

University of Maryland Francis King Carey School of Law  
**DigitalCommons@UM Carey Law**

---

Endnotes


---

4-1-2015

# "The Hindrance of a Law Degree": Justice Kagan on Law and Experience

Laura Krugman Ray

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/endnotes>

 Part of the [Law and Philosophy Commons](#), [Legal Profession Commons](#), and the [Legal Writing and Research Commons](#)

---

## Recommended Citation

74 Md. L. Rev. Endnotes 10 (2015)

This Article from Volume 74 is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Endnotes by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

---

---

**“THE HINDRANCE OF A LAW DEGREE”: JUSTICE KAGAN ON  
LAW AND EXPERIENCE**

LAURA KRUGMAN RAY\*

Elena Kagan, the current United States Supreme Court’s newest Justice, has also proven to be its most innovative writer. In place of the usually dry and formal prose that readers of the Court’s opinions have long encountered (with Justice Scalia’s vigorous dissents and Chief Justice Roberts’s urbane observations the rare exceptions), she consistently leavens her judicial prose with an assortment of rhetorical devices. Her arsenal includes colloquial diction, direct invitations to the reader to participate in her analytic process, and vivid metaphors that link legal argument to the experience of everyday life. That stylistic approach is not merely decorative or playful. It is intended to bridge the gap between authoring Justice and lay reader, a strategy that Kagan has explicitly embraced. In a recent interview she said of her opinion writing that she “tr[ies] very hard to make it understandable to a broad audience.”<sup>1</sup> And “one of the ways” of reaching that audience is “to drop the legalese” and “try to express things in the way people would express it in normal conversation.”<sup>2</sup>

I have elsewhere written in detail about what I have called Kagan’s “doctrinal conversation,” her determined effort through these devices to make her opinions accessible and persuasive to readers unfamiliar with the language of the law.<sup>3</sup> In this article I go a step further and argue that Kagan’s rhetoric also suggests a more subversive position: that legal doctrine should, at its core, be grounded in the texture of common experience and understandable through the same lens that non-lawyers use to assess questions of responsibility and fairness. The Court’s holdings, in short, should make sense to lawyers and non-lawyers alike. If those holdings cannot be expressed persuasively in terms that non-lawyers can

---

© 2015 Laura Krugman Ray.

\* Professor of Law, Widener University School of Law, Ph.D., J.D., Yale University; A.B., Bryn Mawr College. I am grateful to Jean Eggen, Alan Garfield, and Philip Ray for their helpful readings of earlier drafts of this article.

1. Interview by Wendy Collins Purdue, Dean, University of Richmond School of Law with Justice Elena Kagan, Richmond, Va. (Sept. 20, 2012), <http://www.c-span.org/video/?308291-1/conversation-supreme-court-justice-elena-kagan>.

2. *Id.*

3. Laura Krugman Ray, *Doctrinal Conversation: Elena Kagan’s Supreme Court Opinions*, 89 IND. L.J. SUPP. 1 (2013).

appreciate, then perhaps they should not persuade the Justices who have been too quick to endorse them.

One of the most striking aspects of Kagan’s opinions is her insistence on prompting the reader to play an active role in reading the text rather than passively accepting a Justice’s expert analysis, even when that analysis is Kagan’s own. She may invite her reader simply to “consider”<sup>4</sup> an element of the case under review or challenge that reader to “suppose”<sup>5</sup> or “pretend”<sup>6</sup> or “imagine”<sup>7</sup> a variant of the accepted version of the case in order to reach a different outcome. More assertively, she may tell the reader to “put on blinders” and then “take off those blinders”<sup>8</sup> in order to grasp the full implications of a statutory subsection or instead to put two statutory sections “together—say, in the form of a syllogism, to make the point obvious.”<sup>9</sup> Sympathizing with the reader’s exertion in the latter case, she offers the reassurance that “[i]f you need to take a deep breath after all that, you’re not alone.”<sup>10</sup> This is a shared activity, one that makes the reader a silent partner in the decisionmaking process and prepares him to reject the other side’s tortuous argument. When Kagan, writing for the Court, concludes that “[i]t would be hard to dream up a more roundabout way of bifurcating judicial review,” the reader, whether lawyer or lay person, may well share the satisfaction of having earned a stake in that conclusion.<sup>11</sup>

Kagan’s occasional use of metaphor and simile serves a related role of engagement, allowing the lay reader to analogize a legal issue to familiar experience. In *Fox v. Vice*,<sup>12</sup> the Court faced the complicated question of when a defendant may recover fees under Section 1988 for expenses incurred defending against a civil rights suit raising both frivolous and non-frivolous claims.<sup>13</sup> Explaining why the statutory language alone fails to provide courts with clear-cut standards, Kagan offers a familiar simile:

These standards would be easy to apply if life were like the movies, but that is usually not the case. In Hollywood, litigation most often concludes with a dramatic verdict that leaves one party fully triumphant and the other utterly prostrate. The court in such

---

4. *Nat’l Meat Ass’n v. Harris*, 132 S. Ct. 965, 970 (2012).

5. *Match-E-Be-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2205 (2012).

6. *Arizona Free Enterprise Club’s PAC v. Bennett*, 131 S. Ct. 2806, 2838 (2010) (Kagan, J., dissenting).

7. *Sykes v. United States*, 131 S. Ct. 2267, 2290 (2011) (Kagan, J., dissenting).

8. *Id.* at 2293 (Kagan, J., dissenting).

9. *Kloeckner v. Solis*, 133 S. Ct. 596, 604 (2012).

10. *Id.* at 605.

11. *Id.*

12. 131 S. Ct. 2205 (2011).

13. *Id.* at 2211.

---

---

a case would know exactly how to award fees (even if that anti-climactic scene is generally left on 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. . . . In short, litigation is messy, and courts must deal with this untidiness in awarding fees.<sup>14</sup>

For the reader familiar with litigation only through the Hollywood version, the analogy serves as both a friendly introduction to the complexity of civil rights cases and a serious caution that courts have to deal with a far messier reality than filmmakers, who can simply delete unwieldy complications. Although that reality may not lend itself to the simplified approach of fictional courts, Kagan suggests that the problem, if not the solution, is still understandable by non-lawyers.

In *Judulang v. Holder*,<sup>15</sup> a case involving the disparate standards for providing waiver rights to excludable and deportable aliens under a federal statutory scheme, the Court confronted an even messier case, and Kagan finds an even more flexible analogy to illustrate the basis for its holding. Observing that eligibility for a waiver depended on “the chance correspondence” of two statutory schemes, she underscores the irrational quality of the challenged test by comparing it to another common experience: the coin toss.<sup>16</sup> If, she notes, the Board of Immigration Appeals had itself chosen the coin toss as its method of deciding which aliens could apply for a waiver—“heads an alien may apply for relief, tails he may not”—the Court wouldn’t hesitate to strike it down as arbitrary.<sup>17</sup> Extending her analogy to counter some of the government’s arguments in defense of its approach, she rejects the argument based on its “vintage,” noting that “flipping coins to determine Section 212(c) eligibility would remain as arbitrary on the thousandth try as on the first.”<sup>18</sup> Rejecting as well the government’s economic defense of its position, she notes that “cheapness alone cannot validate an arbitrary agency policy. (If it could, flipping coins would be a valid way to determine an alien’s eligibility for a waiver.)”<sup>19</sup> These refinements of the original image provide a sustained visual analogy for the Court’s rejection of the government’s argument, one that non-lawyers can grasp without mastering the complicated statutory framework.

---

14. *Id.* at 2213–14.

15. 132 S. Ct. 476 (2011).

16. *Id.* at 484.

17. *Id.* at 485.

18. *Id.* at 488.

19. *Id.* at 490.

Kagan has used a similar strategy in several other cases. Dissenting from a rape conviction, she has argued that the Confrontation Clause requires the direct testimony of the technician who produced the DNA profile linking the defendant to the crime, and thus the bare testimony of an analyst about the implications of that profile is insufficient.<sup>20</sup> “If the Confrontation Clause prevents the State from getting its evidence in through the front door,” she insists, “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.”<sup>21</sup> The front door or back door imagery, supported by the unwholesome implications of “sneak” and “trick,” brands the majority’s holding as an evasive ruse that even a lay reader can detect. Writing for the Court to reverse an enhanced sentence based on an incorrect reading of the relevant statute, Kagan notes that the lower court erred in viewing the crime “as containing an infinite number of sub-crimes corresponding to ‘all the possible ways an individual can commit’ it.”<sup>22</sup> To illustrate her point, she then offers, in an aside, a helpfully exaggerated analogy based on Clue, a board game familiar to both lay and legal readers: “(Think: Professor Plum, in the ballroom, with the candlestick? Colonel Mustard, in the conservatory, with the rope, on a snowy day, to cover up his affair with Mrs. Peacock?).”<sup>23</sup> The evocation of a childhood pastime in the sentencing context signals that the lower court’s unreasonably expansive interpretation is itself a misguided judicial game rather than a thoughtful reading of the statute. And in a recent dissent taking the majority to task for an interpretation of the Federal Arbitration Act that forecloses any avenue to relief for the petitioners’ antitrust claim, Kagan concludes her opinion with another vivid metaphor. “To a hammer,” she writes, “everything looks like a nail.”<sup>24</sup> The majority’s position is thus a blunt instrument applied without sufficient discrimination to reach a target unintended by the statutory scheme. Her image is brief and pithy, an efficient and effective way to make her point.

As the recent case of *Florida v. Jardines*<sup>25</sup> demonstrates, however, for Kagan an analogy can serve as something more than a single vivid image. At issue in *Jardines* was whether the detection of marijuana by a trained police dog from the porch of a private home is a search under the Fourth Amendment. Kagan opens her concurring opinion by announcing that

---

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

21. *Id.* at 2272.

22. *Descamps v. United States*, 133 S. Ct. 2276, 2290–91 (2013).

23. *Id.* at 2291.

24. *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013).

25. 133 S. Ct. 1409 (2013).

“[f]or me, a simple analogy clinches this case.”<sup>26</sup> She then presents that analogy, a detailed scenario that parallels *Jardines*’s facts:

A stranger comes to the front door of your home carrying super-high-powered binoculars. . . . He doesn’t knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home’s furthest corners. It doesn’t take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. Has your visitor trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has.<sup>27</sup>

The police dog, like the binoculars, is “a super-sensitive instrument,” and the fact that the instrument is “animal, not mineral” in no way undermines the analogy.<sup>28</sup> Expanding the comparison, she adds that highly trained police dogs “are to the poodle down the street as high-powered binoculars are to a piece of plain glass.”<sup>29</sup> Kagan bases her argument squarely—and entirely—on her invented scenario and its relation to the facts before the Court. “That case,” she assures the reader, “is this case in every way that matters.”<sup>30</sup>

Kagan’s reliance on analogical reasoning is scarcely surprising, since it bears some relation to her stated preference for the familiar over the novel. She makes that point expressly in *Martel v. Clair*,<sup>31</sup> where the Court was asked to adopt a tougher standard for substitution of new counsel in a criminal case.<sup>32</sup> In light of the State’s concession that its proposed test came, as Kagan puts it, “well, from nowhere,” she declines to venture into new territory.<sup>33</sup> “Inventiveness is often an admirable quality,” she muses, “but here we think the State overdoes it. . . . [We] prefer to copy something familiar than concoct something novel.”<sup>34</sup> The verb “concoct” efficiently conveys her skepticism toward unnecessarily creative legal arguments where reliable doctrine exists. In a similar spirit, she joins Justice Scalia’s majority opinion in *Jardines*, which relied on the police intent to conduct a search of the defendant’s home, but writes separately to ground her argument as well in the realm of familiar human (and canine) experience.

---

26. *Id.* at 1418.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. 132 S. Ct. 1276 (2012).

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

33. *Id.* at 1285.

34. *Id.*

That reliance on familiar experience is a recurring theme in Kagan’s opinions. In *Arizona Christian School Tuition Organization v. Winn*, Kagan dissented from the Court’s decision rejecting on standing grounds an Establishment Clause challenge to a law allowing taxpayers making voluntary contributions to a religious school to receive a state income tax credit.<sup>35</sup> In support of her view that *Flast v. Cohen*<sup>36</sup> clearly provided standing for the challenge, she offers what she terms “an example far afield from *Flast*.”<sup>37</sup> In her scenario, one with a familiar ring, the government decides to provide insolvent banks with hundreds of billions of dollars, and many taxpayers object strenuously:

In the face of this hostility, some Members of Congress make the following proposal: Rather than give the money to banks via appropriations, the Government will allow banks to subtract the exact same amount from the tax bill they would otherwise have to pay to the U.S. Treasury. Would this proposal calm the furor? Or would most taxpayers respond by saying that a subsidy is a subsidy (or a bailout is a bailout), whether accomplished by the one means or by the other? Surely the latter; indeed, we would think the less of our countrymen if they failed to see through this cynical proposal.<sup>38</sup>

The protesting taxpayers would have no difficulty seeing through the alternate proposal and, Kagan suggests, neither should the Court on the facts before it. “What ordinary people would appreciate,” she continues, “this Court’s case law also recognizes.” She explains how this is so by citing precedent for the view that “targeted tax breaks are often economically and functionally indistinguishable from a direct monetary subsidy.”<sup>39</sup> The common sense attributed to “ordinary people,” who would need no knowledge of legal precedent to see the right response to the statute at issue, here helps to trump the majority’s holding.

Kagan’s endorsement of common experience over legal expertise as an interpretive tool manifests itself in a number of ways. Applying a federal railroad statute, she is unmoved when “Alabama dresses up” its legal argument “in Latin” by relying on the interpretive canon *ejusdem generis*.<sup>40</sup> She finds instead that “the better version of Alabama’s claim reads entirely in English” and is much more persuasive.<sup>41</sup> And, interpreting a criminal flight statute, she observes that the Court does not “proceed by exploring

---

35. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

36. *Flast v. Cohen*, 392 U.S. 83 (1968).

37. *Ariz. Christian School Tuition Org.*, 131 S. Ct. at 1455 (Kagan, J., dissenting).

38. *Id.* at 1455–56.

39. *Id.* at 1456.

40. *CSX Transp., Inc. v. Ala. Dep’t of Revenue*, 131 S. Ct. 1101, 1113 (2011).

41. *Id.*

whether some platonic form of an offense—here, some abstract notion of vehicular flight—satisfies ACCA’s residual clause. We instead focus on the elements of the actual state statute at issue.”<sup>42</sup>

Not surprisingly, Kagan’s approach leads her to formulate her legal arguments in terms accessible to both her legal and lay readers. In *Williams v. Illinois*,<sup>43</sup> the Confrontation Clause case discussed earlier, the issue was whether an expert witness should be permitted to testify about the implications of the defendant’s DNA profile when the technician who had created the profile did not take the stand. Addressing that issue in her dissent, Kagan asks her readers to “[c]onsider a prosaic example not involving scientific evidence”.<sup>44</sup>

An eyewitness tells a police officer investigating an assault that the perpetrator had an unusual, star-shaped birthmark over his left eye. The officer arrests a person bearing that birthmark (let’s call him Starr) for committing the offense. And at trial, the officer takes the stand and recounts just what the eyewitness told him. Presumably the plurality would agree that such testimony violates the Confrontation Clause unless the eyewitness is unavailable and the defendant had a prior opportunity to cross-examine him. Now ask whether anything changes if the officer couches his testimony in the following way: “I concluded that Starr was the assailant because a reliable witness told me that the assailant had a star-shaped birthmark and, look, Starr has one just like that.”<sup>45</sup>

Justice Alito, writing for the *Williams* majority, held that the expert’s testimony about the DNA profile was offered “solely for the purpose of explaining the assumptions on which” her own opinion rested and should “thus fall outside the scope of the Confrontation Clause.”<sup>46</sup> By translating the subject of the testimony from the specialized knowledge of the two analysts to the conversation of a police officer with a witness, Kagan reframes the issue. In her version, the police officer is clearly relying on what he has heard from the absent witness, and thus his testimony should be precluded. The “prosaic example” suggests that the majority has been led astray by the scientific window dressing of the testimony and has failed to focus on the substance of the exchange. “Allowing the admission of this evidence,” Kagan concludes, “would end-run the Confrontation Clause, and make a parody of its strictures.”<sup>47</sup>

---

42. *Sykes v. United States*, 131 S. Ct. 2267, 2289 (2011).

43. 132 S. Ct. 2221 (2012).

44. *Id.* at 2269 (Kagan, J., dissenting).

45. *Id.*

46. *Id.* at 2228 (majority opinion).

47. *Id.* at 2269 (Kagan, J., dissenting).



In light of her preference for accessible arguments, it should be no surprise that Kagan prefers to root her opinions in concrete situations rather than theoretical abstractions. She is skeptical of assumptions that “would have no real-world meaning or application” and would “serve[] only to address a make-believe problem.”<sup>48</sup> Criticizing the majority for basing its interpretation of the Fair Labor Standards Act on a mistaken view of the law, she plays out the consequences. “The decision,” she argues, “would turn out to be the most one-off of one-offs,” and she advises her readers to act accordingly.<sup>49</sup> “Feel free,” she instructs, “to relegate the majority’s decision to the furthest reaches of your mind: The situation it addresses should never again arise.”<sup>50</sup>

Kagan prefers to derive her own assumptions from ordinary and recurring experience. When she asks her readers to “assume” that a defendant has given up his right to trial by pleading guilty to a lesser offense, she adds parenthetically “(as happens every day)” to reassure them that this is a commonplace event.<sup>51</sup> And although “a court blessed with sufficient time and imagination could devise a laundry list of potential ‘weapons’” not included in the applicable sentencing statute, such imaginative additions are not relevant to the case.<sup>52</sup> “But the thing about hypothetical lists,” she observes dryly, “is that they are, well, hypothetical.”<sup>53</sup> When she offers her own hypothetical list of the various ways in which a landowner could pay an obligation imposed by a government water district—“a checking account, shares of stock, a wealthy uncle”—the options are both familiar and whimsical.<sup>54</sup> Unlike the hypothetical weapons list, which would depart from the statutory framework, Kagan’s list is presented purely to illustrate her point that the landowner was not required to meet his obligation by surrendering part of his property.

A recent opinion illustrates her method of engaging the lay reader directly in the Court’s decisionmaking process by drawing on familiar human experiences. In *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk*,<sup>55</sup> the outcome depended on the meaning of the common phrase

---

48. *Genesis Healthcare Corporation v. Symczyk*, 133 S. Ct. 1523, 1533, 1535 (2013) (Kagan, J., dissenting).

49. *Id.* at 1533.

50. *Id.*

51. *Descamps v. United States*, 133 S. Ct. 2276, 2289 (2013).

52. *Id.* at 2290.

53. *Id.*

54. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2607 (2013) (Kagan, J., dissenting).

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

“not an.”<sup>56</sup> When Novo sued Caraco, the manufacturer of a generic drug that would compete with Novo’s own product, for infringement of its patent, Caraco in turn counterclaimed. The relevant statute authorizes a counterclaim “on the ground that the patent does not claim . . . an approved method of using the drug.”<sup>57</sup> The question before the Court was whether the statutory language “not an” meant, as Novo argued, “not any” or, as Caraco argued, meant “not a particular one.”<sup>58</sup> Addressing this interpretational dilemma, Kagan writing for the Court decided that the answer was ““It depends.””<sup>59</sup> To explain why, under the statute’s language, Caraco should prevail, she offers an extended illustration of the way context determines meaning:

If your spouse tells you he is late because he “did not take a cab,” you will infer that he took no cab at all (but took the bus instead). If your child admits that she “did not read a book all summer,” you will surmise that she did not read any book (but went to the movies a lot). And if a sports-fan friend bemoans that “the New York Mets do not have a chance of winning the World Series,” you will gather that the team has no chance whatsoever (because they have no hitting). But now stop a moment. Suppose your spouse tells you that he got lost because “he did not make a turn.” You would understand that he failed to make a particular turn, not that he drove from the outset in a straight line. Suppose your child explains her mediocre grade on a college exam by saying that she “did not read an assigned text.” You would infer that she failed to read a specific book, not that she read nothing at all on the syllabus. And suppose that a lawyer friend laments that in her last trial, she “did not prove an element of the offense.” You would grasp that she is speaking not of all the elements, but of a particular one. The examples could go on and on, but the point is simple enough: When it comes to the meaning of “not an,” context matters.<sup>60</sup>

In this passage Kagan asks the reader to consider a series of ordinary conversations with a spouse, a child, or a friend, confident that in each instance the reader will interpret those conversations in the same way that the Court is interpreting the statute’s text. No legal expertise is required to grasp the point; in fact, the absence of legal expertise, Kagan suggests, helps to clarify why the Court should answer as it does and accept Caraco’s argument. The passage bridges two varieties of speech—personal and

---

56. *Id.* at 1680–81.

57. *Id.*

58. *Id.* at 1681.

59. *Id.*

60. *Id.*

technical—to resolve a disputed provision by accepting “the most natural reading of a statute.”<sup>61</sup>

Kagan uses a variant of the same strategy in *American Express Co. v. Italian Colors Restaurant*,<sup>62</sup> where she dissents from the Court’s decision enforcing an arbitration provision barring a restaurant owner from pursuing his antitrust claim.<sup>63</sup> She opens her opinion with what she terms “a nutshell version of the case, unfortunately obscured in the Court’s decision” effectively insulating Amex from any antitrust liability.<sup>64</sup> She then adds “the nutshell version of today’s opinion, admirably flaunted rather than camouflaged: Too darn bad”; that is, there is no recourse available for the plaintiff.<sup>65</sup> Those “nutshell” versions suggest that even a reader unacquainted with the complicated doctrines of antitrust law should be able to grasp the basic unfairness of the majority decision. After setting out the Court’s precedents, she offers the reader a clearly defined choice between her position and the majority’s: “So down one road: More arbitration, better enforcement of federal statutes. And down the other: Less arbitration, poorer enforcement of federal statutes. Which would you prefer? Or still more aptly: Which do you think Congress would?”<sup>66</sup> The reader is now pressed into service as a surrogate decisionmaker, first asked to choose his preferred outcome and then, more challengingly, to choose the outcome that Congress, in passing the statute, would prefer. The doctrinal intricacies of the case are transformed to a clear-cut choice between protecting Amex and protecting the small business owner. And the reader, now the decisionmaker, has been led inevitably to the common sense conclusion that the Court has rejected.

Kagan’s reliance on ordinary experience as a valid basis for legal analysis is a recurring theme in her opinions. In a second case dealing with a police dog’s detection of drugs, this time in the defendant’s automobile, she defines the probable cause standard as “whether all the facts surrounding a dog’s alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.”<sup>67</sup> In this case, there is substantial evidence of the dog Aldo’s training and prior success in the detection of drugs. Since “[a] sniff is up to snuff when it meets” the probable cause test,

---

61. *Id.* at 1682.

62. 133 S. Ct. 2304 (2013).

63. *Id.* at 2312.

64. *Id.* at 2313.

65. *Id.*

66. *Id.* at 2315.

67. *Florida v. Harris*, 133 S. Ct. 1050, 1058 (2013).

“Aldo’s did.”<sup>68</sup> In her *Williams* dissent she complains that neither Justice Alito’s plurality opinion nor Justice Breyer’s concurrence on the damaging impact of requiring the DNA analyst to testify “provides any evidence, even by way of anecdote,” suggesting that she would have been receptive to the latter commonplace source.<sup>69</sup> And writing for the majority in a case dealing with public access to the Navy’s maps of explosives, she rejects the argument that those maps fall within the category of protected personnel files because “[n]o one staring at these charts of explosions and using ordinary language would describe them in this manner.”<sup>70</sup> Once again, the lay person’s perspective is a valid basis for resolving a legal question.

Perhaps Kagan’s strongest endorsement of the ordinary person’s ability to assess and resolve legal issues comes in *Arizona Free Enterprise Club Freedom PAC v. Bennett*,<sup>71</sup> where the Court struck down Arizona’s campaign finance matching fund provision as a burden on political speech under the First Amendment.<sup>72</sup> Under that provision, the candidate choosing to accept public financing first receives a lump-sum payment from the state. Thereafter, “for every dollar his privately funded opponent (or the opponent’s supporters) spends over the initial subsidy, the publicly funded candidate will—to a point—get an additional 94 cents.”<sup>73</sup> His public funding is capped at three times the initial lump sum, however much money his privately funded rival spends. Chief Justice Roberts, writing for a five-Justice majority, found that the state’s “cash subsidy, conferred in response to political speech, penalizes speech” by the privately funded candidate.<sup>74</sup>

In sharp contrast, Kagan’s dissent, joined by Justices Ginsburg, Breyer, and Sotomayor, finds that, far from burdening speech, the Arizona law has created what she calls “the Goldilocks solution, which produces the ‘just right’ grant to ensure that a participant in the system has the funds needed to run a competitive race.”<sup>75</sup> The fairy tale reference suggests that the law has a kind of childlike simplicity in its determination to treat all competing candidates fairly. “Except in a world gone topsy-turvy,” she argues, “additional campaign speech and electoral competition is not a First Amendment injury.”<sup>76</sup> The petitioners attacking the statute “are making a novel argument that Arizona violated *their* First Amendment rights by disbursing funds to *other* speakers even though they could have received

---

68. *Id.*

69. *Williams v. Illinois*, 132 S. Ct. 2221, 2275 n.6 (Kagan, J., dissenting).

70. *Milner v. Department of the Navy*, 131 S. Ct. 1259, 1269 (2011).

71. 131 S. Ct. 2806 (2011).

72. *Id.* at 2828–2829 (Kagan, J., dissenting).

73. *Id.* at 2832.

74. *Id.* at 2821.

75. *Id.* at 2832.

76. *Id.* at 2833.

(but chose to spurn) the same financial assistance.”<sup>77</sup> In an appeal to the non-legal universe, she observes that “[s]ome people might call that *chutzpah*.”<sup>78</sup>

Placing herself squarely among those people, she offers her strongest endorsement of the lay person’s ability to reject legal subterfuge and reach the heart of the matter: “If an ordinary citizen, without the hindrance of a law degree, thought this result an upending of First Amendment values, he would be correct.”<sup>79</sup> It is the legal blinders worn by the majority that prevent its members, all apparently hindered by their law degrees, from seeing the simple fairness of Arizona’s solution. Turning directly to those perceptive ordinary citizens, she offers them a choice of campaign finance approaches:

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.<sup>80</sup>

In Kagan’s scenario, the non-lawyers once again have penetrated the legal fog to see what the members of the majority have missed—that Arizona’s plan actually gives the privately funded candidate some control over how much money his opponent receives. When Kagan joins in the conversation with her “Me too” response, she is taking her place among the commonsensical lay people who grasp the way the campaign finance law will actually operate.

Kagan is not the first member of the Court to appreciate the importance of communicating directly with lay readers as well as lawyers. Chief Justice Warren specifically instructed the clerk assigned to draft the Court’s opinion in *Brown v. Board of Education*<sup>81</sup> to produce a text that would be “readable by the lay public.”<sup>82</sup> And Hugo Black instructed his law clerk that an opinion should be written so that ““your momma”” could understand it.<sup>83</sup> Justice Kagan is, however, the first Justice to adopt that perspective as a central element of her jurisprudence, not only in the language she uses but, more fundamentally, in the way she crafts her arguments. Since the law is grounded in human experience, she suggests,

---

77. *Id.* at 2835.

78. *Id.*

79. *Id.*

80. *Id.* at 2838.

81. 347 U.S. 483 (1954).

82. BERNARD SCHWARZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 97 (1983).

83. ROGER NEWMAN, *HUGO BLACK* 325 (1994).

the Court's decisions, properly expressed, should reach and persuade both the lay and legal communities. And, in her brief tenure on the Court, she has crafted a jurisprudential voice that speaks to both.