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Conservatives seek to amend U.S. Constitution through state action

By MELISSA MAYNARD / Stateline.org

WASHINGTON -- Last week, with little fanfare, the Virginia House of Delegates approved a truly radical piece of legislation. It passed a "Repeal Amendment" to the U.S. Constitution that would give the states veto power over any enactment of Congress.

Not only did the Repeal Amendment win a majority in the Virginia House, it did so with the backing of Republican Speaker William Howell and Republican Gov. Robert McDonnell. The legislation is unlikely to go any further, because the Democratic-controlled state Senate has shown no interest in taking it up. But the event was a demonstration of the renewed activism toward the U.S. Constitution that has been emerging among conservatives in state legislatures.

Marianne Moran, executive director of the organization that is pushing the Repeal Amendment nationally, says that the effort is partly about the need to rein in out-of-control federal spending and unfunded mandates imposed on the states, and partly a reaction to the new health care law.

"Repeal is a popular word right now," she says, "and that has not hurt our momentum."

The details of the U.S. Constitution are getting closer scrutiny at the state level than they have in a long time, thanks in large part to the tea party movement that has sprung up all over the country. The emphasis is on stricter interpretation of the original language and the intent of the framers.

A surprising side effect of this push is that some of the same proponents are advocating other amendments to the Constitution that would fundamentally change the structure of government in the United States. And they are doing it in state legislatures, rather than in Congress, where constitutional amendments usually are originated.

Part of this is the work of the American Legislative Exchange Council (ALEC), a quietly influential national organization of conservative state lawmakers and business leaders, which has launched a broad initiative to "restore federalism in the United States." That effort includes model language for eight constitutional amendments. The Repeal Amendment is one of them.

Among the other ALEC-endorsed amendments currently being circulated to state lawmakers nationwide are a call for a constitutional convention to discuss unfunded federal mandates imposed on the states; a federal balanced budget requirement; and an amendment requiring a vote of the people before Congress can raise taxes, increase the federal deficit or spend beyond a certain level.

David Biddulph, who is heading the push for the latter proposal, which is called the "Vote on Taxes" amendment, says amending the Constitution is necessary because the courts have failed to preserve the rights of states as outlined in the original document. Biddulph, who has a picture of the Constitution on his business card and believes it to be a sacred document, devotes most of his time these days to pushing for the changes.

"The fact is," he says, "the Constitution has been changed innumerable times by all three branches of government without any sort of input from our founders."

Biddulph and others point to the 17th amendment, which when enacted in 1913 took the power to elect U.S. senators away from state legislatures and put it in the hands of the public.

"There is no formal state check on federal power anymore," complains Randy Barnett, a professor of legal theory at Georgetown University and a senior fellow at the libertarian Cato Institute.

It is Barnett who came up with the concept behind the Repeal Amendment. Barnett says that because the courts have done a poor job of upholding states' constitutional rights, a structural change enforced by legislators rather than the courts provides the best chance of restoring the balance of power in the federal system.

Historically, it has been Congress that proposed constitutional amendments. But Article V of the Constitution also lays out a mechanism by which two-thirds of the states can propose an amendment by sending Congress a petition. States have petitioned Congress for amendments in the past, and this has been effective in a way. When there has been significant national support, Congress has sent the amendments back to the states for their approval before the two-thirds threshold could be reached. This is largely because of a fear of the next step - an "amendments convention" that some worry could turn into a free-for-all constitutional convention.

One solution to this that is now being proposed - dubbed the "Madison Amendment" - would allow states to circumvent the need for a convention by agreeing upon specific language that would be submitted to Congress in the form of a proposed amendment.

Roman Buhler, who leads the organization that is pushing for this approach, says it wouldn't actually change the Constitution. But he says it would help ensure that the courts adhere to the original intent of the founders as made clear by James Madison and

Alexander Hamilton in the Federalist Papers and other historical documents.

"The way to prevent any risk and empower the states is to put into clear language what Madison and Hamilton always thought the states had the ability to do," he says.

Right now, prospects for approval of any of these approaches seem a long way off at best. In general, supporters still represent a small cadre of conservative legislators. Governors and even many Republican legislative leaders have generally shied away from them.

Still, the proposals are not going to go away. Backers of the Repeal Amendment appear to have the most mainstream support: Organizers such as Marianne Moran claim to have the backing of legislators in 14 states who have introduced or will be introducing legislation this year.

Virginia House Del. Joseph Morrissey, a Democrat and a former constitutional law professor, responds that the push for the Repeal Amendment in Virginia is a misguided expression of opposition to the federal health care law. Federalism as designed by the Founding Fathers is alive and well, he says, as evidenced by the myriad challenges to the health care law currently working their way through the court system.

"We don't monkey around with the Constitution lightly, and that's the way the Founding Fathers designed it," he says. "What they're proposing is radical and dangerous and unpatriotic."