



CENTER ON BUDGET AND POLICY PRIORITIES

820 First Street, NE, Suite 510, Washington, DC 20002
Tel: 202-408-1080 Fax: 202-408-1056 center@cbpp.org <http://www.cbpp.org>

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THE CONSTITUTIONAL AMENDMENT TO REQUIRE A TWO-THIRDS SUPERMAJORITY TO RAISE TAXES

by Robert Greenstein

The House of Representatives is expected to vote April 25 on an amendment to the U.S. Constitution to require a two-thirds vote by the House and Senate for any measure that would raise federal tax revenues (H.J. Res. 41). This amendment would have far-reaching effects.

I. The Constitutional Amendment and the Long-Term Fiscal Forecast

The federal deficit has been eliminated for now. If no action is taken to raise revenues or reduce program costs, however, the deficit will return and rise sharply when the baby boom generation retires in large numbers.

Deficits of the magnitude that CBO expects to emerge in those decades would be unhealthy for the U.S. economy. To avoid such a development, major deficit reduction measures are likely to be needed eventually.

Testifying before the Bipartisan Commission on Entitlement and Tax Reform in 1994, Robert Reischauer, then the director of the Congressional Budget Office, observed that the public would be unlikely to accept the steps that would be required either to extract *all* of the needed deficit reduction in the decades ahead just from government programs or to extract all of the needed deficit reduction from revenues. In the long run, Reischauer predicted, policymakers will need to reach agreement on some mix of program cuts and revenue increases to prevent deficits of a magnitude that would significantly damage the economy.

The proposed constitutional amendment is designed to ensure that virtually no future deficit reduction measures come from the revenue side and virtually all come from cutting programs. That the amendment is likely to bar all or nearly all revenue increases can be seen by examining House votes for the five principal deficit reduction measures enacted between 1982 and 1993, all of which raised revenue. Although four of these five measures were signed by Republican presidents and all five enjoyed the support of Democratic Congressional leaders, *none* received two-thirds support on the House floor. Even the 1983 Social Security rescue plan, which accelerated scheduled Social Security payroll tax increases and reduced future benefits, failed to secure a two-thirds vote despite strong support from President Reagan and Congressional leaders of both parties.

Most States Do Not Have Supermajority Requirements

Only seven states require the approval of at least two-thirds of their legislatures for any tax increase. Eight other states either require such approval for some taxes but not others, require a three-fifths rather than a two-thirds vote, or both. The other 35 states generally require simple majority approval for revenue increases of all sorts.

A 1993 General Accounting Office study of recent state budget trends found that a majority of states surveyed had used both spending cuts and revenue increases to balance their budgets. Revenue increases accounted for about one-third of the deficit reduction these states instituted to balance their budgets during the period studied.

As a result, the proposed constitutional amendment would likely lead to one or more of several possible outcomes: 1) larger deficits over time; 2) a sharply shrunken federal government that must radically scale back in areas other than running Social Security and Medicare, maintaining national defense, making federal pension and veterans payments, and making interest payments on the national debt; and 3) overly steep reductions in Social Security and Medicare benefits that reduce the living standards of millions of elderly people who are not well off. Such stark outcomes are much less likely to be necessary if a balance of spending cuts and revenue-raising measures can be considered in coming decades. Such a balance, however, is what the constitutional amendment is designed to prevent. (Some supporters of the amendment claim it would lead to another outcome — stronger economic growth. These supporters sometimes cite a study purporting to show that states which require supermajority votes to raise taxes have experienced faster growth than other states. An appendix at the end of this paper shows that the study in question is severely flawed and its conclusions invalid. Careful examination of the data does not support the claim that supermajority tax requirements boost state economic performance.)

II. The Amendment Makes it Difficult to Close Tax Loopholes

The requirement for a two-thirds majority would apply not only to measures to raise tax rates but also to measures to cut unproductive tax expenditures that grant subsidies to powerful special interests. A 1995 Congressional Budget Office study found that more than half of the corporate subsidies the federal government provides are delivered through the tax code. Curbing “corporate welfare” provided through the tax code could contribute to addressing future deficits, but doing so would require a two-thirds vote under the proposed amendment. This would likely rule out closing unproductive corporate tax breaks to help shrink deficits when deficits re-emerge.

The constitutional amendment would effectively place a substantial share of the federal budget largely off limits for deficit reduction in future decades. Provisions of the tax code that the Joint Committee on Taxation classifies as “tax expenditures” — spending programs that operate through the tax code by selectively reducing the tax liability of particular individuals or

Law School Dean Warns of Perverse Effects, Including Increased Difficulty in Stanching Unintended Revenue Losses

In testimony before the Subcommittee on the Constitution of the House Judiciary Committee on March 18, 1997, Samuel C. Thompson, Dean of the University of Miami Law School, warned of potential perverse consequences from the proposed amendment. Thompson stated:

“Under either interpretation, H.J. Res. 62 will have the effect of making it much harder for Congress to close tax loopholes, because any such legislation could be blocked with a mere 34% vote in either house of Congress....

“This amendment would also penalize the American public for mistakes made in the tax legislative process. For example, assume that after an adoption of this Constitutional amendment, Congress adopts a flat tax. Assume that before enactment it is estimated that the flat tax will reduce revenues by \$100 billion. It turns out, however, that the revenue estimates are wrong and the actual revenue loss is \$200 billion, which will lead to a significant increase in the budget deficit. The Treasury immediately proposes legislation to increase the revenues by \$100 billion, thereby restoring fiscal responsibility. The legislation is, however, opposed by powerful special interest groups who will prevail if they can convince just 34% of the members of either the House or the Senate to vote against the amendment....

“The core problem with this proposed constitutional amendment is that it would give special interest groups the upper hand in the tax legislative process. Once a group of taxpayers receives either a planned or unplanned tax benefit with a simple majority vote of both houses of Congress, the group will then be able to preserve that tax benefit with just a 34 percent vote in one house of Congress. Thus this amendment would create an unlevel playing field in the tax legislative process. Indeed, I believe that if enacted this amendment would become known as the ‘Tax Loophole Preservation Amendment to the Constitution.’”

businesses — now appear to cost in the neighborhood of \$740 billion a year.¹ This is substantially more than the federal government spends on Social Security or defense.

In testimony before the Entitlement Commission in 1994, Federal Reserve Board chairman Alan Greenspan referred to these tax code provisions as “tax entitlements” because they entitle those who qualify for them to government subsidies provided in the form of a tax reduction. Greenspan testified that the tax entitlements should be looked at, along with the

¹ The Joint Committee on Taxation publishes each year a compendium of all tax expenditures and their costs. The Joint Committee does not total these expenditures, but if one adds the cost for each of these tax expenditures, the total is approximately \$740 billion. Since various tax expenditures interact, the total cost will vary somewhat from the \$740 billion estimate. The Joint Committee indicates that due to interactions, the total cost could be either higher or lower.

spending entitlements, in developing measures to address the nation's long-term deficit problems.

If anything, however, the proposed constitutional amendment would encourage the spread of more tax expenditures over time, since such measures would take only a majority vote to enact but a two-thirds vote to remove. California's experience with a constitutional supermajority requirement for raising taxes bears out this concern. The California Citizens Budget Commission, a distinguished bipartisan panel of business and community leaders formed in 1993 to study the state's budget problems, reported that the state's supermajority requirement "makes it relatively easy to enact tax breaks but difficult to repeal them." The Commission recommended the state Constitution be changed to allow the legislature to narrow or eliminate tax breaks by a simple majority vote, so that it would be as easy to eliminate tax breaks as to create them.²

Moreover, if Congress passed a series of tax changes that were thought to be deficit-neutral, but tax lawyers and accountants found ways to convert some of the measures into tax shelters at a greater-than-anticipated cost to the Treasury, it would take a two-thirds vote to scale back the shelters so the original measure did not produce an unintended revenue loss. Even measures to prevent corporations from gaining tax advantages by moving plants and jobs overseas would require a two-thirds vote.

Furthermore, Congress is now considering major changes in tax laws that would substantially reduce revenues. Any loopholes unintentionally created by passage of such a major tax bill could be costly and exceedingly difficult to reverse under H.J.Res. 41. Past history has shown that major tax legislation is often followed by the emergence of new tax avoidance mechanisms that policymakers did not anticipate or intend, and that subsequently need to be addressed.

III. The Amendment Tilts Toward the Wealthy and the Powerful At the Expense of Average Families and the Poor

Most Government benefits that low- and middle-income Americans receive come through government programs, such as Social Security, Medicare, Medicaid, unemployment insurance, student loan and grant programs, the school lunch program, and the food stamp program. By contrast, most government subsidies that wealthy individuals and large corporations receive come through tax subsidies. A constitutional amendment that makes it difficult to scale back tax subsidies in future decades when major deficit reduction is needed would tilt the playing field in favor of the wealthy and powerful over Americans of average or lesser means.

² Sources: *A 21st Century Budget Process for California: Recommendations of the California Citizens Budget Commission* (Los Angeles, Center for Governmental Studies, 1998) and *Reforming California's Budget Process: Preliminary Report* (1995)

The amendment also would be likely to affect the middle class and the poor adversely for another reason. If the federal government is unable to raise revenue when needs for public expenditures rise, one likely result will be to shift more of the burden of raising revenue and meeting public needs to state and local governments. Most state tax codes are regressive — that is, the taxes they impose consume a larger percentage of the income of low- and middle-income households than of more affluent households. Compared to the federal government, state and local governments extract a larger proportion of the revenues they raise from the middle class and the poor and a smaller proportion from the well-to-do. If revenue-raising burdens are shifted from federal to state and local levels, the share of the overall tax burden borne by the middle class and the poor is likely to rise.

IV. Amendment Could Make it More Difficult to Restore Social Security and Medicare Solvency Without Overly Large Benefit Cuts

The constitutional amendment could lead to larger reductions in Social Security and Medicare benefits for low- and middle-income elderly and disabled beneficiaries than otherwise would be needed to put these programs in long-term actuarial balance. This would be the case for several reasons.

- By making it much more difficult to secure revenue increases when the need for large-scale deficit reduction reappears, the amendment could place a greater deficit-reduction load on Medicare.
- The amendment probably would rule out measures to raise the Medicare premiums that well-to-do beneficiaries pay. The 1995 budget reconciliation bill contained such a measure. Because the added premium charge would have been based on family or personal income, it could be viewed as a tax on income. When the 1995 reconciliation bill was about to come to the House floor, the House parliamentarian advised the measure could be considered a tax increase. A House rule that Congress adopted in January 1995 required a three-fifths majority for measures raising tax rates, so the parliamentarian's advice meant the budget bill would need a three-fifths vote unless this rule was waived. The House leadership promptly arranged for the House Rules Committee to waive the rule. Once a supermajority requirement is written in the U.S. Constitution, however, no such waivers are possible. If Medicare premiums cannot be raised on those at high income levels, more of the burden of addressing Medicare's financing problems is likely to fall on elderly people at low- and moderate-income levels.
- The amendment also would pose problems for efforts to restore Social Security solvency because it would require a two-thirds vote for Social Security reform measures that include provisions raising additional tax revenue for the Social Security trust funds. For example, many Social Security experts concur that all new state and local employees should be brought into the Social Security system. (Some state and local government workers in a number of states remain outside the system, comprising the last sizable group of workers not covered under Social

Security.) Although the 1994-1996 Advisory Council on Social Security split three ways in its recommendations on how to address the program's long-term financing problems, the Council was unanimous in recommending that all state and local government workers not covered under Social Security be brought into the system.

Expanding coverage in this manner would improve the balance in the Social Security trust fund while benefitting many workers who spend only part of their careers in the government sector. But expanding coverage entails a revenue increase, since the newly covered employees and their state and local employers would become subject to the Social Security payroll tax. Accordingly, this provision would require a two-thirds vote and be much more difficult to pass. Failure to pass proposals such as this would likely mean that larger Social Security benefit cuts eventually would have to be instituted instead.

The constitutional amendment also would effectively rule out small adjustments in Medicare and Social Security payroll taxes as part of the effort to bring these programs into long-term actuarial balance. Modest increases in the ceiling on wages subject to the Social Security payroll tax or modest increases of a fraction of a percentage point in the Medicare payroll tax would require a two-thirds vote, making them virtually impossible to achieve.

This would be an especially serious problem for Medicare. It is likely to prove exceedingly difficult to restore long-term solvency to the program without some modest increase in payroll tax contributions, along with other significant program changes, unless the health insurance that Medicare provides is scaled back substantially. The controversial Medicare plan that Senator John Breaux and Representative Bill Thomas proposed in 1999 is instructive in this regard. It would significantly reduce projected Medicare spending. Yet it would close only a modest fraction of the long-term gap between projected Medicare expenditures and anticipated revenues. That even so controversial a proposal as the Breaux-Thomas plan would close no more than a modest fraction of the long-term financing gap illustrates that some revenues will almost certainly be needed to help achieve Medicare solvency. For these reasons, a politically diverse panel of Medicare experts that the National Academy of Social Insurance convened in 1999 concluded unanimously that the provision of new revenues for Medicare must be part of the debate on long-term Medicare solutions.³

V. Amendment Could Increase Pressures for Pork-barrel Projects

The proposed supermajority requirement could result in the expansion of special-interest projects. The two-thirds requirement would empower individual legislators to demand federal funding for pet projects in return for agreeing to provide the necessary votes so a budget containing revenue-raising measures could obtain two-thirds support and pass. To be sure, such

³ Members of the National Academy of Social Insurance Study Panel on Medicare Financing, *The Financing Needs of a Restructured Medicare Program*, September, 1999.

James Madison on Majority Rule

The Constitutional Convention rejected requiring supermajority approval for basic functions such as raising taxes. Supermajority rules had applied in the Continental Congress. The framers of the constitution had experience with these rules and understood what they were rejecting.

In the Federalist Papers No. 58, James Madison, one of the key figures in drafting the Constitution, explained why the Constitution rejected supermajority rule:

“It has been said that more than a majority ought to have been required for a quorum, and in particular cases, if not in all, more than a majority of a quorum for a decision....[But that would mean] ... [i]n all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority. Were the defense privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or in particular emergencies to extort unreasonable indulgences.”

Madison equated majority rule with “free government.” In his view, freedom consisted not just of protecting individuals from unreasonable intrusion by government but also in the right of citizens to have an equal voice in the affairs of government. According to Madison, a person whose vote is diluted by supermajority rules is not an equal citizen and does not fully enjoy the fruits of freedom.

vote-swapping can occur whether revenue-raising measures require a simple majority or a supermajority. But as the California Citizens Budget Commission noted, the degree of vote-swapping tends to intensify as the level of difficulty needed to obtain the necessary votes to pass a budget increases. The level of difficulty is much greater when a two-thirds supermajority is required.

The commission found evidence that California’s requirement for a two-thirds majority to pass budgets has led to enactment of substantial “pork-barrel” legislation that individual legislators have promoted.⁴ Supermajority requirements present legislators with tempting opportunities to threaten to block revenue-raising measures that a majority favors unless the majority accepts various pet projects or programs these legislators are pushing.

VI. Weakening Our System of Democracy

As the foregoing discussion indicates, the amendment would weaken the principle of majority rule that has been at the heart of our system of representative democracy for more than 200 years. As Rep. James Moran has observed, it would partially restore the system we had in

⁴ *Reforming California’s Budget Process: Preliminary Report and Recommendations of the California Citizens Budget Commission*, (Los Angeles: Center for Governmental Studies, 1995), pp. 43-47.

the 1780s under the Articles of Confederation, a system that functioned poorly and was soon abandoned.

The Articles of Confederation required the assent of nine of the 13 states to raise revenue. At the Constitutional Convention in 1787, the Founding Fathers recognized this as an insurmountable defect. They fashioned instead a national government that can impose and enforce laws and collect revenue through simple majority rule.

The proposed constitutional amendment would end the ability of a majority of the American people, acting through their duly elected representatives, to decide whether they want to raise more revenues so the federal government can address needs the majority finds legitimate. The amendment would deny the majority this right both now and in future generations. As Representative Nancy Johnson pointed out on the House floor during debate on a similar constitutional amendment in April 1996, future generations should be “free to establish that balance between taxing and spending that they believe is in their interest.”

At its core, the amendment is rooted in deep distrust of the ability of the majority of the American people to make decisions that the authors of the amendment believe to be ideologically correct. The amendment seeks permanently to deny the majority that right. Powerful, well-connected minorities would gain power at the expense of the majority.

Appendix

Data Do Not Show Better Economic Performance in States with Supermajority Requirements

The Heritage Foundation had contended that states in which a supermajority vote of the legislature is required to raise taxes have experienced faster economic growth and fewer tax increases than other states. A March 1996 Heritage report looked at the seven states that have had supermajority requirements in place for a number of years — Arkansas, California, Delaware, Florida, Louisiana, Mississippi, and South Dakota — and found that five of the seven states experienced slower than average growth in tax revenue. It also found that five of the seven states (but not the same five states) experienced faster economic growth than the average state. The Heritage report suggested a causal link between supermajority limits, lower taxes, and faster economic growth, saying “...there is no escaping the logical relationship between supermajorities and superior state performance.”⁵

The Heritage study, however, is fundamentally flawed. It considered only state-level tax changes rather than changes in total state and local revenues, despite the capacity of states to shift costs and responsibilities to local governments. In addition, it compared 1980 — a year in which the economy was just beginning to turn down after reaching the peak of an economic expansion — to 1992, a year at the beginning of a recovery from a deep recession. Economists and analysts frown upon comparisons such as this that use years representing different points in the business cycle.

If one measures state *and* local revenues, examines years that represent similar points in the business cycle, and looks at various measures of economic growth, conclusions very different from those Heritage has presented may be drawn. By some measures, supermajority states have had *less* economic growth than other states and have *not* had smaller tax increases. For example:

- Five of the seven states with supermajority requirements experienced *lower-than-average economic growth*, as measured by changes in per capita personal incomes between 1979 and 1989. (Both of these years were business-cycle peaks.) If economic growth during this period is measured by changes in Gross State Product, four of the seven supermajority states had lower-than-average growth.
- In addition, five of the seven states with supermajority requirements had *higher-than-average growth of state and local revenues*, as a percent of residents' incomes, from 1979 to 1989. Five of the seven states (not the same five) had higher-than-average increases in state and local taxes per capita from 1986 to 1995, two other years that fall at similar points in the business cycle.

This is not to say that supermajority requirements hinder economic growth and lead to revenue increases. Rather, the point is that different choices of years and of measures of economic growth and taxes lead to diametrically opposed results. This should serve as a strong caution that *no* valid conclusions about the effects of supermajority requirements can be drawn from the type of simplistic analysis the Heritage Foundation has conducted.

⁵ Daniel J. Mitchell, "Why a Supermajority Would Protect Taxpayers," The Heritage Foundation, March 29, 1996.