

SCOTUSblog Briefing Paper**Elena Kagan – *Citizens United*****June 21, 2010****I. Summary and Our Take**

When President Obama nominated Elena Kagan last month, he sought to portray her as a defender of the ordinary person against big companies. Exhibit A was Kagan's choice to make *Citizens United v. Federal Election Commission*, in which the government defended restrictions on corporate expenditures in election campaigns, the first case that she argued before the Court. That choice, the President indicated, "says a great deal about her commitment to protect our fundamental rights, because in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens."

We disagree with the claim that Kagan's decision to argue *Citizens United* says anything about her views; indeed, we believe that such a claim is inconsistent with assertions – made elsewhere by Kagan's supporters – that her positions as Solicitor General do not necessarily reflect her personal views.

Generally, the positions Kagan took and the cases that she argued as Solicitor General imply little, if anything, about her personal views because the Solicitor General's job is to defend federal statutes and presidential policies before the Court – regardless of whether she agrees with them. By tradition, the Solicitor General argues the most important cases before the Court, a category that certainly includes *Citizens United*. Even if Kagan had no personal affinity for *Citizens United*, the case promised to be immensely important, because of the prospect that the Court could overturn both a federal statute (part of the McCain-Feingold Act) and a past Supreme Court decision (*Austin v. Michigan Chamber of Commerce* (1990)). For her to decline to argue the case would have been a near-abdication of her responsibilities.

That Kagan selected *Citizens United* as her *first* oral argument says little more. Her options were limited to the cases that were argued after she was confirmed in March 2009. Kagan declined to argue any of the final cases of that Term, deferring to the attorneys who had previously been involved. That left *Citizens United* – which was argued in September 2009 – as the first available case.

Some on the right worry that Kagan would go further than the *Citizens United* dissenters in regulating corporate speech, citing as evidence statements made by Kagan and another government lawyer during the two oral arguments in the case. But precisely for the reason that we think it is unfair to infer anything from Kagan's oral argument choice, so too her legal position in the case does not provide evidence of the views of the law she would take as a Justice. (Although, stepping outside of her Solicitor General role, Kagan did tell Senator Arlen Specter during a courtesy call to his office that she thought the case was wrongly decided.) An excellent illustration is the fact that Ted Olson successfully defended the McCain-Feingold

statute as the Bush Administration's Solicitor General, then successfully argued against the constitutionality of the same statute in *Citizens United*.

Kagan's opponents also misconstrue the statements they cite. During the first argument in *Citizens United*, the lawyer representing the government – Deputy Solicitor General Malcolm Stewart – took the position that, under the McCain-Feingold Act, a corporation that wanted to publish a book to influence an election would have to fund the book through a special political committee. In the second argument in the case, Kagan explicitly disavowed that position. Although she opined that a corporation probably could not fund an electioneering pamphlet directly from its corporate coffers, that is a far cry from banning “books,” and even from “banning” pamphlets.

The accusation from the left is exactly the opposite: that Kagan's support for the regulation of corporate political spending may not go far enough. During oral argument, when Chief Justice Roberts asked if she was defending that “distortion” argument, Kagan declined to do so. Instead, she emphasized that corporate spending distorts the speech of *shareholders*, whose money is spent to support political views they may not hold, and increases the likelihood of actual or apparent corruption. But again, that position reflected Kagan's tactical judgment as a lawyer from the government, not necessarily her personal view of the law.

Long before she became Solicitor General, Kagan did express distrust of speech regulations imposed on particular classes of speakers. In a 1996 law review article, she wrote that laws justified to “equalize” political speech opportunities among speakers often have the ulterior motive of suppressing speech unfavorable to incumbents: “all the laws directed at equalization that the Court has considered, whether classified as facially content based or content neutral, raise questions as to the motives of the enacting legislatures. Campaign finance laws like those in *Buckley* easily can serve as incumbent-protection devices, insulating current officeholders from challenge and criticism.” That view nonetheless appears to allow room for regulations with broad bipartisan support.

I. Relevant Source Materials

1. President Obama's statements suggesting that Kagan opposes the ruling in *Citizens United*:
 - When Justice John Paul Stevens announced his intent to retire, [Obama said](#) he would nominate someone “who, like Justice Stevens, knows that in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens.” (Apr. 9, 2010)
 - Upon her nomination, he [said](#) that Kagan chose *Citizens United* “as her very first case to argue before the court. . . . I think it says a great deal about her commitment to protect our fundamental rights, because in a democracy powerful interests must not be allowed to drown out the voices of ordinary citizens.” (May 10, 2010)
2. Responses to Senators' written questions during her confirmation as Solicitor General ([all responses](#)):

- “My role as Solicitor General, however, would be to advance not my own views, but the interests of the United States, as principally expressed in legislative enactments and executive policy.”
3. The most widely cited exchange during Kagan’s [oral argument](#) in *Citizens United* (Sept. 9, 2009) is the one in which she said corporate pamphlets might be restricted under the McCain-Feingold Act (pp.66-67):

CHIEF JUSTICE ROBERTS: But we don’t put our -- we don’t put our First Amendment rights in the hands of FEC bureaucrats; and if you say that you are not going to apply it to a book, what about a pamphlet?

GENERAL KAGAN: I think a -- a **pamphlet would be different. A pamphlet is pretty classic electioneering**, so there is no attempt to say that 441 b only applies to video and not to print. It does –

...

GENERAL KAGAN: ...what we’re saying is that there has never been an enforcement action for books. Nobody has ever suggested -- nobody in Congress, nobody in the administrative apparatus has ever suggested that books pose any kind of corruption problem, so I think that there would be a good as-applied challenge with respect to that.

4. In another exchange during the argument, Kagan rejects a suggestion by Chief Justice Roberts that the government is defending a “market distortion” rationale for campaign finance regulation (pp.47-48) (emphases added):

CHIEF JUSTICE ROBERTS: Putting it outside, putting the quid pro quo interest aside, where in your supplemental briefing do you support the interest that was articulated by the Court in Austin?

GENERAL KAGAN: Where we talk about shareholder protection and where we talk about the distortion of the electoral process that occurs when corporations use their shareholders’ money who may or may not agree --

CHIEF JUSTICE ROBERTS: I understand that to be a different interest. That is the shareholder protection interest as opposed to the fact that corporations have such wealth and they -- they distort the marketplace.

GENERAL KAGAN: Well, I -- I think that they are connected because both come --

CHIEF JUSTICE ROBERTS: So -- so am I right then in saying that in the supplemental briefing you do not rely at all on the market distortion rationale on which Austin relied; not the shareholder rationale, not the quid pro quo rationale, the market distortion issue. These corporations have a lot of money.

GENERAL KAGAN: **We do not rely at all on Austin to the extent that anybody takes Austin to be suggesting anything about the equalization of a speech market. So I know that that’s the way that many people understand the distortion rationale of Austin, and if that’s the way the Court understands i[t], we do not rely at all on that.**

JUSTICE GINSBURG: So --

CHIEF JUSTICE ROBERTS: So if we have to preserve -- if we are going to preserve Austin we have to accept your invitation that the quid pro quo interest supports the holding there or the shareholder protection interest.

GENERAL KAGAN: I would say either the quid pro quo interest, the corruption interest or the shareholder interest, or what I would say is a -- is something related to the shareholder interest that is in truth my view of Austin, which is a view that **when corporations use other people’s money to electioneer, that is a harm not just to the shareholders themselves but a sort of a broader harm to the public that comes from distortion of the electioneering that is done by corporations.**

5. The [first oral argument](#) of *Citizens United* (May 24, 2010), in which Malcolm Stewart, representing the Solicitor General’s office, stated that books would be subject to McCain-Feingold Act restrictions (p. 27):

JUSTICE ALITO: That’s pretty incredible. You think that if -- if a book was published, a campaign biography that was the functional equivalent of express advocacy, that could be banned?

MR. STEWART: I’m not saying it could be banned. I’m saying that Congress could prohibit the use of corporate treasury funds and could require a corporation to publish it using its --

6. The [first](#), main supplemental brief filed by the Solicitor General’s office in *Citizens United*, and the merits [brief in opposition](#) filed before Kagan joined the office:
 - Key rationales for corporate spending regulation from Kagan’s supplemental brief, filed July 24, 2009:
 - “Shareholder protection” rationale: “Restrictions on the use of treasury funds for corporate or union electioneering also ‘protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.’ . . . Persons who buy shares in for-profit corporations entrust money to the corporations’ managers because of their business acumen, not their political ideology, and the purchase of corporate stock does not imply any intent to subsidize electoral advocacy.” (PDF p.18)

- “*Quid pro quo* corruption” rationale: “The nature of business corporations makes corporate political activity inherently more likely than individual advocacy to cause *quid pro quo* corruption or the appearance of such corruption. Even minor modifications in complex legislation have great potential to benefit or burden particular companies, industries, or sectors.” (PDF p.15)
 - Corporations have special advantages: “Corporations, moreover, are artificial persons endowed by government with significant ‘special advantages’ that no natural person possesses. . . . Well before *Austin*, this Court recognized the need for ‘particularly careful regulation’ to limit the effect of those corporate special advantages on the political process. . . . Because corporations do not age, retire, or die, they can amass great wealth from their business activities even while changing owners, directors, and officers as needed.” (PDF p.15)
 - Corporations have less need for expression than individuals: “A restriction on individuals’ independent election-related spending, moreover, would intrude far more deeply on First Amendment values because it would prevent individuals from spending their own money to express their own electoral preferences. That is not the case with corporate spending, which does not reflect the personal views of the officers (who cannot appropriately spend corporate money for purposes of personal self expression), the customers or shareholders (whose political preferences officers do not and generally cannot ascertain), or the corporation itself (which is an artificial entity that has no “beliefs” to express).” (PDF p.16)
 - The “distortion” rationale from *Austin* mentioned in the first merits brief, filed Feb. 17, 2009 [before Kagan was confirmed as Solicitor General]:
 - “[B]ecause of the numerous advantages that the corporate form confers, a corporation’s ability to pay for electoral advocacy has ‘little or no correlation to the public’s support for the corporation’s political issues.’ *McConnell*, 540 U.S. at 205 (quoting *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990)).” (PDF p.24) [The same is cited in Justice Stevens’ dissent in [Citizens United](#), p.49.]
7. Kagan’s writing on *Buckley* and political speech restrictions from “[Private Speech, Public Purpose](#)” (*University of Chicago Law Review*, 1996)
- The widely cited introduction to the section on the equalization of a speech market (p.464):
 - “In what has become one of the most castigated passages in modern First Amendment case law, the Court pronounced in *Buckley v Valeo* that ‘the concept that 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. . . .’ The Court made this statement in the course of invalidating expenditure ceilings in a campaign finance law, one justification for which was that they ‘equaliz[ed] the relative ability of individuals and groups to influence the outcome of elections.’ . . . Campaign finance laws like those in *Buckley* easily can serve as

incumbent-protection devices, insulating current officeholders from challenge and criticism.”

- Suggesting that corporate contributions cannot be distinguished from individual contributions (p.465):
 - “The Court’s commitment to the principle of *Buckley* has lapsed on some occasions. After the Court invalidated *Buckley*’s expenditure ceilings (which applied to individuals and groups alike), it accepted as an adequate justification for a statute limiting a corporation’s political expenditures that corporate wealth could cause ‘distortion’ and ‘unfairly influence elections.’¹⁴³”

- (a) Footnote 143: “The Court tried to distinguish *Austin* from *Buckley*, principally on the ground that corporate wealth derives from privileges bestowed on corporations by the government. But this argument fails, because individual wealth also derives from governmental action. What the Court recognized in *Austin* is only what is true in every case: direct regulation of speech occurs against a backdrop of law that, while not referring to speech, goes far toward structuring the sphere of public expression. The question in every case is whether the government may use direct regulation of speech to redress prior imbalances.”

- Kagan focuses foremost on the government motive behind the speech restriction (p.467):
 - “The *Buckley* principle emerges not from the view that redistribution of speech opportunities is itself an illegitimate end, but from the view that governmental actions justified as redistributive devices often (though not always) stem partly from hostility or sympathy toward ideas - or, even more commonly, from self-interest.”

- But that motive is probably inappropriate when the rationale is equalization of the market (pp.469-70):
 - “The increased probability of taint arises, most fundamentally, from the very design of laws directed at equalizing the realm of public expression. Unlike most content-neutral regulations, these laws not only have, but are supposed to have, content-based effects; their *raison d’être* is to alter the mix of ideas-or, at least, of speakers, who tend to be associated with ideas-in the speech market. Given this function, these laws will have not the diverse, diffuse, and crosscutting content-based effects usually associated with content-neutral laws, but a set of targeted and coherent effects on ideas and speakers. This set of focused effects renders a law directed at equalization nearly as likely as a facially content-based law, and much more likely than most facially content-neutral laws, to stem from improper motive. In considering such a law, a legislator’s own views of the ideas (or speakers) that the equalization effort means to suppress or promote may well intrude, consciously or not, on her decision-making process. The law thus raises grounds for suspicion.”

- “The likelihood of impermissible taint increases further because of the nature of the harm claimed to justify the action. This harm – a disproportionate access or undue influence – has an amorphous aspect to it that often (though not always) will make it peculiarly difficult to measure. This does not mean that legislators cannot debate rationally the size of the harm and cannot reach what appears to be – and in fact might be – a reasonable decision to counteract it. But because the harm has a fuzzy quality, the decision whether the harm justifies a limit on speech becomes especially susceptible to the infiltration of illicit factors. 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 any regard to whether she agrees or disagrees with – or whether her own position is helped or hurt by – the speech (or speakers) in question.”
- “Indeed, all the laws directed at equalization that the Court has considered, whether classified as facially content based or content neutral, raise questions as to the motives of the enacting legislatures. Campaign finance laws like those in *Buckley* easily can serve as incumbent-protection devices, insulating current officeholders from challenge and criticism. When such laws apply only to certain speakers or subjects, the danger of illicit motive becomes even greater; for example, the law in *First National Bank v Bellotti*, which barred corporations from spending money in referendum campaigns, almost surely arose from the historic role of corporate expenditures in defeating referenda on taxation.”

II. Commentary

A. Claims made against Kagan based on her argument in *Citizens United*:

1. **She would ban books, based on her comment during the *Citizens United* oral argument.**
 - Senator Mitch McConnell on [NBC’s Meet the Press](#) (May 16, 2010)
 - “Solicitor Kagan’s office, in the initial hearing, argued that it’d be okay to ban books. . . . And then when there was a re-hearing, Solicitor Kagan herself, in her first Supreme Court argument, suggested that it might be okay to ban pamphlets. I think that’s very troubling.”
 - David Bossie, president of Citizens United, in a [Washington Post](#) op-ed (May 21, 2010)
 - “Most troubling of all is that the line of reasoning running through Kagan’s opposition to our case leads directly to the conclusion that the government has the authority to ban books and other forms of communication. When our case was reargued before the high court last September, Kagan tried to walk back from that reasoning, saying that the ‘FEC has never applied this statute to a book.’ But she specifically noted that pamphlets could be censored, which leads to questions: What about content published on a Kindle or an iPad?”

What about YouTube or other Internet sites that do not have 200 years of tradition and jurisprudence protecting them?”

- “A nominee who believes that certain types of speech and certain speakers should be censored for no other reason than that speech affects a lawmaker’s chances of reelection is not fit for the Supreme Court.”
 - Frank Perley, senior opinion editor at the [Washington Times](#) (May 18, 2010)
 - “Ms. Kagan’s work on First Amendment free-speech issues suggests she might restrict Thomas Paine, circa 1776, from distributing his famous pamphlet. Solicitor General Kagan likewise might outlaw ‘The Federalist Papers’ if Founding Fathers James Madison and Alexander Hamilton refused to say who paid to publish their essays.”
2. **Kagan opposes the *Citizens United* decision because she chose it as her first case to argue before the Court.**
 3. **She opposes *Citizens United* because Obama picked her after emphasizing her involvement in the case, on his side.**
 - David Bossie, president of Citizens United, in a [Washington Post](#) op-ed quoted above (May 21, 2010)
 - “Kagan’s defenders will argue that she was merely doing her job as solicitor general and that her personal beliefs cannot be divined from her arguments in *Citizens United v. FEC*. But the president’s remarks in introducing Kagan as his court nominee indicate that he believes otherwise. That day, the president mentioned only one case and said: ‘Despite long odds of success, with most legal analysts believing the government was unlikely to prevail in this case, **Elena still chose it as her very first case to argue before the court.**’ I think we should take the president’s stated rationale for his decision at face value.”
 - Brad Smith and Jeff Patch at the [Center for Competitive Politics](#) (May 12, 2010)
 - “It also seems fair to assume that President Obama would not be making *Citizens United* a central element of Kagan’s nomination if he hadn’t **received some assurances that she generally shares his views on campaign finance regulation.**”
 4. **Kagan opposes the *Citizens United* decision because she told Senator Specter that.**
 - Statement of the [First Amendment Center](#) (May 18, 2010)
 - “Take, for example, her closed-door exchange last week with Sen. Arlen Specter, D-Pa., who voted against Kagan’s nomination to her current job last year on the grounds she wouldn’t talk about her legal views. . . . Kagan divulged that she disagreed with [Citizens United v. Federal Election Commission](#), a recent Supreme Court ruling that has provoked intense partisan

debate, according to Specter. She criticized the Court’s ruling upholding the First Amendment rights of corporations and labor unions to spend money on campaign ads, thus enhancing their ability to influence federal elections.”

- John Cornyn, according to the [Daily News](#) (May 23, 2010)
 - “I just don’t get the disregard for the First Amendment and freedom of speech coming from the President, coming from Ms. Kagan and others, and somehow thinking that Congress can violate the fundamental law of the land, which is the Constitution, in restricting and suppressing political speech. . . . We’re going to have a good debate about that.”
 - From elsewhere in the Daily News story: “Last week, Kagan reportedly told one senator she disagreed with the court’s ruling — it’s traditionally a no-no for a nominee to weigh in on a recent decision during the confirmation process — but said it was because she thought the Supremes should mostly defer to the will of Congress, which had banned such spending.”
- 5. **She actually supports *Citizens United* because she abandoned the stronger speech market distortion rationale for the McCain-Feingold Act when she took over the *Citizens United* case for the government.**
 - Kenneth Vogel on the [Huffington Post](#) (May 11, 2010)
 - “In fact, in arguing the case in her role as Solicitor General, Kagan abandoned Obama’s main argument against corporate ad spending — that it can “drown out the voices of ordinary citizens.” That holding had been at the center of a 1990 case the Court was reviewing in *Citizens United*, and Kagan’s shift in tactics surprised Chief Justice John Roberts enough for him to comment on it. It also puzzled campaign finance experts, some of whom considered it a tactical error.”
 - Eric Zimmerman at [The Hill online](#) (May 16, 2010)
 - “In a later oral argument, Kagan slightly modified that position, but still found herself arguing that the government could ban certain pamphlets, depending on who paid for their publication.”
 - Jess Bravin at the [Wall Street Journal](#) (via National Review Online--because this is a subscription-only article)
 - “But based on her arguments in the case and her writings on the subject, it isn’t clear Ms. Kagan hews to that rationale for spending limits.”
 - “In arguing the case, known as *Citizens United*, she distanced herself from that logic. Rather than embrace a 1990 precedent [*Austin*] that upheld similar limits, intended to stop corporations from ‘distorting’ the political process with their wealth, she made other arguments. . . .”

- At [Reason](#), Jacob Sullum intimated that Kagan might have abandoned the political speech distortion argument in *Citizens United* because she isn't personally convinced by it (May 12, 2010)
 - “Although [the speech distortion argument] was the main rationale for *Austin v. Michigan Chamber of Commerce*, one of the decisions the Court overturned in *Citizens United*, Kagan instead tried to justify restrictions on corporate speech by citing the potential for corruption and for contradicting the views of shareholders. That switcheroo led Chief Justice John Roberts to remark during the second round of oral arguments . . . that ‘you are asking us to uphold *Austin* on the basis of two arguments, two principles, two compelling interests we have never accepted in the expenditure context.’”

- 6. **Kagan’s scholarship suggests she would vote with the conservatives in *Citizens United*.**
 - Marvin Ammori at [Balkinization](#) (May 9, 2010)
 - “Here is the conclusion I am reaching: the implication of her arguments are that *Austin* should be overruled (*Citizens United* did that) and so should *Turner*, under the standard argument model, because they are ‘exceptions’ to the broad rule. She does not explicitly call for their reversal, but the argument structure almost necessarily implies it.”
 - “The last sentence above suggests that laws singling out ‘certain speakers’—only corporations, for example—are most likely to reflect an illegitimate speech-motive, and therefore to violate the constitution. That would agree with the *Citizens* conservatives. This is her rule.” [The “last sentence above” references this sentence from the PSPP article: “When such laws apply only to certain speakers or subjects, the danger of illicit motive becomes even greater; for example, the law in *First National Bank v Bellotti* [cited repeatedly by the *Citizens* conservative majority], which barred *corporations* from spending money in referendum campaigns, almost surely arose from the historic role of corporate expenditures in defeating referenda on taxation.”]

 - Jacob Sullum again, in the same [Reason](#) post (May 12, 2010)
 - “This discussion of *Buckley* comes in the context of a section explaining how the seemingly neutral goal of ‘equalizing the speech market’ can be a cover for viewpoint discrimination. The fact that Kagan considers ‘the redistribution of expression’ unconstitutional (or, at least, believes that is what the Supreme Court has said) may shed light on her decision in *Citizens United* to eschew the argument that corporate speech can be restricted to prevent wealthy companies from distorting the public debate.”

 - Frank Perley again, in the same [Washington Times](#) editorial (May 18, 2010)
 - “While it isn’t always fair to ascribe personally to solicitors general the positions they argue in court on the government’s behalf, it is fair if the arguments they use in court echo ones they made in private practice. Ms.

Kagan’s record suggests her personal views match her solicitor arguments. In a 1996 University of Chicago Law Review article, she argued that speech restrictions are allowable if the government’s ‘motive’ is acceptably nonideological. In dense academic prose, Ms. Kagan openly mused about the merits of ‘redistribution of expression,’ of ‘neutral regulations of speech . . . that are justified in terms of achieving diversity’ and of ‘disfavoring [an] idea [to] “unskew,” rather than skew, public discourse.’”

- The [ABA Journal](#)’s Debra Cassens Weiss seems to agree that Kagan might not back the *Citizens United* ruling, based on facts from a New York Times article (May 17, 2010)
 - “But during oral arguments Kagan dropped the rationale that corporations should not be allowed to drown out the voices of ordinary citizens and instead advanced another argument—that corporations may be treated differently than individuals, the Times points out. And Kagan didn’t appear to care for either argument in a 1996 article published in the University of Chicago Law Review, the story says.”
 - “The Times identifies two other First Amendment stands taken by Kagan. She backed Justice Antonin Scalia’s opinion in a case that struck down a hate-speech ordinance, and agreed with a Supreme Court opinion that struck down a statute that made flag-burning a crime. In the flag-burning case, Scalia was in the majority and Stevens dissented.”

B. Responses in Kagan’s defense

1. Rick Hasen argued at [ACSBlog](#) that Kagan’s abandonment of the equality argument doesn’t mean she opposes limits on corporate speech (May 10, 2010)
 - “Even aside from the equality rationale, which SG Kagan abandoned during the briefing and argument in *Citizens United*, there are other rationales for upholding a corporate spending limit in candidate elections, including shareholder protection (which the SG pushed hard at the *Citizens United* oral argument) and prevention of quid pro quo corruption (something I’m writing about more extensively). So even if SG Kagan does not believe equality can be considered a compelling interest to justify regulation (something I don’t think she actually says on those pages of her law review article), **there could well be other compelling interests to justify the limits.**” (emphasis added)
2. Hasen answers the book-banning charges at [Slate](#) (May 24, 2010):
 - “The book-banning claim against Kagan is completely spurious, based on a distortion of her remarks at a Supreme Court oral argument in the *Citizens United* case as well as the comments made the same week Kagan started as solicitor general by Malcolm Stewart, a career deputy solicitor general who argued the case last spring. Not only have these isolated comments blossomed into full-on hysteria over Kagan the potential book banner, but they actually have come to obscure the fact that how Kagan herself would vote in campaign finance cases is far from clear. **Her**

- own academic writings show she is deeply concerned about incumbents passing laws to protect themselves from competition, and she could well end up agreeing with Chief Justice John Roberts, and Justices Samuel Alito, Anthony Kennedy, Antonin Scalia, and Clarence Thomas that limits on campaign spending by corporations are unconstitutional.” (emphasis added)
- “As for Kagan herself, when she defended the campaign finance law at the September reargument of the case, she did not endorse the proposition that the government could ‘ban’ books and indeed said that if the government ever tried to apply the PAC requirement to books published by corporations, there would be a good basis for it to be challenged as unconstitutional. . . . Kagan also had a number of backup arguments, contending, for instance, that ideological corporations that take just a little bit of for-profit corporate money, like the Citizens United group, should get the same exemption from the PAC requirement as ideological corporations that don’t take any.”
 - “But what has so exercised Sen. McConnell, David Bossie, and others is Kagan’s statement at argument—in response to more pressing by the conservative justices—that if a corporation produced ‘a pamphlet’ directly calling for the election or defeat of a federal candidate (‘Vote against Smith’), it would have to pay for it with its PAC funds. This is hardly the stuff of book-banning and government censorship. As Justice Stevens explained in his dissent in *Citizens United*, to call the PAC requirement a ‘ban’ is ‘highly misleading, and needs to be corrected.’”
 - “It is quite possible that a Justice Kagan would vote to strike down, rather than uphold, new campaign finance restrictions that come before the court.”
 - “Ordinarily, it would be enough to say that when Kagan made her arguments, she was arguing on behalf of her client, the United States, and who knows what she really thinks? After all, Ted Olson defended the same statute as solicitor general and nobody has called him a book-banner.”

III. News Sources

- New York Times, [*On Speech, Kagan Leaned Toward Conservatives*](#) (May 14, 2010)
- Balkinization, [*Does Elena Kagan Disagree With Justice Stevens on Citizens United?*](#) (May 9, 2010)
- Slate, [*The Big Ban Theory*](#) (May 24, 2010)
- Wall Street Journal, [*Kagan and Key Case: The Jury Is Out*](#) (May 12, 2010)
- Politico, [*McConnell attacks Kagan over Citizens United*](#) (May 16, 2010)
- Politico, [*Doubts about Kagan on key Obama issue*](#) (May 11, 2010)
- The Hill, [*Obama says Citizens United case signals Kagan is ready for the high court*](#) (May 10, 2010)