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ON CONSTITUTIONAL CHANGES TO LIMIT GOVERNMENT

*Frank H. Easterbrook**

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 cannot 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 is Section 5 of the Fourteenth Amendment, allowing the national government to regulate the states.¹ There is universal suffrage.² There is the Sixteenth Amendment on the income tax.³ There is the direct election of senators.⁴ 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 are 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 us start with the commerce power.⁵ The commerce power was limited at the outset because

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¹ U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.")

² U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.")

³ U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.")

⁴ U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.")

⁵ U.S. CONST. art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

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*⁶ had been overruled and that *E. C. Knight*⁷ 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.⁸ 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 is 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*?⁹ The Supreme Court held that Congress had no power to enact a rule saying that there cannot be any guns within a thousand feet of schools.¹⁰ 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 is so obviously effective under settled doctrine. Now, one might doubt that this was sensible, but that is what went with the old *E. C. Knight* version of thinking about the nature of the commerce power.

⁶ 317 U.S. 111 (1942).

⁷ *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

⁸ *Id.* at 13.

⁹ *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁰ *Id.* at 551.

Then of course, there is the Necessary and Proper Clause.¹¹ When the commerce power is not 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 is 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."¹² 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 is necessary, and now you have 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 is 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 cannot 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 is the taxing power.¹³ By abolishing the apportionment requirement, the Sixteenth Amendment gave the federal government the power to control one hundred percent of the economy. It can tax income. Or it can achieve its goals by tax expenditures—that is, by encouraging those things that are not 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 is a logical consequence of the Sixteenth 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 is one that did not 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 is always worth a reminder. Somebody came up with the proposition that if the government

¹¹ U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

¹² *McCulloch v. Maryland*, 17 U.S. 316, 324 (1819).

¹³ U.S. CONST. amend. XVI.

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.¹⁴

Term limits. Much has been said about them, 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.¹⁵ Technically, if you came in with less than two years left to go, you can serve up to ten, but there is a ten-year max limit on the President of the United States. I do not 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.¹⁶

Now, of course, it turns out that 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 is because, even if you are a full-time policymaker, you do nothing but serve in the Cabinet or serve in Congress. The choices that need to be made are

¹⁴ See, e.g., Lavinia L. Mears, *The Truth About the Balanced Budget Amendment*, 20 SETON HALL LEGIS. J. 592, 593–94 (1996).

¹⁵ U.S. CONST. amend. XXII, § 1.

¹⁶ See THE FEDERALIST NO. 10 (James Madison).

so complex that you could not 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 are doing whatever it is they do for a living. Is it worth their while to learn all this in detail? No, it is 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 does not 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 am very much of Churchill's view, that government by democracy is the worst form of government ever invented, except for every other form.¹⁷ 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.

¹⁷ Winston Churchill, Address to the House of Commons (Nov. 11, 1947), *in* IRREPRESSIBLE CHURCHILL: A TREASURY OF WINSTON CHURCHILL'S WIT 279 (Kay Halle ed., 1966).

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