

## The States That Can Say No

Conservative legislators take lessons on how to subvert the feds.

By David Weigel

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"How many of you know something about the Second Amendment?" asked Randy Barnett. This was a rhetorical question. Barnett, the Georgetown law professor who has spent the last few years researching ways for states to opt out of federal mandates, was speaking to conservative state legislators gathered in Washington for the American Legislative Exchange Council's post-election meeting, and they were spending their third consecutive day boning up on federalism.

In response to Barnett's question, every hand went up. No one had any questions about the right to bear arms.

"Well, the Article Five convention process is like a gun in the Constitution," he said. He's referring to how "the Legislatures of two thirds of the several States" are allowed to call conventions and propose amendments. "It's a loaded gun, in the Constitution, put in the hands of state legislators to use for good and to use for ill."

The legislators nodded their heads and took notes. An Arizona state senator scribbled on the handout she got for the

session: *Art 5, 2/3 of states to propose*. It wasn't a new idea, just one that has never been tried. According to Barnett, this was not because the convention was such an implausible idea. It was because the states hadn't ever been so threatened.

"Now, the question you have to ask yourself is: Are we living in a really happy, tranquil time where everything is going pretty well and we don't want to rock the boat, and therefore we don't want to pick up our guns? We want to keep them in the drawer because it's not time? Or are we living in a different time in which the federal government is coming at us with its constitutional powers as interpreted by the Supreme Court, and it's time to open up the drawer in which our Article Five powers are, and take that out, and start brandishing it to ward off the attack of

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the people who are trying to break into your homes? I think that time is now."

Last month, Republicans gained a majority of governorships, around 680 seats in state legislatures, and a record number of other statewide offices—attorneys general, secretaries of state. In some states, like New Hampshire, they have majorities large enough to override gubernatorial vetoes. Plenty of the new members won election on Tea Party platforms, promising to fight back against President Obama's army of Feds and their new regulations.

But how can they do it? The mission of ALEC was to inform hundreds of state legislators (organizers wouldn't put a number on how many attended; there were about 50 at Barnett's workshop) what threats they were about to confront, how the Obama administration would try to slip past them, and how they could roll back or obliterate federal mandates.

This was revelatory stuff for the legislators. Daniel Knodl, a second-term state assemblyman from Wisconsin, attended the conference with five of his 25 new Republican peers. The tips he was getting about how to challenge the federal government were new to all of them. Barnett's vision had been catching on, and some legislators had been aware of the law professor's proposed "Repeal

Amendment," but they were introduced for the first time to ideas like interstate compacts between states that refused to enforce health insurance mandates—compacts that could theoretically supersede laws passed by Congress.

"I'm not a constitutional scholar by any means," said Knodl. "A lot of this is interesting to me. We're learning what power the states really have."

Are they learning about tactics that will actually work? The neo-nullification theories on display at ALEC aren't taken seriously by liberal constitutional scholars. On Friday, Ian Millhiser of the Center for American Progress rebutted the interstate-compact concept by pointing out that the Supreme Court, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, ruled that state compacts do, in fact, need the approval of Congress.

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That doesn't stop the conservative scholars from trying. At last week's event, Nick Dranias, director of the Center for Constitutional Government at Arizona's libertarian Goldwater Institute, told legislators to look at using local taxpayer courts to challenge federal laws. "How many here would have liked taxpayers to get a crack at the GM bailout?" he asked. "I'm not promising you that cases like that are going to win, but I am saying you have better odds there than you have in state courts."

But asking whether these new ideas are feasible is almost beside the point. The first goal of the new legislators will be to do what Barnett was talking about: Make it clear, immediately, that Republican-run states won't accept subservience to the federal government. They'll do this at a time when a Republican-run House will not pass any new legislation to bail out state governments. In 2009, many Republicans in the states said they didn't want the obligations attached to stimulus or Medicare funds, but they were outnumbered and had to take it. The extra money won't be there in 2011; the old obligations will be ripe for attacking.

It's not just Republicans who want to see how far this can go. At another event last week held in the bowels of another Washington hotel, Oregon's incoming

Gov. John Kitzhaber was asked what, if anything, the new Tea Party-infused House of Representatives could do for Democrats.

"Now is the time for us to ask them to put their money where their mouths are," said Kitzhaber, flanked by other new Democratic governors, "and provide states with some of the flexibility to innovate, without dealing with some of these antiquated regulations that don't make sense in the 21st century."

Kitzhaber is only adjusting to new terms. Barnett and the other conservative lawyers making their cases to the new class of elected Republicans are defining the terms. "You have the ability to restrict yourselves from accepting conditional grants," Dranias told legislators. "There's nothing that stops states from doing that. I'd suggest doing that in every state."

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