

NO EASY CONSTITUTIONAL SOLUTION FOR BIG GOVERNMENT

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I start with the question: Why is the national government so large? Or, perhaps, why did we have that long security line at this conference the other night? They might be related questions. 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. If the problems are big and complex, bigger government is a likely response in the modern era. A second possible reason is that we the people want bigger government, perhaps for the first reason, perhaps for a variety of reasons. Hence, we are willing to accept long lines, etc., because we want the government to regulate. 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 logrolling and compromising in the legislature, because of special interests, as in the Smoot-Hawley Tariff Act¹ 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 might be all right, but most are lamentable.

Following the Framers of the 1789 Philadelphia Convention, the Federalist 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 have been asked to address are the line-item veto, term limits, and the national initiative.

Now, at least two of these mechanisms have been tested, and we have data. I have some thoughts on the third one. I go in surprisingly different

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¹ Smoot-Hawley Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (1930) (codified as amended at 19 U.S.C. § 1202-1654 (2000)).

directions on the three. I am most pessimistic about the line-item veto, which we have tried briefly at a federal level. It did not 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, which 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.²

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.³ It benefits the constituencies of the governor in a way that is unpredictable as to its ultimate effect. So, at least based upon these studies and the unimpressive performance in the Clinton Administration, I would not be optimistic about the ability of the line-item veto to shrink government.

On term limits, we do not have sufficient empirical data. We certainly do not have experience at the federal level, except with voluntary term limitations. In my opinion, term limits are not likely to head off the main dysfunctions I would be concerned about. Because term limits do not apply to agencies, they do not address the problem of turf-protection by agencies. Nor will term-limiting your representatives address the logrolling problem; logs get rolled, compromises get made as part of the normal process of legislation. Finally, I doubt that term limits solve the special interest problem. Even recently elected representatives, such as the Democrats who have been elected in substantial numbers to the new Congress, did not waltz into Capitol Hill as naïve lambs. They marched 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 am not all that optimistic even about term limits.

As to the initiative or the referendum, we have a lot of experience at the municipal and the state level since the early part of the twentieth century. To be sure, most academics are hostile to this proposal. But few of them have examined the evidence systematically. University of Southern California Professor John Matsusaka, however, has systematically studied this lawmaking mechanism in his excellent book, *For the Many or the*

² See, e.g., Douglas Holtz-Eakin, *The Line Item Veto and Public Sector Budgets: Evidence from the States* 1-2 (Nat'l Bureau of Econ. Research, Working Paper No. 2531, 1988) (discussing that the line-item veto has minimal effects on states' long run budgets); see also Catherine C. Reese, *The Line-Item Veto in Practice in Ten Southern States*, 57 PUB. ADMIN. REV. 510, 515 (1997) (concluding that the line-item veto has not been useful for controlling general expenditures at the state level).

³ See, e.g., Holtz-Eakin, *supra* note 2, at 1-2.

Few.⁴ Based upon a sophisticated empirical analysis that controls for the most obvious variables, Matsusaka found that, for the period from 1970 to 2000, states with the initiative had substantially lower taxes, substantially lower spending, and substantially greater localization of government than states without the initiative.⁵

Professor Matsusaka also found that the initiative in the early twentieth century actually helped increase the size of government because urban interests in the early twentieth century were underrepresented in legislatures.⁶ 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 do not inherently produce government in the direction of less or more government; they produce government in the direction of electoral preferences.⁷ 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 do not exactly know what the preferences are today or what they will be tomorrow; so, it is quite possible.

Now, if you think that the national government is too big because of special interest logrolls and turf-grabbing, and not because it represents popular preferences, then you might want to consider the national initiative as your device for constitutional change. I do not think you would ever get this through the constitutional amendment process, but that is another matter.

Nor am I certain that 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 federalist political system such as ours naturally gravitate toward the national level and away from the local and state levels where people can vote with their feet.⁸ If that is 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 have 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 that brake might actually be diminished with the national initiative, because the larger population states such as California would play a larger role.

⁴ JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY* (2004).

⁵ *Id.* at 33, 47.

⁶ *Id.* at 94–97.

⁷ *Id.*

⁸ Michael J. Rich, Book Review, 58 J. POL. 1226 (1996) (reviewing PAUL PETERSON, *THE PRICE OF FEDERALISM*).

Among the constitutional proposals the convenors asked us to evaluate, I believe the initiative is the most promising constitutional mechanism for reducing the size of government, but I am far from certain that it would have that effect in the long term.

Going beyond the list suggested by the convenors, one might also consider an individual rights-based constitutional strategy for reducing the size of government. 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.⁹ That might shrink government in some ways.

Probably the most promising individual-rights strategy would be to reinvigorate the Fifth Amendment's Takings Clause. This provision is almost never enforced by the U.S. Supreme Court.¹⁰ An anti-big government reform should refocus 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. (Do not ask me to suggest the language for such an amendment!) Whatever amendment you come up with, you can bet your copy of the Constitution that you attorneys would litigate the hell out of it. Litigation over the meaning of a more expansive Takings Clause 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.

There are many problems with revising the Takings Clause, such as coming up with appropriate language and pushing the proposal through the exceedingly difficult Article V process. A deeper problem with a broader Takings Clause is that it might disable government from doing the things that we need the government to do.

⁹ U.S. CONST. amend. IV (stating that people have the "right . . . to be secure in their persons, houses . . . against unreasonable searches and seizures . . .").

¹⁰ *See, e.g.,* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (holding that legislation requiring coal companies to leave coal in place where mining would cause subsidence of surface did not effect a taking).