Supreme Court Nominee Elena Kagan: Selected Freedom of Speech Scholarship

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Summary

President Obama has nominated his Solicitor General, Elena Kagan, to be the next Supreme Court Justice. If confirmed, she would fill the seat being vacated by Justice John Paul Stevens upon his retirement at the end of the 2009/2010 term. Prior to her term as Solicitor General, Ms. Kagan, in her capacity as an academic and scholar, wrote influential pieces analyzing free speech jurisprudence.

In particular, Ms. Kagan wrote a law review article entitled "Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine." This article is best described as an attempt to understand the underlying issues free speech doctrine addresses. Ms. Kagan argues, basically, that the Supreme Court scrutinizes most closely speech restrictions that carry the most risk of having been enacted to serve improper government motives (e.g., to benefit certain ideas, to suppress particular ideas, or to serve legislative self-interest). Ms. Kagan opens the article by noting that the Supreme Court claims that the purpose of Congress (or any governmental body) "is not a basis for declaring legislation unconstitutional." Ms. Kagan posits, nonetheless, that free speech jurisprudence is an *indirect* (even unconscious) attempt by the Court to ferret out improper government motives where speech restrictions are at issue. In this way, she explains seeming inconsistencies in First Amendment law. For example, she uses her improper motive theory to explain why it is permissible for the government to ban *all* fighting words, but impermissible for the government to ban *only* fighting words motivated by racial or ethnic discrimination. Under Ms. Kagan's theory, it is more likely that the latter restriction was enacted pursuant to the improper governmental motive of suppressing ideas with which legislators disagree than the former, making the latter restriction unconstitutional, while the former withstands scrutiny.

Ms. Kagan does not appear to argue that the theory she describes is the best possible way to establish a freedom of speech doctrine, nor does she argue that her theory is the only way to understand free speech jurisprudence. She states, instead, that she has engaged in this analysis, because "only when we know why the doctrine has emerged and what purposes it serves will we know whether and how to modify it." Thus, to the extent that she evaluates particular cases within this article, it seems that her assertions of whether particular decisions are "correct" or "incorrect" may refer to whether the reasoning of the decisions fits with the theory of jurisprudence she is explicating rather than her beliefs regarding the proper outcomes of the cases.

Ms. Kagan took a somewhat different, though consistent, perspective in her earlier article entitled "Regulation of Hate Speech and Pornography After *R.A.V.*" The focus of this article, rather than being motivated by an attempt to understand the Court's underlying aims, seemed to be more on crafting statutes that would comport with the Court's existing case law, which takes into account what Ms. Kagan would argue are the Court's underlying aims. Ms. Kagan suggests various ways for crafting statutes that would restrict pornography and hate speech that she believes could be constitutional under the Court's then-current doctrine.

This report will explain these articles in further detail, as well as an additional, shorter piece, discussing the First Amendment implications of codes of conduct at public universities. This report will not be updated.

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Introduction

President Obama has nominated his Solicitor General, Elena Kagan, to be the next Supreme Court Justice. If confirmed, she would fill the seat being vacated by Justice John Paul Stevens upon his retirement at the end of the 2009/2010 term. Prior to her term as Solicitor General, Ms. Kagan, in her capacity as an academic and scholar, wrote influential pieces analyzing free speech jurisprudence. This report will discuss some of her most significant scholarly articles related to the First Amendment guarantee of freedom of speech.

In her First Amendment scholarship, Ms. Kagan seems primarily concerned with developing an understanding of the evolution of the Supreme Court's First Amendment jurisprudence. Ms. Kagan does not appear to be arguing for a change in First Amendment analysis, or hinting towards how she believes cases would be better analyzed. Rather, Ms. Kagan argues that First Amendment case law is designed to prevent the government from enacting laws that are more likely to spring from improper motives. In another article, she offers suggestions for developing statutes that would be consonant with her understanding of First Amendment case law, and, therefore, more likely to be upheld as constitutional. It is unclear how this scholarship would apply or even if it would apply in the context of her position as a Supreme Court Justice, if she is confirmed.

"Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine"

The most comprehensive article (over 100 pages) Ms. Kagan has written on the First Amendment is "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine."[1] This article argues that, at bottom, First Amendment doctrine is concerned with using objective tests to accomplish indirectly what it cannot do directly: revealing and rejecting ("flushing out" in Kagan's words) laws that may have, at their core, an improper government motive. She calls it the motive-based theory of First Amendment doctrine. Ms. Kagan hypothesizes that the Court cannot directly inquire into government motive to enact a particular law, because, among other things, the government is likely able to advance a legitimate interest in enacting virtually any law. Therefore, her argument continues, the Court has developed a schema that more closely scrutinizes laws that are at a greater risk of being improperly motivated in their enactment. And, as would be logically expected, the Court also scrutinizes less closely laws that carry less risk of improper motive. In the course of building this argument, Ms. Kagan analyzes many aspects of First Amendment law including campaign finance cases, indecency cases, fighting words cases, and the logic of the secondary effects doctrine.

It is a complex article and every aspect of it cannot be addressed here. It is also important to note that the article was published in 1996. Many developments in First Amendment jurisprudence have occurred since then. To the extent possible, recent developments will be mentioned and compared to Ms. Kagan's arguments. As a result of the article's age, it is not clear how Ms. Kagan's view of First Amendment doctrine may have changed, if it has at all.

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[1] 63 U.Chi. L. Rev. 413 (1996) [hereinafter Private Speech, Public Purpose].

Ms. Kagan begins her analysis by recognizing that the Supreme Court has said that "the purpose of Congress ... is not a basis for declaring a law unconstitutional."[2] Courts instead are to focus on the effects of a particular speech restriction on First Amendment freedoms. Consequently, most analysis of First Amendment doctrine focuses on the potential effects of the restrictions to attempt to create coherent theories. Ms. Kagan believes these effects-focused theories are ultimately unsatisfying on their own to explain First Amendment doctrine. She argues instead that First Amendment doctrine, in spite of the Supreme Court's protestations, is primarily (though perhaps not solely) motivated by a desire to discover improper government motive.

To explain why Ms. Kagan thinks her government motive theory is necessary to understand First Amendment doctrine, she begins with an example of a case that, in her opinion, could only make sense in the context of First Amendment doctrine if the Court is primarily concerned with improper government motive. In *R.A.V. v. City of St. Paul,*[3] the Supreme Court invalidated a statute that prohibited fighting words based upon race, color, etc. The outcome of this case is strange, Ms. Kagan notes, because fighting words have been identified as a category of speech that falls outside the protections of the First Amendment and can be prohibited completely. Thus, under an effects-based theory, it likely would not matter constitutionally if only a subset of this category of speech was prohibited. The Court nonetheless invalidated the statute despite the fact that it punished only a subset of a category of unprotected speech. Ms. Kagan hypothesizes that this outcome can be best understood when viewed as an attempt by the Court to guard against laws that have a greater likelihood of being motivated by an improper purpose.[4] Even within the spheres of unprotected speech, the Court will invalidate a statute if it appears that "official suppression of ideas [may be] afoot," because, under Ms. Kagan's theory, preventing the official suppression (or support) of particular ideas is the Court's primary concern.

After explicating this example, Ms. Kagan embarks upon a methodical and thorough explanation and analysis of her theory. She does so by offering other holistic and widely accepted theories of First Amendment jurisprudence and attempting to fit aspects of First Amendment jurisprudence with those theories as rigorously as she attempts to fit those aspects of doctrine with the government motive theory. She ultimately concludes that, in general, her government motive theory does the best job of explaining First Amendment doctrine, but in arriving at that conclusion she makes numerous observations where the other First Amendment doctrine models may explain doctrine better than the theory she advances. Her analysis is rigorous, but she does not suggest that it is without its flaws. She acknowledges room for disagreement with her theory, but appears to believe, nonetheless, that she has devised the best explanation for then-current First Amendment jurisprudence possible.

The Concept of Impermissible Motive

Ms. Kagan acknowledges that her attempt to reconcile First Amendment doctrine is hardly the first endeavor of its kind.[5] Throughout her article, she compares how her improper motive theory

[2] *Id.* citing United States v. O'Brien, 391 U.S. 367, 383 (1968).

[3] 505 U.S. 377 (1992).

[4] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 421-23.

[5] *Id.* at 423.

fits with two other theories that attempt to explain First Amendment doctrine: the speaker-based theory and the audience-based theory.[6]

In contrast to the government motive or improper motive theory, which focuses on the possible underlying reasons for enacting a particular speech restriction, the speaker- and audience-based theories are effects based. In other words, they focus upon the effects speech restrictions have on the marketplace of ideas. The speaker-based theory hypothesizes that the primary value of the First Amendment resides in the conferral of expressive rights and opportunities on speakers. Therefore, laws under this theory should be evaluated based upon their effect on the ability of individuals to speak on particular subjects, from particular points of view, or in particular ways. "Quantity, in other words, is of the essence; as one proponent of this model has stated, First Amendment doctrine should concern itself with how much a law 'reduces the sum total of information or opinion disseminated.'"[7] The audience-based theory focuses instead on the quality of the expressive arena in order to make sure that every idea worth expression enters the marketplace. The primary goal is to enable the audience to "arrive at truth and make wise decisions, especially about matters of public import." What matters under this theory, according to Alexander Meiklejohn, "is not that everyone shall speak, but that everything worth saying shall be said."[8] These two theories are compared with Ms. Kagan's "government motive-based" theory, which claims that "what is essential is not the consequences of a regulation but the reasons that underlie it" and that where a law leaves too much room for impermissible underlying motivations, the court will be more likely to strike it down as a result of that suspicion.

Assuming there is an attempt to flush out impermissible motives, which motives are impermissible? According to Ms. Kagan, there are likely four impermissible government motives of which the Court is suspicious. Ms. Kagan argues that the Court is suspicious of laws where it appears the government is restricting speech because it disagrees with the message being conveyed. Furthermore, the government should not be allowed to restrict speech because the ideas espoused threaten officials' self-interest. Logically consistent with the first and second suspicions, Ms. Kagan finds that the Court is suspicious of government attempts to provide advantages to favored ideas or ideas that would advance the self-interests of lawmakers. Lastly, the Court is suspicious of laws that would use the opinions of citizens to define what can and cannot be said. The basic inquiry into whether hostility towards particular ideas played a role in enacting any law turns on "whether the government would have treated identically ideas with which it disagreed, ideas with which it agreed, and ideas to which it was indifferent, to the extent that those ideas caused the same harms."[9] This inquiry would permit regulations of speech seeking to address harms unrelated to ideology expressed and would command invalidation of laws that presumed a harm based upon the expression of ideas disfavored by the government, as, Ms. Kagan argues, First Amendment doctrine does.

Ms. Kagan argues that all free speech cases dealing with restrictions on the speech of private persons (she leaves the discussion of government speech for another day) can be explained, at

[6] It should be noted that Ms. Kagan is responding to competing theories of doctrine, not to competing analysis of case law. The distinction is important, because Kagan is attempting to offer a theory to explain why First Amendment doctrine is consistent. She does not, however, appear to be arguing that the Court or that others analyze cases improperly.

[7] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 424, citing Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 Stanford L. Rev. 113, 128 (1981).

[8] *Id.* at 425.

[9] *Id.* at 431.

least in part, by the Court's indirect inquiry into whether the law was motivated by the above impermissible reasons. She acknowledges that in *United States v. O'Brien,*[10] the Supreme Court said that the purpose of Congress (or any governmental body) "is not a basis for declaring legislation unconstitutional."[11] However, rather than considering this a declaration that the Court does not inquire into governmental motive when conducting a free speech analysis, Ms. Kagan argues that *O'Brien* merely clarifies the means by which the inquiry is conducted. That is, because the Court cannot conduct an effective direct inquiry into government motive, the Court was forced to devise a doctrine (whether consciously or unconsciously) that conducted the inquiry indirectly. This indirect inquiry places a higher burden on laws carrying the most risk of improper motivation and a lesser burden on laws seen to carry less risk of impropriety.

The Doctrine of Impermissible Motive

After describing the other possible theories for the development of First Amendment doctrine, Ms. Kagan puts all three theories to the test.[12] She analyzes the extent to which any of them can explain why courts treat certain speech restrictions more or less harshly than others. She concludes ultimately that the government motive theory is the better explanation, though perhaps not the perfect explanation.

She states that if one accepts the premise that the First Amendment prohibits speech restrictions stemming from hostility towards a message, sympathy towards a message, or the self-interest of lawmakers and further accepts that it is difficult if not impossible to prove that a particular law is so motivated, then one would probably come up with an indirect method of flushing out impermissible motives that is nearly exactly like the First Amendment doctrine actually in operation. She claims four rules would likely arise if courts had affirmatively followed her logic. In her view, the four primary rules that in fact have arisen to constitute First Amendment doctrine are identical to her predicted rules.

The Distinction Between Content-Based and Content-Neutral Laws

In general, the Court reviews more strictly laws that discriminate against speech based upon its content and less strictly laws that do not so discriminate. To explain this, Ms. Kagan uses laws that might restrict billboards as an example. A law that banned all billboards would probably be constitutional, under current doctrine. A law that banned all political billboards would be much less likely to be upheld as constitutional. A law that banned only billboards paid for by the Democratic party would almost certainly be unconstitutional. She then proceeds to use the speaker-based, audience-based, and government-motive-based models to attempt to explain this general rule.

She argues that the speaker-based theory would not produce this rule.[13] Quantity of speech is all under the speaker-based theory. Therefore, Ms. Kagan argues that this rule would not make sense under the speaker-based theory because the law most likely to be constitutional (the one banning all billboards) is also the law that restricts the most speech and the most speakers. It would be

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[10] 391 U.S. 637 (1968) (upholding a criminal conviction for burning a draft card).

[11] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 442. *See O'Brien*, 391 U.S. at 383.

[12] *Id.* at 443.

[13] *Id.* at 444.

antithetical to an organizing principle of maximization of opportunities for speakers for the law that restricts the most speech to be the law that is most likely constitutional.

The audience-based theory makes more sense, in Ms. Kagan's opinion, but it provides an imperfect explanation of this rule in doctrine.[14] Under the audience-based theory it makes sense to treat content-based restrictions more harshly than content-neutral restrictions because restrictions based upon content might disparately affect the ideas available in the marketplace, causing distortion. However, that statement, in Ms. Kagan's view, oversimplifies matters. The audience-based theory, with its concern for preventing distortion, should also dictate that facially content-neutral laws that skew speech markets should get the closest possible scrutiny as well, but they do not.[15] Furthermore, if First Amendment doctrine truly is based upon preventing the distortion of the marketplace of ideas, then content-based laws that only have a mild tilting or skewing effect on the marketplace should be less closely scrutinized, but, again, they are not. In fact, Ms. Kagan continues, the audience-based theory would actually command, rather than merely tolerate, content-based laws in some circumstances, because the disparate impact of a law on a set of ideas might just as easily lead to balance as it leads to distortion. It is equally possible that some content-neutral laws actually preserve a skewed speech market and should receive closer scrutiny.

Despite these seeming inconsistencies, the audience-based theory would argue that it is difficult to measure skewing effects. Therefore, it is possible that the Court has drawn the line between content-based and content-neutral laws to best prevent skewing, with an awareness that the fit is not perfect. Ms. Kagan disagrees and argues that the audience-based model fails to explain the content-based/content-neutral distinction made by the Court. For example, she notes that it "is not incoherent (it may even be correct) to suggest that campaign finance restrictions improve the speech market."[16] Some may disagree with that statement, she concedes, but it would be a sensible and supportable claim. Therefore, according to Ms. Kagan, it is not always impossible to reach a well-supported decision on the effects of regulation on an existing speech market. As a result, the content-based/content-neutral distinction cannot arise from an inability to evaluate skewing effects. Furthermore, even assuming this inability to evaluate skewing effects existed, the inability still would be incapable of properly explaining the distinction between content-based and content-neutral laws, because all government action has effects on the speech market. Both content-based and content-neutral laws are capable of skewing the speech market, and we are provided with no reason for their difference in treatment by the Court from the audience-based theory.

Thus, Ms. Kagan is left with the government-motive-based theory, and she argues that it explains the content-based/content-neutral distinction more clearly than the other theories. Courts, under this theory, would disfavor content-based laws because they are disproportionately likely to be linked to suspect government motives. "The goal of the doctrine, then, must be to identify a set of improper motives, which themselves may give rise to untoward consequences—not to identify a set of untoward consequences defined independent of improper motives."[17] Ms. Kagan argues that the content-based/content-neutral distinction "separates out roughly but readily actions with

[14] *Id.* at 445.

[15] Kagan explains skewing speech markets by example. She returns to her billboard example. "Suppose, for example, that only Democrats, and not Republicans, use billboards to advertise; then, the skewing effect of a general ban on billboards would match the skewing effect of a law specifically barring Democrats from this forum." *Id.* at 446.

[16] *Id.* at 450.

[17] *Id.* at 451.

varying probabilities of arising from illicit motives."[18] She turns again to the billboard example. In the law banning all billboards, she argues that because it applies to all ideas it is the law most unlikely to be motivated by the suppression of disfavored ideas. Therefore, the presumption of constitutionality for a law banning all billboards makes sense under the motive-based theory. On the other hand, Ms. Kagan notes, improper purpose could more easily infect a law that bans billboards based upon only one viewpoint, commanding, as doctrine does, higher scrutiny. She also argues that it explains the more relaxed mid-level scrutiny given to subject-based restrictions, because, like generally applicable restrictions, it applies to a range of ideas, thus reducing the risk of improper motivation (though the risk is greater here than with a law that applies to all ideas rather than only ideas related to a certain subject matter).

Ms. Kagan also argues that the government motive theory explains why doctrine ignores the disparate skewing effects of some content-based and content-neutral laws. In her view, a law's "terms more reliably indicate illicit motive than its effect and thus [its terms] should [and do] control the legal analysis."[19] Content-neutral laws, even when they have significant skewing effects, affect a diffuse range of dimensions. This diffuseness "outweighs the severity of its impact on any particular idea as evidence of motive."[20] On the other hand, content-based laws have a very focused effect. Therefore, even where skewing is insignificant, it happens in such a narrow area as to heighten suspicion of improper purpose.

The heightened scrutiny for content-based laws and lesser scrutiny for content-neutral laws remains an imprecise tool, nonetheless. Ms. Kagan acknowledges that the distinctions will produce some "wrong" results, but they are tolerated because the alternative (a direct inquiry into motive) will produce even more frequent errors due to the government's ability to assert pretextual and seemingly legitimate motives. To mitigate potential imprecision the outcomes of the analyses are presumptive only. She argues that the standard applied by the Court functions as an evidentiary device to allow the government to disprove the presumption of improper motive (under the strict scrutiny standard) arising from the content-based nature of a law. A law may be upheld under the strict scrutiny standard if it applies to all speech that threatens the compelling interest asserted and only to that speech. The less compelling the interest, the more suspicious the Court may become. Furthermore, if the restriction would capture more speech than just the speech threatening the asserted interest, the Court's suspicions of improper motive may deepen as well. Thus, the strict scrutiny standard may serve as an opportunity for the government to "disprove (again, of necessity indirectly) the inference of bad motive that arises from the content-based face of a law."[21]

This presumption operates in reverse for content-neutral laws. Content-neutral laws do carry risk of improper motive, in Ms. Kagan's view, because they restrict speech, and it is possible that lawmakers may be so averse to a particular idea that they are willing to suppress more speech than necessary to restrict that idea's expression. "At a certain point—when the asserted [government] interest is insubstantial or when it does not fit the scope of the challenged regulation—the usual presumption of proper purpose topples; there is reason, then, to think that the law, though content neutral, has been tainted by impermissible purpose."[22]

[18] *Id.*

[19] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 452.

[20] *Id.*

[21] *Id.* at 454.

[22] *Id.* at 455.

Ms. Kagan closes this section by arguing that only the motive-based model can explain the distinctions in the levels of review applicable to content-based and content-neutral laws. Since this is such a fundamental aspect of First Amendment doctrine, it would seem, therefore, that her theory fits best in explaining its development. She next goes on to argue that the government motive theory explains exceptions to the general rules for content-based and content-neutral laws.

Suspect Content-Neutral Laws

Ms. Kagan observes that most content-neutral laws receive more relaxed scrutiny, but certain content-neutral laws carry special risk and, therefore, receive closer scrutiny from courts.[23] These are laws that confer standardless discretion on agencies, laws that turn on the communicative effect of speech, and laws that attempt to "equalize" the speech market. Ms. Kagan argues that these types of laws, similar to content-based laws, are treated more strictly because they carry a higher risk of improper government motivation for enacting the speech restriction.

Standardless Discretion

Ms. Kagan begins with an example. In *Saia v. New York,*[24] the Court struck down a law that prohibited persons from operating radio devices or loudspeakers in a way that the sounds they made could be an annoyance or inconvenience to travelers on the street unless permission was obtained from the chief of police.[25] The Court has struck down laws granting similar discretion to officials to determine when speech, though generally prohibited, is permissible. In none of the cases did the Court wait for an administrator to make an improper decision; instead the Court's concern appeared to be the wide authority granted to administrators by the statute.

Again, the analysis begins by discarding the alternative effects-based theories as explanations for the doctrine. The speaker-based model, concerned only with the quantity of speech opportunities, cannot account for this rule against standardless licensing schemes, "because such schemes do not necessarily curtail more speech than other, less constitutionally suspect modes of restricting expression."[26] The speaker-based model thus provides no reason for why the Court would strike down the statute in *Saia* but uphold the statute in *Kovacs v. Cooper*,[27] which completely prohibited the use of sound trucks, loud speakers, or amplifiers on public streets."[28] The amount of speech restricted in the law at issue in *Saia* is arguably less than the law at issue in *Kovacs*, yet the *Kovacs* statute is constitutional. The audience-based model, Ms. Kagan argues, fares no better. It is still possible that content-based decisions could as easily improve the speech market as impair it. If there is reason to presume distortion rather than improvement of the speech market, Ms. Kagan believes that presumption must arise from concerns with illicit motives.[29]

This leaves only the government motive theory to explain the higher standard applied to content-neutral laws that allow administrators to grant exceptions without setting standards for those

[23] *Id.* at 456.

[24] 334 U.S. 558 (1948)

[25] *Id.* at 558-59 n1.

[26] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 458.

[27] 336 U.S. 77 (1949).

[28] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 458.

[29] *Id.* at 459.

exceptions. In Ms. Kagan's opinion, this is so because the laws that grant administrators or agencies the power to grant exceptions without setting standards delegate to administrators (e.g., the chief of police in the *Saia* case) the power to make decisions about speech based upon content.[30] When there is no standard for administrators to follow, the Court cannot determine, without a direct admission from the administrator, what the official based her decision on. The decision could easily be based upon the content of the speech. Therefore, greater scrutiny for laws like this prevents the legislators from granting to administrators the power to make decisions regarding speech on the basis of criteria (i.e., content) that could involve impermissible motive.[31]

Communicative Effect

Laws that prohibit speech based upon its communicative effects are similarly closely scrutinized by the Court. The most common example is a breach of peace statute. Ms. Kagan at first acknowledges that her motive theory seems to be a poor fit because the avowed government interest in preventing violence appears to be legitimate. But lawmakers may very well know what ideas provoke hostility in their communities. Laws turning on communicative effect, in Ms. Kagan's estimation, allow content-based actions in application because they are dependent upon enforcers of the law to act. Content-based government action raises fear of improper motive. And they may do so for content-based reasons, just as in the case of laws granting standardless discretion to administrators and laws that are facially content-based. "The key to the analysis ... is first, the functional equivalence between statutes referring to content and statutes turning on communicative impact and second, the relation between content discrimination and impermissible motive."[32] The risk of content-based actions in application justifies the same suspicion of improper motives as any other facially content-based laws.

Laws that Equalize the Speech Market

In *Buckly v. Valeo*, the Supreme Court declared "the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[33] As a result, the Court invalidated certain campaign finance expenditure ceilings.[34] However, Ms. Kagan argues that this principle can apply more broadly. For example, the Court could have been similarly motivated to strike down the statute at issue in *Miami Herald v. Tornillo*,[35] which required newspapers to publish replies to articles that attacked political candidates.[36] She also argues that the dissenting Justices in *Turner Broadcasting Inc. v. FCC*[37] were motivated by this principle when they voted to strike down cable "must-carry" rules.[38] Both the "must-carry" laws and the right-of-reply statute would have required one set of

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[30] *Id.* at 459-461.

[31] *Id.* at 460.

[32] *Id.* at 463.

[33] 464, 424 U.S. 1, 48-49 (1976)

[34] CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by (name redacted).

[35] 418 U.S. 241 (1974)

[36] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 464.

[37] 512 U.S. 622, 674-85 (1994) (O'Connor, J. concurring in part and dissenting in part).

[38] The "must-carry" rules, at their most basic level, require cable operators to carry local broadcast stations free of charge upon the request of the broadcast station entitled to carriage. *See* 47 U.S.C. § 534.

speakers to provide a forum for another set of speakers in order, essentially, to even the speech playing field. In Ms. Kagan's assessment they, therefore, arguably violated *Buckley*'s pronouncement against disadvantaging some speakers to favor others.[39]

Ms. Kagan observes, however, that the Court is less than wholly committed to the *Buckley* principle. For example, she notes that within *Buckley* itself, the Court seemed to contradict this principle by upholding spending limits on corporate independent expenditures, because the Court found that these types of expenditures could distort or unfairly influence an election.[40] Ms. Kagan indicates that she believed this finding to be inconsistent with the primary principle announced in *Buckley*. Ms. Kagan does not indicate whether she agrees with the Court's acceptance of the justification offered by the Court. Ms. Kagan also does not go so far as to say that this portion of *Buckley* was wrongly decided. It should be noted here that, in 2010, the Supreme Court invalidated independent expenditure limits for corporations in *Citizens United v. FEC*.[41] Given the reasoning stated in this article, Ms. Kagan may find the holding in *Citizens United* to be consistent with *Buckley*'s heightened suspicion of laws that seek to "equalize" the speech market. However, such an observation does not necessarily indicate that Ms. Kagan would agree with the holding in *Citizens United* invalidating the restrictions, though the reasoning of the opinion may be more consonant with the theory announced in her article.

Another case in which the Court did not adhere to the principle announced in *Buckley* was *Red Lion Broadcasting v. FCC*.[42] In that case, the Court upheld the FCC's fairness doctrine, which required balanced treatment of issues of public importance and functioned in a similar way to the right-of-reply statute that was struck down in *Tornillo*.[43] Furthermore, Ms. Kagan points out that the Court actually upheld the cable "must-carry" rules in *Turner Broadcasting*. The Court reached this conclusion by refusing to view "must-carry" as a violation of the *Buckley* principle.[44] That is, Ms. Kagan argues, the Court refused to see the "must-carry" rules as an attempt to achieve the appropriate mix of ideas in the marketplace, and, instead, categorized the rules preserving access to free over-the-air television regardless of the speech occurring on the medium. Ms. Kagan asserts that what is important for the purposes of her analysis is that the Court understood the rules in such a way as to obviate a conflict with *Buckley*.

In any event, Ms. Kagan definitively asserts that no Justice on the Court (in 1996) would dispute the statement that "the government may not restrict the speech of some to enhance the speech of others."[45] The real question for Ms. Kagan is not when or why the Court might deviate from that statement, but why that statement is accepted by the Court as a truism at all.

When viewed through the prism of the audience-based theory of the First Amendment, in Ms. Kagan's estimation, it would seem that the exact opposite of *Buckley*'s mandate is required.[46] If

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[39] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 464.

[40] *Id.* at 465.

[41] No. 08-205, slip op. (U.S. Jan. 21, 2010). *See* CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC*, by (name redacted).

[42] 395 U.S. 367 (1969).

[43] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 465. *See* CRS Report R40009, *Fairness Doctrine: History and Constitutional Issues*, by (name redacted).

[44] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 465 n145.

[45] *Id.* at 466.

[46] *Id.* at 466.

the Court and the government should be primarily concerned with making sure that everything that is worth being said is said, then the First Amendment probably should *require* a reallocation of speech opportunities to disadvantaged speakers. That is not, however, the general rule, as evidenced by cases like *Buckley*; therefore, Ms. Kagan argues that the audience-based model cannot explain the Court's heightened suspicion.

The speaker-based model does not explain the *Buckley* principle much better in Ms. Kagan's analysis.[47] If the speaker-based model were, in fact, the Court's motivation for its treatment of "equalizing" laws, the Court would have asked whether the interest in promoting diversity outweighed the loss of expressive opportunities caused by the expenditure limitations. Since the Court does not ask that question, Ms. Kagan concludes the speaker-based model is a poor fit.

Having eliminated the other two theories of First Amendment doctrine, Ms. Kagan is left with the motive-based theory. She admits that at first glance the motive-based theory may seem incongruent with the *Buckley* principle because the motivation for enacting laws that equalize the speech market appears to be the opposite of improper because they are not trying to silence anyone. Instead, on their face, they appear to grant more speakers the opportunity to speak. Ms. Kagan, again, argues that the presumption against the constitutionality of these types of laws should be viewed as an evidentiary tool. She argues that "governmental actions justified as redistributive devices often (thought not always) stem from hostility or sympathy for ideas or, even more commonly, from self interest."[48] Laws of this type, Ms. Kagan argues, carry a greater risk that government officials have taken into account improper factors, and courts have particular difficulty detecting tainted deliberations, due to the seemingly legitimate interest in providing speech opportunities to disadvantaged speakers.

The main issue, for Ms. Kagan's purposes, is that laws equalizing the speech market exist specifically to alter the mix of ideas, or at least alter the speakers associated with ideas, in the market. Ms. Kagan argues that laws that seek to equalize speech opportunities, therefore, are nearly as likely as content-based laws to stem from improper motives. For example, Ms. Kagan notes that campaign finance laws could easily serve as incumbent protection devices, and posits that suspicion of this type of motive could have been what prompted the Court to invalidate the statute that prevented corporations from advocating particular positions on referenda in a case called *First National Bank of Boston v. Bellotti*.[49] Ms. Kagan also hypothesizes that the Court may have struck down the statute in *Tornillo* for fear that the government was actually motivated by a desire to allow incumbent politicians to have the last word in debates about their character.[50] Under this theory, the dissenters in the "must-carry" case, *Turner Broadcasting*, may have been similarly suspicious of improper motivation, because must-carry could have been to protect local broadcasters because they more extensively cover local politicians than cable outlets. Ms. Kagan also theorizes that it would be difficult, if not impossible, to detect such improper motives. But Justice Scalia has hinted that it is a factor that he considers, saying "The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition."[51] Therefore, Ms. Kagan concludes

[47] *Id.*

[48] *Id.* at 467.

[49] *Id.* at 470 (citing First National Bank v. Belotti, 435 U.S. 765 (1978)).

[50] *Id.* at 470.

[51] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 471-72 (citing Austin v. Michigan Chamber of Commerce, 494 U.WS. 652, 692 (Scalia, J. dissenting).

that the government motive theory plausibly explains the heightened scrutiny the Court applies to laws that seek to equalize the speech market.

Safe Content-Based Laws

If some content-neutral laws require more heightened scrutiny than the Court would normally accord because they present greater risk of improper motive, then it would make sense that content-based laws that presented slight risk of improper government motivation would qualify for a lesser degree of First Amendment review. Ms. Kagan argues that this is, in fact, the case for restrictions on low-value speech, like obscenity and fighting words, and laws directed at the "secondary effects" of certain types of content.

Low-Value Speech

Some categories of speech can be restricted with either greatly reduced scrutiny from the Court or no scrutiny at all. Obscenity, child pornography, and fighting words have been declared to be unprotected speech and can be banned entirely. Commercial speech restrictions receive a lesser degree of scrutiny than restrictions on all other types of speech. Furthermore, libel is subject to a "bewildering" array of restrictions.[52] Ms. Kagan asks why it is okay to restrict this type of content without fear of the highest constitutional scrutiny. One possible reason is that it is not political speech, which the Court has often identified as the category of protected speech at the heart of the First Amendment. Ms. Kagan discards this possibility because, in her analysis, the instances when the Court has declared an elevated status for political speech gave only added support to decisions that would have had the same result without those statements.

She proceeds to attempt to apply the three theories of the First Amendment to the Court's formal delineation of low-value speech and informal elevation of political expression. She concludes that this doctrine cannot be explained by the speaker-based model, but can be explained by the audience-based theory rather well.

She discards the speaker-based approach because it could explain low-value categories "only if speech of the disfavored kinds confers less value on a speaker than does speech receiving full protection."[53] Low-value speech must promote values a speaker gains by communicating less well than other forms of speech, somehow. Ms. Kagan acknowledges uneasiness with this rationale, because it is not clear "what kind of speech does the greatest good for speakers, or best promotes their interests."[54] Arguments can and have been made for the benefits some low-value speech can confer on speakers. Under this model, Ms. Kagan believes "the most appropriate course would place in the speaker's own hands the question what kind of speech has value to her, by freeing her to choose among expressive activities." This seems to run counter to the Court's decisions to create categories of speech with a lower value under the First Amendment.

The audience-based approach explains the creation of low-value categories of speech better, because if the goal is to provide a range of opinion and information that serves the audience in its

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[52] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 472. CRS Report R41281, *Supreme Court Nominee Elena Kagan: Defamation and the First Amendment*, by (name redacted).

[53] *Id.* at 475.

[54] *Id.* at 476.

search for the truth, it makes sense to place little value on speech that does not aid the audience in searching for that truth. Under this theory, commercial speech could qualify for lower scrutiny because it carries special risk of being deceptive and deception cannot serve the audience interest in the truth. Obscenity and fighting words restrictions might qualify for reduced review, because obscenity and fighting words are not reasoned and cannot, therefore, aid reasoned discourse. This, in Ms. Kagan's view, seems to indicate that the audience-based model might fit with the creation of low-value categories of speech. However, she notes that false speech (that is not commercial speech and is not defamatory) remains protected by the Constitution, and no one could argue that speech that is false aids audiences in reaching the truth. Therefore, perhaps the audience-based model is not a perfect explanation for low-value categories.

If the government-motive-based theory is to fit with the creation of low-value categories of speech then, Ms. Kagan finds, it must be because there is something about restricting these types of content that carries less risk of improper motivation on the part of the government. Ms. Kagan, therefore, analyzes each disfavored category to determine whether a lack of risk of illicit motive may be the reason these categories of speech are more easily restricted.

In Ms. Kagan's view, the government motive theory could explain the different levels of review for defamation depending on the subject matter of the speech at issue. Defamation is more likely to be exempt from punishment due to First Amendment concerns if the subject of the alleged defamatory statements is a public figure or the speaker was addressing issues of public importance. Speech about these subjects and individuals, in Ms. Kagan's theory, is more likely to implicate the views and interest of decision-makers. Thus, their restriction carries more risk of improper government motivation, because silencing them would be more likely to be in lawmakers' self-interest. On the other hand, speech about private individuals and private affairs is less likely to implicate improper motives and can therefore be more easily restricted.

Ms. Kagan also finds logic in applying the government motive theory to the treatment of commercial speech. She reasons that there is less risk of improper motivation for restrictions of commercial speech because the government already regulates commercial activity very closely. Therefore, it is possible that the Court has decided to presume legitimacy in regulations of speech proposing commercial activity, qualifying those restrictions for a lower standard of scrutiny. This seems logical to Ms. Kagan because speech proposing a commercial transaction is itself very close to a commercial activity. Therefore, the Court lowers the burden placed on the government to justify restrictions of commercial speech to an intermediate level of scrutiny, and allows the government to freely restrict false and misleading commercial speech.

Ms. Kagan then shifts her analysis to the unprotected categories of speech. She acknowledges that the delineation of these categories of speech as lacking protection of the First Amendment does not square easily with the government motive theory. She finds justification for the lack of protection for fighting words by arguing that the Court may be approving of the government's response to an immediate danger of violence. Because the government would likely respond regardless of the ideas expressed, the Court may have a reduced fear that an impermissible motive underlies the speech restrictions.

Obscenity restrictions are a more difficult fit, however. Ms. Kagan goes so far as to say that it is a poor fit. She acknowledges that government motive does not appear to be the key concern for the Court in reviewing obscenity restrictions. The Court's key concern is obscenity's effect on its audience. In fact, part of the test for whether speech is obscene mandates an inquiry into the standards of the community. "And even if the formal test did not include these attributes, the

probability of taint infecting an obscenity law seems severe," particularly the improper motive of maintaining the status quo on sexual mores.[55] "In this area," Ms. Kagan admits, "a motive-based model thus fails to explain the doctrine."[56]

Unless, Ms. Kagan hypothesized, calling these categories of speech "low value" categories is actually a misnomer. Perhaps, the restrictions placed upon these categories carry a "low risk" of improper government motive. When viewed through the prism of "low risk" restrictions (as opposed to restrictions on "low value" speech), Ms. Kagan argues that the lesser degree of protection for these categories makes more sense.[57] Ms. Kagan observes that when faced with restrictions that present a greater risk of improper motivation, even within these "low value" categories, the Court may heighten its standard of review. For example, in *R.A.V.*, the Court invalidated a statute that discriminated against fighting words based upon viewpoint. In Ms. Kagan's view, the invalidation of this statute could only make sense if the Court were primarily concerned with illicit government motives. Furthermore, in *Cincinnati v. Discovery Network*,[58] the Court invalidated a statute that prohibited newsracks carrying commercial publications, but not newsracks carrying news publications. In invalidating the statute, the Court stated that the distinction made between commercial and noncommercial speech "bears no relationship whatsoever to the particular interests that the city has asserted."[59] Ms. Kagan argues that the Court could have reached this conclusion because the lack of relationship between the commercial content and the regulation at issue created a heightened suspicion of improper government motive. In other words, the decisions in *Discovery Network* and *R.A.V.* arose from "a judgment of risk, rather than a judgment of value."[60] In this way, Ms. Kagan argues that "low-value categories fall into line with the rest of First Amendment law; they become another way of focusing and refining the search for motive."[61]

Secondary Effects

The secondary effects doctrine has been used by the Court to uphold laws that restrict speech based upon content that are directed at preventing or mitigating the so-called "secondary effects" of that type of content. The secondary effects doctrine holds, essentially, that "facially content-based restrictions on speech that are justified without reference to the content of the regulated speech" should be treated as if they made no facial distinctions on the basis of content.[62] It is the only aspect of First Amendment doctrine that directly focuses on the nature of government motive, and, in doing so, seems to conflict with Ms. Kagan's theory that First Amendment doctrine, overall, *indirectly* seeks to flush out impermissible motives. Ms. Kagan acknowledges that her theory may be ill-equipped to explain the Court's motivations in devising and applying the secondary effects doctrine, but she also argues that the secondary effects doctrine does not comport with the speaker- or audience-based theories either.

[55] *Id.* at 480.

[56] *Id.* at 481.

[57] *Id.* at 481

[58] 507 U.S. 410 (1993).

[59] *Id.* at 424.

[60] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 483..

[61] *Id.*

[62] *Id.*

She demonstrates through example. Ms. Kagan posits a law that restricts sexually explicit speech to preserve neighborhood character and another law that restricts the same speech in order to curb sexual libertinism. Both laws curtail exactly the same amount of speech in her example, and under both the speaker-based and audience-based models (which are focused upon the effects of regulations on the speech market) the differences between these regulations should have no constitutional significance. Yet, under the secondary effects doctrine, the former proposed law is likely constitutional where the latter is not. Therefore, the speaker-based and audience-based models cannot explain the secondary effects doctrine, according to Ms. Kagan.

However, as noted above, the secondary effects doctrine also fits uneasily with the government motive theory. Ms. Kagan's theory is that the courts have developed objective tests that serve indirectly to flush out laws bearing the highest risk of improper government motive, and states specifically that direct inquiry into such motives is ineffective. The secondary effects doctrine, however, directly inquires into motive, seemingly, Ms. Kagan admits, contradicting her theory.

Ms. Kagan attempts to reconcile the secondary effects doctrine with her government motive theory nonetheless. She observes that the distinction at the heart of the secondary effects doctrine is the distinction between communicative (primary) effects and noncommunicative (secondary) effects. Under the secondary effects doctrine, laws that seek to mitigate noncommunicative effects receive less scrutiny from the Court, but laws that focus on primary effects remain unlikely to be upheld as constitutional. According to Ms. Kagan, "the difference lies in whether the harm the government is seeking to prevent arises from the expressive aspects of the speech, or, stated in another way, whether the harm results from a listener's hearing the content of speech and reacting to it."[63] Therefore, the Court's justification for a more relaxed standard for laws targeting secondary effects is that the target of the regulation merely happens to be associated with a particular kind of content, instead of the particular kind of content being the target of the regulation.

The question becomes, then, why this distinction is important. One possible theory is that it is important because it marks the divide between presumptively permissible and presumptively impermissible restrictions.[64] Ms. Kagan does not believe this to be the case, however, because this explanation fails to address the fact that the secondary effects doctrine hinders rather than aids the effort to uncover improper government purpose. This criticism assumes that Ms. Kagan's theory that First Amendment doctrine actually is an elaborate attempt to flush out improper motive indirectly is correct.

Regardless, in Ms. Kagan's opinion, a better explanation for the importance of the distinction between laws that address expressive effects of speech and laws that address nonexpressive effects is that communicative impact plays a "quasi-evidentiary" role, which signals a change in the standard of review to be used. If one assumes that improper motive is easier to detect "when the justification for a statute relates to noncommunicative, rather than communicative impact," then a relaxed standard would be sufficient to separate proper and improper motives.[65] For Ms. Kagan, the "key point is that because the harm in secondary effects cases derives from a thing only contingently related to expression, courts and legislators in theses cases possess, to a greater

[63] *Id.* at 486.

[64] *Id.* at 487.

[65] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 487.

degree than usual, two testing devices for stripping away pretexts and revealing motives."[66] First, the court may ask whether the government has tried to regulate speech in the absence of the asserted harm. Second, courts can check for improper motive by asking whether the government regulates conduct that causes the same harm as the expression affected. Since the court can apply these tests to reveal improper motive, the court arguably does not need to apply the more stringent standard of review in secondary effects cases.

Ms. Kagan acknowledges, nonetheless, that there is still an uneasy fit between the secondary effects doctrine and the government motive theory, and she goes so far as to suggest that the secondary effects doctrine may be in error, if not, at least, an aberration. The government motive theory and secondary effects doctrine create a problematic paradox for Ms. Kagan in which the doctrine most concerned with evaluating government motive is the doctrine least reconcilable with her motive-based model. Furthermore, she claims that the secondary effects doctrine may be in error because the decision to evaluate reasons for restrictions by asking about them is ineffective. In her argument, all other areas of First Amendment doctrine have exhibited that the most effective avenue towards discovering the risk of improper motive is to pose questions having little or nothing to do with motive (e.g., asking whether the law is content-based or content-neutral). The only way that Ms. Kagan can devise to bring her government motive theory into line with the secondary effects doctrine is to view it as an evidentiary tool in the manner she describes, but, even then, Ms. Kagan refrains from "[staking] very much on the strength of this motive-based explanation."[67]

The Distinction Between Direct and Incidental Restrictions on Speech

Courts have long reviewed laws that directly restrict speech more closely than those that merely "incidentally" restrict speech.[68] Ms. Kagan observes that, without this distinction, nearly every law would implicate the First Amendment because every law may have at lease *some* effect on expression and expressive opportunities. The questions, therefore, become where, how, and why to draw the line.

According to Ms. Kagan, the distinction that governs here is the distinction between government actions targeting expression alone and government actions applying generally to both expressive activities and nonexpressive activities. The more generally applicable a law is, the more it targets an action irrespective of its potential for expression, and the more likely the Court is to weaken, if not eliminate, its First Amendment review. In other words, if a law would have applied to an act of expression regardless of the fact that the act was expressive, it is more likely to be treated as an incidental restriction on speech, and presumptively constitutional.

Ms. Kagan posits that incidental restrictions on speech are treated with less suspicion because they create less risk of improper government motivation. She reasons, by example, that the speaker-based model does not explain the Court's treatment of incidental restrictions. She hypothesizes laws that restrict speech directly to a generally applicable regulation (e.g., a law making it illegal to deface synagogues with swastikas versus a law that bans vandalism in general). "If what mattered were the effect of a regulation on a speaker's expressive

[66] *Id.* at 488.

[67] *Id.* at 490.

[68] *Id.* at 491.

opportunities, then the court would review these municipal acts in identical fashion."[69] However, they do not. She reasons similarly for the audience-based model. She notes that if all laws have the potential to distort the speech market, then, under this theory, they should all be reviewed under the First Amendment, but they are not.

In Ms. Kagan's estimation, the government motive theory better explains the Court's treatment of incidental restrictions, because there is less fear of improper motivation underlying these laws. For example, generally applicable laws (e.g., taxes that apply to all corporations) aren't targeted at ideas, normally; therefore, there is little if any First Amendment scrutiny applied. However, there are two categories of generally applicable laws that the Supreme Court has identified as requiring heightened scrutiny, and, Ms. Kagan argues, this is because the categories carry elevated risk of improper motivation.

Courts more closely scrutinize generally applicable laws that "have the inevitable effect of singling out those engaged in expressive activity" (e.g., a tax on newsprint) and "laws that sanction conduct that has a significant expressive element" (e.g., burning a flag, or destroying a draft card).[70] Ms. Kagan argues that these laws qualify for heightened scrutiny because laws of this type are more likely to be motivated by bias. She uses as an example laws that would prohibit flag burning. Flag burning can be prohibited without prohibiting "flag burning" per se. It can be prohibited by a law that bans public fires, for example, and that law would likely be treated as an incidental restriction on speech. In contrast, the government could attempt to regulate flag burning directly, but only ban such action accomplished as a protest of the government. This example is more likely to be treated as a direct restriction on speech, and, therefore, unconstitutional, because it is also content-based, carrying a higher suspicion of improper motive. Ms. Kagan then inquires into the treatment of a law that prohibits the knowing mutilation of the American flag. This hypothetical statute poses a closer question because it falls closer to the line between incidental and direct restrictions. However, Ms. Kagan notes that, in her view, the only rational interests underlying a law prohibiting the knowing mutilation of the flag would relate to suppressing a message, and therefore would relate to illicit government motive. Thus, Ms. Kagan believes that the Court was correct to strike down just such a law in *Texas v. Johnson*, a case she believes to be consonant with her government motive theory.[71]

The last incidental restrictions Ms. Kagan addresses are hate crimes laws. She observes that hate crimes laws are incidental restrictions on speech because, like labor laws preventing race-based firings, whatever speech is involved in the crime is incidental to the ultimately illegal activity.[72] She argues that "the generality of the law provides a qualified assurance that disapproval of ideas qua ideas played no causal role in the legislative process."[73]

Some argue that hate crimes laws amount to proscribing a certain kind of expression and that the law is not generally applicable because it only applies to a subset of ideas. Ms. Kagan argues that this criticism is incorrect because hate crimes laws ban conduct that may occur independent of expression, which means the punishable offense itself remains a generally applicable law (the

[69] *Id.* at 494.

[70] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 497-98.

[71] *Id.* at 502. CRS Report R41256, *The Jurisprudence of Justice John Paul Stevens: Leading Opinions on the Free Speech Clause of the First Amendment*, by (name redacted).

[72] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 502-03.

[73] *Id.* 503.

hate crimes portion is generally a sentence enhancement for the prohibited conduct). Others similarly claim that hate crimes laws bar racist ideas, but not others, and should therefore be more closely reviewed. Ms. Kagan responds that many generally applicable laws affect speech in asymmetrical ways, but are not so stringently reviewed. The last and most effective argument, in Ms. Kagan's view, for increased scrutiny of hate crimes law is that the only rational justification for a hate crime law relates to the message the proscribed activity conveys. Ms. Kagan posits that the government interest may not be in eradicating the message at all. Rather, the government may actually be attempting to eradicate racial disadvantage (not unlike the prohibition on race-based employment discharge) by preventing disproportionate harm from falling on members of a racial group.[74]

In total, Ms. Kagan finds that the "doctrine acts as a complex mechanism to provide review where necessary and of the kind necessary to invalidate improperly motivated government actions."[75]

The Underpinnings of Motive Analysis

Assuming that there is a focus on government motive, Ms. Kagan now asks why it might be so. She begins her analysis by first looking to the general justifications usually offered for rules of process. To begin, she offers that perhaps a rule of process is adopted to promote good consequences. On the other hand, perhaps a rule is adopted for its own sake, "because it possesses certain attributes or expresses certain norms, the correctness of which renders any outcome it produces correct."[76] The important distinction is between rules whose justification derives from the results and rules whose internal attributes justify them independently of results.

Ms. Kagan concludes that the motive-based theory may be justified because it produces "good results." It is true, in her theory, that a rule foreclosing on improperly motivated restrictions would promote a set of outcomes that would benefit the audience. It may be fair to say also that "any actions deriving from improper motives also become improper."[77] However, if what the Court is concerned about is actually the effects a law would have on the speech market, then it would seem that the Court should adhere more completely to the audience-based theory. That is, unless the audience-based theory is not judicially manageable, which Kagan argues could be the case. Assuming that the motive-based inquiry does arise from a concern with untoward effects, Kagan suggests the reasons for the development may have proceeded as follows:

> Why do we wish to discover improper motive? Perhaps because we wish to discover adverse effects, but cannot do so directly; because we know that actions tainted with certain motives tend to have such consequences; because although a focus on motive will prove imprecise, we can think of no better way to gauge the effects of an action on the state of public discourse.[78]

The other possible justification for a reliance on the motive-based theory would ask "why motives, for their own sake and irrespective of material consequence, should determine the

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[74] *Id.* at 504.

[75] *Id.* at 505.

[76] *Id.* at 506.

[77] Private Speech, Public Purpose, *supra* note 1, 63 U. Chi. L. Rev. at 507.

[78] *Id.* at 509.

legitimacy of governmental action."[79] Ms. Kagan notes that doctrine often treats laws that may have exactly the same practical effect differently, and argues that this may be so because actions derive meaning through what motivates the actions. Under this justification, "the government may not treat differently two ideas causing identical harms on the ground that – thereby conveying the view that – one is less worthy, less valuable, less entitled to a hearing than the other." Ms. Kagan wonders, however, why it is improper for the government to restrict objectively contemptible ideas, independent of the harm they might cause. The best answer to this question, for Kagan, appears to be "the probability that the government will err, as a result of self-interest or bias, in separating the true and noble ideas from the false, abhorrent ones."[80] If this is true, "a scheme of neutrality [would provide] the surer means" to prevent such error.[81]

Ms. Kagan lastly makes clear that the question she has been addressing is why government motive might be important. She does not argue that government motive is all-important or that the effects-based models are irrelevant. Ms. Kagan writes that she has "posited only that our system of free expression focuses on motive."[82]

"Regulation of Hate Speech and Pornography After *R.A.V.*"

Three years prior to publishing her article described above, Ms. Kagan wrote a piece in the University of Chicago Law Review on the implications of the Court's decision in *R.A.V.*[83] Some of the same themes as in the article above are evident, though possibly in their earlier stages of development, but her focus was different in writing this article as well. Here, she focused primarily on the design of laws that would restrict hate speech and pornography, with an eye towards designing restrictions that, in her view, would be more likely to be upheld by the Supreme Court. Like the article above, she does not appear to suggest changes in doctrine (though she does make one statement about her opinion on the correctness of a particular decision). Instead, she appears to take the position that assuming her understanding of the Court's doctrine is correct, statutes may be designed to comport with that doctrine and restrict some hate speech and pornography, though certainly not all.

The Presumption Against Viewpoint Discrimination

Ms. Kagan begins her article by noting that if hate speech and pornography regulations fail constitutional scrutiny it is usually because they discriminate on the basis of a particular viewpoint. Laws that discriminate based upon viewpoint are particularly constitutionally suspect.

[79] *Id.*

[80] *Id.* at 512.

[81] *Id.*

[82] *Id.* at 514.

[83] Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. Chi. L. Rev. 873 (1993).

To illustrate that point, Ms. Kagan discusses two cases: *R.A.V. v. City of St. Paul*[84] (hate speech), and *American Booksellers Ass'n, Inc. v. Hudnut*[85] (pornography).

As noted previously, in *R.A.V.*, the Court struck down a law that prohibited only those fighting words based on race, color, creed, religion, or gender.[86] Fighting words are unprotected expression.[87] It therefore seemed anomalous to many that a law that banned a particular subset of unprotected expression would be unconstitutional. However, "in the Court's view, the ordinance in practice discriminated between different viewpoints: it effectively prohibited racist and sexist fighting words while allowing all others."[88] This was unacceptable, because "[the] government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed." This deep aversion to laws that discriminate based upon viewpoint, therefore, justified the Court's decision to strike down a law that discriminated against viewpoints even in communication that is traditionally unprotected.

A similar motivation, in Ms. Kagan's opinion, underlies the Seventh Circuit's decision (affirmed summarily by the Supreme Court) in *American Booksellers Ass'n, Inc. v. Hudnut*,[89] striking down a law that banned pornography that depicted women as sexually subservient. The problem with the ordinance, Kagan observes, is that it creates an "approved viewpoint" for women in the context of sexual conduct: speech where women are portrayed as sexually equal is approved speech; while speech where women are portrayed as sexually subservient is not.[90] Invalidation, Kagan argues, necessarily followed this conclusion.

Ms. Kagan further explains that these decisions, in her opinion, are deeply rooted in First Amendment doctrine. To be sure, she acknowledges some cases might contradict the holdings of *R.A.V.* and *Hudnut*, but, by and large, they fit within the overall doctrine and underscore the importance of viewpoint neutrality when legislators construct speech restrictions. "Any attempt to regulate pornography or hate speech—or at least any attempt standing a chance of success—must take into account these facts (the 'is,' regardless whether the 'ought') of First Amendment doctrine."[91] Therefore, if one were to practically approach crafting a hate speech or pornography restriction, one should likely take pains to avoid a law that discriminated against viewpoints on its face.

Ms. Kagan further states that she believes this approach to be the most harmonious with free speech principles. In other words, she appears to support the strong presumption against laws that discriminate against viewpoint and to support laws that are viewpoint neutral. She states "the principle of viewpoint neutrality, which now stands as the primary barrier to certain modes of regulating pornography and hate speech, has at its core much good sense and reason.... [My] view

[84] 505 U.S. 377 (1992).

[85] 771 F.2d 323 (7th Cir. 1985), *aff'd mem*, 475 U.S. 1001 (1986).

[86] [86] 505 U.S. at 396.

[87] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[88] Regulation of Hate Speech and Pornography After *R.A.V.*, *supra* note 77, 60 U. Chi. L. Rev. at 874.

[89] 771 F.2d 323 (7th Cir. 1985), *aff'd mem*, 475 U.S. 1001 (1986).

[90] *Id.* at 875.

[91] *Id.* at 877.

is that efforts to regulate pornography and hate speech not only will fail, but also should fail to the extent that they trivialize or subvert this principle."[92]

Nonetheless, Ms. Kagan addresses two main avenues of critique of the rule against viewpoint discrimination preventing regulation of hate speech and pornography. The first critique would claim that hate speech and pornography laws actually comport with the prohibition on viewpoint discrimination because they are harm-based rather than viewpoint-based. Kagan argues that this critique fails because there is no practical distinction between laws that regulate based upon the harm a viewpoint causes and laws that discriminate against the idea behind the viewpoint. For example, Kagan contrasts a law that punishes "abortion advocacy and counseling with an ordinance punishing any speech that might induce a woman to get an abortion. To sever these pairs of statutes would be to transform the First Amendment into a formal rule of legislative drafting."[93] The facially harm-based statute and the facially viewpoint-based statute actually function in the same way. Therefore, to say that hate speech and pornography restrictions are harm-based in application is not as meaningful a distinction as its proponents would like, in Kagan's view.

The second, and more difficult, critique attacks the presumption against viewpoint discrimination wholesale. It would hold that the "viewpoint discrimination doctrine is both incoherent and corrupt."[94] The critique rests, in part, on the argument that recognizing when viewpoints are discriminated against may well depend on who is determining that viewpoint discrimination is present. The real danger, therefore, is that those with the power to identify laws that discriminate based upon viewpoint (lawmakers and/or courts) may fall victim to their own worldview. That is, a judge may be more likely to uphold a law that discriminates against a viewpoint that the judge also personally disapproves (whether consciously or not). This could lead to a skewing towards approval of laws that would uphold more traditional views.

Kagan argues that, even assuming that this is true, doing away with the viewpoint discrimination principle is not the solution. Historic examples of viewpoint discrimination abound. And, Kagan points out, they are not a concern of the past.

> And if all these seem remote either from current threats or from the kind of viewpoint discrimination in *R.A.V.* and *Hudnut* ... consider instead the case of *Rust v. Sullivan*[95].... There the government favored anti-abortion speech over abortion advocacy, counseling, and referral, and the Court, to its discredit, announced that because the selectivity occurred in the context of a governmental funding program, the presumption against viewpoint discrimination was suspended.[96]

The dangers of viewpoint discrimination are very much alive in Kagan's opinion.

Kagan further posits that the critique of a viewpoint neutrality principle serves to illuminate the necessity of that principle. Government actors tend to see speech regulations through the prism of their own worldviews. The viewpoint neutrality principle is in place to safeguard against the

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[92] *Id.* at 878.

[93] *Id.* at 879.

[94] Regulation of Hate Speech and Pornography After *R.A.V.*, *supra* note 77, 60 U. Chi. L. Rev. at 880.

[95] 500 U.S. 173 (1991).

[96] Regulation of Hate Speech and Pornography After *R.A.V.*, *supra* note 77, 60 U. Chi. L. Rev. at 882.

"imposition of an official orthodoxy."[97] In Kagan's opinion, the groups with the most to lose from the imposition of official orthodoxy are minority groups and women; therefore, removal of one of the safeguards against its imposition seems antithetical to the goals of those groups, though it may permit the enactment of some laws that those groups favor.

Kagan allows for the possibility of exceptions to the general rule for hate speech and pornography, and her theories on how they might be crafted will be discussed later. First, however, Kagan posits laws that could restrict hate speech and pornography that would comport with the presumption against viewpoint discrimination.

New Approaches

Kagan identifies four new approaches for regulating hate speech and pornography. They are the enactment of new or stricter bans upon conduct; the enactment of viewpoint-neutral speech restrictions; the enhanced use of obscenity; and the creation of carefully crafted and limited exceptions to the rule against viewpoint discrimination.[98] Kagan does not argue that these will certainly work, nor does she argue that these are the only paths. She offers them as well-reasoned suggestions.

Conduct

Kagan begins by making clear that she is not attempting to conflate speech and conduct. She observes that some scholars attempt to blur that line by arguing that speech is conduct because speech has consequences. She dispenses with this argument because she believes that it carries the danger of making First Amendment doctrine incoherent. When Kagan uses the word conduct, she means "acts that, in purpose and function, are not primarily expressive."[99] Therefore, this section focuses on the continued enactment and use of hate crimes laws and increasing legal sanctions for some of the illegal acts that are committed in the course of creating pornography.

Kagan argues that hate crimes laws are targeted at conduct, not speech, "because they apply regardless whether the discriminatory conduct at issue expresses, or is meant to express, any sort of message." It is comparable, therefore, to government prohibitions on firing an employee because of his race, or any other law prohibiting discrimination. "A penalty enhancement [for a crime committed based solely upon the victim's race] constitutionally may follow because it is pegged to an act—a racially based form of disadvantage—that the state wishes to prevent, and has an interest in preventing, irrespective of any expressive component."[100] Kagan further believes that tort-based and civil remedies could stem from this reasoning that "acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."[101] She argues that communities should consider creating civil violations committed on the basis of race or sex.

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[97] *Id.* To support this statement, Kagan cites Justice Stevens, who noted, in Kagan's characterization, "that doctrine responds, preeminently, to fear of the 'imposition of an official orthodoxy,' or (perhaps even especially as to matters involving sex or race." The Hon. John Paul Stevens, *The Freedom of Speech*, 102 Yale L J 1293, 1304 (1993).

[98] Regulation of Hate Speech and Pornography After *R.A.V.*, *supra* note 77, 60 U. Chi. L. Rev. at 883.

[99] *Id.*

[100] *Id.* at 885.

[101] *Id.* at 886 (citing *R.A.V.* 505 U.S. at 389-90).

Turning to the regulation of pornography, Kagan notes that many activities that may be engaged in when creating pornography are already criminal. For example, states, without having to enact a single new statute, could more aggressively prosecute the abuse and assault often endured by or inflicted upon women in the making of pornography. States could also make the use of fraud or other forms of illegal deception specifically illegal to induce a woman to perform in a film, regardless of the viewpoint expressed in the film eventually produced. Again, she argues for the creation of additional tort remedies on these bases as well.

Kagan further argues that laws against prostitution and pandering could be used to curb pornography. She noted a case in which a conviction for prostitution and pandering was upheld against a woman who presented a sex show. "The [Arizona state court] reasoned, consistent with established First Amendment doctrine, that the prosecutions were permissible because even if the show had expressive content, the state had acted under statutes directed at conduct in order to further interests unrelated to the suppression of expression."[102] Kagan argues that this statement could be extended to the creation of depictions and used to prosecute pornographers that would meet the standard for pandering. She concedes, however, that this approach, particularly if applied broadly, may face significant constitutional problems.

Kagan also acknowledges that these approaches likely would not apply as broadly as those opposed to pornography and hate speech would like. They certainly would not go so far as to eliminate these types of speech from common discourse. However, Kagan's argument is merely that they would likely be upheld as constitutional.

Viewpoint-Neutral Restrictions

Kagan's next suggestion is to craft laws that, though content-based, have no viewpoint bias. The Supreme Court disfavors content-based restrictions, but has upheld such restrictions on occasion nonetheless. One possibly effective course would be to use generally applicable laws banning harassment, threats, or intimidation. The Court in *R.A.V.* had offered such a possibility as well.[103] Kagan further suggests that laws prohibiting sexual violence might be used to curb pornography. Some might argue that "sexual violence" serves as a code word for disfavored viewpoint. Kagan disagrees because some works that are non-violent may portray women in subservient positions and those works would remain permissible. Conversely, some violent works may portray women in dominant positions, and those works would be prohibited. Kagan concedes that a restriction on sexually violent speech still may present constitutional problems, but argues, nonetheless, that it is worth consideration.

Lastly, Kagan argues, that "the Constitution may well permit direct regulation of speech, if phrased in a viewpoint-neutral manner, when the regulation responds to a non-speech related interest in controlling conduct involved in the material's manufacture."[104] The distinction she makes here is based upon *New York v. Ferber*,[105] which held that the government could criminalize child pornography because the government's interest was in preventing the child abuse inherent in the creation of the speech.[106] She argues, therefore, that it would be logically

[102] *Id.* 887-88.

[103] 505 U.S. at 395-369.

[104] Regulation of Hate Speech and Pornography After *R.A.V.*, *supra* note 77, 60 U. Chi. L. Rev. at 891.

[105] 458 U.S. 747 (1982).

[106] A similar argument was advanced by the United States and rejected by the Supreme Court in *United States v.* (continued...)

consistent if "the government may prohibit directly the dissemination of any material whose manufacture involved coercion of, or violence against, participants."[107] Kagan admits, however, that this theory will have its limits and, if constitutional, likely would not capture all speech that those opposed to pornography find offensive.

Obscenity

Ms. Kagan begins this section by noting that it is difficult in practice to distinguish between the pornographic and the obscene. Much scholarship argues for distinctions between the two, and Kagan admits that she does not believe the distinctions argued for are wrong. Kagan nonetheless relates her experiences with teaching the constitutional standards related to obscenity and pornography. Her classes often, if not conflated the two, at least identified them as related concepts to be treated similarly. Kagan hypothesizes that this shift from viewing obscenity and pornography as distinct to an inability to think of one without the other might have arisen from the success of the anti-pornography movement, which, in her view, transformed "obscenity into a category of speech understood as intimately related, in part if not in whole, to harms against women."[108] Regardless of this potential shift in the conception of obscenity, the judicial treatment of such speech has not shifted. Consequently, it could be argued that the public shift in viewpoint will matter little from the perspective of what speech may be constitutionally restricted. Kagan argues that attempts to restrict obscenity would prove successful constitutionally nonetheless. "The key point here is that regulation of obscenity may accomplish some, although not all, of the goals of the anti-pornography movement; and partly because of the long established nature of the category, such regulation may give rise to fewer concerns of compromising First Amendment principles."[109]

Exceptions to Viewpoint Neutrality

The Supreme Court seems to have foreclosed the possibility of carving out exceptions from the general rule of viewpoint neutrality for hate speech and pornography in *R.A.V.* and *Hudnut*.

(...continued)

Stevens, No. 08-769, slip op. (Apr. 20, 2010), 559 U.S. ____ (2010). The government had argued that depictions of animal cruelty, such as those described in Sec. 48, fall outside the bounds of First Amendment protection, and therefore may be restricted or criminalized without regard for the First Amendment. Basing its argument on the Supreme Court's description of other categories of unprotected speech, the government opined that depictions of animal cruelty "'are of such minimal redeeming value as to render [them] unworthy of First Amendment protection." *Id.* at 7 (quoting the Brief for the United States). The Court rejected this argument. According to the Court, categories of speech that are currently unprotected (e.g., obscenity and defamation) are well defined and narrowly limited classes of speech the regulation of which, historically, has raised little or no concern. In reviewing its case law related to those categories of unprotected speech, the Court found that it had never created a "test" for determining new categories of speech that would fall outside the amendment's protections. The Court concluded:

> Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.

Id. at 9.

[107] Regulation of Hate Speech and Pornography After *R.A.V.*, *supra* note 77, 60 U. Chi. L. Rev. at 891.

[108] *Id.* at 896.

[109] *Id.* at 897.

Kagan asks whether a coherent argument can be made for carefully considered exceptions, nonetheless. She notes that there are two necessary (but alone insufficient) factors that argue for exceptions to the general rule: (1) the seriousness of the harm the speech causes, and (2) the "fit" between the harm and the viewpoint-discriminatory mechanism chosen to address it.[110] Kagan believes that regulations of hate speech and pornography could be crafted to satisfy both of these elements.

Kagan also believes that satisfying these two elements is insufficient to justify viewpoint-neutrality exceptions. She uses as an example a law that would satisfy the above standards and was designed to reduce the incidence of abortion (rather than discrimination in the hate speech context, or violence towards women in the pornography context). She presumes if a court upheld this statute that the decision to do so would "strike many as irretrievably wrong."[111] Some may argue otherwise, but Kagan remains unconvinced by the counterarguments she posits.

Therefore, if the test for harm and fit cannot alone justify the exception, Kagan hypothesizes that perhaps applying the restriction to low-value speech would be the last factor needed. "In other words, if legislators can make the case that speech leads to harm, if the speech regulated correlates precisely with that harm, and if the speech is itself low-value, then any viewpoint discrimination involved in the regulation becomes irrelevant." Kagan observes that *R.A.V.* seems to reject this argument, but she contrasts *R.A.V.* with laws banning obscenity and finds inconsistency in reasoning. She argues, therefore, that with the proper "fit" a law designed in this way might withstand scrutiny.

Assuming her theory would hold, it begs the question whether pornography and hate speech should be considered low value. She argues that to save the potential statutes' constitutionality pornography and hate speech should be narrowly defined to include "speech that may not count as speech" like racial epithets, for hate speech, and "materials that operate primarily ... as masturbatory devices" and obscenity for pornography.

Conclusion

Kagan reiterates that she finds value in the presumption against viewpoint discrimination. As a result, she argues that any law seeking to limit hate speech or pornography would have to take this presumption into account. Efforts to regulate this type of speech with any chance of surviving scrutiny, she argues, will fall into the categories she has described, in her opinion. She acknowledges that the laws may not reach every aspect of hate speech and pornography, but "they can achieve much worth achieving."[112]

[110] *Id.* at 898.

[111] *Id.* at 899.

[112] *Id.* at 902.

"When a Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restrictions"

In "When a Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restrictions,"[113] Kagan responds to a code of conduct that was put into place at Stanford University (Stanford policy). According to Kagan, the Stanford policy—which specifically applies to expression based upon sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin—regulated speech despite all arguments to the contrary. Ms. Kagan argues that a speech policy of this kind presents constitutional problems. In her analysis, she concluded that Stanford could have avoided these constitutional issues by enacting a policy that banned all forms of harassment, threats, and fighting words because such a policy would likely have been treated as an incidental restriction on speech. However, the Stanford policy at issue in her article singled out particular viewpoints for punishment, a defect Kagan determined to be potentially fatal.

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[113] Elena Kagan, *When a Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restraints*, 29 U.C. Davis L. Rev. 957 (1996).

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