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THE WALL STREET JOURNAL.
WSJ.com

NOTABLE & QUOTABLE | JANUARY 5, 2011

Notable & Quotable

Law Prof. Randy Barnett on Rep. Rob Bishop's recent introduction of the "Repeal Amendment."

Law Prof. Randy Barnett writing Monday in the Washington Examiner:

Rep. Rob Bishop, R-Utah, has introduced into Congress a very simple and clear amendment to the U.S. Constitution. Called the Repeal Amendment, it reads:

'Any provision of law or regulation of the United States may be repealed by the several states, and such repeal shall be effective when the legislatures of two-thirds of the several states approve resolutions for this purpose that particularly describe the same provision or provisions of law or regulation to be repealed.'

In short, the legislatures of two-thirds of the states can repeal any federal law or regulation. . . . The Repeal Amendment seems to have touched a nerve on the left.

First, the Washington Post's Dana Milbank played the race card. "[T]here'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."

But this is imaginary. Undermining civil rights is simply not on the agenda of anyone who favors this. Besides, to reach the two-thirds threshold to repeal any law would require the support of lots of blue states as well as red states, from different parts of the country. . . .

The only objection of substance concerns the theoretical possibility that two-thirds of the least populous states, representing less than half of the nation's population, could stymie legislation backed by a majority.

Although our Constitution is as much about protecting the minority from the tyranny of the majority as it is about majoritarian rule, this scenario is highly unlikely. . . .

Realistically, repeal will only happen when the 535 persons comprising Congress plus the president are grossly out of step with public opinion, or when Congress has messed with the internal operation of state governments in ways that are out of public view.

Besides, the proposal has a built-in safety valve: Congress can re-enact anything the states manage to repeal.

So the strongest objection to the Repeal Amendment is that it is too modest to check runaway federal power. But, like the president's veto power, the threat of repeal would deter Congress from interfering with states.