

**QUESTIONS FOR THE RECORD FOR ELENA KAGAN
SUBMITTED BY SENATOR JEFF SESSIONS**

1. Do you believe moral and ethical principles can provide a rational basis to support a law?

Answer: Yes. I believe that many laws are grounded in moral and ethical principles and that those principles can provide a rational basis to support such laws.

2. In his famous *Lochner* dissent, Justice Holmes wrote:

It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

...

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.¹

- A. Do you agree or disagree with Justice Holmes's view of judicial restraint when it comes to second-guessing the legislature on morally inspired legislation, as articulated in *Lochner*? How would you articulate your own view in this area, especially as it relates to your likely future role as the chief federal advocate before the Court?

Answer: I agree generally with Justice Holmes's observation that courts should be restrained in second-guessing legislative action, including all the kinds of legislation that Justice Holmes cites. As the chief advocate for the United States before the Supreme Court, I will frequently be in the position

¹ *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

of defending federal statutes and therefore expect often to urge this restraint on the Court.

- B. Do you believe the federal government has a rational basis for the military's recruiting policy – whether embodied in “Don't Ask/Don't Tell” or the statute that policy supplements – 10 U.S.C. § 654? How would you analyze the constitutional issue on the matter, whether under the Due Process clause or the Equal Protection Clause?

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

- C. Do you believe 10 U.S.C. § 654 violates the Equal Protection Clause of the Fourteenth Amendment, as incorporated by the Fifth Amendment? Please explain your views.

Answer: Please see my answer directly above. If I am confirmed as Solicitor General, one of my principal responsibilities would be to defend statutes as long as there is any reasonable basis to do so. In the context of the usual process that the Solicitor General's office follows when considering the positions it will adopt in litigation, I would take into account as I carried out this responsibility the various precedents and principles noted above, all of which support the constitutionality of 10 USC § 654.

3. In a *Kentucky Law Journal* article, Clinton-era Solicitor General Drew Days wrote “the Solicitor General has the power to decide whether to defend the constitutionality of the acts of Congress or even to affirmatively challenge them.” What federal statutes now on the books do you believe are unconstitutional?

Answer: If I am confirmed as Solicitor General, I would follow the traditions of the office and defend the constitutionality of each and every statute except when there is no reasonable basis to do so or the statute impermissibly curtails Article II powers. I do not now know of any federal statute that could not be defended under this standard (although I am of course not fully knowledgeable about the great mass of federal statutes).

4. In your 1996 law review article, “Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine,” you take to task what you call “[l]aws ‘equalizing’ the speech market.”² You question whether a politician or policy-maker could check his or her views in deciding whether speech needed to be balanced by another viewpoint. You write:

It is the rare person who can determine whether there is ‘too much’ of some speech (or speakers), ‘too little’ of other speech (or speakers), without regard to whether she agrees or disagrees with – or whether her position is helped or hurt by – the speech (or speakers) in question.”³ You further wrote that “the goal of equalization often and well conceals what does conflict with the First Amendment: the passage of laws tainted with ideological, and especially with self-interested, motivations.”⁴

Do you still believe that “[i]t is the rare person who can determine whether there is ‘too much’ of some speech (or speakers), ‘too little’ of other speech (or speakers), without regard to whether she agrees or disagrees with – or whether her position is helped or hurt by – the speech (or speakers) in question[?]”

Answer: In this part of my article, “Private Speech, Public Purpose,” I ask what accounts for the Supreme Court’s frequent (though not universal) suspicion of laws designed to “equalize” the speech market – otherwise put, to promote balance or diversity of opinion. The question I set out to answer, after establishing that the Court indeed tends to be suspicious of such laws, is: “what view of the First Amendment accounts for the Court’s refusal to allow, by means of

² Elena Kagan, “Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine,” 63 U. Chi. L. Rev. 413, 464 (1996).

³ *Id.* at 469-70.

⁴ *Id.* at 471.

restrictions, the redistribution of expression?” (p. 466). I explain the Court’s doctrine in part by noting that views on laws designed to promote balance in the “speech market” often (though again not always) are influenced by views on the content of the speech that such laws predictably tend to favor (or disfavor). I continue to find this account of the Court’s doctrine generally persuasive, although I should note that I have not fully explored whether the Court’s doctrine today is as it was in 1996, when I wrote this article.

5. The section of your article addressing “laws equalizing the speech market” states in its conclusion: “Laws directed at equalizing speech thus join the list of laws that, although facially content neutral, demand strict scrutiny because of the heightened concerns relating to improper purpose.”⁵ Do you believe the “Fairness Doctrine,” if revived, should be subject to strict scrutiny under the First Amendment?

Answer: The sentence quoted above is what I might call a sympathetic description of the Court’s general approach to laws attempting to promote balance in the expressive arena. (Another sentence in the same paragraph echoes: “The Court thus treats these laws in a strict manner – presuming improper taint though giving the government a chance to rebut this presumption.” (p. 472)). Earlier in the same section, I note that the Court departed from this general approach in approving the FCC’s then-existing fairness doctrine (p.465). The article does not state any view, nor do I recall having one at the time, of whether the Court was right to craft this exception, and I have not considered the matter any further in the years since.

6. During your confirmation hearing, you were asked about a memorandum you wrote in 1987 as law clerk to Justice Thurgood Marshall in *Bowen v. Kendrick*. In *Bowen*, the Supreme Court reversed a lower court’s ruling that federal grants to religious and other organizations under the Adolescent Family Life Act (AFLA) violated the Establishment Clause of the First Amendment. The Supreme Court, in a 5-4 opinion written by Chief Justice Rehnquist, declared that AFLA’s funding mechanism did not violate the Establishment Clause. The Court noted “[t]here is no requirement in the Act that grantees be affiliated with any religious denominations, although the Act clearly does not rule out grants to religious organizations.” *Id.* at 604. Although the Court remanded for consideration of whether the Act had been applied correctly in individual grants, the Court made clear: “The facially

⁵ *Id.* at 472

neutral projects authorized by the AFLA-including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, educational services, residential care, child care, consumer education, etc., are not themselves ‘specifically religious activities,’ and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations.” *Id.* at 613.

Your memo suggested a different approach and made clear your view – at the time – that AFLA violated the Establishment Clause:

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

Kagan Bowen Mem. at 3 (emphasis in original).

When asked about your memo during your hearing, you described it as “the dumbest thing I’ve ever read.” You appeared to want to explain further why your 22 year-old memorandum was “the dumbest thing,” but time constraints and further questioning did not allow your explanation. I would like to give you the opportunity to provide your explanation and clarify your current position. Why do you believe the legal position described in your memorandum is so incorrect you now view it as “the dumbest thing[?]” Further, what is your current view of the constitutionality of faith-based funding under the Establishment Clause?

Answer: I indeed believe that my 22-year-old analysis, written for Justice Marshall, was deeply mistaken. It seems now utterly wrong to me to say that religious organizations generally should be precluded from receiving funds for providing the kinds of services contemplated by the Adolescent Family Life Act. I instead agree with the *Bowen* Court’s statement that “[t]he facially neutral projects authorized by the AFLA-including pregnancy testing, adoption counseling and

referral services, prenatal and postnatal care, educational services, residential care, child care, consumer education, etc.- are not themselves ‘specifically religious activities,’ and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations.” As that Court recognized, the use of a grant in a particular way by a particular religious organization might constitute a violation of the Establishment Clause – for example, if the organization used the grant to fund what the Court called “specifically religious activity.” But I think it incorrect (or, as I more colorfully said at the hearing, “the dumbest thing I ever heard”) essentially to presume that a religious organization will use a grant of this kind in an impermissible manner.