

We Need a Realistic Path to Government Reform

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By **Peter Berkowitz** - October 16, 2013



There is much to criticize in the tactics adopted by Texas Sen. Ted Cruz and other Tea Party enthusiasts who -- with the cunning cooperation of Senate Democratic Leader Harry Reid and President Obama -- are pushing the federal government to the brink of default. But the underlying apprehensions that motivate the Tea Party are justified. Even a cursory glance at the federal government's size, scope, and level of competence should raise concerns about the condition of contemporary constitutional government.

Our labyrinthine tax code numbers more than 70,000 pages.

Despite having wound down two wars and despite the official end in June 2009 of the recession he inherited, Obama has presided over an explosion in the national debt. Since he assumed office in January 2009, the debt has increased by 57 percent. It is nearing \$17 trillion and, if it remains on its current trajectory, it will have doubled under the president's watch by the time he leaves office in January 2017.

Beyond the impenetrable and colossal tax code and the surging debt, we face long-term fiscal problems of epic proportions: In 2012, the unfunded liabilities of Medicare stood at \$42.8 trillion and those of Social Security totaled \$20.5 trillion.

At 2,700 pages in length, the 2010 Affordable Care Act is indigestible by mere mortals. The botched rollout of the \$634 million Obamacare website provides a telling illustration of the high cost of forgoing transparency and accountability.

Although top officials at the Internal Revenue Service have done their best to thwart congressional investigators, the agency's inspector general determined that the IRS targeted Tea Party conservatives, citizens whom the sitting president in particular regards as his political enemies. And it turns out that the National Security Agency was all the while conducting a massive surveillance program of telephone calls and emails of American citizens.

In these circumstances, you don't have to be a Tea Party activist or conservative radio talk show host to be worried about the federal government's unwieldy size and expansive scope, not to mention its sheer bungling. According to a recent [Gallup poll](#), a sizable majority of Americans -- 60 percent, a record number -- believe that the federal government has too much power. Another Gallup poll published last month revealed that Americans' confidence in the ability of the federal government to handle problems has hit historic lows: Only 49 percent have a great deal or a fair amount of confidence in the government's ability to handle international problems while even fewer, 42 percent, report a great deal or a fair amount of confidence in its ability to handle domestic problems. However the debt ceiling showdown is resolved, it is unlikely to improve voters' confidence in the men and women who hold high office in Washington.

All this helps explain why conservative radio talk show star Mark Levin's most recent book, "The Liberty Amendments: Restoring the American Republic," debuted in first place on the Sept. 1 New York Times bestseller list and remains on the list nearly two months after its publication. In the book, Tea Party favorite Levin draws on an impressive knowledge of the Constitution, of the founding debates, and of contemporary public policy to sketch a plan for recovering individual liberty and reinvigorating self-government by re-imposing limits on the federal government and bolstering state governments.

Don't expect to read about "The Liberty Amendments" in the book review pages of The New York Times, Washington Post, or Los Angeles Times. Despite the salience of Levin's subject to current controversies, elite publications have decided to spare their readers the inconvenience of grappling with his arguments.

To be sure, Levin does his best to antagonize elite opinion, arguing that over the last century "statists" have forged "a federal Leviathan"; the result has been to "disfigure and mangle the constitutional order and undo the social compact." To save the republic, he proposes 11

amendments to the Constitution.

Levin is well aware that the process of amending the Constitution, spelled out in Article V, is arduous and was designed by the framers to be so. It requires both super-majorities and super-super majorities. Two-thirds of both houses of Congress must propose an amendment or two-thirds of the states must petition Congress to call a convention to propose amendments. For an amendment to become law, three quarters of the states, either through their legislatures or via state conventions, must ratify it. Levin envisages “a bottom-up, grassroots initiative that empowers the citizenry, organizing in neighborhoods and communities, and working through the state legislatures, to stem federal domination, reverse course, and escape ruin.”

His amendments would establish term limits for members of Congress; return responsibility for electing senators to state legislatures, as originally required by Article I of the Constitution (thereby repealing the 17th Amendment, adopted in 1913, which provided for the direct election of senators by the people); establish term limits for Supreme Court justices; and create a super-majority congressional override of Supreme Court decisions.

The amendments would also curb federal spending and taxing; limit the size and expense of the federal bureaucracy; promote free enterprise; protect private property; grant states authority to directly amend the Constitution; grant states authority to check Congress by overriding federal statutes by means of a three-fifths vote of state legislatures and also to overturn (by the same mechanism) executive branch regulations costing more than \$100 million. Finally, he would ensure the integrity of the voting process by requiring that voters provide valid photographic identification documents and by limiting early voting.

Every one of these amendments responds to a real problem or cluster of problems connected to federal government overreach; every one aims to fortify self-government; and all are provocative and deserving of serious consideration.

In one crucial respect, moreover, Levin’s proposals are very much in the spirit of “The Federalist,” a practical book that made the case for ratifying the Constitution by connecting principles of freedom and self-government to the political realities of the day. Each of Levin’s amendments is intended to provide, in James Madison’s wise words at the end of “Federalist” No. 10, “a republican remedy for the diseases most incident to republican government.” Indeed, each of Levin’s amendments seeks to secure individual liberty, the primary aim of the Constitution, and all are grounded in and designed to give effect to the consent of the governed -- the source, from the Constitution’s perspective, of legitimate political power.

But in another crucial respect, Levin’s amendments, certainly taken as a whole, depart from the spirit of “The Federalist.” That’s because they do not seriously reckon with our political world as it really is.

First, progressives are not, as Levin's colorful invective declares, wicked and their programs are not monstrous. They may be wrong, and some of them may harbor a haughty sense of their own virtue and a not-so-secret disdain for the ordinary men and women whose interests they purport to serve. Nevertheless, progressive public policy preferences by now have sunk deep roots in the America constitutional tradition and have in many cases come to be widely shared. They will not be wished away.

Second, Levin provides little attention to unintended consequences of his proposed amendments. For example, the amendment he proposes to limit the term a person could serve on the Supreme Court to 12 years aims to prevent the nation from growing too dependent on or too hampered by the opinions of any single justice. Especially given the wide range of divisive issues that have come within the court's purview over the last 60 years, and the overt politicization of the appointments process (led by the legal professoriate, beginning with its successful campaign against President Reagan's nomination of Robert Bork in 1987), that's a desirable policy goal.

But life tenure was meant to preserve the independence of the judiciary, so that justices could decide cases impartially and objectively. With term limits, especially as their terms wind down, justices, being human, would likely be distracted in their deliberations on the cases and controversies that come before them by their post-Supreme Court opportunities. This would create an additional and highly undesirable obstacle to their impartiality and objectivity.

Third, to make the righting of the ship of state ride on 11 constitutional amendments is to indulge in utopianism. There is little chance of assembling the super- and super-super majorities needed to pass even one of the amendments Levin puts forward, let alone several or all. The bad blood among the political elites flows too forcefully, the differences of opinion between left and right loom too large -- and the resistance to dramatic change shared by ordinary people on both the left and the right runs too deep.

It is urgent for would-be reformers of the right to take these realities to heart. But not only them. It is also crucial that reformers of the left devise public laws and craft public policies that advance their political goals in a manner consistent with the presence of significant numbers of their fellow citizens who disagree with them about how individual freedom and political equality are best achieved.

Whatever the source and whatever the cost of their polemical excesses, conservatives are right to be acutely concerned about the ungainly size, enormous scope, and dubious competence in many areas of the federal government. The question is why progressives and left-liberals seem to see so little cause for concern.

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