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States' Repeal: A Proposed Constitutional Amendment to Reinvigorate Federalism

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I. INTRODUCTION TO THE PROBLEM

In 1789, "We the People of the United States" \(^1\) bestowed an enumerated list of powers upon the national government through the Constitution. The Framers of the Constitution expressly intended that we, the People, would retain ultimate authority in America. \(^2\) Any power granted or usurped by the

\(^1\)U.S. CONST. preamble.

\(^2\)See e.g., U.S. CONST. art. V; U.S. CONST. amends. IX and X.
government may be revoked by the will of the People. This note discusses the People's right and duty to alter, limit or abolish any government which acts beyond its authority.

States recognize this truth. For example Ohio's constitution reads, "All political power is inherent in the people. Government is instituted for their equal protection and their benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary."\(^3\)

In America, a system of checks and balances including federalism, bicameralism, and separation of powers, purported to keep the federal government from interfering with the lives and liberties of the American People. The Constitution itself is a device limiting the scope of the national government.\(^4\) The founders of this country had an unparalleled desire to separate themselves from their government.\(^5\) This separation secures liberties, increases net happiness, and provides the necessary freedom for an individual to self-actualize and to reach his or her full potential. Yet, despite a lack of a deliberate reallocation of power by the People, federal accretion of power has continued over the nearly 200 years since the ratification of the Constitution.

The lack of both legislative and judicial integrity led to a governmental system which is federalist in name but centrally planned in reality. Congress regularly passes laws which stretch the conceivable bounds of its powers. By failing to overturn such legislation, the Supreme Court ignores the benefits of federalism and the significance of dual sovereignty. These changes render the individual citizen's opinion rather meaningless while attacking the roots of democracy and threatening the liberties early Americans so earnestly tried to preserve. The People are left without a mechanism through which to speak on a national level. Because of this dissolution of the People's political ties, it becomes necessary for the governed to assert their inalienable right to prudently alter their form of government.

II. PROPOSED SOLUTION

In the words of Thomas Jefferson:

Happy for us that when we find our constitution defective and insufficient to secure the happiness of our people, we can settle with all the coolness of philosophers and set it to rights, while every other

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\(^3\)Ohio Const. Art. I, § 2. Likewise, North Carolina's constitution of 1776 and the Massachusetts constitution of 1780 state, respectively, "all political power is vested in and derived from the people only," and "therefore all officers of government ... are their trustees and servants, and at all times accountable to them." Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1437, n. 54 (1987).


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nation on earth must have recourse to arms to amend or restore their constitutions.\textsuperscript{6}

Hence, this note proposes and advocates a Constitutional amendment to provide the People a means of checking the breadth of the federal government in defense of personal and economic liberty and autonomy. The spirit and purpose of the United States Constitution both support and justify such an amendment to reinvigorate federalism. To advance prosperity and freedom, Amendment XXVIII of the United States Constitution should contain the following or similar language:

The People of the United States reserve the right to repeal acts and regulations of Congress, or departments or agencies thereof, upon ratification of a two-thirds majority of state legislatures of the several states or by conventions in two-thirds thereof.\textsuperscript{7}

The Amendment is an amalgam of originalist, textualist and functionalist theories of constitutional interpretation; it applies the values, reasoning and structure underlying the Constitution to appropriately redress the People's inability to self-govern. States' Repeal shall provide a permanent mechanism for the People to secure autonomy for current and future generations by checking the breadth of the federal government.\textsuperscript{8}

Because the Supreme Court, Congress, and the procedural protective devices have utterly failed to protect the values of federalism, we are currently without a mechanism to protect the People's Tenth Amendment rights. Jefferson welcomed proposals for constitutional amendments, and "[t]he Federalists knew that constitutional amendment might be necessary to check abuses by the national legislature, and they therefore carefully provided for modes of amendment that would not require congressional concurrence."\textsuperscript{9} The proposed amendment solves the enigma of maintaining a proper balance of power in modern America.

The People, under the proposed Amendment, grant the several states two years to reach the two-thirds quorum after the first state declares a law void. This two year limit is short enough to prevent problems with the amendment process and long enough to accommodate biennial state legislatures. The People may utilize Repeal either through their representatives in the state legislature or directly via referendum. States' Repeal is not a veto power, i.e.,

\textsuperscript{6}Henry Steele Commager, Jefferson, Nationalism, and the Enlightenment 87 (1975).

\textsuperscript{7}Compare U.S. Const. art. V.

\textsuperscript{8}Certainly, "[w]henever the rhetoric of 'states' rights' is deployed to defend states' wrongs, our servants have become our masters; our rescuers, our captors." Amar, supra note 3, at 1520. The proposed Amendment's requirement that two-thirds of the states support the repeal prevents the abuse associated with allowing one or a few states to ignore a law.

\textsuperscript{9}Id. at n.293.
states have no power to prevent a bill from becoming a law. Rather, the People will rely on the benefit of hindsight to determine which federal laws have proven unworkable. Therefore, those federal laws limiting liberty by reducing state autonomy or reducing personal freedom face repeal by the two-thirds majority of states.

Under this proposal, the power to enforce the original plan for dual sovereignty and to secure its blessings reverts to the People. Nothing else changes. The U.S. Constitution and Constitutional interpretations of the Court remain the supreme law of the land. States are not completely sovereign, nor was the Constitution merely a compact between the states. Thus, keeping spirit with Federal Supremacy, the amendment grants Congress a two-thirds overriding veto power. But, if three-fourths of the states (the same number of states permitted to alter the Constitution) repeal a law, then Congress shall have no veto power.

The States' Repeal Amendment, therefore, restores the intended balance of federalism without subverting federal supremacy thereby easily distinguishable from John C. Calhoun's nullification of the 1830s. Calhoun believed one state could nullify and three-fourths of the states then had the burden of overruling the nullifying state. There is no such burden-shifting under States' Repeal thereby circumventing the disorder associated with nullification.

Some, like Professor Deborah Jones Merritt feel contemporary avenues through which state legislatures check the federal government are presently sufficient and, thus, a proposal such as States' Repeal is unnecessary. According to Merritt, states generally effectively lobby Congress to prevent federal usurpations of state authority. Then, if the lobbying fails and Congress

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10 Thus, states will not have a separate or new body of representatives in Washington. See also infra note 172 and accompanying text.

11 At minimum, States' Repeal is applicable to federal law that adversely affects states' fiscal budgets.

12 ALPHEUS THOMAS MASON, THE STATES RIGHTS DEBATE 148 (1972). George Mason agreed that the power to tax and coerce under the Constitution dissolved the confederation and created a national government. Id.

13 U.S. CONST. art. V.


15 Cf. id. at 441. Similarly, Madison predicted citizens would step up to control federal government with caution and it would never happen with "levity or rashness." THE FEDERALIST NO. 16, at 117 (Alexander Hamilton) (Clinton Rossiter ed., 1961).


17 Id. at 5-6.
passes such ultra-vires legislation, states are "indefatigable litigants." This argument discounts the principles and values supporting the American system of federalism. Furthermore, the devastating cost of litigation makes challenging complex legislation a dismal alternative to federal harassment. Use of States' Repeal will effectively prevent federal usurpations of authority while avoiding the unnecessary draining of local budgets like those of Allegheny and Cortland County, New York which successfully defeated the federal government's attempt to dodge political and fiscal accountability for the Low-Level Radioactive Waste Act. 19

III. HISTORICAL REASONING AND APPROACH TO THE PROBLEM

The extension of national power to remote constituents always and inevitably destroys the principles of self-government. So, in the 18th century, the American colonists took up rebellious arms against England primarily based on the desire of the colonists to act independently and not as mere mercantilist pawns of King George III. 20 Prior to the rebellion, the Crown enacted the Navigation Acts, applicable to all English territories. 21 These navigational laws, common among colonial systems of the times, required ships from the West Indies to port in England or pay a duty before trading with the colonies. 22 Compared to today's coercion of states, this amounted to slight regulatory control by the national government over its colonies. Nevertheless it violated the principles of federalism so the colonists refused to obey and revolted against the enforcement of these autonomy-restricting laws. 23 The first and foremost abuse cited in the Declaration of Independence was the extensive control over the individual colonies by England's central government. 24 Consequently, after their shocking victory over the Mother

18 Id. at 5.

19 See 505 U.S. 144 (1992). These counties, along with the State of New York, lost at the district and appellate court level before scoring a moderate victory in the U.S. Supreme Court. See infra Section V.D.


22 Id.

23 Id.

24 DECLARATION OF INDEPENDENCE (U.S. 1776). "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States." Id. Americans believed, "extending national control was dangerous, inefficient, and an affront to the dignity of their states. Antebellum descriptions often refer to 'these' [not collectively the] United States." Kramer, supra note 5, at 1557.
Country, the colonists established an American government with essentially no central power.25

A. Revising the Articles

The proper form and structure of the United States government shall remain a timeless debate; the reasoning behind the formation of the Constitution must always remain a primary source in this debate. The Framers of the Constitution organized the Constitutional convention not to create a radically different government, but "for the express purpose of revising the Articles of Confederation."26 Madison agreed to attend but noted in a letter to Jefferson that the meeting should be "subservient to a plenipotentiary Convention for amending the Confederation."27 The delegates from each colony endeavored to prevent the tyranny of Britain's centralized government while curing the inadequacies of the Articles.28

What Americans did was more important than invent new principles; in the telling phrase of John Adams, 'they realized the theories of the wisest writers.' They actualized them, they legalized them, they institutionalized them. That was and remains the supreme achievement of the American Revolution; indeed, in the longer perspective, that was and is the American Revolution.29 Reliance on their knowledge of federal systems and their understanding of classical antiquity enabled the Framers to construct a brilliant system of federalism which proved to be the most durable and successful ever created.

While compromise dominated the Constitutional convention, a true federal system prevailed. The United States became a nation of independently sovereign states allied by a limited central government. Federalism, a delicate interrelationship between state and nation, "seeks to maintain political


26CHARLES A. BEARD, AN ECONOMIC INTERPRETATION of the CONSTITUTION OF THE UNITED STATES 63 (1954).

27Id. at 62. Madison, therefore, believed the Articles of Confederation needed some repairs, but the present government was, nonetheless, far superior to the governments left behind in Europe.

28Id. at 63. Before the Constitution state governments imposed retaliatory tariffs and discriminatory taxes to benefit one state while harming the others, thus creating interstate rivalries and inhibiting flow of interstate commerce. Chemerinsky, supra note 4, at 28-29. And, due to the high cost of communication in the 18th century, "it is not surprising that centralized, coercive authority was seen as the primary solution to the structural problems that arose under the Articles." Note, To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation, 102 HARV. L. REV. 842, n. 32, (1989).

29COMMAGER, supra note 6, at 85.
decentralization and social diversity while simultaneously promoting national measures to meet [truly] national needs and prevent localized oppression." 30 Professor Larry Kramer similarly describes a federal system as divided political power with neither political unit relying on the other for authority. 31 The resulting system of federalism, which enabled the ratification of the Constitution, 32 is the world's most enduring but certainly not the only version of federalism. A German version, for instance, allows a two-thirds majority of states to veto federal law. 33 All federal systems share the effort to combine the freedoms of a small, restricted central government with the security of a unified nation. 34

B. Objections to the Proposed Constitution

Despite the brilliance of its timelessness and structure, the United States government is one with a long history of problems, many of which were objected to before ratification. The Anti-federalists, led by the likes of George Mason, George Clinton, Patrick Henry, Samuel Adams and Melancton Smith, generally opposed the new Constitution. 35 Their primary objection to the document was the elasticity of several clauses. 36 Because of their extraordinary


31 Kramer, supra note 5, at n.5.

32 Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 568 (1985) (Powell, J., dissenting). Justice Powell noted, "[i]n our federal system, the States have a major role that cannot be preempted by the National Government. States' ratification of the Constitution was predicated on this understanding of federalism." Id.

33 Germany's federal system:

is based upon detailed provisions in its Basic Law [constitution] spelling out in substantial detail the division of functions and the sharing of tax sources among the levels of government.
The Basic Law also provides for a Laender [state] - controlled house in the national legislature for the purpose of reviewing legislation affecting the Laenders and vetoing any legislation found objectionable. Any law thus vetoed by a two-thirds majority of this house, the Bundesrat, can be re-enacted only by a two-thirds majority vote of the popularly elected Bundestag.


36 ld. at 348. The Anti-federalists correctly predicted these elastic clauses would be used to regulate the daily lives of citizens across America from the Capitol building. Id. Contrary to the Anti-federalists, the prophesies of the leading Federalist, Alexander Hamilton, were often incorrect. Hamilton wrongfully predicted that the federal govern-
clairvoyance, an understanding of Anti-federalist thinking is essential when attempting to improve the current imbalance of power between state and nation.

Before the Convention of 1787, a federalist was one who favored a limited central government and comparatively strong state governments. Concurrently, "[s]upporters of the new federal Constitution, nationalists in the years prior to the Philadelphia Convention, now wished to convince the public that their new government was not a radical break with the past but was in fact still a federal system." 37 So, the Federalists filched the name leaving the opposition with the term Anti-federalist. "To people like Mason, they [the Anti-federalists] were the true - and indeed only - federalists. Improper it may have been, but good politics it certainly was also." 38 Despite the name swapping, the Anti-federalists exposed many of the intrinsic deficiencies and weaknesses of the Constitution.

The Anti-federalists justifiably feared the dangers of a distant, remote, far reaching central government and its diversity and liberty usurping potential. 39 They were keenly aware that power breeds avarice or, as Lord Acton later said, "[p]ower tends to corrupt; absolute power corrupts absolutely." 40 Through force of argument, and with the diplomacy of ally Thomas Jefferson, 41 the Anti-federalists modified the Federalists' ideas of a centralized government. 42 Jefferson sympathized with the cause of the Anti-federalists as his core beliefs, the importance of self-government and faith in the common person, were, "in essence, diametrically opposed to the political thinking and social attitude of the Federalists." 43 Jefferson believed the primary "function of government was

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37 FEDERALISM, supra note 33, at 12 (emphasis added).
38 Id.
39 Jefferson incorporates these writings beautifully into the Declaration of Independence. DECLARATION OF INDEPENDENCE (U.S. 1776). For an analysis of this incorporation see COMMAGER, supra note 6, at 78-83.
40 THE QUOTABLE LAWYER 245 (David S. Shrager & Elizabeth Frost eds., 1986) (quoting Lord Acton, Letter to Bishop Mandell Creighton (April 5, 1887)). Similarly, historian Jacqueline de Romilly explains, "power leads to increase in power," thus, one who comes to power inevitably commits hybris which creates increasingly fewer prudent choices leading to political nemesis eventually causing the fall of every republic. JACQUELINE DE ROMILLY, THE RISE AND FALL OF STATES ACCORDING TO GREEK AUTHORS 46-62 (1977).
41 JAMES TRUSLOW ADAMS, OUR BUSINESS CIVILIZATION: SOME ASPECTS OF AMERICAN CULTURE 83-97 (1929); MASON, supra note 12, at 91.
42 MASON, supra note 12, at 77, 83-84. "Mason’s Virginia Declaration of Rights was, in fact, the model for the federal Bill of Rights." FEDERALISM, supra note 33, at 14. See infra note 105 and accompanying text.
43 McLAUGHLIN, supra note 14, at 287.
to preserve the unalienable rights of men, and if it failed in this duty, it forfeited its claim to legitimacy." 44

The Anti-federalists' predictions derived from Greek and Roman history, philosophy and classical literature,45 as well as the socio-economic reform leaders of the European Enlightenment.46 Perhaps the best oversimplification of this era is John Locke's definition of negative liberty. According to Locke, only through citizens' civic virtue, strict defense of property rights and the lack of interference with individual autonomy could one realize true freedom.47 The Framers captured the essence of these great strides in moral, political, philosophical, and economic theory in the Declaration of Independence and the Constitution.

The Anti-federalists objected to the language of the final version of the Constitution's Tenth Amendment which was an ersatz, watered-down version of Article II of the Articles of Confederation. Article II established: "[e]ach state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States."48 The language of the Tenth Amendment, less restrictive than the Anti-federalists and many other Framers preferred, omitted the word "expressly."49 This single word omission may have altered the course of a nation more than any other.

Compromise led the Constitution to contain an enumerated list of federal powers as well as the Necessary and Proper Clause50 (the power of Congress to make any law "necessary and proper" to execute the enumerated powers). George Mason adamantly objected to the Necessary and Proper Clause as it afforded ample opportunity for corruption and thwarted the theory behind creating an enumerated list of powers.51 Other delegates of the Constitutional

44 COMMAGER, supra note 6, at 86.


46 Id.


49 U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." Id. Thomas Jefferson said, "I consider the foundation of the Constitution as laid on this ground." THE PORTABLE THOMAS JEFFERSON 262 (Merrill D. Petersen ed., 1980).

50 U.S. CONST. art. I, § 8, cl. 18.

51 MASON, supra note 12, at 81-82. Contrarily, Hamilton and the Federalists, who endeared central power, favored the Necessary and Proper Clause. Id.
Convention preferred limits on national power but doubted the practicability of creating a complete list of Congressional powers.\footnote{\textit{id.} at 75.} Jefferson questioned the purpose of endeavoring to prevent tyranny and protect rights through a Constitution and Bill of Rights if the government had a way to achieve chosen ends while subjugating other rights and principles in the process.\footnote{DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN 343-44 (1951).} Ultimately, the inclusion of the Necessary and Proper Clause increased the pliability of the powers granted to the federal government.

Anti-federalist concerns quickly proved justified when, in \textit{McCulloch v. Maryland}, Chief Justice John Marshall eliminated any inelasticity the term "necessary" in the Necessary and Proper Clause may have had.\footnote{\textit{McCulloch v. Maryland}, 17 U.S. 316, 323 (1819) (holding Congress had the power to establish a national bank).} Marshall determined that if the government had a legitimate power with which to base its action, then it could choose the means in which to do so;\footnote{\textit{id.}} thus, Congress could carry out its objectives by any means convenient. Contrarily, Jefferson believed that in order to preserve the reserved rights of the People, strict construction of the Necessary and Proper Clause was essential.\footnote{MALONE, supra note 53, at 344-45.} Specifically, on the Constitutionality of a national bank, Jefferson simply commented, government functions "can all be carried into execution without a bank. A bank therefore is not necessary and consequently not authorized."\footnote{THE PORTABLE THOMAS JEFFERSON, \textit{supra} note 49, at 264.}

By redefining necessary as convenient, Justice Marshall nullified much of the Constitutional debate. This misuse of the Necessary and Proper Clause landed a great victory for the nationalists paving the way for Manifest Destiny and the massive federal social and economic legislation of the New Deal. Indeed, it is the sole cause of the administrative state. Undeniably however, the Anti-federalists left a legacy of sound reasoning which had a lasting impact, especially in their concern for possibility of the extension of federal power at the expense of the rights of the People.
C. Ratification

So, why did Jefferson and the Anti-federalists sign the Constitution? Actually, George Mason, one of the finest minds of the revolutionary generation, refused to sign the Constitution. George Clinton, acting on behalf of the state of New York, agreed to cautiously approve the Constitution, but, like Jefferson, added suggestions resembling our Bill of Rights. But, with the structure of federalism, the promise of a Bill of Rights including the Tenth Amendment, and the procedural checks and balances of power, the Constitution appeared superior to the Articles of Confederation. Finally, Benjamin Franklin, a leader of the convention, gave a rousing, unifying speech to end the convention. Franklin asked for solidarity as well as silence concerning the Conventional compromises in order to facilitate acceptance of the document. He then urged the delegates to return home to vigorously promote the Constitution as it reflected theories of natural law and the European Enlightenment while adding what he believed to be the necessary conflict-resolving power of the national government.

The Constitution's intended effects seemed superior to the Articles. The new government quelled problems such as barriers to interstate commerce, currency variations, and national defense. Of equal importance, the Constitution prohibited ex post facto laws, bills of attainder, and prevented Congress from suspending the writ of habeus corpus. Thus, the colonies had united themselves for purposes of trade and for the preservation of individual rights. The newly formed states remained independent and diverse to serve the needs of a heterogeneous society while simultaneously checking central tyranny. Unfortunately, changes over two centuries have led to the People's diminished ability to control national policy.

58 Charles Beard says economic reasons. The Framers were "immediately, directly, and personally interested in, and derived economic advantages from, the establishment of the new system." Beard, supra note 26, at 324.

59 Federalism, supra note 33, at 56.

60 The Anti-Federalist Papers, supra note 35, at 536-46. Anti-Federalist Richard Henry Lee recommended either signing the proposed Constitution or no constitution at all. Id. at 45-47.

61 Id. at 3-5.

62 Id. The Federalist Papers were written after the convention to facilitate ratification. Edward M. Earle, Introduction to The Federalist at x (The Modern Library, 1964). These articles attempted to placate the fears of New Yorkers who feared the Constitution yielded too much central power and lacked adequate measures to allow the benefits smaller, more diverse state and local governments. Id.

63 The Anti-Federalist Papers, supra note 35, at 3-5. This "conflict resolving" power, of course, euphemistically referred to legally sanctioned force.

64 Chemerinsky, supra note 4, at 28.

65 Id.
The pervasiveness of the modern federal government would shock even the most ardent Federalists during the framing. Even Alexander Hamilton, who advocated a form of monarchy believing "the British government was the best in the world,"66 would be shocked at the current breadth of the federal government. The modern train of abuses and usurpations must end. The expansion of the central government cannot be justified by the rise of the industrial or technological era. "Ironically, the decentralized federalism of the horse-and-buggy era is better suited to the needs of our information economy than is the overly centralized, outmoded nationalism of the New Deal."67

IV. BENEFITS OF A DECENTRALIZED FEDERAL SYSTEM

States' Repeal provides the mechanism needed for the People to begin to localize decisionmaking rather than relying on an esoteric body of elites in Washington, D.C. Unfortunately, this century's massive federal expansion, and subsequent learned dependence on the national government, caused the public to know little of the freedoms and benefits provided by a federal system and a decentralized government. (Perhaps a more appropriate term is "noncentralization, not decentralization, since decentralization implies a federal-state hierarchy whereas in federalism there is no hierarchy").68

In James Madison's well-known words, the powers of the federal government were to remain "few and defined."69 He further explains in The Federalist that the federal government will mostly involve foreign policy and efforts to avoid war; states were to safeguard a citizen's life, liberty, property and prosperity.70 Perhaps, then, most importantly, a decentralized government puts a check on abuses of government power to ensure protection of our liberties.71 In sum, the federalist structure of joint sovereigns reserves to the people several well-known, but seldom judicially acknowledged advantages.

A. Purpose of Federalism

The Framers specifically designed the new, limited federal government to serve four basic functions: to protect against foreign invasion and internal fighting, to control factions, to protect private rights, and to preserve the spirit

66CONSTITUTIONAL CONVENTION DEBATES, supra note 35, at 75.
67Calabresi, supra note 34, at 752, 779.
70Id.
71The "constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties." Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 572 (1985) (Powell, J., dissenting).
and form of popular government. Separating these limited national duties from the state authority provides "double security" of intergovernmental counter-checking. Justice O'Connor outlined the benefits of a decentralized system of dual sovereignty in Gregory v. Ashcroft. She noted that localized, decentralized government is more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. The enumerated powers exist to assist states and to assure citizens the liberties and equal protection under the law. The People did not cede these powers for Congress to, for instance, commandeer state budgets or regulate personal morality. Allowing repeal of federal law is perfectly consistent with classical reasoning as States' Repeal will invalidate laws which exceed or abuse the legitimate purpose of the federal government's few and defined powers.

To Anti-federalist Melancton Smith, diversity is a positive attribute of a nation and "fickleness and inconsistency" are characteristic of a free people. One's opinion and one's ballot has much more impact with one's mayor, county government and state government than with the national government. Thus, local color is apparent in all non-national law. Wyoming, for instance, outpaced the national government by thirty years in granting women the right to vote. And, proportionally, women and minorities hold a "stronger toehold in state than national government." The reversal of power, from central to local, which States' Repeal shall provide, reduces social and political apathy while facilitating political identity of the region and meaningful impact on policy.

B. States in Competition

A mobile citizenry challenges and improves the status quo. State and local governments may more easily shut down obsolete programs. Of particular

72See The Federalist Nos. 10, 45 (James Madison).
75Id.
76The Anti-Federalist Papers, supra note 35, at 339.
77Federal Energy Regulatory Comm'n v. Massachusetts, 456 U.S. 742, 788 (1982) (O'Connor, J., dissenting). "When Wyoming became a state in 1890, it was the only state permitting women to vote." Id. But see Susan Rose-Ackerman, Risk Taking and Reelection, Does Federalism Promote Innovation?, 9 J. LEG. STUD. 593 (1980) (arguing risk averse state lawmakers may avoid innovative programs).
78Merritt, supra note 16, at 1, 8.
79Power to the States, Business Week, Aug. 7, 1995, at 48-56 (discussing the results of such experimentation).
significance is that one can escape state laws with which he or she does not agree; one, however, cannot escape federal law by emigrating from a state. Americans may move freely from state to state. In Shapiro v. Thompson, the Supreme Court properly inferred a fundamental right to travel from the structure of the Constitution. The net effect of the right to travel, based on the law of competition, is state governments, anomalous as it is to put economic labels on governments, have a quasi-competitive market while the federal government has a monopoly.

Professor Kramer found "abundant evidence suggesting that the possibility of exit affects the general drift of policy in many areas." This Note asserts that federal law is baneful because it is inescapable. Professor McConnell summarizes: "[t]he liberty that is protected by federalism is not the liberty of apodictic solution, but the liberty that comes from diversity coupled with mobility." In sum, all-encompassing national law stifles, whereas States' Repeal complements, diversity.

V. JUDICIAL DESTRUCTION OF THE FEDERAL SYSTEM

Powers not specifically granted to the government ostensibly remain with the states or the People, but neither group currently possesses security for their reserved rights. With the recent exception of United States v. Lopez, the Court overwhelmingly fails to adhere or even acknowledge the principles of federalism. As with all law, a right without a remedy is no right at all. Anti-federalist prophet George Mason warned of the dangers of a national government that could, at its disposal, "extend their power as far as they think proper." By stretching and warping the intent and meaning of the Necessary and Proper Clause and the Commerce Clause, the nationalists have

80 U.S. CONST. art. I, § 8. See Edwards v. California, 314 U.S. 160 (1941) (Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment, as well as the Commerce Clause, used to overturn a California law which disallowed those leaving the "Dustbowl" to seek a better life in California). The Privileges and Immunities Clauses forbid states from discriminating against newcomers. U.S. CONST. art VI, § 2; U.S. CONST. amend. XVI, § 1. Generally in America, a state may not deny a recent resident the right to vote, or to access the ballot as a candidate. Dunn v. Blumstein, 405 U.S. 330 (1972); Williams v. Rhodes, 393 U.S. 23 (1968). Such a newcomer is entitled to a fair tax system, and the opportunity to conduct business therein. This mobility, and the threat of resources moving out of the state, forces states to use tax revenue more efficiently. See Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416 (1956).


82 Kramer, supra note 5, at n.153.

83 McConnell, supra note 81, at 1504.


85 THE ANTI-FEDERALIST PAPERS, supra note 35, at 348.
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consistently justified expanding the size, scope and intrusiveness of the federal government.

A. Misuse of the Commerce Clause

Beginning with Gibbons v. Ogden\(^86\) in 1824, Chief Justice Marshall expanded the meaning of commerce to include all "commercial intercourse" affecting more than one state.\(^87\) Marshall’s specific holding, that commerce included navigation, appeared relatively harmless to state autonomy. However, Marshall also extended Congressional power to regulate intrastate activities. Later, the Court permitted Congress to "guard[] the people of the United States against the 'widespread pestilence of lotteries'" through the use of the increasingly elastic Commerce Clause.\(^88\) By allowing Congress to use the Commerce Clause to regulate intrastate conduct and "morality," the Court ignored the purpose of the Commerce Clause: "to remove interstate tariffs and to regulate maritime affairs and large-scale mercantile enterprise."\(^89\)

In the 1930s, the Court began striking down extremely nationalistic New Deal legislation, holding that farming, production and mining were not commerce and consequently without the authority of Congress.\(^90\) At this time, however, political pressure on the Court was as high as it has ever been in United States history. President Franklin D. Roosevelt won a sweeping victory and had enough clout to propose his infamous Court-packing scheme.\(^91\) That measure proved unnecessary as Justice Roberts switched his beliefs in favor of Roosevelt’s powerful, far-reaching central government.\(^92\) This switch gave

\(^{86}\) Wheat. 189 (1824).

\(^{87}\) Id. at 189-190.

\(^{88}\) Champion v. Ames, 188 U.S. 321, 357 (1903) (quoting Phalen v. Commonwealth of Virginia, 49 U.S. 163, 167 (1850)). The Champion Court ignored the Founding Fathers refusal to grant the national government a police power. Likewise, the Ninth Amendment forbids Congress from exercising enumerated powers to the detriment of liberties retained by the People. U.S. CONST. amend IX. Neither the Commerce Clause, the other enumerated powers, nor the text, nor the structure of the Constitution allows the federal government to regulate morality. John Stuart Mill believed activity among consenting adults which has no actual injury to others is beyond the regulatory power of government. J.S. MILL, ON LIBERTY 13 (1955); see generally PETER McWILLIAMS, AIN'T NOBODY'S BUSINESS IF YOU DO: THE ABSURDITY OF CONSENSUAL CRIMES IN A FREE SOCIETY (1993).


\(^{91}\) JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 150, 153-54 (4th ed. 1991) (Roosevelt wanted to increase the number of Supreme Court justices to fifteen in order to achieve a majority of support for his socialistic legislation).

\(^{92}\) Id. at 154.
Roosevelt a 5-4 majority in the Supreme Court, enough to reverse the appellate court and to apply the comprehensive National Labor Relations Act to firms whose intrastate activity is deemed in the "flow of commerce."\textsuperscript{93} After 1937 it became clear the Court would not interfere with Congress' or its delegates' central planning of the national economy.

Coinciding with the nationalistic fervor of World War II, the Court again misconstrued the limits of the Commerce Clause in \textit{United States v. Darby} and \textit{Wickard v. Filburn} \textsuperscript{94} These cases further dilated the national commerce clause by expanding the meaning of commerce and reducing the benefits of federalism.\textsuperscript{95} At the time of ratification, the common understanding of "commerce" included only trade and the logistics and transportation of merchandise.\textsuperscript{96} "The Court [in \textit{Gibbons v. Ogden}] was not saying that whatever Congress believes is a national matter becomes an object of federal control."\textsuperscript{97} Contrary to original intent, the modern definition of commerce is whatever Congress claims to be commerce. States' Repeal would provide an opportunity to appropriately check the scope of the federal government.

\textbf{B. Implications of an Expanded Commerce Clause}

The continual erosion of the principles of federalism allowed Congress to enact whatever it pleased. Since the 1930s, the Supreme Court never struck down a law as exceeding the bounds of the Commerce Clause until \textit{United States v. Lopez}, decided in May, 1995.\textsuperscript{98} \textit{Lopez} reversed a high school senior's conviction for violating the Gun Free School Zones Act of 1990\textsuperscript{99} which made carrying a gun within a 1,000 feet radius of a school a federal crime.\textsuperscript{100}

\textsuperscript{93}NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1937). This relegates Hamilton's \textit{Federalist} No. 85 no longer applicable. "We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority." \textit{The Federalist} No. 85 at 526 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

\textsuperscript{94}Lopez v. United States, 115 S. Ct. 1624, 1646-47 (1995) (Thomas, J., concurring); \textit{United States v. Darby}, 312 U.S. 100, 124 (1941) (federal district court dismissed Darby's criminal charge of violating the wage floor and workable hour ceiling of the federal Fair Labor Standards Act based on the Act's violation of the Tenth Amendment; the Supreme Court reversed finding, despite the significance placed on the provision by the Framers, that the Tenth Amendment represented "but a truism"); \textit{Wickard v. Filburn}, 317 U.S. 113 (1942) (upholding Farmer Filburn's fine for growing wheat for his family and livestock which exceeded his allotment under quotas set by the Agricultural Adjustment Act). Neither the \textit{Darby} nor \textit{Wickard} opinion refers to the values of federalism.

\textsuperscript{95}See \textit{Lopez}, 115 S. Ct. at 1647-48 (Thomas, J., concurring).

\textsuperscript{96}\textit{Id.} at 1643.

\textsuperscript{97}\textit{Id.}

\textsuperscript{98}115 S. Ct. 1624 (1995).

In passing the unconstitutional Gun Free School Zones Act, Congress scored an easy political and public relations victory. The evidence presented to the District Court judge led to a federal conviction, but because the federal government prosecuted the case based on an ultra-vires law, the defendant escaped imprisonment. The conviction would have stood under the valid state law. Thus, the federal government's meddling thwarted Texas' ability to enforce its own laws. Whenever the central government unnecessarily interferes with life, liberty, property or the pursuit of happiness, as Jefferson stressed in the Declaration of Independence, the People must destroy that government.\textsuperscript{101} States' Repeal will discourage federal usurpation of criminal law.

C. A New Trend Toward Federalism?

\textit{Lopez}, the first post-New Deal Supreme Court decision to hold that a federal law exceeded the Commerce Clause, helped to rekindle notions of a true federalist society. The Court did attempt to limit regulations to only those which are "economic" in nature; guns in schools were not sufficiently economic.\textsuperscript{102} Nonetheless, the 5-4 decision will likely not create the wide decentralization advocated in Justice Thomas' discerning, historical concurring opinion.\textsuperscript{103} The consensus of scholars at the symposium on The New Federalism After \textit{United States v. Lopez} agreed the case represents little more than a flare across the bow of Congress, reminding the legislature of the importance of federalism.\textsuperscript{104} Hopes of a repudiation of the central economic planning of the New Deal are misguided.

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\textsuperscript{100}115 S. Ct. 1624 (1995).

\textsuperscript{101}\textit{Declaration of Independence} (U.S. 1776). Mason stressed in the Virginia Declaration of Rights that invalid laws must be altered or abolished. That Government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; - of all the various modes and forms of Government that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration; - and that, whenever any Government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the publick [sic] weal.

\textit{Federalism}, \textsuperscript{supra} note 33, at 149.

\textsuperscript{102}\textit{Lopez}, 115 S. Ct. 1624 at 1630, 1632-33.

\textsuperscript{103}\textit{A Landmark Decision?}, \textsuperscript{supra} note 99, at 1133.

\textsuperscript{104}Case Western Reserve Law Review Symposium on the New Federalism After \textit{United States v. Lopez} (Nov. 10, 1995) [hereinafter \textit{Symposium on the New Federalism}]. The Case Western Reserve Law Review presented the symposium to discuss the implications of the \textit{Lopez}
Darby allows Congress to prohibit "any article from interstate commerce" and it may do so by any means reasonably related to that end\(^\text{105}\) such as the mere possession of an item which traveled in interstate commerce. Because virtually all guns derive from interstate commerce,\(^\text{106}\) with a slight rewording of the statute, the federal government could likely enforce a law proscribing possession of a gun near a school. This potential statute, although seemingly legal, would continue to violate the spirit and purpose of federalism and the Constitution.

Within five days of the Lopez decision its limitations manifested. The Supreme Court upheld a conviction based on federal racketeering laws in United States v. Robertson\(^\text{107}\) while never mentioning federalism or the Lopez holding.\(^\text{108}\) Moreover, Justice Thomas' Lopez concurrence acknowledges the practical difficulties in dismantling a century of flawed law.\(^\text{109}\) In determining which intrastate activities substantially affect interstate commerce, Lopez retains the encompassing aggregation principle from Wickard.\(^\text{110}\) Likewise, Lopez retains the nearly all-inclusive rational basis test\(^\text{111}\) from Heart of Atlanta Motel.\(^\text{112}\) Hence, Lopez is by no means a panacea. Therefore, the People cannot rely on the Court to protect the principles of federalism which secure the blessings of liberty, and, thus need a vehicle to reinvigorate federalism.

D. Litigating Tenth Amendment Rights

Voiding the Tenth amendment is no less an obliteration of liberty than voiding any other part of the Bill of Rights, e.g. the right to free speech\(^\text{113}\) or

\(^{105}\)United States v. Darby, 312 U.S. 100, 116, 121 (1940).

\(^{106}\)Lopez 115 S. Ct. at 1651 (Stevens, J., dissenting).

\(^{107}\)115 S. Ct. 1732 (1995). The Court decided Lopez on April 26, 1995 and Robertson on May 1, 1995. In addition, Professor Jesse Choper believes, despite Lopez, the Court will reverse United States v. Pappadopoulos. 64 F.3d 522 (9th Cir. 1995). Jesse Choper, lecture, Symposium on the New Federalism, supra note 104. In Pappadopoulos, the United States contended that natural gas from out-of-state sources leading to the defendant's home conferred federal jurisdiction over the arson charge. 64 F.3d at 522. The appellate court held this strained, contrived nexus to commerce was insufficient. Id.

\(^{108}\)Robertson, 115 S. Ct. at 1732.

\(^{109}\)Lopez v. United States, 115 S. Ct. 1624, 1642-43 (Thomas, J., concurring). See also Kramer, supra note 5, at 1487 n.4.


\(^{112}\)Lopez, 115 S. Ct. at 1629; Heart of Atlanta Motel, 379 U.S. at 252-53.

\(^{113}\)U.S. CONST. amend. I, cl. 1.
the right to avoid self-incrimination. The threat of using States' Repeal focuses lines of accountability; state representatives and governors can no longer blame the President and Congress; in the same vein, the President and Congress can no longer shirk responsibility for the programs they, and their administrative state, enact. For "if the central government's representative runs the city and the province, . . . then you can no longer speak of democracy." Modern nationalists regularly conscript state funds and state officials to carry out politically thankless deeds. This activity circumvents the Constitution, denies the values of federalism and imposes federal policy initiatives on state governments while, most disturbingly, confuses the lines of political accountability. Often, Congress and federal agencies offer states "an ephemeral choice between two options: either pursue the federally desired involvement, or undertake an activity that Congress is not constitutionally empowered to compel of the states." For example, in New York v. United States at issue was "one of our nation's newest problems [nuclear waste] and perhaps our oldest question of constitutional law [federalism]." Justice O'Connor's concern for securing the benefits of federalism finally came to fruition in holding the Low Level Waste Policy Act's "take title" provision violative of the Tenth Amendment. The New York Court deduced that direct coercion of states was unconstitutional because the Framers scrapped the New Jersey Plan, which required state approval before Congress enacted law, in favor of the Virginia Plan which allowed Congress to directly coerce citizens. O'Connor held that forcing states to decide between two constitutionally impermissible regulatory measures violates the structure of the American federal system. While the

114U.S. CONST. amend. V, cl. 3.
116Stewart, supra note 30, at 958. "Federal money is used to conscript local officials in the service of federal objectives and to short-circuit local self-determination. Political accountability is eroded because decisions about spending, policy, and implementation are fragmented, obscuring responsibility for outcomes." Id.
119Id. at 149.
12042 U.S.C. § 2021e(d)(2)(C)(1985). Congress created incentives to comply with the Act's requirement that states dispose of all low-level radioactive waste. Id. A state had the choice of taking possession of the waste or taking title to it, thereby incurring infinite liability for all direct and indirect damages of the waste. Id.
121New York, 505 U.S. at 177.
122Id. at 164-67.
123Id. at 167.
New York opinion modestly rectified state sovereignty, States' Repeal will provide permanent protection for the People's Tenth Amendment rights.

Perhaps the bigger problem in New York was not the logistical-environmental nightmare of disposing of nuclear waste but the more pervasive problem of policy makers not being accountable for their actions. As a result, the People less directly influence the government and localities suffer from the inequities of broad federal law. To make a colossal understatement, bureaucratic initiatives like the Low Level Waste Policy Act\(^{124}\) confuse voters. Through this questionable political subterfuge, federal officials take credit for passing legislation dealing with charged subject-matter, and they leave the fiscal and practical difficulties to state and local governments.

Despite New York, circuit courts have upheld the Brady Handgun Control Act\(^{125}\) and the National Voter Registration Act of 1993.\(^{126}\) In 1995, sheriffs from Arizona and Montana challenged the constitutionality of the Brady Act which required local officials to perform costly and intrusive background checks of handgun purchasers.\(^{127}\) In a related case, the federal government sued the Governor of the State of Illinois to force him to comply with, and pay for, the federally mandated "motor voter" election procedures.\(^{128}\) In both cases, like New York, the chief objection was the conscription of local officials and local funds to carry out federal political goals. These cases exemplify state and local governments' inability or difficulty to defend the People's Tenth Amendment rights.

VI. CONGRESSIONAL DISTORTION OF ORIGINAL INTENT

The prospect of absolutely despotic law in our country is unfortunately and unpleasantly real. To prevent such tyranny, strong procedural safeguards must be in place as "enlightened Statesmen will not always be at the helm."\(^{129}\) Even if we trust the current government, we must assure that future generations will not have to fight for freedom.

A. The Genuine Threat of Nefarious Law

An example of despotic American law occurred within one year of ratification when Congress passed the Alien and Sedition Acts. The Alien Act allowed the President to deport any alien he judged to be "dangerous to the


\(^{127}\) Mack, 66 F.3d at 1025.

\(^{128}\) ACORN, 56 F.3d at 792.

\(^{129}\) The Federalist No. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).
peace and safety of the United States."\(^{130}\) This allowed "the president to remove an alien without a shadow of a judicial trial...."\(^{131}\) The Sedition Act abridged free speech by criminalizing the publishing of "scandalous" or "malicious" writings directed toward the federal government.\(^{132}\) To combat a corrupt federal legislature and corrupt judges, Hamilton told his fellow New Yorkers in *The Federalist*, the People, "as the natural guardians of the Constitution, would throw their weight into the national scale and give it a decided preponderancy."\(^{133}\) Thus, as early as 1798, Jefferson and Madison realized that the People and their state legislatures' influence on the national political process was minimal, the powerful national government would continue to expand and a more effective mechanism to preserve the reserved rights was necessary.\(^{134}\)

To that end, Jefferson and Madison covertly wrote the Kentucky and Virginia Resolutions.\(^{135}\) The Kentucky Resolution, which Jefferson wrote while vice-president, expressly advocated the righteousness of a state's power to nullify federal law.\(^{136}\) These proposals more aggressively advocated the People's right to check Congress than States' Repeal which would require a two-thirds majority of the states acting in concert to negate a federal act. Although "the Alien and Sedition Acts remain the epitome of an unconstitutional abridgment of free speech," federal district and appellate courts upheld them.\(^{137}\) Many were jailed or forced to flee the country.\(^{138}\) Justice did, however, prevail. When Jefferson became the third U.S. President he freed those jailed under the Alien and Sedition Acts.\(^{139}\)

In addition to the aforementioned Alien and Sedition Acts and the Low-Level Radioactive Waste Act, numerous and various examples abound:

\(^{130}\)NOWAK & ROTUNDA, *supra* note 91, at 938. "The Sedition Act was employed by President Adams' Federalist administration against members of Jefferson's Democratic-Republican party for their criticism of his administration." *Id.*

\(^{131}\)MC LAUGHLIN, *supra* note 14, at 273.

\(^{132}\)NOWAK & ROTUNDA, *supra* note 91, at 939.

\(^{133}\)THE FEDERALIST No. 16, at 117 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton concludes that unless the lawmakers, judges and the people were all corrupt, there would be no federal encroachment of state domain. *Id.*

\(^{134}\)MC LAUGHLIN, *supra* note 14, at 272.

\(^{135}\) *Id.* at 435. The second resolution adopted by Kentucky proclaimed, "a Nullification, by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy." BERNARD SCHWARTZ, *THE REINS OF POWER* 72 (1964).

\(^{136}\)See MC LAUGHLIN, *supra* note 14, at 435. "Nullification ... of all unauthorized acts ... is the rightful remedy." SCHWARTZ, *supra* note 135, at 72.

\(^{137}\)NOWAK & ROTUNDA, *supra* note 91, at 939.

\(^{138}\)See *id.* at 938-39.

Fugitive Slave Laws, the Espionage Act, the Smith Act of 1940, the Davis-Bacon Act, and the forcing of federal policy on states through conditional grants. Perhaps the most modern example of Congressional power-grabbing is the Anti-Terrorism and Effective Death Penalty Act of 1996.

If our modern central planning Congress passed similar acts, the People, today as in 1798, lack adequate redress. Traumatic loss of liberty would ensue before, if ever, the Court granted certiorari. The Court's nationalistic record and the lack of Jeffersonian leaders suggest the act may survive judicial review and draconian sentences would go unabated. With States' Repeal, the People can "throw their weight into the national scale" by repealing the law to preserve our liberty.

B. Congenital Difficulties of Distant, Congressional Control

Vast inequities result due to congenital overbreadth when Congress enacts laws affecting every U.S. territory. "In large centralized nations the lawgiver is bound to give laws a uniform character which does not fit the diversity of places and mores." Communications and transportation technology have served to reduce the significance of state borders; nevertheless each region, state, and locality remains quite diverse. For instance, speed limits, due to differing terrain, climate and population, are inherently geographically-specific. Yet the federal government set one arbitrary limit applicable to all states and territories nationwide. Congress then waited twenty years after the elimination of the purported justification for the 55 m.p.h. speed limit (the oil embargo) before it

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140 Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (1850).
141 Act of June 15, 1917, ch. 30, 40 Stat. 217 (1917). Under this nefarious act, the Court upheld the conviction of a person who circulated a flyer to eligible young men asserting that the draft was unconstitutional as it violated the Thirteenth Amendment's prohibition against slavery. Schenk v. United States, 249 U.S. 47 (1919).
142 18 U.S.C. §§ 371, 2385 (1940). Being a member of a disfavored political party was grounds for prosecution. Id. at § 2385.
144 See infra Section VI.D.
yielded control. Analogous problems of central control sparked the Revolution, and they continue to plague these expansive United States.

C. Congressional Coercion

If "freedom is negative, a matter of the absence of coercion," Congress regularly destroys freedom when it forces state and local governments to comply with its rules, regulations, and policies. Congress takes credit for "fighting" crime, "boosting" the economy, or "protecting" the environment without regard to the effectiveness, cost or futility of the act in a given locality. These federal mandates have a crippling effect on state and local budgets.

Additionally, federal commandeering of state budgets and state officials hinders democracy by irreparably blurring the lines of political accountability. Professor Candice Hoke believes the task of voters to trace the unpopular results of complex regulations through the numerous channels of unelected officials back to the proper elected official is "difficult if not impossible." Professor Akhil Reed Amar reasons the problem is so imbedded that "[p]ervasive and systematic illegality will not always be traceable to specific individuals who can be called into account." Finally, the "complex substructure of executive agencies and the even more complicated strata of so-called 'independent regulatory agencies,' with their diffused lines of accountability, may easily confuse members of the national electorate . . . ."

To purportedly curtail these problems, Congress enacted the Unfunded Mandates Reform Act of 1995. However, like the Lopez holding, this act will probably deliver more form than substance.

The Unfunded Mandates Act has numerous exceptions and limitations. For example, it prohibits only those mandates costing $50,000,000 or more per year and is inapplicable to now-existing unfunded mandates. Conveniently, a simple majority, as with all other point-of-order House and Senate rules, overrides the Unfunded Mandates provision. An Advisory Council on

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149 Alan Ryan, Liberty, in THE INVISIBLE HAND 191 (John Eatwell et al. eds., 1989) (how Sir Isaiah Berlin described freedom in his TWO CONCEPTS OF LIBERTY (1958)).

150 Hoke, supra note 117, at 549.

151 Id.

152 Amar, supra note 3, at 1487.

153 Caminker, supra note 25, at n. 256.


156 Caminker, supra note 25, at n. 7.
Intergovernmental Relations (ACIR) report verifies intuition; the cost of determining the cost of the federal mandate is steep and the process difficult.\textsuperscript{157} In sum, the merely procedural act simply erects straw obstacles for the federal government to topple.

\textbf{D. More Congressional Coercion}

Congress regularly deprives citizens of a decentralized federal system when it withholds tax grants unless the locality submits to the policy of the federal government. In 1987, South Dakota sued the federal government seeking a declaratory judgment to enjoin the then-Secretary of Transportation Elizabeth Dole from withholding highway funds from states which refused to submit to the federally dictated minimum drinking age of twenty-one.\textsuperscript{158} The conditional grant left states with the impracticable choice of either forfeiting autonomy by complying with the federal drinking age or forfeiting the much needed highway funds. Chief Justice Rehnquist admitted that, constitutionally, Congress may not institute a national drinking age.\textsuperscript{159} Yet, by distorting the intent and purpose of the congressional spending power the Court upheld the coercion of states.\textsuperscript{160} Justice Brennan dissented proclaiming, "regulation of the minimum age of purchasers of liquor falls squarely within the ambit of those powers reserved to the states by the Twenty-first Amendment."\textsuperscript{161} Most likely the Framers never guessed the nationalists and central planners would attempt and succeed at perverting the United States Constitution by using conditional grants to impose federal policy on the states.

In a similar case, \textit{Nevada v. Skinner},\textsuperscript{162} the Court denied the Tenth Amendment claim of the State of Nevada when it sued the Secretary of Transportation to bar her from conditioning the receipt of highway funds on the basis of maintaining a 55 m.p.h. speed limit. In \textit{Dole}, Congress conditioned five percent of highway funds on states' compliance with federal policy.\textsuperscript{163} In \textit{Skinner}, a draconian 95 percent of highway funds was at issue.\textsuperscript{164} With this amount of revenue at stake, Congress avoided the constraints imposed by federalism and state sovereignty by leaving states with no practicable alterna-

\begin{footnotesize}
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\item[159] \textit{Id.} at 210, 212.
\item[160] \textit{Id.} at 211-12.
\item[161] \textit{Id.} at 212 (Brennan, J., dissenting).
\item[162] 884 F.2d 445 (9th Cir. 1989).
\item[163] 483 U.S. at 205.
\item[164] 884 F.2d. at 446.
\end{enumerate}
\end{footnotesize}
tive but to acquiesce to the federal coercion. Yet, again, the Court held that this coercion did not breach the limits of the spending power of the Commerce Clause nor did it violate the Tenth Amendment.

These cases represent a microcosm of the problems necessarily associated with the federal government imposing one blanket policy for the nation. Because the barren, thirty-three mile, uninterrupted stretch of I-80 west of Lovelock, Nevada at issue in *Skinner* is completely dissimilar to, as an illustration, the congested I-495 Beltway west of Washington, D.C., it should be treated as such. In retrospect, the Framers placed too much faith in Congress' restraint and the Court's ability to interpret and enforce the structure of the Constitution. States' Repeal is an effective method by which to eradicate this federal arm-twisting of state governments.

### VII. OTHER IMPEDIMENTS TO SELF-GOVERNANCE

The Framers presumably did not envision agencies carrying out the functions of all three branches of the federal government which they strived to separate. Likewise, Hamilton ostensibly did not foresee the passage of the Seventeenth Amendment when he promised that U.S. senators would be faithful to the interests of the legislatures of their respective states. The Framers created a stringent system to check governmental officials, yet they underestimated the power of collusion of the two-party system. These troublesome realities emphasize the need for a permanent solution to the demise of self-government.

#### A. Agency and Accountability

Troops of federal agents cause more harm to the values of federalism than does Congress. "The federal government, with its broad constitutional authority, its army of administrative agencies, and its vast financial resources, possesses almost unlimited power to regulate the lives of its citizens." For instance:

Columbus, Ohio, a city of under 650,000 people, is faced with costs of $1 billion during the 1990s to comply with the Clean Water Act and the

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165 *Id.* at 448.

166 *Id.* at 446.


169 This section is but a cursory examination of the problem. For a detailed analysis see generally David Schoenbrod, *Power Without Responsibility: How Congress Abused the People Through Delegation* (1993).

Safe Drinking Water Act. The Columbus Health Commission has estimated that compliance will cost each household an additional $685 each year throughout the 1990s.\footnote{171}{Charles J. Cooper, Capital Hill Hearing Testimony, Constitution, Tenth Amendment and Powers of the States, available in LEXIS, Nexis Library, NWS file (March 24, 1995).}

Under present conditions such an oppressive law is overwhelmingly difficult to alter or abolish. As such, "[t]he individual voter has little hope of influencing the course of this federal leviathan."\footnote{172}{Kramer, \textit{supra} note 5, at n.145.}

Moreover, for numerous reasons, Congress cannot control federal agencies.\footnote{173}{Merritt, \textit{supra} note 16, at 5.} This unelected, unchecked, and unaccountable army of agents has questionable Constitutional authority. Allowing unelected intermediaries to make law erodes both accountability and democracy. Cumbersome, inefficient and costly rules and regulations designed, set and enforced by federal agencies are prime targets for States' Repeal.

\textbf{B. Seventeenth Amendment's Dilution of Federalism}

Protective devices implemented by the Framers to give states a national voice are not in the same form today. For example, the Framers provided states with equal, concrete and direct influence in Congress by allowing each state legislature to appoint U.S. senators.\footnote{174}{U.S. CONST. art I, § 3, cl. 1, \textit{amended by} U.S. CONST. amend. XVII, § 1. For a thorough analysis of the changes wrought by the Seventeenth Amendment, see Todd J. Zywicki, \textit{Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment}, 73 OR. L. REV. 1007 (1994).} The Framers required the same bill to be passed by two distinct houses of Congress, the Senate and the House of Representatives. This procedural safeguard, bicameralism, has been abated. Also, a pragmatic result of the ratification of the Seventeenth Amendment in 1913 is senators now represent national special interest groups, not their sublime constituents, the People of their "home" state.\footnote{175}{States' Repeal also avoids current, practical representational difficulties. Congressmen live in Washington, not their districts; they shop in Washington, raise their families in Washington, educate their children in Washington; they make new friends in and acquire the values of Washington. The culture that legislators formerly shared with their neighbors back home gradually becomes supplanted by one composed primarily of government employees and government supplicants. Dan Greenberg, \textit{Cutting Congress Down to Size: How a Part-Time Congress Would Work}, HERITAGE FOUNDATION REPORTS, November 2, 1994, n.p.} While the structure of the Senate may have been initially flawed by allowing too much nationaliza-
tion, the passage of the Seventeenth Amendment clearly destroyed protection of the states' best interests in the Senate.\textsuperscript{176}

Political action committees spent over $150 million on congressional campaigns in 1990.\textsuperscript{177} A nominal portion of federal election money comes from individual voter contributions to candidates.\textsuperscript{178} To cite but one example of a senator pandering to moneyed interest groups, Senator Rockefeller intended, "to push through health care reform regardless of the views of the American people."\textsuperscript{179} In sum, given the large and diffuse national electorate, federal legislators are much more likely to respond to the wants of special interest groups and lobbyists than the People's will.

Even a successful removal of a harmful senator from office is less than optimal as he or she can do much damage in six years. Frequent elections or limited terms help to reduce the negative effects of hybris.\textsuperscript{180} Frequently, constituents revere their local senators and representatives, but are displeased with congress and national policy as a whole. One writer summarized the public sentiment: "Congress is obscenely corrupt, but my bacon-delivering Congressman is OK."\textsuperscript{181} Members of Congress do local favors with taxpayer money and help erect barriers to ballot access to assure reelection. Then they rather surreptitiously enact ultravires legislation.\textsuperscript{182} Thus, because they no longer appoint senators, state legislatures are out of the national lawmaking equation, leaving us with a unicameral legislature.

C. Two-Party Domination

Another change since days of the founding is the total domination of the two-party system. The Constitution says nothing of political parties nor are they referred to anywhere in the Federalist papers. Moreover, the documents seem hostile toward modern party politics. George Washington warned of the "baneful effects of the Spirit of Party"\textsuperscript{183} in his Farewell Address.

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\item\textsuperscript{176}"Certainly since the 17th amendment states are not at all represented in Congress. . . ." Briffault, supra note 69, at 1351.
\item\textsuperscript{177}See Kramer, supra note 5, at 1533.
\item\textsuperscript{178}Id.
\item\textsuperscript{179}Associated Press, Senator Skipping Specifics, CHARLESTON DAILY MAIL, April 19, 1994, at 7A.
\item\textsuperscript{180}Senators served only one-year terms under the Articles of Confederation. "The Federalists . . . increased sixfold the term of office (and thus enhanced the likelihood of Senators' developing national sentiments and attachments)." Amar, supra note 3, at n.170.
\item\textsuperscript{181}Wilfred McClay, A More Perfect Union? Toward a New Federalism, AMERICAN JEWISH COMMITTEE, Commentary, September 1995, at 28.
\item\textsuperscript{182}Stewart, supra note 30, at 918.
\item\textsuperscript{183}MATTHEW SPALDING & PATRICK GARRITY, A SACRED UNION OF CITIZENS: GEORGE WASHINGTON'S FAREWELL ADDRESS AND THE AMERICAN CHARACTER 72 (1996).
\end{enumerate}
\end{footnotesize}
Commonly, elected officials act contrary to their campaign promises, and party platforms rarely circulate among voters. Each party holds out their ostensible ideals as the antithesis of the other major party, yet the policies of the two parties remain remarkably similar. (Unsurprisingly, as footnoted above, the unconstitutional statute overturned in *Lopez* was signed into effect by President Bush, and the Court's decision to overturn the statute was criticized by President Clinton).\textsuperscript{184} Professor Amar adds that party loyalty reduces the significance of the "vertical separation of powers by fostering collusion among entities that were designed to compete against each other . . . ."\textsuperscript{185}

James Truslow Adams writes: "Jefferson trusted the common man. Hamilton deeply distrusted him."\textsuperscript{186} Yet, "We practise [sic] Hamilton from January 1 to July 3 every year. On July 4 we hurrah like mad for Jefferson. The next day we quietly go about our business."\textsuperscript{187} Adams attributes this hypocrisy to both the Democrats and the Republicans; in practice, he says, despite each party's rhetoric, modern political parties have realized the dreams of Hamilton and the worst fears of Jefferson.\textsuperscript{188} States' Repeal will encourage accountability and integrity to lawmaking. Other ideas like campaign finance reform, repealing the Seventeenth Amendment, creating a part-time Congress, or adding the word expressly to the Tenth Amendment fall short of the objective of States' Repeal: reinvigorating federalism and self-governance \textit{ad infinitum}.

\textbf{VIII. Is Repeal Nullification or Secession?}

The difficulty of reaching a two-thirds majority in the short period of time allotted reduces the practical utility of the States' Repeal. The protective device nonetheless will become a valuable and powerful rights-preserving tool.\textsuperscript{189} Congress will become more accountable, electors and elected will become more politically astute and more aware of the benefits of federalism. Perhaps most importantly, States' Repeal will force the Court to recognize that Americans object to the notion of Congress dictating their lives from afar.

A two-thirds majority of states to repeal federal acts and regulations is incomparable to Calhoun's nullification. In the 19th century John C. Calhoun...
expanded on Jefferson and Madison’s Virginia and Kentucky Resolutions and proclaimed that one state could nullify federal law. The Nullification Crisis began when only one state, South Carolina, acted alone and unjustly. Under no circumstances should Calhoun’s improper use of state sovereignty for malevolent purposes vilify this modern proposal. Professor Martin Redish supports vigorous adherence to structural federalism, as States’ Repeal ensures, for the very reason that it protects the rights of the individual from the will of the majority while simultaneously preventing tyranny.

In a related sense, States’ Repeal is not secession. States’ Repeal remedies unconstitutional uses of power short of dissolving the union, and it may actually prevent secession. Under this proposed Constitutional Amendment, the People will repeal nonsensical national laws forming a closer nexus between the governing and the governed. With this heightened control, states or regions are less likely to break from the federal government.

States’ Repeal prevents, not creates, problems racially, socially and otherwise. Such problems are much too complex to be solved by enacting legislation. Professor Amar believes the increased competition between state and nation created by federalism improves civil rights enforcement. Ultimately the solution lies not in governmental action but in empowerment, autonomous education and personal and economic liberty. States’ Repeal can open these avenues to ending racial and ethnic tensions in the United States.

IX. CONCLUSION

This note contends the reserved rights of the People include the right to rescind any power usurped or abused by the federal government. The language of the Preamble of the Constitution indicates that the federal government becomes illegitimate when it begins to usurp our liberties rather than protect them. John Locke and Lockean thinkers assert that the people are bound to

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190 McLaughlin, supra note 14, at 444. Calhoun believed a state could nullify a federal law unless three fourths of its sister states overruled the nullifying state by maintaining their support of the law. Id.

191 Id. at 442.


193 Commager, supra note 6, at 87.

194 Amar, supra note 3, at 1510-1518.

195 These themes are stressed throughout Bolick, supra note 143.

196 We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. U.S. CONST. preamble.
acquiesce to the government only when it acts within the bounds and in accordance with the purposes for which the People created it.197 Thus the People retain supreme power to alter or abolish impermissible acts.198

The Constitution’s restrictions on federal power have faced many changes hindering their operation. Domination of two political parties, the loss of bicameralism due to the Seventeenth Amendment, swarms of unaccountable agencies, and less-than-enlightened statesmen added to the demise of federalism. Moreover, the pliant Supreme Court allowed Congress to exploit all of the Constitution’s weaknesses. Thomas Jefferson believed the principles set forth in the Constitution are timeless, but he recommended each generation modify the Constitution to suit the times.199 This generation must provide the People an adequate voice in the national arena.

In these times, the People cannot effectively influence policy, nor rely on state legislatures, Congress, or the Court to defend federalism. No other measure short of this amendment is potent enough or durable enough to attain and preserve an appropriate balance of power. States’ Repeal, by a two-thirds majority of states, is the proper measure to reinvigorate a sound system of federalism, which, in turn, shall secure the blessings of liberty for current and future generations of Americans.

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197 THE ENGLISH PHILOSOPHERS, supra note 41, at 404-407.

198 See, e.g., id. Jefferson wrote "[g]overnments 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 of abolish it . . .." DECLARATION OF INDEPENDENCE (U.S. 1776).

199 MALONE, supra note 53, at 342.

200 J.D., magna cum laude, 1997, Cleveland-Marshall College of Law. This note won the 1996 Banks-Baldwin/West Publishing Book Award and is dedicated to the author’s loving memory of Sandra Katherine Wright.