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# The Supreme Court as an Instrument of Oppression

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If you focus on the Supreme Court's expansion of equal rights since the 1950s, you could see Justice Samuel Alito's stunning, leaked draft opinion as a shocking, anomalous reversal, a decision at odds with the trajectory of the court.

But in doing so, you would also have to ignore the fact that for much of the court's history, it has been used as an instrument of oppression.

The potential for persecution is always present in the court, lurking like a recessive gene, waiting for an opportunity to express itself.

Opponents of equality know this well. That's why they focus so heavily on the courts. It is why Senator Mitch McConnell stole an appointment from Barack Obama and defied his own rationale for doing so — because it was an election year — to rush Amy Coney Barrett onto the court.

There are no inviolable rules for those bent on oppression. There is only winning, at all costs, no matter the casualties. Conservatives would abide a boor like Donald Trump because he could give them the judges they wanted, the judges who are now poised to reverse federal abortion protections.

The court is a product of the framers of the Constitution. And, for all their flashes of brilliance, they made some terribly flawed decisions about our government. That's why originalists, those who believe that judgments by the court must conform to how the founders understood the Constitution when it was written, are so dangerous.

As Thurgood Marshall put it in a 1987 speech, when the founders wrote “we the people” in the preamble, “they did not have in mind the majority of America's citizens.” They did not see white women as equal citizens. They didn't see Black people as citizens at all.

As Marshall would say: “I do not believe that the meaning of the Constitution was forever ‘fixed’ at the Philadelphia convention. Nor do I find the wisdom, foresight and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a Civil War and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.”

And yet the originalists know that they can turn that clock back. They know the horrendous history of the court, and they want it to rise again.

It was the court in 1857, in the Dred Scott case, that ruled that the framers believed Black people were “beings of an inferior order” and “so far inferior that they had no rights which the white man was bound to respect and that the Negro might justly and lawfully be reduced to slavery for his benefit.”

As Douglas A. Blackmon laid out in his brilliant book, “Slavery by Another Name,” it was the court that in 1883 “ruled that the Civil Rights Act of 1875, the one federal law forcing whites to comply with the provisions of the 14th and 15th Amendments — awarding voting and legal rights to Blacks — could be enforced only under the most rare circumstances.” He wrote, “Civil rights was a local, not federal issue, the court found.”

Alito used similar logic in the leaked draft of his decision that would overturn Roe.

It was the court that sanctioned the architecture of Jim Crow in its “separate but equal” ruling in the 1896 Plessy v. Ferguson case. And it has continued to hand down oppressive rulings since then.

In 1927, the court upheld the forced sterilization of the disabled. In 1944, it upheld the internment of Japanese Americans. In 1986, it upheld sodomy laws in Georgia.

And now the court has signaled a willingness to revisit some of its previous rulings that increased equality and curbed oppression. In 2013, the court gutted the Voting Rights Act, and now we are entering a new Jim Crow era, as conservative state legislatures adopt waves of voter restrictions. In just a few short weeks, the fundamental right enshrined in Roe nearly 50 years ago could disappear overnight for millions of American women. What's next? Is anything truly safe? The answer is “no.”

The court is not bound by public opinion, the will of the voters or changing mores.

The court is a permanent council that answers to no one. It can behave as it chooses. The robes can go rogue.

This is the power Republicans want — the power to overrule the will of the majority — and the courts are one of the only areas where that power can be guaranteed. Conservative activists have fought for decades for this moment. Two Republican presidents, George W. Bush and Donald Trump (neither of whom won the popular vote when he was first elected), appointed five of the nine justices on the current court.

The average age of those five justices is 61 years old. And, as Forbes noted last year, the average age of a justice leaving the court, by death or retirement, has increased to roughly 81.

Republicans and their judges may well have just ushered in a new age of oppression.

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