



BY ROBERT A. LEVY

“Politicians and judges have devalued the Constitution’s founding principles—federalism, separation of powers, limited government, and individual liberty.”

Chairman’s Message Toward a Better Constitution

The U.S. Constitution has served us well for two and a quarter centuries. But politicians and judges have devalued its founding principles—federalism, separation of powers, limited government, and individual liberty. When we at Cato are asked to recommend constitutional amendments, we often suggest, tongue-in-cheek, that five words be appended: “And we really mean it.”

To elaborate, I’ve asked several Cato scholars what specific changes they would endorse. Here are brief responses from six of our experts.

David Boaz embraces congressional term limits—perhaps 6 years in the House and 12 in the Senate. He also supports a cap on annual federal outlays—say 18 percent of gross domestic product—along with a supermajority requirement to raise taxes or increase the debt limit.

Both Tim Lynch and John Samples would amend the amendment process itself. Tim believes it’s proven too difficult, thereby encouraging “reinterpretation” of provisions as a backdoor means of amending them. Tim would reduce the requirement for Congress to propose amendments from two-thirds to majority vote, and lower the ratification threshold from three-fourths of the states to two-thirds.

John’s concern is that Congress has tended to enlarge national power while rejecting reforms that constrain government growth. He would adopt Michael Rappaport’s suggestion to allow two-thirds of state legislatures to propose amendments, which could then be ratified by state conventions or ballot measures. Empowering the states would reaffirm the federalist character of our Constitution.

Roger Pilon and Ilya Shapiro point to Congress’s power “To regulate Commerce. . . among the several States.” Historically, Supreme Court decisions have focused on defining “commerce.” Roger would focus on “regulate,” which means, “to make regular.” From his perspective, the commerce power was designed to (a) ensure that interstate commerce is conducted according to free-market principles, (b) clarify the rights and obligations of transactors, (c) provide certain limited “public goods” that states alone cannot provide, and (d) prohibit states from imposing protectionist barriers to interstate trade.

Ilya is critical of Court decisions condoning regulation of local economic activities that, in the aggregate, have a substantial effect on interstate commerce. The federal government’s reach now extends to corner stores, family farms, and doctor’s offices.

Ilya would restrict the subject of federal regulation to actual commerce—that is, trade in goods—that is actually interstate.

Trevor Burrus would amend the Bill of Rights to include the “principle of legality,” which would require that all laws be clear and understandable to average people. He would also decriminalize nonviolent, victimless acts and bar punishments that are not strictly and obviously necessary—especially as applied to regulatory offenses.

My personal “Top 10” additional recommendations, in highly condensed form, are: First, all major regulations must be approved by Congress and no regulation or statute shall be effective unless its constitutional authority is explicitly stated. Second, the General Welfare Clause is not a delegation of power, but a restriction on the power to tax and spend, which may not be exercised in a manner intended to favor special interests. Third, the Necessary and Proper Clause authorizes acts that are not merely convenient, but integral to executing other authorized powers. Fourth, Congress may not mandate state or local spending without providing funds, nor condition receipt of funds on performing actions not within Congress’s enumerated powers. Fifth, eminent domain may be exercised only for a legitimate public use, not solely for public purpose or benefit, and regulation of otherwise permissible property uses must be compensated if the regulation materially diminishes the property’s value. Sixth, federal, state, and local governments may not alter the terms, nor prevent the formation, of lawful private contracts. Seventh, no occupational licensing or other barrier to entry shall be imposed for the primary purpose of limiting competition. Eighth, no legally owned asset may be forfeited, except for sale or auction to pay a fine properly imposed against the owner. Ninth, there shall be no limitation on private contributions or expenditures to fund political speech. Tenth, the federal government should raise money through a consumption tax, and the Sixteenth (income tax) Amendment should be repealed.

Of course, this list is not exhaustive; nor is the abbreviated treatment adequate. The purpose of the exercise is to target areas where the Constitution might be improved, and promote a further exchange of views.

Robert A. Levy