

JANUS AND THE MOVEMENT DISSENT

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Abstract: Public approval of the United States Supreme Court has fallen to record lows, driven by Americans who object to the Roberts Court's conservative jurisprudence. This Article explores how incisive, bold, and creative dissents aimed at social mobilization can bolster ordinary citizens who feel estranged from this Court. Using intellectual history tools, the Article shows that Justice Kagan's 2018 dissent in *Janus v. AFSCME* created a dialogic relationship between the Supreme Court and labor activists and liberal academics. The dissent amplified rhetoric pioneered by union leaders and scholars, disseminating it to a mass audience. After *Janus*, the labor movement and its allies deployed the dissent in political organizing, litigation, and storytelling. Overall, the dissent became a mobilizing force that channeled constitutional alienation into constitutional construction. The Article also contextualizes the *Janus* dissent among other demosprudential dissents, with a focus on those of Justices Scalia, Ginsburg, and Sotomayor.

The Article challenges the juricentric and prospective lens that scholars use to evaluate Supreme Court dissents. The *Janus* dissent embodies a genre of dissent aimed at movements and contemporary constitutional meaning making, not just influencing future courts. The Article also defends movement dissenting against institutionalist critiques. By refusing to accept the finality of the Court's decisions, demosprudential dissents create discursive space for popular resistance and reimagination that allows disempowered citizens to feel constitutional ownership. Movement dissents can moderate and channel anger at constitutional decisions, repairing faith in the process of constitutional explication in the long run.

We cannot play ostrich. . . . In the chill climate in which we live, we must go against the prevailing wind. We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust. We must dissent from a nation that has buried its head in the sand, waiting in vain for the needs of its poor, its elderly, and its sick to disappear and just blow away. We must dissent from a government that has left its young without jobs, education or hope. We must dissent from the poverty of vision and the absence of moral leadership. We must dissent because America can do better; because America has no choice but to do better.

—Justice Thurgood Marshall¹

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The most common way people give up their power is by thinking they don't have any.

—Alice Walker²

INTRODUCTION

In the 1970s, the law turned sharply against Justice Thurgood Marshall and his constitutional vision. Between 1969 and 1971, President Nixon appointed four Justices who transformed the Supreme Court's direction.³ With posthaste, the Court began to bleed *Brown v. Board of Education* of its “generative power” and erode the civil rights precedents to which Justice Marshall had devoted his life.⁴

Justice Marshall never acquiesced to this newfangled law. He never responded to it with apathy. Instead, he dissented. Over his twenty-four years on the Court, he wrote 363 dissents and joined 962 dissents penned by colleagues.⁵ Although many dissenting Justices ultimately abide by the decisions reached by the majority, Justice Marshall doggedly refused to retreat from his constitutional vision.⁶ As Professors Kathleen Sullivan and Owen Fiss have argued, these dissents make Justice Marshall as much a “great dissenter” as Justices Oliver Wendell Holmes and John Marshall Harlan.⁷

Justice Marshall consciously embraced his role as a great dissenter.⁸ He carried a copy of Justice Harlan's dissent in *Plessy v. Ferguson*.⁹ He picked

¹ Thurgood Marshall, Former Just. of the Sup. Ct. of the U.S., Liberty Medal Acceptance Speech at Independence Hall (July 4, 1992), https://web.archive.org/web/20121017150108/http://constitutioncenter.org/libertymedal/recipient_1992_speech.html [https://perma.cc/35E8-UAT2].

² CAROLYN WARNER, *THE WORDS OF EXTRAORDINARY WOMEN* 114 (2010).

³ *The President Calling: Richard M. Nixon Choosing Rehnquist*, AM. PUB. MEDIA (2018), <https://americanradioworks.publicradio.org/features/prestapes/fl.html> [https://perma.cc/VF95-DH4G].

⁴ Owen Fiss, *Another Equality*, ISSUES IN LEGAL SCHOLARSHIP: ORIGINS & FATE OF ANTISUBORDINATION THEORY, 2004, art. 20, at 25, https://law.yale.edu/sites/default/files/documents/faculty/papers/Fiss_AnotherEquality.pdf [https://perma.cc/9AKT-T9M7].

⁵ Charles L. Zelden, “How Do You Feel About Writing Dissents”? *Thurgood Marshall's Dissenting Vision for America*, 42 J. SUP. CT. HIST. 77, 81 (2017). In comparison, Justice Marshall wrote 322 majority opinions. *Id.*

⁶ See, e.g., Martha Minow, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 66, 75 (1991) (noting that, unlike Justice Marshall, “[i]t is common practice for Justices whose views have not prevailed with the majority to agree eventually to abide by the majority's decisions”).

⁷ See Kathleen M. Sullivan, *Opinion, Marshall, the Great Dissenter*, N.Y. TIMES (June 29, 1991), <https://www.nytimes.com/1991/06/29/opinion/marshall-the-great-dissenter.html> [perma.cc/UM6K-K23G]; OWEN FISS, *PILLARS OF JUSTICE: LAWYERS AND THE LIBERAL TRADITION* 25 (2017).

⁸ Lee Rawles, *Thurgood Marshall's Courage and Passion Celebrated by Former Law Clerks*, *Author*, AM. BAR ASS'N J. (Aug. 11, 2017), https://www.abajournal.com/news/article/Thurgood_Marshall's_courage_and_passion_celebrated_by_former_law_clerks [https://perma.cc/X5VE-8RN5].

⁹ *Id.*

clerks who indicated that they “liked to write dissenting opinions.”¹⁰ And he expected his clerks not to just write dissents, but to write forceful ones that communicated “the effects of the Court’s actions on living, breathing people.”¹¹ One of these clerks was Elena Kagan, who worked for Justice Marshall after she reassured him that she “would enjoy working on dissents.”¹² During her clerkship, Justice Marshall returned dissents to her “for failing to express [his understanding of the case] in a properly pungent tone.”¹³

Clerk Kagan, of course, would become Justice Kagan.¹⁴ Justice Kagan frequently brings a pungent tone to her dissents (as well as majority opinions and concurrences, which are characteristically trenchant).¹⁵ In this Article, I explore one of these opinions: her 2018 dissent in *Janus v. AFSCME*, a landmark case in which the Supreme Court barred public sector unions from col-

¹⁰ 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/7QUX-KKS9] (“[Justice Marshall] suggested that he accepted the role of a permanent opposition voice. He said that in interviewing prospective law clerks, he always asked if they liked working on dissents. ‘If they said ‘no,’ they didn’t get a job,’ he said.”).

¹¹ See Minow, *supra* note 6, at 66.

¹² See Elena Kagan, *For Justice Marshall*, 71 TEX. L. REV. 1125, 1126 (1993).

¹³ *Id.* at 1129.

¹⁴ See *Senate Confirms Elena Kagan to Supreme Court*, ABC NEWS (Aug. 5, 2010), <https://abcnews.go.com/Politics/senate-confirms-elena-kagan-supreme-court/story?id=11333391> [https://perma.cc/VL2N-WJQX].

¹⁵ See, e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2398–99 (2023) (Kagan, J., dissenting) (accusing the majority of “mov[ing] the goalposts”); *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Kagan, J., dissenting) (calling the Voting Rights Act the “single statute” that “represents the best of America” by marrying the “two great ideals” of “democracy and racial equality”); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 722 (2021) (mem.) (Kagan, J., dissenting) (accusing the majority of ignoring “essentially undisputed epidemiological findings” in blocking California’s efforts “to slow the spread of a deadly disease”); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2525 (2019) (Kagan, J., dissenting) (“The practices [of gerrymandering] challenged in these cases imperil our system of government.”); *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (Kagan, J., concurring) (“[T]he evils of gerrymandering seep into the legislative process itself.”); *Miller v. Alabama*, 567 U.S. 460, 481 (2012) (“So if (as *Harmelin v. Michigan*, 501 U.S. 957 (1991)) recognized) ‘death is different,’ children are different too.”); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 785 (2011) (Kagan, J., dissenting) (criticizing the majority for denying Arizonans “the chance to reform their electoral system so as to attain that most American of goals”). Scholars and Supreme Court observers applaud Justice Kagan’s writing. See generally Mark Joseph Stern, *Elena Kagan Is the Best Writer on the Supreme Court*, SLATE (Mar. 1, 2016), <https://slate.com/news-and-politics/2016/03/elena-kagans-dissent-in-lockhart-v-united-states-shows-shes-scalias-successor-as-the-best-writer-on-the-supreme-court.html> [https://perma.cc/B2LB-MPNA] (discussing Justice Kagan’s eloquent dissent in *Lockhart v. United States*, 577 U.S. 347 (2016)); Richard Wolf, *Associate Justice Elena Kagan, After Decade on Bench, Emerges as Supreme Court ‘Bridge-Builder,’* USA TODAY, <https://www.usatoday.com/story/news/politics/2020/08/04/elena-kagan-after-10-years-supreme-court-justice-wields-influence/5490349002/> [https://perma.cc/YJP7-VXFR] (Aug. 4, 2020) (quoting Walter Dellinger, former U.S. Assistant Attorney General, on Justice Kagan being the current “[C]ourt’s finest writer”).

lecting fair share fees from non-members and overturned *Abood v. Detroit Board of Education*, a unanimous decision from 1977.¹⁶

Justice Kagan's *Janus* dissent illustrates the power of incisive, bold, and creative dissents to bolster ordinary citizens seeking constitutional change in the wake of decisions they view as harmful. I argue the dissent embodied dialogic interaction between the Court and labor activists and liberal academics.¹⁷ Although scholars credit Justice Kagan with drafting key language in the *Janus* dissent, I show how union leaders and liberal scholars used similar rhetoric and intellectual framing in the run-up to the decision.¹⁸ Justice Kagan's *Janus* dissent is best understood as amplification, not creation. I also consider how unions and politicians amplified her amplification.¹⁹ The *Janus* dissent shaped contemporary political organizing, giving labor and supportive elected officials a tool to construct political meaning and muster their constituents.²⁰ This penetrating and accessible dissent became a blueprint for agenda setting, narrative building, and storytelling to non-lawyers. In the spirit of Professor Robert Cover, I document how this "jurisgenerative" dissent became a focal point for those resisting the Court's constitutional and economic visions.²¹

This "jurisgenerative" account challenges how scholars should think of dissent and dissenting Justices. Dean Heather Gerken has observed that the "conventional view of dissent is that dissent means speaking truth *to* power, not *with* it."²² Justice Kagan's *Janus* dissent does not wield the authority of the state, but it speaks with power. This power comes from the organizing potential of its dialectic with ordinary citizens and the labor movement—from its intervention in a long-running constitutional conversation that the Court neither started nor ended. *Janus*, like "[v]irtually all important decisions of the

¹⁶ See generally *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), *overruled by Janus*, 138 S. Ct. 2448. Before *Janus*, government entities could force public employees to contribute "a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment." *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

¹⁷ See discussion *infra* Part IV.

¹⁸ See discussion *infra* Part III. Compare Amy Kapczynski (@akapczynski), X (July 10, 2018), <https://twitter.com/akapczynski/status/1016709140746469378> [<https://perma.cc/CZC6-78GR>] (crediting Justice Kagan with inventing the dissent's "weaponiz[ation]" language), with Sally Kohn, *The Supreme Court Turns the First Amendment into a Weapon for Corporations*, DAILY BEAST, <https://www.thedailybeast.com/the-supreme-court-turns-the-first-amendment-into-a-weapon-for-corporations> [<https://perma.cc/MV6F-TKN6>] (July 12, 2017) (employing similar "weaponization" language, originally in 2014, to describe the Roberts Court years before *Janus*).

¹⁹ See discussion *infra* Parts IV.B–C.

²⁰ See discussion *infra* Parts IV.B–C.

²¹ See Robert M. Cover, *The Supreme Court: 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983) (arguing that the creation of legal meaning occurs "always through an essentially cultural medium").

²² Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1747 (2005).

Supreme Court,” is only “the beginning[] of [a] conversation[] between the Court and the people and their representatives.”²³

I structure the Article in five parts. In Part I, I survey the existing scholarship on Supreme Court dissents, which largely evaluates dissents through a juricentric and prospective lens. I contextualize this Article against the work of scholars closest to my views, namely Professors Lani Guinier, Douglas NeJaime, and Jon Michaels, and consider the potential ideological asymmetry in mobilizing dissents over the three decades since the retirements of Justices Marshall and Brennan.²⁴ In Part II, I identify and analyze modern demosprudential dissents—with a particular focus on those of Justices Scalia, Ginsburg, and Sotomayor—to identify threads on which Justice Kagan builds in *Janus*.²⁵ In Part III, I examine Justice Kagan’s *Janus* dissent in detail, tracing the union and academic roots of the dissent’s structure and substance. The dissent consolidates existing frames and narratives of left and labor discourse, disseminating them to a large audience.²⁶ In Part IV, I explore how progressive commentators, lawyers, union leaders, politicians, and workers used the *Janus* dissent in their political organizing.²⁷ I pay close attention to “citizen activists,” Professor David Cole’s term for the ordinary people who fight for constitutional values (often outside federal courts and Congress).²⁸ In Part V, I reflect on the promise and limits of movement dissenting, responding to potential objections.²⁹

Though President Nixon made a center-left Court into a conservative one, President Trump transformed a conservative Court into the most conservative one in a century.³⁰ *Janus* foreshadowed what already is occurring: sweeping changes to entire bodies of law, imposed by an assertive and ambitious Court willing to uproot precedent.³¹ Especially over the past two years, the Court’s

²³ ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 91 (1970).

²⁴ See *infra* notes 37–119 and accompanying text.

²⁵ See *infra* notes 120–234 and accompanying text.

²⁶ See *infra* notes 235–288 and accompanying text.

²⁷ See *infra* notes 289–477 and accompanying text.

²⁸ See generally DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016) (arguing that citizens have great power to bring about constitutional change through social mobilization).

²⁹ See *infra* notes 478–502 and accompanying text.

³⁰ See, e.g., LEE EPSTEIN, ANDREW D. MARTIN & KEVIN QUINN, *PROVISIONAL DATA REPORT ON THE 2022 TERM 8* (June 30, 2023), <https://static1.squarespace.com/static/60188505fb790b33c3d33a61/t/64a03b22e94ea863778347be/1688222498509/2022TermDataReport.pdf> [<https://perma.cc/DA3B-VNNB>] (finding that in 2021, 63% of the Court’s decisions were “conservative”). See generally Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022), <https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative> [<https://perma.cc/5CZV-BFXX>] (describing the conservative Court as “a nightmare” scenario for liberals).

³¹ See, e.g., Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97, 101 (2022), <https://harvardlawreview.org/forum/vol-136/the-imperial-supreme-court/> [<https://perma.cc/>]

liberal Justices have responded with incandescent dissents aimed at social mobilization.³² The *Janus* dissent—like those in *Dobbs v. Jackson Women’s Health Organization* and *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*—is no outlier, embodying a genre of dissent that is firmly established among the repertoire of the current Court’s liberals and likely to reemerge as the Roberts Court continues to move American law rightward.³³

During this time of legal tumult and upheaval, many Americans feel powerless and unrepresented in constitutional law.³⁴ Public approval of the Court has fallen to record lows, driven principally by citizens who object to the Court’s conservative rulings on abortion, guns, and other topics.³⁵ Through impassioned movement dissents, Justices channel popular alienation into action, constitutional cynicism into constitutional construction.³⁶ By amplifying the organizing frames of ordinary citizens and articulating a progressive constitutional vision, Justices can fortify the efforts of *living* Americans who know our country can and must do better.

2TVD-ALNK] (arguing that the Supreme Court is “implement[ing] the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity *except* the Supreme Court itself” and has routinely ignored precedent); Alaina Lancaster, *How Justice Amy Coney Barrett Is Already Changing the Supreme Court*, ALM LAW.COM (May 14, 2021), <https://www.law.com/therecorder/2021/05/14/how-justice-amy-coney-barrett-is-already-changing-the-supreme-court/> [https://perma.cc/VG9F-JXHS] (quoting Dean Erwin Chemerinsky and Professor Melissa Murray).

³² See *infra* Part I.C (discussing a range of dissents); *infra* notes 181–206 (discussing Justice Kagan’s dissent in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), in detail).

³³ See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 395–417 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 384–411 (2023) (Jackson, J., dissenting).

³⁴ See, e.g., *Over Half of Americans Disapprove of Supreme Court as Trust Plummets*, ANNENBERG PUB. POL’Y CTR. (Oct. 10, 2022), <https://www.asc.upenn.edu/news-events/news/over-half-americans-disapprove-supreme-court-trust-plummets> [https://perma.cc/Y67H-7PY6] (describing Americans’ growing distrust of the Court due to an impression of partisanship among the Justices).

³⁵ See, e.g., Julia Mueller, *Supreme Court Approval Drops to All-Time Low: Poll*, THE HILL (June 21, 2023), <https://thehill.com/regulation/court-battles/4060916-supreme-court-approval-drops-to-all-time-low-poll/> [https://perma.cc/WBX8-GFYB] (describing the results of a Quinnipiac University poll that found that public approval of the Supreme Court has dropped to an all-time low); Chris Cillizza, *Trust in the Supreme Court Is at a Record Low*, CNN, <https://www.cnn.com/2022/09/29/politics/supreme-court-trust-gallup-poll/index.html> [https://perma.cc/ZX3N-756B] (Sept. 29, 2022) (same); Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx> [https://perma.cc/4X99-AQRC] (same).

³⁶ See, e.g., *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 392 (2014) (Sotomayor, J., dissenting) (criticizing the Court for “eviscerat[ing] an important strand of our equal protection jurisprudence”).

I. WHY DO JUDGES DISSENT?

This Part grapples with the question of when and why Justices and judges dissent. Section A examines traditional theories of dissent from an academic and judicial perspective.³⁷ Section B focuses on how scholars have analyzed movement dissents in particular.³⁸ Finally, Section C explores how different Justices have employed movement dissents in the modern era.³⁹

A. Traditional Accounts of Dissent Writing

Why write a dissent? The conventional answer says judges write dissents to influence future law and future judges. Chief Justice Hughes famously gave voice to this juricentric and prospective account of dissents, arguing that a dissent “is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”⁴⁰ Under this frame, “a later decision,” not political conflict in the present, “correct[s] the error.”⁴¹ A phalanx of Justices, from Justices Scalia to Brandeis, admitted they hoped “at least some” of their dissents would eventually become future majority opinions.⁴² Justice Ginsburg, for her part, argued “[d]issents speak to a future age.”⁴³

Within this juricentric and prospective scheme, Judge Diane Wood of the U.S. Court of Appeals for the Seventh Circuit has offered a helpful typology of dissenting. She categorizes dissents into three categories: “principle-based dissents,” “process-based dissents,” and “accuracy-focused dissents.”⁴⁴ Principle-based dissents correspond to the Hughesian account: although “[n]o one writes a dissenting opinion under the illusion that vindication is inevitable,” a principle-based dissent can be “vindicated” in the future.⁴⁵ Process-based dissents involve judicial craftsmanship; they are “motivated by a concern

³⁷ See *infra* notes 40–62 and accompanying text.

³⁸ See *infra* notes 63–74 and accompanying text.

³⁹ See *infra* notes 75–119 and accompanying text.

⁴⁰ CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION* 68 (Columbia Paperback ed., 1966).

⁴¹ See *id.*

⁴² See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). In a 2008 interview, Justice Scalia said he understood dissents as a form of “advocating for the future.” Dan Slater, *Law Blog Chats with Scalia, Part II: ‘Master of the Dissent,’* WALL ST. J. (May 30, 2008), <https://www.wsj.com/articles/BL-LB-5886> [<https://perma.cc/SWE8-G5BP>].

⁴³ Morning Edition, *Ruth Bader Ginsburg and Malvina Harlan*, NPR (May 2, 2002), <https://www.npr.org/templates/story/story.php?storyId=1142685> [<https://perma.cc/Z8J4-6CZX>].

⁴⁴ Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445, 1445 (2012).

⁴⁵ *Id.* at 1468–69; see HUGHES, *supra* note 40, at 68 (focusing on the interplay between dissents and the future).

that the law as stated by the majority was not clear, that the standard of review was incorrect, or that there was a problem with the record.”⁴⁶ Accuracy-focused dissents “strive . . . to set the factual record straight,” which takes on increased importance given the few cases reviewed by the Supreme Court every year.⁴⁷

Modern Justices have provided additional reasons for dissent writing, which are similarly juricentric. Numerous Justices have argued dissents lead to stronger majority opinions by forcing the majority to clarify and rethink positions.⁴⁸ Under this account, dissents play a quintessentially intracourt role: the dialogue occurs between the Justices themselves, not between the Court and legal elites (let alone between the Court and the people). Per Justice Ginsburg: “My experience teaches that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation.”⁴⁹ Relatedly, the mere threat of publishing a dissent also allows Justices to extract concessions from the majority. This bargaining occurs within the Court and is largely shielded from the public.⁵⁰ And dissents can be “‘damage control’ mechanism[s]” that limit the application or interpretation of a majority opinion.⁵¹

Institutional commitments may motivate a Justice to write a dissent. Chief Justice Roberts has posited that dissents are “valuable” devices that show “the thinking of different parts of the Court” as it grapples with contentious questions.⁵² Dissents signal to losing parties their arguments were taken seriously.⁵³ This account similarly centers the Court and its legitimacy in the story of constitutional ownership and change, although it acknowledges the Court’s location in a nexus of actors and forces.

Justices may write dissents for judges who are not their colleagues. Justice Brennan, who famously championed the promise of state constitutionalism

⁴⁶ Wood, *supra* note 44, at 1469.

⁴⁷ *Id.* at 1473; see Stephen Wermiel, *The Court’s End-of-Term Workload: A Historical Perspective*, SCOTUSBLOG (June 10, 2022), <https://www.scotusblog.com/2022/06/the-courts-end-of-term-workload-a-historical-perspective/> [<https://perma.cc/J5BB-YTY4>] (revealing that the Court decided 141 cases in 1982, compared to only 59 in 2022).

⁴⁸ See generally M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283 (reviewing Supreme Court dissents).

⁴⁹ Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010).

⁵⁰ See, e.g., Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 108–09 (2011) (discussing the “credible threat” of dissenting in judicial negotiations).

⁵¹ See William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

⁵² MELVIN I. UROFSKY, *DISSSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT’S HISTORY AND THE NATION’S CONSTITUTIONAL DIALOGUE* 18 (2015).

⁵³ See Justice Elena Kagan, Remarks at Georgetown University Law Center (July 18, 2019), <https://www.c-span.org/video/?462748-1/justice-kagan-remarks-georgetown-university-law-center> [<https://perma.cc/ECS3-KBRH>] (stating that sometimes she writes a dissent to let a losing party know that they convinced at least some of the Justices they were right).

to expand individual rights, argued “dissents from federal courts may increasingly offer state courts legal theories that may be relevant to the interpretation of their own state constitutions.”⁵⁴ These dissents are dialogic, but still juricentric.

Like Justices and judges, most scholars approach dissents through a juricentric lens.⁵⁵ They look to how, when, and which “dissent[s] become[] the majority.”⁵⁶ Even academics who recognize the mobilizing power of dissents speak in juricentric terms. Professor Jon Michaels, for one, has urged the Court’s current liberals to write “strident, inventive and ambitious” dissents.⁵⁷ These defiant dissents, he claims, “can pull the [C]ourt to the left,” revive “abandoned left-liberal constitutional theories” among judges, “nurture a left-liberal farm team” on lower courts, and aid “[p]rogressive lower court judges, lawyers and scholars” in “count[ing] to five.”⁵⁸ Professor Michaels is right, but his account’s focus on judges makes it incomplete.

Scholars and Supreme Court watchers have analyzed Justice Kagan’s dissent from this vantage point. “[Justice Kagan’s] dissents have classic purposes: to provide a fairer, more trustworthy reading of the law, and to elucidate the majority’s misguided use of power—a guide, perhaps, to correction by some future Court,” legal journalist Lincoln Caplan recently observed in a review of her dissents.⁵⁹ Her dissents are understood to shed light on legal errors and serve as a roadmap for enlightened courts of the future.

Influenced by this juricentric and prospective account, many academics have shied away from studying recent dissents on the grounds that insufficient time has passed for a dissent to be identifiable as important, and this approach has created a dearth of scholarship on contemporary dissents. Professor Mark Tushnet, for example, contends, “[t]he more recent the dissent, the harder it is to know what social, economic, and political developments will occur that will

⁵⁴ Brennan, *supra* note 51, at 430; *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (stating that “decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law”).

⁵⁵ *See, e.g.*, 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/Q8PV-P8F5>] (describing the power of dissents to influence other jurists).

⁵⁶ *See, e.g.*, Vanessa Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. 183, 183, 186 (2009).

⁵⁷ Jon D. Michaels, *Op-Ed: The Supreme Court’s Liberals Should Follow Conservative Justice Rehnquist’s Lead—Dissent, Dissent, Dissent*, L.A. TIMES (July 9, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-michaels-power-of-supreme-court-dissents-20180709-story.html> [<https://perma.cc/FJQ6-HE7K>].

⁵⁸ *Id.* Justice Brennan was known “to joke that a critical talent for a Supreme Court Justice was the ability to count to five,” to ensure that a majority of the Justices on the Court would be willing to join an opinion. Anthony Lewis, *In Memoriam, William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 32 (1997).

⁵⁹ Caplan, *supra* note 55.

lead the dissent to fall by the wayside or to become important.”⁶⁰ Professor Melvin Urofsky and Supreme Court journalist Dahlia Lithwick, among others, echo Tushnet’s account.⁶¹ Per Professor Tushnet, “[t]he fate of a dissent lies in the hands of history.”⁶²

B. Theories of Mobilizing Dissents

A few scholars have recognized that dissents can lie in the hands of the present.⁶³ For over a century, some dissents have been aimed explicitly at the people—living, breathing people in the here and now, not just their progeny.⁶⁴ Modern dissents, according to Dean Robert Post, “reflect[] a shift in the Court’s jurisprudential understanding of the nature of law, from a grid of fixed and certain principles designed for the settlement of disputes, to the site of ongoing processes of adjustment and statesmanship designed to achieve social purposes.”⁶⁵ Dissents play into contemporary, “ongoing processes” that involve people who are not judges.⁶⁶

Professor Lani Guinier studied how modern movements use dissents to vindicate competing social purposes.⁶⁷ The account I advance in this Article fits within her theory (with Professor Gerald Torres) of *demosprudence*, which “focuses on the relationship between the lawmaking power of legal elites and the equally important, though often undervalued, power of social movements or mobilized constituencies to make, interpret, and change law.”⁶⁸ Professor

⁶⁰ I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES, at xx–xxi (Mark Tushnet ed., 2008).

⁶¹ UROFSKY, *supra* note 52, at 414–15; Dahlia Lithwick, ‘Dissent and the Supreme Court,’ by Melvin I. Urofsky, N.Y. TIMES (Oct. 21, 2015), <https://www.nytimes.com/2015/10/25/books/review/dissent-and-the-supreme-court-by-melvin-i-urofsky.html> [<https://perma.cc/AFH3-JGT4>] (concurring with Urofsky that “a dissent becomes influential because sometimes future justices will perceive its truth decades later”).

⁶² I DISSENT, *supra* note 60, at 221.

⁶³ See, e.g., Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1357 (2001) (arguing that courts should be in conversation with the people in a democracy and rejecting a formalist view of strictly separating law and politics); Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 121 (2008) (arguing that demosprudential dissents can engage citizens to “make democracy a practice, not just a theory”).

⁶⁴ See Post, *supra* note 63, at 1356 (“In 1898 the *Albany Law Journal* conceptualized dissent as appealing over the head of the Court directly to ‘the people.’”).

⁶⁵ *Id.* at 1274.

⁶⁶ *Id.*

⁶⁷ Guinier, *supra* note 63, at 47.

⁶⁸ See *id.*; see also Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2752 (2014) (explaining that *demosprudence* focuses on the power of ordinary citizens to inform and influence legislative and judicial process); Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135, 143–45 (2007) (same).

Guinier argued that demosprudential dissents “engage dialogically with nonjudicial actors” in the process of constitutional interpretation, resistance, and re-affirmation.⁶⁹ Demosprudential dissents are animated by faith in “deliberative democracy in which leadership or power is dispersed among the many rather than concentrated among the few.”⁷⁰

Guinier’s account accords with Professor Douglas NeJaime’s “winning through losing” theoretical framework, which explores how social movement advocates use litigation loss to mobilize, lobby, persuade, and shape public narratives.⁷¹ Professor NeJaime correctly recognizes that courts exist within multitextured, recursive, and discursive relationships with other lawmaking bodies, social movement actors, and ordinary citizens.⁷² Although his framework does not focus on the Supreme Court or dissents qua dissents, his work demonstrates that “court decisions are merely points along the ongoing process of constitutional meaning-making.”⁷³ In this ongoing process, “movement leaders may use an official, published, and publicized instantiation of unfair treatment to raise consciousness and mobilize constituents.”⁷⁴

C. Contemporary Examples of Mobilizing Dissents

Legal history bears out Professors NeJaime’s and Guinier’s understandings of mobilizing dissents. In the twentieth century, liberal and conservative Justices alike wrote dissents aimed at social causes, many of which galvanized action. The dissents of Justices Rehnquist and White in *Roe v. Wade*, for example, became lodestars to anti-abortion activists,⁷⁵ and Justice Alito invoked their abortion dissents repeatedly in his opinion overturning *Roe*, as did anti-abortion litigators and activists in the decades after *Roe*’s publication.⁷⁶ On the

⁶⁹ Guinier, *supra* note 63, at 50.

⁷⁰ *Id.*

⁷¹ See generally Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (exploring the mobilizing force of litigation loss in the LGBT and Christian rights movements).

⁷² *Id.* at 946.

⁷³ *Id.* at 967.

⁷⁴ *Id.* at 988.

⁷⁵ See, e.g., Frank Pavone, *Justice Rehnquist’s Dissent*, CATH. EXCH. (June 22, 2005), <https://catholicexchange.com/justice-rehnquists-dissent> [<https://perma.cc/E3V9-5QY8>] (presenting a leading anti-abortion activist praising Justice Rehnquist’s “valuable” *Roe* dissent and positioning it as a teaching tool for the pro-life movement). This influence extends to conservative judges. See, e.g., Amy Howe, *Judge Kavanaugh on Abortion: Rehnquist as “Judicial Hero” and the Case of Jane Doe*, SCOTUSBLOG (July 18, 2018), <https://www.scotusblog.com/2018/07/judge-kavanaugh-on-abortion-rehnquist-as-judicial-hero-and-the-case-of-jane-doe/> [<https://perma.cc/8LJX-LTU4>].

⁷⁶ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 228–29, 250, 261, 268–69, 275, 279, 284–86, 291–92 (2022); Richard W. Garnett, *Rehnquist’s Reservations and the Future of Roe*, LAW & LIBERTY (Aug. 6, 2021), <https://lawliberty.org/rehnquists-reservations-and-the-future-of-ro/> [<https://perma.cc/VN3L-CG5Q>].

left, Justice Brandeis's dissents spoke to social movements and highlighted Dickensian working conditions.⁷⁷ Justice Douglas's dissent in *Sierra Club v. Morton* electrified the environmental movement.⁷⁸

One might expect conscious movement building from Justices Brandeis and Douglas, but conservative judges have deliberately used the same playbook. Despite formalist protestations that their jurisprudence is entirely separate from politics, conservative Justices have "use[d] their judicial opinions as conscious tools to excite the anger, fears, and resentments of conservative constituencies, and thus to fan the fires of political mobilization."⁷⁹ Justice Scalia's dissents perhaps best embodied this "genre."⁸⁰ Many of his incendiary dissents, according to Professors Reva Siegel and Robert Post, were "explicitly addressed to the general public and designed to mobilize political resistance to the Court's decision[s]."⁸¹ His dissents "mobilized conservative constituencies

⁷⁷ See, e.g., *Adams v. Tanner*, 244 U.S. 590, 600–03 (1917) (Brandeis, J., dissenting) (documenting "the evils" and "the abuses" of employment agencies), *overruled by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963); Melvin I. Urofsky, *Mr. Justice Brandeis and the Art of Judicial Dissent*, 39 PEPP. L. REV. 919, 931 (2012) ("When aroused, however, and when he thought the matter important, Brandeis would enter a powerful dissent, laden not only with references to legal citations, but to economic and social materials as well. . . . He understood that his brethren might not be persuaded, but he wanted to teach the facts of life to a wider audience, to get politicians, law professors, students, and others engaged in the dialogue."); Duncan Hosie, *A Famous Liberal Justice Offers a Blueprint for Ketanji Brown Jackson*, WASH. POST (Apr. 8, 2022), <https://www.washingtonpost.com/outlook/2022/04/08/famous-liberal-justice-offers-blueprint-ketanji-brown-jackson/> [<https://perma.cc/MAN5-CD7F>] ("When the court made what he viewed as grave errors in constitutional cases, [Justice] Brandeis didn't just write critiques aimed at his fellow justices. He penned opinions designed to educate the public."); see also *Dickensian*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/dickensian> [<https://perma.cc/2UUV-787J>] ("[R]elating to or similar to something described in the books of Charles Dickens, especially living or working conditions that are below an acceptable standard.").

⁷⁸ See ADAM M. SOWARDS, *THE ENVIRONMENTAL JUSTICE: WILLIAM O. DOUGLAS AND AMERICAN CONSERVATION* 136 (2009) (describing how Justice Douglas's dissent "made waves on and off the Court" and inspired activism). See generally *Sierra Club v. Morton*, 405 U.S. 727, 741–52 (1972) (Douglas, J., dissenting).

⁷⁹ Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 567 (2006).

⁸⁰ *Id.*

⁸¹ *Id.*; see Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U.L. REV. 539, 546 (2009) ("Justice Scalia's dissents are often in conversation with a conservative constituency of accountability."); see also Guinier, *supra*, at 558 n.126 ("[Justice Scalia] has an obvious constituency of accountability—and they listen. Within a few days of having published his dissent in *Lawrence* [v. *Texas*, 539 U.S. 558, 586–605 (2003)] (Scalia, J., dissenting)), right-wing activists were making, mimeographing and circulating copies of it."); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1346 (2006) ("In condemning the majority opinion for authorizing same-sex marriage, Justice Scalia's dissent [in *Lawrence*] was implicitly, but urgently, warning opponents of gay rights that if they did not mobilize to protest the Court's decision in *Lawrence*, then the *Lawrence* opinion would soon be read to authorize gay marriage. His warning was perfectly well understood. Within days of the *Lawrence* decision, Randall Terry quoted the passages of Justice Scalia's *Lawrence* dis-

to bring political pressure to bear on the development of constitutional law” and “stimulate[d] political support for changing constitutional law to make it more consistent with his conservative vision.”⁸²

Justice Scalia’s inflammatory dissents alienated other Justices and degraded discourse.⁸³ But Justice Scalia’s dissents had a different project than getting to five or elevating discussion. He wrote for the people—and more precisely—*his* people. Although critics rightfully condemned Justice Scalia for his corrosive pen, they should also recognize Justice Scalia had a perceptive understanding of audience and social mobilization.⁸⁴ His dissents were not just the intemperate screeds of a “a sore loser who like[d] the limelight,” but conscious and sophisticated organizing aimed at the “Fox News crowd.”⁸⁵ Justice Scalia wrote to fortify the resolve and aid the efforts of this crowd, which he

sent that predicted the constitutionalization of same-sex marriage in fundraising letters that Terry posted on a website . . .”).

⁸² Post & Siegel, *supra* note 79, at 568.

⁸³ See, e.g., JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 181 (2006) (“Scalia alienated his ideological allies with his angry dissents and ad hominem attacks.”); Linda Greenhouse, Opinion, *Justice Scalia Objects*, N.Y. TIMES (Mar. 9, 2011), <https://opinionator.blogs.nytimes.com/2011/03/09/justice-scalia-objects/> [<https://perma.cc/323L-8XNR>] (describing Justice Scalia’s “bomb-throwing” dissents as “wildly inefficacious”); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 122 n.602 (1992) (“[O]bservers have speculated that Justice Scalia’s blistering sarcasm toward Justice O’Connor’s and Justice Kennedy’s opinions may indicate some personal animosity that has driven them toward the center.”); see also Terry A. Maroney, (*What We Talk About When We Talk About*) *Judicial Temperament*, 61 B.C. L. REV. 2085, 2089–90 (2020) (revealing that when Justice Scalia was asked, “[i]s there such thing as an ideal judicial temperament, and if so, what is it?” he replied, “[i]f there is one, I don’t have it”). At times, Justice Scalia dismissed the prospect of convincing modern Justices and judges to embrace his views, whom he viewed as already being indoctrinated in “this so-called living Constitution stuff.” See, e.g., Slater, *supra* note 42 (“Who do you think I’m writing my dissents for? I’m writing for the next generation and for law students. . . . I’m not going to persuade my colleagues and I’m not going to persuade most of the federal bench. They’ve had this so-called living Constitution stuff, you know, from the time they were in law school. That’s not going to change. But maybe the next generation will see the advantages of going back to the way we used to do things.” (quoting Justice Scalia)).

⁸⁴ See Mark Sherman, *In Victory or Dissent, Scalia Was a Man of Strong Opinions*, ASSOCIATED PRESS (Feb. 13, 2016), <https://apnews.com/article/96c0cdff1ceaa4c10837f40fe53528116> [<https://perma.cc/VA8T-W3XX>] (describing Justice Scalia as “a lightning rod for criticism from the left”); J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia’s Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201, 203 (2017) (casting blame on Justice Scalia for the declining “civility of public discourse”).

⁸⁵ See Michael O’Donnell, *What’s the Point of a Supreme Court Dissent?*, THE NATION (Jan. 21, 2016), <https://www.thenation.com/article/archive/whats-the-point-of-a-supreme-court-dissent/> [<https://perma.cc/AG2Z-EJSS>]. O’Donnell’s invocation of Fox News is apt. In various interviews on the network, Justice Scalia echoed the tone of his dissents. See, e.g., *Justice Antonin Scalia on Issues Facing SCOTUS and the Country*, FOX NEWS, <https://www.foxnews.com/transcript/justice-antonin-scalia-on-issues-facing-scotus-and-the-country> [<https://perma.cc/JRP2-2UAE>] (Jan. 27, 2017) (volunteering an ad hominem attack on Judge Richard Posner, stating “[i]t’s fun to push the buttons” of critics, and offering his views on the “incursion of immigrants” causing “suffering” in Arizona).

knew would battle for constitutional values long after individual opinions had receded from the headlines.⁸⁶

Justice Scalia is not alone. On the current Court, Justice Thomas frequently uses concurrences and dissents to agenda set for the conservative legal movement, raising salient issues and signaling goals and directions.⁸⁷ Justice Alito's dissents can be catnip for conservative culture warriors. In *Bostock v. Clayton County*, for example, Justice Alito stuffed his lengthy dissent with references to bathrooms, sex-segregated sports, and other fixations of Christian conservatives.⁸⁸ So, too, for Justice Gorsuch, whose accusation that his colleagues "favor[ed] Caesars Palace over Calvary Chapel"⁸⁹ prodded socially conservative religious groups into action.⁹⁰ As a judge on the D.C. Circuit Court of Appeals, Brett Kavanaugh sharply and frequently dissented.⁹¹ His dissents occasionally echoed the slogans of conservative activists, and this symbiotic rhetoric bolstered their cause and now-Justice Kavanaugh's career.⁹²

In the past three decades, liberal Justices have not always matched conservative Justices. Although the "dynamic" of galvanizing dissents often appears on the "right," Professor Guinier argued in 2009 that judges on the "left" have not played a similarly "active and self-conscious role in creating 'analyt-

⁸⁶ See, e.g., Slater, *supra* note 42.

⁸⁷ See, e.g., *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (mem.) (Thomas, J., concurring) ("I write to explain why, in an appropriate case, we should reconsider the precedents that require courts to ask it in the first place. *New York Times* [v. *Sullivan*, 376 U.S. 254 (1964)] and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law."); *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783 (2019) (per curiam) (Thomas, J., concurring) (outlining the contours of a reasons-ban attack on reproductive rights); *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221–24, 1226 n.5 (2021) (mem.) (Thomas, J., concurring) (raising concerns about 47 U.S.C. § 230 and the prospect of "censorship" from technology companies).

⁸⁸ 140 S. Ct. 1731, 1778–79 (2020) (Alito, J., dissenting).

⁸⁹ *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2609 (2020) (mem.) (Gorsuch, J., dissenting).

⁹⁰ See, e.g., *SCOTUS Favors "Caesars Palace Over Calvary Chapel,"* N.C. FAM. POL'Y COUNCIL (July 30, 2020), <https://www.ncfamily.org/scotus-favors-caesars-palace-over-calvary-chapel/> [<https://perma.cc/ULC9-89AH>] (depicting a conservative group citing Justice Gorsuch's language and that of other conservative Justices to mobilize its members).

⁹¹ Elliott Ash & Daniel L. Chen, *What Kind of Judge Is Brett Kavanaugh?: A Quantitative Analysis*, 2018 CARDOZO L. REV. DE NOVO 70, 71, <https://cardozolawreview.com/what-kind-of-judge-is-brett-kavanaugh/> [<https://perma.cc/6E5B-NHVD>] ("[W]e find evidence that Judge Kavanaugh is highly divisive in his decisions and rhetoric. He tends to dissent and be dissented against, typically along partisan lines. Indeed, Judge Kavanaugh is in the top percentiles of dissents, especially against Democrat-appointed colleagues. This divisiveness ramps up during election season: Kavanaugh in particular is observed disagreeing with his colleagues more often in the lead-up to elections . . .").

⁹² See, e.g., *Garza v. Hargan*, 874 F.3d 735, 752 (D.C. Cir. 2017) (mem.) (per curiam) (Kavanaugh, J., dissenting) (asserting that the majority's decision created "a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate *abortion on demand*" (emphasis added)), *vacated by Azar v. Garza*, 584 U.S. 726 (2018).

ic' space for citizens to advance alternative interpretations of their own lived experience and ultimately help change the law."⁹³ Professor Guinier noted that there is "no liberal counterpart" to Justice Scalia, "Justice Ginsburg notwithstanding."⁹⁴

Justice Ginsburg's dissents warrant further discussion. She had a deep and discursive relationship with women's equality advocates, and many of her dissents envisioned political mobilization to remedy the Court's errors. Women's rights activists memorably placed copies of her *Burwell v. Hobby Lobby Stores, Inc.* dissent in craft stores to protest the Court's decision in the 2014 case.⁹⁵ Activists and electeds cited Justice Ginsburg and her 2007 *Ledbetter v. Goodyear Tire & Rubber Co.* dissent in the push for an equal pay act of the same name.⁹⁶ But contrary to the popular iconography of Justice Ginsburg that emerged following her dissent in *Shelby County v. Holder*, her tone in earlier dissents was more sedate.⁹⁷ She normally envisioned popular mobilization aimed at Congress, which is a unitary and narrow framing of the potential remedying actors in our federalist system.⁹⁸ And in many areas of the law, in-

⁹³ Guinier, *supra* note 81, at 558.

⁹⁴ *Id.* at 558 n.126.

⁹⁵ Erin J. Rand, *Fear the Frill: Ruth Bader Ginsburg and the Uncertain Futurity of Feminist Judicial Dissent*, 101 Q.J. SPEECH 72, 80 (2015); see *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 739–72 (2014) (Ginsburg, J., dissenting).

⁹⁶ *S. 181, the Lilly Ledbetter Fair Pay Act of 2009*, DEMOCRATIC POL'Y COMM. (Jan. 15, 2009), https://www.dpc.senate.gov/dpcdoc.cfm?doc_name=lb-111-1-4 [<https://perma.cc/6QAK-M7BT>] (quoting Justice Ginsburg's dissent); Tell Me More, *Lilly Ledbetter and the Fight for Gender Equality*, NPR (Feb. 11, 2009), <https://www.npr.org/templates/story/story.php?storyId=100557186> [<https://perma.cc/5DMC-C4MG>] (interviewing Lilly Ledbetter who invoked Justice Ginsburg's dissent from the bench with admiration); see *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643–61 (2007) (Ginsburg, J., dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. & 42 U.S.C.).

⁹⁷ See 570 U.S. 529, 559–94 (2013) (Ginsburg, J., dissenting). Justice Ginsburg wrote *Shelby County*, the case that propelled her to popular culture stardom, when she had completed nearly three-fourths of her service on the Court. Sara Aridi, *How Ruth Bader Ginsburg Lives on in Pop Culture*, N.Y. TIMES, <https://www.nytimes.com/2020/09/26/at-home/ruth-bader-ginsburg-pop-culture-rbg.html> [<https://perma.cc/H7AT-KMVU>] (Oct. 15, 2020).

⁹⁸ See, e.g., *Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting) ("Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."); *Vance v. Ball State Univ.*, 570 U.S. 421, 470–71 (2013) (Ginsburg, J., dissenting) ("Congress has, in the recent past, intervened to correct this Court's wayward interpretations of Title VII The ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today."); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 386 (2013) (Ginsburg, J., dissenting) ("Today's misguided judgment, along with the judgment in *Vance v. Ball State Univ.* should prompt yet another Civil Rights Restoration Act.").

cluding appeals from death row inmates, she wrote in a proceduralist register that eschewed dialogue with movement activists.⁹⁹

Since Professor Guinier outlined her demosprudential theory in 2007, the Court's liberals have shown an increased willingness to embrace movement dissents, especially after President Trump's three appointments pushed the Court rightward. While just having completed her first term, Justice Jackson has already dissented with an eye to the demosprudence.¹⁰⁰ And even more so than Justice Kagan, Justice Sotomayor has the longest record of dialoging with movement activists and the public.¹⁰¹ Justice Sotomayor's dissents "speak to members of the public at large rather than to [her] usually sequestered colleagues."¹⁰²

Justice Sotomayor's dissents accentuate ordinary people in constitutional interpretation, stressing their equal station in constitutional law and creating a pathway for them to see themselves represented in constitutional discourse. In *Schuette v. Coalition to Defend Affirmative Action*, for example, she ruminates extensively on how "race matters" to young people who encounter "the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts" of not belonging.¹⁰³ In *Jones v. Mississippi*, a case about sentencing juveniles to life without parole, Justice Sotomayor speaks directly to the defendant and "the almost 1,500 other juvenile offenders" with the same burden, telling them that their lives and what they do with them matter.¹⁰⁴ Her dissents in capital punishment cases build on the tradition set by Justices Brennan and Marshall, elevating individual stories of defendants as well as the broader

⁹⁹ See generally *Ruth Bader Ginsburg: On the Death Penalty*, AM. BAR ASS'N (Oct. 30, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/fall-2020/ruth-bader-ginsburg-on-the-death-penalty/ [<https://perma.cc/4JGD-SKT2>] (emphasizing Justice Ginsburg's "strong belief in procedural fairness and her concerns over imbalances of power between state actors and capital defendants").

¹⁰⁰ See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 384–411 (2023) (Jackson, J., dissenting). Her recent dissent in *Students for Fair Admissions* used plain and memorable language (the majority showed an "ostrich-like" and "let-them-eat-cake obliviousness" as it proceeded "Don Quixote style") to accentuate the lived realities of structural racism in American society. *Id.* at 407, 410.

¹⁰¹ David Fontana, *The People's Justice?*, 123 YALE L.J. F. 447, 471 (2014), <http://yalelawjournal.org/forum/the-peoples-justice> [<https://perma.cc/5HVQ-ZTSW>] ("For non-academic audiences to be persuaded by liberal Justices, they must know who they are and what they are saying. Sotomayor's pervasive fame could popularize the liberal constitutional product, and by popularizing the product it could persuade new audiences."); see also *id.* at 473–74 ("The non-academic content of Sotomayor's remarks might therefore be transforming the liberal message by popularizing it. . . . The NAACP can better mobilize its members to contribute by pointing to Sotomayor's defense of affirmative action, rather than to the limited judicial capacity to evaluate the policy merits of affirmative action.").

¹⁰² Guinier, *supra* note 63, at 50.

¹⁰³ 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting).

¹⁰⁴ See 141 S. Ct. 1307, 1341 (2021) (Sotomayor, J., dissenting).

structures of racial injustice.¹⁰⁵ Her abortion dissents—most prominently in *United States v. Texas* and *Whole Woman's Health v. Jackson*, as well as the joint dissent in *Dobbs*—center the lived realities of women, especially poor women and women of color.¹⁰⁶ And in *303 Creative LLC v. Elenis*, Justice Sotomayor recounts the stories and “lives of LGBT people,” the history of exclusion and discrimination they have faced, and the contemporary and febrile “backlash to the movement for liberty and equality for gender and sexual minorities.”¹⁰⁷

These galvanizing dissents acknowledge lawmaking bodies and movement actors, situating the current Court as one actor among many in the process of constitutional meaning making in the same way legal scholars have.¹⁰⁸ Her dissent in *FDA v. American College of Obstetricians & Gynecologists*, for example, suggested the Biden Administration should “reconsider [the policy] and exhibit greater care and empathy for women seeking some measure of control over their health and reproductive lives” and cited two leading scholars of the reproductive justice movement.¹⁰⁹

These dissents, written for a wide audience, can be uplifting in the face of crushing legal defeats. Even while describing the “[p]rofoundly wrong” setback for LGBTQ rights in *303 Creative*, her dissent holds that “we” are not “powerless in the face of the [majority’s] decision.”¹¹⁰ This pronoun choice signals alignment with and even membership in the movement for LGBTQ rights, and her invocation of power serves as a potent reminder that the Court will not have the final say. “The meaning of our Constitution is found not in any law volume, but in the spirit of the people who live under it,” Justice Sotomayor continues in her *303 Creative* dissent, an explicit encouragement of

¹⁰⁵ Jordan S. Rubin, *Sotomayor Emerges as Heir to Marshall in Death Penalty Dissents*, BLOOMBERG L. (Jan. 22, 2021), <https://news.bloomberglaw.com/us-law-week/sotomayor-emerges-as-heir-to-marshall-in-death-penalty-dissents> [<https://perma.cc/M6YD-9HTD>].

¹⁰⁶ See *United States v. Texas*, 142 S. Ct. 14, 15–17 (2021) (mem.) (Sotomayor, J., concurring in part and dissenting in part) (“These women will suffer personal harm from delaying their medical care”); *Whole Women’s Health v. Jackson*, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting) (“[T]he Court’s failure to act . . . inflicts significant harm on the applicants and on women seeking abortions in Texas”); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 411 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (“After today, young women will come of age with fewer rights than their mothers and grandmothers had.”).

¹⁰⁷ 600 U.S. 570, 604, 636 (2023) (Sotomayor, J., dissenting); see also *id.* at 615–23, 636–40 (invoking pivotal moments in the struggle for LGBT rights, from Stonewall to the Pulse nightclub shooting).

¹⁰⁸ See, e.g., Jack M. Balkin & Reva B. Siegel, Essay, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928 (2006) (“[P]olitical contestation plays an important role in shaping understandings about the meaning and application of constitutional principles.”).

¹⁰⁹ 141 S. Ct. 578, 585 (2021) (mem.) (Sotomayor, J., dissenting) (citing Linda Greenhouse and Reva Siegel).

¹¹⁰ *303 Creative*, 600 U.S. at 604, 639 (Sotomayor, J., dissenting).

the people to continue fighting against “a society with social castes.”¹¹¹ “Every business owner in America has a choice whether to live out the values in the Constitution,” she added.¹¹²

Similarly, her *Students for Fair Admissions v. Harvard* dissent urges Americans to continue battling for racial justice. It ends with a defiant exhortation to colleges and activists who “cr[y] for equality”:

Notwithstanding this Court’s actions, however, society’s progress toward equality cannot be permanently halted. Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity will go on. Although the Court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society’s needs for diversity in education. Despite the Court’s unjustified exercise of power, the opinion today will serve only to highlight the Court’s own impotence in the face of an America whose cries for equality resound. As has been the case before in the history of American democracy, “the arc of the moral universe” will bend toward racial justice despite the Court’s efforts today to impede its progress. Martin Luther King “Our God is Marching On!” Speech (Mar. 25, 1965).¹¹³

Justice Sotomayor implores supporters of affirmative action to literally and figuratively march on, emphasizing that the power of a majority opinion (the “unjustified exercise of power”) is ultimately “impoten[t]” in the face of a popular movement for accountability and redress.¹¹⁴ Despite the supposed finality of the Court’s ruling, “the pursuit of racial diversity”—and the activism of those advocating for it—“will go on” thanks to those bending the arc.¹¹⁵ Her mobilizing dissent offers hope and a moral vision.

Justice Sotomayor’s public remarks cohere with her demosprudential dissents. Justice Sotomayor has repeatedly told liberal audiences not to give up on a progressive vision of the Constitution nor stop their “fight” for liberal constitutional values.¹¹⁶ And her questions at oral argument can speak to the

¹¹¹ *Id.* at 637, 639–40.

¹¹² *Id.* at 639.

¹¹³ 600 U.S. 181, 384 (2023) (Sotomayor, J., dissenting).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See, e.g., Adam Liptak, *Sotomayor Says Supreme Court Can ‘Regain the Public’s Confidence,’* N.Y. TIMES (June 16, 2022), <https://www.nytimes.com/2022/06/16/us/sonia-sotomayor-supreme-court.html> [<https://perma.cc/BZ73-HCJG>].

demosprudence.¹¹⁷ During the *Dobbs* oral argument, Justice Sotomayor tellingly observed that “there’s so much that’s not in the Constitution, including the fact that we have the last word.”¹¹⁸ As Professor Melissa Murray noted, Justice Sotomayor’s questions and comments at oral argument alerted “the people to the imminent threat to abortion rights in the hopes that, hearing her alarm, we might mobilize.”¹¹⁹ Her rhetoric on and off the bench has a practical dimension by raising public consciousness, a rousing one by generating popular resistance and amplifying her dissents, and a theoretical one by rejecting a paralytic understanding of the Court’s decisions as final and irreversible.

II. JUSTICE KAGAN’S DUAL REGISTERS: DISSENTING AND BRIDGE BUILDING

This Part takes a deep dive into Justice Kagan’s *Janus* dissent. Section A provides a textual reading of the dissent, examining the myriad rhetorical tools Justice Kagan uses to speak directly to the people.¹²⁰ Section B contextualizes the dissent among Justice Kagan’s recent dissents and her overarching judicial philosophy.¹²¹

A. *The Craft of the Janus Dissent*

Enter Justice Kagan. Although she has forcefully dissented with rhetoric cued into movement discourse, she brings different voices to different cases. Although her timbre does not change—Kagan opinions contain lucid writing, pithy aphorisms, analytical precision, and conceptual clarity—*how* she uses this timbre does. She picks her battles. She holds back, not always mustering the sharpness displayed in *Janus*. Seeking five votes, her majority opinions eschew purity for workable holdings that unite her colleagues. She strives for common ground rather than always offering an unabashed articulation of liberal constitutional values. Overall, her dissents are entangled in a complicated web of institutional commitments, savvy statesmanship, and a predisposition toward pragmatism and ideological moderation.¹²²

¹¹⁷ Oral enunciations from the bench are especially pivotal to democratic accountability under Professor Guinier’s framework. See Guinier, *supra* note 63, at 23–32.

¹¹⁸ Transcript of Oral Argument at 22, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (No. 19-1392).

¹¹⁹ Melissa Murray, *Sotomayor Saw She Couldn’t Sway Her Colleagues. So She Talked to Us Instead.*, WASH. POST (Dec. 3, 2021), https://www.washingtonpost.com/outlook/abortion-sotomayor-dobbs-oral-arguments/2021/12/03/ba6fc4b8-53d5-11ec-8927-c396fa861a71_story.html [https://perma.cc/X3JN-MR6Y].

¹²⁰ See *infra* notes 122–161 and accompanying text.

¹²¹ See *infra* notes 162–234 and accompanying text.

¹²² See, e.g., *Edwards v. Vannoy*, 141 S. Ct. 1547, 1573 n.1 (2021) (Kagan, J., dissenting) (criticizing the Court for ignoring the precedential value of a recent decision she had dissented from) (“I

Janus exemplifies one of her registers. Instead of adopting what Professor Mark Tushnet calls “defensive crouch constitutionalism,” the dissent holds fast to an alternative vision of what law is and should be.¹²³ It “soar[s] with passion and ring[s] with rhetoric.”¹²⁴ Reflecting her longstanding belief that judicial writing should be accessible, it is straightforward and concise.¹²⁵ Justice Kagan builds a vivid tale with allegory and antagonists, plot and narrative.¹²⁶ Her dissent manages to methodically respond to Justice Alito’s points while communicating the “large-scale consequences” of the case.¹²⁷ Scholars rightfully praise Justice Kagan for her “persuasive” and “compelling” dissent,¹²⁸ which contains “the strongest writing of her years on the [C]ourt.”¹²⁹

Justice Kagan builds this tale from a conversational style and tone. The *Janus* dissent deploys short, declarative sentences,¹³⁰ imperative sentences,¹³¹ deliberately ungrammatical sentences that emphasize core themes,¹³² and repetitive sentences that similarly accentuate points.¹³³ It uses arresting verbs,¹³⁴

dissented in *Ramos* [v. *Louisiana*, 140 S. Ct. 1390 (2020)] precisely because of its abandonment of *stare decisis*. . . . Now that *Ramos* is the law, *stare decisis* is on its side. I take the decision on its own terms, and give it all the consequence it deserves.” (internal citations omitted)).

¹²³ Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> [<https://perma.cc/BZ28-DY5T>].

¹²⁴ Brennan, *supra* note 51, at 431. Justice Brennan observed that dissents “soar with passion and ring with rhetoric,” straddling “the worlds of literature and law” as they “seek to sow seeds for future harvest.” *Id.*

¹²⁵ See, e.g., *SCOTUS Justice Kagan Gives Students “Keys to Success,”* B.C. L. MAG. ONLINE (Sept. 15, 2015), <https://lawmagazine.bc.edu/2015/09/scotus-justice-kagan-gives-students-keys-to-success/> [<https://perma.cc/C325-FAAE>] (“To be a world class lawyer you have to do a lot of writing and you have to be good at it Good writing is hard generally and good legal writing is harder than that—because a lot of legal concepts are complicated and arcane and not particularly intuitive to an audience, and figuring out how to convey these complicated and arcane ideas in a way that people can understand and in a way that sticks with people is something that I think every day I wish I could do better.”).

¹²⁶ See, e.g., *Janus v. AFSCME*, 138 S. Ct. 2448, 2488 (2018) (Kagan, J., dissenting) (“I begin with *Abood* . . .”).

¹²⁷ *Id.* at 2487.

¹²⁸ William B. Gould IV, *How Five Young Men Channeled Nine Old Men: Janus and the High Court’s Anti-Labor Policymaking*, 53 U.S.F. L. REV. 209, 224, 231 (2019).

¹²⁹ Linda Greenhouse, Opinion, *A Precedent Overturned Reveals a Supreme Court in Crisis*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/23/opinion/supreme-court-precedent.html> [<https://perma.cc/BZH3-SC7Z>].

¹³⁰ *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting) (“Not any longer.”); *id.* at 2492 (“It is not.”); *id.* at 2498 (“Well, not quite that . . .”); *id.* at 2499 (“Not today.”).

¹³¹ *Id.* at 2490 (“Remember that once a union achieves exclusive-representation status, the law compels it to fairly represent all workers in the bargaining unit . . .”).

¹³² *Id.* at 2491 n.1, 2492 (beginning sentences with “[t]hat means”); *id.* at 2494 (“Which is completely predictable.”).

¹³³ See, e.g., *id.* at 2499–500 (repeating the phrase “[i]t does so” to stress the damage the majority opinion does to already negotiated agreements).

first-person narration,¹³⁵ second-person narration that refers explicitly to the reader,¹³⁶ sentence-initial conjunction,¹³⁷ vivid imagery,¹³⁸ colloquial idioms,¹³⁹ creative expressions,¹⁴⁰ derisive humor,¹⁴¹ irony,¹⁴² rhetorical ellipsis that invites the reader's participation,¹⁴³ rhetorical questions,¹⁴⁴ analogies to the real-world experiences of workers,¹⁴⁵ and evocative constructions to describe overturning precedent,¹⁴⁶ among other legal moves of the majority opinion. Although Justice Kagan discusses the relevant legal precedents and concepts at length, she also eschews legalistic terms throughout the dissent.

These deliberate, expressive choices draw citizen activists into constitutional dialogue and position the Justice in an egalitarian rather than hierarchical positionality to them. Her prose calls for participation, interaction, and imagination from people with and without legal backgrounds.¹⁴⁷ Rather than *write* from a formal, solemn, and self-important register, she *talks* like a normal person.

This colloquial style does not prevent Justice Kagan from engaging in a sophisticated manner with the relevant legal issues. In fact, the dissent reserves its most acute ire for sloppy legal rationales and the unjustified abandonment

¹³⁴ *Id.* at 2494 (using the phrase “dust off” to describe overturning precedent); *id.* at 2501 (using the verbs “sugarcoat[]” and “limp[]”).

¹³⁵ *See, e.g., id.* at 2488–89, 2494, 2499, 2500 n.6 (invoking the “I” pronoun).

¹³⁶ *Id.* at 2496 (“So take your pick.”); *id.* at 2502 (“Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it).”).

¹³⁷ *See, e.g., id.* at 2487 (“And [*Abood*] is deeply entrenched”); *id.* at 2488 (“And there is no way to confine the union’s services to union members alone”); *id.* at 2489 (“So the Court struck a balance”); *id.* at 2500 (“And anyway”).

¹³⁸ *Id.* at 2491 (describing the technical problem of adverse selection as a “vicious cycle”); *id.* at 2497 (arguing the majority opinion “creates an unjustified hole in the law”); *id.* at 2498 (claiming the majority opinion was “[n]eeding to stretch further”); *id.* at 2501 (depicting the majority’s use of the First Amendment as a “sword”).

¹³⁹ *Id.* at 2491 (using the idiom “[I]ittle wonder”); *id.* at 2492 (using the idiom “truth be told”); *id.* at 2500 (using the idiom “no real clue”); *id.* at 2502 (using the idiom “road runs long”).

¹⁴⁰ *See, e.g., id.* at 2501 (using the term “in-betweeners” to refer to a middle category between the two dominant state approaches to labor issues).

¹⁴¹ *Id.* at 2494 (“So I would wager a small fortune that the next time a general rule governing public employee speech comes before us, we will dust off *Pickering* [*v. Board of Education*, 391 U.S. 563 (1968)].”); *id.* at 2498 (“Don’t like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as ‘special justifications.’”).

¹⁴² *Id.* at 2494 (“But the only case the majority cites for that reading of our precedent is possibly (thankfully) the most exceptional in our First Amendment annals”).

¹⁴³ *Id.* at 2493 (“And so government employees are . . . just employees, even though they work for the government.”).

¹⁴⁴ *Id.* at 2495 (“Why?”).

¹⁴⁵ *Id.* at 2496 (invoking a scenario where a government entity disciplines a group of non-unionized employees organizing for a better health plan).

¹⁴⁶ *Id.* at 2487 (describing the development of precedent as a “6-year campaign to reverse *Abood*”); *id.* at 2498 (commenting on “the assault on *Abood*”).

¹⁴⁷ *See supra* note 136 (illustrating Justice Kagan speaking directly to the reader).

of precedent, the very subjects that (before her translations) would be foreign to a non-lawyer. The “worse part” of the majority opinion, per the dissent, comes in its insubstantial legal reasoning.¹⁴⁸ She meticulously underscores “[t]he standard factors this Court considers when deciding to overrule a decision all cut one way” and dissects the majority’s legal reasoning.¹⁴⁹ Overall, her plain English allows her to make a more convincing case against the technical legal errors in judicial decision-making, sacrificing no intellectual heft but expanding the audience that can engage with it.

Justice Kagan sticks to a clear thesis through the dissent that vivifies this discussion of stare decisis. Her argument—that the majority “has overruled *Abood* because it wanted to. Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate”—is straightforward and clear, offering a digestible narrative that identifies a clear adversary and motivation.¹⁵⁰ She also maintains a razor focus on “real world” consequences of the decision.¹⁵¹ Explaining in detail the impacts of the Court’s decision on “millions of employees,” public workplaces, and state and local governments, Justice Kagan channels Justice Sotomayor’s demosprudential tone and never lets the legal issues obscure the pressing social realities involved in the case.¹⁵²

The dissent goes beyond simply narrating a tale about labor rights. Justice Kagan skillfully frames her dissent by referencing broader and more universal themes, most notably the preservation of democracy and the proper role of courts in a constitutional democracy. The *Janus* Court “end[ed]” a “healthy” and “democratic” debate, substituting its own judgment on “who should prevail” over the policy preferences of twenty-two states in the midst of a live and controversial debate.¹⁵³ The majority opinion, according to the dissent, doesn’t merely harm public sector unions, but erodes “democratic governance” and “unleashes judges” to usurp the decision-making roles of “state and local officials.”¹⁵⁴

She also situates *Janus* in the larger arc of the Court’s jurisprudence. Taking aim at the modern Court’s then-emerging deregulatory First Amendment precedents, she connects the *Janus* majority opinion to *Sorrell v. IMS Health Inc.* and *National Institute of Family & Life Advocates v. Becerra*, two cases in which the Roberts Court applied the First Amendment in “an aggressive way”

¹⁴⁸ *Janus*, 138 S. Ct. at 2497 (Kagan, J., dissenting).

¹⁴⁹ *Id.* at 2501.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 2487, 2499–501.

¹⁵² *Id.*

¹⁵³ *Id.* at 2501.

¹⁵⁴ *Id.* at 2501–02.

to strike down popular laws and that represent a larger set of cases that includes *Citizens United v. FEC*, *McCutcheon v. FEC*, and *Harris v. Quinn*, among others.¹⁵⁵ *Janus*, she warns, “threatens not to be the last” in this line of cases.¹⁵⁶ And although she does not invoke *Lochner v. New York* explicitly, her rhetoric also has unmistakable echoes in Court cases from the New Deal era in which the Due Process Clause was wielded to strike down popular democratic laws that protected workers.¹⁵⁷ In writing a dissent that mobilizes action in the present, Justice Kagan turns to the past and the future.

The dissent consciously draws on the tradition of mobilizing dissents aimed at the present. Justice Kagan portrays the majority as “black-robed rulers overriding citizens’ choices,”¹⁵⁸ echoing Justice Scalia’s dissents in *United States v. Windsor* and other cases.¹⁵⁹ Just like Justice Scalia, she uses clear, memorable phrases to convey complicated legal concepts: the Court “weaponiz[es] the First Amendment,” which was “meant for better things” and “turn[ed] the First Amendment into a sword.”¹⁶⁰ *Janus* was also the second time Justice Kagan read a dissent from the bench, a practice that Professors Guinier and Christine Venter see as aimed at popular mobilization.¹⁶¹

¹⁵⁵ *Id.* at 2501–02. See generally *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361 (2018); *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon v. FEC*, 572 U.S. 185 (2014); *Harris v. Quinn*, 573 U.S. 616 (2014).

¹⁵⁶ *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

¹⁵⁷ See *infra* notes 262–265 and accompanying text (noting the similarity between Justice Kagan’s *Janus* dissent and the writings of legal academics); *Lochner v. New York*, 198 U.S. 45, 58 (1905) (striking down a New York State law capping bakers’ working hours at ten hours per day), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

¹⁵⁸ *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

¹⁵⁹ See *United States v. Windsor*, 570 U.S. 744, 780 (2013) (Scalia, J., dissenting) (equating the *Windsor* majority opinion with “black-robed supremacy”); see also *Obergefell v. Hodges*, 576 U.S. 644, 713 (2015) (Scalia, J., dissenting) (“Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.”).

¹⁶⁰ *Janus*, 138 S. Ct. at 2501–02 (Kagan, J., dissenting).

¹⁶¹ Guinier, *supra* note 63, at 14 (“[O]ral dissents, like the orality of spoken word poetry or the rhetoric of feminism, have a distinctive potential to root disagreement about the meaning and interpretation of constitutional law in a more democratically accountable soil. Ultimately, they may spark a deliberative process that enhances public confidence in the legitimacy of the judicial process. Oral dissents can become a crucial tool in the ongoing dialogue between constitutional law and constitutional culture.”). See generally Christine M. Venter, *Dissenting from the Bench: The Rhetorical and Performative Oral Jurisprudence of Ruth Bader Ginsburg and Antonin Scalia*, 56 WAKE FOREST L. REV. 321 (2021) (arguing that Justice Scalia was more likely to dissent from the bench with an eye toward creating a conservative canon in the legal academy, whereas Justice Ginsburg aimed her oral dissents at social movement actors).

B. Contextualizing the Janus Dissent

The Justice has acknowledged she writes “a lot of different kinds of dissents” for whom the audience “varies.”¹⁶² Most of Justice Kagan’s dissents are not like *Janus*. They eschew a movement dialectic and seem designed to show the case’s losing party that the Court, or at least one Justice on it, seriously grappled with their arguments. Justice Kagan doesn’t read them from the bench. Although engaging and thoughtful, they are not rousing.

Janus is a different kind of dissent, a galvanizing one that is relatively rare when considered against all of Justice Kagan’s writings. These rousing dissents include *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*,¹⁶³ *Rucho v. Common Cause*,¹⁶⁴ *Brnovich v. Democratic National Committee*,¹⁶⁵ *South Bay United Pentecostal Church v. Newsom*,¹⁶⁶ *West Virginia v. EPA*,¹⁶⁷ and *Biden v. Nebraska*.¹⁶⁸

These forceful and mobilizing dissents are limited in their subject matter. All invoke democracy and the Court’s institutional role in a constitutional democracy. All touch on the functioning of political processes and the First Amendment. And all involve the Court’s highest profile cases of each term, the ones that generate public interest and could generate public mobilization by the very fact they are prominent. They overlap with *Janus* in these aspects.

Consider Justice Kagan’s recent dissent in *Biden v. Nebraska*, which foregrounds normative considerations related to democracy and the Court’s “proper role” as an institution designed to be “as detached as possible from the body politic.”¹⁶⁹ She asserts that the majority opinion, which ruled that the Biden Administration had exceeded its authority with its initiative to eliminate more than four hundred billion dollars in student debt, endangered the “democratic order” and “democracy” by abrogating power from Congress, a “democratic institution” that responds “to the preferences of American voters,” and from the Executive, which represents “the broadest of all political constituencies.”¹⁷⁰ The first sentence of the dissent—“[i]n every respect, the Court today exceeds its proper, limited role in our Nation’s governance”—stresses the Court’s appropriate function in a constitutional democracy, a theme she repeatedly re-

¹⁶² Kagan, *supra* note 53.

¹⁶³ 564 U.S. 721, 755 (2011) (Kagan, J., dissenting).

¹⁶⁴ 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting).

¹⁶⁵ 141 S. Ct. 2321, 2350 (2021) (Kagan, J., dissenting).

¹⁶⁶ 141 S. Ct. 716, 720 (2021) (mem.) (Kagan, J., dissenting).

¹⁶⁷ 142 S. Ct. 2587, 2626 (2022) (Kagan, J., dissenting).

¹⁶⁸ 143 S. Ct. 2355, 2384 (2023) (Kagan, J., dissenting).

¹⁶⁹ *Id.* at 2397–98.

¹⁷⁰ *Id.*

turned to throughout the dissent.¹⁷¹ And she chose to write this type of dissent in one of the most high-profile cases of the term, a case with immediate financial ramifications for over forty million Americans—one that had generated sustained political mobilization and could spark political backlash.¹⁷²

This emphasis on democracy and the Court's institutional role in it can be traced through her other movement dissents. The *Bennett* Court denied Arizonans "the chance to reform their electoral system so as to attain that most American of goals"—a functioning democracy.¹⁷³ The *South Bay United* Court blocked California from acting on "essentially undisputed epidemiological findings" to "slow the spread of a deadly disease," imposing the views of "unelected actors" whose "judicial edict[s]" are "forever insulate[d] . . . from responsibility for our errors" by life tenure, in contrast to other actors in a political system.¹⁷⁴ The *Brnovich* Court denied "every American, of every race, an equal chance to participate in our democracy" by diminishing the Voting Rights Act, the "single statute" that "represents the best of America" by marrying the "two great ideals" of "democracy and racial equality."¹⁷⁵ The *West Virginia* Court subverted the judicial role in order to override "legislative choice."¹⁷⁶

Justice Kagan's *Rucho* dissent gestures at a democracy-driven, conceptual framework that may motivate her to write searing dissents. Justice Kagan posited:

If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. . . . The practices [of gerrymandering] challenged in these cases imperil our system of government. Part of the Court's role in that

¹⁷¹ *Id.* at 2384; *see, e.g., id.* at 2386 ("To decide the case is to exceed the permissible boundaries of the judicial role."); *id.* at 2388 ("The requirement that the proper party—the party actually affected—challenge an action ensures that courts do not overstep their proper bounds."); *id.* ("Without that [standing] requirement, courts become 'forums for the ventilation of public grievances'—for settlement of ideological and political disputes." (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982))).

¹⁷² *Id.* at 2385 (noting that "two Secretaries [of Education] serving two different Presidents" had invoked their powers granted under the HEROES Act to forestall loan repayment in response to the Covid-19 pandemic); Aishvarya Kavi, *Outside Supreme Court, Students Rally for Loan Forgiveness*, N.Y. TIMES (Feb. 28, 2023), <https://www.nytimes.com/2023/02/28/us/politics/protests-supreme-court-student-loans.html> [<https://perma.cc/A336-XFVP>].

¹⁷³ *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 785 (2011) (Kagan, J., dissenting).

¹⁷⁴ *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 722, 723 (2021) (mem.) (Kagan, J., dissenting).

¹⁷⁵ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350, 2373 (2021) (Kagan, J., dissenting).

¹⁷⁶ *West Virginia v. EPA*, 142 S. Ct. 2587, 2628, 2643 (2022) (Kagan, J., dissenting).

system is to defend its foundations. None is more important than free and fair elections.¹⁷⁷

In John Hart Ely-esque terms, Justice Kagan writes potent dissents when the Court harms the basic structure of government.¹⁷⁸ The Court has a uniquely “important” role to “defend [democracy’s] foundations,” and she excoriates the Court for abandoning this responsibility.¹⁷⁹

In addition to these substantive and thematic similarities, Justice Kagan’s galvanizing dissents have stylistic commonalities, a result of intentional and punctilious effort.¹⁸⁰ They lean into her characteristically conversational and accessible style. Return, again, to *Biden v. Nebraska*.¹⁸¹ Justice Kagan’s dissent is consciously addressed to her colleagues on the Court and the “40 million Americans [who] will not receive the benefits the [Biden Administration loan] plan provides.”¹⁸² To speak directly to these forty million Americans and supporters of debt cancellation, Justice Kagan turns to the *Janus* tool kit: vivid imagery,¹⁸³ explanatory aphorisms,¹⁸⁴ declarative statements,¹⁸⁵ rhetorical questions,¹⁸⁶ internal iteration and parallel structures,¹⁸⁷ common idioms,¹⁸⁸

¹⁷⁷ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2511, 2525 (2019) (Kagan, J., dissenting).

¹⁷⁸ See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 86–87 (1980) (articulating “a participation-oriented, representation-reinforcing approach to judicial review” that emerged from the Warren Court’s jurisprudence and *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

¹⁷⁹ *Rucho*, 139 S. Ct. at 2525 (Kagan, J., dissenting).

¹⁸⁰ Christine Perkins, *A Conversation with U.S. Supreme Court Justice Elena Kagan on Her Love of Law and Landing ‘the Dream Job,’* HARV. L. TODAY (Sept. 15, 2017), <https://hls.harvard.edu/today/conversation-u-s-supreme-court-justice-elena-kagans-love-law-landing-dream-job/> [<https://perma.cc/S3E3-57PD>] (quoting Justice Kagan) (“I can stare at the same paragraph for hours at a time. I can stare at the same sentence for hours at a time It takes time. It takes work to get a final product that looks as though it has all just flowed from your pen.”).

¹⁸¹ See generally 143 S. Ct. 2355, 2384–400 (2023) (Kagan, J., dissenting).

¹⁸² *Id.* at 2385.

¹⁸³ See, e.g., *id.* at 2390 (discussing a legal argument as “an escape hatch”); *id.* at 2395 (commenting on the judicially created “gaping holes” in the Secretary of Education’s authority); *id.* at 2397 (“So the Court puts its own heavyweight thumb on the scales.”); *id.* (referring to the “the major-questions sword”).

¹⁸⁴ See, e.g., *id.* at 2388 (describing standing doctrine as a way to “keep courts acting like courts”). Just as Justice Sotomayor has used public remarks to echo her dissents, Justice Kagan has used this phrase in public remarks as well. See Lynn Sweet, *Justice Kagan Warns Supreme Court Can’t Be Seen as Political*, CHI. SUN-TIMES (Sept. 14, 2022), <https://chicago.suntimes.com/news/2022/9/14/23353374/supreme-court-justice-kagan-northwestern-legitimacy> [<https://perma.cc/5VHB-KGAL>] (documenting Justice Kagan stating that “[w]hat makes a court ‘legitimate is that the court is acting like a court, doing something that is recognizably law’”).

¹⁸⁵ See, e.g., *Nebraska*, 143 S. Ct. at 2396 (Kagan, J., dissenting) (“Not this Court, not today.”); *id.* at 2397 (“But also often not.”).

¹⁸⁶ See, e.g., *id.* at 2387 (“Which leads to an obvious question: Where’s MOHELA?”); *id.* at 2390 n.1 (“As for any other purpose?”); *id.* at 2393 n.2 (“How could it possibly know?”); *id.* at 2396 (“Which is all well and good, except that under the majority’s reasoning, how could it not be?”); *id.* at

colloquial expressions,¹⁸⁹ colorful verbs,¹⁹⁰ evocative hypotheticals,¹⁹¹ biting humor,¹⁹² thematic framing,¹⁹³ modes of emphasis,¹⁹⁴ simple sentence structures that deviate stylistically from grammar conventions,¹⁹⁵ first-person narrative,¹⁹⁶ and the use of the second-person imperative to directly engage readers.¹⁹⁷

Her sentences are short; her words are simple; her points are clear. In her *Janus* dissent, these literary and stylistic moves draw ordinary citizens directly into the heart of the dissent's constitutional analysis. In *Nebraska*, they function comparably to break down a formalist, legalistic barrier separating constitutional law and the people. She writes—or more precisely, *talks*—in a way that non-lawyers can understand.

2397 (using a series of four rhetorical questions to highlight the unrealistic demands of the “major-questions doctrine” on Congress).

¹⁸⁷ See, e.g., *id.* at 2384–85 (repeating use of the sentence “[t]hat may have been a good idea, or it may have been a bad idea” to describe the relevant language from the HEROES Act); see *id.* at 2385, 2388 (repeating use of the phrase to “keep courts acting like courts”); *id.* at 2397 (repeating a sentence structure beginning with the word “[b]ecause” to underscore why Congress delegates to agencies “often and broadly”).

¹⁸⁸ See, e.g., *id.* at 2386 (contending that the plaintiffs “have thrown no fewer than four different theories of injury against the wall”); *id.* at 2398–99 (accusing the majority of “mov[ing] the goalposts for triggering the major-questions doctrine”).

¹⁸⁹ See, e.g., *id.* at 2396 (“The tell comes in the last part of the majority’s opinion.”).

¹⁹⁰ See, e.g., *id.* at 2388 (using the verb “blow[]”); *id.* at 2391 (using the verb “piggy-back”); *id.* at 2400 (using the verb “kill”).

¹⁹¹ See, e.g., *id.* at 2393 (“So imagine the horrific. A terrorist organization sets off a dirty bomb in Chicago.”).

¹⁹² See, e.g., *id.* at 2388 (“Is there a person in America who thinks Missouri is here because it is worried about MOHELA’s loss of loan-servicing fees?”); *id.* at 2394–95 (“But the answer is no, because Congress would not have written so insane a law.”); *id.* at 2399–400 (“And then, perchance, it wonders why it has only compounded the ‘sharp debates’ in the country?”).

¹⁹³ The dissent stresses the theme throughout that the Court is not “acting like a court.” See, e.g., *id.* at 2385, 2388, 2400; see also *supra* note 184 (noting that Justice Kagan returned to this theme in *Biden v. Nebraska*).

¹⁹⁴ See, e.g., *Nebraska*, 143 S. Ct. at 2395 (Kagan, J., dissenting) (“Change often (usually?) involves or necessitates replacements.”); *id.* at 2397 (“Here is a fact of the matter . . .”).

¹⁹⁵ See, e.g., *id.* at 2386 (“Missouri’s theory of standing, as accepted by the majority, goes as follows.”); *id.* at 2388 (“So this case should have been open-and-shut.”); *id.* at 2390 n.1 (“Not a word to suggest the same result.”); *id.* at 2391 (“A bit of background first, to give a sense of where the HEROES Act came from.”); *id.* (“Which is exactly what the Secretary did in establishing his loan forgiveness plan.”); *id.* at 2399 (“Now here is the other, the one the Court takes.”).

¹⁹⁶ See, e.g., *id.* at 2391 (“The majority and I differ, as I’ll soon address . . .”); *id.* at 2399 (“I can’t believe the majority really thinks Congress would have answered ‘no.’”); *id.* (stating “I have no quarrel with” the majority opinion’s description of the contentious nature of student loan cancellation).

¹⁹⁷ See, e.g., *id.* at 2387 (“If all that makes you suspect that MOHELA is distinct from the State, you would be right.”); *id.* at 2397 (“You can see the problem.”).

Justice Kagan's galvanizing dissents are predicated on a theory of democratic constitutionalism.¹⁹⁸ They implicitly recognize that the Court's constitutional decisions are not final, and that ordinary citizens have the power—and even the responsibility—to participate in constitutional meaning making. Asked by Dean William Treanor about her theory of dissenting at a public forum in 2019, Justice Kagan brought up her dissent against the Court's “abysmally wrong” decision in *Rucho*.¹⁹⁹ Echoing Justices Marshall and Sotomayor, Justice Kagan refused to accept the *Rucho* majority opinion as final, despite it having the Court's imprimatur of finality.²⁰⁰ “There's no part of me that is ever going to become accepting of the decision made,” she said.²⁰¹ She then encouraged all Americans to not accept the finality of the decision, describing the *Rucho* dissent as being directed at people who could reclaim the Constitution's meaning: “For all those people out there who in some way can carry on the efforts against this kind of undermining of democracy, go for it because you're right.”²⁰² And she recognized the contemporary power of her dissents, in addition to their role in constructing future law. “You're writing a dissent because you want to convince the future, and I guess you want to convince the present, too,” she told Dean Treanor.²⁰³

Her *Nebraska* dissent is a compelling example of these ideas in action.²⁰⁴ It reclaims constitutional ownership, boldly asserting that the majority opinion “violates the Constitution” through its opinion and encouraging ordinary Americans to hold on to their vision of the Constitution.²⁰⁵ Her framework invites the public to continue asserting a countervailing and true understanding of the Constitution—to “go for it”—despite the ostensible resolution of the case. Resistance comes through a call for accountability and an unwavering commitment to a particular reading of the Constitution.²⁰⁶

¹⁹⁸ See generally Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) (outlining this theory); Balkin & Siegel, *supra* note 108, at 928–31 (same).

¹⁹⁹ Kagan, *supra* note 53; see *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (holding that partisan gerrymandering is a nonjusticiable political question beyond the jurisdiction of the courts).

²⁰⁰ See Minow, *supra* note 6, at 75 (describing Justice Marshall's stalwart convictions expressed through his dissents); Liptak, *supra* note 116 (describing Justice Sotomayor's speech in which she encouraged a crowd of liberal lawyers and law students to “fight” against the Court's conservative jurisprudence).

²⁰¹ Kagan, *supra* note 53.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See *Biden v. Nebraska*, 143 S. Ct. 2355, 2384–400 (2023) (Kagan, J., dissenting).

²⁰⁵ See *id.* at 2386.

²⁰⁶ See *supra* note 171 (showing how Justice Kagan repeatedly criticized the majority for disregarding standing doctrine in order to achieve a judicially desired outcome); *supra* note 202 and accompanying text (providing her “go for it” language).

Legal commentators, from Professors Jeffrey Rosen to Walter E. Dellinger III, have linked Justice Kagan to Justice Scalia because of their vigorous writing style and distinctive dissents.²⁰⁷ This comparison makes superficial sense. Both were Harvard-trained lawyers who wrote aphoristic, astute opinions that ordinary people could read (and enjoy).²⁰⁸ Both wrote dissents aimed at social mobilization and that rejected the finality of majority opinions.²⁰⁹ Both garnered praise and respect from ideological foes.²¹⁰ The two Justices were friends long before serving on the Court, and their relationship only strengthened after Justice Kagan's appointment in 2010.²¹¹

But their dissents have important differences. Justice Scalia relished writing dissents.²¹² He seemed to genuinely enjoy castigating his perceived enemies, whether they be his colleagues or the "law-profession culture."²¹³ Justice Kagan

²⁰⁷ Jeffrey Rosen, *Strong Opinions*, NEW REPUBLIC (July 28, 2011), <https://newrepublic.com/article/92773/elena-kagan-writings> [<https://perma.cc/AMS2-UHLP>] (equating Justices Kagan's and Scalia's "gifted" writing, especially their "striking" dissents); Wolf, *supra* note 15 (quoting Dellinger as stating that Justice Kagan "has succeeded Justice Scalia as the court's finest writer").

²⁰⁸ See Eyder Peralta, *5 Opinions from Justice Antonin Scalia That Are Worth a Read*, NPR (Feb. 13, 2016) [<https://perma.cc/9EE8-PEH5>] ("One thing that is undeniable about Justice Antonin Scalia is that his opinions were always a good read."); *Justice Elena Kagan*, JUSTIA, <https://supreme.justia.com/justices/elena-kagan/> [<https://perma.cc/LDR7-24SD>] ("Kagan has written some of the most readable opinions by the current Justices. She has emphasized the importance of writing in words that non-lawyers can understand."); Larry Abramson, *The Harvard-Yalification of the Supreme Court*, NPR (May 16, 2010), <https://www.npr.org/templates/story/story.php?storyId=126802460> [<https://perma.cc/MUV4-WCB9>] (noting that Justice Kagan's confirmation in 2010 made it so that every Justice then on the Court had attended law school at either Harvard or Yale).

²⁰⁹ See *supra* note 203 and accompanying text (quoting Justice Kagan as stating that "[y]ou're writing a dissent because you want to convince the future, and I guess you want to convince the present, too"); Adam J. White, *Antonin Scalia, Legal Educator*, NAT'L AFFS. (2017), <https://www.nationalaffairs.com/publications/detail/antonin-scalia-legal-educator> [<https://perma.cc/369H-4KEA>] (quoting Justice Scalia stating that he writes his dissents for law students).

²¹⁰ See, e.g., Andrew C. McCarthy, Opinion, *In Rueful Praise of Elena Kagan: The 'Little Sisters' Ruling*, THE HILL (July 9, 2020), <https://thehill.com/opinion/judiciary/506562-in-rueful-praise-of-elena-kagan-the-little-sisters-ruling/> [<https://perma.cc/3CQX-7294>] ("I wish [Justice Kagan] were on my side."); Corey Adwar, *Liberal Supreme Court Justice Comes to the Defense of Scalia*, BUS. INSIDER (May 2, 2014), <https://www.businessinsider.com/ruth-bader-ginsburg-praises-antonin-scalia-2014-5> [<https://perma.cc/4HCB-MGLF>] (quoting Justice Ginsburg complimenting Justice Scalia's Fourth Amendment jurisprudence).

²¹¹ See David Axelrod, Opinion, *A Surprising Request from Justice Scalia*, CNN, <https://www.cnn.com/2016/02/14/opinions/david-axelrod-surprise-request-from-justice-scalia> [<https://perma.cc/P5BL-QKC2>] (Mar. 9, 2016) (describing the friendship between Justices Kagan and Scalia and explaining that, after her nomination, their friendship grew "even as they differed, sometimes sharply, on issues before them").

²¹² See Sherman, *supra* note 84 (stating that Justice Scalia "liked writing dissents because that justice did not have to pull punches, as the author of the court's majority opinion must sometimes do to ensure his opinion keeps its five votes"). For rich discussions of Scalia's caustic dissents, see Richard L. Hasen, *The Most Sarcastic Justice*, 18 GREEN BAG 2D 215 (2015) and Entrikin, *supra* note 84.

²¹³ See *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (criticizing the bar at large for "sign[ing] on to the so-called homosexual agenda").

does not publicly share his enthusiasm. At times, dissenting even seems to arouse pain and sorrow. In *Rucho*, she ended her dissent with the obligatory “respect[fully],” but added an unusual expression in Supreme Court signoffs: “[w]ith . . . deep sadness.”²¹⁴ Reading the dissent from the bench, her voice trembled with emotion as she neared its conclusion.²¹⁵ In *Brnovich*, she twice referred to the majority’s decision as “tragic,”²¹⁶ and similarly called the *Rucho* majority “tragically wrong” in her dissent.²¹⁷ The joint dissent in *Dobbs* concludes “[w]ith sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection.”²¹⁸ Justice Scalia wrote dissents out of anger; Justice Kagan, out of melancholy.

In addition to these general dispositional differences, Justices Scalia and Kagan have different projects. Justice Scalia’s dissents advanced sweeping legal theories and methodologies. Justice Kagan’s are versatile and unmoored from an overarching legal project as explicit as, say, originalism. She takes cases as they come and frowns upon judges bringing to the bench “broader goals” and philosophical crusades.²¹⁹ As she wrote in *Edwards v. Vannoy*, “[j]udges should take cases one at a time, and do their best in each to apply the relevant legal rules.”²²⁰

These two Justices bring strikingly different tones to their opinions. Justice Scalia often crossed “the rhetorical Rubicon between professional critique and personal attack.”²²¹ He could be nasty and hyperbolic. In just *one* dissent in 1992, he savaged his colleagues’ reasoning as “oblivious to our history,” “incoherent,” and “nothing short of ludicrous.”²²² He claimed he “would hide [his] head in a bag” before joining Justice Kennedy’s *Obergefell* opinion, which he likened to the “mystical aphorisms of the fortune cookie.”²²³ These attacks were often targeted at individual Justices. He told Justice O’Connor

²¹⁴ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2525 (2019) (Kagan, J., dissenting).

²¹⁵ See Jake Holland & Kimberly Strawbridge Robinson, *Kagan Delivers Passionate Dissent in Redistricting Cases*, BLOOMBERG L. (June 27, 2019), <https://news.bloomberglaw.com/business-and-practice/kagan-delivers-passionate-dissent-in-redistricting-cases> [<https://perma.cc/3ZTE-Y9YN>] (reporting that Justice Kagan’s “voice cracked as she read [her *Rucho* dissent from the bench], and she later wiped her face with a tissue”).

²¹⁶ See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2351 (Kagan, J., dissenting).

²¹⁷ *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

²¹⁸ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 417 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

²¹⁹ See *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

²²⁰ 141 S. Ct. 1547, 1581 n.8 (2021) (Kagan, J., dissenting).

²²¹ Brian Porto, *The Rhetorical Legacy of Antonin Scalia*, 43 VT. BAR J. 28, 28 (2017).

²²² *Lee v. Weisman*, 505 U.S. 577, 633, 636–37 (1992) (Scalia, J., dissenting).

²²³ *Obergefell v. Hodges*, 576 U.S. 644, 719 n.22 (Scalia, J., dissenting).

that her logic “cannot be taken seriously”²²⁴ and claimed Justice Breyer “rejects the Enlightenment.”²²⁵ And so on.

Justice Kagan’s dissents stay focused on legal arguments. They shun personal and gratuitous insults. Even in her most blistering dissents, her rhetoric has not taken on the same regrettable dimensions that Justice Scalia’s all too often did. Consider her *West Virginia* dissent, one of her most pointed dissents to date.²²⁶ She accuses the Court of not having “a clue about how to address climate change” and warns its logic risked “frightening” devastation by abrogating power from Congress and the expert agency.²²⁷ But her scathing rhetoric lacks ad hominem belittlement or sarcastic truculence.

There’s a final key difference between these Justices’ dissents. Justice Scalia’s contemptuous outbursts cabined his influence on the Court, alienating Justices who may have been convinced to join him.²²⁸ Fellow Justices dismissed his sneering eruptions as “that’s just Nino being Nino,” especially as some dissents descended into rank partisanship in his final years.²²⁹ Justice Kagan’s dissents are less frequent and never personal. When she dissents, her colleagues listen. Nobody would mistake Justice Kagan for Cassandra or for a bully.²³⁰ And she has not sacrificed her chops as a conciliatory bridge builder.

Rather than emulate the dissents of Justice Scalia, Justice Kagan’s dissents follow more closely in the tradition of Justice Brandeis, whom she has described as her “favorite justice, beyond a doubt.”²³¹ As I have argued, Justice Brandeis wrote distinctive but strategically deployed dissents that “used clear and accessible prose that non-lawyers could understand, articulating constitutional values

²²⁴ *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in judgment).

²²⁵ *Glossip v. Gross*, 576 U.S. 863, 899 (2015) (Scalia, J., concurring).

²²⁶ *West Virginia v. EPA*, 142 S. Ct. 2587, 2626–44 (2022) (Kagan, J., dissenting).

²²⁷ *Id.* at 2644.

²²⁸ See *supra* note 83 and accompanying text.

²²⁹ See Paul J. Watford, *Memoriam: Justice Ruth Bader Ginsburg*, 134 HARV. L. REV. 896, 898 (2021) (“Yet [Justice Ginsburg] took no offense at [Justice Scalia’s] harsh tone [regarding her opinion in *United States v. Virginia*, 518 U.S. 515 (1996)], which she shrugged off by saying: ‘That’s just Nino being Nino.’”); Jeffrey Toobin, *That’s Just Nino: Scalia’s Arizona Dissent*, NEW YORKER (June 25, 2012), <https://www.newyorker.com/news/daily-comment/thats-just-nino-scalias-arizona-dissent> [<https://perma.cc/8HJA-LAAB>] (describing Justice Scalia’s partisan and “splenetic hyperbole” in his *Arizona v. United States*, 567 U.S. 387 (2012), dissent); see also Robert Draper, *The Pariah*, GQ (Apr. 30, 2009), <https://www.gq.com/story/david-souter-supreme-court-robert-draper> [<https://perma.cc/CRY9-8HSD>] (quoting Justice Souter as brushing off Justice Scalia’s “taunting” dissents that “began to call him out by name” with the following quote: “That’s just Nino being Nino”).

²³⁰ See *Cassandra*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/Cassandra> [<https://perma.cc/Q485-XNA6>] (“[O]ne that predicts misfortune or disaster.”).

²³¹ See Andrew Hamm, *Kagan and Urofsky Share Admiration for Justice Louis Brandeis*, SCOTUSBLOG (Oct. 20, 2016), <https://www.scotusblog.com/2016/10/kagan-and-urofsky-share-admiration-for-justice-louis-brandeis/> [<https://perma.cc/KJ6B-XXKM>].

that liberals could rally behind” and outlined channels of resistance to a Court that sat firmly to his right.²³² Many of Justice Brandeis’s dissents were guided by a “concern with protecting the systems ‘essential to effective democracy,’” just as Justice Kagan’s are.²³³ And Justice Brandeis, a champion of workers and organized labor before joining the Court, remained in constant dialogue with the labor movement and other social reformers through dissents.²³⁴

III. PRE-JANUS DISCOURSE: THE ROOTS OF JUSTICE KAGAN’S DISSENT

Justice Kagan deserves credit for the *Janus* dissent. Like any great text, however, the dissent has previously unacknowledged co-authors and contributors. In this Part, I trace how movement actors pioneered some of the language that ultimately became integrated into the dissent. Justice Kagan’s rhetoric builds on the commentary of academics aligned with the labor movement and union leaders, collating existing rhetoric into a narrative and disseminating it broadly. Like the broccoli hypothetical in *NFIB v. Sebelius*,²³⁵ popular constitutionalism “distilled and simplified” complex doctrinal issues, allowing both the public and Justice Kagan to “link popular constitutional mobilization with judicial decisionmaking.”²³⁶

Start with *Janus*’s “weaponiz[ed]” language.²³⁷ Professor Amy Kapczynski credits Justice Kagan with “coin[ing]” this “weaponized” First Amendment phrase.²³⁸ *Janus* was the first time this metaphor had appeared in a Supreme Court opinion.²³⁹ But it was not the first time it appeared in legal, labor, or political discourse. In the winter of 2012, Professor Jedediah Purdy wrote an article in *Democracy* that explored how “the Roberts Supreme Court is using the First Amendment to craft a radical, free-market jurisprudence.”²⁴⁰ Juxtaposing

²³² Hosie, *supra* note 77.

²³³ *Id.* (quoting Justice Brandeis); see, e.g., *Adams v. Tanner*, 244 U.S. 590, 599–600 (1917) (Brandeis, J., dissenting) (arguing that the Court should have applied rational basis review to a challenged state labor law), *overruled by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

²³⁴ See, e.g., *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 566 (1933) (Brandeis, J., dissenting) (decrying a “marked concentration of individual wealth” caused by growing corporations).

²³⁵ See 567 U.S. 519, 557–58 (2012). In that case, the Government tried to distinguish the Affordable Care Act’s individual mandate to buy health insurance from a hypothetical individual mandate to buy broccoli—an analogy the Court then seized on in its ruling to the contrary. *Id.*

²³⁶ See Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 115, 119 (2013).

²³⁷ *Janus v. AFSCME*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J. dissenting).

²³⁸ Kapczynski, *supra* note 18.

²³⁹ Marc O. DeGirolami, *The Sickness Unto Death of the First Amendment*, 42 HARV. J.L. & PUB. POL’Y 751, 800 (2019) (“[U]ntil the 2017 Supreme Court term, the [weaponization] metaphor had not appeared in any Supreme Court opinion.”).

²⁴⁰ Jedediah Purdy, *The Roberts Court v. America*, DEMOCRACY (Winter 2012), <https://democracyjournal.org/magazine/23/the-roberts-court-v-america/> [<https://perma.cc/UH9J-X327>].

Sorrell with *Lochner*, Professor Purdy—who, in addition to being a preeminent scholar, is a civil rights and democratic socialist activist involved with social justice movements—asserted the Court was “giving constitutional protection to unequal economic power in the name of personal liberty” and introduced a metaphor similar to the weaponized one: “the Court has made the First Amendment a new anti-regulatory hammer.”²⁴¹

Professor Purdy’s article shaped left-wing parlance and thought. In July 2014, Sally Kohn, a progressive political commentator with ties to the labor movement, wrote a column after *Hobby Lobby* entitled “The Supreme Court Turns the First Amendment Into a Weapon for Corporations.”²⁴² Citing Professor Purdy, she asserted, “[t]he weaponization of the First Amendment in the *Hobby Lobby* ruling extends a dangerous trend under the Roberts Court” in which “[s]uddenly, the First Amendment is transformed into a weapon, a cudgel if you will”²⁴³ Kohn observed “[t]oday” this cudgel “curtailed” women’s rights, but “[t]omorrow, who knows?”²⁴⁴ She warned this “weaponized” First Amendment would be eventually “turn[ed]” on workers, whose bosses would “us[e] it to slowly but surely dismantle the right to form a union.”²⁴⁵

Professor Joel Rogers sounded the same alarm with similar rhetoric in July 2014. Writing in *The Nation*, he penned an article entitled “How *Harris v. Quinn* and *Burwell v. Hobby Lobby* Turned the First Amendment Into a Weapon.”²⁴⁶ Professor Rogers—an expert on labor relations and a labor activist with deep connections to the Working Families Party, labor unions, and pro-worker social movements—criticized the “use [of] the First Amendment against the affirmative state,” perverting the “fantastically important and beautiful guarantee of a basic right to free speech and association.”²⁴⁷

Public interest organizations embraced this weaponization narrative. In July 2015, the consumer advocacy group Public Citizen published a lengthy report by Professor Tamara Piety on the corporatization of the First Amend-

²⁴¹ *Id.*; see also Jedediah Purdy, DUKE L., <https://law.duke.edu/fac/purdy/> [<https://perma.cc/N3WF-4DJ3>] (describing Professor Purdy’s scholarship and activism).

²⁴² See Kohn, *supra* note 18; see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (holding that regulations from the Department of Health and Human Services mandating that employers provide health insurance covering contraception for their employees violated the Religious Freedom Restoration Act).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Joel Rogers, *How Harris v. Quinn and Burwell v. Hobby Lobby Turned the First Amendment into a Weapon*, THE NATION (July 2, 2014), <https://www.thenation.com/article/archive/after-harris-quinn-state-our-unions/> [<https://perma.cc/2ZTX-C6W8>].

²⁴⁷ *Id.*

ment's protections.²⁴⁸ Professor Piety prominently features "weaponization" language. She posits that the First Amendment had become "the weapon of choice for corporate plaintiffs wanting to attack regulation" and that, unless the Court changes direction, "business will continue to use the First Amendment as a weapon against regulation."²⁴⁹ Public Citizen circulated the report to its allies, including labor unions, through the Corporate Reform Coalition.²⁵⁰ It also promoted Piety's findings to its members and the public.²⁵¹

In 2016, this weaponization language continued to percolate on the left and in the academy. The *Harvard Law Review* would publish a note on *Reed v. Town of Gilbert*²⁵² that criticized the "weaponization" of the First Amendment, arguing it had become "a libertarian lance against reasonable regulation."²⁵³ At its national convention, the American Constitution Society hosted a breakout session entitled "The Weaponized First Amendment."²⁵⁴ Moderated by Linda Greenhouse, the panel of Tamara Piety, Martin Redish, Paul Smith, and Daniel Tokaji discussed how "conservative advocates" have used the First Amendment to "enhance the interests of the already powerful at the expense of everyone else," including in labor law.²⁵⁵ Linda Greenhouse would continue to sound the "weaponization" siren in later columns for the *New York Times*.²⁵⁶

When the Supreme Court agreed to hear *Janus*, union leaders urged the Court to embrace this weaponization framing. The National Education Association (NEA) wrote in its *Janus* amicus brief that the petitioners would "weaponize" the ruling as part of a campaign to slash union membership.²⁵⁷

²⁴⁸ See generally TAMARA R. PIETY, CORP. REFORM COAL., THE CORPORATE FIRST AMENDMENT: WHY PROTECTION FOR COMMERCIAL AND CORPORATE SPEECH DOES NOT ADVANCE FIRST AMENDMENT VALUES (2015), <https://www.citizen.org/wp-content/uploads/crc-corporate-free-speech-report.pdf> [<https://perma.cc/4N5H-4ZNR>] (emphasizing the importance of the Court's landmark decision in *Citizens United v. FEC*, 558 U.S. 310 (2010)).

²⁴⁹ *Id.* at 5.

²⁵⁰ *New Report Details How Expanding Commercial Speech Protections Does Not Advance First Amendment Values*, PUB. CITIZEN (July 20, 2015), <https://www.citizen.org/news/new-report-details-how-expanding-commercial-speech-protections-does-not-advance-first-amendment-values/> [<https://perma.cc/D6AS-SBL3>].

²⁵¹ *Id.*

²⁵² See generally 576 U.S. 155 (2015).

²⁵³ Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1999 (2016).

²⁵⁴ *ACS National Convention 2016: The Weaponized First Amendment*, AM. CONST. SOC'Y (June 10, 2016), <https://www.acslaw.org/video/the-weaponized-first-amendment/> [<https://perma.cc/F9RW-B3D3>].

²⁵⁵ See *id.*

²⁵⁶ See, e.g., Linda Greenhouse, Opinion, *A Conservative Plan to Weaponize the Federal Courts*, N.Y. TIMES (Nov. 23, 2017), <https://www.nytimes.com/2017/11/23/opinion/conservatives-weaponize-federal-courts.html> [<https://perma.cc/XK6K-UPRM>].

²⁵⁷ Brief of the National Education Association et al. as Amici Curiae in Support of Respondents at 4, 30, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (No. 16-1466).

Randi Weingarten, a lawyer and leader of the American Federation of Teachers (AFT), tweeted the AFT's amicus brief out to her supporters in January 2018 with the following message: "Our #Janus brief lays out the role of collective bargaining in improving public sector workplaces, repudiating the plaintiff's constitutionally flawed warping and weaponizing of the First Amendment."²⁵⁸ AFT echoed Weingarten in a press release. The plaintiff in *Janus* "warps and weaponizes the First Amendment by enabling one person's complaint—without any record or evidence—to undermine the interests of millions of workers across the country who benefit from collective bargaining," AFT wrote, citing Weingarten.²⁵⁹ Per AFT, its amicus brief "lays out [the] argument citing [the] role of collective bargaining in improving public sector workplaces, repudiating plaintiff's constitutionally flawed warping and weaponizing of the First Amendment."²⁶⁰ Through its extensive social media sharing of the amicus brief (including the use of hashtags), AFT aimed the brief as much at the public as the nine Justices.²⁶¹

Other parts of Justice Kagan's dissent show the unmistakable traces of the labor movement and liberal academics. In March 2015, Professors Amanda Shanor and Robert Post wrote a *Harvard Law Review Forum* piece entitled "Adam Smith's First Amendment," which outlined key themes that Justice Kagan would incorporate in the *Janus* dissent.²⁶² Professors Shanor and Post, in their final paragraph, wrote:

Because speech is everywhere, [Paul] Sherman's procrustean aspiration to subject all speech to a single set of rules can lead only to doctrinal chaos. Worse, it threatens to revive the long-lost world of *Lochner* and destroy the very democratic governance the First Amendment is designed to protect.²⁶³

Justice Kagan, in the final paragraph of her *Janus* dissent, wrote:

²⁵⁸ Randi Weingarten (@rweingarten), X (Jan. 19, 2018), <https://twitter.com/rweingarten/status/954500781302009862> [<https://perma.cc/38ZA-NL7L>].

²⁵⁹ Press Release, Am. Fed'n of Tchrs., AFT Files Amicus Brief in *Janus v. AFSCME* (Jan. 19, 2018), <https://www.aft.org/press-release/aft-files-amicus-brief-janus-v-afscme> [<https://perma.cc/Z4FN-UXER>].

²⁶⁰ *Id.*

²⁶¹ See, e.g., Lorretta Johnson (@LorrettaJohnson), X (Jan. 22, 2018), <https://twitter.com/LorrettaJohnson/status/955611419600408576> [<https://perma.cc/J8TH-WUFL>] (sharing the brief and quoting Weingarten); AFT Pennsylvania (@AFTPA), X (Jan. 22, 2018), <https://twitter.com/AFTPA/status/955487515213000704> [<https://perma.cc/2SJ8-84J2>] (same).

²⁶² See generally Robert Post & Amanda Shanor, Commentary, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015), <https://harvardlawreview.org/forum/vol-128/adam-smiths-first-amendment/> [<https://perma.cc/PM9W-UWPB>] (explaining a recent shift in First Amendment jurisprudence in which courts apply heightened scrutiny to regulations that burden speech).

²⁶³ *Id.* at 182.

Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.²⁶⁴

The parallels are striking. Justice Kagan conspicuously uses the exact same terminology as Professors Shanor and Post. In their concluding sections, both texts note “speech is everywhere” and condemn this newfangled First Amendment’s threat to “democratic governance.” And even if Justice Kagan had not used the same words and expressions, her dissent encapsulates the spirit and thesis of Shanor’s and Post’s piece.

Shanor’s and Post’s piece connected this emerging First Amendment jurisprudence to *Lochner*, a case Justice Kagan’s dissent never cites explicitly but clearly alludes to.²⁶⁵ Following Shanor’s and Post’s 2015 essay, other academics—including Professors Rebecca Tushnet,²⁶⁶ Leslie Kendrick,²⁶⁷ Samuel Bagenstos,²⁶⁸ Catherine Fisk,²⁶⁹ Laura Weinrib,²⁷⁰ and Charlotte Garden,²⁷¹

²⁶⁴ *Janus v. AFSCME*, 138 S. Ct. 2448, 2502 (2012) (Kagan, J., dissenting).

²⁶⁵ *Id.* at 2501 (“[The majority] wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate. Some state and local governments (and the constituents they serve) think that stable unions promote healthy labor relations and thereby improve the provision of services to the public. Other state and local governments (and their constituents) think, to the contrary, that strong unions impose excessive costs and impair those services. Americans have debated the pros and cons for many decades—in large part, by deciding whether to use fair-share arrangements. Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of in-betweeners). Today, that healthy—that democratic—debate ends. The majority has adjudged who should prevail. Indeed, the majority is bursting with pride over what it has accomplished: Now those 22 States, it crows, ‘can follow the model of the federal government and 28 other States.’” (citation omitted)); *see also id.* at 2502 (citing the risk to “almost all economic and regulatory policy” from the majority’s logic).

²⁶⁶ Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 *FOOD & DRUG L.J.* 25, 26 (2015) (characterizing free speech objections to government labeling regulations as “perhaps the clearest example of the way in which the First Amendment has become the new *Lochner*”).

²⁶⁷ Leslie Kendrick, *First Amendment Expansionism*, 56 *WM. & MARY L. REV.* 1199, 1207 (2015) (comparing *Lochner*-era constitutional arguments to modern First Amendment arguments made by business groups).

²⁶⁸ Irin Carmon, *Religious Freedom Arguments Used to Weaponize the First Amendment*, MSNBC, <https://www.msnbc.com/msnbc/religious-freedom-arguments-used-weaponize-the-first-amendment-msna775026> [<https://perma.cc/S4FH-UULZ>] (Jan. 19, 2016) (“‘You’re seeing an increasing tendency to use the First Amendment or First Amendment-like arguments by conservatives as a way of resisting various forms of regulation or progressive regulation,’ said Samuel Bagenstos . . . ‘The arguments that might have in the past come under the heading of “property rights” or “freedom of contract” now are coming under the heading of “free speech” or “free association” or “religious freedom.”’”).

among others—identified and condemned this “new *Lochner*.” Professor Shanor would write an Article with this title in 2016,²⁷² and it would only proliferate after that. Two years before the *Janus* dissent was released, the legal left rallied behind a particular understanding of First Amendment opportunism that anchored discourse with reference to *Lochner*. The overall tenor of the dissent is very much in conversation with these scholars.

It is, of course, possible that Justice Kagan was unfamiliar with this scholarship and labor rhetoric. I doubt it. *Janus* sits at the intersection of two subjects—unions and the First Amendment—that are especially important to her. Justice Kagan’s brother, Marc, was a prominent union leader in New York before becoming a teacher.²⁷³ Her father, Robert, represented tenant associations and plunged himself in grassroots civic organizing on Manhattan’s Upper West Side.²⁷⁴ She wrote her Princeton senior thesis on labor and socialist radicalism in New York, immersing herself in materials from the leading repository of documents pertaining to New York unions.²⁷⁵ And Justice Kagan was (and is) a leading First Amendment expert.²⁷⁶ As the former Dean of Harvard Law School, she is familiar with legal academia and regularly cites scholars, including in *Janus*.²⁷⁷

²⁶⁹ Catherine Fisk, *Symposium: A Ruling for Plaintiffs Would Revive Lochner*, SCOTUSBLOG (Dec. 19, 2017), <https://www.scotusblog.com/2017/12/symposium-ruling-plaintiffs-revive-lochner/> [<https://perma.cc/7JP7-JR4K>].

²⁷⁰ Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 U. CHI. LEGAL F. 513, 519–20, https://chicagounbound.uchicago.edu/public_law_and_legal_theory/671 [<https://perma.cc/536N-ESMU>] (commenting, under the header of “Organized Labor in the *Lochner* Era,” that “[t]he *Janus* case is part of a mounting effort to challenge social and economic regulation through the guise of the First Amendment” and that “[t]his transformation has aptly been labeled the *Lochnerization* of the First Amendment”).

²⁷¹ Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 326 & n.20 (2016) (describing and historicizing this developing jurisprudence).

²⁷² Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133.

²⁷³ Michael Wilson, *Recalling a Union Brother Who Is Kagan’s Brother*, N.Y. TIMES (June 29, 2010), <https://www.nytimes.com/2010/06/30/nyregion/30elenanyc.html> [<https://perma.cc/TJ7L-EYMZ>].

²⁷⁴ Sheryl Gay Stolberg, Katharine Q. Seelye & Lisa W. Foderaro, *High Court Kagan’s Girlhood Dream*, SEATTLE TIMES, <https://www.seattletimes.com/nation-world/high-court-kagans-girlhood-dream/> [<https://perma.cc/5YV9-99XE>] (May 11, 2010).

²⁷⁵ Hendrik Hertzberg, *Elena Kagan’s Not-So-Final Conflict*, NEW YORKER (June 3, 2010), <https://www.newyorker.com/news/hendrik-hertzberg/elena-kagans-not-so-final-conflict> [<https://perma.cc/WA89-RHRX>].

²⁷⁶ David L. Hudson, Jr., *Elena Kagan*, FREE SPEECH CTR. <https://firstamendment.mtsu.edu/article/elena-kagan/> [<https://perma.cc/JE3D-AM3Q>] (Sept. 19, 2023).

²⁷⁷ See, e.g., *Janus v. AFSCME*, 138 S. Ct. 2448, 2491 (2012) (Kagan, J., dissenting) (citing a paper published by Professors Casey Ichniowski and Jeffrey Zax). Justice Kagan became Harvard Law School’s first female dean in 2003 and served in that role until 2008. Liz Mineo, *If at First You Don’t Succeed . . .*, HARV. GAZETTE (Aug. 30, 2019), <https://news.harvard.edu/gazette/story/2019/08/supreme-court-justice-elena-kagan-dispenses-advice-to-harvard-law-students/> [<https://perma.cc/>]

Asked about amicus briefs by Judge Wood in a September 2019 interview, Justice Kagan said, “I can’t say that I read every single [amicus brief on] every page.”²⁷⁸ But she quickly noted her clerks “read every single one, every page” and “sometimes on big cases I’ll . . . flip through them all.”²⁷⁹ *Janus* was a big case.

Only the Justice can know whether she consciously chose her words to engage in a dialectic with union leaders and liberal academics. Yet the impact of Justice Kagan’s words exists regardless of her intent. Unions saw a Justice not just agree with their argument but use their framing and rhetoric to justify her argument.²⁸⁰ Liberal academics saw a Justice directly responsive to their writings, elevating their words from law journals to the U.S. Reports.²⁸¹ Justice Kagan aligned her dissent with an emerging movement “of accountability that mobilizes” to shape “the meaning of the Constitution over time.”²⁸²

Following the Supreme Court’s decision, this dialectic sent an unmistakable message of resolve and responsiveness. The dissent did not create the key frames and narratives of this movement, as some scholars have claimed.²⁸³ But it collated discourse on the left and popularized it to a larger audience. It simplified a complicated, technical legal story into a values-based framework that “role-literate participants” could understand and mobilize around.²⁸⁴

An additional note: Justice Alito’s *Janus* majority opinion also dialogues with and amplifies conservative activists and their years-long “campaign” to overturn *Abood*.²⁸⁵ With language that could have appeared in a *Wall Street Journal* editorial, he muses on “[u]nsustainable collective-bargaining agreements” and the “substantial role” that “the mounting costs of public-employee wages, benefits, and pensions undoubtedly play[]” in municipal bankruptcies

HY7A-TJWX]; see also Elena Kagan, OYEZ, https://www.oyez.org/justices/elena_kagan [<https://perma.cc/D2RE-NCLV>] (outlining Justice Kagan’s academic career).

²⁷⁸ Justice Elena Kagan, Remarks at the Seventh Circuit Judicial Conference (May 2, 2016), <https://www.c-span.org/video/?c4815228/user-clip-justice-elena-kagan-amicus-briefs> [<https://perma.cc/XD9X-FUW3>].

²⁷⁹ *Id.*

²⁸⁰ See, e.g., *supra* notes 257–261 and accompanying text (discussing the efforts of the National Education Association and the American Federation of Teachers to circulate their framing of the *Janus* case on social media prior to the Court’s decision).

²⁸¹ See, e.g., *supra* notes 262–279 and accompanying text (discussing how Justice Kagan’s dissent in *Janus* seemingly incorporates existing labor movement and academic themes).

²⁸² See Guinier, *supra* note 63, at 114.

²⁸³ See, e.g., Kapczynski, *supra* note 18 (crediting Justice Kagan with inventing the “weapon-iz[ation]” framework).

²⁸⁴ Cf. Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1757 (2017) (discussing this concept in the context of same-sex marriage and *Obergefell v. Hodges*, 576 U.S. 644 (2015)).

²⁸⁵ See *Janus v. AFSCME*, 138 S. Ct. 2448, 2487 (Kagan, J., dissenting) (“Today, the Court succeeds in its 6-year campaign to reverse *Abood*.”).

and “severe budget problems.”²⁸⁶ To justify these opinions unrelated to the legal issues before the Court, Justice Alito thrice cites the amicus brief of Jason Barclay, a Republican operative and anti-union activist who had been involved in earlier legal efforts to weaken public sector unions, including *Friedrichs v. California Teachers Ass’n*.²⁸⁷ At times, Justice Alito obscures Barclay’s role in shaping the foundation of the majority opinion. He adopts the passive voice to summarize Barclay’s claims. For example, Justice Alito substitutes “[w]e are told” for “Barclay told us” to introduce a talking point from Barclay’s amicus brief.²⁸⁸ But the influence of Barclay—and the conservative intellectual apparatus Barclay embodies—is unmistakable. Justice Alito transforms Barclay’s outlook on a question of political economy, once decisively rejected by the Court, into binding law.

IV. POST-*JANUS* MOBILIZATIONS: THE IMPACT OF THE DISSENT

When the Court decided *Janus*, right-wing activists rejoiced.²⁸⁹ They thought *Janus* would cripple public sector unions and “deliver a mortal blow” to the labor movement.²⁹⁰ In private, some union leaders worried it would have ruinous consequences.²⁹¹ Progressive legal scholars were also not optimistic, characterizing the decision as “a devastating blow to unions” and one that “will likely have substantial adverse effects” on unions, including on their ability “to remain viable.”²⁹²

²⁸⁶ *Id.* at 2483, 2476 (majority opinion).

²⁸⁷ *Id.* at 2475 nn.12–13, 2483; see also *Illinois: Governor Tells Agencies to Divert Union Fees*, N.Y. TIMES (Mar. 19, 2015), <https://www.nytimes.com/2015/03/20/us/illinois-governor-tells-agencies-to-divert-union-fees.html> [<https://perma.cc/9WEJ-MFMU>] (revealing that as general counsel to former Illinois Governor Bruce Rauner, Barclay drafted a memorandum with the goal of sabotaging state unions that required non-unionized members to pay fair share fees). See generally *Friedrichs v. Cal. Tchrs. Ass’n*, 578 U.S. 1 (2016) (mem.) (per curiam).

²⁸⁸ See *Janus*, 138 S. Ct. at 2475.

²⁸⁹ See, e.g., Austen Bannan, *How Has Janus v. AFSCME Affected First Amendment Rights for Public Workers Five Years Later?*, AMS. FOR PROSPERITY (June 27, 2023), <https://americansforprosperity.org/janus-v-afscme-five-years-later/> [<https://perma.cc/TLJ5-DLED>].

²⁹⁰ See ADAM COHEN, *SUPREME INEQUALITY: THE SUPREME COURT’S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA* 220 (2020) (quoting The State Policy Network).

²⁹¹ See *id.* at 219 (noting that the National Education Association, the nation’s biggest teachers’ union, was preparing to lose “as many as 307,000 members over two years”); P.R. Lockhart, *The Supreme Court Just Hit Public Unions Hard. Workers of Color Have the Most to Lose*, VOX, <https://www.vox.com/policy-and-politics/2018/2/26/17053328/janus-afscme-decision-supreme-court-unions-minorities> [<https://perma.cc/EF3D-8H37>] (June 27, 2018) (“[P]ublic sector unions feared [*Janus*] would deal a heavy blow by potentially reducing their financial coffers and opening the door for declines in membership.”).

²⁹² See Kate Andrias, *Janus’s Two Faces*, 2018 SUP. CT. REV. 21, 22–23.

Yet in the five years after the decision, something remarkable happened. Public sector unions redoubled recruitment efforts.²⁹³ The American Federation of State, County and Municipal Employees (AFSCME), AFT, and other public sector unions launched new campaigns to educate current members about the benefits of unions.²⁹⁴ Liberal academics proposed new pathways and theories to counter the decision.²⁹⁵ States passed laws designed to mitigate *Janus*'s effects.²⁹⁶ Although public sector union membership in the five years since *Janus* has fallen, there has not been the mass exodus union leaders once feared.²⁹⁷ *Janus* weakened public sector unions, but they remain viable.

Justice Kagan's dissent played a key and overlooked role in this remarkable mobilization effort. In the sections below, I examine how movement actors deployed the dissent in the years following the decision. Section A describes how the press covered *Janus* and Justice Kagan's impassioned dissent.²⁹⁸ Section B surveys various reactions from labor organizers across the country.²⁹⁹ Section C describes the steps activists and lawmakers took to mitigate the effect of the ruling, refusing to let the Court have the final word.³⁰⁰ Finally, Section D examines various cases in the years since *Janus* to explore how progres-

²⁹³ Daniel DiSalvo & Michael Hartney, *Teachers Unions in the Post-Janus World*, EDUC. NEXT, <https://educationnext.org/teachers-unions-post-janus-world-defying-predictions-still-hold-major-clout/> [<https://perma.cc/K2YE-AGQM>] (July 7, 2020).

²⁹⁴ See, e.g., Annette Licitra, *After Janus, We're in It to Win It*, AM. FED'N OF TCHRS. (June 27, 2018), <https://www.aft.org/news/after-janus-were-it-win-it> [<https://perma.cc/BE5D-5Y3J>] (describing union efforts to combat the decision).

²⁹⁵ See, e.g., Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. 677, 677, 723–55 (2019) (outlining the “range of legislative responses” available to “pro-labor states” that could “soften *Janus*'s blow or even negate it altogether”).

²⁹⁶ See, e.g., DiSalvo & Hartney, *supra* note 293 (explaining that Massachusetts changed its laws to allow unions to charge non-union teachers for representation in grievance and arbitration cases).

²⁹⁷ Daniel DiSalvo, Opinion, *Janus Barely Dents Public-Sector Union Membership*, WALL ST. J. (Feb. 13, 2019), <https://www.wsj.com/articles/janus-barely-dents-public-sector-union-membership-11550100582> [<https://perma.cc/9M5R-5W NX>] (acknowledging the state legislative efforts to shore up public sector unions following *Janus*); Ian Kullgren & Aaron Kessler, *Unions Fend Off Membership Exodus in 2 Years Since Janus Ruling*, BLOOMBERG L. (June 26, 2020), <https://news.bloomberglaw.com/daily-labor-report/unions-fend-off-membership-exodus-in-2-years-since-janus-ruling> [<https://perma.cc/DE92-6EDK>] (describing the results of an empirical analysis of federal disclosures); Daniel DiSalvo, *By the Numbers: Public Unions' Money and Members Since Janus v. AFSCME*, MANHATTAN INST. (Apr. 14, 2022), <https://manhattan.institute/article/by-the-numbers-public-unions-money-and-members-since-janus-v-afscme> [<https://perma.cc/TF9V-Z2AU>] (“The percentage of public employees belonging to unions has remained largely flat since the *Janus* decision. Much of the decline in the number of public-sector union members could be due to declines in public-sector employment.”). But see generally JARRETT SKORUP, MACKINAC CTR. FOR PUB. POL'Y, *THE JANUS EFFECT: THE IMPACT OF THE 2018 SUPREME COURT DECISION ON PUBLIC SECTOR UNIONS* (2023), <https://www.mackinac.org/s2023-05> [<https://perma.cc/TB4J-LRDN>] (finding a more significant decline in public sector union membership, but noting their continued strength).

²⁹⁸ See *infra* notes 304–347 and accompanying text.

²⁹⁹ See *infra* notes 348–388 and accompanying text.

³⁰⁰ See *infra* notes 389–441 and accompanying text.

sive lawyers have used Justice Kagan's dissent as a tool to cabin the scope of the decision.³⁰¹

In short, the dissent became a compass for liberal journalists, union leaders, and politicians, consolidating rhetoric and framing for the battles that followed. Progressives used it to agenda set, muster support, and build a narrative in the aftermath of a devastating defeat.³⁰² As Randi Weingarten told me, "[u]nions may have been on the losing side of the majority in *Janus*, but Justice Kagan helped educate our members for the struggles ahead."³⁰³

A. Framing the Issue: Press Coverage of Janus

Most Americans do not read Supreme Court decisions. They learn of cases through intermediaries: journalists and legal commentators who read cases, summarize findings, and draw conclusions.³⁰⁴ Justice Kagan's acerbic dissent shaped how legal commentators and progressive pundits covered the decision. For many reporters, it became the story—and its eminently quotable language massively expanded the audience that read portions of Justice Kagan's dissent.³⁰⁵ This set the stage for the union and political response to come.

Prominent commentators immediately flagged the significance of the *Janus* dissent. Dean Erwin Chemerinsky devoted 109 words of a 771-word column to quoting Justice Kagan and echoed her framing throughout his piece.³⁰⁶ Katrina vanden Heuvel, then-editor of *The Nation*, wrote a syndicated *Washington Post* column on *Janus* entitled "The Supreme Court's five 'black-robed rulers.'"³⁰⁷ Her piece quoted heavily from Justice Kagan's dissent.³⁰⁸ The *New Yorker* and the *New York Times* editorial boards praised Justice Kagan's "thunderous"³⁰⁹ and "sharp" dissent,³¹⁰ respectively, and quoted from it. Days after

³⁰¹ See *infra* notes 442–477 and accompanying text.

³⁰² See discussion *infra* Part IV.C (discussing political reactions to *Janus*).

³⁰³ Email Interview with Randi Weingarten, President, Am. Fed'n of Tchrs. (Mar. 29, 2021).

³⁰⁴ See generally Katerina Linos & Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods*, 45 J. LEGAL STUD. 223 (2016) (examining the media's role in how the public digests Supreme Court decisions).

³⁰⁵ See, e.g., Ian Millhiser, *The Supreme Court Just Stuck a Knife in Public Sector Unions*, THINKPROGRESS (June 27, 2018), <https://archive.thinkprogress.org/gorsuch-knives-unions-a8769c908b29/> [<https://perma.cc/9R4R-GDPG>] (quoting Justice Kagan's dissent).

³⁰⁶ See Erwin Chemerinsky, Opinion, *The Supreme Court's Janus Ruling Was Pure Judicial Activism. Unions, Look Out.*, SACRAMENTO BEE, <https://www.sacbee.com/opinion/california-forum/article-214596740.html> [<https://perma.cc/N8NT-WWUT>] (July 10, 2018).

³⁰⁷ See Katrina vanden Heuvel, Opinion, *The Supreme Court's Five 'Black-Robed Rulers.'*, WASH. POST (July 3, 2018), https://www.washingtonpost.com/opinions/the-supreme-courts-five-black-robed-rulers/2018/07/03/d4c404d6-7e37-11e8-b660-4d0f9f0351f1_story.html [<https://perma.cc/V8F4-RGK3>].

³⁰⁸ *Id.*

³⁰⁹ John Cassidy, *As Kennedy Retires, the Supreme Court's Attack on Labor Unions Is a Sign of Things to Come*, NEW YORKER (June 27, 2018), <https://www.newyorker.com/news/our-columnists/as->

the decision, Justice Kagan's dissent would prompt the *New York Times*' Adam Liptak to write a lengthy article headlined "How Conservatives Weaponized the First Amendment."³¹¹ His piece, which revolves around Justice Kagan's dissent, ricocheted widely on social media and even generated criticism from Donald Trump, Jr.³¹² and John Cornyn, a U.S. Senator from Texas.³¹³ And the dissent resonated with journalists at local papers with a fraction of the readership of the *Times* or the Twitter following of Trump. The *Daily Ukiah*, a small newspaper with a circulation of seven thousand in Northern California, ran a piece with a concluding paragraph copied and pasted from Justice Kagan's concluding paragraph.³¹⁴

Other legal elites rallied behind Justice Kagan's dissent, praising and quoting it. They included professors like Catherine Fisk,³¹⁵ Marty Lederman,³¹⁶ Amanda Shanor,³¹⁷ and Dan Epps,³¹⁸ liberal legal activists, like Vanita

kennedy-retires-the-supreme-courts-attack-on-labor-unions-is-a-sign-of-things-to-come [https://perma.cc/WE28-CAKD].

³¹⁰ Editorial, *After Janus, Unions Must Save Themselves*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/opinion/janus-supreme-court-unions.html [https://perma.cc/5X7Q-86YM].

³¹¹ See Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html [https://perma.cc/R2A5-YN6B].

³¹² Donald Trump, Jr. (@DonaldJTrumpJr), X (July 1, 2018), https://twitter.com/DonaldJTrumpJr/status/1013454389066035201 [https://perma.cc/9KBD-4WHN] (linking to Liptak's article and commenting "[o]nly in the alternative universe that the failing New York Times lives in, could this story not be titled: 'How the Left Gave Up on the 1st Amendment.' The liberal Resistance now in open warfare against the entire Bill of Rights. Terrifying. #walkaway").

³¹³ Sen. John Cornyn (@JohnCornyn), X (June 30, 2018), https://twitter.com/JohnCornyn/status/1013188904982401024 [https://perma.cc/GRQ9-H5KB] (linking to Liptak's article and commenting "I guess standard reporting is passé [. . .] Now editorializing on news pages is SOP: How Conservatives Weaponized the First Amendment").

³¹⁴ See Frank Zotter, Jr., Opinion, *Judicial Follies: Lochner Up and Throw Away the Key*, UKIAH DAILY J., https://www.ukiahdailyjournal.com/2018/06/28/judicial-follies-lochner-up-and-throw-away-the-key/ [https://perma.cc/2PUU-CJSJ] (Aug. 23, 2018) (quoting Justice Kagan and comparing *Janus* to *Lochner*).

³¹⁵ Catherine L. Fisk, Janus: *Weaponized First Amendment Shoots at Democracy*, AM. CONST. SOC'Y: EXPERT F. (July 2, 2018), https://www.acslaw.org/expertforum/janus-weaponized-first-amendment-shoots-at-democracy/ [https://perma.cc/VMF4-FPD7] (repeatedly quoting Justice Kagan).

³¹⁶ Marty Lederman (@marty_lederman), X (June 27, 2018), https://twitter.com/marty_lederman/status/1011976109838258179 [https://perma.cc/L39B-GJJE] (quoting Justice Kagan to explain the "Lochnerization of 1A").

³¹⁷ Amanda Shanor, *When the Supreme Court Takes Sides*, TAKE CARE (June 28, 2018), https://takecareblog.com/blog/when-the-supreme-court-takes-sides [https://perma.cc/4XQ5-DNHU] (quoting and praising Justice Kagan's "powerful dissent").

³¹⁸ Dan Epps (@danepps), X (June 27, 2018), https://twitter.com/danepps/status/1011973357141557248 [https://perma.cc/RR8Z-NJ26] (uploading a screenshot from Justice Kagan's dissent with the caption, "From the final section of Justice Kagan's dissent in *Janus*").

Gupta,³¹⁹ Jesse Jackson,³²⁰ Joshua Matz,³²¹ Stephen Spaulding,³²² and Brianne Gorod;³²³ labor experts like Steven Greenhouse,³²⁴ Mark Gaston Pearce,³²⁵ and Joseph McCartin;³²⁶ political and legal commentators like Peter Daou,³²⁷ Josh Marshall,³²⁸ Mark Joseph Stern,³²⁹ Ian Millhiser,³³⁰ and Gilad Edelman;³³¹ and labor gadflies like Jonathan Tasini.³³² Mainstays of the liberal legal movement, like the Alliance for Justice,³³³ Brennan Center for Justice,³³⁴ People for the

³¹⁹ Vanita Gupta (@vanitaguptaCR), X (June 27, 2018), <https://twitter.com/vanitaguptaCR/status/1011976683438596096> [https://perma.cc/HTX2-D9QS] (quoting and praising “Justice Kagan’s powerful dissent in *Janus*”).

³²⁰ Jesse Jackson, *Arrogant Supreme Court Justices Trample the Law in Service of the Rich*, CHI. SUN-TIMES (July 2, 2018), <https://chicago.suntimes.com/2018/7/2/18461106/arrogant-supreme-court-justices-trample-the-law-in-service-of-the-rich> [https://perma.cc/AYB2-WQAE] (quoting Justice Kagan’s dissent).

³²¹ Joshua Matz (@JoshuaMatz8), X (June 27, 2018), <https://twitter.com/joshuamatz8/status/1011974596684320768?lang=en> [https://perma.cc/E66G-GB77] (praising Justice “Kagan’s extraordinary dissent in #Janus” and quoting from it).

³²² Stephen Spaulding (@SteveESpaulding), X (June 27, 2018), <https://twitter.com/SteveESpaulding/status/1011979545795268608> [https://perma.cc/XKL2-Q3XC] (quoting Justice Kagan’s dissent).

³²³ Brianne Gorod (@BrianneGorod), X (June 27, 2018), <https://twitter.com/BrianneGorod/status/1011978439996436480> [https://perma.cc/Z2SH-F98X] (praising Justice “Kagan’s incredible dissent in #JanusvAFSCME” and posting a screenshot from it).

³²⁴ Steven Greenhouse (@greenhousesny), X (June 27, 2018), <https://twitter.com/greenhousesny/status/1012004705508249600> [https://perma.cc/UF34-WP2W] (uploading a typed section of the dissent).

³²⁵ Mark Gaston Pearce (@NLRBPearce), X (June 27, 2018), <https://twitter.com/NLRBPearce/status/1012020149459841024> [https://perma.cc/P25U-6ZUR] (quoting Justice Kagan’s dissent).

³²⁶ Joseph A. McCartin, *Janus v. Democracy*, DISSENT (June 27, 2018), https://www.dissentmagazine.org/online_articles/janus-v-democracy [https://perma.cc/B5A4-NAEB] (repeatedly quoting Justice Kagan’s dissent).

³²⁷ Peter Daou (@peterdaou), X (June 27, 2018), <https://twitter.com/peterdaou/status/1012003574879064065?lang=en> [https://perma.cc/F8TG-MNSU] (quoting Justice Kagan’s dissent).

³²⁸ Josh Marshall (@joshtpm), X (June 27, 2018), <https://twitter.com/joshtpm/status/1012003105846824960> [https://perma.cc/86YQ-R72A] (linking to a blog post on his website focusing attention on Justice Kagan’s dissent).

³²⁹ Mark Joseph Stern, *A New Lochner Era*, SLATE (June 29, 2018), <https://slate.com/news-and-politics/2018/06/the-lochner-era-is-set-for-a-comeback-at-the-supreme-court.html> [https://perma.cc/7LND-UDU6] (quoting Justice Kagan’s dissent).

³³⁰ Millhiser, *supra* note 305 (quoting Justice Kagan’s dissent).

³³¹ Gilad Edelman, *The First Amendment vs. Democracy*, WASH. MONTHLY (Apr. 7, 2019), <https://washingtonmonthly.com/magazine/april-may-june-2019/the-first-amendment-vs-democracy/> [https://perma.cc/J7MS-U4ZY] (quoting Justice Kagan’s dissent).

³³² Jonathan Tasini (@jonathantasini), X (June 27, 2018, 10:42), <https://twitter.com/jonathantasini/status/1011983185104850944> [https://perma.cc/2GDF-8J5Q] (quoting and praising Justice Kagan’s dissent).

³³³ All. for Just. (@AFJustice), X (June 27, 2018), <https://twitter.com/AFJustice/status/1011979545623318528> [https://perma.cc/L84V-ZVK3] (uploading a screenshot from the dissent and drawing attention to its “powerful” and oral nature).

³³⁴ Martha Kinsella & Sean Morales-Doyle, *Freedom to Free Ride: The Supreme Court Rules Against Unions*, BRENNAN CTR. FOR JUST. (June 27, 2018), <https://www.brennancenter.org/our-work/>

American Way,³³⁵ and the National Women's Law Center,³³⁶ spotlighted the dissent and its pungent language.

The dissent unified a normally fractious left. "I'm not usually one for quoting Elana [sic] Kagan," wrote political historian and socialist theorist Corey Robin in August 2018, two months after the decision was released.³³⁷ "[B]ut I did think hers was a limpid bit of wisdom: 'The First Amendment was meant for better things.'"³³⁸ This was not the only time Robin publicly cited Justice Kagan's dissent.³³⁹ Writing in the *Washington Post*, historian Elizabeth Tandy Shermer wrote that the *Janus* dissent "shows that liberal justices are finally on the side of the working class."³⁴⁰ The dissent created an accessible and unifying narrative to understand a conservative campaign to recast the First Amendment.

In addition to being featured prominently in standard articles summarizing the *Janus* case, Justice Kagan's penetrating dissent prompted progressive journalists and commentators to write separate articles focused on it entirely. Consider representative examples from *Vox* ("Elena Kagan's dissent trashes Supreme Court as 'black-robed rulers overriding citizens' choices"),³⁴¹ the *Huffington Post* ("Justice Elena Kagan Says The Supreme Court Turned The First Amendment 'Into A Sword'"),³⁴² *Talking Points Memo* ("Kagan: SCOTUS Conservatives Are 'Weaponizing The First Amendment'"),³⁴³ and labor-

analysis-opinion/freedom-free-ride-supreme-court-rules-against-unions [https://perma.cc/B6HR-4HZY] (repeatedly quoting Justice Kagan's dissent).

³³⁵ Paul Gordon, *Court's Ultra-Conservatives Attack Workers in the Janus Case*, PEOPLE FOR THE AM. WAY (June 28, 2018), <https://www.pfaw.org/blog-posts/courts-ultra-conservatives-attack-workers-in-the-janus-case/> [https://perma.cc/R7FP-SBL4] (quoting Justice Kagan's dissent).

³³⁶ Nat'l Women's L. Ctr. (@nwlc), X (June 27, 2018), <https://twitter.com/nwlc/status/1012009663611789312> [https://perma.cc/TSN9-5ME8] (quoting Justice Kagan's dissent).

³³⁷ Corey Robin (@CoreyRobin), X (Aug. 8, 2018), <https://twitter.com/CoreyRobin/status/1027194973513572354> [https://perma.cc/8EXK-LVYX].

³³⁸ *Id.* (quoting Justice Kagan's dissent).

³³⁹ See, e.g., Corey Robin (@CoreyRobin), X (July 10, 2018), <https://twitter.com/CoreyRobin/status/1016534396940189696> [https://perma.cc/CZY9-UVT3].

³⁴⁰ Elizabeth Tandy Shermer, *The Dissent in Janus Shows That Liberal Justices Are Finally on the Side of the Working Class*, WASH. POST (June 27, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/06/27/the-dissent-in-janus-shows-that-liberal-justices-are-finally-on-the-side-of-the-working-class/> [https://perma.cc/7GSH-V6X3].

³⁴¹ Jen Kirby, *Elena Kagan's Dissent Trashes Supreme Court as "Black-Robed Rulers Overriding Citizens' Choices"*, VOX (June 27, 2018), <https://www.vox.com/2018/6/27/17510338/supreme-court-kagan-dissent-janus> [https://perma.cc/LHG3-59FH].

³⁴² Dave Jamieson, *Justice Elena Kagan Says the Supreme Court Turned the First Amendment 'into a Sword'*, HUFFPOST (June 27, 2018), https://www.huffpost.com/entry/justice-elena-kagan-says-her-colleagues-turned-the-first-amendment-into-a-sword_n_5b33dc13e4b0b5e692f3cb79 [https://perma.cc/LHP4-KNAH].

³⁴³ Tierney Sneed, *Kagan: SCOTUS Conservatives Are 'Weaponizing the First Amendment'*, TALKING POINTS MEMO (June 27, 2018), <https://talkingpointsmemo.com/dc/elena-kagan-janus-dissent> [https://perma.cc/B5Q3-E4WZ].

affiliated *The 74 Million* (“Kagan’s Fiery Dissent Says Supreme Court Majority Creates ‘Problem of Nightmarish Proportions’ for Nation’s Public Unions”).³⁴⁴ And even some journalists outside the progressive media world took note.³⁴⁵ *The Hill*, for example, ran an article entitled “Kagan accuses Supreme Court majority of weaponizing the First Amendment.”³⁴⁶ While the majority made law, Kagan made headlines.³⁴⁷

B. Mustering Opposition: Union Response to Janus

Justice Kagan’s dissent quickly jumped from the pages of the U.S. Reports to the mouths of union leaders and members. National union leaders embraced Justice Kagan’s framing of the case, and this narrative would trickle down to local affiliates. For public sector unions, Justice Kagan’s dissent became a mustering rallying cry that diffused defeatism, reduced complex legal issues into an accessible story, and gave credibility to resistance organizing. Although *Janus* came at a particularly perilous moment for the labor movement—coinciding with fresh threats from the Trump Administration and more structural and ongoing challenges from globalization, the privatization of social services, and anti-labor policies—its narrative building gave its actors tools to constructively resist. For these movement leaders, to quote Professor NeJaime, the litigation loss “crystallize[d] the deprivation of rights and the unequal treatment that the movement is fighting.”³⁴⁸ And it gave them a framework and tangible talking points to describe the case.

Take Lee Saunders, the president of AFSCME. In a sharply worded op-ed (“Five justices cannot break the solidarity of America’s unions”) two days after

³⁴⁴ Andrew Brownstein, *Kagan’s Fiery Dissent Says Supreme Court Majority Creates ‘Problem of Nightmarish Proportions’ for Nation’s Public Unions*, *THE 74* (June 27, 2018), <https://www.the74million.org/article/kagans-fiery-dissent-says-supreme-court-majority-creates-a-problem-of-nightmarish-proportions-for-nations-public-unions/> [https://perma.cc/63P8-DEL3].

³⁴⁵ In subsequent years, journalists continued to invoke the *Janus* dissent as a touchstone to explain the remade Supreme Court—despite the fact that the case dealt with a legal subject with less popular salience than cases involving abortion, guns, affirmative action, climate, and other issues. *See, e.g.*, Linda Greenhouse, Opinion, *The Supreme Court, Weaponized*, *N.Y. TIMES* (Dec. 16, 2021), <https://www.nytimes.com/2021/12/16/opinion/supreme-court-trump.html> [https://perma.cc/ZB9U-PJJD].

³⁴⁶ Lydia Wheeler, *Kagan Accuses Supreme Court Majority of Weaponizing the First Amendment*, *THE HILL* (June 27, 2018), <https://thehill.com/regulation/court-battles/394402-kagan-accuses-supreme-court-majority-of-weaponizing-the-first?rl=> [https://perma.cc/8PRF-4C69].

³⁴⁷ *See, e.g.*, 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/P3WC-BWLA]. The Justice may have even hoped journalists would write these headlines. Justice Kagan has indicated she is familiar with the interplay between her words and popular press coverage. *See id.* (“‘I’ve gotten pretty good at knowing what, if I say it, will create headlines I don’t want,’ [Justice Kagan] said recently, in a conversation with [Dean Heather] Gerken at Yale Law School. ‘You’re not going to hear every single thought that I have today.’”).

³⁴⁸ NeJaime, *supra* note 71, at 987.

the decision was released, Saunders relied on Justice Kagan's dissent to tell a complicated legal story.³⁴⁹ Rather than attempt to explain the legal issues or even paraphrase the dissent himself, he quoted a seventy-five-word chunk of her concluding section and wrote, "Justice Kagan put it best in her dissenting opinion."³⁵⁰ Immediately after quoting Justice Kagan at length, he vowed: "[W]e are unbowed by this decision. We will continue to do what we have always done, but now with greater energy and passion."³⁵¹ Two weeks later, Saunders would again praise and quote Justice Kagan's "blistering dissent," which "makes a powerful argument that this decision is wrong on legal and policy grounds."³⁵² After condemning the Court's "zealous crusade to weaken, if not abolish, labor unions," he identified ways policymakers could help workers in response to the decision and declared "[n]o one, not even the Supreme Court, can deprive free people of the opportunity to work together to create a better life for themselves and their communities."³⁵³

The *Janus* dissent instantly resonated with Randi Weingarten of AFT, who had used similar rhetoric to Justice Kagan in the run-up to oral argument.³⁵⁴ The day that the Supreme Court published *Janus*, Weingarten tweeted, "Kagan accuses Supreme Court majority of weaponizing the First Amendment - and she is right!!!!"³⁵⁵ Future comments from Weingarten exuded similar enthusiasm. The next day, Weingarten tweeted text ("Kagan's dissent in #JanusVAFSCME was so important. #union") with a redolent image.³⁵⁶ Against the darkened pillars of the Court, Weingarten placed a block quote from the dissent, headlined with "Justice Kagan said in her dissent."³⁵⁷ In public statements on July 1st and July 11th, Weingarten would similarly quote from Justice Kagan to explain the long-running campaign to overturn *Abood*.³⁵⁸

³⁴⁹ Lee Saunders, Opinion, *Five Justices Cannot Break the Solidarity of America's Unions*, THE HILL (June 29, 2018), <https://thehill.com/opinion/judiciary/394748-five-justices-cannot-break-the-solidarity-of-americas-unions> [https://perma.cc/YZ7S-QN7P].

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² Lee Saunders, *A Union Response to the Supreme Court's Janus Decision*, AM. PROSPECT (July 9, 2018), <https://prospect.org/justice/union-response-supreme-court-s-janus-decision/> [https://perma.cc/87U9-JYJ4].

³⁵³ *Id.*

³⁵⁴ See *supra* notes 258–260 and accompanying text (describing Weingarten's characterization of AFT's *Janus* amicus brief).

³⁵⁵ Randi Weingarten (@rweingarten), X (June 27, 2018), <https://twitter.com/rweingarten/status/1012006889616564231> [https://perma.cc/9LNZ-AL7E].

³⁵⁶ Randi Weingarten (@rweingarten), X (June 28, 2018), <https://twitter.com/rweingarten/status/1012453777113165824> [https://perma.cc/FE5E-XUWY].

³⁵⁷ See *id.*

³⁵⁸ Randi Weingarten, #Union, AM. FED'N OF TCHRS. (July 1, 2018), <https://www.aft.org/column/union> [https://perma.cc/GW7V-QV9S]; Randi Weingarten, *The Right-Wing Assault on Teachers' Unions Won't Win. It Only Makes Us Angrier*, EDUC. WK. (July 11, 2018), <https://www.edweek.org/>

Weingarten used the *Janus* majority as a metonym for the broader plutocratic threat to American democracy, and Justice Kagan's dissent spotlighted this problem. On July 13th, Weingarten spoke at AFT's 2018 annual convention. Her address—titled “Hope in Darkness”—was an homage to Justice Kagan's dissent and politic assessment of the current moment.³⁵⁹ “Justice Kagan's dissent nailed it,” she said.³⁶⁰ “Her five conservative colleagues were ‘weaponizing the First Amendment’ [in *Janus*], perverting it from its intended purpose of securing the political freedom necessary for democracy,” Weingarten continued.³⁶¹ “Why would those justices, as Kagan put it, ‘overthrow a decision entrenched in this Nation's law and its economic life for over [forty] years’? Because the court's right-wing 5–4 majority wants to destroy unions and, with them, the aspirations and dreams of working folks,” she added.³⁶² Weingarten closed her rallying speech by urging her members to resist the conservative majority on the Supreme Court and its “weaponiz[ation]” of the Constitution.³⁶³ In other statements, Weingarten similarly based larger arguments around Justice Kagan's dissent.³⁶⁴

After her “Hope in Darkness” speech, Weingarten joined a “*Janus Will Not Stop Us*” roundtable with other senior union officials and ordinary union members.³⁶⁵ Justice Kagan's *Janus* dissent became a *cri de cœur* for Weingarten, creating a defiant narrative on which Weingarten would build and introduce her own melodies:

[W]e are emboldened. We will continue to make our case in the halls of statehouses and our workplaces and our communities to organizing, activism and membership recommitting. But let me just say one more thing about this case. As Justice Kagan said the majority overturned a decision that was embedded in the nation's law and its economy. A majority has taken away the 10th Amendment right of states to do what they need to do to govern their workplaces. A majority has taken away what was a unanimous decision 40 years

teaching-learning/opinion-the-right-wing-assault-on-teachers-unions-wont-win-it-only-makes-us-angrier/2018/07 [https://perma.cc/PE5S-WN9W].

³⁵⁹ Randi Weingarten, President, Am. Fed'n of Tchrs., *Hope in Darkness: Remarks at the AFT 2018 Convention* (July 13, 2018), <https://www.aft.org/press/speeches/hope-darkness> [https://perma.cc/WG9G-Y36D].

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ See, e.g., Licitra, *supra* note 294 (quoting Weingarten reprising similar themes and language).

³⁶⁵ *Labor Coalition Vows 'Janus Will Not Stop Us'*, CHI. SUN-TIMES (July 1, 2018), <https://chicago.suntimes.com/2018/7/1/18456175/labor-coalition-vows-janus-will-not-stop-us> [https://perma.cc/R8RK-3AMQ].

ago because the majority was siding with corporations and billionaires who want to defund and defang unions because they do not want workers to have a right. But workers are rising up like never before and we will continue to fight in the court of public opinion, the bargaining table and the ballot box for our values.³⁶⁶

Weingarten echoes Justice Kagan and then adds her own gloss. Justice Kagan, for example, wrote the *Abood* precedent was “embedded in the law . . . [and] in the world” and stressed its “unanimously” decided nature.³⁶⁷ But Justice Kagan does not cite the Tenth Amendment or condemn billionaires, even if she wrote broadly about the importance of “state and local officials” in making policy “choices about workplace governance.”³⁶⁸ The dissent was not a script, but an inspiration, invitation, and a guide on which to build.

Dissents, as Justice Brennan recognized, can be “damage control mechanism[s].”³⁶⁹ While right-to-work leaders touted *Janus* as an all-encompassing and revolutionary ruling, union leaders relied on Justice Kagan’s language to advance limited interpretations of the ruling in the cauldron of public opinion formation. Craig Becker, the general counsel of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), wrote in the wake of *Janus* that the “silver lining” of the case was “the ruling should amplify free-speech rights on the job, including freedoms to voice concerns about wages, hours, benefits and working conditions.”³⁷⁰ For substantiation, he turned to Justice Kagan. “Or else, as Justice Kagan warns, ‘we will discover that today’s majority has crafted a “unions only” carve-out to our employee-speech law.’”³⁷¹ Becker, like other union leaders, vowed that the “Supreme Court won’t have the last word on worker rights” and promised to keep organizing.³⁷²

Like their leaders, national unions echoed and elevated Justice Kagan’s rhetoric. After the decision, the AFL-CIO pivoted to a new theme: “Don’t Mourn. Organize.”³⁷³ In a separate press release, the AFL-CIO condemned the six-year campaign identified by Justice Kagan, “initiated by a sitting justice and funded by corporate interests and dark money . . . to disrupt 40 years of

³⁶⁶ *Id.*

³⁶⁷ *Janus v. AFSCME*, 138 S. Ct. 2448, 2497–98 (2018) (Kagan, J. dissenting).

³⁶⁸ *Id.* at 2501.

³⁶⁹ See Brennan, *supra* note 51, at 430 (internal quotations omitted).

³⁷⁰ Craig Becker, Opinion, *Supreme Court Won’t Have the Last Word on Worker Rights*, CNN (June 27, 2018), <https://www.cnn.com/2018/06/27/opinions/supreme-court-deals-blow-to-unions-becker> [<https://perma.cc/YR83-HALK>].

³⁷¹ *Id.* (quoting Justice Kagan’s dissent).

³⁷² *Id.*

³⁷³ AFL-CIO (@AFLCIO), X (June 27, 2018), <https://twitter.com/AFLCIO/status/1011975664554168320> [<https://perma.cc/9CJ9-S7BR>].

well-established law to rule against working people.”³⁷⁴ Throughout the document, America’s largest federation of unions turned to Justice Kagan, quoting multiple lines of her dissent to explain how the Court “flip-flopped on the meaning of the First Amendment” in order to “side with corporate interests over those of working people.”³⁷⁵

For its part, AFT told its members that “[d]issent is patriotic” and posted about how it was “reflecting on Supreme Court Justice Elena Kagan’s dissent,” drawing attention to Justice Kagan’s word.³⁷⁶ Pride at Work, a national LGBTQ labor group, wrote a public memorandum that promised that “LGBTQ Working People Will Overcome *Janus*.”³⁷⁷ After quoting the final paragraph of Justice Kagan’s dissent, Pride at Work said it would be “organizing and mobilizing like never before.”³⁷⁸ The United Federation of Teachers (UFT), Jobs with Justice, and others also quoted the dissent.³⁷⁹ Some national unions, like the Seafarers Entertainment and Allied Trades Union, reprinted large chunks of it in national publications aimed at their members.³⁸⁰

State and local affiliates of national unions joined in, taking cues from the dissent. Local unions do not have the same type of extensive communications and press operations as their national counterparts do. They face comparative budgetary and institutional constraints. Justice Kagan’s clear prose became an indispensable communication tool as they educated their members on a technical subject. In Kansas, a union for state employees tweeted out parts of the dissent, noting it “doesn’t mince words” and adding the “#BringIt” hashtag.³⁸¹ In Nevada, the Clark County Education Association quoted the dissent in an

³⁷⁴ *Supreme Court: Judge Brett Kavanaugh Is the Wrong Man for the Job*, AFL-CIO (July 26, 2018), <https://aflcio.org/about/leadership/statements/supreme-court-judge-brett-kavanaugh-wrong-man-job> [<https://perma.cc/N9ZM-BJNS>].

³⁷⁵ *See id.*

³⁷⁶ *See* AFT—Am. Fed’n of Tchrs., *Dissent Is Patriotic*, FACEBOOK (July 5, 2018), https://www.facebook.com/AFTunion/posts/10156005945884160?comment_id=10156005950634160 [<https://perma.cc/F6TB-WMD2>].

³⁷⁷ *See* Tim Schlittner & James Larson, *LGBTQ Working People Will Overcome Janus*, PRIDE AT WORK (Sept. 18, 2018), <https://www.prideatwork.org/lgbtq-working-people-will-overcome-janus/> [<https://perma.cc/A5YC-P4XU>].

³⁷⁸ *Id.*

³⁷⁹ *See* UFT (@UFT), X (June 27, 2018), <https://twitter.com/UFT/status/1012053302790377472> [<https://perma.cc/75E7-E7BU>]; Jobs with Just. (@jwjnational), X (June 27, 2018), <https://twitter.com/jwjnational/status/1011982521976938496> [<https://perma.cc/C39Z-AQYB>].

³⁸⁰ *See* Mark Gruenberg, *Janus Verdict Weakens Workers’ Rights: Corporate-Funded Case Blatantly Attacks Labor Movement*, 21 THE ENTERTAINER 6, 6 (2018), <https://partners.aflcio.org/system/files/q22018entertainer.pdf> [<https://perma.cc/Q2AL-J5MJ>].

³⁸¹ KOSE Union (@KOSE_Union), X (June 27, 2018), https://twitter.com/KOSE_Union/status/1012050432758353920 [<https://perma.cc/92Q3-N7UH>].

effort to mobilize its members.³⁸² The New York State Nurses Association plastered parts of Justice Kagan's dissent on its website.³⁸³ One of its directors, a nurse named Judith Cutchin, invoked it as part of a resilient call to arms and union solidarity:

Justice Kagan, in her dissent, wrote that with *Janus* the court: [i]nterferes with “thousands of ongoing contracts involving millions of employees” and “prevents the [A]merican people . . . from making important choices about workplace governance.” She concluded: “The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.” We join today with our brothers and sisters in public unions to say: “We will not be defeated by *Janus*!” . . . We will push *Janus* aside! We will stop the billionaire elites and the inequality they are bringing on!³⁸⁴

In addition to citing the dissent, many state and local unions opted to re-print it. The New Mexico affiliate of AFT put out an 812-word press release after the decision—with over 60% of it cut and pasted from Justice Kagan's dissent.³⁸⁵ In Minnesota, the newspaper of the Minneapolis Regional Labor Federation wrote a 525-word article on *Janus*, devoting 209 words (40%) to quoting directly from Justice Kagan.³⁸⁶ From the Sailors' Union of the Pacific to Local 1014 of the Communications Workers of America in New Jersey, a vast array of other unions block quoted Justice Kagan to explain *Janus*.³⁸⁷ And Justice Kagan's rhetoric shaped union narratives even when not explicitly cited. Denise Specht, the president of the Education Minnesota union, promised that “[n]either this ruling nor the right-wing groups that will weaponize it, will silence the voices of Minnesota's professional educators.”³⁸⁸

³⁸² See Clark Cnty. Educ. Ass'n (@cceanv), X (June 27, 2018), <https://twitter.com/cceanv/status/1012016042183290880> [<https://perma.cc/X4RN-77VJ>].

³⁸³ See *RNs Say: The Union Makes Us Strong!*, N.Y. STATE NURSES ASS'N, <https://www.nysna.org/rns-say-union-makes-us-strong#.YKDgInlKgUo> [<https://perma.cc/B6KT-DW76>].

³⁸⁴ *Id.*

³⁸⁵ *Groups Blast Supreme Court's Anti-Labor Decision*, KRWG PUB. MEDIA (June 27, 2018), <https://www.krwg.org/post/groups-blast-supreme-courts-anti-labor-decision> [<https://perma.cc/83DS-53YG>].

³⁸⁶ See Steve Share, *In 5-4 'Janus' Vote, US Supreme Court Strikes Blow Against Public Sector Unions*, MINNEAPOLIS LAB. REV. (July 27, 2018), <https://perma.cc/B8F8-GNUN>.

³⁸⁷ *Supreme Court v. Organized Labor*, 81 W. COAST SAILORS, July 20, 2018, at 9, https://www.sailors.org/sites/default/files/newsletter/pdf/wcs_july_2018b_0.pdf [<https://perma.cc/5Z5B-QD7D>]; CWA Local 1014 (@CWALocal1014), X (June 28, 2018), <https://twitter.com/CWALocal1014/status/1012324411016466432> [<https://perma.cc/62D9-C3AS>].

³⁸⁸ John Rosales, *Supreme Court Ruling in 'Janus' Deals Blow to Working Families*, NEATODAY (June 27, 2018), <https://www.nea.org/advocating-for-change/new-from-nea/supreme-court-ruling-janus-deals-blow-working-families> [<https://perma.cc/X8X2-JHMW>].

C. Mitigation and Resistance: Political Reaction to Janus

Politicians rallied behind Justice Kagan's *Janus* dissent. I start by discussing federal officials, whose invocations of Justice Kagan framed national discourse. I then turn to state and local officials, who were on the forefront of blunting the majority opinion through legislative and regulatory reforms. Influenced by Dean Gerken's framework of "dissenting by deciding," in which "would-be dissenters—individuals who hold a minority view within the polity as a whole—enjoy a local majority on a decisionmaking body and can thus dictate the outcome," I show how state officials turned anger over the *Janus* into concrete action that mitigated the decision.³⁸⁹ These officials did not succeed exclusively on account of Justice Kagan's dissents, but her words fortified their efforts.

United States senators don't normally implore their constituents and social media followers to read Supreme Court dissents, but that is exactly what happened with Justice Kagan's *Janus* dissent. Using the imperative, Senator Sheldon Whitehouse urged the hundreds of thousands of people who follow him on Twitter to read it. "Don't be taken in by Charles Koch. Don't play checkers against chess players. Read Justice Kagan's *Janus* dissent about a 'weaponized' First Amendment to see a small slice of what they're up to. This is NOT on the up and up," he wrote.³⁹⁰ To Senator Whitehouse, Justice Kagan's dissent was not just a legal document, but a strategic and mobilizing account of social theory that exposed reactionary and nefarious ("NOT on the up and up") machinations.³⁹¹

Other Democratic senators coalesced behind Kagan's *Janus* dissent. Then-Senate minority leader Chuck Schumer would namecheck Justice Kagan and quote her dissent in a speech delivered from the Senate floor.³⁹² Senator Ben Cardin cited Justice Kagan in a tweet, quoting her and adding the hashtag "#*Janus*" to his post.³⁹³ Representative Rosa DeLauro of Connecticut, a veteran of congressional battles to mitigate *Wal-Mart Stores, Inc. v. Dukes*³⁹⁴ and other conservative Supreme Court decisions, wrote in a press release, "As Justice Elena

³⁸⁹ See Gerken, *supra* note 22, at 1748.

³⁹⁰ Sheldon Whitehouse (@SenWhitehouse), X (July 7, 2018), <https://twitter.com/SenWhitehouse/status/1015614230601465858> [<https://perma.cc/85Y4-DU64>].

³⁹¹ See *id.*

³⁹² See 164 CONG. REC. S4829–30 (daily ed. July 9, 2018) (statement of Sen. Schumer).

³⁹³ See Sen. Ben Cardin (@SenatorCardin), X (June 27, 2018), <https://twitter.com/SenatorCardin/status/1012018967177826305> [<https://perma.cc/8XMS-ESP7>].

³⁹⁴ See 564 U.S. 338, 348–60 (2011) (holding that female Walmart employees challenging alleged gender discrimination did not meet standard of class certification under FED. R. CIV. P. 23(a)).

Kagan wrote today in her dissent, “[t]he majority overthrows a decision entrenched in this Nation’s law—and in its economic life—for over 40 years.”³⁹⁵

Members of Congress who are not known for legal reform chimed in. Representative Bobby Scott of Virginia quoted a different part of the dissent from Representative DeLauro, highlighting Justice Kagan’s summation that “the majority overturned established precedent, ‘for no exceptional or special reason, but because it never liked the decision . . . it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate.’”³⁹⁶ He promised to act against a “weapon[ized]” First Amendment.³⁹⁷ The next day, Representative Matt Cartwright of Pennsylvania took to the House floor to read Justice Kagan’s words into the Congressional Record.³⁹⁸ “Associate Justice Kagan described it yesterday as a weaponization of the First Amendment that has been going on,” he said.³⁹⁹ “And she is right. This decision comes at a time when hardworking Americans are fighting every day just to pay their bills and support their families.”⁴⁰⁰

A year after the decision, Representatives Cartwright and Scott would partner with Senator Mazie Hirono to introduce the Public Service Freedom to Negotiate Act, a bill that has been re-introduced in all following congressional sessions.⁴⁰¹ The bill, framed as an explicit measure to counter the *Janus* decision, would have codified organizing and collective bargaining protections for public sector workers. In explaining the bill, lawmakers again turned to Justice Kagan. Speaking on the Senate floor on the anniversary of the decision, Senator Hirono urged the Senate to pass the Act to take a stand against the Court’s “torpedoing [of] 41 years of precedent under the pretext of protecting ‘fundamental free speech rights.’”⁴⁰² Senator Hirono added:

³⁹⁵ See Press Release, Rosa DeLauro, Rep., House of Representatives, DeLauro Statement on *Janus v. AFSCME Council 31* Supreme Court Decision (June 27, 2018), <https://delauro.house.gov/media-center/press-releases/delauro-statement-janus-v-afscme-council-31-supreme-court-decision> [<https://perma.cc/JH3B-CYL2>] (quoting Justice Kagan); see also 158 CONG. REC. H3917–18 (daily ed. June 21, 2012) (statement of Rep. DeLauro) (criticizing the *Dukes* decision and emphasizing the need to pass remedial legislation).

³⁹⁶ See Press Release, Bobby Scott, Rep., House of Representatives, Scott Statement on Supreme Court’s Ruling in *Janus v. AFSCME* (June 27, 2018), <https://bobbyscott.house.gov/media-center/press-releases/scott-statement-supreme-courts-ruling-janus-v-afscme> [<https://perma.cc/MAN2-FEES>] (quoting Justice Kagan).

³⁹⁷ *Id.*

³⁹⁸ See 164 CONG. REC. H5823 (daily ed. June 28, 2018) (statement of Rep. Cartwright).

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ H.R. 3463, 116th Cong. (2019); S. 970, 116th Cong. (2019); see also, e.g., AFSCME, PUBLIC SERVICE FREEDOM TO NEGOTIATE ACT: LEGISLATIVE FACT SHEET 2 (2021), https://projects.iq.harvard.edu/files/htupworkshops/files/mcbride_psfna_afscme_fact_sheet_3.16.21.pdf [<https://perma.cc/BA7E-E9GC>] (stating that the bills would once again be introduced in the 117th Congress).

⁴⁰² 165 CONG. REC. S4617–18 (daily ed. June 27, 2019) (statement of Sen. Hirono).

Justice Elena Kagan saw right through this argument. In a strong dissent, she said: “The majority overthrows a decision entrenched in this Nation’s law . . . for over 40 years . . . and it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.”⁴⁰³

State leaders echoed their federal counterparts as they began to plot a legislative response to *Janus*. They spoke from every corner of the country. In the East, Pennsylvania’s Governor (whose eponymic *Janus* amicus brief was cited four times by the *Janus* dissent) and Attorney General praised Justice Kagan’s dissent and quoted it.⁴⁰⁴ In the Midwest, Minnesota’s Secretary of State tweeted, “The SCOTUS ruling in *Janus* is a punch in the gut for working people—like the talented & dedicated employees in my office. As Justice Kagan’s dissent says, the ‘stable balance’ of the last 40 [years] is gone, & the 1st amendment is now a sword to undermine collective bargaining.”⁴⁰⁵ In the West, the Democratic nominee for Colorado Attorney General quoted Justice Kagan, who, he said, “clearly and effectively” demonstrated the decision was “a blow to the First Amendment and principled jurisprudence.”⁴⁰⁶ If elected, he vowed to support public sector union members. And moving even further West: Alaska State Senator Jesse Kiehl remarked, “The Supreme Court’s ‘weaponized’ anti-union decision today makes it more important than ever that elected officials look out for—and work with—working people. #*Janus* #Union.”⁴⁰⁷

Local officials also joined in. The Mayor Pro Tem of Sacramento, California, Angelique Ashley, typed the “weaponization” paragraph into an iPhone note and then uploaded the picture of her transcription to Facebook and Twit-

⁴⁰³ *Id.* at S4617.

⁴⁰⁴ See Tom Wolf (@TomWolfPA), X (June 29, 2018), <https://twitter.com/TomWolfPA/status/1012764096477958144> [<https://perma.cc/E23A-2GAV>] (attaching a screenshot from the dissent, commenting “[t]he Supreme Court’s decision to dismiss workers’ rights is a major step backwards,” and expressing gratitude “that Justice Elena Kagan dissented and referenced our fight here in Pennsylvania to protect workers’ rights and unions. #*Janus*”); *Janus v. AFSCME*, 138 S. Ct. 2448, 2496, 2499 n.5, 2500 (2018) (Kagan, J. dissenting) (citing the brief of Governor Tom Wolf); Press Release, Josh Shapiro, Pennsylvania Att’y Gen., Statement of Attorney General Josh Shapiro on Supreme Court Decision Undermining Public Sector Unions (June 27, 2018), <https://www.attorneygeneral.gov/taking-action/statements/statement-of-attorney-general-josh-shapiro-on-supreme-court-decision-undermining-public-sector-unions/> [<https://perma.cc/VN28-DUPZ>].

⁴⁰⁵ Steve Simon (@MNSteveSimon), X (June 27, 2018), <https://twitter.com/MNSteveSimon/status/1012058313188667392> [<https://perma.cc/2BHQ-7S3W>].

⁴⁰⁶ Phil Weiser (@pweiser), X (June 27, 2018), <https://twitter.com/pweiser/status/1012003174201225217> [<https://perma.cc/2H8Q-MV3S>] (discussing, in the first tweet, his perspective of the Court’s opinion); Phil Weiser (@pweiser), X (June 27, 2018), <https://twitter.com/pweiser/status/1012003175207858176> [<https://perma.cc/W559-QGDT>] (discussing, in a second tweet, Justice Kagan’s dissent).

⁴⁰⁷ Jesse Kiehl (@JesseKiehl), X (June 27, 2018), <https://twitter.com/JesseKiehl/status/1012001292330229760> [<https://perma.cc/B963-MEGE>].

ter. “Couldn’t agree more with Justice Elena Kagan’s dissent to #*Janus* today,” she wrote.⁴⁰⁸ “Sacramento is a better place to live because of our public sector unions.”⁴⁰⁹ Her Facebook post generated seventy comments, as Sacramentans joined in the debate and discussed the dissent. This dissent provided a rebuttal to the juricentric position that the Supreme Court’s decision had ended debate over agency fees.

Public sector unions had braced for the *Janus* decision. In 2015, Communications Workers of America (CWA), AFSCME, and other unions launched member engagement campaigns as an adverse ruling loomed in *Friedrichs*, which raised similar constitutional issues to *Janus*.⁴¹⁰ Although Justice Scalia’s death led the Court to split 4-4 in *Friedrichs*, union leaders continued their efforts and escalated them following Justice Gorsuch’s confirmation.⁴¹¹ Liberal academics began drafting state legislative responses, many of which were published not long after the Court published *Janus*.⁴¹² These organizing and intellectual efforts bore fruit. As the conservative Manhattan Institute bemoaned, “Within two weeks of the *Janus* ruling (and, in some cases, anticipating the ruling), about a third of the 22 affected states passed laws to help shield unions from its full impact.”⁴¹³

Justice Kagan’s dissent did not generate this resistance, but it helped state lawmakers and union leaders frame their mitigation campaigns. Take Washington State. Before the decision, labor prepared for a loss. David Groves, the Communications Director of the Washington State Labor Council (WSLC) for the AFL-CIO, argued in the run-up to *Janus* that the case represented “weaponized First Amendment rights [that could have the consequence of making] each workplace dispute a constitutional controversy.”⁴¹⁴ Firmly rejecting a juricentric understanding of constitutional law, Groves urged public sector unionists

⁴⁰⁸ Angelique Ashby (@AngeliqueAshby), X (June 27, 2018), <https://twitter.com/AngeliqueAshby/status/1012086516955340800> [<https://perma.cc/S6QR-8G2D>].

⁴⁰⁹ *Id.*

⁴¹⁰ *See generally* *Friedrichs v. Cal. Tchrs. Ass’n*, 578 U.S. 1 (2016) (mem.) (per curiam).

⁴¹¹ Mark Sherman, *Neil Gorsuch Has Deciding Vote in Key Labor Union Funding U.S. Supreme Court Case*, DENV. POST (Feb. 19, 2018), <https://www.denverpost.com/2018/02/19/neil-gorsuch-deciding-vote-labor-union-case/> [<https://perma.cc/G7MX-CRED>].

⁴¹² *See generally*, e.g., Tang, *supra* note 295 (proposing legislative strategies to overcome the collective action problem in union membership exacerbated by *Janus*); Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CALIF. L. REV. 1821 (2019) (same).

⁴¹³ DANIEL DISALVO, PUBLIC-SECTOR UNIONS AFTER *JANUS*: AN UPDATE 7 (2019), <https://media4.manhattan-institute.org/sites/default/files/IB-DaD-0219.pdf> [<https://perma.cc/FT73-EGJ7>].

⁴¹⁴ David Groves, *Janus (Part 2): Get Ready to Defend Your Freedom*, THE STAND (Mar. 7, 2018), <https://www.thestand.org/2018/03/janus-get-ready-to-defend-your-freedom/> [<https://perma.cc/X7R8-XJKC>].

to stay engaged, telling them that “[t]he simple truth is that no activist court or shady group can take away our freedom to stick together.”⁴¹⁵

State officials’ tenor echoed Justice Kagan’s defiance. Washington State Representative Noel Frame posited, “While [*Janus*] is a devastating blow to our brothers and sisters in labor, we WILL fight back and work at the state level to support unions.”⁴¹⁶ She added, “This isn’t over.”⁴¹⁷ The day the Court published *Janus*, Jay Inslee, Washington’s Governor, tweeted that “[w]e need to elect state leaders who can push back on Donald Trump’s agenda in Washington and protect the rights we cherish” because “Americans can’t rely on the current Supreme Court alone to protect our rights.”⁴¹⁸

These Washington State leaders and their allies turned to the resonant and cogent dissent as they crafted a legislative response. State Senator Karen Keiser wrote, “I am afraid we can’t rely on any branch of the federal government at this point. #SCOTUS has ‘weaponized’ the 1st Amendment to allow *Citizen’s* [sic] *United* . . . and now #*JANUS*.”⁴¹⁹ Leanne Kunze, deputy director of the Olympia, Washington-based AFSCME Council 28, roared at an August rally before the state capitol, “As [Justice] Kagan’s dissent so clearly stated, the *Janus* decision (6/27/18) has weaponized the First Amendment and aids in the opposition’s desire to weaken the voice of public service workers and interfere with their freedom to form strong unions.”⁴²⁰ Kunze continued, “[t]hankfully, the power of workers coming together to improve conditions has existed long before the *Janus* decision, and the power of people coming together will continue well beyond.”⁴²¹

Workers and supportive lawmakers came together in Washington State to mitigate *Janus*. In January 2019, Frame, Keiser, and other state lawmakers introduced H.B. 1575 (and its Senate counterpart—S.B. 5623).⁴²² The legislation amended dues deduction authorization laws and clarified the obligations of

⁴¹⁵ See *id.*

⁴¹⁶ Noel Frame (@NoelFrame), X (June 27, 2018), <https://twitter.com/NoelFrame/status/1012113819278106624> [https://perma.cc/ZBS6-T88N].

⁴¹⁷ *Id.*

⁴¹⁸ Jay Inslee (@JayInslee), X (June 27, 2018), <https://twitter.com/JayInslee/status/1012095911621611520> [https://perma.cc/SB7P-XTP4].

⁴¹⁹ Karen Keiser (@KarenKeiser1), X (June 28, 2018), <https://twitter.com/KarenKeiser1/status/1012382746826723334> [https://perma.cc/2D88-N8TU].

⁴²⁰ *OUR VIEW—Stop Kavanaugh*, WASH. FED’N OF STATE EMPs. (Aug. 26, 2018), <https://www.wfse.org/news/our-view-stop-kavanaugh> [https://perma.cc/LH5D-CDUD].

⁴²¹ *Id.*

⁴²² See *HB 1575—2019–20*, WASH. STATE LEGISLATURE, <https://app.leg.wa.gov/billssummary?BillNumber=1575&Year=2019&Initiative=false> [https://perma.cc/8SDP-P6P3]; *SB 5623 - 2019-20*, WASH. STATE LEGISLATURE, <https://app.leg.wa.gov/billssummary?BillNumber=5623&Chamber=Senate&Year=2019> [https://perma.cc/CNW3-3G2U].

public employers and public sector unions.⁴²³ The act, according to Larry Brown, the president of the WSLC, blunted *Janus*'s consequences by facilitating public sector union membership and changing the process by which public sector workers unionize and revoke their decision to pay union dues.⁴²⁴ It passed by a decisive margin.⁴²⁵

Or consider Massachusetts, which passed what some called the most comprehensive response law to *Janus*.⁴²⁶ In the wake of the decision, lawmakers and unions in the Bay State stridently vowed to resist the ruling. The president of Service Employees International Union Local 509, which represents close to twenty thousand service workers and teachers throughout Massachusetts, said "no court case is going to stop us from fighting for the strong unions our communities need."⁴²⁷ Massachusetts Senate President Harriette Chandler agreed, telling journalists that she could not "wait to stand with" labor in fighting back.⁴²⁸ Massachusetts House Speaker Robert DeLeo promised to find "ways to soften the blow" of the decision.⁴²⁹

After extensive discussion, these lawmakers unveiled a sweeping bill designed to blunt *Janus*. The legislation authorized unions to charge non-members certain fees, created new pathways for unions to organize and speak to public employees, and exempted unions from certain obligations to non-member workers.⁴³⁰ To sell this legislation, lawmakers turned to Justice Kagan's dissent. Massachusetts State Senator Joe Boncore, a lead sponsor of the anti-*Janus* bill, told the *Boston Globe* that legislation was needed because the Supreme Court had "weaponized the First Amendment" and was using it

⁴²³ See *Union Dues Bill Passes Legislature*, ASS'N OF WASH. CITIES (Apr. 22, 2019), <https://www.cities.org/advocacy/News/advocacy-news/2019/04/22/union-dues-bill-passes-legislature> [<https://perma.cc/4UUN-D4AC>] (limiting union and employer liability "from claims or actions for requiring, deducting, receiving, or retaining agency fair share fees before June 27, 2018").

⁴²⁴ *Senate Approves Post-Janus Collective Bargaining Bill*, THE STAND (Apr. 15, 2019), <https://www.thestand.org/2019/04/senate-approves-collective-bargaining-bill/> [<https://perma.cc/9Q9Q-2L93>].

⁴²⁵ See *HB 1575—2019–20*, *supra* note 422 (passing by a vote of 25–21 in the Senate, and 56–38 in the House).

⁴²⁶ See, e.g., Rachael Running, *Massachusetts Passes Strongest Response to Janus in the Country*, MASS. AFL-CIO (Sept. 19, 2019), <https://www.massafcio.org/news/massachusetts-passes-strongest-response-janus-country> [<https://perma.cc/64JB-CKHR>].

⁴²⁷ Steve LeBlanc, *Beacon Hill Looks for Ways to Help Unions After Court Ruling*, ASSOCIATED PRESS (July 7, 2018), <https://apnews.com/article/9a4c3a79f4d24806b32973be0541465b> [<https://perma.cc/BA94-FZGH>]; see *About Local 509*, SEIU LOCAL 509, <https://www.seiu509.org/about/> [<https://perma.cc/YF8D-HSHM>].

⁴²⁸ LeBlanc, *supra* note 427.

⁴²⁹ *Id.*

⁴³⁰ Lisa Adams, *New Law Changes Workplace Rules for Public Employers and Unions*, MASS. MUN. ASS'N (Oct. 3, 2019), <https://www.mma.org/new-law-changes-workplace-rules-for-public-employers-and-unions/> [<https://perma.cc/CW4L-WW9W>].

against unions.⁴³¹ When the bill became law, Boncore framed the victory in constitutional terms—even as the bill explicitly repudiated one of the Court’s constitutional decisions. “I am proud to see the Legislature’s unwavering commitment to protecting the Constitutional right to organize and collectively bargain effectively as a basic tenant [sic] of our democracy,” he said.⁴³² Like Justice Kagan, he recognized that the Constitution did not just belong to five sequestered judges in Washington, D.C., but to the people. And his legislation turned this recognition into binding law. Although it is hard to isolate causality, Massachusetts has seen a lower decline in public sector union membership than other states impacted by the *Janus* decision in the five years since the legislation became law.⁴³³

Massachusetts and Washington are no aberrations. In the years after *Janus*, many other progressive states responded with mitigating legislation that made it easier for public sector unions to organize workers, recruit new members, and manage the fallout from the decision. These measures—which were passed in California,⁴³⁴ Connecticut,⁴³⁵ Illinois,⁴³⁶ New Jersey,⁴³⁷ Oregon,⁴³⁸

⁴³¹ Jon Chesto, *Bill Nearing Finish Line on Beacon Hill Would Soften Blow of High Court’s Ruling on Union Dues*, BOS. GLOBE (July 10, 2019), <https://www.bostonglobe.com/business/2019/07/10/bill-nearing-finish-line-beacon-hill-would-soften-blow-high-court-ruling-union-dues/ohMbUPhxoVi03B2Y0LOIIM/story.html> [https://perma.cc/55EB-7224].

⁴³² *From the Office of Senator Boncore: Janus Fix to Become Law*, N. END WATERFRONT (Sept. 24, 2019), <https://northendwaterfront.com/2019/09/from-the-office-of-senator-boncore-janus-fix-to-become-law/> [https://perma.cc/8W5U-FNQW].

⁴³³ See, e.g., SKORUP, *supra* note 297, at 8 (reporting a 17.6% decline in union membership in Massachusetts, compared to an average national decline of 22.2%).

⁴³⁴ *The California Legislature’s Response to Janus v. AFSCME*, KRONICK (July 3, 2018), <https://kmtg.com/news/legal-alerts/the-california-legislatures-response-to-janus-v-afscme/> [https://perma.cc/QQ4Q-GJAX].

⁴³⁵ *Post-Janus Protections Pass House, Sent to Governor’s Desk*, CONN. AFL-CIO (May 28, 2021), <https://ctaflcio.org/news/post-janus-protections-pass-house-sent-governor-s-desk> [https://perma.cc/6LA3-5YDS]; see also Mark Pazniokas, *Senate Democrats Vote to Strengthen Hand of Public Unions*, CONN. MIRROR (May 13, 2021), <https://ctmirror.org/2021/05/13/senate-democrats-vote-to-strengthen-hand-of-public-unions/> [https://perma.cc/73VL-Z4W7] (noting that “Senate Democrats rallied Thursday behind a bill intended to help public-sector unions maintain or grow membership in the face of an adverse decision by the U.S. Supreme Court” in *Janus*).

⁴³⁶ Jennifer Dunn & Melissa Sobota, *Post-Janus Legislation Weakens Impact of Supreme Court’s Decision and Imposes Heightened Requirements on Public and Educational Employers*, FRANCKEK (Dec. 19, 2019), <https://www.franczek.com/blog/post-janus-supreme-court-requirements-new-legislation/> [https://perma.cc/Q397-6THF].

⁴³⁷ *Senate Panel Approves ‘Janus 2’ Bill to Protect Rights of Unions & Workers*, N.J. SENATE DEMOCRATS (2019), <https://www.njsendems.org/senate-panel-approves-janus-2-bill-to-protect-rights-of-unions-workers-2/> [https://perma.cc/6QMR-R57V].

⁴³⁸ *Oregon Governor Signs Sweeping Union Rights Law Affecting Public Employers*, OGLETREE DEAKINS (July 1, 2019), <https://ogletree.com/insights/oregon-governor-signs-sweeping-union-rights-law-affecting-public-employers/> [https://perma.cc/STJ5-7RP4].

and Rhode Island⁴³⁹—were framed around opposition to *Janus* and sold as means of softening the impact of the decision, with explicit and implicit echoes of Justice Kagan. *Janus* also led other states to pass broader bills defending labor rights. Virginia, for example, enacted a law in 2021 that allows local governments “to engage in collective bargaining for the first time in the state’s history,” a legislative action that was inspired, in part, by *Janus*.⁴⁴⁰ These lawmakers’ political contestation “change[d] the social meaning of [the] constitutional principles and the practices they regulate” outlined by the *Janus* Court.⁴⁴¹

D. Limiting Legal Damage: Progressive Lawyers After Janus

Justice Alito’s opinion decided one question but opened the door to many more. In *Janus*’s wake, conservative legal groups flooded federal and state courts with challenges that pressed a maximalist interpretation of the opinion. These lawsuits generally fell into four categories. First, conservative public interest groups sought to extend *Janus* beyond labor law, often in ways consistent with the deregulatory First Amendment that Justice Kagan warned of.⁴⁴² Second, a set of lawsuits argued that the First Amendment logic of *Janus* raised constitutional issues with exclusive representation—the system in which a single labor union is granted the sole right to represent all employees—in negotiations with state and local government.⁴⁴³ Third, non-union public employees sought retroactive refunds of the agency fees they had paid before *Janus*.⁴⁴⁴ Fourth, union members who renounced their membership post-*Janus* brought constitutional challenges against “maintenance of membership” provi-

⁴³⁹ Katherine Gregg, *Bill Aims to Ensure Union-Dues Collection from Public Workers*, PROVIDENCE J., <https://www.providencejournal.com/story/news/politics/2019/06/16/political-scene-bill-aims-to-ensure-collection-of-ri-public-employee-union-dues/4896365007/> [<https://perma.cc/H5Z5-7WUK>] (June 16, 2019).

⁴⁴⁰ DANIEL DISALVO, MANHATTAN INST., *THE LEGAL AFTERMATH OF JANUS V. AFSCME 2* (2021), https://media4.manhattan-institute.org/sites/default/files/MI_Report_DiSalvo_LegalAftermath_JanusvAFSCME-V5.pdf [<https://perma.cc/M35R-SB34>].

⁴⁴¹ See Balkin & Siegel, *supra* note 108, at 929.

⁴⁴² See, e.g., Daniel Wiessner, *State Bar of Texas Faces Fresh Challenge to Mandatory Dues*, REUTERS (Aug. 31, 2021), <https://www.reuters.com/legal/legalindustry/state-bar-texas-faces-fresh-challenge-mandatory-dues-2021-08-31/> [<https://perma.cc/NCT7-8CCF>].

⁴⁴³ See, e.g., Brief of Amici Curiae National and Illinois Labor Organizations Supporting Affirmance in Favor of Defendant-Appellees at 9–11, *Sweeney v. Raoul*, 990 F.3d 555 (7th Cir. 2021) (No. 19-3413).

⁴⁴⁴ See, e.g., James Varney, *After Janus Ruling, Worker Asks Supreme Court for Return of Paid Union Dues*, WASH. TIMES (Mar. 15, 2020), <https://www.washingtontimes.com/news/2020/mar/15/after-janus-ruling-worker-asks-supreme-court-for-r/> [<https://perma.cc/C2XU-AV4Q>] (describing the *Janus* plaintiff’s subsequent unsuccessful attempts to claw back fees he had paid to the union before the Court’s ruling).

sions, which regulate when an individual can stop paying dues.⁴⁴⁵ To date, these efforts have largely been unsuccessful, although some remain ongoing. Across all four buckets, the dissent's movement dialectic bolstered those seeking to cabin *Janus* and assisted them in limiting the damage.

Concerning the first tranche of cases, Justice Kagan's dissent anticipates future legal challenges would wield *Janus* in "aggressive way[s]."⁴⁴⁶ Even while decrying the majority opinion's dismantling of existing relational structures between employers and public employees, Justice Kagan's dissent repeatedly underscores that *Janus* was limited to labor law, and a narrow part of labor law at that. "And so, the key point about today's decision is that it creates an unjustified hole in the law, applicable to union fees alone. This case is *sui generis* among those addressing public employee speech—and will almost surely remain so," she observes.⁴⁴⁷

In addition to warning about the theoretical dangers of a deregulatory First Amendment, the dissent identifies the precise precedents most vulnerable to future attack under the majority opinion's logic and threw preemptive cold water on those challenges. Acknowledging the destabilizing potential of the overturning of *Abood*, Justice Kagan wrote that "today's decision does not question" the long line of "cases involving compelled speech subsidies outside the labor sphere" and named *Keller v. State Bar of California*,⁴⁴⁸ *Board of Regents of the University of Wisconsin System v. Southworth*,⁴⁴⁹ and *Glickman v. Wileman Brothers & Elliott, Inc.*⁴⁵⁰ as among the examples of still valid cases.⁴⁵¹ She also attached a footnote reiterating this point and the viability of these cases, which (like *Abood*) are important to the maintenance of civic institutions.⁴⁵²

This language gave lawyers a concrete tool with which to defend these precedents, allowing litigants to assert with authority that *Janus* should not raise doubts about these cases' precedential value despite the tension between

⁴⁴⁵ See, e.g., *Kurk v. Los Rios Classified Emps. Ass'n*, 540 F. Supp. 3d 973, 978, 982 (E.D. Cal. 2021), *aff'd* No. 21-16257, 2022 WL 3645061 (9th Cir. Aug. 24, 2022), *cert. denied*, 143 S. Ct. 2431 (2023).

⁴⁴⁶ *Janus v. AFSCME*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

⁴⁴⁷ *Id.* at 2497.

⁴⁴⁸ 496 U.S. 1, 14 (1990) (holding that attorneys may be required to be members of a state bar association).

⁴⁴⁹ 529 U.S. 217, 221 (2000) (holding that public universities can subsidize campus groups through mandatory student activity fees without violating the students' First Amendment rights).

⁴⁵⁰ 521 U.S. 457, 468–69 (1997) (holding that governments can require agricultural commodity producers to pay assessments for generic advertising programs without violating their First Amendment rights).

⁴⁵¹ *Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting).

⁴⁵² *Id.* at 2495 n.3.

their legal foundations and the Court's recent opinion.⁴⁵³ Numerous state bars—including those in Texas,⁴⁵⁴ Wisconsin,⁴⁵⁵ Michigan,⁴⁵⁶ Louisiana,⁴⁵⁷ North Dakota,⁴⁵⁸ and Oklahoma,⁴⁵⁹ as well as amicus briefs in support of them,⁴⁶⁰ including from the state bars of Missouri⁴⁶¹ and California⁴⁶² and the

⁴⁵³ See, e.g., Andrias, *supra* note 292, at 51.

⁴⁵⁴ Defendants' Reply in Support of Cross-Motion for Summary Judgment at 5 n.3, McDonald v. Sorrells, No. 19-CV-00219, 2020 WL 3261061 (W.D. Tex. May 29, 2020) ("Plaintiffs also contend that their interpretation of *Keller* is 'buttressed' by *Janus* Indeed, *Janus*'s principal dissent emphasizes that the majority's opinion 'does not question' *Keller*." (internal citations omitted)); see also Defendants' Cross-Motion for Summary Judgment at 3, McDonald, 2020 WL 3261061 (similar language).

⁴⁵⁵ Wisconsin Supreme Court Memorandum of Law in Support of Their Motion to Dismiss at 17–18, File v. Kastner, 469 F. Supp. 3d 883 (E.D. Wis. 2020) (No. 19-CV-1063) ("[T]he *Janus* Court did not address *Keller* whatsoever, much less overrule it. To the contrary, Justice Kagan's dissent noted that the Court has relied upon *Abood* 'when deciding cases involving compelled speech outside the labor sphere—cases today's decision does not question. See, e.g., *Keller* Justice Kagan also noted the Court has 'blessed the constitutionality of compelled speech subsidies in a variety of cases beyond *Abood*, involving a variety of contexts beyond labor relations. The list includes mandatory fees imposed on state bar members (for professional expression) . . . See *Keller* ' The *Janus* Court did not respond to either of Justice Kagan's references to *Keller*, yet it responded to many of her other points." (cleaned up)); see also Brief of the Wisconsin Supreme Court Justices in Opposition to the Petition for Certiorari at 15, File v. Hickey, 469 F. Supp. 3d 883 (E.D. Wis. 2020) (No. 19-C-1063) (similar language).

⁴⁵⁶ Defendants' Brief in Support of Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment at 14, Taylor v. Barnes, No. 19-CV-00670, 2020 WL 10050772 (W.D. Mich. Sept. 8, 2020) (quoting Justice Kagan's dissent to argue that "*Janus* 'd[id] not question' *Keller*").

⁴⁵⁷ Defendants' Memorandum in Support of Motion to Dismiss Pursuant to Rule 12(b)(6) at 6, Boudreaux v. La. State Bar Ass'n, 433 F. Supp. 3d 942 (E.D. La. 2020) (No. 19-CV-11962) (citing Justice Kagan's invocation of *Keller* and statement that *Janus* does not involve cases outside the labor sphere).

⁴⁵⁸ See, e.g., Brief in Opposition for Joe Wetch, Aubrey Fiebelkorn-Zuger, and Tony Weiler at 5, Fleck v. Wetch, 140 S. Ct. 1294 (2020) (mem.) (No. 19-670) (observing that Justice Kagan's dissent noted "that the majority in *Janus* did 'not question' cases like *Keller* that are outside the labor sphere").

⁴⁵⁹ See, e.g., Appellees' Joint Answer Brief, Schell v. Chief Just. & Justices of Okla. Sup. Ct. at 16 n.10, 19, 11 F.4th 1178 (10th Cir. 2021) (No. 20-6044) (observing that the majority opinion did not respond to Justice Kagan's comment on *Keller* and the limited application of *Janus*).

⁴⁶⁰ See, e.g., Brief *Amici Curiae* of Former Presidents of the State Bar of Texas, Former Chairs of the Texas Bar College, and Former Chairs of the State Bar of Texas Council of Chairs at 3, McDonald v. Sorrells, No. 19-CV-219, 2019 WL 7670024 (W.D. Tex. May 20, 2019) ("*Janus* said nothing about the lawfulness of bar fees. Justice Kagan's dissent in *Janus* explicitly lists *Keller* as falling into the category of cases that '[*Janus*] does not question.' *Id.* at 2498 (Kagan, J., dissenting). . . . And the majority did not dispute Justice Kagan's observation that *Janus* does not question *Keller*.").

⁴⁶¹ Brief of the Missouri Bar as Amicus Curiae in Support of Appellees and Affirmance at 5–7, Fleck v. Wetch, 937 F.3d 1112 (8th Cir. 2019) (No. 16-1564) (commenting on "Justice Kagan's observation" that the majority had not commented on "the lawfulness of integrated bar fees" in the *Janus* dissent).

⁴⁶² Brief of the California State Bar as Amicus Curiae in Support of Appellees and Affirmance at 5–7, Fleck v. Wetch, 937 F.3d 1112 (8th Cir. 2019) (No. 16-1564) (commenting on "Justice Kagan's observation" that the majority had not commented on "the lawfulness of integrated bar fees" in the *Janus* dissent).

state of Oregon⁴⁶³—discussed Justice Kagan’s dissent in legal filings to argue that *Keller* was still valid, despite its reliance on *Abood*.

Similarly, government lawyers defending generic assessment advertising programs turned to Justice Kagan’s dissent to show that promotional activities funded by checkoff fees (a mechanism in which a government collects fees from producers of a particular agricultural commodity and uses the collected funds to promote that particular commodity) were still constitutional.⁴⁶⁴ And so did government lawyers defending the validity of *Southworth*.⁴⁶⁵ Conservative interest groups that attempted to extend the logic of *Janus* also had to grapple with the dissent’s delimitation of the majority opinion’s scope, including one of the conservative interest groups whose amicus brief Justice Alito cited in his majority opinion.⁴⁶⁶

This language then traveled from litigants’ briefs to judicial decisions, many of which relied on Justice Kagan’s dissent to reject challenges predicated on *Janus* that called for overturning these cases.⁴⁶⁷ Among the courts to cite

⁴⁶² Brief for *Amicus Curiae* the State Bar of California in Support of Defendant-Appellee and Affirmance at 9, *Crowe v. Or. State Bar*, 989 F.3d 714 (9th Cir. 2021) (No. 19-35463) (citing Justice Kagan’s *Janus* dissent to reaffirm the validity of *Keller*).

⁴⁶³ Amicus Brief of the State of Oregon at 3, *Crowe v. Or. State Bar*, 989 F.3d 714 (9th Cir. 2021) (No. 19-35463) (“Most importantly, *Janus* did not overrule *Keller* or even suggest that it was wrongly decided. *See Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting) (explaining scope of *Janus* holding).”).

⁴⁶⁴ *See, e.g.*, Brief in Opposition at 21, *Ranchers-Cattlemen Action Legal Fund v. Vilsack*, 142 S. Ct. 2867 (2022) (mem.) (No. 21-918) (citing Justice Kagan’s language that *Janus* does not extend beyond the labor sphere to argue that *Janus* did not disturb *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550 (2005), which rejected a First Amendment challenge to a compelled advertising program for beef producers on the grounds of the government speech doctrine).

⁴⁶⁵ *See, e.g.*, City of Seattle’s Brief in Response to Appellants’ Supplemental Brief at 3–4, *Elster v. City of Seattle*, 444 P.3d 590 (Wash. 2019) (en banc) (No. 96660-5) (quoting Justice Kagan’s dissent to argue that *Janus* “‘does not question’ *Southworth*’s continued validity”); *see also* Bd. of Regents of the Univ. of Wisc. Sys. v. *Southworth*, 529 U.S. 217, 221 (2000).

⁴⁶⁶ *See, e.g.*, Brief of Amicus Curiae Mackinac Center for Public Policy in Support of Petitioners at 4, *Belgau v. Inslee*, 141 S. Ct. 2795 (2021) (mem.) (No. 20-1120).

⁴⁶⁷ *See, e.g.*, *Boudreaux v. La. State Bar Ass’n*, 433 F. Supp. 3d 942, 976 (E.D. La. 2020) (“The majority in *Janus* did not discuss *Keller* or respond to the dissent’s assertion that *Keller* was a ‘case . . . involving compelled speech subsidies outside the labor sphere [that] today’s decision does not question.’ 138 S. Ct. at 2498 (Kagan, J., dissenting).”), *rev’d*, 3 F.4th 748 (5th Cir. 2021); *Jarchow v. State Bar of Wis.*, No. 19-CV-266, 2019 WL 6728258, at *1 (W.D. Wis. Dec. 11) (same), *aff’d*, No. 19-3444, 2019 WL 8953257 (7th Cir. 2019); *McDonald v. Sorrels*, No. 19-CV-219, 2020 WL 3261061, at *5 (W.D. Tex. May 29, 2020) (same), *vacated*, *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), *cert. denied*, *McDonald v. Firth*, 142 S. Ct. 1442 (2022) (mem.).

Justice Kagan's dissent in this vein were the Eighth Circuit⁴⁶⁸ and the Ninth Circuit.⁴⁶⁹

Justice Kagan's dissent provided a framing chassis for progressive litigators resisting efforts to use a deregulatory First Amendment in domains with little connection to labor law, from defending laws regulating consumer products to protecting LGBTQ rights to establishing gun control.⁴⁷⁰ Courts have also used language from Justice Kagan's dissent to criticize novel suits premised on deregulatory extensions of the First Amendment.⁴⁷¹

Concerning labor law, Justice Kagan's dissent led the majority to respond with limiting concessions that signaled exclusive representation remained permissible.⁴⁷² Labor lawyers then pointed to these concessions as proof that systems of exclusive representation remained viable.⁴⁷³ Labor lawyers also

⁴⁶⁸ *Fleck v. Wetch*, 937 F.3d 1112, 1114–15 (8th Cir. 2019) (“The majority in *Janus* did not discuss *Keller* nor respond to the dissent’s assertion that *Keller* was a ‘case involving compelled speech subsidies outside the labor sphere [that] today’s decision does not question.’ 138 S. Ct. at 2498 (Kagan, J., dissenting).”).

⁴⁶⁹ *Crowe v. Or. State Bar*, 989 F.3d 714, 725 (9th Cir. 2021) (“But *Keller* plainly has not been overruled. See *Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting) (noting that ‘today’s decision does not question’ cases applying *Abood*, including *Keller*).”).

⁴⁷⁰ See, e.g., Brief for Amicus Curiae Tanenbaum Center for Interreligious Understanding in Support of Respondents at 16, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) (citing the *Janus* dissent to argue “Justice Kagan has already warned against weaponization of the First Amendment’s Free Speech Clause against non-speech interests” to defend antidiscrimination laws); Supplemental Brief for Appellees City of Berkeley and Christine Daniel at 17, CTIA—Wireless Ass’n v. City of Berkeley, 928 F.3d 832 (9th Cir. 2019) (No. 16-15141) (citing Justice Kagan’s weaponization framing to defend a local ordinance requiring cell phone sellers to inform prospective cell phone purchasers that carrying a cell phone in certain ways may cause them to exceed federal guidelines for radio-frequency radiation exposure); Reply in Support of Motion for Preliminary Injunction at 7, *Washington v. U.S. Dep’t of State*, 318 F. Supp. 3d 1247 (W.D. Wash. 2018) (No. 18-CV-01115) (brief of Attorney General Ferguson) (“[T]his Court should reject their attempt to literally ‘weaponiz[e] the First Amendment.’ *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).”).

⁴⁷¹ See, e.g., *Billups v. City of Charleston*, 331 F. Supp. 3d 500, 518 n.10 (D.S.C. 2018) (quoting multiple lines from Justice Kagan’s *Janus* dissent and stating that its opinion “echoes” her dissent in ruling against a First Amendment challenge to a municipal tour guide licensing law), *aff’d*, 961 F.3d 673 (4th Cir. 2020).

⁴⁷² See, e.g., *Janus v. AFSCME*, 138 S. Ct. 2448, 2465, 2467 n.4, 2476, 2477 n.23, 2481 n.25, 2482 n.26, 2485 n.27, 2486 n.28 (2018).

⁴⁷³ See, e.g., Brief of Amici Curiae National and Illinois Labor Organizations Supporting Affirmance in Favor of Defendant-Appellees at 10–11, *Sweeney v. Raoul*, 990 F.3d 555 (7th Cir. 2021) (No. 19-3413) (observing that “in addressing a concern raised by a dissenting opinion that the ruling would require states that had authorized agency fees to undertake an ‘extensive legislative response,’ [*Janus*] at 2499 (Kagan, J., dissenting), the *Janus* majority pointedly assured that states would be able to ‘keep their labor-relations systems *exactly as they are*—only they cannot force nonmembers to subsidize public-sector unions,” and contending “certainly no principle is closer to the foundations of modern labor law than exclusive representation supported by a duty of fair representation”).

relied on Justice Kagan's arguments to defeat retroactivity claw-back suits.⁴⁷⁴ They argued that *Abood* was still valid "[a]t all times prior to June 27, 2018" from a framework clarified by the *Janus* dissent's extensive discussion of how *Abood* was "embedded in the law . . . in a way not many decisions are."⁴⁷⁵ Justice Kagan's discussion of precedent coheres well with the good-faith defense that unions relied on with great success.⁴⁷⁶ And courts cited Justice Kagan's language stressing the deeply embedded nature of the *Abood* regime to reject efforts aimed at "punishing unions" after *Janus*.⁴⁷⁷ Ultimately, the dissent shaped the constitutional meaning of *Janus* by influencing the litigation that followed.

V. THE PROMISE AND THE LIMITS OF MOVEMENT DISSENTS

Like any procedural tool, mobilizing dissents have limits and complications. In this Part, I respond to potential counterarguments about movement dissenting and identify considerations a Justice might ponder before writing one. My goal is not to prescribe a rigid rubric for when a movement dissent should be deployed, but to defend integrating mobilizing, resonant dissents into a Justice's arsenal.

A critic might argue that mordant movement dissents damage the institution of the Supreme Court.⁴⁷⁸ By writing for the people with an eye to social mobilization, this argument would go, Justices politicize the Court and overstep their judicial role.⁴⁷⁹ Chief Justice Roberts made a derivation of this ar-

⁴⁷⁴ To prove a good faith defense against § 1983 claims, for instance, unions had to demonstrate that they reasonably followed presumptively valid state law in effectuating membership paycheck deductions, even though the deductions would later be deemed to be unconstitutional. *See, e.g., Clement v. City of Glendale*, 518 F.3d 1090, 1096–97 (9th Cir. 2008); *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993).

⁴⁷⁵ *Janus*, 138 S. Ct. at 2497 (Kagan, J., dissenting); *see, e.g., Joint Stipulated Record* at 4–5, *Bennett v. AFSCME*, 612 F. Supp. 3d 821 (C.D. Ill. 2020) (No. 19-CV-04087).

⁴⁷⁶ *See, e.g., DISALVO, supra* note 440, at 7 (noting that "[m]ost courts have endorsed the good-faith defense offered by unions and government employers and dismissed claims that plaintiffs have a retroactive claim on union treasuries").

⁴⁷⁷ *See, e.g., LaSpina v. SEIU Pa. State Council*, 985 F.3d 278, 288 (3d Cir. 2021) ("That old [*Abood*] regime supported the statutory schemes of nearly half the states, underpinning thousands of collective bargaining agreements involving millions of employees. *See Janus*, 138 S. Ct. at 2499 (Kagan, J., dissenting).").

⁴⁷⁸ *See, e.g., Jason Richwine, Justice Kagan's Rhetoric Diminishes the Court*, NAT'L REV. (July 6, 2021), <https://www.nationalreview.com/corner/justice-kagans-rhetoric-diminishes-the-court/> [<https://perma.cc/JSL7-RX6B>] (commenting unfavorably on Justice Kagan's *Brnovich* dissent).

⁴⁷⁹ *See, e.g., id.* ("Given the political nature of the dispute, a naïve Court observer might assume that the justices would be especially careful to limit their analysis to the relevant text and case history, avoiding any hint of personal investment in the outcome. The naïve observer is not familiar with Justice Elena Kagan.").

gument in *Biden v. Nebraska*.⁴⁸⁰ Objecting to Justice Kagan’s dissent—which he recognized was aimed at the “public”—the Chief Justice wrote:

It has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary. . . . Reasonable minds may disagree with our analysis—in fact, at least three do. See *post* . . . (Kagan, J., dissenting). We do not mistake this plainly heartfelt disagreement for disparagement. It is important that the public not be misled either. Any such misperception would be harmful to this institution and our country.⁴⁸¹

There is some truth to this argument at the margin. A Justice who *only* wrote in a movement dialectic would be ineffective, and their rhetoric would likely cross into a form of “disparagement.” Most cases on the Court call for technical and dry legal parsing and careful engagement with their colleagues’ and litigants’ arguments. Constant calls to action aimed at “public” consciousness would be inappropriate and corrosive to the “institution and our country.”

Overall, however, this argument is unconvincing. Widespread constitutional estrangement threatens the Constitution’s legitimacy.⁴⁸² In the eyes of many Americans, the Court’s lurch rightward is *the* “disturbing feature” of many recent opinions.⁴⁸³ Movement dissents can modulate and channel this alienation, bringing those who feel “heartfelt disagreement” with the Court

⁴⁸⁰ 143 S. Ct. 2355, 2375–76 (2023).

⁴⁸¹ *Id.*

⁴⁸² See JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 10 (2011) (“The possibility that constitutional government will ultimately be responsive to public mobilization and public opinion gives ordinary people reason to hope that in the time the Constitution can be redeemed [C]onstitutional legitimacy depends on what Sanford Levinson has called constitutional protestantism—the idea that no institution of government, and especially not the Supreme Court, has a monopoly on the meaning of the Constitution.”); see also Post & Siegel, *supra* note 198, at 374 (“The premise of democratic constitutionalism is that the authority of the Constitution depends on its democratic legitimacy, upon the Constitution’s ability to inspire Americans to recognize it as *their* Constitution. This belief is sustained by traditions of popular engagement that authorize citizens to make claims about the Constitution’s meaning and to oppose their government—through constitutional lawmaking, electoral politics, and the institutions of civil society—when they believe that it is not respecting the Constitution. . . . Yet judicial authority to enforce the Constitution, like the authority of all government officials, ultimately depends on the confidence of citizens. If courts interpret the Constitution in terms that diverge from the deeply held convictions of the American people, Americans will find ways to communicate their objections and resist judicial judgments.”).

⁴⁸³ *Nebraska*, 143 S. Ct. at 2375; see, e.g., Mark Sherman & Emily Swanson, *Trust in Supreme Court Fell to Lowest Point in 50 Years After Abortion Decision, Poll Shows*, ASSOCIATED PRESS (May 17, 2023), <https://apnews.com/article/supreme-court-poll-abortion-confidence-declining-0ff738589bd7815bf0eab804baa5f3d1> [<https://perma.cc/5WBF-4WSP>] (discussing a decrease in public confidence regarding the Supreme Court).

into the center of constitutional conversation.⁴⁸⁴ Justices of the Court become not only actors creating injustice, but also partners in process of remediation and rebuilding. By engaging and directing the people in a participatory conversation about their Constitution, these devices promote constitutional ownership and constructive democratic resistance, repairing faith in the process of constitutional explication. In the long run, this is good for the Court as an institution. The Supreme Court depends on the Constitution's legitimacy for its own.

Justice Kagan acutely understands the threats to the Court's legitimacy from widespread constitutional alienation and judicial detachment from popular sentiment. Speaking to a judicial conference in Montana following the extraordinarily divisive 2021-22 term, she reflected on the unique insulation of the Court from the responsive pressures of democracy: "The thing about judicial decision-making is that you can't throw the bums out; we're in there for life. And in particular with respect to our constitutional rulings, there is no way for any other branch of government to reverse them."⁴⁸⁵ She then added: "But if, over time, the Court loses all connection with the public and with public sentiment, that's a dangerous thing for a democracy."⁴⁸⁶ Her movement dissents create a vital connection between the Court and the public, channeling the throw-the-bums-out anger into a productive and impactful pathway for constitutional change. It creates a release valve in response to divisive "constitutional rulings" that ultimately strengthens the Court as an institution.

The institutionalist objection overlooks other salient factors of America's constitutional culture. As legal scholars have compellingly demonstrated, ordinary people are the "engines of liberty" who shape America's constitutional law.⁴⁸⁷ The Supreme Court does not have the last word.⁴⁸⁸ Movement dissents tether this dialogic reality to the heart of our constitutional jurisprudence, connecting life-tenured and cloistered Justices to the democratic process that drives constitutional law. Justices may wish that their decisions end debates,

⁴⁸⁴ *Nebraska*, 143 S. Ct. at 2376. Emerging political science scholarship bolsters this claim. See, e.g., Christopher M. Parker & Benjamin Woodson, *How Blistering Dissents Help Some Americans Trust the Supreme Court*, WASH. POST (July 2, 2021), <https://www.washingtonpost.com/politics/2021/07/02/how-blistering-dissents-help-some-americans-trust-supreme-court/> [<https://perma.cc/BS24-CFYJ>] (recounting empirical scholarship that demonstrates how "blistering" dissents like Justice Kagan's in *Brnovich* can embody a "signal of representation").

⁴⁸⁵ Justice Elena Kagan, Remarks at the Ninth Circuit's Judicial Conference (July 21, 2022), <https://www.c-span.org/video/?521729-1/justice-elena-kagan-public-confidence-supreme-court> [<https://perma.cc/DH8P-D978>].

⁴⁸⁶ *Id.*

⁴⁸⁷ See generally, e.g., COLE, *supra* note 28 (highlighting the role that citizens and social movements play in the Court's jurisprudence).

⁴⁸⁸ See Guinier, *supra* note 63, at 31 ("Were the Court to engage the people more directly in dialogue about the issues being raised in constitutional adjudication, we might come to realize that constitutional adjudication by a Court majority is often not, at least over time, the final word.").

but that rarely happens, especially in contentious cases that explicate constitutional values. Liberty finds no refuge in a jurisprudence of delusion.

There surely are institutional harms from majority opinions like *Janus*—a case in which shifting political winds changed the ideological orientation of Justices, who proceeded to overturn a longstanding precedent with a sweeping ruling premised on flimsy rationales. The *Janus* Court, lest we forget, invalidated popular and carefully crafted laws in twenty-two states and the District of Columbia.⁴⁸⁹ Justice Kagan’s dissent—with its ferocious defense of precedent, workable legal standards, and self-government—is an institutionalist one tied to a defense of the rule of law. Its movement dialectic does not crowd out analytical rigor and legal precision. And more generally, her movement dissents emphasize the proper institutional role of the Court and the preservation of its lawmaking function.⁴⁹⁰

A critic might object that movement dissents distract from the prospect of reaching achievable majority opinions. Not so. By all accounts, Justice Kagan commands the respect of conservative Justices, with Kaganicians speculating about her sway with Chief Justice Roberts and Justice Kavanaugh in particular.⁴⁹¹ Justice Kagan’s fierce dissents have not stopped her from moderating majority opinions from the inside, narrowing legal questions and reframing issues.⁴⁹² By deploying this dialect tactically and writing cordially, Justice Kagan has never been dismissed as “Kagan just being Kagan.”

There are risks to both over- and underusing this type of dissent. Overusing it reduces the potency and credibility of each dissent. Underusing it risks legitimizing opposing perspectives on law and suppressing oppositional organizing. For Justices interested in harm reduction, the appeal of signing onto a majority and narrowing its holding is clear. The same Justices should recognize that harm reduction can also come from a fiery dissent that inspires political mobilization.

There is no formula a Justice can use to figure out when to write a mobilizing dissent. There are some easy cases that all but demand one, pairing weak

⁴⁸⁹ *Janus v. AFSCME*, 138 S. Ct. 2448, 2499 (2018) (Kagan, J., dissenting).

⁴⁹⁰ See, e.g., *supra* notes 169–179 (discussing this theme in *Biden v. Nebraska* and other cases).

⁴⁹¹ See, e.g., Gonny Nir, *The Discreet Uniter: An Analysis of Elena Kagan’s Role on the Roberts Court*, 9 BRANDEIS U. L.J. 33, 38–39 (2021) (positing why Chief Justice Roberts and Justice Kavanaugh “frequently vote[] alongside Kagan in cases”).

⁴⁹² See, e.g., Ian Millhiser, *The Supreme Court Deals Another Blow to Labor Unions*, VOX (June 1, 2023), <https://www.vox.com/scotus/2023/6/1/23745372/supreme-court-unions-labor-strike-glacier-northwest-teamsters-amy-coney-barrett> [<https://perma.cc/EU89-H4S4>] (positing that “[Justice] Barrett’s *Glacier Northwest* [*v. International Brotherhood of Teamsters*, 598 U.S. 771 (2023)] opinion reads like it may be the product of a brokered compromise, where Sotomayor and Kagan agreed to sign on to an anti-union decision in order to prevent Thomas or Alito from assembling five votes for their more extreme positions”).

legal reasoning and sweeping holdings. Other cases are harder calls. Reasonable progressives will disagree, for example, whether Justices Kagan and Breyer's majority votes—qualified with narrowing concurrences—in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*⁴⁹³ and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*⁴⁹⁴ were worth the candle, especially in light of the Court's subsequent free exercise jurisprudence and the decision in *303 Creative LLC v. Elenis*.⁴⁹⁵ In recent years, many progressives would have preferred the *Janus* Kagan to the *Our Lady of Guadalupe School v. Morrissey-Berru*,⁴⁹⁶ *Kahler v. Kansas*,⁴⁹⁷ *Trinity Lutheran Church of Columbia, Inc. v. Comer*,⁴⁹⁸ *American Legion v. American Humanist Ass'n*,⁴⁹⁹ or *Fulton v. City of Philadelphia*.⁵⁰⁰ Kagan, and liberal scholars have warned of "appeasement."⁵⁰¹ And in the last term, many wished that Justice Kagan had joined Justice Jackson's scorching dissent in a significant labor rights case.⁵⁰²

I write to highlight the overlooked benefits of values-based, movement dissents, not to critique Justices for past votes. None of us are privy to the internal deliberations and negotiations of the Court; all of us should be chary of Monday morning quarterbacking with limited information. And Justice Kagan's votes in some of these cases may just be the product of ideological and methodological differences with the left, not bargaining compromises. In short,

⁴⁹³ 140 S. Ct. 2367, 2396–400 (2020) (Kagan, J., concurring in the judgment).

⁴⁹⁴ 138 S. Ct. 1719, 1732–34 (2018) (Kagan, J., concurring).

⁴⁹⁵ 600 U.S. 570, 587–89 (2023) (striking down a Colorado anti-discrimination law on First Amendment grounds).

⁴⁹⁶ See generally 140 S. Ct. 2049 (2020) (showing Justice Kagan joining with Chief Justice Roberts and Justices Alito, Thomas, Breyer, Gorsuch, and Kavanaugh in a case that found the "ministerial exception" read into the First Amendment's religion clauses applicable to two teachers at Catholic schools).

⁴⁹⁷ See generally 140 S. Ct. 1021 (2020) (showing Justice Kagan authoring an opinion joined by Chief Justice Roberts and Justices Alito, Thomas, Gorsuch, and Kavanaugh that found no due process violation in a state's restricted insanity defense test).

⁴⁹⁸ See generally 582 U.S. 449 (2017) (showing Justice Kagan joining an opinion written by Chief Justice Roberts that deemed the exclusion of churches from a neutral and secular aid program violative of the First Amendment's Free Exercise Clause).

⁴⁹⁹ See 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring in part) (showing Justice Kagan joining the operative part of a majority opinion that allowed the Bladensburg Peace Cross to remain on state property).

⁵⁰⁰ See generally 141 S. Ct. 1868 (2021) (showing Justice Kagan joining Chief Justice Robert's majority opinion in full).

⁵⁰¹ See generally, e.g., Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271 (criticizing the tendency of the Court's center-left Justices to join the Court's most conservative Justices in Establishment Clause cases).

⁵⁰² See, e.g., Veena Dubal, *Chipping Away at the Right to Strike*, DISSENT (Fall 2023), <https://www.dissentmagazine.org/article/chipping-away-at-the-right-to-strike/> [<https://perma.cc/6AVP-XGXA>] (noting with disappointment that Justice Kagan's majority vote contributed to a "decision [that] undercuts the already limited right of workers to collectively withhold their labor"). Cf. *Glacier Northwest, Inc. v. Int'l Bhd. of Teamsters*, 598 U.S. 771, 789–815 (2023) (Jackson, J., dissenting).

my point is not prescriptive. As Justices weigh the difficult and context-specific calculus of when to dissent and when to compromise, I propose that they not underestimate the force of a mordant, movement-aligned dissent. When Justices view dissents through an exclusively prospective and juricentric paradigm, they will understate these devices' (and their own) power.

CONCLUSION

Most Justices don't aspire to dissent. They aim to make binding law by convincing their colleagues to embrace their views. Justice John Paul Stevens, for example, believed "[a] dissenting judge is never happy, because it is obvious that either the majority has come to the wrong conclusion or his own reasoning is flawed."⁵⁰³ Likewise for Justice Brennan. According to Professor Fiss, Justice Brennan "never saw his dissents as being at the core of his mission" and found his "true source of pleasure and pride" in writing majority opinions.⁵⁰⁴ By all indications, Justice Kagan is in the same camp.

This Article does not advocate for abandoning the pursuit of majority opinions. Justices should try to cobble together five votes when they can do so without sacrificing their principles. Justice Brennan's legacy testifies to the power of unlikely coalitions that can emerge even as the Court sprinted right.⁵⁰⁵ In recent years, surprising coalitions of Justices have delivered majority opinions that protected LGBTQ people,⁵⁰⁶ Native Americans,⁵⁰⁷ immi-

⁵⁰³ JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 235 (2011). Justice Stevens memorably dissented in landmark cases, especially in his later years on the bench. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 393–479 (2010) (Stevens, J., concurring in part and dissenting in part); *District of Columbia v. Heller*, 554 U.S. 570, 636–80 (2008) (Stevens, J., dissenting); *Bush v. Gore*, 531 U.S. 98, 123–29 (2000) (Stevens, J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186, 214–20 (1986) (Stevens, J., dissenting), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵⁰⁴ FISS, *supra* note 7, at 43.

⁵⁰⁵ *See generally, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982) (showing a Brennan majority opinion that found denying undocumented students public education violates the Equal Protection Clause); *Texas v. Johnson*, 491 U.S. 397 (1989) (finding a state law banning flag desecration to be inconsistent with the First Amendment); *United States v. Eichman*, 496 U.S. 310 (1990) (finding a federal flag desecration law as violating the First Amendment); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (involving a Brennan majority opinion from his final year on the Court upholding a minority preference policy), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). As discussed earlier, *supra* note 51, Justice Brennan strongly defended dissents. He also wrote many resonant dissents, discussed *supra* note 54 and accompanying text.

⁵⁰⁶ *See generally* *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (holding that Title VII of the Civil Rights Act makes it unlawful for an employer to fire someone for being homosexual or transgender).

⁵⁰⁷ *See generally* *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (recognizing Native American sovereignty in a criminal case arising under the Major Crimes Act); *Haaland v. Brackeen*, 599 U.S. 255 (2023) (upholding the Indian Child Welfare Act against a constitutional challenge).

grants,⁵⁰⁸ healthcare coverage,⁵⁰⁹ the Voting Rights Act,⁵¹⁰ and the Census.⁵¹¹ These opinions may not be written in the way, say, Justice Brennan would have written them. But it would be foolish to ignore them.

In our current moment, however, progressive dissents are inescapable.⁵¹² When Justices fall short in getting to five, or must abandon their values to get there, they should embrace this vital mechanism with pleasure, pride, and a recognition of the potential of their words. Shrewd, engaging dissents cued into movement discourse can bolster citizen activists in making constitutional change. By understanding dissents through the prism of contemporary political mobilization, Justices can find a reason to be “happy” about these writings, even as they fall short in convincing their colleagues.

The *Janus* dissent shows the promise of this path. Drawing upon the discourse of the left and labor, Justice Kagan consolidated key frames of movement actors to write a keen, accessible narrative. Her tour de force shaped the storytelling and agenda setting of those resisting the decision. The effects run long. Randi Weingarten told me that even today—years after the decision—the AFT “continue[s] to draw on its insights as we organize.”⁵¹³ In contrast to Professor Tushnet’s theory of dissenting, *Janus* reveals that dissents can be recognized as “important” without the analytical lens of the distant future.⁵¹⁴

Movement dissents may not be panaceas, but they can be palliatives. Justice Kagan’s dissent offers lessons to institutional actors who view the current Court and its decisions with alienation, alarm, and “deep sadness.” Justices should remember that their dissents matter. Vigorous, clear, and principled prose can engage the people in a dialogue of constitutional change, especially as a mediating vehicle for consolidating and disseminating rhetoric. Ordinary citizens should reject a paralyzing, formalist logic that positions a majority opinion as the start, middle, end, and sine qua non of constitutional interpreta-

⁵⁰⁸ See generally *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020) (stopping the Trump Administration from rescinding the Deferred Action for Childhood Arrivals (DACA) program).

⁵⁰⁹ See generally *NFIB v. Sebelius*, 567 U.S. 519 (2012) (upholding the constitutionality of the Patient Protection and Affordable Care Act (PPACA)); *King v. Burwell*, 576 U.S. 473 (2015) (rejecting a challenge to the PPACA based on statutory language).

⁵¹⁰ See generally *Allen v. Milligan*, 599 U.S. 1 (2023) (striking down gerrymandered voting maps under the Voting Rights Act).

⁵¹¹ See generally *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019) (blocking the addition of a question concerning citizenship status on the census under the Administrative Procedure Act).

⁵¹² See, e.g., Duncan Hosie, *The Paranoid Style in the Supreme Court*, HARV. L. REV. BLOG (July 21, 2022), <https://harvardlawreview.org/blog/2022/07/the-paranoid-style-in-the-supreme-court/> [<https://perma.cc/HVQ3-UMDV>] (noting “the Court’s torrent of hard-right decisions” and arguing that “the Court’s most conservative Justices are operating from slanted epistemic baselines” and framing “legal issues through the political hyperbole of the Far Right”).

⁵¹³ Email Interview with Randi Weingarten, *supra* note 303.

⁵¹⁴ Cf. *supra* notes 60–62 and accompanying text (discussing Tushnet’s theory).

tion. Liberal academics should renew their study of preexisting mechanisms, like movement dissents, to moderate bad law. Resistance need not come through far-reaching proposals like Court packing, Court jurisdiction stripping, or renunciations of the Warren Court and the constitutional vision of Marshall and Brennan.

To paraphrase Alexander Bickel, Justice Alito and four cloistered colleagues forced a constitutional conversation.⁵¹⁵ With Justice Kagan's assistance, the people shaped it. In an era of emboldened "black-robed rulers," these dissents can be more important than ever.⁵¹⁶

⁵¹⁵ See *supra* note 23 and accompanying text (quoting Bickel's discussion of this topic).

⁵¹⁶ See *Janus v. AFSCME*, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting) ("So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices.").

