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## The Case for the Repeal Amendment

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# THE CASE FOR THE REPEAL AMENDMENT

RANDY E. BARNETT\*

Today, a political movement has arisen to oppose what seems to be a highly discretionary and legally unconstrained federal government.<sup>1</sup> Beginning in the Bush Administration during the Panic of 2008 and accelerating during the Obama Administration, the federal government has bailed out or taken over banks, car companies,<sup>2</sup> and student loans.<sup>3</sup> It is now preparing to vastly expand the Internal Revenue Service to help it take charge of the practice of medicine for the first time in American history.<sup>4</sup>

This marked and rapid increase of power has shaken many Americans who are now looking to the United States Constitution with renewed interest in the limits it imposes on the powers of Congress. Despite what the Constitution says, however, federal judges have allowed Congress to exceed its enumerated powers for so long, it seems they no longer entertain even the possibility of enforcing the text.

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1. See, e.g., TEA PARTY PATRIOTS, *Mission Statement and Core Values*, <http://www.teapartypatriots.org/Mission.aspx> (last visited May 5, 2011) (noting that the “impetus for the Tea Party movement is excessive government spending and taxation”). The Tea Party is not the only political movement opposing the unchecked growth of federal power, but it is one of the most visible and influential. See Randy E. Barnett, *The Tea Party, the Constitution, and the Repeal Amendment*, 105 NW. U. L. REV. Colloquy 281 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/10>.

2. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, §§ 101–136, 122 Stat. 3765, 3767–3800 (codified as amended in 12 U.S.C. §§ 5211–41) (creating the Troubled Assets Relief Program (“TARP”)). Companies receiving TARP money, to name only a few, include Citigroup, Bank of America, JP Morgan Chase, Wells Fargo, Goldman Sachs, Morgan Stanley, PNC Financial Services Group, U.S. Bancorp, Capital One Financial, Regions Financial Corporation, SunTrust, GMAC Financial Services, General Motors, and Chrysler. See *Bailout Recipients*, PROPUBLICA.ORG, <http://bailout.propublica.org/list/index> (last visited May 5, 2011).

3. See Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, §§ 2201–13, 124 Stat. 1071–81 (codified as amended in scattered sections of 20 U.S.C.) (ending federal subsidies of student loans, consolidating existing student loans, and granting the federal government authority to issue and oversee future loans).

4. See *id.* § 1002, 124 Stat. 1029, 1032-33 (codified as amended at I.R.C. § 5000A (West 2010)) (imposing penalties on individuals who fail to maintain minimum essential coverage); H. COMM. ON WAYS AND MEANS, 111TH CONG., *THE WRONG PRESCRIPTION: DEMOCRATS’ HEALTH OVERHAUL DANGEROUSLY EXPANDS IRS AUTHORITY* 4, 7–9 (2010) (estimating the “IRS may need to hire as many as 16,500 additional auditors, agents, and other employees” to implement the new Act).

5. See, e.g., *Gonzalez v. Raich*, 545 U.S. 1 (2005) (holding that Congress has the

Judges appointed by both Republican and Democratic presidents largely operate within what academics call the “New Deal settlement.”<sup>6</sup> By this it is meant that the courts allow Congress to exercise unchecked power over the national economy and everything that may affect it, limited only by the express guarantees of the Bill of Rights.<sup>7</sup> In this arena, with some exceptions, the post-New Deal judiciary disagrees only on whether other unenumerated rights may also receive protection and, if so, which ones.<sup>8</sup> But whatever few additional “fundamental” rights may be recognized, they do not include the protection of any so-called “economic liberty” that might inhibit the national regime of economic regulation.<sup>9</sup>

In this manner, the original scheme of islands of federal powers in a sea of liberty has been transformed into a regime of islands of rights in a vast sea of national power.<sup>10</sup> But judicial passivism is not the only cause of expanding congressional power. Also responsible are two changes to the Constitution’s structure that were made in 1913 as “populist” or “progressive” reforms but which fundamentally altered the relationship between the federal government, the states, and the people as it appears in the Constitution’s text.<sup>11</sup>

The first change was the Sixteenth Amendment.<sup>12</sup> By giving Congress the power to impose an income tax, the amendment allowed Congress to tax, spend, and redistribute income to a degree previously unimaginable. The Sixteenth Amendment has enabled Congress to evade the limits placed

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authority under the Commerce Clause to prohibit the local cultivation and use of marijuana in accordance with state law). Justice Thomas’s dissent states, “If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.” *Id.* at 57–58 (Thomas, J., dissenting).

6. See, e.g., Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 880 (2003); Richard A. Epstein, *The Classical Liberal Alternative to Progressive and Conservative Constitutionalism*, 77 U. CHI. L. REV. 887, 903 (2010); Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052, 1066 (2005); Larry Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 122 (2001).

7. See Kramer, *supra* note 6, at 125.

8. Compare *Washington v. Glucksberg*, 521 U.S. 702, 706 (1997) (declining to recognize physician-assisted suicide as a “fundamental right” protected by the Due Process Clause), with *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding state sodomy law unconstitutional without employing the two-step analysis used in *Glucksberg*).

9. See Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008) (discussing the evolution and operation of the Supreme Court’s “fundamental rights” doctrine).

10. See STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 32 (rev. ed. 1987).

11. See GERARD N. MAGLIOCCA, *THE TRAGEDY OF WILLIAM JENNINGS BRYAN: CONSTITUTIONAL LAW AND THE POLITICS OF BACKLASH* 134 (2011) (locating the Sixteenth and Seventeenth Amendments as originating in the populist movement and adopted by progressives).

12. U.S. CONST. amend. XVI.

on its power by funding all sorts of activities not otherwise within its enumerated powers—a proposition that the Supreme Court did not accept until 1936.<sup>13</sup> These funds have also allowed Congress effectively to bribe states into exercising their broader police powers as Congress sees fit.<sup>14</sup> Once states are “hooked” on receiving federal funds, they can be coerced to obey federal dictates or lose the revenue.

That the Sixteenth Amendment was necessary to empower Congress to tax incomes is contested. Some maintain that the amendment was only needed to correct an erroneous Supreme Court decision that denied Congress this power.<sup>15</sup> Whatever the merits of this claim, prior to the Sixteenth Amendment, Congress had not taxed income except in times of war.<sup>16</sup> Since 1913, Congress has taxed income at an increasing rate and used the revenues to vastly expand its reach beyond its enumerated powers as even the post-New Deal Supreme Court defines them, co-opting state governments to do its bidding in ways it could not do itself.

The second structural change was the Seventeenth Amendment, providing for the direct election of United States senators by the voters of each state.<sup>17</sup> Under the original Constitution, senators were selected by state legislatures.<sup>18</sup> Senators could therefore be expected to provide some check on the growth of federal power at the expense of the reserved powers of the states. How much of a check on federal interference with state governments this constraint ever provided cannot be assessed with any precision. In addition, the selection of senators by state legislatures was being phased out by the procedure of appointing senators who had prevailed in state elections.<sup>19</sup> Regardless of how effective the previous system may have

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13. See *United States v. Butler*, 297 U.S. 1, 66 (1936) (“[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”).

14. See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (allowing federal funding to be conditioned on states exercising their legislative powers as Congress wishes).

15. See *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895) (declaring the Income Tax of 1894 unconstitutional as it violated the requirement that direct taxes be apportioned); see, e.g., MAGLIOCCA, *supra* note 11, at 77 (“Almost nobody prior to *Pollock* thought that Congress lacked the authority to impose an income tax.”); *id.* at 76–87 (discussing *Pollock* extensively).

16. See e.g., Revenue Act of 1861, ch. 45, § 49, 12 Stat. 292, 309, *repealed by* Revenue Act of 1862, ch. 119, § 89, 12 Stat. 432, 473. The Revenue Act of 1862 replaced the flat tax imposed by the previous Act with a progressive tax rate. See *id.* § 90, 12 Stat. 473. The Revenue Act of 1862 specified that the income tax it created would terminate after June 30, 1866. See *id.* § 92, 12 Stat. 474.

17. See U.S. CONST. amend. XVII.

18. See U.S. CONST. art. I, § 3, cl. 1.

19. See Senate Historical Office, *Direct Election of Senators*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/briefing/Direct\\_Election\\_Senators.htm](http://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm) (last visited May 5, 2011) (noting that as many as twenty-nine states directly elected senators by 1912).

been, the Seventeenth Amendment eliminated the only structural “check” on federal power that the Founders provided to state governments in the original Constitution.

All this was accomplished because, throughout the twentieth century, the growth of federal power was popular enough that political movements were able to successfully push for constitutional amendments. These groups were also able to elect presidents who would nominate judges who adopted a latitudinarian construction of federal power, along with senators who would confirm them. To the extent that the popularity of unfettered federal power is waning—and only time will tell if this is a blip or a trend—those who would limit federal power need to address the twentieth-century changes to the text of the Constitution and to its interpretation by courts.

A constitutional amendment, or amendments, to constrain Congress is one option. But what sort of amendment? The most obvious type would be a provision like the First Amendment commanding that “Congress shall or shall not do X.” However, any additional text that relies on judicial enforcement would likely be undermined by the same post-New Deal judicial philosophy that construed existing constitutional constraints out of existence. What is needed is a structural check on federal power residing not in the judiciary but elsewhere.

One proposal is the Repeal Amendment, which has already been introduced into Congress and will also be considered by state legislatures. The Repeal Amendment would give two-thirds of the states the power to repeal any federal law or regulation. Its text is simple, and its effect is transparent:

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.<sup>20</sup>

On May 12, 2011, this proposal was reintroduced before the House of Representatives by Rep. Bob Bishop and introduced before the Senate by Sen. Michael Enzi.<sup>21</sup> In the same month, Florida became the first state legislature to call for an Article V convention to adopt this proposed Amendment.<sup>22</sup>

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20. H.R.J. Res. 542, 111th Cong. (2010).

21. See S.J. Res. 12, 112th Cong. (2011); H.R.J. Res. 62, 112th Cong. (2011); see generally Mike Enzi & Bob Bishop, *Introducing the Repeal Amendment*, FOXNEWS.COM (May 12, 2011), <http://www.foxnews.com/opinion/2011/05/12/sen-mike-enzi-rep-rob-bishop-introducing-repeal-amendment/>.

22. See S. Con. Res. 1558, 2011 S., Reg. Sess. (Fla. 2011); H. Mem. 1429, 2011 H., Reg. Sess. (Fla. 2011).

At present, the only way for states to contest a federal law or regulation is to bring a constitutional challenge in federal court or seek an amendment to the Constitution. A state repeal power would provide a targeted way to reverse particular congressional acts and administrative regulations without either relying on federal judges or permanently amending the text of the Constitution just to correct a specific abuse of federal power.

A state repeal power should not be confused with the power of federal courts to “nullify” unconstitutional laws. Unlike the judiciary, under the Repeal Amendment, states can reject a federal law for policy reasons that are irrelevant to constitutional concerns. In this sense, a state repeal power is more like the President’s veto power, though it can be applied to *any* existing law or regulation that has already been enacted.

This provision would help restore the original balance between state and federal power and allow states to protect the liberties and rights of their citizens, as well as their own operations, from overreaching federal power. It places confidence in the collective wisdom of the men and women from diverse backgrounds, elected by diverse constituencies, who comprise the modern legislatures of two-thirds of the states. Put another way, it allows thousands of democratically elected representatives outside the Beltway to check the will of 535 elected representatives in Washington, D.C.

Compare this with the presidential veto power held by a single person or the power of five justices to nullify a law they find unconstitutional. But unlike a law declared unconstitutional, nothing in the Amendment would prevent Congress from reenacting a repealed measure if it felt that two-thirds of state legislatures were somehow out of touch with popular sentiment. Unlike the presidential veto, congressional reenactment would require just a simple majority. In effect, with this power the states could force Congress to take a second look at a controversial law.

Americans revere their Constitution, but they have also acted politically to improve it. The Thirteenth<sup>23</sup> and Fourteenth<sup>24</sup> Amendments limited the original power of states to violate the fundamental rights of their own citizens, while the Fifteenth<sup>25</sup> and Nineteenth<sup>26</sup> Amendments prohibited disfranchisement based on race and sex, respectively. Additionally, the Twenty-first Amendment<sup>27</sup> repealed another “progressive” reform: the Eighteenth Amendment that empowered Congress to prohibit alcohol.<sup>28</sup>

The Repeal Amendment alone will not cure all the current problems with federal power. Getting two-thirds of state legislatures to agree on repealing a federal law will not be easy, and repeal will only happen if a law is highly unpopular. Perhaps its most important effect will be deterring

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23. See U.S. CONST. amend. XIII.

24. See U.S. CONST. amend. XIV.

25. See U.S. CONST. amend. XV.

26. See U.S. CONST. amend. XIX.

27. See U.S. CONST. amend. XXI.

28. See U.S. CONST. amend. XVIII (repealed 1933).

even *further* expansions of federal power. Just as Congress must now contemplate the President's veto, so too would it need to anticipate how states will react.

While it is no panacea, the Repeal Amendment would restore the states' ability to protect the powers "reserved to the states" noted in the Tenth Amendment.<sup>29</sup> Moreover, it would provide citizens with another political avenue to protect the "rights . . . retained by the people" to which the Ninth Amendment refers.<sup>30</sup> In short, the Repeal Amendment would provide a new political check on the threat to American liberties posed by a runaway federal government.

The Repeal Amendment has already drawn some criticism. First, the *Washington Post*'s Dana Milbank tried to associate the measure with racism: "[T]here's the unfortunate echo of nullification—the right asserted by states to ignore federal laws they found objectionable—and the 'states' rights' argument that was used to justify slavery and segregation."<sup>31</sup> But, this association is imaginary. Undermining civil rights is simply not on the agenda of anyone who favors this amendment. Even before the Civil War, two-thirds of the states never supported slavery or segregation. Had the Repeal Amendment existed then, at least half the states, though not two-thirds, would have used this power in an attempt to repeal the Fugitive Slave Acts, both of which were enacted by Congress.<sup>32</sup> Today, reaching the two-thirds threshold would require the support of many states from different parts of the country, blue as well as red. As will be further explained below, the two-thirds threshold ensures a broad and bipartisan political consensus.

In addition to Milbank's criticism, *Slate*'s Dahlia Lithwick and Jeff Shesol attempted to find a contradiction in Repeal Amendment supporters' professed love for the Constitution: "For a party (whether of the Tea or Grand Old variety) that sees the Constitution as something so perfect as to have been divinely inspired, the idea that it needs to be altered fundamentally is beyond crediting . . . ."<sup>33</sup> But the amendment process of

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29. See U.S. CONST. amend. X.

30. U.S. CONST. amend. IX.

31. Dana Milbank, *A Strange Way to Honor the Founding Fathers*, WASH. POST, Dec. 1, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/01/AR2010120105576.html>.

32. Fugitive Slave Act of 1850, ch. 60, §§ 1–10, 9 Stat. 462, 462–65 (repealed 1865); Fugitive Slave Act of 1793, ch. 7, §§ 1–4, 1 Stat. 302, 302–05 (repealed 1865); see Map of Free and Slave States, SLAVERY, <http://www.sonofthesouth.net/slavery/slave-maps/map-free-slave-states.htm> (last visited Feb. 16, 2011). In 1857, there were 31 states. Fifteen permitted slavery, and sixteen had either abolished or never permitted slavery. Twenty-one states would have been required to meet the two-thirds threshold.

33. Dahlia Lithwick & Jeff Shesol, *Repealing Common Sense: The Conservative Mission to Destroy the Constitution in Order to Save It*, SLATE, Dec. 3, 2010, <http://www.slate.com/id/2276463>.

Article V is part of the original Constitution. And, as was noted above,<sup>34</sup> this process has already been used to alter the original scheme by allowing a national income tax and eliminating the power of state legislatures to select United States senators. Add to this that the judicial construction of the Constitution has vastly expanded federal power in just the past sixty years. To the extent Lithwick and Shesol sincerely care about the original Constitution, the Repeal Amendment is simply restoring some semblance of the original state-federal balance.

Then the editors of the *New York Times* weighed in with objections that are a little harder to fathom. They noted, “Under the Tea Party proposal, the states would have much greater power than the president to veto federal laws. Because the amendment includes no limit on the time in which states could exercise their veto, it would cast a long shadow over any program under federal law.”<sup>35</sup> Getting both houses of the legislatures of two-thirds of the states to repeal a federal law, however, would be a daunting task—far more difficult than a single President wielding a veto pen. True, older laws can be repealed, but this is likely to happen only when these laws are no longer perceived as current. And inserting states into the actual lawmaking of Congress, as the veto power inserts the President in the legislative process, would raise practical difficulties of its own, so the Repeal Amendment avoids this by operating only after the fact.

The *New York Times* also made a more fundamental objection. It rejected the notion “that the United States defined in the Constitution are a set of decentralized sovereignties where personal responsibility, private property and a laissez-faire economy should reign.”<sup>36</sup> Instead, it contended, “America’s fundamental law holds competing elements, some constraining the national government, others energizing it.”<sup>37</sup> But giving two-thirds of state legislatures a formal way to “constrain[] the national government” no more elevates states into “sovereignties” than the veto power makes the President a king. Giving states this option simply compensates for other changes that have greatly expanded federal power at the expense of the reserved powers of states and the rights retained by the people.

And, while the *New York Times* is quite correct in saying that “the government the Constitution shaped was founded to create a sum greater than the parts, to promote economic development that would lift the fortunes of the American people,”<sup>38</sup> one crucial mechanism by which this was accomplished was through the scheme of checks and balances. A defect in this original scheme was an inadequate federal check on state powers, when such powers were used by states to oppress their own

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34. See *supra* notes 12, 17 and accompanying text.

35. Editorial, *The Repeal Amendment*, N.Y. TIMES, Dec. 27, 2010, at A14, available at <http://www.nytimes.com/2010/12/27/opinion/27mon2.html>.

36. *Id.*

37. *Id.*

38. *Id.*

citizens. This defect was rectified by an amendment devised by Republicans in the Thirty-Ninth Congress: The Fourteenth Amendment.<sup>39</sup> What is now lacking is any complementary check on federal power by the states.

In part because the judiciary has failed to exercise its own checking function, the powers of Congress have grown so enormously that they swamp the operations of state governments. For this reason the Court has recognized certain limits on Congress *vis-à-vis* state legislatures<sup>40</sup> and state executive officials.<sup>41</sup> The Repeal Amendment merely places an additional structural check in the hands of democratically elected members of state legislatures.

The only real objection of substance to the Repeal Amendment concerns the theoretical possibility that two-thirds of the least populous states—representing less than half of the nation's population—could stymie legislation backed by a majority. As Milbank observes, “the 33 smallest states, which have 33 percent of the population, have the power to overrule the 17 largest states, which have 67 percent of the population.”<sup>42</sup>

Of course, our Constitution is as much about protecting the minority from the tyranny of the majority as it is about majoritarian rule. Indeed, the legitimacy of majority rule is suspect unless it is somehow constrained to protect the rights of individuals from abuses by majorities. In other contexts, one expects that Milbank would agree. As long as one is fantasizing, why is it proper that densely populated, urban states could expropriate the wealth of less populated areas—perhaps to pay their public-sector union workers large pensions? Abuses of creditors, who constituted a small minority of the citizenry, by state legislatures appealing to the large majority of voters who were debtors, was just one of the reasons the Constitution was adopted in the first place.<sup>43</sup> It was certainly not adopted to allow a majority of voters at the national level to exploit, economically or otherwise, a minority, which is the reason why each state is entitled to two senators regardless of population—senators formerly selected by state legislatures.

Nonetheless, any such counter-majoritarian scenario is highly unlikely. Remove just seven of the least populous blue states,<sup>44</sup> add Florida and

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39. See U.S. CONST. amend. XIV, § 5 (giving Congress the power to enforce the Fourteenth Amendment's provisions against the states).

40. See *New York v. United States*, 505 U.S. 144 (1992) (barring federal commandeering of state legislatures).

41. See *Printz v. United States*, 521 U.S. 898 (1997) (barring federal commandeering of state executives).

42. Milbank, *supra* note 31.

43. See U.S. CONST. art. I, § 10 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”).

44. From least to most populous: Vermont, Delaware, Rhode Island, Hawaii, New Hampshire, New Mexico, and Connecticut. U.S. DEP'T OF COMMERCE, U.S. CENSUS

Texas to the thirty-two remaining least populous states,<sup>45</sup> and the result is well over one half of the national population.<sup>46</sup> Furthermore, this group is comprised of a mix of states, both politically and geographically. Given that the political valence of states is not necessarily correlated with their size, the fear of a small state takeover is reminiscent of some of the more fevered writings of the Antifederalists.<sup>47</sup>

Realistically, we can expect two-thirds of state legislatures to band together to repeal a law or regulation under two circumstances. The first is when public opinion turns against a formerly popular law or when, for some unusual reason, a majority of the 535 individuals comprising Congress plus the President become grossly out of step with public opinion. Allowing elected legislators outside the Beltway to check this power is a way of protecting, rather than undermining, truly popular governance.

In the second circumstance, Congress or a regulatory agency may have messed with the internal operation of state governments in ways that are out of public view. Perhaps the regulation is buried in a massive omnibus bill. To claim a majoritarian imprimatur for such a law, or many an administrative regulation, is pure fiction. Such measures have never been subjected to any meaningful popular approval. Of course, if two-thirds of the states take exception and gain its repeal and repeal is unpopular—something pretty hard to imagine—Congress can always then reenact such a measure by a simple majority vote, ensuring that it truly reflects the views of a congressional majority.

This highlights the ultimate safety valve built into the Repeal Amendment: Congress can reenact anything the states manage to repeal. Unlike a constitutional decision of the Supreme Court, Congress could override a state repeal. And it would see a repeal movement coming from a mile away, preparing it to reenact legislation should it feel strongly that the states are misguided or out of touch. At the end of the day, all states may do is force Congress to take a second look at a measure.

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BUREAU: Table 2. Resident Population of the 50 states, the District of Columbia, and Puerto Rico: 2010 Census, *available at* <http://2010.census.gov/news/press-kits/apportionment/apport.html>.

45. Alabama, Alaska, Arizona, Arkansas, Colorado, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

46. The result is approximately 166 million. *Id.*

47. See, e.g., Centinel, *Number 1* (October 5, 1797), in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 235 (Ralph Ketcham ed., Signet Classic 2003) (1986). Centinel argues against bicameralism because the “smallest State in the Union has equal weight with the great States of Virginia, Massachusetts or Pennsylvania.” Centinel also stated that the Constitution was “a most daring attempt to establish a despotic aristocracy among freemen, that the world has ever witnessed.” *Id.* at 232.

So the strongest objection to the Repeal Amendment may well be that it is too modest to check runaway federal power effectively. But, like the President's veto power, the threat of repeal would deter Congress from interfering with states. Members of Congress and their staffs would have to think about the possible reaction of state legislatures. State legislative leaders could organize to communicate their views to Washington, and the public would have an alternate channel of protest when the federal government gets too out of touch.

That so modest a measure as the Repeal Amendment would so frighten folks like Dana Milbank, Dahlia Lithwick, and the editors of the *New York Times* is a sign of how far federal power has expanded. That these are the strongest objections they could muster shows the strength of the proposal. But the tenor of their reaction also suggests that, however modest it may be, the Repeal Amendment is a genuine step in the right direction.