

A summary of the media-law background of Supreme Court nominee Elena Kagan

*Prepared by The Reporters Committee for Freedom of the Press
May 13, 2010*

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Elena Kagan has worked on free-speech and free-press issues more than any recent high court nominee, but her writings tend to explore the underpinnings of current doctrines and standards, rather than argue for or against any particular approach. She has also expressed skepticism with how workable the “actual malice” libel standard and a reporter’s privilege are, and whether those standards need to be reworked.

After her judicial clerkship following law school, Kagan worked for Williams & Connolly, a Washington, D.C., law firm with a well-respected media law practice that has long represented *The Washington Post*, the *National Enquirer*, and many other media outlets.

When she turned to an academic career, she wrote on libel law and government regulations of speech before ultimately turning to other topics. Since becoming solicitor general, she has personally argued a First Amendment issue before the Supreme Court in one case, *Citizens United v. FEC*, but her office has brought other speech cases, including *United States v. Stevens*, the case over the criminalization of depictions of animal cruelty.

All of her non-academic experience — at the law firm, and with the Solicitor General’s office — reflects the fact that she was advocating the position of a client, so it cannot be considered useful as insight into her own beliefs. However, it does demonstrate her familiarity with the issues.

Libel

When Kagan was a Williams & Connolly associate from 1989 to 1991, she handled at least five lawsuits that involved First Amendment or media law issues.

In her [Senate questionnaire](#), Kagan said she played a significant role in three libel actions. These cases included the representation of a publishing company in a libel action arising from an allegation that the plaintiff was in prison for child molestation, the representation of *Newsweek* in a matter where the plaintiff claimed he had been defamed by being identified as a subject of a fraud investigation, and the representation of the *National Enquirer* in a libel action brought by a person mistakenly identified in the

publication. Kagan's work on these matters show a familiarity with the legal standards applied in libel cases, such as the "actual malice" standard and the "libel-proof plaintiff" doctrine.

After leaving private practice for academia, Kagan took a more academic approach to libel law.

Writing a "Libel and the First Amendment" update for the second edition of the Encyclopedia of the American Constitution, she expressed surprise at the lack of reform in the complex standards developed under *New York Times v. Sullivan*, "given the breadth and depth of dissatisfaction that this doctrine has engendered."

Among the problems she sees with libel law is the case law's complexity and its categorization of speech on public figures versus private figures.

Kagan finds the complexity of libel law to be in conflict with broader First Amendment theory. She writes in this update, "The intricate, even convoluted nature of this categorical scheme, governing as it does every important aspect of libel litigation, ill comports with the Court's usual concern for certainty and predictability in matters affecting freedom of speech."

Kagan seems most skeptical that the "actual malice" heightened proof requirements in public figure cases is beneficial as a whole, stating that it "deprives falsely defamed individuals of the ability to obtain monetary damages" and "prevents the public from ever learning of the falsity of widely disseminated libelous statements."

She finds the well-established area of law has a "surprising air of permanence" and notes that the Supreme Court took few cases in the late twentieth century, closing the entry by saying that the "rootedness" made reforms unlikely.

This theme is somewhat echoed in her 1993 book review of *Make No Law: The Sullivan Case and the First Amendment*, by Anthony Lewis.

She criticized Lewis' spinning Sullivan's story of a sheriff suing the New York Times as support for the broad application of actual malice to all public figures, saying that he "he uses these facts as springboard to justify principles of libel law and First Amendment law applicable to a much wider range of cases."

"The drawing of morals from a story may be more or less apt; so, too, may be the creation of legal rule and principle," Kagan writes. "The adverse consequences of the actual malice rule do not prove Sullivan itself wrong, but they do force consideration of the question whether the Court, in subsequent decisions, has extended the Sullivan principle too far."

In one part she lambastes the press for a perceived arrogance, writing, "Today's press engages in far less examination of journalistic standards and their relation to legal rules. Rather than asking whether some kinds of accountability may in the long term benefit

journalism, the press reflexively asserts constitutional insulation from any and all norms of conduct. Lewis himself notes this air of exceptionalism and entitlement.”

In her review, she suggests other approaches to application of actual malice, including the application of the “rule to all (but only) those cases involving speech on governmental affairs” and alternatively, weighing “the respective power of the speaker and the subject and the relation between the two.”

Still, she writes, “Questions of this kind in no way prove that the Court decided *Sullivan* incorrectly or that the Court now should reconsider its holding.”

Furthermore, she uses lofty language to describe First Amendment values in the general sense, saying of the book, “It is an account of the development of certain core free-speech principles: that the people are sovereign in a democracy; that wide open debate is necessary if the people are to perform their sovereign function; that government regulation of such debate should ever be distrusted. In turn, these principles provide the measure of current First Amendment problems. Thus, Lewis makes a compelling case that the greatest of all obstacles to a flourishing system of freedom of expression is governmental secrecy. . . .”

A logical extension of these admittedly decade-old beliefs could indicate that if she became a Supreme Court justice, she might take an interest in new judicial interpretations of well-established libel law, which is potentially problematic for those who have come to rely on *New York Times v. Sullivan* since the mid-twentieth century.

Reporter’s privilege

Kagan also dealt with reporter’s privilege issues at Williams & Connolly, often on behalf of *Washington Post* reporters. In a [Harvard Law Bulletin interview](#) in 2005, Kagan said the *Post*’s legal strategy to quash subpoenas grew from former editor Ben Bradlee’s assertion that a reporter’s privilege exists whether the Supreme Court says it does or not. She expressed surprise that boilerplate motions to quash subpoenas had such efficacy in court.

[W]hat was shocking is that sometimes we won notwithstanding that there wasn't a whole lot of law in these motions. The prosecutors would back down often after we convinced them that the reporter didn't know anything or wouldn't say anything particularly useful. Or the judge would rule for us on the ground that there wasn't any necessity for the reporter's testimony. And the client — the reporter — never, ever ended up in jail.

However, one *Post* reporter was indeed threatened with jail at that time. Linda Wheeler was held in contempt of court for refusing to disclose the source who tipped her off about a police raid. The Wheeler case led to the enactment of the D.C. shield law the next year.

In the *Bulletin* interview, she also talked about the likelihood of the Supreme Court reviewing some of the reporter subpoena cases at the time, such as the Judith Miller subpoena seeking information in connection with the revelation of the identity of CIA operative Valerie Plame. Though she noted that high-profile cases could prompt the justices to take up the issue, she noted that at any rate, the “status quo isn’t so bad, really.”

It's hard to think of important prosecutions that have not gone forward because reporters have refused to give information. On the other hand, it's hard to make the argument that freedom of the press has been terribly infringed by the legal regime that's been set up. So it may be that the Supreme Court looks at the status quo and says: "Nothing seems terribly wrong with this. People are ignoring a little bit what we said, but it seems to have results that are not too bad, from either perspective."

She also commented on the problems with the shield law then (and still) before Congress, particularly the difficulty in determining who it should cover, likening including bloggers to shielding “you, and me, and everybody else in the world ... once that happens, there’s a real problem for prosecutors seeking to obtain information.”

But then she continued to say the Supreme Court hasn’t distinguished among different mediums of the press and there is likely a good reason it has avoided doing so. “First Amendment law is already very complicated ... [t]here are lots and lots of different kinds of press entities and other speakers. And if each one gets its own First Amendment doctrine, that might be a world we don’t want to live in.”

Obscenity

Kagan also gained familiarity with the obscenity standard when she was one of the attorneys at Williams & Connolly who wrote a friend-of-the-court brief in the appeal of *Luke Records v. Nick Navarro*, in which a federal district court held that a rap recording by the group 2 Live Crew was obscene. According to Kagan’s questionnaire, she drafted a brief in the case that focused on the problems with declaring a musical recording obscene under constitutional law. The court found that the local prosecutor who had won the obscenity ruling had failed to prove that the material at issue was obscene.

Court access

Kagan also worked on one case involving open access to court documents. In *In re Application of News World Communications, Inc.*, Kagan represented the *Post* and the local NBC affiliate in a media coalition’s effort to compel the public release of the unredacted transcripts of audiotapes that were used as evidence in a criminal trial. The case involved balancing the public right of access to the courtroom with a defendant’s

right to a fair trial – a common judicial test in open court cases. Kagan argued two motions before Judge Charles Richey of the U.S. District Court in Washington, D.C., to compel release of the transcripts and to prohibit redaction. Judge Richey granted both motions.

Government regulation of speech

Academic writings

On the whole, Kagan's academic writings on free speech adopt a weighty and divorced academic tone and do not necessarily advocate for specific reforms within the First Amendment legal sphere. Rather, her scholarship more often presents possible explanations as to how First Amendment law has developed and suggests ways that laws restricting speech could be permissible under those constructed views.

Her work can best be summarized as an exploration into how the motivations behind enacting laws restricting speech have guided the development of free speech jurisprudence, while at the same time being critical of the doctrinal lines of law that have developed regarding how strictly the Supreme Court scrutinizes prohibitions on speech.

Kagan's most known work is a 1996 University of Chicago Law Review article entitled [“Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine.”](#)

The major premise of the article is that the evolution of First Amendment jurisprudence can best be explained as an implicit examination into government motives when enacting a speech regulation. According to Kagan, it is this approach to First Amendment law the Supreme Court uses when determining the constitutionality of a law restricting speech, rather than relying on models focusing on expanding the speech opportunities of individuals or those focused on the quality of speech an audience encounters.

Kagan argues that impermissible government motive — defined as hostility for or promotion of a particular message — is the implicit but central inquiry in determining whether a speech restriction should be upheld. She believes the court has attempted to determine when the probability of improper motive is greatest through the varying levels of judicial scrutiny it has developed. For example, laws prohibiting specific content (e.g., racist speech) are subject to heightened levels of review than those that are content-neutral (e.g., laws regulating all speech which may invoke a violent reaction, no matter its specific message) because it suggests the government is favoring one message over another. Conversely, speech restrictions that do not suggest ill motive would be subject to less exacting constitutional review.

When Kagan applies the ill-motive model, she does not necessarily agree that the Supreme Court has developed proper distinctions between content-based and content-neutral laws that properly ferret out motive. Kagan believes that the actual effects a

speech restriction has are often more important in determining ill motive than whether the law as written appears to be neutral in terms of promoting particular content or viewpoints.

Therefore, Kagan writes that the current judicial doctrine that a content-neutral law should always receive less scrutiny than a content-based law fails to recognize that a content-neutral law may in practice restrict more speech — and even the message of a particular speaker — much more so than a content-based law. In that case, the content-neutral law would, because of the greater possibility of improper government motive, be subjected to a more rigorous judicial review. Of course, Kagan also concedes that under an impermissible motive approach, there may be instances when a content-based law has minimal impact on one's ability to speak freely and therefore should be subjected to a lesser standard of review.

Kagan previously explored the practical difficulties in strictly adhering to developed legal notions of whether content or viewpoint restrictions are constitutional in her 1992 Supreme Court Review article, [“The Changing Faces of First Amendment Neutrality: *R.A.V. v. St. Paul*, *Rust v. Sullivan*, and the Problem of Content-Based Underinclusion.”](#)

Here, Kagan presented an early look at what effect a speech regulation has on the ability of one to speak freely, despite whether the language of the law appears to be viewpoint-neutral. This article uses the laws at issue in the *R.A.V.* case (a law prohibiting racist speech that would arouse anger or resentment) and the *Rust* case (a law preventing federal subsidies to medical providers engaged in pro-abortion services) to illustrate how the government often selectively chooses to prohibit or dissuade a particular message.

Kagan defines “content-based underinclusion” as situations when the government picks and chooses what messages will be heard when it has authority to regulate speech in much broader terms. In the *R.A.V.* case, the Supreme Court acknowledged that a broader law covering all kinds of speech amounting to “fighting words,” which are not constitutionally protected, may have passed muster. Only including racist speech, therefore, would be an underinclusive law. In the *Rust* case, the government had wide authority to support speech through federal funding but chose not to fund speech promoting abortion.

Kagan uses these cases to again argue that a possibility of ill-motive arises even when the government appears to be acting constitutionally. Under a motives-based approach, it is of little consequence whether Congress could constitutionally restrict racist fighting words because they were but a subset of the larger class of fighting words that can be regulated. Likewise, in *Rust*, it does not matter that the government can and does engage in its own speech agenda. In both cases, what results is a viewpoint-based discrimination against particular kinds of speech that requires heightened judicial review.

In another article, [“Regulation of Hate Speech and Pornography after *R.A.V.*,”](#) Kagan explores how hate speech and pornography may be regulated in ways that may avoid the

admonition in *R.A.V.* against viewpoint discrimination. She offers, again in a detached academic manner, four means by which this may occur.

First she suggests a greater focus on laws proscribing particular conduct rather than speech. Laws, for example, targeting sexual exploitation or pimping or focusing on the harms associated with hate crimes rather than any message conveyed may better avoid *R.A.V.* viewpoint-based problems. Second, Kagan argues that enacting laws that are more viewpoint neutral (e.g., prohibiting all fighting words or a broader range of sexually explicit materials irrespective of the actual message) are a possible means. Third, she suggests that redefining obscenity to focus on actual harm to women rather than the actual content or message expressed would aid in demonstrating that there is an interest independent of speech for which the government is justified in regulating. Finally, she points out that the government could argue for limited exceptions to viewpoint-based discrimination that highlight the gravity of the harm caused by speech, which would justify regulation.

In Kagan's final piece, a 1996 comment entitled "[When is a Speech Code a Speech Code,](#)" she again explores the notion that the Supreme Court's conceived speech doctrines can be viewed through a motives-based approach. In this article, Kagan takes issue with the perceived belief that direct restraints on speech (as opposed to incidental restraints) are presumptively more harmful to speech and should be subject to greater scrutiny. Kagan again discusses her belief that motive is key in determining whether a speech restriction is constitutional.

Citizens United

Kagan argued a First Amendment case before the Supreme Court as solicitor general just last fall in [Citizens United v. FEC](#). While the argument cannot truly be attributed to Kagan as her position, as she was arguing on behalf of the government, it may be illustrative of how she will act on the bench. It is particularly useful because of how she reshaped the argument from the initial brief and initial argument before the court — the court asked for additional briefing on the question of whether the law was unconstitutional on its face — that took place before she worked for the office.

The most dramatic change in the government's argument was in how it proposed to apply the law. During the first round of arguments, the associate solicitor general then handling the case suggested that Congress had the authority to limit or prohibit political campaign speech in many forms, including books.

In her oral argument, however, Kagan explained that the government was backing off this position. "We went back, we considered the matter carefully, and the government's view is that although [a different campaign-finance law] does cover full-length books, that there would be quite good as-applied challenge to any attempt to apply [that law] in that context."

She added that the Federal Election Commission has never attempted to enforce the law against book publishers and there is no reason to believe it would. She said it would apply to pamphlets, as those are “pretty classic electioneering.” Kagan drew a distinction between election activities by corporations and those of individuals and nonprofits and between books and typical election activities.

Kagan’s argument was unsuccessful, as the Supreme Court chose to overturn the entire law in question, rather than narrow it or affirm the lower court. However, the arguments Kagan endorsed and the care she took to distinguish the different kinds of speech involved in the case may be indicative of how she’d treat a case involving a media organization or member of the press in the future.

United States v. Stevens

In [*United States v. Stevens*](#), the Solicitor General’s office (during the Bush Administration) asked the Supreme Court to hear an appeal of the dismissal of charges against a man convicted of selling videotapes that included footage of dog fights. The U.S. Court of Appeals in Philadelphia (3rd Cir.) had struck down the law as unconstitutional on its face.

The law at question was enacted to combat the appearance on Internet sites of “crush videos” — clips of small animals being crushed by women in bare feet or high heels. But the law was broadly written to include all images of animal cruelty, which included any images of the killing of animals.

The solicitor general is charged with defending all federal laws before the court. But in the brief on the merits of the case (filed after Kagan took over as Solicitor General), the office went farther than just defending this particular law, and instead argued that Congress can create entire categories of unprotected speech any time it finds that the value of the speech does not outweigh its cost to society.

Such a broad standard would surely open the door for a wide range of speech restrictions, and is almost impossible to reconcile with the plain meaning of the First Amendment.

Cameras in court

At the Ninth Circuit’s Judicial Conference last summer, [Kagan was interviewed](#) by conference chair Kelli Sager, a noted media lawyer. Sager asked Kagan “a question that I’m interested in personally” — if the members of the Court were to ask Kagan for her views on whether they should allow television cameras to cover their proceedings, what would she say?

Kagan first said she has “a feeling that they’re not going to ask me,” and backed off from stating a definite position. Then she added:

“They’re going to make this decision themselves and they probably should make this decision themselves. They’re the folks who best know the dynamics on the court and I wouldn’t pretend to give them advice on this. But I will say this: . . . if cameras were in the courtroom, the American public would see an amazing and extraordinary event. . . . I think if you put the cameras in the courtroom, people would see . . . an institution of their government working at a really high level. So that’s one plus factor for doing it.”