

The Discreet Uniter: An Analysis of Elena Kagan's Role on the Roberts Court

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Eleven years have passed since Elena Kagan's appointment to the United States Supreme Court. Kagan's confirmation hearings were stifled with doubts concerning her lack of experience practicing law and outright absence of judicial experience. Nevertheless, past colleagues, mentors, and former President Obama all endorsed Kagan's intellectual prowess and her particular knack for forging consensus. Since her appointment, doubts regarding the Justice's qualifications to apply justice under the law have gradually dissipated. This article aims to identify Kagan's success through examining her role as I) an advocate for democracy, II) her textualist pragmatism, and III) her role as an uniter on the Court.

Pragmatic, narrow-ruling, impartial, consensus-building, and clever. These adjectives could all be used to describe Justice Elena Kagan. Kagan is neither the subject of a Tumblr blog⁴⁷ nor a dazzling DC star. A poll conducted by the American Council of Trustees and Alumni found that only 44% of Americans could identify Kagan as a Justice of the U.S. Supreme Court.⁴⁸ Evidently, Kagan does not have the recognizability of some of her current or former colleagues. Yet this Upper West Side New Yorker has revealed herself to be the Supreme Court's quiet and clever linchpin during her tenure thus far. The keys to Kagan's success largely stem from her jurisprudence, authoring style, and unique ability to forge consensus among her increasingly divided colleagues.

Jurisprudence

Examining Kagan's jurisprudence is essential to understanding what makes her unique from her colleagues.⁴⁹ Kagan's jurisprudence is unusual in that it is grounded in the principles of *textualism*, a judicial method that

46 Brandeis University Undergraduate, Class of 2025.

47 See, Collaborative Platform. "Notorious R.B.G." *Tumblr*. 2013. <https://notoriousrbg.tumblr.com/>.

48 American Council of Trustees and Alumni. "A Crisis in Civic Education." *GoActa.Org*, 2016.

https://www.goacta.org/wp-content/uploads/ce/download/A_Crisis_in_Civic_Education.pdf

49 Jurisprudence is a legal theory that a judge utilizes to apply law.



interprets laws through the word choice of the legislator.⁵⁰ Conservative judges typically utilize this jurisprudence to conserve the role of the Judiciary because it preserves a law's primary language; traditionally resulting in a narrower ruling. Hence, the term 'conservative' refers to the circumscribed outcomes resulting from *textualism*, rather than the political Conservatism associated with the Republican party. Kagan's decisions differ from the traditional use of *textualism* because she uses the principle to interpret a law and then apply the interpretation on a case-by-case basis, keeping in mind how the law will serve itself in practice. Kagan's decisions remain pragmatic, moderate, and reasonable by utilizing this kind of judicial philosophy. Kagan garners intellectual respect from both her conservative and liberal-minded colleagues because she's a grounded textualist who doesn't stray far from the primary words of the legislator, as well as a pragmatist whose judgments are sensibly sound and founded in applicability.

In sum, Kagan's jurisprudence is one of a reasonably-minded judge; which allows her to view cases in a uniquely fair fashion; free from strict ideological constraints. Professor Kate Shaw of the Cardozo School of Law asserted that Kagan's jurisprudence is one of "a common-law judge who takes each case as it comes to her. She's sort of a judge's judge."⁵¹ Kagan doesn't reside on either ideological extreme of the judicial spectrum, rather closer to the center. This has led her to forge consensus with much more ease than some of her more ideologically hard-minded colleagues.

Understanding Kagan's jurisprudence allows for a holistic understanding of her role on the Roberts Court. The following sections of this article will expand on her role as an advocate for democracy and how her unique jurisprudence has united both sides of the spectrum in the Supreme Court.

An Activist for Democracy

Kagan is by no means a "people's lawyer" in the same breath as Justices Ginsburg, T. Marshall, or Brandeis. Yet, court-watchers were

50 Nelson, Caleb. "What is Textualism?" Virginia Law Review. September 2, 2013. <https://www.virginialawreview.org/articles/what-textualism/>.

51 Talbot, Margaret. "Is the Supreme Court's Fate in Elena Kagan's Hands?" The New Yorker, November, 11, 2019. sec. Profiles, <https://www.newyorker.com/magazine/2019/11/18/is-the-supreme-courts-fate-in-elena-kagans-hands>



offered an exclusive glimpse of what invigorates the Justice by virtue of her impassioned dissent in *Rucho v. Common Cause* (2019). *Rucho* encompassed two cases of gerrymandering in North Carolina and Maryland, where voter suppression materialized due to congressional districts drawn to appease political outcomes. The majority opinion, authored by Chief Justice John Roberts, argued that “a ‘political question’... [is] nonjusticiable—outside the courts’ competence and therefore beyond the court’s jurisdiction.”⁵² In an uncharacteristically sharp dissent, Kagan disputed that the Judiciary is bound by an active pledge to protect the democratic process from politically charged harm. Appealing to the very essence of representative republican democracy, Kagan wrote:

...partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power is fundamentally from the people... They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.⁵³

The dissent, dripping in impassioned similarity to the dissenting style of her former colleague Justice Ginsburg, marked one of the few occasions where Kagan has so viscerally rejected a majority’s opinion. In her quest for plurality, the Justice has not dissented more than four times per term and she has yet to file more than three concurrences in one term.⁵⁴ Kagan’s dissents convey a heavier significance than some of her other colleagues because so few are issued per term. Less is more in terms of Kagan’s dissents; if she does dissent, it is due to a fundamentally rudimentary argument that she cannot align herself with. In Kagan’s eyes, *Rucho v. Common Cause* overstepped the bindings of the Framers’ vision for this republic. Kagan’s tone was that of a gutted Justice, ending her dissent by stating, “with respect but deep sadness, I dissent.”⁵⁵

52 *Rucho v. Common Cause*, 588 U.S. 422 (2019).

53 *Rucho v. Common Cause*, 4.

54 Ballotpedia. “Elena Kagan,” Ballotpedia.Org, 2020. https://ballotpedia.org/Elena_Kagan

55 *Rucho v. Common Cause*, 72.



In the Court's 2020 term, Kagan voted with the majority 75% of the time.⁵⁶ Her colleagues take note when she is among the minority, chiefly when she's the author of the dissent. Kagan favors unanimity as a method of safeguarding the Court's legitimacy, often phrasing her majority opinions in the narrowest sense, so that a majority of seven justices or more can be obtained. Her technique is elementary yet effective: adhere to the text, and remain practical.

An Atypical Textualist Who Directs Novel Alliances

Statutory interpretation, the term used to describe adhering to the primary text of a law, is traditionally considered a core principle among conservative judges. Yet Kagan's use of it has enabled her decisions to remain equitable and has even earned a conservative colleague's vote on several occasions. Perhaps the optimal illustration of Kagan's adherence to statutory interpretation is exemplified by her dissent in *Yates v. United States* (2015), which saw the conservative Justices Scalia, Thomas, and Kennedy sign on to her opinion.⁵⁷ *Yates* centered around a fisherman, John L. Yates, and his crew, who ventured into the federal waters off the Gulf of Mexico. Once the fishermen returned to the harbor, federal field officer John Jones measured a group of fish that appeared to be less than the mandated twenty inches. Jones issued Yates a citation, informing Yates that the National Marine Fisheries Service would confiscate the fish upon the ship's docking. Yates and co. threw the fish overboard and reinstated a larger group of fish in direct violation of Jones' instructions. Through criminal law, 18 U. S. C. §1519, Yates was charged with falsification and destruction of evidence.⁵⁸ The majority, authored by Justice Ginsburg, argued that Yates was not in violation of 18 U. S. C. §1519 because Congress intended the phrase "tangible object" to pertain solely to objects of "financial-fraud mooring... [a tangible object] must be one used to record or preserve information."⁵⁹ In a witty dissent, Kagan argued the plain language stated:

the term "tangible object" means the same thing in §1519 as it means in everyday language—any object capable of being touched... The term "tangible object" is broad, but clear... When Congress has not

56 BallotPedia. "Elena Kagan," Ballotpedia.Org, 2020. https://ballotpedia.org/Elena_Kagan

57 *Yates v. United States*, 574 U.S. 528 (2015).

58 *Yates v. United States*.

59 *Yates v. United States*, 5.



supplied a definition, we generally give a statutory term its ordinary meaning.⁶⁰

The dissent flawlessly captures the universality of Kagan’s textualist outlook in combination with her *pragmatism*. By examining the plain text of §1519, Kagan implemented a common-law approach to a reasonably candid circumstance. The synthesis of *textualism* and *pragmatism*, showcased how Kagan utilizes the plain meaning of a legislated statute to apply to a case, so that the outcome would make more comprehensive sense in practice. Kagan’s unique approach to law has united her with Justices of opposing jurisprudence more commonly than all of her ideologically-like-minded comrades.⁶¹ In this dissent, Kagan even seized the accord of two of the staunchest originalists, Justices Scalia and Thomas, on the Court at the time.

Kagan’s unique ability to garner consensus by listening to opposing views ere to her tenure on the Court is best exemplified by her deanship at Harvard Law School. Kagan served as dean of Harvard Law between 2003 and 2009. Within those years, twenty-four full-time professors were hired, an astounding number considering a two-thirds supermajority is required to appoint all new faculty members.⁶² Believing that students should receive a holistic education, Kagan sought out conservative-minded professors to add to an overwhelmingly liberal faculty. When testifying before the Senate Judiciary Committee on her Supreme Court nomination, former Harvard Dean turned professor, Robert C. Clark stated, “it says something about the ability of the dean to build consensus.”⁶³ Expanding on Kagan’s admiration of opposing views, Clark attested, “she wasn’t just ‘political’; she actually learned to understand and appreciate many different points of view.”⁶⁴

60 *Yates v. United States*, 29.

61 Bowers, Jeremy, Liptak, Adam, & Willis, Derek. “Which Supreme Court Justices Vote Together Most and Least Often.” *The New York Times*, July 3, 2014, sec. The Upshot. <https://www.nytimes.com/interactive/2014/06/24/upshot/24up-scotus-agreement-rates.html>.

62 “HLS Professors Testified on Behalf of Elena Kagan ‘86,” *Harvard Law Today*, July 7, 2010. sec. Faculty Scholarship, <https://today.law.harvard.edu/hls-professors-testified-on-behalf-of-elena-kagan-86/>.

63 “HLS Professors Testified on Behalf of Elena Kagan ‘86,” *Harvard Law Today*, July 7, 2010. sec. Faculty Scholarship, <https://today.law.harvard.edu/hls-professors-testified-on-behalf-of-elena-kagan-86/>.

64 “HLS Professors Testified on Behalf of Elena Kagan ‘86,” *Harvard Law Today*, July 7, 2010. sec. Faculty Scholarship, <https://today.law.harvard.edu/hls-professors-testified-on-behalf-of-elena-kagan-86/>.



Kagan's *sui generis*⁶⁵ capability to seek the crux of the opposing side's argument is essential to understanding her role on the Roberts Court. Kagan does not simply search for an argument's elementary claims. Rather, she wishes to comprehend the idea at its core. In his testimony before the Senate Judicial Committee during Kagan's confirmation hearings, Harvard Professor Jack Goldsmith revealed, "Kagan sought my views and expressed a genuine interest in my arguments and ideas. I never got the sense that she wanted to know what I thought as a conservative. For Kagan, it was the idea and the argument that mattered."⁶⁶ Perhaps the greatest testament to Kagan's thirst for intellectual difference comes from her late colleague, Justice Scalia, who confessed to CNN's David Axelrod that he hoped President Obama would nominate Kagan for a seat on the High Bench. Scalia divulged, "I hope he sends us someone smart... I hope he sends us Elena Kagan."⁶⁷ Scalia unquestionably knew Kagan's jurisprudence would differ axiomatically from his. Yet, Scalia appreciated not only Kagan's intellectual capacity but her willingness to hear the other side for the sake of diversifying her views.

In addition to peer confession, Kagan's Martin-Quinn (MQ) score can discern another testament to her ideological overlap with her conservative colleagues. A Martin-Quinn score is a dynamic metric developed by a duo of political scientists from the University of Michigan that measures a Justice's ideological lean by assessing their voting record. By plotting a given Justice on a continuum with conservative on the positive range and liberal on the negative range, each vote a Justice casts shifts the Justice's overall placement on the continuum which has no minimum or maximum values. The objective of the MQ model is to quantitatively measure a Justice's ideological lean, with the hopes of gauging how Justice's align and morph throughout their tenure.⁶⁸ Kagan's MQ score

65 Original, or unique.

66 "HLS Professors Testified on Behalf of Elena Kagan '86," Harvard Law Today, July 7, 2010. sec. Faculty Scholarship, <https://today.law.harvard.edu/hls-professors-testified-on-behalf-of-elena-kagan-86/>.

67 Axelrod, David. "A Surprising Request from Justice Scalia," CNN, March 9, 2016, sec. Opinion, <https://www.cnn.com/2016/02/14/opinions/david-axelrod-surprise-request-from-justice-scalia/index.html>.

68 Farnsworth, Ward. "The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices with Special Attention to the Problem of Ideological Drift." Northwestern University Law Review Colloquy. Nov. 2007: 12,



stands at -1.69, this reasonably dictates why Justice Brett Kavanaugh (0.51) and Chief Justice John Roberts (0.22) have frequently voted alongside Kagan in cases.⁶⁹

Unanimity, She will Pursue

If the Court is to be continually seen as a statutory institution, widespread consensus whenever and wherever possible is crucial. Kagan's *textualist pragmatism*, which tends to appease both sides of the bench to forge a more robust majority, is well exemplified by *Loughrin v. United States* (2014). *Loughrin* consisted of a bank-fraud scheme insinuated by the defendant, Kevin Loughrin, in which he stole mailed-out checks from individuals, bought items at Target, and returned those items in exchange for cash. The question at hand regarded whether a federal prosecutor ought to prove a defendant's intent to defraud a financial institution under 18 U. S. C §11344.

At the outset of his trial, Loughrin confessed the sole intent to defraud Target Inc., not the banking institutions from which the checks were derived. The second clause of §11344 states "whoever knowingly executes, or attempts to execute, a scheme or artifice... to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises" be fined no more than \$1,000,000 or 30 years in prison (or both).⁷⁰ Loughrin argued that if the Court were to interpret the 'by means of' language to include all petty frauds involving checks "all frauds affected by receipt of a check would become federal crimes."⁷¹ A federalism faux pas, as states are customarily tasked with prosecuting "bad check" cases. Yet, Kagan argued that "it is not enough that a fraudster scheme to obtain money from a bank and that he make a false statement... The criminal must acquire (or attempt to acquire) bank property 'by means of' the misrepresentation."⁷² Essentially ruling that bank fraud by means of a check can only be prosecuted federally if the criminal's

https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1110&context=nulr_online

69 Michigan Law School. "Martin-Quinn Scores," M|LSA, 2019,

<https://mqscores.lsa.umich.edu/measures.php>

70 *Loughrin v. United States*, 573 U.S. 316 (2014)

71 *Loughrin v. United States*, 18.

72 *Loughrin v. United States*, 14.



deception naturally induces a bank to part with property or money in its possession.⁷³

The central crux of Loughrin's claim rested on the assertion that by stretching the language of 18 U. S. C §11344(2), every bank fraud case committed by means of a check would be subject to federal prosecution. However, Kagan with legislative history as an advocate for her argument, argued: "nothing in the [second] clause additionally demands that a defendant have a specific intent to deceive a bank... imposing that the requirement would prevent §11344(2) from applying to a host of cases falling within clear terms."⁷⁴ Kagan clarified that 18 U. S. C §11344's first clause "to defraud a financial institution," was written with the intent to separate it from the language of the second clause so that a broader range of cases could be decided under 18 U. S. C §11344(1) and (2). This opinion chiefly represents how Kagan's *textual pragmatism* was able to gain a broad consensus, as the Court unanimously ruled 9-0. Each conservative justice signed on to her opinion because of the clear and direct interpretation of 18 U. S. C §11344. Yet, by interpreting it in such a practical manner, Kagan was able to garner the consensus of her liberal colleagues as well. It's not guaranteed that had the second clause of 18 U. S. C §11344 been interpreted alternatively, it would have secured a unanimous vote.

Justice Scalia, for example, merely concurred in the ruling because he was unconvinced by the Government's 'natural inducement' test which the majority accepted. Scalia expressed that the Court heard "scant argument (nothing but the Government's bare-bones assertion) in favor of the 'by means of' textual limitation, and no adversary presentation whatever opposing it."⁷⁵ Scalia believed that interpreting §11344(2)'s 'by means of' language, should follow the dictionary's definition, of "[a] method, or course of action, by the employment of which [bank property was] attained," so that 18 U. S. C §11344 would innately involve criminally inducing a bank away from its money or property.⁷⁶ Scalia remained unconvinced by the Government's 'natural inducement,' test, thus expressing that the Court should have left deciding the textual limitations of the 'by means of' test for another case. Yet, it should be noted that Justice Thomas was the sole signed

73 *Loughrin v. United States*, 18.

74 *Loughrin v. United States*, 7.

75 *Loughrin v. United States*, 18.

76 *Loughrin v. United States*, 19.



justice to Scalia's opinion. Yet Kagan's received eight signatures, it suffices to show that Kagan's pragmatic interpretation of 18 U. S. C §11344 permitted that unanimity to materialize.

In an era of severe political polarity infiltrating the halls of the Legislature and the office of the Executive, Americans are becoming increasingly pessimistic regarding the federal government's ability to govern. Thus, the Judiciary must take it upon itself to be a model of what the Framers would identify as "good government," or what modern generations refer to as "productive." Suppose the Court consistently turned out 5-4 or 6-3 decisions. In that case, the American people would see the Judiciary as just another political branch of government that cannot put its differences aside to solve palpable issues. A number of justices have professed their concern for the Court's legitimacy. Yet, none have expressed the concern more directly and frequently than Kagan. In a lecture given at Georgetown Law, Kagan professed that "during these polarized times... [the justices should] look and see if there's something smaller we can agree on, some greater consensus we can achieve," adding that unanimity was crucial to maintaining the Court's legitimacy.⁷⁷ Kagan comprehends the colossal weight currently placed on the Court's shoulders. Thus it's not a stretch of the imagination to conclude that she has the Court's legacy in mind while she's tenured on the high bench.

Conclusion

In concluding this analysis, it is of great importance to view Kagan as a unique player on the Roberts Court. Due to her unparalleled jurisprudence, she likely possesses the greatest ability to sway justices from one side of an opinion to the other. Kagan's narrow-rulings allow her to feel more comfortable siding with her decisions as they don't necessarily change the Court's precedent dramatically. Court-watchers mustn't mistake Kagan's fairness for disinterest, she shows a great deal of passion for protecting the voting rights of citizens and has zero tolerance for political gerrymanders, regardless of which side of the political aisle they benefit. Fairness, in every sense of the word, perfectly describes Kagan as a judge. She's shown

⁷⁷ "What Justice Kagan Told ABA About Decision-Making, Politics, Pro Bono, and More." American Bar Association. November 2018.

<https://www.americanbar.org/news/abanews/publications/youraba/2018/november-2018/what-justice-kagan-told-the-aba-about-decision-making--politics/>



distinguished humbleness and admiration for the position she currently holds; her tenure, though only in its early stages, has proven to be one of vital importance to this unique era of the Supreme Court.



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