
Erin Connolly

Follow this and additional works at: http://scholarship.shu.edu/student_scholarship

Part of the Law Commons

Recommended Citation

http://scholarship.shu.edu/student_scholarship/678
Still Evolving: Balancing Individual Rights and the Functionality of the Legal System:

Justice Eléna Kagan’s Jurisprudential Stance

By Erin Connolly

Supreme Court Seminar
Biography

Elena Kagan was born on April 28, 1960 in New York, New York, the middle child and only daughter of Gloria Gittelman Kagan and Robert Kagan. Her family resided in a four-room apartment in Stuyvesant Town, before moving to the Upper West Side, when she was a teenager. Kagan shared a room with her two brothers and the family’s home was full of art, books, and friends and relatives of her parents’ who shared their passion for politics and social justice.\(^1\) Kagan also honed her legal skills at home discussing current events and verbally sparring at the dinner table.\(^2\)

The Kagan family was Jewish, and Elena practiced skills she would later utilize in her career as a lawyer, when a dispute arose between her and the rabbi concerning a detail of her bat mitzvah (then called a bas mitzvah). She eventually constructed a compromise that satisfied both parties, and was one of the first girls to be bat mitzvahed.\(^3\) A friend reported that her maternal grandfather, of Philadelphia, helped convince the


\(^3\) Id.
Orthodox Jewish rabbi that girls also deserved this opportunity long afforded to boys.4

Robert Kagan was a graduate of Yale Law School and utilized his skills to secure federal protections for Native Americans, and later switched his focus to West Side apartment dwellers’ rights. Gloria Kagan taught poor students in Harlem before moving to Hunter College Elementary School, the all-girls selective school that her daughter Elena also attended.5 Elena’s brothers, Marc and Irving, eventually followed in their mother’s footsteps, also becoming teachers; both teaching social studies, one at Bronx High School of Science and the other at Hunter College High.6

The rigorous public school of Gloria’s employ, Hunter College Elementary School, was notably diverse. Despite the high caliber of students, Elena’s classmates said that her intelligence and drive readily set her apart from others, despite the fact that she didn’t flaunt either. Her leadership ability also began to emerge during her time at Hunter, when she was elected president of the student government. Whether an indication of her aspirations or her foresight, she was

5 Id. at A01.
photographed for her yearbook picture in this role, wearing a judge’s robe and holding a gavel. A classmate also admitted that Elena had the dream of serving as a Supreme Court Justice since her time at Hunter.  

Elena graduated high school early, beginning her college years at Princeton University, at age 17. She quickly found her niche at the Princeton newspaper, called the “Prince” by insiders. She ran for the newspaper’s top editor position but lost. Instead she took the position of editorial chairwoman. Possibly with a view to her goal of being a justice on the Supreme Court, Elena revealed little about her private life as well as her political views. The exception to the latter is when she wrote a piece for the Princeton University paper explaining how she lamented the loss of Representative Elizabeth Holtzman—who she had tirelessly assisted in her reelection campaign—and the election of Ronald Reagan, by getting drunk on vodka the night the results came in.

Her 153-page senior thesis, required of all Princeton graduates, examined the loss of momentum the socialist movement had in the United States, and explored the causes. In the

---

7 Id.
acknowledgements she thanked her brother and his involvement in radical causes, appearing to contribute to her interest in this topic. Upon her summa cum laude graduation from Princeton, Elena attended Oxford as Princeton's Daniel M. Sachs Graduating Fellow, earning an M. Phil,\textsuperscript{10} while serving as a coxswain for a women’s crew team in her free time.\textsuperscript{21}

Upon her return to the United States, she began her studies at Harvard Law School, ultimately making law review. Her selection of schools was a slight disappointment for her father, who had hoped she would choose his alma mater, Yale Law School, where she had also been accepted. Her colleague Jeffrey Toobin, now a legal commentator, on CNN, noted her ability to navigate the different factions that had arisen at Harvard Law School, making it particularly divisive.\textsuperscript{12}

After graduation Elena held two esteemed clerkships, first with Judge Abner J. Mikva, of the federal appeals court in Washington, and next for Justice Thurgood Marshall of the Supreme Court of the United States. From her time with Justice Marshall, who thought that "all lawyers (and certainly all judges) should be reminded, that behind law there are stories -

\textsuperscript{10} Id.
stories of people’s lives as shaped by law, stories of people’s lives as might be changed by law”, she learned to always keep in mind the impact that decisions would have on the individuals involved in the cases.\textsuperscript{13} Her decisions since coming to the bench on the Supreme Court reflect this compassion and humanity. Justice Kagan may also have been influenced by Judge Mikva’s more liberal stances in forming her own views, particularly those regarding gun rights. His views on the NRA were clear from his characterization of them as the “street-crime lobby in Washington” leading them to unsuccessfully spend $1 million lobbying against his confirmation as a judge on the second circuit court of appeals.\textsuperscript{14}

After completing her clerkships, Elena began working as a litigator for Williams & Connolly. Her preference would have been to work in a Democratic administration, but George W. Bush’s election eliminated this option—for the moment.\textsuperscript{15}

In 1991, Elena moved again, this time to Chicago Law School, arriving at the same time as Barack Obama.\textsuperscript{16} Her


\textsuperscript{14} Ben Johnson, Kagan’s Heroes, The Right’s Writer (December 9, 2014 4:00 PM), http://therightswriter.com/2010/05/kagans-heroes/.


\textsuperscript{16} Id.
academic specialization was administrative law.\textsuperscript{17} She was granted tenure in 1995, despite what many consider her low level of publication.\textsuperscript{18} By this time the change of presidential administrations led Elena to revisit her earlier goal of working in one. At the invitation of Judge Mikva, then President Clinton’s chief counsel, Elena took a position as an associate serving under him in Washington. Chicago Law School allowed her a two-year leave, as was its policy.\textsuperscript{19} When the time for her return to Chicago arrived, Elena decided to stay in Washington, at the urging of her friend from Princeton, Bruce Reed, now President Clinton’s director of domestic policy, to be his top deputy. She changed her mind so soon before her relocation, that she had movers scheduled and 120 students signed up for her class the following semester.\textsuperscript{20} While in this position, Elena ironically, being a long-time smoker, worked with Senator John McCain, on a bill to allow the FDA to add tobacco control to its duties. Ultimately the bill failed after extensive lobbying by the tobacco industry. During her time in this position, Elena

\begin{flushleft}
\textsuperscript{17} Laurence Tribe & Joshua Matz, \textit{Uncertain Justice: The Roberts Court and the Constitutions} 214 (2014).


\textsuperscript{19} Id.

\end{flushleft}
was careful to only be a proponent for her boss, President Clinton’s, agenda, and keep her own views to herself.\textsuperscript{21}

In 1999, Elena almost stayed in Washington, when President Clinton nominated her for a judgeship on the federal appeals court of Washington D.C. This was the same court in which she had clerked for Justice Mikva. However, Republicans refused to schedule a confirmation hearing and the position ultimately went to John G. Roberts, the current Chief Justice of the Supreme Court. She was also turned down for a deanship at the University of Texas School of Law. Considering her alternatives, Elena pursued a return to Chicago Law School. However, she ran into a prevailing attitude that those lawyers who had gone to Washington would not be willing to work hard in academia upon their return. Instead, Elena accepted a position at Harvard Law School, gaining tenure in 2000, and being appointed dean in 2003. She continued to break gender barriers, becoming the first female dean of Harvard Law School. Her effectiveness in revitalizing the school, particularly its campus, as well as its curriculum was noticed. She made an effort to counteract the liberal tilt the school had, hired a large number of new faculty members, and improved the physical campus. Perhaps most important to her success, she made sure to speak to and truly listen to those with a stake in the school’s

\textsuperscript{21} Id.
success, as well as information about its improvement—its professors and students.\textsuperscript{22}

In 2009 Elena was appointed solicitor general. Oddly for someone in this important position, she had not argued any cases before the Supreme Court and had just recently been admitted to its bar. Elena lost her first case, \textit{Citizens United v. Federal Political Commission}, before the Court, in a 5-4 split, with a decision allowing unlimited corporate spending in political elections.\textsuperscript{23}

Justice Kagan was nominated by Barack Obama and confirmed by the Senate in a 63-37 vote, with only a few Republicans crossing the aisle to join the Democrats as expected. She is the nation’s 112th Supreme Court Justice and its fourth female member.\textsuperscript{24} Her humor was on display during the confirmation hearings, as evident by her response to a senator’s question about where she was on Christmas: “You know, like all Jews, I was probably at a Chinese restaurant.”\textsuperscript{25} She was sworn in on August 7, 2010.\textsuperscript{26}

\textbf{Jurisprudential Approach}

\textsuperscript{22} Id.
\textsuperscript{26} Id.
Justice Kagan in her decisions, tends to be more left-leaning, but they, similarly as those of her colleagues, are not necessarily made with that in mind.\textsuperscript{27} Coupled with her left-leaning tendencies she also tends to be broader in her construction of statutes, finding the language contained with them ambiguous more often than her colleagues, leading her to “interpret the relevant words not in a vacuum, but with reference to the statutory context, ‘structure, history, and purpose.’”\textsuperscript{28} Additionally, her aim appears to be to implement the spirit of the law, even if the letter of the specific law strays slightly. This approach allows her to parse details and distinctions within statutes, that can significantly affect the outcome of the case, such as vehicular flight that “creates a substantial risk of bodily injury to another person” and that which does not.\textsuperscript{29} Justice Kagan’s decisions are broad in another aspect as well. She aims to provide guidance to lower courts for other cases that may come before the them in the future, and has criticized her colleagues for doing the opposite. Generally, Justice Kagan also tends to be protective of individual rights\textsuperscript{30}, with the exception of a few cases, involving public

\textsuperscript{27} Id. at 4.
\textsuperscript{28} Abramski v. United States, 134 S. Ct. 2259, 2267 (2014).
\textsuperscript{29} Sykes v. United States, 131 S. Ct. 2267, 2993 (2011).
safety and gun rights. Such as Abramski v. United States\textsuperscript{31}, where she says that a gun straw buyer (one who claims they are buying the gun for themselves, when they are in fact doing so at the behest of another) is not what Congress anticipated as an acceptable concept, in passing the Gun Control Act of 1968, as amended, 18 U. S. C. §§921-931 and Messerschmidt v. Millender\textsuperscript{32}, where a search warrant for guns and gang paraphernalia was challenged as being overbroad, and the officers who had written and executed it, were seeking immunity. Whether Justice Kagan has a particular interest in preemption, or those are simply the cases that her senior colleagues tend to assign her to write, she has addressed the topic more than once.\textsuperscript{33} Finally, Justice Kagan, true to her left-leaning tendencies and protection of individual rights, tends to be protective of citizens in their interactions with, and remedies against, big businesses; recognizing that regulation of businesses plays an important part of that protection.

As the Roberts Court attempts to limit those who can seek redress in front of the court, through seemingly benign procedural rulings, Justice Kagan valiantly tries to fight back. She did this with her opinions in Arizona Christian School

\textsuperscript{31} 134 S. Ct. 2259 (2014).
\textsuperscript{32} 132 S. Ct. 1235 (2012).
Tuition Organization v. Winn, dissenting to the majority's decision that the Arizona taxpayers lacked standing and thus denying them, or anyone, the ability to challenge Arizona's tax credit for taxpayer contributions to School Tuition Organizations, and American Express Co. v. Italian Colors Restaurant, in which the majority strictly enforced an arbitration clause despite it allowing arbitration to threaten "to become a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability." Whether due to expense or lack of standing, Justice Kagan realizes that a right unenforced is a right lost.

Obtaining any further insight into Justice Kagan's judicial tendencies has proven difficult since this is only her fourth term on the bench; she is very reluctant to write separately, and has recused herself from many cases as well, leaving fewer examples to analyze. This is in large part due to her previous role as Solicitor General, and tallying twenty-six recusals total in her first term, 2010. Some commentators thought that she was being

---

34 131 S. Ct. 1436 (2011).

35 133 S. Ct. 2304, 2320 (2013).

overly cautious and recusing herself too often.\textsuperscript{37} This will be less relevant as her time on the bench proceeds, and it becomes less likely that cases in which she was previously involved, come before the court.

\textbf{Dissents: Religion}

While Justice Kagan has written dissents on a few different topics thus far, she most consistently parts ways with the majority, regarding the separation of church and state. Whether in \textit{Arizona Christian Tuition Organization v. Winn}\textsuperscript{38}, or \textit{Town of Greece v. Galloway} in which she feels public resources are being used to endorse a religion, and as a result those in a minority religion are being forced to identify themselves, in the process being set apart as different; or in \textit{Burwell v. Hobby Lobby Stores, Inc.} where she joined the opinion that the challenges brought by the corporations failed on their merits and but wrote separately to state that she did not, and would not, decide whether corporations can bring such claims under RIFRA. This is unusual for her, as she tends to prefer to answer as broadly as possible, while still staying within her acceptable role as


\textsuperscript{38} 131 S. Ct. 1436 (2011).

\textsuperscript{39} 134 S. Ct. 1811 (2014).
justice of only evaluating the "controversies" brought before her and her colleagues, when issues are brought to the Supreme Court, so as to provide guidance to lower courts. Justice Kagan's stance on the Establishment Clause is likely influenced by being raised in a minority religion, Judaism, whose adherents have been horribly discriminated against over the centuries, and may have instilled in her a sense of sticking up for the underdog, which has carried over to her opinions in non-religious cases as well.


This opinion, authored by Justice Kennedy, and joined by Justices Scalia, Thomas, Roberts, and Alito, was decided on jurisdictional grounds, not on the merits. Rather on the fact that the taxpayers lacked standing to bring a First Amendment Establishment Clause challenge to Ariz. Rev. Stat. Ann. § 43-1089. That statute allowed tax credits for contributions to organizations that provided scholarships for religious and other private schools. The tax credit did not involve extraction and spending of tax money. Citing Flast v. Cohen⁴⁰, and its 2-part test, the Court found that the taxpayers did not satisfy the first portion, requiring that "there must be a 'logical link' between the plaintiff's taxpayer status 'and the type of

---
legislative enactment attacked.”41 Secondly, Flast42, found that there also "must be 'a nexus' between the plaintiff's taxpayer status and 'the precise nature of the constitutional infringement alleged.'"43 The majority states that this tax credit is not a government expenditure by distinguishing the government imposing a tax from the government declining to impose a tax (a.k.a. credits) and states that the former does not constitute a close enough connection between "the dissenting taxpayer and the alleged establishment" and as such, "any injury remains speculative."44

Justice Kagan quickly disposes of the notion that taxpayers seeking to qualify under the Flast45, Establishment Clause exception, do not qualify. She explains that a tax credit and declining to impose a tax have the same effect, and "either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy."46 She also makes the point that since the taxpayers were prohibited from bringing the suit due to standing, no one else is left to seek judicial enforcement of the rights citizens have in the Establishment Clause to "religious neutrality".47 She supports her conclusions by citing numerous cases, that are very similar,

42 supra, 392 U.S. 83.
43 Id.
44 Id at 1447.
45 supra, 392 U.S. 83.
46 Id. at 1450.
47 Id. at 1451.
almost identical to the one at hand, that lower courts and the Supreme Court have examined and decided in accordance with her proposed holding. 48


Again, Justice Kagan dissented from what she viewed as a disregard of the Establishment Clause, this time interfering with citizens' rights to partake on an equal level in municipal proceedings. The majority decided that the town of Greece, New York, did not impose an impermissible establishment of religion by opening its monthly board meetings with a prayer. By examining **Marsh v. Chambers**49, Justice Kennedy decided that that decision's blessing of legislative prayer is applicable to the town meeting at issue, despite the differences that Justice Kagan details in her dissent. The majority also took the ironic approach of claiming that should the judiciary order that prayers be nonsectarian that would entail a violation of the establishment clause due to the government becoming more involved in deciding matters of religion. **Town of Greece v. Galloway**.50

In supporting her point, Justice Kagan, in a dissent written with Justice Beyer, delineates the difference between legislative bodies in which the public, if they are present, are

---

48 Id. at 1452-53.
50 134 S. Ct. 1811, 1822 (2014).
there as observers, while at the town meetings at issue, they may be seeking action in one way on certain matters they have brought before the body.\textsuperscript{51} This, combined with the Christian clergy’s (the only deviations from this occurred in response to protests raised by respondents\textsuperscript{52}) urging those present to join in and the remaining option left to those not wishing to participate, as proposed by the majority, was to leave the room, visually identifying their beliefs conflicting with those of the majority and forcing them to set themselves apart simply to comply both with their beliefs but also conduct their necessary business before the town council was sufficiently a violation of the Establishment Clause for Justice Kagan.\textsuperscript{53}

Justice Kagan concluded by eloquently stating that “For me, that remarkable guarantee means at least this much: When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines.”\textsuperscript{54}

C. \textit{Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014)}

Although Justice Kagan only wrote separately in a short dissent, Justice Ginsburg’s longer dissent, which Kagan joined

\textsuperscript{51} Id. at 1851-52.
\textsuperscript{52} Id. at 868.
\textsuperscript{53} Id. at 1844.
\textsuperscript{54} Id. at 1854.
excepting a small portion, coincides with Justice Kagan’s track record and philosophy of separation of church and state. The case was filed by the corporation of craft stores, Hobby Lobby, seeking to overturn the portion of the Affordable Care Act requiring employer health plans (barring some specific exemptions for religious institutions) to provide coverage for all FDA approved forms of birth control, arguing that it violated the corporation’s first amendment rights prohibiting government establishment of religion and the corporation’s free exercise of its religion.

Ginsburg’s quote that “in sum, with respect to free exercise claims no less than free speech claims, [y]our right to swing your arms ends just where the other man’s nose begins” seems a particularly apt summary of both her and Justice Kagan’s approach to individual’s rights and society’s rights as a whole.\textsuperscript{55} While Justice Kagan declined to decide, as Ginsburg did, that corporations cannot bring RIFRA claims, alleging that the means the government has used for general applicability, substantially burdens Hobby Lobby’s exercise of religion, and that it was not the least restrictive means to further a compelling governmental interest, she did join the rest of Ginsburg’s argument.\textsuperscript{56} This entailed a finding that even if Hobby Lobby was allowed to bring

\textsuperscript{55} Id. at 2791.
\textsuperscript{56} Id.
suit under RFRA, it failed on the merits. First because the action of obtaining and utilizing birth control methods would be the result of an independent choice by the individual female employee, in conjunction with her doctor, and not the government. Next Justice Ginsburg argues that even if Hobby Lobby had met the previous portion of RFRA, the impact on nonbeneficiaries of an accommodation must be considered, which in this case weighs against providing said accommodation to Hobby Lobby. Finally, she examines the proffered alternatives in turn and concludes that none of them would serve the compelling interest the government has to ensure “comprehensive preventive care for women furnished through employer-based health plans.”

Dissent: Ensuring Access to the Judicial System

A. American Express v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)

In this case, Italian Colors Restaurant sought to bring suit against American Express under the Sherman Anti-Trust Act alleging that the company “used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards.” However, the cost to do so exceeded the gains Italian Colors Restaurant would receive.

57 Id. at 2003.
58 Id. at 2308.
if they won, so they sought class action certification. However, the restaurant, along with other American Express customers that it sought to join in its class, had signed contracts which included waivers of class arbitration. The issue before the court was whether this provision was “enforceable under the Federal Arbitration Act when the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.”

The majority found that it was enforceable and that the cost of litigation absent class certification was irrelevant to the inquiry as “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.” Congress had taken steps to encourage enforcement of anti-trust laws in others forms, but had clearly chosen not to do so in this circumstance.

In her dissent, Kagan argues that this is incorrect, citing Mitsubishi for its finding that “an arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, however it achieves that result.” She further opines that the majority’s finding actually negates the purpose of the FAA since “what it prefers to litigation is arbitration, not

---

59 Id. at 2307.
60 Id. at 2309.
62 Id. at 2314.
de facto immunity"63 with the court conferring the latter upon American Express. Regarding the threshold for consideration of cost as a practical bar to bringing suit, Kagan cites the standard of "prohibitively expensive"64 established in Randolph.65 She establishes that while this standard was not met in Randolph66, it is certainly met in the present case where the cost of the suit against American Express is ten times what Italian Colors Restaurant hopes to recover if they're successful in their suit.67

This case is an ideal example of Kagan's championing of the underdog or smaller, less powerful player in the dispute represented. Despite the technicalities the majority cites as barring the class certification in violation of the contract, Kagan finds it illogical and reprehensible to allow a company to "use its monopoly power to protect its monopoly power, by coercing agreement to contractual terms eliminating its antitrust liability." She argues that while the court would not allow a contract to stand that bar merchants from bringing Sherman Act claims, their decision ultimately has that effect.68

Concurrences

63 Id. at 2315.
64 Id. at 2316.
65 121 S. Ct. 513 (2000).
66 Id.
67 Italian Colors Restaurant, supra, at 2316.
68 Id. at 2313.
Per her preference to only write separately when she finds herself compelled to do so, there are only two instances of concurrences by Justice Kagan thus far in her Supreme Court career. The two cases in which she felt the need to qualify her agreement with the majority were criminal ones, Florida v. Jardines\(^69\) and Messerschmidt v. Millender.\(^70\) In the first she wrote separately to urge against the upending of over fifty years of fourth amendment case law decided on privacy interests in favor of returning to the long-thought discarded trespass; but instead to illustrate an example in the present case of how both trespass and privacy interests can coexist to evaluate fourth amendment violations.\(^71\) In the second, she both concurs and dissents, attempting to find a middle ground between the majority and the dissent. She extends qualified immunity to the officers for part of their search at the wrong address but not in its entirety, as she feels that a reasonable officer would have, and should have, noticed when the items included in the warrant were no longer supported by any probable cause in the accompanying information in the affidavit.\(^72\)


\(^69\) 133 S. Ct. 1409 (2013).
\(^70\) 132 S. Ct. 1325 (2012).
\(^71\) Jardines, supra, at 1418-19.
\(^72\) Messerschmidt, supra, at 1251-52.
In this case a detective of the Miami-Dade police department received a tip that Jardines was growing marijuana in his home. A month later the same detective accompanied a drug surveillance team to the location but noticed nothing unusual after fifteen minutes of observation. He then approached the front porch of the home accompanied by a canine handler detective and his trained canine. The canine tracked furiously on the porch and then alerted, by sitting definitively, directly in front of the front door to the home. Based on this information the first detective obtained a search warrant for Jardines' home. Jardines attempted to flee when the warrant was executed and was arrested. The search revealed marijuana plants and Jardines was charged with trafficking cannabis.\(^{73}\)

Justice Kagan concurred to make clear that just because this case was decided upon the trespass theory of violation of the fourth amendment, did not mean that the privacy interests theory of the same was no longer applicable. In honoring her apparent goal to provide as much guidance to lower courts, and practitioners appearing before them, as possible, she provided the reasoning of how the privacy interests theory would also lead to the same conclusion as the majority had made utilizing the trespass theory.\(^{74}\) This intention may stem from her short

\(^{73}\) Id. at 1413.

\(^{74}\) Id. at 1418-19.
time as Solicitor General of the United States wherein she probably sought out any and all information that would assist in her anticipating how receptive justices would be to certain arguments and theories. Her approach could also be one of judicial efficiency, so that the Supreme Court does not then also have to take a case to clarify whether the privacy interests standard for evaluating violations of the fourth amendment still applies, and then upend the interim reliance solely on the trespass standard.


Shelly Kelly sought help from police after she attempted to break off her relationship with Jerry Ray Bowen. She wanted to return to her apartment, to which Bowen had a key, to move out and retrieve her belongings but feared being assaulted by Bowen. The police agreed to accompany her but were called away on a more urgent matter before she had finished. Immediately upon their departure, Bowen appeared at the bottoms of the steps, yelled at Kelly that "I told you never to call the cops on me bitch!", then grabbed her by her shirt and attempted to throw her over the second story railing.\(^{75}\) After she successfully resisted him Bowen bit her on her shoulder and attempted to drag her into the apartment by her hair. She managed again to escape

\(^{75}\) Id. at 1241.
his grasp, and ran to her car. He ran in front of the car, pointing a sawed-off shotgun at her, threatening to kill her if she left. She hit the gas pedal and sped away. Bowen fired five shots at her retreating car, blowing out the car’s left front tire, but not halting Kelly’s escape.⁷⁶

Kelly quickly located officers and reported the assault. In addition to recounting the details of how Bowen attacked her, she informed police that he was a member of the Mona Park Crips, the details of previous assaults of him on her, provided them with pictures of Bowen, and provided the address of Bowen’s foster mother where she believed he might be found. One of the officers did a background check on Bowen and in addition to confirming the information a given by Kelly, also found that he had a “rapsheet” of over seventeen printed pages and thirty one arrests. “Nine of these arrests were for firearm offenses and six were for violent crimes; specifically three were for assault with a deadly weapon.”⁷⁷ Two warrants were obtained: one to arrest Bowen and one to search his foster mother’s residence.⁷⁸

The search warrant was executed and although Bowen was not located, a shotgun belonging to the seventy-year old female resident Augusta Millender, “a California Social Services letter

---

⁷⁶ Id.
⁷⁷ Id. at 1242.
⁷⁸ Id. at 1241-42.
addressed to Bowen, and a box of .45-caliber ammunition" were seized.\textsuperscript{79} Ms. Millender, along with her daughter and grandson, who were present during the search, filed suit against the County of Los Angeles, the sheriff's department, the sheriff, and a number of individual officers alleging that the warrant was invalid because it violated the Fourth Amendment. The question that was asked of the Supreme Court was whether the individual officers were “entitled to individual immunity from damages, even assuming that the warrant should not have been issued”.\textsuperscript{80}

The majority reasoned that the “broad classes of items being sought” reasonably related to the incident that the police were investigating. Beginning with the search for weapons the court reasoned that considering his use of the shotgun in the assault on Kelly, it was likely that Bowen owned other weapons, that they were illegal, and that preventing further assaults on Kelly required their seizure by police.\textsuperscript{81} Regarding the search for materials relating to Bowen’s gang affiliation, the majority reasoned that Bowen’s attack on Kelly may not have been solely domestic but also could’ve been motivated by an attempt to prevent her from revealing incriminating gang-related information to the police. In this vein of reasoning, searching for aforementioned materials was deemed logical and reasonable.

\textsuperscript{79} Id. at 1243.
\textsuperscript{80} Id. at 1243.
\textsuperscript{81} Id. at 1246.
Alternatively, the majority cited gang affiliation information as being relevant to rebutting any defenses Bowen might assert at trial and/or demonstrate the connection of Bowen to any other evidence found at the residence. Citing this reasoning the court found that the officers belief that the warrant was supported by probable cause may have been mistaken, it was not "plainly incompetent", and that their judgment was reasonable. Finally, the court took into account that police supervisors and an independent and impartial magistrate had approved the warrant. The court reversed the lower court’s finding denying immunity to the officers.

Kagan writes to concur in part and dissent in part. She finds herself disagreeing with both the court and the dissent, stating that she thinks "the right answer lies in between [the two camps], although the Court makes the more far-reaching error". She finds the court’s logic regarding the search for firearms acceptable, but finds the reasoning supporting a search for materials establishing Bowen’s gang affiliation strained to the point of inapplicableness. Ultimately she notes that evidence of gang affiliation found at the house cannot even be attributable to Bowen as other gang members are regularly known to stay there and

82 Id. at 1247-48.
83 Id. at 1250.
84 Id.
85 Id. at 1250-51.
86 Id. at 1251.
that the court’s reasoning is so broad it could also support a search of all of Bowen’s possessions on the premises, which would clearly violate the Fourth Amendment. 87

The middle ground that Justice Kagan frequently finds herself is a nod to, and possibly influenced, by her time as a consensus builder at Harvard Law School, as its Dean. This remarkable ability to find commonalities with multiple viewpoints, likely leads to her rare dissents and concurrences and her membership in the majority of at least 80% of the time or more for each term since she joined the court, rising to 92% in the 2013 term. 88

Majority Opinions: Honoring Congressional and Constitutional Intent

In her majority opinions a pattern has emerged of Justice Kagan striving to honor congressional and constitutional intent, while also preserving the finality and functionality of the legal system in the United States. Whether she identifies the subject of the information to be obtained and retained by a gun dealer as the ultimate owner, and the not the “straw” purchasing in place of him with his money 89 or declares mandatory imprisonment for a juvenile without the possibility of parole a violation of the Eight

87 Id. at 1251-52.
89 Abramaski v. United States, 134 S. Ct. 2259.
Amendment prohibition of cruel and unusual punishment—Justice Kagan tends not to quibble on minute details but instead reasons through the statute or amendment and any accompanying history of its formulation and passage, to determine, and ultimately honor the intent behind it. In preventing an upheaval of the legal system, specifically casting doubt on decades of criminal decisions when a ruling altering a previous rule was decided or making a mockery of it by requiring an adherence to the motions despite no likely difference in the outcome—“harmless error.” In all of these cases the ultimate outcome is what Justice Kagan seems to retain in the recesses of her mind as she reasons through to her decision.

A. Abramaski v. United States, 134 S. Ct. 2259 (2014)

In this case, the court is represented with the question of whether a man was rightly charged with violating 18 U.S.C. 922(a)(6)—making false statements about “any fact material to the lawfulness of the sale” in connection with a firearm’s acquisition—when he was a straw purchaser. A straw purchaser is defined as buying gun on someone else’s behalf while falsely claiming it is for oneself. The court, with Justice Kagan writing, ultimately holds that the defendant’s actions do

---

93 Abramaski, supra, at 2262–63.
violate the statute, whether or not the person he was purchasing
the firearm for was eligible to do so on his own behalf.\footnote{Id. at 2263.}

Justice Kagan reasoned that a loophole this large would thwart
the Congress’ intent in passing the Gun Control Act of 1968. The
purpose of requiring prospective purchasers to supply the detailed
information, as well as requiring dealers to retain it, was to
prevent non-qualified person from obtaining firearms and to trace
guns obtained legally if they were subsequently used in a crime.
If the person present in the store, providing the money, and
receiving the gun, is not the intended owner, these aims are
swiftly eluded. By providing his own information, instead of the
ultimate owner, the straw has made false statements regarding
facts material to the lawfulness of the sale; as the real sale,
between the dealer and the non-present intended owner, has not
been vetted, but instead an alternative fake one between the
dealer in the straw has been.\footnote{Id. at 2275.}

This opinion was likely influenced by Judge Abner Mikva’s
staunch anti-NRA and gun right stance. Justice Kagan was exposed
to this during her clerkship with the Judge and appears to have
adapted it and tempered it with some of her balancing skills to
conclude that while the Second Amendment protects the right to
bear arms to a certain extent, it does not extend far enough to include straw buyers.

B. **Miller v. Alabama, 132 S. Ct. 2455**

In this case, Justice Kagan, writing for the majority, held that a mandatory term of lifetime imprisonment without possibility of parole for a juvenile violates the Eighth Amendment prohibition of cruel and unusual punishment. She likened such a sentence to that of a death sentence for an adult, with its accompanying safeguards, which were absent for the juveniles in this appeal. This blanket sentence, without regard to mitigating factors, first violates the principle of proportionality of ensuring that the punishment is relative to the offense committed and the individual offender, which in turn causes it to violate of the Eighth Amendment's prohibition of cruel and unusual punishment.

The children convicted of these horrific crimes, fall within the framework of Justice Kagan's championing of underdogs. As mitigating factors in at least some of the juveniles' cases, she cites horrific abuse. When the very people whose duty it was to protect them, their parents, instead did the opposite and inflicted pain and suffering, while withholding love and acceptance, she rises to the occasion to fill the role in a parens patriae role backed by legal logic and authority. This
likely stems from her experiences as a less advantaged individual due to her gender and religion, despite her idyllic upbringing within her supportive family.

C. *Chaidez v. United States, 133 S. Ct. 1103 (2012)*

This case illustrates where Justice Kagan feels compelled by the law to draw the line in championing the rights of the less fortunate. The issue represented was whether in *Padilla v. Kentucky*\(^\text{96}\) altered a previous rule or decided a new rule, in so deciding that “the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea".\(^\text{97}\) The result of the decision would either deem the previous holding retroactively applicable to cases already having finished their journey through the appellate process or only allow it to apply to the case on appeal at that time and forthcoming ones.

In finding that a new rule was required for the holding in *Padilla*\(^\text{98}\), Justice Kagan firmly draws a line, ensuring the finality and certainty of the system, regarding the relevant issue. While she is an advocate for, and fiercely protective, of individual rights, she balances this with need for faith to

\(^{96}\) 130 S. Ct. 1473.
\(^{97}\) Id. at 1105.
remain in the legal system and to ensure its efficient operation.


The first question that had to be answered by the court was what standard the "district courts should use to adjudicate federal habeas petitioners' motions to substitute counsel in capital cases." 99 The Justices sided with the defendant and the Ninth Circuit, agreeing that the standard should be "in the interests of justice." 100 Despite this initial decision in favor of the defendant, the court ultimately found against him, that "the District Court abused its discretion in denying Clair's second request for new counsel under §3599's 'interests of justice' standard." 101

This is another example of Justice Kagan determining where individual rights end and the health of the system in its entirety takes precedence. The rest of the justices agreed with her, and her opinion was delivered on behalf of the unanimous court. 102 Essentially Justice Kagan

---

99 Id. at 1283.
100 Id.
101 Martel, supra, at 1287.
102 Id. at 1280.
found that "the court was not required to appoint a new lawyer just so Clair could file a futile motion."\textsuperscript{103}

Conclusion

Justice Kagan continues her consensus building on the Supreme Court, as she did as dean of Harvard Law School. In doing so she has cast some surprising votes with colleagues one would regard as holding diametrically opposed views to her own, leaving many guessing about what type of jurisprudential legacy she will leave. However, a theme of ensuring that the minority and the less powerful maintain their rights in the face of the majority and economic giants, seems to be a constant and guiding force for her thus far.

\textsuperscript{103} Martel, supra, at 1289.