

## THE TEA PARTY, THE CONSTITUTION, AND THE REPEAL AMENDMENT

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On February 19, 2009, CNBC financial correspondent Rick Santelli stood on the bustling floor of the Chicago Mercantile Exchange and pronounced what will be historic words: “We’re thinking of having a Chicago Tea Party in July. All you capitalists that want to show up at Lake Michigan, I’m going to start organizing it.”<sup>1</sup> Rallies were held around the nation on April fifteenth of that year. Over the summer, Tea Party members showed up en masse at Congressional town halls. A September twelfth march on Washington drew thousands of people to the National Mall. This, in a nutshell, was how the social movement called the Tea Party was born.

Reactions by Democratic politicians, activists, journalists, bloggers, and academics have varied wildly. The first was denial. When asked about the impending demonstration in September, White House Press Secretary Robert Gibbs shrugged and told reporters, “I don’t know who the group is.”<sup>2</sup> A series of memes were floated in the press by politicians, activists, pundits, and reporters. The Tea Party was astroturf. The Tea Party were angry white males. The Tea Party was potentially violent. The Tea Party would either split the Republican Party or found a third party. And, of course, the all-purpose standby—the Tea Party were racists. Reporters paid very close attention to the handmade signs at Tea Party rallies for this reason, though my favorite read: “No matter what this sign says, you’ll say it is racist.”

For a meme to work, it must be based on a nugget of truth. But all of these were essentially false. In reality, Tea Party rallies are largely self-organized and self-financed. These gatherings represent the largest spontaneous outpouring of citizen involvement since the student demonstrations against the Vietnam War. Women dominate Tea Party leadership and gatherings.<sup>3</sup> The demonstrations have been remarkably peaceful, and what very little violence has accompanied Tea Party rallies was perpetrated by

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<sup>1</sup> *Squawk Box: Santelli’s Tea Party* (NBC television broadcast Feb. 19, 2009) (link).

<sup>2</sup> *Tea Party Express Takes Washington by Storm*, FOX NEWS, Sept. 12, 2009, <http://www.foxnews.com/politics/2009/09/12/tea-party-express-takes-washington-storm/> (link).

<sup>3</sup> Kenneth P. Vogel, *Face of the Tea Party is Female*, POLITICO, Mar. 26, 2010, <http://www.politico.com/news/stories/0310/35094.html> (link).

counter-demonstrators. The Tea Party, moreover, has resisted any interest in forming a third party, seeking instead to take over the Republican Party by organizing at the local level and backing challengers to incumbents in primaries.

But what does the Tea Party stand for? Given that the Tea Party is a right-of-center movement, it does not take an empiricist to know that most Tea Partiers hold right-of-center views on a variety of issues. This does not mean, however, that the Tea Party *movement* is about immigration policy or social issues like abortion, any more than the gun-rights movement is about any other beliefs that may be held by a majority of gun-rights advocates. Instead, the Tea Party movement is about two big subjects: first, the undeniable recent surge in national government spending and debt, and second, what Tea Partiers perceive as a federal government that has greatly exceeded its constitutional powers.<sup>4</sup> As indicated by Santelli's declamation, the former concern was initially induced by the government bailouts that began under the Bush Administration, while the latter concern was accentuated by the year-long run up to the enactment of the Affordable Care Act in March of 2010. As a result, there is more grassroots interest in the Constitution than has existed in my lifetime, and perhaps in over a century. So what does this mean? Well, there's the rub.

Precisely because the Tea Party is *not* astroturf directed by Kansas billionaires, because it is *not* a product of Fox News, because it is *not* an adjunct of the Republican Party, in short, because it *is* a genuinely grassroots movement of millions of people, it has no official doctrines or national spokespersons. As such, Tea Party organizations couch their beliefs in extremely general terms—restore fiscal balance, end the bailouts, restore constitutional limits on the federal government.

Genuine mass movements do not develop innovative or concrete policies. Instead, they demand that those in the political and intellectual classes produce ideas that the movement will then vet. In other words, the Tea Party is not the *producer* of ideas for social change, nor should that be expected. Rather, it is an emerging political *market* for such ideas. When it comes to the Constitution, I no more expect Tea Partiers to produce detailed critiques of current constitutional practice or develop a reform agenda than I expect the readers of these Remarks collectively to design the iPods, iPhones or iPads they love, the cars they drive, or the clothes they wear. Just as consumers are the ultimate judges of whether they like or are indifferent to any particular device, so too will Tea Partiers be the judges of which reform ideas appeal to them and which leave them cold and unsatisfied.

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<sup>4</sup> See Jonathan Weisman, *GOP Hopefuls Narrow Focus*, WALL ST. J., Oct. 18, 2010, <http://online.wsj.com/article/SB10001424052702304250404575558473960527854.html> (explaining Tea Party influences in elections focused on federal spending and the constitutionality of federal involvement in certain activities) (link).

## NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

Under these circumstances, political and intellectual entrepreneurs are needed to devise, develop and disseminate ideas that meet the demands of the Tea Party market. Many will try to speak to the demands of Tea Partiers. Some will get them; others will not. Many ideas will be floated. Some will stick; most will be discarded.

When I first noticed a mass movement professing its interest in restoring the lost Constitution in April 2009, I took it upon myself to draft what I called the “Federalism Amendment” to give them something to stand for. I described the Amendment in an op-ed for the Wall Street Journal,<sup>5</sup> which stimulated a greater email response than all of my previous op-eds combined. After it appeared, I accepted an invitation to be interviewed on a Tea Party Internet television show about the proposal. I readily admitted it was merely a rough draft of something I took just a few days to write. More thought was needed before it was ready for prime time. The host asked if I would return when I had a more finished product, and I agreed.

I decided to give it a try using the email feedback I received, as well as blog posts, for guidance. It seemed like there were actually too many ideas to put into a single amendment. If any one proved to be politically toxic, it could sink the others. And for the proposal to have its desired effect, each part had to remain more or less intact. Delete or even slightly alter any of the elements, and the overall provision might have unintended consequences. Once the proposal was out of my hands, I would be unable to control its developments to assure it fulfilled its original purpose, so it needed to be as clear and specific as possible.

Accordingly, I decided to take a different approach. I assembled a group of amendments around which a coalition could be built. What resulted was the “Bill of Federalism,” consisting of ten proposed amendments designed to restore constitutional federalism.<sup>6</sup> They covered many issues, including term limits, a line item veto power triggered by an unbalanced budget, abolition of the income tax, limits on the scope of the commerce power, unfunded mandates, protection of political speech, protection of unenumerated liberties, and even how the Constitution should be interpreted. While I designed each proposal to change or *amend* the Constitution, each proposal was also an effort to *restore* some feature of the original Constitution that had been altered either by judicial construction or other constitutional amendments. I was very careful, however, to devise these proposals so they would expand upon, rather than restrict, the protections of civil rights and liberties that had been added to the Constitution by the Republicans in the Thirty-Ninth Congress. I did not set out to write a proposal that

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<sup>5</sup> Randy E. Barnett, Op-Ed., *The Case for a Federalism Amendment: How the Tea Partiers Can Make Washington Pay Attention*, WALL ST. J., Apr. 23, 2009, <http://online.wsj.com/article/SB124044199838345461.html> (link).

<sup>6</sup> Randy E. Barnett, *A Bill of Federalism*, FORBES, May 20, 2009, <http://www.forbes.com/2009/05/20/bill-of-federalism-constitution-states-supreme-court-opinions-contributors-randy-barnett.html> (link).

reflected *my* first choices; instead, I sought to develop ideas that might appeal to *others*, who would form a coalition around the package of changes.

A website was set up to solicit additional commentary and feedback from the public. I went back on the Tea Party program to let people know about it. After receiving hundreds of comments, I refined the proposals and published them in May 2009 on Forbes.com.<sup>7</sup> Then things went dormant for a long while as Tea Partiers focused on congressional town hall meetings and blocking the enactment of pending health insurance proposals. While this effort failed at one level, it succeeded in securing remarkably united Republican opposition in both the House and Senate. As a result, the Affordable Care Act was the first major comprehensive social welfare measure enacted by a bare majority vote of just one party. This had not been true of Social Security, Medicaid, Medicare, or any of the civil rights acts.

Tellingly, the Republicans in the Senate raised a point of order against the constitutionality of the individual mandate in the Senate bill. Although that objection lost on a strictly party-line vote, it set the stage for the challenges that would be filed by fourteen state attorneys general the day after the House approved the Senate bill in March 2010. The number of challengers has now grown to comprise over half the states in the Union.<sup>8</sup>

As these lawsuits began their slow progress last summer, some Tea Partiers in Virginia turned their attention back to constitutional reform. They asked me to join a series of conference calls to advise them on their alternatives. With the Bill of Federalism as their menu, they expressed an interest in three or four ideas. Eventually they settled on the sixth of my original ten proposals—what is now called the “Repeal Amendment,” a measure that would give two-thirds of state legislatures the power to repeal any federal law or regulation. The Repeal Amendment is an attempt to fend off federal encroachment on state prerogatives and restore the structural check on federal power states used to have when their legislatures had the power to appoint United States Senators. At the same time that it gives states a seat at the table when Congress proposes unpopular legislation, the Repeal Amendment preserves the popular election of Senators and the checks on state powers that have been added to the Constitution since the Civil War. The proposal reads:

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 particu-

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<sup>7</sup> *Id.*

<sup>8</sup> Melissa Nelson, *26 States Join Obama Health Care Lawsuit in Fla.*, YAHOO! NEWS, Jan. 18, 2011, [http://news.yahoo.com/s/ap/20110118/ap\\_on\\_re\\_us/us\\_health\\_overhaul\\_lawsuit](http://news.yahoo.com/s/ap/20110118/ap_on_re_us/us_health_overhaul_lawsuit) (link).

## NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

larly describe the same provision or provisions of law or regulation to be repealed.<sup>9</sup>

Why they chose this particular proposal is instructive. These individuals were citizen activists, not lawyers, who were wary of legalistic measures the exact implications of which they could not be sure. They also seemed to be influenced by my explanation of the difference between “substantive” and “structural” changes. A substantive proposal is a command such as “Congress shall do or not do X.” I explained that such provisions would need to be interpreted and enforced by the same courts that already refused to enforce other constraints in the Constitution, such as the requirement that revenue bills like the health insurance reform act originate in the House, not the Senate. The Tea Partiers, clearly aware of the possibility of judicial distortion of core reforms, preferred a route that would give state legislatures a direct power to check Congress without the need for judicial interpretation.

Toward this end, structural provisions, which Jack Balkin has called the “hard wired” parts of the Constitution,<sup>10</sup> are transparent and require little, if any, construction. Constraining federal power by situating a veto in elected state legislatures fits this description. And it held another attraction: by increasing their power, it would appeal to the very state legislators who would have to call for an Article V amendments convention to propose the Repeal Amendment for ratification. In the past, Congress has avoided convening an Article V convention by proposing the desired amendment itself before the two-thirds threshold of states is met.

By this process, citizen activists made their choice from a menu of options I presented to them. I did not select the Repeal Amendment; they did. From there, we went on to meet with Bill Howell, the Speaker of the Virginia House of Delegates and some key members of the Virginia Senate and House to secure their support. After this meeting, Speaker Howell arranged a briefing in Richmond for Governor Bob McDonnell. That day we also met with Attorney General Ken Cuccinelli. In September, Speaker Howell and I went public with the idea in an op-ed in the *Wall Street Journal*.<sup>11</sup>

Since then, the Repeal Amendment has received the endorsements of legislative leaders in Florida, Texas, South Carolina, and Utah, and legislators from a variety of other states like Missouri. House majority leader Eric Cantor next issued a statement supporting the idea, and Utah Congressman Rob Bishop introduced it into Congress. With the outpouring of legislative support, the Repeal Amendment was no longer just a Tea Party proposal.

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<sup>9</sup> REPEAL AMENDMENT, <http://www.repealamendment.org/index.html> (last visited Mar. 7, 2011) (link).

<sup>10</sup> See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 553 (2009) (link).

<sup>11</sup> Randy E. Barnett & William J. Howell, Op-Ed., *The Case for a “Repeal Amendment”*, WALL ST. J. (Sept. 16, 2010) (link).

The Cantor endorsement and introduction by Bishop apparently touched a nerve as critical pieces were immediately published by Dana Milbank in the *Washington Post*,<sup>12</sup> and Dahlia Lithwick and Jeff Shesol in *Slate*.<sup>13</sup> Most recently, the *New York Times* editorialized against the idea,<sup>14</sup> and a critical op-ed appeared in early January in the *National Law Journal*.<sup>15</sup> Clearly, these opponents are now sensing that the Tea Party phenomenon is real enough that their proposals cannot be ignored.

Like their previous criticisms of the Tea Party, however, these critiques are not serious or compelling. Milbank attempted to play the race card by noting its origin in Virginia.<sup>16</sup> Lithwick and Shesol purported to find a contradiction in Tea Partiers revering the Constitution while at the same time proposing its amendment,<sup>17</sup> as if the document had not already been changed by amendment and the courts in ways that Tea Partiers reject. Somewhat bizarrely, the *New York Times* waxed nostalgic for the days when economic hard times led folks to call for more rather than less federal power.<sup>18</sup>

Thus far, there are only two serious criticisms of the proposal. The first is Professor Levinson's objection that it would empower states comprising less than a majority of the population to repeal a federal law presumably supported by a majority.<sup>19</sup> However, such an outcome is almost entirely hypothetical. Given that there is no correlation between the size of states and whether they are blue or red, no law is likely to be repealed unless it includes enough large states to get over the fifty percent mark. For example, if you remove just seven of the least populous blue states (Vermont, Delaware, Rhode Island, Hawaii, Massachusetts, New Mexico and Connecticut) and add Florida and Texas with the remaining least-populous thirty-four states to reach two-thirds, you are well over one-half of the national population, and still with a mix of red and blue states from throughout the country. Besides, what makes the original Constitution distinctive is

<sup>12</sup> Dana Milbank, Op-Ed., *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> (link).

<sup>13</sup> 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/> (link).

<sup>14</sup> Editorial, *The Repeal Amendment*, N.Y. TIMES, Dec. 26, 2010, <http://www.nytimes.com/2010/12/27/opinion/27mon2.html> (link).

<sup>15</sup> John R. Vile, Op-Ed., *The Case Against a "Repeal Amendment"*, NAT'L L.J., Jan. 3, 2011, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202476606739&sreturn=1&hblogin=1> (link).

<sup>16</sup> See Milbank, *supra* note 12.

<sup>17</sup> See Lithwick & Shesol, *supra* note 13.

<sup>18</sup> See *The Repeal Amendment*, *supra* note 14.

<sup>19</sup> See Sanford Levinson, *If We Have an Imperfect Constitution, Should We Settle for Remarkably Timid Reform? Reflections Generated by the General Phenomenon of "Tea Party Constitutionalism" and Randy Barnett's Particular Proposal for a "Repeal Amendment" Designed to Rein in an Overreaching Congress*, 105 NW. U. L. REV. COLLOQUY 271, 274-75 (2011) (link).

## NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

all the ways it checks power to protect minorities from the tyranny of the majority.

But, to my mind, the strongest criticism of the Repeal Amendment is that it is too modest. After all, getting two houses of thirty-four legislatures to agree on repealing anything is a high hurdle. Moreover, under the Repeal Amendment, Congress is free to reenact any measure the states repeal if it remains convinced of the measure's necessity, propriety, and popularity. Since there was no effective way to limit the power of Congress to reenact a similar measure after a repeal, it was decided to make vice a virtue and allow reenactment. For this reason, the Repeal Amendment amounts to a power to force Congress and the President to take a second look at a controversial measure.

So why bother adopting it? Well, for one thing, it can be used in the extreme and highly unusual circumstances when Congress acts on a bare partisan majority over the apparent preferences of the general public and state governments. I can think of one example in recent history when that happened—passage of the health care act in March 2010. For another, it would allow state legislatures to resist federal mandates that fall under the political radar and can hardly claim majoritarian support.

Perhaps the biggest reason to support the Repeal Amendment is symbolic. It symbolizes a principled reassertion of the idea of constraints on federal power. Symbols matter, which is why Milbank, Lithwick, and *The New York Times* are so agitated by a proposal that is still a long shot to become part of the Constitution. They rightly see the Repeal Amendment as posing the same threat to the political class that has dominated American politics for a very long time as is posed by the Tea Party itself.

What all this will lead to is anyone's guess. As this essay goes to press, the political momentum that existed last fall seems to have ebbed, especially after the Democratic majority in the Virginia Senate managed to kill the proposal for this session by parliamentary maneuvering rather than taking a direct vote.<sup>20</sup> But one thing is certain: so long as the Tea Party remains a powerful political force that continues to focus on how the Constitution should be interpreted, future law professors are going to be talking a whole lot more critically about "popular constitutionalism" than they did in the recent past.

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<sup>20</sup> See Rosalind S. Helderman, *Repeal Amendment Stumbles at First Senate Legislative Hurdle*, WASH. POST VA. POL. BLOG, Jan. 18, 2011, [http://voices.washingtonpost.com/virginiapolitics/2011/01/repeal\\_amendment\\_stumbles\\_at\\_f.html](http://voices.washingtonpost.com/virginiapolitics/2011/01/repeal_amendment_stumbles_at_f.html) (link).