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Two Interesting But Entirely Unrelated Posts

Randy Barnett • August 29, 2011 11:40 pm

I have been working on a new edition of my constitutional law casebook and traveling this summer, so have not had time for much blogging. Now I am getting organized for my Contracts course at Penn. Still, I thought I would break radio silence by passing along links to two unrelated blog posts I found interesting.

The first is by Brian Leiter in the nature of ad hominem arguments: [What an “Ad Hominem” Argument Is and Isn’t](#). Here is how it begins:

We take a break from our regularly scheduled programming for a brief detour into a subject that is occasionally addressed in the philosophy blogosphere, and is standard fare in “informal logic” or “critical reasoning” classes: namely, the ad hominem argument, what it is, and why it is fallacious with respect to the truth of what someone says, but not necessarily with respect to whether they are reliable or whether one is justified in believing them. There was not a single fallacious ad hominem in my post last week, and while the fact that the random know-nothings that populate cyberspace didn’t understand that, it was slightly more surprising that one or two law professors made the same mistake. So perhaps this can be an educational moment. (Those who already know what an actual ad hominem fallacy is can move on!)

Just as its title promises, Brian clearly explains what an ad hominem argument is, and is not—something very useful to know in these days of plentiful personal attacks. Read the whole thing.

The second is [Constitutional Structure Matters: A Response to Larry Tribe](#) by Ilya Shapiro and Chaim Gordon responding to an argument by Larry Tribe criticizing the Eleventh

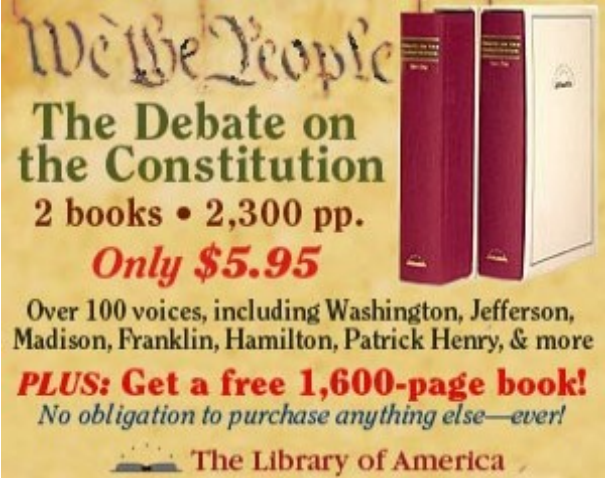
Circuit's decision finding the individual mandate unconstitutional. Here is how it ends:

Under modern jurisprudence, essentially the only check on Congress's taxing and spending powers under the General Welfare Clause (as opposed to its regulatory power under the Commerce Clause) is political. So yes, Professor Tribe, there is a constitutional reason for depriving Congress of the power to do in one step what it could surely do in two other steps: to maintain that remaining constitutional qua political check. Indeed, the very reason why Congress adopted the individual mandate was because it lacked the political will — it feared political accountability too much — to impose single-payer universal coverage, where the government would first impose a tax on everyone and then provide health care (at this point it's no longer "insurance") to everyone.

To accomplish the same result without having to impose significant new taxes — as President Obama famously promised there would not be — Congress tried to evade political accountability through the individual-mandate mechanism. That's why the Eleventh Circuit wisely declined to grant Congress the power to move a significant part of its spending "off budget" and "mandate that individuals enter into contracts with private insurance companies for the purchase of an expensive product from the time they are born until the time they die."

The rest of the post is also worth reading.


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