REMAPPING DEBATE
Asking "Why" and "Why Not"

New effort to limit federal authority would make all federal laws and regulations subject to repeal by two-thirds of states

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December 21, 2010 — As reported on Dec. 20 in The New York Times, opponents of various aspects of the modern-day exercise of federal power are seeking to pass a constitutional amendment that would allow two-thirds of states to overrule those federal laws or regulations with which they disagreed. While the odds against passage of any change to the Constitution are long, the campaign is striking for the support it has garnered from lawmakers in a dozen states — and for the sweeping language of the proposed amendment, which is set out in the sidebar below.

TEXT OF "REPEAL AMENDMENT"

"Any provision of law or regulation of the United States may be repealed by the several states, and such repeal shall be effective when the legislatures of two-thirds of the several states approve resolutions for this purpose that particularly describe the same provision or provisions of law or regulation to be repealed."

Much pro-amendment rhetoric focuses on recent events. For example, Marianne Moran, the executive director of a group that is coordinating support for the Repeal Amendment, as the measure is known, rattled off a long list of topics where, she claimed, the public sees Congress as having overstepped: "TARP, the bailouts to Wall Street, the bailouts to the mortgage industry, the bailouts to the auto industry, the bailouts to the banks and lending institutions, the [stimulus] bill, [and] the health care bill."

Similarly, Amy Handlin, a New Jersey Assemblywoman who recently introduced in her state legislature a resolution urging Congress to propose the amendment, claimed that her motivations were "spending, spending, spending, and more spending…and certainly Obama-care is up there as well."

But there are a dizzying array of federal laws and regulations that could conceivably be at issue — civil rights, environmental, and labor laws among them. The term regulation on its face encompasses each and all of myriad elements of the tax code. Every time the Supreme Court directs the federal government to act to enforce a constitutional right, that direction can only take effect if the federal government passes substantive legislation, develops regulations, or, at the least, appropriates funds so that federal employees can carry out the direction.

Amendment advocates disclaim any connection with those who views on "nullifying" federal authority stemmed from animus to civil rights enforcement. First, they have noted, state power would not be exercised in defiance of federal law, but would be part of the exercise of a new constitutional balance that lawfully placed tighter controls on the federal government.

Second, animus to civil rights laws, or to environmental and other business regulation, is "not motivating anyone," according to Randy Barnett, a law professor at Georgetown University who planted the seeds for the amendment with a 2009 Forbes article and recently touted it in a Wall Street Journal op-ed. "If I thought we were going to roll back environmental laws, do something on civil rights, I wouldn't be behind this thing," claimed James LeMunyon, a member of the Virginia House of Delegates who recently co-sponsored a state resolution in support of the amendment.

But advocates do acknowledge that the amendment does not specify any limits on the power of two-thirds of the states to repeal any or all unwanted federal laws or regulations. (According to 2009 American Community Survey data from the Census Bureau, that two-thirds, if comprised of the least populated states, would represent only 27 percent of the American population.)

"The language of the amendment is very simple" in defining what federal actions would be subject to repeal, Moran said. "It's any law, or any regulation. Any means any."

Asked, for example, whether the amendment would allow state legislatures to revoke funding for American troops during a war, New Jersey's Handlin replied, "I don't think you're misreading what we have in front of us."

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Drafters of the amendment deliberated over whether to specify that actions taken under the powers enumerated to Congress by the Constitution would not be subject to repeal, LeMunyon said. But, LeMunyon added, they decided that it was a better course not to protect any federal law or regulation from potential state-level control than to set limits and find that "any implementation of this amendment immediately gets thrown into a court."

Georgetown's Barnett agreed.

Barnett has in the past drafted language that does limit the reach of an amendment. One of a series of proposed "federalism" amendments in Barnett's earlier Forbes article is the specification that Congress would retain the power "to regulate harmful emissions between one state and another," but the choice here was to leave all federal laws and regulations subject to repeal. (Barnett made that same choice when his 2009 version of the Repeal Amendment did not protect any area of federal law or regulation from state-level action, but his earlier proposal required a higher threshold of 75 percent of the states for repeal of a law or regulation to take effect).

Barnett had this assurance for those worried that the amendment might be used to repeal major federal legislation regarding civil rights, environmental rules, or business regulation. “Those laws are generally popular. And laws that are popular are not going to get two-thirds of the legislatures wanting to repeal them.”

Those laws, of course, have not always been popular, and some are not popular now.

Greg Marx contributed reporting.