

# George F. Will: Here are some tough queries Kagan might like to answer

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Given Elena Kagan's aversion to "vapid and hollow" confirmation hearings devoid of "legal analysis," beginning Monday she might relish answering these questions:

- It would be naughty to ask you about litigation heading for the Supreme Court concerning this: Does Congress have the right, under its enumerated power to regulate interstate commerce, to punish the *inactivity* of not purchasing health insurance? So instead, answer this harmless hypothetical: If Congress decides that interstate commerce is substantially affected by the costs of obesity, may Congress require obese people to purchase participation in programs such as Weight Watchers? If not, why not?

- The government having decided that Chrysler's survival is an urgent national necessity, could it decide that Cash for Clunkers is too indirect a subsidy and instead *mandate* that people buy Chrysler products?

- If Congress concludes that ignorance has a substantial impact on interstate commerce, can it constitutionally require students to do three hours of homework nightly? If not, why not?

- Can you name a human endeavor that Congress cannot regulate on the pretense that the endeavor affects interstate commerce? If courts reflexively defer to that congressional pretense, in what sense do we have limited government?

- In Federalist 45, James Madison said: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite." What did the Father of the Constitution not understand about the Constitution? Are you a Madisonian? Does the doctrine of enumerated powers impose *any* limits on the federal government? Can you cite some things that, *because of that doctrine*, the federal government has no constitutional power to do?

- Is it constitutional for Arizona to devote state resources to enforcing federal immigration laws?

- Is there anything novel about the Arizona law empowering police officers to act on a "reasonable suspicion" that someone might be in the country illegally?

- The Fifth Amendment mandates "just compensation" when government uses its eminent domain power to take private property for "public use." In its 2005 Kelo decision, the court

said government can seize property for the "public use" of transferring it to wealthier private interests who will pay more taxes to the government. Do you agree?

- Should proper respect for precedent prevent the court from reversing *Kelo*? If so, was the court wrong to undo *Plessy v. Ferguson*'s 1896 ruling that segregating the races with "separate but equal" facilities is constitutional?
- In 1963, President John Kennedy said Congress should "make a commitment ... to the proposition that race has no place in American life or law." Was he right?
- In 1964, Sen. Hubert Humphrey, a principal sponsor of that year's Civil Rights Act, denounced the "nightmarish propaganda" that the law would permit preferential treatment of an individual or group because of race or racial "imbalance" in employment. What happened?
- William Voegeli, contributing editor of the *Claremont Review of Books*, writes: "The astonishingly quick and complete transformation of the Civil Rights Act of 1964, from a law requiring all citizens be treated equally to a policy requiring that they be treated unequally, is one of the most audacious bait-and-switch operations in American political history." Discuss.
- In a 2003 case affirming the constitutionality of racial preferences in law school admissions, Justice Sandra Day O'Connor said: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." If you are a sitting justice in 2028, do you expect to conclude that such preferences can no longer survive constitutional scrutiny because they no longer serve a compelling public interest?
- The president is morose about the court's *Citizens United* decision holding that the First Amendment, which says Congress shall make "no law" abridging freedom of speech, means no laws abridging a corporation's freedom to speak, including nonprofit advocacy corporations such as the National Rifle Association and the Sierra Club. The court called it "censorship" for government "to command where a person may get his or her information or what distrusted source he or she may not hear." Do you agree?

Just wondering.

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