Written by **Jack Kenny** on July 13, 2011

Does Anyone Understand the Law?

Take Richard Blumenthal, *please*. The Connecticut Democrat is a freshman member of the U.S. Senate but hardly a novice in the fields of law and politics. He is a 65-year-old graduate of two of the nation's most prestigious Ivy League institutions, Harvard College and Yale Law School. He is a former member of the U.S. House of Representatives and served for two decades as Connecticut's Attorney General. All of which makes a recent statement by Blumenthal in a Senate debate all the more remarkable and all the more embarrassing, one hopes, to Harvard, Yale, and the sensible people of Connecticut. (I despair of finding anything capable of embarrassing the U.S. House or Senate.)

The comment came during the Senate debate over the nomination (since withdrawn) of University of California law professor Goodwin Liu to the Ninth Circuit Court of Appeals. Republicans successfully filibustered against the nomination, citing, among other things, the professor's lack of experience as either a judge or trial lawyer. Yet Sen. Blumenthal said the following in support of the nominee, a native-born American of Taiwanese parentage: "There is no Asian-American member on the Ninth Circuit Court of Appeals. There should be, and Professor Liu ought to be that judge."

Thus judicial nominations, in Blumenthal's view, should be subject to affirmative-action scrutiny to ensure that all (or is it just favored?) ethnic and racial minorities are represented in judicial robes. And why stop at racial and ethnic classifications? Are there "gay" Americans on the Ninth Circuit Court of Appeals? Any left-handed lesbians? What about religious classifications? Are members of the Hare Krishna sect represented by any of the judges on our federal courts?

But courts were not meant to be representative institutions, nor do they exist to advance a social or political agenda, however noble or worthy the goals might appear. In 2010, the U.S. Supreme Court ruled in *Citizens United v. Federal Elections Commission* that significant portions of the McCain-Feingold Campaign Reform Act were unconstitutional, holding in a 5-4 decision that the lofty goal of protecting the political process from the corrupting influence of money does not trump the First Amendment's guarantee of the freedom of speech. Last month, the court made a similar ruling in declaring Arizona's Citizens Clean Elections Act unconstitutional. The law's thinly disguised purpose was to "level the playing field" among candidates by preventing candidates with more money from outspending opponents less generously funded. In short, its purpose was to discourage candidates from spending more money than the state deemed appropriate on political speech.

It did this by providing that any money spent by a privately funded candidate in excess of the amount allotted to his or her publicly funded opponent would be matched by an increased taxpayer subsidy to the candidate already receiving public funds. Spending by independent organizations in support of a

privately funded candidate would also trigger matching donations of taxpayer funds to the candidate's publicly funded opponent(s).

Such laws are often called incumbent protection acts, since challengers typically need to spend more money than those already in office, who start with an advantage in name recognition and greater access to free media coverage. Yet a candidate's efforts to raise more money to buy more ads are considerably burdened when those efforts prove as fruitful for his opponent as they are for himself. As columnist George Will noted: "When Arizona Democrat Janet Napolitano, now secretary of homeland security, was running for governor, she joked that President George W. Bush, in effect, held a fundraiser for her. When he spoke at a fundraiser for her privately funded opponent. She received $750,000 in matching tax dollars."

In another 5-4 decision, Chief Justice John Roberts wrote that the Arizona law "substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment." Justice Elena Kagan, the court's newest member, wrote for the dissenting justices that the law "promotes the values underlying both the First Amendment and our entire Constitution by enhancing the 'opportunity for free political discussion to the end that government may be responsive to the will of the people.'"

The First Amendment, however, was not written to protect the "will of the people," but "the freedom of speech," which is often opposed by the popular will. Courts exist to protect such rights, not to protect the state handicapping of elections. And not, as Senator Blumenthal might wish, to provide an affirmative-action program for judges or a full-employment plan for lawyers.