The Volokh Conspiracy

Comment on Kerry-Lieberman Climate Bill

Jonathan H. Adler • May 17, 2010 10:52 am

I am a sometime-contributor to the *National Journal*'s Energy & Environment Expert Blog. This week the focus is the Kerry-Lieberman climate change bill, the "American Power Act," and the EPA's decision to raise the threshold for stationary sources regulated under the Clean Air Act from emissions to 75,000 tons per year for carbon dioxide, even though the statute contains a far lower numerical threshold. Here is my comment:

> The American Power Act is an agglomeration of complex regulatory measures and corporate subsidies. In an effort to provide something for everyone, the bill provides little for the American people. As it stands, the bill is not in the economic nor environmental interest of the United States. Erecting an ever-more complex cap-and-trade scheme on an industry-by-industry basis invites rent-seeking and corporate gamesmanship at the expense of meaningful reductions. Directed subsidies and grants may reward powerful constituencies, but they won't encourage the innovation and deployment of transformative environmental technologies. A partial directed rebate of the revenues from carbon allowances is half of a good idea. A far better, and much simpler, approach would be the adoption of an economy-wide carbon tax from which *all* revenues are *directly* rebated to American taxpayers, with no strings attached. This is the simplest and fairest way to provide marginal incentvies for increased efficiency and carbon-use reductions without hampering economic growth.
>
> While the bill is bad, the EPA's plans are not much better. This week the EPA finalized rules purportedly designed to fulfill the agency's statutory obligation to regulate greenhouse gases as pollutants under the Clean Air Act. The rule EPA issued, however, is patently illegal and a flagrant violation of the plain text of the Act. The statute sets clear numerical thresholds for the imposition of PSD and Title V permitting requirements, and provides EPA with no authority to re-write these thresholds —

> turning 250 tons-per-year into 75,000 tons-per-year — by administrative fiat. The EPA may believe that the it is not practicable to apply the express terms of the Clean Air Act to GHGs, but that is not the agency's call to make, especially not after the Supreme Court's decision in *Massachusetts v. EPA,* which expressly rejected the argument that the CAA was unworkable for GHGs. If the EPA would like to follow a different course, it must go to Congress — and let's hope Congress can come up with something better than the APA.

Categories: Climate Change, Energy, Environment, Regulation No Comments

Interesting SCOTUS Lineup

Jonathan H. Adler • May 17, 2010 10:37 am

Among the opinions handed down today by the Supreme Court was *Abbott v. Abbott.* The case involved the question of whether a *ne exeat* clause confers a "right of custody" within the meaning of the Hague Convention on International Child Abduction. (More here.) The Court answered "yes," by a vote of 6–3, but the lineup was interesting. Justice Kennedy wrote the opinion for the court, joined by the Chief Justice and Justices Scalia, Ginsburg, Alito, and Sotomayor. Justice Stevens dissented, joined by Justices Thomas and Breyer.

Categories: Supreme Court No Comments

Life-Without-Parole Sentence for Under-18 Offender Unconstitutional, When the Crime Is Not Homicide

Eugene Volokh • May 17, 2010 10:27 am

So holds the Court, by a 6–3 vote, in *Graham v. Florida*. Hope to have more later today, when I've read the opinions, but here's one item that's likely to be quite controversial: The majority opinion (Justice Kennedy writing for the four liberals and himself) has a subsection near the end that begins,

> There is support for our conclusion in the fact that, in continuing to impose life

> without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over.This observation does not control our decision. The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But "'[t]he climate of international opinion concerning the acceptability of a particular punishment'" is also "'not irrelevant.'"

Categories: Uncategorized 10 Comments

Constitutionally Defenseless?

Randy Barnett • May 17, 2010 10:23 am

Has thirty years of political conservatives pushing "judicial restraint" left us constitutionally defenseless against an unprecedented claim of Congressional power? Judicial restraint was a judicial philosophy devised by Progressives to overcome Supreme Court resistance to the then-unprecedented growth of federal and state power during the so-called Progressive Era. After the Warren Court deviated from this restraint, it was reasserted, this time by political conservatives against liberals. Now, in the face of a renewed progressive legislative activism to expand federal power, judicial conservatives have been uncharacteristically quiet about the constitutionality of these measures. Today, on National Review Online, Colorado law professor Robert F. Nagel breaks radio silence to condemn the constitutional challenges to the individual health insurance mandate. The piece is long and you should read it all, but two points stand out.

The first is the repeated reference to "judicial power" as though judicial negation is the same as legislation. If Professor Nagel believes that judicial review is unconstitutional–as some conservatives do-let him say so. But if the judicial negation of unconstitutional legislation is a part of the "judicial power" of the United States (which is overwhelmingly supported by historical evidence, some of which is presented in my book Restoring the Lost Constitution: The Presumption of Liberty) and the courts may *ever* hold legislation unconstitutional let him explain why holding Congress to its constitutionally enumerated powers is somehow illegitimate. Yes, I know the drill. Express prohibitions and all that, but we are not talking the Ninth Amendment. The enumerated powers scheme is as "express" as the Bill of Rights.

The second is the distortion of the Supreme Court's Commerce Clause doctrine, which Professor Nagel summarizes as follows:

> The Court's general standard demands merely that the affected activity must, in the aggregate, have a substantial impact on interstate commerce. It is difficult to see how anyone could conclude that requiring millions of people to purchase medical insurance would not have such an impact.

In fact, the Supreme Court in both *U.S. v. Lopez*, and *U.S. v. Morrison* held that the "affected activity"–actually intrastate activity–must be "economic" in natural. And the Court followed this doctrine in *Gonzales v. Raich* when it held (relying on a 1966 dictionary definition) that possessing, growing, distributing a commodity such as marijuan was "economic" activity. To date, the Congress has never claimed the power to *require* that persons engage in economic activity, and consequently the Court has never upheld the constitutionality of such a power. Instead, until now, Congress has always confined itself to the regulation or

prohibition of activity.

Further, the second sentence is also inaccurate: "It is difficult to see how anyone could conclude that requiring millions of people to purchase medical insurance would not have such an impact." But it is not the "requirement" that must be shown to substantially affect interstate commerce, it is the economic intrastate activity being regulated that must affect interstate commerce–or in this case the "decision" not to engage in economic activity.

In fairness to Professor Nagel, for 60 years, law professors taught that the Supreme Court's Commerce Clause doctrine was pretty much as he describe it in his first sentence, so this is very likely how he was taught it as a law student at Yale. But that doctrine was clarified in 1995. Of course, the Supreme Court has the "power" to reverse itself and extend Congress's power beyond where it has ever gone before, as Professor Nagel would have it do. But this would be to make new law, not follow what has been said before.

Professor Nagel endorses the judicial restraint exercised by the Court in *Kelo v. City of New London* on the ground that political action in 42 states allegedly weakened the power to take property for economic development. Setting aside the fact that much of this legislation is symbolic and ineffective–as Ilya could explain better than I–it was the very prominence of the 5–4 *Kelo* decision that raised the consciousness of the American people against this abuse of the Takings power. Had the challenges been routinely turned away (as such challenges had long been turned away) the American people would not have known how precarious their property rights truly are and there would have been no political backlash–such as it was. It was only because Supreme Court had been friendly to such challenges, and the novel argument of the Institute for Justice concerning economic development takings, that the high profile refusal of the Court to enforce the Constitution could engender political action.

If the Supreme Court upholds the individual insurance mandate–as it usually upholds acts of Congress (*see e.g.* the *Comstock* decision handed down today)–it will be fundamentally redefining the relationship of citizens to the U.S. government. That too would be an exercise of "judicial power." Just one that would violate rather than follow the U.S. Constitution.

Categories: Uncategorized No Comments

Federal Government Wins *Comstock*

Jonathan H. Adler • May 17, 2010 10:12 am

This morning the Supreme Court handed down its opinion in *United States v. Comstock*, a challenge to the federal government's authority to civilly commit a "sexually dangerous" federal prisoner beyond the time of his sentence. The U.S. Court of Appeals for the Fourth Circuit held that the federal government lacked such authority within its enumerated powers. The Supreme Court disagreed, voting 7–2 to uphold the federal government's commitment power under the Necessary & Proper Clause. Justice Breyer wrote for the majority. Justices Kennedy & Alito concurred in the judgment, and Justice Thomas dissented, joined by Justice Scalia. The opinions are here. Some earlier VC posts on the case are here and here. I haven't had a chance to read the opinions yet, but given that Justice Breyer wrote the majority — and that he is such an avowed advocate of

broad federal power — I suspect this decision is a major setback for those seeking to limit the federal government to its constitutionally enumerated powers.

UPDATE: Here is how Justice Breyer summarizes the Court's rationale in the concluding portion of his opinion:

> We take these five considerations together. They include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in lightof the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope. Taken together, these considera-tions lead us to conclude that the statute is a "necessary and proper" means of exercising the federal authority thatpermits Congress to create federal criminal laws, to pun-ish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the securityof those who are not imprisoned but who may be affected by the federal imprisonment of others. The Constitution consequently authorizes Congress to enact the statute.
>
> We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution. Respondents are free topursue those claims on remand, and any others they have preserved.

Categories: Federalism, Supreme Court 1 Comment

Federal Government Has the Power to Civilly Commit Sexually Violent Predators After Federal Incarceration

Eugene Volokh • May 17, 2010 10:11 am

So the Court just held in *United States v. Comstock*, with Justices Thomas and Scalia dissenting, and Justices Kennedy and Alito concurring in the judgment. I hope to have more later today, after I have a chance to read the opinions.

UPDATE: In the meantime, here's the syllabus, from Justice Breyer's majority opinion, which is joined by the four liberals plus Chief Justice Roberts:

> (1) The Clause grants Congress broad authority to pass laws in furtherance of its constitutionally enumerated powers. It makes clear that grants of specific federal legislative authority are accompanied by broad power to enact laws that are "convenient, or useful" or "conducive" to the enumerated power's "beneficial exercise," e.g., McCulloch v. Maryland, 4 Wheat. 316, 413, 418, and that Congresscan "legislate on that vast mass of incidental powers which must beinvolved in the constitution," id., at 421. In determining whether the Clause authorizes a particular federal statute, there must be "means-ends rationality" between the enacted statute and the source of federal power. Sabri v. United States, 541 U. S. 600, 605. The Constitution "addresse[s]" the "choice of means" "primarily ... to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." Thus, although the Constitution nowhere grants Congress express power to create federal crimes beyond those specifically enumerated, to punish their violation, to imprison violators, to provide

> appropriately for those imprisoned, or to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others, Congress possesses broad authority to do each of those things under the Clause.

Continue reading 'Federal Government Has the Power to Civilly Commit Sexually Violent Predators After Federal Incarceration' »

Categories: Uncategorized 1 Comment

Now that the Government has Proved as Incompetent

David Bernstein • May 17, 2010 8:20 am

in first not preventing and then managing a man-made disaster in the Gulf of Mexico as it proved in managing the aftermath of Hurricane Katrina, can we finally put to rest the inane (not to mention counter-factual) Krugman argument that the Bush Administration's incompetence in handling Katrina was a result of the government being "run by a political party committed to the belief that government is always the problem, never the solution?"

Indeed, if we want to follow Prof. Krugman's argument to its logical conclusion, given that we have had two administrations in a row that have believed in big government and have proven incompetent, maybe having the government run by believers in government causes incompetence.

Or perhaps government just has some structural flaws that transcend the ideology of whatever party happens to be in power.

UPDATE: Amusingly, some commenters are insisting that the Bush Administration failed because it was composed of bad people who hated government but (a) the Obama Administration hasn't failed with regard to the rig (how about Nashville, then?); or (b) the failure was a result of corporate malfeasance, which somehow makes it different from a failure that resulted from a natural disaster; or (c) the Bush Administration failed because its members just didn't care about the people who lost their lives and homes under Katrina, whereas, apparently because empathy is an inherent part of being a liberal Democrat, the members of the Obama Administration really, really care.

Putting aside the partisan component, this does demonstrate a difference in mindset between (many) liberals and libertarians. Liberals tend to believe that government fails because the wrong people are in power, or the right people were not given enough power to do good. Libertarians tend to believe that government failure is a result of poor incentives and other structural problems that can sometimes be mitigated, but are always looming over government action.

Categories: Regulation 67 Comments

Do Law Schools Seek "Exciting" and "Diverse" Students?

David Bernstein • May 17, 2010 8:06 am

Berkeley Law School Dean Christopher Edley Jr. writes:

> In fact, law schools strive for an elitism that is quite democratic in comparison with many other fields. As at Yale and Harvard, we at Berkeley seek to build a campus community that is as exciting and diverse as our nation. That means a New Jersey physics major who models underwear. A single-parent firefighter medievalist from Denver. A former Navy Seal, a software designer, a late-blooming high school dropout, a dancer with published poetry. And when they are here, they teach each other, they learn to understand each other, and then they remember each other.

I'm dubious. Sure, law schools aggressively look for "diversity" in terms of recruiting students from official minority classifications (though giving preferences based on ethnicity is illegal for Berkeley under California law). But beyond that, and even at the most elite law schools (and unlike at elite private undergrads, where "exciting" applicants do get a significant leg up), admission for 80+% of students is primarily, in most cases almost exclusively, based on LSATs and GPAs. Berkeley Law School may have a physics major who models underwear, a dancer with unpublished poetry, and whatnot, but I bet they all have very high LSAT scores. If these students happen to bear any resemblance to "our nation as a whole," that's mere happenstance.

Not that there's anything necessarily wrong with focusing on grades and standardized test scores for law school admissions. I benefited from this myself; I was not nearly "exciting" or "diverse" enough to be admitted to Harvard or Yale undergrad, but did get into their law schools–but let's not confuse a system designed to diligence, intelligence, a sound educational background, and, to some extent, the wherewithal and resources to attend elite private undergrads with "democracy."

Categories: Academia 24 Comments

James Ely on Stevens, Kagan, Obama, and Property Rights

Ilya Somin • May 16, 2010 8:25 pm

Vanderbilt lawprof James Ely — a leading expert on constitutional property rights — has an interesting column on the relevance of property rights to the current Supreme Court nomination:

> In seeking a replacement for retiring Supreme Court Justice John Paul Stevens, President Obama indicated that he wanted to name someone in the Stevens mold. Among the qualities of Justice Stevens that Mr. Obama hoped to find in a successor, the president noted "a keen understanding of how the law affects the daily lives of the American people."
>
> However, in at least one important area of constitutional law — the rights of property owners — Justice Stevens' record fell woefully short of protecting the interests of average citizens. In fact, Justice Stevens consistently dismissed property rights claims and voted to strengthen government control over the lives of individuals....
>
> Justice Stevens' propensity to minimize the rights of property owners was demonstrated vividly in his opinion in the controversial case of *Kelo v. City of New London* (2005). At issue was a city economic redevelopment plan under which land acquired from residents through eminent domain would be transferred to private

> parties for the construction of new residences, stores and recreational facilities.... Pfizer Corp. helped instigate the redevelopment plan in the hope that the new facilities would benefit its planned new headquarters. The area slated for redevelopment was a middle-class neighborhood that was not blighted or dilapidated. A few of the neighbors challenged the condemnation on grounds that it was not permissible under the takings clause of the Fifth Amendment, which limits the exercise of eminent domain to "public use." Writing for the court majority, Justice Stevens rejected this argument and upheld the taking of property for economic development purposes. He stressed heavy deference to governmental determination of what amounted to public use and was especially impressed with the notion that this taking was part of a development plan....
>
> Because Justice Stevens barred courts from attempting to "second guess" the quality of a plan, as a practical matter, municipalities could easily prepare a plan that in reality benefited private interests. There is yet another problem with the Stevens opinion. The very purpose of the Bill of Rights is to safeguard individuals from abuses of governmental power. Broad deference to the officials it is intended to restrain is inconsistent with this purpose.
>
> In Kelo, Justice Stevens virtually eviscerated the public use limitation of the Fifth Amendment at the federal level. Under his reading of public use, legislators appear to have almost unlimited power to take homes and businesses for economic development. The beneficiaries likely will be corporations and others with political clout.....
>
> The framers of the Constitution and Bill of Rights believed that protection for private property was essential for self-government and individual liberty. In sharp contrast, Justice Stevens invariably manifested statist thinking about the property rights of individuals. His legacy is a testament of how far we have wandered from the constitutional vision of the framers.
>
> Hopefully Elena Kagan, Mr. Obama's nominee to replace Justice Stevens, holds a more balanced view of the importance of property rights in the American constitutional order. As in many other fields of law, however, Ms. Kagan's record with respect to property rights is a blank slate. It certainly would be appropriate for senators at Ms. Kagan's confirmation hearing to ask about her thoughts on this subject.

As I have argued previously, there is a potential for fruitful left-right alliances in this area. Many left-wing organizations and activists, including the NAACP, Rep. Maxine Waters, and Ralph Nader, vehemently opposed the Kelo decision because they correctly recognized that giving government unconstrained power to condemn property and transfer it to private parties would tend to victimize the poor, minorities, and the politically weak.

In *The Audacity of Hope*, President Obama wrote that "[]o]ur Constitution places the ownership of private property at the very heart of our system of liberty.... The result of this business culture has been a prosperity that's unmatched in human history." Unfortunately, his first Supreme Court nominee, Sonia Sotomayor, had a very poor record on property rights, as I explained in my Senate testimony at her confirmation hearings.

As Ely points out, Elena Kagan has almost no record in this field. Hopefully, her relative openness to ideas that depart from liberal orthodoxy might come into play here.

In the federal Supreme Court, property rights issues have split the justices along left-right lines over the last thirty years. But as the left-wing reaction to Kelo demonstrates, such a division is not inevitable. In some state judiciaries, liberal judges have voted to enforce tight state constitutional restrictions on eminent domain and exclusionary zoning, a point I discussed in the last part of this

article.

If he is so inclined, it is not too late for President Obama to start appointing relatively pro-property rights liberals to the federal courts. Breaking the ideological logjam that has hobbled federal judicial protection of constitutional property rights would be an admirable example of change we can believe in.

UPDATE: Readers interested in this subject should check out Ely's excellent 2005 article "Poor Relation Once More: The Supreme Court and the Vanishing Rights of Property Owners," where he critiqued several of Justice Stevens' important opinions in this area in more detail. Ely's book *The Guardian of Every Other Right* is perhaps the best general history of constitutional property rights, and is must-reading for students of the field.

Categories: Eminent Domain, Judicial Nominations, Kagan Nomination, Kelo, Post-Kelo Reform, Property Rights, Supreme Court 33 Comments

Right-leaning bloggers like dark horses better than front runners in 2012

David Kopel • May 16, 2010 7:47 pm

The online daily newspaper *The New Ledger* has debuted its "online influencers poll." It's a monthly poll "of 100 online influencers on the right. We asked leading voices from around the blogosphere, with writers from Redstate, National Review Online, The Weekly Standard, HotAir, Commentary, BigGovernment, individual bloggers, and others throughout the conservative/libertarian thinktank world to weigh in." The first poll asked about preferences for the Republican nominee for President in 2012.

Question 1 asked for ordered preferences among six candidates. Indiana Governor Mitch Daniels turned out to be the big favorite, with Tim Pawlenty and Mike Pence also faring well. Pawlenty was rarely a favorite, but he was acceptable to almost everyone as a backup choice. Mitt Romney and Newt Gingrich came in fifth and sixth.

The second question included more dark horse candidates. Paul Ryan, with 30%, ran away with first place, followed by Mitch Daniels and John Thune. Sarah Palin polled only six percent, and Mike Huckabee came in last, with zero votes.

Categories: Uncategorized 20 Comments

Mothers Against Debt

David Kopel • May 16, 2010 7:05 pm

A new grassroots organization started by my Independence Institute colleague Amy Oliver. This short video shows the growth in per-person national debt in the United States. Even when you take into account the fact that some of the increase in nominal debt is due to inflation, the tremendous increase in debt in the 21st century is frightening.

Categories: Economy 22 Comments

Congrats to the Class of 2010, and a Blogging Hiatus

Orin Kerr • May 16, 2010 6:56 pm

Today was graduation day for the GW Law Class of 2010, and I wanted to congratulate the graduating class on-blog. For that matter, congrats to the graduating classes at other law schools, too: May you all pass the bar exam and may the market for 1st year associates get back to normal. With the academic year over, I'm going off-blog for a spell to return to the position I had last year as an advisor to Senator Cornyn. Have a great summer, everyone.

Categories: Uncategorized No Comments

Sunday Song Lyric

Jonathan H. Adler • May 16, 2010 7:44 am

Paul Weller has a new album out. *NME* likes it. I'll need to give it a listen at some point (perhaps when I'm done grading exams). He's put out some good stuff solo and with The Style Council, but my heart stays with his early work with The Jam, one of my favorite bands. He penned lots of tracks to choose from for an SSL. For some reason, this morning I'm stuck on "Going Underground" — their first number one single in the UK. Here's how it begins:

> Some people might say my life is in a rut,
> But I'm quite happy with what I got
> People might say that I should strive for more,
> But I'm so happy I can't see the point.
> Somethings happening here today
> A show of strength with your boy's brigade and,
> I'm so happy and you're so kind
> You want more money — of course I don't mind
> To buy nuclear textbooks for atomic crimes
>
> And the public gets what the public wants
> But I want nothing this society's got -
> I'm going underground
> Well the brass bands play and feet start to pound
> Going underground,
> Well let the boys all sing and the boys all shout for tomorrow

Here are the full lyrics, a video, and a live performance.

Categories: Sunday Song Lyric 1 Comment

Elena Kagan's Paper Trail

Jonathan H. Adler • May 15, 2010 6:09 pm

Some commentators have suggested that Elena Kagan is a nominee without much of a paper trail. I think this is overstated on two counts. First, her academic writing is more substantive than some have given her credit for (see

here and here). Second, there appears to be a substantial amount of material from her time in the Clinton Adminsitration for the Senate Judiciary Committee to review. Documents from her tenure at the Domestic Policy Council have already been released. As Byron York reports, this is only the tip of the iceberg. There are many more documents from her time in the White House Counsel's office — documents Senators are certain to demand, citing the release of papers from John Roberts tenure in the Reagan Administration as precedent. These records will shed more light on Kagan's approach to legal and policy questions, even if they don't reveal how she is likely to approach (let alone vote upon) specific issues.

UPDATE: *Politico* reports:

> The Clinton Presidential Library is facing a mammoth task to prepare for confirmation hearings for Supreme Court Nominee Elena Kagan: processing about 160,000 pages of records from Kagan's time as a lawyer and policy adviser in the Clinton White House.
>
> The staggering page count comes from a letter President Barack Obama's White House Counsel Bob Bauer sent Saturday to Archivist David Ferriero, asking that the Archives expedite release of the files so the Senate can have them to consider Kagan's nomination.
>
> "I understand that preparing these 160,000 pages for public release will require very significant efforts," Bauer wrote. "Their availability, on an expedited schedule, is necessary to afford the Senate a reasonable opportunity to evaluate Ms. Kagan's nomination."

Categories: Kagan Nomination 22 Comments

Stormhammer Deathclaw Firebrand

Eugene Volokh • May 15, 2010 12:26 pm

Better even than Snaphappy Fishsuit Mokiligon — and certainly than Richard Smith.

Categories: Uncategorized 19 Comments

The Lawyer-Poet:

Todd Zywicki • May 15, 2010 11:23 am

An interesting profile in First Things of Michael J. Astrue, lawyer and head of the Social Security Administration, who moonlights as A.M. Juster: "formalist poet, comic versifier, and classical translator."

Categories: Uncategorized 7 Comments

A Historic Victory

Jonathan H. Adler • May 15, 2010 12:19 am

Tonight the Philadelphia Flyers overcame a 3–0 deficit to win the seventh game of their playoff series with the Boston Bruins – a series in which they trailed 3–0. In the process they became only the third NHL team to win a seven-game

series after losing the first three games, and the first such team in 35 years. Now the seventh-seeded Flyers will face the eighth-seeded Montreal Canadiens in the Eastern Conference finals — and that has to be a historic match-up as well. Go Flyers!

[Note: I went back and forth over "a historic" and "an historic," eventually settling on the former.]

Categories: Hockey 38 Comments

Miguel Estrada Writes in Support of Elena Kagan's Confirmation

Eugene Volokh • May 14, 2010 7:38 pm

Estrada, you may recall, is the brilliant conservative lawyer whose nomination for the D.C. Circuit was blocked by Democrats early last decade; his letter supporting the nomination of Elena Kagan — whom he knows from law school — is here. The letter is quite substantive and graceful, as is to be expected from Estrada, and bears reading. Here's one passage:

> [I]t brings no credit to our government, and risks affirmative harm to our courts, when our elected representatives simply swap talking points — emphasizing the same considerations they previously minimized or derided — only to revert to their former arguments as soon as electoral fortunes turn.

And one more: "As has often been said, though rarely by senators whose party did not control the White House at the time, elections have consequences."

Thanks to How Appealing for the pointer.

Categories: Kagan Nomination 207 Comments

The Battle for the Internet:

David Post • May 14, 2010 6:04 pm

Bernard Kouchner, the Foreign Minister of France and a founder of Doctors Without Borders, has an interesting but somewhat unsettling op-ed in today's New York Times. Entitled "The Battle for the Internet," it's a call to arms in

> the battle of ideas . . . between the advocates of a universal and open Internet — based on freedom of expression, tolerance and respect for privacy — against those who want to transform the Internet into a multitude of closed-off spaces that serve the purposes of repressive regimes, propaganda and fanaticism.

It's a subject dear to my heart, as you probably know; I, too, believe that preserving what the Center for Democracy and Technology aptly calls the "free, open, and innovative Internet" is of the deepest importance for the future — literally — of human society on the planet. I like where Kouchner's coming from:

> The Internet is above all the most fantastic means of breaking down the walls that close us off from one another. For the oppressed peoples of the world, the Internet provides power beyond their wildest hopes. It is increasingly difficult to hide a public

> protest, an act of repression or a violation of human rights. In authoritarian and repressive countries, mobile telephones and the Internet have given citizens a critical means of expression, despite all the restrictions.

He's right about that — at least, I agree wholeheartedly. (Libertarian blogger Adam Thierer called my book about the Net "an extended love letter to both cyberspace and Jefferson," and though I'm not entirely sure he meant it as one, I took it as a compliment. Though we academics are supposed to take the posture of ironic detachment from pretty much everything we encounter, I happen to think, and I'm happy to say to whomever is listening, that the Net is an astonishing achievement with the potential, only partly but tantalizingly realized to date, to become a true milestone in the history of human communication and a possibly unstoppable force for the spread of liberty and freedom around the globe. I realize (see Evgeny Morozov's rather peevish piece in Foreign Policy, denying that the Net has been (or can be) a force for good in the world) that it has not instantly transformed everything it touches into the Earthly Paradise — but that's a pretty high standard to hold it to.

And I'm certainly with him when he writes:

> However, the number of countries that censor the Internet and monitor Web users is increasing at an alarming rate. The Internet can be a formidable intelligence-gathering tool for spotting potential dissidents. Some regimes are already acquiring increasingly sophisticated surveillance technology. If all of those who are attached to human rights and democracy refused to compromise their principles and used the Internet to defend freedom of expression, this kind of repression would be much more difficult.

The Net is under siege, and will require some serious work to keep it free and open. But somehow, I can't work up much enthusiasm for Kouchner's call to action:

> Multilateral institutions like the Council of Europe, and nongovernmental organizations like Reporters Without Borders, along with thousands of individuals around the world, have made a strong commitment to these issues. No fewer than 180 countries meeting for the World Summit on the Information Society have acknowledged that the Universal Declaration of Human Rights applies fully to the Internet, especially Article 19, which establishes freedom of expression and opinion. And yet, some 50 countries fail to live up to their commitments.
>
> We should create an international instrument for monitoring such commitments and for calling governments to task when they fail to live up to them. We should provide support to cyber-dissidents — the same support as other victims of political repression. We should also discuss the wisdom of adopting a code of conduct regarding the export of technologies for censoring the Internet and tracking Web users.
>
> These issues, along with others, like the protection of personal data, should be addressed within a framework that brings together government, civil society and international experts.

It sounds a bit, to my ears, too much like asking the UN to run the Net (which, as readers of my work know, we tried once before, with notable lack of success).

Kouchner also makes me nervous when he begins his list of what the "enemies of the Internet" are up to this way:

> Extremist, racist and defamatory Web sites and blogs disseminate odious opinions in real time. They have made the Internet a weapon of war and hate. . . . Violent

> movements spread propaganda and false information.

There are many threats out there to the free and open Internet, but I don't regard "extremist, racist, and defamatory Web sites," or "blogs disseminating odious opinions," as among them. Although Kouchner has ringing words for freedom of expression — "Freedom of expression, said Voltaire, 'is the foundation of all other freedoms.' Without it, there are no 'free nations.'" — somehow I think that his agenda is to the contrary. Freedom of expression without "extremist, racist, and defamatory web sites" and "odious opinions" is not freedom of expression — not in my book, anyway. Something tells me that when the "World Summit on the Information Society" gets its hands on the Net, true freedom of expression on the Net will not be high on their list of preferred outcomes.

So, on the one hand, I'm glad Kouchner has sounded the alarm; he ends his piece by declaring that "the defense of fundamental freedoms and human rights must be the priority for governance of the Internet. It is everyone's business" and I think he's right — importantly right — about that. But I think we need — rather desperately — alternate governance models to deal with this problem, alternate models that move in a direction away from the UN and towards something that better reflects the wishes and desires of the world's people, not the world's governments. It's not going to be easy, though I'm working on it . . .

Categories: Cyberspace Law, Freedom of Speech, Internet 60 Comments

Virginia Circuit Court Opinion Issues Preliminary Injunction Shutting Down a Web Site, Reverses Itself the Next Day

Eugene Volokh • May 14, 2010 5:21 pm

I just noticed this decision, from a few weeks ago — *Burfoot v. May4thCounts.com* (Va. Cir. Ct. Apr. 22) (Poston, J.):

> Today the Court sua sponte vacates the Order of April 21, 2010. In that Order the Court granted plaintiffs Motion for Entry of a Temporary Injunction prohibiting the defendants from using a website entitled "May4thCounts.com" and ordered the removal of the website from the internet. The Court also directed the plaintiff to effect service of process on the defendants and continued the action for July 7, 2010, for further proceedings. Under the Injunction Order's terms, the action will be advanced on the docket upon the motion of any defendant.

Continue reading 'Virginia Circuit Court Opinion Issues Preliminary Injunction Shutting Down a Web Site, Reverses Itself the Next Day' »

Categories: Cyberspace Law, Freedom of Speech 8 Comments

Epstein, Murphy, and Kerr On the Third-Party Doctrine

Orin Kerr • May 14, 2010 5:14 pm

Last year I published an article, *The Case for the Third-Party Doctrine*, 107 Mich.

L. Rev. 561 (2009), defending the widely-criticized Fourth Amendment rule that what a person discloses to a third party cannot retain Fourth Amendment protection.

The *Berkeley Technology Law Journal* has now published three essays on the third party doctrine at least in part in response to my article. First, Richard Epstein wrote an essay offering his own take on the third-party doctrine, and at times responds directly to some of my ideas. Second, Erin Murphy wrote a short reply that is largely a critical response to my article. Finally, the BTLJ published a short response by me to both Epstein and Murphy.

Unfortunately, the BTLJ website is about a year out of date, so the exchange hasn't been posted there yet. However, I have posted my short reply article here: *Defending The Third-Party Doctrine: A Response To Epstein And Murphy*, 24 Berkeley Tech. L.J. 1229 (2009).

If you have access to Westlaw or the paper journal, you can find the Epstein and Murphy articles here: Richard A. Epstein, *Privacy and the Third Hand: Lessons from the Common Law of Reasonable Expectations*, 24 Berkeley Tech. L.J. 1199 (2009); Erin Murphy, *The Case Against the Case for the Third-Party Doctrine: A Response to Epstein and Kerr*, 24 Berkeley Tech. L.J. 1239 (2009).

Categories: Fourth Amendment 3 Comments

PC

Eugene Volokh • May 14, 2010 3:39 pm

A tip for lawyers (and others): The standard phrase for certain kinds of unsigned court opinions is "per curiam," not "per curium" — except perhaps in science fiction stories involving decisionmaking by artificially intelligent radioactive-element-driven quantum computers.

A quick Westlaw search through Allcases (date > 5/1/2010) confirms that "per curium" is still nonstandard: "Per curiam" gets 1427 hits, "per curium" only 10. (Usage among judges is probably the best yardstick for lawyers to measure themselves against, since judges are the people whom lawyers are trying to influence in their filings.) Yet "per curium" is common enough to be warning people against: A search through the Brief-All file (date > 1/1/2010) reports 88 instances of "per curium."

Categories: Uncategorized 36 Comments

Error in Many Versions of the United States Constitution

Eugene Volokh • May 14, 2010 1:27 pm

No, really (or so it seems to me). I've just noticed that — according to what I take to be the original handwritten copy of the Constitution, posted at the National Archives — the Archives' official transcript, as well as the Commission on the Bicentennial, Cato, and Heritage pocket reprints, include a mistranscription of the original.

The Date Clause of Article VII mentions the date the Constitution was signed, and also gives the year as counted from "the Independence of the United States of America" (perhaps an echo of the British legal practice of using regnal years?). Or so say the print and online versions; the handwritten text actually says "Independ**a**nce" (emphasis added). Check it and see.

Incidentally, a search through Gale's Eighteenth Century Collections Online database, selecting only the "Law" category and the date range 1775–1799, yields 65 hits for "independance" and 518 for "independence," so "independance" was either a variant spelling or an unusually common error, even in presumably edited printed text.

The Archives transcript also says "Done in Convention ..." where the original says "done in Convention ..." But other copies of the constitution seem to faithfully use the lower-case "done."

The LexisNexis pocket version, by the way, omits the Date Clause altogether.

UPDATE: I talked to the National Archives, and they seem to agree with me that this should be corrected in their official transcript.

Categories: Uncategorized 28 Comments

Create a Constitutional Theory Out of *This*

Eugene Volokh • May 14, 2010 12:57 pm

In the Date Clause of article VII (see the high-resolution version of the original), which gives the date as "the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven," the "Eighty" is capitalized but the rest of the year is not. Aha!

Categories: Uncategorized 56 Comments

Kagan's record on guns

David Kopel • May 14, 2010 11:45 am

Discussed by Brian Darling, of the Heritage Foundation, in an article this morning for *Human Events*. Hopefully the confirmation hearings will provide an opportunity for Kagan to explain whether her views of the Second Amendment have evolved or changed since her days as a clerk or a Clinton staffer.

Categories: Kagan Nomination 59 Comments

"We Cannot Ask a Man [Being Considered for the Supreme Court] What He Will Do"

Eugene Volokh • May 14, 2010 10:56 am

Whenever a Supreme Court confirmation hearing approaches, this quote from Abraham Lincoln tends to come up (e.g., here):

> We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it.

I thought I'd pass along, though, the full context. The quote, as best I can tell, comes from George S. Boutwell's Reminiscences of 60 Years of Public Affairs, vol. 2, p. 29 (1902), who reports that Lincoln had said (apropos the nomination of Salmon P. Chase to be Chief Justice):

> [W]e wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders. We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore we must take a man whose opinions are known.

A somewhat different meaning, it seems to me.

And one more twist: While Lincoln rightly estimated Chase's views on emancipation, Chase ultimately voted against Lincoln's expectations — contrary to his supposedly "known" "opinions" — to provide the swing vote striking down the legal tender legislation that Chase himself had helped create. (That decision was itself reversed within a year using the votes of two newly appointed Justices. Some say those two Justices were themselves appointed because they were seen as likely to uphold the legal tender law; and they, unlike Chase, complied with the expectations.)

Categories: Kagan Nomination 20 Comments

Why Jews and Catholics on the Supreme Court?

David Bernstein • May 14, 2010 10:28 am

I'll join Orin in some speculation. For the dominance of Catholics appointed by Republicans, I think Alkali, commenting on Orin's thread, identifies part of the reason:

> A Republican president can't win by nominating a Protestant: if the nominee is a conservative evangelical, that could be controversial with moderate voters; if the nominee is not a conservative evangelical, that would create problems with the conservative base. That dynamic strongly favors nominating a Catholic or Jewish justice. The fact that no current Republican-nominated justice is Jewish is very likely just an artifact of chance — had Douglas Ginsburg's nomination succeeded, it wouldn't be the case.

But we can't neglect the issue of Harvard/Yale laws schools dominance of the nominee pool. (There were many fair criticisms of Harriet Miers, but the fact that she didn't attend Harvard or Yale like her potential USSC colleagues was not one of them!) Both schools have a lot more conservative Catholics than conservative Protestants, and of course Catholics are much more likely to be conservative Republicans, and especially to have anti-abortion sympathies, than are Jews. If I'm remembering correctly, a Catholic was the president of the Federalist Society all three of the years I attended Yale.

As for Jews and the Democrats, Yale was at least one-third Jewish when I attended, and I think has been so for a long time (less true at Harvard, but Harvard's Jewish quotas were long gone by Kagan's time). (A proposed song at the annual satirical show, eventually and wisely thought better of, was "Two

Jews for every Goy" sung to the tune of "Two Girls for every Boy.") The Jews, overall, were probably not much more liberal than the class as a whole, but let's say that 40% of the graduating liberal Democrats were Jews. The percentage would be slightly higher if we limit ourselves to graduating liberal Democratic women.

The percentage would likely be even higher if we limited ourselves to "liberal Democratic women who graduated from Yale or Harvard and chose to pursue careers at the upper echelons of the legal profession in the Boston-Washington corridor," which is where all the Justices have come from since Clarence Thomas [the Boston-Washington corridor, that is]. With those background statistics in mind, and given Obama and Clinton's eagerness to find women for the Court, 75% of the Democratic appointees on the Court being Jewish doesn't seem outside the range of normal statistical chance.

Categories: Judicial Nominations, Kagan Nomination 115 Comments

Kagan's New View of Confirmation Hearings? — Take Two

Jonathan H. Adler • May 14, 2010 9:21 am

As an academic, Elena Kagan thought recent Supreme Court confirmation hearings were a "hollow charade." In a prior post, I noted reasons to suspect Elena Kagan might not adhere to this view once it's her turn before the Senate Judiciary Committee. But perhaps I spoke too soon. Jan Crawford reports:

> In her private meetings with Senators, Elena Kagan is making a point that's pretty hard to dispute. But in doing so, she's turning up the pressure — on herself.
>
> Kagan, the no-nonsense solicitor general, is criticizing past Supreme Court hearings as lacking in substance — and the performance of at least one justice now on the Court, according to senators who talked to her. . . .
>
> Specter said today that Kagan didn't back away from her views, and stood by the word "charade." . . .
>
> Kohl said Kagan told him in their meeting she hopes the hearings will be a "teachable moment." . . .
>
> So Kagan is setting a high bar and raising expectations. Of course, as Kohl said, she hasn't talked about the hearings yet with her White House confirmation team. But already, these senators are expecting to hear a lot more from her than they have from past nominees.
>
> And that, as Kohl put it, would be a real "public service."

UPDATE: It also appears that in her meetings with Senators, Elena Kagan has been expressing her views about the Supreme Court's recent decision in *Citizens United*. One might expect Kagan to talk about this case because she worked on it as Solicitor General, and argued it before the Supreme Court, but if this is a basis for her to talk about her *personal* opinions on the case, then this would seem to apply to other cases as well, and would preclude her from simply passing off the positions she has taken as SG as those of the administration and avoiding additional comment. If she is willing to talk about her personal views of *Citizens United*, she should be willing to talk about her personal views about other cases

as well.

Categories: Judicial Nominations, Kagan Nomination 21 Comments

Why Catholics and Jews?

Orin Kerr • May 14, 2010 2:10 am

A lot of people have noted that if Elena Kagan is confirmed to replace Justice Stevens, the Supreme Court will have no Protestants for the first time. Instead, there will be six Catholics and three Jews. About 24% of adult Americans are Catholic, and less than 2% of adult Americans are Jewish. That raises an interesting question: Why Catholics and Jews? Is it just a coincidence?

I really don't know. But hey, this is a blog, so here's some amateurish speculation anyway. On one hand, I suspect some of it *is* just a coincidence. On the other hand, some of it likely reflects the pool of lawyer-intellectual types from which Supreme Court nominees are often drawn. Generally speaking, Jews are heavily overrepresented in the law geek set. This blog is a good example: Most of us VC bloggers are Jewish. And given that most American Jews tend toward the political left, it shouldn't be overly surprising, in an environment in which there is no Jewish "seat" or quota, that three of the last four nominees of Democratic Presidents are Jewish.

Perhaps the more interesting question is the religious affiliation of the Republican nominees. All five GOP-nominated Justices are Catholic. Granted, that uniformity masks some nuance. For example, Justice Thomas apparently rejoined the Catholic church in the late 1990s, after being raised Catholic and then later attending an Episcopal church instead. Nonetheless, it's pretty notable that all five of the GOP-nominated Justices on the post-Stevens Court self-identify as Catholic.

How did that come to be? I'm not really sure. One possible hypothesis is that this is an indirect consequence of *Roe*. Given the Catholic church's strong pro-life position, and the fact that Supreme Court nominees are not directly asked their view of such matters, affiliation with the Catholic church may be seen by Republican Administrations and conservative judicial groups as signaling a likelihood of a nominee's view toward abortion rights while not providing any direct evidence that could itself cause controversy (given the wide range of views on abortion among self-identified Catholics). Or maybe not — I don't know.

Perhaps it's largely a coincidence? Any ideas?

Categories: Uncategorized 196 Comments

Where Spike Lee and I Agree

Ilya Somin • May 13, 2010 11:06 pm

There aren't many events in the world of sports that could make both me and inveterate Boston-hater Spike Lee happy. Tonight's great Celtics series win over LeBron James and the Cleveland Cavaliers was one of them.

It's not quite equal in importance to my areas of agreement with Dennis Kucinich, Hillary Clinton, and Barack Obama. But it's much more fun. On to the conference finals!

Categories: Sports and Games 12 Comments

Gov. Pawlenty's Court Picks

Jonathan H. Adler • May 13, 2010 10:50 pm

Minnesota Governor Tim Pawlenty announced two appointments to the Minnesota Supreme Court today. First, he elevated sitting associate justice Lorie Skjerven Gildea to Chief Justice, replacing outgoing Chief Justice Eric Magnuson. Second, as some of my co-bloggers have noted below, he tapped University of Minnesota law professor David Stras to fill the vacancy created by Justice Gildea's elevation. With these two appointments, Governor Pawlenty continues to place his stamp on the Minnesota Supreme Court, as he has named four of the court's seven justices. These appointments also suggest that Governor Pawlenty takes judicial appointments seriously and recognizes the policy consequences of the court's composition. (For my prior post on this subject, see here.)

The rationale for the Governor's picks is not difficult to discern. Elevating a sitting associate justice makes sense. A sitting justice understands the current court, the personalities of the justices, and is likely in better position to provide immediate leadership on the court than would an outsider. It also broadens the range of potential appointees for the newly created associate justice spot. And, as Gov. Pawlenty had named three of the court's associate justices, it was only logical he would elevate one of his own appointees rathern than one of the remaining justices.

I also think it was quite shrewd for the Governor to use the second pick on a younger appointee to provide an intellectual spark on the court. Professor Stras is a well-regarded academic and is exceptionally smart. His academic experience could have an effect beyond his single vote in individual cases. The two appointments, in tandem, enable the Governor to influence the Court in two ways — simultaneously providing more senior leadership in line with his judicial philosophy while also adding intellectual depth to the court's deliberations. In this regard, Pawlenty's appointments remind me of President Reagan's decision to elevate then-associate justice William Rehnquist while nominating Antonin Scalia at the same time.

Finally, on a personal note, I'd like to join Dale and Orin in congratulating David Stras on his appointment. I've known David for over ten years, and I have always been impressed by his intellect, open-mindedness, and good humor. He has insights beyond his years, and should be a significant asset to the Court. It's a tremendous honor and opportunity for a legal academic to receive such an appointment, even if he will have to stand for re-election. That won't be fun, but it can't be much worse than grading exams.

Categories: Judicial Nominations 8 Comments

Looks Like Now We Need a Commercial Financial

Protection Agency:

Todd Zywicki • May 13, 2010 8:24 pm

Martin Robins has a good summary today of some of the flaws of the financial regulatory reform bill in his column "Financial Regulations Miss The Target." He notes, among other points, that by the end of the year at least 11 percent of securitized commercial loans are expected to be 60 days or more past due.

Sounds like we need a Commercial Financial Protection Agency to protect all those poor unfortunate commercial real estate developers who were taken advantage of and are now in foreclosure. Unfortunately the acronym "CFPA" has already been taken.

I'm not certain that I necessarily agree with all of the details of what Robins says, but he makes some strong points, especially about how many of the proposals under consideration would not do anything to address real problems but could create more cost and uncertainty for markets.

Categories: Uncategorized 20 Comments

Louisiana Parish Government Suing Online Commenters for Libel

Eugene Volokh • May 13, 2010 6:03 pm

Yup — not just a particular government official, but Jefferson Parish itself is claiming that some anonymous commenters are spreading lies about the Parish (the Louisiana equivalent of a county) that damage the reputation of the Parish. It's not clear to me from the story exactly what the comments about the co-plaintiff, Steve Theriot (Interim President of the Parish), said, and whether they would reasonably be understood as making false statements of fact or just expressing derogatory opinions. But the one thing that is clear, from the landmark *New York Times Co. v. Sullivan* decision, is that "prosecutions for libel on government" (which in context clearly refers to civil lawsuits for libel as well) have no "place in the American system of jurisprudence."

Seems to me like an anti-SLAPP special motion to strike should easily prevail, at least against the Parish, and thus require the Parish to pay the defendants' costs and attorney fees. Thanks to Charles Stiegler for the pointer.

Categories: Freedom of Speech 35 Comments

Speech Restrictions Aimed at Making Sure People Act in "Right-Thinking" Ways

Eugene Volokh • May 13, 2010 5:52 pm

The comment thread in my "down the memory hole" speech restrictions post reminded me of what I wrote ten years ago about the California Supreme Court's 1971 decision in *Briscoe v. Reader's Digest* (which has since been overruled, based on intervening Supreme Court First Amendment precedent). Here's my

criticism of *Briscoe* (some paragraph breaks added, and some punctuation adjusted):

[R]evealing Briscoe's identity eleven years after his crime, the court said, served no "public purpose" and was not "of legitimate public interest"; there was no "reason whatsoever" for it. The plaintiff was "rehabilitated" and had "paid his debt to society." "[W]e, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime" by revealing his past.

"Ideally, [Briscoe's] neighbors should recognize his present worth and forget his past life of shame. But men are not so divine as to forgive the past trespasses of others, and plaintiff therefore endeavored to reveal as little as possible of his past life." And to assist Briscoe in what the court apparently thought was a worthy effort at concealment, the law may bar people from saying things that would interfere with Briscoe's plans.

Judges are of course entitled to have their own views about which things "right-thinking members of society" should "recognize" and which they should forget. But it seems to me that under the First Amendment members of society have a constitutional right to think things through in their own ways.

Continue reading 'Speech Restrictions Aimed at Making Sure People Act in "Right-Thinking" Ways' »

Categories: Freedom of Speech, Privacy 11 Comments

A Law-Professor-Blogger Becomes A Justice

Orin Kerr • May 13, 2010 5:10 pm

Okay, we're talking a state Supreme Court Justice, but still: As Dale Carpenter notes below, University of Minnesota law professor David Stras, who blogs at SCOTUSblog and Empirical Legal Studies, has been appointed to the Minnesota Supreme Court. You can watch the announcement here, with Stras starting at the 9:30 mark.

My congratulations to David — that's pretty cool. Of course, don't expect other law professor bloggers to become judges any time soon. Federal judgeships and most state appellate judgeships require either confirmation by the legislature or, in some state cases, an election. Law professors generally aren't very good running for the latter, and blogging regularly about controversial legal topics is just about the worst way to smooth the path for the former. However, as I understand Minnesota law, this is an appointment that the Governor was free to make that does not require any confirmation.

Categories: Uncategorized 6 Comments