

Janus and the Movement Dissent

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Abstract

This paper examines Justice Kagan's 2018 dissent in *Janus v. AFSCME* to illustrate how incisive, bold, and creative dissents can bolster ordinary citizens seeking constitutional change. Using the tools of intellectual history, the paper shows that the dissent created a dialogic relationship between the Supreme Court and labor activists and liberal academics. It then explores how progressive commentators, union leaders, politicians, and workers deployed the *Janus* dissent in political and discursive organizing that resisted the Court's constitutional and economic visions. The paper concludes by reflecting on the promise of movement dissents in channeling constitutional cynicism and alienation into constitutional construction.

Table of Contents

I. Introduction.....	4
II. Why Do Judges Dissent?.....	8
A. Traditional Accounts of Dissent Writing.....	8
B. Theories of Mobilizing Dissents.....	11
C. Contemporary Examples of Mobilizing Dissents.....	12
D. Kagan’s Dual Registers: Dissenting and Bridge Building.....	17
III. Pre- <i>Janus</i> Discourse: The Roots of Kagan’s Dissent.....	23
IV. Post- <i>Janus</i> Mobilizations: The Impact of the Dissent.....	31
A. Framing the Issue: Press Coverage of <i>Janus</i>	31
B. Mustering Opposition: Union Response to the <i>Janus</i>	36
C. Mitigation and Resistance: Political Reaction to <i>Janus</i>	42
IV. The Promise and the Limits of Movement Dissents.....	50
V. Conclusion.....	54

“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

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

Alice Walker²

I. 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. With posthaste, the Court began to bleed *Brown* of its “generative power” and erode the civil rights precedents to which Marshall had devoted his life.³

Marshall never acquiesced to this newfangled law. He never responded to it with apathy. Instead, he dissented. Over his 24 years on the Court, he wrote 363 dissents and joined 962 dissents penned by colleagues.⁴ While many dissenting justices ultimately abide by the decisions reached by the majority, Marshall doggedly refused to retreat from his constitutional vision.⁵ As

¹ Thurgood Marshall, Liberty Medal Acceptance Speech at Independence Hall (July 4, 1992), <https://constitutioncenter.org/liberty-medal/recipients/thurgoodmarshall>.

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

³ Owen Fiss, *Another Equality*, 2 *ISSUES IN LEGAL SCHOLARSHIP: THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY* 1, 27 (2004).

⁴ 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, he wrote 322 majority opinions. *Id.*

⁵ See, e.g., Martha Minow, *A Tribute to Justice Marshall*, 105 *HARV. L. REV.* 66, 75 (1991) (noting “[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”).

Professors Kathleen Sullivan⁶ and Owen Fiss have argued,⁷ these dissents make Marshall as much a “great dissenter” as Justices Oliver Wendell Holmes and John Marshall Harlan.

Justice Marshall consciously embraced his role as a great dissenter. He carried a copy of Harlan's dissent in *Plessy v. Ferguson*.⁸ He picked clerks who indicated that they “liked to write dissenting opinions.”⁹ And he expected his clerks not to just write dissents, but forceful ones that communicated the “effects of the Court's actions on living, breathing people.”¹⁰ One of these clerks was Elena Kagan, who worked for Justice Marshall after she reassured him that she “would enjoy working on dissents.”¹¹ During her clerkship, Justice Marshall returned dissents to her “for failing to express [his understanding of the case] in a properly pungent tone.”¹²

Clerk Kagan, of course, would become Justice Kagan. Justice Kagan frequently brings a pungent tone to her dissents (and majority opinions and concurrences, which are characteristically trenchant).¹³ In this paper, I explore one of these opinions: her 2017 dissent in

⁶ Kathleen M. Sullivan, *Marshall, the Great Dissenter*, N.Y. TIMES (June 29, 1991), <https://www.nytimes.com/1991/06/29/opinion/marshall-the-great-dissenter.html>.

⁷ 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_Marshalls_courage_and_passion_celebrated_by_former_law_clerks.

⁹ Neil A. Lewis, *Marshall Urges Bush to Pick 'the Best'*, N.Y. TIMES, June 29, 1991, at 8. *See also id.* (“[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.”).

¹⁰ Minow, *supra* note 5, at 66.

¹¹ Elena Kagan, *For Justice Marshall*, 71 TEX. L. REV. 1125, 1126 (1993).

¹² *Id.* at 1129.

¹³ 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) (discussing Kagan's eloquent dissent in *Lockhart v. United States*, 136 S. Ct. 958 (2016)); Richard Wolf, *Associate Justice Elena Kagan, after decade on bench, emerges as Supreme Court 'bridge-builder'*, USA TODAY (Aug. 4, 2020), <https://www.usatoday.com/story/news/politics/2020/08/04/elena-kagan-after-10-years-supreme-court-justice-wields-influence/5490349002/> (quoting Walter Dellinger on Kagan being the current Court's “finest writer”); Lincoln Caplan, *The Talented Justice Kagan*, N.Y. TIMES (June 29, 2013), <https://www.nytimes.com/2013/06/30/opinion/sunday/the-talented-justice-kagan.html> (arguing Kagan's writing “puts her in a class by herself”); Mark Sherman, *High court nominee praised for breezy, witty writing style*, ASSOCIATED PRESS (Mar. 8, 2017), <https://apnews.com/article/5dc36339cdad45b5b9acb00a6cb952bc> (“Chief Justice John Roberts and Justice Elena Kagan are widely regarded as the two most engaging — and at times entertaining — writers on the court.”).

Janus v. AFSCME, a landmark case in which the Supreme Court barred public sector unions from collecting fair share fees from non-members.¹⁴

Kagan's *Janus* dissent illustrates the power of incisive, bold, and creative dissents to bolster ordinary citizens seeking constitutional change following harmful decisions. I argue it embodied dialogic interaction between the Court and labor activists and liberal academics. While scholars credit 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. Kagan's *Janus* dissent is best understood as amplification, not creation. I also consider how unions and politicians amplified her amplification. Kagan's *Janus* dissent shaped contemporary political organizing, giving labor and supportive elected officials a vital tool to construct political meaning and muster their supporters. This penetrating and accessible dissent became a blueprint for agenda setting, narrative building, and storytelling to non-lawyers. In the spirit of Robert Cover, I document how this "jurisgenerative" dissent became a focal point for those resisting the Court's constitutional and economic visions.

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."¹⁵ 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 Supreme Court," is only "the beginnin[g] of [a] conversation between the Court and the people and their representatives."¹⁶

¹⁴ 138 S. Ct. 2448 (2018).

¹⁵ Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1747 (2005).

¹⁶ ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 91 (1970).

I structure the paper in four parts. First, I survey the existing scholarship on Supreme Court dissents, which largely evaluate dissents through a juricentric and prospective lens. I contextualize my paper 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. Second, I examine Kagan’s *Janus* dissent, tracing the union and academic roots of the dissent’s structure and substance. Kagan’s dissent consolidated existing frames and narratives of left and labor discourse, disseminating them to a large audience. Third, I explore how progressive commentators, union leaders, politicians, and workers used the *Janus* dissent in their political organizing. 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).¹⁷ Fourth, I reflect on the promise and limits of movement dissenting, responding to potential objections.

While 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.¹⁸ *Janus* presages what already is occurring: sweeping changes to entire bodies of law.¹⁹ At a time of constitutional tumult and upheaval, many feel powerless. Through movement dissents, justices channel popular alienation into action; constitutional cynicism into constitutional construction. By amplifying the organizing frames of ordinary citizens and articulating of a progressive constitutional vision, justices can fortify the efforts of *living* Americans who know our country can and must do better.

¹⁷ See generally DAVID D. COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016).

¹⁸ See Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html>; Joan Biskupic, *The Supreme Court hasn't been this conservative since the 1930s*, CNN (Sept. 26, 2020), <https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html>.

¹⁹ See, e.g., Alaina Lancaster, *How Justice Amy Coney Barrett Is Already Changing the Supreme Court*, LAW.COM (May 14, 2021) (quotes of Dean Erwin Chemerinsky and Professor Melissa Murray).

II. Why Do Judges Dissent?

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.”²⁰ Under this frame, a “later decision,” not political conflict in the present, “correct[s] the error.” A phalanx of justices, from Justices Scalia to Brandeis, admitted they hoped “at least some” of their dissents will eventually become future majority opinions.²¹ Justice Ginsburg, for her part, argued “[d]issent speaks to a future age.”²²

Within this juricentric and prospective scheme, Judge Diane Wood of the Seventh Circuit has offered a helpful typology of dissent-writing. She categorizes her dissents into three categories: “principle-based dissents,” “process-based dissents,” and “accuracy-focused dissents.”²³ “Principle-based dissents” correspond to the Hughesian account; while “[n]o one writes a dissenting opinion under the illusion that vindication is inevitable,” a principle-based dissent can be “vindicated” in the future.²⁴ “Process-based dissents” involve judicial craftsmanship; they are “motivated by a concern 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.”²⁵ “Accuracy-focused” dissents “strive” to “the factual record straight,” which takes on increased

²⁰ CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928).

²¹ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 864 (1989). In a 2008 interview, 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>.

²² Nina Totenberg, *Ruth Bader Ginsburg and Malvina Harlan*, NPR (May 2, 2002), <https://www.npr.org/templates/story/story.php?storyId=1142685>.

²³ 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).

²⁴ *Id.* at 1468.

²⁵ *Id.* at 1469.

importance given the few cases reviewed by the Supreme Court every year.²⁶

Current justices have provided additional reasons for dissent writing, which are similarly juricentric. A wide-range of justices have argued dissents lead to stronger majority opinions by forcing the majority to clarify and rethink positions. 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.”²⁷ 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. And dissents can be a damage control mechanism that limits the application or interpretation of a majority opinion.²⁸

Institutional commitments may motivate a Justice to write a dissent. Chief Justice Roberts posits that dissents are “valuable” devices that show “the thinking of different parts of the Court” as it grapples with contentious questions.²⁹ Dissents signal to losing parties their arguments were taken seriously. 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 to expand individual rights, argued “dissents from federal courts may increasingly offer state courts legal theories that may be

²⁶ *Id.* at 1474.

²⁷ Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010).

²⁸ William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

²⁹ MELVIN I. UROFSKY, *DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE* 18 (2015).

relevant to the interpretation of their own state constitutions.”³⁰ These dissents are dialogic, but still juricentric.

Like justices and judges, most scholars approach dissents through a juricentric lens. They look to how, when, and which “dissents become the majority.”³¹ 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.³² These defiant dissents, he claims, “can pull the court 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.”³³ Michaels is right, but his account’s focus on judges makes it incomplete.

Influenced by this juricentric account, many academics have shied away from studying recent dissents on the grounds that sufficient time has passed for a dissent to be identifiable as important. Professor Mark Tushnet, for example, claims, “The more recent the dissent, the harder it is to know what social, economic, and political developments will occur that will lead the dissent to fall by the wayside or become important.”³⁴ Professor Melvin Urofsky³⁵ and Dahlia

³⁰ Brennan, *supra* note 28, 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”).

³¹ 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 (2009).

³² Jon D. Michaels, *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>.

³³ *Id.*

³⁴ MARK V. TUSHNET, *I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES* xxi (2008).

³⁵ UROFSKY, *supra* note 29, at 414-15.

Lithwick³⁶ echo Tushnet’s account. Per Tushnet, “the fate of a dissent lies in the hands of history.”³⁷

B. Theories of Mobilizing Dissents

Other scholars recognize that dissents can also lie in the hands of the present. For over a century, dissents have been aimed explicitly at the people—living, breathing people in the here and now, not just their progeny.³⁸ 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.”³⁹ Dissents play into contemporary, “ongoing” processes that involve people who are not judges.

Professor Lani Guinier has studied how modern movements use dissents to vindicate competing social purposes. The account I advance in this paper 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.”⁴⁰ Guinier has argued that dissents in the demosprudential tradition address the people, not just a justice’s cloistered colleagues. These dissents “engage dialogically with nonjudicial actors” in the process of constitutional interpretation, resistance, and reaffirmation.⁴¹

³⁶ 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> (concurring with Urofsky that “a dissent becomes influential because sometimes future justices will perceive its truth decades later”).

³⁷ TUSHNET, *supra* note 34, at 220.

³⁸ Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1356 (2001) (“In 1898 the Albany Law Journal conceptualized dissent as appealing over the head of the Court directly to ‘the people.’”).

³⁹ *Id.* at 1274.

⁴⁰ Lani Guinier, *The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 47 (2008).

⁴¹ *Id.* at 50.

Guiner’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.⁴² NeJaime correctly recognizes that courts exist within multitextured, recursive, and discursive relationships with other lawmaking bodies, social movement actors, and ordinary citizens. While 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.”⁴³ In this ongoing process, “movement leaders may use an official, published, and publicized instantiation of unfair treatment to raise consciousness and mobilize constituents.”⁴⁴

C. Contemporary Examples of Mobilizing Dissents

Recent history bears out 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 Justice Rehnquist and White in *Roe v. Wade*, for example, became lodestars to anti-abortion activists.⁴⁵ On the left, Justice Brandeis’s dissents spoke to social movements and highlighted Dickensian working conditions.⁴⁶ Justice Douglas’s dissent in *Sierra Club v. Morton* electrified the environmental movement.⁴⁷

⁴² Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011).

⁴³ *Id.* at 967.

⁴⁴ *Id.* at 988.

⁴⁵ See, e.g., *Justice Rehnquist’s Dissent*, CATHOLIC EXCHANGE (June 22, 2005), <https://catholicexchange.com/justice-rehnquists-dissent> (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/>.

⁴⁶ See, e.g., *Adams v. Turner*, 244 U.S. 590, 600-03 (1917) (Brandeis, J., dissenting) (documenting “the evils” and “the abuses” of employment agencies); Melvin I. Urofsky, *Mr. Justice Brandeis and the Art of Judicial Dissent*, 39 PEPP. L. REV. 919, 931 (2013) (“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.”).

⁴⁷ ADAM M. SOWARDS, *THE ENVIRONMENTAL JUSTICE: WILLIAM O. DOUGLAS AND AMERICAN CONSERVATION* 136 (2009) (describing how Douglas’s dissent “made waves on and off the Court” and inspired activism).

One might expect conscious movement building from 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.”⁴⁸ Justice Scalia’s dissents perhaps best embodied this “genre.”⁴⁹ 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 decisions.”⁵⁰ His dissents “mobilized conservative constituencies 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.”⁵¹

Scalia’s inflammatory dissents alienated other justices.⁵² His churlish vitriol degraded

⁴⁸ Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545, 567 (2006).

⁴⁹ *Id.*

⁵⁰ Lani Guinier, *Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence*, 89 *B.U. L. REV.* 539, 546 (2009) (“Justice Scalia’s dissents are often in conversation with a conservative constituency of accountability.”). *See also id.* 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, 602 (2003)], 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* dissent that predicted the constitutionalization of same-sex marriage in fundraising letters that Terry posted on a website . . .”).

⁵¹ Post & Siegel, *supra* note 48, at 569.

⁵² *See, e.g.*, JEFFREY ROSEN, *THE SUPREME COURT* 181 (2007) (“Scalia alienated his ideological allies with his angry dissents and ad hominem attacks.”); Linda Greenhouse, *Justice Scalia Objects*, *N.Y. TIMES* (Mar. 9, 2011), <https://opinionator.blogs.nytimes.com/2011/03/09/justice-scalia-objects/> (describing Scalia’s “bomb-throwing” dissents as “wildly inefficacious”); Kathleen M. Sullivan, *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.”). At times, Scalia dismissed the prospect of convincing modern justices and judges to embrace his views, who he viewed as already being indoctrinated in “this so-called living Constitution stuff.” *See, e.g.*, Slater, *supra* note 21 (quoting Scalia as stating, “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

discourse. But Scalia’s dissents had a different project than getting to five or elevating discussion. He wrote for the people—and more precisely—*his* people. While critics rightfully condemned Scalia for his corrosive pen, they should also recognize Scalia had a perceptive understanding of audience and social mobilization. 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.”⁵³ Scalia wrote to fortify the resolve and aid the efforts of this crowd, which he knew would battle for constitutional values long after individual opinions had receded from the headlines.

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.⁵⁴ Justice Alito’s dissents can be catnip for conservative culture warriors. In *Bostock*, for example, Alito stuffed his lengthy dissent with references to bathrooms, sex-segregated sports, and other fixations of Christian conservatives.⁵⁵ So too for Justice Gorsuch, whose recent accusation that his colleagues “favor[ed] Caesars Palace over Calvary

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.”).

⁵³ Michael O’Donnell, *What’s the Point of a Supreme Court Dissent?*, NATION (Jan. 21, 2016), <https://www.thenation.com/article/archive/whats-the-point-of-a-supreme-court-dissent/>. O’Donnell’s invocation of Fox News is apt. While being interviewed on the network, Justice Scalia could be disputatious and rude, echoing the tone of this dissents. *See, e.g., Transcript: Justice Antonin Scalia on issues facing SCOTUS and the country*, FOX NEWS (July 29, 2012), <https://www.foxnews.com/transcript/justice-antonin-scalia-on-issues-facing-scotus-and-the-country> (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).

⁵⁴ *See, e.g., McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (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 Colum. Univ.*, 141 S. Ct. 1220, 1221-24, 1226 n.5 (2021) (Thomas, J., concurring) (raising concerns about 47 U.S. C. § 230 and the prospect of “censorship” from technology companies).

⁵⁵ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1778, 1779 (2020) (Alito, J., dissenting).

Chapel”⁵⁶ prodded socially conservative religious groups into action.⁵⁷ As a judge on the D.C. Circuit, Brett Kavanaugh sharply and frequently dissented.⁵⁸ His dissents occasionally echoed the slogans of conservative activists, and this symbiotic rhetoric bolstered their cause and Kavanaugh’s career.⁵⁹

In recent years, liberal justices have not always matched conservative justices. While the “dynamic” of mobilizing dissents often appears on the “right,” Guinier argued in 2007 that judges on the “left” have not played a similarly “active and self-conscious role in creating ‘analytic’ space for citizens to advance alternative interpretations of their own lived experience and ultimately help change the law.”⁶⁰ Guinier noted that there is “no liberal counterpart” to Scalia, “Justice Ginsburg notwithstanding.”⁶¹

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 *Hobby Lobby* dissent in craft stores to protest the Court’s decision in the 2014 case.⁶²

Activists and electeds cited Ginsburg and her *Ledbetter* dissent in the push for an equal pay act

⁵⁶ *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2609 (Mem.) (2020) (Gorsuch, J., dissenting).

⁵⁷ See, e.g., *SCOTUS Favors “Caesars Palace Over Calvary Chapel”*, N.C. FAMILY POL’Y COUNS. (July 30, 2020), <https://www.ncfamily.org/scotus-favors-caesars-palace-over-calvary-chapel/> (a conservative group citing Justice Gorsuch’s language and that of other conservative justices to mobilize its members).

⁵⁸ Elliott Ash and Daniel L. Chen, *What Kind of Judge Is Brett Kavanaugh? A Quantitative Analysis*, 2018 CARDOZO L. REV. DE NOVO 70, 71 (“[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 . . .”).

⁵⁹ See, e.g., *Garza v. Hargan*, 874 F.3d 735, 752 (D.C. Cir. 2017) (en banc) (per curiam) (Kavanaugh, J., dissenting) (asserting 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).

⁶⁰ Guinier, *supra* note 50, at 558.

⁶¹ *Id.* at 558 n.126.

⁶² Katie Gibson, *In Defense of Women’s Rights: A Rhetorical Analysis of Judicial Dissent*, 35 J. WOMEN’S STUD. IN COMM. 123, 137 (2015).

of the same name.⁶³ But contrary to the popular iconography of Ginsburg that emerged following her dissent in *Shelby County*, Ginsburg's tone in earlier dissents was more sedate.⁶⁴ She normally envisioned popular mobilization aimed at Congress, which is a unitary and narrow framing of the potential remedying actors in our federalist system.⁶⁵ And in many areas of the law, including appeals from death row inmates, she wrote in a proceduralist register that eschewed dialogue with movement activists.⁶⁶

On the current Court, Justice Sotomayor comes closest to dialoguing with movement activists and the public.⁶⁷ Through dissents, Justice Sotomayor accentuates ordinary people in constitutional interpretation, often speaking directly to them. In *Schuette v. Coalition to Defend Affirmative Action*, for example, she ruminated 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.⁶⁸ This past term, in a case concerning sentencing juveniles to life

⁶³ 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. and 42 U.S.C.).

⁶⁴ *Shelby County v. Holder*, 570 U.S. 529 (2013). Justice Ginsburg wrote *Shelby*, the case that propelled her to popular culture stardom, when she had completed nearly three-fourths of her service. Sara Aridi, *How Ruth Bader Ginsburg Lives on In Pop Culture*, N.Y. TIMES (Sept. 26, 2020), <https://www.nytimes.com/2020/09/26/at-home/ruth-bader-ginsburg-pop-culture-rbg.html>.

⁶⁵ See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 661 (2007) (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.”).

⁶⁶ See generally *Ruth Bader Ginsburg: On the Death Penalty*, AM. BAR ASS'N J. (Oct. 29, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/fall-2020/ruth-bader-ginsburg-on-the-death-penalty/.

⁶⁷ David Fontana, *The People's Justice?*, 123 YALE L.J.F. 447, 471 (2014) (“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.”).

⁶⁸ *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting).

without parole (LWOP), Sotomayor spoke directly to the defendant and “the almost 1,500 other juvenile offenders” with the same burden, telling them that what they do in life matters.⁶⁹ She also invoked the stark “racial disparities in juvenile LWOP sentencing” that ensure “[t]he harm from these sentences will not fall equally.”⁷⁰

These dissents, written for a wide audience, can be forceful and galvanizing. In capital punishment cases, legal scholars have equated her dissents with the those of Brennan and Marshall.⁷¹ And her dissents can acknowledge lawmaking bodies and movement actors. Her recent dissent in *ACOG* 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.”⁷² It also cited two leading scholars of the reproductive justice movement.⁷³

D. Kagan’s Dual Registers: Dissenting and Bridge Building

Enter Justice Kagan. She has forcefully dissented with rhetoric cued into movement discourse, but brings different voices to different cases. While 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 sharp tone 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 offering an unabashed articulation of liberal constitutional values. Overall, her dissents are

⁶⁹ *Jones v. Mississippi*, 141 S. Ct. 1307, 1341 (2021) (Sotomayor, J., dissenting).

⁷⁰ *Id.* at 1334 n.2.

⁷¹ Jordan S. Rubin, *Sotomayor Emerges as Heir to Marshall in Death Penalty Dissents*, BLOOMBERG LAW (Jan. 22, 2021), <https://news.bloomberglaw.com/us-law-week/sotomayor-emerges-as-heir-to-marshall-in-death-penalty-dissents>.

⁷² *Food and Drug Admin. v. Am. College of Obstetricians*, 141 S. Ct. 578, 585 (Mem.) (2021) (Sotomayor, J., dissenting).

⁷³ *Id.* (citing Linda Greenhouse and Reva Siegel).

entangled in a complicated web of institutional commitments, savvy stateswomanship, and a predisposition towards pragmatism and ideological moderation.

Janus exemplifies one of her registers. Instead of adopting what Mark Tushnet calls “defensive couch constitutionalism,” the dissent holds fast to an alternative vision of what law is and should be. It soars with passion and rings with rhetoric.⁷⁴ Reflecting her longstanding belief that judicial writing should be accessible, it is straightforward and concise. Kagan builds a vivid tale with allegory and antagonists, plot and narrative. It manages to methodically respond to Justice Alito’s points while communicating the “large-scale consequences” and consequence of the case.⁷⁵ Scholars rightfully praise Kagan for her “persuasive” and “compelling” dissent,⁷⁶ which contains “strongest writing of her years on the court.”⁷⁷

The dissent’s strength, in part, comes from its conscious drawing on the tradition of mobilizing dissents. Kagan portrays the majority as “black-robed rulers overriding citizens’ choices,”⁷⁸ echoing Justice Scalia’s dissent in *Windsor* and other cases.⁷⁹ Just like Justice Scalia, she uses digestible, memorable phrases to convey complicated legal concepts: the Court “weaponize[es] the First Amendment,” which was “meant for better things.”⁸⁰ *Janus* was the second time Justice Kagan read a dissent from the bench, a practice that Professors Guinier⁸¹ and

⁷⁴ Justice Brennan observed that “soar with passion and ring with rhetoric,” straddling “the worlds of literature and law” as they “seek to sow seeds for future harvest.” Brennan, *supra* note 28, at 431.

⁷⁵ *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

⁷⁶ William B. Gould IV, *How Five Young Men Channeled Nine Old Men: Janus and the High Court's Anti-Labor Policymaking*, 53 UNIV. OF SAN FRANCISCO L. REV. 209, 224, 231(2009).

⁷⁷ Linda Greenhouse, *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>.

⁷⁸ *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

⁷⁹ 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.”).

⁸⁰ *Janus*, 138 S. Ct. at 2501, 2502.

⁸¹ Guinier, *supra* note 40, 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

Christine Venter⁸² see as aimed at popular mobilization. Kagan herself has acknowledged the contemporary power of her dissents.⁸³

A few other Kagan dissents are like *Janus*. They include *Arizona Free Enterprise Club's Freedom PAC v. Bennett*,⁸⁴ *Rucho v. Common Cause*,⁸⁵ *Brnovich v. Democratic National Committee*,⁸⁶ and *South Bay United Pentecostal Church v. Newsom II*.⁸⁷ Considered against all of her writings, however, these forceful, mobilizing dissents are rare. This, in turn makes each one more noteworthy. And they are limited in their subject matter. All involve democracy and the First Amendment; all relate to the functioning of political processes.

In *Janus*, for example, the Court “end[ed]” a “healthy” and “democratic” debate, substituting its own judgment on “who should prevail” over the policy preferences of 22 states.⁸⁸ The *Bennett* Court denied Arizonans “the chance to reform their electoral system so as to attain that most American of goals” of a functioning democracy.⁸⁹ And the *South Bay United* Court blocked California from acting on “good sense” and “essentially undisputed epidemiological findings” to “slow the spread of a deadly disease,” leaving “leaves state policymakers adrift.”⁹⁰

Her *Rucho* dissent hinted at a democracy-driven, conceptual framework that may motivate her to write searing dissents. Kagan posited:

in the legitimacy of the judicial process. Oral dissents can become a crucial tool in the ongoing dialogue between constitutional law and constitutional culture.”).

⁸² Christine M. Venter, *Dissenting from the Bench: The Performative Jurisprudence of Ruth Bader Ginsburg and Antonin Scalia*, 41 WAKE FOREST L. REV. (forthcoming 2021).

⁸³ Discussing her spirited dissent in *Rucho v. Common Cause*, Kagan said, “You’re writing a dissent because you want to convince the future, and I guess you want to convince the present, too.” Jacqueline Thomsen, *Kagan: I will 'never accept' Supreme Court's ruling on partisan gerrymandering*, HILL (July 18, 2019), <https://thehill.com/regulation/court-battles/453809-kagan-i-will-never-accept-supreme-court-ruling-on-partisan>.

⁸⁴ 564 U.S. 721 (2011).

⁸⁵ 139 S. Ct. 2484 (2019).

⁸⁶ *Brnovich v. Democratic National Committee*, No. 19-1257, slip op. at 45 (S. Ct. July 1, 2021) (Kagan, J., dissenting).

⁸⁷ 141 S. Ct. 716 (Mem.) (2020).

⁸⁸ *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

⁸⁹ *Bennett*, 564 U.S. at 785 (Kagan, J., dissenting).

⁹⁰ *South Bay*, 141 S. Ct. at 722, 723 (Kagan, J., dissenting).

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 system is to defend its foundations. None is more important than free and fair elections.⁹¹

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

These dissents also emphasize inadequate legal reasoning. While Kagan never ignores the broad stakes of Court opinions, she reserves acute ire for sloppy legal rationales and the unjustified abandonment of precedent. The *Janus* Court showed “little regard for the usual principles of *stare decisis*” as it jettisoned a 40-year precedent.⁹² To Kagan, the “worse part” of the decision came in its insubstantial legal reasoning.⁹³ She observed that “[t]here [were] no special justifications for reversing *Aboud*,” which has “proved workable” and not undergone “recent developments” to “erod[e] its underpinnings.”⁹⁴ She underscored “[t]he standard factors this Court considers when deciding to overrule a decision all cut one way” and dissects the majority’s tendentious and conclusory reasoning on legalistic grounds.⁹⁵ Similarly, in *Rucho*, she decried the Court abdicating a core responsibility “[f]or the first time ever” and misstating the case’s facts and procedural history.⁹⁶ Writing in plain English, Kagan took particular offense to technical errors in legal judicial decisionmaking.

⁹¹ *Rucho*, 139 S. Ct. at 2512, 2525 (Kagan, J., dissenting).

⁹² *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

⁹³ *Id.* at 2497.

⁹⁴ *Id.* at 2487.

⁹⁵ *Id.* at 2501.

⁹⁶ *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

Legal commentators, from Professors Jeffrey Rosen⁹⁷ to Walter E. Dellinger III,⁹⁸ have linked Kagan to Scalia because of their vigorous writing style. This comparison makes superficial sense. Both were Harvard-trained lawyers who wrote aphoristic, astute opinions that ordinary people could read (and enjoy). Both wrote dissents aimed at social mobilization. Both garnered praise and respect from ideological foes. The two justices were friends long before serving on the Court, and their relationship only strengthened after Kagan's appointment in 2010.⁹⁹

But their dissents have important differences. Scalia relished writing dissents.¹⁰⁰ He seemed to genuinely enjoy castigating his perceived enemies, whether they be his colleagues or the "law-profession culture."¹⁰¹ Kagan 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 "respectfully," but added an unusual expression in Supreme Court signoffs: "[w]ith deep sadness."¹⁰² Reading the dissent from the bench, her voice trembled with emotion as she neared its conclusion. In *Brnovich*, she twice referred to the majority's decision as "tragic."¹⁰³ Scalia wrote dissents out of anger; Kagan, out of melancholy.

In addition to these general dispositional differences, Scalia and Kagan have different

⁹⁷ Jeffrey Rosen, *Strong Opinions*, NEW REPUBLIC (July 27, 2011) (equating Kagan's and Scalia's "gifted" writing, especially their "striking" dissents).

⁹⁸ Wolf, *supra* note 13 (quoting Dellinger as stating that Kagan "has succeeded Justice Scalia as the court's finest writer").

⁹⁹ David Axelrod, *A surprising request from Justice Scalia*, CNN (Mar. 9, 2016), <https://www.cnn.com/2016/02/14/opinions/david-axelrod-surprise-request-from-justice-scalia>.

¹⁰⁰ Mark Sherman, *In victory or dissent, Scalia was a man of strong opinions*, ASSOCIATED PRESS (Feb. 13, 2016), <https://apnews.com/article/96c0cdf1ceaa4c10837f40fe53528116> (stating that "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 THE GREEN BAG 2D 215 (2015) and J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201 (2017).

¹⁰¹ *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

¹⁰² *Rucho*, 139 S. Ct. at 2525 (Kagan, J., dissenting).

¹⁰³ *Brnovich*, No. 19-1257 at 47 (Kagan, J., dissenting).

projects. Scalia’s dissents advanced sweeping legal theories and methodologies. Kagan’s are versatile and unmoored from an overarching legal project as explicit as, say, originalism. She takes cases as they come. As she wrote this past term in *Edwards v. Vannoy*, “Judges should take cases one at a time, and do their best in each to apply the relevant legal rules.”¹⁰⁴

These two justices bring strikingly different tones to their opinions. Scalia often crossed “the rhetorical Rubicon between professional critique and personal attack.”¹⁰⁵ 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.”¹⁰⁶ 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.”¹⁰⁷ These attacks were often targeted at individual justices. He told Justice O’Connor that her logic “cannot be taken seriously”¹⁰⁸ and claimed Justice Breyer “rejects the Enlightenment.”¹⁰⁹ And so on.

Sarcastic truculence is entertaining, but it is not legal reasoning. Kagan’s dissents stay focused on legal arguments. They avoid personal and gratuitous insults. Even in her most blistering dissents, I found no examples in which her rhetoric took on the same regrettable dimensions that Justice Scalia’s all too often did.

There’s a final key difference between Scalia and Kagan’s dissents. Scalia’s contemptuous outbursts cabined his influence on the Court, alienating justices who may have been convinced to join him.¹¹⁰ Fellow justices dismissed his sneering eruptions as “that’s just

¹⁰⁴ *Edwards v. Vannoy*, No. 19–5807, slip op. at 15 n.8 (S. Ct. May 17, 2021) (Kagan, J., dissenting).

¹⁰⁵ Brian Porto, *The Rhetorical Legacy of Antonin Scalia*, 43 VT. B.J. 28, 28 (Summer 2017).

¹⁰⁶ *Lee v. Weisman*, 505 U.S. 577, 633, 636, 637 (1992) (Scalia, J., dissenting).

¹⁰⁷ *Obergefell*, 576 U.S. at 719 n.22 (Scalia, J., dissenting).

¹⁰⁸ *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part).

¹⁰⁹ *Glossip v. Gross*, 576 U.S. 863, 899 (2015) (Scalia, J., concurring).

¹¹⁰ See *supra* note 52 and accompanying text.

Nino being Nino,” especially as some dissents descended into rank partisanship in his final years.¹¹¹ Kagan’s dissents are less frequent and never personal. When she dissents, her colleagues listen. Nobody would mistake Kagan for Cassandra or for a bully. And she has not sacrificed her chops as a conciliatory bridge builder.

III. Pre-*Janus* Discourse: The Roots of Kagan’s Dissent

Kagan deserves credit for the *Janus* dissent. Like any great text, however, the dissent has previously unacknowledged co-authors and contributors. In this section, I trace how movement actors pioneered some of the language that ultimately became integrated into the dissent. Kagan’s rhetoric builds on the commentary of academics and union leaders, collating existing rhetoric into a narrative and disseminating it broadly. Like the broccoli hypothetical in *NFIB v. Sebelius*,¹¹² popular constitutionalism “distilled and simplified” complex doctrinal issues, allowing both the public and Justice Kagan to “link popular constitutional mobilization with judicial decisionmaking.”¹¹³

Start with *Janus*’s “weaponized” language. Professor Amy Kapczynski, among others, credit Kagan with “coining” this “weaponized” First Amendment phrase.¹¹⁴ *Janus* was the first time this metaphor had appeared in a Supreme Court opinion.¹¹⁵ But it was not the first time it

¹¹¹ 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> (describing Scalia’s partisan and “splenetic hyperbole” in his *Arizona v. United States* dissent). See also Paul J. Watford, *Memoriam: Justice Ruth Bader Ginsburg*, 134 HARV. L. REV. 882, 898 (2011) (“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.’”); Robert Draper, *The Pariah*, GQ (Apr. 30, 2009), <https://www.gq.com/story/david-souter-supreme-court-robert-draper> (quoting Justice Souter as brushing off Scalia’s “taunting” dissents that “began to call him out by name” with the following quote: “that’s just Nino being Nino.”).

¹¹² 567 U.S. 519 (2012).

¹¹³ 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).

¹¹⁴ Amy Kapczynski (@AKapczynski), TWITTER (July 10, 2018, 8:42 AM), <https://twitter.com/akapczynski/status/1016709140746469378>.

¹¹⁵ 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.”).

appeared in legal 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.”¹¹⁶ Juxtaposing *Sorrell* with *Lochner*, he 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.”¹¹⁷

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.”¹¹⁸ Citing 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.”¹¹⁹ Kohn observed today this cudgel “curtailed” women’s rights, but “tomorrow, who knows?”¹²⁰ She warned this “weaponized” First Amendment would be eventually “turned” on workers, whose bosses would “us[e] it to slowly but surely dismantle the right to form a union.”¹²¹

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.”¹²² Rogers, an expert on labor relations, criticized

¹¹⁶ Jedediah Purdy, *The Roberts Court v. America*, DEMOCRACY (Winter 2012), <https://democracyjournal.org/magazine/23/the-roberts-court-v-america/>.

¹¹⁷ *Id.*

¹¹⁸ Sally Kohn, *The Supreme Court Turns the First Amendment Into a Weapon for Corporations*, DAILY BEAST (July 8, 2014), <https://www.thedailybeast.com/the-supreme-court-turns-the-first-amendment-into-a-weapon-for-corporations>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Joel Rogers, *How Harris v. Quinn and Burwell v. Hobby Lobby Turned the First Amendment Into a Weapon*, NATION (July 2, 2014), <https://www.thenation.com/article/archive/after-harris-v-quinn-state-our-unions/>.

the “use the First Amendment against the affirmative state,” perverting the “fantastically important and beautiful guarantee of a basic right to free speech and association.”¹²³ Union leaders quickly circulated his piece. The American Federation of State, County and Municipal Employees (AFSCME), for example, included it on its “information highway,” a blog run by its national headquarters to keep local unions up-to-date on news and developments.¹²⁴

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 Amendment’s protections.¹²⁵ Piety prominently features “weaponization” language throughout. She posits that the First Amendment had become “the weapon of choice for corporate plaintiffs wanting to attack regulation” and that “business will continue to use the First Amendment as a weapon against regulation” without changed doctrine from the Court.¹²⁶ Public Citizen circulated the report to its allies, including labor unions, through the Corporate Reform Coalition. It also promoted Piety’s findings to its members and the public.

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* which criticized the “weaponization” of the First Amendment, arguing it had become a “libertarian lance against reasonable regulation.”¹²⁷ At its national convention, the American Constitution Society hosted a breakout session entitled “The Weaponized First Amendment.”¹²⁸ Moderated by

¹²³ *Id.*

¹²⁴ *After ‘Harris v. Quinn’: The State of Our Unions*, AFSCME Information Highway (July 8, 2014), <https://www.afscmeinfocenter.org/blog/2014/07/after-harris-v-quinn-the-state-of-our-unions.htm#.YGIeVZNKhfU>.

¹²⁵ TAMARA R. PIETY, *THE CORPORATE FIRST AMENDMENT* (2015).

¹²⁶ *Id.* at 4, 5.

¹²⁷ Note, *Free Speech Doctrine after Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1999 (2016).

¹²⁸ *The Weaponized First Amendment*, AMERICAN CONSTITUTION SOCIETY (June 10, 2016), <https://www.acslaw.org/video/the-weaponized-first-amendment/>.

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.¹²⁹

Linda Greenhouse would continue to sound the “weaponization” siren in later columns for the *New York Times*.¹³⁰

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.¹³¹ 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,” she wrote.¹³² 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.¹³³ Per AFT, its amicus brief “lays out [the] argument citing role of collective bargaining in improving public sector workplaces, repudiating plaintiff’s constitutionally flawed warping and weaponizing of the First Amendment.”¹³⁴ Through its extensive social media sharing of the amicus brief (including the

¹²⁹ *Id.*

¹³⁰ See, e.g., Linda Greenhouse, *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>.

¹³¹ Brief of the National Education Association as Amicus Curiae Supporting Respondents at 4, 30, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (No. 16-1466).

¹³² Randi Weingarten (@Rweingarten), TWITTER (Jan. 19, 2018, 3:48 PM), <https://twitter.com/rweingarten/status/954500781302009862>.

¹³³ Andrew Crook, *AFT Files Amicus Brief in Janus v. AFSCME*, AM. FED. OF TEACHERS (Jan. 19, 2018), <https://www.aft.org/press-release/aft-files-amicus-brief-janus-v-afscme>.

¹³⁴ *Id.*

use of hashtags), AFT aimed the brief as much at the public as the nine justices.

Other parts of 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 Kagan would incorporate in the *Janus* dissent.¹³⁵ 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.¹³⁶

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

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.¹³⁷

The parallels are striking. Kagan conspicuously uses the exact same terminology as 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 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.¹³⁸ Following

¹³⁵ Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165 (2015).

¹³⁶ *Id.* at 182.

¹³⁷ *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

¹³⁸ *Id.* at 2501 (“[The majority] has overruled *Abod* 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. 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

Shanor’s and Post’s 2015 piece, other academics—including Professors Rebecca Tushnet,¹³⁹ Leslie Kendrick,¹⁴⁰ Samuel Bagenstos,¹⁴¹ Catherine Fisk,¹⁴² Laura Weinrib,¹⁴³ and Charlotte Garden,¹⁴⁴ among others—identified and condemned this new *Lochner*. Shanor would write an Article with this title in 2016.¹⁴⁵ And it would only proliferate after that. Two years before the *Janus* dissent was released, the legal left rallying 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. Her father, Robert, represented tenant associations and plunged himself in grassroots civic organizing on Manhattan’s Upper

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 crowds, ‘can follow the model of the federal government and 28 other States.’”). See also *id.* at 2502 (citing the risk to “almost all economic and regulatory policy” from the majority’s logic).

¹³⁹ 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*”).

¹⁴⁰ 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).

¹⁴¹ Irin Carmon, *Religious freedom arguments used to weaponize the First Amendment*, MSNBC (Jan. 15, 2016), <https://www.msnbc.com/msnbc/religious-freedom-arguments-used-weaponize-the-first-amendment-msna775026> (“‘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”’”).

¹⁴² Catherine Frisk, *Symposium: A ruling for plaintiffs would revive Lochner*, SCOTUSBLOG (Dec. 19, 2017), <https://www.scotusblog.com/2017/12/symposium-ruling-plaintiffs-revive-lochner/>.

¹⁴³ Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 U. CHI. LEGAL F. 513, 519, 520 (2018) (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 this “transformation has aptly been labeled the *Lochnerization* of the First Amendment”).

¹⁴⁴ Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 326 (2016) (describing and historicizing this developing jurisprudence).

¹⁴⁵ Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133.

West Side. 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. And Kagan was (and is) a leading First Amendment expert. As the former Dean of Harvard Law School, she is familiar with legal academia and regularly cites scholars, including in *Janus*.¹⁴⁶

Asked about amicus briefs by Judge Wood in a September 2019, Justice Kagan said, “I can’t say I read every single [amicus brief on] every page.”¹⁴⁷ But she quickly noted her clerks “read every single one on every single page” and “sometimes on big cases I’ll flip through all of them.”¹⁴⁸ *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 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. Liberal academics saw a justice directly responsive to their writings, elevating their words from law journals to the U.S. Reports. Kagan aligned her dissent with an emerging movement “of accountability” that mobilizes the shape “the meaning of the Constitution over time.”¹⁴⁹ In the wake of 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. But it collated discourse on the left and popularized it to a larger audience. It simplified a complicated, technical legal story into

¹⁴⁶ See, e.g., *Janus*, 138 S. Ct. at 2491 (Kagan, J., dissenting) (citing a paper published by Professors Casey Ichniowski and Jeffrey Zax).

¹⁴⁷ *Justice Elena Kagan and Judge Diane Wood In Conversation*, C-SPAN (May 2, 2016), <https://www.c-span.org/video/?c4815228/user-clip-justice-elena-kagan-amicus-briefs>.

¹⁴⁸ *Id.*

¹⁴⁹ Guinier, *supra* note 50, at 558.

a framework that “role-literate participants” could understand and mobilize around.¹⁵⁰

An additional note: Justice Alito’s *Janus* majority opinion also dialogues with and amplifies conservative activists and their years-long “campaign” to overturn *Abood*.¹⁵¹ 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 and “severe budget problems.”¹⁵² To justify these tendentious propositions irrelevant from the legal issues before the Court, Alito thrice cites the amicus brief of James Barclay, a Republican operative and anti-union activist who had been involved in earlier legal efforts to hamstring public sector unions, including *Friedrichs v. California Teachers Association*.¹⁵³ At times, Alito obscures Barclay’s role in shaping the foundation of majority opinion. He adopts the passive voice to summarize Barclay’s claims. For example, Alito substitutes “[w]e are told” for “Barclay told us” to introduce a talking point from Barclay’s amicus brief.¹⁵⁴ But the influence of Barclay—and the conservative intellectual apparatus Barclay embodies—is unmistakable. Alito transforms Barclay’s outlook on 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. They thought *Janus* would cripple public sector unions and “deliver a mortal blow” to the labor movement.¹⁵⁵ In private,

¹⁵⁰ Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1757 (2017).

¹⁵¹ *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting) (“Today, the Court succeeds in its 6-year campaign to reverse *Abood*.”).

¹⁵² *Janus*, 138 S. Ct. at 2483, 2476.

¹⁵³ *Friedrichs v. California Teachers Assn.*, 136 S. Ct. 1083 (2016).

¹⁵⁴ *Janus*, 138 S. Ct. at 2476.

¹⁵⁵ ADAM COHEN, SUPREME INEQUALITY 220 (2020).

some union leaders worried it would have ruinous consequences. Yet in the year after the decision, something remarkable happened. Public sector unions redoubled recruitment efforts. AFSCME, AFT, and other public sector unions launched new campaigns to educate current members about the benefits of unions. Liberal academics proposed new pathways and theories to counter the decision. States passed laws designed to mitigate *Janus*' effects. While the full impact of *Janus* will appear in the decades to come, public sector union membership fell by less than 1% in the year following the decision.¹⁵⁶

Justice Kagan's dissent played a key role in this remarkable mobilization effort. In the section below, I examine how movement actors deployed the dissent in the year following the decision. 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 wake of a devastating defeat. As Randi Weingarten told me, "Unions may have been on the losing side of the majority in *Janus*, but Justice Kagan helped educate our members for the struggles ahead."¹⁵⁷

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. Justice Kagan's acerbic dissent shaped how the 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 Kagan's dissent. This set the stage for the union and political response to come.

¹⁵⁶ Daniel DiSalvo, *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> (lamenting that state legislative to shore up public sector unions following *Janus*).

¹⁵⁷ Email interview with Randi Weingarten (Mar. 29, 2021).

Prominent commentators immediately flagged the significance of the *Janus* dissent. Dean Erwin Chemerinsky devoted 109 words of a 771 column to quoting Kagan’s own words and echoed her framing throughout his piece.¹⁵⁸ Katrina vanden Heuval, then editor of *The Nation*, wrote a syndicated *Washington Post* column on *Janus* entitled “The Supreme Court’s five ‘black-robed rulers.’”¹⁵⁹ Her piece quoted heavily from Kagan’s dissent. The *New Yorker* and the *New York Times* editorial board praised Kagan’s “thunderous”¹⁶⁰ and “sharp” dissent,¹⁶¹ respectively, and quoted from it. Days after the decision, Kagan’s dissent would prompt the *New York Times*’ Adam Liptak to write a lengthy entire article headlined “How Conservatives Weaponized the First Amendment.”¹⁶² His piece, which revolves around Kagan’s dissent, ricocheted widely on social media and even generated criticism from Donald Trump, Jr.¹⁶³ and John Cornyn, a U.S. senator from Texas.¹⁶⁴ And the dissent resonated with journalists at local papers with a fraction of the readership of the *Times* or the Twitter following of a Trump. The *Daily Ukiah*, a small newspaper with a circulation of 7,000 in Northern California, ran a piece whose concluding

¹⁵⁸ Erwin Chemerinsky, *The Supreme Court’s Janus ruling was pure judicial activism. Unions, look out*, SACRAMENTO BEE (July 9, 2018), <https://www.sacbee.com/opinion/california-forum/article214596740.html>.

¹⁵⁹ Katrina vanden Heuval, *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.

¹⁶⁰ 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-kennedy-retires-the-supreme-courts-attack-on-labor-unions-is-a-sign-of-things-to-come>.

¹⁶¹ *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>.

¹⁶² 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>.

¹⁶³ Donald Trump, Jr. (@DonaldJTrumpJr), TWITTER (July 1, 2018, 9:08 AM), <https://twitter.com/DonaldJTrumpJr/status/1013454389066035201> (linking to 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”).

¹⁶⁴ John Cornyn (@JohnCornyn), TWITTER (June 30, 2018, 3:33 PM), <https://twitter.com/JohnCornyn/status/1013188904982401024> (linking to article and commenting “I guess standard reporting is passé [sic] Now editorializing on news pages is SOP: How Conservatives Weaponized the First Amendment”).

paragraph copied and pasted from Kagan’s concluding paragraph.¹⁶⁵

Other legal elites rallied behind Kagan’s dissent, praising and quoting it. They included professors, like Catherine Fisk,¹⁶⁶ Marty Lederman,¹⁶⁷ Amanda Shanor,¹⁶⁸ and Dan Epps;¹⁶⁹ liberal legal activists, like Vanita Gupta,¹⁷⁰ Jesse Jackson,¹⁷¹ Joshua Matz,¹⁷² Stephen Spaulding,¹⁷³ and Brianne Gorod;¹⁷⁴ labor experts like Steven Greenhouse,¹⁷⁵ Mark Gaston Pearce,¹⁷⁶ and Joseph McCartin;¹⁷⁷ political commentators like Peter Daou,¹⁷⁸ Josh Marshall,¹⁷⁹

¹⁶⁵ Frank Zotter, Jr., *Judicial Follies: Lochner up and throw away the key*, UKIAH DAILY J. (June 28, 2018), <https://www.ukiahdailyjournal.com/2018/06/28/judicial-follies-lochner-up-and-throw-away-the-key/> (quoting Kagan and comparing *Janus* to *Lochner*).

¹⁶⁶ Catherine Fisk, *Janus: Weaponized First Amendment Shoots at Democracy*, ACS EXPERT FORUM (July 2, 2018), <https://www.acslaw.org/expertforum/janus-weaponized-first-amendment-shoots-at-democracy/> (repeatedly quoting Kagan).

¹⁶⁷ Marty Lederman (@Marty_Lederman), TWITTER (June 27, 2018, 7:14 AM), https://twitter.com/marty_lederman/status/1011976109838258179 (quoting Kagan to explain the “Lochnerization of 1A”).

¹⁶⁸ Amanda Shanor, *The Supreme Court Applies the First Amendment to Some, but Not to Others*, TAKE CARE BLOG (June 28, 2018), <https://takecareblog.com/blog/when-the-supreme-court-takes-sides> (quoting and praising Kagan’s “powerful dissent”).

¹⁶⁹ Dan Epps (@DanEpps), TWITTER (June 27, 2018, 7:03 AM), <https://twitter.com/danepps/status/1011973357141557248> (uploading a screenshot from Kagan’s dissent with the caption, “From the final section of Justice Kagan’s dissent in *Janus*.”).

¹⁷⁰ Vanita Gupta (@VanitaGuptaCR), TWITTER (June 27, 2018, 7:16 AM), <https://twitter.com/vanitaguptaCR/status/1011976683438596096> (quoting and praising “Justice Kagan’s powerful dissent in *Janus*”).

¹⁷¹ 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>.

¹⁷² Joshua Matz (@JoshuaMatz8), TWITTER (June 27, 2018, 7:08 AM), <https://twitter.com/joshuamatz8/status/1011974596684320768?lang=en> (praising “Kagan’s extraordinary dissent in #Janis [sic]” and quoting from it”).

¹⁷³ Stephen Spaulding (@SteveESpaulding), TWITTER (June 27, 2018, 7:28 AM), <https://twitter.com/SteveESpaulding/status/1011979545795268608> (quoting Kagan).

¹⁷⁴ Brianne Gorod (@BrianneGorod), TWITTER (June 27, 2018, 7:23 AM), <https://twitter.com/BrianneGorod/status/1011978439996436480> (praising Kagan’s “incredible dissent in *Janus*vAFSCME” and posting a screenshot from it).

¹⁷⁵ Steven Greenhouse (@greenhousenyt), TWITTER (June 27, 2018, 9:08 AM), <https://twitter.com/greenhousenyt/status/1012004705508249600> (uploading a typed section of the dissent).

¹⁷⁶ Mark Gaston Pearce (@NLRBPearce), TWITTER (June 27, 2018, 10:09 AM), <https://twitter.com/NLRBPearce/status/1012020149459841024> (quoting Kagan’s dissent).

¹⁷⁷ Joseph A. McCartin, *Janus v. Democracy*, DISSENT (June 27, 2018), https://www.dissentmagazine.org/online_articles/janus-v-democracy (repeatedly quoting Kagan’s dissent).

¹⁷⁸ Peter Daou (@Peterdaou), TWITTER (June 27, 2018, 9:03 AM), <https://twitter.com/peterdaou/status/1012003574879064065?lang=en> (quoting Kagan’s dissent).

¹⁷⁹ Josh Marshall (@joshtpm), TWITTER (June 27, 2018, 9:01 AM), <https://twitter.com/joshtpm/status/1012003105846824960> (linking to a blog post on his website focusing attention on Kagan’s dissent).

Mark Joseph Stern,¹⁸⁰ Ian Millhiser,¹⁸¹ and Gilad Edelman;¹⁸² and labor gadflies like Jonathan Tasini.¹⁸³ Mainstays of the liberal legal movement, like the Alliance for Justice,¹⁸⁴ Brennan Center for Justice,¹⁸⁵ People for the American Way,¹⁸⁶ and the National Women’s Law Center,¹⁸⁷ spotlighted the dissent and its pungent language.

The dissent unified the normally fractious left. “I’m not usually one for quoting Elana Kagan,” wrote political historian and socialist theorist Corey Robin in August 2018, two months after the decision was released.¹⁸⁸ “[B]ut I did think hers was a limpid bit of wisdom: ‘The First Amendment was meant for better things.’”¹⁸⁹ Robin would cite Kagan’s dissent on other occasions.¹⁹⁰ Writing in the *Washington Post*, historian Elizabeth Tandy Sherman wrote that the *Janus* dissent “shows that liberal justices are finally on the side of the working class.”¹⁹¹ The dissent created an accessible and *unifying* narrative to understand a conservative campaign to

¹⁸⁰ 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> (quoting Kagan’s dissent).

¹⁸¹ 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/> (quoting Kagan’s dissent).

¹⁸² Gilad Edelman, *The First Amendment vs. Democracy*, WASH. MONTHLY (May 2019), <https://washingtonmonthly.com/magazine/april-may-june-2019/the-first-amendment-vs-democracy/> (quoting Kagan’s dissent).

¹⁸³ Jonathan Tasini (@jonathantasini), TWITTER (June 27, 2018, 7:42), <https://twitter.com/jonathantasini/status/1011983185104850944> (quoting and praising Kagan’s dissent).

¹⁸⁴ Alliance for Justice (@AFJustice), TWITTER (June 27, 2018, 7:28 AM), <https://twitter.com/AFJustice/status/1011979545623318528> (uploading a screenshot from the dissent and drawing attention to its “powerful” and oral nature).

¹⁸⁵ Martha Kinsella & Sean Morales-Doyle, *Freedom to Free Ride: The Supreme Court Rules Against Unions*, BRENNAN CTR. FOR JUSTICE (June 27, 2018) (repeatedly quoting Kagan).

¹⁸⁶ Paul Gordon, *Court’s Ultra-Conservatives Attack Workers in the Janus Case*, PEOPLE FOR THE AMERICAN WAY (June 28, 2018), <https://www.pfaw.org/blog-posts/courts-ultra-conservatives-attack-workers-in-the-janus-case/>.

¹⁸⁷ National Women’s Law Center (@nwlcl), TWITTER (June 27, 2018, 9:28 AM), <https://twitter.com/nwlc/status/1012009663611789312>.

¹⁸⁸ Corey Robin (@CoreyRobin), TWITTER (Aug. 8, 2018, 7:09 AM), <https://twitter.com/CoreyRobin/status/1027194973513572354>.

¹⁸⁹ *Id.*

¹⁹⁰ *See, e.g.*, Corey Robin (@CoreyRobin), TWITTER (July 9, 2018, 9:07 PM), <https://twitter.com/CoreyRobin/status/1016534396940189696>.

¹⁹¹ Elizabeth Tandy Sherman, *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/>.

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”)¹⁹², the *Huffington Post* (“Justice Elena Kagan Says The Supreme Court Turned The First Amendment ‘Into A Sword’”)¹⁹³, *Talking Points Memo* (“Kagan: SCOTUS Conservatives Are ‘Weaponizing The First Amendment’”)¹⁹⁴, and labor-affiliated the *74 Million* (“Kagan’s Fiery Dissent Says Supreme Court Majority Creates ‘Problem of Nightmarish Proportions’ for Nation’s Public Unions”)¹⁹⁵. And even some journalists outside the progressive media world took note. *The Hill*, for example, ran an article entitled “Kagan accuses Supreme Court majority of weaponizing the First Amendment.”¹⁹⁶ While the majority made law, Kagan made headlines.¹⁹⁷

B. Mustering Opposition: Union Response to the *Janus*

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

¹⁹² 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>.

¹⁹³ Dave Jamieson, *Justice Elena Kagan Says The Supreme Court Turned The First Amendment ‘Into A Sword’*, HUFFINGTON POST (June 27, 2018), https://www.huffpost.com/entry/justice-elena-kagan-says-her-colleagues-turned-the-first-amendment-into-a-sword_n_5b33dc13e4b0b5e692f3cb79.

¹⁹⁴ Tierney Sneed, *Kagan: SCOTUS Conservatives Are ‘Weaponizing The First Amendment’*, TALKINGPOINTSMEMO (June 27, 2018), <https://talkingpointsmemo.com/dc/elena-kagan-janus-dissent>.

¹⁹⁵ 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/>.

¹⁹⁶ Lydia Wheeler, *Kagan accuses Supreme Court majority of weaponizing the First Amendment*, HILL (June 27, 2018), <https://thehill.com/regulation/court-battles/394402-kagan-accuses-supreme-court-majority-of-weaponizing-the-first?rl=>.

¹⁹⁷ The Justice may have even hoped journalists would write these headlines. Kagan has indicated she is familiar with the interplay between her words and popular press coverage. See, e.g., Margot Talbot, *Is the Supreme Court’s Fate in Elena Kagan’s Hands?*, NEW YORKER (Nov. 18, 2019), <https://www.newyorker.com/magazine/2019/11/18/is-the-supreme-courts-fate-in-elena-kagans-hands> (“‘I’ve gotten pretty good at knowing what, if I say it, will create headlines I don’t want,’ she 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.’”).

case, and this narrative would trickle down to local affiliates. For public sector unions, 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. While *Janus* came at a particularly perilous moment for the labor movement—coinciding with the Trump Administration and conservative legal groups launching new efforts to stymie organized labor—its narrative building gave them 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.”¹⁹⁸ 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 the decision was released, Saunders relied on Kagan’s dissent to tell a complicated legal story.¹⁹⁹ Rather than attempt to explain the legal issues or even paraphrase the dissent himself, he quoted a 75-word chunk of her concluding section and wrote, “Justice Kagan put it best in her dissenting opinion.”²⁰⁰ Immediately after quoting Kagan at length, he vowed “we are unbowed by this decision. We will continue to do what we have always done, but now with greater energy and passion.”²⁰¹ 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.”²⁰² 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

¹⁹⁸ NeJaime, *supra* note 42, at 987.

¹⁹⁹ Lee Saunders, *Five justices cannot break the solidarity of America’s unions*, HILL (June 29, 2018), <https://thehill.com/opinion/judiciary/394748-five-justices-cannot-break-the-solidarity-of-americas-unions>.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Lee Saunders, *A Union Response to the Supreme Court’s Janus Decision*, AMERICAN PROSPECT (July 9, 2018).

even the Supreme Court, can deprive free people of the opportunity to work together to create a better life for themselves and their communities.”²⁰³

The Kagan dissent instantly resonated with Randi Weingarten of AFT, who had used similar rhetoric to Kagan in the runup to the decision. The day that the Supreme Court published *Janus*, Weingarten tweeted, “Kagan accuses Supreme Court majority of weaponizing the First Amendment - and she is right!!!!”²⁰⁴ 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.²⁰⁵ Against the darkened pillars of the Court, Weingarten placed a block quote from the dissent, headlined with “Justice Kagan said in her dissent.”²⁰⁶ In public statements on July 1st²⁰⁷ and July 11th,²⁰⁸ Weingarten would similarly quote from Kagan to explain the long-running campaign to overturn *Abood*.

Weingarten used the *Janus* majority as a metonym for the broader plutocratic threat to American democracy, and Kagan’s dissent spotlighted for this problem. On July 13, Weingarten spoke at AFT’s 2018 annual convention. Her address—titled “Hope in Darkness”—was an homage to Kagan’s dissent and politic assessment of the current moment. “Justice Kagan’s dissent nailed it,” she said.²⁰⁹ “Her five conservative colleagues were ‘weaponizing the First Amendment’ [in *Janus*], perverting it from its intended purpose of securing the political freedom

²⁰³ *Id.*

²⁰⁴ Randi Weingarten (@Rweingarten), TWITTER (June 27, 2018, 9:16 AM), <https://twitter.com/rweingarten/status/1012006889616564231>.

²⁰⁵ Randi Weingarten (@Rweingarten), TWITTER (June 28, 2018, 2:52 PM), <https://twitter.com/rweingarten/status/1012453777113165824>.

²⁰⁶ *Id.*

²⁰⁷ Randi Weingarten, #Union, AM. FED. OF TEACHERS (July 1, 2018), <https://www.aft.org/column/union>.

²⁰⁸ Randi Weingarten, *The Right-Wing Assault on Teachers’ Unions Won’t Win. It Only Makes Us Angrier*, ED. WEEK (July 11, 2018), <https://www.edweek.org/teaching-learning/opinion-the-right-wing-assault-on-teachers-unions-wont-win-it-only-makes-us-angrier/2018/07>.

²⁰⁹ Randi Weingarten, *Hope in Darkness: Remarks by AFT president Randi Weingarten at the 2018 AFT Convention*, AM. FED. OF TEACHERS (July 13, 2018), <https://www.aft.org/press/speeches/hope-darkness>.

necessary for democracy,” Weingarten continued.²¹⁰ “Why would those justices, as Kagan put it, ‘overthrow a decision entrenched in this Nation’s law and its economic life for over 40 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.²¹¹ Weingarten closed her rallying speech by urging her members to resist the “conservative majority on the Supreme Court” and its “weaponization” of the Constitution.²¹² In subsequent speeches, Weingarten similarly based larger arguments around Kagan’s dissent.²¹³

After her “Hope in Darkness” speech, Weingarten joined a “*Janus* will not stop us” roundtable with other senior union officials and ordinary union members. Kagan’s *Janus* dissent became a *cri de coeur* 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 years 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.²¹⁴

Weingarten echoes Kagan and then adds her own gloss. Kagan, for example, wrote the *Abood* precedent was “embedded in the law . . . [and] in the world” and stressed its “unanimously”-decided nature.²¹⁵ But Kagan does not cite the Tenth Amendment or condemn

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ See, e.g., Randi Weingarten, *Post-Janus, We’re Ready*, WASH. TEACHER’S UNION (July 15, 2018), https://www.wtulocal6.net/post_janus (reprising similar themes and language).

²¹⁴ *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>.

²¹⁵ *Janus*, 138 S. Ct. at 2497, 2498.

billionaires, even if she wrote broadly about the importance of “state and local officials” in making policy “choices about workplace governance.”²¹⁶ The dissent was not a script, but an inspiration, invitation, and a guide.

Dissents, as Justice Brennan recognized, can be damage control mechanisms. As right-to-work leaders touted *Janus* as an all-encompassing and revolutionary ruling, union leaders relied on Kagan’s language to advance limited interpretations of the ruling in the cauldron of public opinion formation. Craig Becker, the general counsel of the 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.”²¹⁷ 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.’”²¹⁸ Becker, like other union leaders, vowed that the “Supreme Court won’t have the last word on worker rights” and promised to keep organizing.²¹⁹

Like their leaders, national unions echoed and elevated Kagan’s rhetoric. After the decision, the AFL-CIO pivoted to a new theme: “Don’t mourn. Organize.”²²⁰ In a separate press release, the AFL-CIO condemned the six-year campaign identified by Kagan, “initiated by a sitting justice and funded by corporate interests and dark money” to “to disrupt 40 years of well-established law to rule against working people.”²²¹ Throughout the document, America’s largest federation of unions turned to Kagan, quoting multiple lines of her dissent to explain how the

²¹⁶ *Id.* at 2501.

²¹⁷ Craig Becker, *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>.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Kenneth Quinnell, *Don't Mourn, Organize: In the States Roundup*, AFL-CIO (July 5, 2018), <https://aflcio.org/2018/7/5/dont-mourn-organize-states-roundup>.

²²¹ *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>.

Court “flip-flopped on the meaning of the First Amendment” in order to “side with corporate interests over those of working people.”²²²

For its part, AFT told its members that “dissent is patriotic” and posted about how it was “reflecting on Supreme Court Justice Elena Kagan’s dissent,” drawing attention to Kagan’s word.²²³ Pride at Work, a national LGBTQ labor group, wrote a public memorandum that promised that “LGBTQ Working People Will Overcome *Janus*.”²²⁴ After quoting the final paragraph of Kagan’s dissent, Pride at Work said it would be “organizing and mobilizing like never before.”²²⁵ UFT,²²⁶ Jobs With Justice,²²⁷ and others also quoted the dissent. Some national unions, like the Seafarers Entertainment and Allied Trades Union, reprinted large chunks of it in national publications aimed at their members.²²⁸

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 significant budgetary and institutional constraints. 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.²²⁹ In Nevada, the Clark County

²²² *Id.*

²²³ AFT, *Dissent is patriotic*, FACEBOOK (July 5, 2018), https://www.facebook.com/AFTunion/posts/10156005945884160?comment_id=10156005950634160.

²²⁴ Tim Schlittner, *LGBTQ Working People Will Overcome Janus*, PRIDE AT WORK (Sept. 15, 2018), <https://www.prideatwork.org/lgbtq-working-people-will-overcome-janus/>.

²²⁵ *Id.*

²²⁶ UFT (@UFT), TWITTER (June 27, 2018, 12:21 PM), <https://twitter.com/UFT/status/1012053302790377472>.

²²⁷ Jobs With Justice (@jwjnational), TWITTER (June 27, 2018, 7:40 AM), <https://twitter.com/jwjnational/status/1011982521976938496>.

²²⁸ *Janus Verdict Weakens Workers’ Rights*, 21 ENTERTAINER 1, 6 (June 2018), <https://partners.aflcio.org/system/files/q22018entertainer.pdf>.

²²⁹ KOSE Union (@Kose_Union), TWITTER (June 27, 2018, 12:10 PM), https://twitter.com/KOSE_Union/status/1012050432758353920.

Education Association quoted the dissent in an effort to mobilize its members.²³⁰ The New York State Nurses Association plastered parts of Kagan’s dissent on its website.²³¹ 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 interferes with ‘thousands of ongoing contracts involving millions of employees’ and ‘prevents the American 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!’²³²

In addition to citing the dissent, many state and local unions opted to reprint 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 Kagan’s dissent.²³³ 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 Kagan.²³⁴ From the Sailors’ Union of the Pacific²³⁵ to Local 1014 of the Communications Workers of America in New Jersey,²³⁶ a vast array of other unions block quoted Kagan to explain *Janus*. And Kagan’s rhetoric shaped union narratives even when not explicitly cited. Denise Specht, the president of the Education Minnesota union, promised that “[n]either

²³⁰ Clark County Education Association (@cceanv), TWITTER (June 27, 2018), <https://twitter.com/cceanv/status/1012016042183290880>.

²³¹ Judith Cutchin, *Janus Statement*, NEW YORK NURSES ASSOCIATION (June 2018), <https://www.nysna.org/rms-say-union-makes-us-strong#.YKDgIn1KgUo>.

²³² *Id.*

²³³ *Groups Blast Supreme Court’s Anti-Labor Decision*, KRWG PUBLIC MEDIA (June 2018), <https://www.krwg.org/post/groups-blast-supreme-courts-anti-labor-decision>.

²³⁴ Steve Share, *In 5-4 ‘Janus’ vote, US Supreme Court strikes blow against public sector unions*, MINNEAPOLIS LAB. REV (July 27, 2018), https://www.minneapolisunions.org/mlr2018-7-27_janus.php.

²³⁵ *Supreme Court v. Organized Labor*, 81WEST COAST SAILORS 7, 9 (July 20, 2018), https://www.sailors.org/sites/default/files/newsletter/pdf/wcs_july_2018b_0.pdf.

²³⁶ CWA Local 1014 (@CWALocal1014), TWITTER (June 28, 2018, 6:18 AM), <https://twitter.com/CWALocal1014/status/1012324411016466432>.

this ruling nor the right-wing groups that will weaponize it will silence the voices of Minnesota's professional educators."²³⁷

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 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 Heather 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 decision-making body and can thus dictate the outcome," I show how state officials turned anger over the *Janus* into concrete action that mitigated the decision.²³⁸ These officials did not succeed because of Justice Kagan, 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 Kagan's *Janus* dissent. Using the imperative, United States 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.²³⁹ To Whitehouse, 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.

²³⁷ John Rosales, *Supreme Court Ruling in 'Janus' Deals Blow to Working Families*, NEA NEWS (June 27, 2018), <https://www.nea.org/advocating-for-change/new-from-nea/supreme-court-ruling-janus-deals-blow-working-families>.

²³⁸ Gerken, *supra* note 15, at 1748.

²³⁹ Sheldon Whitehouse (@SenWhitehouse), TWITTER (July 7, 2018, 8:11 AM), <https://twitter.com/SenWhitehouse/status/1015614230601465858>.

Other Democratic senators coalesced behind Kagan’s *Janus* dissent. Senate minority leader Chuck Schumer would name check Justice Kagan and quote her dissent in a speech delivered from the Senate floor.²⁴⁰ Senator Ben Cardin cited Justice Kagan in a tweet, quoting her and adding the hashtag “#Janus” to his post.²⁴¹ Representative Rosa DeLauro of Connecticut, a veteran of congressional battles to mitigate *Wal-Mart v. Dukes* and other Supreme Court decisions, wrote in a press release, “As Justice Elena 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.’”²⁴²

Members of Congress who are not known for legal reform chimed in. Representative Bobby Scott of Virginia quoted a different part of the dissent than DeLauro, highlighting 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.’”²⁴³ He promised to act against a “weaponized” First Amendment and urged working Americans to stay vigilant. The next day, Representative Matt Cartwright of Pennsylvania took to the House floor to read Kagan’s words into the Congressional Record. “Associate Justice Kagan described it yesterday as a ‘weaponization of the First Amendment’ that has been going on,” he said.²⁴⁴ “And she is right. This decision comes at a time when hardworking Americans are fighting every day just to

²⁴⁰ 164 CONG. REC. S114, 4829 (daily ed. July 9, 2018) (statement of Sen. Schumer).

²⁴¹ Ben Cardin (@SenatorCardin), TWITTER (June 27, 2018, 10:04 AM), <https://twitter.com/SenatorCardin/status/1012018967177826305>.

²⁴² *DeLauro Statement on Janus v. AFSCME Council 31 Supreme Court Decision*, OFFICE OF REP. DELAURO (June 27, 2018), <https://delauro.house.gov/media-center/press-releases/delauro-statement-janus-v-afscme-council-31-supreme-court-decision>.

²⁴³ *Scott Statement on Janus*, OFFICE OF REP. SCOTT (June 27, 2018), <https://bobbyscott.house.gov/media-center/press-releases/scott-statement-on-supreme-court-s-ruling-in-janus-v-afscme>.

²⁴⁴ 164 CONG. REC. H820-26 (daily ed. June 28, 2018) (statement of Rep. Cartwright).

pay their bills and support their families.”²⁴⁵

A year after the decision, Representatives Cartwright and Scott would partner with Senator Hirono to introduce the Public Service Freedom to Negotiate Act.²⁴⁶ 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 year 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.’”²⁴⁷ Hirono added:

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.”²⁴⁸

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 Governor²⁴⁹ (whose eponymic *Janus* amicus brief was cited by Kagan in her dissent)²⁵⁰ and Attorney General²⁵¹ praised Justice Kagan’s dissent and quoted it. 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

²⁴⁵ *Id.*

²⁴⁶ H.R. 3463, 116th Cong. (2019); S. 1970, 116th Cong. (2019).

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

²⁴⁸ *Id.*

²⁴⁹ Tom Wolf (@TomWolfPA), TWITTER (June 29, 2018, 11:25 AM), <https://twitter.com/TomWolfPA/status/1012764096477958144> (attaching a screenshot from the dissent and commenting “The Supreme Court’s decision to dismiss worker’s rights is a major step backwards. I’m glad that Justice Elena Kagan dissented and referenced our fight here in Pennsylvania to protect worker’s rights and unions. #Janus”).

²⁵⁰ *Janus*, 138 S. Ct. at 2496 (citing the brief of Governor Tom Wolf).

²⁵¹ *Statement of Attorney General Josh Shapiro on Supreme Court Decision Undermining Public Sector Unions*, OFFICE OF JOSH SHAPIRO (June 27, 2018), <https://www.attorneygeneral.gov/taking-action/statements/statement-of-attorney-general-josh-shapiro-on-supreme-court-decision-undermining-public-sector-unions/>.

balance’ of the last 40 [years] is gone, & the 1st amendment is now a sword to undermine collective bargaining.”²⁵² 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.”²⁵³ 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.”²⁵⁴

Local officials also joined in. Easthampton, Massachusetts Mayor Nicole LaChapelle told her constituents about “Justice Kagan’s unflinching #Janus dissent,” pasting the dissent’s final paragraph to various social media platforms.²⁵⁵ So too did the Mayor pro tem of Sacramento, California, Angelique Ashley. She typed the “weaponization” paragraph into an iPhone note and then uploaded the picture of her transcription to Facebook and Twitter. “Couldn’t agree more with Justice Elena Kagan’s dissent to #Janus today,” she wrote.²⁵⁶ “Sacramento is a better place to live because of our public sector unions.”²⁵⁷ Her Facebook post generated seventy comments, as Sacramentans joined into the debate and discussed the dissent.

²⁵² Steve Simon (@MNSteveSimon), TWITTER (June 27, 2018, 12:41 PM), <https://twitter.com/MNSteveSimon/status/1012058313188667392>.

²⁵³ Phil Weiser (@Pweiser), TWITTER (June 27, 2018, 9:02 AM), <https://twitter.com/pweiser/status/1012003175207858176>. *See also* Phil Weiser (@Pweiser), TWITTER (June 27, 2018, 9:02 AM), <https://twitter.com/pweiser/status/1012003174201225217> (offering additional commentary on the case).

²⁵⁴ Jesse Kiehl (@JesseKiehl), TWITTER (June 27, 2018, 8:54 AM), <https://twitter.com/JesseKiehl/status/1012001292330229760>.

²⁵⁵ *See, e.g.*, Nicole LaChapelle (@MayorLachapelle), TWITTER (June 27, 2018, 8:43 AM), <https://twitter.com/MayorLachapelle/status/1011998513763438593>.

²⁵⁶ Angelique Ashby (@AngeliqueAshby), TWITTER (June 27, 2018, 2:33 PM), <https://twitter.com/AngeliqueAshby/status/1012086516955340800>.

²⁵⁷ *Id.*

This dissent provided a rebuttal to the juricentric position that the Supreme Court’s decision had ended debate over agency fees. A constituent named Keith Sharward disagreed with Angelique Ashley’s post, writing in response that he had some sympathies for unions but “I believe there is no need to lament this ruling--it's done.”²⁵⁸ But Ashley responded *it wasn't done*—again turning to the dissent. “Agreeing with 4 Supreme Court Justices on their dissenting opinion in a landmark ruling is a principle well within our constitutional rights,” she wrote in response to Sharward.²⁵⁹ She told him the Court’s majority opinion had not changed her opinion of the matter. Another constituent named Genise Hood-Plessas backed her up; dissent, Hood-Plessas contended “is the beauty of our Republic!”²⁶⁰

Public sector unions had braced for the *Janus* decision. In 2015, CWA, AFSCME, and other unions launched member engagement campaigns as an adverse ruling loomed in *Friedrichs*, which raised similar constitutional issues to *Janus*. While 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. Liberal academics began drafting state legislative responses, many of which were published not long after the Court published *Janus*.²⁶¹ 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.”²⁶²

²⁵⁸ Angelique Ashby, *Janus*, FACEBOOK (June 27, 2018), <https://www.facebook.com/CouncilmemberAngeliqueAshby/posts/10155393278351790>.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ 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 have” that could “soften *Janus*’s blow or even negate it altogether”); Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CALIF. L. REV. 1821 (2019) (proposing legislative strategies to overcome the collective action problem in union membership exacerbated by *Janus*).

²⁶² Daniel DiSalvo, *Public-Sector Unions After Janus: An Update*, MANHATTAN INST. (Feb. 14, 2019), <https://www.manhattan-institute.org/public-sector-unions-after-janus>.

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, AFL-CIO (WSLC), 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.”²⁶³ Firmly rejecting a juricentric understanding of constitutional law, Groves urged public sector unionists 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.”²⁶⁴

In the wake of the decision, state officials’ tenor echoed Kagan’s defiance. 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.”²⁶⁵ She added, “This isn’t over.”²⁶⁶ 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.”²⁶⁷

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

²⁶³ David Groves, *Janus: Get ready to defend your freedom*, Stand (Mar. 7, 2018),

²⁶⁴ *Id.*

²⁶⁵ Noel Frame (@NoelFrame), TWITTER (June 27, 2018, 4:21 PM), <https://twitter.com/NoelFrame/status/1012113819278106624>.

²⁶⁶ *Id.*

²⁶⁷ Jay Inslee (@JayInslee), TWITTER (June 27, 2018, 3:10 PM), <https://twitter.com/JayInslee/status/1012095911621611520>.

Amendment to allow *Citizen's United* [sic] . . . and now #JANUS.”²⁶⁸ 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 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.”²⁶⁹ Kunze continued, “Thankfully, 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.”²⁷⁰

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 after months of discussion with union leaders. The legislation amended dues deduction authorization laws and clarified the obligations of public employers and public sector unions. 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. It passed by a decisive margin.

Or consider Massachusetts, which passed what some called the most comprehensive response law to *Janus*.²⁷¹ 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 20,000 service workers and teachers throughout Massachusetts, said

²⁶⁸ Karen Keiser (@KarenKeiser1), TWITTER (June 28, 2018, 10:10 AM), <https://twitter.com/KarenKeiser1/status/1012382746826723334>.

²⁶⁹ Leanne Kunze, *Our View: Stop Kavanaugh*, AFSCME COUNCIL 28 (Aug. 26, 2018), <https://www.wfse.org/news/our-view-stop-kavanaugh>.

²⁷⁰ *Id.*

²⁷¹ See, e.g., Rachel Running, *Massachusetts Passes Strongest Response to Janus in the Country*, MASSACHUSETTS AFL-CIO (Sept. 19, 2019), <https://www.massafcio.org/news/massachusetts-passes-strongest-response-janus-country>.

“no court case is going to stop us from fighting for the strong unions our communities need.”²⁷² Massachusetts Senate President Harriette Chandler agreed, telling journalists that she could not “wait to stand with” labor in fighting back.²⁷³ Massachusetts House Speaker Robert DeLeo promised to find ways to soften the blow of the decision.²⁷⁴

These lawmakers unveiled a sweeping bill designed to mitigate *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. To sell this legislation, lawmakers turned to 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 to attack unions.”²⁷⁵ 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 of our democracy,” he said.²⁷⁶ Like Kagan, he recognized that the Constitution did not just belong to five sequestered men in Washington, D.C., but to the people. And his legislation turned this recognition into binding law.

²⁷² Steve LeBlanc, *Beacon Hill looks for ways to help unions after court ruling*, ASSOCIATED PRESS (July 7, 2018), <https://apnews.com/article/9a4c3a79f4d24806b32973be0541465b>.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ 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>.

²⁷⁶ *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/>.

IV. The Promise and the Limits of Movement Dissents

Like any procedural tool, mobilizing dissents have limits and complications. In this section, I respond to potential counterarguments about movement dissenting and identify considerations a justice might ruminat e over 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.²⁷⁷ By writing for the people with an eye to social mobilization, this argument would go, justices politicize the Court and overstep their judicial role. Mobilizing dissents can be unstable, leading to unpredictable results. There is some truth to this argument at the margin. A justice who *only* wrote in a movement dialectic would be ineffective. 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 would be inappropriate and corrosive.

Overall, however, this argument is unconvincing. Widespread constitutional estrangement threatens the Constitution’s legitimacy.²⁷⁸ Movement dissents can modulate and

²⁷⁷ 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/> (commenting on Justice Kagan’s *Brnovich* dissent).

²⁷⁸ 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 Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) (“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.”).

channel this alienation.²⁷⁹ 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.

The institutionalist objection overlooks other salient factors of America's constitutional culture. As others have compellingly demonstrated, ordinary people are the "engines of liberty" who shape America's constitutional law.²⁸⁰ The Supreme Court does not have the last word.²⁸¹ 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. Liberty finds no refuge in a jurisprudence of delusion.

And surely there 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 a flimsy (and dangerous) rationale. The *Janus* Court, lest we forget, invalidated popular and carefully crafted laws in 22 states and the District of Columbia. Kagan's dissent—with its ferocious defense of precedent, workable legal standards, and self-government—is an institutionalist one.

²⁷⁹ 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/> (recounting empirical scholarship that demonstrates how "blistering" dissents like Justice Kagan's in *Brnovich* can embody "signal of representation").

²⁸⁰ Cole, *supra* note 17, at 1.

²⁸¹ Guinier, *supra* note 40, 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.").

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. Kagan’s fierce dissents have not stopped her from moderating majority opinions from the inside, narrowing legal questions and reframing issues. By deploying this dialect tactically and writing cordially, nobody has ever dismissed “Kagan just being Kagan.” And the *Janus* dissent demonstrates that this register does not preclude technical and meticulous legal analysis.

There are risks to both over- and under- using 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 write a mobilizing dissent. There are some easy cases that all but demand one. A few recent Supreme Court decisions (*Janus* comes to mind, but so do *Shelby County*, *Rucho*, *Hobby Lobby*,²⁸² *NIFLA*,²⁸³ and *Sorrell*²⁸⁴) pair weak legal reasoning and sweeping holdings. Other cases are harder calls. Reasonable progressives will disagree, for example, whether Kagan’s and Breyer’s majority votes—qualified with narrowing concurrences—in *Little Sisters of the Poor v. Pennsylvania*²⁸⁵ and *Masterpiece*²⁸⁶ were worth the candle. In

²⁸² 573 U.S. 682 (2014).

²⁸³ 138 S. Ct. 2361 (2018).

²⁸⁴ 564 U.S. 552 (2011).

²⁸⁵ 140 S. Ct. 2367, 2396-2400 (2020) (Kagan, J., concurring in the judgment).

²⁸⁶ 138 S. Ct. 1719, 1732-34 (2018) (Kagan, J., concurring).

recent years, many progressives would have preferred the *Janus* Kagan to the *Morrisey-Berru*,²⁸⁷ *Kahler*,²⁸⁸ *Trinity Lutheran*,²⁸⁹ *American Humanist Association*,²⁹⁰ or *Fulton*²⁹¹ Kagan.

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 and Justice Breyer’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, my point is not prescriptive. As justices weigh the difficult and context-specific calculus of when to dissent and when to compromise, all I ask is 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.

V. 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.”²⁹² Likewise for Justice Brennan. According to

²⁸⁷ 140 S. Ct. 2049 (2020) (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).

²⁸⁸ 140 S. Ct. 1021 (2020) (Justice Kagan authoring an opinion joined by Chief Justice Roberts and Justices Alito, Thomas, Gorsuch and Kavanaugh finding no due process violation in a state’s restricted insanity defense test).

²⁸⁹ 137 S. Ct. 1012 (2017) (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).

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

²⁹¹ No. 19–123, slip. op. (S. Ct. June 17, 2021).

²⁹² JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 235 (2011). Stevens memorably dissented in landmark cases, especially in his later years on the bench. Future scholarship should examine the impact of some of

Owen Fiss, 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.²⁹³ By all indications, Justice Kagan is in the same camp.

This paper 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.²⁹⁴ In recent years, surprising coalitions of justices have delivered majority opinions that protected LGBTQ people,²⁹⁵ Native Americans,²⁹⁶ immigrants,²⁹⁷ healthcare coverage,²⁹⁸ and the Census.²⁹⁹ These opinions may not be written in the way, say, Brennan would have written them. But it would be foolish to ignore them.

In our current moment, however, progressive dissents are inescapable. 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

these dissents. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 393 (2010) (Stevens, J., concurring in part and dissenting in part); *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting); *Bush v. Gore*, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186, 214 (1986) (Stevens, J., dissenting).

²⁹³ FISS, *supra* note 7, at 43.

²⁹⁴ *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982) (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) (same for a federal flag law); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (a Brennan majority opinion from his final year on the Court upholding a minority preference policy). As discussed earlier, *supra* note 28, Brennan strongly defended dissents. He also wrote many resonant dissents, discussed *infra* Section II.

²⁹⁵ *Bostock*, 140 S. Ct. (2020).

²⁹⁶ *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

²⁹⁷ *Dept. of Homeland Security v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020).

²⁹⁸ *NFIB*, 567 U.S. (2012); *King v. Burwell*, 576 U.S. 473 (2015).

²⁹⁹ *Dept. of Commerce v. New York*, 139 S. Ct. 2551 (2019).

in convincing their colleagues.

The *Janus* dissent shows the promise of this path. Drawing upon the discourse of the left and labor, 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—that AFT “continue[s] to draw on its insights as we organize.”³⁰⁰ Contra Mark Tushnet’s theory of dissenting, *Janus* reveals that dissents can be recognized as “important” without the analytical lens of the distant future.

Movement dissents may not be panaceas, but they can be palliatives. 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 interpretation. 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. With Kagan’s assistance, the people shaped it. In an era of emboldened “black-robed rulers,” these dissents can be more important than ever.

³⁰⁰ Email interview with Randi Weingarten (Mar. 29, 2021).