

World U.S. New York Business Markets Tech Personal Finance Life & Culture **Opinion**

Careers Real Estate Small Business

## bottom line.

Dow Jones Reprints: This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers, use the Order Reprints tool at the bottom of any article or visit [www.djreprints.com](http://www.djreprints.com)

See a sample reprint in PDF format.

Order a reprint of this article now

**THE WALL STREET JOURNAL.**

WSJ.com

OPINION | SEPTEMBER 16, 2010

## The Case for a 'Repeal Amendment'

*Virginia will consider proposing a constitutional amendment that would allow two thirds of the states to repeal a federal law.*

By RANDY E. BARNETT AND WILLIAM J. HOWELL

On Sept. 17, 1787, the U.S. Constitution was signed. The celebration of Constitution Day this year takes on renewed significance as millions of Americans are objecting to a federal government that has bailed out or taken over banks, car companies and student loans while it prepares to take charge of the practice of medicine. Unfortunately, because there is no single cause for this growth of federal power, there is no single solution.

One cause is political, with elected officials promising solutions to social problems that are beyond their power to deliver. Another is judicial, with federal judges who have allowed the Congress to exceed its enumerated powers for so long that they no longer entertain even the possibility of enforcing the text of the Constitution.

Also responsible are two "progressive" constitutional amendments adopted in 1913. Both dramatically increased the power of the federal government at the expense of the states, creating a constitutional imbalance that needs to be corrected.

The 16th Amendment gave Congress the power to impose an income tax, allowing it to tax and spend to a degree previously unimaginable. This amendment enabled Congress to evade the constitutional limits placed on its own power by effectively bribing states. Once states are "hooked" on receiving federal funds, they can be coerced to obey federal dictates or lose the revenue.

The 17th Amendment provided for the direct election of U.S. senators by the voters of each state. Under the original Constitution they were selected by state legislatures and could be expected to restrain federal power. Whatever that amendment's democratic benefits, the loss of this check on the federal government has been costly.

In its next session beginning in January, the legislature of Virginia will consider proposing a constitutional "Repeal Amendment." The Repeal Amendment would give two-thirds of the states the power to repeal any federal law or regulation. Its text is simple:

'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.'

At present, the only way for states to contest a federal law or regulation is to bring a constitutional challenge in federal

court or seek an amendment to the Constitution. A state repeal power provides a targeted way to reverse particular congressional acts and administrative regulations without relying on federal judges or permanently amending the text of the Constitution to correct a specific abuse.

The Repeal Amendment should not be confused with the power to "nullify" unconstitutional laws possessed by federal courts. Unlike nullification, a repeal power allows two-thirds of the states to reject a federal law for policy reasons that are irrelevant to constitutional concerns. In this sense, a state repeal power is more like the president's veto power.

This amendment reflects confidence in the collective wisdom of the men and women from diverse backgrounds, and elected by diverse constituencies, who comprise the modern legislatures of two-thirds of the states. Put another way, it allows thousands of democratically elected representatives outside the Beltway to check the will of 535 elected representatives in Washington, D.C.

Congress could re-enact a repealed measure if it really feels that two-thirds of state legislatures are out of touch with popular sentiment. And congressional re-enactment would require merely a simple majority. In effect, with repeal power the states could force Congress to take a second look at a controversial law.

Americans revere their Constitution but have also acted politically to improve it. The 13th and 14th Amendments limited the original power of states to violate the fundamental rights of their own citizens, while the 15th and 19th Amendments extended the right to vote to blacks and women. The 21st Amendment repealed another "progressive" reform: the 18th Amendment that empowered Congress to prohibit alcohol.

The Repeal Amendment alone will not cure all the current problems with federal power. Getting two-thirds of state legislatures to agree on overturning a federal law will not be easy and will only happen if a law is highly unpopular.

Perhaps its most important effect will be deterring even further expansions of federal power. Suppose, for example, that Congress decides to nationalize private pension investments. Just as it must now contemplate a presidential veto, so too would Congress need to anticipate how states will react.

The Repeal Amendment would help restore the ability of states to protect the powers "reserved to the states" noted in the 10th Amendment. And it would provide citizens another political avenue to protect the "rights . . . retained by the people" to which the Ninth Amendment refers. In short, the amendment provides a new political check on the threat to American liberties posed by a runaway federal government. And checking abuses of power is what the written Constitution is all about.

*Mr. Barnett is a professor at the Georgetown University Law Center and author of "Restoring the Lost Constitution: The Presumption of Liberty" (Princeton 2005). Mr. Howell is the Speaker of the Virginia House of Delegates.*

Copyright 2009 Dow Jones & Company, Inc. All Rights Reserved

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our [Subscriber Agreement](#) and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit [www.djreprints.com](http://www.djreprints.com)