

## Doctrinal Conversation: Justice Kagan's Supreme Court Opinions

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Confirmation hearings are sometimes memorable for their moments of high drama, as in Clarence Thomas's fiery attack on the Senate Judiciary Committee,<sup>1</sup> or apparent blunders, as in Robert Bork's seeming rejection of a major Supreme Court desegregation decision,<sup>2</sup> or flashes of human emotion, as in Martha-Ann Alito's tearful departure after her husband was asked a provocative question.<sup>3</sup> In contrast, Elena Kagan's confirmation hearing is likely to be remembered for something quite different: the nominee's humorous comments that the transcript repeatedly records as followed by "[Laughter.]"<sup>4</sup> When, in a lead-in to a question about an attempted terrorist attack, South Carolina Republican Senator Lindsey Graham asked Kagan where she was on Christmas Day, she famously replied "You know, like all Jews, I was probably at a Chinese Restaurant."<sup>5</sup> Graham, presumably startled, was nonetheless appreciative, responding "Great answer. Great answer," before returning to his serious theme.<sup>6</sup>

Kagan's humorous comments were not simply isolated jokes intended to lighten the hearing's atmosphere. They served as well to build bridges between the nominee and her examiners, to inject a human element into what at times showed signs of becoming an adversarial process, and to create a rapport with observers as well as Judiciary Committee members of both parties. Questioned about her law review article calling for substantive exchanges between senators and Supreme Court nominees, Kagan was quick to acknowledge the tension between that article and her reticence in providing specific answers. When Senator Patrick Leahy noted of the article that "[y]ou probably reread those words," Kagan replied "Many times. . . . And you know what? They have been read back to me many times."<sup>7</sup> Asked by Senator Grassley about a thesis she wrote as a student at Oxford University, Kagan was candidly ironic: "Senator Grassley," she replied, "all I can say about that paper is that it's – it's dangerous to write papers about the law before you've spent a day

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1. Jane Mayer & Jill Abramson, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 289–90 (1994).

2. Ethan Bronner, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 232–33 (1989).

3. Neil A. Lewis, *Court in Transition: In the Background; An Intense Experience for Family Members, Too*, N.Y. TIMES, Jan. 12, 2006, at A27.

4. 23 Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee 1916–2010, at 62, 79, 88, 95, 118, 128, 136, 144, 208, 262, 266, 277, 281, 292.

5. *Id.* at 144.

6. *Id.*

7. *Id.* at 62.

in law school.”<sup>8</sup> Toward the close of her second and final day of testimony, when Senator Coburn prefaced a question by noting that “I’m 12 or 13 years older than you,” Kagan responded “Maybe not after this hearing.”<sup>9</sup> And when Senator Klobuchar intervened briefly to correct a point she had made only minutes earlier about the number of women senators elected in past years, Kagan was quick to sympathize. “Isn’t email a wonderful thing,” she said. “You can learn you’re wrong right away.”<sup>10</sup> It is not surprising that even Senator Arlen Specter, who earlier scolded Kagan for evading his questions, ended by complimenting her.<sup>11</sup> “You have shown a really admirable sense of humor,” he told her. “I think that is really important.”<sup>12</sup>

Kagan’s tendency to lower the temperature of an inherently adversarial situation by connecting with her audience has not been confined to her confirmation hearing. It has become as well a hallmark of her opinions. Whether she is writing for the Court, concurring, or dissenting, Kagan’s style is remarkably conversational. She employs a range of rhetorical strategies to speak directly to the reader, suggesting that her enterprise is less indoctrination than a more congenial mode of persuasion. Leavening her legal prose with colloquial diction, she engages the reader in something approaching an informational, if one-sided, chat. I have elsewhere characterized Justice Scalia’s distinctive rhetorical style as “indignant conversation,” speaking to the reader in the voice of “a man of common sense whose patience is tried beyond endurance by the follies of his colleagues.”<sup>13</sup> Kagan’s variety of conversation is quite different in tone: genial rather than indignant, seeking to enlighten rather than to chastise those who disagree with her. Her judicial prose might aptly be called friendly pedagogy, an approach that seems to offer the reader a glimpse of the author as she once was in her professorial role. This similarity is scarcely surprising. Kagan herself has said that “I approach opinion writing much as I used to approach the classroom,”<sup>14</sup> and her judicial prose contains numerous strategies of engagement between author and reader that recall the strategies of a gifted teacher.

More than two dozen times in her first two terms on the Court, Kagan opens a sentence with a direct invocation to the reader, much as a teacher addresses her students. Sometimes the opening is a simple “Recall” or “Remember,” to prompt

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8. *Id.* at 128.

9. *Id.* at 281.

10. *Id.* at 292.

11. For example, dissatisfied with Kagan’s response to his question about the deference owed by the Court to Congress, Specter interrupted her reply: “Ms. Kagan, I know what you said. You have talked about that a great deal. My question is very pointed. Wasn’t that disrespectful?” When she tried again to respond, he again interrupted her: “I’m going to move on. I know all of that. The point that I’m trying to find out from you is what deference you would show to Congressional fact finding.” *Id.* at 132.

12. *Id.* at 136.

13. Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 227 (2002).

14. Interview with Dean Wendy Purdue, University of Richmond School of Law, September 20, 2012. <http://www.c-span.org/Events/Conversation-with-Supreme-Court-Justice-Elena-Kagan/10737434240-1/>.

the reader's memory about the facts of the case or an argument made by the other side.<sup>15</sup> At other times she asks a bit more of the reader: to consider a different slant on an issue or suppose an invented situation. That may take the basic form of a simple request, like "Consider first"<sup>16</sup> or "Consider a prosaic example."<sup>17</sup> Or it may place a heavier demand, asking the reader to go beyond the facts of the case to examine a hypothetical sequence of events ("First suppose. . . . But now suppose. . . .").<sup>18</sup> That demand may become quite personal, as when she asks the reader to "[s]uppose your spouse tells you that he got lost because he 'did not make a turn.'"<sup>19</sup> She may even offer directions for the mental process required, as when she asks the reader to "[p]ut on blinders" and then later "take off" those blinders,<sup>20</sup> or when she commands "[b]ut now stop a moment" to reflect on the importance of context in interpreting the phrase "not an."<sup>21</sup> She may ask for an even greater leap, instructing the reader to "Imagine"<sup>22</sup> or, more precisely, to "Pretend." The latter injunction introduces a detailed exchange with the reader in Kagan's dissent from the majority's rejection of a campaign finance matching fund provision as unconstitutional:

Pretend you are financing your campaign through private donations. Would you prefer that your opponent receive a guaranteed, upfront payment of \$150,000, or that he receive only \$50,000, with the *possibility* a possibility that you mostly get to control - of collecting another \$100,000 somewhere down the road? Me too. That's the first reason the burden on speech cannot command a different result in this case than in *Buckley*.<sup>23</sup>

Kagan puts the reader in the shoes of the candidate whose own expenditures would determine the size of the matching payments to his opponent. Her colloquial two

15. See, e.g., "Recall that the FMIA's regulations provide for the inspection of all pigs at delivery," *Nat'l Meat Ass'n. v. Harris*, 132 S. Ct. 965, 971 (2012); "Remember: Indiana has made a purposeful choice to divide the full spectrum of vehicular flight into different degrees," *Sykes v. United States*, 131 S. Ct. 2267, 2292 (2011) (Kagan, J., dissenting).

16. "Consider first what the two statutes tell a slaughterhouse to do . . . ," *Nat'l Meat*, 132 S. Ct. at 970.

17. "Consider a prosaic example not involving scientific experts," *Williams v. Illinois*, 132 S. Ct. 2221, 2269 (2012) (Kagan, J., dissenting).

18. "First, suppose Patchak had sued under the APA claiming that *he* owned the Bradley Property . . . . But now suppose that Patchak had sued under the APA claiming only that use of the Bradley Property was causing environmental harm," *Match-E-Be-She-Wish Band of Pottawatomí Indians v. Patchak*, 132 S. Ct. 2199, 2205 (2012).

19. *Caraco Pharm. Laboratories, Ltd. v. Novo Nordisk*, 132 S. Ct. 1670, 1681 (2012).

20. "Put on blinders, and the subsection is naturally understood to address all flight, up to and including the most dangerous kinds. But take off those blinders – view the statute as a whole – and the subsection is instead seen to target failures to stop. *Sykes*, 132 S. Ct. at 2293.

21. *Caraco*, 132 S. Ct. at 1681.

22. "Imagine the converse of the statute described above," *Sykes*, 131 S. Ct. at 2291 (Kagan, J., dissenting).

23. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2838 (2011) (Kagan, J., dissenting).

word agreement with the anticipated answer – “Me too” – draws dissenter and reader into a friendly alliance before she caps the argument with the authority of precedent.

Kagan may also, at times, go beyond these one-size-fits-all instructions to single out or even flatter her readers, a strategy of classroom encouragement. When she observes that “[c]areful readers may note . . .,” she is focusing her readers’ attention by complimenting their powers of observation.<sup>24</sup> And in the same case she then observes that “[t]hose mathematically inclined might think of the comparable-grounds approach as employing Venn diagrams,” drawing those eager to accept the compliment into a visual image used to illustrate a statutory provision.<sup>25</sup> In the inverse of that flattery, she may instead encourage her readers to question the resolution of a technical issue involving scientific test results by providing them with a more accessible approach. Dissenting from a Court opinion accepting laboratory evidence without the testimony of the technician involved, Kagan substitutes a simple analogy. “Consider a prosaic example,” she asks, in which a police officer testifies to what an absent eyewitness told him, suggesting that common sense rather than technical expertise is sufficient to undermine the majority’s position.<sup>26</sup>

Kagan enhances the conversational quality of her opinions with a generous sprinkling of informal and even colloquial diction, speaking in the language of her readers much as a teacher might speak in the language of her students. Writing for a unanimous Court in her first term, she puts her own stamp on a brief opinion by referring to a “faux complaint” made against a police chief,<sup>27</sup> a “downright lucky assertion” of a claim,<sup>28</sup> and “green-eyeshade accountants.”<sup>29</sup> In subsequent opinions she has characterized an amicus’ argument as “a kind of loosey-goosey caution not to put *too* much faith in the capacity of prisons to rehabilitate,”<sup>30</sup> reported an increase in campaign expenditures of “a whopping 253%,”<sup>31</sup> rejected a claimed injury as barred “[e]xcept in a world gone topsy-turvy,”<sup>32</sup> and become the second Justice to use the word “chutzpah.”<sup>33</sup> She rejects a plurality opinion that in her view would have allowed an easy evasion of the Constitution as “a wink and a nod.”<sup>34</sup> Expanding her point, she argues in a conversational voice: “If the Confrontation Clause prevents the State from getting its evidence in through the

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24. *Judulang v. Holder*, 132 S. Ct. 476, 482 n.4 (2011).

25. *Id.* at 482.

26. *Williams v. Illinois*, 132 S. Ct. 2221, 2269 (2012) (Kagan, J., dissenting).

27. *Fox v. Vice*, 131 S. Ct. 2205, 2211 (2011).

28. *Id.* at 2215-16.

29. *Id.* at 2216.

30. *Tapia v. United States*, 131 U.S. 2382, 2387 (2011) (Kagan, J.).

31. *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2834 n.2 (2011).

32. *Id.* at 2833.

33. “Some people might call that *chutzpah*.” *Id.* at 2835 (Kagan, J., dissenting). The first to use the word was Justice Scalia, referring to “a particularly high degree of *chutzpah*.” *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 597 (1998) (Scalia, J., concurring in the judgment).

34. *Williams v. Illinois*, 132 S. Ct. 2221, 2270 (2012) (Kagan, J., dissenting).

front door, then the State could sneak it in through the back. What a neat trick – but really, what a way to run a criminal justice system. No wonder five Justices reject it.”<sup>35</sup> The plurality’s arguments in support of the reliability of the evidence are met with a terse and weary rebuttal: “Been there, done that.”<sup>36</sup> Kagan’s rhetorical strategy in dissent is one of mockery rather than direct assault, using language to puncture rather than to pummel the opposition’s argument. Toward the end of her opinion, she concludes that “[w]hat comes out of four Justices’ desire to limit” precedent on the admissibility issue “is—to be frank—who knows what.”<sup>37</sup> That frankness, couched in a colloquial expression of bewilderment, speaks directly to the reader as well as to her fellow Justices.

It is curious that in the same dissent Kagan, for thus far the only time, uses a remarkably obscure word, one that has never appeared in any other Supreme Court opinion. Criticizing Justice Thomas’s concurrence, she finds that his “approach, if accepted, would turn the Confrontation Clause into a constitutional geegaw – nice for show, but of little value.”<sup>38</sup> “Geegaw” is described in the Oxford English Dictionary as a variant of “gewgaw” and defined as “a gaudy trifle, plaything, or ornament, a pretty thing of little value, a toy or bauble.”<sup>39</sup> Kagan has thus selected not only an obscure word but its even more obscure variant to make her point. The choice is deliberate: she helpfully provides a definition for the reader who is not expected either to know the word or to reach for a historical dictionary to find out what it means. The obscurity is presumably the point, a way of underscoring how out of step with the Constitution the Thomas approach must be. It is also worth noting that the expression itself may remind the reader of Justice Marshall’s famous phrase in *McCulloch v. Maryland*, where he suggests that an incorrect interpretation of the Constitution may reduce it to “a splendid bauble.”<sup>40</sup> Kagan’s definition – “nice for show, but of little value” – could serve as well for Marshall’s phrase, and that is unlikely to be merely fortuitous.

When Kagan reaches for similes and metaphors outside the legal sphere to explain her opinions, she chooses areas of popular culture and sport that are likely to be familiar to her readers. In her most extended development of one such figure of speech, she compares litigation to its Hollywood versions:

These standards would be easy to apply if life were like the movies, but that is usually not the case. In Hollywood, litigation often concludes with a dramatic verdict that leaves one party fully triumphant and the other utterly prostrate. The court in such a case would know exactly how to award fees (even if that anti-climactic scene is generally left on

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35. *Id.* at 2272 (Kagan, J., dissenting).

36. *Id.* at 2275.

37. *Id.* at 2277.

38. *Id.* at 2276.

39. Oxford English Dictionary (2d ed., 1989), vol. 6, p. 489. Kagan displays her taste for obscure diction in another case, when, in discussing “a crime involving turpitude,” she uses the adjectival form, “turpitudinous,” a word the Oxford English Dictionary terms “literary” and that does not appear elsewhere in the U.S. Reports. The New Shorter Oxford English Dictionary (1993), vol. 2, p. 3429.

40. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

the cutting-room floor). But in the real world, litigation is more complex, involving multiple claims for relief that implicate a mix of legal theories and have different merits. Some claims succeed; others fail. Some charges are frivolous; others (even if not ultimately successful) have a reasonable basis. In short, litigation is messy, and courts must deal with untidiness in awarding fees.<sup>41</sup>

The analogy is prologue to a resolution that allows civil rights litigants to receive attorney's fees for claims that, although unsuccessful, were nonetheless non-frivolous. On her way to that resolution, Kagan introduces two defendants, "call them Vice and Rice," only one of whom faced both frivolous and non-frivolous claims.<sup>42</sup> She is deliberately blending reality with her fiction, since Vice is the name of one actual defendant in the case, in order to illustrate the basis for the Court's resolution of the "messy" claims issue. Elsewhere, Kagan invokes television rather than the movies, describing a case as "little more than a rerun" of the relevant precedent.<sup>43</sup> In a campaign finance case, she reaches for a fairy tale metaphor to explain that "[t]he difficulty, then, is in finding the Goldilocks solution – not too large, not too small, but just right."<sup>44</sup> She introduces a history of sentencing jurisprudence by noting that "[a]lficionados of our sentencing decisions will recognize much of the story line."<sup>45</sup> And she finds that admitting certain evidence "would end-run the Confrontation Clause, and make a parody of its strictures."<sup>46</sup> The submerged theme of such references is that legal opinions are also, like film and fiction, narratives that are most effective when they engage their readers.

In the same spirit, Kagan draws on the vocabulary of gambling to illustrate her points. Describing a circuit split on an issue of immigration law, she notes that, after two other circuits rejected the Ninth Circuit's position, it nonetheless "doubled down on its contrary view."<sup>47</sup> Explaining the basis for the Court's rejection of a litigant's interpretation of a statute, she relies on poker terms to conclude "[w]e think that sees, raises, and bests Novo's argument."<sup>48</sup> And, in a recurrent metaphor, she compares the Bureau of Immigration Appeals' method of determining whether an alien may be granted discretionary relief from deportation to a coin toss. "If," she observes, "the BIA proposed to narrow the class of deportable aliens eligible to seek § 212(c) relief by flipping a coin – heads an alien may apply for relief, tails he may not – we would reverse the policy in an instant."<sup>49</sup> The statutory distinction relied on is "as extraneous to the merits of the case as a coin flip would be."<sup>50</sup> A record of reliance on that policy is unpersuasive

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41. *Fox v. Vice*, 131 S. Ct. 131 S. Ct. 2205, 2213-14 (2011).

42. *Id.* at 2215.

43. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011).

44. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2832 (2011).

45. *Tapia v. United States*, 131 S. Ct. 2382, 2386 (2011).

46. *Williams v. Illinois*, 132 S. Ct. 2221, 2269 (2012).

47. *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2016 (2012).

48. *Caraco Pharm. Lab., Ltd. v. Novo Nordisk*, 132 S. Ct. 1670, 1682 (2012).

49. *Judulang v. Holder*, 132 S. Ct. 476, 485 (2011).

50. *Id.* at 486.

support since “[t]o use a prior analogy, flipping coins to determine §212(c) eligibility would remain as arbitrary on the thousandth try as on the first.”<sup>51</sup> Finally, she rejects “cheapness” as a rationale to save the policy: “(If it could, flipping coins would be a valid way to determine an alien’s eligibility for a waiver.)”<sup>52</sup> By providing a powerful visual image, the coin toss analogy strengthens the Court’s rejection of what it finds an equally arbitrary decision-making method. Attorneys may enjoy, but do not need, such imagery to understand judicial analyses. Kagan seems to include them in part in the hope that she may number interested amateurs as well as legal professionals among readers of Court opinions.<sup>53</sup>

Kagan has other strategies of engagement that she frequently uses to underscore an important point. One of her favorites, the use of parenthetical commentary on her own argument, has become a signature of her style. These interjections function like the asides a speaker uses to establish a bond with a listener – a change of tone that suggests a shared sensibility. Kagan may use these parentheticals to strengthen a point, as when, writing for the Court to strike down mandatory life sentences without parole for juveniles, she describes the special nature of children by referring to “their distinctive (and transitory) mental traits and environmental vulnerabilities”<sup>54</sup> and later makes clear the drastic consequence of the rejected policy by calling it “a sentence of life (and death) in prison.”<sup>55</sup> She questions a majority assertion by noting that it is made “(without explaining how this can be true)”<sup>56</sup> and then debunks the majority’s reliance on language from a government website “(written by who-knows-whom?).”<sup>57</sup> She may use a parenthetical to highlight for the reader what she considers an indisputable point by adding

51. *Id.* at 488.

52. *Id.* at 490.

53. It is not surprising that Kagan, known as a fierce New York Mets fan, also uses occasional sports imagery, though not always with complete success. She observes that “[a] trial court has wide discretion when, but only when, it calls the game by the right rules.” *Fox v. Vice*, 131 S. Ct. 2205, 2217 (2011). She refers approvingly to “[o]ur more essential point” that “has less gamesmanship about it.” *Caraco*, 132 S. Ct. at 1682. Most emphatically, though, she recognizes the limits of her own sports imagery when she concludes her campaign finance dissent by insisting that “[t]ruly, democracy is not a game.” *Arizona Free Enter. Club’s Freedom Club PAC*, 131 S. Ct. 2806, 2846. In a particularly vivid dissenting passage that combines sport and firearms imagery, Kagan builds her charge against the majority: “As against all this, the majority claims to have found three smoking guns that reveal the State’s true (and nefarious) intention to level the playing field. But the only smoke here is the majority’s and it is the kind that goes with mirrors.” *Id.* at 2843.

On other occasions, Kagan is not quite so successful in avoiding that danger. For example, immediately after noting that “the Government also emphasizes the comparable-grounds rule’s vintage,” she adds that “[a]s an initial matter, we think this is a slender reed to support a significant government policy.” *Judulang*, 132 S. Ct. at 488. In the same opinion, she observes that “the BIA tried to have it both ways” before concluding that “the BIA’s cases were all over the map.” *Id.*

54. *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

55. *Id.* at 2567.

56. *Arizona Free Enter.*, 131 S. Ct. at 2840.

57. *Id.* at 2844.

energetically “(no controversy there!)”<sup>58</sup> or, in a tone of mild irony, observe that the Quiet Title Act “concerns (no great surprise) quiet title actions.”<sup>59</sup> The informal language in these two examples serves to draw writer and reader together in their shared appreciation of the obvious.

At other times she uses the parenthetical to characterize or qualify her own position. Criticizing the Court’s admission of laboratory test results without the analyst’s testimony as a Confrontation Clause violation, she finds that this “approach – no less (perhaps more) than the confrontation-free methods of presenting forensic evidence we have formerly banned – deprived” the defendant of his Sixth Amendment rights.<sup>60</sup> When she compares the test applied in this case to similar precedent, she finds that any distinction “amounts to (maybe) a nickel’s worth of difference” and that “the variances are no more (probably less)” than those the Court has earlier rejected.<sup>61</sup> Here the parenthetical phrases suggest that she is actually more restrained than she might be in rejecting the Court’s position and thus a more credible critic. This is the reverse of hyperbole, a deliberate understatement offered to the reader as a credential of trustworthiness.

Kagan employs another rhetorical strategy, a pedagogic staple for making sure that an audience is alerted to the important points: the simple but effective device of repetition. In the juvenile penalty case, she echoes the Court’s earlier language to refute it, finding that “if, as *Harmelin* recognized, ‘death is different,’ children are different too.”<sup>62</sup> She repeatedly makes double use of a word or phrase to drive home her point: “to avoid avoidance”;<sup>63</sup> “courts should think hard, and then think hard again”;<sup>64</sup> and “differences that make no difference.”<sup>65</sup> There may be a slight variation, as in “a sentencing judge may never, ever”<sup>66</sup> or “we have never, not once,”<sup>67</sup> but the effect is almost identical. More dramatically, a number of these repetitions are triplets, with the key term used three times in close proximity: “In First Amendment Law, that difference makes a difference – indeed it makes all the difference,”<sup>68</sup> and, at greater length, “in authorizing one person to bring one kind of suit seeking one form of relief, Congress barred another person from bringing another kind of suit seeking another form of relief.”<sup>69</sup> More simply, in an opinion pointing out the potential consequences of the Court’s avoidance of certain qualified immunity claims, Kagan combines two forms of repetition: “Another plaintiff brings suit, and another court both awards immunity and bypasses the

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58. *Caraco*, 132 S. Ct. at 1686.

59. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2206 (2012).

60. *Williams*, 132 S. Ct. at 2265.

61. *Id.* at 2276.

62. *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012).

63. *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011).

64. *Id.* at 2032.

65. *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1458 (2011) (Kagan, J., dissenting).

66. *Tapia v. United States*, 131 S. Ct. 2382, 2389 (2011).

67. *Arizona Free Enter.*, 131 S. Ct. at 2837.

68. *Id.* at 2839.

69. *Match-E-Be*, 132 S. Ct. at 2209.



claim. And again, and again, and again.”<sup>70</sup> The effect is to illustrate the substantive point by embedding it in the rhetorical structure.

These rhetorical devices and diction choices combine to produce the conversational tone that Kagan has said she works to achieve. In a recent interview at the University of Richmond School of Law, she was candid about her stylistic goals. “It’s important that my opinions sound like me,” she told the audience, and to that end she writes them herself rather than delegating to her law clerks.<sup>71</sup> And she targets lay readers as well as legal professionals. “I try very hard,” she said of her opinion writing, “to make it understandable to a broad audience.”<sup>72</sup> She makes clear that her choice of diction is deliberate. “One way” of achieving her goal, she has found, is “to drop the legalese and try to express as people would in normal conversation.”<sup>73</sup> And she often meets that goal. When she feels that her colleagues on the other side are misinterpreting her dissent, she observes crisply that “the plurality must be reading someone else’s opinion.”<sup>74</sup> Responding to the majority’s assumption that the Indiana legislature simply forgot to remove a crucial phrase in amending a statute, she notes that “if so, the legislature forgot four more times to correct its error.”<sup>75</sup> These are rejoinders that might easily be heard in ordinary conversational sparring. Dissenting from the Court’s acceptance of Arizona’s school tuition tax credit plan, she observes that “[i]t is, after all good fun to spend other people’s money,” a formulation that would fit comfortably into a family financial discussion.<sup>76</sup>

Although these separate examples of Kagan’s deliberately colloquial style are engaging, the cumulative effect of her rhetorical strategy can be considerably more potent. Not surprisingly, that effect appears most emphatically in a spirited dissent joined by her three liberal colleagues, Justices Ginsburg, Breyer, and Sotomayor. The issue in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett* is the constitutionality of a state election statute that authorizes the payment of public funds to a candidate in order to match threshold amounts spent by a privately financed opponent.<sup>77</sup> Under the state’s Clean Election Act, a publicly financed candidate receives an initial lump-sum to, as Kagan puts it, “get his campaign off the ground.”<sup>78</sup> As the candidate’s privately financed opponent spends money on his campaign, the state matches every dollar with ninety-four cents in public funds, up to three times the initial lump-sum payment. The dissenters argue that this scheme is both constitutionally valid and practical as a means of preventing corruption or its appearance in the election process.

Having set out the substance of the majority’s position—that the matching fund provision has the prohibited effect of restricting speech by the privately funded

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70. *Camreta*, 131 S. Ct. at 2031.

71. Interview, *supra* note 14.

72. *Id.*

73. *Id.*

74. *Williams v. Illinois*, 132 S. Ct. 2221, 2271 (2012).

75. *Sykes v. United States*, 131 S. Ct. 2267, 2295 (2011) (Kagan, J., dissenting).

76. *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1458 (2011) (Kagan J., dissenting).

77. 131 S. Ct. at 2813.

78. *Id.* at 2832.

candidate, since any money he spends will be matched, up to a point, by the state—Kagan proceeds to dismantle that argument by speaking directly to the reader. Although she writes for three colleagues, Kagan speaks as an individual, repeatedly using first person pronouns. Thus, she tells the reader that “I will not quarrel” and “My guess is” and “I will take on faith.”<sup>79</sup> Even a footnote begins with “I will note” and continues in the first person voice, as she insists that “I understand” and “I will not belabor the issue.”<sup>80</sup> It is here that Kagan directly engages the reader as listener, asking him, in a passage quoted earlier, to “[p]retend that you are financing your campaign through private donations” and to consider which of two schemes is preferable.<sup>81</sup> The dissent has now created a conversation of sorts, with the reader pressed to play an actively responsive role. The exchange ends with Kagan’s “Me too,” assuming that the reader has agreed with her point that even the privately financed candidate would choose “mostly” to control the amount his opponent receives by controlling how much he himself spends.<sup>82</sup>

As she concludes this section of her argument, Kagan again relies on the intelligence—and memory—of the reader, noting that “I doubt that I have to reiterate that the Arizona statute imposes no restraints on any expressive activity.”<sup>83</sup> She and the reader are by now in perfect agreement. Moreover, the reader is complimented for the good sense to see through the majority’s weak rationale for striking down the statute. “If an ordinary citizen,” she observes, “without the hindrance of a law degree, thought this result an upending of First Amendment values, he would be correct.”<sup>84</sup> The lay reader is not merely the equal of a majority Justice in comprehending the way the statute works. He is actually better able to penetrate the fog of legal argument and grasp the right result precisely because he is unhampered by the majority’s technical preconceptions. Just as Kagan talks to the reader in the language of daily life, she also presents legal issues as practical problems that can be solved without sophisticated jurisprudential expertise. All she asks of the reader is the application of logic, common sense, and human experience.

It is not surprising that Kagan often uses a similarly pragmatic perspective when assessing legal standards. Writing for a unanimous Court in *Judulang v. Holder*<sup>85</sup> to find the Board of Immigration Appeals’ standard for discretionary relief from deportation arbitrary and capricious, she again relies on common sense rather than exclusively on legal exegesis. She opens her analysis by announcing that “[t]he legal background of this case is complex, but the principle guiding our decision is anything but.”<sup>86</sup> The syntax of the sentence reinforces its point. The concluding phrase, “anything but,” is not only colloquial in tone but also grammatically casual

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79. *Id.* at 2837.

80. *Id.* at 2837, n.6.

81. *Id.* at 2838.

82. *Id.*

83. *Id.* at 2839. Distinguishing a precedent that the majority has invoked, Kagan again speaks in the first person to underscore her point that the majority’s reading of that precedent actually supports her own position as well. “Let me be clear,” she tells the reader, “[t]his is not my own idiosyncratic or *post hoc* view.” *Id.* at 2840.

84. *Id.* at 2835.

85. 132 S. Ct. 476, 479 (2011).

86. *Id.* at 479.

in its use of a conjunction to end the sentence. She offers no adjective to contrast with “complex,” trusting the reader to understand her point. It is here that Kagan uses the coin-flipping analogy discussed earlier to underscore the disturbingly random quality of the current standard, a problem that even non-lawyers can readily grasp.<sup>87</sup>

In another unanimous opinion, this one finding no abuse of discretion in a district court’s denial of a prisoner’s request for new counsel, Kagan is faced with the need “to fill [a] statutory hole” by selecting an appropriate standard for deciding requests by capital defendants.<sup>88</sup> She rejects the prosecution’s proposed new theory in favor of applying the existing capital standard to non-capital defendants. “Inventiveness is often an admirable quality,” she observes, “but here we think the State overdoes it.”<sup>89</sup> Instead, “we prefer to copy something familiar than concoct something novel.”<sup>90</sup> The pairing of the two alliterative verbs—the straightforward “copy” with the pejorative “concoct”—alerts the reader to the contrast between the two strategies. Where one prudently adopts an established test, the other invents a new test that may prove to have unexpected consequences. These epigrammatic comments reflect Kagan’s belief that even technical legal issues can often be both resolved and expressed without resort to needlessly complicated formulations. Her diction reinforces her point: the prosecution “overdoes it” by introducing an unnecessary risk while the unanimous Court chooses the simpler and safer course.

Through her rhetorical strategies, Kagan has accomplished a feat in her first two Court terms that few of the Court’s Justices have matched. Adapting the classroom techniques that engage students by speaking to them in familiar diction and imagery, Kagan has crafted a voice that reaches not only those trained in the law but also those interested in its impact on their lives and their society. Just as she used humor to build bridges at her confirmation hearing, she now uses her colloquial style to put a human face on what, in the absence of cameras in the courtroom, has largely remained an aloof and austere institution. As Jeffrey Rosen, an early Kagan admirer, puts it, “her dissents often read like a really good *New York Times* op-ed.”<sup>91</sup> Like that really good op-ed, her opinions bridge the gap between legal doctrine and its practical consequences for her readers, allowing the Court’s broad national constituency of non-lawyers to grasp both the reasoning and the result of its decisions. If, as Kagan intends, her style allows her to reach lay readers, the Court’s most junior Justice may well turn out to be its most effective communicator, a valuable link between those who decide the law and those who are bound by it.

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87. *See supra* notes 47–48.

88. *Martel v. Clair*, 132 S. Ct. 1276, 1284 (2012).

89. *Id.* at 1285.

90. *Id.*

91. Jeffrey Rosen, *Strong Opinions*, THE NEW REPUBLIC (July 28, 2011), <http://www.newrepublic.com/article/politics/magazine/92773/elena-kagan-writings>. For another appreciation of Kagan’s prose style, *see* Stanley Fish, *A Dollar Is a Dollar: Elena Kagan’s Style*, N.Y. TIMES, (April 11, 2011, 8:30 PM), <http://opinionator.blogs.nytimes.com/2011/04/11/a-dollar-is-a-dollar-elena-kagans-style/>.