

TWO CONCEPTS OF GOVERNMENT

*Richard D. Parker**

I want to pick up where Professor Lowenstein¹ left off but come back to Professor Eskridge's three hypotheses about the steady expansion of government.² If you believe that there is such a thing as a one-way "logic of history" and you believe that the first or third explanation, or the two in combination, are the key problems and cause of institutional dysfunction, then this is hopeless and there is nothing very much to talk about except at the margins.

The key, as Professor Lowenstein suggested, is what people actually want.³ That was Professor Eskridge's second explanation.⁴ Now on Election Day, less than two weeks ago, a polling group called McLaughlin and Associates polled actual voters, and found these results: 59% favor smaller government with fewer services; 28% favor larger government with many services. Among people who voted Republican: 74% favor smaller government; 13%, larger government. Among Democrats—and this is more surprising—41% favor smaller government; and only 4% more, 45%, favor larger government. Among Independents—of course, most importantly—68% favor smaller government with fewer services; 20%, less than a third of the first number, favor larger government with many services.⁵ If this is in fact any kind of accurate representation of public opinion now and in 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

* Richard D. Parker is a Professor at Harvard Law School. Professor Parker originally delivered these remarks during Showcase Panel III, entitled *Are Constitutional Changes Necessary to Limit Government?*, at the Federalist Society's 2006 National Lawyers Convention, on Saturday, November 18, 2006, in Washington, D.C.

¹ Daniel H. Lowenstein, *Term Limits, Initiatives, and Other Gimmickry*, 102 NW. U. L. REV. 461 (2008).

² William N. Eskridge, Jr., *No Easy Constitutional Solution for Big Government*, 102 NW. U. L. REV. 457, 457 (2008).

³ Lowenstein, *supra* note 1, at 461.

⁴ Eskridge, *supra* note 2, at 457.

⁵ See John McLaughlin, McLaughlin & Associates, M&A Poll: 6 in 10 Prefer Smaller Government (Nov. 9, 2006), <http://www.mclaughlinonline.com/newspoll/np2006/061109smallgovt.htm>.

mid-1990s. I think we know at least what the most recent result has been. I do not have much hope on that score. Perhaps some of you do. It can always change. But, at least for the moment, I think it is 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.⁶ 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: Justices Blackman, Stevens, O’Connor, Kennedy, and Souter. It is much like the 1994 electoral victory. It is too unreliable as a strategy. Moreover, for people who favor smaller government—whether they are 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 government. 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 am 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. 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.

Might the structural reforms discussed by now-Professors Lowenstein and Eskridge be means toward that end?⁷ Redistricting, term limits, initiative and referendum are all valuable as tactical strikes. As I am sure many of you know, there are powerful counterattacks underway, meant to cut the guts out of initiative and referendum, out of term limits and redistricting re-

⁶ See, e.g., William W. Van Alstyne, *The Constitution in Exile: Is It Time to Bring It in from the Cold?*, 51 DUKE L. J. 1 (2001).

⁷ See generally Eskridge, *supra* note 2; Lowenstein, *supra* note 1.

form. 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 would like to reword the question just a little bit: not constitutional changes, but constitutional change—for its own sake. That is the strategy I recommend. This would take us back to basics.

What is 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 this muscle, which we have allowed to atrophy at the national level for thirty-five 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 David Rivkin and Lee Casey criticizing the rising number of constitutional amendments at the state level.⁸ They write, “To enshrine the definition of marriage in a state’s constitution removes the issue from the give-and-take of the normal political process. That process rarely produces an absolute victory for any side, but it also rarely results in absolute defeat. . . . [T]he defeated party can rally, regroup, and try again.”⁹ This argument is based on two quite different mistakes. On one hand, it treats constitutional amendments as above and outside politics—absolute, immutable.¹⁰ It thus forgets that such amendments can be amended (even repealed). On the other hand, it compares them with ordinary legislative politics, forgetting that what they are about is the structure of such politics and that they, unlike legislation, can be amended only by a direct vote of the people. Whenever a state constitution is amended, whether it is a proposed living wage amendment¹¹ or the Michigan Affirmative Action Amendment¹² or the Arizona English as Official Language Amendment,¹³ what is most important is not the substance of the amendment or how it will be interpreted or enforced, but the very fact that the Constitution was amended. Popular sovereignty was asserted.

I have been involved for twelve years in an effort to amend the U.S. Constitution. In the last thirty-five years in which there has been no amendment, one cause has maintained the overwhelming support of the American people for half of that period. That is the Flag Amendment, giving Congress the power again, as it used to have, to punish physical dese-

⁸ David B. Rivkin, Jr. & Lee A. Casey, *Conservatives: Keep Gay Marriage Out of the Courts*, N.Y. TIMES, Nov. 17, 2006, at A31.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See, e.g., COLO. CONST. art. XVIII, § 15.

¹² MICH. CONST. art. I, § 26.

¹³ ARIZ. CONST. art XXVIII, § 2.

creation 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 twelve years, is that in some cases their institutional narcissism and arrogance are virtually boundless. Bounds need to be imposed. Indeed the very principle of bounds needs to be affirmed. There is no better way than amending the Constitution.