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# The Court's Third Great Crisis

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This February, the U.S. Supreme Court will celebrate its 233rd birthday. Twice before over that quarter millennium, the Court has precipitated national crisis by attempting to move into the center of power and govern the country from the bench. The first crisis arose during the 1850s, when a Court dominated by slaveowners decided to end the slavery controversy by awarding total and permanent victory to the South. The second took place during the 1930s, when a majority of the "nine old men," in the face of national upheaval, set out to block any attempt at progressive government, labor rights, or economic justice.

The Court has now triggered a third crisis, as its newly installed majority moves to upend both established constitutional precedent and vital democratic norms. What the result will be is impossible to predict. Just as in the 1850s and the 1930s, the Court's aggressive actions have sparked a dangerous situation that threatens generations of progress toward genuine democracy. As a nation, we like to believe that we are an exception to the somber lessons of history, that somewhere above us hover the "better angels of our nature" who can be counted on to ensure that the Republic will not only survive but prosper.

But this is a fantasy. We will never escape the current danger unless we face the facts.

In the first two crises, the Supreme Court's motive was the same: to return America to the grandeur of an imagined past. For the *Dred Scott* Court, that was a golden age when the dominance of the white man was eternal, absolute, and beyond question; for the pre-1937 Court, paradise lost was the brutal grandeur of the Gilded Age, when the U.S. Constitution was read as absolute protection of massed wealth and privilege, and barred any concession to human equality.

In our time, the Court's aggressive stance flows from a deep well of conservative resentment at the social changes of the past 50 years—at the very idea of a multicultural republic, of changes in the status of women and the liberty of sexuality, and of any challenge to the cultural dominance of a peculiarly white American strain of conservative Christianity.

Whatever former President Donald Trump's own future may be, he lives on in a Supreme Court determined to Make America Great Again.

The Supreme Court in 2022 is an entirely different institution from the Court of 2016. Most obvious is the turnover of personnel. Four new justices have joined the high bench since then—as many as turned over in the previous 16 years. But the Court has also drastically changed its

jurisdiction and procedures, most importantly with the rise of the emergency, or "shadow," docket—a toolbox of temporary emergency orders and procedures that allows the justices to intervene in lower-court cases at any point it chooses, awarding "provisional" victory to favored litigants. The Court has used the shadow docket to intervene without allowing trials in the district courts, oral argument in any appellate court, full briefing by the parties, participation by the public through "friend of the court" briefs, or sometimes, in the end, any explanation—only a one-line order that often does not even make clear which justices voted which way. The shadow docket has become a kind of appellate star chamber, resolutely closed to the public or the parties, and aggressively wielded in aid of the Court's reactionary project.

Most important, of course, is a new jurisprudence, unveiled in the raft of radical decisions at the end of the 2021–22 term. The results were startling enough—an end to constitutional abortion rights, a sweeping expansion of Second Amendment gun rights, and a stunning cutback in the government's power to address the climate crisis. Equally startling was the Court's new method of reaching results. Precedent no longer matters, the justices have said, if five members of the current Court consider a line of cases "egregiously wrong." That category, the new majority hints, sweeps into one wastebasket the major civil society landmarks of the past half century—cases that have enhanced racial and sexual equality and LGBTQ rights.

For this Court, and for constitutional law in the 21st century, 2022 is Year Zero. Nothing is settled law; nothing is certain.

What happened? The change in the Court is the result of a sustained, highly organized, entirely conscious campaign to annex the federal judiciary to the political party system. It is not just a matter of a change in judicial personnel—in the wedging, through banana republic tactics, of three hard-right justices onto the Court. That change has taken place amid a profound and irreversible shift in the very idea of law, and in the meaning of judicial independence. Though we can look back at the historical record and see where both sides have broken the norms that undergirded the old system, the recent assault did not come from "both sides." It was initiated, organized, and conducted by the GOP, the conservative legal movement and its billionaire backers, and the politicized wing of white evangelical Protestantism.

Democrats and progressives have responded, spasmodically, clumsily, and to little effect, but they too have made statements and taken actions that violate traditional ideas of respect for judicial independence. One could argue that this response is not only appropriate but necessary—because a norm that binds only one side of a dispute is not a norm; it is a trap. The Court's majority has thrown in its lot with the right wing of the GOP, and we must deal with it as the partisan institution it now is.

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The story begins in February 2016, when Justice Antonin Scalia died suddenly. Though in actuarial terms a vacancy on the Court had been looming for some time, the news of Scalia's death seemed to catch Washington's grandees by surprise—with one exception. Within two hours of the announcement, Senate Majority Leader Mitch McConnell had stated that President Barack Obama should not be permitted to fill the vacancy, and in the remaining few months of

Obama's term, McConnell was able to block both hearings and a vote on Obama's nominee, then Judge Merrick Garland.

There's more to that story than meets the eye. Though McConnell pretended to base his intransigence on democratic principles—the *next* president should pick the next justice, he asserted, since the end of Obama's term was relatively near—neither he nor his conservative backers even tried to make that claim persuasive. The real objection to Garland, openly expressed, was the looming failure of three decades of effort at a conservative takeover of the Court. Republican Senator John McCain supported the blockade of Garland, but warned that if Hillary Clinton was elected in the fall, he would oppose any nominee she offered during her four-year term. "The Senate is fully within its powers to let the Supreme Court die out," Cato Institute counsel Ilya Shapiro wrote in *The Federalist*.

On March 6, even after McConnell's pledge to block a nominee, Republican Senator Orrin Hatch had publicly suggested that, if Obama nominated Garland, Hatch would support him. Hatch, a former Senate Judiciary Committee chair, was respected on both sides of the Senate aisle and had spent more than 35 years in the judicial confirmation business. As early as 2010, Hatch had been pushing Obama to nominate Garland instead of a more liberal nominee. Garland had been seen for some time as a conciliatory centrist nominee who in a normal time would attract significant Republican support. Obama went ahead with the nomination 10 days later. Hatch refused to support it.

Blocking the Garland nomination set off a fairly complex political earthquake. In May 2016, Donald Trump announced that, if elected, he would pick Scalia's replacement from a list of 11 sitting federal judges—all of them white, all but three of them male, and every one of them chosen with the approval of the conservative Federalist Society and Heritage Foundation. Until that moment, the economic, political, and religious groups for whom the Supreme Court was a dominant political issue had hung back from candidate Trump. Though Trump was now taking a hard conservative line on the courts, he was a former Democrat, and one who had once proclaimed himself pro-choice. Considering Trump's erratic personality, and his random musings about the courts, these groups reasonably feared that his nominees might be random or whimsical, rather than ideological—TV personalities like Jeanine Pirro, for example, or cronies like former New York City Mayor Rudy Giuliani, or even his own sister, Judge Maryanne Trump Barry, whom the right loathed for her willingness to enforce abortion rights precedent. But now Trump made them a solemn promise that he would name only the judges they approved.

This may be the only promise Donald Trump ever kept.

That list changed the entire campaign. In a larger sense, many observers believe it is the reason why Trump got the party's nomination in July and came out of the convention with a unified party behind him, then eked out an electoral win despite losing the popular vote in November. It was important in another way: It marked the first time in history that a presidential candidate produced a list of specific names from which he would pick his Supreme Court nominees. It put the Court—not its overall direction, but the specific names of potential members—on the ballot

for the first time. In 2018 and 2020, as well, specific judicial nominees—Brett Kavanaugh and Amy Coney Barrett—became part of the electoral mix. Trump's list also signaled to certain sitting federal judges that they were under consideration for the Court—a signal that might very well affect their conduct in high-profile litigation in the meantime. By 2020, Republicans began to demand that candidate Joe Biden release his own list, as if naming specific judges in advance were a normal part of politics rather than a gross violation of judicial norms.

The attack on judicial independence was well under way by this time. Even before Scalia died, Trump's campaign speeches featured scathing attacks on Chief Justice John Roberts, a profoundly conservative George W. Bush nominee, because Roberts had voted with the liberals in one important case—the 2012 challenge to the Affordable Care Act. Trump's nominees would never deviate from the conservative legal movement's line, he implied. In fact, in October 2016, Trump assured American voters that his Supreme Court justices, once safely seated, would "automatically" overturn *Roe v. Wade*.

Thus, by Election Day, Trump and the Republicans had firmly lashed the nature of the Supreme Court to party politics. But Trump was not only promising a specific result in a specific case, radical as that promise was; he was also systematically calling into question the legitimacy of any court that defied the will of the conservative legal movement—or, for that matter, Trump's own preferences.

That attack had begun before he was elected: In June 2016, Trump took aim at Judge Gonzalo Curiel of the Southern District of California. Curiel, an American citizen born in Indiana, had refused part of Trump's motion for summary judgment in a civil fraud case against Trump University. After apparently brooding over this slight, Trump exploded, calling for an investigation of Curiel because he was "Mexican" and thus anti-Trump.

The Curiel attack produced signs that Trump's disdain for judges and the law was being noticed within the Court's marble palace. Shortly after candidate Trump's attack on Curiel, Justice Ruth Bader Ginsburg dropped her mask in an interview with Adam Liptak of *The New York Times*: "I can't imagine what this place would be—I can't imagine what the country would be—with Donald Trump as our president," she said. She noted the ages of some of her fellow senior justices, and suggested that a Trump presidency could reshape the Court in a malign direction. "For the country, it could be four years. For the Court, it could be—I don't even want to contemplate that." Four days later, in a written statement, she apologized: "On reflection, my recent remarks in response to press inquiries were ill-advised and I regret making them. Judges should avoid commenting on a candidate for public office. In the future I will be more circumspect." The words, however, could not be unsaid. They crossed a line against public partisan statements; but, of course, they simply expressed the alarm many people within and outside the court system were feeling. In that sense, they were what journalists call a "Kinsley gaffe," in honor of Michael Kinsley, the renowned editor who first identified the phenomenon by which a public figure gets into trouble by saying something everyone knows to be true.

The threatening attack on Curiel and on the legitimacy of a court was only the first of many that came from Trump before and during his term in office. When, in February 2017, District Judge

James Robart of Washington enjoined Trump's first "travel ban" aimed at Muslim countries, Trump promptly attacked him as a "so-called judge." When District Judge William Orrick III of California stayed an executive order attacking "sanctuary cities," an official White House statement accused Orrick of presenting "a gift to the criminal gang and cartel element in our country." When the Ninth Circuit Court of Appeals refused to lift Orrick's order, Trump publicly threatened to break up the court. (It was a threat that he apparently saw as genuine: The journalists Peter Baker and Susan Glasser write in their new book, *The Divider: Trump in the White House, 2017–2021*, that after the sanctuary cities ruling, Trump ordered his homeland security secretary, Kirstjen Nielsen, to "cancel" the court and "get rid of the fucking judges.") When District Judge Derrick Watson of Hawaii enjoined the second travel ban, Trump said Watson ruled against him "for political reasons." When District Judge Jon Tigar of California enjoined an executive order restricting the ability of migrants to apply for asylum, Trump said, "This wasn't law, this was an Obama judge."

By November 2018, the attack on Tigar, coming at the end of a drumbeat of assaults on judges, produced something beside which Ginsburg's indiscretion seemed minor—a sitting chief justice directly rebuking the president: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges," Roberts said in an official Court statement. "What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."

Even more remarkably, the president, rather than accept the rebuke, tweeted a counterattack, aimed at the chief justice by name: "Sorry Chief Justice John Roberts, but you do indeed have 'Obama judges,' and they have a much different point of view than the people who are charged with the safety of our country." As a grace note, Trump used scare quotes to ridicule the very idea of independent judges: "It would be great if the 9th Circuit was indeed an 'independent judiciary.' "

In his fourth year in the White House, Trump lifted his judge-bashing sights and demanded that Justices Sonia Sotomayor and Ruth Bader Ginsburg recuse themselves from "all Trump or Trump-related matters." His excuse for attacking Ginsburg was her 2016 statement; the claim against Sotomayor was that, in a shadow docket dissent, she had criticized the Supreme Court majority for being too eager to use its emergency powers to set aside challenges to administration initiatives. The party in that case was the secretary of homeland security, or, in other words, the U.S. government—not the president officially, and certainly not Trump personally. But it was clear by this point that Trump regarded himself as the government, and the courts as underlings.

Some of the judges Trump attacked had to have special security assigned to them afterward to deal with the threats they received. Of the handful of judges Trump attacked by name, two were Latino, one was Native Hawaiian, and two were Jewish.

Trump had attacked Ginsburg even before he entered the White House, but his rhetoric took on the level of actual threat when directed against another Jewish target, Judge Amy Berman Jackson of the District Court for the District of Columbia. Jackson had presided over a jury trial

in which Trump's longtime crony Roger Stone was convicted of lying to Congress and tampering with witnesses during a congressional investigation into Russian meddling in the 2016 election. Stone displayed flagrant contempt of court, at one point posting to Instagram a photograph of Jackson with rifle cross hairs near her face; now, as the sentencing drew near, the president waded in with mob-style musings about the judge. Nine days before Jackson was to sentence Stone, Trump tweeted a demand that she grant his friend a new trial based on a flimsy allegation against the foreperson of the jury.

At this point, the president had arguably slithered from impropriety into crime—attempting to corruptly influence or intimidate a federal judge presiding over a criminal prosecution. (Under 18 U.S.C. § 115, conviction of making such a threat can carry a maximum 10-year prison sentence.) The overstep was so blatant that the chief judge of the D.C. District Court, Beryl A. Howell, issued a Roberts-style rebuke: "The Judges of this Court base their sentencing decisions on careful consideration of the actual record in the case before them; the applicable sentencing guidelines and statutory factors; the submissions of the parties, the Probation Office and victims; and their own judgment and experience."

The caution did not discourage either Trump or his attorney general, William Barr. After the unseemly attack on Jackson, Trump blasted the Justice Department lawyers trying the case for requesting a "horrible and very unfair" sentence. Barr, on the same day, ordered the trial team to alter its recommendation and sharply reduce the penalty requested. The career DOJ lawyers then withdrew from the case. Jackson sentenced Stone to 40 months in prison—and Trump then commuted the sentence to eliminate prison time altogether.

The Roger Stone commutation was a gross misuse of the presidential pardon power, but hardly the worst. Trump's most notorious pardons, of course, were issued to former members of his own entourage—Stone; former campaign manager Paul Manafort; campaign aide George Papadopoulos; campaign strategist Steve Bannon; and former National Security Adviser Michael Flynn. But in his assault on the very idea of independent courts, the most important pardon was his first—that of the former sheriff of Maricopa County, Arizona, Joe Arpaio, on August 25, 2017.

If in retrospect the sensation of shock still had any meaning, the Arpaio pardon, coming almost at the beginning of the new administration, would be shocking. Arpaio had been convicted of "criminal contempt" of the federal district court in Phoenix, because he "willfully" violated a direct court order to stop his deputies from detaining Latinos in the county based on nothing more than their national origin. In her opinion, District Judge Susan Bolton wrote,

*Credible testimony shows that the Defendant knew of the [District Court's] order and what the order meant in regards to the [Sheriff's Department] policy of detaining persons who did not have state charges for turnover to ICE for civil immigration violations. Despite this knowledge, Defendant broadcast to the world and to his subordinates that he would and they should continue "what he had always been doing."*

Trump's pardon—announced on Twitter before Arpaio had been sentenced—sent a powerful message to law enforcement personnel who might be tempted to emulate Arpaio's lawlessness:

The president was on their side, even if they defied the courts. And it sent the converse message to judges: Trump shared Arpaio's contempt for them and for the law and Constitution they were charged with enforcing—and if they displeased him, he would overrule them.

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Viewed month by month, these events illuminate a steady drumbeat of attacks on the idea of courts as institutions independent of politics or the executive branch. That these were not merely whims of the unpredictable Trump was made clear by the willing participation of his attorney general, a previously respected figure whose years in Washington had earned him a reputation as an "institutionalist" who understood the need for the Justice Department to remain independent of partisanship. In a speech to the Federalist Society in November 2019, however, Barr laid out a thoroughly Trumpist view of the Constitution as an order where the courts are subordinate to the executive branch. Federal court rulings against the administration, and congressional investigations of its conduct, he said, were largely illegitimate. Trump's offenses, in fact, merely involved breaches of etiquette—and embodied the popular will: "While the president has certainly thrown out the traditional Beltway playbook and punctilio … he was up front about what he was going to do and the people decided they wanted him to serve as president," he said. Nonetheless, he said, the courts had defied Trump:

*In recent years the judiciary has been steadily encroaching on executive responsibilities in a way that has substantially undercut the functioning of the presidency. And the courts have done this in essentially two ways. First, the judiciary has appointed itself the ultimate arbiter of separation-of-powers disputes between Congress and the executive, thus preempting the political process, which the Framers conceived of as the primary check on interbranch rivalry. And second, the judiciary has usurped presidential authority for itself, either (a) by, under the rubric of "review," substituting its judgment for the executive['s] in areas committed to the president's discretion, or (b) by assuming direct control over realms of decision making that heretofore have been considered at the core of presidential power.*

Together, the Arpaio pardon, the attorney general's "warning" to allegedly overreaching judges, and the joint attack by Trump and Barr on Judge Jackson sent a powerful message of disrespect, contempt, and defiance of the judiciary. All these formed an unavoidable political and psychological background as the Trump administration went about remodeling the U.S. Supreme Court.

That remodeling was part and parcel of the assault on law. And in early 2017, amid the furor over Trump's travel ban, the White House took an initial step in that process by unveiling its first Supreme Court nominee, Neil Gorsuch.

The Gorsuch nomination arrived bearing a partisan stench—the vacancy he was named to fill only existed because of Mitch McConnell's insistence on blocking the Garland nomination at the end of Obama's second term. Though the Gorsuch hearings unfolded with an air of normality, the Democratic bitterness about the "stolen seat" was palpable and culminated in a Democratic filibuster against the nominee. McConnell then invoked the so-called nuclear option, which

removed the filibuster from Senate rules regarding high court confirmations. Gorsuch was confirmed, 54–45, on April 7.

Partisan appearances did not seem to bother either the nominee or his Senate patron. On September 21, Gorsuch made twin appearances in Kentucky alongside McConnell, who introduced him to audiences in Louisville and Lexington with words of self-praise for his nomination and confirmation.

It is easy to forget that McConnell's Senate seat is an elective office, and the majority leader faced reelection in 2020. Press observers were quick to note that the appearances had some of the air of a campaign swing, with Gorsuch, who owed his seat to the senator, praising McConnell to his constituents. This seeming partisanship raised some eyebrows at the time; though friendships, and even collaboration, between politicians and justices were not unknown, such an overt display of gratitude and implied electoral support was highly unusual.

Gorsuch also appeared a week later before a conservative group at the Trump International Hotel, sending a pointed signal about where he stood in Washington's partisan wars. And the Kentucky victory tour, it turned out, was the first of what became a seemingly obligatory pilgrimage by Trump Supreme Court nominees to praise McConnell in front of his political constituency.

The Court itself, meanwhile, began to display a remarkable degree of deference to Trump—and to tolerate some overt displays of contempt by the administration. In April 2018, with Gorsuch newly seated, the justices heard arguments over the third and final version of Trump's travel ban. In a surreal moment, then Solicitor General Noel Francisco assured the justices that the president's order had no relationship to his promised "shutdown" of Muslim immigration, his frequent statements that "Islam hates us," or his repeated musings about closing mosques in the U.S. "The president has made crystal clear, on September 25, that he had no intention of imposing the Muslim ban," Francisco told the Court. "He has made crystal clear that Muslims in this country are great Americans and there are many, many Muslim countries who love this country, and he has praised Islam as one of the great countries of the world."

This statement was, to coin a phrase, a tissue of lies. Trump had not, in fact, withdrawn his Islamophobic comments, and he had refused to apologize. In addition, there had been no presidential statement on September 25. Francisco submitted a letter to the Court on May 1, retracting the reference to September 25; he cited, instead, a relatively ambiguous statement by Trump on January 25, 2017, that the first "travel ban" was "not the Muslim ban, but it's countries that have tremendous terror." Conspicuous by their absence in that interview were any words about "Muslims who love this country." That part of Francisco's statement seemed to have been invented out of whole cloth.

Though this was not the first time in history the solicitor general's office had made inaccurate representations to the Court, a blatant misstatement of fact is unusual and was, to Court observers, disturbing. The solicitor general is known in Court circles as "the tenth justice," because the Court has often relied on that office's advice about whether a given case is worthy of consideration or not. Constitutional norms for decades had required solicitors general to maintain

some independence from the administration they serve, with a parallel duty to furnish truthful and disinterested advice to the Court. (Francisco's misstatement was so blatant that it triggered comparisons to the systematic falsehoods the solicitor general's office had tendered to the Court during the Japanese internment cases at the end of the Second World War.) But the administration paid no penalty when the Court issued its decision in the travel ban case in June 2018. In an opinion by Roberts, a five-justice majority approved the ban. Roberts did not even inferentially note that the administration had lied to the Court; Trump's consistent promises of a "Muslim ban," and his virulently Islamophobic statements, Roberts wrote in Barr-like terms, were irrelevant:

*Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.*

The opinion demonstrated extraordinary deference to a president's "neutral" proclamation. Considering that every Republican justice voted for the ban, and every Democratic justice voted against it, the picture as of June 2018 was of a highly partisan majority eager to defer to even the most extravagant initiatives of the Trump administration.

In addition, as the University of Texas professor Stephen Vladeck pointed out, the Court majority had by this time begun to employ emergency orders, often unsigned and unexplained, to support Trump's most controversial policies. Vladeck noted that the new conservative majority had apparently come to see any delay in the implementation of a Trump administration program as an "irreparable harm" to the government.

The solicitor general's office had traditionally been loath to ask the Court for "emergency relief" in any but extraordinary circumstances—in cases such as death penalty appeals, for example, or genuine emergencies that demanded an immediate decision. Under Trump, the office had begun to seek these shadow orders so regularly that it seemed the administration regarded the Court almost as an administrative agency whose function was to assure the smooth implementation of Trump's agenda without meddling by lower courts. It was a role the new majority was happy to play.

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Even though he had gained more sway over the Supreme Court than any president since Franklin D. Roosevelt, in the spring of 2019 Trump demonstrated that he was willing to threaten dire consequences unless judges, like executive officials, complied with his wishes at once and without question.

The occasion for this display was the census case, *Department of Commerce v. New York*. Almost from the moment it had arrived in Washington, the Trump administration had begun to advocate for a new question on the 2020 census form that asked whether every member of a

household was a U.S. citizen. Census Bureau experts warned that adding such a question would discourage immigrant households from responding at all because of a fear that immigration authorities would gain access to the information. This reluctance would reduce the accuracy of the count. But that reduction in accuracy, it seemed clear, was the aim. Smaller numbers of immigrant responses would mean that areas with high foreign-born populations—largely urban areas that tended to vote Democratic—would be undercounted. Since legislative seats, and many federal aid programs, are allotted based on population figures, this would shift political power and federal resources to older, whiter, more rural, and more Republican areas.

But even in 2019, "This will help the Republican Party" didn't pass judicial muster as a reason for changing the constitutionally required census, so the new administration began a desperate search for another rationale. Commerce Department officials urgently asked other cabinet departments to find a reason, any reason, for needing citizenship data. Those officials refused. After the Justice Department denied such a request, high-level political intervention forced career employees to backtrack and send one, claiming (falsely) that the numbers were needed to enforce the Voting Rights Act.

Once the question was adopted, citizen groups and the governments of immigrant-heavy states and localities, led by the state of New York, filed suit to block it as a violation of the Constitution and the Census Act. On June 27, 2019, the Court decided against the administration, 5–4. Roberts joined the four Democratic appointees; in his opinion, he wrote that a theoretical decision to include the question would be well within the government's proper power, both constitutionally and as a matter of statute. *This* question, however, was "arbitrary and capricious" (and thus invalid in administrative law terms) because the administration had corrupted the process. "Our review is deferential," Roberts wrote, but "we are not required to exhibit a naiveté from which ordinary citizens are free … If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case." This was judicial language for "pants on fire."

But an empty ritual was clearly what Trump had expected, and he reacted with fury, announcing on the same day that he would delay the census until the Court could be convinced to approve the question. That possible delay was, it turned out, illegal—the Census Act lays out a timetable for the decennial count and does not give the secretary of commerce the power to change it. But eight days after the decision, Trump revealed that he was considering adding the question by executive order. This would not be outright defiance of the Court, administration officials explained. Because the Court had held that the Voting Rights Act justification was false, all that would be needed, the argument ran, was a less ridiculous justification. As soon as the administration thought of one, the question could be placed on the census form.

A brand-new justification was theoretically possible—but probably *only* theoretically, because a new rationale for the question would have had to be extracted from the record of the Census Department's deliberations and then subjected to a process of review that, under ordinary circumstances, takes years but would need to be completed within a week or two. Beyond that, it would have required admitting that officials from the Commerce and Justice Departments had lied to the Court.

Lurking in the background was the idea of a direct challenge to the Supreme Court's authority. Only a few days after oral arguments, a reliably pro-Trump legal blogger wrote an outlandish post claiming that Trump had the power to ignore an adverse Court decision. After the case was decided, administration mouthpieces took to *The Wall Street Journal* and *The Washington Post* to suggest that census questions were executive matters in which the Court had no jurisdiction to interfere.

In the end, Trump's defiance failed to materialize, likely for logistical reasons—statutory deadlines required printing the questionnaires before the charade of a new justification could play out. Complicating the task was a botched attempt by Barr to replace the legal team that had argued the case to that point, which was rejected by one of the trial courts hearing the case.

But the message, for those paying attention, was striking: Conservative Court or not, Trump, if displeased, might consider sweeping it aside. The prospect would have been enough to worry a sitting justice, since one truism every new justice absorbs is that the Court has no weapon but persuasion to deploy against a recalcitrant president. President Richard Nixon had floated the idea of defying the Court in *United States v. Nixon*, the case requiring him to turn over the incriminating White House tapes that led to his resignation, but he had backed off in the face of stiff political resistance. Franklin D. Roosevelt, as the Court considered a last-minute appeal by German spies sentenced to death by military tribunals, had sent word to the chief justice by back channel that he intended to execute the defendants regardless of what the Court decided—so the Court ended up rejecting the spies' appeal.

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By 2019, the Supreme Court had gone through another shock. In June 2018, Justice Anthony Kennedy announced his retirement. The ensuing events would erode the Court's neutrality to a stunning degree.

Kennedy had been the centerboard of a conservative majority, keeping it on a measured course when other members had seemed tempted to tack sharply into the wind. Kennedy had joined a three-justice plurality that refused to overturn *Roe v. Wade* in the 1991 *Planned Parenthood v. Casey* decision; he had also been the architect and author of the Court's three major LGBTQ rights decisions between 1996 and 2015. Only two months earlier, in late April 2018,the *New York Times* editorial board had issued an extraordinary "open letter" to Kennedy under the headline "Please Stay, Justice Kennedy. America Needs You."

Subsequent news reports revealed that Kennedy, in a meeting with Trump to inform the president of his retirement, had lobbied the chief executive personally to appoint his former law clerk and protégé, Brett Kavanaugh; Kavanaugh was duly nominated on July 9. Though justices and presidents had sometimes communicated on appointments, there was still something noteworthy about this departure from norms by the usually decorous Kennedy. He may in fact have been emboldened by the open campaign of persuasion directed at him in previous months by the White House counsel's office under the direction of Donald McGahn, who had made remodeling the courts his major objective.

The Gorsuch nomination, the travel ban decision, and the Kennedy resignation, it soon developed, had been only light squalls compared to the storm that now engulfed the Court with the nomination of Kavanaugh.

Late in the confirmation process, a letter to Democratic Senator Dianne Feinstein had outlined charges by Christine Blasey Ford, a professor at Stanford, that, as a teenager, Kavanaugh had sexually assaulted her at a gathering. At Ford's request, Feinstein kept the letter to herself. She took no steps to investigate until the letter leaked. The awkwardness of the timeline was magnified by Kavanaugh's own performance before the committee. His response to the allegations was searingly combative. It contained overtly partisan references—perhaps the first of any such hearing in history—and at least inferential threats of partisan retaliation by Kavanaugh on the Court. Few viewers would forget Kavanaugh's snarling face as he spat defiance at his Democratic critics:

*This whole two-week effort has been a calculated and orchestrated political hit, fueled with apparent pent-up anger about President Trump and the 2016 election, fear that has been unfairly stoked about my judicial record, revenge on behalf of the Clintons and millions of dollars in money from outside left-wing opposition groups. This is a circus. The consequences will extend long past my nomination. The consequences will be with us for decades. This grotesque and coordinated character assassination will dissuade confident and good people of all political persuasions from serving our country. And as we all know, in the United States political system of the early 2000s, what goes around comes around.*

The Senate's confirmation vote on Kavanaugh took place on October 6, 2018, exactly a month before the midterm elections. Even before the 50–48 vote, Trump and the Republican Party had aggressively deployed Kavanaugh's name and testimony for partisan purposes. Votes on Kavanaugh were explicitly linked to the nascent backlash against the #MeToo movement. Trump had begun to mock Ford at his rallies, asking Republican women to "Think of your son" and "Think of your husband" as potential victims of supposedly false allegations of assault.

Immediately after the vote, Kavanaugh was sworn in. He then went to the White House, where Trump, with the full Supreme Court in attendance, blasted those who had opposed his nominee: "On behalf of our nation, I want to apologize to Brett and the entire Kavanaugh family for the terrible pain and suffering you have been forced to endure." Trump then recognized Mitch McConnell and thanked every Republican member of the Judiciary Committee by name.

Kavanaugh told the group, "The Supreme Court is an institution of law. It is not a partisan or political institution. The justices do not sit on opposite sides of an aisle. We do not caucus in separate rooms." The setting and atmosphere rendered this assurance ambiguous at best.

This marked the second election cycle in a row in which specific Supreme Court nominees had been by implication on the ballot. Though previous presidents had, in a campaign context, praised their judicial nominees (Gerald Ford openly boasted of the quality of his nominee, John Paul Stevens), this was something new. Kavanaugh was held up not as an example of judicial excellence but as a rebuke and punishment to the internal enemies of the sitting president and his party—as a new superweapon in the culture wars. It was an impression that Kavanaugh's

grotesque performance in confirmation had helped create, and that was reinforced when he became the second sitting justice to make a campaign-style appearance with McConnell in his home state. (Kavanaugh's visit came only eight months before McConnell faced reelection.)

A specific judicial name became an issue in the 2020 election cycle as well. Justice Ruth Bader Ginsburg, who had battled multiple cancers during her final decade on the Court, died in her Watergate apartment on September 18, 2020, 46 days before the election. Within eight days of her death, Trump had nominated Amy Coney Barrett, a former Notre Dame professor who had been named to the bench only three years earlier. Barrett was a deeply conservative Catholic who made no secret that she was strongly against abortion and *Roe v. Wade*. In 2016, of course, McConnell had said that a president in the last year of his term should not fill a February Supreme Court vacancy; in 2020, McConnell discarded that rule with the equivalent of a cynical shrug. When Barrett's nomination was announced on September 26, early presidential voting had already begun in parts of the country. McConnell shoved the confirmation through the Senate on October 26—just eight days before the election.

Trump made no secret of his expectation that Barrett, once confirmed, would help secure his own reelection: "We need nine justices. You need that. With the unsolicited millions of ballots that they're sending, it's a scam," Trump said on September 22, referring to his claim that mail-in ballots were fraudulent. "It's a hoax. Everybody knows that. And the Democrats know it better than anybody else. So you're going to need nine justices up there. I think it's going to be very important. Because what they're doing is a hoax, with the ballots."

This was the first time in history that a president had advanced a specific Supreme Court nominee on the grounds that their vote would ensure that he remained in office.

McConnell later assessed the political advantages of his manipulation of the Supreme Court issue: "In terms of the politics of it, I think [the issue of Supreme Court seats] was helpful for us in 2016 and 2018, and it is clearly, I think, a plus in 2020 as well. So, good for the country and good for us politically as well."

About a year after the election, Barrett became the last of the three new justices to make a campaign-style appearance with her senatorial patron, Mitch McConnell. After being introduced by McConnell on a stage at the McConnell Center at the University of Louisville in September 2021, Barrett told the crowd, "My goal today is to convince you that this Court is not comprised of a bunch of partisan hacks." This odd statement ranks beside "I did not have sexual relations with that woman" as among the least convincing statements ever uttered by an American public figure.

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The makeup of the Court had, meanwhile, become an important electoral issue for Democrats as well as Republicans. In March 2019, the presidential candidate Pete Buttigieg announced his own "court reform" plan, largely taken from a proposal published by Daniel Epps (disclosure: a family member) and Ganesh Sitaraman in *The Yale Law Journal*. From that moment on, the issue became an inescapable part of the 2020 presidential campaign. From the end of the

Kavanaugh confirmation forward, Democratic progressives had repeatedly urged that, if successful in taking over Congress in 2020, Democrats should enact term limits, or expand the Court to counterbalance Trump's appointees.

Trump and the GOP campaign then began to accuse Biden of planning to "pack the Court." In their chaotic first presidential debate, Trump repeatedly demanded that Biden release a list of nominees, as if such a list were a standard part of presidential campaigns rather than a shredding of centuries-old norms.

Biden largely ignored the "pack the Court" taunts. But he injected Court appointments into the debate as well. On February 25, 2020, Biden, in a primary candidate debate in South Carolina, promised, "I'm looking forward to making sure there's a Black woman on the Supreme Court, to make sure we in fact get every representation." Accounts of the campaign agree that the promise was in response to a specific request from Representative James Clyburn, the most influential Democrat in South Carolina, and that Clyburn's endorsement salvaged a Biden campaign that had seemed to be floundering.

The promise pushed up against, though did not quite break, pre-Trump norms. In 1980, candidate Ronald Reagan had promised to nominate a woman to the Court—a promise that helped him overcome a looming "gender gap" among women voters. Trump's first list of nominees, in May 2016, had been all white—functionally, the same as saying, "I will name a white person to the Court." His second list, in the fall of 2016, included one male Black judge, though no Black woman. Again, this was a promise to *not* name a Black woman—but it was made with the obligatory hypocrisy politicians employ about racial promises, especially those that favor the white majority.

Nonetheless, Biden's was the first announcement of an explicit racial qualification for a potential nomination, and was jarring to some observers on both sides. What is striking, however, is how pale a compromise of norms it seems in the context of the years since 2016. When in early 2022 Biden fulfilled the promise by nominating Judge Ketanji Brown Jackson to fill the seat Stephen Breyer was leaving, Republicans attempted to make an issue of it, disparaging her as unqualified because of the "Black woman" pledge; that attack got little traction with the public, so in the end they took to accusing her of coddling pedophiles. Nonetheless, she was confirmed on April 7, 2022.

During the campaign, the accusations of a "court-packing" plan proved so bothersome to Biden that on October 22—four days before Barrett was confirmed—he promised that, if elected, he would name a commission to study ways of reforming the Court. This was a classic politician's method of defusing an issue he didn't want to address; the eventual commission was made up of largely reliable centrist figures and academic insiders, and its eventual report, to no one's surprise, recommended no changes.

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After the election, in late 2020, Trump attempted to enlist "his" Court in his effort to remain in office. Insider accounts suggest that he expected the Court to hear a case that would allow the

conservative majority to throw out Joe Biden's victory. Most of the post-election challenges, however, could not, under the rules of federal jurisdiction, go directly to the Supreme Court—and the lower courts that heard these cases threw out all but one of the dozens of challenges brought by the national Trump campaign and local Republican groups. So uniform and categorical was the rejection that the Supreme Court prudently chose not to get involved.

However, on December 7—only a week before the electors were to cast their votes—Texas Attorney General Ken Paxton fulfilled Trump's wishes by filing an original jurisdiction complaint in the high court on behalf of Texas against the states of Pennsylvania, Georgia, Michigan, and Wisconsin. (Lawsuits between states are among the few kinds of cases that go straight to the Supreme Court.) Paxton contended that the swing states' executive officials and courts had violated the U.S. Constitution by interpreting their state law and constitutions to limit the authority of the state legislature over presidential elections. He also made the outlandish claim that Texas had a "judicially cognizable interest in the manner in which another State conducts its elections"—that is, that the Lone Star State was somehow injured, in constitutional terms, because swing state voters had freely chosen to award their states' electors to a candidate opposed by Texas voters. Paxton ended with the ridiculous request that, without finding the election results inaccurate, the Court should nonetheless set aside the vote in each defendant state and order the legislature to choose new electors.

This lawsuit was a bad joke, surely understood as such even by Paxton, and by Senator Ted Cruz, who volunteered his services to argue the case if it came before the Court. Trump, however, clearly regarded the lawsuit as the moment he had remade the Court to meet. At the White House he entertained several red-state attorneys general who had joined Paxton's lawsuit, and he ensured that the justices knew what was expected of them by tweeting, "The Supreme Court has a chance to save our Country from the greatest Election abuse in the history of the United States. 78% of the people feel (know!) the Election was RIGGED."

On December 11, the Court dismissed Texas's motion in an unsigned order that mildly stated, "Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections." The next day, Trump angrily tweeted, "The Supreme Court Really Let Us Down. No Wisdom, No Courage!" Even after leaving office, he has continued to insist that the Court betrayed him and the public. In a February 2021 speech to the Conservative Political Action Conference, he said,

*They didn't have the courage, the Supreme Court, they didn't have the courage to act, but instead used process and lack of standing. I was told the president of the United States has no standing. It's my election, it's your election. We have no standing. We had almost 25 … if you think of it … we had almost 20 states go into the Supreme Court so that we didn't have a standing problem. They rejected it. They rejected it. They should be ashamed of themselves for what they've done to our country. They didn't have the guts or the courage to make the right decision. They didn't want to talk about it. We had the case led by the great state of Texas. Eighteen states went in. "You don't have standing." Let's not talk about it. They didn't have the guts to do what should be done.*

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On January 6, 2021, the joint session of Congress to count electoral votes was nearly blocked by a bloody mob attack on the Capitol building by pro-Trump rioters brandishing guns, clubs, and nooses. Not for more than a year would the country learn that Virginia Thomas, the spouse of Justice Clarence Thomas, had been among those attending the "Stop the Steal" rally that turned into the violent attempted coup, and that she had repeatedly urged White House officials to block Biden's accession to office. The proof was found in texts subpoenaed by the House special committee investigating the January 6 riot. Trump, by then out of office, asked the Supreme Court to block disclosure of the texts, but the justices voted 8–1 to require it. The sole dissenting justice was Clarence Thomas.

Prominent Democrats had begun as early as 2019 to warn in stark terms that the Court was headed for trouble. In August, Senator Sheldon Whitehouse had filed an amicus brief in a gun rights case joined by four other Democratic senators that ended with this stark warning to the justices: "The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be 'restructured in order to reduce the influence of politics.' Particularly on the urgent issue of gun control, a nation desperately needs it to heal."

In early 2020, Senator Majority Leader Chuck Schumer, at an abortion rights protest in front of the Court, said, "I want to tell you, Gorsuch; I want to tell you, Kavanaugh: You have released the whirlwind, and you will pay the price. You won't know what hit you if you go forward with these awful decisions." Schumer quickly apologized for his choice of words, which he said were about a political price—but the violence of the rhetoric was, by historical standards, startling.

A year later, on March 10, 2021, Whitehouse, a frequent critic of the Court's ethical rules, presided over a Senate Judiciary hearing entitled "What's Wrong With the Supreme Court?" The hearing laid out the progressive critique that the Court was not only extreme but was also influenced improperly by "dark money" committees and advocacy groups like the Federalist Society.

The unease plainly affected the justices as well. On April 6, Justice Stephen Breyer delivered the annual Scalia Lecture at Harvard Law School, in which he warned against the "perils of politics" as a threat to the Court's legitimacy. Questions about that legitimacy, he suggested, were the fault of the news media, which could prevent further damage to the Court by not using terms like *liberal* and *conservative* to describe either justices or their decisions. There was something plaintive, indeed almost pathetic, about Breyer's attempt to justify the new Court in terms of Courts of the past that had ruled against racial segregation. The lecture, and the subsequent small book based on it, seems in retrospect to have been aimed at his new colleagues rather than at the public. A few months later, Breyer announced his impending retirement; Biden fulfilled his campaign pledge by naming Ketanji Brown Jackson, who had served as a district judge and a judge of the Court of Appeals, to replace him.

The unease deepened when, on September 1, the Court allowed Texas to put into effect a radical new law designed to block all abortions after six weeks of pregnancy. Though the decision came

in a short shadow docket order, it implied to most observers that at least five justices were prepared to overrule *Roe v. Wade*.

On September 30, Justice Samuel Alito appeared at Notre Dame Law School, where he echoed, in more aggressive form, the claim that it was the media, not the Court, that was out of step. He particularly attacked coverage of the Court's role in the Texas case, singling out an article by the *Atlantic* magazine staff writer Adam Serwer for what Alito called a "false and inflammatory claim that we nullified *Roe v. Wade* … We did no such thing, and we said that expressly in our order." Alito's outrage has not aged well; on May 2, 2022, *Politico* published a leaked draft opinion in the abortion case, *Dobbs v. Jackson Women's Health Organization*. The Court was, in fact, preparing to nullify *Roe*—and Alito wrote the opinion.

Within days of the *Politico* leak, the Court was surrounded by high metal fences to protect against demonstrations. The chief and most of the justices adopted a tight-lipped approach to the story, but Thomas, in the mood to lecture the nation on ethics, delivered at a conservative meeting in Texas a eulogy for the old days of the Court. "What happened at the Court is tremendously bad," he said. "I wonder how long we're going to have these institutions at the rate we're undermining them." On May 3, Roberts announced an internal investigation into the leak, to be conducted by the marshal of the Court. As of this writing, no report has been released to the public.

In June, the Court announced formal decisions in its most contentious cases. The shock of the *Dobbs* draft, if anything, grew. The other major decisions—on gun rights, environmental law, Indian tribal sovereignty, and public displays of religion—were written in terms so broad as to seem an open invitation for conservative advocacy groups seeking to roll back existing precedent in a wide variety of areas. In addition, the opinions proclaimed both the Constitution and the Court to be indifferent to the practical consequences of the Court's decisions. Well before *Dobbs* was even argued, it was clear that gutting abortion rights would cause chaos and suffering—the confusion and medical tragedy in Texas had been prominent in the news since the Texas law had taken effect the previous September. By June 2022, it was clear that neither government officials, medical professionals and hospitals, nor pregnant women themselves were prepared for the changes a wholesale rejection of *Roe* would make in obstetric care, maternal health, and, indeed, maternal survival.

The Court's climate change decision, *West Virginia v. EPA*, came at the outset of one of the hottest summers on record, with a heat wave claiming lives across most of the country, terrifying wildfires in the West, and drenching rain and flooding in parts of the Midwest. And it further propounded doctrines that promised to cripple the government's ability to regulate a wide variety of national problems—under a "major questions doctrine" that seemed to suggest that the more important and pressing a problem was, the less power the Court would give the government to address it.

And the gun rights case, *New York State Rifle & Pistol Association v. Bruen*, blasted a hole in gun licensing restrictions only weeks after a gunman killed 21 people, 19 of them children, at Robb Elementary School in Uvalde, Texas.

In each case, the new majority piously disclaimed any concern for real-world consequences. The Court, the majority blandly explained, had no role in assessing the results of its jurisprudence; all that mattered was an abstract doctrine like “history and tradition” or the major questions doctrine. This attitude was best summed up by Alito’s dismissal, in *Dobbs*, of the slightest interest in the practical effect of the reversal of *Roe* on women’s lives, saying it was “an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women.”

The full *Dobbs* opinion had been foreshadowed by the May leak—but no one had seen the separate opinions until the official opinion was released on June 24. The Court’s full decision included a separate opinion by Thomas, in which he explicitly called on the Court to overturn the seminal cases of *Griswold v. Connecticut* (right to contraceptive use), *Lawrence v. Texas* (consensual sex between same-sex adults), and *Obergefell v. Hodges* (same-sex marriage). Alito’s opinion had promised that “nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.” But Thomas’s concurrence made clear that Alito’s assurances had no legal effect, and were probably not even sincerely meant when made, but were instead (like Alito’s earlier claim that the Texas decision did not “nullify” *Roe*) contemptuous gaslighting of the public.

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By June 30, the last day of the 2021–22 term, the Court’s transformation was complete. It had four new justices (Gorsuch, Kavanaugh, Barrett, and Jackson); a new set of procedures (the hypertrophied shadow docket, with its foreshortened, and largely opaque, approach to contentious issues); a new doctrine of *stare decisis* (precedent is entitled to respect unless five justices consider it “egregiously wrong”); a new relationship toward both state governments (frequent filers and frequent winners in conservative-agenda cases) and Congress (extraordinary deference to congressional inaction and little or no regard for congressional statutes); and a disdainful attitude toward the public it nominally serves.

The end of the term promised little respite from the restless activism of the new majority. On the last day, the Court granted review in a North Carolina case that would give the conservative majority a chance to begin to establish the principle Texas had tried to use to overturn the 2020 election. This is the conservative claim, relatively recent in origin and with little history or doctrine to support it, that state courts and election officials may not play any role in setting voting procedures for congressional or presidential elections—that only the “independent state legislatures” can regulate, supervise, and eventually decide these elections. Acceptance of this theory in its full extent would wipe out a large number of voting rights protections erected by state constitutions and court decisions, and in the worst case set the stage for a future case approving the radical change Trump and his supporters had urged—a simple decision by a state legislature to overrule the state’s voters and award electors to the candidate of the legislators’ choice. A second granted case presents a chance to cut back drastically on the remaining protections of the Voting Rights Act of 1965. A third set of cases affords the Court the chance to achieve a long-held conservative aim of eliminating “affirmative action” programs in college admissions.

Public opinion polls showed the Court—by tradition the most popular branch of the federal government—gaining record-low shares of public approval. Democratic politicians found that criticism of *Dobbs* produced a powerful response on the campaign trail. There was also a new atmosphere within the Court, with personal and ideological divisions sharper and respect for the institution weaker. During the run-up to the 2022–23 term, Roberts took a turn promulgating the "It's the public's fault" explanation for the Court's unpopularity: "Simply because people disagree with an opinion is not a basis for questioning the legitimacy of the Court," he told an audience at the Tenth Circuit's biennial judicial conference on September 9. Three days later, Justice Elena Kagan issued what seemed like a pointed response in a speech at a New York synagogue: "Judges create legitimacy problems for themselves … when they instead stray into places where it looks like they're an extension of the political process or where they are imposing their own personal preferences." On September 27, Alito issued a fiery rebuke, implicitly accusing Kagan of an ethical breach: "It goes without saying that everyone is free to express disagreement with our decisions and to criticize our reasoning as they see fit. But saying or implying that the Court is becoming an illegitimate institution or questioning our integrity crosses an important line."

The public rancor; the partisan lineup of the justices; the aggressive tone of the majority's opinions; the leaks that surrounded *Dobbs*; the freedom with which the justices speak out in nonjudicial settings; the willingness of the conservative justices to lend themselves to seemingly partisan organizations, events, causes, and even individual politicians; the ostentatious disregard by Clarence Thomas of even the most basic norms of impartiality—all of these resemble nothing so much as the workings of a legislative branch of government, charged with setting the policy, social, and even religious agenda for the nation. Our Supreme Court is now something akin to the Guardian Council that ensures religious conformity within the "democratic" government of the Islamic Republic of Iran.

This Court is not what we have recognized for 75 years as a legal institution, and the role it seeks to play is not the one Americans have accepted—sometimes reluctantly—during that time. Like the Taney Court in 1857, like the pre–New Deal Court in the 1930s, it seems to be grasping for unchallenged control of American politics and government. And as in 1857 and 1937, the Court's power grab presents a destabilizing challenge to America's political institutions, and to the American people.

The end of this crisis is hard to foresee, and the proper response by the people is difficult to be sure of. But one thing is clear: Democratic forces in our society have no choice but to challenge the Court's pretensions to omniscience and omnipotence. For all its roaring and bluster, the post-Trump Court majority is six unelected judges cowering behind a curtain, where they demand obeisance but refuse to make the slightest gesture toward earning it.

Resistance to a lawless Court is not lawlessness itself; it can be adherence, and respect, for the law against which the Court has sinned. After the Taney Court's power play in the *Dred Scott* decision, Abraham Lincoln was elected president, in part because of a backlash to the Court's embrace of slavery. In his first inaugural address, Lincoln told the nation that to resist and challenge the Court was not the same thing as challenging the rule of law itself:

*I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government … At the same time, the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.*

There is little evidence in our politics or culture that the public is willing to surrender its rights to Clarence Thomas and Samuel Alito—at least not without a fight. The future of this Court will be settled, in large part, by the response of the voters. As the early-20th-century humorist Finley Peter Dunne wrote, the Supreme Court follows the election returns. If the assault on *Roe*, for example, does not damage the Republican Party, then its partisan judges will strip more rights. If Republican candidates suffer, however, those judges may hesitate. If elected Democratic leaders make a feckless response to judicial aggression, the Court will grab more authority. If they respond strongly, the Court majority may hesitate. If the voters prize their rights, then they will preserve them. If not, then they will lose them.

Our better angels will not rescue the nation. We the people must.