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Proposed Amendment Would Enable States to Repeal Federal Law

By **KATE ZERNIKE**

The same people driving the lawsuits that seek to dismantle the Obama administration's health care overhaul have set their sights on an even bigger target: a constitutional amendment that would allow a vote of the states to overturn any act of Congress.

Under the proposed "repeal amendment," any federal law or regulation could be repealed if the legislatures of two-thirds of the states voted to do so.

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.

Like any constitutional amendment, it faces enormous hurdles: it must be approved by both chambers of Congress — requiring them to agree, in this case, to check their own power — and then by three-quarters of, or 38, state legislatures.

Still, the idea that the health care legislation was unconstitutional was dismissed as a fringe argument just six months ago — but last week, a federal judge agreed with that argument. Now, legal scholars are handicapping which **Supreme Court** justices will do the same.

The repeal amendment reflects a larger, growing debate about federal power at a time when the public's approval of Congress is at a historic low. In the last several years, many states have passed so-called sovereignty resolutions, largely symbolic, aimed at nullifying federal laws they do not agree with, mostly on health care or gun control.

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.

“Washington has grown far too large and has become far too intrusive, reaching into nearly every aspect of our lives,” Mr. Cantor said this month. “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.”

[Randy E. Barnett](#), a law professor at [Georgetown](#) who helped draft the amendment, argued that it stood a better chance than others that have failed to win ratification. “This is something state legislatures have an interest in pursuing,” he said, “because it helps them fend off federal encroachment and gives them a seat at the table when Congress is proposing what to do.”

Professor Barnett, considered by many scholars to be the intellectual godfather of the argument that the health law is unconstitutional, first proposed the repeal amendment in a [column published by Forbes.com](#) in 2009.

Tea Party groups in Virginia contacted him. Virginia’s governor, attorney general and speaker of the House, all Republicans, then expressed their support. The speaker, William J. Howell, joined Professor Barnett in an op-ed article proposing the amendment in [The Wall Street Journal](#) in September.

Virginia was a particularly ripe place to start the argument. The attorney general, Kenneth T. Cuccinelli II, was among the first attorneys general to try to overturn the federal health care law, filing a lawsuit minutes after [President Obama](#) signed the measure last spring.

Mr. Cuccinelli argued that the federal provision establishing a health insurance mandate was against a law the legislature had recently passed decreeing that no resident could be required to have health insurance. The judge who declared the mandate unconstitutional last week was

ruling in that case.

This month, Mr. Cuccinelli wrote to the attorneys general of every state for their support of the repeal amendment.

The measure was introduced in the House by Representative Rob Bishop, Republican of Utah, who was a founder of the Western States Coalition, which advocates states' rights.

[Sanford V. Levinson](#), a professor of constitutional law at the University of Texas, called the proposal "a really terrible idea" because it would give the same weight to small states as it would to large ones, allowing those with a relatively small proportion of the national population to have outsize influence.

"There's not the slightest chance it would get through Congress" or be ratified by the states, he said. "You can bet the ranch that there are enough state legislators in the large states who will not consider it a good idea to reinforce the power of small parochial rural states in which most Americans do not live."

Even if it were approved, it would be extremely unlikely to have any practical effect, Professor Levinson said. "Any bill that can get through the byzantine, gridlocked process of being approved by two houses and the presidential signature is wildly unlikely to be opposed by two-thirds of the states," he said.

Marianne Moran, a lawyer in Florida who runs [RepealAmendment.org](#), said that legislative leaders in Florida, Georgia, Indiana, Iowa, Minnesota, Missouri, Montana, New Jersey, South Carolina, Texas and Utah, as well as Virginia, were backing the amendment.

"Considering we've had 12 states get on board in the last two or three months that we've been pushing this, I think we're getting some speed," she said. "No amendment has ever been ratified without a broad national consensus — it's an uphill battle — but we've done it 27 times as a country, and I think we can get enough states to agree."

Proponents say their effort is not directed at any one law or set of laws. "Our desire is to have it in place so we can repeal as things come up," Ms. Moran said. "What we're trying to do is to draw a line in the sand saying the federal government has gone too far."

