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TRANSFERRING POLICYMAKING POWER TO JUDGES—
THE EFFECT OF JUDICIALLY ENFORCEABLE
CONSTITUTIONAL RESTRAINTS—IS NOT A DEFENSIBLE
ALTERNATIVE TO MAJORITY RULE

LINO A. GRAGLIA*

In *Supermajority Rules as a Constitutional Solution*,¹ John McGinnis and Michael Rappaport tackle nothing less than the basic problem of government: how to keep it from serving private interests rather than the public interest. Government—the grant of power to some people to exercise coercive force over others²—is infinitely dangerous;³ unorganized individuals do not commit genocide or impose mass famines.⁴ Why have government, an instrument of coercive transactions, when voluntary, free-market transactions are necessarily mutually beneficial and therefore wealth-increasing? The answer, at least in economic terms, is that because of “market defects,” free markets do not always operate to increase wealth.⁵

McGinnis and Rappaport point out that a basic purpose of government is to correct one of these defects by making possible the production of “public goods” that the market cannot produce easily. These goods include national defense or the rule of law,

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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 Virginia Elizabeth Richards, *Our Money For Your Rights: Conditional Spending As A Restraint on Liberty*, 21 CAP. U. L. REV. 1165, 1175 (1992) (noting that government has a monopoly on the legitimate use of coercive force).

3. Lino A. Graglia, *Transcript, The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L.J. 17, 48 (1996) (arguing that because government is dangerous, we should try to have as little of it as possible).

4. See, e.g., Thomas W. Simon, *Defining Genocide*, 15 WIS. INT'L L.J. 243, 248 (1996) (explaining that the proposed refinement of the Genocide Convention's definition of genocide rules out a single individual committing genocide).

5. See McGinnis & Rappaport, *supra* note 1, at 376 (arguing that government can provide some goods more efficiently than the market).

which once produced, benefit everyone, including those who do not contribute to their cost.⁶ Government is necessary to overcome this "free-rider" problem by coercing contributions.⁷ Government may also be necessary to deal with negative "externalities," such as air and water pollution, that result from productive activities, when the number of people involved is so large that transaction costs preclude settling the problem by private contracts.⁸

Once government is established for these good purposes, however, individuals will be tempted to use it to obtain subsidies, that is, to extract wealth from others.⁹ An inherent defect of democratic government, or at least of the American version of democratic government, our authors argue, along with Milton Friedman and many other conservatives, is that subsidy or "rent-seeking" private interests often have advantages that enable them to prevail over the public interest.¹⁰ Special interest groups, such as sugar producers or the elderly, may by concentrated effort be able to obtain a subsidy that is enormously beneficial to each member of the group, but not sufficiently harmful to the general public to bring forth effective resistance.¹¹ To some extent, the people are trapped in what is known in game theory as a prisoner's dilemma: it is in the interest of each group to expend efforts to obtain a subsidy, although everyone would be better off if there were no subsidies.¹² The inevitable result, the argument goes, is a national government that spends more money than a majority of the people want it to spend.¹³

It is this problem that is the basis of the always nearly, but never quite, successful movement for a Balanced Budget Amend-

6. *See id.* at 376-78.

7. *See id.* at 377 (stating that a citizenry with a "universal preference" for eliminating poverty would be unlikely to succeed because it would lack the power to coerce free riders).

8. *See id.* at 377.

9. *See id.* at 378-79 (positing that members of groups that possess a disproportionate amount of power in the political process will spend time and money securing and protecting their subsidies).

10. *See id.* at 379-80.

11. *See id.* at 379.

12. *See id.* at 372.

13. *See id.* at 398 n.150.

ment to the Constitution that would prohibit deficit spending except in certain emergencies.¹⁴ It is also at least partly behind the movement for campaign finance reform, which would limit campaign expenditures and individual contributions, and for term limits.¹⁵ Both would help counter, their proponents believe, the advantages of special interests. The Balanced Budget Amendment, however, our authors point out, would not limit spending in general, but only deficit spending, which Congress could avoid by raising taxes or printing money.¹⁶ Campaign finance reform, at best a very indirect means of limiting spending, is often popular with legislators primarily because it tends to protect incumbents.¹⁷ The media and academics find campaign finance reform attractive primarily because it enhances the power of opinion makers over the power of money.¹⁸

McGinnis and Rappaport believe they have a better idea: limiting spending by requiring a legislative supermajority.¹⁹ They do not propose a simple supermajority requirement for the passage of every spending bill, however, because that would create serious "holdout problems."²⁰ A supermajority requirement means that a minority of legislators can defeat a measure, which in turn means that a legislator who would ordinarily vote for it would have an incentive to withhold his vote unless he obtains some concession.²¹ McGinnis and Rappaport therefore propose a two-part plan.²² First, they would require supermajority authorization in order for Congress to be able to spend in any year more than ninety percent of what it spent in the prior year.²³ Second, they would require a moderate supermajority of three-

14. *See id.* at 399.

15. *See id.* at 398.

16. *See id.* at 405.

17. *See id.* at 465 n.390.

18. *See id.* at 467.

19. *See id.* at 400.

20. *See id.* at 406.

21. *See id.* at 404 (arguing that holdouts have more leverage under supermajority rules "because there are fewer other legislators with whom the majority can bargain to form a supermajority coalition").

22. *See id.* at 406.

23. *See id.*

fifths or two-thirds to pass bills that enact or expand an entitlement program.²⁴

I agree with McGinnis and Rappaport that the national government probably spends much more than most people want it to and that the nation would be better off, economically and socially, if its spending for what appears to be private interests rather than the public interest could be reduced. Indeed, perhaps the most encouraging thing about our present situation is that it could be easily improved by the simple expedient of repealing most of what Congress has done in the past five or six decades. We have been improving our situation for some years by a process of undoing the works of the New Deal.²⁵ We could improve it more by accelerating that process—for example, by overhauling Social Security—and applying it as well to much of the post-New Deal, such as the Great Society. The repeal of most or all federal entitlement programs would almost surely be a contribution to human welfare, if only because such programs can be handled better by the states.²⁶

I have my doubts, however, that the McGinnis and Rappaport proposal is the answer to the problem of excess federal spending. For the same reason that they say the holdouts problem precludes a supermajority requirement for all spending bills, I think it likely that it also precludes their proposal. They argue that although entitlement measures, too, “are subject to holdouts, they are far less vulnerable than appropriation bills . . . [b]ecause the entitlement program . . . is not yet in existence, [and] the public does not yet rely on [it].”²⁷ There is, therefore, “much less pressure to enact it by a specific date.”²⁸ Congress can avoid the holdouts problem, they say, by “simply postpon[ing] the establishment or expansion of the program un-

24. *See id.*

25. *See* Harry H. Wellington, *Term Limits: History, Democracy and Constitutional Interpretation*, 40 N.Y.L. SCH. L. REV. 833, 837-38 (1996).

26. *See* Steven M. Dawson, *The Promise of Opportunity—and Very Little More: An Analysis of the New Welfare Law's Denial of Federal Public Benefits to Most Legal Immigrants*, 41 ST. LOUIS U. L.J. 1053, 1072-73 (1997) (arguing that allowing states to experiment with welfare programs will produce long-term benefits).

27. McGinnis & Rappaport, *supra* note 1, at 422.

28. *Id.*

til a more convenient time."²⁹ Major entitlement programs, however, are the result of ardent and sustained effort,³⁰ making it doubtful, I would think, that such programs can easily be postponed once they are on the legislative agenda or that there ever will be a "more convenient time."

Similarly, I disagree with McGinnis and Rappaport when they claim that under the ninety percent rule, "holdouts would have much less leverage" than if every spending bill required a supermajority.³¹ Congress could again avoid the supermajority requirement and thus reduce the leverage of holdouts, they argue, by simply keeping spending below the ninety percent ceiling that brings the requirement into play.³² They contradict this assertion with their later argument that although "a simple majority could always choose to avoid the supermajority requirement" by simply not exceeding the ninety percent limit, "[t]he existence of this option ... 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."³³

It is not easy to see why the unacceptability of restricted spending in order to avoid a supermajority rule in the case of an antispending minority would not also make that option unacceptable in the case of holdouts. Our authors respond that although legislators would find the ninety percent limit unattractive for the whole year, they would not deem it unattractive as a temporary measure.³⁴ The resolution requiring a supermajority will, however, eventually have to be passed and, as our authors concede, holdouts would have leverage at that time.³⁵

At this point, matters become complex. Holdouts would use their leverage, McGinnis and Rappaport state, to attempt "to acquire some power over the content of individual spending

29. *Id.*

30. See generally MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS* (1981) (explaining the role of interest groups on the passage of legislation).

31. McGinnis & Rappaport, *supra* note 1, at 423.

32. See *id.*

33. *Id.* at 426.

34. See *id.* at 426 n.241.

35. See *id.* at 426.

bills.³⁶ To do this they would have to refuse "to approve spending resolutions until the budget process was structured to confer some credible information to them about the content of federal spending."³⁷ The budget process could be structured by having the resolution come early or late in the legislative session.³⁸ They recognize, however, that either option presents serious problems for the minority's attempt to exercise some control over the content of spending bills.³⁹ Their attempt to deal with these problems is too complicated to discuss here or, I would imagine, to be workable.

McGinnis and Rappaport's basic notion is that a supermajority rule can be seen as "a third decision-making rule," along with majority rule and constitutional restraints ("absolute limitations") enforced by courts.⁴⁰ Majority rule has much to be said for it—at least more than our authors, like most intellectuals, are willing to admit.⁴¹ It is how legislators ordinarily make decisions. Again, however, it is subject to the defect of permitting disproportionate influence by special interest groups,⁴² which actually operates to defeat majority rule.⁴³ Although it is tangential to their argument for a supermajority rule—and a subject with which they may lack expertise—our authors also believe that there are some circumstances in which decisionmaking, in restraint of and contrary to the will of elected legislators, is best left to courts.⁴⁴ This occurs, in their view, when three conditions are met:

36. *Id.* at 424.

37. *Id.*

38. *See id.* at 424 n.239.

39. *See id.*

40. *See id.* at 400-01.

41. *See id.* at 455-60 (explaining that democracy is not necessarily a good idea).

42. *See supra* notes 9-10 and accompanying text.

43. *See* Frank H. Easterbrook, *The Supreme Court, 1983 Term-Foreward: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984) (explaining that laws that benefit the citizenry in common are hard to enact because smaller groups are more effective lobbyists).

44. *See* McGinnis & Rappaport, *supra* note 1, at 435-36 (contending that absolute limitations work well when the courts can be called on to protect an activity the nation wants to protect).

First, there must be a category of activity that society wants to protect absolutely. For instance, 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 which the courts are *capable* of enforcing neutrally. Thus, also it 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.⁴⁵

A more compact compendium of error than this parroting of standard law professor rationalizations for government by judges would be difficult to find.

It happens, first, that there are no categories of activity that society wants to “absolutely protect,” whatever that might mean.⁴⁶ “All rights,” Justice Holmes once noted, “tend to declare themselves absolute to their logical extreme.”⁴⁷ Nonetheless, they “all in fact are limited,” he pointed out, “by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.”⁴⁸ Freedom of speech is certainly not in any such absolutely protected category; speech obviously can be and is limited in many ways.⁴⁹ Second, it would be difficult to think of an area of the law that yields less of a “determinate principle” than freedom of speech. As

45. *Id.* at 436.

46. See Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329, 391 (1989) (explaining that there are no absolutely protected freedoms).

47. *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

48. *Id.*

49. See, e.g., 18 U.S.C. § 1621 (1994) (providing criminal sanction for perjurious statements); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that constitutional protection of speech ends “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (upholding state statute prohibiting use of “fighting words”).

Alexander Hamilton objected in regard to the analogous guarantee of freedom of the press, no one can say what it means and it would seem to be more appropriate as a moral exhortation than as a provision of a code of laws.⁵⁰

Third, there are no principles that judges are "capable of enforcing neutrally" by using their alleged "distinctive jurisprudential methods, including interpretation through text."⁵¹ The usefulness of law professors lies in their disabusing the public of, not spreading, such nonsense. Problems requiring decision arise not from a failure to discern the applicable "determinate principle," but from a clash of principles; that is, a clash of interests recognized as legitimate. They can be solved not by "neutrally" enforcing a determinate principle, but only by making value judgments.⁵² Judges are not in possession of any "distinctive jurisprudential methods"; they have no means of deciding the policy issues involved in controversial constitutional cases that are not available to everyone else.

There is no greater fallacy in constitutional law than the notion that the Supreme Court decides constitutional questions—of individual rights, free speech, or anything else—by "interpreting" the Constitution.⁵³ This should be evident enough from the fact that ordinarily there is almost nothing to interpret. The great majority of cases involve state law, not federal law,⁵⁴ and nearly all of them purport to turn on a single sentence of a single constitutional provision, the Fourteenth Amendment, and indeed, on four words, "due process" and "equal protection."⁵⁵ Which word do McGinnis and Rappaport think Justice Blackmun was interpreting in *Roe v. Wade*,⁵⁶ "due" or "process"?

50. See THE FEDERALIST NO. 84, at 580 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

51. McGinnis & Rappaport, *supra* note 1, at 436.

52. See *Hudson Water Co.*, 209 U.S. at 357 (explaining that judges must continually balance and reconcile constitutional principles).

53. See Lino A. Graglia, "Constitutional Theory": *The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 TEX. L. REV. 789, 789 (1987); Lino A. Graglia, "Interpreting" *The Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1022 (1992); Lino A. Graglia, *Romer v. Evans: The People Foiled Again by the Constitution*, 68 U. COLO. L. REV. 409, 410 (1997).

54. See *id.*

55. See *id.*

56. 410 U.S. 113 (1973).

Supreme Court justices cannot and do not decide anything "neutrally,"⁵⁷ whatever that might be thought to mean. The Constitution precludes very few policy choices that American legislators are likely to make, therefore the only thing judges have to decide in so-called constitutional cases is whether to exercise self-restraint and let the legislators' policy choice stand or succumb to the temptation to substitute their own policy preferences.⁵⁸ Finally, it is worth noting that it was not the Supreme Court, but Congress, that "greatly expanded the Commerce and Spending Clauses during the New Deal,"⁵⁹ if in fact they were "expanded." The Court merely allowed Congress's policy choices to stand.⁶⁰ As I have explained elsewhere, it is difficult to see how they could have properly done otherwise.⁶¹ Why would McGinnis and Rappaport prefer to have Justice Souter, rather than elected congressmen, decide how and on what money is to be spent? Fortunately, none of all this humbug is crucial to the argument of the article. Reflecting a more realistic view of the appropriate role of judges, our authors correctly criticize proposals for a balanced budget amendment on the ground that it would necessarily grant judges a high degree of discretion, that is, policy-making power.⁶² A prime virtue of their proposal is that it seeks to minimize such discretion. Because of its complexity and other reasons, I am not sure that they have entirely succeeded. In any event, their proposal does involve judges in national fiscal matters to some extent.⁶³ The last thing the country needs at this time is any such enhancement of judicial power. It simply will not do to have the national government's spending and budget decisions made or influenced in any degree by majority vote of the nine electorally unaccountable lawyers comprising the Supreme Court.

57. See Graglia, *supra* note 55, at 411.

58. See *id.* at 410-11.

59. McGinnis & Rappaport, *supra* note 1, at 437.

60. See Lino Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 738-40 (1996).

61. See *id.*

62. See McGinnis & Rappaport, *supra* note 1, at 449.

63. See *id.* at 442 (noting, however, that the courts have far less discretion making decisions under supermajority rules than in deciding individual rights cases).

We no doubt need a means of limiting federal spending, and it may be that this will require or be aided by a constitutional amendment.⁶⁴ If so, the amendment should make clear that all issues arising under it are to be considered, like some other constitutional issues, purely "political questions"; that is, questions not subject to judicial resolution. The effectiveness of such an amendment would rest entirely on the good faith of congressmen and the President, and on the fact that it would provide a potent weapon to opponents of spending in congressional debates and in election campaigns. A clear denial of a role for judges in the budget process would also indicate a much needed determination to solve our problems through the political process prescribed by the Constitution and carry on as best we can without the aid of judges.

64. See David Lubecky, Comment, *The Proposed Federal Balanced Budget Amendment: The Lesson from the State Experience*, 55 U. CIN. L. REV. 563, 582-83 (1986) (explaining that a balanced budget amendment is necessary to promote greater fiscal responsibility at the federal level).