



## A Fire in The Theater Hate Speech, Elena Kagan and the First Amendment

The oldest man to sit on the Supreme Court was Oliver Wendell Holmes Jr., the son of a distinguished physician and poet. Justice Holmes, who retired at the age of 91 in 1932, made his most famous legal contributions with regard to legitimate limitations on free speech. In the celebrated case of *Schenck v. United States* (1919), Holmes wrote *the most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic.*

### A Prison for the Mind

Many college history textbooks define the broad scope of American History as a constant tug-of-war between the forces of freedom and those of bigger government. The ability to talk freely without interference is a benchmark of a free society. One of the greatest yokes of the communist and fascist states throughout the 20<sup>th</sup> century was their suppression of political opposition and verbal dissent.

While few people will argue that free speech, as protected under the 1<sup>st</sup> Amendment to the Constitution, is an absolute right, there is a growing confusion as to what constitutes free speech. Jurists generally understand this to mean that the government cannot regulate the content of speech, but that it can sanction the harmful effects of speech through laws such as those against defamation or incitement to riot, often under the rubric of *national security*.

Big government thrives when verbal and printed dissent is at a minimum. The founding fathers believed that freedom to think and speak were indispensable to the discovery and spreading of political truth. Without such free speech and the concomitant right of free assembly, discussion would be futile. Totalitarian governments try to create a *prison for the mind*. One of the ways of doing this is to withhold or distort information from the public's view.

Part of the Obama blueprint for the Leviathan state control has been his concerted effort to stifle grass roots movements such as the Tea Parties, which are critical of his policies. His main tactic has been to use the mainstream media abetted by what Michelle Malkin calls *Chicago thuggery* to discredit their views against his regime's tax and spend policies as well as his attempt to seize the health care industry.

### Love of the Underdog

The matrix for the liberal assault on free speech has permeated virtually all avenues of American life. One need only look to cultural Marxism to understand Obama's formidable attack on a major constitutional safeguard for American liberty. To undermine the Constitution, the Marxists have turned the document on its head by a creative use of *political correctness*. The hallmark of political correctness is intolerance. Americans have an unfavorable predisposition to prejudice and foul play against the designated underdogs of society.

In Marxist lexicon, the goal of political correctness has been the creation of categories of underdogs who have been *oppressed* for years. The most obvious group has been the descendants of slavery. America's *peculiar institution* left an aura of guilt that has lingered over the nation since its Civil War, prompting some historians to call slavery America's *original sin*. This verbally protected list has been widely expanded over the years to include gender, handicaps, ethnicity, sexual preference and culture, as deserving of protective legislation against critical speech.

While the term dates back to the 18<sup>th</sup> century, it was not until the latter part of the 20<sup>th</sup> century that it was adopted by the *New Left* to silence its critics. Writing in the *New York Times* in 1990, Richard Bernstein noted that *the term 'politically correct,' with its suggestion of Stalinist orthodoxy, is spoken more with irony and disapproval than with reverence.* Some conservatives, such as commentator Pat Buchanan, believe political correctness is used to *punish dissent and to stigmatize social heresy.*

### A Public Theater of Debate

When linked with multiculturalism and diversity, political correctness becomes a powerful tool that can change the way an entire nation thinks and acts. The best place to try out such subversive ideas is the college campus, one of the main influences of American Marxism since the collapse of the Soviet Union in 1991.

In 1964, Marxist students at California's Berkley College started the oxymoronic *Free Speech Movement* as a protest against

campus *suppression* of their radical politics. By pushing the envelope to the far end of the liberty spectrum, they were able to put constitutional government on the defensive. Their Holmesian *shouting of fire* in a public theater of debate with its accompanying threat to public order forced Americans to demand limitations on their free speech.

In 1965 cultural Marxist philosophy professor Herbert Marcuse attracted a wide following with his provocative essay, *Repressive Tolerance*, which provided a scholarly cover for the students' Marxist ideas. His essay concluded that many supposedly *tolerant* institutions were in fact highly selective in their tolerance in a way that benefited those in power.

According to author David Horowitz, Marcuse falsely described *revolutionary tolerance as tolerance that enlarged the range and content of freedom*. Revolutionary tolerance could never be neutral towards rival viewpoints. It swiftly became a justification for the suppression of conservative speech on the grounds that their views reflect the rule of an oppressive and already dominant social class and should never be tolerated. As Nat Hentoff's 1992's book implied, *Free Speech for Me but not for Thee*.

The erroneous Free Speech Movement of the 60's evolved into the Speech Code Movement of the 80's and 90's. By 1991, there were over 300 such codes on college campuses. While the universities expected their codes to foster an atmosphere more conducive to learning, the opposite occurred. Their codes were a direct violation of the necessary openness of a university where all ideas should be subjected to scrutiny and debate. In a recent Supreme Court decision Justice Samuel Alito reaffirmed the principle that there is *no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning*.

### An Orwellian Village

College speech codes prohibit what is now called *hate speech*. Using the university system as a conduit, hate speech restrictions on the 1<sup>st</sup> Amendment have now permeated most of American society and culture. These restrictions are designed to control not only incendiary talk, but also more importantly, the individual's critical reasoning, making the university an Orwellian village of the *thought crime*.

They define *hate speech* as a communication that carries no meaning other than the expression of *hatred* for some group, especially in circumstances in which they fear such speech is likely to provoke violence against a group of persons defined in terms of race, ethnicity, national origin, gender, religion, and sexual orientation. This is a gray area whose applications are defined by those writing the codes. As William Lind, a pundit on cultural conservatism has noted for *the first time in our history, Americans have to be fearful of what they say, of what they write, and of what they think*.

Hate crimes are simply the Marxist translation from economic terms into cultural terms. The proletariat is no longer the working class but the oppressed cultural entities such as blacks, women, homosexuals and other elements. Even

Newsweek magazine recognized the face of George Orwell's *1984* with their 1990 cover story on the new *Thought Police*. In Orwell's book, the government not only tries to control speech and actions, but also the thoughts of its subjects. All negative thoughts become *thoughtcrimes*.

Before the ink was dry on the health care bill, liberals were already on the name-calling offensive, describing anyone who opposed their political power grab as racists, homophobes, white supremacists, fascists, or domestic terrorists. Last June the Supreme Court upheld the right of the Hastings Law School to demand that the student chapter of the Christian Legal Society seeking official campus recognition openly denounce its statement of faith on sexual matters.

### The Canadian Model

Thanks to the American media, the cultural semantics of political correctness have already infected much of America's daily lexicon. In what amounts to a new medieval *Oath of Supremacy*, the Obama regime is using its substantial power to advance thought crime legislation, so that it can continue' the left's dedicated plan to undermine 1<sup>st</sup> Amendment rights in order to speed up the passage of its authoritarian agenda on the American people. However the left recognizes that the advocates of American traditionalism, especially the values that have been expressed in the Tea Party Movement are a direct threat to their ability to profit from the recent string of crises that have intensified since the advent of Barack Obama and his political elite.

Americans need to look to Canada to see their future. A monthly Catholic news magazine incurred thousands of dollars of legal fees to defend itself against the government's bogus charges and scurrilous campaign of harassment, including a human rights complaint from homosexual activists. Since Canada allows homosexual marriage, it is not surprising that they would be in the forefront to restrict Christianity's strictures against their sexual behavior.

In fact the Canadian approach has already started to show its ugly face. A perfect example is the case of Kenneth Howell, a former University of Illinois adjunct professor who was recently fired from the Department of Religion for teaching in an Introduction to Catholicism class that homosexual acts violated the natural law. The decision came after an anonymous student complained in an e-mail written by a friend that Howell's comments constituted *hate speech*. Howell had been teaching this class without incident since 2001. He vigorously protested that the department's decision was a violation of academic freedom. His protests fell on deaf ears as political correctness had trumped freedom of speech. The winds of change are definitely blowing.

It has become apparent that if the Obama regime can weather the storms of the next elections, the Canadian model could well be in place in this country with regard to the Bible, Christian moral teachings, and free speech. With Washington's support it will be easier for states to enact these oppressive laws on its citizens. As a foretaste, in Boston the state ordered Catholic Charities to violate their religious beliefs and place children in

gay households or cease all their adoption operations. To their credit, but at a loss to the community, Catholic Charities ceased making adoptions.

### A Broader Public Forum

This does not bode well for traditional moral teachings. The day is fast approaching when the federal and state governments can wave the *thought crime flag* in the face of traditional religious and civic groups opposed to rampant secularism. This could result in sermons against homosexuality, protest movements against abortion, and dissent such as the Tea Parties, being criminalized.

The Catholic Church will undoubtedly be in the eye of the storm. In 2009 the United States Conference of Catholic Bishops' (USCCB) membership in a left advocacy group, the interfaith group So We Might See, (SWMS) raised many eyebrows. Given the group's blanket condemnation of conservatives, including Rush Limbaugh, Glenn Beck and Michael Savage on talk radio and Fox News, some may conclude that the Church seems to have switched sides in the culture war. According to the *American Spectator* SWMS is a member of a *Media Justice* project run by the United Church of Christ and funded by many left-wing groups, like the Ford Foundation and billionaire George Soros.

In a letter written by Denver Archbishop Charles Chaput, the USCCB denied that it signed onto the formal petition to the FCC naming Limbaugh or anyone in talk radio or on Fox News as a *purveyor of hate speech*. His letter was seemingly in contrast to the SWMS's FCC filing and its media package. The USCCB said it supported a *broad public forum in which to raise and debate (hate speech and other issues) in a respectful manner*.

Helen Osman, the Secretary of Communications for the USCCB, denied that the USCCB was *participating in any campaign to censor any news organization, program, or commentator*.

Osman said that the USCCB had no clear intention in approving such bold criticism of conservative commentators. In fact their own petition rightfully raised a variety of questions about the Church's vulnerability to future hate crime legislation with regard to homosexuality and even abortion.

Osman could not or would not answer if the USCCB planned to remove itself as one of the organization's *primary partners*. Even a loose association with a group such as SWMS sends an ambiguous message to the faithful. The Bishops must fully realize that the further the country moves to the left, the more its teachings on marriage and family life will become the target of restrictive laws that will impact its ability to disseminate the truth. Hate speech can easily be shifted to Catholic priests and deacons who express the Church's moral teachings.

### The Pesky 1st Amendment

Given America's litigious nature, the battleground for speech controversies will ultimately meet in the chambers of the Supreme Court. It is not surprising then that President Obama's selection of Elena Kagan to fill the seat of retiring Supreme Court Justice Paul Stevens reveals a kindred

spirit, whose legal progressivism mirrors his own. Her philosophy resonates perfectly with the Obama regime's blatant attempt to circumvent the constitutional restrictions on the extension of federal power and its consequences for human freedom, especially free speech.

It is increasingly apparent that Kagan's personal crusade to restrict free speech is motivated by a leftist mindset. According to the New York Times, one of Kagan's mentors was Judge Abner Mika, who was in the *vanguard of the left-wing judicial activist movement*. Kagan's paper trail exposes her more as a *policy advocate* who is apt to legislate from the bench than someone likely to be an impartial judge.

With regard to the *pesky* 1<sup>st</sup> Amendment it has always been one of Kagan's judicial goals to insure that it does not protect any kind of speech she dislikes. She promises to be even less inclined than Stevens, who had a mixed 1<sup>st</sup> Amendment record, to support freedom of speech. While at Harvard, she banned the U.S. military from recruiting on campus because she opposed the war in Iraq.

Many of Kagan's decisions have centered on ways to circumvent or nullify rulings or laws that impeded governmental restrictions on speech she did not like. Kagan is adept at paying lip service to the legal tradition of the 1<sup>st</sup> Amendment while finding ways to ensure that her speech restriction goals are achieved. As for hate speech, Kagan professes that the government can suppress speech it deems harmful to the public good, yet it cannot restrict speech based on *hostility toward ideas*. She has had to concede that her distinction ultimately collapses because people are hostile to ideas they consider harmful.

In words directly out of the *Al Capone Handbook of Intimidation*, Kagan argues that certain kinds of speech can just *disappear*. If the citizens of Justice Holmes' era were alive today, they would be warning America that there really *is a fire in the theater*.

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