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GETTING FROM HERE TO THERE: THE REBIRTH OF CONSTITUTIONAL CONSTRAINTS ON THE SPECIAL INTEREST STATE

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In *Supermajority Rules as a Constitutional Solution*,¹ Professors John O. McGinnis and Michael B. Rappaport have said much with which we agree. We share their conception of federal spending legislation as the product of a repeated prisoner's dilemma² that steadily increases the amount,³ and decreases the efficiency,⁴ of federal spending over time.⁵ We agree that a supermajority requirement for enacting spending (or any other) legislation would increase the various decisionmaking costs, in-

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

2. See *id.* at 372, 469; see also Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 30-34 (1997) (discussing enactment of aggregate-welfare-reducing rent-seeking legislation in terms of prisoner's dilemma).

3. See McGinnis & Rappaport, *supra* note 1, at 367-83.

4. See *id.* at 410-16.

5. As a preliminary matter, we share McGinnis and Rappaport's public choice perspective on how and why interest groups are able to persuade a majority of the legislature to provide their group special benefits at public expense, "even though a majority of voters would not support the legislation." *Id.* at 380; see also Baker & Dinkin, *supra* note 2, at 30-34 (explaining why and how legislators trade votes to secure legislation favoring their own constituents even when this legislation does not have the support of a majority of the electorate).

cluding the holdout costs, of passing such legislation,⁶ and therefore decrease the frequency with which it passes.⁷ Finally, we agree that "as the percentage of legislators required to pass a bill increases, the percentage of efficient spending bills that are enacted also should increase."⁸

Notwithstanding these central areas of agreement, we are troubled by two important aspects of McGinnis and Rappaport's analysis and proposal. First, we do not believe they have demonstrated that the interest groups that benefit under the existing majoritarian system would in fact support the adoption of a constitutional amendment that required the consent of a supermajority to pass certain spending legislation.⁹ In Part I of

6. McGinnis and Rappaport describe decisionmaking costs as "the costs of securing the support of the requisite number of legislators to pass a bill through negotiation and persuasion." McGinnis & Rappaport, *supra* note 1 at 404 n.173 (citing JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 68 (1962)). They add that "[t]hese costs increase as the percentage of legislators required to pass a bill increases, because it takes longer and more effort to secure an agreement between a larger number of parties." *Id.* They describe holdout costs as follows:

Holdouts occur when legislators who would otherwise support a bill refuse to do so in order to extract additional benefits. . . . Under supermajority rules, holdouts have more leverage [than under simple majority rules] because there are fewer other legislators with whom the majority can bargain to form a supermajority coalition.

Id. at 404.

We believe that decisionmaking costs include holdout costs, *see* Baker & Dinkin, *supra* note 2, at 56-57, and we do not read the above definitions provided by McGinnis and Rappaport to suggest that they disagree.

7. *See* McGinnis & Rappaport, *supra* note 1, at 416-18; *see also* Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 148-58 (1995) (noting that supermajority requirements make initiative amendments to state constitutions more difficult to pass, resulting in a maintenance of the status quo); *see also* Baker & Dinkin, *supra* note 2, at 56-57 (observing that some legislation that might be enacted under a simple-majority rule would not pass under a supermajority rule).

8. McGinnis & Rappaport, *supra* note 1, at 408. McGinnis & Rappaport define "efficient" spending bills as those whose total benefits exceed their total costs. *See id.* at 408.

9. As we read their article, the McGinnis-Rappaport Amendment would require an unspecified supermajority of each house of Congress to pass a resolution authorizing the government to spend more than 90% of the total amount spent in the previous year, *see* McGinnis & Rappaport, *supra* note 1, at 422-23, and "would require a supermajority to pass bills that establish or expand entitlement programs," *id.* at 421 (emphasis omitted). They describe this as "a two-tiered supermajority rule." *Id.* at 420.

this Essay, we provide evidence not only that getting from here to there may be more difficult than McGinnis and Rappaport anticipate, but that their chosen destination may well be unattainable under the U.S. Constitution. Second, even if we were persuaded that the McGinnis-Rappaport Amendment could be formally proposed and ratified, we contend in Part II that the Amendment would do little to decrease the aggregate cost to society of the special interest legislation that Congress enacts.

I. THE SMALL STATE BIAS IN CONGRESS AND IN AMENDING THE CONSTITUTION

In order to be an effective constraint on congressional spending, the supermajority rule that McGinnis and Rappaport propose must be a provision of the U.S. Constitution. Otherwise, of course, a simple majority of both houses of Congress could simply repeal, or create an exception to, the rule whenever it proved inconvenient.¹⁰ Amending the Constitution to include such a supermajority rule, however, is likely to prove much more difficult than McGinnis and Rappaport expect, even though they explicitly "recognize that even beneficial changes in a regime are effectuated only with difficulty."¹¹

McGinnis and Rappaport aptly quote Machiavelli's observation that "innovation in regimes 'has as enemies all the people who were doing well under the old order, and only halfhearted defenders in those who hope to profit from the new.'"¹² But they fail to appreciate the potentially fatal implications of Machiavelli's observation for their own proposal, perhaps because of their assumption that "everyone has special interests regarding some kinds of legislation and is a member of the diffuse public for other kinds."¹³ From this highly plausible premise, McGinnis and Rappaport go on to conclude that each citizen

10. McGinnis and Rappaport quite obviously understand this. *See id.* at 369-70, 399.

11. *Id.* at 469.

12. *Id.* (quoting NICCOLÒ MACHIAVELLI, *THE PRINCE* 17 (Robert M. Adams' ed. & trans., Norton 1992) (1513)).

13. *Id.* at 458; *see also id.* at 372 ("[A]lmost all [citizens] are members of some special interest group benefitting from some particular redistribution.").

would be willing to surrender his own subsidy so long as all other citizens agreed to do the same,¹⁴ presumably because all citizens benefit *equally* under the existing regime.¹⁵ We believe, however, that some citizens systematically benefit much more than others under the existing regime and, therefore, might well *not* be willing to surrender their own subsidies even if all other citizens would agree to do so.

In previous articles, we have demonstrated both theoretically and empirically¹⁶ that the existing structure of representation in Congress, combined with the existing rules of majoritarian decisionmaking,¹⁷ affords small population states disproportionately great representation, and therefore also disproportionately great coalition-building power, relative to their shares of the nation's population.¹⁸ This allocation of coalition-building power importantly affects the distribution of gains from any pork-barrel legislation Congress enacts, ensuring small population states a disproportionately large slice, and large population states a disproportionately small slice, of the federal "pie."¹⁹ That is, the existing regime promotes systematic wealth redistribution from the larger states to the smaller states.²⁰

14. See *id.* at 372 (asserting that "almost all [citizens] are members of some special interest group benefitting from some particular redistribution," and concluding that "it would be irrational for members of any interest group to surrender their subsidies unless members of other groups agree to do the same"); *id.* at 469 ("[N]o one will give up their subsidies unless they can be certain that others will give up theirs as well.").

15. McGinnis and Rappaport state that "[b]ecause everyone has special interests regarding some kinds of legislation and is a member of the diffuse public for other kinds, everyone is advantaged and disadvantaged by [a supermajority] rule in a fairly unpredictable manner." *Id.* at 458. If one subscribes to McGinnis and Rappaport's premise, the existing regime of simple majority rules is not logically distinguishable in the resulting allocation of its effects.

16. See, e.g., Lynn A. Baker, *Federalism: The Argument from Article V*, 13 GA. ST. U. L. REV. 923 (1997); Baker & Dinkin, *supra* note 2.

17. Of course, Congress is at present only an imperfectly majoritarian body given the Senate's cloture rule, which requires 60 votes to end debate regardless of the number of Senators present. See Baker & Dinkin, *supra* note 2, at 29 & n.28, 61. See generally Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997) (discussing filibusters, including their antimajoritarian aspects).

18. See Baker & Dinkin, *supra* note 2, at 36.

19. See *id.* at 38.

20. See Baker, *supra* note 16, at 940-42 (showing for fiscal year 1995 "an average

This means that the existing rules governing the enactment of federal spending legislation have a clearly identifiable group of systematic beneficiaries—the small population states that are afforded disproportionately great (because equal) representation in the Senate, and therefore also in Congress, relative to their shares of the nation's population.²¹ Based on the 1990 Census, thirty-two states currently are over-represented in the Senate.²² Each might be expected to oppose the adoption of a constitutional amendment that would adversely affect its continued ability to obtain a disproportionately large share of the federal "pie." Under Article V, the consent of two-thirds of the Senate (or a convention called by two-thirds of the state legislatures) is necessary even to propose an amendment, and ratification by three-fourths of the states is required for adoption.²³ Thus, if the senators (or legislatures) from as few as seventeen of these thirty-two over-represented states opposed the proposal of the McGinnis-Rappaport Amendment, or as few as thirteen states opposed ratification, the continuation of the existing regime would be ensured.

Thus, in order for the McGinnis-Rappaport Amendment to have any chance at adoption, its authors would need to persuade a substantial number of the states that clearly benefit from the existing regime that they would do *even better* under the proposed regime. This would require McGinnis and Rappaport to demonstrate not only that aggregate social welfare would increase if their amendment were adopted,²⁴ but also that at least twenty of the thirty-two states that disproportionately benefit from the existing regime would *each* experience an increase in aggregate welfare notwithstanding the anticipated loss of federal redistribution in their favor. Moreover, to the extent that particular interest groups might have disproportionately great power

per capita income transfer of -\$446 for residents of the ten largest states, compared to an average per capita transfer of +\$356 for residents of the ten smallest states"); Baker & Dinkin, *supra* note 2, at 38-41 (showing the degree of redistribution from larger to smaller states in fiscal year 1995 to be statistically significant ($p < 0.05$)).

21. See Baker & Dinkin, *supra* note 2, at 24.

22. See *id.* at 71.

23. See U.S. CONST. art. V.

24. See McGinnis & Rappaport, *supra* note 1, at 416-18, 424-27.

within particular states (e.g., farmers in Iowa and Nebraska, the dairy industry in Wisconsin), McGinnis and Rappaport similarly would need to persuade each of these interest groups that they would experience an increase in aggregate welfare notwithstanding the anticipated loss of federal redistribution in their favor if the McGinnis-Rappaport Amendment were adopted. We are far from sanguine that McGinnis and Rappaport could provide the relevant states and interest groups persuasive evidence on this score.

McGinnis and Rappaport assert that they "are optimistic, nevertheless, that supermajority rules [for the enactment of federal spending legislation] can command widespread support" because "all sides of the political spectrum are pressing proposed constitutional amendments that are best understood as proposals to dissolve the special interest state."²⁵ They appear to have in mind here the Balanced Budget Amendment and "an amendment to require a two-thirds vote to raise taxes."²⁶ In addition to the obvious fact that neither amendment has yet to secure the approval of two-thirds of the Senate,²⁷ let alone three-quarters of the states, it is significant that the proposed Balanced Budget Amendment would not necessarily constrain federal spending.²⁸ It simply requires that any increase in federal spending be accompanied by an equivalently large tax increase.²⁹ Small population states will benefit disproportionately from any increase in federal revenues,³⁰ and the Balanced Budget Amendment would not alter the systematic wealth redistribution from larger states to smaller states that we have shown occurs under the existing

25. *Id.* at 469.

26. *Id.* at 371.

27. McGinnis and Rappaport acknowledge this fact. *See id.* at 371 n.21.

28. McGinnis and Rappaport acknowledge this: "[B]ecause a Balanced Budget Amendment restrains only debt, it does not prevent Congress from raising taxes or printing money." *Id.* at 406.

29. H.R.J. Res. 1, 104th Cong. § 1 (1995) ("Congress may, by law, amend [the statement of receipts and outlays] provided revised outlays are not greater than revised receipts" (emphasis added)). The amendment also allowed Congress to "provide . . . for a specific excess of outlays over receipts by a vote directed solely to that subject in which three-fifths . . . of each House agree to such excess." *Id.*

30. *See Baker, supra* note 16, at 933-42; Baker & Dinkin, *supra* note 2, at 30-42.

rules.³¹ Thus, the small population states would be more likely to oppose the McGinnis-Rappaport Amendment than the Balanced Budget Amendment.

Similarly, the amendment to require a two-thirds vote to raise taxes would not alter the systematic redistribution from large to small states that occurs under the existing regime. The amendment simply would make it more difficult to *increase* the amount of federal revenue available for such redistribution. The McGinnis-Rappaport Amendment, in contrast, would make it more difficult to *maintain* the amount of federal revenue available for such redistribution.³² This again suggests that the small population states would be more likely to oppose the McGinnis-Rappaport Amendment than an amendment requiring a two-thirds vote to raise taxes.

II. WHY DECREASING SPENDING IS INSUFFICIENT TO CONSTRAIN THE SPECIAL INTEREST STATE

Even if the necessary shifts in the American population were to occur so that the states over-represented in the Senate numbered fewer than the thirteen necessary to block the ratification of the McGinnis-Rappaport Amendment, we expect that the Amendment would have little effect on the total cost to society of the special interest legislation Congress would enact. The McGinnis-Rappaport Amendment undoubtedly would make it more difficult for Congress to enact *spending* legislation that benefits special interests and to increase the total amount of federal *spending*. We do not believe, however, that the McGinnis-Rappaport Amendment would cause interest groups to give up their pursuit of federal rent-seeking legislation. Rather, and much more pessimistically, we believe the Amendment would merely shift the locus of the interest groups' pursuit from spending legislation to other types of special interest legislation

31. See *supra* notes 16-22 and accompanying text.

32. That is, a likely effect of the McGinnis-Rappaport Amendment would be successive 10% reductions in total federal spending until the budget reached an equilibrium level that the requisite supermajority would approve. See McGinnis & Rappaport, *supra* note 1, at 422-27.

including favorable regulations, quotas, restraints on trade, differential taxation, giveaways, and unfunded mandates.

McGinnis and Rappaport anticipate this argument,³³ and acknowledge that regulatory benefits and tax preferences “probably would increase after the passage of a supermajority rule for spending.”³⁴ We are not persuaded, however, that the increase in regulatory benefits and tax preferences “would be considerably smaller than the reduction in special interest spending caused by the supermajority rule,” yielding an overall reduction in special interest legislation.³⁵ In particular, McGinnis and Rappaport critically overlook the possibility that under the existing regime the groups that are the beneficiaries of special interest spending

33. *See id.* at 428-34.

34. *Id.* at 433. Indeed, McGinnis and Rappaport concede that “[i]f special interests do prove more successful in substituting tax preference and regulatory legislation for spending legislation than we think they would be, we would consider applying supermajority rules to those categories of legislation as well.” *Id.* at 432-33 n.273. They give two reasons for why they nonetheless “would not begin constitutional reform with these more sweeping supermajority rules,” *id.* at 433 n.273, but we find neither reason persuasive.

First, McGinnis and Rappaport contend, without elaboration, that “there is a strong argument for incrementalism in constitutional reform” that suggests that one should “begin with the least radical constitutional change arguably sufficient to solve the problem of governance at issue.” *Id.* As we explain in this Part, however, our concern is precisely that the McGinnis-Rappaport Amendment is *not* in fact “sufficient to solve the problem of governance at issue.” In addition, the infrequency with which the U.S. Constitution is amended seems compelling evidence against the feasibility of a strategy of incrementalism in constitutional reform. Were the McGinnis-Rappaport Amendment adopted, history suggests that one could expect a very long wait before further amendments to that amendment would be successfully proposed, let alone ratified.

Second, McGinnis and Rappaport argue that because tax preferences and regulation are more difficult concepts to define than spending, supermajority rules tied to these concepts are less amenable to enforcement by the judiciary than the McGinnis-Rappaport Amendment. *See id.* We are not persuaded, however, that “spending” is any easier to define than “regulation.” For example, should one characterize as “spending” or as “regulation” an offer of federal highway money to the states that is conditional on the states having a certain minimum drinking age? *Cf. South Dakota v. Dole*, 483 U.S. 203 (1987) (holding congressional condition on highway spending constitutionally valid). More importantly, McGinnis and Rappaport’s argument overlooks the dispositive fact that requiring a supermajority for *all* congressional enactments as we propose, *see infra* Part III, does not even require a definition of “spending” and should therefore be even more amendable to enforcement by the judiciary than the McGinnis-Rappaport Amendment.

35. McGinnis & Rappaport, *supra* note 1, at 433.

legislation would have similarly little difficulty obtaining other forms of rent-seeking legislation if that were their preference.

That is, contrary to McGinnis and Rappaport's contention, one might logically infer from various groups' successful pursuit of special benefits through spending legislation under the existing regime, not that they would face greater opposition if they sought beneficial regulatory or tax legislation instead,³⁶ but rather that they would be similarly successful (and face similarly little opposition) if they were to pursue other forms of rent-seeking legislation. Regulatory or tax legislation that benefits farmers, for example, is no more difficult to characterize as "preserving traditional lifestyles and promoting an industry"³⁷ than is a direct subsidy to the same group. Similarly, any special interest legislation that benefits small business, whether or not it takes the form of a direct subsidy, can be characterized as "promoting the economy."³⁸ The key, in sum, is the identity of the interest group receiving the benefit (and the benefit's susceptibility to such uncontroversial characterization) and not the form that the rent-seeking legislation takes. Thus, were the McGinnis-Rappaport Amendment adopted, we would surely see a different "population" of interest groups seeking beneficial regulatory or tax legislation than at present, including many groups that currently benefit from subsidies. We would also expect, however, that the groups that currently face little opposition in their pursuit of beneficial spending legislation would face similarly little opposition in their pursuit of beneficial regulatory or tax legislation under the McGinnis-Rappaport regime.

III. SALVAGING THE MCGINNIS-RAPPAPORT AMENDMENT

It is possible that shifts in the American population might someday occur that would cause the number of states over-represented in the Senate to fall below the thirteen currently nec-

36. See *id.* at 430-31.

37. *Id.* at 430.

38. *Id.*; see also, e.g., Contract With America Advancement Act of 1996, Pub. L. No. 104-21, § 202, 110 Stat. 847, 857 (justifying the reduction of the regulatory burden on small businesses because "a vibrant and growing small business sector is critical to creating jobs in a dynamic economy").

essary to block the ratification of a constitutional amendment. In that unlikely eventuality, our conclusion is not that McGinnis and Rappaport should abandon their quest to rein in the modern special interest state through the adoption of a constitutional supermajority rule, but that they should become more ambitious. The total cost to society of the special interest legislation that Congress enacts can indeed be reduced, we believe, but only through the adoption of a constitutional amendment that would require a supermajority for *all* congressional enactments and not just for certain spending legislation. McGinnis and Rappaport, however, explicitly dismiss this possibility on two grounds.

First, they argue, a supermajority rule imposes holdout costs that may exceed the benefits of the rule's ability to "filter" out special interest legislation.³⁹ They are therefore eager to limit the use of supermajority rules in order to minimize the chance of "government shutdowns and the inclusion of inefficient provisions" in federal appropriation and other laws.⁴⁰ We agree with McGinnis and Rappaport that as one moves from a simple majority rule toward a unanimity rule, the holdout costs and the benefits of the filtering effect both increase.⁴¹ Near unanimity, the incremental benefits of the filtering effect are low and the incremental holdout costs are high. Near a simple majority, the incremental benefits of the filtering effect are high and the incremental holdout costs are low. It is important to note, however, that although there are surely points along this continuum at which the increased holdout costs (which increase the difficulty of enacting both aggregate-welfare-reducing special interest leg-

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

40. *Id.* at 421. We might also note that the government shutdown so feared by McGinnis and Rappaport is an extremely recent phenomenon, and that there have been only a small number of shutdowns, all of very brief duration, in more than 200 years. See Anita S. Kirshnakumar, Note, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget "Train Wreck"*, 35 HARV. J. ON LEGIS. 589, 590 & n.5 (1998) (observing that "[b]udget breakdowns between Congress and the President had engendered federal government shutdowns nine times before 1995 [and] none had lasted longer than three days").

41. See McGinnis & Rappaport, *supra* note 1, at 402-18; see also Baker & Dinkin, *supra* note 2, at 56-59 (observing that "a fifty-percent-plus-one decision rule differs from a sixty-seven percent rule or a ninety-five percent rule only in the combination of decision and expropriative costs which it is likely to impose").

islation and aggregate-welfare-increasing public interest legislation) exceed the benefits of the greater difficulty in enacting special legislation, there are surely other points at which these benefits exceed the holdout costs. Thus, the issue, we believe, is not *whether* to have a supermajority rule for the enactment of all federal legislation, but rather *which* supermajority rule to adopt.

Second, McGinnis and Rappaport express the concern that a supermajority rule for regulatory legislation, for example, would not "filter public interest legislation from private interest legislation as well as a supermajority rule for spending" because "public interest regulatory legislation is more likely to have concentrated special interest opponents than public interest spending legislation."⁴² We disagree with their premise and therefore also with their conclusion. Although federal regulatory legislation may sometimes be enacted in the face of opposition by a concentrated interest group,⁴³ such legislation is more often enacted with enthusiastic interest group support. In addition, any spending legislation that benefits a particular interest group can be reformulated as regulatory or other legislation that is equally beneficial to the interest group.⁴⁴ A subsidy for widget makers,

42. McGinnis & Rappaport, *supra* note 1, at 443. Indeed, McGinnis and Rappaport go so far as to assert that "supermajority rules for regulatory legislation often would have the perverse effect of strengthening the hand of the special interests." *Id.* at 444.

43. McGinnis and Rappaport give the example of "legislation seeking to regulate the pollution caused by a production process" whose enactment would be resisted by the producing companies. *Id.* at 443. Given that the supporters of the legislation are "a classic instance of a diffuse group that is less effective at defending its interests in the political process," *id.* at 444, one is left to wonder why McGinnis and Rappaport suggest that such legislation would be enacted more often than rent-seeking legislation that would benefit the concentrated interest group at the expense of the diffuse public. If they in fact agree with us that regulatory legislation is more often enacted with interest group support than with interest group opposition, they should be more eager to expand their proposed amendment to include a supermajority rule for the enactment of all federal legislation.

44. The example of pollution regulation provided by McGinnis and Rappaport, *see id.* at 443-44, would result in a comparison of apples and oranges—a regulation *opposed* by an interest group would be compared to a subsidy *sought* by the same interest group. Consider instead a subsidy to a polluting industry and a regulation *sought* by the same industry, such as tradable pollution permits that are issued free of charge to existing polluters. Presumably, the rent-seeking polluting industry would prefer that *either* type of legislation be enacted under a simple majority rule rather than under a supermajority rule.

for example, can be reformulated as a price floor with tight import restrictions, or as a quota on who is permitted (licensed) to make widgets and how many they are permitted to make. In sum, a supermajority rule must apply to regulatory (and other nonspending) legislation as well as to spending legislation if it is to decrease significantly the aggregate cost to society of the special interest legislation Congress enacts.

CONCLUSION

In *Supermajority Rules as a Constitutional Solution*, Professors McGinnis and Rappaport have persuasively demonstrated the role that majoritarian congressional decisionmaking and the enactment of spending legislation have played in the continued rise of the special interest State. Understanding how a problem arose, however, may not be sufficient for understanding how to mitigate it. The supermajoritarian constitutional amendment proposed by McGinnis and Rappaport is thoughtful and creative but, as we have shown, it also suffers two major flaws. Because a significant number of states systematically (if unjustifiably) benefit under the existing majoritarian system, the McGinnis-Rappaport Amendment is unlikely ever to be adopted. And even if it were adopted, the proposed amendment is too limited in its scope to result in any significant reduction in the aggregate cost to society of the special interest legislation Congress enacts.

Nevertheless, we share McGinnis and Rappaport's hope that the original Constitution's constraints on the special interest State will eventually be restored. And we expect that their "first draft[] of a blueprint to restore the Framers' vision of a limited government"⁴⁵ will both inspire drafts by others and prove useful in their making.

45. *Cf. id.* at 372 ("Although critics of fiscal supermajority rules, including the Balanced Budget Amendment and the tax amendments, view them as radical innovations, we argue that such rules are better seen as the first drafts of a blueprint to restore the Framers' vision of a limited government.").