A Pragmatic New Yorker on a Careful Path to Washington

By SHERYL GAY STOLBERG, KATHARINE Q. SEELYE and LISA W. FODERARO.

WASHINGTON — She was a product of Manhattan’s liberal, intellectual Upper West Side — a smart, witty girl who was bold enough at 13 to challenge her family’s rabbi over her bat mitzvah, cocky (or perhaps prescient) enough at 17 to pose for her high school yearbook in a judge’s robe with a gavel and a quotation from Felix Frankfurter, the Supreme Court justice.

She was the razor-sharp newspaper editor and history major at Princeton who examined American socialism, and the Supreme Court clerk for a legal giant, Thurgood Marshall, who nicknamed her Shorty. She was the reformed teenage smoker who confessed to the occasional cigar as she fought Big Tobacco for the Clinton administration, and the literature lover who reread Jane Austen’s “Pride and Prejudice” every year.

She was the opera-loving, poker-playing, glass-ceiling-shattering first woman to be dean of Harvard Law School, where she reached out to conservatives (she once held a dinner to honor Justice Antonin Scalia) and healed bitter rifts on the faculty with gestures as simple as offering professors free lunch, just to get them talking.

Elena Kagan has been all of these things, charting a careful and, some might say, calculated path — never revealing too much of herself, never going too far out on a political limb — that has led her to the spot she occupies today: the first female solicitor general of the United States, who won confirmation with the support of seven Republicans, and now, at 50, President Obama’s nominee for the United States Supreme Court.
“Elena is open-minded, pragmatic and progressive,” said Walter Dellinger, an acting solicitor general in the Clinton administration who is close to both Ms. Kagan and the White House. “Each of those qualities will appeal to some, and not to others.

“Her open-mindedness may disappoint some who want a sure liberal vote on almost every issue,” Mr. Dellinger said. “Her pragmatism may disappoint those who believe that mechanical logic can decide all cases. And her progressive personal values will not endear her to the hard right. But that is exactly the combination the president was seeking.”

In some respects, Ms. Kagan’s traits — her desire to build consensus through persuasion, her people skills, her ability to listen to others — mirror those Mr. Obama sees in himself; on Monday, he cited her temperament as one reason he picked her. They are qualities that the president hopes will play out in a leadership role on a deeply divided court. While Ms. Kagan has cited Justice Marshall as one she most admires, some expect her to behave more like the center-left Justice David H. Souter, who retired last year, or the master tactician Justice John Paul Stevens, whom she would succeed if confirmed.

“She was one of the most strategic people I’ve ever met, and that’s true across lots of aspects of her life,” said John Palfrey, a law professor who was hired at Harvard by Ms. Kagan. “She is very effective at playing her cards in every setting I’ve seen.”

Ms. Kagan’s paper trail is scant, her academic writings painstakingly nonideological. And while Justice Sonia Sotomayor, a fellow New Yorker and Princeton graduate, has written and spoken extensively about her childhood, Ms. Kagan, the daughter of a lawyer and a schoolteacher, the granddaughter of immigrants, is more private. During her academic and public life, she has rarely spoken of her political beliefs.

When Mr. Dellinger interviewed her recently for a forum at Georgetown Law, he prodded her to talk about her past, and the influences that shaped her. She obliged, somewhat reluctantly, serving up only some bland details about her admiration for her parents.

Yet as a young writer for The Daily Princetonian, the student newspaper at Princeton, Ms. Kagan offered insight into her worldview. She had spent the summer of 1980 working to elect a liberal Democrat, Elizabeth Holtzman, to the Senate. On election night, Ms. Kagan drowned her
sorrow in vodka and tonic as Ronald Reagan took the White House and Ms. Holtzman lost to “an ultraconservative machine politician,” she wrote, named Alfonse M. D’Amato.

“Where I grew up — on Manhattan’s Upper West Side — nobody ever admitted to voting for Republicans,” Ms. Kagan wrote, in a kind of Democrat’s lament. She described the Manhattan of her childhood, where those who won office were “real Democrats — not the closet Republicans that one sees so often these days but men and women committed to liberal principles and motivated by the ideal of an affirmative and compassionate government.”

It was perhaps the last time Ms. Kagan shared her political views so openly. Last year, at her confirmation hearing to become solicitor general, senators focused less on her politics than on whether she was too much in the ivory tower, with too little lawyerly experience to argue cases before the nation’s highest court. The experience question will surely come up again, given that Ms. Kagan has never been a judge.

“One of the things I would hope to bring to the job is not just book learning, not just the study that I’ve made of constitutional and public law, but of a kind of wisdom and judgment, a kind of understanding of how to separate the truly important from the spurious,” Ms. Kagan said. “I like to think that one of the good things about me is that I know what I don’t know and that I figure out how to learn it when I need to learn it.”

A Leader Emerges

At Hunter College High School in the 1970s, Ms. Kagan was a standout in a school of ultrabright girls. At least one classmate there, Natalie Bowden, remembers she had an ambitious dream: to become a Supreme Court justice.

“That was a goal from the very beginning,” Ms. Bowden said. The school, which then occupied two floors of an office building at 46th Street and Lexington Avenue, was and remains one of New York’s elite public high schools. It drew girls from across the city and an array of backgrounds — all admitted on the strength of their performance on an entrance exam, rather than money or family connections.

“We were really exposed to tremendous diversity there,” said Ellen M. Purtell, a high school
classmate of Ms. Kagan’s, “whether it was a Jewish girl from the Upper West Side or a cop’s kid from the Bronx or the daughter of a C.E.O. from the Upper East Side or kids whose parents worked in sweatshops in Chinatown.”

It was a rigorous, nurturing environment that instilled an ethos of public service.

“There was no driver’s ed, there was no home economics, you didn’t learn to type,” said Jennifer Raab, the president of Hunter College, who attended the high school a few years ahead of Ms. Kagan, who graduated in 1977. “You were reading great books, and you were going to college. You were going to lead, you were going to give back.”

Ms. Kagan, the middle child of three, grew up in a family that embraced such values. They lived in a third-floor apartment at West End Avenue and 75th Street that was comfortable, but not fancy, in the days before the Upper West Side became trendy. The dinner talk tended to current events.

“Verbal sparring was commonplace in their home,” said Gail Katz-James, a cousin of Ms. Kagan. “They just really enjoyed debating and discussing everything.”

Ms. Kagan’s mother, Gloria, who died two years ago, taught fifth and sixth grade at Hunter College Elementary School, which Elena attended. Her brothers followed their mother’s footsteps. Marc, a onetime subway worker and union activist, teaches social studies at the Bronx High School of Science, while Irving teaches social studies at Hunter College High.

Ms. Kagan, who has never married, adopted her father’s love of opera, the New York Mets and the law. With her infectious laugh and New York accent, she brought a chuckle out of the senators at her confirmation hearing when she called herself “a famously excellent teacher.” But family friends say, she is her father’s daughter.

Robert Kagan, who died in 1994, represented tenant associations whose rental apartments were being converted to co-ops. A graduate of Yale Law (Mr. Kagan was said to have been crushed when his daughter chose Harvard Law though she also had been accepted at Yale), he was also immersed in the politics and culture of the West Side.

He fought the controversial Westway Highway project as chairman of Community Board 7, an
influential citizens’ advisory group. He was a trustee of the West End Synagogue and president of the United Parents Association, a citywide advocacy group.

“He could deal with people in extremely difficult circumstances — everything at the grass-roots level on the Upper West Side was a major problem,” said William J. Lubic, Mr. Kagan’s law partner of 20 years. “That was his talent. I firmly believe that that’s what his daughter got from their relationship.”

The young Ms. Kagan was independent and strong-willed. Mr. Lubic recalls her bat mitzvah — or bas mitzvah, as it was then called — in a synagogue where Elena clashed with the rabbi over some aspect of the ceremony.

“She had strong opinions about what a bas mitzvah should be like, which didn’t parallel the wishes of the rabbi,” Mr. Lubic said. “But they finally worked it out. She negotiated with the rabbi and came to a conclusion that satisfied everybody.”

Friends recall her as confident, likeable and careful not to flaunt her smarts. Adults did not seem to intimidate her.

Ms. Purtell recalled one teacher who sometimes insulted students. “When he would ask a question that I think he half the time assumed was an unanswerable question, she would answer it, and just look at him as if to say, ‘Is that all you have?’ ”

One thing was unusual about Ms. Kagan: she smoked cigarettes. One old friend, Margaret Raymond, now a law professor at the University of Iowa, said Ms. Kagan was the only girl she knew who smoked in high school. Another classmate remembers Ms. Kagan helped get smoking “legalized” in one of four girls’ bathrooms. Disco was the rage in New York back then, but Ms. Kagan’s was not a partying crowd; on Saturday nights, Ms. Raymond said, they were more apt to sit on the steps of the Metropolitan Museum of Art and talk.

Ms. Kagan emerged as a leader. She became president of the student government. Although there was nothing judicial about the position, in her senior yearbook Ms. Kagan, in wire-rimmed aviator glasses and long hair, is pictured on the group’s page wearing a judge’s robe, gavel in hand. Underneath her senior picture is a quotation from Justice Frankfurter, who was...
appointed to the Supreme Court by President Franklin D. Roosevelt.

“Government,” it reads, “is itself an art, one of the subtlest of arts.”

Choosing a Path

Ms. Kagan’s arrival at Princeton in the fall of 1977 proved a bit of a shock. Its eating clubs did not appeal to her; men made up two-thirds of the student body. She quickly found a home at The Daily Princetonian, the student paper. By her senior year she held a top job: editorial chairwoman. She always held her own in debates.

“She would argue, she would disagree with you, but it was controlled, restrained, forceful,” said Peter Elkind, now an editor-at-large for Fortune magazine. “There was a toughness there.”

Her circle of friends was a high-powered one, including Eliot Spitzer, the future governor of New York, who became student body president. Bruce Reed, who would hire her as his deputy when he ran the White House Domestic Policy Council under President Bill Clinton, worked under Ms. Kagan at the paper. Mr. Reed said he wrote “smart-alecky columns, mostly about politics,” while she seemed “determined to have a serious discussion about the nation’s problems.”

Some at the “Prince,” as the paper was called, chafed at the restrictions against student journalists working in politics. Ms. Kagan was not among them, friends say. But she did spend one summer interning for Representative Ted Weiss, Democrat of New York, and another with Ms. Holtzman.

In her senior year, after she left the paper, she joined Mr. Spitzer in signing a manifesto, “Campaign for a Democratic University,” that called for a greater role in student governance. As a history major, Ms. Kagan dove into the roots of American radicalism in a senior thesis titled “To the Final Conflict: Socialism in New York City, 1900-1933.” In the acknowledgments, she thanked her brother Marc, whose “involvement in radical causes,” she wrote, “led me to explore the history of American radicalism in the hope of clarifying my own political ideas.”

In 153 pages, the paper examines why, despite the rise of the labor movement, the Socialist Party lost political traction in the United States — a loss that she attributed to fissures and
feuding within the movement. “The story is a sad but also a chastening one for those who, more than half a century after socialism’s decline, still wish to change America,” she wrote.

If that sounds like a defense of socialism, her adviser, Prof. Sean Wilentz, asserts that is not the case.

“To study something is not to endorse it,” he said.

She graduated summa cum laude, went off to Oxford on a two-year fellowship and returned to enroll in law school at Harvard, where, predictably perhaps, she made law review. It was a time of deep political divisions on the law school campus and review board, said Jeffrey Toobin, a classmate and close friend of Ms. Kagan’s who today covers legal issues for The New Yorker and CNN.

“She was someone who could always navigate easily between and among factions,” Mr. Toobin said.

She went on to win two plum clerkships, first for Judge Abner J. Mikva, of the federal appeals court in Washington, and then for Justice Marshall. In the afternoons, the female Supreme Court clerks went to the gym to do Jane Fonda’s workout. The 5-foot-3 Ms. Kagan played basketball with the men.

“I wouldn’t say she dominated,” said Harry Litman, a fellow clerk. “It was very much a hacker’s game.”

To Ms. Kagan, Justice Marshall was an icon. But she made clear that he did not exactly take her under his wing.

“You know, I was a 27-year-old pipsqueak and I was working for an 80-year-old giant in the law and a person who, let us be frank, had very strong jurisprudential and legal views,” she told senators during her confirmation hearing. “He knew what he thought about most issues. And for better or for worse, he wasn’t really interested in engaging with his clerks on first principles.”

In 1988, as she was wrapping up her clerkship, it was time for Ms. Kagan to make a career
decision. She had hoped to work for a Democratic administration but George Bush won the presidency. So she went to work for Williams & Connolly as a litigator in Washington, though it was clear she was not motivated by money.

Carol Steiker, a fellow clerk who is now a Harvard law professor, recalls Ms. Kagan’s interview with a young associate at a mergers and acquisition firm in New York.

“He was single and he had no family and he was earning — the sum seemed unimaginable — $750,000 a year as a young partner,” Professor Steiker said. “So she asked the guy, ‘What do you do with all that money?’ And he said, ‘I buy art.’ I remember her telling that story, and just shaking her head.”

‘Very Focused’

If there was one trait about Ms. Kagan that stood out, beyond her obvious intellect, it was her fierce ambition.

“This was a very focused person,” said Richard A. Epstein, a professor at the University of Chicago Law School, where Ms. Kagan took a job in 1991. “There was this desperate desire to get ahead in the world and make a mark for herself.”

Ms. Kagan arrived the same year as another bright young lawyer, Barack Obama, an Illinois state senator who lectured in constitutional law on the side. Unlike Mr. Obama, Ms. Kagan was on a tenure track. She quickly demonstrated a gift for teaching.

“She was tough, she was independent-minded, she was demanding of her students, she had a good sense of humor,” said Geoffrey R. Stone, the professor who hired her. “The students admired her and raved about her right from the beginning.”

And she was intense, so much so that life’s mundane tasks would sometimes slip her mind. The native New Yorker Ms. Kagan was never a very good driver. “A couple of times when she was so focused on her work, she would park her car and leave it running overnight,” said Lawrence Lessig, a longtime friend who taught alongside Ms. Kagan in Chicago. “She just forgot to turn it off.”
As a scholar, Ms. Kagan’s interests were narrow, somewhat technical, and free of ideology. Her papers examined questions like when the government could limit free speech. “This is not a subject about which there is any ideological slant,” Professor Stone said. “It’s an intellectual puzzle.”

She was granted tenure in 1995, despite the reservations of some colleagues who thought she had not published enough. Shortly thereafter, Washington beckoned. Judge Mikva was Mr. Clinton’s White House counsel and offered Ms. Kagan a spot as an associate.

She knew it was a risk. Chicago, like many universities, would allow her leave for up to two years. After that she would have to resign, giving up her tenure. That is exactly what she did, in December 1996, when Bruce Reed, her old friend from Princeton who was then Mr. Clinton’s director of domestic policy, asked her to stay on as his top deputy.

“She thought going ahead in politics was the better path,” Professor Epstein said. “I think her preferred path was to stay there an extra year, get a really big administrative position, or a judgeship.”

Inside the White House, Ms. Kagan developed a reputation as a kind of in-house constitutional lawyer, batting around ideas with the president. She was also a policy powerhouse on a range of matters, including a contentious tobacco bill that sought to give the Food and Drug Administration regulatory authority over cigarettes. Although it never passed, she won over important Republicans like Senators John McCain of Arizona, and Bill Frist of Tennessee. “She and McCain hit it off from the beginning,” Mr. Reed said.

But sometimes Ms. Kagan rubbed colleagues the wrong way. Jamie Gorelick, a deputy attorney general in the Clinton administration, told The New York Sun in 2006 that Ms. Kagan, whom she admired, was sometimes seen as brusque and overly demanding.

“She was extremely aggressive when she was in the White House in trying to carry out the president’s agenda,” Ms. Gorelick was quoted as saying. “She was not the most popular person there in part because of that.”

In 1999, Ms. Kagan almost received her judgeship, when President Clinton nominated her to a
seat on the federal appeals court for the District of Columbia, where she had clerked for Judge Mikva. But the nomination fell through; Republicans would not schedule a hearing. The seat eventually went to John G. Roberts Jr., now the chief justice.

**Change Comes to Harvard**

The law school at Harvard University resembled a dysfunctional family, stuck in the legal Dark Ages, when Ms. Kagan took over as dean in 2003. When her judgeship fell through and her tour in the Clinton White House expired, she had tried to return to Chicago, but was rebuffed. Instead, she took a visiting professorship at Harvard; four years later, the university’s president, Lawrence H. Summers (now Mr. Obama’s top economics adviser) installed her as dean.

The faculty was at odds with itself. The curriculum was out of date. The gym and the dining facilities were old and run-down. The professors were aging, the students unhappy and the law school trailed Yale in the all-important school ranking in U.S. News & World Report.

Ms. Kagan undertook a top-to-bottom transformation. Often, her consensus-building efforts revolved around meals — a hint, friends say, of her nurturing, Jewish-mother side. With the faculty unable to come to terms over how to update the first-year curriculum, Ms. Kagan opened her home.

“She would have the corporate law people, then the public law people, then the criminal law people to her house for dinner and they would talk about it,” said John Manning, a law professor Ms. Kagan poached from Columbia in January 2004. Together with Martha Minow, who succeeded her as dean, Ms. Kagan built a proposal to add courses on legislation, international law and problem-solving. The faculty adopted it unanimously.

But perhaps the hallmark of Ms. Kagan’s tenure as dean was breaking the logjam that had bogged down the hiring of new professors.

The faculty was divided into ideological factions and each could stop a new hire. Ms. Kagan convinced her colleagues that the law school needed fresh blood. She went after star professors at other universities and helped raise significant amounts of money to lure them to Cambridge. In less than six years, she added 22 slots to a faculty of 81.
Her hiring binge became the subject of an April Fool’s parody in 2008 in The Harvard Law Record. “Dean Kagan Hires Every Law Professor in the Country,” the headline blared.

Critics have noted that most of the hires were white men, though law school officials say more women and minorities received offers than they accepted.

But Ms. Kagan broadened the faculty ideologically. Mr. Manning, a conservative, was one of the first professors she hired. Another early recruit was Jack Goldsmith, a Justice Department official in the Bush administration.

Allies have praised Ms. Kagan as a consensus-builder, but one Harvard law professor who spoke on the condition of anonymity to discuss internal politics at the school, said she was more of a coalition-builder. The faculty was essentially split in three, this person said: conservatives, liberals and those in the middle who usually backed the dean.

“Elena would count the votes and say, ‘This crowd will vote for X and I want X, so that will be two-thirds and we’ll make it happen,’ ” the professor said. “It was not that she won over people after they suddenly saw the wisdom of what she wanted.”

To Washington

For someone so prominent in academia, Ms. Kagan published very little. Except for her deep involvement in a fracas over whether military recruiters could use the law school’s facilities, Ms. Kagan did not write or speak out on the issues of the day. On Veterans Day, she took pains to have dinner with military students. But on the matter of barring gay men and lesbians from openly serving in the armed forces, she was adamant, and her statements are bound to be a subject of her confirmation hearings.

“I abhor the military’s discriminatory recruitment policy,” Ms. Kagan wrote, calling it “a moral injustice of the first order.”

One of her biggest accomplishments at Harvard, former students and faculty members say, was simply making the campus more student-friendly. She renovated the gym and opened a skating rink and volleyball court. She put free tampons in the ladies’ rooms. Her first summer, she hired contractors to create a place for students to sit outside Harkness Dining Hall and
renovated the Harkness Commons. She created a faculty dining area that served free lunch.

“She put two big round tables in the room and created a good place where people could get to know each other,” Mr. Manning said. “She understands human nature very well.”

When Ms. Kagan left Harvard to become solicitor general, the federal government’s top appellate lawyer, in March 2009, she had argued no cases in the United States Supreme Court and had, indeed, just recently become a member of its bar.

Six months later, she made her debut in a case that would turn out to be one of the court’s biggest decisions in recent years, Citizens United v. Federal Election Commission.

She lost.

The court ruled against Ms. Kagan in January by a 5-to-4 vote, with the court’s more conservative justices in the majority. Now that decision, which allowed unlimited corporate spending in candidate elections, will figure prominently in Ms. Kagan’s coming hearing. Mr. Obama has used the case to argue that the court under Chief Justice Roberts is engaging in a conservative brand of judicial activism.

Mr. Obama has been looking for a justice who can counter what he regards as the court’s rightward tilt. In introducing Ms. Kagan to the nation on Monday, the president spoke of her “understanding of the law, not as an intellectual exercise or words on the page, but as it affects the lives of ordinary people.”

Ms. Kagan, in brief remarks, spoke of her love for the law, “not just because it’s challenging and endlessly interesting — although it certainly is that — but because law matters; because it keeps us safe; because it protects our most fundamental rights and freedoms; and because it is the foundation of our democracy.”

But as she spoke in the East Room of the White House, with the president and vice president beside her, the solicitor general, a woman whose fast rise through government and academia now puts her within reach of the job she coveted as a teen, had a wistful look.

“If this day has a just a touch of sadness in it for me,” Ms. Kagan said, “it is because my parents
aren’t here to share it.”

Adam Liptak, Charlie Savage and Elissa Gootman contributed reporting.