Three Amendments: Responsibility, Generality, and Natural Liberty

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Introduction

A central message of public choice theory tells us that if politics generates undesirable results, it is better to examine the rules than to argue about different policies or to elect different representatives. Well and good. But those of us who have peddled this message have been too reluctant to get down and dirty with proposals for constitutional change. Hence, I felt challenged by the editor's invitation to propose three specific amendments.

What is wrong with things as they are? And among any extended listing that each of us might make, which of the observed results might be amenable to fixing through changes in the rules?

Fiscal irresponsibility stares us in the face and cries out for correction. The near-total disregard for any pretense of generality in the distribution of apparent governmental largesse, along with the increasing manipulation of the tax structure, can only be turned around by constitutional prohibition of discrimination. Existing rules, as interpreted, have not been successful in guaranteeing the natural liberty of citizens to engage in voluntary exchange, both among themselves within the political jurisdiction and with others beyond national boundaries.

Fiscal Responsibility

Political leaders, both legislative and executive, with public support, act as if it is possible to spend without taxing, indeed as if the fisc offers the political equivalent of perpetual motion. This observed fiscal profligacy stems from diverse sources: institutional history, Keynesian follies, supply-side exaggerations, and, finally, the very logic of collective action, which fosters the personalized illusion of something for nothing, especially amid the natural

constituency pressures of representative democracy.

The twentieth century experienced a manifold increase in the size of government, at all levels, but concentrated in the United States at the federal level. The political decision structure accelerated this growth. Congress found itself able to advance popular spending programs separately from the imposition of taxes needed to finance them. Further, the spending process itself was effectively decentralized through the delegation of authority to committees, members of which were necessarily responsive to interest groups. Sporadic efforts to reform the budgetary decision structure have been unsuccessful.

Ideas have consequences. The heritage of budget deficits can be traced, in part, to the now-discredited Keynesian economics, which dominated the academies in mid-century and influenced political arguments from the 1960s. The Keynesian response to the Great Depression neglected monetary relevance, causal and corrective, and emphasized budgetary expansion through debt finance, soft-pedaled by a bizarre denial that the incidence of spending even exists. Politicians were delighted with this logic and rushed in to expand government outlay.

As concerns over mounting deficits emerged in the late 1970s and early 1980s, opportunities were missed to introduce a constitutional amendment for budget balance. In part, this failure was due to the Reagan administration's distraction by supply-side arguments, which relegated deficit worries to the second order of smalls. The Reagan cuts in marginal tax rates did, indeed, set the stage for economic growth, which during the 1990s obscured the fiscal profligacy inherent in existing institutions and attitudes.

Fiscal responsibility again moved to center stage in public discussion in the early 2000s, as responses to terrorism and natural disasters supplemented ordinary proclivities to expand governmental outlays. The urgency of reform is exacerbated by the recognition that creditor accounts have increasingly been accumulated by Asian central banks.

A constitutional amendment could take the following form. In its final budget resolution, Congress should restrict estimated spending to the limits imposed by estimated tax revenues. This requirement should be waived only upon approval separately by three-fourths of the House of Representatives and the

Senate. This exception would allow for debt financing of federal outlay in situations that are indeed extraordinary (major wars, natural disasters), an exception recognized by classical public finance.

Such a constitutional amendment would exert a major impact on world attitudes. Such action would, in itself, increase prospects that the dollar would not lose its role as the international reserve currency. The attainment of fiscal responsibility by the United States, both in fact and appearance, is imperative. Specific amendment of the Constitution offers the means for telling the world that the fiscal house is in order.

Toward Nondiscriminatory Politics

In a 1978 video-taped interview, F.A. Hayek stated to me that a constitutional amendment should read: "Congress shall make no law authorizing government to take any discriminatory measures of coercion." He went on to add that, with such an amendment, all of the other rights would be unnecessary. The principle is that of generality, which has long been accepted as the central element in the rule of law. The Hayek proposal amounts to an extension of the legal tradition in Western civil order to the workings of ordinary politics.

The principle, as such, may be widely understood and accepted as an appropriate normative guideline. It may prove difficult, however, to incorporate nondiscrimination in a constitutional provision that would forestall prospects for divergent judicial interpretation. Any specific provision here would be akin to the equal protection clause that has been construed well beyond its initial meaning. Nonetheless, few would argue that the Constitution would be improved by total elimination of the Equal Protection Clause.

Why should the politics of democracy, either in idealized form or in practice, be different from the law, again as idealized or in substance? Why is discrimination in political action constitutionally permissible whereas discrimination in law is out of bounds?

The answer, in part, lies in political-constitutional history over the life of the United States, during which the activity of the federal government has expanded beyond the imagination of the Framers. Those who prepared the initial documents did recognize the dangers of discriminatory treatment on the

taxing side of the fiscal account. The uniformity clause has been variously interpreted through the years, but it did prove strong enough to have required an amendment explicitly making progressive income taxation constitutionally acceptable.

The outlay side of the account has been, surprisingly, ignored, and fiscal history is characterized by a failure to distinguish between programs that, at least in principle, are aimed to benefit citizens of the polity generally and those that are, often explicitly, aimed to benefit members of identified groups.

Arguments about applications might arise, even among those who support the generality norm in principle. Such arguments should not, however, be allowed to undermine the persuasive force of the nondiscriminatory objective in the civic and public understanding of the ultimate justification of collective action. The American structure will not survive if "democratic politics" comes to be interpreted as overt conflict among parties and groups each seeking to further particular interest.

Regardless of the specific wording of a nondiscrimination amendment, there will remain scope for disagreement as to its implications. Such an amendment would not require change in the Sixteenth Amendment, since this provision allows only the levy of taxes on income and does not stipulate rates of tax. A nondiscrimination amendment might, however, offer the basis for the replacement of the complex tax structure by a uniform rate of tax that is imposed on all income, without exemptions, deductions, credits, or other special treatments. On the spending or outlay side of the budget, the generality norm would require that program benefits be extended across all members of the polity. If programs include cash transfers, the generality standard would dictate equal-per-head payments, sometimes called demogrants, to all citizens.

What about programs that clearly discriminate among groups by some criteria, but which are deemed to be legitimized by appeal to "the public interest"? Here a partial answer might refer to the generality of the qualification criteria, as such. For example, tax-financed outlay on pensions or medical care for the elderly might be adjudged to be nondiscriminatory since all citizens become equally eligible if age standards are satisfied. Each person gets old, and age is not subject to behavioral manipulation. More difficult issues arise if program benefits are differentially targeted toward members of groups, benefits that may seem justifiable on public interest grounds, but which cannot, by their

nature, be interpreted to be general, e.g., aid to the blind, deaf, disabled. All such programs are subject to some behavioral manipulation. No hard and fast line can be drawn here, and the apparent violation of any generality standard must be weighed against a meaningful interpretation of how much general interest is involved.

What are clearly ruled out, at least in principle, are all programs that target persons who qualify in accordance with identification by ethnicity, location, occupation, industry, or activity.
Regardless of how a nondiscrimination amendment is finally worded, there will remain relevant issues of interpretation. But, as is the case with the equal protection clause, it would surely be better to have such a nondiscrimination provision in the constitutional document itself than to ignore the continuing blatant violation of the generality norm in the workings of ordinary majoritarian politics. After all, constitutions do serve as constraints, even if subject to evasion and misinterpretation.

Natural Liberty

Neither of the two constitutional changes discussed previously—those aimed to correct for fiscal irresponsibility and overt political discrimination—will insure against continuing pressures for growth of government. The welfare state could remain with us, perhaps commanding a major share of value that is produced. The third proposal, discussed here, might operate more directly on extension of governmental activity, although such extensions would, in themselves, lose much public support if contained within the limits of the first two rules.

The Madisonian construction is flawed by its authorization of government regulation through the much abused Commerce Clause. The authorization should be restricted to the prevention of interferences with voluntary exchanges and should not extend to the prohibition, or the coercive dictation of the terms, of such exchanges. Nor should any differentiation be made between exchanges within the domestic economy and those made with others outside the political jurisdiction. The Constitution has proved effective in insuring that the large American market be open inside national boundaries; it has not operated to insure freedom of trade beyond these limits.

Public understanding, including, importantly, that of the practicing judiciary,

must embody the recognition that limiting government intrusion into the operation of markets, while imposing on government the obligation to prevent interferences with voluntary exchange, does not, in any way, amount to the constitutionalization of a particular economic theory, as sometimes alleged. Such a requirement is little more than explicit acknowledgement that persons possess the natural liberty to enter into and exit from agreements, without concern for collectively imposed constraints.

The first two proposals may be broadly appealing since they may be interpreted as correctives for observed departures from acceptable normative standards. The third proposal, treated here, is dramatically different because its endorsement, even as principle, requires rethinking the two-century presumption that governmental action is preferred to that generated through markets. The mind-set that elevates collective action to its idealized image while ignoring the reality of its operation must be exorcised, and especially as this mind-set has come to dominate legal interpretation after the usurpation of constitutional limits in the Roosevelt era.

Measured against a yardstick of potential implementation, the three proposals stand in ascending order of difficulty. The balanced budget constraint is within reasonable prospect. Constitutional prohibition of political discrimination is acceptable in principle. But even die-hard classical liberals may bridle at constitutional prohibition of governmental regulatory authority.

It is here that the lessons of public choice theory have yet to penetrate public consciousness. The shift in perspective requires that governmental failure in regulatory activities be set against the market failure arguments of those who idealize collective action. The proposed amendment would allow government authority to prevent interferences with the natural liberty of voluntary exchange while not allowing for intrusion into private market behavior. This idea is, indeed, revolutionary, even in the post-socialist climate of discourse, but the debate can be joined only if the alternatives are seen for what they are. The “regulatory state” has not worked. Abandonment of its constitutional legitimacy offers a starting point for constructive dialogue.

Conclusion

In some aspects, the three proposals for constitutional change are internally redundant. Effective enforcement of any one would do much toward meeting

the need for implementation of the others. In this sense, perhaps the Hayekian requirement for political nondiscrimination seems the most inclusive. Such a rule could be so interpreted as to disallow debt financing of ordinary outlay, and, also, intrusive regulation of exchange emerges only because discrimination is permissible. If all governmental action must conform to the generality norm, how much regulation could exist?

As already noted, the three basic changes would not, in themselves, insure against a governmental sector that is Leviathan-like in size. The proposals are procedural rather than substantive. They would not prevent constituencies, through ordinary democratic processes, from choosing to levy general tax rates sufficient to finance a massive budget that embodies generalized benefits. Perhaps the culture of dependence is so entrenched in public attitudes that a large and cumbersome nonproductive welfare state remains in prospect. The test should be carried out, nonetheless, before proposals are advanced that reflect abandonment of the fundamental democratic faith.

In initial instructions, the editor limited me to three proposals for constitutional change. This limit has not allowed discussion of a monetary constitution as a supplement and possible substitute for fiscal constraint. Nor has it been possible to explore constitutional changes that may have been made imperative with the emergence of terrorism, both in the enabling of effective prevention and in the control of possible abuses of authority.