

In Sable and Black Robes

You're gonna light up the skies, I can see it /
You're God's favorite child, boy, believe it

—Lana Del Rey, “You and Me”

1

ONE OF THE most striking features of the modern public ritual initiated when a candidate is named by the president to the Supreme Court is the celerity with which all of the relevant actors snap into place. A general spirit of merriment and free-wheeling parlor speculation shifts one day into an aperient tremor across the Beltway papers that the vetting is now “closed,” that a decision “has been made,” that a nomination is “imminent,” culminating finally in a colorless statement issued by the White House establishing a time and date for the coming-out ceremony—: *fumata bianca*. The White House press corps, having for weeks recited the names, ages, judicial temperaments, and alma maters of those they have generally come to regard as the top contenders, converse with each other in code (temperament being a stand-in for ideology, etc.), arrive thirty minutes early to snap pictures of the Speaker of the House coming in with the Secretary of State. The cable news stations will have already cut into their regularly scheduled programming, legal experts will be called into the studio, pundits with J.D.s will be in hair and makeup. Finally, as the clock strikes the hour of coronation, through Cross Hall and into the East Room will walk the president and the triangulated product of what has for weeks been referred to by the national media as a “tricky political calculus,” often

alongside a beaming spouse or mother. “Thank you, Mr. President,” the nominee will say in a set of prepared remarks that typically last no longer than ten minutes. And so will begin the nominee’s elevation out of obscurity, at least briefly, into the highest reaches of celebrity that our political media has to offer.

We call this showering of attention the “Supreme Court nomination process,” and it is perhaps,
with the exception of our presidential elections,
our democracy’s single most elaborate exercise in self-deception.

2

The modern Supreme Court has as its given an institutional composition (a certain number of justices appointed by the president with the advice and consent of the Senate, as specified by our Constitution) and an ideological one. It is the fantastic residue of our democracy’s boundless capacity for magical thinking that we are to speak in certain settings as if this second composition did not exist. It is magical thinking that leads us to believe, for instance, that the application of reasonable and yet mutually incompatible interpretations of the Constitution with respect to divisive public policies takes place inside some cleanroom of the mind, immaculate of the preferences for certain policies over others that even Americans who have not spent their entire lives preparing for careers in public service tend to have. It is magical thinking that leads us to believe, for instance, that the sort of maturation of intellectual instincts that inevitably accompanies a young thinker’s rise from law student to Supreme Court nominee culminates in a sort of *tabula rasa*—a disinterest in, or even ignorance of, the relevant ideological alternatives, and their respective virtues and foibles, that have directed various members of Supreme Courts past toward opposing commitments, and opposing conclusions.

But this is the United States Congress we are talking about, and the entertainment of magical thinking is their business here. To observe the hearings that culminated in the recent elevation to the Supreme Court of Neil Gorsuch, the conservative jurist nominated by Donald Trump to replace Antonin Scalia, is to remember the extent to which nominees from either party have gone to uphold that particularly American delusion—that the border separating the values one must rely upon to adjudicate jurisprudential controversies, and the values that one must rely upon to adjudicate *all other controversies*, including the controversies at the heart of our nation’s contentious social fabric, is somehow clear enough to erect on top of which an impermeable wall.

“I’m not quite sure how I would characterize my politics, but one thing I do know is that my politics would be, must be, have to be, completely separate from my judgment.” This was Elena Kagan, President Obama’s second appointment to the Supreme Court, during her confirmation hearings in 2010. “I prove my fidelity to the law, the fact that I do not permit personal views, sympathies, or prejudices to influence the outcome of cases.” This was Sonia Sotomayor, Obama’s first appointment to the Court, in 2009—suggesting, presumably, that a preference for one of several viable interpretations of the law, the existence of which would provide the sole basis whereby a case in controversy would percolate to the attention of the Supreme Court, is not in fact a “personal view.” It is a premise that has become so deeply embedded into the accepted narrative of our political life that a belief in its essential veracity transcends party lines: the belief in an “apolitical judiciary.” When confronted about a statement of qualifications he had submitted to the Reagan administration in 1985 endorsing the view that “racial and ethnic quotas should not be allowed,” and that “the Constitution does not protect a right to an abortion,” Samuel Alito is reported to have assuaged senators wary of his confirmation to the Supreme Court by assuring them: “I don’t give heed to my personal views. What I do is interpret the law.” (“I believe he

was very sincere in what he said," Dianne Feinstein, the pro-life Democratic senator from California, told reporters after the meeting.)

This astonishing suggestion that "personal views" are somehow distinct from "interpretations" implies a construction of interpretation as something clean-edged, objective, impartial in character. And yet each interpretation we settle on inevitably derives from the same wellspring of values that gives rise also to our sympathies and prejudices—in other words, our "personal views." Interpretations are necessarily subjective, are necessarily constructed by our preferences and biases and the life experiences that inform them, are necessarily constricted by what we intuitively do and do not see. In the cracks of every ambiguity of text—whether the text in question is the Constitution, a judicial precedent, or *Finnegans Wake*—there exists space for multiple interpretations to flourish, and the degree to which any plausible interpretation is more or less viable than any other depends entirely on where the interpreter initially stands—depends entirely, that is, on the interpreter's "personal views."

These statements should not be controversial, and yet they stand in marked opposition to the segregation of "judicial opinion" from "ordinary opinion," and the implied elision of any legitimate textual ambiguity that might exist in either the Constitution or our written laws, counseled by the fabulists of our political institutions. To comb through the transcripts of the past three decades of Supreme Court nomination hearings is to encounter again and again a studied recital of this sentiment—articulated here with a touch of pathos by John Roberts during his Senate confirmation hearings in 2005:

The ideal in the American justice system is epitomized by the fact that judges, justices, do wear the black robes—and that is meant to symbolize the fact that they're not individuals promoting their own particular views, but they are supposed to be doing their best to interpret the law, to interpret the Constitution

according to the rule of law, not their own preferences,
not their own personal beliefs.

In other words we *need* these black robes to sustain a more fundamental fiction: that the pronouncements of the Supreme Court emanate from a wisdom uncontaminated by mere “opinion,” proceed from a provenance that is in some way “enlightened,” that is in some enigmatic sense “pure,” that can hold the burden of being the final word on subjects of disputed legality and constitutionality, on matters of life and death, on issues that will change the course of this country and the private fates of its three hundred and thirty million inhabitants enduringly if not irrevocably—and so what a wonderful providence it has been to find again and again a group of impartial observers so ruthlessly disinterested in the attainment of any particular outcome.

3

“There is no such thing as a Republican judge or a Democratic judge. We just have judges in this country.” With this extraordinary pronouncement Neil Gorsuch opened his first day of public testimony before the Senate Judiciary Committee on March 20, 2017, inaugurating the four-day hearings that would determine whether or not he would replace Antonin Scalia, who had died thirteen months earlier, on the Supreme Court.

It is an extraordinary pronouncement for several reasons.

For one, it appeared to signal on the part of Gorsuch a flair for affectation that must have put to rest any fears the White House might have had that their new nominee was simply too earnest or forthcoming to perform the theatrical functions necessary to advance to the nation’s highest court. After all a theater had been built around him, draped in the costume of court proceedings—aside from Gorsuch himself, an astonishing twenty-eight witnesses would be called to testify

either in support of or against the nominee, as if the week had begun with a discussion of the nominee in question and not a dizzying volley of accusations and recriminations about the fate of the previous nominee appointed by the previous president to replace Antonin Scalia on the Supreme Court. As if it mattered to anyone in the room that Jamil Jaffer, a former law clerk of Gorsuch's, thought of his old boss as "the kind of judge that Mrs. Phillips," the woman who had spoken before him, a self-described Republican who had lost her daughter to a 2012 shooting massacre and was now in D.C. to testify against Gorsuch's confirmation, "would want on the bench." As if the hearings themselves were not an event with an outcome computable via an even cursory assessment of the partisan composition of the United States Senate.

The pronouncement would be remarkable even if the context that had enabled its utterance—a judicial nomination by a president whose inauguration earlier that year had triggered the largest single-day protest in American history—had not itself been a brazenly partisan do-over of a failed nomination by the previous president in which the partisan affiliations had been scrambled, the relevant actors misaligned, the celestial line connecting the Supreme Court nominee's political party with the president's and the Senate majority leader's not there.

The story begins, as do so many of its kind that have at its center the question of noble succession, with the death of a favored child—in this case the death of Antonin Scalia, a Republican-appointed Supreme Court justice, in the absence of a Republican president to replace him. "I am not happy about the intrusion of politics into the judicial appointment process in my country," Scalia was fond of saying, this being the third-to-last sentence of "Mullahs of the West: Judges as Moral Arbiters," a speech the late justice began presenting in 2005 as "the staple of his 'Dead Constitution Tour,'" writes biographer Bruce Allen Murphy, "following his failure to be named chief justice," and which Scalia resurrected sporadically—first in Warsaw in 2009 and then at various

state bar conventions (Utah, North Carolina) over the last ten years of his life. “But frankly, I prefer it to the alternative, which is government by judicial aristocracy.”

I found myself thinking a lot about these words—“judicial aristocracy”—as I began contemplating the celestial line connecting Antonin Scalia’s place in the stars with that of his now-successor, Neil Gorsuch, and that of all the other favored sons and daughters that had come before them (four daughters, to be exact, and 107 sons). “Raised in the psychological security and academic rationality of a bourgeois Roman Catholic family during the 1940s and 1950s, [Scalia] had the life of an exceptional child of the East Coast Roman Catholic intelligentsia,” writes political scientist Richard Brisbin in *Justice Antonin Scalia and the Conservative Revival*.

Whatever his political leanings during his formative years, he was exposed to a world in which merit derived from adherence to formal rules of behavior.... His early life isolated him from the economic uncertainty facing working-class America throughout the post-World War II cycles of boom and recession. His education in elite urban Roman Catholic institutions distanced him from confrontations with nativist hostility to Italian-American Catholics.... These patterns of elite contacts would mark much of his life, and they would contribute in subtle ways to his perception of law and politics as he moved from success to success as lawyer, professor, federal official, and academic pundit.

This blue-toned characterization of Scalia’s early life, standing in stark contrast to the suggestive *America America* intimations hinted at by Scalia’s Wikipedia page and elsewhere (the word “immigrant” appears two times in the opening paragraph of Scalia’s profile on Oyez, his delivery at Mercer Hospital in New Jersey to two U.S. citizen parents notwithstanding), offers a potent counterpoint to the

positioning of Scalia's life by the dominant narrative into the two great engines of American social mobility that have prevailed over America's self-conception ever since its founding: the American immigration system and the American meritocracy. (An instructive example: "Because of Scalia's dismal record on secrecy and surveillance as a federal appellate judge, the libertarian *New York Times* columnist William Safire attacked him in 1985 as 'the worst enemy of free speech in America today,'" Jeffrey Rosen wrote in *The New York Times* in 2009. "Yet when Scalia was nominated to the Supreme Court a year later, the Senate, giddy at his heartwarming ethnic rags-to-meritocracy story, voted to confirm him 98-0.")

It is within the dislocation suggested by these words ("in which merit derived," "isolated," "distanced," "patterns of elite contacts," "from success to success") that one begins to discern the foundations of some larger psychic dreamscape, distinctively hierarchal, distinctively upward-facing, and against which the trajectory of someone whose demonstrably superior accomplishments—valedictorian at Saint Francis Xavier Military Academy, valedictorian at Georgetown, an LL.B. from Harvard Law School, *magna cum laude*, topped off by a professorship at the University of Chicago Law School and then the various court appointments that followed—might come to be fathomable as the end result of a particular set of circumstances interplayed against a particular set of aptitudes that might or might not be independently remarkable, but at any rate not the end result of those aptitudes themselves.

Now. A word about those aptitudes, since our fascination with them as isolable entities sets the tone for everything else, and the lineages of things can be the hardest to uncover. The only child of a meticulous mother who "made a conscious effort to join the right clubs" and whose high school classmates predicted would have a future "writing theme essays," and a cerebral father whose erudite passions involved amassing "a great collection of Italian lyrics and sheet music" (this per Joan

Biskupic's 2009 biography *American Original*), the young Scalia appears to have been a midcentury proof of concept of what today would be recognized by any reader familiar with the child-rearing habits of the upper middle class as "helicopter parenting," telling C-SPAN's Brian Lamb in 2008: "[My mother] devoted her life to making sure I did the right things, hung out with the right people, joined the right organizations.... She made it her job to know who I was hanging out with." (Scalia's own son, a graduate of the University of Chicago Law School and a former United States Solicitor of Labor, puts it more bluntly: "They made him an education project," he told Biskupic in 2007.)

The meritocracy as a feature of American life is perhaps best understood as a machine for self-replication, never mind its presentation to the American public as an immigration system.

The bill of goods sold to us is this: cream rises.

We take for granted the dual premises that cream is everywhere, locatable at any point within what is by all accounts a deeply disordered distribution of social circumstances across the population span of a single country (I recall a recent afternoon in downtown New Haven when a woman approached me as I was smoking on the front porch, asking for my help in reclaiming a coffee table that my neighbors had discarded onto the curbside, only to understand moments later that what she had intended to reclaim was not the coffee table at all but the contents of the recycling bin next to it: "Why would anybody throw this *out*?" she had said, holding up a half-empty bottle of Lysol), and that the distance between these circumstances is traversable, amenable to the contours of one's own aptitude, or else the brightness of one's own star. We are told that the borders separating the classes are permeable (after all, we all go to the same schools as children—or else we all go to school as children—or else we all once were children), and that the visas and entry cards required to emigrate to a higher class can be strung together out of a series of travel documents ("class rankings" to illustrate

our industry, “standardized test scores” to illustrate our aptitude, “application essays” to illustrate our resourcefulness), forged and lovingly crafted over the course of two decades, beginning no later than age five.

As with all delusions, much ado is made of the exceptions.

Much ado is made of the colors within the gray, as with any psychic register that sustains itself through nourishment by way of its most top-heavy characters (the children of the poor who are permitted to rise if they work hard enough, the children of the rich who are permitted to fall if they do not)—we are at bottom hopeful creatures, responsive first and foremost to pinkish hues. Never mind the backdrop against which these exceptions become evident. Never mind that what is billed to us as openings are in fact pores—the backdrop of scarcity that abundance requires in order merely to be discerned, the preponderance of low-lying land masses (low-lying neighborhoods, low-lying opportunities, low-lying labor) that demand, by virtue of how we have carved out the topography, to be filled. To encounter this argument on its own preferred terms—its preferred terms being totalization—is to encounter a vision of the world in which absorption is everywhere: the absorption of dominant values, the absorption of dominant wisdom, the absorption of underclass neighborhoods into the new and the niche, and the underclass who once lived there into one of several relegated states, often the criminal justice system; the absorption of smaller fish into bigger ones and bigger fish into celestial ones (celestial ledger sheets, celestial value systems, celestial reputations, celestial personalities), and the absorption, finally, of aptitude into money and power as aptitude’s only lawful end state, rendered immediately upon absorption into evidence for itself.

It is this totalization that I remember when I think back to my own experience at Yale Law School, a life outcome attributable to my full and unthinking acquiescence to the terms of the argument as a swaggering and demonic twenty-two-year-old—the totalization of a psyche that demanded first and foremost its own self-elevation into every last sphere

of public life—: public entanglements, public virtues, public opinion, public service. Bourgeois sociopathy was the mode de rigueur there. We all wanted the world to change, and we all wanted to be the ones to do it, but of course what we all had in common was our own remoteness from a world that was less decisively on the up and up.

This fundamental cognitive dissonance seemed to warm the waters for everything else. “Congratulations—you’re off the treadmill now,” are the six words that can most reliably be counted upon to appear in the dean of Yale Law School’s opening address to incoming students when we first show up at Yale, although a more truthful description of what we were in fact to look forward to at Yale might have involved an evocation of Lilly Pulitzer sundresses and Baltic blue blazers, ambling up the steps of a sheltered walkway, a very different kind of treadmill; of unassuming smiles and unassertive small talk, mediated by a quiet fixation on each participant’s social capital (or “what one brings to the table,” ancestrally, professionally, intellectually, ethically, with decreasing capacity to inspire), and all the attendant paroxysms that such preoccupations with signals pitched beyond the range of human hearing tend to arouse—it was the ethos of a particle accelerator melded into the ethos of a regatta.

The clock bells of self-ascension were everywhere.

“*Let your own extraordinariness ring*” seemed to capture the prevailing register of the place—paths were smoothed out for us, bureaucratic ironies understood to be the given of all ordinary confrontations with American life (at the department of motor vehicles, for instance, or else at state schools) ironed out. To call the proceedings decadent would be to miss the point entirely—of course it was. The achievement of the proceedings, and its sole remarkable attribute, was to cloak the proceedings inside an envelope that could be deemed respectable by the liberal-minded meritocrats who populated the estate. Unenviable mental health outcomes were the norm there, although anxieties tended to fixate on stakes that were unrelatable to an extreme (the paper that if not finished would

consign the writer to a lifetime of alcoholism and menial labor as an associate at DLA Piper, but that once completed could elicit a recommendation letter to clerk for Ruth Bader Ginsburg).

Presiding over the estate, of course, were the victors of self-ascension themselves. Prominent faculty members formed centers of gravity around whom rotated minor moons referred to as, with minimal irony, “groupies.” In its idealized form—which is to say in its public-facing form—this alchemy of luminance and ambition was thought to generate a hyper-radiant superstructure that in many ways could be said to be a microcosm of the meritocracy itself. Cream rises, but toward the service of others. Cream rises, but toward the betterment of all, toward the reduction of human suffering and alienation, toward the advancement of the mean and the low, those bright lights plucked out to shine for all of our country’s vast stretches of dark—“a rising tide lifts all boats,” the victors of self-ascension appear to believe, in practice if not in theory, and whether they identified with the Austrians or not (in fact they almost certainly did not, “respectability” being the most valuable token in the game).

That this superstructure tended to generate only confirmations of its own luminance—luminance that could be isolated and reintegrated into “curricula vitae,” into “academic homepages,” and, for a certain category of aspirants, into “candidate bios,” to be submitted for elevation to a higher and higher rung of the meritocracy, higher and higher rungs of American status, power, and influence—seldom attracted any attention to itself, so much attention the superstructure tended to pay, by way of its reflexive fixation on more winning narratives, to the causes it was supporting and to the people it was helping, held up like shields.

The concealment of dubious preoccupations behind the rhetoric of praiseworthy ones is hardly a recent innovation, and yet the totality with which the victors of self-ascension could have their cake and eat it too had a tendency to take the breath away. Colorful ironies abounded. Lamentations about

the plight of refugees at the Southern border melded into and out of easily lamentations about an upcoming nor'easter's "implications" for a ski trip to Vermont, while a professor famous for his work on inequality could throw a house party for his law students interested in his work on inequality where the waiters served Comté and Rioja in bowties. If mendacity could be said to be a type of poetry, then nowhere was the poetry of self-ascension more persuasive as a controlling idea during my first two years at Yale than in the deformation of the psychic landscape around a single psychic center: a professor turned author of a bestselling parenting memoir whose diamond Rolodex was understood to extend equally into the worlds of *Fortune 500* companies, the elite media, and judges at every point of the political spectrum ("All she has to do is make one phone call for you," a classmate noted to me during my first week of orientation, "and you're in"), and whose outsized social power at the law school seemed to obtain as much from the thrill she derived in dangling it above avid snouts as it did from her skillful ascension of her favored sons and daughters into careers at the highest rungs of the federal judiciary—or, in the case of one former student, as the author of his own bestselling memoir about his childhood in Ohio.

Her preferred milieu, ex-sorority girls and virile young men of a certain build who had served in the military, was supplemented and thereby shielded behind a richly avowed interest in the "disinherited." This avowed interest, the favored attire of early twenty-first century meritocrats throughout the upper perches of the American estate (these being the years, you see, when those Viennese chickens have come home to roost), had the curious effect of rendering the unfathomable unspeakable, and the unspeakable unimpeachable. An atmosphere of silence and suppression blanketed over the demonstrable irregularities of a place that seemed to draw its cues aspirationally from Nicholas D. Kristof's columns in *The New York Times*, and operationally from the wedding announcements three sections later, obscuring the degree to which a well-connected and well-appointed professor who

outwardly had made the elevation of “marginalized voices” the project of her life could insinuate herself into the drinking lives of her students, could indulge with her favored charges (on those drinking nights, behind closed doors) in gossip that idled dispiritingly on the dating lives and sexual feasibility of students not in attendance, and could throw, as a show of unity, lavish house parties at her Gatsbyesque estate for the student body at large before pruning, as a show of strength, the most physically promising of whom to “stay for the afterparty.” Concealed power, after all, is the precondition of indefinite power, and it was concealed power that pulsed just beneath the sultry and subtropical rhetoric of the place—here’s was a psychic landscape pitched to the accrual of social capital, attuned most acutely toward each participant’s own self-elevation, and only nominally so to the elevation of those ideals that would become each successful participant’s *pièce de résistance*, brand identity, *raison d’ascension* and calling card.

It all seemed with the distance of high altitude to be such a fitting terminus—power that has evolved structural defenses, elaborate immunities to the scorn that power (the shiny side of the coin, the other side being subordination) inevitably invites—freshen the young aspirants with gold scents, infuse the air we breathe with rosewater and send us off to take our places in the world. How do the ideals of childhood chip away? They chip away like this: with blood-red geraniums that sway and flutter unobtrusively in a courtyard, with oil paintings of movers and shakers that line the walls of the classrooms and visions of bounty that loom tall and unimpeded against an otherwise barren horizon, lauded and canonized and forever in full bloom. The tears we point to are the tears we cry for the downtrodden. The sweat we point to is the sweat of year after year of letting our own extraordinariness ring, against a backdrop of neverending bells. “*Keep up the good work,*” the stridency of those bells seem intended to say. “*Now isn’t the time to let your guard down—there’s still plenty of room up here at the top,*” implying either the perpetual inflation of the

utopian class or else appreciable downward trends from utopia to dystopia, neither of which appears to be in evidence.

What is instead in evidence is the rhetoric of goodwill.

In a country of winners and losers in which the losers are in perpetual thrall to the goodwill of the winners, goodwill, it seems, is suddenly everywhere. Goodwill drips down from the lips of the powerful, coating the tempered iron of power's chassis with the restraint and self-mastery of a politician's platitudes. Goodwill, that sweet nectar, is taught to our children. What is cream, after all, if not first and foremost a substance that is crafted, churned by a father who has integrated all of the fashionable ways of understanding the world, and molded to specification by a mother who knows where good schools are? The objective markers that the spirit of the meritocracy demands are provided for, most reliably, not by spontaneous emergence but by *replication*—: aptitude, ancestral capital, an excess of ambition, an ability to take all that is disjointed and paradoxical about one's own experience of life and extract, ruthlessly and mechanically, for "narrative potency" (an instinct, in other words, to see a spotlight shining onto the ground and running over to it), and finally, meritocracy's latest favorite child, an excess of *compassion*, an excess of *goodwill*, an excess of caring about others: these are all ingredients that can be cultivated and distilled and rejoined into preferred quantities—each ingredient a byproduct of parents who look after their children, or else friends in high places who look after each other.

Goodwill, in this light, has now become a substance hostile to hierarchy that can be called upon to vindicate hierarchy itself, a counter in a larger game, a substance that floats and floats, lightening the density of cream and inducing it to rise—secured, with a wink and a nod, into cream's "personal views." From this initial mendacity all subsequent mendacities breed—that river swell of good intentions and self-effacing smiles that have no other place to go but *flow*, unrelentingly, toward the suppression of cognitive dissonance and the recital of doublespeak, toward a hallucination of

America in which demonstrable misfortunes can be held perpetually at arm's length, in subordination to more useful ones—the daughter of a Harvard-educated corporate executive and a governor of the Federal Reserve who graduated Phi Beta Kappa from Stanford before becoming a Rhodes Scholar, the son of a prominent Colorado attorney and the first female head of the E.P.A. who attended prep school at Georgetown before becoming a Supreme Court nominee, the contents of the Harvard and Yale student facebook's bursting open into page after page of the best and brightest of what the bourgeoisie has to offer.

A meritocracy is an aristocracy sans aristocracy's self-suspicion.

This is what I've been trying to tell you.

There is no such thing as a Republican judge or a Democratic judge. We just have people who care about others in this country.

4

In the torrent of what passed for self-examination by the national media in the aftermath of Donald Trump's electoral victory on November 8, 2016, two factors quickly gained ascendancy in the national media's scramble to explain how a 71-year-old reality T.V. vulgarian could win the White House: a higher-than-expected turnout by white working-class voters, and James Comey's announcement ten days before the election that the FBI had reopened its investigation into Hillary Clinton's private email server.

What did not capture the media's attention was the Supreme Court seat that had by then been vacant for 237 days.

Yet in the weeks and months before Election Day, Antonin Scalia's Supreme Court seat had become an issue invoked by both candidates at nearly every campaign stop (Trump: "Even if you dislike Donald Trump, I'm going to put great conservative justices on"; Clinton: "I want a Supreme

Court that will not reverse marriage equality, that will not reverse *Roe v. Wade*, that will stand up against *Citizens United*”), and the sentiment that “perhaps no single presidential decision is as consequential as choosing Supreme Court justices” was already reverberating across every newspaper and every cable news channel and into every echo chamber of the political internet. When I think back to my own experience speaking with friends in the days and weeks leading up to the 2016 election, days and weeks in which the disintegration of self-respect seemed to be the only stable attribute of our democratic process, I remember hearing a lot about Trump’s boorishness and nativism and misogyny, about Clinton’s foreign policy record and her ties to Wall Street, but the phrase I kept hearing again and again was “the Supreme Court.”

That open seat.

That waiting justice.

On the night of November 7, 2016, three separate exit polls by ABC, CNN, and Fox News each found that Supreme Court appointments were “the most important factor” for 21 percent of voters. Those voters broke for Trump over Clinton by an average of 16 percent. I can still remember watching T.V. as the results came in—Trump had just won Florida and he was poised to win Wisconsin and Pennsylvania, and a shell-shocked Chris Matthews was telling Rachel Maddow on MSNBC: “I heard another source today that the people out there on the Republican side have a real problem, they hold their nose on Trump, but they do care about the Supreme Court.” “I heard that from John Boehner a week ago,” Nicolle Wallace chimed in, “I said what’s your message, he’s out there obviously as a private citizen now giving speeches, and he said my message is exactly as you articulated, in the same words: hold your nose and vote for him for the sake of the Supreme Court. It obviously resonated.” I can still remember the moment it dawned on me that not only Trump’s candidacy but the Senate Republican majority would prevail, that some recombinant of nativism and nausea with the status quo had

ushered in a conservative deluge, looking at the boyfriend who I might or might not marry in the spring but at any rate enjoyed having the right to do so, and thinking, thinking and perhaps even saying out loud: *And there it goes.*

There what goes?

There goes the Supreme Court.

5

What we have witnessed in the past half century are the fireworks of the American meritocracy exploding all around us in full bloom, and the country that those soaring streams of gallant light have left for us in their aftermath. They begin as charcoal and sulfur, mined from the depths of the upper middle class, and they can go their whole entire lives waiting for the moment a fuse is finally lit, a hand reaches down from above, and a shoulder is tapped behind closed doors—those ladies and gentlemen-in-waiting who have spent the most formative years of their lives saying the right things and doing the right people and staying on for the afterparty. On January 3, 2017, fifty-six days after Donald Trump was elected president of the United States and 294 days after President Obama had emerged into the White House Rose Garden with his new nominee, Merrick Garland, and a warning to Senate Republicans that a failure to convene hearings for his new nominee would suggest “a process for nominating and confirming judges that is beyond repair,” Merrick Garland’s nomination to the Supreme Court officially expired.

Twenty-eight days later, Donald Trump nominated Neil Gorsuch to Antonin Scalia’s seat on the Supreme Court.

Neil Gorsuch of Colorado, like Merrick Garland of Illinois, had graduated Phi Beta Kappa from an Ivy League college (in Gorsuch’s case, Columbia; in Garland’s case, Harvard) and had gone on to Harvard Law, finishing in the same graduating class as Barack Obama before going on to clerk for the Supreme Court, for Byron White and then

Anthony Kennedy, had done a stint at George W. Bush's Department of Justice and had been named, in 2006, by George W. Bush to serve as a judge for the Tenth Circuit Court of Appeals. He had, in other words, moved in his passage through life from accomplishment to accomplishment, or success to success—cobbling together, as a former employer of Merrick Garland's once put it to *The New York Times*, “a résumé that makes you want to cry.”

Now look.

It is worth pausing to consider here the degree of restraint and self-mastery that the sort of person with a “résumé that makes you want to cry” must inevitably harbor: the sort of person who could inspire in his friends compliments like, “If anybody was going to be the president, it was going to be Neil Gorsuch” (or, in the case of Merrick Garland, “Look at his record. Every choice is virtually perfect”), the sort of person who could, after being handpicked by Donald Trump from a list of twenty-one names supplied to him by the Heritage Foundation and the Federalist Society—it is worth pausing to consider here the degree of restraint and self-mastery that such a person must inevitably harbor to look the Senate Judiciary Committee in the eyes, and say with a straight face:

“There is no such thing as a Republican judge or a Democratic judge. We just have judges in this country.”

Restraint and self-mastery, polished with a coat of affability, saturated every aspect of Neil Gorsuch's Senate testimony on March 21 and 22, 2017, revealing a man whose commitment to evasion and equivocation extended all the way to his inability to name his favorite fishing stream in Colorado—a throwaway lobbed to him by the Republican senator from Idaho (“Do I have to answer this question, Mr. Chairman?” Gorsuch asked to polite laughter from the gallery. “I'd be happy to share with you privately my views on this subject—my experience is though that once the word gets out, then it's not my favorite spot anymore.”). Here was a man affable enough to correct himself when the phrase “undocumented alien” spontaneously tumbled out of his

mouth (“—immigrant, sorry”), a man who would cite several times at the hearings a case in which he had found in favor of a petitioner who happened to be an undocumented immigrant, a case whose ruling in fact demonstrated an interest in curtailing the power of federal agencies, as somehow dispositive of his concern for the ordinary American, “and sometimes the non-American.” A man who would go on to suggest that merely sitting on a panel that had replaced a judge for “perhaps” using language that “might” bear on a man’s ethnicity (“arguably”), without explaining what position he himself had taken on the panel, could somehow function as a character-revealing detail.

On *D.C. v. Heller*: “Senator, I’d respectfully respond that it is a precedent of the United States Supreme Court.”

On *Shelby County v. Holder*: “I’m happy to say *Shelby* is a precedent of the United States Supreme Court. It’s a recent one, it’s a controversial one, I understand that.”

On *Gideon v. Wainwright*: “Mr. Chairman, it’s certainly a seminal decision of the United States Supreme Court, there’s no doubt about it. It’s a very old decision of the Supreme Court now. It’s been reaffirmed many times. There’s a lot of reliance interest built around it.”

On *Griswold v. Connecticut*: “Senator, it’s a precedent that’s now fifty years old. *Griswold* involved the right of married couples to use contraceptive devices in the privacy of their own home and it’s fifty years old. The reliance interests are obvious. It’s been repeatedly reaffirmed. All very important factors, again, in analyzing precedent.”

On *Roe v. Wade*: “Senator, again, I would tell you that *Roe v. Wade*, decided in 1973, is a precedent of the United States Supreme Court. It has been reaffirmed. The reliance interest considerations are important there and all the other factors that go into analyzing precedent have to be considered.”

On *Bush v. Gore* (a decision which notoriously limited its holding to “present circumstances”): “It’s a precedent of the United States Supreme Court and it deserves the same respect as other precedents of the United States Supreme Court.”

Not the intransigence of his refusal to offer any insight into his personal views but the fact that this refusal was predictable, expected, “baked into the system,” is the remarkable feature here. Gorsuch’s performance—and it was, like the State of the Union or anything else a politician involves themselves with that unfolds in front of a camera, a performance in every way—had been baked into the script of the “Supreme Court nomination process,” and all Neil Gorsuch had to do was play his part correctly. To wonder if some ejaculatory fireworks by a senator on the other side—himself angling for a ten-second cut on the evening news—might distract the nominee from reading the script correctly, is to wonder if a Frisbee might alter the path of a comet.

This is why it is important to understand the sort of person we are talking about here. We are talking here about the sort of person whose preternatural instincts for restraint and self-mastery have gotten him to not so much a nomination hearing but a finish line. We are talking here about the sort of person whose elevation past the finish line hinges on his ability to indulge our public fables one last time, to play in front of the T.V. cameras one final role—the role of a judicial technocrat that is neither a Republican or a Democrat, an exasperated sitcom father who floats freely above the riffraff of politics, a cipher in black robes whose capacity for speaking about the principles and doctrines underlying various Supreme Court controversies is matched only by his facility for speaking in platitudes and generalities when confronted with a question that comes anywhere close to grazing his mind for an opinion of his own.

We are talking here about the sort of person who has been preparing for his confirmation hearings all his life.

What happens on the Supreme Court has policy ramifications for not only a set of petitioners and respondents but for every

citizen in the United States (and sometimes the “non-American” as well), and not the text of the Constitution but an 1803 decision by the Supreme Court to grant itself the power to invalidate Congress’s laws and the president’s actions made it so. When we think of how our country has transformed in the past two and a half centuries, we tend to think of individual strongwomen and strongmen, events that changed everything, marches and explosions and assassinations, cultural transformations that had as its source no single wellspring, certain presidents and certain icons, and we tend to think of the Supreme Court.

Our *Miranda* rights.

Interracial marriage.

Contraception.

A woman’s right to choose.

The desegregation of public schools.

I remember being assigned to read Plato’s *The Republic* by Mr. Phillips at Bellaire High School in Houston and falling in love with the idea of philosopher-kings. “This is the way society should be organized,” I remember telling Mr. Phillips, “by benevolent rule.” I stopped believing in benevolent rule the moment I understood our truest motivations, our deepest reasons for doing anything at all, are either forever self-interested or else forever unknowable. Neil Gorsuch was confirmed to the Supreme Court by the Senate on April 7, 2017—I remember watching his swearing-in ceremony in the White House Rose Garden three days later live on T.V., watching Anthony Kennedy as he administered to Neil Gorsuch the oath of office as Donald Trump looked on, watching Ruth Bader Ginsburg in her off-white blazer and dark glasses sitting next to Stephen Breyer in the front row, and wondering which of these eight justices the Heritage Foundation and the Federalist Society will get to replace next.

Gorsuch, who until his nomination to the federal judiciary in 2006 by a Republican president had been a card-carrying member of the Republican National Lawyers Association, continued to maintain throughout his twenty-hour hearing

that a “canon of ethics” precluded him “from getting involved in any way, shape, or form in politics.” There is a reason why, he said, “judges don’t clap at the State of the Union, and why I can’t even attend a political caucus in my home state to register a vote in the equivalent of a primary.” (It is worth pausing to consider here what sort of impression a man must have of his role as a federal appellate judge on the brink of rising to the Supreme Court that he should construe an inability to “clap at the State of the Union” or “attend a political caucus in his home state” as a net loss in his political efficacy.) It is one thing to acknowledge that our federal judges, as a result of a hyperdysfunctional judicial appointment process fashioned out of fourteen words in the Constitution, have ideological orientations that are if not “political in essence” then at least “predictable in consequence”—and then to dispute the value or significance or actionable implications of this observation. It is another thing to reject this observation altogether.

And yet there it is.

“There is no such thing as a Republican judge or a Democratic judge. We just have judges in this country.”

This statement would stay with me well after I had finished watching Neil Gorsuch’s confirmation hearings, during which he reflexively responded to any question about his four-decade-long involvement in conservative politics with the sentence: “Senator, judges have to stay out of politics”; would stay with me well after I realized that the face he had put on at the Senate hearings would be generally commended by the national media as “affable” and “congenial” and “clean-cut,” the face of a good ol’ boy from Colorado who had gone on to Columbia and Oxford and Harvard Law, and that any recognition of his testimony as a sustained two-day-long exercise in obfuscation would dissemble along party lines; would stay with me well after I had learned that Justice Gorsuch in his first two months on the Supreme Court had sided with Justice Sotomayor 40 percent of the time, with Justices Ginsburg and Breyer and Kagan 53 percent of the time, with Justice Kennedy 73 percent, with Justice Roberts 80

percent, with Justice Alito 93 percent, and with Justice Thomas, widely regarded to be the most conservative member of the present Court, 100 percent of the time.

A popular emphasis on a nominee's congeniality and affability and the presence of certain professional and educational affiliations functions only to give the nominee's actually relevant affiliations a place to hide, helps only to conceal from the American public that the nominee's "personal views" were all that mattered for the nominee's selection by the White House in the first place. This element of the "Supreme Court nomination process," unlike what unfolds publicly at the Central Hearing Facility of the Hart Senate Office Building, is abstruse, clandestine, and unabashedly fabulized—we do not know precisely how the nominees' names will be culled or on what basis or by whom. "They," and not the public, will know all they need to know about the finalists' ideological leanings and personal views. "They," and not the public, will counsel the finalist on how to obfuscate those leanings and views effectively.

There is no such thing as a Republican judge or a Democratic judge. We just have judges in this country.

It is one of the fables about our political process that we have not only inculcated our bright young things into believing, but punished them for not repeating—those bright young things who walk the procession every year from Harvard Yard or University Chapel or Stanford Quad to an internship on Capitol Hill, and then to Yale Law, to a clerkship on a Court of Appeals and then the Supreme Court, to a year or two at Latham & Watkins and then five or six at the Department of Justice and then, if all goes well, if the bright young thing is affable and congenial and has said the right things and shaken hands with the right people, to the attention of an organization like the Federalist Society or one of its many aspiring Democratic analogues, to a seat on the federal judiciary, and then maybe, just maybe, if the right person were to become president and the right person were to resign or die, to a seat on the Supreme Court.

To a greater degree than Congress or even the president, we have been conditioned to look to the Supreme Court to perfect the soul of our union. We look to the Supreme Court to interpret not only our laws, which may or may not be riddled with ambiguities, but our Constitution, which demonstrably is. We have discovered inside of those ambiguities the constitutionality and unconstitutionality of slavery, the constitutionality and unconstitutionality of segregation, the constitutionality and unconstitutionality of sodomy laws, the constitutionality and unconstitutionality of laws banning same-sex marriage, the constitutionality of forced sterilization and ethnic internment, the unconstitutionality of bans on corporate political speech. We are told that any one of these precedents can change at any time, be overturned by the will of some future Court. We are told to trust the justices who created these precedents, and to trust the justices who overturn these precedents, because in each and every instance they were not acting on their "personal views." We are told that in order to execute his or her functions correctly, we must learn as little as possible during the nomination process about a judge or justice's "personal views." We are told that the nomination process is a functional check on the judge or justice's power, a check that guarantees the judge or justice's "independence," and that this independence justifies the judge or justice's lifetime seat on the high court.

In short, we are told to trust those black robes.

The Supreme Court is the closest thing our country has to a benevolent despot, to unchecked elite rule, to a permanent class of philosopher-kings. I think of all those smart, affable, clean-cut boys and girls I walk past in the corridors of Yale, all the big words they use and all the wonderful fates they must be settling into in their minds. I think of all the stories they'll be able to tell from their time at the bottom of the pyramid, all the backs they'll scratch and all the fables that they've yet to learn. What would I want to know that they know before they put on those robes, and become our philosopher-kings? It is a question I suddenly realize arrests me completely. It occurs to

me suddenly that there will not be much for the rest of us to do, the great many of us who will not make in our lifetimes that walk from Harvard Yard to Latham & Watkins to the Robert F. Kennedy Building and then to the Supreme Court, as our attention spans dwindle and our democratically-elected institutions congeal with each passing year into partisan paralysis, there will not be much for the great many of us in this country to do but to turn off the T.V. and wait, to divert ourselves with idle amusements, to distract ourselves with petty bickering and even pettier controversies, to pretend we are doing something by “speaking up” about the bickering and “keeping up” with the controversies, to get out the “vote,” to make ourselves “heard,” to take action “today,” to turn on the T.V.—

and wait.

2017