Further Thoughts On The Repeal Amendment

DOUG MATACONIS · THURSDAY, DECEMBER 2, 2010 · 18 COMMENTS

Dana Milbank weighs in today with some thoughts about the so-called "Repeal Amendment" **which I wrote about yesterday** and, along with the numerous comments my post generated, Milbank's piece raises some issues worth expanding on:

> The mechanics of the amendment are also a bit odd. It would allow the repeal of any federal law – from civil rights to health care – if two-thirds of the states say so. But that could mean that the 33 smallest states, which have 33 percent of the population, have the power to overrule the 17 largest states, which have 67 percent of the population.
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> Then there's the unfortunate echo of nullification — the right asserted by states to ignore federal laws they found objectionable – and the "states' rights" argument that was used to justify slavery and segregation.
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> The man who thought up the amendment, Georgetown Law professor Randy Barnett, intended no such thing. "States are every bit as subject to abusing their power as the federal government," he told me in his office Wednesday. Barnett, a Chicago native who is affiliated with the libertarian Cato Institute and wants to limit restrict government at all levels, said he would oppose the amendment himself if he thought it could be used to restore discrimination. "There was never two-thirds of states that supported slavery or supported segregation," he reasoned. "At best it was half."

Glenn Reynolds slaps Milbank a little for arguing against the proposed amendment on the basis that it would upset the Constitutional balance between the Federal government and the states:

> The amendment process, after all, is *part of the Constitution*. The Framers had no illusions that they were creating perfection, and believed in the

> sovereignty of the people and in the power of the people to revise the Constitution as needed, through the process they created. The idea that the text of the Constitution should be revised only through judicial reinterpretation is a modern conceit, and one that does no honor to the Framers at all.

nn Althouse **agrees with Reynolds:**

> Since the **Repeal Amendment, proposed by Randy Barnett**, can easily be portrayed as an effort to return to something closer to the balance of power provided for in the original Constitution, it is pretty silly to portray yourself as brimming with respect for the Founders when what you really support is the shift of power to the national government that occurred over the long stretch of time, a shift that the courts have allowed to take place.

rofessor Reynolds makes a valid point, and Professor Althouse is right that the elationship between the Federal Government and the states has changed drastically om the way it was envisioned by the Founders.

art of that change, of course, occurred because of the passage of the 14th and 15th mendments, which gave the Federal Government significant authority over the the ates when it came to due process, equal protection of the laws, and voting rights, and ıe 17th Amendment, which altered the manner in which Senators were selected. All of ıese significantly altered the relationship between the Federal Government and the ates, and those alterations were done in what is, as Instapundit himself points out, a erfectly Constitutional manner.

's also true, of course, that a whole series of Supreme Court decisions has also ontributed to the changed relationship between the Washington and the states. Some of ıose are based on wildly incorrect interpretations of the Commerce Clause, others, owever, are simply a natural outgrowth of the **Incorporation Doctrine,** which pplied the provisions of the Bill of Rights to the states. Because of that doctrine, the upreme Court has ruled that states are bound by the provisions of the **Fifth, Sixth, eventh,** and **Eighth** Amendments in criminal matters, that they **cannot engage in nreasonable searches or searches without a warrant,** that they must **comply ith the provisions of the First Amendment,** and that they **cannot impose a lanket ban on the ownership of handguns.** All of these restrict the power of the ates, but they do so in a manner which actually increases and helps to protect ıdividual liberty.

inally, the Civil War itself was the beginning in a change in the way Americans thought f their country. Where it used to be the case that people thought of themselves primarily s residents of their state, Americans today tend to think of themselves as Americans rst. On top of all that, a long history of movement from place to place that people don't ecessarily think of the state where they live as "home" any more. For better or worse, oing back to the Founders "original intent" on this issue is impossible simply because o much has changed over the past 223 years.

/hich brings us to the Repeal Amendment, the related concept of "nullification," and the ıtire idea of "state's rights."

art of my concern about the Repeal Amendment is that American history is replete with vidence that states can be as great a threat to liberty as the Federal Government, erhaps even more so considering that they have the ability to have so much more uthority over the daily lives of citizens. More often than not, the assertion of states's ghts has been in support of causes that actually harm individual liberty.

hat history begins with the **Nullification Crisis of 1832,** when South Carolina

purported to declare a Federal import tariff unconstitutional and took steps to prevent Federal agents from collecting tariffs on goods entering through the Port of Charleston. Though the matter was resolved, it set the nation down a road toward secession that resulted in the bloodiest war in American history. After the Supreme Court's decision in **Brown v. Board of Education,** ten Southern states used the doctrine of nullification, and the related concept of **interposition,** to attempt to resist efforts desegregate school and refuse to enforce the Court's decision. In **Cooper v. Aaron,** the Supreme Court held that **such efforts were unconstitutional:**

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of Marbury v. Madison, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this Constitution." Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State . . . ." Ableman v. Booth, 21 How. 506, 524.
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> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery . . . ." United States v. Peters, 5 Cranch 115, 136. A Governor who asserts a **[358 U.S. 1, 19]** power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, "it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases . . . ." Sterling v. Constantin, **287 U.S. 378, 397** -398.

In other words, if nullification of the type that the Repeal Amendment contemplates actually existed, we would no longer live in a Federal system, but in something more closely resembling the Articles of Confederation. Since the Constitution was written to *replace* the Articles, it's clear that the Founders never intended to give the states the power to decide for themselves what the Constitution means and to randomly choose to ignore Federal laws based on that interpretation. Amending the Constitution to give that power legitimacy as the Repeal Amendment suggests strikes me as a both a bad, and an outdated, idea.

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About Doug Mataconis

Doug is an attorney in private practice in Northern Virginia. He holds a B.A. in Political Science from Rutgers University and J.D. from George Mason University School of Law. He joined the staff of OTB in May, 2010 and also writes at **Below The Beltway**. Follow Doug on **Twitter** | **Facebook**

Comments

Incoming House Majority Leader Endorses Plan To Destroy Constitution says:
Thursday, December 2, 2010 at 16:51

[...] Welcome Instapundit readers. Two thoughts. First, I've written a follow-up piece on the Repeal Amendment that you ought to check out. Second, I think there's some confusion about the "destroy [...]

Steve Plunk says:
Thursday, December 2, 2010 at 18:12

I don't understand how repeal of a federal law could infringe upon liberty. In almost all cases laws are used to limit liberty.

These are extraordinary times and it should not surprise anyone that new ideas will emerge. Now that the idea is out there having discussions like this is exactly how it's supposed to work. I see Doug's point that the potential for mischief with such an amendment is there but we already have criminal mischief taking place in terms of deficits and debt.

Of course much of this debate is a result of the health care reform process and how the federal government rammed through something we still haven't figured out. Those sorts of abuses could be threatened with nullification and Congress forced to do things right.

Brian Knapp says:
Thursday, December 2, 2010 at 18:35

Professor Reynolds makes a valid point, and Professor Althouse is right that the relationship between the Federal Government and the states has changed drastically from the way it was envisioned by the Founders
I was going to go on a screed about The Federalist papers, the architects, and the Articles and such, but then you said:
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