

# THE LIBERTY AMENDMENTS



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## CHAPTER ONE

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# RESTORING THE AMERICAN REPUBLIC

I UNDERTOOK THIS PROJECT *not* because I believe the Constitution, as originally structured, is outdated and outmoded, thereby requiring modernization through amendments, but because of the *opposite*—that is, the necessity and urgency of *restoring* constitutional republicanism and *preserving* the civil society from the growing authoritarianism of a federal Leviathan. This is not doomsaying or fearmongering but an acknowledgment of fact. The Statists have been successful in their century-long march to disfigure and mangle the constitutional order and undo the social compact. To disclaim the Statists' campaign and aims is to imprudently ignore the inventions and schemes hatched and promoted openly by their philosophers, experts, and academics, and the coercive application of their designs on the citizenry by a delusional governing elite. Their handiwork is omnipresent, for all to see—

a centralized and consolidated government with a ubiquitous network of laws and rules actively suppressing individual initiative, self-interest, and success in the name of the greater good and on behalf of the larger community. Nearly all will be emasculated by it, including the inattentive, ambivalent, and disbelieving.

The nation has entered an age of *post-constitutional soft tyranny*. As French thinker and philosopher Alexis de Tocqueville explained presciently, “It covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate, to rise above the crowd. The will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting. Such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd.”<sup>1</sup>

Social engineering and central planning are imposed without end, since the governing masterminds, drunk with their own conceit and pomposity, have wild imaginations and infinite ideas for reshaping society and molding man’s nature in search of the ever-elusive utopian paradise. Their clumsy experiments and infantile pursuits are not measured against any rational standard. Their piety and sanctimony are justification enough.

Tocqueville observed further, “It would seem as if the rulers of our time sought only to use men in order to make things great; I wish that they would try a little more to make great men; that they would set less value on the work and more upon the workman; that they would never forget that a nation cannot long re-

main strong when every man belonging to it is individually weak; and that no form or combination of social polity has yet been devised to make an energetic people out of a community of pusillanimous and enfeebled citizens.”<sup>2</sup>

Today Congress operates not as the Framers intended, but in the shadows, where it dreams up its most notorious and oppressive laws, coming into the light only to trumpet the genius and earnestness of its goings-on and to enable members to cast their votes. The people are left lamebrained and dumbfounded about their “representatives’ ” supposed good deeds, which usually take the form of omnibus bills numbering in hundreds if not thousands of pages, and utterly clueless about the effects these laws have on their lives. Of course, that is the point. The public is not to be informed but indoctrinated, manipulated, and misled.

Congress also, and often, delegates unconstitutionally law-making power to a gigantic yet ever-growing administrative state that, in turn, unleashes on society myriad regulations and rules at such a rapid rate the people cannot possibly know of them, either—and if, by chance, they do, they cannot possibly comprehend them. Nonetheless, ignorance, which is widespread and deliberately so, is no excuse for noncompliance, for which the citizen is heavily fined and severely punished.

Not to be outdone, the current occupant of the Oval Office sees his primary duty as “fundamentally transforming the United States of America.”<sup>3</sup> By this, of course, President Barack Obama did not mean a fresh allegiance to the nation’s founding principles and a new respect for the Constitution’s limits on federal authority, but the converse. He is more blatant and aggressive than his twentieth-century predecessors, but faithfully follows the footsteps of the most transgressive among them. The metamorphosis

of the executive branch into an immense institution exercising a conglomeration of powers, including lawmaking and decreeing, is clearly without constitutional origin, a quaint notion mostly derided these days.

Having delegated broad lawmaking power to executive branch departments and agencies of its own creation, contravening the separation-of-powers doctrine, Congress now watches as the president inflates the congressional delegations even further and proclaims repeatedly the authority to rule by executive fiat in defiance of, or over the top of, the same Congress that sanctioned a domineering executive branch in the first place. Notwithstanding Congress's delinquency, but because of it, an unquenched President Obama, in a hurry to expedite a societal makeover, has repeatedly admonished Congress that "[i]f [it] won't act soon to protect future generations, I will!"—that is, if Congress will not genuflect to his demands, and pass laws to his liking, he will act on his own.<sup>4</sup>

And the president has made good on his refrain. On a growing list of matters, he has, in fact, displayed an impressive appetite for imperial rule. With the help of a phalanx of policy "czars," from immigration, the environment, and labor law to health care, welfare, and energy, the president has exercised his executive "discretion" to create new law, abrogate existing law, and generally contrive ways to exploit legal ambiguities as a means to his ends. He has also declared the Senate in recess when it was not, thereby bypassing the Senate's constitutional "advice and consent" role to install several partisans in top federal posts.

Today this is glorified and glamorized as compassionate progressivism. The Framers called it despotism. In *Federalist* 48, James

Madison, considered the father of the Constitution, wrote, “An ELECTIVE DESPOTISM was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.”<sup>5</sup>

The third branch of the federal triarchy, the judiciary, is no better. Among the biggest myths is that the men and women of the judiciary, operating under monklike conditions, would dutifully and faithfully focus their undivided mental faculties toward preserving the Constitution. They would apply their expertise, experience, and insight free from the political pressures and biases of elections and the legislative and executive branches of government, and within a narrow scope of authority and purpose. Moreover, it was assumed there was little to fear from this part of government. In *Federalist* 78, Alexander Hamilton explained, “Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.”<sup>6</sup> Yet, having seized for itself in the early years of the nation the final word on all matters before it, the Supreme Court with just five of its nine members can impose the most far-reaching and breathtaking rulings on the whole of society, for which there is no effective recourse.

It turns out that justices are also God’s children; and being of this world, their makeup consists of actual flesh and blood. They are no more noble or virtuous than the rest of us, and in some

cases less so, as they suffer from the usual human imperfections and frailties. And the Court's history proves it. In addition to delivering the routine and, in some cases, exceptional rulings, the Court is responsible for several notorious holdings, including *Dred Scott v. Sandford*<sup>7</sup> (endorsing slavery), *Plessy v. Ferguson*<sup>8</sup> (affirming segregation), and *Korematsu v. United States*<sup>9</sup> (upholding the internment of Americans), among others. During the last eighty years or so, the justices have rewritten sections of the Constitution, including the Commerce Clause (redefining noncommerce as commerce) and the tax provisions (redefining penalties as taxes), to accommodate the vast expansion of the federal government's micromanagement over private economic activity. Moreover, the justices have laced the Court's jurisprudence with all manner of personal policy preferences relating to social, cultural, and religious issues, many of which could have been avoided or deferred.

What was to be a relatively innocuous federal government, operating from a defined enumeration of specific grants of power, has become an ever-present and unaccountable force. It is the nation's largest creditor, debtor, lender, employer, consumer, contractor, grantor, property owner, tenant, insurer, health-care provider, and pension guarantor. Moreover, with aggrandized police powers, what it does not control directly it bans or mandates by regulation. For example, the federal government regulates most things in your bathroom, laundry room, and kitchen, as well as the mortgage you hold on your house. It designs your automobile and dictates the kind of fuel it uses. It regulates your baby's toys, crib, and stroller; plans your children's school curriculum and lunch menu; and administers their student loans in college. At your place of employment, the federal government oversees every-

thing from the racial, gender, and age diversity of the workforce to the hours, wages, and benefits paid. Indeed, the question is not what the federal government regulates, but what it does not. And it makes you wonder—how can a people incapable of selecting their own lightbulbs and toilets possess enough competence to vote for their own rulers and fill out complicated tax returns?

The illimitable regulatory activity, with which the federal government torments, harasses, and coerces the individual's private and economic behavior, is the progeny of a colossal federal edifice with inexhaustible energy for societal manipulation and change. In order to satisfy its gluttonous appetite for programmatic schemes, the federal government not only hurriedly digests the Treasury's annual revenue, funded with confiscatory taxes on a diminishing number of productive citizens, but desserts on the wealth not yet created by generations not yet born with unconstrained indebtedness. And what havoc has this wrought.

The federal government consumes nearly 25 percent of all goods and services produced each year by the American people.<sup>10</sup> Yearly deficits routinely exceed \$1 trillion.<sup>11</sup> The federal government has incurred a fiscal operating debt of more than \$17 trillion, far exceeding the total value of the annual economic wealth created by the American people, which is expected to reach about \$26 trillion in a decade.<sup>12</sup> It has accumulated unfunded liabilities for entitlement programs exceeding \$90 trillion, which is growing at \$4.6–6.9 trillion a year.<sup>13</sup>

There is not enough money on the planet to make good on the federal government's financial obligations. Hence, the Federal Reserve Board has swung into action with multiple versions of "quantitative easing," which is nothing more than the federal government monetizing its own debt—or buying its own debt—

with a combination of borrowing, issuing itself credit, and printing money amounting to trillions of dollars.<sup>14</sup> Of course, this has the eventual effect of devaluing the currency, fueling significant inflation or deflation, and destabilizing the economy at some future point.

But like the laws of physics, there is no escaping the laws of economics. As these fiscal and monetary malpractices escalate, for there is no end in sight, the federal government will turn increasingly reckless and demanding, taking an even harder line against the individual's accumulation of wealth and retention of private property. For example, when the federal income tax was instituted one hundred years ago, the top individual income tax rate was 7 percent. Today the top rate is about 40 percent, with proposals to push it to nearly 50 percent. There is also serious talk from the governing elite about instituting a national value-added tax (VAT) on top of existing federal taxes,<sup>15</sup> which is a form of sales tax, and divesting citizens of their 401(k) private pension plans.<sup>16</sup> Even the rapaciousness of these policies will not be enough to fend off the severe and widespread misery unleashed from years of profligacy. Smaller nations such as Cyprus, Spain, and Greece provide a window into the future, as their borrowing has reached its limit. Moreover, unable to print money, their day of reckoning is either looming or arrived. Therefore, bank accounts, other investments, and wealth generally are subject to governmental impoundment, sequester, and theft. The individual's liberty, inextricably linked to his private property, is submerged in the quicksand of a government that is aggregating authority and imploding simultaneously.

What, then, is the answer? Again, Tocqueville offers guidance. Looking back at the Constitutional Convention some fifty years afterward, he observed that "it is new in history of society to see

a great people turn a calm and scrutinizing eye upon itself when apprised by the legislature that the wheels of its government are stopped, to see it carefully examine the extent of the evil, and patiently wait two whole years until a remedy is discovered, to which it voluntarily submitted without its costing a tear or a drop of blood from mankind.”<sup>17</sup>

It is asking too much of today’s governing masterminds and their fanatical adherents to reform the product of their own fatuity—that is, the continuing disassembly of the Constitution and society. After all, despite one credible source after another, both within and outside the federal government, ringing alarm bells about the nation’s hazardous track—describing it as unsustainable, desperate, and immoral—they are blinded to reason, experience, and knowledge by their political DNA and ideological invincibility and therefore are intransigent to effective ameliorative steps. They long ago renounced by word and action their adherence to the Constitution’s confinements since the Statists’ utopia and the Framers’ Constitution cannot coexist.

However, it is not asking too much of “a great people [to] turn a calm and scrutinizing eye upon itself” and rally to their own salvation. It is time to return to self-government, where the people are sovereign and not subjects and can reclaim some control over their future rather than accept as inevitable a dismal fate. Unlike the radicalism of the governing masterminds, who self-servingly oversee a century-old, perpetual counterrevolution against the American dawn, the people must have as their goal the reestablishment of the founding principles and the restoration of constitutional republicanism, thereby nurturing the individual and preserving the civil society. This requires, first, an acknowledgment of the federal government’s unmooring from its

constitutional foundation; second, an acceptance that the condition is urgent and, if untreated, will ultimately be the death knell of the American Republic; third, the wisdom to rebalance the government in a way that is without novelty and true to the Framers' original purpose; and, fourth, the courage to confront—intellectually and politically—the Statists' stubborn grip on power.

There is a path forward but it requires an enlightened look back at our founding. And what we find is that the Framers rightly insisted on preserving the prominent governing role of the state legislatures as a crucial mechanism to containing the power of the proposed new federal government. In fact, other than the limited, specified powers granted to the federal government, the states retained for themselves plenary governing authority. The debates during the Constitutional Convention and the state ratification conventions are unequivocal in this regard. During the ratification period, the Federalists repeatedly assured the Anti-Federalists and other skeptics of the proposed federal government's limits. For example, Madison argued in *Federalist* 14, "In the first place, it is to be remembered, that the general government is not to be charged with the whole power of making and administering laws: its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the *separate* provisions of any."<sup>18</sup> In *Federalist* 45 he insisted, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."<sup>19</sup> In *Federalist* 46, Madison asserted that "the powers proposed to be lodged in the federal government are as little formidable to those reserved to the individual States, as they are indispensably necessary to accomplish the purposes of the Union; and that all

those alarms which have been sounded, of a meditated and consequential annihilation of the State governments, must, on the most favorable interpretation, be ascribed to the chimerical fears of the authors of them.”<sup>20</sup>

Madison’s declarations were not unique among the Constitution’s proponents but rather were commonplace. And without these assurances—and the additional pledge that the First Congress would offer amendments to the Constitution further ensuring that individual and state sovereignty would be safeguarded against the new federal government (what became the Bill of Rights, including the Ninth and Tenth Amendments)—the Constitution would not have been ratified. Thus, the Constitution, drafted by delegates who were sent by the states to Philadelphia in 1787 and ratified subsequently by delegates in the state conventions, preserved the decisive role of the states in the American Republic.

It requires emphasis that *the states* established the American Republic and, through the Constitution, retained for themselves significant authority to ensure the republic’s durability. This is not to say that the states are perfect governing institutions. Many are no more respectful of unalienable rights than is the federal government. But the issue is how best to preserve the civil society in a world of imperfect people and institutions. The answer, the Framers concluded, is to diversify authority with a combination of governing checks, balances, and divisions, intended to prevent the concentration of unbridled power in the hands of a relative few imperfect people.

Unlike the modern Statist, who defies, ignores, or rewrites the Constitution for the purpose of evasion, I propose that we, the

people, take a closer look at the Constitution for our preservation. The Constitution itself provides the means for restoring self-government and averting societal catastrophe (or, in the case of societal collapse, resurrecting the civil society) in Article V.

Article V sets forth the two processes for amending the Constitution, the second of which I have emphasized in italics:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, *on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments*, which, in either Case, *shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof*, as the one or the other Mode of Ratification may be proposed by the Congress . . .<sup>21</sup>

Importantly, in neither case does the Article V amendment process provide for a constitutional convention. It provides for two methods of amending the Constitution. The first method, where two-thirds of Congress passes a proposed amendment and then forwards it to the state legislatures for possible ratification by three-fourths of the states, has occurred on twenty-seven occasions. The second method, involving the direct application of two-thirds of the state legislatures for *a Convention for proposing Amendments*, which would thereafter also require a three-fourths ratification vote by the states, has been tried in the past but without success. Today it sits dormant.

The fact is that Article V expressly grants state legislatures

significant authority to rebalance the constitutional structure for the purpose of restoring our founding principles should the federal government shed its limitations, abandon its original purpose, and grow too powerful, as many delegates in Philadelphia and the state conventions had worried it might. The idea was first presented at the Constitutional Convention on May 29, 1787, by Edmund Randolph, governor of Virginia, as a proposal in the so-called Virginia Plan drafted by Madison.

Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not be required thereto.<sup>22</sup>

On June 11, George Mason of Virginia—who had earlier drafted Virginia’s Declaration of Rights, the precursor to the Declaration of Independence—responded to some of the delegates who did not see the necessity of the proposal, by strongly advocating for it.

Col: Mason urged the necessity of such a provision. The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in any easy, regular and Constitutional way than to trust to chance and violence. It would be improper to require the consent of the Natl Legislature, because they may abuse their power, and refuse their consent on that very account. . . .<sup>23</sup>

Later, when the delegates returned to the issue, Roger Sherman of Connecticut—who had been a member of the Committee of Five, which helped draft the Declaration of Independence, and who coauthored the so-called Connecticut Plan, which served as the basis for our bicameral Congress—offered an alternative in which Congress would propose amendments and the states would ratify them. Madison suggested dropping the state convention altogether.

On September 15, Mason, alarmed that Congress would have the sole power to propose amendments, continued to insist on state authority to call for conventions. Mason explained that an oppressive Congress would never agree to propose amendments curtailing its own tyranny:

Col: Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.<sup>24</sup>

Mr. [Gouverneur] Morris [of Pennsylvania] & Mr. [Elbridge] Gerry [of Massachusetts] moved to amend the article so as to require a Convention on application of 2/3 of the Sts [states].<sup>25</sup>

Earlier, Pennsylvania's James Wilson, among the most active participants at the Constitutional Convention, had "moved to insert 'three fourths of' before the words 'several States,' " which was adopted and then ultimately added as a requirement for both

amendment processes under Article V.<sup>26</sup> Consequently, under both amendment procedures, the Constitution requires that three-fourths of the states ratify amendments, either by their state legislatures or state conventions.

I was originally skeptical of amending the Constitution by the state convention process. I fretted it could turn into a runaway caucus. As an ardent defender of the Constitution who reveres the brilliance of the Framers, I assumed this would play disastrously into the hands of the Statists. However, today I am a confident and enthusiastic advocate for the process. The text of Article V makes clear that there is a serious check in place. Whether the product of Congress or a convention, a proposed amendment has no effect at all unless “ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof. . . .” This should extinguish anxiety that the state convention process could hijack the Constitution.

After more research and reflection, the issue crystallized further. If the Framers were alarmed that states calling for a *Convention for proposing Amendments* could undo the entire undertaking of the Constitutional Convention, then why did they craft, adopt, and endorse the language? In *Federalist* 43, Madison considered both Article V amendment processes equally prudent and judicious. He wrote, in part, “That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments

to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other. . . .”<sup>27</sup>

There are other reasons for assuaging concerns. Robert G. Natelson, a former professor of law at the University of Montana and an expert on the state convention process, explains that “a convention for proposing amendments is a *federal convention*; it is a creature of the states or, more specifically, of the state legislatures. And it is a *limited-purpose convention*. It is not designed to set up an entirely new constitution or a new form of government. How do we know that it’s a federal convention? [It] was the only kind of interstate convention the Founders ever knew, or likely ever considered. Indeed, when they talked during the ratification process about conventions for proposing amendments, they always talked about them as representing the states.”<sup>28</sup> Moreover, the state legislatures determine if they want to make application for a convention; the method for selecting their delegates; and the subject matter of the convention.<sup>29</sup>

In addition, Congress’s role in the state application process is minimal and ministerial. It could not be otherwise, as the Framers and ratifiers adopted the state convention process for the purpose of establishing an alternative to the congressionally initiated amendment process. It provided a constitutional solution should “the [federal] Government . . . become oppressive.”<sup>30</sup> The text and plain meaning of Article V are inarguable. In *Federalist* 85, Alexander Hamilton—a leading advocate of a robust federal government—explained that “the national rulers, whenever nine [two-thirds] States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be *obliged* ‘on the application of the legislatures of two thirds of the States [which at present amount to nine], to call a convention for proposing

amendments, which *shall be valid*, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof.’ The words of this article are peremptory. The Congress ‘*shall call a convention.*’ Nothing in this particular is left to the discretion of that body. And of consequence, all the declamation about the disinclination to a change vanishes in air.”<sup>31</sup>

I have no illusions about the political difficulty in rallying support for amending the Constitution by this process. After all, all past efforts have fallen short. And the governing masterminds and their disciples are more powerful and strident than ever. There is no doubt that their resistance will be stubborn and their tactics desperate as they unleash the instrumentalities of the federal government and the outlets of a corroboratory media to vanquish such a movement and subdue the public. Having rejected the Constitution’s limits, they will not be persuaded by references to its text and history. Their evasion has been their design. Others who self-identify as originalists, constitutionalists, and conservatives in asserting allegiance to the Constitution, as I do, might nonetheless be wary of or opposed reflexively to the state convention process for several reasons, including their unfamiliarity with its history and workings. Perhaps, in time, their high regard for the Constitution will persuade them of the judiciousness in resorting to it before there is little left of it. Still more may be resigned to a grim future, preferring lamentation to the hard work of purposeful action. And, of course, there are always the unmindful and content.

Whatever the reasons, there are also untold numbers of citizens who comprehend the perilousness of the times and circumstances, and the urgency of drawing the nation’s attention to the

restoration of constitutional republicanism. This book is an appeal to them. The Framers anticipated this day might arrive, for they knew that republics deteriorate at first from within. They provided a lawful and civil way to repair what has transpired. We, the people, through our state legislatures—and the state legislatures, acting collectively—have enormous power to constrain the federal government, reestablish self-government, and secure individual sovereignty.

What follows are proposed amendments to the Constitution—*The Liberty Amendments*. It is my hope and aspiration for our country that these amendments can spur interest in and, ultimately, support for the state convention process. In any event, should there come a time, sooner or later, when the states convene a convention, these amendments or amendments of the same nature—as I make no claim of unassailable knowledge—may prove useful and find their way into the debate. But a plan is what is needed, as is a first step. This is mine.