6-23-2010

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JURISPRUDENCE | THE LAW, LAWYERS, AND THE COURT. | JUNE 23 2010 12:09 PM

Constitutional Interpretation? There's No App for That.

Elena Kagan needs to talk honestly about what Supreme Court justices really do.

By Sonja West

Elena Kagan

The confirmation hearings of Supreme Court nominee Elena Kagan begin Monday, and court watchers are steeling themselves for another round of the vacuous Q&A that has become the stuff of modern confirmation hearings. It's a tedious process that has been widely and rightly criticized—most notably by Kagan herself. Kagan the Academic wrote a piece in 1995 urging nominees to openly discuss their views on substantive law. Kagan the Nominee, on the other hand, probably thinks that the less she says about real legal issues, the better the odds that she'll soon be donning a new black robe. The belief that it's career suicide for a nominee to talk about any actual cases is a dubious one, but sadly it's prevalent enough that such a discussion is unlikely.

What she will likely talk about—if she's anything like other recent nominees—is that, if confirmed, she promises to become Kagan the Robot. She will find 100 different ways to assure us that when deciding cases she will do nothing more than mechanically apply the law to the facts. And this is where Kagan needs to throw away the script. The absence of any dialogue on substantive law at these hearings is regrettable, but the political theater of discussing judging as mere law-to-fact application is truly alarming in that it goes to the heart of the public's understanding of what it is Supreme Court justices actually do. That's why Kagan needs to talk to the American people honestly next week about the job for which she is applying and why she is so qualified to get it.

In a **speech at Harvard** last month, former Supreme Court Justice David Souter boldly declared the obvious: Constitutional interpretation is **complicated**. Souter waited until after his Supreme Court career was over to start this conversation, but Kagan should have it with us right from the beginning. Over the last few decades, Americans have been repeatedly fed a line about judging in which the "law" is something that can be looked up in a big book, then applied to cases with precision. This tale is now endlessly told about constitutional interpretation. In his last State of the Union address, former President George W. Bush declared that "the Constitution means what it says." The Constitution certainly might mean what it says, but the problem is that it says frustratingly little and what it does say is often unclear.

The easy cases, of course, rarely make it to the Supreme Court. It is the difficult cases the justices chiefly face—the ones in which the text can be read multiple ways, the precedent is ambiguous,

justices can't avoid what the values conflict. Add to this mix 200 years of precedent and a constantly changing world, and the calculus becomes all the more convoluted. Supreme Court justices are the nine people upon whom we have bestowed the vital role of finding and connecting the dots between all of these numerous considerations. Each justice is equipped with the same bag of traditional interpretative tools: text, history, precedent, and facts. (No sincere justice includes personal whims and biases in that collection, although the honest ones concede that this is a struggle.) It is then up to the individual justice to determine which tool to use and how to use it. The idea that constitutional text snaps perfectly onto the facts of each case is an attractive one. In real life, it happens almost never.

The court's 2008 case of *District of Columbia v. Heller* is an example of the limits of the "it means what it says" approach to constitutional analysis. Regardless of your personal feelings on individual gun ownership, a candid reading of the Second Amendment reveals that the sparse 27 words of text are just not that clear. What does it mean to "keep and bear Arms"? What *is* a "well regulated Militia" and what does it have to do with "the right of the people"? And, seriously, what's with all the commas? The justices had a crazy hard task in front of them when they set about parsing the amendment for the first time in decades, and so they did what justices do—they tore apart the text and examined every word. When that failed to clarify matters, they all turned to history in an attempt to decipher what these phrases meant at the time and what the drafters thought they were saying. They reread prior court cases and considered whether the reasoning of past justices made as much sense in this case. They thought a bit about **how Americans use guns** both then (mostly to hunt grizzlies, according to Justice Kennedy) and now (mostly to shoot one another, according to Justice Breyer). And in the end, they took 157 pages to explain to us that they completely disagreed, by a score of 5-4, about both what the Constitution says as well as what it means.

Sorting through ambiguous text isn't the only difficult task Supreme Court justices deal with daily. Often, the text is clear but it conflicts with other—also clear—text. The Constitution protects a variety of different values—personal liberty, equality, due process, and federalism, to name just a few—and, as Justice Souter reminded us, the justices must figure out what these values are and how to weigh them against one another when they are in conflict. If a state allows parents to use state-funded vouchers to send their children to religious schools, is that constitutionally *required* to promote their free exercise of religion or is it *prohibited* as the establishment of religion? The Constitution doesn't say. Do the First Amendment rights to freedom of speech and press give citizens the right to attend a criminal trial or do the rights of the defendant to a fair trial let him close the courtroom to spectators? The Constitution doesn't say. Does the president's role as commander in chief of the armed forces permit him to unilaterally send troops into a battle or does Congress' power to "declare War" mean it must be involved, too? The Constitution—say it with me now—doesn't say.

Even when the Constitution does say things clearly, every justice sitting today accepts that it doesn't always mean what it says. No current justice (and practically no justice ever) has treated the absolute language of the First Amendment, for example, as a complete prohibition on the government's ability to regulate speech. Really, how could they? If they did, laws prohibiting perjury, treason, defamation, and child pornography would be unconstitutional. But once a literal reading of the text is abandoned, it all becomes a murky mess. Is obscenity speech? Is flag burning? Are political contributions? Then there are constitutional questions that are simply novel: If the government uses a thermal imaging device to search your home from the skies above you, is that a warrantless search? The Constitution is even sneaky at times, hinting of unnamed rights that are "retained by the people" (Ninth Amendment) and of powers "reserved to the States respectively, or to the people" (10th Amendment). But just what are these mysterious rights and powers, and where do they fit in?

And this is when the justices earn their keep. They go to work, pulling the tools from their bags and trying to figure out what they can about the meaning of the constitutional values at stake and how to prioritize them when they conflict. This is not the same as a rogue justice just making up the law, but it can and does result in different outcomes depending on the justice's technique, constitutional values, and the facts of the case. This is why we require them to explain their thought processes to us in writing, when they produce opinions. When the explanation makes sense, the decision is publicly accepted and followed by future courts. When the logic is weak, there is public skepticism and the opinion is susceptible to being overturned in the future.

The job of judging is hard, but the job description needn't be. Kagan should trust the American people's ability to understand that eventually the law runs out and it is the justices who are tasked with filling in the missing parts. So, yes, there is an art to judging, but that doesn't mean judicial anarchy. It's a difficult job that requires uncommon intelligence, deep knowledge of the law, an adherence to logic, a drive to be true to the Constitution's values, and the honesty to acknowledge when those values conflict. The law-to-facts view on judging sells the idea that the

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Constitutional interpretation is not simple. It's better than simple. It's a beautiful, intricate document that cannot be interpreted easily, or by anyone who reads English. This isn't a matter of conservative versus liberal or of originalists versus nonoriginalists. This is simply what justices do—every single one of them. By all accounts, Kagan is a superb teacher. And this is a rare teaching opportunity for an important lesson on which we desperately need a refresher course.

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