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Foreword: Divine Operating System?

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Discussion of constitutional amendments—and especially a full-blown constitutional convention—seems inevitably to bring the Beatles' "You say you'll change the Constitution?" line to mind.[1] But in pondering this Symposium, I was put in mind of another musical reference: "Divine Operating System."[2] This is because the Constitution is regarded by many on both the left and the right as being of at least somewhat divine provenance, and because the role that it serves in our system of government is more like that of an operating system than of software. But as any computer user can attest, operating systems do not notably partake of the divine.

One of the most over-used and under-appreciated statements in constitutional law is Chief Justice John Marshall's admonition to remember that "we must never forget, that it is *a constitution* we are expounding."[3] Philip Kurland observed more recently that when modern judges cite this statement, "you can be sure that the Court will be throwing the constitutional text, its history, and its structure to the winds in reaching its conclusion."[4] There is some truth to this observation, but it is more a reflection of modern judges than on Chief Justice Marshall's statement. Marshall's statement instead captured the difference between a constitution—which lays down structure and general rules but cannot "partake of the prolixity of a legal code"[5]—and, well, the prolixity of a legal code. Ignore this distinction and you get something like the California constitution, which can certainly be so described, but which few regard as a model of elegant or effective drafting.

I. THE OPERATING SYSTEM MODEL

A computer operating system, like a constitution, establishes a structure and a set of basic rules. That structure has certain consequences for what comes later—compare Windows with OS X with Ubuntu—but in general, the purpose of the operating system is to establish the framework, while fleshing out that structure with function is left to the application software

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1. THE BEATLES, *Revolution*, *on* THE BEATLES (Apple 1968).
2. SUPREME BEINGS OF LEISURE, DIVINE OPERATING SYSTEM (Palm Pictures 2002).
3. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).
4. Philip B. Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts "To Say What the Law Is,"* 23 ARIZ. L. REV. 581, 591 (1981).
5. *McCulloch*, 17 U.S. at 407.

that is layered on top. What the operating system permits software to do is important, but so are the things that software is prohibited from doing. Flaws in those prohibitions can lead to unnecessary conflicts, memory leaks, and catastrophic misallocation of resources. Those flaws are (sometimes) fixed in later updates.

In principle, of course, the operating system can do anything the software layered on top of it does, and to a large degree the reverse is true as well. You could design an operating system that contained a full-featured word processor and spreadsheet, and you could produce software that compensates for operating-system deficiencies. But it is much better to keep the two separate, as the operating system does a better job of keeping watch on the applications programs if the two are not combined.

Though I am a fan of constitutional metaphors in general,[6] the idea of an operating system metaphor for the Constitution is not entirely my own. It is explored by Neal Stephenson in his history of operating systems and their consequences, *In The Beginning . . . Was The Command Line*, where he warns that abandoning the constraints of an established constitutional operating system is much more dangerous than trying out the latest iteration of Windows on your laptop. Stephenson writes that in the twentieth century:

> [I]ntellectualism failed, and everyone knows it. In places like Russia and Germany, the common people agreed to loosen their grip on traditional folkways, mores, and religion, and let the intellectuals run with the ball, and they screwed everything up and turned the century into an abattoir. Those wordy intellectuals used to be merely tedious; now they seem kind of dangerous as well. We Americans are the only ones who didn't get creamed at some point during all of this. We are free and prosperous because we have inherited political and value systems fabricated by a particular set of eighteenth-century intellectuals who happened to get it right. But we have lost touch with those intellectuals.[7]

Stephenson's cautionary note is one that advocates of wholesale constitutional revision—or perhaps even modest constitutional change—should bear in mind. Though sweeping and/or clever changes to the Constitution can make for enjoyable seminar discussion, the machinery of government is subject to catastrophic failure (failure which, based on human history, seems to be more-or-less inevitable on any significant time scale). Those who would tinker with that machinery need to be very aware

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6. *See, e.g.*, Glenn Harlan Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110 (1991) [hereinafter Reynolds, *Chaos and the Court*] (chaos theory as model for Supreme Court decisionmaking); Glenn Harlan Reynolds, *Is Democracy Like Sex?* 48 VAND. L. REV. 1635 (1995) [hereinafter Reynolds, *Is Democracy Like Sex?*] (comparing the role of democracy in restraining special-interest networks with the role of sexual reproduction in boosting resistance to parasitism).

7. NEAL STEPHENSON, IN THE BEGINNING . . . WAS THE COMMAND LINE 53 (1999).

of the potential damage that can result from unwise alterations, as the term "catastrophic" is no metaphor here. In this sense, I think that constitutional amendments are perilous, and a constitutional convention is analogous to the "hyperspace" button in the old *Asteroids* videogame—worth pressing only *in extremis*, since it was almost as likely to kill you as to save you.

On the other hand, the constitutional operating system is not divine—it was the product of human beings, who were subject to human blindnesses and failures, and like any human creation it is subject to being rendered obsolescent by future developments. It was not, in Michael Kammen's memorable phrase, intended to be a "machine that would go of itself."[8] The Framers inserted the Article V amendment process out of an expectation that their work would require adjustments over time. The adoption of the Constitution itself was accompanied by an enormous ten-amendment project known as the Bill of Rights. Amendments Eleven and Twelve followed quite soon after, as imperfections in the original scheme were discovered. The Reconstruction Amendments followed after considerable difficulty revealed other substantial flaws. Furthermore, of course, the Constitution has been effectively amended by judicial interpretations on numerous occasions as well. If the Republic can face the risks of amendment via judicial action with equanimity, it can surely face the risks inherent in amendment via the procedures of Article V.

So if constitutional amendments, large and small, are in a sense part of the system, how can we determine what sorts of amendments are best?

II. AMENDMENTS GOOD AND BAD

Predicting the result of even modest changes in a complex system is often difficult, and sometimes impossible.[9] But my first observation is that a constitutional amendment should be directed at something structural, something basic to the functioning of our government, and not at some particular policy issue or legislative question. If one is possessed of a supermajority but fears losing it in the future, there may be a powerful temptation to "lock in" policy preferences by promoting them to the level of the Constitution, where future change to undo them will be much more difficult. But such changes are not really the objective of the amendment process.

And, indeed, a survey of the constitutional amendments adopted to date tends to support the wisdom of this approach. Most are structural reallocations of power: between the states and the federal government (and between black people and white people) in the Reconstruction Amendments, between the federal government and individuals in the Sixteenth Amendment, between the people and states in the Seventeenth

8. MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986).

9. *See generally* Reynolds, *Chaos and the Court*, *supra* note 6.

Amendment, between men and women in the Nineteenth Amendment, between the executive and the electorate in the Twenty-second Amendment, between Congress and the electorate in the Twenty-eighth. Others fix structural problems: reducing dangerous "lame duck" periods in the Twentieth Amendment and fixing bugs in presidential succession in the Twenty-fifth Amendment.

In fact, the only major departure from this principle is to be found in the most unsuccessful constitutional amendment of all time, the repealed 18th Amendment, which imposed an alcohol prohibition. Rather than being primarily about structure, it was primarily about policy. It was also a spectacular failure. This experience should, perhaps, encourage caution regarding similar efforts. Note that this involves both form and substance: An amendment to ban abortion would seem to resemble Prohibition, while an amendment to place abortion decision-making exclusively in the states would not; likewise a law to ban gay marriage versus placing the decision in the hands of state legislatures.

At any rate, I offer some (brief) thoughts to follow on a number of proposals for constitutional change and reform beyond those that are spelled out at greater length—and, no doubt, greater erudition—by the participants in this Symposium. While many if not all of them probably belong on whatever constitutes the constitutional equivalent of the cutting-room floor, they will perhaps serve as a spur to further thought. In all cases, I will try to observe the constitution-as-operating-system distinction between constitutional subjects and legislative software. Readers may judge how well I succeed.

In addition, I proceed on the basis that, with the federal government at record size and the federal debt at record levels, constitutional amendments intended to bring runaway government expansion under control are most likely to interest the electorate over the coming years. I may be wrong, but I believe that social-issue amendments, on topics like abortion or gay marriage, are unlikely to generate the sort of interest they might have in less parlous financial circumstances. Certainly it seems likely that, should a constitutional convention be called in the near future, it will be to deal with these sorts of financial and structural problems, not the social-issue bugbears of yore.

III. CH-CH-CH-CHANGES

A. Taking Some Amendments Seriously

In the past I have proposed altering the Ninth Amendment to read: "The enumeration, in this Constitution, of certain rights, shall not be construed so as to deny or disparage other rights retained by the people. *And we really mean it!*"

That, I thought, would make clear that the Constitution's distribution of power consists of discrete government powers in a sea of individual rights,

and not the other way around. The only change I would make today would be to add the same postscript to the Tenth Amendment as well. With limited government unpopular among politicians—because, one suspects, it is insufficiently productive of graft—and with federal courts largely unwilling since the New Deal to police the "internal" limits of government power, some additional external constraints might well be worth it. A somewhat more serious—though less amusing—version of this might provide, instead of *And we really mean it!* that no law made in violation of such principles could be upheld, and that any U.S. citizen should have standing to seek judicial remedies of violations. But perhaps reliance on the federal courts to protect liberties is a mistake. And so, the next proposal.

B. Setting Ambition Against Ambition in Cause of Smaller Government: A House of Repeal

Our structure of government, in which laws must pass bicamerally and then be presented to the President, and, after passage, face judicial review from the courts, would seem to produce powerful checks against the overweening growth of government power. This, however, has turned out not to be the case—or, at least, such checks have not proven powerful enough.

Thus, in keeping with James Madison's principle of letting ambition counteract ambition, I suggest a third house of Congress whose sole function is to repeal laws. Members should serve staggered terms, and their only power—and hence, the only thing they could place before constituents in seeking reelection—would be to repeal laws enacted by Congress.[10]

There might be concerns about infinite recursion—in which Congress passes bills, has them repealed, and then re-passes them to face a further repeal—though in practice I wonder how likely that might be (or whether it would be so terrible, if it were to happen). However, there could be limitations, such as a requirement that the House of Repeal act by a two-thirds vote of each house, or a provision that a House of Repeal could only repeal a given law once per session, or a veto-style override provision allowing the House and Senate to re-pass a "repealed" law by a two-thirds margin in each house. (Or, perhaps more sensibly, forbidding them from re-passing a repealed law until an election has intervened). Perhaps even all of these might apply, or with different standards depending on the age or subject matter of the legislation in question, depending on how much repeal one believes is likely to be necessary.

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10. This idea is not original with me. As far as I know, it was first aired in Robert Heinlein's novel *The Moon Is a Harsh Mistress*. *See* Dmitri Feofanov, *Luna Law: The Libertarian Vision in Heinlein's* The Moon Is A Harsh Mistress, 63 TENN. L. REV. 71, 126–27 (1995).

Though the details, as with all constitutional provisions, matter a lot, the key virtue of a House of Repeal goes beyond the details: The point of its existence would be to give *someone* in the federal government an incentive to give us *less* law rather than more. Right now, only the federal judiciary is free from incentives to create additional regulation (though not necessarily free from incentives to create additional legal complexity),[11] but federal judges get no reward for striking laws down. There is no institutional incentive to do so. Yet it seems that things are much more likely to get done in our system if some institution benefits from the doing.

In a sense, the House of Repeal proposal would simply institutionalize Randy Barnett's Repeal Amendment proposal[12] under one roof. The difference is that while state legislatures might sometimes favor repealing particular legal provisions, they too lack an institutional incentive to identify poorly functioning federal laws and eliminate them. In our current system, no one has such an incentive, really. This proposal would remedy that.

C. No Representation Without Taxation

Since the adoption of the Sixteenth Amendment and the institution of a progressive income tax, we have seen an enormous expansion of federal spending and an increasing inability of the political system to keep such spending from growing. There are numerous reasons for this phenomenon, but one characteristic of a progressive income tax system is that people who make less money have less of a stake in controlling spending.

Indeed, according to a 2009 report from the Tax Foundation, the income tax burden of the top one percent of taxpayers exceeds that of the bottom ninety-five percent.[13] The top fifty percent of earners, meanwhile, paid over ninety-seven percent of income taxes (and the top twenty-five percent paid over eighty-six percent), while the bottom fifty percent paid less than three percent, and many not only paid no taxes but actually received money back due to various refundable-credit schemes for low-income workers.[14] One need not be an opponent of progressive taxation in general to recognize that such a narrow concentration of tax burdens poses risks in a largely majoritarian political system. Those who pay no taxes—as

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11. *See, e.g.*, Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453 (2008).

12. *See generally* Randy E. Barnett, *The Case for the Repeal Amendment*, 78 TENN. L. REV. 815 (2011); Randy E. Barnett & William J. Howell, *The Case for a 'Repeal Amendment'*, WALL ST. J., Sept. 16, 2010, at A23.

13. Scott A. Hodge, *Tax Burden of Top 1% Now Exceeds That of Bottom 95%*, TAX POLICY BLOG (July 29, 2009), http://www.taxfoundation.org/blog/show/24944.html.

14. Gerald Prante & Mark Robyn, *Fiscal Fact: Summary of Latest Federal Individual Income Tax Data*, TAX FOUND., 3 (Oct. 6, 2010), http://www.taxfoundation.org/files/ff249.pdf.

a large number of Americans do not[15]—or whose taxes are negligible as a fraction of their income, are likely to be rather sanguine about the burdens of increased spending and increased taxation, since those burdens will fall on others.[16]

The American Revolution was based, in part, on cries of "no taxation without representation," but the problem here is something a bit different. Those who pay substantial taxes get to vote, but the progressivity of the system ensures that they will be in the minority. And it seems no great stretch to foresee a future in which less than half the electorate will pay any federal income tax at all.

A system in which voting for increased spending and taxation has no visible cost to the majority of voters is a system that is likely to suffer from much-higher-than-optimal levels of spending and taxation. Perhaps some sort of corrective is in order.

The flip side of "no taxation without representation"—"no representation without taxation"—is questionable. Such an approach, limiting the franchise to those who pay income taxes, would likely violate the Twenty-fourth Amendment, which provides:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.[17]

And at any rate, shrinking the scope of the franchise is not likely to promote government stability or accountability.[18] On the other hand, there is no reason why the Sixteenth Amendment could not be amended to limit the progressivity of the federal income tax. Under an ideal system, everyone, regardless of income, would pay at least some income tax (enough to notice—say in the neighborhood of five percent of gross personal income), and the amount paid would fluctuate up or down in tandem with federal

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15. Stephen Ohlemacher, *Nearly Half of U.S. Households Escape Fed Income Tax*, YAHOO! FINANCE (Apr. 7, 2010, 5:38 PM), http://finance.yahoo.com/news/Nearly-half-of-US-households-apf-1105567323.html?x=0&.v=1.

16. The percentage of households paying no income tax climbed rapidly in recent years. Tad DeHaven notes that "[a]s the price of something drops, the demand increases. For a growing share of Americans, government services are effectively 'free,' so they are demanding even more and policymakers are giving it to them." Tad DeHaven, *The Something-for-nothing Quandary*, CATO@LIBERTY (Sept. 15, 2010, 3:00 PM), http://www.cato-at-liberty.org/the-something-for-nothing-quandary.

17. U.S. CONST. amend. XXIV, § 1.

18. In his future history series, science fiction writer Jerry Pournelle has envisioned a future in which America is divided between dole-receiving "Citizens" and more elite "Taxpayers." It is not an especially appealing future. *See, e.g.*, JERRY POURNELLE, HIGH JUSTICE (1979).

spending. More spending should hurt, at least a little. But how do we keep Congress from making up the difference through borrowing, as it has done evermore frequently lately? That brings us to the next proposal.

D. A Question of Balance

Nearly every state in the Union already possesses some sort of state-constitutional provision requiring a balanced budget, though the rigor of these provisions varies.[19] There is no corresponding provision in the federal Constitution, whose Article I, Section 8 merely authorizes Congress "[t]o borrow Money on the credit of the United States."[20]

Many have considered that to be a defect and have proposed various flavors of balanced budget amendments designed to curb federal borrowing. Here is the text of one version, introduced in the 111th Congress:

> Section 1. Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote.
> Section 2. The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a rollcall vote.
> Section 3. Prior to each fiscal year, the President shall transmit to the Congress a proposed budget for the United States Government for that fiscal year in which total outlays do not exceed total receipts.
> Section 4. No bill to increase revenue shall become law unless approved by a majority of the whole number of each House by a rollcall vote.
> Section 5. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. The provisions of this article may be waived for any fiscal year in which the United States is engaged in military conflict which causes an imminent and serious military threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law.
> Section 6. The Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts.
> Section 7. Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include all outlays of the United States Government except for those for repayment of debt principal.

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19. *See generally* NAT'L CONFERENCE OF STATE LEGISLATURES, *NCSL Fiscal Brief*: *State Balanced Budget Provisions* (Oct. 2010), http://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf (providing constitutional and statutory citations for state balanced budget requirements).

20. U.S. CONST. art. 1, § 8.

> Section 8. This article shall take effect beginning with the later of the second fiscal year beginning after its ratification or the first fiscal year beginning after December 31, 2014.[21]

This version found little traction and the 111th Congress was not notable for its progress toward balanced budgets. But note that this language is milder than many state balanced-budget provisions, in that it provides for unbalanced budgets by a relatively small (three-fifths rather than two-thirds) supermajority. It also does not limit the assumption of unfunded future liabilities, something that has proven to be a serious problem for many states.[22] It is likely to be a problem for the federal government as well, and any serious balanced budget proposal should take such liabilities into account.

Another approach would grant the President a line-item veto whenever the budget is out of balance.[23] This is even weaker tea. Of course, at the opposite end of the spectrum, it is possible to imagine extending Article I, Section 10's prohibition against the states making "any Thing but gold and silver Coin a Tender in Payment of Debts,"[24] to the federal government, but that seems, well, rather strong tea.

Still, the demonstrated tendency of politicians to keep on spending other people's money well past the point at which it has run out suggests that some sort of check might be worthwhile. A survey of state balanced budget proposals—which, in some cases, as in Oregon, limit the size of surpluses as well as deficits[25]—might be worthwhile. Because states cannot print their own money, the problem of overspending has come up more often, and the solutions they have arrived at are likely to have considerable relevance now that the federal government is approaching its limits.

E. Turnover

Many Americans interested in political reform are unhappy with the low rate of turnover in Congress. With its long-term civil service employment practices, the bureaucracy, of course, hardly turns over at all. But Congress is little better. Even in national elections where the shift seems drastic, like the midterm elections of 2010, the vast majority of

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21. H.R.J. Res. 1, 111th Cong., (2009).

22. *See, e.g.*, Megan McArdle, *Dire States*, THE ATLANTIC, Jan./Feb. 2011, at 36 (describing budgetary difficulties of many states resulting from unfunded pension liabilities, etc.).

23. *See* Anthony W. Hawks, *The Balanced Budget Veto: A New Mechanism to Limit Federal Spending*, POL'Y ANALYSIS, Sept. 4, 2003, at 1.

24. U.S. CONST. art. 1, § 10.

25. *See* OREGON DEP'T OF REVENUE, OREGON CORPORATE EXCISE AND INCOME TAX: CHARACTERISTICS OF CORPORATE TAXPAYERS APP. D (2007), *available at* www.oregon.gov /DOR/STATS/docs/102-405-FY07/102-405-07.pdf.

incumbents are still re-elected. This has led to a number of proposals for limiting the terms of representatives and senators, both at the federal level[26]—where, unsurprisingly, they have found limited congressional support—and at the state level, where the Supreme Court, in *U.S. Term Limits v. Thornton*,[27] found such beyond state power.

Were we to hold a constitutional convention, of course, congressional defensiveness would no longer be a roadblock, and, I suppose, it is because of such potential roadblocks to change that the convention approach was included as an alternative to amendment by congressional action. That said, I remain skeptical that mechanical term limits are the way to go. In my essay, *Is Democracy Like Sex?*, I discussed the role of electoral turnover in limiting special-interest corruption and suggested that a term limits approach would be much less effective:

> The imposition of mandatory turnover on elective offices certainly tends to change things around, but it is not at all certain that it would accomplish as much as the reshuffling brought about by democratic electoral politics. The value of "shuffling," after all, is that it is more or less random. The turnover created by term limits would not be random at all. In addition, the term-limit remedy acts whether it is needed or not. Turnover accomplished by electoral processes, on the other hand, may be in part "random," but it may also stem—as I think it has in the last couple of elections—from a widespread sense on the part of voters that special interest parasitism has gotten out of hand. Even if we do not feel that we can count on voters to engage in the kind of day-to-day effort required to make plebiscitary democracy work—something hard to expect in an age when we cannot get people to show up for jury duty—perhaps we *can* count on them to know when things have gotten too cozy, and to act appropriately. Certainly the end of the Cold War has produced just such a sense, and just such action, in quite a few democracies besides this one.[28]

I continue to feel this way, though I confess that, in the intervening years, I have become more concerned that the role of gerrymandering may be undercutting the prospects for democratic turnover to a greater degree than I appreciated. To the extent that this is true, a constitutional amendment aimed at limiting gerrymandering might do more good than term limits. Personally, I would rather see an official leave office because the voters kicked the individual out, than simply because of the calendar.

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26. For a current term-limits proposal, see generally Richard A. Epstein, *Why We Need Term Limits for Congress: Four in the Senate, Ten in the House*, 78 TENN. L. REV. 851 (2011).

27. 514 U.S. 779 (1995) (finding unconstitutional state-imposed term limits on federal representatives).

28. Reynolds, *Is Democracy Like Sex?*, *supra* note 6, at 1650 (citations omitted).

V. CONCLUSION

The other participants in this symposium have far more to contribute than I have managed here, but I hope that these observations will serve to spur discussion. And, should the nation choose to try a second constitutional convention, I hope that my words of caution will encourage some degree of additional care and consideration in any participants who happen to read them. When our Constitution was drafted, the participants in that convention knew that they were undertaking something audacious, unprecedented, and risky, but, under the circumstances, they considered the risk worth running in the hopes of producing a stable, prosperous, and free society that would last many decades. That they succeeded beyond their wildest dreams should not be taken as a reason for any successors to be less careful.