Constitutional Restrictions on the Power of Government

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My title is indeed comprehensive, and it should be evident that I cannot, in the space of one article, do more than offer highly selected comments. Nonetheless, I should defend both my title and my own efforts, here and elsewhere, to call attention to constitutional matters. I use this inclusive term to embody constitutional history, constitutional law, constitutionalism as an approach to political philosophy, and, in particular, constitutional challenges that the United States faces in the 1980s.

I have often suggested that what is now needed is widespread adoption of a genuine "constitutional attitude," a proclivity or tendency to examine issues from a constitutional perspective, as opposed to the pragmatic, short-run, utilitarian perspective that seems to characterize modern academic scholarship as well as day-to-day political discussion and action. As I compare the political discourse of our time, the late twentieth century, with that of the late eighteenth century, when the American Founding Fathers were doing their work, the distinctive difference lies in our century's loss of an earlier "constitutional wisdom."

There are, of course, very good reasons why the American Founders, and especially Madison, Hamilton, and Jay, adopted a constitutional perspective in the 1780s. They were actively engaged in Constitution making, and they were trying to articulate the set of ideas that would convince the wider public that a draft document would work. As we all know, subsequent generations of Americans, including our own, have been beneficiaries of their genius, both with respect to basic design and to their persuasive powers. We still live in the "building" that they constructed for us, and I think that this metaphor is of considerable advantage in thinking about my whole subject matter.

Once constructed and in place, the "building" stood the test of time. It has been added to, changed, twisted out of recognition in some respects, allowed to fall down here and there, deliberately torn down in parts, but perhaps it still remains recognizable as the same "building" that emerged in 1789. These modifications in the structure have been allowed to take place, however, almost without conscious attention to the "grand design" of the architects. The changes have been essentially pragmatic responses to particular situations as these arose. It should not be surprising therefore, that what we

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now see appears jerry-built and distorted, considerably out of line, strongly tilted, and apparently liable to collapse unless shoring up efforts are commenced, and soon.

Only within the decades of the 1960s and notably the 1970s has there been an emerging awareness that the very bases of our socioeconomic-political-legal order are seriously in disarray. For more than a century, and indeed since the debate prior to the Civil War, political leaders, social philosophers, social scientists, constitutional lawyers, and the public generally forgot the simple principles, apparently secure in the false presumption that the American constitutional structure was permanently emplaced and not subject even to potential collapse. I shall discuss the signs of this new awareness later, but before I do so, it is necessary to lay out in some detail the fundamental meaning of a *constitution.*

Constitutional and Postconstitutional Choice

I have continued to be surprised that my economist colleagues, all of whom are sophisticated and competent social scientists, seem to have no inkling as to what a "constitution" is, and that they go about their own chores as if the whole subject remains irrelevant and unimportant. I could extend this category beyond economists, to include most modern social scientists, and even to many of those who lable themselves as constitutional lawyers. It should not be necessary here to go over what must be very elementary precepts were it not for what I can only label as gross illiteracy on the part of so many who should but do not know them. And perhaps I should stress that it is "knowledge" not "values" or "beliefs" that I refer to here.

What a Constitution Is

Put in its simplest if possibly confusing terms, "a constitution" is the "higher law." This terminology is helpful because it suggests a two-stage or two-level legal structure. There are laws that lay down the rules within which ordinary laws are made. The political constitution is the first set of laws here, the higher laws, the basic rules for political order and political decision making. Professor Hayek, in the very title of his three-volume work, distinguishes between the terms *law* and *legislation.*[1] These may be translated, in my terms, as *constitutional law* and *ordinary legislation.*

On many occasions, and in several places in print, I have used the analogy with games since I think this allows us to present the basic distinction most clearly. Consider a poker game. Participants must initially agree on the set of rules that will define the game to be played. This agreed-on set of rules becomes the constitution of the game. Play takes place within these rules, and this play may be termed *postconstitutional.* As such, it is explicitly constrained by the rules chosen, constrained externally to the actual play itself.

There are two quite distinct stages or levels of choice involved here, and these choices have quite different features. First, there is the choice of the

rules themselves, *constitutional choice*. Second, there is the choice among the strategies of play within the rules that define the game. I call this choice of strategy *postconstitutional choice*.

We may think of a single person as he or she tries to establish criteria for evaluating alternatives for choices in these different settings, with the knowledge that he or she is participating in a collective or group decision process. In constitutional choice, the individual cannot know precisely what his or her own position will be, or precisely how the cards will fall in the poker game analogy. In his or her own self-interest, the person will be led to evaluate alternative rules on something like the "fairness" criterion.[2] For choices made within the constraints of established rules, however, the individual will be able to identify his or her position. He or she will, therefore, aim at maximizing the individual payoffs to be gained, whatever these payoffs might be. Here the appropriate model is one of a maximizing strategy.

Constitutional Rules

Let me now return to the political constitution and apply these basic notions. A political constitution is the set of rules that define the socioeconomic-political game that we all must play. These rules define the relative spheres for private and governmental action, and they impose external constraints on the procedures through which political action takes place.

The central confusion in the discussions of politics has been in the failure to recognize that two levels of evaluation and choice exist and that these are quite different from each other, requiring different types of analysis on the part of social scientists. The analysis-evaluation of alternative constitutional rules and arrangements must have as an input some models or predictions as to how choices will be made within or under the alternative sets of rules that might be laid down in the constitution. Modern social scientists have failed to recognize that reform or improvement must have as its direct object change in the rules or constraints within which political decision makers are allowed to operate. They have not been concerned at all with genuine constitutional reform. Instead, modern social scientists have tended to focus on the particulars of policy alternatives or options.

Constitutionalism and Public Choice

These scholars have proceeded as if they are offering advice to some benevolent despot, who is presumed to stand ready and willing to promote "the public interest" once it is enlightened as to what such "interest" is by the expertise of those who are doing the advising. Such a procedure is absurd on its face. Government politics is not a single-minded decision-making entity. And even if government were such, we surely could not model it to be benevolent. Government as it exists is, of course, an extremely complex interaction process that involves literally thousands of persons, who participate in many different roles and capacities. Out of this process particular

outcomes emerge. Of what use is the "advice" of the economist to the effect that this or that policy A is more or less "efficient" than policy B? Persons who participate in political decision making are no different from the rest of us. They respond to the rewards and penalties that the "rules of the game" confront them with, and such persons would indeed be foolish if they took the advice of their economist advisers very seriously.

Public Choice Analysis

"Public choice," the new subdiscipline that applies essentially economic methods of analysis to the behavior of persons in political decision-making capacities, involves the study of the whole interaction process. As such, the analysis in public choice is positive rather than normative. It does not advance propositions that politicians, bureaucrats, or voters "should" or "should not" adopt.

Nonetheless, there are important reform implications that emerge from the whole body of public choice analysis, and these implications are those that tie us back into the main theme of this essay. Public choice analysis, which has as one of its central elements the critical distinction between constitutional and postconstitutional choice, strongly implies that reform or improvement in political outcomes or results is to be sought through possible changes in the rules, in the set of constraints within which political decisions are made, in the *Constitution,* and not in changes in day-to-day policy that temporary politicians may be somehow persuaded to follow.

A somewhat different way of constrasting the constitutional perspective with the standard one taken in most discussions on politics is to note that, with constitutional-institutional reform, there is little or no concern with replacing "bad," "evil," or "incompetent" politicians with others who may be "good," "kind," or "competent." The emphasis in constitutional reform is neither on persuasion nor on selection of "better" persons to act as agents in governing roles. The emphasis stays precisely where it was with the Founding Fathers: on setting up rules or constraints within which politicians must operate, rules that will make it a relatively trivial matter as to the personal characteristics of those who happen to be selected as governors. This emphasis is strictly eighteenth-century in spirit, and it is present in Adam Smith's great treatise on economics, *The Wealth of Nations* (1776), as well as in *The Federalist Papers.*

Can Government Be Constrained?

Critics of the constitutional perspective, for three centuries, have made several arguments. Perhaps the most important of these, and surely one that warrants our consideration here, is the charge that constitutions do not and cannot constrain sovereign governments. If this charge is valid, all discussion of constitutional constraints is mere fancy, an illusory and escapist exercise in futility.

Hobbes's View

The position was taken by Thomas Hobbes, who published his book *Leviathan* in 1651. Hobbes argued that persons value the security of life and property so highly that they will assent to the establishment of a sovereign governmental power. They will do so, however, in the full knowledge that, once established, persons can exert no subsequent control over the activity of the sovereign. Government can do as it pleases, once it has attained a position of authority and power. There is no enforcing agent or agency that can require the sovereign to abide by the rules that might be laid down in some conceptual contract, some constitution.

In this Hobbesian perspective, the only constraints on the range and extent of the activities of the sovereign must be self-imposed. Those persons who are in positions of governmental authority may voluntarily choose to restrict their behavior, but they recognize no externally imposed limits in so doing.

I suggest that this rejection of the efficacy of constitutional constraints on government belies the whole tradition that embodies the American political experience. The Founding Fathers did not conceive their own efforts to be illusory; they thought that the framework of rules laid down would, and could, limit the scope of governmental power. And two centuries of history corroborate this hypothesis, despite the record that also exhibits failure, erosion, and explicit violation of constraints that the Founders sought to incorporate into our basic "higher law." I need not list the many aberrations in our constitutional history, aberrations from the basic structure of governance as conceived by our Founders.

I shall assert, however, that, even in the 1980s, government is limited by the Constitution, and not by the mere self-impositional behavior of those who act in the name and the authority of government. There are things that government dare not do, even in our era where governmental power seems almost ubiquitous. We may, of course, readily point to areas of activity where government intrusion into our lives and liberties seems unlimited. I shall treat some of these in more detail later, but my primary emphasis at this point is to state categorically that the United States, even in the 1980s, is not "beyond law," beyond some "constitutional limits."

The Electoral Fallacy

Acceptance of the general proposition that government can be constitutionally limited, and that, in the United States, government remains subject to constitutional constraints, need not embody the "constitutional attitude" nor reflect the genuine "constitutional wisdom" that seemed characteristic of eighteenth-century political thought. Many modern scholars, along with practicing politicians and members of the public, will acknowledge that basic individual rights, such as those summarized in the first ten amendments, the Bill of Rights, should be and must be accorded constitutional status; that is,

such rights should not be embodied in the "higher law" of the land and should not be subject to change by temporary majority coalitions in the Congress, acting with the assent of the president.

Such acknowledgment of the constitutional status of basic individual rights may, however, be accompanied by an acceptance of or acquiescence in, and even support for, almost any decision that is reached through constitutionally sanctioned means or processes. So long as individuals possess freedom of speech, press, and assembly; so long as each person has the right to vote; so long as candidates and parties are chosen in free and open elections conducted on agreed-on rules; and so long as agents or representatives are chosen for specifically limited terms of office—if these conditions are guaranteed constitutionally, the results, whatever these might be, are themselves to be treated as "constitutionally legitimate." Or so the standard argument goes to the extent that it is articulated at all.

The whole argument is, I suggest, based on a set of elementary misconceptions or errors. At a fundamental philosophical level, the argument embodies an exclusive evaluation of process and procedures quite independently of the end-states or results that such procedures may generate. In many of my own writings, I have strongly supported arguments for process evaluation, largely because institutional procedures or rules are the normal objects for choice. However, the choice or selection among different processes or procedures must remain empty unless it is somehow informed by predictions of outcome or end-state patterns that will be generated under alternative rules. To judge a set of procedural rules to be desirable it is necessary to establish at least some proof, within reasonable tolerance, that such rules will "work," that is, will produce end-states that are valued in themselves. To argue that any collective outcome or decision reached by a majority of the community's members (or by some majority of their representatives, themselves elected by simple majorities in defined constituencies) is acceptable merely because it is reached by procedures that are independently evaluated to be desirable is an unwarranted logical step. Procedures themselves must be adjudged in accordance with predicted end-state patterns. Hence, simple majority rule, political equality, and periodic elections are to be judged acceptable only if there is independent argument to the effect that such institutions will generate a pattern of end-states that may be judged acceptable independently of procedures.

To put my point in a somewhat different way, I am suggesting that there is nothing sacred in the ordinary institutions of political democracy, nothing that should prevent us from taking a continuing critical look at these institutions to try to understand as best we can just what patterns of results they seem most likely to generate. To assume the opposing stance, to refuse to look at such results, to retain an implicit and blind faith in the efficacy of such institutions is to be trapped in what I shall call "the electoral fallacy."

Models of Politics

In order to evaluate alternative political rules and institutions, it is necessary to undertake positive analysis of how they work. It is necessary to model

politics and political behavior. Such modeling is much of what "public choice theory" is all about. And what can such modeling tell us? What does it tell us?

Major scientific advances have been made in our understanding of governmental-political processes in the decades since World War II. One of the most shocking proofs, at least to many scholars, was a rediscovery of an earlier demonstration to the effect that simple majority voting does not, on many occasions, result in a stable set of outcomes. A majority may be found that will support almost any choice in a set; there may be no unique majority motion or candidate. Among a set of three options—A, B, and C—a majority may be found to support A over B and B over C, then choose C over A. To expect institutions of majority voting to yield "rational" outcomes was shown to be folly. Political decision rules that incorporate the evaluations of more than one person are inherently unstable, capricious, nonrational.

This proof, associated with the work of Duncan Black and Kenneth Arrow in the early 1950s, shocked those who placed implicit faith in democratic electoral process unbounded by constitutional constraints. But what if actual governments are not so simple as these elementary majority-rule models imply? What if actual politics, as it really works, is not properly modeled as simple majority voting, but instead is best interpreted in terms of the behavior of a monolithic decision maker, a "ruler." Would not decisions in such cases be consistent, stable, and rational? Would not all problems of cyclical rotation, inconsistency, and nonrationality then disappear? Indeed so, but what arguments are then to be put into the objective or utility function of the decision makers? Unless we somehow can justify a "benevolent despot" presumption here, we find it even more necessary to reexamine the appropriateness of extending constitutional limits beyond the basic protections of rights of speech, press, assembly, and voting. Otherwise, what is to prevent government from taking all that is of economic value for its own purposes?

If models of genuinely democratic politics (one man, one vote majority models) are demonstrated to generate nonconsistent patterns of outcomes, and if nondemocratic models (monolithic bureaucracy, dictatorship, one-party states, etc.) dare not embody a benevolence presumption, the argument for some reexamination of constitutional constraints or limits is surely in order. If all politics is flawed, what sort of constitutional constraints can be invented to keep government within tolerable bounds?

The Power to Take and the Power to Tax

I posed the question above: What is to prevent government from taking all that is of economic value from citizens? A preliminary answer to this question is provided in the set of basic rights laid out in the United States Constitution. Government cannot explicitly "take" property without "due process of law," and without appropriate compensation. There are, of course, notable exceptions, and there have been many violations of the taking prohibition that have been allowed to go unchallenged by the courts. Nonetheless, there do

exist constitutional limitations on the taking power of government, and these limitations are acknowledged.

But what about the closely related power to tax? If government cannot arbitrarily "take" property from a person, it may accomplish roughly the same purposes by *taxing*. The essential legal difference between "taking" and "taxing" is that, in the latter, there is some acknowledged requirement of uniformity, generality, or nondiscrimination, at least within broad ranges. The difference can perhaps be illustrated by the existing constitutional limits on the government's power to tax in the United States. Neither the federal government, the state government, nor the local government can single out a particular person by name, by clan, by religion, by race, by sex, or any other arbitrary designation, and levy on that person a particular tax. Such arbitrary treatment would be held unconstitutional. Grounds for differentiation in taxation must be nonarbitrary and must somehow be seen to emerge from reasonable argument. Hence government cannot tax away a substantial part of the economic value earned or owned by a person *unless it also treats like persons similarly*. The proviso for uniformity, generality, or equity is very important for my purposes in this discussion because, properly understood, it points up a glaring omission in existing constitutional limits on governmental powers to exact economic resources from the citizenry. *There is no constitutional limit on the aggregate power of government to tax,* provided only that the uniformity-equity precepts are honored. That is to say, if government treats all persons in comparable situations similarly (say, all persons with incomes over $20,000), then it becomes constitutionally permissible for taxes to be levied confiscatorily. There would be nothing unconstitutional in a coercive tax measure that imposed 100 percent marginal rates on all incomes above some designated figure, say, $25,000 per year, with all incomes below this level totally exempted from taxation.

Before 1913 and the passage of the Sixteenth Amendment no such tax arrangement would have been constitutional, but even then there would have been no barrier against the levy of, say, a 90 percent rate of tax on all incomes. In either case, the point is clear. There are no constitutional constraints on government's power to raise revenues via taxes.

Only in the 1970s did it come to be recognized, grudgingly by some, that the failure to include such absolute limits on the power to tax reflects a rather obvious deficiency in the "law of the land," the United States Constitution, a deficiency that cries out for remedy. It is, of course, easy to understand why the American Founding Fathers did not include any such limit. They could scarcely imagine, two centuries ago, that the central government would come to be the dominant economic force that it has grown to be, and that the rate of growth in government's share in the economy, and hence in real taxes, would increase more than proportionately with the nongovernmental sector.

The Fiscal Challenge of the 1980s

The challenge of the 1980s lies in constitutional reform. Can our society reform itself by imposing fiscal constraints on government's power to tax,

and, by inference, on its power to spend monies for governmental purposes, including transfers to those persons and groups who do not pay taxes but who hold rights to the franchise? Alongside such fiscal constraints that may be discussed, there is the accompanying set of issues involving possible constitutional limits on the obtrusive regulatory interferences of modern governmental agencies. But in the remainder of this article I shall concentrate attention on fiscal constraints, both because these are easier to analyze and because my own research in the last two years has been largely on the "fiscal constitution," broadly defined.[3]

Is Constitutional Reform Possible?

First of all, it is necessary to examine the conceptual possibility of such constitutional reform. Is it idle fancy to think that such fiscal limits might be incorporated in the Constitution? In 1977 many persons might have thought so, but in 1978 California voters did overwhelmingly approve Proposition 13. And further, in 1979 thirty state legislatures did pass resolutions calling on the Congress to authorize a constitutional convention to consider a balanced-budget amendment. Given sufficiently broad citizen-taxpayer support, existing and long-established procedures will allow genuine constitutional changes to be made.

Will the Public Back It?

Second, however, we come back to the electoral issue, discussed above. If it is possible to generate broad-based citizen support for constitutional reform, why is it not possible that the ordinary checks of the democratic electoral process will produce similar results, thereby making resort to constitutional change unnecessary? In other words, if taxpayers-citizens want to turn things around, why won't they throw the big spenders out and replace them with politicians and parties that promise and deliver lower taxes and reduced rates of government growth?

I do not want to deny that some such effect has happened since 1978; politicians of all persuasion did get the Jarvis-Gann message. But to depend on electoral feedbacks to reverse the long-continuing trend of public sector expansion would, I think, be a dangerous delusion. In saying this, I am referring to what I consider to be fundamental biases in the taxing and spending process in American politics, biases that insure a continuation of pressures for increased real tax rates, almost independently of just what politicians or parties hold electoral offices. Several of these biases deserve further discussion.

Pressure Groups

As our representative democracy works in the context of our legal-constitutional history, prospective beneficiaries of governmental spending programs bring concentrated pressures to bear on elected representatives. There are no constitutional requirements that benefits from spending programs shall be uniformly or generally distributed; the spending side of the account differs

categorically from the taxing side in this important respect. Arbitrary discrimination in providing governmental benefits is constitutionally permissible; hence, the beneficiaries of a program can be sufficiently concentrated to allow for carefully orchestrated efforts. Offsetting these pressure groups, the program costs will tend to be spread out among all taxpayers, no one group of which has much incentive to oppose a particular program. Congressmen respond, quite straightforwardly, to pressures from their constituents, and we should not then be surprised when we see them devote more interest to spending projects in their own districts than to the level of real tax rates imposed on taxpayers throughout the economy.

Once a spending program is established, once it gets across the commencement threshold, the specific beneficiaries become an even more intensive pressure group for maintenance and expansion of rates of outlay. It becomes almost impossible, politically, to cut off program benefits, once these have been commenced, and once recipients come to treat benefits as entitlements.

This basic bias is accentuated by the role of the bureaucracy, which introduces nondemocratic elements in the whole process. Spending programs are often invented by imaginative entrepreneurs in the bureaucracy, who then are led to organize the beneficiary groups and to manipulate the agenda for political action so as to insure program continuation and expansion.

Nontax Sources of Revenue

The bias discussed above is inherent in the structure of democratic decision making so long as there is a basic asymmetry between the legal constitutional norms applied to the taxing and the spending sides of the fiscal account. A quite different bias toward spending emerges from potential governmental access to nontax sources of revenue raising. Even with the decision bias noted above, spending rates would be lower if all programs were required to be tax-financed. Government, however, may have access to both debt issue and money creation as alternative revenue sources. These allow the government to spend without taxing, which is almost the ideal setting for elected politicians. By creating deficits, goverment is allowed to finance desired programs that provide benefits to potential voters without overt increases in rates of tax.

This bias is important only for governments that have money-creation power; without such power any public debt issued must be borrowed quite like ordinary borrowing. Even for central governments, however, the deficit-spending bias has become important only in the post-Keynesian era, during which Keynesian economics has offered politicians academic-intellectual excuses for pursuing their own interests. Keynesian teachings provided an apologia for deficit creation, producing rapidly increasing public debt accompanied by accelerating inflation generated by use of the printing press.[4] Inflation, in its own turn, increased real rates of taxes on incomes, which, in turn, allowed revenues to be available for increased real rates of governmental outlay. Politicians have been allowed to play out their roles in an ideal setting,

to spend without taxing; and, even more surprising in many respects, they have been largely successful in blaming the predictable inflation on the evil machinations of businessmen and labor leaders. The response of the public to the inflation of the 1970s scarcely provides much ground for expecting reforms in this pattern by way of ordinary electoral (i.e., nonconstitutional) channels.

Inflation Expectations

Inflation, like particularized spending programs, cannot readily be "turned off" once inflationary expectations come to be incorporated in contracts. In short-run terms, there is a trade-off between any reduction in the rate of inflation and economic prosperity. To try to reduce an inflation rate of 15 percent to, say, 10 percent, after the 15 percent rate has come to be expected or anticipated, exerts economic effects that are equivalent to the imposition of a 5 percent deflation on an economy adjusted to monetary stability. Politically it becomes almost impossible for a government to get a continuing inflation under control without major disruption, despite the government's direct role and responsibility in creating the inflation in the first place. There is a bias toward inflationary financing almost independently of the form of government itself, whether this be pure democracy, representative democracy, or dictatorship.

This deficit spending–inflation bias, along with the structural bias discussed earlier, suggests that genuine reform must be sought *constitutionally* rather than *electorally*. That is to say, politicians who find themselves in responsible official positions will almost necessarily find it impossible to impose fiscal constraints, regardless of ideological persuasion. If fiscal constraints on government are to be imposed at all, there must be change in the set of things governments are allowed to do; there must be change in the basic rules, the Constitution.

Procedural and Quantitative Constraints

If we acknowledge that additional fiscal and monetary constraints on government are desired and, further, that these constraints must be implemented constitutionally, we are still confronted with issues concerning specific forms of limits.

More Than a Simple Majority

There are two broad types. The first includes what I have called *procedural* constraints. By these, I refer to possible constitutional changes in the rules for making decisions politically. If simple majority voting rules in legislatures, in Congress, are predicted to generate undesired results on the side of an excessive rate of growth in real tax and spending rates, these rules may be changed so as to require majorities larger than simple majorities for approval of any fiscal measure. Alan Greenspan has proposed that all spending authorizations

require two-thirds majorities in each house of Congress. One of the important, and sometimes overlooked, parts of California's Proposition 13 is the requirement that new taxes must have the approval of two-thirds majorities in the state legislature.

Linkage of Taxing and Spending

A somewhat less dramatic procedural change would be one that required more direct linkage between taxing and spending decisions. Legislatures might be required to keep their own accounts in better balance, and to indicate just how revenues sufficient to finance each item of spending are to be raised before the item of spending is approved. This requirement may, but need not, take the form of imposing a balanced-budget constraint, requiring that anticipated tax revenues match anticipated outlays, essentially closing off the debt and money-creation options as revenue-raising devices. The balanced-budget proposal, as a constitutional amendment, was demonstrated in 1979 to have widespread appeal to the public generally. If finally incorporated as an explicit amendment to the United States Constitution, it might do much toward eliminating the proclivity of government toward excessive rates of growth in spending and close up, so to speak, the deficiency on the fiscal constitution noted earlier.[5]

Quantitative Limits on Taxing and Spending

Additional procedural constraints could be mentioned, but my purpose here is not to list all potential constitutional changes. The general set of procedural constraints should, however, be compared with what I have called *quantitative* constraints, perhaps best exemplified by the proposed constitutional amendment that would relate the rate of growth in federal outlays directly to the rate of growth in national product, an amendment widely discussed in 1979. Variants on this sort of constraint have been introduced in several state constitutions. An additional example of a quantitative constraint is Proposition 13's explicit limit on the rate of tax on real property in California. The quantitative constraints have the advantage of being more specific than the procedural ones, but, like the other side of this same coin, they reduce the flexibility of governmental response to uncertain circumstances somewhat more than procedural requirements.

A Fiscal-Monetary Constitution

It should be evident that I could go on to elaborate this discussion of alternative proposals for elements of a fiscal constitution at some length. But this elaboration would hardly be appropriate in the more general discussion of constitutional limits that I have undertaken here. Let me summarize my previous discussion in a set of statements. I have argued that government can be constitutionally constrained. I have argued that there is a flaw in our existing Constitution that allows for excessive rates of growth in real taxes, real public

spending, and in the relative size of the governmental sector. I have argued that observed rates of growth in governmental outlays can be scientifically adjudged to be excessive due to biases in the processes of democratic decision making, as these are legally defined in the United States. Finally, I have argued that there are essentially two separate ways of imposing desired limits to deal with the problem discussed.

I do not, however, want to leave my discussion at such a level of generality. I think that the arguments I have advanced should clearly demonstrate the desirability of changes in our Constitution. This much may be granted, however, without necessary agreement on the specific proposals to be adopted.

In order to end on a positive note, I want to lay out my own set of proposals for constitutional change. Both at the level of academic scholarship and in testimony before committees of federal and state legislatures, I have supported the proposed constitutional amendment that would require the federal government to balance its budget accounts. I have suggested that a four-year phase-in period might be needed to avoid sudden and unanticipated shifts in rates of real taxes and spending. Accompanying this budget-balance amendment, I should also support the adoption of a monetary growth rule. Such a rule would require that the Federal Reserve authorities increase the supply of base money in the economy between 3 and 5 percent annually, with specified penalties for violations of these targets. Note that, with a budget-balance rule in place, there would be much less political pressure on the monetary authorities to exceed defined money-growth targets. The two rules suggested, the fiscal and the monetary, are closely complementary.

The enactment of such constitutional amendments would have major symbolic value, over and beyond the directly constraining effects that are incorporated in them. The enactment of such changes would modify dramatically both domestic and foreign expectations about the future activities of American governments in the third century of our constitutional history. My personally idealized scenario calls for the "constitutional dialogue," which did genuinely commence in the late 1970s, to accelerate in the early 1980s, so much so that the 1980s will become the "decade of constitutional reexamination and reevaluation." The scenario then calls for these efforts to be crowned with success well before we celebrate the bicentennial of the Constitution itself, a celebration that could then take place in confidence and hope.

NOTES

1. F. A. Hayek, *Law, Legislation, and Liberty*, 3 vol. (Chicago: University of Chicago Press, 1979).
2. The fairness criterion for evaluating alternative rules has been made familiar to social scientists and social philosophers through the work of John Rawls. See *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971). For a similar evaluative procedure, strictly related to constitutional choice, see James M.

Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1962).

3. See Geoffrey Brennan and James Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* (Cambridge: Cambridge University Press, 1980).
4. For an elaboration of this argument, see James M. Buchanan and Richard E. Wagner, *Democracy in Deficit* (New York: Academic Press, 1977).
5. Although it was legislative rather than constitutional, the Budget Reform Act of 1974 represents an attempt by Congress to introduce procedural changes in its own fiscal decision processes so as to remove acknowledged biases toward excessive spending. This act does not require budget balance, but, by means of the Budget Resolutions, it does require Congress to consider simultaneously both sides of the budget account. The act's history is too short to allow for much evaluation of its effect. And, of course, its legislative basis means that any Congress could disregard its precepts.