

Crazy Stuff: The KC Catholic Key on Kagan

Joe Feuerherd | Jun. 30, 2010 NCR Today

Last week, [I offered some praise \[1\]](#) for "The Catholic Key Blog," the online presence of the Kansas City-St. Joseph archdiocesan newspaper edited by Jack Smith. Smith offers some provocative and generally well-written commentary that reflects the views of the conservative bishop he serves (or so it seems) and a good number of the faithful of the church.

But there's provocative and then there's "well, bizarre." Supreme Court nominee Elena Kagan, [Smith writes this week\[2\]](#), is "thoroughly totalitarian." (You have to scroll down a bit to see this posting.)

Accusing someone in political life of being "thoroughly totalitarian" is, to my mind, the equivalent of charging that someone is a fascist or communist, a Holocaust denier, a racist, an anti-Catholic, an anti-Semite, a bigot; someone, in other words, whose ideas and actions make them, by definition, illegitimate, not worthy of consideration in the civil discussion. Someone to be shunned.

It is a serious accusation, or at least it should be, because, in fact, there are people in public life actually worthy of the title. And when the charge is made casually it diminishes the impact when it is made substantively.

Smith bases his "thoroughly totalitarian" calumny on an exchange Kagan, the Solicitor General of the United States, had yesterday with Oklahoma Senator Tom Coburn (R-OK). Coburn, though he's not a lawyer, engaged Kagan in a classic law school hypothetical. Can the government, he asked Kagan, pass a law requiring Americans to eat three vegetables and three fruits a day? Moreover, can defense of such a statute be based on the Constitution's commerce clause, an expansive reading of which Coburn generally opposes.

Kagan, to her credit, said the statute envisioned by the Coburn hypothetical sounded like a "dumb law." Then, channeling conservative Justice Antonin Scalia, she noted that just because a law is stupid doesn't mean it is necessarily unconstitutional.

Kagan and Coburn then engaged in a rather arcane discussion of the elasticity, or lack thereof, of the commerce clause. Coburn was making a point that ultimately had little to do with vegetables and fruits. Rather, his metaphorical garden was about health care, particularly provisions of the recent reform package that require Americans who do not have health insurance to either purchase such coverage or be charged a fine/tax if they don't. Several state attorneys general are planning to sue the Federal government on this very question and the defense is expected to be based on the Federal government's right to regulate commerce "in this case the purchase of health care" under the commerce clause.

As it happens, a broad reading of the commerce clause is pretty standard stuff in the world of jurisprudence. There a reason for this: The wording of the clause itself is, well, pretty expansive. Congress, says the Constitution, has the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." It's hardly a classic liberal vs. conservative or even states' rights vs. federalist issue.

Kagan is by almost all accounts a pretty smart lawyer, as are her future colleagues on the Supreme Court. Each

of them, no doubt, would find some constitutional basis to oppose such a stupid law (the right not to associate with broccoli?) But, again, the question was a hypothetical designed to ferret out her views on health care mandates asked in the context of an ongoing debate about the scope of the Commerce Clause. And that's how she answered it.

None of which Smith seems to understand. ??with this nominee, Obama has put forward a totalitarian who thinks even the power to decide your dinner menu is absolutely Uncle Sam's,? he writes.

Does he really believe this nonsense?

And how does it serve the Church (which is what I assume Smith sees his role as) to have a *de facto* spokesman for one of the nation's more controversial bishops, former Diocesan newspaper editor Robert Finn, slinging loony political epithets at the next associate justice of the Supreme Court?

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