



Elena Kagan:

Nominee for the Supreme Court of the United States

June 17, 2010

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INTRODUCTION

On May 10, 2010, President Obama nominated Elena Kagan to fill the vacancy left by Justice Stevens’s retirement at the end of the Supreme Court’s current term.¹ If confirmed, Kagan will be the

¹ Press Release, The White House, Presidential Nomination Sent to the Senate, 5/10/2010 (May 10, 2010), <http://www.whitehouse.gov/the-press-office/presidential-nomination-sent-senate-5102010>; Press Release, The White House, Remarks by the President on the Retirement of Justice Stevens and on the West Virginia Mining Tragedy (April 9, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-retirement-justice-stevens-and-west-virginia-mining-tragedy>.

first Justice in nearly forty years to join the Court without previous judicial experience.² Therefore, it is important to examine her writings, briefs, and public statements carefully to ascertain her views on the role of a judge and the rule of law. In fact, then-Senator Obama, in an October 14, 2005, podcast on Harriet Miers's nomination to the Supreme Court, said:

Some of you have been interested in finding out what's going on with the Harriet Miers nomination. One thing that I do think is important is that the White House recognize that in the absence of any judicial record on her part, in the absence of any significant work that she appears to have done related to constitutional issues—that she's going to need to be more forthcoming and the White House is going to [need to] be more forthcoming than they were during the Roberts nomination. Ms. Miers is completely a blank slate.³

According to *The Plum Line*, Obama also put out this statement on the Miers nomination:

“Harriet Miers has had a distinguished career as a lawyer, but since her experience does not include serving as a judge, we have yet to know her views on many of the critical constitutional issues facing our country today. In the coming weeks, we'll need as much information and forthright testimony from Ms. Miers as possible so that the U.S. Senate can make an educated and informed decision on her nomination to the Supreme Court.”⁴

Obama's own nominees should be held to the standard that he has set forth. In the absence of a judicial record, it is critically important that the Senate Judiciary Committee carefully question Kagan to ascertain how she would approach the role of judging and interpreting the Constitution if confirmed.

EDUCATION, PROFESSIONAL AND ACADEMIC BACKGROUND

Elena Kagan was born on April 28, 1960, in New York, New York.⁵ In 1981, she received her bachelor's degree from Princeton University, *summa cum laude*.⁶ She subsequently earned a Master's of Philosophy as Princeton's Daniel M. Sachs Graduating Fellow at Worcester College at Oxford University in 1983.⁷ Kagan then received her J.D. from Harvard Law School, graduating *magna cum laude* in 1986.⁸ While at Harvard, Kagan served as supervising editor of the Harvard Law Review.⁹ During the summer of 1986 she worked as a research assistant for Harvard Law School Professor

² Josh Gerstein & Carol E. Lee, *President Obama to Senate: Act Fast*, POLITICO.COM, May 9, 2010, <http://www.politico.com/news/stories/0510/36989.html>.

³ *Obama Flashback: A Supreme Court Nominee With No Judicial Experience Requires Extreme Scrutiny*, BREITBART.TV, <http://www.breitbart.tv/obama-flashback-a-supreme-court-nominee-with-no-judicial-experience-requires-extreme-scrutiny/> (last visited May 15, 2010).

⁴ Posting of Greg Sargent to The Plum Line, *Flashback: Obama Raised Concerns About Miers' Lack of Judicial Experience*, WASH. POST, http://voices.washingtonpost.com/plum-line/2010/05/flashback_obama_said_harriet_m.html (May 12, 2010, 15:00 ET).

⁵ *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to be Associate Attorney General of the United States and Elena Kagan Nominee to be Solicitor General of the United States*, 111th Cong. 48 (2009) (Questionnaire for Non-Judicial Nominees: Elena Kagan), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:55828.pdf [hereinafter *Solicitor General Hearing*].

⁶ United States Dept. of Justice, Office of the Solicitor General, <http://www.justice.gov/osg/meet-osg.html> (last visited May 10, 2010).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Laurence Tribe.¹⁰ She then clerked for Judge Abner Mikva at the U.S. Court of Appeals for the D.C. Circuit.¹¹ From 1987 to 1988, she clerked for Supreme Court Justice Thurgood Marshall.¹² From July 1988 to November 1988, she worked as a researcher for Michael Dukakis's presidential campaign.¹³ According to the Senate questionnaire that she filled out for her solicitor general nomination, Kagan primarily worked on "'defense research'—i.e., preparing responses to attacks on Governor Dukakis's record."¹⁴

From 1989 to 1991, Kagan worked for the D.C.-based law firm, Williams & Connolly.¹⁵ In 1991, she became an assistant professor at the University of Chicago Law School, where she became a tenured law professor in 1995.¹⁶ During the summer of 1993, she worked as a special counsel to the Senate Judiciary Committee.¹⁷ She was appointed by then-Senator Joseph Biden to that position and, as special counsel, worked on Justice Ginsburg's nomination to the Supreme Court.¹⁸

In 1995, Kagan was named associate counsel to President Bill Clinton.¹⁹ From 1997 to 1999, she served as deputy assistant to the President for domestic policy and deputy director of the Domestic Policy Council.²⁰ Kagan "played a key role in the Executive Branch's formulation, advocacy, and implementation of law and policy in areas ranging from education to crime to public health."²¹ In 1999, President Clinton nominated Kagan to serve on the U.S. Court of Appeals for the District of Columbia, but her nomination was "never acted upon."²² In 1999, Kagan served as a visiting professor at Harvard Law School where she became professor in 2001.²³ In 2003, Kagan became the first female dean of Harvard Law School.²⁴ In March 2009, Kagan was confirmed as solicitor general of the United States by a vote of 61–31.²⁵

POSSIBLE JUDICIAL PHILOSOPHY

Because Kagan has not served as a judge, it is difficult to ascertain with certainty what approach she would take to judging if confirmed. She has offered some clues, however, in connection with her nomination as solicitor general and in her earlier writings.

¹⁰ *Solicitor General Hearing*, *supra* note 5, at 49 (Questionnaire for Non-Judicial Nominees: Elena Kagan).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 78.

¹⁴ *Id.*

¹⁵ *Id.* at 49.

¹⁶ *Id.*; United States Dept. of Justice, Office of the Solicitor General, <http://www.justice.gov/osg/meet-osg.html> (last visited May 10, 2010).

¹⁷ *Solicitor General Hearing*, *supra* note 5, at 49 (Questionnaire for Non-Judicial Nominees: Elena Kagan).

¹⁸ *Id.* at 77, 79.

¹⁹ *Id.* at 49.

²⁰ Elena Kagan, Questionnaire for Nominee for the Supreme Court, United States Senate Committee on the Judiciary, at 2, <http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-PublicQuestionnaire.pdf>.

²¹ Harvard Law School Lambda Second Annual Gay and Lesbian Legal Advocacy Conference "Don't Ask, Don't Tell," 14 DUKE J. GENDER L. & POL'Y 1173, 1229 (2007) (introduction of Kagan, who was moderating a panel, by Harvard Law student Alexis Caloza).

²² *Solicitor General Hearing*, *supra* note 5, at 77 (Questionnaire for Non-Judicial Nominees: Elena Kagan).

²³ *Id.* at 49.

²⁴ Lauren A.E. Schuker, *People in the News: Elena Kagan*, THE HARV. CRIMSON, June 5, 2003, <http://www.thecrimson.com/article.aspx?ref=348422>.

²⁵ Josh Gerstein & Carol E. Lee, *President Obama to Senate: Act Fast*, POLITICO.COM, May 9, 2010, <http://www.politico.com/news/stories/0510/36989.html>.

As a college student, Kagan clearly demonstrated liberal political leanings. In an article for *The Daily Princetonian* written shortly after the November 1980 election, Kagan, who had worked on Democrat Liz Holtzman's senatorial campaign, wrote about her feelings after Holtzman's defeat. In the article, she referred to Alfonse M. D'Amato, the Republican who defeated Holtzman, as "an ultra-conservative machine politician" ²⁶ In discussing the races in which Democrats lost, she wrote:

Reagan I expected, but Symms, Abdnor, Quayle and Grassley I did not. Even after the returns came in, I found it hard to conceive of the victories of these anonymous but Moral Majority-backed opponents of Senators Church, McGovern, Bayh and Culver, these avengers of "innocent life" and the B-1 Bomber, these beneficiaries of a general turn to the right and a profound disorganization on the left. ²⁷

She concluded her article on a somewhat positive note, holding out hope for a liberal comeback, while at the same time expressing skepticism for conservative solutions:

Looking back on last Tuesday, I can see that our gut response—our emotion-packed conclusion that the world had gone mad, that liberalism was dead and that there was no longer any place for the ideals we held or the beliefs we espoused—was a false one. In my more rational moments, I can now argue that the next few years will be marked by American disillusionment with conservative programs and solutions, and that a new, revitalized, perhaps *more* leftist left will once again come to the fore. I can say in these moments that one election year does not the death of liberalism make and that 1980 might even help the liberal camp by forcing it to come to grips with the need for organization and unity. But somehow, one week after the election, these comforting thoughts do not last long. Self-pity still sneaks up, and I wonder how all this could possibly have happened and where on earth I'll be able to get a job next year. ²⁸

Kagan's political leanings during her college years are also alluded to in her senior thesis. In the acknowledgement portion of her senior thesis on "Socialism in New York City, 1900-1933," Kagan thanked her brother Marc, noting that his "involvement in radical causes led [her] to explore the history of American radicalism in the hope of clarifying [her] own political ideas." ²⁹ While the bulk of the thesis is a historical study of the aforementioned topic, Kagan concluded her paper by pondering why a radical or socialist party has never become a major force in American politics:

In our own times, a coherent socialist movement is nowhere to be found in the United States. Americans are more likely to speak of a golden past than of a golden future, of capitalism's glories than of socialism's greatness. Conformity overrides dissent; the desire to conserve has overwhelmed the urge to alter. Such a state of affairs cries out for explanation. Why, in a society by no means perfect, has a radical party never attained the status of a major political force? Why, in particular, did the socialist movement never become an alternative to the nation's established parties?

²⁶ Elena Kagan, *Fear and Loathing in Brooklyn*, THE DAILY PRINCETONIAN, Nov. 10, 1980, available at <http://www.dailyprincetonian.com/2010/05/03/26082/>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Elena Kagan, *To the Final Conflict: Socialism in New York City, 1900-1933* (April 15, 1981) (unpublished senior thesis, Princeton University) (on file with the Mudd Library, Princeton University).

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Through its own internal feuding, then, the SP exhausted itself forever and further reduced labor radicalism in New York to the position of marginality and insignificance from which it has never recovered. The story is a sad but also a chastening one for those who, more than half a century after socialism's decline, still wish to change America. Radicals have often succumbed to the devastating bane of sectarianism; it is easier, after all, to fight one's fellows than it is to battle an entrenched and powerful foe. Yet if the history of Local New York shows anything, it is that American radicals cannot afford to become their own worst enemies. In unity lies their only hope.³⁰

The Senate should inquire into the statements quoted above. The Senate Judiciary Committee should ask Kagan if she still hopes for a "more leftist left" and whether she believes that the judicial branch should be used to achieve or support liberalism and liberal policy positions. She should be further questioned about what imperfections in American society she was alluding to in her thesis, and what role she believes the judiciary should play in addressing those imperfections. For example, in response to a written question from Senator Specter following her nomination hearing for solicitor general asking whether she "believe[d] that the Constitution, properly interpreted, confers a right to a minimum level of welfare,"³¹ Kagan responded:

The Constitution has never been held to confer a right to a minimum level of welfare. For a very short period of time around 1970, some courts and commentators suggested that welfare counted as a fundamental interest for purposes of equal protection review. This period of constitutional thought, however, came to a close very quickly, as the courts determined that welfare policy was not best made by the judicial branch. This determination comported with this nation's traditional understanding that the Constitution generally imposes limitations on government rather than establishes affirmative rights and thus has what might be thought of as a libertarian slant. I fully accept this traditional understanding, and if I am confirmed as Solicitor General, I would expect to make arguments consistent with it.³²

While a solicitor general is well-advised to argue consistent with "traditional understandings" of the Constitution, under a more liberal understanding of the role of a Supreme Court Justice in interpreting the Constitution, Kagan would not be as confined and could revisit this "traditional understanding" and decide that the Constitution does confer a right to a minimum level of welfare. Therefore, it is critical that the Senate Judiciary Committee, in reviewing her nomination, question Kagan about her views of the role of a judge and the proper methods of constitutional interpretation.

This line of questioning is even more relevant in light of Kagan's master's thesis at Oxford, entitled, "The Development and Erosion of the American Exclusionary Rule: A Study in Judicial Method." In the thesis, Kagan chastised the Warren Court for failing to "develop a single, constitutionally-based rationale for the exclusionary rule,"³³ noting that "[b]ecause the Warren Court

³⁰ *Id.* at 127, 129-30.

³¹ *Solicitor General Hearing*, *supra* note 5, at 168 (Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter).

³² *Id.*

³³ Elena Kagan, *The Development and Erosion of the American Exclusionary Rule: A Study in Judicial Method* 118 (April 20, 1983) (unpublished master's thesis, Oxford University) (on file with the Bodleian Library, University of Oxford), available at http://www.fed-soc.org/docLib/20100518_OxfordThesis.pdf [hereinafter Oxford Thesis].

did not adequately support the exclusionary rule, the Burger Court has been able slowly to strangle it.”³⁴ Kagan concluded her thesis with the observation that “[t]he history of the exclusionary rule thus suggests that the way in which a court explains a decision matters quite as much as the decision itself.”³⁵ She noted that “the law of the future is likely to be the law that is founded upon cogent, coherent and constitutionally-based argument.”³⁶ While few would argue with that statement, Kagan went on to state that “even the most meticulously crafted and closely analyzed opinion may not endure the test of time: A future court may overturn such an opinion on the ground that new times and circumstances demand a different interpretation of the Constitution.”³⁷ This troubling statement raises the question: What “new times and circumstances” demand, in Kagan’s mind, a “different interpretation of the Constitution”?

Kagan then proceeded to discuss how judges should reach their decisions, and in doing so blurred the line between lawmaker and judge. When creating law, maintaining high ideals and goals is certainly important. Those ends, however, are for the electorate and their representatives to decide:

As men and as participants in American life, judges will have opinions, prejudices, values. Perhaps most important, judges will have goals. *And because this is so, judges will often try to mold and steer the law in order to promote certain ethical values and achieve certain social ends. Such activity is not necessarily wrong or invalid.* The law, after all, is a human instrument—an instrument designed to meet men’s needs. . . . Concern for ethical values thus has an important role to play in the judicial process. For in the last analysis, the law is a very human enterprise with very human goals.

And yet, no court should make or justify its decisions solely by reference to the demands of social justice. *Decisions should be based upon legal principle and reason; they should appeal no less to our intellectual than to our ethical sense.* If a court cannot justify a ruling in terms of legal principle, then that court should stay its hand: *No judge should hand down a decision that cannot plausibly be grounded in principles referable to an accepted source of law.* If, on the other hand, a court can justify a ruling in terms of legal principle, then that Court must make every effort to do so. Judicial decisions must be based, above all else, on law and reason.³⁸

Kagan’s position is troubling for several reasons. First, she does not reject the practice of judges “mold[ing] and steer[ing] the law in order to promote certain ethical values and achieve certain social ends.” As Ed Whelan has noted,

It simply does not follow from the proposition that law is “an instrument designed to meet men’s needs” that judges may properly “try to mold and steer the law” to promote the ethical values and social ends that they favor. One obvious alternative that Kagan passes over is that judges should accept the “instrument” of law as it has been crafted by its enactors.³⁹

³⁴ *Id.* at 119.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* 120-21 (emphasis added).

³⁹ Posting of Ed Whelan to Bench Memos, *Kagan’s Oxford Thesis*, NAT’L REV. ONLINE, <http://www.nationalreview.com/bench-memos/55818/kagan-s-oxford-thesis/ed-whelan> (May 19, 2010, 142:17).

Second, although Kagan recognized the importance of “ruling in terms of principle,” she believed that this was necessary, in part, because it gave opinions “lasting effect,”⁴⁰ not necessarily because it made them right. As Whelan has noted, reading the paragraphs together, it appears that

Kagan thinks that it’s fine for a judge to pursue his favored ethical values and social ends in interpreting the law so long as he can offer public reasons that are “plausibly . . . grounded” in legal principles. In Kagan’s usage, terms like “justify” and “be based upon” do not mean that the decision must be *right*; they mean only that it must be *plausible*. Given the broad acceptance in the modern legal culture of freewheeling methodologies and the existence of so many wrongheaded precedents, the test of mere plausibility isn’t much of a constraint on judicial willfulness.⁴¹

In fact, Kagan wrote on the next page, “Judicial opinions may well appeal to the ethical sense—but this alone is not enough. In order to achieve some measure of permanence in an ever-fluctuating political and social order, judicial decisions must be plausibly rooted in either the Constitution or another accepted source of law.”⁴² Most Americans, however, hope that judges will root their decisions in a proper reading of the Constitution, not merely a “plausible” one. Senators should question Kagan about the document and how, if at all, her views have evolved.

Nearly thirty years later, Kagan’s writings are more tempered. In written questions following the hearing on her nomination to be Solicitor General of the United States, she was asked by Senator Specter, then the ranking Republican on the Senate Judiciary Committee, as part of a larger question on “[w]hat principles of constitutional interpretation help [her] to begin [her] analysis of whether a particular statute infringes upon some individual right,” if there is “any room in constitutional interpretation for the judge’s own values or beliefs?”⁴³ She replied: “I think a judge should try to the greatest extent possible to separate constitutional interpretation from his or her own values and beliefs. In order to accomplish this result, the judge should look to constitutional text, history, structure, and precedent.”⁴⁴ When asked about “judicial activism” and if she “agree[d] with the view that the courts, rather than the elected branches, should take the lead in creating a more just society,” Kagan responded, “I do not agree with this view. I think it is a great deal better for the elected branches to take the lead in creating a more just society than for courts to do so.”⁴⁵

Despite these statements, the most telling clues about what one might expect as to Kagan’s general approach to judging appear in a book review she wrote outside of her normal scholarly

⁴⁰ Oxford Thesis, *supra* note 33, at 121. Kagan wrote,

The judge must make principled decisions for three reasons. First, only the methods of principle and reason can justify supreme judicial authority in a political democracy. Second, only those methods can guarantee that the public will continue to accept and support the Supreme Court’s role in the American system of government. Third—and most important from our point of view—only those methods can ensure that opinions will have a lasting effect.

Id. (footnotes omitted).

⁴¹ Posting of Ed Whelan to Bench Memos, *Kagan’s Oxford Thesis*, NAT’L REV. ONLINE, <http://www.nationalreview.com/bench-memos/55818/kagan-s-oxford-thesis/ed-whelan> (May 19, 2010, 14:17) (alteration in the original).

⁴² Oxford Thesis, *supra* note 33, at 121.

⁴³ *Solicitor General Hearing*, *supra* note 5, at 168 (Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter).

⁴⁴ *Id.*

⁴⁵ *Id.* at 167.

interests in First Amendment and administrative law. In *Confirmation Messes, Old and New*,⁴⁶ Kagan reviewed a book by Professor Stephen Carter, *The Confirmation Mess*,⁴⁷ in which Carter argued that the Senate, in confirming Supreme Court Justices, ought to limit their questioning to matters of technical competence (objective qualifications such as analytical ability, writing skills, and the like) and moral judgment and avoid questions concerning judicial philosophy and the application of that philosophy to concrete cases.⁴⁸ Kagan, however, argued that “[t]he kind of inquiry that would contribute most to understanding and evaluating a nomination is the kind Carter would forbid: discussion first, of the nominee’s broad judicial philosophy and, second, of her views on particular constitutional issues.”⁴⁹ In Kagan’s view, Carter rightly believes that both “the Senate and the President have an independent responsibility to evaluate . . . whether a person ought to serve as a Supreme Court Justice.”⁵⁰ But, “contrary to Carter’s view, the President and Senate themselves have a constitutional obligation to consider how an individual, as a judge, will read the Constitution: that is one part of what it means to preserve and protect the founding instrument.”⁵¹ Kagan concluded with this observation:

The real confirmation mess, in short, is the absence of the mess that Carter describes. . . . [T]he problem is not that senators engage in substantive discussion with Supreme Court nominees; the problem is that they do not. Senators effectively have accepted the limits on inquiry Carter proposes; the challenge now is to overthrow them.⁵²

This conclusion in itself should not be troubling. Indeed, if one takes seriously the Senator’s duty, it is fundamentally correct.⁵³ Along the way to reaching this conclusion, however, Kagan raises several red flags concerning her own understanding of the proper role of the Court and the Justices’ work; that apparent understanding is disconcerting. Kagan notes with approval Carter’s stated view that most cases before the Court require more “than the application of ‘mundane and lawyerly’ skills.”⁵⁴ Rather, these cases require “‘interpretive judgment,’” and in all such cases “‘there comes a crucial moment when the interpreter’s own experience and values become the most important data.’”⁵⁵ Kagan notes, as part of her agreement with Carter on this point, that “many of the votes a Supreme Court Justice casts have little to do with technical legal ability and much to do with conceptions of value.”⁵⁶

⁴⁶ 62 U. CHI. L. REV. 919 (1995).

⁴⁷ STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994).

⁴⁸ Kagan, *Confirmation Messes*, 62 U. CHI. L. REV. at 920-23.

⁴⁹ *Id.* at 935.

⁵⁰ *Id.* at 931.

⁵¹ *Id.* at 938.

⁵² *Id.* at 942.

⁵³ See generally *id.* at 934-35. Senators, like the President, take an oath to defend and uphold the Constitution, and it is difficult to see how Senators are acting consistently with this oath by simply rubber-stamping a President’s Supreme Court nominees without determining how those nominees are likely to treat the Constitution the Senators swore to defend. Justices Souter’s, Breyer’s, and Ginsburg’s careers provide ample evidence of the dangers of failing to conduct a searching substantive review of Supreme Court nominees. Conservative scholar Matthew Franck has endorsed Kagan’s view that Senators should focus confirmation questioning on a nominee’s judicial philosophy, understanding of the Constitution, and the application of that philosophy and understanding to specific situations. Posting of Matthew J. Franck to Bench Memos, *Stephen Carter Recycles*, NAT’L REV. ONLINE, <http://www.nationalreview.com/bench-memos/50176/stephen-carter-recycles/matthew-j-franck> (May 10, 2009, 15:50).

⁵⁴ Kagan, *Confirmation Messes*, 62 U. CHI. L. REV. at 932 (quoting CARTER, *THE CONFIRMATION MESS* 151).

⁵⁵ *Id.* (quoting CARTER, *THE CONFIRMATION MESS* 151).

⁵⁶ *Id.*

Kagan's thoughts seem to echo President Obama's statement explaining his decision to vote against confirming John Roberts to be Chief Justice. As Ed Whelan recounts, quoting another essay that he had written, "In explaining his vote against [Chief Justice] Roberts, Obama opined that deciding the 'truly difficult' cases requires resort to 'one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.'" ⁵⁷ To be fair, Kagan does not specifically mention "empathy" in her exposition of the judge's role. Yet, it is not unfair to suggest that Kagan's agreement with Obama's emphasis on the importance of "empathy" in a judge is at least implicit in her endorsement of Carter's view that a judge's "'own experience'" is crucial in deciding difficult cases. She cannot be saying that "'experience'" means simply the judge's experience in textual exegesis and application of law to fact; such a limited understanding of "'experience'" would be inconsistent with her approval of Carter's view that judging requires more "than the application of 'mundane and lawyerly skills'" (which one would think includes the skills to engage in textual exegesis and to apply law to fact). It is more reasonable to conclude that Kagan means by "'experience'" the type of real world experiences and associations that allow a judge to develop the empathy that President Obama has stated is so important to the judge's task.

Kagan does differentiate between a judge's moral character (*i.e.*, the moral values he holds personally) and other "values that matter most in the enterprise of judging." ⁵⁸ Those more relevant values are the "values embodied in the Constitution and the proper role of judges in giving effect to those values." ⁵⁹ From this, one might conclude that Kagan does not really believe that a judge's personal values should have a role in deciding cases; rather the only values the judge should rely on are those the judge finds in the Constitution.

But two things raise doubt about this conclusion: First, as was the case concerning the role of empathy in Kagan's judicial philosophy, to conclude that Kagan eschews all reliance on personal values in judging seems inconsistent with her endorsement of Carter's view that in difficult cases, "'interpretive judgment'" depends on "'the interpreter's own experience and values.'" ⁶⁰ Second, given that President Obama has clearly stated his view of the importance of a judge's "deepest values," "core concerns," "empathy," ⁶¹ and, most recently, "a keen understanding of how the law affects the daily lives of the American people," ⁶² to the task of judging, it is difficult to believe he would nominate someone for a lifetime appointment to the Supreme Court who does not to some extent share that view. There is certainly enough in Kagan's published views about the enterprise of judging to at least raise serious concern about whether she could (or even whether she would think it is necessary to) put aside her own personal values in deciding cases (or at least what she terms the difficult cases, which likely include cases involving controversial social issues). Furthermore, in an interview published in the May

⁵⁷ Posting of Ed Whelan to Bench Memos, *Ruth Marcus's Misguided Defense of the Obama Standard*, NAT'L REV. ONLINE, <http://www.nationalreview.com/bench-memos/50192/ruth-marcuss-misguided-defense-obama-standard/ed-whelan> (May 6, 2009, 8:16) (alteration in the original) (quoting Edward Whelan, *Obama's Constitution*, THE WEEKLY STANDARD, Mar. 17, 2008, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/014/849oyckg.asp>).

⁵⁸ Kagan, *Confirmation Messes*, 62 U. CHI. L. REV. at 933.

⁵⁹ *Id.* at 933-34.

⁶⁰ *Id.* at 932 (emphasis added).

⁶¹ Posting of Ed Whelan to Bench Memos, *Ruth Marcus's Misguided Defense of the Obama Standard*, NAT'L REV. ONLINE, <http://www.nationalreview.com/bench-memos/50192/ruth-marcuss-misguided-defense-obama-standard/ed-whelan> (May 6, 2009, 8:16) (internal punctuation omitted) (quoting Edward Whelan, *Obama's Constitution*, THE WEEKLY STANDARD, Mar. 17, 2008, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/014/849oyckg.asp>).

⁶² Press Release, The White House, Remarks by the President on the Retirement of Justice Stevens and on the West Virginia Mining Tragedy (April 9, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-retirement-justice-stevens-and-west-virginia-mining-tragedy>.

2004 issue of *The Metropolitan Corporate Counsel*, Kagan said, in recognizing the “inevitabl[e] . . . political aspect” to confirmation hearings,

Our courts are called upon to decide important matters—matters that often have great public impact. *The attitudes and views that a person brings to the bench make a difference in how they reach those decisions. So the Senate is right to take an interest in who these people are and what they believe.*⁶³

Moreover, even if Kagan believes the only values a judge should rely on are those the judge finds in the Constitution, that in itself is troubling. It has been a hallmark of Supreme Court jurisprudence over the last half-century or so to substitute constitutional “values” for the actual constitutional text.⁶⁴ That approach to constitutional “interpretation” is illicit because it “fails to respect the choices made by those who drafted and ratified the Constitution.”⁶⁵ Drafting a constitution (or any law) requires “determining how and to what extent to implement concretely often-conflicting principles or values,” and typically requires “difficult judgments and compromises.”⁶⁶ Those judgments and compromises are written into the Constitution’s text; to exalt constitutional “values” over the actual text “‘dishonor[s] an essential part of the enactment,’ and thus usurps power that properly belongs to the lawmaker”⁶⁷ Put another way, this constitutional “values” method of interpretation requires the judge to make policy decisions—especially, but not only, the decision of how far to extend a constitutional “value”—that the Constitution leaves to the people and their representatives. If that is Kagan’s approach to deciding constitutional cases, her nomination should cause concern even if she rejects a judge’s reliance on personal values. Of course, it may also be that the point of searching for and abstracting “values” from the Constitution’s text is to have a means of putting constitutional clothing on one’s own values. For instance, it is very likely that the Supreme Court’s discovery and abstraction of the “constitutional” value of “privacy” in *Griswold v. Connecticut*,⁶⁸ was just a means to connect the Justices’ own value judgments to something in the Constitution, no matter how tenuous that connection was. Given the general focus of her scholarship on doctrine and policy rather than constitutional text, it is not a stretch to conclude that may well be her approach. Certainly, there is more than sufficient reason to question her extensively on her judicial philosophy and her view of a judge’s task in interpreting and applying the Constitution.

These concerns about the role of “values” in Kagan’s judicial philosophy raise one other question: What values would Kagan bring to the Supreme Court or find in the Constitution? In her response to written questions following the hearing on her nomination to be solicitor general, Kagan said that she “view[s] as unjust the exclusion of individuals from basic economic, civic, and political opportunities of our society on the basis of race, nationality, sex, religion, and sexual orientation.”⁶⁹ A

⁶³ Editor Interviews Elena Kagan, Dean of Harvard Law School, *New England and Boston—Law Schools; Harvard Law School: Progress on Many Fronts*, THE METROPOLITAN CORPORATE COUNSEL, May 2004, at 45, 45, available at <http://www.metrocorpccounsel.com/pdf/2004/May/45.pdf> (emphasis added).

⁶⁴ See generally John Tuskey, *Do as We Say and Not (Necessarily) as We Do: The Constitution, Federalism, and the Supreme Court’s Exercise of the Judicial Power*, 34 CAP. U. L. REV. 153, 169-71 (2005).

⁶⁵ *Id.* at 170.

⁶⁶ *Id.*; see also John Harrison, *The Power of Congress to Limit the Jurisdiction of the Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 253-54 (1997); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 252 (1991).

⁶⁷ Tuskey, *Do as We Say*, 34 CAP. U. L. REV. at 171 (quoting *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 139 (7th Cir. 1987) (Easterbrook, J., dissenting)).

⁶⁸ 381 U.S. 479 (1965).

⁶⁹ *Solicitor General Hearing*, *supra* note 5, at 172 (Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter) (her answer was in response to a multi-part question that included “What other ‘moral injustices of the

more general indication of Kagan’s “values” is her characterizations of Judge Bork, and Justices Thomas, Souter, Breyer, and Ginsburg. Kagan writes of the “extreme conservatism of Bork’s known views,”⁷⁰ and opines, citing David Strauss’s argument in his review of Carter’s book, that the cause of the confirmation “mess” that Carter decried in Bork’s and subsequent cases was “the simple attempt of the Reagan and Bush administrations to *impose an ideologically charged vision of the judiciary* in an unsympathetic political climate.”⁷¹ In contrast, Kagan describes Justices Breyer and Ginsburg—despite Justice Ginsburg’s close association with the ACLU, her radical theory that a right to abortion is required to provide equal protection for women, and her suggestion to replace Mother’s Day and Father’s Day with an androgynous Parent’s Day to “minimize traditional sex-based differences in parental roles”⁷²—as “moderates.”⁷³ Given the characterizations, it is not unreasonable to think that Kagan would most likely share (or at least sympathize with) Justice Breyer’s and Justice Ginsburg’s understanding of the Constitution and the role of Supreme Court Justices.

In her written responses following the hearing on her solicitor general nomination, however, Kagan clarified her previous characterization of Justice Ginsburg:

My statement in 1995 that Justice Ginsburg was a “moderate” (meaning something like “in the middle”) was based on her record on the Court of Appeals for the D.C. Circuit, not on any of the positions you cite. I do not recall (or perhaps never knew) what Justice Ginsburg said about the women’s issues you cite, but as these positions are presented here, I do not agree with them and would not characterize them as moderate.⁷⁴

Also of interest is the fact that, at her confirmation hearing, Kagan moved away from her position in the article. Senator Hatch asked about her argument that “the Senate should ask judicial nominees about their views on constitutional issues, the direction they would take the Court, and even about votes that they would cast” and how she would “square this with the principle that judges must be impartial and with the oath they take to provide justice without respect to persons,”⁷⁵ With regard

first order’ do you see in our society?” *Id.* at 171.), *see also supra* pp. 3-5 (noting Kagan’s leftist political views while at Princeton).

⁷⁰ Kagan, *Confirmation Messes*, 62 U. CHI. L. REV. at 940.

⁷¹ *Id.* at 929 (emphasis added) (citing David A. Strauss, *Whose Confirmation Mess?*, AM PROSPECT 91, 96 (Summer 1994), reviewing Carter, *The Confirmation Mess*).

⁷² Kagan herself notes Justice Ginsburg’s views on the relationship between abortion and sexual equality. *See* Kagan, *Confirmation Messes*, 62 U. CHI. L. REV. at 938 (citing Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. REV. 375 (1985)). On Justice Ginsburg’s suggestion to abolish Mother’s Day and Father’s Day, *see* Posting by Ed Whelan to Bench Memos, *This Day in Liberal Judicial Activism—May 10*, NAT’L REV. ONLINE, <http://www.nationalreview.com/bench-memos/50177/day-liberal-judicial-activism-may-10/ed-whelan> (May 10, 2009, 8:00).

⁷³ *See* Kagan, *Confirmation Messes*, 62 U. CHI. L. REV. at 941.

⁷⁴ *Solicitor General Hearing*, *supra* note 5, at 170 (Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter). The question asked was

Prior to Justice Ginsburg’s confirmation to the Supreme Court, she wrote on a number of women’s issue[s]. She had written that the age of consent for women should be 12, that prisons should house men and women together in order to have gender equality, that Mother’s and Father’s Day should be abolished because they stereotype men and women, and that there is a constitutional right to prostitution. In a 1995 book review, you called Justice Ginsburg a “moderate.” Do you believe these are moderate positions? Do you agree with these positions? If not, with which ones do you disagree?

Id. at 169. *But see* note 72, *supra* (noting how Kagan herself cited Ginsburg’s article on abortion and sexual equality in her 1995 *Confirmation Messes* article).

⁷⁵ *Id.* at 118 (Questioning of Sen. Orrin Hatch).

to the first part of the question, Kagan stated, “I am not sure that sitting here today I would agree with that statement.”⁷⁶ She continued with this statement:

I wrote that when I was in the position of sitting where the staff is now sitting and feeling a little bit frustrated that I really was not understanding completely what the judicial nominee in front of me meant and what she thought. But I think that you are exactly right, of course, that there are other—that this has to be a balance. The Senate has to get the information that it needs, but as well, the nominee for any particular position, whether it is judicial or otherwise, has to be protective of certain kinds of interests.⁷⁷

Although Kagan moved away from the position stated in her book review during her solicitor general nomination hearing, in an interview published in the May 2004 issue of *The Metropolitan Corporate Counsel*, then-Dean Kagan was asked “Is there a better way of placing appellate judges? Must it be part of a political process?”⁷⁸ Kagan responded,

I think confirmation proceedings inevitably have a political aspect. Our courts are called upon to decide important matters—matters that often have great public impact. The attitudes and views that a person brings to the bench make a difference in how they reach those decisions. *So the Senate is right to take an interest in who these people are and what they believe. The Senate in fact has an important role to play in the confirmation of judges, although there are more and less responsible ways to carry out that function.*⁷⁹

This quote, made recently, but before Kagan faced Senate confirmation, seems to affirm the position taken in her book review. Furthermore, Senator Specter, in his written questions to Kagan following her solicitor general nomination, prefaced his request for her views on constitutional issues with a quote from her book review and her statement to Senator Hatch that the “‘Senate has to get the information that it needs . . . [from] the nominee, for any particular position—whether it’s judicial or otherwise.’”⁸⁰ Kagan responded that “the information the Senate needs is related to the position that the nominee hopes to perform. So, for example, information that is relevant to one executive branch position may not be relevant to another, and information that is relevant to a judicial position may not be relevant to either (or vice versa).”⁸¹ In her answer, Kagan seems to leave room for the Senate seeking different information from judicial nominees than they would seek from an executive branch nominee. Given that Kagan has now been nominated to a lifetime judicial position on the nation’s highest court, it would seem that by Kagan’s own reckoning, the Senate has a stronger interest in more forthcoming answers regarding her judicial philosophy and her views on constitutional issues.

Kagan’s tribute to Justice Thurgood Marshall, published in the *Texas Law Review*, might also shed some light on her judicial philosophy and approach to constitutional interpretation, particularly if Kagan adopts Justice Marshall’s approach to constitutional interpretation. On its face, the article only

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Editor Interviews Elena Kagan, Dean of Harvard Law School, *New England and Boston—Law Schools; Harvard Law School: Progress on Many Fronts*, THE METROPOLITAN CORPORATE COUNSEL, May 2004, at 45, 45, available at <http://www.metrocorpcounsel.com/pdf/2004/May/45.pdf>.

⁷⁹ *Id.* (emphasis added).

⁸⁰ *Solicitor General Hearing*, *supra* note 5, at 165 (Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter) (alteration in the original).

⁸¹ *Id.*

discusses Justice Marshall's approach to the law and provides little of Kagan's own views. She explained that the stories Justice Marshall told to his law clerks,

reminded us, as Justice Marshall thought all lawyers (and certainly all judges) should be reminded, that, behind law there are stories—stories of people's lives as shaped by law, stories of people's lives as might be changed by law. Justice Marshall had little use for law as abstraction, divorced from social reality (he muttered under his breath for days about Judge Bork's remark that he wished to serve on the Court because the experience would be "an intellectual feast"); his stories kept us focused on law as a source of human well-being.⁸²

She explained that Justice Marshall had an "understanding of the pragmatic—of the way in which law worked in practice as well as on the books, of the way in which law acted on people's lives,"⁸³ and that

[i]f a clerk wished for a year of spinning ever more refined (and ever less plausible) law-school hypotheticals, she might wish for a clerkship other than Justice Marshall's. If she thought it more important for a Justice to understand what was truly going on in a case and to respond to those realities, she belonged in Justice Marshall's chambers.⁸⁴

While Kagan noted that "notions of equity" did not always govern Justice Marshall's votes in cases and that he "believed devoutly . . . in the rule of law," "[a]lways, though, Justice Marshall believed that one kind of law—the Constitution—was special, and that the courts must interpret it in a special manner. Here, more than anywhere else, Justice Marshall allowed his personal experiences, and the knowledge of suffering and deprivation gained from those experiences, to guide him."⁸⁵ She explained with this statement:

[I]n Justice Marshall's view, constitutional interpretation demanded, above all else, one thing from the courts: it demanded that the courts show a special solicitude for the despised and disadvantaged. It was the role of the courts, in interpreting the Constitution, to protect the people who went unprotected by every other organ of government—to safeguard the interests of people who had no other champion. The Court existed primarily to fulfill this mission.⁸⁶

According to Kagan, the case that she thought Justice Marshall cared the most about during her clerkship was *Kadrmas v. Dickinson Public Schools*, a case raising the question of "whether a school district had violated the Equal Protection Clause by imposing a fee for school bus service and then refusing to waive the fee for an indigent child who lived sixteen miles from the nearest school."⁸⁷ Although Kagan had told him "it would be difficult to find in favor of the child, Sarita Kadrmas, under equal protection law," Kagan further explained,

[t]o Justice Marshall, the notion that government would act so as to deprive poor children of an education—of "an opportunity to improve their status and better their lives"—was

⁸² Elena Kagan, *For Justice Marshall*, 71 TEX. L. REV. 1125, 1127 (1993).

⁸³ *Id.* at 1127-28.

⁸⁴ *Id.* at 1128.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1129.

⁸⁷ *Id.*

anathema. And the notion that the Court would allow such action was even more so; to do this would be to abdicate the judiciary's most important responsibility and its most precious function.⁸⁸

Kagan explained that, under "Justice Marshall's vision of the Court and the Constitution," "[t]he nine Justices sat . . . to ensure that Sarita Kadrmas could go to school each morning. . . . And however much some recent Justices have sniped at that vision, it remains a thing of glory."⁸⁹

Justice Marshall's approach to judging and constitutional interpretation sound much like the qualities that President Obama has said that he will look to in selecting judges. The Senate Judiciary Committee should question Kagan about this article and ask whether she, if confirmed, will adopt Justice Marshall's view of the role of the Supreme Court and of the Constitution in deciding cases that come before the Court.

Finally, Kagan's praise for Aharon Barak may shed light on her judicial philosophy. According to an article in the *Harvard Law Record*, Kagan called Aharon Barak, her "'judicial hero,'" stating that "'[h]e is the judge who has best advanced democracy, human rights, the rule of law, and justice.'"⁹⁰ The remarks were made on the occasion of Barak, "the recently retired President of the Supreme Court of Israel," receiving "the Peter Gruber Foundation 2006 Justice Prize"⁹¹

Ed Whelan, writing about Kagan's comments, cited Judge Richard Posner's critique of Barak from Posner's book *How Judges Think*:⁹²

"One of the most prominent of the aggressively interventionist foreign judges is Aharon Barak. . . . [H]is book on judging is Exhibit A for why American judges should be wary about citing foreign judicial decisions. . . . Although Barak is familiar with the American legal system and supposes himself to be in some sort of sync with liberal American judges, he actually inhabits a completely and, to an American, weirdly different juristic universe. . . .

[W]ithout a secure constitutional basis, Barak created a degree of judicial power undreamt of by our most aggressive Supreme Court justices. . . . Among the rules of Israeli law that Barak's judicial opinions have been instrumental in creating are that any citizen can ask a court to block illegal action by a government official even if he is not personally affected by it . . . ; that any government action that is 'unreasonable' is illegal . . . ; that in the name of 'human dignity' a court can order the government to alleviate homelessness and poverty; and that a court can countermand military orders. . . .

Barak bases his conception of judicial authority on abstract principles that in his hands are merely plays on words. . . . For Barak, [the term 'democracy'] has a 'substantive' component, namely a set of rights ('human rights' not limited to political

⁸⁸ *Id.* (footnote omitted).

⁸⁹ *Id.* at 1130.

⁹⁰ Rebecca Agule, *Distinguished Israeli Jurist Receives 2006 Justice Prize*, HARV. LAW REC., Sept. 29, 2006, available at <http://www.hlrecord.org/2.4463/distinguished-israeli-jurist-receives-2006-justice-prize-1.578536>.

⁹¹ *Id.*

⁹² Posting of Ed Whelan to Bench Memos, *Kagan's "Judicial Hero," Aharon Barak*, NAT'L REV. ONLINE, <http://www.nationalreview.com/bench-memos/55919/kagan-s-judicial-hero-aharon-barak/ed-whelan> (May 21, 2010, 14:16).

rights, such as the right to criticize public officials, that support democracy), enforced by the judiciary, that clips the wings of elected officials. This is not a justification for a hyperactive judiciary, but merely a redefinition of it.

To him [interpretation] is a practice remote from a search from the meaning intended by the authors of legislation. . . .

Armed with such abstractions as ‘democracy,’ ‘interpretation,’ . . . and (of course) ‘justice’ (‘I try to be guided by my North Star, which is justice. I try to make law and justice converge, so that the Justice will do justice’), the judiciary is a law unto itself.”⁹³

Whelan also notes that Posner “quotes Judge Bork as writing that Barak ‘establishes a world record for judicial hubris.’”⁹⁴

The full context of then-Dean Kagan’s comments regarding President Aharon Barak can be found by reviewing the video of the award presentation and are even more disturbing. Kagan began by recounting her conversation with President Barak the night before,

We were having dinner last night in the Caspersen Room in the library. And, in the Caspersen Room there are a couple of portraits of famous and great judges whom Harvard is associated with. The portraits there are of Justice Brandeis and of Justice Holmes, and, as we look around this room [Ames Courtroom] there are some more portraits of great Justices whom Harvard Law School is associated with. Here, Justice Brennan, and there, Justice Frankfurter, but as I said to President Barak yesterday, the Harvard Law School association of which I’m most proud is the one we have with President Barak of the Israeli Supreme Court. . . . I told President Barak and I want to repeat in public that he is my judicial hero. He is the judge or justice in my lifetime whom I think best represents and has best advanced the values of democracy and human rights, of the rule of law, and of justice.⁹⁵

Senators should question Kagan about her statements regarding President Barak being her judicial hero. While Barak has a compelling life story and certainly, as Whelan notes, “merits respect,” it is “a far different matter for an American lawyer—a Supreme Court nominee, no less—to regard him as one’s ‘judicial hero.’”⁹⁶

Questions

- In general, what is your understanding of the Court’s power of judicial review? Do you believe the rationale given in *Marbury v. Madison* and *Federalist 78* for the exercise of judicial review correctly explain the basis for the power? If so, why? If not, why not?

⁹³ *Id.* (quoting RICHARD POSNER, HOW JUDGES THINK 362-68) (alterations in the original).

⁹⁴ *Id.*

⁹⁵ Videotape: September 21, 2006 Introduction of Israeli Supreme Court President Aharon Barak (Harvard Law School Media Services 2006), available at <http://judiciary.senate.gov/nominations/SupremeCourt/KaganQuestionnaire.cfm> (Audio and Video Files, Part 1, comment begins at 2:04 mark).

⁹⁶ Posting of Ed Whelan to Bench Memos, *Kagan, Aharon Barak, and the “Litmus Test” of Standing*, NAT’L REV. ONLINE, <http://www.nationalreview.com/bench-memos/56149/kagan-aharon-barak-and-litmus-test-standing/ed-whelan> (May 28, 2010, 12:15).

- General Kagan, in your senior thesis, *To the Final Conflict: Socialism in New York City, 1900-1933*, you wrote “Why, in a society by no means perfect, has a radical party never attained the status of a major political force?” What imperfections did you see in our society at that time, and what imperfections do you see today?
 - Is it an imperfection that “[t]he Constitution has never been held to confer a right to a minimum level of welfare”?
 - What role do you believe the judiciary should play in addressing imperfections in society?
- In your master’s thesis, you state that it “is not necessarily wrong or invalid” for judges to “try to mold and steer the law in order to promote certain ethical values and achieve certain social ends.” Do you still agree with that statement?
 - You also wrote that “[d]ecisions should be based upon legal principle and reason; they should appeal no less to our intellectual than to our ethical sense. If a court cannot justify a ruling in terms of legal principle, then that court should stay its hand: No judge should hand down a decision that cannot plausibly be grounded in principles referable to an acceptable source of law.” You later wrote, “Judicial opinions may well appeal to the ethical sense—but this alone is not enough. In order to achieve some measure of permanence in an ever-fluctuating political and social order, judicial decisions must be plausibly rooted in either the Constitution or another accepted source of law.” Do you believe it is sufficient for a judicial decision to merely be “based upon legal principle and reason” and be simply “plausibly rooted in either the Constitution or another accepted source of law”? Shouldn’t judges be seeking to firmly ground their decisions in legal principle and reason and seek out the proper interpretation of the Constitution, not merely a plausible one? If two equally plausible interpretations exist, one that would advance the judge’s ethical values and preferred social ends, and the other that would not, is it acceptable for the judge for this reason to choose one interpretation over the equally plausible other interpretation?
 - If it is acceptable, can you square that answer with the rationale for judicial review set out in *Marbury* and *Federalist* 78, which ground the power in the judge’s duty to prefer the Constitution over other sources of law, thus requiring judges to set aside those other sources when they conflict with the Constitution? If two equally plausible interpretations of a relevant constitutional provision exist, and the statute or other government enactment or action at issue is consistent with one of those interpretations, can a judge honestly find a conflict with the Constitution?
- You also wrote in your master’s thesis that “even the most meticulously crafted and closely analyzed opinion may not endure the test of time: A future court may overturn such an opinion on the ground that new times and circumstances demand a different interpretation of the Constitution.” What do you believe are “new times and circumstances” that would “demand a different interpretation of the Constitution?” What “new times and circumstances” could, for example, alter the meaning of the words “nor shall any State deprive any person of life, liberty, or property, without due process of law,” and how could new times and circumstances change that meaning?

- You said in your response to written questions following the hearing on your nomination as solicitor general that you “fully accept” the “nation’s traditional understanding that the Constitution generally imposes limitations on government rather than establishes affirmative rights and thus has what might be thought of as a libertarian slant.” Acceptance is different from agreement. Do you agree with the traditional understanding? Would you apply that understanding if confirmed?
- General Kagan, in your review of Professor Carter’s book, you note with approval Carter’s stated view that most cases before the Court require more “than the application of ‘mundane and lawyerly’ skills.” Rather, these cases require “‘interpretive judgment,’” and in all such cases “‘there comes a crucial moment when the interpreter’s own experience and values become the most important data.’” You write, as part of your agreement with Carter on this point, that “many of the votes a Supreme Court Justice casts have little to do with technical legal ability and much to do with conceptions of value.” However, in responding to written questions following the hearing on your nomination as solicitor general you told Senator Specter that “I think a judge should try to the greatest extent possible to separate constitutional interpretation from his or her own values and beliefs. In order to accomplish this result, the judge should look to constitutional text, history, structure, and precedent.” Can you please reconcile these statements?
- In 2006, you called Aharon Barak your “judicial hero” and noted that “[h]e is the judge or justice in my lifetime whom I think best represents and has best advanced the values of democracy and human rights, of the rule of law, and of justice.” Can you please elaborate on what you meant by that statement? If confirmed, would you look to Barak’s judicial method as a model for how to decide cases? On what basis should a judge consider, use, or rely upon foreign precedents?
- In *Griswold v. Connecticut*, the Court held that the Constitution contains a right to privacy and that this right extended to protect a married couple’s right to use contraceptives. The Constitution nowhere mentions either “privacy” or “contraception,” but the *Griswold* majority found a right to privacy in the emanations from penumbras of various constitutional provisions that in the majority’s view had more or less to do with protecting some aspect of personal privacy. Do you approve of the majority’s reasoning in *Griswold*? If so, how is that method consistent with any sound method or theory of interpretation? If not, do you still accept that the Constitution protects some general right to privacy or personal autonomy? If so, how do you derive that right from the Constitution’s text, structure, and history?

MILITARY RECRUITING & “DON’T ASK, DON’T TELL”

In October 2003, Kagan, then-dean at Harvard Law School, sent an e-mail to the law school community explaining that the military was recruiting on campus in violation of the school’s anti-discrimination policy. As she explained,

[t]he Law School’s anti-discrimination policy, adopted in 1979, provides that any employer who recruits at the School and uses the services of OCS [the Office of Career Services] must sign a statement indicating that it does not discriminate on various bases, including sexual orientation. As a result of this policy, the military was barred for many years from using the services of OCS. Last year, the Dean of [the] Law School, in consultation with other officers of the University, reluctantly lifted this ban for the military. The Dean took this action because of a new ruling by the Department of

Defense stating that unless the Law School took this action, the entire University would lose federal funding under a statute known as the Solomon Amendment The Law School does not receive significant federal funding, and our federally sponsored student loan programs would not have been at risk. The University, however, receives about 16% of its operating budget from the federal government The Dean determined, as did all his counterparts at other law schools, that he should make an exception to the School's anti-discrimination policy in the face of this threat to the University's funding. I left this exception in force this year, once again because of the enormous adverse impact a prohibition of military recruitment would have on the research and educational missions of other parts of the University.⁹⁷

Kagan continued on, writing:

This action causes me deep distress *I abhor the military's discriminatory recruitment policy.* The importance of the military to our society—and the extraordinary service that members of the military provide to all the rest of us—makes this discrimination more, not less, repugnant. The military's policy deprives many men and women of courage and character from having the opportunity to serve their country in the greatest way possible. *This is a profound wrong—a moral injustice of the first order.* And it is a wrong that tears at the fabric of our own community, because some of our members cannot, while others can, devote their professional careers to their country.⁹⁸

When the Solomon Amendment was challenged in court on constitutional grounds, fifty-four Harvard Law School faculty members, including Kagan, “filed an amicus brief in that suit [in the U.S. Court of Appeals for the Third Circuit] articulating different, statutory grounds for overturning the [Department of Defense's] policy.”⁹⁹ After the Third Circuit held in late 2004 that “FAIR [Forum for Academic and Institutional Rights] ha[d] demonstrated a likelihood of success on the merits of its First Amendment claims and that it [wa]s entitled to preliminary injunctive relief” to enjoin enforcement of the Solomon Amendment,¹⁰⁰ according to the *New York Times*, “Ms. Kagan . . . barred military recruiters from [] campus[]. In Harvard's case, the recruiters were barred only from the main career office, while Ms. Kagan continued to allow them access to students through the student veterans' group.”¹⁰¹ However,

⁹⁷ Email from Elena Kagan, Dean of Harvard Law School, to Harvard Law School Community (Oct. 6, 2003, 8:03), available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/KaganSG-Question13A-Part22.pdf>.

⁹⁸ *Id.* (emphasis added).

⁹⁹ Email from Elena Kagan, Dean of Harvard Law School, to Harvard Law School Community (Sep. 20, 2005, 17:36), available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/KaganSG-Question13A-Part22.pdf>; *Solicitor General Hearing*, *supra* note 5, at 80-81 (Questionnaire for Non-Judicial Nominees: Elena Kagan).

¹⁰⁰ *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 224 (3d Cir. 2004). The Third Circuit “reverse[d] and remand[ed] for the District Court to enter a preliminary injunction against enforcement of the Solomon Amendment.” *Id.* at 246.

¹⁰¹ Katharine Q. Seelye, *Potential Court Pick Faced Dilemma at Harvard*, N.Y. TIMES, May 6, 2010, available at <http://www.nytimes.com/2010/05/07/us/politics/07kagan.html?ref=todayspaper&pagewanted=all>. Nina Totenberg reported that “[w]hen a federal appeals court struck down the provision nearly a year and a half after she became dean, she reinstated Harvard's anti-discrimination policy barring military recruiters from using the school's placement office.” Nina Totenberg, *Kagan's Attitude Toward Military Faces Scrutiny*, NPR, June 9, 2010, <http://www.npr.org/templates/story/story.php?storyId=127579195>. However, Totenberg explains that while her public position as dean was to revert to the anti-discrimination policy, Kagan reached out privately to the Student Veterans Association, asking the members, some of them Iraq War veterans, to once again act as a proxy for the placement office.

the ban lasted only for the spring semester in 2005. The Pentagon told the university over the summer that it would withhold ‘all possible funds’ if the law school continued to bar recruiters from the main placement office. So, after consulting with other university officials, Ms. Kagan said, she lifted the ban.¹⁰²

When the Third Circuit’s decision was appealed to the Supreme Court, Kagan, “in her capacity as a Professor of Law,”¹⁰³ joined thirty-nine other law professors in filing an *amicus* brief in support of FAIR in *Rumsfeld v. FAIR*,¹⁰⁴ a case addressing the Solomon Amendment’s constitutionality.¹⁰⁵ Notably, *amici* began their brief by expressing a “deep[] commit[ment]” to their asserted “fundamental moral principle” that a society that discriminates or otherwise tolerates discrimination on the basis of ““sexual orientation”” is not ““just.””¹⁰⁶

The Solomon Amendment was a congressional response to law schools’ disagreement with the government’s prohibitions of homosexuals in the military.¹⁰⁷ The Solomon Amendment,¹⁰⁸ provides that institutions of higher education denying military recruiters equal access to students, at the same level provided to others allowed to recruit on campus, stand to lose their federal funding.¹⁰⁹ The Solomon Amendment’s text, with its most recent revision, prohibits funding to flow to an institution of higher education that

has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—(1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer¹¹⁰

Recollections of her meeting with the group vary, and of the dozen or so people who were there, many could not speak on the record because of the positions they now hold.

“It was a tough room,” said one of those present. “She got more pushback than she was used to.”

. . . .

Another officer of the club recalls the meeting as quite a bit less contentious. “I don’t remember us turning her down. We agreed to do a half-step less than she wanted.”

In the end, the group posted on the Harvard website a somewhat ambiguous announcement declaring that it had decided to accept a “limited interim role to assist fellow classmates” who wanted to meet with recruiters from the military legal offices. While the group declined to serve in a “formal liaison” capacity for the school, it still sent out e-mails to the student body announcing when a military recruiter would be on campus and letting students know how to arrange interview times. Military recruiters thus continued to meet with students on campus and in the same classrooms where other recruiters met with students.

Id.

¹⁰² Katharine Q. Seelye, *Potential Court Pick Faced Dilemma at Harvard*, N.Y. TIMES, May 6, 2010, available at <http://www.nytimes.com/2010/05/07/us/politics/07kagan.html?ref=todayspaper&pagewanted=all>.

¹⁰³ Brief of Professors William Alford, et al. as Amici Curiae Supporting Respondents, *Rumsfeld v. FAIR*, 547 U.S. 47 (2006) (No. 04-1152), at *1 n.2 [hereinafter Brief of Professors].

¹⁰⁴ 547 U.S. 47 (2006).

¹⁰⁵ 10 U.S.C. § 983 (2000 ed. and Supp. IV).

¹⁰⁶ See Brief of Professors, *supra* note 103, at *1.

¹⁰⁷ *Rumsfeld v. FAIR*, 547 U.S. at 51.

¹⁰⁸ 10 U.S.C. § 983 (2000 ed. and Supp. IV).

¹⁰⁹ *Id.*

¹¹⁰ 10 U.S.C. § 983(b), (b)(1) (2000 ed. and Supp. IV).

FAIR and the government agreed that the Solomon Amendment required law schools to “offer military recruiters the same access to [their] campus[es] and students that [they] provide[] to the nonmilitary recruiter receiving the most favorable access.”¹¹¹ In other words, if a school allowed even one nonmilitary recruiter certain access, it had to allow the same access to military recruiters.

The professors’ brief Kagan joined interpreted the Solomon Amendment differently. According to that brief, the Solomon Amendment “rules out policies that target military recruiters for disfavored treatment, but it does not touch evenhanded antidiscrimination rules that incidentally affect the military.”¹¹² In other words, if schools did not allow access to nonmilitary recruiters who discriminated, the Solomon Amendment did not require schools to allow access to military recruiters.¹¹³ The professors framed the issue to characterize their schools’ policies as content and viewpoint neutral:

[T]he question is whether the Solomon Amendment confers upon military recruiters the unprecedented entitlement to disregard neutral and generally applicable recruiting rules whenever a school’s failure to make a special exception might incidentally hinder or preclude military recruiting. The answer is “no.”¹¹⁴

The Supreme Court unanimously rejected the professors’ proposed interpretation.¹¹⁵ According to the Court, the Solomon Amendment’s text focused on the access provided to military recruiters rather than the content of a school’s recruiting policy. Moreover, during the course of the FAIR litigation, Congress had revised the Solomon Amendment to “now prevent[] an institution from receiving certain federal funding if it prohibits military recruiters ‘from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.’”¹¹⁶ Congress had done this in response to the district court’s reading that the original text of the Solomon Amendment required schools to provide only entry to campus but not necessarily equal access to students.¹¹⁷ The Supreme Court held that to accept the professors’ interpretation would negate the revision—a revision enacted to allow military recruiters access to students on campus—by allowing schools to deny access to military recruiters so long as they did so under a generally applicable nondiscrimination policy.¹¹⁸ Following the Court’s decision, Kagan sent an email to the Harvard Law School community in which she said that she was “disappointed” by the Court’s decision.¹¹⁹

Notably, the *amici* professors made an argument in their brief that could threaten the protection of religious liberties should it be accepted by the Supreme Court. In urging the Court to not decide the constitutional issues, the professors stated,

¹¹¹ *FAIR*, 547 U.S. at 55.

¹¹² Brief of Professors, *supra* note 103, at *3.

¹¹³ *FAIR*, 547 U.S. at 55-56.

¹¹⁴ Brief of Professors, *supra* note 103, at *2.

¹¹⁵ *FAIR*, 547 U.S. at 55-58. Justice Alito did not participate in the case.

¹¹⁶ *See id.* at 54 (quoting 10 U.S.C. A. § 983(b) (2000 ed., Supp. IV)) (footnote omitted) (second alteration in the original).

¹¹⁷ *Id.* at 54, 57

¹¹⁸ *Id.*

¹¹⁹ Email from Elena Kagan, Dean of Harvard Law School, to the Harvard Law School Community (Mar. 7, 2006, 9:16 am), available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/KaganSG-Question13A-Part22.pdf>.

if the Court of Appeals’ stated justifications for concluding that the Solomon Amendment is likely unconstitutional were applied to the Amendment as we read it—an exercise not undertaken below—the consequences could be worrisome. Our concern, first and foremost, is in furthering the eradication of invidious discrimination. Accordingly, we are deeply concerned about an opinion that would accept the assertion that the Solomon Amendment requires nothing more than equal access—but then conclude that the statute is nonetheless unconstitutional because it infringes upon associational rights, compels unwilling speech, or restricts expressive conduct.¹²⁰

As they explained,

Most obviously, such an approach could encourage attempts by discriminatory employers, educational institutions, or other groups to evade compliance with various pieces of federal civil rights legislation—including the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972—by asserting that granting equal treatment without regard to race or sex would send a “message” with which they disagree.

An additional complication in our view is the possibility that affirmance of the Court of Appeals’ reasoning would *be invoked by discriminators in efforts seeking immunity from the large and growing number of laws and ordinances that outlaw unequal treatment on the basis of sexual orientation*. By one recent count, 23 States, the District of Columbia, and at least 183 cities and counties now prohibit sexual orientation discrimination in areas such as education, employment, housing, and public accommodations.

At this point in our history, there are—*happily*—few institutions or groups willing to seek exemptions from civil rights laws on the ground that discrimination on the basis of race or sex is fundamental to their associational values. *But the same cannot be said of those who seek to treat people unfavorably because they are lesbian, gay, bisexual, or transgender*. And while this Court has recognized the compelling nature of the government’s interest in stamping out discrimination against racial minorities and women—an interest that should outweigh even a constitutionally-based objection to enforcement of civil rights laws—it has not yet had the occasion to recognize a similarly compelling interest in the eradication of anti-gay bigotry.¹²¹

The professors’ argument could be seen to claim that statutory protections for sexual orientation trump the First Amendment’s religious liberty protections—a very dangerous position for those who believe on religious grounds that homosexual activity is morally wrong. Of course, if the

¹²⁰ Brief of Professors, *supra* note 103, at *21–22 (citation and footnote omitted) (by “equal access” the *amici* presumably mean their reading of the statute). The professors did note in a footnote that

If this Court were to accept the position of these amici, the propriety of proceeding to address the constitutional issue when the Court of Appeals had not done so on our understanding of the statute, and when sorting out issues of standing would pose its own difficulties, would seem doubtful. If, instead, the Court were to reject the position of these amici and thus could not avoid reaching the constitutional question, amici express no view of how the constitutional analysis should proceed, nor of the implications of a holding that such a requirement is unconstitutional.

Id. at *22, n.27.

¹²¹ *Id.*, at *22–23 (footnotes and citations omitted) (emphasis added).

anti-discrimination law is neutral and generally applicable, under *Employment Division v. Smith*,¹²² there would be no Free Exercise problem. So, if the law generally forbids discrimination on the basis of sexual orientation, the Free Exercise Clause, as interpreted in *Smith*, offers no exemption for discrimination based on religious reasons. But a legislature could provide such an exemption by statute. Therefore, another question that arises is whether the right to non-discrimination on the basis of sexual orientation trumps any legislatively-created exemption.

Interestingly, as a result of the brief and the Court's decision, one commentator called for a deeper exploration into Kagan's "ability to separate her reading of the law from her own political positions or from the politically correct stances of the legal academy."¹²³ The commentator, Ed Whelan, quoted Peter Berkowitz, a writer for *The Weekly Standard*, who found ironic the professors' inability to craft a plausible argument:

"This dazzling array of eminent law professors proved incapable—even after hiring the best Democratic party legal talent money could buy—of advancing a single legal argument persuasive enough to pick off even a single dissent from the four more progressive justices on the court—Souter, Breyer, Ginsburg, and Stevens—or to provoke even a single concurrence expressing a single demurral on a single point of law from Chief Justice Roberts's opinion."¹²⁴

Whelan's call for a deeper exploration is even more important in light of statements that Kagan made at her confirmation hearing for the position of solicitor general and positions that the Department of Justice has taken since her confirmation. In her opening statement, Kagan made clear that if confirmed her "responsibilities to Congress" would include "most notably, the *vigorous defense* of the statutes of this country against constitutional attack."¹²⁵ She explained that "[t]raditionally, outside of a very narrow band of cases involving the separation of powers, the Solicitor General has defended any Federal statute in support of which any reasonable argument can be made," and she "pledge[d] to continue this strong presumption that the Solicitor General's Office will defend each and every statute enacted by this body."¹²⁶

In written questions following the hearing, Kagan was asked by Senator Grassley about her ability to "vigorously defend" the Solomon Amendment.¹²⁷ She replied that she would "defend this law as vigorously as any other in the United States statute books," and that she felt "confident in saying" that had she been solicitor general when the Third Circuit ruled in *FAIR v. Rumsfeld*, she "would have sought certiorari in the Supreme Court, exactly as the then-Solicitor General did."¹²⁸ She was also asked by Senator Sessions if she "believe[d] the federal government has a rational basis for the military's recruiting policy—whether embodied in 'Don't Ask/Don't Tell' or the statute that policy

¹²² 494 U.S. 872 (1990).

¹²³ Posting of Ed Whelan to Bench Memos, *Obama's SG Pick Elena Kagan—Part 2*, NAT'L REV. ONLINE, <http://www.nationalreview.com/bench-memos/50543/obamas-sg-pick-elena-kagan-mdash-part-2/ed-whelan> (Jan. 7, 2009, 15:48).

¹²⁴ *Id.* (quoting Peter Berkowitz, *U.S. Military: 8, Elite Law Schools: 0 How did so many professors misunderstand the law?*, *The Weekly Standard*, March 20, 2006, at Vol. 11, Issue 25, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/011/959tzkai.asp>).

¹²⁵ *Solicitor General Hearing*, *supra* note 5, at 47 (Opening Statement of Elena Kagan) (emphasis added).

¹²⁶ *Id.*

¹²⁷ *Id.* at 153 (Written Questions of Senator Chuck Grassley to Elena Kagan to be Solicitor General, U.S. Department of Justice).

¹²⁸ *Id.*

supplements—10 U.S.C. § 654” and how “would [she] analyze the constitutional issue on the matter, whether under the Due Process clause or the Equal Protection Clause?”¹²⁹ She responded:

I have never stated a position on the constitutionality of 10 U.S.C. § 654, and I am mindful of the established practice of the Solicitor General’s office not to express views or take positions in advance of the presentation of a concrete case. I can, however, say the following. If I am confirmed as Solicitor General, I would apply the same strong presumption of constitutionality to 10 U.S.C. § 654 as I would to every other statute, irrespective of my personal views of the policy articulated in that statute. I know that courts have upheld this statute against constitutional attack under the rational basis standard, *see, e.g. Able v. U.S.*, 155 F.3d 628 (2nd Cir. 1998); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996), that the rational basis standard is generally easy to satisfy, and that courts frequently grant Congress special deference in military matters, *see, e.g., Rostker v. Godberg*, 453 U.S. 57 (1981). All of these precedents and principles would support, in a suit challenging 10 U.S.C. § 654, the usual strong presumption of constitutionality that the Solicitor General’s office applies to all federal statutes.¹³⁰

In a March 18, 2009, letter to Senator Specter, Kagan expounded on her answer to Senator Sessions, writing:

Under prevailing Equal Protection law, the “don’t ask, don’t tell” policy and 10 U.S.C. § 654 are subject to rational basis scrutiny. . . . [T]he rational basis standard is very easy to satisfy. See, e.g., New York City Transit Authority v. Beazer, 440 U.S. 568 (1979). Moreover, courts frequently grant Congress even greater deference than usual when military matters are involved. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57 (1981). In enacting 10 U.S.C. § 654, Congress made extensive findings explaining the military’s recruiting policy. These findings satisfy the Equal Protection Clause’s rational basis test, and the government accordingly has had broad success in defending the “don’t ask, don’t tell” policy and its associated statute against constitutional challenge. *See, e.g., Able v. United States*, 155 F.3d 628 (2nd Cir. 1998); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996).¹³¹

While Kagan has not had a direct opportunity to confront this policy, she has, by implication, undermined it. In May 2008, the U.S. Court of Appeals for the Ninth Circuit held in *Witt v. Department of the Air Force* that “Don’t Ask, Don’t Tell,” “must satisfy an intermediate level scrutiny under substantive due process, an inquiry that requires facts not present on the record before us.”¹³² In

¹²⁹ *Id.* at 160 (Questions for the Record for Elena Kagan Submitted by Senator Jeff Sessions).

¹³⁰ *Id.*

¹³¹ Letter from Elena Kagan, Solicitor General Nominee, to Senator Arlen Specter, Ranking Member of the Senate Judiciary Committee (Mar. 18, 2009), at 11, *available at* http://www.scribd.com/full/31251143?access_key=key-9vfspao9f5yrl1mpn7 (emphasis added) [hereinafter March 18 Letter].

¹³² *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 821-22 (9th Cir. 2008) The court affirmed the dismissal of the equal protection claim, noting that

Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997)] clearly held that DADT does not violate equal protection under rational basis review, 106 F.3d at 1424-25, and that holding was not disturbed by *Lawrence*, which declined to address equal protection, *see* 539 U.S. at 574-75 (declining to reach the equal protection argument and, instead, addressing “whether *Bowers* itself ha[d] continuing validity”).

Id. at 821. It vacated and remanded “the district court’s judgment with regard to Major Witt’s substantive due process claim and procedural due process claim” *Id.* at 822; Posting of Ed Whelan to Bench Memos, *SG Kagan’s Subversion of “Don’t Ask, Don’t Tell” Law*, NAT’L REV. ONLINE, (May 19, 2009, 12:22) [hereinafter *Don’t Ask, Don’t Tell*].

his dissent from the court's denial of rehearing en banc, Judge O'Scannlain noted that "[t]his is the first case in which a federal appellate court has allowed a member of the armed services to bring a substantive due process challenge to the congressionally enacted 'Don't Ask, Don't Tell' homosexual personnel policy for the military."¹³³ He further noted that the opinion "claim[ed] to rest its decision on the Supreme Court's opinion in *Lawrence v. Texas* Instead, however, *Witt* contravenes Supreme Court precedent, including *Lawrence*, in the area of substantive due process, creates a circuit split, and stretches the judicial power beyond its constitutional mandate."¹³⁴

Given Kagan's stated commitment to vigorously defend the laws of the United States, one would expect her to have filed a petition for a writ of certiorari with the Supreme Court of the United States. Despite twice asking for and receiving one-month extensions to the deadline to file a certiorari petition with the Supreme Court, the Obama administration "let the most recent deadline pass without seeking another extension."¹³⁵ The *Wall Street Journal* reported that "[a] Justice Department spokeswoman said the government would defend the law at the trial over Maj. Witt's dismissal. The decision not to appeal to the Supreme Court 'is a procedural decision made because the case is still working its way through the regular judicial process,' she said."¹³⁶ Attorney General Holder sent a letter to the Senate explaining that "the decision not to seek review of the Ninth Circuit decision 'was made after extensive consultation with the Department of Defense and is based on the longstanding presumption against Supreme Court review of interlocutory decisions as well as practical litigation considerations.'"¹³⁷ However, as Ed Whelan has noted,

Holder's explanation makes little sense. What Holder calls a presumption against review of interlocutory decisions is, at least for federal appellate rulings, only a prudential consideration, and that consideration is of little weight where, as here, (1) the court of appeals has ruled on a pure question of law (not a mixed question of law and fact that might benefit from further factual development); and (2) that ruling subjects a litigant—especially *the military during a time of war*—to litigation burdens that would be eliminated by a reversal. The "practical litigation considerations" that Holder invokes cut in favor of immediate review.¹³⁸

Whelan further pointed out that:

A solicitor general acting "with vigor" to "advance . . . the interests of the United States" would seek an immediate Supreme Court reversal of the Ninth Circuit's rogue ruling, rather than require the military to undergo burdensome litigation in the district court under an amorphous standard—litigation, that in the event of a victory by the military, would leave in place the Ninth Circuit's ruling. The continuing existence of the Ninth Circuit's ruling invites further lawsuits by additional plaintiffs before various judges, the predictable end result of which is chaos and confusion.

¹³³ *Witt v. Dep't of the Air Force*, 548 F.3d 1264, 1265 (9th Cir. 2008) (denying rehearing en banc) (O'Scannlain J., dissenting); *Don't Ask, Don't Tell*, *supra* note 132.

¹³⁴ *Witt v. Dep't of the Air Force*, 548 F.3d at 1265 (denying rehearing en banc) (O'Scannlain J., dissenting); *Don't Ask, Don't Tell*, *supra* note 132.

¹³⁵ Jess Bravin & Laura Meckler, *Obama Avoids Test on Gays in Military*, WALL ST. J., May 19, 2009, at A3, available at <http://online.wsj.com/article/SB124268952606832391.html>.

¹³⁶ *Id.*

¹³⁷ *Don't Ask, Don't Tell*, *supra* note 132.

¹³⁸ *Id.*

....

Kagan's failure to seek immediate review of the Ninth Circuit's ruling is either a remarkably poor judgment call or a betrayal of her promise to set aside her personal opposition to "Don't Ask, Don't Tell" in representing the interests of the United States. Alas, I have too much regard for Kagan's legal ability to consider the first alternative to be plausible.¹³⁹

Questions

- General Kagan, the *amicus* brief that you and thirty-nine other Harvard professors filed with the Supreme Court in *Rumsfeld v. FAIR*, stated that "there are—*happily*—few institutions or groups willing to seek exemptions from civil rights laws on the ground that discrimination on the basis of race or sex is fundamental to their associational values. *But the same cannot be said of those who seek to treat people unfavorably because they are lesbian, gay, bisexual, or transgender.*" The brief went on to state, "[a]nd while this Court has recognized the compelling nature of the government's interest in stamping out discrimination against racial minorities and women—an interest that should outweigh even a constitutionally-based objection to enforcement of civil rights laws—it has not yet had the occasion to recognize a similarly compelling interest in the eradication of anti-gay bigotry." Do you believe that statutory protections for sexual orientation trump the First Amendment's religious liberty protections?
 - Should a legislature be permitted to provide a statutory exemption, such as a religious exemption, to a neutral and generally applicable law that prohibits discrimination based on sexual orientation? For example, does the government have a compelling interest in requiring a landlord to rent an apartment to a homosexual couple despite her sincere religious belief that renting the apartment to the couple would be to enable their lifestyle and thus be morally wrong? Or, would the government have a compelling interest in requiring the Catholic Church to admit homosexuals to seminaries despite the Church's understanding that homosexuals are not fit for the priesthood?
 - Do you believe, under a proper interpretation of the Equal Protection Clause or the Due Process Clause, that Courts should apply a higher level of scrutiny, such as intermediate or strict scrutiny to discrimination based on sexual orientation?
- You made clear at your confirmation hearing for the position of solicitor general that if confirmed your "responsibilities to Congress" would include "most notably, the *vigorous defense* of the statutes of this country against constitutional attack." You were also asked in follow-up questions if you "believe[d] the federal government has a rational basis for the military's recruiting policy—whether embodied in 'Don't Ask/Don't Tell' or the statute that policy supplements—10 U.S.C. § 654" and how "would you analyze the constitutional issue on the matter, whether under the Due Process clause or the Equal Protection Clause?" You responded that "courts have upheld this statute against constitutional attack under the rational basis standard" Given these statements, why did the government decline to seek certiorari after the U.S. Court of Appeals for the Ninth Circuit held in *Witt v. Department of the Air Force* that "Don't Ask, Don't Tell," "must satisfy an intermediate level scrutiny under substantive due process" Do you believe the government's

¹³⁹ *Don't Ask, Don't Tell*, *supra* note 132 (first alteration in the original).

failure to seek certiorari was consistent with your promise to vigorously defend the statutes of this country?

SAME-SEX MARRIAGE & THE DEFENSE OF MARRIAGE ACT

In written questions following the hearing on her nomination to be solicitor general, Kagan was asked by Senator Cornyn if she “believe[d] that there is a federal constitutional right to same-sex marriage.”¹⁴⁰ Kagan responded, “There is no federal constitutional right to same-sex marriage.”¹⁴¹ In her March 18, 2009, letter to Senator Specter, however, she expounded on that answer with the statement:

I previously answered this question briefly, but (I had hoped) clearly, saying that “[t]here is no federal constitutional right to same-sex marriage.” I meant for this statement to bear its natural meaning. Constitutional rights are a product of constitutional text as interpreted by courts and understood by the nation’s citizenry and its elected representatives. By this measure, which is the best measure I know for determining whether a constitutional right exists, there is no federal constitutional right to same-sex marriage.¹⁴²

This response, which is far more telling than her first response, leaves open the possibility that, if confirmed as a Justice, Kagan could interpret the Constitution to include a right to same-sex marriage.

Kagan was also asked in written questions whether she would “defend the constitutionality of the Defense of Marriage Act before the Supreme Court?”¹⁴³ She responded:

I would apply the same standard to defending the Defense of Marriage Act and the FISA Amendments Act as to any other legislation: I would defend the Acts if there is any reasonable basis to do so. As I noted above, this is a low bar for a statute to climb over. It is very unusual for a Solicitor General to decline to defend a statute. Indeed, I have no present belief that *any* federal statute now on the books is clearly unconstitutional (such that a reasonable defense of the statute could not be offered).¹⁴⁴

As with “Don’t Ask, Don’t Tell,” Kagan, as solicitor general, has not directly acted on the Defense of Marriage Act (DOMA). However, the Department of Justice’s (DOJ) actions in the case *Smelt v. United States* call into question her commitment to defending the Act. In *Smelt*, the DOJ filed a Motion to Dismiss Petitioner Smelt’s case challenging DOMA.¹⁴⁵ According to a news report, the “wording of the brief” “riled the gay and lesbian community.”¹⁴⁶ Geoff Kors, executive director of

¹⁴⁰ *Solicitor General Hearing*, *supra* note 5, at 148 (Questions from Senator Cornyn).

¹⁴¹ *Id.*

¹⁴² March 18 Letter, *supra* note 131, at 11-12.

¹⁴³ *Solicitor General Hearing*, *supra* note 5, at 175 (Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter).

¹⁴⁴ *Id.* at 176.

¹⁴⁵ Defendant United States of America’s Notice of Motion and Motion to Dismiss; Memorandum of Points and Authorities in Support Thereof, *Smelt v. United States*, NO. SACV09-00286 (C.D. Cal. Aug. 3, 2009), *available at* http://www.scribd.com/full/16355867?access_key=key-1imfup80kg4qowe2io3r.

¹⁴⁶ Carolyn Lochhead, *Gay Activists Not Impressed with Obama’s Move*, SAN FRAN. CHRON., June 18, 2009, at A1, *available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/06/18/MNN618910H.DTL>.

Equality California, called it a “‘horrendous brief.’”¹⁴⁷ Congressman Barney Frank “told the Boston Herald . . . that Obama made a ‘big mistake’ with the brief.”¹⁴⁸ Additionally, “[s]everal activists . . . pulled out of a gay Democratic National Committee fundraiser in Washington”¹⁴⁹ In its Reply Memorandum in Support of Defendant United States of America’s Motion to Dismiss, however, DOJ made clear that the administration does not support DOMA.¹⁵⁰ The memorandum explained that “[w]ith respect to the merits, this administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal.”¹⁵¹ The government then noted that DOJ “has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their constitutionality, *even if the Department disagrees with a particular statute as a policy matter, as it does here.*”¹⁵² Moreover, DOJ went on to undercut its own argument for DOMA’s constitutionality by rejecting the procreation and childrearing as legitimate government interests served by DOMA:

Unlike the intervenors here, the government does not contend that there are legitimate government interests in “creating a legal structure that promotes the raising of children by both of their biological parents” or that the government’s interest in “responsible procreation” justifies Congress’s decision to define marriage as a union between one man and one woman. Since DOMA was enacted, the American Academy of Pediatrics, the American Psychological Association, the American Academy of Child and Adolescent Psychiatry, the American Medical Association, and the Child Welfare League of America have issued policies opposing restrictions on lesbian and gay parenting because they concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents. Furthermore, in Lawrence v. Texas, Justice Scalia acknowledged in his dissent that encouraging procreation would not be a rational basis for limiting marriage to opposite-sex couples under the reasoning of the Lawrence majority opinion—which, of course, is the prevailing law—because “the sterile and the elderly are allowed to marry.” For these reasons, the United States does not believe that DOMA is rationally related to any legitimate government interests in procreation and child-rearing and is therefore not relying upon any such interests to defend DOMA’s constitutionality.¹⁵³

Dale Carpenter called the government’s new position on this issue

a gift to the gay-marriage movement, since it was not necessary to support the government’s position. It will be cited by litigants in state and federal litigation, and will no doubt make its way into judicial opinions. Indeed, some state court decisions have relied very heavily on procreation and child-rearing rationales to reject [same-sex marriage] claims. The DOJ is helping knock out a leg from under the opposition to gay marriage.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Reply Memorandum in Support of Defendant United States of America’s Motion to Dismiss at 2, *Smelt v. United States*, NO. SACV09-00286 (C.D. Cal. Aug. 24, 2009), *available at* http://www.scribd.com/full/18692933?access_key=key-2ar50f9ov1dee9282hiu [hereinafter Reply].

¹⁵¹ *Id.*

¹⁵² *Id.* (emphasis added).

¹⁵³ *Id.* at 6–7 (footnote omitted) (citations omitted).

....

The idea that same-sex parents are inadequate or at least sub-optimal has been a major point in the public-policy opposition to [same-sex marriage], and was used to support passage of DOMA. The DOJ now implies that DOMA is anachronistic, a holdover from a benighted time when we didn't know so much about the quality of gay parenting. The parenting concern has also been a reason for deference by state courts: as long as there was still a legitimate debate over the quality of same-sex parenting, courts ought to defer to states' judgments that traditional families are best. While the DOJ hasn't exactly endorsed the view that the parenting debate is over, this passage certainly points us in that direction.¹⁵⁴

This brief, issued by the Civil Division of the Department of Justice, did not bear Kagan's signature. This fact, however, does not signify that Kagan did not support or authorize the brief. Ed Whelan, writing for *National Review Online*, noted: "Consistent with convention, SG Kagan's name does not appear on the district-court brief. But two former senior DOJ officials have confirmed that, under usual practices, she surely must have been aware of, and approved, the positions taken in it."¹⁵⁵ The Senate Judiciary Committee should question Kagan about her involvement in the brief and why DOJ abandoned a key argument in support of DOMA's constitutionality.

Questions

- Do you believe that the Constitution, properly interpreted, contains a right to same-sex marriage? If so, please explain how you derive that right from the Constitution's text, structure, original understanding, and the logical implications that flow from those sources.
- Did you play any role in approving or reviewing the Reply Memorandum in Support of Defendant United States of America's Motion to Dismiss in the case *Smelt v. United States*? If so, could you please explain why DOJ abandoned the argument that traditional marriage rationally served the legitimate interest of promoting the raising of children by both parents, which Congress could reasonably conclude is the optimal environment for raising children?
- Do you believe that it was necessary to the court's determination of the issues in *Smelt* to note in the Reply Memorandum that the "administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal." Do you believe that such language is consistent with your promise to vigorously defend the statutes of this country?

¹⁵⁴ Posting of Dale Carpenter to The Volokh Conspiracy, *DOJ Boosts Cause of SSM*, THE VOLOKH CONSPIRACY, <http://volokh.com/2009/08/17/doj-boosts-the-cause-of-ssm/> (Aug. 17, 2009, 16:44).

¹⁵⁵ Posting of Ed Whelan to Bench Memos, *SG Kagan Breaks Her Vows?*, NAT'L REV. ONLINE, <http://bench.nationalreview.com/post/?q=ZWl5NDVmOTIwNDhiMzMxNDlmYzA1MWY2NjZjNmU2MzY=> (Aug. 18, 2009, 12:43).

FIRST AMENDMENT

Academic

In a lengthy article entitled, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Law*,¹⁵⁶ Kagan set forth her general understanding of current First Amendment doctrine. Briefly put, Kagan understands First Amendment doctrine to be concerned primarily (though not entirely) with the government's motive or purpose for regulating speech (or, more broadly put, expression). In her view, the complex system of rules and categories that characterizes present First Amendment doctrine is best explained as an attempt (whether conscious or unconscious) by the courts to ferret out speech restrictions that result from "improper" government motive.

The improper motive of which Kagan writes is "mere disapproval [of that speech], no matter whose or how widely shared."¹⁵⁷ In other words, in Kagan's view, at the heart of current First Amendment doctrine is the principle that government may not regulate speech because the government or other citizens are hostile to or deem the speech offensive.¹⁵⁸ Kagan contrasts what she deems these "ideological" reasons for restricting speech ("ideological" because they relate to the ideas the speech expresses) from what she calls "harm-based" reasons.¹⁵⁹ In theory, at least, government may restrict speech to prevent harm the speech causes, apart from the "harm" caused by exposing people to a disapproved idea.¹⁶⁰

Kagan recognizes problems with premising First Amendment doctrine on examining the motive for speech restriction. First, Kagan notes problems of proof: How does one go about determining what really motivated a legislator to vote to enact a law, much less what motivated a body of legislators?¹⁶¹ Moreover, while a speech restriction may ostensibly be addressed at some kind of harm caused by the speech (apart from the "harm" of merely disseminating an idea), a legislator's judgment concerning the magnitude of the harm or the need to address it may well be influenced by hostility or sympathy toward the speech at issue.¹⁶² Indeed, "[h]ostility toward ideas may . . . even impel the judgment of harm."¹⁶³

Given these practical problems, Kagan notes that the courts have for the most part eschewed efforts to inquire directly into what motivated a particular restriction on speech. How, then, does the First Amendment doctrine take account of—indeed, make central—motivation in determining constitutionality? According to Kagan, First Amendment doctrine accounts for motive by constructing a set of rules based on objective criteria—for example, "what a law includes and excludes," the classifications the law uses, and "how it is written"—that allows judges to sort out laws motivated by ideological concerns from those that are not.¹⁶⁴ Kagan notes that the sorting accomplished by these

¹⁵⁶ 63 U. CHI. L. REV. 413 (1996).

¹⁵⁷ *Id.* at 430.

¹⁵⁸ *Id.* at 429.

¹⁵⁹ *Id.* at 430.

¹⁶⁰ *See id.* at 436 (stating that her "conception of motive countenances (to use but a few examples) reasons relating to the capacity of speech to cause psychic trauma, trigger a hostile audience response, or persuade an audience to violate a law . . .").

¹⁶¹ *See id.* at 438-40.

¹⁶² *Id.* at 434.

¹⁶³ *Id.* at 435.

¹⁶⁴ *Id.* at 441.

rules will not be perfect—“simultaneously under- and overinclusive”—but that given the difficulty of determining motive directly, will achieve better results than directly inquiring into motive.¹⁶⁵

What would these rules look like? Kagan answers:

The first rule would draw a sharp divide between content-based and content-neutral restrictions, with a fuzzier line bisecting the world of content-based restrictions into those based on viewpoint and those on subject matter. The second and third rules would specify exceptions to the first: instances in which a restriction, though content-neutral, demands heightened scrutiny because of suspect origin; instances in which a restriction, though content-based, could receive relaxed scrutiny because apparently safe. And the fourth rule would draw another sharp distinction, this time between actions directly addressed to speech and those affecting speech only incidentally.¹⁶⁶

Kagan devotes the bulk of her article to demonstrating that “[t]hese rules . . . in fact constitute the foundation stones of First Amendment doctrine”¹⁶⁷ and showing how these rules work in practice. Rather than looking at all the rules Kagan notes, examining the distinction between content-based and content-neutral distinctions should give a sufficient understanding of her thesis.

The distinction between content-based and content-neutral speech restrictions is a basic distinction in First Amendment doctrine. Kagan explains the distinction by positing that content-based—and, especially, viewpoint-based—restrictions are far more likely to be motivated by ideological motives than content-neutral distinctions.¹⁶⁸ Therefore, content-based distinctions are presumptively suspect. But it is possible, however unlikely, that a content-based restriction could be free of impermissible motive. Thus, the idea that content-based distinctions are based on impermissible motive is only a presumption, albeit a strong presumption. Because it is only a presumption, courts must consider evidence that the restriction was not based on impermissible motive.¹⁶⁹ But because it is a strong presumption, the evidentiary requirement for overcoming it must be stringent. Hence, the strict scrutiny standard. As Kagan explains, that standard is “best understood as an evidentiary device that allows the government to disprove the implication of improper motive arising from the content-based terms of the law.”¹⁷⁰ But like the distinction between content-based and content-neutral distinctions, strict scrutiny examines motive indirectly rather than directly. The stronger a government’s asserted interest is, the more likely it is the government would act to advance that interest absent any improper motive; likewise, if the government restricts more speech than is necessary to achieve its interest, the more likely it is the government was really acting to quash ideas than to advance its asserted interest.¹⁷¹ A content-based law that passes strict scrutiny—a law that is necessary to advance a compelling interest—is thus likely to be one not based on improper motive.

On the other hand, a content-neutral restriction could conceivably result from an improper motive. Therefore, the presumption that content-neutral laws were not enacted for improper reasons can be rebutted. But because the likelihood of improper motive is less than that raised by content-based restrictions, the standard of review is looser. “[F]lunking this looser standard demonstrates that a

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 443.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 451-52.

¹⁶⁹ *Id.* at 453.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

content-neutral law has an illegitimate basis, thus rebutting the opposite presumption. . . . At a certain point—when the asserted interest is insubstantial or when it does not fit the scope of the challenged regulation—the usual presumption of proper purpose topples”¹⁷²

The above should suffice to explain Kagan’s underlying analysis of current First Amendment doctrine. Kagan also applies her thesis—that all First Amendment doctrine involves the use of evidentiary rules to search for improper motive—to content-neutral laws that raise a heightened likelihood of impermissible motive,¹⁷³ to content-based laws that raise a lesser likelihood of improper motive,¹⁷⁴ and to incidental (non-direct) restrictions on speech.¹⁷⁵

Before moving on to that discussion, there are some general observations to make. First, *Private Speech, Public Purpose* is well-written and demonstrates excellent analytical ability. Kagan does a very good job of tying together into a coherent whole the myriad rules and classifications that comprise present Supreme Court First Amendment doctrine. She makes a more than plausible defense of her thesis that the Court’s speech doctrine really is concerned primarily with discovering improper government motives for restricting speech. Moreover, her explanation of the different levels of scrutiny for content-based and content-neutral restrictions as evidentiary devices to discern improper motive powerfully (though implicitly) challenges a common understanding of the levels of scrutiny merely as devices to “balance” the value of speech against the perceived importance of and need for its restriction.

That said, in a 100-page article concerning First Amendment law, Kagan does not once mention the First Amendment’s text or the original understanding of that text. Underlying Kagan’s analysis is the unstated premise that the freedoms of speech and press guaranteed by the First Amendment are freedoms from government restrictions based on hostility towards the ideas expressed (though government may restrict speech to alleviate the harms—apart from the harm of exposing people to ideas—the speech may cause). That may be an accurate understanding of the First Amendment (or it may not), but nowhere does Kagan attempt to reconcile that understanding with the Amendment’s text. This focus on judicial doctrine, and not text, seems to be a common thread in Kagan’s scholarship. Moreover, while Kagan’s explanation of the levels of scrutiny in current First Amendment doctrine challenges the view that those levels are *merely* devices for *ad hoc* balancing of interests, the fact remains that First Amendment doctrine, even as Kagan explains it, requires courts to balance the government’s interest in regulating speech against the value of that speech and, in the process, requires judges to assess the relative importance or strength of the government’s interest. But that inquiry is unguided by any specific constitutional text, and that Kagan appears to accept that doctrine means that she may well think a judge’s decision in constitutional cases can be properly guided by factors outside of the Constitution itself.

In a 1992 article, Kagan identified and analyzed what she said is a recurring though unappreciated issue in First Amendment jurisprudence, an issue she termed “content-based

¹⁷² *Id.* at 454-55.

¹⁷³ *See id.* at 456-72. Specifically, Kagan addresses “(1) laws conferring standardless discretion on administrative officials; (2) laws turning on the communicative effect of speech; and (3) laws attempting to ‘equalize’ the speech market.” *Id.* at 456.

¹⁷⁴ *See id.* at 472-91. Specifically, Kagan addresses content-based restrictions on so-called “low-value” speech (e.g., fighting words, obscenity) and speech restrictions designed to alleviate the secondary effects of speech. *See id.*

¹⁷⁵ *See id.* at 491-505.

underinclusion.”¹⁷⁶ This problem arises, according to Kagan, in cases in which the government may restrict speech entirely but restricts only a subset of that speech based on subject matter or viewpoint. The most noteworthy example of this context-based underinclusion is the Supreme Court’s decision in *R.A.V. v. St. Paul*.¹⁷⁷ In *R.A.V.*, the Supreme Court held unconstitutional a St. Paul, Minnesota ordinance that prohibited fighting words that “‘arouse[] anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender”¹⁷⁸ Writing for a majority of the Court, Justice Scalia opined that while the First Amendment allows government to proscribe fighting words, it does not allow government to proscribe only those fighting words that address a particular subject or viewpoint.¹⁷⁹ This phenomenon of content-based underinclusion, according to Kagan, exists in varied settings: for example, the imposition of content-neutral time, place, and manner restrictions and selective exclusions of speech in non-public fora.¹⁸⁰

As the title of her article indicates, Kagan also sees the problem of content-based underinclusion in cases in which the government selectively subsidizes speech. Prominent among these cases is *Rust v. Sullivan*.¹⁸¹ *Rust* involved government grants to provide family planning services under Title X of the Public Health Service Act. That Act provided that Title X funds could not go to “‘programs where abortion is a method of family planning.”¹⁸² In implementing Title X, the Secretary of Health and Human Services promulgated regulations that barred recipients of Title X grants from providing abortion counseling or referrals or encouraging or advocating abortion as a family planning method.¹⁸³

A number of Title X grantees and doctors sued, claiming the regulations violated their right to free speech by discriminating in the provision of benefits on the basis of viewpoint and by conditioning benefits on relinquishing free speech rights.¹⁸⁴ The Supreme Court rejected these claims and held that the regulations on their face did not violate the First Amendment. The Court reasoned that the government did not discriminate on the basis of viewpoint by selectively funding activities it found to be in the public interest without funding alternative programs. The Court also reasoned that the regulations did not force Title X grantees to give up abortion-related speech but merely required the grantees to keep that speech separate from their Title X activities.¹⁸⁵ As the *Rust* majority saw things, the government, in promulgating the regulations, was implementing the statutory command that Title X funds not be spent on programs that use abortion as a means of family planning and ensuring that Title X recipients not use funds to provide services outside Title X’s scope.¹⁸⁶

In Kagan’s view, *Rust* presented precisely the same First Amendment issue as *R.A.V.*—the issue of content-based underinclusion—and the Court should have applied the same analysis in deciding the two cases.¹⁸⁷ Kagan believes generally that content-based underinclusion based on subject matter (for instance, a law banning all obscenity except that dealing with government affairs) is

¹⁷⁶ Elena Kagan, *The Changing Face of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 S. CT. REV. 29.

¹⁷⁷ 505 U.S. 377 (1992).

¹⁷⁸ *Id.* at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)).

¹⁷⁹ *Id.*; see Kagan, *First Amendment Neutrality*, *supra* note 176, at 34-35.

¹⁸⁰ See Kagan, *First Amendment Neutrality*, *supra* note 176, at 41-43.

¹⁸¹ 500 U.S. 177 (1991).

¹⁸² *Id.* at 178 (quoting 42 U. S. C. § 300a-6).

¹⁸³ *Id.* at 179-80.

¹⁸⁴ *Id.* at 192, 196.

¹⁸⁵ *Id.* at 193, 196.

¹⁸⁶ *Id.* at 193-94.

¹⁸⁷ See Kagan, *First Amendment Neutrality*, *supra* note 176, at 58.

presumptively constitutional, while such underinclusion that is based on viewpoint (for instance, a law banning only obscenity that is critical of the government) is presumptively unconstitutional and subject to strict scrutiny.¹⁸⁸

Thus, Kagan would have applied strict scrutiny to determine the validity of the regulation in *Rust* because in her view there was “little serious argument” that the regulation in *Rust* discriminated on the basis of viewpoint.¹⁸⁹ “Once the determination of viewpoint discrimination is made in this manner, a strong presumption of unconstitutionality would attach, rebuttable only upon a showing of great need and near-perfect fit.”¹⁹⁰

While Kagan does not say expressly that *Rust* was wrongly decided (as opposed to improperly analyzed),¹⁹¹ it is at least highly probable that she believes the government could not make the required showing of “great need and near-perfect fit” strict scrutiny would require and, therefore, that *Rust* was wrongly decided:

The regulations at issue in *Rust* can hardly be understood except as stemming from government hostility toward some ideas (and their consequences) and government approval of others Further, the regulations, in treating differently opposing points of view on a single public debate, benefitted some ideas at the direct expense of others and thereby tilted the debate to one side. For both these reasons, a refusal to fund any speech relating to abortion would have been constitutionally preferable to the funding scheme that the regulations established.¹⁹²

That *Rust* involved subsidies to speech rather than outright restriction of opposing speech does not matter to Kagan. In Kagan’s view, any distinction between subsidy and penalty in the context of content-based underinclusion is meaningless. When the government can proscribe all of a particular category of speech (such as fighting words or obscenity), to allow some but not all speech of that category can be viewed either as a penalty to those whose speech is proscribed or a benefit (subsidy) to those whose speech is not proscribed.¹⁹³ Moreover, according to Kagan, when government may proscribe (or penalize) all of a category of speech, the unconstitutionality of selectively proscribing certain speech within that category must be a function of the selection rather than the penalty (which, as Kagan notes, “is, in and of itself, perfectly permissible”).¹⁹⁴

Kagan also rejects any notion that *Rust* is distinguishable from cases like *R.A.V.* because *Rust* involved government speech (that is, that the government in funding Title X programs was, in effect,

¹⁸⁸ See generally *id.* at 63-68. Kagan does posit that some underinclusion that is based (at least on the face of that statute) only on subject matter should still be subject to strict scrutiny where the subject matter excluded—the type of speech restricted—will realistically only be used by one side in a debate. For instance, one could argue that banning only race-based fighting words distinguishes on the basis of subject matter, not viewpoint, and therefore should not be subject to strict scrutiny. But Kagan would still apply strict scrutiny because realistically, only racists use race-based fighting words, so the law (as legislators must have known when they enacted it) would handicap only one side of a debate. *Id.* at 70-72. Kagan also posits that it is possible that some viewpoint-based underinclusive laws would not be subject to strict scrutiny. *Id.* at 74-75. We will discuss this in the text.

¹⁸⁹ *Id.* at 67.

¹⁹⁰ *Id.*

¹⁹¹ For instance, Kagan stated that “I do not . . . assert that if *R.A.V.* is right, the *Rust* must be wrong I claim only that these cases . . . should be subjected to the same constitutional standards.” *Id.* at 58.

¹⁹² *Id.* at 67-68.

¹⁹³ See generally *id.* at 46-52.

¹⁹⁴ *Id.* at 53.

paying private parties to speak for it). Kagan rejects this government speech rationale for two reasons. First, when the government hires private parties to speak for it, the public may not realize that it is really the government speaking, and therefore lacks a bit of information that may be necessary to evaluate the speech.¹⁹⁵ Second, government subsidy could “operate to distort or influence the realm of private expression in a manner that systematically advantages public power. . . . When the government speaks through subsidy schemes, it may change and reshape the underlying dialogue” by providing incentive to private speakers to adopt the government’s message.¹⁹⁶

Kagan’s argument that in content-based underinclusion cases subsidizing speech is not materially distinguishable from proscribing opposing speech has a certain logical appeal. But as noted when discussing Kagan’s general understanding of First Amendment doctrine, Kagan does not attempt to square her argument with the First Amendment text. Instead, she focuses entirely on the policy or the values undergirding the right to free speech. The First Amendment, however, does not say that “Congress shall make no law skewing public debate;” the amendment says “Congress shall make no law . . . abridging the freedom of speech.” This language seems directed at protecting directly the ability of speakers to speak (and thereby to advance whatever policies and values a regime of free speech serves). And in cases like *Rust*, those whose speech is not subsidized are still entirely free to speak.

Moreover, to treat all viewpoint-based government subsidies of speech as presumptively unconstitutional and therefore subject to strict scrutiny could lead to some disturbing results. Is it, or should it be, presumptively unconstitutional for the government to fund a symposium on the dangers of art as propaganda featuring Leni Riefenstahl’s *Triumph of the Will* while refusing to fund a showing of the same film by a neo-Nazi group? If the government funds speech discouraging drunk driving, must it fund speech encouraging, or minimizing the dangers of, drinking while driving?

Kagan does leave some possible room for viewpoint-based speech subsidies. She notes that “strict scrutiny need not invalidate a viewpoint-based underinclusive action” if the government can show that the action is “both necessary and narrowly tailored to serve a compelling interest.”¹⁹⁷ Thus, “[i]f the government can show . . . that it has a compelling interest, that it must regulate speech to achieve that interest, and that it has regulated all (but only) such speech as is necessary to achieve the interest, then the government action should pass strict scrutiny.”¹⁹⁸ Kagan posits a law restricting speech “extolling cigarettes in the immediate vicinity of a school” (assuming the government has a compelling interest in preventing children from smoking, and that pro-cigarette speech near schools causes children to smoke) as a restriction that could pass strict scrutiny.¹⁹⁹

Kagan also “tentatively” suggests that not all viewpoint-based underinclusive actions should be subject to strict scrutiny. She notes that the smoking example suggests that “not all viewpoints are alike although it is difficult to fashion a principled reason why”²⁰⁰ and suggests that

[i]f our intuitions rebel against the idea that the government cannot fund speech discouraging smoking without also funding its opposite, they do so for some combination of three reasons, each of which exists in tension with common First Amendment

¹⁹⁵ *Id.* at 55.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 74.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

principles. First, *the debate in this case, by its nature, offers the hope of right and wrong answers—answers subject to verification and proof.* Second, *society has reached a shared consensus on the issue;* the answers, in addition to being verifiable, are widely believed. And *third—and most important—one side of the debate appears to do great harm.* When these factors join, a viewpoint regulation may appear justifiable whenever a more general regulation could exist. Then, *government disapproval of a message may seem no longer illegitimate, because the disapproval emerges from demonstrable and acknowledged harms;* then too, the distortion of debate resulting from the government action may appear not vice, but virtue.²⁰¹

Kagan does not wholeheartedly endorse this reasoning, in large part because “[a]lmost all viewpoint-based regulations can be viewed as ‘harm-based’ regulations”²⁰² Kagan believes that the law should take account of harm that can be caused by a particular viewpoint (for example, the viewpoint that one should smoke cigarettes) in determining whether a viewpoint-based underinclusive regulation survives strict scrutiny.²⁰³ But whether the law should take “profound and indisputable” harms into account for the purpose of identifying viewpoint-based regulations that should not be subject to strict scrutiny is still an “open” question for her.²⁰⁴

While the general question is still open for her, it is apparent that one case *Kagan* would not include in the subset of viewpoint-based actions not subject to strict scrutiny is *Rust*. In fact, Kagan uses *Rust* to illustrate her point that “[a]lmost all viewpoint-based regulations can be viewed as ‘harm-based’ regulations,”²⁰⁵ a point she made to critique her own suggestion that some viewpoint-based underinclusion may not be subject to strict scrutiny. Nor is it likely, as noted, that Kagan would find the selective funding in *Rust* to survive strict scrutiny. But why must this be so? The prohibition on abortion counseling in *Rust* served at least three interrelated interests: first, to ensure that funds were not used contrary to the statutory mandate that Title X funds not go to programs that used abortion as a means of family planning; second, to insure that taxpayers would not have to be involved in the business of abortions, even if just by providing funds for advocacy or referrals; and third, to favor live birth over abortion, an act that kills the living offspring of human parents. If one accepts the reasonable premise that the unborn are human beings, it is easy to view the harm caused by abortion and abortion advocacy and referral as great (the destruction of innocent life) and characterize the government’s interest in not subsidizing abortion advocacy and referrals as compelling. Moreover, the regulations in *Rust* only did what was necessary to effectuate these interests (or at least the interest concerning taxpayer involvement in abortion). In *Rust*, the government merely refused to pay for abortion referrals and counseling. Title X recipients were still free, outside their Title X programs, to advocate abortion, and refer women for abortions. The recipients only had to make sure no Title X money was used for these activities.

One could reasonably say that the government’s interests in *Rust* are every bit as compelling, and the fit between the government’s regulation and those interests is every bit as close, as the interests and fit would be in Kagan’s hypothetical prohibiting pro-smoking speech, a hypothetical Kagan uses to illustrate the notion that not all viewpoint-based underinclusive regulations would fail strict scrutiny. So, what could explain Kagan’s antipathy toward *Rust*? One could speculate (reasonably, we think),

²⁰¹ *Id.* at 74-75 (emphasis added).

²⁰² *Id.* at 75.

²⁰³ *Id.*

²⁰⁴ *Id.* at 76.

²⁰⁵ See *id.* at 75. “So, for example, in *Rust*, supporters of the regulations might argue that the selective funding corresponds not to viewpoints, but to demonstrable injuries” *Id.* at 76.

that Kagan simply does not view the government's interests in preventing abortions or at least keeping taxpayers from funding any aspect of abortion practice as sufficiently compelling. (This assumes that Kagan accepts the Court's decisions in *Roe* and *Casey* that hold a woman has a constitutional right to choose to have an abortion, a reasonable assumption given President Obama's statements that he would appoint only pro-*Roe* Justices.) If so, Kagan's treatment of *Rust* provides reason not only for concern about her view that viewpoint-based speech subsidies are presumptively unconstitutional, but also for her views concerning abortion and related issues and the Court's jurisprudence in those areas.

In a 1993 essay, Kagan specifically addressed the issue of how government might go about regulating hate speech and pornography in a way that would pass constitutional muster in light of the Supreme Court's decision in *R.A.V.*²⁰⁶ Kagan began the essay by stating:

I take it as a given that we live in a society marred by racial and gender inequality, that certain forms of speech perpetuate and promote this inequality, and that the uncoerced disappearance of such speech would be cause for great elation. I do not take it as a given that all governmental efforts to regulate such speech thus accord with the Constitution.²⁰⁷

Kagan's goal in the essay is to explore tentatively how government might regulate hate speech and pornography in ways that do "accord with the Constitution" (or at least the Supreme Court's understanding of constitutional requirements).

Kagan begins by noting how the majority in *R.A.V.* held unconstitutional the St. Paul hate speech ordinance—an ordinance that, as construed by the Court, prohibited only fighting words based on race, color, creed, religion, or gender—because the statute in practice discriminated on the basis of viewpoint.²⁰⁸ Kagan notes that *R.A.V.*'s reasoning resembles closely that in *American Booksellers v. Hudnut*,²⁰⁹ a case in which the Seventh Circuit held unconstitutional an Indianapolis anti-pornography ordinance.²¹⁰ The Indianapolis ordinance defined pornography as "'the graphic sexually explicit subordination of women, whether in pictures or in words,' that depicted women in specified sexually subservient postures."²¹¹ The Seventh Circuit held that because "the legality of expression [was] 'depend[ent] on the perspective the author adopts'" and thus "'establishe[d] an 'approved' view' of women and of sexual relations," the ordinance discriminated on the basis of viewpoint and violated the First Amendment.²¹²

As one should expect given the other writings we have discussed, Kagan generally approves of the Supreme Court's viewpoint neutrality doctrine. Indeed, she states that "the principle of viewpoint neutrality . . . has at its core much good sense and reason. . . . [E]fforts to regulate pornography and hate speech not only will fail, but also should fail to the extent they trivialize or subvert this principle."²¹³

²⁰⁶ Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873 (1993). See *supra* pp. 31-32 for a discussion of *R.A.V.*

²⁰⁷ Kagan, *Regulation After R.A.V.*, *supra* note 206, at 873.

²⁰⁸ See *id.* at 874.

²⁰⁹ 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

²¹⁰ Kagan, *Regulation After R.A.V.*, *supra* note 206, at 875.

²¹¹ *Id.* (quoting *American Booksellers*, 771 F.2d at 324).

²¹² See *id.* (quoting *American Booksellers*, 771 F.2d at 324) (second and third alteration in the original).

²¹³ Kagan, *Regulation After R.A.V.*, *supra* note 206, at 878.

So, Kagan's goal in the remainder of her essay is to propose and explain means to regulate hate speech and pornography effectively without running afoul of *R.A.V.* She proposes several different ideas. These ideas include regulating non-expressive conduct (for example, by laws enhancing criminal penalties for crimes such as assault based on racist or other motives for targeting the victim²¹⁴ and civil remedies for victims of hate-motivated crimes);²¹⁵ viewpoint-neutral restrictions (for instance, prohibiting all fighting words rather than just those based on race, sex, etc.);²¹⁶ using (which, in Kagan's view, would involve recasting) obscenity laws to regulate pornography;²¹⁷ and, finally (and tentatively) treating hate speech and pornography (narrowly defined) as "low-value" speech subject to lesser First Amendment protection (akin to the treatment of obscenity or fighting words).²¹⁸

The chief concern that arises regarding the regulation of "hate speech" is the specter of Canadian-style regulation of speech that offends certain groups not because the speech is meant to offend and hurt merely for the sake of offending or hurting but rather because the listener does not like the speaker's message. Contrast, for example, shouting offensively in the face of a homosexual, and writing a newspaper column explaining why homosexual acts are wrong or same-sex "marriage" is an oxymoron. One can reasonably argue that even a society committed to a robust understanding of free speech could (or even should) legitimately regulate the former but not the latter.

Kagan's understanding of hate speech would seem not to lead her to uphold regulating speech merely because the ideas expressed offend people. When discussing whether to treat hate speech and pornography as "low-value" forms of speech that could be prohibited entirely without raising any First Amendment concern (just as obscenity and fighting words are treated), Kagan insists that any such law prohibiting "hate speech" "should be limited to racist epithets and other harassment: speech that may not count as 'speech' because it does not contribute to deliberation and discussion."²¹⁹ Assuming the idea of "harassment" is properly limited,²²⁰ Kagan's understanding of hate speech appears to be consistent with the distinction noted above: her understanding would include as hate speech the offensive shouting in someone's face but would seem to exclude serious discussion (or even just discussion) of moral issues, even if some find one side of the discussion to be offensive.

Still, some of the ideas Kagan expresses in discussing how to effectively regulate hate speech and pornography merit concern. For instance, Kagan discusses the possibility that the Constitution "may well permit direct [viewpoint-neutral] regulation of speech . . . when the regulation responds to a non-speech related interest in controlling conduct involved in the materials' manufacture."²²¹ As an example, she discusses the decision in *New York v. Ferber*,²²² in which the Supreme Court held constitutional a New York law prohibiting the distribution of child pornography, primarily because the government had a strong interest in preventing pornographers from exploiting the children who appear in the pornographic material.²²³ She posits that the same principle should allow government to prohibit

²¹⁴ See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), in which the Supreme Court upheld a Wisconsin criminal penalty enhancement.

²¹⁵ See Kagan, *Regulation After R.A.V.*, *supra* note 206, at 883-88.

²¹⁶ See *id.* at 888-92.

²¹⁷ See *id.* at 892-97. See *infra* pp. 38-39 for a discussion of how Kagan would recast obscenity law.

²¹⁸ See *id.* at 897-901.

²¹⁹ *Id.* at 900.

²²⁰ *The American Heritage Dictionary* (2d College ed. 1991) defines "harass" as "to irritate or torment persistently." The entry for "harass" goes on to note that "[h]arass implies systematic persecution by besetting with annoyance, threats, or demands."

²²¹ Kagan, *Regulation After R.A.V.*, *supra* note 206, at 891.

²²² 458 U.S. 747 (1982).

²²³ Kagan, *Regulation After R.A.V.*, *supra* note 206, at 891.

distributing material that involved coercion of or violence against participants in its manufacture.²²⁴ She also notes that courts have applied this principle to enjoin publishing stolen trade secrets and to award damages for unapproved publishing of copyrighted material.²²⁵

None of the above raises any real concern. But Kagan goes on to note that “there are almost surely limits on the principle that the government may engage in viewpoint-neutral regulation of speech whenever it has an interest in deterring conduct involved in producing the expression.”²²⁶ She posits two examples that “suggest the need for a boundary line.”²²⁷ First, she posits that prohibiting all speech whose manufacture required violating the Fair Labor Standards Act would “surely” be unconstitutional.²²⁸ Second, she posits that prohibiting the distribution of national security information stolen from the government would be unconstitutional.²²⁹

But the question arises: Why can the government regulate child pornography, or enjoin the publication of stolen trade secrets or copyrighted material to deter the conduct involved in producing those materials, but not prohibit speech whose manufacture involved violating the FLSA or the publication of stolen national security information? The answer is not found in the First Amendment’s text (which, as noted, Kagan has never analyzed in all her writing on First Amendment law). Rather, Kagan sees the question as one of degree that requires judges to balance factors such as “the value of the speech at issue, the magnitude of the harm involved in producing the speech, the extent to which prohibiting the speech is necessary to prevent the harm from occurring, and the extent to which the expression itself reinforces or deepens the initial injury.”²³⁰ The problems here, as with all judicial balancing, are that there is nothing in the Constitution to guide judges in determining what factors to balance or how much weight to give various factors, and there is no good reason to believe that any balance courts strike will necessarily be better than the balance struck by legislatures.

This penchant for balancing of interest also appears in Kagan’s understanding of how the Supreme Court establishes “low-value” speech categories: the Court “determines that the harms caused by the covered speech so outweigh its (miniscule) value that regulation of the speech, even if viewpoint discriminatory, will be permitted.”²³¹ In other words, the content of the First Amendment—that is, what is within the “freedom of speech” protected—is (or at least seems to be), in Kagan’s view, a product of the Court’s determination based on a balancing of factors rather than an analysis focused on the original meaning of the amendment’s text. As explained later, Kagan made this very argument as Solicitor General in urging the Court to uphold a federal prohibition of depictions of animal cruelty. Eight members of the Court soundly rejected this argument.²³²

More potential cause for concern is raised by Kagan’s proposal to use obscenity laws to regulate pornography, not so much by the proposal itself (for much pornography probably is legally obscene), but rather in Kagan’s understanding of obscenity and the relationship of morality to law. At

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* Actually Kagan only asks whether prohibiting publishing the stolen security information would be unconstitutional. But she responds by noting that to say “yes” would require overruling the *Pentagon Papers* case.” *Id.* (citing *New York Times v. United States*, 403 U.S. 713 (1971)).

²³⁰ Kagan, *Regulation After R.A.V.*, *supra* note 206, at 892.

²³¹ *Id.* at 899.

²³² See *infra* p. 41-42.

the beginning of the discussion, Kagan notes how using obscenity laws to regulate pornography “has come to assume the aspect of heresy in the ranks of anti-pornography feminism.”²³³ That this approach is “heresy” stems from the notion that while obscenity doctrine focuses on morality, offensiveness, and sexual prurience, pornography regulation should focus on power, sexual exploitation, and harm to women.²³⁴ In other words, in the orthodox feminist view that Kagan cites, what makes pornography bad is not merely sexual explicitness and prurience, but rather the exploitation and harm to women pornography involves. Kagan does not think that this feminist account is “flatly wrong.”²³⁵ In fact, she seems to agree with this account; besides positing that using obscenity law to regulate pornography (that is, sexually graphic material that harms women) is a useful way of achieving some of the objectives of anti-pornography feminism, using obscenity law in this way would benefit obscenity doctrine by shifting that doctrine’s focus from sexual prurience and offensiveness to sexual violence and exploitation.²³⁶

In the course of reaching her conclusions, Kagan begins by observing:

To be sure, the Supreme Court [in its earlier obscenity discussions] . . . spoke of the need “to protect the social interest in . . . morality” and, what is perhaps the same thing, of the need “to maintain a decent society. . . .” Here, the Court *appeared to stress a version of morality divorced from tangible social consequences and related to simple sentiments of offense or disgust*. But the Court also spoke of . . . the “correlation between obscene material and crime” and in particular, the correlation between obscene materials and “sex crimes.” This concern too may reflect a notion of morality, but if so it is a morality rooted in material harms. And *although some of the specific harms then perceived might now appear dated—the Court was thinking as much of unlawful acts involving “deviance” as of unlawful acts involving violence*—still the Court understood the obscenity category as emerging not merely from a body of *free-floating values*, but from a set of tangible harms, perhaps including sexual violence.²³⁷

She goes on to state that “one of the great (if paradoxical) achievements of the anti-pornography movement has been to alter views on obscenity—to transform obscenity into a category of speech understood as intimately related, in part if not in whole, to harms against women.”²³⁸ She notes approvingly the Canadian Supreme Court’s decision that “made sexual violence rather than sexual offensiveness the keystone of the obscenity category,”²³⁹ and concludes that efforts to similarly transform U.S. obscenity doctrine may benefit that doctrine by “bring[ing] the doctrine into greater accord with the harm-based morality of today, rather than of twenty years ago.”²⁴⁰

Kagan’s discussion of obscenity raises concerns about her understanding of morality and about whether as a Justice she would consider morality (or, at least, what one might call “traditional” morality) to be a legitimate reason for laws restricting personal conduct. Kagan distinguishes between morality she sees as based on “simple sentiments of offense or disgust” of “free-floating values,” and

²³³ *Id.* at 892.

²³⁴ *Id.* at 893.

²³⁵ *Id.*

²³⁶ See generally *id.* at 893-97.

²³⁷ *Id.* at 893-94 (internal quotes and citations omitted) (emphasis added).

²³⁸ *Id.* at 894.

²³⁹ *Id.* at 895 (citing *Regina v. Butler and McCord* [1992] 1 SCR 452, 134 NR 81, 108-18 (Canada)).

²⁴⁰ *Id.* at 897.

morality based on “tangible harms.”²⁴¹ With regard to the latter, she distinguishes between harms that “might now appear dated,” such as sexual deviance, and harms involving violence or exploitation of women.²⁴²

Kagan’s distinctions suggest one of two things concerning the relationship between morality and law. The first possibility is that Kagan believes that morality divorced from what she considers to be bad effects on others, or in her words, “tangible harms,” is based not in reason but in mere “simple sentiments.” This would imply that, in her view, moral principles that condemn behavior that is self-regarding (for example, the notion that masturbation or other private consensual sexual conduct is morally wrong) are irrational or, at best, subrational. The second possibility is that Kagan believes that moral norms regulating self-regarding conduct, while perhaps valuable in informing people how to best live their lives, are outside the law’s purview, a purview that is restricted to addressing harms caused to others.

Both of these views lead to the same practical result: it is not legitimate for government to restrict private personal conduct simply because that conduct is immoral. This view, coupled with accepting the doctrine of substantive due process and a broad autonomy-based understanding of liberty like that expressed in *Planned Parenthood v. Casey* (two positions we assume Kagan holds, and definitely needs to be questioned about) would almost certainly lead a judge to hold that laws restricting personal conduct that do not (in the judge’s view) cause harm to others violate due process. Thus, for example, if what we have noted above about Kagan’s possible understanding of morality and our assumption that Kagan accepts the broad understanding of liberty set forth in *Casey* are correct, it is difficult to imagine that she would not have voted in the majority *Lawrence v. Texas*,²⁴³ and it is reasonable to think she may well be persuaded to find a right to same-sex marriage (if convinced marriage is a private matter that does not cause harm to others).

Another problem with Kagan’s understanding of morality (if we have read it correctly) and the relationship of morality to law concerns the questions, What constitutes sufficient harm? and Who decides what constitutes sufficient harm? First off, nothing in the Constitution guides the inquiry as to what constitutes sufficient harm to allow states to regulate personal conduct, and nothing in the Constitution assigns that inquiry to federal judges or requires that their answers trump those of legislators. Moreover, the question as to what constitutes sufficient harm to justify legislation is often a subtle one, and reasonable minds can disagree over the correct answer. For example, with regard to obscenity, Kagan seems to question whether the concern with preventing deviant sexual behavior (at least where that behavior does not involve violence or exploitation) is a sufficient basis for regulating obscenity.²⁴⁴ But why should leading others into deviant sexuality not count as harm, or why, at least, can a state not conclude that leading others into deviant sexuality counts as harm? The question is especially pertinent given two millennia of Western thought that deviant sexual conduct does harm and degrade the people who engage in it. Moreover, even if the focal point of obscenity regulation should be harm to women, why can a state not reasonably conclude that all obscenity (even when the “actresses” or “models” engaging in the sexual activity depicted are willing participants) degrades women and harms them by feeding male fantasies and distorting men’s perception of women?

²⁴¹ *Id.* at 893-94.

²⁴² *Id.* at 894.

²⁴³ 539 U.S. 558 (2003) (holding unconstitutional a Texas law making private homosexual sodomy a crime).

²⁴⁴ See Kagan, *Regulation After R.A.V.*, *supra* note 206, at 894 (stating that some of the specific harms that animated earlier Supreme Court discussions of obscenity, such as unlawful acts involving deviance, “might now appear dated”).

As nothing in the Constitution’s text, structure, or history guides judges in answering the types of questions raised above, those questions are properly consigned to the people and their elected representatives (primarily, state representatives). Kagan’s seeming understanding of the relationship between law and morality could well mean that she would be another in the long line of modern Justices who are all too willing to conclude that the Constitution embodies their own views of morality and wise policy and empowers them to enact those views into law in deciding cases.

Solicitor General

Two of the cases that Kagan has handled as solicitor general have raised questions concerning her views on the First Amendment.²⁴⁵ The first case, *United States v. Stevens*,²⁴⁶ involved the constitutionality of 18 U.S.C. § 48, which was enacted “to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty.”²⁴⁷ In arguing that the statute was constitutional, the government, in a brief signed by Kagan, stated that “[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”²⁴⁸ The Supreme Court rejected the government’s test. Chief Justice Roberts, writing for the eight-member majority,²⁴⁹ agreed with the government that “the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies,” but noted that the Court was “unaware of any similar tradition excluding *depictions* of animal cruelty from ‘the freedom of speech’ codified in the First Amendment, and the Government points us to none.”²⁵⁰ The Court continued,

[t]he Government contends that “historical evidence” about the reach of the First Amendment is not “a necessary prerequisite for regulation today,” and that categories of speech may be exempted from the First Amendment’s protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress’s “‘legislative judgment that . . . depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them] unworthy

²⁴⁵ Jacob Sullum, *The Bounds of Silence, Obama’s Supreme Court Pick Looks Wobbly on Freedom of Speech*, REASON.COM, May 12, 2010, <http://reason.com/archives/2010/05/12/the-bounds-of-silence>.

²⁴⁶ 130 S. Ct. 1577 (2010).

²⁴⁷ *Id.* at 1582.

²⁴⁸ Brief for Petitioner/Appellant United States at *8; *see also United States v. Stevens*, 130 S. Ct. at 1585.

²⁴⁹ Justice Alito dissented. He explained at the beginning of his dissent that:

The Court strikes down in its entirety a valuable statute, 18 U.S.C. § 48, that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty—in particular, the creation and commercial exploitation of “crush videos,” a form of depraved entertainment that has no social value. The Court’s approach, which has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production, is unwarranted. Respondent was convicted under § 48 for selling videos depicting dogfights. On appeal, he argued, among other things, that § 48 is unconstitutional as applied to the facts of this case, and he highlighted features of those videos that might distinguish them from other dogfight videos brought to our attention. The Court of Appeals—incorrectly, in my view—declined to decide whether § 48 is unconstitutional as applied to respondent’s videos and instead reached out to hold that the statute is facially invalid. Today’s decision does not endorse the Court of Appeals’ reasoning, but it nevertheless strikes down § 48 using what has been aptly termed the “strong medicine” of the overbreadth doctrine, a potion that generally should be administered only as “a last resort.”

Instead of applying the doctrine of overbreadth, I would vacate the decision below and instruct the Court of Appeals on remand to decide whether the videos that respondent sold are constitutionally protected. If the question of overbreadth is to be decided, however, I do not think the present record supports the Court’s conclusion that § 48 bans a substantial quantity of protected speech.

United States v. Stevens, 130 S. Ct. at 1592-93 (Alito, J., dissenting) (citations and footnote omitted).

²⁵⁰ *Id.* at 1585.

of First Amendment protection,”” and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document “prescribing limits, and declaring that those limits may be passed at pleasure.”²⁵¹

Kagan has also been criticized for her argument in *Citizens United v. FEC*.²⁵² The case, which was argued twice before the Supreme Court, concerned a challenge by the group Citizens United to “the provisions of the McCain-Feingold law that had prohibited it from airing a documentary film, *Hillary: The Movie*, through video on demand within 30 days of any 2008 Democratic presidential primary.”²⁵³ Following the reargument in the case, Benjamin Barr, who has served as advisor and counsel to two FEC Chairmen,²⁵⁴ wrote,

[w]hile General Kagan did much to advance the government’s position addressing the many reasons why speech could be criminalized, she obfuscated in one of the case’s most central points: whether campaign finance laws and *Austin v. Michigan Chamber of Commerce* and *McConnell v. FEC*, at issue in *Citizens United*, allow the government to censor books.

Asked whether the government possessed book banning authority through the Federal Election Campaign Act, the Solicitor General assured the Court books would remain safe. In March, the same government reasoned just the opposite: books could be banned if they contained a call to vote for or against a candidate. . . .

When pressed on the switch, the Solicitor General explained that the FEC has never enforced the law when it came to books. Justice Antonin Scalia rightly retorted, “You are a lawyer advising somebody who is about to come out with a book and you say don’t worry, the FEC has never tried to send somebody to prison for this . . . Is that going to comfort your client? I don’t think so.”

What is even more troubling than a government that decides it can ban books in March, but not in September, is a government that misspeaks or misunderstands the truth about the law. Solicitor General Kagan explained to the Court that it need not worry about book banning because, “what we’re saying is that there has never been an

²⁵¹ *Id.* at 1585 (citations omitted) (emphasis added) (all but first alteration in the original).

²⁵² 130 S. Ct. 876 (2010).

²⁵³ Bradley A. Smith, *Citizens United We Stand*, AMER. SPECTATOR, May 2010, available at <http://spectator.org/archives/2010/05/07/citizens-united-we-stand/print>.

²⁵⁴ Center for Competitive Politics, Benjamin Barr, of Counsel, http://www.campaignfreedom.org/about_us/author/benjamin-barr (last visited May 24, 2010).

enforcement action for books. Nobody has ever suggested—nobody in Congress, nobody in the administrative apparatus has ever suggested that books pose any kind of corruption problem.”

The first problem with this is that Kagan leaves open the possibility that books will be banned in the future, once it is determined that they “pose a corruption problem.” And as other avenues for political speech are cut off through regulation, books will become more prominent tools for political discourse.

Leaving that aside, let’s be clear about this from Kagan’s view—as of now (but not back in March), books will not corrupt the minds of the electorate or be too influential on public officeholders’ judgments, but pamphlets, movies, and bumper stickers prove just too corrupting to trust to an open exchange of ideas.

....

In deciding whether to trust our citizens with the full protection of the First Amendment, the Court should be wary of relying on the representations of counsel that prove unreliable. As Chief Justice John Roberts exclaimed at the oral argument, “We don’t trust our First Amendment rights to FEC bureaucrats.”²⁵⁵

Barr also noted that the FEC had, in fact, investigated a book written by George Soros and its “related publicity.”²⁵⁶ Bradley A. Smith, a former chairman of the Federal Election Commission, wrote of Kagan’s argument:

On reargument last September, Solicitor General Elena Kagan tried to control the damage, arguing that the government never actually had tried to censor books, even as she reaffirmed its claimed authority to do just that. She also stated that “pamphlets,” unlike books, were clearly fair game for government censorship. (Former Federal Election Commissioner Hans von Spakovsky has noted that in fact the FEC has conducted lengthy investigations into whether certain books violated campaign finance laws, though it has not yet held that a book publisher violated the law through publication. And the FEC has attempted to penalize publishers of magazines and financial newsletters, only to be frustrated by the courts.)²⁵⁷

The Court’s opinion in *Citizens United* criticized the government’s argument:

The Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. See Part II–E, *supra*; Tr. of Oral Arg. 66 (Sept. 9, 2009); see also *id.*, at 26–31 (Mar. 24, 2009). If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. The Government responds “that the FEC has never applied this statute to a book,” and if it did, “there would be quite

²⁵⁵ Benjamin Barr, *Will S.G. Correct the Government’s Book Banning Mistake*, CENTER FOR COMPETITIVE POLITICS, Sept. 17, 2009, <http://www.campaignfreedom.org/blog/detail/will-sg-correct-the-governments-book-banning-mistake> (alteration in Justice Scalia’s quote in the original).

²⁵⁶ *Id.*

²⁵⁷ Bradley A. Smith, *Citizens United We Stand*, AMER. SPECTATOR, May 2010, *available at* <http://spectator.org/archives/2010/05/07/citizens-united-we-stand>.

[a] good as-applied challenge.” Tr. of Oral Arg. 65 (Sept. 9, 2009). This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.²⁵⁸

Kagan’s actions in this case raise questions, and the Senate should question her about her views on the First Amendment.

Questions

- You have stated that the government’s funding of certain speech on a topic, while not funding opposing speech on the same topic, is presumptively unconstitutional and must be evaluated under strict scrutiny. Why is this so, so long as the government does not otherwise prevent those with opposing views from speaking? How does your view square with the First Amendment’s language that “Congress shall make no law *abridging* the freedom of speech”? If opposing speakers are free to speak, can we say government has abridged their right to speak?
- Your view on selective speech subsidy seems to lead to some interesting results. Is it presumptively unconstitutional for government to fund speakers who discourage drunk driving while not funding speakers who encourage drinking while driving or who minimize the dangers of drinking while driving (even if government leaves those people free to speak)?
- Your academic writing on the First Amendment seems to focus exclusively on doctrine, values, and policy. Have you in any of your writings addressed the First Amendment’s text in light of the surrounding historical context? Based on the First Amendment’s text and history, what do you believe it means to “abridge the freedom of speech”?
- Do you believe it is legitimate for courts to determine what is included within the freedom of speech by balancing the “value” of the speech against the harms the speech may cause?
- Is morality a legitimate basis for regulating private personal conduct? If so, what do you think “morality” is?
- You have distinguished in your writing morality “divorced from tangible social consequences and related to simple sentiments of offense or disgust” from morality “rooted in material harms.” You seem to suggest that the former may not be a legitimate (or at least a sound) basis for regulating obscenity. Is that your view? Is morality a legitimate reason for legal regulation only if it is rooted in “material harms”? If so, what counts as harm? And what in the Constitution assigns to judges the task of answering that question, guides judges in answering that question, or gives any basis for determining that the judges’ answers to that question are superior to the legislature’s?

²⁵⁸ *Citizens United*, 130 S. Ct. at 904 (alteration in the original); see also Posting to The Leader Board, *As Solicitor, Elena Kagan’s Office Argued The U.S. Government Could Ban Books Before She Personally Revised The Position To Argue The Ban Would Only Apply To Pamphlets*, SEN. REP. COMM. CENTER (May 17, 2010 at 9:50:43 EDT), http://republican.senate.gov/public/index.cfm?FuseAction=Blogs.View&Blog_Id=efefee75-9be9-4275-843c-986d9dff3fb4.

PRESIDENTIAL POWERS

There has been speculation regarding Kagan's views on executive power. Walter Dellinger, noting "the critique of Solicitor General Elena Kagan's views on executive power" and citing Glenn Greenwald's speculation "that Kagan would move the court 'closer to the Bush/Cheney vision of Government and the Thomas/Scalia approach to executive power and law,'" has argued that Kagan's views of presidential power are "fundamentally progressive."²⁵⁹ Kagan has implicitly criticized some of the policies of the Bush Administration. In November 2005, she and three other law school deans sent a letter to Senator Leahy urging the Senate to adopt an amendment that would remove from the Department of Defense authorization bill a "court-stripping" amendment by Senator Graham. The letter expressed their belief that "immunizing the executive branch from review of its treatment of persons held at the U.S. Naval Base at Guantanamo strikes at the heart of the idea of the rule of law and establishes a precedent we would not want other nations to emulate."²⁶⁰ They noted two examples of cases that could be affected by the amendment:

The Supreme Court rejected the Government's claim in *Rasul v. Bush* that federal habeas corpus review did not extend to Guantanamo. The extent of the rights protected by federal habeas law is now before the Federal Court of Appeals for the D.C. Circuit. Another challenge has been filed to the authority of the President, acting without congressional authorization, to convene military commissions at Guantánamo. Just last week the Supreme Court announced that it would review the case, *Hamdan v. Rumsfeld*.

The Graham Amendment would attempt to stop both of these cases from proceeding and would unwisely interrupt judicial processes in midcourse. Respect for the constitutional principle of separation of powers should counsel against such legislative interference in the ongoing work of the Supreme Court and independent judges.

Unfortunately, the Graham Amendment would do much more. With a minor exception, the legislation would prohibit challenges to detention practices, treatment of prisoners, adjudications of their guilt and their punishment.²⁶¹

The deans concluded with this statement:

We cannot imagine a more inappropriate moment to remove scrutiny of Executive Branch treatment of noncitizen detainees. We are all aware of serious and disturbing reports of secret overseas prisons, extraordinary renditions, and the abuse of prisoners in Guantanamo, Iraq and Afghanistan. The Graham Amendment will simply reinforce the public perception that Congress approves Executive Branch decisions to act beyond the reach of law. As such, it undermines two core elements of the rule of law:

²⁵⁹ Walter Dellinger, *Elena Kagan Is a Progressive on Executive Power*, SLATE, April 16, 2010, <http://www.slate.com/id/2251138> (quoting Glenn Greenwald, *The Case Against Elena Kagan*, SALON, April 13, 2010, http://www.salon.com/news/opinion/glenn_greenwald/2010/04/13/kagan).

²⁶⁰ Letter from T. Alexander Aleinkoff, Dean, Georgetown University Law Center, Elena Kagan, Dean and Charles Hamilton Houston Professor of Law, Harvard Law School, Harold Hongju Koh, Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law, Yale Law School, Larry Kramer, Dean and Richard E. Lang Professor of Law, Stanford Law School, to Senator Patrick Leahy (Nov. 14, 2005) (printed in the Congressional Record, 151 Cong. Rec. S12802 (daily ed. Nov. 15, 2005)), available at <http://judiciary.senate.gov/nominations/SupremeCourt/upload/12C-4-111405OppositionToGrahamAmendment.pdf>.

²⁶¹ *Id.*

congressionally sanctioned rules that limit and guide the exercise of Executive power and judicial review to ensure that those rules have in fact been honored.²⁶²

One problem with the deans' letter is that in its discussion of the jurisdiction stripping provision it abstracts a structural principle—the separation of powers—from the constitutional text that implements and (in some respect) limits that principle. It is specious to suggest that “separation of powers” bars congressional action without first coming to grips with the power the Constitution actually assigns to the three branches. And, some of those powers are powers to stick their fingers in other branches' business—for example, Congress's power to impeach and the President's power to veto legislation. The deans' suggestion that the jurisdiction stripping provision somehow improperly violates the separation of power by undermining “judicial independence” fails to recognize that Article III implicitly gives Congress the power to regulate lower federal court jurisdiction and expressly gives Congress the power to make exceptions to and regulate the Supreme Court's appellate jurisdiction. If that power extended to the Graham amendment (and *Ex Parte McCordle*²⁶³ and Article III's plain language suggest that it did), there could not be a separation of powers problem because Congress was just doing what the Constitution empowers it to do. In so doing, Congress was acting consistently with another fundamental principle of our constitutional system—the principle of checks and balances.

The deans' letter, with its call for “congressionally sanctioned rules that limit and guide the exercise of Executive power” stands in contrast with the tone of Kagan's scholarly article on presidential power. As an academic, Kagan wrote a lengthy article on the subject of presidential control over administrative agencies. The 2001 law review article²⁶⁴ outlines and evaluates the development and role of “presidential administration,” which she defined in a speech on the article as “the increased control of administrative action by the president.”²⁶⁵ Unlike the letter, this article argued for a strong executive branch and described a way that the executive branch could circumvent, to a degree, a hostile Congress. Her aims in the article were

(1) to trace the development of presidential administration, particularly in the last eight years under President Clinton; (2) to consider the legality of the practices used to effect presidential control, again focusing on the practices developed by Clinton; (3) to consider the desirability of these practices; and (4) finally, to consider the ways in which courts should respond to the emergence of these practices in developing and applying administrative law.²⁶⁶

Kagan disclosed at the outset of the article that as a member of the Clinton White House she “participated in some of the administrative actions discussed in this Article.”²⁶⁷ During Clinton's presidency, “presidential control of administration, in critical respects, expanded dramatically . . . ,

²⁶² *Id.*

²⁶³ 74 U.S. 506 (1868) (holding that Congress could, under its power to make exceptions to the Supreme Court's appellate jurisdiction, strip the Court of jurisdiction even if the Court had to dismiss a case that had been argued and was pending decision).

²⁶⁴ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

²⁶⁵ Elena Kagan, Remarks at the Harvard Law School Faculty Workshop on Presidential Administration Article (Nov. 17, 2000) (notes available at <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/KaganSG-Question13D-Part75.pdf>) [hereinafter *Presidential Administration Speech*].

²⁶⁶ *Id.* at 2.

²⁶⁷ Kagan, *Presidential Administration*, 114 HARV. L. REV. at 2246 n.*.

making the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda."²⁶⁸ Kagan explained,

[f]aced for most of his time in office with a hostile Congress but eager to show progress on domestic issues, Clinton and his White House staff turned to the bureaucracy to achieve, to the extent it could, the full panoply of his domestic policy goals. Whether the subject was health care, welfare reform, tobacco, or guns, a self-conscious and central object of the White House was to devise, direct and/or finally announce administrative actions—regulations, guidance, enforcement strategies, and reports—to showcase and advance presidential policies.²⁶⁹

As Kagan noted later in her article, "Clinton's use of directive authority over the executive branch agencies accelerated dramatically when the Democrats lost control of Congress"²⁷⁰ The directives were often linked to "Clinton's legislative agenda," and, for example,

[t]he many directives on patient protections . . . would have had less purpose if Democrats had maintained a working majority of both houses of Congress throughout Clinton's time in office. These and similar directives functioned as an end run around Congress, and also a goad to Congress, in a context in which presidential inaction could incur a steep price from the press and the public.²⁷¹

Contrasting Clinton's supervision of the administrative state with that of the previous two presidents, Kagan stated,

Where once presidential supervision had worked to dilute or delay regulatory initiatives, it served in the Clinton years as part of a distinctly activist and pro-regulatory governing agenda. Where once presidential supervision had tended to favor politically conservative positions, it generally operated during the Clinton Presidency as *a mechanism to achieve progressive goals*.²⁷²

Kagan noted, however, that "[a] key aspect" of Clinton's "system of administrative control raises serious legal questions."²⁷³ "Clinton's use of what [Kagan] call[s] directive authority—his commands to executive branch officials to take specified actions within their statutorily delegated discretion—ill-comports" with the conventional views about the relationship between Congress, the president, and administrative agencies.²⁷⁴ Kagan explained that the "[a]ccepted constitutional doctrine holds that Congress possesses broad, although not unlimited, power to structure the relationship between the President and the administration"²⁷⁵ Also, she explained,

[t]he conventional view further posits, although no court has ever decided the matter, that by virtue of this power, Congress can insulate discretionary decisions of even removable (that is, executive branch) officials from presidential dictation—and, indeed,

²⁶⁸ *Id.* at 2248.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 2312.

²⁷¹ *Id.* at 2313.

²⁷² *Id.* at 2249 (emphasis added).

²⁷³ *Id.* at 2250.

²⁷⁴ *Id.* at 2250-51.

²⁷⁵ *Id.* at 2250.

that Congress has done so whenever (as is usual) it has delegated power not to the President, but to a specified agency official.²⁷⁶

While Kagan “acknowledge[d] that Congress generally may grant discretion to agency officials alone and that when Congress has done so, the President must respect the limits of this delegation,”²⁷⁷ she defended Clinton’s actions by looking at the “statutory predicate underlying the conventional view.”²⁷⁸ As Kagan explained in her speech, her “argument . . . to the legality of this practice is that, contrary to the conventional view, a statute delegating power to named officials in the executive branch should not be viewed as foreclosing presidential directive authority.”²⁷⁹ She argued for the necessity of “some kind of default rule or clear statement rule in mind—a rule requiring Congress to state explicitly either that the president shall have this power or that he shall not.”²⁸⁰ She believed that the best type of clear statement rule would be one “requiring Congress to say so clearly if it wishes to foreclose presidential directive authority.”²⁸¹ As she wrote in her article, “most statutes granting discretion to executive branch—but not independent—agency officials should be read as leaving the ultimate decisionmaking authority in the hands of the President.”²⁸² Kagan also recognized “potential objections to enhanced presidential control of agency decisions raised, respectively, on behalf of Congress, agency experts, and affected constituencies.”²⁸³ While she “generally conclude[d] that these objections fail,” she did identify “select areas in which the objections reveal a need for limits on the presidential role.”²⁸⁴ In the conclusion of her article, she affirmed the “continuing roles” for Congress, agency experts, and constituency groups in “administrative governance.”²⁸⁵

Kagan’s views on the topic of presidential power can also be seen in her answers following the hearing on her nomination for solicitor general. When asked by Senator Specter if the “the President has the constitutional authority as commander-in-chief to override laws enacted by Congress and to immunize people under his command from prosecution if they violate these laws passed by Congress” and if he has “the authority to circumvent the Foreign Intelligence Surveillance Act (FISA), and bypass the FISA court to conduct warrantless electronic surveillance that may include spying on Americans,”²⁸⁶ Kagan responded that “[t]he appropriate analysis in considering any question of this kind derives from Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.”²⁸⁷ She explained,

In that opinion, Justice Jackson describes three situations: the first where executive power is exercised pursuant to a congressional authorization; the second where executive power is exercised in the absence of any congressional action; and the third “when the President takes measures incompatible with the expressed or implied will of Congress.” In the last situation, Justice Jackson notes, presidential “power is at its lowest ebb” and “must be scrutinized with caution, for what is at stake is the equilibrium established by our

²⁷⁶ *Id.* (footnote omitted).

²⁷⁷ *Id.* at 2320.

²⁷⁸ *Id.*

²⁷⁹ Presidential Administration Speech, *supra* note 265, at 5.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 2320.

²⁸³ *Id.* at 2346.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 2384.

²⁸⁶ *Solicitor General Hearing*, *supra* note 5, at 168 (Written Questions for Solicitor General Nominee Elena Kagan from Senator Specter).

²⁸⁷ *Id.* at 169 (citation omitted).

constitutional system.” This does not mean the President *never* has power to act in such a situation, for on some occasions, as Justice Jackson recognizes, Congress is indeed “disabl[ed]” from acting upon a subject. But these occasions are rare and cannot be created or justified merely by a general invocation of the commander-in-chief power. These principles are the ones I would apply to the consideration of any executive action, including any action relating to FISA.²⁸⁸

Kagan’s textbook answer provides little insight into her true views on the topic, especially when compared to her letter and law review article. The Senate should continue to seek clarification on her views regarding executive power.

ABORTION

According to the *Washington Post*, Kagan’s position on abortion may become a “sleepers issue” as both sides try to determine how she would rule if confirmed to the Supreme Court.²⁸⁹ President Obama, however, has made his position on abortion clear. In a July 2007 address before the Planned Parenthood Action Committee, then-Senator Obama stated in a pertinent part:

I have worked on these issues for decades now. I put Roe at the center of my lesson plan on reproductive freedom when I taught Constitutional Law. Not simply as a case about privacy but as part of the broader struggle for women’s equality. Steve and Pam will tell you that we fought together in the Illinois State Senate against restrictive choice legislation—laws just like the federal abortion laws, the federal abortion bans that are cropping up. I’ve stood up for the freedom of choice in the United States Senate and I stand by my votes against the confirmation of Judge Roberts and Samuel Alito.

So, you know where I stand. But this [is more] than just about standing our ground. It must be about more than protecting the gains of the past. We’re at a crossroads right now in America—and we have to move this country forward. This election is not just about playing defense, it’s also about playing offense. It’s not just about defending what is, it’s about creating what might be in this country. And that’s what we’ve got to work together on.

There will always be people, many of goodwill, who do not share my view on the issue of choice. On this fundamental issue, I will not yield and Planned Parenthood will not yield. But that doesn’t mean that we can’t find common ground. Because we know that what’s at stake is more than whether or not a woman can choose an abortion.²⁹⁰

²⁸⁸ *Id.* (alteration in the original).

²⁸⁹ Michael D. Shear, *Abortion Could Be Sleepers Issue in Supreme Court Confirmation Process*, WASH. POST, May 11, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/11/AR2010051101019.html>.

²⁹⁰ Senator Barack Obama, Address to Planned Parenthood Action Fund (July 17, 2007) (transcript available at <http://sites.google.com/site/lauraetch/barackobamabeforeplannedparenthoodaction>) (applause notation omitted) (second alteration reflects audio rather than transcript). See also Robert P. George, *Obama’s Abortion Extremism*, PUBLIC DISCOURSE: ETHICS, LAW, AND THE COMMON GOOD, Oct. 14, 2008, <http://www.thepublicdiscourse.com/2008/10/133>.

Furthermore, in a 2007 debate during his Presidential campaign, Obama was quoted as stating, ““I would not appoint somebody who doesn’t believe in the right to privacy.””²⁹¹ Given President Obama’s consistent record in defending the right to abortion,²⁹² there is little reason to doubt that he would nominate an individual who holds his beliefs. His selection of Kagan indicates his belief that she would hold his views concerning a constitutional right to abortion, and therefore raises a rebuttable presumption that Kagan, as a Justice, would support that right and vote not to overrule *Roe v. Wade* and *Planned Parenthood v. Casey*. The question for Senators concerned with this issue, then is whether the hearings produce sufficient evidence to rebut the presumption. The burden of proof on this point rests with Kagan and the Administration. Any Senator who holds the view that *Roe*, *Casey*, and the abortion regime those decisions create are contrary to the Constitution should vote not to confirm Kagan unless she convinces him or her that she does not support those decisions and that regime.

In trying to determine Kagan’s position on abortion, the pro-life group American’s United for Life pointed to contributions by Kagan to the National Partnership for Women and Families (NPWF).²⁹³ In the Senate questionnaire that Kagan filled out regarding her nomination for solicitor general, she stated, “In a questionnaire I submitted to the Senate in connection with a judicial nomination in 1999, I listed membership in the National Partnership for Women and Families as a result of charitable contributions. I have no current memory of whether such contributions ever made me a member of this organization.”²⁹⁴ NPWF is a pro-abortion organization. According to their website, “We have a deep, unwavering commitment to reproductive health whether it’s expanding your reproductive rights or blocking attempts to reverse hard-won gains. Our goal is to give every woman access to the full range of reproductive health information and services, including . . . abortion services.”²⁹⁵ Kagan’s affiliation with NPWF suggests a sympathetic leaning toward NPWF’s goal of supporting abortion.

A memorandum sent to President Clinton on May 13, 1997, by Kagan and her boss, Bruce Reed, also raises questions about Kagan’s position on abortion. In the memorandum, Kagan recommended that President Clinton send a letter to Congress supporting separate substitute amendments proposed by Senator Daschle and Senator Feinstein regarding the Partial Birth Act (HR 1122).²⁹⁶ Each amendment included a health exception, but Senator Daschle’s amendment was more “stringent” than Senator Feinstein’s amendment.²⁹⁷ The differences in the language of the two

²⁹¹ Robert Barnes and Michael D. Shear, *Abortion Rights Backers Get Reassurances on Nominee*, WASH. POST, May 29, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/05/28/AR2009052803937.html?wprss=rss_nation.

²⁹² For a brief summary of that record, see George, *Obama’s Abortion Extremism*, *supra* note 290.

²⁹³ Press Release, Americans United for Life, *Yoest Notes Kagan Is “Stealth Candidate” with a “Fill-in-the-Blank” Approach to Law* (May 10, 2010), <http://www.aul.org/2010/05/yoest-notes-kagan-is-stealth-candidate-with-a-fill-in-the-blank-approach-to-law/>.

²⁹⁴ *Solicitor General Hearing*, *supra* note 5, at 52 (Questionnaire for Non-Judicial Nominees: Elena Kagan).

²⁹⁵ National Partnership for Women and Families, Issues & Campaigns, Reproductive Health, http://www.nationalpartnership.org/site/PageServer?pagename=issues_repro (last visited June 11, 2010).

²⁹⁶ Memorandum from Bruce Reed and Elena Kagan on Daschle and Feinstein Amendments to the President of the United States 1 (May 13, 1997) (on file at the Clinton Presidential Library), available at <http://www.clintonlibrary.gov/Documents/Kagan%20-%20Bruce%20Reed/Kagan%20-%20Bruce%20Reed%20-%20Subject%20File%20Series/Box%2097%20Abortion%20Doc%203.pdf> [hereinafter Memorandum on Daschle and Feinstein Amendments].

²⁹⁷ *Id.* According to the memorandum,

Most critically, both amendments contain a health exception, though of different kinds. The Feinstein legislation would exempt an abortion if, “in the medical judgment of the attending physician, the abortion is necessary to . . . avert serious adverse health consequences to the woman.” This language is essentially identical to the language you have used in calling for a health exception to the Partial Birth Act. The

amendments caused pro-abortion groups to oppose Senator Daschle's proposal because they feared it would undermine *Roe*.²⁹⁸

Although the memorandum recommended that President Clinton support both amendments, even though one of the amendments received opposition from pro-abortion organizations, that does not support the conclusion that Kagan advocated for a ban on partial-birth or late-term abortions. The memorandum urged President Clinton to support Senator Daschle's amendment despite pro-choice opposition "in order to sustain your credibility on HR 1122 and prevent Congress from overriding your veto."²⁹⁹ The memorandum went on to state, given Clinton's past statements and the American College of Obstetricians and Gynecologists' support for the amendment, that "declining to support the amendment will weaken your position and increase the chance that Congress will override your veto."³⁰⁰

However, at least one pro-life group rejected the Daschle Amendment as a compromise. National Right to Life Legislative Director Douglas Johnson said at the time, "'The Clinton-Daschle proposal is an empty shell. It is a purely political contrivance. It has one purpose: to provide political cover for lawmakers who want to appear to their constituents to have voted to restrict partial-birth abortions, but without in any way offending the extreme pro-abortion lobby.'"³⁰¹ He further explained that the "'Clinton-Daschle proposal was designed to look good on paper, and to fool unwary journalists, but in no way to impose the slightest actual impediment to the unfettered ability of abortionists to perform the procedures.'"³⁰²

Properly read, the memorandum expressed Kagan's concern about the politics of Clinton's position on the partial birth abortion ban, not the policy. Kagan does not appear to have actually encouraged President Clinton to support a partial-birth or late-term abortion ban. As a *New York Times* article pointed out, "[t]he memo anticipated that the Daschle plan would fail but suggested that it would provide political cover for enough senators to stick by the president when he ultimately vetoed the tougher bill sponsored by Republicans."³⁰³ According to the *New York Times*, Clinton "accepted the recommendation, and the White House signaled support for the Daschle amendment the same day. The amendment was defeated, and the Republican-led Congress sent the tougher ban to Mr. Clinton, who vetoed it. An effort to override the veto fell three votes short in the Senate."³⁰⁴ President Clinton's apparent intention was to veto HR 1122 (assuming that the Daschle Amendment failed), and Kagan's memorandum merely urged his support of Senator Daschle's substitute amendment to prevent an override of his later veto of HR 1122. At best, this evidence seems to show that Kagan encouraged President Clinton's pro-choice agenda, but the evidence certainly does not show she supported a partial-birth or late-term abortion ban.

Daschle language is more stringent. It exempts an abortion when the physician "certifies that continuation of the pregnancy would . . . risk grievous injury to [the mother's] physical health." "Grievous injury" is then defined as "a severely debilitating disease or impairment specifically caused by the pregnancy, or an inability to provide necessary treatment for a life-threatening condition."

Id. (alterations in the original).

²⁹⁸ *Id.* at 2.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ Steven Ertelt, *Memo Misread: Elena Kagan Did Not Tell Clinton to Back Partial-Birth Abortion Ban*, LIFE NEWS.COM, May 11, 2010, <http://lifenews.com/nat6323.html>.

³⁰² *Id.*

³⁰³ Peter Baker, *As Clinton Aide, Kagan Recommended Tactical Support for an Abortion Ban*, N.Y. TIMES, May 11, 2010, available at <http://www.nytimes.com/2010/05/12/us/politics/12abort.html>.

³⁰⁴ *Id.*

A June 12, 1998, memorandum written by Kagan's boss, Bruce Reed and Charles Ruff, may also provide insight into Kagan's views on abortion. The memorandum indicated that Kagan supported applying the then-current Hyde Amendment to Medicare and not ruling that "Medicare can cover abortions necessary to protect the health of the woman (in addition to abortions allowed by Hyde)."³⁰⁵ The memorandum noted that this option would "anger womens' groups, which would prefer us to provide Medicare coverage of the widest possible range of abortions, even if doing so would provoke Republicans to enact contrary legislation."³⁰⁶ Although Kagan did recommend that President Clinton adopt the more moderate view, the memorandum makes clear one of the "[p]ros" of the option Kagan endorsed was that "[t]his option is most likely to avoid a legislative showdown on abortion funding that we are unlikely to win."³⁰⁷ Furthermore, the memo noted that the recommended option would "cover more abortions than the current policy allows."³⁰⁸ Once again, Kagan's position does not show that she supports a centrist abortion policy. Instead, this memorandum merely shows her decision was prompted by the politics of the situation.

A piece of evidence that may actually reveal Kagan's personal views on abortion can be found in *The Daily Princetonian* article discussed above in which Kagan wrote,

Reagan I expected, but Symms, Abdnor, Quayle, and Grassley I did not. Even after the returns came in, I found it hard to conceive of the victories of these anonymous but Moral Majority-backed opponents of Senators Church, McGovern, Bayh, and Culver, *these avengers of "innocent life"* and the B-1 Bomber, these beneficiaries of a general turn to the right and a profound disorganization on the left.³⁰⁹

Kagan's view of the pro-life movement seems evident in this essay. Her scare quotes around the words "innocent life" seem to indicate her disbelief that unborn babies are truly part of the human race. The Legislative Director of the National Right to Life Committee, Douglas Johnson, shared the same concern when he stated, "Was Ms. Kagan so dismissive of the belief that unborn children are members of the human family that she felt it necessary to put the term 'innocent life' in quote marks, or does she have another explanation?"³¹⁰ Although the essay expresses Kagan's strong emotions following the election, the essay does not specifically state that Kagan is pro-choice. However, it does give a good glimpse into Kagan's personal views about the pro-life movement.

Finally, as a law clerk to Justice Marshall, Kagan wrote a memo to Justice Marshall on the case *Bowen v. Kendrick*.³¹¹ The case involved a challenge to the Adolescent Family Life Act (AFLA), which, as the Supreme Court described it, "is essentially a scheme for providing grants to public or nonprofit private organizations or agencies 'for services and research in the area of premarital

³⁰⁵ Memorandum from Bruce Reed and Charles F.C. Ruff on Hyde Amendment Application to Medicare and Abortion Coverage Requirements for Catholic Provider Sponsored Organizations to the President of the United States 3 (June 12, 1998) (on file at the Clinton Presidential Library), *available at* http://www.politico.com/pdf/PPM154_memos5_9_051110.pdf (emphasis omitted) [hereinafter Hyde Amendment Application Memorandum].

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 3; *see also id.* at 4.

³⁰⁸ *Id.* at 3.

³⁰⁹ Elena Kagan, *Fear and Loathing in Brooklyn*, THE DAILY PRINCETONIAN, Nov. 10, 1980, *available at* <http://www.dailyprincetonian.com/2010/05/03/26082> (emphasis added)

³¹⁰ Press Release, National Right to Life, National Right to Life Comments on the Nomination of Elena Kagan to U.S. Supreme Court (May 10, 2010), http://www.nrlc.org/press_releases_new/Release051010.html.

³¹¹ 487 U.S. 589 (1988).

adolescent sexual relations and pregnancy.”³¹² As the Supreme Court described it, “[c]onsidering the federal statute both ‘on its face’ and ‘as applied,’ the District Court ruled that the statute violated the Establishment Clause of the First Amendment insofar as it provided for the involvement of religious organizations in the federally funded programs.”³¹³ The Supreme Court, however, determined that “the statute is not unconstitutional on its face, and that a determination of whether any of the grants made pursuant to the statute violate the Establishment Clause requires further proceedings in the District Court.”³¹⁴ In Kagan’s memo to Justice Marshall on the case, she wrote:

“I think the [district court] got the case right. The funding here is to be used to support projects designed to discourage adolescent pregnancy and to provide care for pregnant adolescents. It would be difficult for any religious organization to participate in such projects without injecting some kind of religious teaching. The government is of course right that religious organizations are different and that these differences are sometimes relevant for the purposes of government funding. The government, for example, may give educational subsidies to religious universities, but not to parochial schools. But when the government funding is to be used for projects so close to the central concerns of religion, all religious organizations should be off limits.”³¹⁵

When asked about the memo at her solicitor general confirmation hearing, Kagan said that, looking back at the memo she thought “‘That is the dumbest thing I have ever heard.’”³¹⁶ In answering written questions from Senator Sessions, she expounded on her answer, stating:

I indeed believe that my 22-year-old analysis, written for Justice Marshall, was deeply mistaken. It seems now utterly wrong to me to say that religious organizations generally should be precluded from receiving funds for providing the kinds of services contemplated by the Adolescent Family Life Act. I instead agree with the *Bowen* Court’s statement that “[t]he facially neutral projects authorized by the AFLA—including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, educational services, residential care, child care, consumer education, etc.—are not themselves ‘specifically religious activities,’ and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations.” As that Court recognized, the use of a grant in a particular way by a particular religious organization might constitute a violation of the Establishment Clause—for example, if the organization used the grant to fund what the Court called “specifically religious activity.” But I think it incorrect (or, as I more colorfully said at the hearing, “the dumbest thing I ever heard”) essentially to presume that a religious organization will use a grant of this kind in an impermissible manner.³¹⁷

³¹² *Id.* at 593 (quoting S. Rep. No. 97-161, at 1 (1981)).

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Solicitor General Hearing, supra* note 5, at 163 (Questions for the Record for Elena Kagan Submitted by Sen. Jeff Sessions) (alteration in the original, but emphasis in Kagan’s memo).

³¹⁶ *Id.* at 98 (Questioning of Sen. Specter).

³¹⁷ *Solicitor General Hearing, supra* note 5, at 163-64 (Questions for the Record for Elena Kagan Submitted by Sen. Jeff Sessions) (alteration in the original).

Questions

- General Kagan, in your November 10, 1980, article in *The Daily Princetonian*, entitled “Fear and Loathing in Brooklyn,” you called Senators Symms, Abdnor, Quayle, and Grassley “avengers of ‘innocent life,’” with the words “innocent life” in what appears to be scare quotes. Why did you put quotes around the words “innocent life?” Did you question these Senators’ commitment to the pro-life cause? Did you disagree with their assertion that unborn babies represent “innocent life?”
 - Do you think that your use of scare quotes could be seen as offensive to individuals who are deeply committed to the pro-life cause? To individuals who, to borrow your words, “abhor” abortion and consider it “a profound wrong” and a “moral injustice of the first order?”
- Do you agree with the Court in *Roe*, that the Constitution protects a right to privacy and that the right to privacy extends to protect the right to abortion?
- Professor John Hart Ely wrote in 1973 that “*Roe* is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be.” Do you agree with that statement? If not, why not? In your view, what is *Roe*’s constitutional basis? How does the Constitution’s text support the Court’s decision in *Roe*?
 - If you think *Roe*’s reasoning was deficient, do you think the Court’s decision in *Planned Parenthood v. Casey* remedied the deficiencies?
- Do you agree with *Casey*’s definition of the “heart of liberty” as the “right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”? If so, what in the Constitution’s text, structure, or history supports that definition? If that is the definition of constitutional liberty, on what principled basis can the courts limit its application? Is there a principled basis? For example, the Supreme Court in *Glucksberg v. Washington* held that the Due Process Clause did not protect a right to assisted suicide. Yet, in *Lawrence v. Texas*, the Court depended on large part on *Casey*’s definition of liberty to hold unconstitutional on due process grounds a law prohibiting same-sex sodomy. What is the principled *legal* basis for distinguishing assisted suicide from sodomy and abortion such that sodomy and abortion are protected by the Due Process Clause but assisted suicide is not? What in the Constitution’s text, structure, or history supports that distinction?
- With respect to *Casey*’s undue burden standard, where does a judge find guidance to make a legally principled determination whether a law regulates abortion too much? Must the judge resort to balancing interests? What in any legal materials (in particular, the Constitution) guides this balancing? Does the decision really come down to questions of policy? Aren’t policy choices supposed to be left to the political branches or the states?
- Do you agree with the *Casey* joint opinion’s *stare decisis* analysis? If so, why? If not, why not? Do federal courts really have the power to perpetuate decisions that are not supported by the Constitution? If so, how is this consistent with the power of judicial review as explained in *Marbury v. Madison*, which premised the power on the Constitution’s superiority to other sources of law in our system? If *Marbury* is correct, why should judicial decisions inconsistent with the Constitution stand while statutes inconsistent with the Constitution fall?

OTHER ISSUES

Second Amendment

Kagan's views on the Second Amendment are as unclear as her views on many other controversial issues. Since her nomination was announced, news reports have identified previous positions that she took, which might provide insight into her views on the Second Amendment. For example, during Kagan's tenure on President Clinton's staff, she helped to draft an executive order "restricting the importation of certain semiautomatic assault rifles."³¹⁸ However, more evidence is necessary to determine whether Kagan's personal views on the Second Amendment are represented by her work as a member of the Clinton Administration (i.e. whether she advised Clinton to "infringe upon the [Second] Amendment rights of Americans").³¹⁹ Furthermore, in 1987, as a law clerk for Justice Marshall, Kagan, in a memorandum to Justice Marshall on whether to grant certiorari, stated that "she was 'not sympathetic' toward a man who contended that his constitutional rights were violated when he was convicted for carrying an unlicensed pistol."³²⁰ As a news report on the memorandum explained, "The man's 'sole contention [wa]s that the District of Columbia's firearms statutes violate[d] his constitutional right to 'keep and bear arms,'" Kagan wrote. 'I'm not sympathetic.'"³²¹

Perhaps the statements that express more clearly her personal position on the Second Amendment are those made in the March 18 letter that she sent to Senator Specter. When asked by Senator Specter about whether she believed *Heller* was rightly decided, Kagan stated,

Although I have never written about or taught the Second Amendment, I have read a fair bit of the scholarship that has appeared in recent years regarding the original meaning and history of the Second Amendment. I have always found this scholarship singularly difficult to evaluate. Both sides (that is, the individual rights view and the collective rights view) present cogent and sometimes powerful arguments, and I have come away thinking that immersion in the primary sources, which I have never attempted, would be necessary to choose between them with any degree of confidence. My instinctive response to reading the opinions in *Heller* last summer was much the same. This is not to say that the questions at issue are incapable of resolution; to the contrary, I have no doubt that the textual and historical questions with which the opinions wrestle are fundamental to appropriate constitutional analysis. It is only to say that I have not done the work required. I therefore have no reason to believe that the Court's analysis was faulty.³²²

Kagan went on to state that "if confirmed as Solicitor General, I would view *Heller*—and its fundamental understanding that the Second Amendment guarantees an individual right to keep and bear arms—as settled law, and I would fully accept the Court's determination."³²³ Since Kagan may

³¹⁸ Brian Darling, *Kagan Bad on Guns*, HUMAN EVENTS, May 14, 2010, available at <http://www.humanevents.com/article.php?id=36973> (quoting James Oliphant, *She's a White House Veteran*, LOS ANGELES TIMES, May 11, 2010, <http://articles.latimes.com/2010/may/11/nation/la-na-kagan-profile-20100511/2>).

³¹⁹ *Id.*

³²⁰ Greg Stohr & Kristin Jensen, *Kagan Was 'Not Sympathetic' as Law Clerk to Gun-Rights Argument*, BLOOMBERG.COM, May 13, 2010, <http://www.bloomberg.com/apps/news?pid=20601010&sid=aPI35t8uR6Gs#>.

³²¹ *Id.*

³²² March 18 Letter, *supra* note 131, at 6.

³²³ *Id.* at 7.

well soon be one of the Justices determining the scope of the right identified in *Heller*, it is important to understand how she would approach interpreting the Second Amendment.

Questions

- General Kagan, you said in a March 18 letter to Senator Specter that you thought both sides in the Second Amendment debate—“the individual rights view and the collective rights view”—“present cogent and sometimes powerful arguments” Would you characterize the Court’s decision in *Heller* as a close call?
 - What should the Court do in the situation of a “close call”? What should the Court do if analysis of constitutional text, structure, and history do not lead to a definitive answer?
- You told Senator Specter that you had not closely studied the issue, and, therefore, you had “no reason to believe that the Court’s analysis was faulty.” You also said that as Solicitor General you would “view *Heller* . . . as settled law.” If confirmed to the Supreme Court, would you still view *Heller* as settled law?
- You have done research and written on the First Amendment. How would you compare the importance of the right embodied in the Second Amendment with the rights embodied in the First Amendment?

Foreign/International Law

Kagan’s views about the relevance of foreign or international law in interpreting our Constitution and its use in Supreme Court decisions deserve inquiry. Statements she made during her confirmation hearings for solicitor general and during her time as dean of Harvard Law School, and her full-throated support of President Aharon Barak, suggest she would support the use of foreign or international law as a Supreme Court Justice.

In follow-up questions after the hearing on her nomination to be solicitor general, Senator Specter asked Kagan, “[I]s it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of provisions of the Constitution?”³²⁴ Specter then continued to ask Kagan under what circumstances she would “consider foreign law when interpreting the Constitution” in general and the Second and Eighth Amendments in particular.³²⁵ Kagan responded, “At least some members of the Court find foreign law relevant in at least some contexts. When this is the case, I think the Solicitor General’s office should offer reasonable foreign law arguments to attract these Justices’ support for the positions that the office is taking.”³²⁶ Kagan continued to give her opinion about when Justices would most likely take foreign law into consideration by stating, “Even the Justices most sympathetic to the use of foreign law would agree that the degree of its relevance depends on the constitutional provision at issue.”³²⁷ She explained, “A number of the Justices have considered foreign law in the Eighth Amendment context, where the

³²⁴ *Solicitor General Hearing*, *supra* note 5, at 166.

³²⁵ *Id.*

³²⁶ *Id.* at 166-67.

³²⁷ *Id.* at 167.

Court's inquiry often focuses on 'evolving standards of decency' and then on the level of consensus favoring or disfavoring certain practices."³²⁸ However, she further explained,

none of the Justices relied on other nations' restrictions on gun rights in their opinions in *District of Columbia v. Heller*, and the grounded historical approach adopted in that case (and echoed even in the dissents) would grant no relevance to arguments from comparative law in defining the scope of the Second Amendment right.³²⁹

Kagan placed a qualification, however, on her answer to Senator Specter's question when she said, "This set of questions appears different when viewed from the perspective of an advocate than when viewed from the perspective of a judge."³³⁰ Therefore, Kagan's answer as a solicitor general nominee offers little insight into how she would use foreign or international law if confirmed as a Justice on the Supreme Court.

Kagan further clarified her position on the use of foreign or international in her March 18 letter to Senator Specter. She explained, "*There are some circumstances in which it may be proper for judges to consider foreign law sources in ruling on constitutional questions. . . .* This is most often the case when the Court has deemed interpretation of a provision to rest in part on current practices and norms regarding some subject."³³¹

Kagan stated the Eighth Amendment is the "classic case" where the Supreme Court "in determining what counts as 'cruel and unusual' punishment, often looks to 'evolving standards of decency that mark the progress of a maturing society' as exemplified by practices both in the United States and around the world."³³² She also stated that she did "not know of any bodies of constitutional doctrine other than that associated with the Cruel and Unusual Punishment Clause of the Eighth Amendment that survey current practices and norms in this way."³³³ Kagan's expanded answer is troubling. Not only does she acknowledge that "[t]here are some circumstances in which it may be proper for judges to consider foreign law sources in ruling on constitutional questions," she appears to accept the notion that "current practices and norms" are relevant to interpreting constitutional provisions. Such a loose standard leaves ample room for judges to insert their own values and policy preferences into constitutional interpretation.

As dean of Harvard Law School, Kagan has made comments about international law. During opening remarks at an International Law Journal Conference at Harvard Law School, Kagan called the topic being discussed, the "relationship between domestic constitutions and international law", "such an important one" that was becoming more important "every year as the different legal systems of the world become more and more interwoven and as that interweaving creates all kinds of complex difficulties and issues."³³⁴

³²⁸ *Id.*

³²⁹ *Id.* (citation omitted).

³³⁰ *Id.* at 166.

³³¹ March 18 Letter, *supra* note 131, at 3 (emphasis added).

³³² *Id.* (citation omitted).

³³³ *Id.* In her answer, Kagan overlooked the majority's citation to foreign law and practices in *Lawrence v. Texas*. See 539 U.S. 558, 572-77 (2003).

³³⁴ Videotape: April 18, 2008 International Law Journal Conference (Harvard Law School Media Services 2008), available at <http://judiciary.senate.gov/nominations/SupremeCourt/KaganQuestionnaire.cfm> (comment begins at 3:16 mark).

Also, during a public conversation with Supreme Court Justice Ginsburg, Kagan asked Justice Ginsburg about a then-recent *New York Times* article that “talk[ed] about foreign courts’ reception of U.S. Supreme Court opinions and sa[id] that foreign courts really no longer cite the U.S. Supreme Court at least to the extent that they used to.”³³⁵ Kagan posed the questions: “Why has that happened? Do you care about it?”³³⁶ Justice Ginsburg started her response with this statement: “I have often said that if we don’t listen, we won’t be listened to.”³³⁷ In her response Ginsburg also noted that there is a “tremendous misunderstanding about references to decisions of tribunals abroad, and that is, they are [in] no sense binding on any United States judge, they are simply informative, they may be highly persuasive.”³³⁸ She said that she does not understand why it is acceptable to note in an opinion that she had considered a law review article, but it is not acceptable to admit that she had consulted a foreign opinion.

Finally, in a short article on revisions to Harvard’s first-year student curriculum, which included a requirement to take a class in international or comparative law,³³⁹ Kagan noted that “[t]he courses in international and comparative law are opening up new questions and possibilities, showing choices made by different societies and challenges that arise from globalization, while also helping every student to locate American law in the larger map of laws, politics, and histories across the world.”³⁴⁰ She also said in remarks to Lex Mundi, “the world’s leading association of independent law firms,”³⁴¹ that

law schools have two interrelated tasks. They have to do a better job of convincing our students of the great relevance and importance of international and comparative law in their legal studies. And they have to do a better job of incorporating and integrating international and comparative law issues into the curriculum.³⁴²

“One important way” to “accomplish these tasks” she said was to “bring to law schools visiting professors and practitioners from abroad.”³⁴³ She explained that “[f]oreign lawyers and law professors often will have the deepest and most detailed knowledge of their legal systems. More broadly, they will help to make American students aware that there are many different ways of solving legal problems and of using law to shape public life.”³⁴⁴ She further stated that,

equally if not more important, law schools must find ways to encourage U.S. trained teachers to retool our courses and our research to better raise and address international and comparative law and practices. I’m not talking here about encouraging more US-trained lawyers to go into the field of international law or comparative law itself,

³³⁵ Videotape: September 20, 2008 Q&A—With Justice Ginsburg, Harvard Law School Alumni “Celebration 55” (Harvard Law School Media Services 2008), *available at*

<http://judiciary.senate.gov/nominations/SupremeCourt/KaganQuestionnaire.cfm> (comment begins at 41:06 mark).

³³⁶ *Id.*

³³⁷ *Id.* at 41:30

³³⁸ *Id.* at 44:02.

³³⁹ Elena Kagan, *The Harvard Law School Revisited*, 11 GREEN BAG 2D 475, 478 (2008).

³⁴⁰ *Id.*

³⁴¹ Lex Mundi Homepage, <http://www.lexmundi.com> (last visited May 21, 2010).

³⁴² Elena Kagan, Remarks at the Lex Mundi Annual North American Meeting (May 15, 2004) (notes available at

<http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/KaganSG-Question13D-Part61.pdf>).

³⁴³ *Id.*

³⁴⁴ *Id.*

although that too is important. I'm talking about all faculty in all courses thinking about the international and comparative dimensions of what they do.³⁴⁵

Senators should carefully question Kagan about how, if confirmed, she would approach the use of foreign or international law in her opinions. Her written answers to Senator Specter certainly raise concerns that, if confirmed, she would join the Justices who believe that it is proper to consider foreign or international law.

Questions

- In your March 18 letter to Senator Specter, you wrote that “[t]here are some circumstances in which it may be proper for judges to consider foreign law sources in ruling on constitutional questions This is most often the case when the Court has deemed interpretation of a provision to rest in part on current practices and norms regarding some subject.” By this answer, can we assume that you believe that it is appropriate for judges to, at times, look to foreign law in interpreting and applying the Constitution?
- Do you think that it is appropriate for the Court to “deem[] interpretation of a [constitutional] provision to rest in part on current practices and norms regarding some subject”? If so, how is the Court to determine what constitutes “current practice and norms”? What principled basis exists for keeping this search from devolving into looking over the heads of guests to pick out your friends?
- Doesn't such a loose test leave room for the judge to substitute her own policy positions for “current practices and norms”?
- You cite the Eighth Amendment as a “classic case.” Do you believe that it is appropriate for the Court, in the Eighth Amendment context, to look to foreign law? Which country's law? What principle guides the judge in determining which country's practices are relevant?
- In *Lawrence v. Texas*, the Court cited to several sources of foreign law and practice (e.g., the 1957 Wolfenden Report on laws punishing homosexual conduct and decision by the European Court of Human Rights) to support its decision to hold the Texas sodomy law unconstitutional. Do you agree with the Court's use of foreign sources in *Lawrence*?
- You held a “public conversation” with Justice Ginsburg as part of an event while you were dean of Harvard Law School. You asked her about a then-recent *New York Times* article addressing “foreign courts' reception of U.S. Supreme Court opinions and saying that foreign courts really no longer cite the U.S. Supreme Court at least to the extent that they used to.” You asked her, “Why has that happened? Do you care about it?” General Kagan, do you care about it? If so, why?
- In her answer, Justice Ginsburg said: “I have often said that if we don't listen, we won't be listened to.” She also stated that there is a “tremendous misunderstanding about references to decisions of tribunals abroad, and that is, they are in no sense binding on any United States judge, they are simply informative, they may be highly persuasive.” Do you agree with her answer?

³⁴⁵ *Id.*

CONCLUSION

The nomination of Elena Kagan causes several reasons for concern. Although she has generally steered clear of controversial social issues in her scholarly writings, there are enough red flags in her record to cause reasonable concern that if confirmed as a Justice she would be another reliable vote to constitutionalize controversial policy decisions (for example, on same-sex marriage) that the Constitution leaves to the people and their representatives. Therefore, while it would seem that Kagan possesses the technical skills—analytical ability, writing ability, and the ability to make cogent and coherent arguments—to be a Supreme Court Justice, it is important that she address these areas of concern during her confirmation hearing. Although she disavowed (or at least greatly nuanced) her position when facing her own confirmation hearing, Kagan has argued forcefully that Senators should ask searching questions about a potential Justice's judicial philosophy and how that philosophy would affect specific cases, thus practically inviting such questioning in her own hearing. Given the red flags in Kagan's record, Senators who are concerned about limiting the Court to its proper role in our constitutional republic should take her up on that invitation.