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Justice Kagan's Political Process Dissent Evolution

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TABLE OF CONTENTS

ABSTRACT

The Supreme Court has transformed into the most conservative Court in three generations. Accordingly, Justice Kagan, a famed consensus builder, has been less successful at advancing liberal principles or logrolling in exchange for more moderate holdings. This is especially prominent in cases relating to political process. This Article analyzes how Justice Kagan has responded to the change in the Court through the lens of three notable political process cases. The Article notes how she began to change her style to call attention to the majority's disregard for precedent after the political makeup of the Court began to shift. Her dissents became increasingly oppositional. Her writing began to break

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Court-recognized and personal norms. Further, her opinions progressively represented a call to action—not just to lawyers, but to all citizens. Additionally, this Article outlines Justice Kagan's goals in dissenting. One goal is to defend stare decisis, which can act as a retraining force to moderate extreme holdings, mirroring her prior logrolling strategy. Through public comments, Justice Kagan has expressed that another reason for the shift is an effort to preserve the Court's legitimacy. This is especially true in light of the speed with which the Court has, in Justice Kagan's view, snubbed clear precedent. While too early to determine the effectiveness of this tactic, this Article sheds light on the strategy Justice Kagan has chosen for the immediate future.

INTRODUCTION

When interviewing clerks, Justice Marshall was known to ask if the candidate liked working on dissents.[1] Justice Marshall once quipped, "If they said 'no,' they didn't get a job."[2] He asked Elena Kagan that question in 1986 when she interviewed, and having answered correctly, she began clerking for him shortly after.[3]

Justice Elena Kagan is now forced to test her enjoyment of dissent writing. In the past five years, the Supreme Court has transformed into the most conservative Court in three generations.[4] Forming a majority that subscribes to liberal principles has become harder. This comes at a time when American ideological polarization is more pronounced than it has been in decades.[5] Justice Kagan, a famed consensus-builder,[6] finds herself in a tight spot. To influence a holding, she must convert at least two conservative Justices to vote with the three liberal Justices, or she must hope that her vote with the conservative block is valuable enough to acquire reasonable concessions. With neither option readily available for contentious cases, Justice Kagan has turned increasingly to dissent.

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1. Neil A. Lewis, *Marshall Urges Bush to Pick 'the Best'*, N.Y. TIMES (June 29, 1991), https://www.nytimes.com/1991/06/29/us/marshall-urges-bush-to-pick-the-best.html [https://perma.cc/RYR3-ZRDM].

2. *Id.*

3. Elena Kagan, *For Justice Marshall*, 71 TEX. L. REV. 1125, 1125–26 (1993).

4. Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [https://perma.cc/QXU6-UFVB].

5. *Political Polarization in the American Public*, PEW RSCH. CTR. (Jun. 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public [https://perma.cc/2JDT-44ZE].

6. *See infra* Section II.

In the past, the addition of new Justices has altered the practices of the Court's existing members.[7] For instance, Justice Ginsburg reportedly changed her "style" and became "less bound by what [had] been the conventions of the [C]ourt" after Justice Alito replaced Justice O'Connor.[8] Similarly, Justice Kagan has shifted her practices as a result of the changing Court. She began speaking more in oral arguments after Justice Kennedy was replaced.[9] And her dissenting strategy has changed: Not only are they more numerous, but they are also more intense.[10] They have become increasingly oppositional, disruptive of personal and Court-recognized norms, and accusatory of the majority betraying fundamental goals. Justice Kagan's writing and public comments demonstrate that this change is not simply because she is unable to achieve her preferred outcome. Her dissents, exhibited by her political process dissents,[11] stem from a fear that the majority is damaging the perception and legitimacy of the Supreme Court.

Since "public confidence in the Supreme Court is impossible to disentangle from public confidence in the very idea of law itself," it is imperative that the Court is seen as a legitimate institution.[12] Without proper regard, the Court will have a diminished capacity to resolve significant questions and may leave the other branches to infringe upon protected rights without check.[13] The Court relies on relative goodwill to safeguard rights; "a damaged Court may not have had the institutional

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7. *See* Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 198 (2002) (claiming that the status quo of the Court is "bound to dissipate . . . especially as new Justices come on the scene"); *see also* Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 283 (1985) ("The appointment of new members to the Court quite naturally induces a clarification if not a reassessment of positions by previous dissenters.").

8. Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice on Court*, N.Y. TIMES (May 31, 2007), https://www.nytimes.com/2007/05/31/washington/31scotus.html [https://perma.cc/W9LH-X2DK].

9. Adam Feldman, *Empirical SCOTUS*, SCOTUS BLOG (Jan. 30, 2019, 3:39 PM), https://www.scotusblog.com/2019/01/empirical-scotus-looking-back-to-assess-the-potential-future-of-oral-arguments [https://perma.cc/KG26-4NFJ] (noting that Justice Kagan went "from speaking around 11.5 percent of the justices' words to over 18 percent" after Justice Gorsuch replaced Justice Kennedy).

10. *See infra* Section II.B.

11. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011); Rucho v. Common Cause, 139 S. Ct. 2484 (2019); and Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

12. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 151 (2019).

13. *Id.* at 166–167.

capital to issue *Brown*, *Loving*, or other [celebrated] civil rights decisions."[14] For these reasons, among others, Justice Kagan continues to make Court legitimacy a top priority.

Section I will provide an overview of why Justices dissent and the important categories of dissents. Section II focuses on Justice Kagan as a Justice, including an analysis of her typical strategy, her writing style, and her dissenting practices. Section II also introduces the three political process case studies to illustrate the evolution of her dissents. Section III attempts to explain Justice Kagan's motivation behind the change by pulling from the cases and the Justice's public comments. It argues that Justice Kagan's impassioned dissents demonstrate more than a shift in strategy—they are a plea for the Court to maintain the respect necessary to do its job.

I. OVERVIEW OF DISSENTING TACTICS

Justices choose to dissent for a variety of strategic and personal reasons. Chief Justice Hughes famously described a dissent as "an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error."[15] But hoping for an eventual overturning is not the only benefit. In dissent, Justices may force the majority to refine or narrow their

14. Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2270–71 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)). Of course, the Court does not only issue opinions that enhance rights. Additionally, individuals from both ends of the political spectrum have at times wished for the Supreme Court to exercise more limited power in settling contested issues. However, there is a difference between a Court with diminished institutional capacity and one that is fundamentally unable to issue respected opinions. Without legitimacy, the Court loses the power of judicial review, and "[n]o one can know what would happen if [judicial review] disappeared tomorrow" since it has been a staple of our legal system for centuries. Epps & Sitaraman, *supra* note 12, at 167. And while the Court does not always protect rights, "it bears note that in some of the cases where the Supreme Court is thought to have erred most grievously, it is because the Court failed to exercise the power of judicial review and defend individual rights from political actors." *Id.*

15. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1936).

holding,[16] "propel legislative change,"[17] engage in "judicial log-rolling,"[18] organize external activists,[19] receive increased media coverage,[20] provide guidance to state courts,[21] or endeavor to "keep doctrine alive."[22] Dissents can also serve a broader goal: legitimization. Dissents highlight that the Court arrived at its decision through genuine deliberation and ensure that people who disagree with the judgment are given a voice.[23]

Three non-exclusive dissent categories are relevant to this Article. First, there are collaborative dissents. A collaborative dissent is an "attempt to work with the premises and reasoning of the majority's approach."[24] In a collaborative dissent, the dissenting Justice accepts the majority's principles but argues that it "misapplie[d] the very principles it invoke[d]."[25] The Justice points out these inconsistencies and warns of potential pitfalls of such a mistake.[26] A dissent being collaborative does not mean it cannot be radical; it merely means that the opinions are working from a similar baseline.[27]

The second category, mobilizing dissents, is illustrated through the goals of organizing activists and encouraging legislative change.[28] These dissents target external actors with the goal of "shap[ing] public narratives."[29] Mobilizing dissents rely on the "power of social movements

16. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010).

17. *Id.* at 6.

18. Steven A. Peterson, *Dissent in American Courts*, 43 J. POL. 412, 417 (1981) (quoting Robert Sickels, *The Illusion of Judicial Consensus*, 59 AM. POL. SCI. REV. 100, 101 (1965)).

19. *See* Duncan Hosie, Janus *and the Movement Dissent*, 65 BOSTON COLL. L. REV. 1 (2023).

20. Christine M. Venter, *Dissenting from the Bench*, 56 WAKE FOREST L. REV. 321, 337 (2021).

21. Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMPLE L. REV. 307, 351 (1988).

22. *Id.*

23. Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2236 (1996); Jon Heintz, *Sustained Dissent and the Extended Deliberative Process*, 88 NOTRE DAME L. REV. 1939, 1973 (2013).

24. Robert F. Blomquist, *Concurrence, Posner-Style*, 71 ALB. L. REV. 37, 40 (2008).

25. Fried, *supra* note 7, at 180.

26. *Id.* at 180–81.

27. *Id.* at 180 (A radical collaborative dissent "assumes that [both opinions] share more [minor] general principles.").

28. Hosie, *supra* note 19, at 11–20.

29. *Id.* at 12.

or mobilized constituencies to make, interpret, and change law."[30] Examples include the dissenting opinions in *Roe v. Wade* encouraging anti-abortion activism and in *Sierra Club v. Morton* empowering the environmental movement.[31]

The third dissent category is perpetual dissents. Perpetual dissents are described as "continually repeat[ed] resistance to a decision even years after the decision has become law."[32] When done well, a perpetual dissent does not allow precedent to settle, thereby allowing "a minority of Justices [to] affect a future Court's" reliance interest assessment.[33] Further, perpetual dissents are effective at signaling to the public that a matter is important and worth reevaluation.[34] A well-known example of this strategy is Justices Brennan and Marshall's dissents to death penalty cases.[35] A more recent example included Justice Scalia's dissents to abortion cases, which culminated in *Dobbs v. Jackson Women's Health Organization*.[36]

There are three noteworthy motivations behind perpetual dissents. First, the strategic motivation stems from a focused effort to completely overturn precedent by seeking an eventual fifth vote or striving to influence the public.[37] Strategic perpetual dissents are used most often in "recently decided, hotly contested cases that have not yet reached protected status and would benefit from the extended deliberative process."[38] Second, the institutional motivation comes from a Justice's belief that "the oath of office obliges [them] to follow [their] own version of constitutional truth no matter how singular it is."[39] Third, the personal motivation is inspired by a Justice's convictions, including their personal beliefs or insistence on maintaining intellectual consistency.[40]

There are limits to perpetual dissents. Justices are more likely to launch a perpetual dissenting strategy where the question is constitutional

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30. *Id.* at 11 (quoting Lani Guinier, *The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 47 (2008)).

31. *Id.* at 12.

32. Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 447 (2008).

33. Heintz, *supra* note 23, at 1959.

34. Larsen, *supra* note 32, at 475.

35. Heintz, *supra* note 23, at 1944.

36. Fried, *supra* note 7, at 190; *see, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 979 (Scalia, J., concurring in the judgment in part and dissenting in part); *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

37. *Id.* at 460.

38. Heintz, *supra* note 23, at 1984–85.

39. Kelman, *supra* note 7, at 249.

40. Heintz, *supra* note 23, at 1950.

as opposed to statutory because "Congress can correct a construction it did not intend [in the statutory context], a move ordinarily not open to it in the constitutional context."[41] Also, perpetual dissents should be used sparingly, otherwise "they quickly lose their justification as an extreme sign of protest."[42] Finally, in using perpetual dissent, a Justice forfeits the ability to collaboratively narrow or moderate the case law.[43] These considerations typically limit how often a Justice will perpetually dissent.

II. JUSTICE KAGAN'S APPROACH

Justice Kagan was recognized as a consensus-builder well before joining the Court.[44] She served as President Bill Clinton's deputy chief of staff in the 1990s where she was praised for working closely with Republicans to expand the Food and Drug Administration's power over tobacco regulation.[45] Later, as the dean of Harvard Law School, Justice Kagan resolved a long-standing standoff between liberal and conservative professors.[46] This required "careful diplomacy" which she reportedly "achieved with astounding competence and ease."[47] On the Court, Justice Kagan continued these bridge-building tendencies by investing in personal relationships with the Justices, which even included going hunting with Justice Scalia.[48]

As a Justice, Justice Kagan has effectively combined her interpersonal prowess with strategic votes to secure "modest compromise[s]" and

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41. Kelman, *supra* note 7, at 237 (quoting John Hart Ely, *The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 10 n.33 (1978)); *see also* Larsen, *supra* note 32, at 459.

42. Larsen, *supra* note 32, at 464.

43. Fried, *supra* note 7, at 183.

44. *See The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States*: *Hearing Before the Comm. on the Judiciary*, 111th Cong. 38 (2010) (statement of Sen. Ben Cardin) (calling Kagan "a known consensus-builder").

45. NICHOLA D. GUTGOLD, THE RHETORIC OF SUPREME COURT WOMEN 107 (2012); Alec MacGillis, *Kagan Battle-Tested by Tobacco Legislation Fight*, NBC NEWS (June 4, 2010, 9:10 AM), https://www.nbcnews.com/id/wbna37508014 [https://perma.cc/QDQ2-ZNTR].

46. Margaret Talbot, *Is the Supreme Court's Fate in Elena Kagan's Hands?*, NEW YORKER (Nov. 11, 2019), https://www.newyorker.com/magazine/2019/11/18/is-the-supreme-courts-fate-in-elena-kagans-hands [https://perma.cc/FMF4-R2XV].

47. GUTGOLD, *supra* note 45, at 106.

48. Joan Biskupic, *Justice Kagan—Giving Liberals a Rhetorical Lift*, 2012 SUP. CT. PREVIEW 55, 57 (2012).

goodwill among the Court's conservatives.[49] When dealing with conservative holdings, Justice Kagan's oft-used strategy is to offer her vote in exchange for "framing the question at hand as narrowly as possible" to minimize its applicability.[50] In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, Justice Kagan joined the conservative majority where the holding was limited to the facts.[51] This narrow holding was disappointing to many conservative observers who hoped for a sweeping religious exemption.[52] In another example, Justice Kagan voted with the majority in *Trinity Lutheran v. Comer*, likely to extract a footnote that narrowed the holding of the case to its specific facts.[53] This strategy has sought to secure "near- or medium-term gains at the margins of cases where [she] might be able to make a difference in the foreseeable future."[54]

This strategy becomes harder to execute when the Court lacks moderate figures willing to compromise. On the same day as the Senate cloture vote for Justice Kavanaugh to replace Justice Kennedy, Justice Kagan lamented the loss of swing Justices. She said that since "people couldn't predict" how Justices O'Connor and Kennedy would vote, the Court did not appear to be "owned by one [partisan] side."[55] This made the Court "impartial and neutral and fair."[56] She remarked that without a figure in the middle, the Justices have to "realize how precious the Court's legitimacy is."[57] Research into the Court confirms this: "[I]n our polarized era, the Supreme Court can best preserve its sociological legitimacy by

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49. Linda Greenhouse, *When Dissent Is All There Is*, THE ATLANTIC (Nov. 2, 2021), https://www.theatlantic.com/ideas/archive/2021/11/what-can-liberals-supreme-court-do-now/620575 [https://perma.cc/JUW5-P6WP].

50. Talbot, *supra* note 46; *see generally* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 272 (2019) ("A pattern has emerged, in which Justices Breyer and Kagan either join conservative majorities or concur separately, while Justices Ginsburg and Sotomayor dissent.").

51. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 584 U.S. 617 (2018).

52. *See* Talbot, *supra* note 46.

53. Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017); Schwartzman, *supra* note 50, at 291.

54. Talbot, *supra* note 46.

55. Princeton University, *A Conversation with Sonia Sotomayor '76 and Elena Kagan '81*, MEDIA CENTRAL (Nov. 8, 2018), https://mediacentral.princeton.edu/media/A+Conversation+with+Sonia+Sotomayor+'76+and+Elena+Kagan+'81%2C+Associate+Justices+of+the+Supreme+Court+of+the+US/1_hk3rz8a5 [https://perma.cc/38NC-WGQN].

56. *Id.*

57. *Id.*

issuing a mix of 'conservative' and 'progressive' decisions in salient cases."[58]

This change came to bear in cases. After Justice Kavanaugh replaced Justice Kennedy—the swing vote that helped to deliver a mix of opinions—Justice Kagan's strategy was materially impacted. Building upon an example from above, footnote three in *Trinity Lutheran* was rendered moot three years later in *Espinoza v. Montana Department of Revenue* where the Court expanded the Free Exercise Clause without any liberal Justices' support.[59] Justice Kagan's strategy of moderating the holding at the margins was no longer as effective or available.

A. General Writing Style

Justice Kagan is known as one of the best writers on the Court.[60] Her opinions straddle the line of eloquent and colloquial, making them accessible.[61] By employing a conversational tone and language that non-lawyers understand, Justice Kagan expands the reach and impact of her writing.[62] An essential component of her conversational writing style is her mastery of rhetoric.[63] "[A] range of rhetorical strategies" allows Justice Kagan "to speak directly to the reader, suggesting that her enterprise is less indoctrination than a more congenial mode of persuasion."[64] Justice Kagan also has a keen skill for articulating the bigger picture to the audience. "Her best opinions often begin by sounding broad political

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58. Grove, *supra* note 14, at 2262. For a discussion on sociological legitimacy versus other types of legitimacy, *see* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018).

59. Schwartzman, *supra* note 50, at 292–95; Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

60. Talbot, *supra* note 46 (Kagan "has long been admired by legal scholars for the brilliance of her opinion writing."); *see generally* Lincoln Caplan, *Justice Elena Kagan, in Dissent*, HARV. MAG. (Nov.–Dec. 2022), https://www.harvardmagazine.com/2022/11/feature-justice-elena-kagan [https://perma.cc/8T2Q-4F87] (Kagan "is among the best writers ever on the Supreme Court.").

61. Jeffrey Rosen, *Strong Opinions*, NEW REPUBLIC (July 28, 2011), https://newrepublic.com/article/92773/elena-kagan-writings [https://perma.cc/HN5S-C9RR].

62. David Fontana & Christopher N. Krewson, The Rhetorical Power of the Supreme Court 15–16 (Feb. 9, 2022) (unpublished manuscript) (on file with author); Emily Kuhl, *Stare Decisis and Stylistic Devices*, 1 ALTHEIA 2, 4 (2016).

63. *See* Biskupic, *supra* note 48, at 57 (Justice "Ginsburg has praised Kagan's rhetorical skills.").

64. Laura Krugman Ray, *Doctrinal Conversation: Justice Kagan's Supreme Court Opinions*, 89 IND. L.J. SUPP. 1, 2 (2013).

themes,"[65] and "end[] by transcending the particulars of the case and articulating the principles that hang in the balance."[66] These various methods allow her to form a bond with the reader, encouraging them to feel as though she is speaking directly to them.

Justice Kagan is not a copious dissenter, and she prefers her writing to appeal to logic rather than emotion.[67] Even when her narrowing-the-question strategy does not work, she does not write dissents indiscriminately; she "picks her battles" carefully.[68] This allows them to be attention-grabbing and passionate, despite not being overtly emotional.

B. Quantitative Review of Justice Kagan's Dissenting Practices

Justice Kagan's dissenting practices have quantitatively changed along with the composition of the Court. Three members of the Court were appointed by President Trump between 2017 to 2020.[69] Those replaced included Justice Kennedy, a consistent swing vote, and Justice Ginsburg, a liberal powerhouse.[70]

As expected, Justice Kagan's time in the majority decreased starting in the 2017 term. From the 2012 to 2016 terms, Justice Kagan was in the majority on average 89% of the time.[71] In 2017, that decreased to 74%.[72] She was in the majority on average 76% of the time from the 2017 to 2021 terms.[73]

The number of dissents Justice Kagan authored has increased. Justice Kagan authored significantly more dissents in the five years since Justice Gorsuch joined the Court (30 dissents)[74] than she did in the preceding

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65. Talbot, *supra* note 46.

66. Rosen, *supra* note 61.

67. *See* Princeton University, *supra* note 55 (Justice Kagan stating that, unlike Justice Sotomayor, she is not an emotional writer: "I tend not to try to get people to feel things. . . . But I want them to think [the majority] got[] it so wrong.").

68. Hosie, *supra* note 19, at 21.

69. *Justices 1789 to Present*, SCOTUS (last visited Mar. 13, 2022).

70. *Id.*

71. Angie Gou et al., *STAT PACK for the Supreme Court's 2021-22 Term*, SCOTUS BLOG, 8 (July 2, 2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/A3JY-W229] (data compiled and calculated by Author).

72. *Id.*

73. *Id.*

74. This number was calculated by the author compiling results from LEXISNEXIS (search in search bar "dissent by (Elena Kagan)" then filter results to

seven years (17 dissents).[75] In fact, in 2023, she has written almost as many dissents over the three years since Justice Barret joined the Court (20 dissents)[76] than over her first eight years on the Court (21 dissents).[77]

The intensity of her dissents has increased as well. Reading a dissent from the bench was one indicator of how intensely a dissenter felt about a case. The practice "garners immediate attention" and indicates that the dissenter believed the majority was "grievously misguided."[78] Justice Kagan's first dissent read from the bench was *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* in 2011.[79] It was not until seven years later during the 2017 term that she read her second, *Janus v. AFSCME, Council 31*,[80] and then she read *Rucho v. Common Cause* during the following 2018 term.[81] It is impossible to say if this increase in frequency would have continued because the Supreme Court ceased reading dissents from the bench from the 2019 to 2022 terms due to the

include the following date range: Jan. 1, 2011 to Apr. 10, 2017, dates included in *Justices 1789 to Present*, *supra* note 69).

75. This number was calculated by the author compiling results from LEXISNEXIS (search in search bar "dissent by (Elena Kagan)" then filter results to include the following date range: Apr. 10, 2017 to Oct. 4, 2023, dates included in *Justices 1789 to Present*, *supra* note 69).

76. This number was calculated by the author compiling results from LEXISNEXIS (search in search bar "dissent by (Elena Kagan)" then filter results to include the following date range: Oct. 27, 2020 to Oct. 4, 2023, included in *Justices 1789 to Present*, *supra* note 69).

77. This number was calculated by the author compiling results from LEXISNEXIS (search in search bar "dissent by (Elena Kagan)" then filter results to include the following date range: Jan. 1, 2011 to Aug. 7, 2018, dates included in *Justices 1789 to Present*, *supra* note 69.

78. *See* Ginsburg, *supra* note 16, at 2.

79. THE J. OF THE SUP. CT. OF THE U.S., OCTOBER TERM 2010 vii (2011) (referring to the "Dissenting opinion announced" section").

80. *Id.* at OCTOBER TERM 2017 vi (2018).

81. *Id.*, at OCTOBER TERM 2018 v (2019).

coronavirus pandemic,[82] but Justice Kagan indicated that she would have read multiple more from the bench over those terms if she were able.[83]

C. Case Studies

Three political process dissents—*Bennett*, *Rucho*, and *Brnovich*—illustrate the evolution of Justice Kagan's writing. Each was decided under a different makeup of the Court and, taken together, portray increasing levels of frustration and resistance. This Article does not analyze the merits of Justice Kagan's arguments; rather, it examines the content, delivery, and intended effect of her arguments.

1. "Unsettling"—Arizona Free Enterprise Club's Freedom Club PAC v. Bennett *(2011)*[84]

Bennett concerned public election financing.[85] Supporters of this policy claim that public financing encourages democratic representation by removing reliance on special interest contributions and empowering more diverse candidates who do not have access to large donors.[86] Public

82. Joan Biskupic, *Dissents from the Bench*, CNN POLITICS (June 30, 2021, 7:16 AM), https://www.cnn.com/2021/06/30/politics/dissent-from-the-supreme-court-bench/index.html [https://perma.cc/LGS4-67S7]. Following the pause, the first dissent read from the bench was in 2023. Kimberly Strawbridge Robinson, *Sotomayor Chides High Court's 'Impotence' on Affirmative Action*, BLOOMBERG LAW (June 29, 2023, 12:00 PM), https://news.bloomberglaw.com/us-law-week/sotomayor-chides-high-courts-impotence-on-affirmative-action [https://perma.cc/827D-M5DL].

83. University of Pennsylvania, *Justice Elena Kagan on the Rule of Law*, C-SPAN (July 18, 2019) (Referring to announcing opinions from the bench, she stated, "I probably would have done it a few more last year" had she been able.).

84. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 768 (Kagan, J., dissenting) ("[T]he [majority's] notion that additional speech constitutes a 'burden' is odd and unsettling.").

85. Public financing of elections is when the government provides funding for candidates running for office. *Public Financing of Campaigns: Overview*, NAT'L CONF. STATE LEGIS., https://www.ncsl.org/elections-and-campaigns/public-financing-of-campaigns-overview [https://perma.cc/G5MQ-UYFH] (last visited Sep 3, 2023).

86. *See, e.g.*, Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L REV. 563 (1999); *see also Public Campaign Financing*, BRENNAN CTR. FOR JUST. (2012), https://www.brennancenter.org/issues/reform-money-politics/public-campaign-financing [https://perma.cc/6P9B-YRW7]; *Public Financing of Elections*, CAMPAIGN LEGAL CTR., https://campaignlegal.org/demo

financing has been shown to increase competitiveness in elections, enabling candidates who otherwise "would not have the ability to mount effective campaigns against incumbents."[87] *Bennett* decided whether Arizona's particular public financing program violated the First Amendment by basing the amount given to a candidate on the amount their opponent spent.[88] In 2011, the Court held it did.[89] Justice Kagan dissented based on her stance that "[t]he First Amendment's core purpose is to foster a healthy, vibrant political system full of robust discussion and debate," which Arizona's program furthered.[90]

Justice Kagan's dissent laid out high-level goals. She defined the United States' "core values" as "devotion to democratic self-governance, as well as to 'uninhibited, robust, and wide-open debate."[91] Justice Kagan stated that the Constitution's "ultimate object" is "a government responsive to the will of the people."[92] She alleged that Arizona's campaign financing program promoted all of these values by "enhancing the opportunity for free political discussion."[93]

Justice Kagan contended that the majority misapplied precedent and miscategorized the speech at issue to arrive at the opposite conclusion. First, Justice Kagan argued that the majority failed to properly distinguish between a speech restriction and a speech subsidy, which the Court had otherwise distinguished properly "[i]n case after case, year upon year."[94] Then, she asserted the majority's First Amendment burden analysis in the case at hand should more closely mirror that in *Buckley v. Valeo*,[95] in disclosure requirement cases,[96] and in contribution limit case law.[97] Those analyses "support[ed] the constitutionality of Arizona's law,"[98] whereas the majority's approach as to what constituted a burden was "odd and

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cracyu/inclusion/public-financing-elections [https://perma.cc/HJ5G-DZL8] (last visited Sep 3, 2023).

87. Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 STATE POL. & POL'Y Q. 263, 275 (2008); *see* Patrick D. Donnay & Graham P. Ramsden, *Public Financing of Legislative Elections: Lessons from Minnesota*, 20 LEGIS. STUD. Q. 351 (1995).

88. *Bennett*, 564 U.S. at 727–28.

89. *Id.* at 728.

90. *Id.* at 757 (Kagan, J., dissenting).

91. *Id.* at 756 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

92. *Id.* at 784–85.

93. *Id.* at 757 (internal quotation marks omitted).

94. *Id.* at 764.

95. *Id.* at 770–71.

96. *Id.* at 771–72.

97. *Id.* at 772.

98. *Id.*

upsetting."[99] She argued that the similarities between this case and *Davis*, a case upon which the majority "pegs everything on," are minimal.[100] Finally, Justice Kagan noted that there is "no doubt" that the state has a compelling interest here, directly conflicting with the majority which found there was no such state interest.[101] This led Justice Kagan to a different understanding of the scope of the First Amendment.

The dissent used accessible language and rhetoric. Justice Kagan used cultural references to connect with her audience.[102] She cited notable non-binding authority, which generally "makes [Justices'] opinions more persuasive."[103] She effectively used repetition, both between and within sentences, to hone the reader's attention.[104]

This is a collaborative dissent because Justice Kagan engaged in good faith with the majority's test. It is not radical since she argued that the majority misapplied, not abandoned, the precedent in determining the First Amendment's scope.[105] It also has features of a movement dissent since she effectively used rhetoric, made complex case law accessible, and was "eminently quotable."[106]

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99. *Id.* at 768.

100. *Id.* at 772–73. "Here is the similarity: In both cases, one candidate's campaign expenditure triggered . . . something." *Id.* at 773. "To say that *Davis* 'largely controls' is to decline to take [the Court's] First Amendment doctrine seriously." *Id.* at 774.

101. *Id.* at 776 ("Our campaign finance precedents leave no doubt: Preventing corruption or the appearance of corruption is a compelling government interest.").

102. *See, e.g.*, *id.* at 760 (referencing a "Goldilocks solution—not too large, not too small, but just right").

103. Robert J. Hume, *The Use of Rhetorical Sources by the U.S. Supreme Court*, 40 L. & SOC'Y REV. 817, 819 (2006); *see, e.g.*, *Bennett*, 564 U.S. at 757 (Kagan, J. dissenting) ("President Theodore Roosevelt proposed the reform as early as 1907 in his State of the Union address.").

104. *See, e.g.*, *Bennett*, 564 U.S. at 769 (Kagan, J., dissenting) ("Once again: We have never, not once, understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden on another."); ROBERT A. HARRIS, WRITING WITH CLARITY AND STYLE 125 (2d ed. 2018) ("[S]trategic restatement of words and phrases enables the writer to stress an idea [or] maintain or regain focus.").

105. Fried, *supra* note 7, at 180 (A radical dissent claims "the majority abandons [shared] principles altogether.").

106. Guy-Uriel Charles, *The Court's Battle of Ideology*, N.Y. TIMES (Sep. 14, 2011, 5:38 PM), https://www.nytimes.com/roomfordebate/2011/06/27/the-court-and-the-future-of-public-financing/the-courts-battle-of-ideology [https://perma.cc/4C9N-AD4E]; *see generally* Andrew Cohen, *Better Know a Justice!*, THE ATLANTIC (Aug. 21, 2012), https://www.theatlantic.com/national

2. "Deep Sadness"—Rucho v. Common Cause *(2019)*[107]

In 2018, the Court remanded a partisan gerrymandering case, *Gill v. Whitford*, for the plaintiffs to prove standing.[108] This sidestepped many of the open questions about partisan gerrymandering. Gerrymandering—creating electoral districts that overconcentrate or overstretch minority votes to dilute their impact—is a difficult issue for the legislature to resolve since legislators are self-interested in the composition of their districts.[109] In *Gill*, Justice Kagan authored a concurrence that outlined a path forward for the plaintiffs to have their case heard in court. Strategically, this concurrence was seen as laying out the most plausible path to achieve Justice Kennedy's support—a fifth vote—for when the question arose again.[110]

However, Justice Kennedy did not rule on the next partisan gerrymandering case. *Rucho v. Common Cause* was decided in 2019 after Justice Kavanaugh replaced Justice Kennedy.[111] In *Rucho*, the Court held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts" because federal judges cannot allocate political power "in the absence of a constitutional directive."[112] Justice Kagan disagreed with the premise, stating that "partisan gerrymanders . . . deprive[] citizens of the *most fundamental* of their constitutional rights."[113] She added that it is not beyond the power of federal courts to check these

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/archive/2012/08/better-know-a-justice-a-supreme-court-cheat-sheet/261360 [https://perma.cc/PUQ9-AT6J].

107. Rucho v. Common Cause, 139 S. Ct. 2484, 2525 (Kagan, J. dissenting) ("With respect but deep sadness, I dissent.").

108. *See* Gill v. Whitford, 585 U.S. 48, 54 (2018).

109. Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering under the Voting Rights Act*, 92 MICH. L. REV. 652, 660 n.45, 675 (1993). Additionally, "a legislature that constitutes itself tampers with its own *legitimacy*," which is dependent on external perception. *Id.* at 675 (emphasis added). Note that there is a difference, both in application and in how the Court approaches the issues, between partisan gerrymandering and racial gerrymandering.

110. *See Gill*, 585 U.S. at 74 (Kagan, J., concurring); Barry C. Burden & David T. Canon, *The Supreme Court Decided Not to Decide Wisconsin's Gerrymandering Case*, WASH. POST (June 19, 2018, 7:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/19/the-supreme-court-decided-not-to-decide-wisconsins-gerrymandering-case-but-heres-why-it-will-be-back/ [https://perma.cc/96AX-EY3R].

111. *Rucho*, 139 S. Ct. 2484; *Justices 1789 to Present*, *supra* note 69.

112. *Id.* at 2506–07.

113. *Id.* at 2509 (Kagan, J., dissenting) (emphasis added).

abuses; in fact, federal courts "have coalesced around manageable judicial standards to resolve partisan gerrymandering claims."[114]

Justice Kagan again focused on overarching goals. However, she articulated these principles more forcefully and extensively than she did in *Bennett*. The general proposition that she hoped to communicate was that it is a core right for people to choose their government. She used parallel structure and alliteration to emphasize this point.[115] As in *Bennett*, she cited non-binding authority to support this proposition, but here, the authorities were more numerous, more respected, and more fundamental to American history.[116] Justice Kagan cited the goals articulated by prior Court opinions to fortify her assertion.[117] In making her argument, she expanded the goals beyond American democracy to the goals "of republican government."[118] She also broadly defined the Court's role as defending our system of government's foundations, the most important of which is "free and fair elections."[119] Finally, she emphasized the importance of these goals given the moment in time when the case was decided.[120] These goals are more substantial and accentuated than those in *Bennett*.

Other attributes of this dissent that echoed *Bennett* but were more prevalent here include widely accessible language and rhetorical tools. In addition to the parallel structure and alliteration above, Justice Kagan used

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114. *Id.*; *see id.* at 2514–2515 ("Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering . . . violates the constitution.").

115. *See, e.g., id*. (parallelism: describing the "most fundamental of [citizens'] constitutional rights" as "the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives"; alliteration: "partisan gerrymanders here debased and dishonored our democracy," "promoted partisanship above respect for the popular will," and "encouraged a politics of polarization.").

116. *See, e.g., id.* at 2511 (citing the Declaration of Independence, the Gettysburg Address, and James Madison for the assertion that the government should be run by and serve the people).

117. *See, e.g., id.* at 2512 ("The 'core principle of republican government,' this Court has recognized, is 'that the voters should choose their representatives, not the other way around.'" (quoting Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015))).

118. *Id*.

119. *Id.* at 2525.

120. *See, e.g., id.* ("Of all times to abandon the Court's duty to declare the law, this was not the one.").

idioms,[121] extreme emphasis,[122] and sarcasm.[123] Justice Kagan spoke directly to the audience on numerous occasions. She instructed, "[A]sk yourself: Is this how American democracy is supposed to work?"[124] Later, she colloquially answered the question: "I have yet to meet the person who thinks so."[125] In other parts, Justice Kagan seemed to be casually dialoguing with the reader.[126] These methods made the opinion more readable and engaging, helping Justice Kagan spread her message.

An atypical note about this dissent is the emotion behind it. Justice Kagan described the majority decision as "tragically wrong"[127] and claimed that gerrymanderers had "beat democracy."[128] Her closing line diverged from the traditional sign-off, "I respectfully dissent." In its place, she wrote, "With respect but deep sadness, I dissent."[129] Her voice reportedly "vibrated with emotion" when she read the closing line from the bench.[130] One journalist remarked that the ending's "defiance . . . was unusual both for [Justice Kagan] and for the Court."[131]

This is a radical dissent. While Justice Kagan noted that the majority and dissent both agree that "gerrymandering is incompatible with democratic principles," she claimed that the majority abandoned those shared values.[132] It is not a collaborative dissent since the opinions do not share more general principles. It is properly classified as a movement dissent because it is accessible and espouses core principles to rally around. Lawyers and activists claimed that the opinion "provide[d] a template for how state courts and others" can respond to partisan gerrymandering.[133] Justice Kagan herself acknowledged that encouraging activism was one of her goals. At a later event, she encouraged those who

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121. *See, e.g.*, *id.* at 2513 ("These are not your grandfather's—let alone the Framers'—gerrymanders."; "The proof is in the 2010 pudding."); *see also, e.g.*, *id.* at 2515 ("I'll give the majority this one—and important—thing."); *id.* at 2516 ("[I]n throwing up its hands, the majority misses something under its nose.").

122. *See, e.g.*, *id.* at 2518 (claiming that North Carolina's maps were "an out-out-out-outlier").

123. *See, e.g.*, *id.* ("The results were, shall we say, striking.").

124. *Id.* at 2509.

125. *Id.* at 2511.

126. *See, e.g.*, *id.* at 2510 ("You might think that . . . ." and "But give Lewis credit for this much . . . .").

127. *Id.* at 2509.

128. *Id.* at 2519.

129. *Id.* at 2525.

130. Talbot, *supra* note 46.

131. *Id.*

132. *Rucho*, 139 S. Ct. at 2512 (internal quotation marks omitted).

133. Talbot, *supra* note 46.

"can carry on the efforts against this kind of undermining of democracy [to] go for it."[134] And they have. Two state courts have since struck down gerrymandered maps citing Kagan's *Rucho* dissent.[135] Finally, the dissent laid the groundwork for a perpetual dissent. Justice Kagan later stated, "[T]here's no part of me that's ever going to become accepting . . . of the decision made" in *Rucho*.[136]

3. "Tragic"—Brnovich v. Democratic National Committee *(2021)*[137]

Brnovich grappled with Section 2 of the Voting Rights Act (VRA) in 2021 after Justice Barrett replaced Justice Ginsburg.[138] The Court considered the permissibility of two of Arizona's voting laws: one barring out-of-precinct voting and the other banning the delivery of another person's mail-in ballot.[139] These measures were seen to disproportionately affect minority communities since the out-of-precinct voting policy discarded more ballots cast by people of color than by white voters and the newly banned community ballot collection was popular among rural Native American localities that did not have access to mail services.[140] Nonetheless, the Court held that these restrictions were acceptable. Justice Kagan disagreed. She stated that "the Court undermine[d] Section 2 and

134. Washington Council of Lawyers, *A Conversation with Justice Elena Kagan and Dean William Treanor*, C-SPAN (July 18, 2019), https://www.c-span.org/video/?462748-1/justice-kagan-remarks-georgetown-university-law-center.

135. *See* Harper v. Lewis, No. 19-CVS-012667, 2019 WL 13198030 (N.C. Super. Ct. Oct. 28, 2019); Common Cause v. Lewis, No. 18-CVS-014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019).

136. Washington Council of Lawyers, *supra* note 134.

137. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2351 (2021) (Kagan, J., dissenting) (internal quotation marks omitted) ("What is tragic here is that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America's greatness, and protects against its basest impulses. What is tragic is that the Court has damaged a statute designed to bring about the end of discrimination in voting.").

138. *Id.* at 2321.

139. *Id.* at 2350.

140. Adam Liptak, *Supreme Court Seems Ready to Sustain Arizona Voting Limits*, N.Y. TIMES (Mar. 2, 2021), https://www.nytimes.com/2021/03/02/us/politics/supreme-court-arizona-voting.html; *see Brnovich*, 141 S. Ct. at 2366–72 (Kagan, J., dissenting).

the right it provide[d]."[141] She accused the Court of incorrectly interpreting and rewriting the VRA in order to weaken it.[142]

This dissent communicated palpable anger. Justice Kagan criticized the majority to an extent not seen in the previous two cases.[143] Most

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141. *Brnovich*, 141 S. Ct. at 2351 (Kagan, J., dissenting).

142. *Id.*

143. *See, e.g.*, *id.* at 2351 ("[T]he majority writes its own set of rules."); *id*. at 2359 n.5 ("The majority pretends that *Houston Lawyers' Assn.* did not ask about the availability of a less discriminatory means."); *id.* at 2360 n.6 ("The majority is hazy about the content of this compromise" and "dead wrong [about my motivations]."); *id.* at 2361 ("The majority's opinion mostly inhabits a law-free zone," "leaves [relevant] language almost wholly behind," "barely mentions this Court's precedents," "is determined to avoid [a broad and fair reading of Section 2's language]," "fails to note Section 2's application," "neglects to address the provision's concern[s]," "declines to consider Congress's use of an effects test," "[does not] acknowledge the force of Section 2's implementing provision," "says as little as possible about what it means for voting to be 'equally open,'" "only grudgingly accepts—and then apparently forgets—that the provision applies to facially neutral laws," and "skates over the strong words Congress drafted to accomplish its equally strong purpose."; At times, the majority's "lawmaking threatens to leap off the page."; Section 2 "tells courts—however 'radical' the majority might find the idea—to eliminate facially neutral (as well as targeted) electoral rules that unnecessarily create inequalities of access to the political process."); *id.* at 2361 n.7 ("[T]he majority huffs that 'nobody disputes' various of these 'points of law.' Excellent! I only wish the majority would take them to heart."; "[T]he majority refuses to acknowledge how all the 'points of law' it professes to agree with work in tandem."); *id.* at 2362 ("The majority . . . founds its decision on a list of mostly made-up factors, at odds with Section 2 itself," "gratuitously dismisses several factors that point the opposite way," possesses "delusions of modesty," and "departs from Congress's vision."); *id.* at 2363 (The majority expresses "unsupported speculation[]."); *id.* at 2364 ("[T]he majority's discussion of state interests [is] skewed so as to limit Section 2 liability."; "[T]he majority wrongly dismisses the need for the closest possible fit between means and end."); *id.* at 2364 n.9 ("[T]his Court has long rejected—including just last Term—the majority's claim that the state of the world at the time of a statute's enactment provides a useful 'benchmark[].'"); *id.* at 2366 ("[T]he majority should pay more attention to the 'historical background;'" "today undermines" the "democratic principle" of "the right of every American, of every race, to have equal access to the ballot box;" "enables voter discrimination;" and "reaches the opposite conclusion because it closes its eyes to the facts on the ground."); *id.* at 2368 ("The majority fails to conduct the [searching evaluation] that Section 2's 'totality of the circumstances' inquiry demands."); *id.* at 2369 n.11 (The majority puts forward an "odd" "excuse for failing to consider the plaintiffs' evidence."); *id.* at 2369–70 ("The majority once more comes to a different conclusion only by ignoring the local conditions."); *id.* at 2371 n.15 (The majority's argument that a

notably, she accused the majority of "enabl[ing] voting discrimination" and warned that the majority permits "discriminatory policies" in the "garb" of "election integrity."[144] She twice called the Court's holding "tragic."[145] She also frequently relied on textualist arguments surrounding the statute.[146] By heavily referencing a traditionally conservative interpretive strategy, Justice Kagan highlighted the majority's hypocrisy.[147]

Justice Kagan clearly repeated the goals of the statute and the danger of the holding. The first section recounts a sweeping history of voting rights in America.[148] To Justice Kagan, the VRA was a formidable statute and symbol of American excellence.[149] She argued the text of the VRA upheld "the right of every American, of every race, to have equal access to the ballot box."[150] More specifically, Section 2 was "crucial to the operation of our democracy."[151] Counter to the analysis the majority opinion employs, Section 2 was designed to "disrupt the status quo, not to preserve it—to eradicate then-current discriminatory practices, not to set them in amber."[152] For these reasons, she claimed the VRA, "of all laws,

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claim "fails because the plaintiffs did not produce *less* meaningful evidence . . . does not meet the straight-face standard."; "[T]he majority's remaining argument is, if anything, more eccentric."; "The majority's argument to the contrary is no better than if it condoned a literacy test on the ground that a State had long had a statutory obligation to teach all its citizens to read and write."); *id*. at 2372 ("Like the rest of today's opinion, the majority's treatment of the collection ban thus flouts what Section 2 commands."; "One does not hear much in the majority opinion about" Congress' promise that "the political process would be equally open to every citizen, regardless of race.").

144. *Id.* at 2365–66.

145. *Id.* at 2351.

146. *See, e.g., id.* at 2366 ("Both policies violate Section 2, on a straightforward application of its text.").

147. *See id.* at 2356 ("I then show how far from that text the majority strays."); *see also id.* at 2362 ("Think of the majority's list as a set of extra-textual restrictions on Section 2."; "[T]he majority departs from Congress's vision, set down in text, of ensuring equal voting opportunity."); *id.* at 2372 ("The Court always says that it must interpret a statute according to its text—that it has no warrant to override congressional choices. But the majority today flouts those choices with abandon.").

148. *Id.* at 2350–66.

149. *See id.* at 2350 ("If a single statute represents the best of America, it is the Voting Rights Act . . . . If a single statute reminds us of the worst of America, it is the Voting Rights Act."); *see also id.* at 2351 ("Never has a statute done more to advance the Nation's highest ideals.").

150. *Id*. at 2366.

151. *Id.* at 2361.

152. *Id.* at 2363–64.

deserves the sweep and power Congress gave it."[153] As in *Rucho*, she focused on how essential these goals are at the exact moment the Court heard the case.[154] Nevertheless, the VRA was "diminished" by the majority.[155]

This is not a collaborative dissent because it shares no principles with the majority. As noted, it was uniquely critical and passionate. Like *Rucho*, this is a mobilizing dissent. It is readable and motivating to the public given her broad use of rhetorical maneuvers, including her use of parallel structure,[156] repetition,[157] irony,[158] conversational language,[159] and cultural references.[160] The case also received wide media attention when the decision came down, with the dissent quoted frequently.[161] Later, Justice Kagan referenced her *Brnovich* dissent in her *Merrill v. Milligan* dissent, in which the majority granted a stay in a racial gerrymandering VRA Section 2 case.[162] She stated that she is "again dissent[ing] from a ruling that 'undermines Section 2 and the right it provides.'"[163] This could be framed as a high level perpetual dissent over the scope of Section 2, which is especially notable because it is a statutory case, and it is well

153. *Id.* at 2373.

154. *See, e.g.*, *id.* at 2356 ("[T]he Court decides this Voting Rights Act case at a perilous moment for the Nation's commitment to equal citizenship."); *id.* at 2351 ("[F]ew laws are more vital in the current moment.").

155. *Id.*

156. *See, e.g.*, *supra* note 149; *see also, e.g.*, *id.* at 2351 ("What is tragic here . . . . What is tragic. . . .").

157. *See, e.g.*, *id.* at 2361 (emphasis added) ("Section 2's language is *broad*. To read it fairly, then, is to read it *broadly*. And to read it *broadly* is to do much that the majority is determined to avoid.").

158. *See, e.g.*, *id.* at 2365 ("In the majority's high-minded account. . . .").

159. *See, e.g.*, *id.* at 2368 ("If you were a minority vote suppressor . . . , you would want that rule in your bag of tricks.").

160. *See, e.g.*, *id.* at 2354 ("Combating those efforts was like 'battling the Hydra'—or to use a less cultured reference, like playing a game of whack-a-mole.").

161. *See, e.g.*, Sam Levine, '*Tragic': Justice Elena Kagan's Scorching Dissent on US Voter Suppression*, GUARDIAN (Jul. 8, 2021), https://www.theguardian.com/us-news/2021/jul/08/supreme-court-justice-elena-kagan-arizona-voting-rights [https://perma.cc/A6ET-FUFR].

162. Merrill v. Milligan, 142 S. Ct. 879, 883 (2022) (Kagan, J., dissenting); *see generally* Michael Mello, *Adhering to Our Views*, 22 FLA. ST. U. L. REV. 591, 692 (1995) (claiming that "other types of dissents can be equally" as important as majority case dissents).

163. *Merrill*, 142 S. Ct. at 883 (quoting *Brnovich*, 141 S. Ct. 2321, 2351 (Kagan, J., dissenting)).

acknowledged that statutory dissents should not be repeated.[164] In cutting against to this conventional principle, Justice Kagan demonstrated her perseverance, straying from her former strategy of compromising to moderate conservative holdings. Notably, this new approach worked here: She voted with the majority in the adjudication on the merits finding that Alabama's racial gerrymander violated Section 2.[165]

III. JUSTICE KAGAN'S AIMS IN DISSENTING

Looking at the content of Justice Kagan's political process dissents, there is an evident progression. She begins to break personal and Court-recognized norms. While her dissents remain accessible in language, they become more stinging and oppositional. The goals they espouse become broader and more pressing. In some ways, Justice Kagan's recent dissents are reminiscent of Justice Scalia's famed dissents. Both use "memorable phrases to convey complicated legal concepts"[166] and utilize "rhetorical stratagems to reach a broader audience."[167] In *Brnovich*, Justice Kagan's attacks on the majority are evocative of Justice Scalia's assaults.[168]

Yet their reasons for dissenting differed. Justice Scalia abided by the institutional and personal reasons for dissenting.[169] It was well documented that Justice Scalia believed that "his oath requires him to interpret and obey the Constitution and not others' views about the Constitution."[170] Additionally, his "repeated application of originalist analysis"[171] supports the assertion that he wanted "to be remembered for his consistent philosophy."[172] However, the individual rationale weakens the stability and consistency, and thus legitimacy, of the Court because "the Supreme Court's legitimacy depends . . . upon the Court reaching its

164. Larsen, *supra* note 32, at 459; *see also* Antonin Scalia, *Dissents*, 13 JUD. HIST. 18, 20 (1998) ("In cases involving statutory law, rather than the Constitution, we will almost certainly not revisit the point, no matter how closely it was decided.").

165. Allen v. Milligan, 599 U.S. 1 (2023).

166. Hosie, *supra* note 19, at 25.

167. Meghan J. Ryan, *Justice Scalia's Bottom-up Approach to Shaping the Law*, 25 WM. & MARY BILL RTS. J. 297, 298 (2016).

168. *See generally* J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201 (2017).

169. *See supra* text accompanying notes 39 and 40.

170. Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court*, 24 GA. ST. U. L. REV. 381, 397 (2007).

171. Diarmuid F. O'Scannlain, *We Are All Textualists Now*, 91 ST. JOHN'S L. REV. 303, 309 (2017).

172. Venter, *supra* note 20, at 362.

judgments through a deliberative process."[173] When an individual Justice continually dissents because of their personal philosophy, they are "merely restat[ing] a . . . fundamental disagreement" with a decision that has been made, not bringing in new arguments.[174]

Instead of acting in a way that harms the Court's legitimacy, Justice Kagan strives to defend it. Her motivations square with the strategic reasoning since her dissents are limited to "recently decided, hotly contested cases that have not yet reached protected status."[175] Justice Kagan does not show the same intransigence towards stare decisis as Justice Scalia. All of the analyzed dissents emphasize stare decisis, and Justice Kagan progressively becomes more emphatic about preserving it. In *Bennett*, Justice Kagan argued that the majority misapplied the Court's standing precedent. She goes further in *Rucho*, arguing that the majority disregarded accepted constitutional breadth. And finally, she argued in *Brnovich* that the conservatives snubbed precedent, ignoring clear statutory directives and conveniently flouting their preferred interpretive methods. Accordingly, her dissents increasingly rely on and stress stare decisis.

Justice Kagan's original strategy of narrowing the question acted as a restraining force to dull the magnitude of large partisan shifts, and stare decisis can be used similarly. Generally, "stare decisis acts as a bastion of legitimacy by moderating potential ideological swings and assuring the public that the Court is an apolitical legal institution."[176] Weakening stare decisis "undermines the legitimacy of the Court and calls into question its apolitical status."[177] Justice Kagan's recent public comments reflect this understanding and raise similar concerns. She has stated that the Court must "act like a Court" to "build up some reservoir of public confidence and goodwill."[178] She noted that the "first thing" in "acting like a Court" is to "abide[] by precedent."[179] This explains part of the increased frustration in her dissents and focus on former Court holdings.

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173. Stack, *supra* note 23, at 2236.

174. Heintz, *supra* note 23, at 1984.

175. *Id.* at 1984–85; *see generally supra* text accompanying notes 37 and 38.

176. James Tilghman, *Restoring Stare Decisis in the Wake of* Janus v. AFSCME, Council 31, 64 N.Y. L. SCH. L. REV. 135, 142 (2019).

177. *Id.* at 145.

178. Northwestern Pritzker School of Law, *U.S. Supreme Court Justice Elena Kagan in Conversation with Dean Hari Osofsky*, YOUTUBE (Sep. 16, 2022), https://www.youtube.com/watch?v=9AWZcsp6wGc [https://perma.cc/WBN8-FX6S].

179. *Id.*

Another reason for the increased frustration is the abruptness and timing with which precedent is being disregarded. Precedent overturned very soon after members join the Court "diminish[es] the Court's legitimacy in the public eye."[180] Justice Kagan's statements echo this sentiment:

> If new members of a Court come in and all of a sudden everything is up for grabs, very fundamental principles of law are being overthrown, replaced, then people have a right to say: "What's going on there? That doesn't seem very law-like. That just seems as though people with one set of policy views are replacing another."[181]

This jurisprudential whiplash harms the Court's reputation and, in turn, makes it difficult for the Court to protect fundamental liberties.[182] For our legal system to function properly, the public must view it as meriting esteem and deference.[183] Justice Kagan's dissents call attention to how the majority diverges from precedent and forcefully critiques them for doing so in an effort to maintain this respect.

CONCLUSION

Justice Kagan's dissent progression shows that she is doing more than arguing for her preferred result. She is fighting for the Court to, in her words, "act like a Court."[184] Moving forward, Justice Kagan will likely continue to author defiant dissents. In an event at the University of Pennsylvania, Justice Kagan reflected on the Court's collaboration and her dissenting: "Do we engage with each other in a way that attempts to find common ground? In a way that fosters principled compromise? Or is that beyond us? And, for me, I really want it to be the first."[185] However, "[t]ime will tell whether this is a Court that can get back to finding common ground."[186] If the Court is not going to operate in a way conducive to compromise, Justice Kagan informed listeners that "I will spend a lot of my time dissenting."[187]

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180. Michael Gentithes, Janus-*Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 139 (2020).
181. Northwestern Pritzker School of Law, *supra* note 178.
182. *See supra* notes 12–14.
183. Grove, *supra* note 14, at 2244.
184. Northwestern Pritzker School of Law, *supra* note 178.
185. University of Pennsylvania, *supra* note 83.
186. *Id.*
187. *Id.*