

SOVEREIGNTY, REBALANCED: THE TEA PARTY & CONSTITUTIONAL AMENDMENTS

ELIZABETH PRICE FOLEY*

“[E]xperience hath shewn, that even under the best forms, those entrusted with power have, in time, and by slow operations, perverted it into tyranny. . . .” –Thomas Jefferson¹

Jefferson’s words ring true today. Arguably since the Marshall Court and undoubtedly since the New Deal, the U.S. Constitution has been subverted to the point where its original meaning has been substantially lost inside a tangled knot of Supreme Court case law. Like termites eating away at the constitutional architecture, Supreme Court interpretations of provisions such as the Commerce Clause, taxing and spending power, Privileges or Immunities Clause, Ninth Amendment, Tenth Amendment, and Eleventh Amendment have so rotted them that they no longer serve the critical functions originally envisioned.

One of the most pervasive themes in this journey into constitutional Wonderland—where constitutional law professors teach at least six impossible things before breakfast—is the loss of vertical separation of powers, or federalism. Year after year, the drumbeat of expanding federal power grows louder, drowning out objections and concerns voiced by the states. The noise has recently reached a fevered pitch, fueled by actions of the Obama Administration: massive industry bailouts overloaded with federal strings, mind-numbing trillion-dollar stimulus programs laden with earmarks, aggressive use of federal powers to shut down states’ efforts to fight illegal immigration, and, the *coup de grâce*, Obamacare.²

The six-million-dollar question is how to untangle this constitutional Gordian knot. The most intriguing proposals call for specific constitutional amendments or a constitutional convention, the latter of which has not occurred since the grand convention in Philadelphia that fateful, hot

* Institute for Justice Chair in Constitutional Litigation and Professor of Law, Florida International University College of Law. Professor Foley is the author of *LIBERTY FOR ALL: RECLAIMING INDIVIDUAL PRIVACY IN A NEW ERA OF PUBLIC MORALITY* (2006) and *THE LAW OF LIFE AND DEATH* (2011). She is currently working on a book about the Tea Party that will be published by Cambridge University Press in early 2012.

1. Thomas Jefferson, A Bill for the More General Diffusion of Knowledge, in 2 *THE WORKS OF THOMAS JEFFERSON* 414 (Paul Leicester Ford ed., 1904).

2. See generally THE HERITAGE FOUND., *Federal Budget and Spending*, ISSUES 2010: THE CANDIDATE’S BRIEFING BOOK 39–43 (2010), http://issues2010.com/pdf/Full_PDF.pdf; Jackie Calmes, *Obama to Seek Spending Freeze to Trim Deficits*, N.Y. TIMES, Jan. 26, 2010, at 1.

summer of 1787.³ This essay will explore the major themes of these calls for constitutional amendments and conventions, who is behind them, what problems they seek to solve, and their likelihood of success.

I. WHY REBALANCING IS NEEDED

A refrain commonly encountered when discussing federalism is something like this: “Who cares what a bunch of dead prejudiced white guys thought about states’ rights? The Civil War was fought in the name of states’ rights and the South lost. We should care more about what modern society needs from government than about turning back the constitutional clock in the name of some outdated federalism fetish.”⁴ Professor Michael Klarman sums up this attitude with the pejorative label, “constitutional idolatry.”⁵ Buried not too deeply behind this label is a liberal-progressive ideology harboring a deep-seated fear that federalism is secret code for supporting slavery and segregation and opposing things like abortion, gay marriage and, most recently, health care reform.

What these Constitution vilifiers fail to grasp is that modern Americans who decry the erosion of federalism are not pining for a return to segregation or some pre-Civil War version of states’ rights. Instead, they want to maximize individual liberty by identifying and enforcing meaningful limits on federal power. Put another way, federalism proponents are not romanticizing a bygone era. They are trying to preserve a constitutional principle—a vigorous system of dual sovereignty—that is designed to compete for the affection of citizens and jealously guard their rights. In the words of James Madison in *Federalist No. 45*:

Several important considerations have been touched in the course of these papers, which discountenance the supposition that the operation of the federal government will by degrees prove fatal to the State governments. The more I revolve the subject, the more fully I am persuaded that the balance is much more likely to be disturbed by the preponderancy of the last than of the first scale.

3. See Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 2 (1979).

4. See, e.g., *The Perils of Constitution-Worship*, THE ECONOMIST, Sept. 25, 2010, at 46. (Describing conservatives’ and tea partiers’ emphasis on the Constitution and Declaration of Independence as indicative of the “same dream of return to prelapsarian innocence” unwarranted because the Framers were “aristocrats, creatures of their time fearful of what they considered the excessive democracy taking hold in the states in the 1780s. They did not believe that poor men, or any women, let alone slaves, should have the vote.”).

5. Michael Klarman, *A Skeptical View of Constitution Worship*, BALKINIZATION (Sept. 16, 2010, 6:34 AM), <http://balkin.blogspot.com/2010/09/skeptical-view-of-constitution-worship.html>.

. . . [T]he States will retain, under the proposed Constitution, a very extensive portion of active sovereignty. . . .

The State government will have the advantage of the Federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other.

The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former.⁶

Madison could not be any clearer in his message to the American people who ratified the Constitution: state sovereignty not only exists, but it exists for the benefit of “We the People.” So it is both extremely simplistic and borderline disingenuous to suggest that federalism proponents are motivated by a desire to protect states qua states. The motivation is to protect “We the People,” and federalism is a critically important structural mechanism for doing this.

Even assuming you are convinced that federalism is more than just a quaint antediluvian relic, the question arises as to *why* so many people suddenly seem to think it needs to be restored. The Civil War Amendments undeniably shifted power away from the states.⁷ The New Deal Court’s Commerce Clause jurisprudence aggrandized federal power at the expense of the states. But these seismic shifts occurred long ago. So why is an audible cry of “federalism!” only now emerging, in *Horton Hears a Who!* fashion, from a seemingly small speck of intellectual dust?

There is no single reason. Extant angst over federalism is based not only on the collective impact of Supreme Court decisions regarding commerce, the spending power, the Tenth Amendment, etc., but on several recent events that seem to have broken the proverbial camel’s back. Since late 2008, the federal government has been spending like a drunken sailor on leave, with no apparent awareness of the responsibility to repay its debt. It responded to a free-falling economy by spending trillions of dollars to bail out banks, brokerage houses, automakers, Fannie Mae and Freddie Mac, pension funds and others. Additional massive stimulus laws have doled out hundreds of billions more for infrastructure projects, unemployment and food-stamp benefits, shoring up state education and Medicaid, and various congressional pet projects.⁸

On top of all this, in the face of some of the most uncertain economic times ever experienced, the Obama Administration used strong-arm tactics

6. THE FEDERALIST NO. 45 (James Madison) (George F. Hopkins ed., 1802).

7. See generally John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U. L. REV. 1209 (1997).

8. See generally John B. Taylor, *The Coming Debt Debacle: Top Economist Says President Obama Must Slash Spending, Now*, N.Y. DAILY NEWS, Aug. 31, 2009.

to pass a nearly trillion-dollar health reform bill over the objections of most Americans.⁹ Obamacare purports to rely upon Congress's power to regulate interstate commerce as its basis for imposing heavy regulations on the health insurance industry—an area traditionally regulated by the states—and mandating that individuals buy private health insurance.¹⁰ This unprecedented assertion of federal power, if sustained, would effectively give the federal government a police power, affecting individual liberty in an unprecedented and limitless way.

The net result of the federal government's intoxicated behavior has been a federal power grab of a magnitude never seen before. Americans have become disgusted with the behavior of the President and Congress, viewing their behavior as motivated more by politics and power than a sincere attempt to get America back on track. This disgust has emerged as a major unifying theme of the Tea Party, an incipient, grass roots political movement that exploded upon the national scene in 2009. By September 12, 2009, the Tea Party movement had grown so large that over a million tea partiers invaded D.C., marching through the halls of Congress waving signs declaring "What Would Jefferson Do?"; "I'm Taking Back My Country, one politician at a time"; "More Government for The People = Less Freedom of The People"; "Read the Tenth Amendment"; and "Wake Up America, Before Your Liberty is Gone."¹¹ Tea Party enthusiasm drove the results of the 2010 mid-term elections, when Tea Party issues and candidates propelled the Republican Party to recapture control of the U.S. House of Representatives and gain six U.S. Senate seats.¹²

Tea Party opposition to bailouts, stimulus packages and health-care reform is reflected in various proposals to amend the Constitution, including proposals to require a balanced budget, repeal the Sixteenth and Seventeenth Amendments, and give states a veto power over federal laws (the so-called Repeal Amendment).¹³ Liberals have decried the Tea Party's

9. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119; CNN Political Unit, *CNN Poll: Time doesn't change views on health care law*, POLITICALTICKER... (Mar. 23, 2011, 5:30 AM), <http://politicalticker.blogs.cnn.com/2011/03/23/cnn-poll-time-doesnt-change-views-on-health-care-law/>.

10. See DEMOCRATIC POLICY COMM., *The Individual Responsibility Policy Is Constitutional* (Oct. 15, 2010), http://dpc.senate.gov/dpcdoc.cfm?doc_name=fs-111-2-163.

11. See Lisa Miller, *223 Tea Party Signs and Placard Ideas*, TEA PARTY WDC (June 13, 2009, 1:35 PM), <http://www.meridianteparty.com/tea-party-rally-sign-ideas>.

12. See generally Michael Cooper, *Victories Suggest Wider Appeal of Tea Party*, N.Y. TIMES, Nov. 3, 2010, at 1; *The U.S. Constitution as a Celebrity: The Rising Star of the Tea Party Isn't a Person, It's a Document*, THE TORONTO STAR, Nov. 13, 2010, at IN1.

13. See generally Elizabeth Wydra & David Gans, CONSTITUTIONAL ACCOUNTABILITY CTR., *Setting The Record Straight: The Tea Party and The Constitutional Powers of the Federal Government*, (July 16, 2010), [http://www.theusconstitution.org/upload/fck/file/File_storage/Setting%20the%20Record%20Straight%20Issue%20Brief%20formatted\(1\).pdf?phpMyAdmin=TzXZ9IzqiNgbGqj5tqLH06F5Bx](http://www.theusconstitution.org/upload/fck/file/File_storage/Setting%20the%20Record%20Straight%20Issue%20Brief%20formatted(1).pdf?phpMyAdmin=TzXZ9IzqiNgbGqj5tqLH06F5Bx); Randy Barnett, *The Case for the Repeal Amendment*, 78 TENN. L. REV. 815 (2011).

call for constitutional amendments as hypocritical. They do not understand how Tea Partiers can simultaneously pledge fealty to the Constitution and seek to change it. In the words of one recent liberal blogger, this is akin to “wrapping themselves in the rhetoric of the Constitution while simultaneously trying to remake [the] document into something completely unrecognizable.”¹⁴

These criticisms have rhetorical appeal but no real substance. Imagine that I have a bicycle that I hold dear. You borrow it one day and, not revering it as much as I, damage its seat, handlebars and spokes. When I now look at my beloved bicycle, I am deeply saddened by these changes. What should I do: lament the harm done to these important features, or restore the bicycle to its original glory? Of course I should restore it, and this is precisely what federalism-based proposed amendments seek to do for the Constitution. Restoring the Constitution, not remaking it, is the goal of the Tea Party and federalism-based amendments.

II. AMENDMENTS VERSUS REVOLUTIONS

It is worth briefly pondering the range of options for effectuating constitutional change. On one end of the spectrum is revolution, a self-conscious rebellion against an existing legal regime. The signers of the Declaration of Independence recognized and invoked the natural right of revolution in their quest to break free from the tyranny of King George III:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.¹⁵

Because revolutions are fundamental or radical breaks with existing legal regimes, they are often accompanied by violence, as was the case with the American Revolution. There is no inherent necessity for violence in the context of revolution. Theoretically, any overt, self-conscious rejection of the binding authority of an existing legal regime would qualify for the revolution label. Yet, precisely because revolutions are so complete in their rejection of existing legal authority, they are much rarer than discrete acts—

14. Ian Millhiser, *Cantor Endorses Bizarre Tea Party Constitutional Amendment*, THE WONK ROOM (Dec. 1, 2010, 7:00 PM), <http://wonkroom.thinkprogress.org/2010/12/01/peal-cantor>.

15. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

such as constitutional amendments—that express disagreement only with distinct aspects of an existing regime. Of course not all legal regimes provide a mechanism for amendment, but most do, including our own. When discrete options are available, they provide an important pressure valve for effectuating changes broadly supported by the citizenry. But amendments are not always enough, and revolution is sometimes inevitable. In the words of the signers of the Declaration of Independence:

Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.¹⁶

The message seems to be this: Longstanding governments should be tinkered with when desired and discarded *in toto* only when necessary to defend individuals' natural rights to life, liberty, and the pursuit of happiness. When government becomes destructive of such rights, however, revolution is not only morally just, but morally imperative.

On what side of the revolution-amendment line do we find America today? This question is harder to answer than it initially seems. Everyone agrees that the Declaration of Independence was an act of revolution. But what about a constitutional convention, like the 1787 convention in Philadelphia? Is an Article V constitutional convention an act of revolution, or a mere act of amendment? It is an interesting question because current calls for constitutional change advocate not only discrete constitutional amendments—e.g., balanced budgets or a presidential line item veto—but also the use of constitutional conventions to ratify such amendments.¹⁷

Because there is a noticeable states' rights undercurrent to recent calls for constitutional reform, proponents are not content with the usual proposal by two-thirds of Congress followed by ratification by three-quarters of the states.¹⁸ Instead, they seek to bypass Congress to the extent permitted by Article V, invoking a mode of amendment never actually used. Specifically, Article V recognizes that constitutional amendments can be proposed not only upon approval by two-thirds of both houses of Congress, but also “on the application of the legislatures of two thirds of the several States.”¹⁹ It further declares that, upon application from the requisite

16. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

17. See generally David B. Rivkin, Jr. & Lee A. Casey, *The States Can Check Washington's Power*, WALL ST. J., Dec. 22, 2009, at A23.

18. *Id.*

19. U.S. CONST. art. V.

two-thirds of states, Congress “shall call a Convention for proposing Amendments” which are then deemed ratified upon approval by three-fourths of the states.²⁰

But why bypass the usual process of congressional proposal and instead call for a state-initiated constitutional convention? David Rivkin and Lee Casey, two of the earliest proponents of this method, asserted in a December 2009 *Wall Street Journal* op-ed that a state-initiated convention is needed.²¹ They contend that an unchecked expansion of federal power since the mid-1800s has created a situation in which Congress “has little interest in proposing limits on its own power.”²² As Bradford Plumer recently confessed in *The New Republic*, “It’s difficult to imagine [two-thirds] of senators signing up to . . . suddenly make their jobs contingent on the whims of a bunch of state legislators by axing the Seventeenth Amendment.”²³

Plumer’s observation is undoubtedly correct. After ratification of the Bill of Rights in 1791 and the Eleventh Amendment in 1798, every single constitutional amendment proposed by Congress affecting the vertical distribution of power—other than the Twenty-first Amendment’s repeal of Prohibition—has either restricted state power or enlarged federal power.²⁴ Three-quarters of the states ratified each of these power-adjusting amendments, which is understandable given the specific contexts in which they were considered. The Civil War Amendments, for example, were designed to address specific state abuses of the natural and civil rights of citizens. The cumulative effect of these amendments, particularly when combined with the impact of the Supreme Court case law vastly expanding federal power, has created the impression that something radical needs to be done to rebalance sovereignty. Invoking Article V’s procedure for a state-initiated constitutional convention provides a mechanism for venting these concerns.

Rivkin and Casey did not stop with advocating a state-initiated constitutional convention.²⁵ They proposed that states demand that the convention take up a specific constitutional amendment “to permit two-thirds of the states to propose amendments directly.”²⁶ Amending Article V in this way, if successful, would provide a more powerful means to jumpstart consideration of states’ rights by bypassing Congress completely. Rivkin and Casey confessed that their proposal is designed to “shift the power calculus” back toward the states, “enabl[ing] the states to check

20. *Id.*

21. See Rivkin & Casey, *supra* note 17.

22. *Id.*

23. Bradford Plumer, *The Revisionaries: The Tea Party’s Goofy Fetish for Amending the Constitution*, *THE NEW REPUBLIC*, Sept. 23, 2010, at 16.

24. See generally *id.*

25. See Rivkin & Casey, *supra* note 17.

26. *Id.*

Washington power [and] provide a constructive outlet for much of the growing anger—especially evident in phenomena such as the ‘tea party’ movement—toward the political elites of both parties.”²⁷

The use and potential expansion of state-initiated constitutional conventions has evoked visceral opposition, mostly from the political left.²⁸ Dylan Matthews, writing in the *Washington Post* in April 2010, asserted that “a convention would just bring trouble” because the “flavor of the week culture war amendments—school prayer, same-sex marriage, flag-burning . . . could sneak out of a constitutional convention.”²⁹ Even more boldly, Matthews admitted that “[t]he Constitution could use serious reform, but the institutional changes of the type procedural-minded liberals advocate don’t have the constituency that silly and reckless proposals do.”³⁰

Putting aside Matthews’s obvious political bias and his concomitant fear about “silly and reckless” proposals that do not reflect his views, Matthews’s concerns about a “runaway” convention are widely shared by individuals across the political spectrum.³¹ By their very nature, constitutional conventions have the potential to run away. The thirteen original states agreed to send delegates to the Philadelphia Convention with, in the words of the Continental Congress resolution calling the convention, the avowed purpose of “revising the Articles of Confederation, and reporting to congress and the several legislatures, such alterations and provisions therein, as shall . . . render the federal Constitution, adequate to the exigencies of government, and the preservation of the Union.”³² What emerged was not exactly a revision of the Articles of Confederation; so if history is any indication, it would be impossible to force a convention to focus only on specific proposals.

We could also expect special interest groups to descend on a modern convention like flies on a carcass. But it could not be held behind closed doors the way the 1787 Convention was, so every move a modern convention makes would be tweeted, blogged, and Facebooked to death, not to mention commented on by every cable pundit left and right. This alone would dampen tendencies toward adopting truly wild proposals. Moreover, the convention’s proposals would still need to be ratified by three-quarters of the states. As James LeMunyon has noted, “there are a sufficient number of ‘red’ and ‘blue’ states to block any attempt to amend the Constitution in a radical way from the left or right.”³³

27. *Id.*

28. *See, e.g.*, Dylan Matthews, *Would a Constitutional Convention Get It Right?*, EZRA KLEIN (Apr. 1, 2010, 8:36 AM), http://voices.washingtonpost.com/ezra-klein/2010/04/would_a_constitutional_convent.html.

29. *Id.*

30. *Id.*

31. *See generally id.*

32. THE FEDERALIST NO. 40 (James Madison) (George F. Hopkins ed., 1802).

33. James M. LeMunyon, *A Constitutional Convention Can Rein In Washington*,

Pragmatically, LeMunyon's observation is probably correct. In theory, however, a constitutional convention could change the Article V rules requiring ratification of three-fourths of the states.³⁴ Indeed, Article VII of the U.S. Constitution declared that ratification of nine out of the thirteen states would be sufficient, even though Article XIII of the Articles of Confederation required unanimous state approval for any amendments.³⁵

The 1787 Convention's blatant disregard of Article XIII, combined with its failure to stick to "revising" the Articles of Confederation, could be perceived as placing the Convention on the revolutionary side of the line. These revolutionary possibilities are admittedly possible with any convention. Yet it is also worth noting that Article XIII of the Articles of Confederation was only about ten years old when it was ignored by the Philadelphia Convention.³⁶ None of the provisions of the Articles of Confederation had sufficient time to become deeply rooted, venerable constitutional doctrine. Article V, by contrast—including its requirement of ratification by three-fourths of the states—is venerated, and accordingly something a modern constitutional convention would be highly unlikely to disregard.

The bottom line is that there is growing interest in using the state-initiated constitutional convention process to implement amendments rebalancing the vertical division of power. While a constitutional convention via Article V is "scary" because it has never been officially used, it offers a creative solution for vetting growing popular concern about ever-expanding centralized power.

III. PROPOSALS TO REBALANCE SOVEREIGNTY

Aside from proposals to invoke a state-initiated constitutional convention, current proponents of constitutional change have advocated specific amendments geared towards rebalancing sovereignty between the state and federal governments. I will discuss only two of the most provocative proposals, both of which come from Professor Randy Barnett: (1) a Federalism Amendment; and (2) a Repeal Amendment.

A. The Federalism Amendment

Professor Barnett's Federalism Amendment contains a cornucopia of items, the bulk of which can be characterized as attempts to restore federalism, including repealing the Sixteenth Amendment, limiting the exercises of the spending power to those necessary to carry out enumerated powers, and trimming back the commerce power by forbidding Congress

WALL ST. J., Apr. 1, 2010, at A19.

34. See U.S. CONST. art. V.

35. See U.S. CONST. art. VII; ARTICLES OF CONFEDERATION art. XIII.

36. See generally ARTICLES OF CONFEDERATION art. XIII.

from regulating activity “wholly within a single state, regardless of its effects outside the state or whether it employs instrumentalities therefrom.”³⁷ Critics of these vertical separation provisions have pointed out that repealing the income tax power might have undesirable economic consequences and that forbidding regulation of activity “wholly within a single state” does not forbid much at all.³⁸ Of course, cutting back on federal spending power would inevitably cause massive withdrawal symptoms from addicted states.

Despite these criticisms, one has to give Barnett credit for moving the federalism ball down the field. Rather than simply complaining about things, he has generated extensive discussion about why rebalancing sovereignty is needed, and how to go about it. At the same time, Barnett’s Federalism Amendment includes some provisions that, at least at first glance, seem to have nothing to do with restoring federalism. For example, section one would grant Congress expanded power over any interstate or foreign activity that is not technically “commerce,” which Barnett explains was designed to give Congress power to regulate activities such as pollution.³⁹ The implications of section one are potentially quite far-reaching. Other than pollution, Barnett offers no other clarification regarding what sort of new activities would fall under this expanded congressional power, obscuring its original public meaning.⁴⁰

The Federalism Amendment would also expand federal judicial power to include “the power to nullify any prohibition or unreasonable regulation of a rightful exercise of liberty” and mandates that the Constitution be “interpreted according to [its] public meaning” at the time of the relevant text’s enactment.⁴¹ These last two provisions contained in section five are clearly designed to carry out Barnett’s articulated vision of a “presumption of liberty” and its relationship to original public meaning. While they are not necessarily “federalist” in nature, section five’s proposals are critically important to a robust understanding of the nature of sovereignty. As I have advocated elsewhere, the Framers did not merely divide the sovereignty pie among the states and federal government; they also reserved a good deal of sovereignty to “We the People.”⁴² This is the message of the Ninth Amendment, which declares that the enumeration of certain rights—e.g., the Bill of Rights—“shall not be construed to deny or disparage others

37. Randy E. Barnett, *The Case for a Federalism Amendment*, WALL ST. J., Apr. 23, 2009, at A17.

38. See, e.g., Ilya Somin, *Randy Barnett’s ‘Federalism Amendment,’ THE VOLOKH CONSPIRACY* (Apr. 23, 2009, 3:08 PM), <http://volokh.com/posts/1240513704.shtml>.

39. See *id.*

40. See Barnett, *supra* note 37.

41. *Id.*

42. ELIZABETH PRICE FOLEY, *LIBERTY FOR ALL: RECLAIMING INDIVIDUAL PRIVACY IN A NEW ERA OF PUBLIC MORALITY* 10–15 (2006).

retained by the people.”⁴³ It is also one of the messages in the Tenth Amendment, which states that any power not given to the federal government is “reserved to the States respectively, or to the people.”⁴⁴ Taken together, the Ninth and Tenth Amendments stand for the proposition that the people—the original repository of all sovereignty—retained all rights and power not specifically ceded to state or federal government.

Therefore, in understanding federalism, it is critically important not to forget the role of the people. Yes, the sphere of state sovereignty is significant and must be protected against encroachment by the federal government, but section five of Barnett’s Federalism Amendment serves as an important reminder that “We the People” should not become lost in a quest to restore the vertical balance of power. Properly conceived, rebalancing sovereignty is not just a matter of redrawing lines of power between the federal and state governments. It is also a matter of triangulating—i.e., making sure that individual rights and power, as well as state sovereignty, are respected.

B. The Repeal Amendment

Another amendment that has gained a good deal of traction—more so than the larger and more complex Federalism Amendment—is the so-called Repeal Amendment. In September 2010, Randy Barnett and William Howell, Speaker of the Virginia House of Delegates, wrote an op-ed in the *Wall Street Journal* advocating a brief amendment as follows:

Any provision of law or regulation of the United States may be repealed by the several states and such repeal shall be effective when the legislatures of two-thirds of the several states approve resolutions for this purpose that particularly describe the same provision or provisions of law or regulation to be repealed.⁴⁵

As Barnett and Howell explained, the purpose of the Repeal Amendment is to give a supermajority of states the power to veto federal legislation and regulations that are widely unpopular—health care reform obviously comes to mind—providing a “new political check” on a “runaway federal government.”⁴⁶ They acknowledge that even if states vetoed a federal law, Congress would be free to reenact it with a simple majority.⁴⁷ Even so, the Repeal Amendment would serve an important deterrent effect, requiring Congress to consider states’ reactions to legislation before passage and, if

43. U.S. CONST. amend. IX.

44. U.S. CONST. amend. X.

45. Randy E. Barnett & William J. Howell, *The Case for a ‘Repeal Amendment,’* WALL ST. J., Sept. 16, 2010, at A23; see also Barnett, *supra* note 13.

46. *Id.*

47. See *id.*

ultimately repealed by the states, “forc[ing] Congress to take a second look at a controversial law.”⁴⁸

Critics initially worried that the Repeal Amendment’s reference to “[a]ny provision of law or regulation of the United States” would be sufficiently broad to permit states to veto treaties or even provisions of the Constitution with the support of only two-thirds of states, effectively bypassing Article V.⁴⁹ However, Barnett has subsequently acknowledged that the Repeal Amendment’s reference to “law[s] . . . of the United States,” was intentionally borrowed from the Supremacy Clause,⁵⁰ which makes three clear textual distinctions between the Constitution, “laws of the United States” and treaties made under authority of the United States.⁵¹ As such, the Repeal Amendment would be limited to repealing federal statutes and agency regulations.

Critics have also lambasted the Repeal Amendment based on the fact that it gives equal weight to the opinions of small and large states. For example, Professor Sanford Levinson has called the Repeal Amendment a “really terrible idea” because it would give “outsized influence” to “small parochial rural states in which most Americans do not live.”⁵² The fact that Levinson does not like giving equal weight to small and large states tells us that he’s not a big fan of the concept of federalism. Moreover, his use of the pejorative adjective “parochial” to describe small states reveals a common liberal bias against rural America, which liberals fault for clinging too tightly to guns, Bibles, and the Constitution. It is much better, under this elitist liberal view, to let densely populated, “sophisticated” urban areas dominate the legal system.

The Repeal Amendment has been introduced thus far by legislators in twelve states who are planning to use the state-initiated constitutional convention process to force its consideration.⁵³ It has also been introduced in the Senate by Republican Senator Mike Enzi of Wyoming and the U.S. House of Representatives by Republican Congressman Bob Bishop of Utah.⁵⁴ House Majority Leader Eric Cantor of Virginia has praised it warmly, calling it a way to “provide a check on the ever-expanding federal

48. *Id.*

49. *See, e.g.*, Bob Marshall, *Why Meddle With the Constitution?*, RICHMOND TIMES-DISPATCH, Oct. 17, 2010, available at <http://www2.timesdispatch.com/news/2010/oct/17/ed-marshall17-ar-566354>.

50. Randy Barnett, *The Case for a ‘Repeal Amendment,’* THE VOLOKH CONSPIRACY, (Sept. 16, 2010, 6:00 AM), <http://volokh.com/2010/09/16/the-case-for-a-repeal-amendment>.

51. U.S. CONST. art. VI.

52. Kate Zernike, *Proposed Amendment Would Enable States to Repeal Federal Law*, N.Y. TIMES, Dec. 20, 2010, at 14.

53. *See id.*

54. S.J. Res. 12, 112th Cong. (2011); H.R.J. Res. 62, 112th Cong. (2011). Additionally, Rep. Bishop introduced it in the 111th Congress. H.R.J. Res. 102, 111th Cong. (2010).

government, protect against Congressional overreach, and get the government working for the people again, not the other way around.”⁵⁵ Though it will be difficult to garner the support of two-thirds of the states to call a constitutional convention—and it would even harder to garner the support of two-thirds of both houses of Congress—there seems to be enough growing support for the Repeal Amendment that its overarching message about the need to rebalance sovereignty will somehow find a way to be meaningfully manifested. Even something as simple as requiring every federal bill to cite a specific constitutional power source—a promise made in the Republicans’ recent Pledge to America—could help.⁵⁶

IV. CONCLUSION

We live in fascinating times. Rarely, if ever before, have so many Americans talked so much about the Constitution. Never in my lifetime did I think I would witness popular media and grassroots, non-lawyer political activists discussing and debating the Commerce Clause, the Necessary and Proper Clause, the taxing and spending power, and the need for restoring federalism. One of my neighbors recently sheepishly pulled out of his coat a pocket Constitution, smudged with fingerprints and underlined in places. He wanted to talk about Obamacare and the constitutional bases for lawsuits challenging it. This is the gift the Tea Party movement has given us: It has made it acceptable and fashionable again to talk about the Constitution. While some elitists may whine that these pesky Americans do not know what they are talking about and should not have any input, my own experience is that they know more than many lawyers do, and are hungry to learn more. This cannot, by any stretch of the imagination, be a bad thing for America.

The reason why federalism-based constitutional amendments are being widely proposed, discussed and debated is because it does not take a degree in rocket science (or its rough equivalent, law) to realize that the federal government’s powers have spun out of control. Supreme Court interpretations of some of the most important constitutional provisions defining the division of power between people, states and federal government have cumulatively eroded the fundamental architecture of the Constitution itself. The Federalism Amendment, the Repeal Amendment, the balanced budget amendment and others are designed to restore this architecture, rebalancing sovereignty in the name of protecting “We the

55. Evan McMorris-Santoro, *Cantor Urges “Open Mind” on VA Legislature Plan to Blow Up the Constitution*, TPMDC (Nov. 30, 2010, 1:45 PM), <http://tpmdc.talkingpointsmemo.com/2010/11/va-legislator-says-gop-congress-wants-to-help-him-deconstruct-the-constitution-video.php>.

56. See David Weigel, *Republicans Start Teaching Members How to Obey the Constitution*, SLATE (Dec. 20, 2010, 1:49 PM), <http://www.slate.com/blogs/blogs/weigel/archive/2010/12/20/republicans-start-teaching-members-how-to-obey-the-constitution.aspx>.

People.” Before you drink the mainstream media Kool-Aid and dismiss these efforts as right wing, anachronistic, or just plain silly, ask yourself whether you want more or less liberty. If you want more (and I suspect you do), remember that our Constitution created a federal, not national, government for this very reason. Aside from the hopeless cynics among us, liberty is never silly.