



Written by [Raven Clabough](#) on December 20, 2010

Lawmakers Consider “Repeal Amendment”

The passage of President Obama’s signature, and unconstitutional, health care law prompted a number of reactions at the state level. Some states are considering the prospect of nullification to overturn the law at the state level. Others have turned to the courts in order to restore the individual and state liberties that have been violated by the law. Another group, however, is considering something far more extreme: a constitutional amendment that would provide states with the power to overturn any act of Congress.



The proposed “repeal amendment” allows state legislatures to reject any federal law or regulation, so long as two thirds of the states agree to it. The amendment has already been introduced in the House of Representatives by Rob Bishop, Republican of Utah.

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Any provision of law or regulation of the United States may be repealed by the several states, and such repeal shall be effective when the legislatures of two-thirds of the several states approve resolutions for this purpose that particularly describe the same provision or provisions of law or regulation to be repealed.

Of the amendment’s progress, the [New York Times](#) reports:

The idea has been propelled by the wave of Republican victories in the midterm elections. First promoted by Virginia lawmakers and Tea Party groups, it has the support of legislative leaders in 12 states. It also won the backing of the incoming House majority leader, Representative Eric Cantor, when it was introduced this month in Congress.

Cantor defends the amendment:

Washington has grown far too large and has become far too intrusive, reaching into nearly every aspect of our lives. Massive expenditures like the stimulus, unconstitutional mandates like the takeover of health care and intrusions into the private sector like the auto bailouts have threatened the very core of the American free market. The repeal amendment would provide a check on the ever-expanding federal government, protect against Congressional overreach and get the government working for the people again, not the other way around.

Likewise, Randy E. Barnett, a law professor at Georgetown who helped to draft the amendment, stated, “This is something legislatures have an interest in pursuing because it helps them fend off federal encroachment and gives them a seat at the table when Congress is proposing what to do.”

Virginia’s attorney general, Kenneth Cuccinelli — one of the first attorneys general to file a lawsuit against Obama’s health care law — has indicated his support for the amendment and written to the attorneys general of every state to encourage their support as well.



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The repeal amendment reportedly has the support of legislative leaders in Iowa, Minnesota, Florida, Missouri, Montana, New Jersey, South Carolina, Texas, Utah, Georgia, and Indiana.

The very notion that states are considering such an amendment highlights the changing demands of the American people. As Congress' approval rating continues to plummet and currently sits at a historic low, states are beginning to fight vehemently to reclaim their rights.

The *New York Times* notes:

Tea Party groups and candidates have pushed for a repeal of the 17th Amendment, which took the power to elect United States senators out of the hands of state legislatures. And potential presidential candidates like Mitt Romney and Sarah Palin have tried to appeal to anger at Washington by talking about the importance of the 10th Amendment, which reserves for states any powers not explicitly granted to the federal government in the Constitution.

While the "repeal amendment" appears at first to be an effective way for states to reclaim their authority, careful examination reveals that it actually undermines state authority by requiring the approval of others states before a state can reject a law. States already possess the power to nullify unconstitutional legislation under the process of [nullification](#), which does not require majority support.

Nullification is a tool bestowed upon the American people by the Founding Fathers specifically to protect the rights of the states and safeguard the American people from unconstitutional overreach. The doctrine of nullification dates back to the writings of Thomas Jefferson, who, in his 1798 Kentucky Resolutions, argued against Congress' passage of the Alien and Sedition Acts.

Of Jefferson's nullification notion, the [Tenth Amendment Center](#) explains, "Thomas Jefferson's Kentucky Resolutions claim that the U.S. Constitution was a compact among the several states — whereby the states delegated certain limited powers to the U.S. government, any undelegated power exercised by the U.S. is thus void...Thus, every state can of its own authority nullify within its territory 'all assumptions of power by others' — i.e. all perceived violations of the Constitution by the federal government."

Jefferson's Kentucky Resolution points to the Tenth Amendment to justify strict construction of federal powers.

Thomas Woods, author of [Nullification: How to Resist Federal Tyranny in the 21st Century](#), summarizes Jefferson's ideas:

Thomas Jefferson imagined that the states would act as the sentinels of the liberty of the people. They would protect the people from the unconstitutional overreaches and those powers have by and large been stripped from the states over the years and they need to be reclaimed.

Nullification proves to be a far better option for the states than the proposed amendment, because nullification allows each individual state to act in its own best interest. The repeal amendment, on the other hand, requires majority approval for states to overturn federal law that may positively impact some states while negatively impacting others. As a result, individual states must comply with the will of the majority, even when that will is diametrically opposed to the best interest of the state.

Sanford V. Levinson, professor of constitutional law at the University of Texas, notes another issue with the amendment: "[It] reinforces the power of small parochial rural states in which most Americans do not live." While Levinson's statement indicates a clear bias against rural states, his overall argument is that allowing majority to rule is an imposition on states' rights.



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Another issue posed by the repeal amendment is that it tips the scale too far away from the central government and disrupts the balance of states' rights versus federal powers. Larry Greenley of The John Birch Society observes, "[The amendment] undermines the authority of the federal government, which has the power to pass laws as long as they are in accordance with the enumerated powers delegated to Congress in Article I, Section 8 of the Constitution." He adds, "It complicates the whole idea of federalism."

Of particular concern to Greenley is that the wording of the repeal amendment does not explicitly state that the amendment applies solely to unconstitutional laws or regulations. Some contend that even provisions of the Constitution could feasibly be overturned under the repeal amendment.

The amendment will likely face a number of obstacles as it requires approval in both the U.S. House of Representatives and the Senate. If it passes both chambers of Congress, it must then be ratified by 38 state legislatures.

Larry Greenley raises concerns, however, that if Congress fails to propose the amendment, then backers of the repeal amendment will attempt to get 34 states, in accordance with a second amendment process provided in Article V of the Constitution, to petition Congress to convene a constitutional convention to propose the amendment, a process that The John Birch Society has long considered "[too risky](#)."

While it is honorable for lawmakers to attempt to restore state and individual authority, it is important that their overzealous efforts do not compromise the sanctity of the United States Constitution.

Photo: Rep. Rob Bishop



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