Still A Solution: In Further Support of Spending Supermajority Rules

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REPLY

STILL A SOLUTION: IN FURTHER SUPPORT OF SPENDING SUPERMAJORITY RULES

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We are gratified by the responses to our article because they suggest that supermajority rules are a constitutional idea whose time has come. All of the responses agree with our view that simple majority rule can result in inefficient outcomes, including excessive spending.¹ The responses also agree either explicitly or implicitly that the usual solution to a substantial constitutive problem—giving more power to judges to resolve it—seems clearly inadequate or ill-advised in this case.² Two of the responses also acknowledge that structural changes in legislative voting rules on spending may be needed.³ Although each response raises questions about the particular supermajority rules that we propose, we are grateful for this criticism. Supermajority rules will become familiar and effective implements in the constitutional toolbox only if they are sharpened through serious debate.

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2. See Baker & Dinkin, supra note 1, at 526; Garrett, supra note 1, at 472; Graglia, supra note 1, at 510-14.
3. See Baker & Dinkin, supra note 1, at 524; Garrett, supra note 1, at 472.
Our reply to these commentators first takes note of Professor Lino Graglia's reservations about judicial review and suggests that such reservations may argue for an even broader scope for supermajority rules. We then turn to two important criticisms of the consequences of our proposed rule. First, Professor Elizabeth Garrett as well as Professor Lynn Baker and Dr. Samuel Dinkin suggest that spending supermajority rules may cause interest groups to substitute private interest regulatory or tax preference legislation for private interest spending legislation.4 Although our original article discussed the problem of substitutability at length, we return to that very important subject here to offer additional reasons for believing that interest groups will find tax preferences and regulation very imperfect substitutes for spending. Second, Professor Garrett contends that our proposal actually may lead to more inefficient spending because legislators may spend additional funds to form the larger coalitions necessary under supermajority rules.5 We show that such a scenario is very unlikely to occur, because it will be hard to assemble a coalition that wants to spend more than the coalition already formed under majority rule. We next counter various claims that our proposal suffers from design defects: both Professor Graglia's contention that holdouts will remain a problem under our supermajority rules,6 and Professor Garrett's questions about the accounting baseline on which those rules are based.7

We then address suggestions that we have made errors of omission as well as of commission. Professor Garrett asks that we provide more empirical support for our proposal.8 We are receptive to empirical work, but are not persuaded that her outline of subjects for investigation would have been so fruitful as to merit inclusion in our already lengthy paper. Finally, we conclude by replying to the claim of Professor Baker and Dr. Dinkin that our proposal, however meritorious, will never pass because it would harm small states that both obtain disproportionate

4. See Baker & Dinkin, supra note 1, at 522-23; Garrett, supra note 1, at 497-98.
5. See Garrett, supra note 1, at 486-87.
6. See Graglia, supra note 1, at 509-10.
7. See Garrett, supra note 1, at 489-94.
8. See id. at 480-81.
shares of private interest spending by virtue of their overrepre-
sentation in the Senate and can protect this advantage from be-
ing eroded by constitutional amendment.9 This contention offers
us the opportunity to show that the supermajority rules embed-
ded in the constitutional amendment process also constrain the
power of special interests and therefore should ease the passage
of our proposed supermajority rule.

I. ANOTHER WORD ON MAJORITARIANISM

Professor Graglia is characteristically trenchant in criticizing
judicial excesses and praising democracy.10 Our support for
supermajority rules, however, is premised in no small measure
on many of his own concerns. They motivate our own rejection of
individual rights solutions to the problem of excessive expropria-
tion, such as Professor Richard Epstein's suggestion that judges
should hold much of the modern welfare state unconstitutional
under the Takings Clause.11 Indeed, one way of understanding
our position is that supermajority rules offer a third path toward
sound governance—a path between that embraced by those like
Professor Graglia, who uncompromisingly celebrate majority
rule, and that embraced by those like Professor Epstein, who
have very substantial confidence in the judicial protection of in-
dividual rights.12 Supermajority rules avoid excessive expropria-
tion and rash decisionmaking—the characteristic defects of ma-
ajority rule—and also skirt the dangers of judicial usurpation and
ultimate frailty, the characteristic defects of structures based on
individual rights.

Indeed, if, as Professor Graglia asserts, no principles are wor-
thy of absolute protection,13 we would invite him to consider
whether he would prefer (at least as compared to the current re-

9. See Baker & Dinkin, supra note 1, at 517-21.
10. See Graglia, supra note 1, at 510-14.
11. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF
EMINENT DOMAIN x (1985).
12. Although Professors Graglia and Epstein are on the political right, a similar
disagreement divides the political left. Compare RONALD DWORKIN, TAKING RIGHTS
SERIOUSLY 147-49 (1977), with RICHARD D. PARKER, HERE THE PEOPLE RULE: A POP-
13. See Graglia, supra note 1, at 511.
gime) an even broader use of supermajority rules than we propose. A First Amendment cast as a supermajority rule would permit society to address matters that Professor Graglia believes the judiciary has wrongly removed from political debate. For instance, under a supermajority rule, Congress could ban indecency on the Internet because such laws pass with overwhelming majorities. Yet, a supermajority requirement would generally prevent Congress from passing laws that suppress core categories of speech because such laws tend to be less popular.

II. THE SCOPE OF THE SUPERMAJORITY RULE

Professor Baker and Dr. Dinkin, as well as Professor Garrett, criticize our argument that a supermajority rule should apply only to spending measures. Professor Baker and Dr. Dinkin contend that a supermajority rule also should govern regulatory laws, while Professor Garrett questions our reasons for excluding tax preferences from the supermajority rule. We anticipated these criticisms. Like all constitutional structures, supermajority rules force us to trade off advantages against disadvantages and therefore determining their optimal scope is difficult. Nonetheless, we continue to maintain that persuasive reasons support applying the supermajority rule only to spending—reasons that the commentators fail to answer effectively.


17. See Garrett, supra note 1, at 497-502.

18. For instance, even if a particular supermajority rule would prevent some kinds of undesirable legislation, we must also consider whether it would confer too much discretion on the judiciary and whether it would prevent too much desirable legislation.
We begin with a discussion of why the supermajority rule should not govern regulatory legislation. The efficiency of a regulatory supermajority rule—as with any supermajority rule—depends on whether it prevents the enactment of more efficient or inefficient legislation. The legislation that a regulatory supermajority rule will impede falls into two categories. The first category involves ordinary regulatory legislation—legislation that would take the form of regulatory legislation under any regime, including the existing regime, that applies the same voting rule to spending and regulatory measures. Regarding this type of regulatory legislation, we believe that a regulatory supermajority rule would prevent the enactment of more desirable than undesirable regulatory legislation. Indeed, we will argue that a regulatory supermajority rule ironically and quite harmfully would impede the passage of laws that deregulate. We recognize, however, that under a supermajority rule that applies only to spending, special interests will have an incentive to convert undesirable spending bills that cannot secure a supermajority into regulatory bills. This would be a second category of legislation that a regulatory supermajority rule might impede. Nonetheless, these benefits of a regulatory supermajority rule would be small because only a limited number of converted regulatory bills would pass. We thus conclude that on balance a regulatory supermajority rule would be undesirable.

Professor Baker and Dr. Dinkin question our arguments about both categories of legislation that a regulatory supermajority rule would impede. First, they assert that ordinary regulation is “more often enacted with enthusiastic interest group support” than in opposition to it, suggesting that a regulatory supermajority rule would tend to prevent the enactment of undesirable legislation.\(^\text{19}\) Professor Baker and Dr. Dinkin, however, fail to confront the primary reason we gave for distinguishing between regulatory and spending legislation. Although spending legislation normally is funded by broad based taxes that do not fall on any special interest group, regulatory legislation often imposes

\(^{19}\) Baker & Dinkin, supra note 1, at 525.
obligations on a particular group that will be more organized in the political process. As a result, undesirable regulatory legislation is less likely to pass under majority rule than undesirable spending legislation.\(^2\)

The most significant problem with Professor Baker and Dr. Dinkin's proposal to extend a supermajority rule to laws involving regulations, however, is that the rule would impede the passage of laws that deregulate. If, as they suggest, regulatory laws are usually special interest legislation, then requiring a supermajority to eliminate such laws would be extremely harmful. Professor Baker and Dr. Dinkin might try to redesign their supermajority rule to exempt deregulatory laws by applying the rule only to laws that impose obligations but not to laws that eliminate them. Although this would be an improvement, the problem is that virtually any law that deregulates a previously regulated area will also impose obligations.\(^2\)

Professor Baker and Dr. Dinkin also question our view that special interests will find it too difficult to convert spending laws into regulatory laws. They contend that "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."\(^2\)\(^2\) Again, they do not fully confront our arguments. In our Article, we explained that when special interests design their benefits in the form of spending rather than regulation, they do so because it is easier to enact them in this form. If a special interest were forced to convert its subsidy into the form of regulation, that would make it harder for the special interest to obtain its benefits.

\(^{20}\) Similarly, it will more difficult for desirable regulatory legislation to pass than for desirable spending legislation. Desirable spending legislation normally will not face opposition from special interests, but desirable regulatory legislation often will.

\(^{21}\) A law that deregulates may impose various types of new obligations: it may (1) reduce existing obligations by imposing less onerous duties on the regulated parties; (2) eliminate some obligations, while imposing different ones; and (3) impose new or reduced obligations during a transition period. When Congress passed the Airline Deregulation Act of 1978, the statute was 50 pages long and imposed numerous obligations on the airline industry. See Airline Deregulation Act of 1975, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

\(^{22}\) Baker & Dinkin, supra note 1, at 525.
The very example that Professor Baker and Dr. Dinkin give to show that spending legislation and regulations are interchangeable only illustrates our point. They claim that "[a] subsidy for widget makers . . . 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." These reformulations, however, might affect the ability of special interests to enact the subsidy. For example, if the widgets were sold largely to one or a few industries—rather than to the public generally—the purchasers may be able to organize and oppose effectively either of these mechanisms. The purchasers would not oppose, however, and might even mildly support, a subsidy to the sellers. Even if the widgets were sold to a diffuse group of consumers, there are still many situations in which organized interests might oppose these regulations. For instance, the seller of a complementary good might be organized and therefore oppose regulations that would decrease the demand for their product. Finally, even if a regulation would not affect any organized interest, widget makers still might find it difficult to enact at times. Members of Congress, for example, might be reluctant to pass a naked price floor and risk being seen as responsible for the high price of a product, especially if the product were used by many people.

Converting other spending laws into regulatory laws would raise different problems. One of the most significant is that certain spending laws cannot be converted easily into regulatory laws without significant changes in the structure of the program. Consider, for example, the difficulties of converting Social Security into a regulatory program. Although it might be possi-

23. Id. at 525-26.
24. They might support a subsidy to the sellers because it would lower the seller's costs and might reduce the price of the product.
25. Two goods are complementary "when an increase in the demand for one will lead to an increase in the demand for the other." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 504 n.5 (5th ed. 1998). An example of complementary goods are CDs and CD players. There generally will be less demand for a good if the price of a complementary good were to increase.
26. Again, members of Congress might not oppose a spending subsidy because it might even lower the price of the good.
ble to require firms to provide their workers with pensions upon retirement, that regulatory program would differ substantially from the existing Social Security program. For example, the regulatory program would require fully funded pensions rather than the pay-as-you-go system established by Social Security. A fully funded system, however, would have been much harder to enact initially and would have been much better public policy.

27. A fully-funded system would involve taxing people during their working years to fund their retirement pensions; by contrast, a pay-as-you-go system involves taxing existing workers to fund the retirement pensions of existing retirees. See Peter J. Ferrara, Social Security: The Inherent Contradiction 117-18 (1980). The difficulties of operating private pensions on a pay-as-you-go basis are too extensive to permit discussion here. Consider just one problem: Under a pay-as-you-go system, firms would be required to pay pensions to prior workers from existing revenues. Consequently, firms with long histories would be at tremendous disadvantages against new firms who have no prior workers. The older firms would have an incentive to close down and form new firms without the prior obligations.


29. A Congress truly determined to pass the current Social Security system as a regulatory program could have established a regulated private monopoly that would receive the regulatory transfers (taxes) from firms and workers, invest them in government bonds, and then make payments to workers in accordance with benefit standards established by Congress. Even this program would differ significantly from Social Security. For example, regulatory payments by workers to the private monopoly would establish some contractual right to benefits—in contrast to the noncontractual character of Social Security benefits—unless Congress was willing to require people to make transfers of funds without any right to benefits in return (and the courts were willing to hold such a program constitutional). Similarly, the monopoly would be administered by officials chosen by the private sector—in contrast to the presidential appointment of the Secretary of Health and Human Services—unless Congress required presidential appointment. If Congress chose to have the regulatory system precisely mirror the spending program, that would create at least two other problems. First, the courts might find the regulated private monopoly to be governmental and therefore the payments it makes to be government spending. After all, the private monopoly might be found to be governmental for purposes of other constitutional provisions, including the First Amendment. See Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 394 (1995) (holding that Amtrak is a governmental entity for "the purpose of individual rights guaranteed against the Government by the Constitution"). Second, a regulatory program that precisely mirrored a spending program could strengthen the position of opponents of the program. They could now
Clearly, converting spending programs into regulatory programs is a much harder task than Professor Baker and Dr. Dinkin suggest. The conversions would incur additional political opposition, which might often prevent the program from being enacted. After all, the spending programs that are likely to be converted to regulatory programs are those that could not secure a supermajority as a spending program—that is, the spending programs that are the weakest politically.

We now turn to Professor Garrett's contention that the supermajority rule should be extended to tax preferences. Our argument here closely follows our argument against a supermajority rule for regulatory legislation and therefore we confine ourselves to two main points. First, because it is difficult to define tax preferences in a narrow and precise manner, any supermajority rule that applies to tax preferences would also apply to reductions in taxes.\(^3\) Requiring a supermajority for tax reductions, however, would impede tax cuts, which are both an extremely beneficial form of legislation and one of the most potent ways of pressuring the government to reduce spending. Second, it often will be difficult for Congress to convert spending bills into tax preference legislation. Many of the same reasons that make it difficult to convert spending laws into regulatory laws also make it difficult to convert spending laws into tax preferences, including the difficulty of framing certain spending programs as tax preference programs. For example, one could not enact Social Security as a tax preference because most of the recipients receive much more in Social Security benefits than they pay in federal taxes.\(^3\)
III. FILTERING

Professor Garrett questions our claim that supermajority rules will filter out undesirable spending. She argues that the need to assemble a coalition of sixty percent of the legislature might increase the amount of such spending. That is, for a majority to secure the support of an additional ten percent of the legislators, it might have to spend extra funds desired by these legislators. Professor Garrett asserts that "[t]he key question concerns the preferences of lawmakers whose votes are required to make up the difference between majority support and supermajority support."33

Professor Garrett raises an interesting and important point. We agree with her that it is the preferences of the additional legislators needed to secure the supermajority—and especially of the legislators in the majority who are least supportive of the majority coalition—that are important. Nonetheless, we believe that these legislators are unlikely to support additional spending. Therefore, filtering is likely to occur.

An example will help to illustrate our point. Assume that under majority rule, a coalition of fifty-one senators was formed that supported private interest spending of $51 million. Each senator in the coalition would receive $1 million of such spending for his state. Assume that a sixty percent supermajority rule is then enacted. According to Professor Garrett's argument, in order to gain the support of sixty senators, the coalition might decide to spend an extra $9 million on nine additional senators. Although this is a theoretical possibility, there are strong reasons to doubt that it would occur.

To see why this result is unlikely, consider the following question. If the original coalition of fifty-one senators could have spent $60 million—allocating the additional $9 million amongst themselves—then why did they not do so? The most likely reason is that the coalition did not spend the extra funds because it would have generated opposition within the coalition. Senators

pursposes and thus would fall under" the spending supermajority rule).

32. See id. at 486-87.
33. Id. at 487.
are not willing to spend unlimited funds, even if allocated to their own states, because such expenditures would require increases in taxes or the deficit. They are willing to support only those expenditures which have more political value to them than the additional taxes or deficit. We therefore can surmise that the additional $9 million of private interest expenditures would have caused the members of the coalition who were least supportive of such spending (the "marginal members") to drop out.

Under this analysis, the response to a supermajority rule that Professor Garrett envisions is extremely unlikely. If the coalition of fifty-one members were unable to muster support for $9 million of additional expenditures \textit{for itself}, it certainly would not have supported $9 million of additional expenditures \textit{for nine other senators}.\textsuperscript{34} It also is unlikely that new senators can be found who would be willing to join the coalition. If a coalition under majority rule wanted to maximize the amount of private interest spending it could secure, it would include within the coalition only those legislators who most supported such spending. This would be the optimal strategy for generating marginal members who prefer large private interest spending. If the coalition were to pursue this strategy under majority rule, however, the coalition would be forced to attract new members from a pool of senators who all desired even less private interest spending than the marginal members.\textsuperscript{35} In the end, the problem with

\textsuperscript{34} Another reason why the coalition might have been unwilling to spend $60 million under majority rule is that the additional spending might have provoked senators outside of the coalition to take extraordinary actions to defeat the bill. If this were the reason why the majority coalition did not spend more under majority rule, it also would prevent the coalition from attempting to secure supermajority support by spending additional funds. The threatened extraordinary actions by senators outside the coalition still would be damaging under a supermajority rule.

\textsuperscript{35} It might be argued that our analysis is unrealistic because it assumes that members are chosen for the coalition based exclusively on their preference for spending. We adopted this assumption because it is a useful analytic device. Relaxing it, moreover, does not change the result significantly. Assume that the coalition is formed based not only on preference for spending, but also on other factors, such as party affiliation and whether the legislator is the chair of an important committee. The coalition then might include certain legislators who prefer moderate amounts of spending because these other factors are regarded as more important to the coalition. But if that were true under majority rule, those members also will be included under a supermajority rule because these other factors will remain important. Tak-
Professor Garrett's response is that it ignores the hurdles that a spending coalition must address under majority rule and therefore overestimates the options that the coalition would have under a supermajority rule.

What then will be the result of a supermajority rule? Because the majority spending coalition would spend only as much as its members would support, it could not secure additional support by increasing the total amount of private interest spending. Instead, there are three possible effects of the supermajority rule. First, and most optimistically, the senators might not be able to form any coalition to support undesirable spending. There simply might be no spending package that would provide net benefits to a supermajority of senators. Second, the coalition might be able to obtain the support of a supermajority only by reducing the amount of private interest spending. A reduction in such spending could decrease the costs of the spending to each member by lowering the taxes or deficits that must be imposed. Although a reduction in private interest spending also would decrease the benefits of the spending to each member, if the coalition were to eliminate those spending projects that each member deems to be the least politically valuable, the decrease in benefits might not be as large as the decrease in costs. As a result, the net benefits that each member derives from the spending would increase. This, in turn, might allow the coalition to use some of the funds to attract the additional senators needed to form a supermajority without losing the marginal members.

While the first two possibilities would promote the public interest by reducing or eliminating private interest spending, the final possibility is neutral. The majority coalition may decide to

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Taking other factors into account, however, may change the result as to whether nine additional senators can be found to support additional spending. If the original majority coalition does not contain the biggest spenders, some senators who support spending more than the marginal members may be available to join the coalition. Yet, the need to take additional factors into account often will frustrate the coalition's ability to choose these senators. If these other factors were more important, the coalition might be forced to offer membership to senators who favor less spending.
maintain the same amount of private interest spending, but to allocate it to the additional members needed to obtain a supermajority. Because the marginal members would withdraw if any private interest spending was taken from their share, the spending for the additional members must derive from the coalition members who most support such spending. Depending on how much money the additional members would require and how much money the biggest private interest spenders would be willing to provide and still support the coalition, it is possible that the same level of total spending could secure supermajority support. The coalition is not likely to adopt this strategy, however, because the nonmarginal members of the coalition (who are the most numerous) probably would prefer the second possibility to this one. Under the second possibility, the nonmarginal members gain less spending, but they also have the benefit of a lower tax burden or deficit. Under the third possibility, by contrast, these members secure less spending with a high tax burden or deficit. Unless they care little about higher taxes or deficits, they are unlikely to prefer this possibility. Another reason why the third possibility may be resisted is that it creates additional bargaining problems, because it rewards members who desire private interest spending the least and therefore provides senators a strong incentive to posture.\textsuperscript{36} It thus would appear that the coalition is quite unlikely to choose this strategy.

In sum, there are three possible results of the introduction of a supermajority rule in the situation envisioned by Professor Garrett, and none involves an increase in total private interest spending. Two of the possibilities reduce or eliminate private spending, while the least likely possibility merely leaves private spending at its previous level. This supports our original conclusion that supermajority rules will generally, but not always, filter out undesirable spending.

\textsuperscript{36} Although senators have an incentive to posture under majority rule, they would have more of an incentive if the coalition that was to pursue this strategy under a supermajority rule because the posturing members would receive a larger share of the benefits in the latter case.
IV. HOLDOUTS

Professor Graglia argues that holdout costs would undermine our proposal. Although we addressed these costs in our Article, he is skeptical of our proposed solution. Here we explain why we believe Professor Graglia's criticisms are mistaken.

In our article, we argued that holdouts—legislators whose votes are needed to pass a bill and who use their position to extract concessions—would pose a greater problem under supermajority rules than under majority rule. "Under supermajority rules, holdouts have more leverage because there are fewer other legislators with whom the majority can bargain to form a supermajority coalition."\(^{37}\) We asserted that the most serious holdouts problems would occur if supermajority rules were applied to individual appropriation laws, because such laws already face the greatest holdout problems under majority rule. When Congress fails to enact appropriation laws, the government must close down on a particular date, and this creates tremendous pressure to avoid the high costs created by such a shutdown. Thus, applying supermajority rules to individual appropriation laws might lead to undesirable provisions extracted by holdouts as well as disruptive government shutdowns.

We addressed this problem by not applying supermajority rules to individual appropriation laws, but instead applying them to situations in which there is less pressure to enact a bill at a specific time. In one part of our supermajority rule, we apply the supermajority rule to the establishment and expansion of entitlement programs. Because the programs are not in existence, the public does not rely on them. Professor Graglia maintains, however, that legislators will remain under significant pressure to enact the programs. He states that entitlements programs "are the result of ardent and sustained effort, making it doubtful . . . that such programs can easily be postponed once they are on the legislative agenda."\(^{38}\)

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38. Graglia, *supra* note 1, at 509 (footnote omitted).
The second part of the supermajority rule applies to total spending that exceeds ninety percent of the amount spent in the previous year. Under this part, if there are holdouts, a majority can pass spending at the ninety percent level, temporarily preventing a government shutdown, and then use the additional time to secure the support of a supermajority. Professor Graglia is skeptical that the ninety percent rule will reduce holdout costs, claiming that “[t]he resolution requiring a supermajority . . . eventually [will] have to be passed and . . . holdouts would have leverage at that time.” In our view, both of Professor Graglia’s criticisms rest on a single premise: his belief that there is as much pressure to enact a new entitlement program or to increase total spending above the ninety percent level as there is to avoid a government shutdown.

We contend that Professor Graglia’s premise is mistaken. There is an enormous difference between avoiding a government shutdown, and establishing new government programs or averting a ten percent cut in the funding of an existing program. Congress faces far more pressure to avoid a government shutdown that may impose enormous costs on a public that relies on existing programs. For example, when the government ceases operations and Social Security retirement checks cannot be dispensed, senior citizens who rely on these funds understandably are frightened and agitated. Their anxiety and the public response to this anxiety are not comparable to the public reaction, if any, from a delay in the enactment of a new program for the elderly or from the postponement of a bill that merely would increase funds for the administration of Social Security above the ninety percent level. As long as existing programs are operating, the majority will be able to take the time to determine which other

39. Id.
40. It might be argued that our example is misleading because we assume that full Social Security retirement benefits would be paid, even though the proposed supermajority rule would require that no more than 90% of total spending, including entitlement spending, could be passed with a simple majority. This objection misses the point. The supermajority rule allows the majority discretion to determine how to allocate these funds. The majority no doubt would seek to minimize the political costs of failing to pass an ordinary budget and therefore would choose to fund fully programs that are politically sensitive, like Social Security retirement benefits. Instead, the majority would reduce funding for less pressing programs.
legislators might be willing to support the proposed spending. The majority can bargain with these legislators and other holdouts, and make informed judgments concerning how much their support really will cost. In this way, the majority can establish competition between holdouts to reduce the price of their support.\textsuperscript{41}

V. THE MEASURE OF SPENDING

Under our proposed supermajority rule, a majority of Congress may spend only ninety percent of the amount spent in the previous year. Professor Garrett raises two issues involving how spending should be measured under this rule. First, should the amount spent in the previous year be measured in terms of the dollars actually spent or in terms of the services provided to the public?\textsuperscript{42} Under existing law, Congress measures the amount of services provided through what is called the "current services baseline."\textsuperscript{43} Second, if one measures the dollars actually spent, should one use an accrual or cash-basis method of accounting?\textsuperscript{44}

Professor Garrett's discussion of these issues is interesting, and touches upon many points with which we agree. Most importantly, she recognizes that none of these measures is perfect and the best measure therefore will be the one that most successfully addresses the relevant tradeoffs. In the end, we do not regard the central parts of her discussion as a criticism of our article, because she agrees with our view that a cash-basis method is superior to an accrual method of accounting and acknowledges that there are significant problems associated with a current services baseline.\textsuperscript{45} Nonetheless, her discussion does raise a few issues that merit discussion.

\textsuperscript{41} By contrast, if the government were about to run out of funds, the majority would be forced to bargain with fewer holdouts and make snap judgments concerning how much the holdouts would require to support the legislation. This situation, in turn, might induce holdouts to attempt to extract even more, because they might be able to get away with it.

\textsuperscript{42} See Garrett, \textit{supra} note 1, at 489-94.

\textsuperscript{43} See id. at 490 (quoting W. Mark Crain & Nicole Verrier Crain, \textit{Fiscal Consequences of Budget Baselines}, 67 J. PUB. ECON. 421, 421-22 (1998)).

\textsuperscript{44} See id. at 484-86.

\textsuperscript{45} See id. at 492-93, 495.
Our proposed supermajority rule measures the previous year's spending based on the amount actually expended rather than the amount of services provided. In part, we chose the actual expenditures measure because the current services baseline is too accommodating of spending increases, can be used to mislead the public, and can be manipulated. Professor Garrett contends, however, that the current services baseline has the benefit of better measuring the amount of services that current law provides. Even if this were true, it is not a significant benefit under our supermajority rule. The primary purpose of the ninety percent feature of the rule is to allow a majority of Congress to pass enough temporary spending so that it can defend itself against holdouts and that does not require a precise measure of current services.

Our proposed supermajority rule also employs cash accounting rather than the accrual method. Although we recognized that Congress can manipulate a cash accounting rule, this rule confers much less interpretive discretion on Congress and the courts. Professor Garrett argues that special interests could attempt to circumvent a cash-basis supermajority rule by passing delayed spending programs. Such programs would spend little in the early years, but large amounts in later years. She contends that these programs might be able to secure supermajority support because they do not involve large expenditures initially. Then, in later years, they might be difficult to repeal and provide significant amounts of spending.

46. See id. at 492.
47. In a footnote, Professor Garrett asks whether appropriations bills could be passed by majority vote if the total authorized spending at that point were less than 90%. See id. at 489-90 n.69. Because the supermajority rule only requires a supermajority to spend more than 90% of the previous year's spending, the Constitution would not prohibit such action. Congress, however, would have a strong incentive to adopt a more orderly process, and we suggested a process employing the concurrent budget resolution that would do so. Professor Garrett criticizes our concurrent resolution proposal on the ground that the existing concurrent resolution procedure does not work well. But our proposal would function under different incentives—the supermajority rule—and would operate differently than the existing arrangement. For example, members of the minority in Congress would have an incentive to insist on strict procedures in the concurrent resolution process. Moreover, under our proposal, if a concurrent resolution were not passed by a supermajority, the committees could propose spending of only 90% of the previous year's amount.
Although delayed spending is possible under our proposed supermajority rule, we do not believe it would create significant problems. First, the most effective method of insulating a delayed spending program from repeal would be to enact an entitlement. Entitlement programs, however, could not easily pass under our proposal because we include an additional rule that requires a supermajority to enact such programs. Second, our spending supermajority rule will provide Congress with a strong incentive to pass rules guarding against such delayed spending. Delayed spending programs ordinarily will not lead to higher overall spending levels because that would require the approval of a supermajority; instead, they will displace other appropriations. Advocates of the other programs therefore would have a strong incentive to foreclose delayed spending. Finally, even if delayed spending were enacted, it would not be able to raise total spending levels significantly, because such action requires the support of a supermajority. Instead, delayed spending would displace other forms of spending, which still is an improvement over the spending growth permitted by majority rule.

VI. PROFESSOR GARRETT’S EMPIRICAL SUGGESTIONS

Professor Garrett suggests that we need to provide more empirical support for our spending supermajority rules. In particular, she notes that Congress already has some supermajority rules governing the budget process whose effects could be investigated. She singles out the filibuster rule—the requirement that sixty votes are needed to close off debate in the Senate—as a particularly promising area and notes that a recent study contends that the filibuster has not in fact operated to promote public interest legislation.

We are grateful for Professor Garrett’s suggestions and embrace the potential value of empirical work in the supermajority area. The subjects for empirical investigation Professor Garrett suggests, however, do not present avenues of research sufficiently tractable or relevant to merit inclusion in our initial defense.

48. See Garrett, supra note 1, at 479-81.
49. See id. at 483-84.
of spending supermajority rules. The inclusion of a lengthy and diffuse empirical section would have detracted from our focus on the theory of supermajority rules and made for an oversized article. In any event, we believe that a careful theoretical analysis, especially if supported by the lessons of constitutional history, can present a compelling case for constitutional reform.

Arguments for constitutional provisions have long been based on logical analysis of their likely effects. The Federalist Papers, for instance, offered such arguments for the original constitution. In our original article, we presented detailed reasons showing that special interests lead to inefficient spending under our current fiscal constitution. The reasons are based in the science of public choice, which is itself rooted in empirically tested claims about political behavior. We also provided rough empirical support for this proposition by reviewing the history of our fiscal constitution. We offered reasons to believe that federalism acted to frustrate inefficient spending and showed that spending dramatically rose after the death of constitutional federalism. Thus, we made a common sense empirical argument that excessive spending results when a unitary government exercises plenary powers and is subject to majority rule.

We then explained why supermajority rules would restrain such spending. First, we suggested that if most spending under a supermajority rule were inefficient, a spending supermajority rule would lead to more efficient spending even if it reduced efficient and inefficient spending equally. Here we made a factual case that more current spending is inefficient than efficient, while acknowledging that in an article of this kind, we could not comprehensively discuss the efficiency of all federal programs. We argued at length that supermajority rules for spending will filter out more inefficient spending than efficient spending. Aside from one argument that we discuss above, Professor Garrett does not suggest that any of these arguments are flawed.

51. For a discussion of the empirical success public choice has had in explaining the size of government, see DENNIS C. MUELLER, PUBLIC CHOICE II 320-47 (1989).
52. For a response to this argument, see supra notes 32-36 and accompanying text.
It is the argument for filtering that Professor Garrett believes could benefit from an empirical analysis of current rules. We are familiar with the House and Senate rules governing legislation that she suggests as possible opportunities for empirical rigor. Precisely because of our familiarity, however, we are not persuaded that empirical work on these rules could provide sufficiently powerful evidence to have warranted inclusion in our original article.

We begin with Professor Garrett’s primary suggestion that we investigate the effect of the Senate filibuster rule, because reviewing the difficulties of such an investigation illustrates the general problems for empirical work in this area. The first hitch is that the filibuster rule differs significantly from our proposed supermajority rules. Thus, even were the filibuster rule ineffective in promoting public interest legislation, it would not show that supermajority rules were ineffective. The supermajority required to close off debate is triggered only by a decision of senators to filibuster. Because considerations of party unity and reciprocity toward other senators restrain filibusters, a filibuster may not produce the systemic beneficial effects of a supermajority rule that operates automatically.

53. See Garrett, supra note 1, at 480-82.
55. See Garrett, supra note 1, at 482-83.
57. Professor Garrett also mentions the committee system in passing as a possible point of comparison. See Garrett, supra note 1, at 478. The differences between our rule and the committee system are so enormous that we are a little surprised she considers it relevant. The committee system may be countermajoritarian but it is unlikely to restrain private interest legislation. Individual representatives in fact frequently choose committees so that they can be more effective in gaining spending for their special interests. See McGinnis & Rappaport, Constitutionality, supra note 54, at 498 & n.75.
Second, an empirical study of the filibuster would be extremely difficult to carry out with the rigor necessary to be persuasive. This is demonstrated by the very study Professor Garrett references to suggest that the filibuster rule may block much public interest legislation—*Politics or Principle? Filibustering in the United States Senate*. This study does not even purport to be a rigorous empirical demonstration of the claim that the filibuster rule has damaged the public interest.\(^{58}\) In fact, it expressly tells us why empirical analysis of the filibuster rule is fraught with difficulty. First, it notes that it is impossible to determine what legislation was not introduced because of the possibility it would be filibustered.\(^{59}\) This analysis would be crucial to understanding whether the filibuster has actually blocked more private interest than public interest legislation. Second, it notes that individual legislators for strategic and other reasons may not vote under the filibuster rule as they would under majority rule, thus making it hard to ascertain what the result would have been in the absence of a filibuster rule.\(^{60}\)

Moreover, as both Professor Garrett and the authors of *Policy or Principle?* themselves argue, determining whether the legislation was in the public interest is difficult.\(^{61}\) In fact, the authors of *Policy or Principle?* do not themselves make any careful defense of the claim that measures blocked by the filibuster were, taken as whole, in the public interest.\(^{62}\) Although we believe we can distinguish between public interest legislation and private interest legislation conceptually, applying those judgments in specific cases would be a lengthy task of the kind we elsewhere

\(^{58}\) It simply provides lists of measures that in the view of the authors were killed by the filibuster or substantially modified by the filibuster. See Binder & Smith, *supra* note 56, at 135, 144.

\(^{59}\) See id. at 130.

\(^{60}\) See id. at 131-32 (referencing such considerations as party affiliation and status in a minority party). For further discussion, see *supra* note 57 and accompanying text.

\(^{61}\) See Binder & Smith, *supra* note 56, at 137 (stating that the utility of a filibuster is bound up in one's assessment of the merits of civil rights legislation); Garrett, *supra* note 1, at 485.

\(^{62}\) See Binder & Smith, *supra* note 56, at 134-36 (listing measures blocked by the filibuster and thought by the authors to be in the public interest).
acknowledged was simply beyond the scope of our paper. Making such judgments in fiscal matters would be particularly challenging because a bill might be inefficient overall, despite containing some efficient provisions.

In addition, Policy or Principle? does not undermine our case for spending supermajority rules, because it focuses largely on nonspending legislation. In fact, this study provides some anecdotal support for our decision not to apply supermajority rules to regulatory legislation because of our suggestion that such rules may block more public interest than private interest legislation.

Empirical studies of other federal legislative rules would suffer from the same combination of difficulties—the legislative rules are very different from the supermajority rules we propose and are resistant to easy empirical analysis. For instance, the House rule requiring a three-fifths majority to raise taxes has little bearing on constitutional rules because it is both waivable by a majority and is frequently waived.

Two important rules in the budgetary process referenced by Professor Garrett do require a supermajority to be waived in the Senate, but close examination again suggests that they neither so directly bear on the case for supermajority rules nor are so tractable as to have warranted inclusion in our article. One rule permits any senator to raise a point of order on a bill that would lead to a breach of the budget ceiling set by the concurrent budget resolution. Another permits a senator to raise a point of order against a bill that would breach the ceiling set by an applicable federal budget act. Such points of order can be overridden only by a sixty-vote majority.

These supermajority rules are very different in nature from our proposed supermajority rule. First, these rules have an en-

63. See McGinnis & Rappaport, supra note 37, at 411.
64. See Binder & Smith, supra note 56, at 135 (listing 41 measures blocked by filibuster of which only two were appropriations bills).
65. See McGinnis & Rappaport, supra note 37, at 443-44.
66. See McGinnis & Rappaport, Constitutionality, supra note 54, at 500-02 (discussing the ability of Rules Committee to waive House rules).
67. See Garrett, supra note 1, at 479-80.
68. See id.
69. See id. at 480.
tirely different purpose: they seek to keep the Senate from exceed-
ing the budget ceiling set either by previous law or resolution.\textsuperscript{70} They are thus not designed to filter public interest from private interest legislation. Moreover, the point of order structure, unlike the structure of our rule, requires a member to raise a point of order with the risk that he will face retaliation for doing so. The cost of raising such points of order increases the likelihood that they will be used strategically to advance the pursuit of some highly politicized issue or a cause of some interest group. Professor Garrett has herself pointed out this problem in her fine discussion of the Unfunded Mandate Act of 1995, which seeks to police unfunded mandates by the use of points of order.\textsuperscript{71} A study of this Senate rule would also be beset by the same problems that prevented the authors of \textit{Policy or Principle?} from undertaking a real empirical study. To determine the real efficiency effects of the rule, one would have to evaluate the legislation it prevented (and perhaps the legislation that was never introduced) as well as the legislation that it allowed to pass.\textsuperscript{72}

\textbf{VII. THE POLITICAL FEASIBILITY OF OUR PROPOSAL}

Professor Baker and Dr. Dinkin suggest that our proposed constitutional amendment, however worthy, stands little chance of being incorporated into the Constitution.\textsuperscript{73} They argue that citizens of small states enjoy disproportionate leverage in gaining pork-barrel spending, principally because the equal repre-

\begin{itemize}
\item \textsuperscript{70} For a discussion of the purpose of the point of order process in enforcing budget ceilings, see Elizabeth Garrett, \textit{Rethinking the Structures of Decisionmaking in the Federal Budget Process}, 35 HARV. J. ON LEGIS. 387, 399 (1998).
\item \textsuperscript{72} One other way of studying the effect of filibusters would be to compare budgetary legislation passed by the House of Representatives with budgetary legislation passed by the Senate under the filibuster rule. That study would also face problems. First, the actions of the House would be influenced by the rules of the Senate because the bills in the House also would have to pass the Senate to become law. Second, the House is a very different institution from the Senate in other ways as well, with power concentrated in the majority party rather than in the majority preferences of its members. See McGinnis & Rappaport, \textit{Constitutionality}, supra note 54, at 499. Thus, such a comparison might not be able to isolate the effects of the filibuster rule.
\item \textsuperscript{73} See Baker & Dinkin, supra note 1, at 517-21.
\end{itemize}
sentation in the Senate gives them power disproportionate to their numbers. Small states also have disproportionate power in both stages of the constitutional amendment process, because either a supermajority of the Senate or of the states themselves is required both for proposing and ratifying an amendment. Accordingly, a constitutional amendment that will deprive citizens of small states of their pork-barrel spending faces very serious obstacles.

Professor Baker, in particular, is an expert in the area of federalism, the constitutional amendment process, and public choice, and we are grateful for this sustained consideration of the feasibility of our proposal. We did not purport in our original article to give a complete defense of the political feasibility of our specific proposal and thus Professor Baker and Dr. Dinkin provide us with an opportunity for discussing this point further. Although we certainly agree that our proposal, like all proposals for fundamental change, faces substantial hurdles, we do not believe that they are insuperable.

First, the opposition to our proposal from small states depends in part on whether it is applied to the House alone or also to the Senate. Even if the proposal were applied to both the House and the Senate, however, the small states would continue to have disproportionate power in the Senate because all states would still have two senators irrespective of their population. Although the supermajority rule would reduce the amount of undesirable spending, small states could expect to receive the same disproportionate percentage of this spending. Thus, small states might not actively oppose the supermajority proposal. Moreover, it is not clear that our proposal for supermajority spending rules should necessarily be applied to the Senate. If the proposed rule applied only to the House, the small states would even more clearly retain their leverage and would be disadvantaged only in the sense that Congress as a whole would approve less pork-barrel spending.

We recognize that small states might object even to the same proportion of a smaller sum, because they would be in absolute

74. See id. at 518-19.
75. See U.S. CONG. art. V.
terms losers from the change. Even in these circumstances, though, the problem of the small states poses a less substantial barrier than it once would have, because geographically based pork-barrel spending is a smaller proportion of inefficient spending than it used to be. As we noted in our article, the latter half of this century has seen the rise of new types of interest groups, like the elderly, that live in symbiosis with the modern welfare state. As a result, entitlement spending, which is largely not geographically based, has come to represent more than half of all spending.\footnote{See Allen Schick, \textit{The Federal Budget: Politics, Policy, Process} 9 (1995).}

The importance of the rise of such interest groups is twofold. First, depending on their distribution in small and large states, these nongeographically based interest groups may significantly weaken the desire of small states to maintain a structure that permits substantial inefficient spending. For instance, there is evidence suggesting that by 2020 the percentage of the elderly in the larger states will be greater than the percentage of the elderly in the smaller states.\footnote{See Frank B. Hobbes, \textit{U.S. Dept of Commerce, Current Population Reports, Special Studies, P23, No. 190, 65+ in the United States} 5-4 (1990) (providing figures that suggest that by 2020, the average percentage of the elderly in each of the 10 largest states will be approximately 17% while the average percentage in each of the 10 smallest states will be approximately 15%).} If much of the spending for the elderly is inefficient, large states will be proportionally advantaged by these transfers because they disproportionately consist of the elderly. This might counterbalance the small states' advantage in pork-barrel spending and thus incline them more favorably to reform. Moreover, nongeographic interest groups are not reinforced in their political power by the federalist structure of our political system and thus have less power in the constitutional amendment process.

Second, eliminating such inefficient spending can make everyone wealthier. This gives voters incentives to accept a change in rule even if they will lose out on some geographically distributed pork. The wealth incentive is also likely to become more important as the proportion of inefficient spending that is not geographically based grows.\footnote{For reasons stated in our article, we believe that nongeographically based in-}
The second reason we are more optimistic than Professor Baker and Dr. Dinkin derives from our view of political behavior regarding the Constitution. Although we agree that much political behavior is based on narrow self-interest, we believe that citizens can also under certain circumstances act for the public good. Indeed, based on an analysis similar to that we undertook on supermajority rules, we have reason to conclude that the system for ratifying constitutional amendments is likely to promote public spirited deliberation concerning significant proposals. First, constitutional amendments are simply more important, both practically and symbolically, than ordinary legislation. Not only do they govern ordinary legislation, they also are bound up with citizens' fundamental conception of themselves. As a result, the diffuse public pays more attention. This reduces the power of interest groups who are less able to exploit the citizenry's rational ignorance of politics.

Second, the supermajoritarian requirement for proposing constitutional legislation discourages narrowly rent-seeking legislation because such legislation cannot overcome the high hurdles for constitutional reform. This restricted agenda for constitutional proposals also helps the public focus on the few proposals that may succeed in overcoming these hurdles. Third, the supermajority rules also tend to assure that proposals for constitutional reform possess a generality of application, and their status as constitutional amendments assures that, if adopted, they are entrenched against easy repeal. Consequently, individuals determine their support for constitutive rules under a gauzier veil of ignorance than they do in the case of ordinary legislative proposals. For instance, in a mobile society like ours,

79. In this, we follow the originators of public choice analysis. See James M. Buchanan & Gordon Tullock, The Calculus of Consent 285-86 (1969).


81. See John R. Vile, Constitutional Change in the United States 96 (1994) (suggesting that the obstacles in the constitutional amendment process discourage interest groups).

82. See id. at 98 (noting the relative clarity and generality of constitutional amendments as opposed to ordinary legislation).
citizens in small states do not necessarily expect to remain in their state, and they recognize that their children will move. Because they cannot be sure of their family's future state of residence, citizens in small states will be less motivated to protect their current state's power.

The votes taken on the Balanced Budget Amendment and Tax Limitation Act also support both of our reasons for optimism—that small states are not insuperable barriers to passage of our proposed amendment and that positions taken on the amendment will rise above concern about preserving geographically based private interest legislation. Both these amendments should have limited spending growth. It might be argued that neither a limitation on debt nor a limitation on taxes would limit spending because in the case of a debt limitation, debt would be replaced by taxes and in the case of a tax limitation, taxes would be replaced by debt. Congress, however, is circumscribed in its ability to run large deficits or impose high taxes; otherwise Congress would have higher taxes and run larger deficits than they do. Public choice theory suggests that Congress will finance its spending with the combination of taxes and debt that minimizes opposition to its program. A supermajority rule applied to either debt or taxes will disrupt this optimal combination and thereby restrain spending.

Thus, if small states were an insuperable barrier to passing our spending limitations, one would expect to see the representatives of small states vote disproportionately against these amendments. No such bias exists, however, because approxi-
mately the same proportion of small-state and large-state members of Congress support these amendments.\textsuperscript{88} Indeed, it is absolutely clear that division on the amendments breaks along partisan and ideological fault lines.\textsuperscript{89} This offers some confirmation of our view that in the amendment process citizens and legislators are more likely to vote on their notion of the public interest rather than on their ability to maintain pork-barrel legislation.

Finally, although our proposal faces obstacles, one needs to compare it with the alternatives. Professor Baker and Dr. Dinkin have proposed abolishing the Senate,\textsuperscript{90} but a proposal to abolish the Senate would face more obstacles than our supermajority proposal. First, abolishing the Senate would eliminate the advantages of small states across the board, rather than in the fiscal arena alone. Second, senators would obviously fight an amendment that did away with their own offices. Third, the Constitution's prohibition on depriving states of their equal representation in the Senate raises potential legal obstacles to passage of such an amendment.\textsuperscript{91} Thus, given that the Senate

\textsuperscript{88} On the 1995 Senate vote on the Balanced Budget Amendment, 75\% of senators from the 10 smallest states and 70\% of senators from the 10 largest states supported the amendment. See 53 Cong. Q. Wkly. Rep. 708 (1995) (recording vote). In the House vote, 62\% of the representatives from the 10 smallest states and 64\% of representatives from the 10 largest states supported the amendment. See id. at 316-17 (recording vote). On the 1998 Tax Limitation Amendment, 50\% of senators from the 10 smallest states and 40\% of senators from the 10 largest states supported the Amendment. See Grover G. Norquist, \textit{Read Their Lips: There's a Tax Limitation Amendment in Your Future}, AM. SPECTATOR, June 1998, at 62 (listing Republican senators who voted against the Tax Limitation Amendment and the Democratic senator who voted for the amendment). In the House, 62\% of representatives from the smallest states and 51\% of the representatives from the largest states supported the amendment. See 55 Cong. Q. Wkly. Rep. 1086-87 (1998) (recording vote).


\textsuperscript{91} See U.S. Const. art. V (making the amendment process subject to the proviso
is likely here to stay, those who want to reduce inefficient spending should embrace our proposal because of its greater feasibility.

"that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate"). Whether this provision would actually prohibit an amendment abolishing the Senate and whether the proviso itself could be amended separately are complex constitutional questions that we cannot resolve here. In any event, they would pose additional obstacles to smooth passage of any such amendment.