

SHOWCASE PANEL III:

ARE CONSTITUTIONAL CHANGES NECESSARY TO LIMIT GOVERNMENT?

Frank H. Easterbrook, William N. Eskridge, Jr., Daniel H. Lowenstein, Richard D. Parker; Moderator: David B. Sentelle

DEAN REUTER: Good morning, and welcome to the third day of the Federalist Society National Lawyers Convention. This is, I don't mind telling you since you're here, the single best day of the Convention. Now, I know what you're thinking; if you were here yesterday, I announced that yesterday. But I was only kidding then. And of course, when I said that yesterday, I had no idea how long the metal detector line would be to see the Vice President. So, this offers me an opportunity to issue an official Federalist Society apology for that inconvenience. We were very excited to have the Vice President as our guest at the Convention, but we were just as troubled and distressed by the complications as you. So, we are sorry for that. All that having been said, today is the best day of the convention, so I'm glad you're here.

We have two showcase panels today on limited government; the first, a panel on whether constitutional changes are needed to limit government. To lead our discussion, we've enlisted the help of Judge David Sentelle. I believe that he's so well known to this group that he truly needs no introduction. Most of you have clerked for him or argued cases before him or shared time and meals with him; so there isn't much that I can tell you in three or four minutes time that you don't already know about him. So, without using any more of this panel's time, please help me welcome Judge David Sentelle.

DAVID B. SENTELLE: Good morning. Not too much more than 200 years ago, our ancestors and forebears adopted a constitution and a bill of rights designed in large part to limit government. Fewer than a dozen and a half times since then has it been necessary in the public view to amend that constitution, and two of those canceled each other out. Nonetheless, we

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still have, perhaps, if not the most limited, certainly one of the most limited governments in the world and in history.

It would be foolish, however, to deny that that limited government has been churning against its limits for decades, really going back to the Civil War. Sometimes those limits have come back; sometimes they haven't. The question is now raised whether there we should amend the Constitution to limit government to what we see as the proper role and size. We have four distinguished panelists who are going to comment on that question.

Following Mr. Reuter, I'm not going to offer them introductions. There are bios at the end of the book. I can think of nothing sillier than standing here reading to you that which you could read for yourself. I would feel like a lawyer again if I were doing that. So, without further ado, coming to us from Yale University Law School will be Professor William Eskridge, who will then be followed in the order that I will announce as we go along.

WILLIAM N. ESKRIDGE, JR.: So, I start with the question: why is the national government so large? Or, perhaps, why did we have that long security line? They might be related questions. Well, there are three possible explanations. One reason might be that problems are big and getting bigger; problems of international terror, nuclear proliferation, a complex economy, threats to the environment, etc. If the problems are big and complex, that's probably going to call forth a bigger government. A second possible reason is that we the people want bigger government, perhaps for the first reason, and we're willing to accept long lines, etc., because we want government regulating more. A third possible reason, maybe in combination with the other two, is that we have big government because of dysfunction. In other words, we might have big government because of log-rolling and compromising in the Legislature, because of special interests, as in the Smoot-Hawley tariff and a number of other pieces of legislation, trading off with one another so that the overall size of government gets bigger and bigger as each group is paid off in its

own rent-seeking way. Another dysfunctional reason to consider is turf-grabbing by federal government agencies. That might be one reason why we have so many security lines. These are possible reasons for our big government, and some of them are alright, some lamentable.

Following the Framers of the 1789 Philadelphia Convention, the Society has asked us this question: Can we make structural or constitutional changes that will shrink the national government in appropriate ways, in ways that will not derogate what we the people want or our ability to address genuine problems, while also addressing issues of special interest logrolling and turf protection? Some of the items we been asked to address are the line-item veto, term limits, and the national initiative.

Now, these mechanisms have been tested, at least two of them, and we have data. I have some thoughts on the third one. I go in surprisingly different directions on the three. I'm most pessimistic, I think, about the line-item veto, which we've tried briefly at a federal level. It didn't produce a lot of shrinkage in government. At the state level, we have a lot of experience with line-item vetoes. An overwhelming majority of states have, and have had, line-item vetoes, and these have been studied relentlessly by political scientists using comparative data regression analyses and other sophisticated treatments to determine whether this variable contributes to the shrinkage of government. And the studies, on the whole, by political scientists of all political stripes, have found either no effect or a small effect at the state level.

There is I think virtually no persuasive evidence that the line-item veto reduces the size of government. The main effect the political scientists have found is that the line-item veto, which gives more power to the governor, energizes the governor's bargaining power, which might be used for bigger or smaller government. It benefits the constituencies of the governor in a way that is unpredictable as to its ultimate effect. So, at least based upon the studies and the unimpressive performance in the Clinton administration, I would not be optimistic on the line-item veto.

On term limits, we don't have a lot of political science data. We certainly don't have experience at the federal level, except voluntary term limitations. In my opinion, term limits are not likely to head off

the main dysfunctions I would be concerned about—(rent-seeking, logrolling on the part of special-interest groups and turf protection by agencies)—because, of course, the term limits don't apply to the agencies. Maybe it would be a good idea generally, but you don't need a constitutional amendment for that. You could do that by statute. Term-limiting your representatives will not address the agency problem. And I'm not sure that it solves the special-interest problem. Even recently elected representatives, such as the Democrats who've been elected in substantial numbers to the new Congress, are not going to waddle into Capitol Hill in January naïve lambs. They're going to waddle in stoked to the gills with special interest money and influence. Don't laugh, because the Republicans did the same in 1995. This cuts both ways. So, at least as a theoretical matter, I'm not all that optimistic even about term limits.

Now, as to the initiative or the referendum at the national level, here again we have a lot of experience at the municipal and the state level since the early part of the 20th century. Most academics, certainly in law school, are quite hostile to this proposal. But of course, most academics don't look at the evidence systematically. My colleague and former student at USC, John Matsusaka, however, has looked at the evidence much more systematically in his excellent book, *For the Many or the Few* (2004). We have a number of political science studies, but this is the best one I've read. What Matsusaka finds is that in states and municipalities, particularly states with the initiative, in the period from 1970 to about 2000 had substantially lower taxes, substantially lower spending, and substantially greater localization of government—(and this is controlling for a number of variables). Does it control for all variables? Of course not. It's very complicated, but it controls for a lot.

Matsusaka also found that the initiative in the early 20th century—(not the late but in the early 20th century, when you first had it)—actually helped increase the size of government because urban interests in the early 20th century were underrepresented in legislatures. They wanted more government. And so, the initiative actually fueled their desire for more and larger government. According to Matsusaka, as a theoretical matter, initiatives don't inherently produce government in the direction of less or more government; it produces government in the direction of electoral preferences. Now, that might be good

from the limited government perspective, if you think that the preferences of the electorate will remain in favor of limited government. I don't exactly know what the preferences are today or what they'll be tomorrow; so, it's quite possible.

Now, if you think that the national government is too big because of special interest log-rolls and turf-grabbing, and not because it represents popular preferences, then you might want to consider the national initiatives as your device for constitutional change. I don't think you'd ever get this through the constitutional amendment process, but that's another matter. I'm also not sure the national initiative would ultimately diminish the size of government at the national level. There might be some workability problems. Moreover, some political scientists, such as Harvard's Paul Peterson, argue that issues of redistribution—which are often rent-seeking issues—in a political system such as our, of Federalism, do naturally gravitate toward the national level and away from the local and state level where people can vote with their feet. If that's the case, if Peterson's hypothesis is correct, you might see the national initiative subjected to the same kind of rent-seeking and logrolling you've already seen.

Moreover, you might think—and this is interesting—that the U.S. Senate, which disproportionately represents the small-population states of the sagebrush West, might be a brake on big government, and that brake might actually be diminished with the national initiative, because the larger population states such as California would play a larger role. Ultimately, I'm somewhat pessimistic that structural constitutional change will necessarily limit the size of the federal government.

You might also consider—and this is going outside what the Society asked us to discuss—but you might also consider an individual rights kind of amendment. Depending on where you are coming from, you might want to redo the Fourth Amendment, the home of a privacy right that includes protections not only of the body but of the home. That might shrink government in some ways. Maybe more attractive to more of you would be to redo the Fifth Amendment. That's the Takings Clause, which is almost never enforced by the U.S. Supreme Court. You might redo the Fifth Amendment to regulate what we call regulatory takings, one way in which national, state and local governments often

grow at the expense of small businesses. Don't ask me to suggest the language for such amendments. Judge Sentelle, who's a learned jurist, can draft them. But whatever amendment you come up with, even if written by someone as learned and excellent as Judge Sentelle, you can bet your bottom dollar that you attorneys would litigate the hell out of it. Although litigation, particularly for a revised Fifth Amendment, actually might discourage aggressive government regulation in several arenas. Government would be scared off by the prospect of litigation, and not just by the actual constitutional language.

The problem with a revised Fifth Amendment, or even a revised Fourth Amendment, is that it might disable government from doing the things that we need the government to do—aside from whether it would actually stop the government from doing things that we think are dysfunctional.

Thank you.

DANIEL H. LOWENSTEIN: Thank you very much. I've only been living in California since 1968. I'm still a New York boy. I'm going to be even more skeptical about this general notion of attempting to limit government through constitutional change. In fact, we had a bit of a caucus over the telephone a week ago, and I'm afraid that's probably going to be a theme running through this panel. But I will limit myself primarily to the electoral proposals.

When I first got a letter asking me to be on this panel I was confused. I thought maybe they had either sent it to the wrong person or sent me the wrong panel, until I read the description and saw that they were talking about these devices. My primary field has been election law. But my guess is, the skepticism would go over to other devices too.

Just to tell you where I'm coming from, ultimately I think that we actually do live in a democracy, despite the skepticism a lot of people have about the political process. Ultimately, major matters are decided by the public. It's a debate of ideas. So, if you want to limit government, what you need to do is persuade the public that it's a good idea to limit government.

So, to begin, I'll talk about briefly about term limits, initiatives, and an extra item (redistricting), and why I'm skeptical about all three of them.

Term limits. We do have some experience with term limits in California. Other states do as well. Any

of you who think that term limits are likely to lead to a legislature more to your liking, I invite you to visit California. You can observe the California legislature. And if you go home with the same opinion, I will be deeply shocked. I believe that the California legislature is probably the most liberal legislature that we've ever had in this country. I don't know; I haven't looked at the Massachusetts legislature. Maybe they would give us some competition.

But you know, I think what term limits do is make legislatures less effective than they would be otherwise, whatever it is that they're trying to do by way of public policy. If legislators came to office with a little label on their forehead that said either "leadership" or "backbencher" and you could apply limits only to the backbenchers, I still wouldn't favor term limits.

I used to live in Sacramento. I knew something about what was going on in the Legislature. Now I rely more on secondhand accounts. But all the secondhand accounts I get from across the political spectrum tell me that the Legislature, especially the assembly which has been most affected by term limits, has just become a dysfunctional organization.

Initiatives. I haven't read John Matsusaka's book yet. But John and I think highly of him, and I have no doubt that his conclusions are well-founded. So let's take it as given that some experience with initiatives shows that there is a statistical tendency to reduce state budgets. There are still two problems with that, however. First of all, John is a social scientist. He's not a constitutional designer, and he doesn't purport to be. He's properly studying what has happened and perhaps extrapolating to what tends to happen under the current circumstances. But these are not laws of physics, and what has happened is not bound to continue under different political circumstances. So, even assuming his thesis is correct, I don't think you can project it into the indefinite future. Nor, if you're thinking about initiatives at the federal level, as Bill said and I agree, can you assume that the dynamics of it are going to be the same at the federal level as they are at the state level.

But there's another question, and that is, what do you mean by limiting government? Is it simply a matter of how much money the government spends? Let me just give you an example from California. We had Proposition 13. We also had a less well-known initiative shortly after that limiting spending by the

state government. Maybe those have a tendency to control spending to some extent in California. But this is leaving aside side-effects such as the shift of power from local government to state government, which may be good or bad, depending on your view. And there are other things besides spending money.

One major initiative passed in California not too many years after I moved there was Proposition 20, which created the State Coastal Commission, which was, I believe at the time, an enormous advance in land use regulation over an enormous area, the California coastline. Now, I'm wont argue for or against that law, but it seems to me that the California Coastal Commission, so far as public spending is concerned, is not a particularly major item. It's probably a very small item in the state budget. And is that limited government, when the initiative is used to extend regulation in that dramatic way? If the initiative can be used for that purpose and also has the effect to marginally decrease federal and state spending? Would you say that's a net? Would you say that's a limitation or an expansion of government?

I think everybody who studied the initiative will agree with this, if you look at it over time, the initiative does not belong to liberals. It does not belong to conservatives. It's been used by both sides quite effectively, and by all kinds of other groups that cut across the liberal-conservative divide. It should be considered on its own merits, but not as something that's going to benefit one side of the political spectrum or the other. We can say that, I think, based on experience.

Let me also just say word about redistricting, because I spent the 1980s defending the California redistricting plan, both in court and in public, against Republican charges that this was the greatest crime in the history of mankind. The *Wall Street Journal* editorial page certainly seemed to think so, and I think many Republicans at the time thought that redistricting change would be the key to Republican electoral success. Now, in the current decade, it's interesting because a different ox was gored by redistricting after the 2000 Census, and Democrats have been very upset by it. The main push for redistricting change has been from the Democrats, not in California but in other states, and many Republicans have been resisting it.

For example, Mike Carvin, whom some of you may have heard yesterday give a stirring address on his view of civil rights, has been defending Republican plans around the country with effectiveness against Democratic challenges. Here again, I think both groups are mistaken. I don't have time to go into all the details here; it's a very complicated subject. But redistricting has very little effect, I think, on the general thrust of partisan or policy politics in this country. It can be of great importance to individual politicians, which is why they care about it so much, but I think that the press and many politically active people greatly exaggerate the significance of it.

So, I just want to conclude with the point again that if you want limited government, the way to get it is not to rely on gimmicks. The way to get it is the old-fashioned way: to convince the public that is a good idea. My first flight out of Burbank on Wednesday, when I was coming over here, got canceled, so I had more time than I expected sitting in airports, and I spent at least a little bit of that profitably reading an article in what I think is the current issue of *National Review* by Ramesh Pannuru-- a rather astute political analyst, I think. He was writing about the crisis of conservatism at the present juncture -- although I think he wrote the piece before the election. Let me just read you a sentence or two from his conclusion. He says, "That crisis can be boiled down to two propositions. The first is that, as least as the American electorate is presently constituted, there is no imaginable political coalition in America capable of sustaining a majority that takes a reduction of the scope of the federal government as one of its central tasks." That's bad news for those of you who want limited government. "The second is that modern American conservatism is incapable of organizing itself without taking that as a central mission."

What he's saying is that the conservative movement can't stand without a wing pushing for limited government, but it cannot possibly succeed if that wing leads. So, I think you have a burden of persuasion, and a tricky but not unmanageable political task to make sure you get your share of what you want without seeking so much that you undermine the entire movement. Whether that's the right analysis or not, I'm convinced you're not going to win by gimmicks. You're going to have to do it by hard political work.

RICHARD PARKER: Thanks very much. I want to pick up where Dan left off but come back to Bill's three hypotheses about the steady expansion of government. If you believe that there is such a thing as historical logic—if you're a Marxist, in other words—(and you believe that the first or third explanation, or the two in combination, are the key, big problems and institutional dysfunction, then this is hopeless and there's nothing very much to talk about except at the margins.

The key, as Dan suggested, is what people actually want. That was Bill's second explanation. Now on Election Day, less than two weeks ago, a polling group called McLaughlin and Associates polled actual voters, and found these results: 59 percent favor smaller government with fewer services; 28 percent favor larger government with many services. Among people who voted Republican: 74 percent favor smaller government; 13 percent, larger government. Among Democrats—(and this is more surprising—(41 percent favor smaller government; and only four percent more, 45 percent, favor larger government. Among Independents —(of course, most important—(68 percent favor smaller government with fewer services; 20 percent, less than a third of the first number, favor larger government with many services. If this is in fact any kind of accurate representation of public opinion now and of the recent past, it poses a strategic question, and that is how to make use of that feeling, how to appeal to that body of opinion, and by what strategy to mobilize to produce actual change.

Now, of course the classic strategy would be to elect candidates or members of a political party committed to a particular approach to this matter: smaller government. That was tried, of course, most recently in the mid-1990s. I think we know at least what the most recent result has been. I don't have much hope on that score. Perhaps some of you do. It can always change. But, at least for the moment, I think it's best to be pessimistic on that front.

A second approach is to interpret the Constitution we have. People in the Federalist Society have been creative and assiduous in pushing this strategy. Talk of the "Constitution in exile" was hot for a while. The effort was to persuade judges to interpret the Constitution so as to impose stricter limits on government, and to select judges who could be subject to such persuasion. I guess my answer to

that approach at this point would be: Blackman, Stevens, O'Connor, Kennedy, and Souter. It's much like the 1994 electoral victory. It's too unreliable as a strategy. Moreover, for people who favor smaller government, whether they're Republicans, Democrats, or Independents, to rely on the courts would be to fall into the same trap that the feminists fell into when they relied on the courts to protect reproductive freedom. It wound up being a somewhat unreliable victory, and it certainly did harm to their movement.

So, how better to think about this problem? It seems to me that we might start with two concepts of what government is. What is it that the American people overwhelmingly want to limit? On one hand, you could define government in the terms of our pamphlet for this panel, in terms of its power and reach, the sum total of laws and regulations promulgated and enforced. On the other hand, one could think of the government "that the American people want to limit" not in terms of its power and reach but rather as the governing class, by which I mean not just the bureaucracy and the interest groups but more importantly the individuals who believe or who come to believe once in office that they know better than the American people, that they are entitled to rule the American people. I'm talking about individuals whose main characteristic is a fancy education but whose main psychological characteristic is a sort of narcissism and grandiosity that leads them to believe that detachment from public opinion is in principle a good thing, i.e., the governing class is the class that hates democracy. That, it seems to me, is the government that the American people want to limit, and if we can limit the governing class, we may wind up in the end limiting the power and reach of government. But it seems, to me in any event, that the first task is the more important one.

Now, how to go about that structural reform Dan and Bill have discussed? Redistricting, term limits, initiative and referendum all, it seems to me, are valuable as tactical strikes. I'm sure many of you know, there are powerful counterattacks underway now that have been underway for some time, meant to cut the guts out of initiative and referendum, out of term limits and redistricting reform. Those fights are always worth fighting, and I have great admiration for the people who have engaged in them. But I want to suggest something different.

The panel was asked whether constitutional changes might make a difference. I think it was Bill who responded, "Well, you put in some fancy new amendment limiting government, and Blackmun, Stevens, O'Connor, Kennedy, and Souter will interpret it as they please." I would like to reword the question just a little bit—(not constitutional changes, but constitutional change, for its own sake; that's the strategy I want to recommend. This would take us back to basics.

What's basic? Basic is popular sovereignty, and the Constitution is the embodiment of popular sovereignty both at the national and state level. Constitutional change *per se* is a muscle that has to be exercised to be maintained. But the muscle that we have allowed to atrophy at the national level for 35 years, we must continue to use at the state level and start using again at the national level.

Let me say a word more about this. Yesterday in the *New York Times* there was an op-ed piece by a couple of people who, for all I know, are here today, David Rivkin and Lee Casey, criticizing the rising number of constitutional amendments at the state level. I'll read you two sentences. They say, "To enshrine the definition of marriage in a state's constitution removes the issue from the give and take of normal political process. That process rarely produces an absolute victory for any side, but it also really results in absolute defeat. The defeated party can rally, regroup, and try again." This argument is based on a simple mistake, and that is, that at the state level, the process of constitutional amendment is a part of the ordinary political process. Sometimes the Legislature is involved; sometimes initiative kicks off a state constitutional amendment. Always, in 49 out of the 50 states, a vote of the people is required to amend the Constitution. Whenever a state constitution is amended, whether it's marriage or the Michigan Affirmative Action Amendment or the Arizona English as Official Language Amendment, what's most important, in my opinion, is not the substance of the amendment but the fact that the Constitution was amended. Popular sovereignty was reasserted. The governing class was given a swift kick.

I've been involved for 12 years in an effort to amend the U.S. Constitution. In the last 35 years in which there has been no amendment, one cause has maintained overwhelming support of the American people for half of that period. That's the

Flag Amendment, giving Congress the power again, as it used to have, to punish physical desecration of the flag. This is an amendment that would have expanded the power and reach of government a tiny bit, but in terms of my second concept of government, challenging the governing class, would have limited government in an important way. My experience talking with senators about this issue, over 12 years, is that their narcissism and arrogance is virtually boundless, and that some bounds need to be imposed. And there's nothing better than amending the Constitution.

FRANK EASTERBROOK: Well, like other members of the Federalist Society's libertarian wing, I would really like to see a government limited to genuine public goods like defense and basic education, a government that keeps its fingers off both the economy and personal life. Is constitutional change necessary to achieve this? Yes and no. Yes, because the current constitution is not one of a limited government. No, because not even with constitutional change can those forms of limits be created.

The national government grew for social and political reasons that can't be called back with words. People chose larger national government, and they chose it through constitutional amendment. Just think of a few of them. There's Section Five of the 14th Amendment, allowing the national government to regulate the states. There's universal suffrage. There's the 16th Amendment on the income tax. There was the direct election of senators. Those are the principal causes for the size of the national government. No one, not even Richard Epstein, proposes to limit suffrage to property holders today. So if you're not planning to repeal those constitutional amendments or change them, you have to live with that.

It seems necessary to me to go back and think about the sources of modern constitutional power at the federal level and ask what could be done about them, even with creative judicial interpretations? Let's start with the commerce power. The commerce power was limited at the outset because commerce was local in this nation. It was really very expensive to put your goods on a cart and ship them a thousand miles from one part of the country to another. Today, shipping is cheap; communication is cheap. The division of labor means that the whole economy depends on goods from other states and goods from

other nations. Thus, national power expands. The Constitution has stayed what it was; it is the world that has changed. Power has shifted to the national level; no doctrinal change can offset that.

Suppose tomorrow morning we woke up and learned that *Wickard v. Filburn* had been overruled, and that *E. C. Knight* had become the accepted doctrine again. You may remember *E. C. Knight*, a holding by Chief Justice Melville Fuller that the only thing Congress could regulate as commerce was something that physically crossed state borders. There was no power to regulate mere effects on commerce. Suppose *E. C. Knight* is reinstated. What happens? As a first approximation, nothing happens, because you have to remember how the commerce power was used in the period between *E. C. Knight* and *Wickard v. Filburn*.

What Congress did was start enacting statutes that said, unless people do X, the goods they make are not going to be allowed to cross state borders. That is, border closing statutes were enacted; hot cargo statutes. And so, the minimum wage was created. Child labor laws were created. Lotteries were abolished through the mechanism of closing the borders to goods that had not been made in conformity with those rules. That form of power could be reasserted. There's nothing that prevents it under the Constitution.

And oh, by the way, you have to remember that what went with *E. C. Knight* and is actually still with us is a deodand's version of commerce power. You remember *Lopez*? The Supreme Court held that Congress had no power to enact a rule saying that there can't be any guns within a thousand feet of schools. No commerce, the Supreme Court said. Remember what happened? Congress reenacted the statute to say that you cannot have within a thousand feet of the school any gun that has ever crossed the state border. The gun became a form of deodand. The commerce power clung to it as it moved around, and no one has even bothered challenging that law because it's so obviously effective under settled doctrine. Now, one might doubt that this was sensible, but that's what went with the old *E. C. Knight* version of thinking about the nature of the commerce power.

Then of course, there's the Necessary and Proper Clause. When the commerce power wasn't enough, there is this ancillary clause that says Congress can

make all laws necessary and proper to carry out the foregoing powers. Think way, way back to the Bank of the United States. Congress charters the bank. There's no banking power. But it may be related to the taxing and currency powers. That power could have been trimmed by saying that only really necessary laws are permissible. And who would decide what was necessary? Why, the judges, of course. And that was Maryland's argument in *McCulloch v. Maryland*, that the power had to be trimmed back by emphasizing the word "necessary." Chief Justice Marshall said, "But look, think of the consequences of that. That really would put the Judiciary in charge of the whole United States because the judges would define what's necessary, and now you've moved the legislative power to the judicial branch." The Federalist Society surely knows that well, rightly condemning judges who write into the Constitution their own views of wise social policy on the death penalty, on abortion, or on religion. Well, that's equally true of economic matters. The judicial role has to be modest. It has to allow the Legislature to set policy because otherwise you deliver the government into the hands of people you can't fire. And of course, the consequence of that, as we know from the upshot of *McCulloch*, is that you wind up with an uncomfortably large federal government.

Then of course, there's the taxing power. By abolishing the apportionment requirement, the 16th Amendment gave the federal government the power to control 100 percent of the economy. It can tax income. Or it can achieve its goals by tax expenditures; that is, by encouraging those things that aren't taxed. It can tax and then subsidize using the dollars that it has just collected from you, or it can grant the dollars back on condition. So that combination of powers are a logical consequence of the 16th Amendment, which gives the federal government control over almost anything it chooses to control. One just has to get over it. There is nothing one can do by creative interpretation of the existing Constitution.

So, what changes might work? Well, I think much has been said about the line-item veto. If you study what happens in the states that use it, the answer is not very much of interest. Here's one that didn't make the program, but used to be thought of a lot - a balanced budget constitutional amendment? Insist that the national government have a balanced

budget. You might remember why that went off the agenda, but it's always worth a reminder. Somebody came up with the proposition that if the government had to balance its budget, and therefore would spend less, why, what could it do? It could just enact more laws requiring people to spend on their own; that is, more regulations in lieu of a budget. And the off-budget regulations could be even more expensive than the on-budget regulations. So the balanced budget amendment vanished.

Term limits. Much has been said about that, but, well, not quite enough. I would point out that we have constitutional term limits in the United States for the President. The President of the United States cannot serve more than eight years or two terms. Technically, if you came in with less than two years left to go, you can serve up to 10, but there's a 10-year max limit on the president of the United States. I don't know anybody who says that has had the effect of diminishing executive power, *vis-à-vis* other sources of power in the national government. What term limits could do, of course, is make the government prone to the "yes, Minister" phenomenon. The short-termers are controlled by the permanent government. That is, the bureaucracy pats the short-termers on the head and says, "Yes, Minister," and then goes off and does exactly what it wants.

Now, as for the referendum and initiative, there is some evidence that the existence of these devices slightly reduces spending. But I do think it worthwhile, if only to earn my reputation as the arrogant minister of the perpetual federal government, to point out that Madison, the guy whose silhouette is everywhere, thought long and hard about this in the design of our government. Direct democracy was considered and found wanting at the time our Constitution was established precisely because it was so prone to dominance by majority faction. The majority factions would run roughshod over minority interests, and the design of a representative democracy was one in which there would be some agency space, in which the representatives, arrogant or not, could make decisions that might represent some aspect of the public interest—the whole public, not just the majority.

Now, of course, it turns out that form of government is highly prone to minority coalitions. The dairy farmers get together with the steel industry

and they come up with programs that are beneficial to them at the expense of the rest of us. But the alternative, the direct democracy alternative, is one in which decisions are prone to majority faction and are made by the most ignorant people you can imagine—(us. You may notice, when you hear your representatives in Washington, or even Cabinet officers, talk about public policy that they usually talk at a pretty shallow level. That's because, even if you're a full-time policymaker, you do nothing but serve in the Cabinet or serve in Congress. The choices that need to be made are so complex that you couldn't possibly keep up with all of them. Members of Congress are doomed to be shallow.

Now, move that decision to the level of the electorate, who are not full-time policymakers, but presumably doing whatever it is they do for a living. Is it worth their while to learn all this in detail? No, it's not. Because everybody knows that your chance of influencing the outcome of any election is much smaller than your chance of being run down by a truck on the way to the polling place, and therefore people are rationally ignorant. So, handing very complex choices to the rationally ignorant doesn't seem to me a very constructive solution.

What we do know, by the way, is that referenda have cut the expenditures of government by a small amount. Much of that cut has come in the area of education. Education is one of those public goods that even limited government people generally tend to favor because there are many benefits to outsiders. But you see local communities using referenda to cut back on the old school board budgets because the benefits of education are felt elsewhere in the country and the costs are paid locally. It may be rational behavior locally but it is bad all around.

So, bottom line: Should we be unhappy about this? I'm very much of Churchill's view, that government by democracy is the worst form of government ever invented, except for every other form. The United States has done pretty well. We have a small government relative to the EU and China. We can keep that up by promoting competition among governmental units and kinds of government, and we should be happy with what we have and not have pie-in-the-sky hopes for something better.

Thank you very much.

