in the Senate. See 143 CONG. REC. S8480 (daily ed. Aug. 1, 1997); 143 CONG. REC. H4815-16 (daily ed. June 26, 1997).

61. For example:

[T]he 1993 tax bill included targeted relief for the real estate industry estimated to reduce federal revenues by \$9.1 billion over the first five years of enactment, and the provisions were worth much more than that to realtors, contractors, investors and related industries. In 1992 through 1994, however, real estate interests contributed only \$29.7 million to the

deed, supermajority voting requirements may increase the amount of special interest legislation as lawmakers work to assemble larger coalitions. As Daniel Shaviro has observed in noting the indeterminate effect of supermajority voting rules (in the context of requiring such a vote to approve deficit spending):

The need to assemble a 60 percent coalition might increase the amount of logrolling that was necessary. Suppose that 51 percent of the House was willing to approve a \$200 billion deficit, which in fact would result from the programs in place, but that getting to 60 percent required the leadership to woo extra votes by agreeing to additional spending programs and targeted tax cuts.⁶²

The key question concerns the preferences of lawmakers whose votes are required to make up the difference between majority support and supermajority support. If they demand increased special interest spending that does not impose concentrated costs on the constituents of others (as deficit spending and other financing methods can allow), the effect of the McGinnis-Rappaport Amendment may be more spending and a larger federal government.

campaign coffers of members of Congress.

Garrett, *supra* note 10, at 548 (footnotes omitted). The \$29.7 million figure may be somewhat understated. See *id.* at 548-49.

62. DANIEL SHAVIRO, *DO DEFICITS MATTER?* 258 (1997); see also Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145, 155 (1992) (hypothesizing that supermajoritarianism would result in "more wasteful rent-seeking and corruption than does bicameralism"); cf. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 90-91 (1991) (describing conditions under which a system that imposes higher transactions costs could increase interest group activity). Similar observations have been made in the context of enactment of a presidential line item veto; the price of the President's support may be additional spending that he supports. See generally Lawrence Lessig, *Lessons from a Line Item Veto Law*, 47 CASE W. RES. L. REV. 1659, 1659 (1997) (supporting the proposition that any line item veto law must be accompanied by a Balanced Budget Amendment to be effective); Aaron Wildavsky, *Item Veto Without a Global Spending Limit: Locking the Treasury after the Dollars have Fled*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 165, 175-76 (1985) (making the argument that, in the absence of a global spending limit, a line item veto would only exacerbate the problems it was intended to resolve); Edward A. Zelinsky, *The Unsolved Problem of the Unfunded Mandate*, 23 OHIO N.U. L. REV. 741, 746 (1997) (making a similar point with respect to supermajority voting requirements in unfunded mandates context).

I raise only a few concerns here—concerns that could be validated or put to rest by more detailed empirical analysis. Other questions no doubt occur to the reader (and occurred to the authors), such as whether programs to benefit the powerless and relatively unrepresented in society will be able to surmount additional obstacles to enactment. Which groups are more likely to pay the higher cost for federal legislation: groups like the elderly, which the authors describe as already disproportionately powerful and able to amass consensus support for their entitlement programs, or the poor who must rely on policy entrepreneurs, service providers, and altruists to enact their programs? The authors assert that the latter group will not be unduly harmed by their proposal,⁶³ but they do not support this hopeful conclusion with, say, an analysis of past years' experience with reforms of means-tested entitlements compared to efforts to pare back middle-class entitlements. Other scholars have concluded, contrary to the optimistic assessment of Professor McGinnis and Rappaport, that procedures increasing transactions costs in the legislative process empower dominant interest groups at the expense of the public good.⁶⁴ Such gaps in the discussion of the effects of supermajority rules can be closed, or at least narrowed, in future work in which the authors take advantage of the rich history of congressional supermajority rules and their interaction with the congressional process and interest group politics.

II.

One likely reason that current budget supermajority voting rules have not operated as Professors McGinnis and Rappaport would like their constitutional provision to work is that lawmakers and potential beneficiaries have circumvented fiscal discipline. The authors suggest as much when they observe that Congress quickly replaced the harsh budget rules imposed by

63. See McGinnis & Rappaport, *supra* note 1, at 461-64.

64. Professor Mashaw notes that organized and powerful interest groups are adept at using procedures to block action that a majority might favor. See JERRY L. MASHAW, GREED, CHAOS & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 72 (1997).

Gramm-Rudman-Hollings with less binding requirements.⁶⁵ Perhaps Professors McGinnis and Rappaport believe that Congress evaded the deficit caps because they were statutory provisions rather than constitutional mandates. I suspect, however, that most of the circumvention of the modern budget framework occurs when sophisticated interest groups and experienced lawmakers devise ways to enact generous federal benefits within the letter of the law. Professors McGinnis and Rappaport have worked to reduce the loopholes in their proposal—for example, they apply supermajority rules to spending rather than to particular means of financing government spending—but the congressional experience since 1974 suggests they have not plugged all the holes. Of course, this article is the first version of their proposal; as the authors continue to draft their new budget framework, they will need to confront several challenges,⁶⁶ three of which I will mention here.

First, the article does not adequately address a nettlesome question for budget policymakers—the question of the appropriate baseline from which to measure annual changes in spending. Recognizing the problem of holdouts in the context of enacting a federal budget,⁶⁷ Professors McGinnis and Rappaport include a default rule to allow the government to enact spending bills by a majority vote as long as they “spend ninety percent or less than the amount spent in the previous year.”⁶⁸ Among the problems that might arise with this rule⁶⁹ is confusion about how to mea-

65. See McGinnis & Rappaport, *supra* note 1, at 370.

66. A good example of the kinds of questions and concerns that a painstaking review of the details of such proposals can raise is 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 (1997).

67. See McGinnis & Rappaport, *supra* note 1, at 420-22.

68. *Id.* at 423.

69. The rather complicated and opaque description of how the supermajority requirement would work in practice (in a process with 13 separate appropriations bills and other entitlement legislation in any fiscal year) suggests that the authors need to work out the mechanism for coordinating the new budget process further. See McGinnis & Rappaport, *supra* note 1, at 424-27 & n.239. For example, could Congress continue to pass appropriations bills by a majority vote as long as the total amount of spending authorized by spending laws remained under the 90% cap? Such a procedure would encourage a race to pass the first appropriations bills, thereby crowding out the later bills that would require supermajority votes to pass. See Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76

sure "the amount spent in the previous year," the baseline against which permissible future spending is measured. Professors Mark Crain and Nicole Verrier Crain describe the importance of budget baselines:

At an elementary level a budget baseline defines what is meant by the terms "increase" and "cut." . . . What is the proper starting point for judging a budget's effects is the essence of the baseline debate. The two main choices for a budget baseline are the dollars spent the year before or the level of services that those dollars bought, which is labeled a "current services" baseline. For example, in the US the federal budget procedure for computing the current services level takes what was spent in the year before, adjusts it for inflation and, in the case of programs like Social Security or unemployment compensation, for the number of people projected to be eligible in the year ahead, and that becomes the baseline.⁷⁰

CAL. L. REV. 593, 657-59 (1988) (detailing the way GRH affected the timing of appropriations bills). The authors indicate that a concurrent budget resolution, which is not legally binding, might set the terms of the subsequent spending bills with sufficient specificity to coordinate the process. See McGinnis & Rappaport, *supra* note 1, at 423-25. Experience with the concurrent resolution casts doubt on the effectiveness of such a coordination device. Currently, budget resolutions provide aggregate figures about total spending and revenue, and the accompanying committee reports parcel out portions of the discretionary funds to the appropriations subcommittees. Details of the spending programs are not included in the budget resolution itself, nor are any programmatic suggestions by the budget committees in their reports binding on appropriators. See Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387, 398-99 (1998). In part, this arrangement stems from the ability of appropriators to protect their committees' turf from incursion by new congressional players. It also results from the inability of lawmakers to set macrolevel objectives at the same time they discuss the consequences on the particular spending programs that affect their constituents. See *id.* at 411-12; see also Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 922-23 (1990) (discussing the benefits of a "real-world veil of ignorance—a state of imperfect information . . . that can reduce self-interest in social decisionmaking processes"). Furthermore, even these generally phrased concurrent resolutions tend to pass by very narrow margins in party-line voting; it seems unlikely that more specific documents would be able to command supermajority support. See SCHICK, *supra* note 33, at 79-81.

70. W. Mark Crain & Nicole Verrier Crain, *Fiscal Consequences of Budget Baselines*, 67 J. PUB. ECON. 421, 421-22 (1998). Indeed, it is even more complex than this passage suggests because there are several ways to measure what the

McGinnis and Rappaport indicate that they would measure against the actual dollars spent in the previous years, rather than the adjusted current services baseline.⁷¹ If that is the case, their amendment should specify precisely their preference because it is a change from budget practice that has long used some form of the current services baseline. The Congressional Budget Act of 1974 defines the budget baseline to be "the estimated budget outlays and proposed budget authority that would be included in the budget for the following fiscal year if programs and activities of the United States Government were carried on during that year at the same level as the current fiscal year without a change in policy."⁷² Lawmakers have used this definition to justify the construction of a baseline with the following features: increased discretionary spending to account for inflation; increased entitlement spending to account for inflation, other increases in cost, and changes in caseloads; and sometimes increased spending to reflect phased-in benefits.⁷³

The idea of a current services baseline may seem strange until one considers the purpose of the measure. A baseline is a way to measure change, and one relevant change is that of policy. Has the government made decisions that reduce or increase the level of services it is providing to citizens? Unless changes in the cost of providing the same level of services are factored into the baseline, lawmakers will find it difficult to isolate the effect of new government policy. Supporters of using current services baselines argue they are policy-neutral.⁷⁴ Whatever the theoretical justification, budget baselines have been used to mislead the

Crains refer to as the current services baseline. See JOHN F. COGAN ET AL., *THE BUDGET PUZZLE: UNDERSTANDING FEDERAL SPENDING* 126-29 (1994) (distinguishing among current services, current policy, and current law).

71. See McGinnis & Rappaport, *supra* note 1, at 422-23.

72. 31 U.S.C. § 1109(a) (describing the budget submission of the President); see also OFFICE OF MANAGEMENT AND BUDGET, *ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 1999*, at 275 (1998) (providing the current services estimates).

73. Technically, this baseline is a current policy baseline, but it is usually referred to as current services. See COGAN ET AL., *supra* note 70, at 128 tbl. B.1.

74. See *id.* at 43-44 (describing defense of current services baseline by the Senate Budget Committee).

public (and perhaps to confuse some lawmakers) about the budgetary effect of legislation.⁷⁵ For example, the recent political battles over proposed "cuts" in Medicare were, in reality, fights over how much federal spending would increase over the actual dollars spent the year before.⁷⁶ Claims of reducing federal spending are easier to make in a world of current services baselines because nominal spending can increase even with substantial reductions from projected baselines.

The current services baseline has come under attack because it is so amenable to gamesmanship⁷⁷ and because it entrenches current spending priorities by institutionalizing a presumption in favor of higher spending for those already receiving federal benefits.⁷⁸ There are several proposals pending before Congress to require lawmakers to use last year's actual spending as the baseline for comparison.⁷⁹ In 1995, the House passed a Truth-in-Budgeting Baseline Reform as an amendment to the House rules.⁸⁰ Under this new rule, the baseline estimates would not include an adjustment for inflation for programs and activities subject to discretionary appropriations. For entitlement spending, if proposed legislation provides a lower rate of increase in spending than under current law, the cost estimate will show that spending is increasing under the proposed legislation, although less so than it would under current law; previously, the cost estimate would show only a reduction from current law.⁸¹

Unless the proposed constitutional amendment requires a specific baseline (or if the wording allows Congress *any* discretion

75. See *id.* at 42.

76. See *id.* at 41.

77. See *id.* at 45-70 (describing numerous ways budget baselines can be manipulated); DONALD F. KETTL, DEFICIT POLITICS: PUBLIC BUDGETING IN ITS INSTITUTIONAL AND HISTORICAL CONTEXT 115-17 (1992) (noting the problems that using a baseline causes in budgeting).

78. See Crain & Crain, *supra* note 70, at 423; see also *id.* at 434 (concluding, through a study of state budgets, that current services baselines increase the growth rate in state spending relative to states using last year's spending level).

79. See, e.g., H.R. 1372, 105th Cong., § 203 (1997) (requiring that the "starting point" for budgets be "the level of outlays for the current fiscal period"); H.R. 4837, 105th Cong., § 612 (1998) (amending language in budget act to require the President and Congress to use "budgetary levels for the preceding fiscal year" as baseline).

80. See House Rule XIII(7)(a)(3), H.R. REP. NO. 104-868 (1996).

81. See *id.*

in selecting a baseline⁸²), lawmakers almost certainly will use some kind of current services estimate so that they can meet the ninety percent default rule without drastically cutting government services. Depending on the assumptions they use to construct the baseline (such as the projected increase in the cost of living, medical costs, and unemployment), lawmakers might be able to meet the ninety percent requirement with no real reduction in the size of the federal government. Budget figures, such as those used in the current services estimates, are extremely sensitive to the economic assumptions on which they are based.⁸³ Lawmakers wishing to evade the discipline of the default rule can use the most favorable assumptions within the range of reasonable estimates and allow for significant increases in the actual dollars spent. In a regime in which so much hinges on budget forecasts and economic assumptions, we should not be surprised if these seemingly "neutral" technical presentations become politicized ways for lawmakers and beneficiaries to preserve current arrangements under new, seemingly foolproof restrictions.⁸⁴

If the McGinnis-Rappaport Amendment explicitly and precisely demands a baseline of last year's dollars (perhaps with adjustments for growth in the number of beneficiaries of entitlement programs), the authors are proposing a real reduction in the size of government larger than the ten percent figure suggests. The federal government will be forced to reduce government services drastically—much more than ten percent—to operate with ninety percent of the actual dollars they used the year before. The authors never mention this significant change from current

82. The choice of a budget baseline is the kind of decision that a court is unlikely to countermand even if the amendment is drafted to require last year's spending as the relevant starting point. See RICHARD BRIFFAULT, *BALANCING ACTS: THE REALITY BEHIND STATE BALANCED BUDGET AMENDMENTS* 37-40 (1996) (describing state experience).

83. See OFFICE OF MANAGEMENT AND BUDGET, *supra* note 72, at 12-14, 14 tbl. 1-6 (discussing and demonstrating the sensitivity of the budget to economic assumptions).

84. See, e.g., Michael D. Bopp, *The Roles of Revenue Estimation and Scoring in the Federal Budget Process*, 56 TAX NOTES 1629 (1992) (examining the process of revenue estimation and how it can be manipulated for political purposes); Michael J. Graetz, *Paint-By-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609 (1995) (discussing politicization of revenue estimates and distributional analyses of revenue bills).

baseline conventions. Given the arcane nature of budget baselines, an explanation of the consequences of their choice is required for informed decisionmaking.

Second, just like the current budget process, Professors McGinnis and Rappaport rely on cash flow measure of outlays in implementing spending discipline.⁸⁵ They acknowledge that cash-flow accounting has been criticized⁸⁶ as not only an inaccurate measure of federal spending, but also as especially manipulable by policymakers seeking to evade expenditure constraints.⁸⁷ For example, lawmakers wishing to enact a new entitlement program can phase it in so that most of the spending is postponed past the current fiscal year, and so that the spending automatically occurs without further legislative action. Because cash-flow accounting turns on outlays but appropriations bills speak in terms of budget authority, Congress can pass bills with substantial amounts of budget authority that could be obligated by agencies now but spent in later fiscal years.⁸⁸ Moreover, cash-flow accounting has been indicted as a cause of short-sighted policy.⁸⁹ To comply with cash-flow measures, lawmakers will eschew solutions that may save money in the long run because they require immediate outlays.⁹⁰ The use of cash-flow account-

85. See McGinnis & Rappaport, *supra* note 1, at 450. The exception to cash-flow accounting in the current budget process is discretionary credit programs, which since 1990 have been displayed in the budget on a net present value basis rather than as federal outlays occur. See Federal Credit Reform Act of 1990, tit. XIII, § 13201(a), 2 U.S.C. § 661 (1994).

86. See McGinnis & Rappaport, *supra* note 1, at 450.

87. See SHAVIRO, *supra* note 62, at 104-05; Garrett, *supra* note 10, at 527-30; see also Jane G. Gravelle, *Estimating Long-Run Revenue Effects of Tax Law Changes*, 19 E. ECON. J. 481 (1993) (exploring the complexities of projecting the impact of alterations in the tax structure into the future).

88. Budget authority is the authority of federal agencies to enter into obligations that will result, either immediately or in the future, in budget outlays. See SHUMAN, *supra* note 34, at 345. Agencies cannot make outlays (actual expenditures) without first receiving budget authority. See *id.* at 345-46. Budget authority in one fiscal year may result in outlays many years in the future if the obligation that arises is a long-term one (e.g., construction of a building or of weapons systems). See SCHICK, *supra* note 33, at 21 exh.2-1. Thus, outlays in any one year can be traced to budget authority provided in many prior fiscal years as well as the current one.

89. See, e.g., Seto, *supra* note 66, at 1484 (describing effect of short-term perspective on government efforts to reform Social Security).

90. See, e.g., Ron Feldman, *How Weak Recognition and Measurement in the Fed-*

ing, rather than some form of measurement that considers the present value cost of federal decisions, seems particularly strange because Professors McGinnis and Rappaport are dismayed at the extent of future unfunded obligations relating to federal retirement and health programs for the elderly.⁹¹

In the end, I agree with the authors that cash-flow accounting is the only currently feasible way to measure most government spending. It is imperfect, and budgeters should work to move to more accurate yardsticks, particularly with respect to programs like Social Security.⁹² Until policymakers are more comfortable with the accuracy of the economic assumptions undergirding present value or generational measures, change is unlikely. My point is only that cash-flow accounting allows lawmakers to game the system through the use of timing gimmicks—by delaying benefits until future fiscal years, they can pass larger programs than the rules of the fiscal constitution would seem to allow.

Acknowledging this possibility, the authors note that their ninety percent rule would work to reduce some of the gains from timing gimmicks.⁹³ If spending is postponed a year, for example, the outlays will count against the ninety percent ceiling in that subsequent year and crowd out any new spending that cannot obtain supermajority support.⁹⁴ Of course, the success of this safeguard depends again on the baseline. Some forms of current services baselines include spending required by phased-in legislation that results in outlays in future years. In other words, because higher spending is part of the baseline, it is not considered an increase in spending. If the ninety percent figure were applied to such a baseline, members would have a great incen-

eral Budget Encouraged Costly Policy: The Case of "Supervisory Goodwill," PUB. BUDGETING & FIN. 31 (1996) (arguing that cash accounting led to short-sighted policies to deal with the savings and loan crisis in the 1980s).

91. See, e.g., McGinnis & Rappaport, *supra* note 1, at 368, 387, 450-51.

92. See, e.g., H.R. 4837, tit. V, § 602, 105th Cong. (1998) (requiring accrual accounting method for federal insurance programs); U.S. GEN. ACCOUNTING OFFICE, BUDGET ISSUES: INCORPORATING AN INVESTMENT COMPONENT IN THE FEDERAL BUDGET (GAO/AIMD-94-40) (1993) (discussing alternate budget procedures to account more accurately for investments that will increase long-term productivity).

93. See, e.g., McGinnis & Rappaport, *supra* note 1, at 423.

94. See *id.*

tive to delay spending, thereby significantly increasing the baseline with future projected outlays.

Even if the McGinnis-Rappaport Amendment could be drafted so tightly as to eliminate Congress's ability to manipulate baselines, lawmakers would still have an incentive to pass delayed spending programs as a second-best solution if they could not surmount the supermajority vote hurdle. After all, the enacted programs would have first dibs on federal spending; although the ninety percent rule might require some cuts in programs, they would be locked in for part of the money. In a way, interest groups would purchase a lottery ticket for a chance to receive federal resources in the future. They would have a better chance than those not yet holding tickets, and if programs were cut uniformly to reach the ninety percent mark, they would receive at least some portion of the benefits. Moreover, they would take a chance that the legislature, the executive, and the judiciary would not enforce the constitutional provision, or that economic conditions would cause lower outlays for entitlement programs, thereby freeing up room under the cap. Or, perhaps Congress would be more likely to meet the supermajority requirement when beneficiaries lobbied them to preserve previously enacted benefits; the mere existence of a program might increase the clout of these groups.⁹⁵ Certainly, interest groups would value these lottery-like benefits less than sure bets, but a chance to receive some federal money is worth more than no program at all.

Third, and most important, the McGinnis-Rappaport definition of spending includes only discretionary spending, appropriated periodically by Congress, and new entitlement legislation.⁹⁶ Indirectly, the proposal may also constrain spending under previously enacted entitlement programs because such outlays would count against the ninety percent cap, which, if exceeded,

95. See KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 395-96 (1986) (positing that interest groups are more effective in defensive posture); Garrett, *supra* note 10, at 522 (describing why groups defending an existing program are in a stronger position than those seeking new programs).

96. See McGinnis & Rappaport, *supra* note 1, at 423 n.234.

would trigger the supermajority voting requirement.⁹⁷ "Spending" does not, however, include unfunded intergovernmental mandates⁹⁸ or tax expenditures.⁹⁹ Such gaps in coverage threaten to undermine the McGinnis-Rappaport Amendment. For example, the growth in unfunded federal mandates imposing on states and localities the responsibility for financing federal programs has been linked to the enactment of budget process acts that have restricted federal lawmakers' ability to use deficit financing.¹⁰⁰ For purposes of this Essay, I will illustrate this kind of circumvention by focusing on the authors' failure to include tax expenditures as "spending."

Many federal programs can be constructed either as direct federal subsidies or as tax subsidies that encourage particular behavior by reducing an entity's tax liability.¹⁰¹ For example, Congress can hand out money through federal grants to those who buy homes, or it can enact the mortgage interest deduction

97. See *id.* at 422-23.

98. Unfunded mandates, most simply, are "federal laws that impose duties on state and local governments without providing federal grants to pay for them." Note, *Recent Legislation: Congress Requires a Separate, Recorded Vote for Any Provision Establishing an Unfunded Mandate*, 109 HARV. L. REV. 1469, 1469 (1996); see also 2 U.S.C. § 658(5)(A)(i) (Supp. I 1995) (defining intergovernmental mandate for purposes of an aspect of the federal budget process—the Unfunded Mandates Reform Act ("UMRA")).

99. The 1974 Budget Act defines tax expenditures as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." 2 U.S.C. § 622(3) (1994). McGinnis and Rappaport also note that they do not include regulation of private entities as spending, see McGinnis & Rappaport, *supra* note 1, at 428, although in some cases such laws can be a method of enacting a federal program and requiring private entities to foot the bill. Interestingly, UMRA requires congressional committees to produce some information about the cost of regulations, which it defines as private sector mandates. See 2 U.S.C. § 658b (c), (d) (Supp. I 1995). Senator Abraham has proposed extending UMRA's discipline to allow members to raise a point of order against any private sector mandate that is not accompanied by federal funding; presumably, such an objection could be lodged against virtually any significant federal regulatory statute. See S. 389, 105th Cong. (1997).

100. See Garrett, *supra* note 12, at 1134.

101. For classic discussions, see STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

to provide homeowners with the same financial incentive. In some cases, tax expenditures are less efficient than direct payments.¹⁰² In other cases, policymakers prefer to use the tool of a tax subsidy, such as in the case of the charitable deduction, because the tax provision allows for decentralized decisions about how to allocate resources to eleemosynary causes.¹⁰³ Spending through the tax code is a significant part of the federal government; one recent estimate puts the revenue loss from tax expenditures at \$531 billion in fiscal year 1999.¹⁰⁴ Although constraints enacted as part of the Budget Enforcement Act of 1990 have slowed the creation of new tax expenditures, tax subsidies remain popular with interest groups in part because they, like entitlement programs, grow automatically and without any formalized oversight by Congress.¹⁰⁵ Indeed, some commentators have observed that the tax code may be among the most active sites of interest group activity and rent-seeking in the legislative arena.¹⁰⁶

The authors' explanation for their decision to exclude tax expenditures is not entirely convincing. First, they argue that the public perceives tax subsidies as different from other spending programs, and this difference results in a more negative view towards special interest giveaways through the tax code.¹⁰⁷ Their

102. For example, many have criticized the exclusion from income of interest on municipal bonds on this ground. See, e.g., Victor Thuronyi, *Tax Expenditures: A Re-assessment*, 1988 DUKE L.J. 1155, 1161-62.

103. See, e.g., Peter J. Wiedenbeck, *Charitable Contributions: A Policy Perspective*, 50 MO. L. REV. 85 (1985).

104. See Christopher Bergin, *Spending Through the Code—The Top Ten Tax Expenditures*, 78 TAX NOTES 795 (1998) (using budget documents to arrive at that figure); see also STAFF OF JOINT COMMITTEE ON TAXATION, 105TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 1998-2002 (Comm. Print 1997) (failing to provide an estimate of the total revenue lost through tax expenditures because of potential interactions among provisions).

105. See Garrett, *supra* note 10, at 514-69 (discussing effect of PAYGO rules on creation of new tax subsidies and indirect effects on the oversight of existing ones).

106. See, e.g., MICHAEL J. GRAETZ, THE DECLINE (AND FALL?) OF THE INCOME TAX 277, 288 (1997); FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 62-66 (1997); J. Mark Ramseyer & Minoru Nakazato, *Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow*, 75 VA. L. REV. 1155 (1989); William F. Shughart, *Durable Tax Reform*, 7 CATO J. 273, 274 (1987).

107. See McGinnis & Rappaport, *supra* note 1, at 431 & n.263.

claim is an empirical one and one that has been contested. Some scholars and political observers have argued that tax expenditures prompt less public outcry because they do not seem like federal spending; instead, they allow people who qualify to pay less tax, a goal avidly pursued by many.¹⁰⁸ Indeed, most who study and compare the different kinds of government spending conclude that tax expenditures are often favored by policymakers because they are significantly less visible to the general public than appropriations or direct spending.¹⁰⁹

Certainly, at some level, a tax code riddled with preferences, particularly those that benefit the well-to-do and holders of capital, can provoke public outcry that leads to sweeping tax reform. The 1986 Tax Reform Act, which eliminated many tax preferences and lowered tax rates, can be seen in part as driven by such concerns.¹¹⁰ Taxpayers are overwhelmingly supportive, however, of so-called middle-class tax expenditures, such as those for edu-

108. See STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 1-2 (1973) (stating that people do not accept the equivalence between one dollar in tax expenditure and one dollar in direct expenditure, minimizing the former in most cases); SURREY & MCDANIEL, *supra* note 101, at 104-05 (arguing that tax expenditures are less visible to the public than traditional spending programs); JOHN F. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 348-52 (1985) (noting that the survey responses depend on the questions—i.e., whether the provisions are called loopholes—and that provisions benefitting corporations are viewed less favorably although not entirely negatively); see also 142 CONG. REC. S5252 (daily ed. May 17, 1996) (statement of Sen. Domenici) ("What are tax expenditures and corporate loopholes? Frankly, there are two ways to look at it. One way to think about it is they were taxes that the Government owned, and we said we are not going to collect them. That is a Democrat version of a tax expenditure. The other version is they belong to the taxpayer and not the Government."); 132 CONG. REC. 5842 (1986) (statement of Harry K. Wells) ("[S]ome personal tax deductions including interest paid on home mortgages are being referred to as tax expenditures to the taxpayer, an interesting turn of phrase. Clearly indicating the idea, it's the government's money that they are expending on you—a pretty scarey [sic] prospect for a country that believes in free enterprise and democracy.").

109. See, e.g., CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES & SOCIAL POLICY IN THE UNITED STATES* 178-79 (1997).

110. See, e.g., JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* (1987); TIMOTHY J. CONLAN ET AL., *TAXING CHOICES: THE POLITICS OF TAX REFORM* (1990). But see Richard L. Doernberg & Fred S. McChesney, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891 (1987) (reviewing BIRNBAUM & MURRAY, *supra*, and offering a less positive view of the motivations of lawmakers).

cation, child care, and relief for two-earner families; many popular entitlement programs could be reconstructed as such tax subsidies relatively easily.¹¹¹ The ability to use refundable tax credits (which would be necessary for absolute equivalence) would be effectively limited under the McGinnis-Rappaport Amendment because payments are considered as outlays for budget purposes and thus would fall under the ninety percent cap. This design limitation would not eliminate the use of tax credits to evade supermajority votes, however. Middle-income Americans have large enough tax liabilities, particularly when one includes payroll taxes, to make nonrefundable tax credits an appealing way to deliver benefits in a world where other spending is constrained.¹¹²

The authors also argue that interest groups that do not now seek their benefits in the form of tax subsidies must have chosen their legislative strategy because tax expenditures are more expensive for them to obtain than other spending.¹¹³ That may be the case in some instances, and perhaps a few of these groups would drop out of the legislative market rather than turn their attention to the tax code. Many others might not, particularly when they realize that the more expensive tax subsidy is also more durable than periodically appropriated discretionary

111. See Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 408 (1998) (noting "the ease with which some tax programs can be reformulated as direct spending along entitlement lines, as well as the ease with which such reformulation can occur in the opposite direction, i.e., entitlement spending can be transformed into tax policy").

112. The authors note that large reductions in businesses' taxes will prompt public outrage. See McGinnis & Rappaport, *supra* note 1, at 431. Again, the empirical assumptions underlying this statement are unproven, but it is plausible that the public will tolerate less in the way of generous tax subsidies for business than they will accept for middle-income relief. For example, the enactment of the much criticized alternative minimum tax responded to such public distaste. See 26 U.S.C. § 55 (1994). Many tax expenditures that make business investments more profitable can be drafted to apply at the shareholder or owner level, however, leaving the tax liability of the business itself unaffected. Furthermore, if programs benefitting large groups of the public take the form of unconstrained tax subsidies, more businesses can receive federal money through traditional programs and remain below the 90% cap.

113. Interestingly, however, the authors conclude in another passage that "there is little evidence that transfers through regulation or tax preferences are more costly than spending subsidies." McGinnis & Rappaport, *supra* note 1, at 433 n.274.

spending programs.¹¹⁴ In other cases, groups have sought discretionary money because they have developed relationships with the relevant subcommittees and become accustomed to this particular method of financing without thinking about the comparative advantages of tax subsidies.¹¹⁵ Under the McGinnis-Rappaport Amendment, these groups would consider forging new relationships with members of the Senate Finance and House Ways and Means Committees. Although these committees' wide jurisdiction may render them less susceptible to capture than the appropriations subcommittees,¹¹⁶ individual committee members work to become affiliated with particular special interests. Furthermore, congressional committee structure is not exogenous. It can change to take account of shifts in other rules and arrangements if change is in the interest of lawmakers. One can imagine a jurisdictional arrangement in which tax subsidies are placed either exclusively or concurrently within the jurisdiction of the substantive committees.¹¹⁷ Certainly, such sweeping alterations in committees' jurisdictions are unlikely,¹¹⁸ but a significant constitutional change such as the McGinnis-Rappaport Amendment might be enough of a jolt to result in far-reaching restructuring.

McGinnis and Rappaport agree that legislation establishing or expanding tax expenditures is likely to increase after adoption of their proposal, but they believe complete substitution is impossible.¹¹⁹ They conclude that the increase in spending through regulations and tax subsidies "would be considerably smaller than

114. See Garrett, *supra* note 69, at 402-03; Zelinsky, *supra* note 111, at 401.

115. See, e.g., Lisa Scruggs, *Tipping the Scales: Reexamining the Call for Expanded Lobbying Restrictions* (1998) (unpublished manuscript, on file with author) (discussing the reasons that members of the education lobby have chosen particular program structures and describing their ability to shift their focus).

116. For the most convincing argument along these lines, see Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165 (1993).

117. See Garrett, *supra* note 69, at 437-42 (discussing possible reconfigurations of committee structure that functional budgeting would entail).

118. See DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION* 37-39 (1997) (explaining that shifts in committee jurisdiction are gradual rather than abrupt or sweeping).

119. See McGinnis & Rappaport, *supra* note 1, at 432-33.

the reduction in special interest spending caused by the supermajority rule."¹²⁰ Certainly, to the extent that the McGinnis and Rappaport Amendment increases the cost of spending—either because groups must meet the higher costs of assembling supermajority support or because they engage in costly evasive tactics—there will be less government spending.¹²¹ I disagree, however, that we can be sure that this reduction in spending will be considerable. Among other things, experience with the federal budget process over the last two decades demonstrates the ingenuity of interest groups and lawmakers in obtaining federal benefits despite the hurdles placed in their path.¹²²

III.

Reform proposals—of the budget process or other areas of legislative concern—can benefit from a close analysis of previous experiences with similar proposals. Careful empirical work is just as important as the kind of theoretical analysis that Professors McGinnis and Rappaport provide in their article and should be part of the legal study of legislative procedures and congressional behavior.

I offer the foregoing observations, criticisms, and questions to serve two purposes. First, to suggest directions for the authors' future work on this topic. Second, and more importantly perhaps, to encourage them to reconsider their decision to frame their proposal as a constitutional amendment. The breadth of the federal budget allows interest groups to alter their behavior to adapt to rules designed to restrict their ability to obtain federal benefits. The sensitivity of the budget to economic and other factors beyond the control of policymakers leads to a plethora of

120. *Id.* at 433.

121. Cf. Steven G. Calabresi, "The Era of Big Government Is Over," 50 STAN. L. REV. 1015, 1022-23 (1998) (reviewing ALAN BRINKLEY ET AL., *NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION* (1997)), and rejecting Brinkley's criticisms of supermajority requirements for passing tax increases, contending that such requirements would make it harder for special interests "to steal the wealth").

122. See generally Garrett, *supra* note 10 (detailing strategies groups use to evade PAYGO requirements).

unexpected consequences. For example, the current cash-flow budget surplus—a surprise to most estimators, lawmakers, and the public—is a consequence of a healthy economy much more than it is a consequence of an effective budget structure.¹²³ Both of these realities militate in favor of constructing flexible decisionmaking structures.¹²⁴

Finally, we should be wary of entrenching particular outcomes. Decisions about how to allocate resources, like the vision of a small federal government advocated by McGinnis and Rappaport, are among the most fundamental political decisions facing a polity and their representatives.¹²⁵ Certainly, the Constitution is designed to entrench some governance decisions, in particular important structural arrangements.¹²⁶ Nevertheless, the durability of its provisions should lead us to think very carefully about the structures we constitutionalize, particularly when less extreme responses along the procedural spectrum are available. Fortunately, the challenging and engaging argument made by Professors McGinnis and Rappaport in *Supermajority*

123. See Congressional Budget Office, *The Economic & Budget Outlook: An Update*, Aug. 1998 (visited Jan. 1999) <<http://www.cbo.gov/showdoc.cfm?index=828&sequence=1>>.

124. Interestingly, McGinnis and Rappaport recognize the need for flexibility in some respects. They note that experience with their proposal may lead to the expansion of supermajority rules to apply to other forms of spending like tax expenditures. See McGinnis & Rappaport, *supra* note 1, at 433 n.273. Despite the possibility of such an expansion of supermajority rules, McGinnis and Rappaport favor incrementalism in constitutional reform. See *id.* I suggest simply that they consider more modest reform, such as strengthening or changing congressional rules, before they move to constitutional provisions.

125. See DONALD F. KETTL, *DEFICIT POLITICS: PUBLIC BUDGETING IN ITS INSTITUTIONAL & HISTORICAL CONTEXT* 2 (1992); see also V.O. Key, *The Lack of a Budgetary Theory*, 34 AM. POL. SCI. REV. 1137, 1138 (1940) ("The completed budgetary document . . . represents a judgment upon how scarce means should be allocated to bring the maximum return in social utility."). As Kettl explains:

Budgeting is the wind tunnel of American politics. . . . The study of the budget reveals both the best and worst of the important institutions, process, and policies of our national government. The budget is thus more than a stay of decision making. It is a unique window into the very care of American democracy.

KETTL, *supra*, at 2.

126. See Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 391; Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 509 & n.81 (1997).

Rules as a Constitutional Solution will doubtlessly be the catalyst for further consideration of federal budget process reforms.