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"Justice on the Brink" and the Rule of Law

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CONFERENCE REMARKS:

"JUSTICE ON THE BRINK" AND THE RULE OF LAW

Linda Greenhouse

INTRODUCTION

Linda Greenhouse is a Pulitzer Prize-winning journalist known for her coverage on the Supreme Court for the New York Times between 1978 and 2008. She is currently a Clinical Lecturer in Law and a Senior Research Scholar in Law at Yale Law School. The University of Dayton School of Law and University of Dayton's Law Review had the distinguished honor of presenting Ms. Greenhouse with the first Susan Newhart Elliott Award for Excellence in Legal Scholarship at the 29th annual Dayton Bench-Bar Conference held at Sinclair Conference Center in Dayton, Ohio, on November 5, 2021. At this event, she made these remarks regarding her new book: *Justice on the Brink: The Death of Ruth Bader Ginsburg, the Rise of Amy Coney Barrett, and Twelve Months that Transformed the Supreme Court*. We hope you enjoy her insights as much as we have.[*]

REMARKS

There is no single, one-dimensional narrative that captures the story of today's Supreme Court. My new book does not purport to have one.[1] Rather, it is a month-by-month chronicle of the last term of the Supreme Court, the term with three Trump-appointed justices, written in real-time as the term unfolded. Certainly, inflection points and themes emerged—but not a single narrative, and I do not propose to offer you one this morning.

Instead, I am going to talk about recent events at the Court and put them in context, to try to illuminate what they might mean for the future—emphasis on *might.*

I will begin with something that happened just a week ago.[2] Pending at the Court was an emergency application filed by a Christian-right litigating organization, Liberty Counsel, on behalf of eight healthcare workers in Maine

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[*] Introductory remarks from Editor in Chief of the University of Dayton Law Review, Melissa Mazer, Class of 2022.

[1] *See generally* LINDA GREENHOUSE, JUSTICE ON THE BRINK: THE DEATH OF RUTH BADER GINSBURG, THE RISE OF AMY CONEY BARRETT, AND TWELVE MONTHS THAT TRANSFORMED THE SUPREME COURT. (Random House Publishing Group, 2021) [hereinafter JOTB].

[2] Doe v. Mills, 211 L. Ed. 2d 243 (2021).

challenging the state's refusal to offer a religious exemption from its Covid vaccine mandate for those who work in licensed healthcare facilities. Maine has a number of vaccine mandates and had once offered an opt-out for those with religious or "philosophical" objections. But in 2019, preceding and unrelated to the Covid pandemic, the legislature repealed those exemptions, leaving only medical reasons as a valid excuse for not accepting one of the state's required vaccines. That legislative action was later overwhelmingly approved in a statewide referendum.[3]

The refusal to offer a religious exemption was upheld in Federal District Court and in the First Circuit.[4] Writing for the panel, Judge Sandra Lynch first examined the state's rationale for the healthcare-specific mandate itself. Health care facilities were being hit particularly hard by the pandemic, correlating with the low vaccination rate among their employees—as low as 68% in intermediate care facilities for people with intellectual disabilities, while the state's Center for Disease Control and Prevention said the vaccination rate had to reach 90% in order to protect the vulnerable populations of these facilities.

Next, Judge Lynch evaluated the plaintiffs' claim that the mandate violated their constitutional right to the free exercise of religion. It did not, she concluded, because the rule was neutral and generally applicable. The existence of a medical exemption did not undermine the mandate's neutrality because while medical contra-indications were related to the state's interest in requiring vaccination, religious exemptions were not. Simple "rational basis" review therefore applied, and the state's rule was constitutional.

The emergency application for injunctive relief claimed, to the contrary, that the rule was not neutral because it recognized a secular exemption but not a religious one. Strict scrutiny therefore applied, the plaintiffs argued, asserting that the state could not demonstrate the necessary compelling interest.

The Supreme Court denied the application the day the mandate took effect. There were three dissenting votes. Justice Neil Gorsuch's opinion for himself and Justices Samuel Alito and Clarence Thomas relied in large measure on an opinion from last term's "shadow docket," a case called *Tandon v. Newsom*.[5] This was one of a series of cases challenging capacity

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[3] *See* Doe v. Mills, Opposition of State Respondents to Emergency Application for Writ of Injunction, at 5.

[4] Doe v. Mills, No. 1:21-cv-242-JDL (D. Me. Oct. 13, 2021) (order denying motion for injunction pending appeal); Doe v. Mills, 16 F.4th 20 (1st Cir. Oct. 19, 2021).

[5] Tandon v. Newsom, 141 S. Ct. 1294 (2021). The term "shadow docket," referring to the Court's handling of applications for various kinds of emergency relief, was coined in 2015 by Prof. William Baude of the University of Chicago. William Baude, *Foreword: The Supreme Court's Shadow Docket*, University of Chicago Public Law & Legal Theory Working Papers No. 508 (2015). The term has gained

limitations imposed by states on various kinds of facilities in an effort to curb the pandemic. Churches challenged limitations on attendance at worship services as a violation of Free Exercise. In the first half of 2020, when Justice Ruth Bader Ginsburg was still alive, the Court had upheld the limitations by votes of 5 to 4, with Chief Justice Roberts joining the four liberal justices over the vigorous dissent of the four justices to his right: Alito, Thomas, Gorsuch, and Brett Kavanaugh.[6] But when Amy Coney Barrett succeeded Justice Ginsburg in November 2020, things changed, and by votes of 5 to 4 the other way, the Court started striking down limitations as they applied to worship services, suggesting in unsigned opinions that as long as any looser restrictions applied anywhere else, limitations on church services were unconstitutional.[7]

Tandon challenged a California rule that limited in-home and backyard gatherings to three unrelated "households" at a time. Two plaintiffs who held Bible study in their homes claimed that the rule amounted to unconstitutional discrimination against religion because shopping malls and other commercial venues did not have the same limitation. The District Court and the Ninth Circuit rejected the claim, pointing out that the rule applied to in-home gatherings for all purposes, religious and secular: there was no discrimination.[8]

I'll quote from the account in my book of what happened next:

> The tone of the emergency application to the Supreme Court that followed was bold to the point of impudence. "This court undoubtedly has better things to do than sheepdog California and the Ninth Circuit," the plaintiffs' lawyer, Ryan J. Walsh, told the justices. "Yet until state leaders and lower court judges respect the boundaries established by the Constitution, the task of protecting religious believers from overzealous government officials remains this court's cross to bear." As Walsh, a former Scalia law clerk, surely knew, only a lawyer who felt certain of holding a winning hand would risk addressing the court in such terms.
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> Walsh judged his audience correctly. . . . The unsigned four-page opinion took the suggestion in the earlier COVID cases and made it explicit: Government

currency as the Court has increasingly used this docket not only to grant temporary relief but to make substantive law, as in the *Tandon* case.

[6] The earlier cases, both decided during the 2019 Term, were *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), and *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).

[7] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

[8] Tandon v. Newsom, 517 F. Supp. 3d 922 (N.D. Cal. 2021) (denying motion for a preliminary injunction); Tandon v. Newsom, 992 F.3d. 916 (9th Cir. 2021).

> regulations were subject to the strictest judicial scrutiny "whenever they treat *any* comparable secular activity more favorably than religious exercise. . . . It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably then the religious exercise at issue."[9]

Tandon v. Newsom thus established, without a grant of plenary review, without briefing or argument, a "most favored nation" status for religion: a religious claim had to be treated at least as well as the most favorably treated secular claim, no matter the objective reason for the distinction.

And this was the basis for the dissent from the Court's refusal to enjoin Maine's vaccine requirement. Justice Gorsuch complained that the Court was permitting the state to maintain a "double standard," explaining:

> This Court has explained that a law is not neutral and generally applicable if it treats "*any* comparable secular activity more favorably than religious exercise" [citing Tandon]. And again, this description applies to Maine's rule. The state allows those invoking medical reasons to avoid the vaccine mandate on the apparent premise that these individuals can take alternative measure (such as the use of protective gear and regular testing) to safeguard their patients and co-workers. But the state refuses to allow those invoking religious reasons to do the very same thing . . . . Maine has so far failed to present any evidence that granting religious exemptions to the applicants would threaten its stated public health interests any more than its medical exemption already does.[10]

It takes the votes of five justices to grant a motion for a stay or an injunction. Clearly, these three dissenters couldn't count on Chief Justice Roberts, who had made clear his position that judges should defer to public health authorities in the midst of a public health emergency. They couldn't expect the votes of Justices Breyer, Kagan, or Sotomayor. But what about the two who had joined the Gorsuch-Alito-Thomas group in the earlier Covid cases—Brett Kavanaugh and Amy Coney Barrett?

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[9] JOTB, *supra* note 1, at 177–78. The filings in the case are on the Supreme Court's website under docket no. 20A151. Tandon v. Newsom, 593 U.S. ___ No. 20A151 (2021), https://www.supremecourt.gov/opinions/20pdf/20a151_4g15.pdf.

[10] Doe v. Mills, 211 L. Ed. 2d 243, 245, 247 (2021).

And this is what makes this development so interesting. Justice Barrett wrote a one-paragraph opinion, joined by Justice Kavanaugh, that explained why they had voted to deny the application.

> When this Court is asked to grant extraordinary relief, it considers, among other things, whether the applicant "is likely to succeed on the merits." I understand this factor to encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case. Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument. In my view, this discretionary consideration counsels against a grant of extraordinary relief in this case, which is the first to address the questions presented.[11]

While this short statement is not without ambiguity, I take from it three points. One, Justices Barrett and Kavanaugh do not view the issue in this case, having been decided in favor of the state, as meriting the Court's plenary review. Two, they are attentive to the growing criticism of the Court's use of its shadow docket. This is perhaps not so surprising. The criticism has come primarily from the legal academy, and Justice Barrett spent her pre-judicial career as a law professor.[12] It was Justice Alito who angrily denounced critics of the shadow docket in a lecture he gave at Notre Dame in September.[13] And in fact, the third reason I regard this paragraph as significant is that I read it as a declaration of independence delivered by Justice Amy Barrett to Sam Alito: "better not take my vote for granted." In my view, anyway, she delivered the same message to him last term's major religion case, *Fulton v. City of Philadelphia*, in which she refused to join his opinion castigating the Court's majority for refusing to vote to overturn *Employment Division v. Smith*.[14] What she said then was that "I am skeptical about swapping *Smith's* categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other

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[11] *Id.* (Barrett, J., concurring)(citations omitted).

[12] *See, e.g.*, Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019).

[13] Katie Barlow, *Alito Blasts Media for Portraying Shadow Docket in "Sinister" Terms*, SCOTUSBLOG (Sept. 30, 2021, 6:59 PM) https://www.scotusblog.com/2021/09/alito-blasts-media-for-portraying-shadow-docket-in-sinister-terms/.

[14] Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (Barrett, J., concurring); Employment Div. v. Smith, 494 U.S. 872 (1990).

First Amendment rights—like speech and assembly—has been much more nuanced."[15]

In my account of the *Fulton* case in my book, I wrote:

> This was a fascinating if cryptic passage. "Nuance" was not a word often seen in recent years in opinions by conservative justices. Taken at face value, Barrett's expression of skepticism seemed to suggest that the free exercise of religion was neither more nor less special than other rights protected by the First Amendment. Was this what she meant?[16]

And now, here she was again. Message to Sam Alito: *Yes, we are both judicial and religious conservatives. But I have my own mind, and I go my own way*.

I may be wrong about this. Both of Justice Barrett's opinions are, as I said, ambiguous. But if I'm right, what happened on October 29 could be the most important development of the term so far.

Ah, you are probably thinking—but what about abortion? And of course, the two abortion cases, one that challenges the Texas vigilante law, S.B. 8, and the other that challenges Mississippi's ban on abortion after 15 weeks of pregnancy, are overshadowing nearly everything else. Had Justice Amy Barrett voted with the dissent on September 1, when the Court refused to grant a temporary stay of S.B. 8, the women of Texas would not have been deprived, without plenary Supreme Court review, of their constitutional right to terminate a pregnancy before fetal viability.[17] In the final paragraph of the Gorsuch dissent in the Maine vaccine case, the dissenters claimed that the "case presents an important constitutional question, a serious error, and an irreparable injury."[18] Healthcare workers in Maine, they complained, "are now being fired and their practices shuttered. All for adhering to their constitutionally protected religious beliefs. Their plight is worthy of our attention. I would grant relief."[19] Substitute another constitutionally protected right—as of now, anyway—abortion, for religion, and the "plight" of the women in Texas is surely "worthy of our attention"—but not, apparently, to a majority of today's Supreme Court.

As I said at the beginning of this talk, extracting a straight-line narrative from this Supreme Court is hard to do. We can drown in the Court's ambiguities. So let me switch gears now and talk about someone who comes

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[15] Fulton, 141 S. Ct. at 1883.
[16] JOTB, *supra* note 1, at 212.
[17] Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021) (denial of application for injunctive relief, Sept. 1, 2021).
[18] Doe v. Mills, 211 L. Ed. 2d 243, 247 (2021).
[19] *Id.*

to mind when I think about the two subjects of religion and abortion. That person is Sandra Day O'Connor. September 25 of this year was the fortieth anniversary of the day she took her seat on the Supreme Court bench. I think it is useful and clarifying to step outside our current morass and reflect on her arrival on the Court and her influence while she served there.

By that time 40 years ago, the Supreme Court had been in operation for 191 years, with only men serving as justices—of course, only white men until Thurgood Marshall's arrival in 1967. From one perspective, 40 years is shockingly recent—did it really take 191 years for a woman to break that barrier? But from another perspective, 40 years is a long time ago. Just over half of Americans today are under the age of 40—which of course means that most people either were not born when Sandra O'Connor joined the Supreme Court or—if they are younger than their early 50s—have no memory of that moment. So, it is incumbent on those of us who were alive and aware in September 1981 to share that memory and its significance.[20]

The distinctive role she carved for herself on the Court is worth reflecting on at this moment of intense polarization that threatens our sense of civic order and is lapping at the Supreme Court's door as well. Justice Sandra O'Connor was more interested in finding workable solutions to the problems people brought to the Court than she was in achieving a goal of doctrinal purity. (For that reason, the legal academy failed to appreciate her and is only coming around now.) The only Supreme Court justice to have served in elective office since 1969, when Chief Justice Earl Warren, former governor of California, retired, she cared about the practical impact of the Court's decisions. She understood that the meaning of a Supreme Court decision does not ultimately reside in United States Reports but in what judges and ordinary members of the public make of it and do with it.

People labeled her the Court's "swing justice," a term she found offensive because it ascribed to her a motivation opposite to the one she felt—not to "swing," but to attach herself firmly to the side that made the most sense, not as pure doctrine but as how the Supreme Court's voice would land in the midst of the ongoing national conversation. That meant that neither her fellow justices, nor the Supreme Court bar, nor the public could take her vote for granted. Her vote had to be earned.

If you infer from what I have said so far that I think today's Supreme Court could use a Sandra Day O'Connor, you would be right. I could stand here and fill our time together by quoting from her opinions, but I will not do that. I will quote from just one, one of her very last opinions, one that I think encompasses the wisdom derived from what was by June 2005

[20] For an informative recent biography, *see* EVAN THOMAS, FIRST: SANDRA DAY O'CONNOR, AN INTIMATE PORTRAIT OF THE FIRST WOMAN SUPREME COURT JUSTICE (New York: Random House, 2019).

nearly 25 years of dealing with the always heavily-freighted matters of church and state. The case was *McCreary County v. American Civil Liberties Union*.[21] The question was whether a Kentucky county's highly politicized placement of a Ten Commandments display on its courthouse wall violated the Establishment Clause. Justice Souter wrote the majority opinion for a 5-to-4 Court holding that it did. Justice O'Connor joined that opinion and filed a concurrence of her own, one that I would, if I could, post on the Supreme Court's front door.

"At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate," she observed.[22] And she went on: "Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"[23]

That question is one that I see as not confined to the religion clauses. It is one I would hope that justices ask themselves on a regular basis: why change? why now? Sometimes the answer is obvious, as it was to six justices in *Lawrence v. Texas* and in other rights-expanding decisions, we could all name: because there's an injustice to be corrected, a constitutional lacuna to be filled, a better understanding of the meaning of due process.[24] Sometimes the honest answer, as Justice Kagan in dissent interpreted the majority's opinion in the *Janus* case in 2018, is "because we can."[25]

It is a question that needs answering now as the Court appears on the verge of overturning *Roe v. Wade*, either explicitly or functionally.[26] Justice Sandra O'Connor was presented with this question in 1992, in *Planned Parenthood v. Casey*.[27] Not even ten years earlier, soon after her arrival at the Court, she had emerged as a sharp critic of *Roe* in a dissenting opinion in one of the early post-*Roe* cases, *Akron v. Akron Center for Reproductive Health*.[28] The framework of *Roe v. Wade*, she asserted, was "on a collision course with itself" as the date of fetal viability moved inevitably back toward the moment of conception.[29]

In this opinion, Justice O'Connor was going by instinct rather than science. As briefs filed by medical organizations in subsequent abortion cases informed the Court, there had been no dramatic change in the date of viability and no prospect that, due to anatomical realities of the developing fetus's

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[21] 545 U.S. 844 (2005) (O'Connor, J., concurring).
[22] *Id.* at 882 (O'Connor, J., concurring).
[23] *Id.* (O'Connor, J., concurring).
[24] 539 U.S. 558 (2003).
[25] Janus v. AFSCME, 138 S. Ct. 2448 (2018) (Kagan, J., dissenting).
[26] 410 U.S. 113 (1973).
[27] 505 U.S. 833 (1992).
[28] *See* 462 U.S. 416, 451–74 (1983) (O'Connor, J., dissenting).
[29] *Id.* at 458 (O'Connor, J., dissenting).

lungs and brain, that there would be. We do not know for sure whether Justice O'Connor read those briefs, but she began to modify her position on abortion and never again mention the so-called "collision course." When in the *Planned Parenthood* case the continued existence of the right to abortion was in grave doubt, she gave her vote to those who would preserve the right.

The Supreme Court is, as political scientists and as justices themselves have observed, a teacher.[30] Its decisions have carried weight because—well, because *we the public* assumed they carried weight. Political scientists have studied what they call the Court's legitimating function. In the *Hazelwood* decision some years ago, the Court held that the First Amendment did not give student newspaper editors in a public high the right to put out the paper free of censorship by school authorities.[31] A political scientist conducted an experiment. He convened two groups of people who had not heard of the *Hazelwood* decision. To one group, they described the facts and then said that the local school board had voted to give the school's principal the authority to censor the school paper. This group reacted with considerable alarm. The other group was informed that it was the Supreme Court that had interpreted the Constitution as giving the principal this authority. This group found the decision perfectly acceptable. That is an example of the legitimating function.[32]

Of course, the fate of high school newspapers was not a question of high political salience. But typically, even more highly charged controversies were subject to the legitimating function. In the immediate aftermath of *Roe v. Wade*, for example, public support for the right to abortion actually increased, according to public opinion polling at the time. This was before the Republican Party hitched its wagon to abortion as a wedge issue, before opinion on abortion became part of an individual's political and cultural identity. When it was simply a Supreme Court question, the public was quite content with the outcome.[33]

More recently, however, the legitimating function seems to have lost its purchase. In 2012, after the Court rejected the first big challenge to the Affordable Care Act ("ACA"), public opinion on the ACA—Obamacare—

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[30] *See e.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. of Pub. L. 279 (1957).

[31] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[32] Jeffrey J. Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 Political Research Quarterly 675, 676 (1994).

[33] For post-decision polling data on public attitudes toward abortion, *see* William Ray Arney & William H. Trescher, *Trends in Attitudes Toward Abortion, 1972–1975,* 8 Family Planning Perspectives 117 (1976). The authors observe that, "[i]t is notable that the 1973 NORC [National Opinion Research Center] survey, fielded just two months after the 1973 Supreme Court decisions, showed a remarkable liberalization of abortion attitudes on the part of all groups and subgroups of American society." *Id.* at 124. For an account of the subsequent politically-driven development of party realignment over the abortion issue, *see* Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 Yale L. J. 2028 (2011).

was unchanged, frozen in place. While the decision in *National Federation of Independent Business v. Sebelius* came as a relief to half the population, the other half regarded it as fundamentally illegitimate.[34] Political feelings were so entrenched that a Supreme Court decision could not move the needle.[35]

We hear a lot of talk these days about the Court's "legitimacy"—is it in jeopardy, can it be saved. What do we mean by legitimacy in the context of the Supreme Court? In a recent book, Professor Richard Fallon of Harvard Law School offered a useful three-part definition.[36] There are three kinds of legitimacy, he wrote. There is *legal legitimacy*, which stems from a perspective internal to law. Has the Court reached its result by means of an interpretive method that is generally accepted within the legal culture?

Then there is *sociological legitimacy,* which has an external perspective. Does the Court's output comport with the public's view of how the Court should be resolving the conflicts that we bring to it?

And finally, there is *moral legitimacy*, which depends on whether the Court is behaving in a way that "we the people" deem worthy of our respect at the deepest level.

Obviously, the three kinds of legitimacy are not always aligned. What happens when a decision answers a problem from a strictly legal perspective, making plausible use of available precedents and tools of interpretation in ways that would fit comfortably in the pages of a casebook and yet is at deep variance with the public's understanding of what the situation requires. That is when the Court has to go out of its way to explain itself, to use its powers of persuasion, and fully inhabit its role as teacher. Perhaps one good example of a mismatch between legal and sociological legitimacy was the Court's ruling in *Texas v. Johnson* in 1989.[37] That was the decision holding that burning as American flag as a political protest was expressive activity protected under the First Amendment. The public response was immediate—bills were introduced, a constitutional amendment was proposed, politicians jumped on the irresistible bandwagon. It was a big ruckus that eventually petered out as people realized that the flag was still flying in every respect that mattered. In fact, Justice Stevens, who dissented in that case, said later that while he still believed he was right to have dissented, the decision had an unintended beneficial effect in basically

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[34] 567 U.S. 519 (2012).

[35] Guy H. Choi, The Supreme Court, Public Opinion, and the Affordable Care Act: The Stability of Partisan Cleavage Over Health Care (2016) (Unpublished undergraduate paper, UC Berkeley), https://escholarship.org/uc/item/31m8w6x0 (collecting polling data).

[36] RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (The Belknap Press of Harvard Press, 2018). *See also* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 Harv. L. Rev. 2240 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018).

[37] 491 U.S. 397 (1989).

eliminating flag-burning. "What once was a courageous act of defiant expression is now perfectly lawful and therefore is not worth the effort," he told an audience in Chicago.[38]

I have not said anything about moral legitimacy because that is above my pay grade, but we can probably think of cases in which legal and sociological legitimacy are aligned, but the result still fails the moral legitimacy test. We can think of some criminal cases, including capital cases; of course, morality is in the eye of the beholder, or the judge, which is why I cannot dwell productively on it. I might mention the Court's recent shadow-docket performance in the Texas abortion case. The unsigned five-member *per curiam* opinion rehearsed various procedural obstacles that prevented the Court from granting the requested emergency stay of the Texas vigilante law to protect access to abortion in the state while the courts figured out the merits. And maybe the five justices were correct—maybe this was too much of a jurisprudential stretch.

Even so, to permit the second most populous state to shut down access to abortion without briefing or argument, in my opinion, failed the test of moral legitimacy. It would have been so simple to stay the implementation of the Texas law long enough to sort out the merits, or at least to wait until the Court decides the constitutionality of a pre-viability abortion ban in the Mississippi case scheduled for argument on December 1.[39] The country has gone 250 years without a law like Texas's S.B. 8, so it seems to me we could have waited a few months to see whether it meets any kind of test of constitutionality.

Compare the Court's reaction earlier this month to a requested stay of execution brought by a Texas death-row inmate who claimed a Free Exercise right to have his pastor not only present at the execution but able to touch him during the lethal injection procedure. Unlike a claim to the well-established right to abortion, this Free Exercise claim was completely novel. Yet the Court not only granted the stay but at the same time granted plenary review of the inmate's case and scheduled argument for early November.[40] Could the difference between this treatment and the Court's response to the Texas abortion case be that this case purports to involve religion? The grant of cert., in this case, prompts two thoughts. One, perhaps anyone filing an emergency application at the Supreme Court would be well advised to tack

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[38] Linda Greenhouse, *Supreme Court Justice John Paul Stevens, Who Led Liberal Wing, Dies at 99*, N.Y. TIMES, July 16, 2019, https://www.nytimes.com/2019/07/16/us/john-paul-stevens-dead.html (Justice Stevens's New York Times obituary recounts his unpublished remarks).

[39] Dobbs v. Jackson Women's Health, docket no. 19-1392, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1392.html (last visited Dec. 30, 2021).

[40] Ramirez v. Collier, docket no. 21-5592. *See* Linda Greenhouse, *Why Did the Supreme Court Stay This Execution?*, N.Y. TIMES, Oct. 22, 2021. https://www.nytimes.com/2021/10/21/opinion/supreme-court-religion-execution.html

on a religious claim. Second—if the Supreme Court has become so squeamish about the death penalty as to think there might be a constitutional right to have a member of the clergy hold a condemned inmate's hand as poison is injected into his veins, it might be time for the justices to take up the question of the constitutionality of capital punishment itself.

But there seems not the slightest possibility of that happening. Between July 2020 and January of this year, the Court allowed the federal government, which had not executed anyone since 2003, to proceed with a series of 13 executions—the most in 120 years, nearly doubling the seven executions carried out in 2020 by all states combined. Many of the cases were troubling, but the Court was undeterred, promptly rejecting requested stays of execution or overturning stays that lower courts had granted.

Troubling as those cases were, a glaring procedural irregularity made the final case, that of Dustin Higgs, even more disquieting.[41] Higgs had been convicted and sentenced to death twenty years earlier in Maryland for his participation in a triple murder on federal property. (He was not the triggerman; the actual killer pleaded guilty and received a life sentence, but Higgs maintained his innocence and insisted on going to trial.) Under the Federal Death Penalty Act, a death sentence must be carried out "in the manner prescribed by the state" that imposed it.[42] However, Maryland had repealed its death penalty statute in 2013, making Higgs's execution impossible if the statute was to be applied as written. The Justice Department filed a motion asking a federal district judge in Maryland to designate Indiana, where Higgs was housed on the federal death row, as the appropriate state for reference under the statute. The judge refused on the grounds that he had no authority to make such a change. The Fourth Circuit granted a stay of execution so that it could consider "the novel legal issues presented" and scheduled oral argument for January 27.[43]

That date, of course, fell a week after Inauguration Day, and the Trump administration could not wait that long. So, the acting solicitor general, Jeffrey Wall, went directly to the Supreme Court, asking the justices to overturn the District Court without waiting for the Fourth Circuit. Higgs should not be handed such an "absurd windfall," Wall wrote in the "petition for a writ of certiorari before judgment."[44] The Supreme Court rarely grants such a petition, but it promptly granted this one, vacating the Fourth Circuit's stay and overturning the District Court with instructions to treat Indiana as if

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[41] United States v. Higgs, No. 20-927. The filings in this case are posted on the Court's website www.supremecourt.gov under docket no. 20A134.

[42] 18 U.S.C. 3596(a).

[43] Petition United States v. Higgs, No. 20-927 at 3. The filings in this case are posted on the Court's website www.supremecourt.gov under docket no. 20A134.

[44] *Petition for writ. No. 20-927* https://www.justice.gov/sites/default/files/briefs/2021/01/25/20-927_united_states_v._higgs_petition_for_cert_before_judgment.pdf

it had been the state that imposed the death penalty all along. The unsigned order offered no explanation of the majority's reasoning.

Justice Kagan noted her dissent. Justice Breyer, who in 2015 had called for the Court to reconsider the constitutionality of the death penalty, wrote a brief dissenting opinion, its tone more sorrowful than angry. "What are courts to do when faced with legal questions of this kind?" he asked.[45] "Are they simply to ignore them? Or are they, as in this case, to 'hurry up, hurry up?'"[46]

Justice Sonia Sotomayor's ten-page dissenting opinion radiated fury. She began by listing the names of the twelve federal inmates already executed in what she called "this expedited spree of executions."[47] The list was an obvious allusion to the "Say their names" mantra of the Black Lives Matter movement. She noted that with Higgs' imminent execution, "the Federal Government will have executed more than three times as many people in the last six months than it had in the previous six decades."[48]

Justice Sotomayor clearly knew that she was not going to change any colleague's mind. Her project was to make as precise a record as possible of the Court's behavior. Noting that "this court has consistently rejected inmates' credible claims for relief," she went on:

> The Court has even intervened to lift stays of execution that lower courts put in place, thereby ensuring those prisoners' challenges would never receive a meaningful airing. The Court made these weighty decisions in response to emergency applications, with little opportunity for proper briefing and consideration, often in just a few short days or even hours. Very few of these decisions offered any public explanation for their rationale.
>
> This is not justice.[49]

She cited the Court's rule governing requests to the justices to accept a case directly from the District Court without waiting for a decision from the Court of Appeals. Under the Court's Rule 11, such a request requires "a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."[50] The government's request in the Higgs case fell "far short" of that standard, she said, explaining: "After failing to act since Higgs' sentence was imposed in 2001, the Government gives no compelling

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[45] United States v. Higgs, 141 S. Ct. 645, 646 (2021).
[46] *Id.*
[47] *Id.* at 647.
[48] *Id.*
[49] *Id.*
[50] *Id.* at 648.

reason why it suddenly cannot wait a few weeks while courts give his claim the consideration it deserves."[51]

"There can be no 'justice on the fly' in matters of life and death," Justice Sotomayor wrote in her concluding paragraph:

> Yet the court has allowed the United States to execute thirteen people in six months under a statutory scheme and regulatory protocol that have receive inadequate scrutiny, without resolving the serious claims the condemned individuals have raised. Those whom the Government executed during this endeavor deserved more from this Court.[52]

Higgs was executed at 1:23 A.M. the next morning, January 16, a Saturday, four days before Donald Trump would board Air Force One for the last time in order to fly to Florida and avoid the inauguration of his duly elected successor.

Two years ago, Donald Verrilli, who served as solicitor general in the Obama administration, gave a lecture at the Chautauqua Institution in which he used a phrase, an image, that has stuck with me. The phrase was "on the level."[53] He explained that this everyday phrase has roots in Freemasonry, which uses symbols of stonecutting and carpentry as part of its visual vocabulary. The level is an essential tool of those professions. Something is "on the level" if it is, as Don Verrilli put it, "straight and true all the way across."[54]

Applied to government, he explained, being on the level means the government "is doing things for the reasons it says it is doing them"—a simple yet vital part of the trust necessary for democracy to function.[55] Within the constitutional framework, it's possible to see the Supreme Court's job as making sure that government is functioning on the level—that the other two branches, along with executive branch agencies, are operating within their constitutional or statutory authority—that the reasons they give when their actions are challenged are the real reasons and are sufficient to explain and justify the challenged action. This was the Court's reasoning behind the Trump administration's few but notable losses—in the census case two years ago, when Chief Justice Roberts said in almost so many words that the administration's stated rationale for rejecting the opinion of its in-house professionals and adding a citizenship question to the 2020 census was not

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[51] *Id.*
[52] *Id.* at 652.
[53] Donald Verrilli's lecture is unpublished. A video of the lecture is available at https://www.youtube.com/watch?v=xTUqWGwpbNs at 9:12.
[54] *Id.* at 10:24.
[55] *Id.* at 12:20.

the real reason.[56] It was not on the level. And ditto for the Court's rejection in this past term of the administration's attempted rescission of the Deferred Action for Childhood Arrivals ("DACA") program.[57] In the Court's two most recent abortion cases, *Whole Woman's Health* in 2016 and *June Medical* in 2020, it's possible to read Justice Breyer's very measured opinions as explaining exactly how the states of Texas and Louisiana, in enacting the laws at issue, had not acted on the level, claiming a reason for their onerous regulation of abortion clinics that was not the real reason.[58]

But in other instances, of course, it is the Court's own actions that may be regarded as not on the level. And that brings me back to the shadow docket. If the Court is a teacher, what lesson is the public supposed to draw from an unsigned midnight ruling that has the effect of changing the legal status quo without having previously invited the public, or at least the bar, in on the conversation by means of briefing and argument?

A Gallup poll issued earlier this fall found public approval of the Court to be near an all-time low, 40 percent.[59] To note that is not to suggest that the Court should be running a popularity contest—one it would win since other government institutions fare even worse. But we need a Court that is perceived as on the level—one that even those who are disappointed or infuriated by the outcome in particular cases can still regard as operating within a framework of legitimacy. That is not simple. We know there is not a single "level" that provides a clear answer to our most pressing problems. Any Supreme Court faces a series of choices—when to weigh in, when to hold off, where to find the balance between judicial overreach and judicial abdication. For this Supreme Court, those choices take on an urgency driven by the politics that have surrounded recent appointments.

President Biden's commission on the Supreme Court, an ideologically diverse group of some three dozen members, most of them academics, has attracted an array of suggestions for changing the Court's structure, operations, and more fundamentally, its role in American life.[60] The range of responses to the commission's solicitation of ideas is bracingly wide. Whether this project will lead to anything concrete is a wide-open question, but as a thought experiment, it promises to be quite fascinating.

What the dozens of invited witnesses seem to have in common is a felt need to push some kind of re-set button that might lower the temperature

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[56] Dep't of Com. v. New York, 139 S. Ct. 2551, 2578 (2019).

[57] Dep't of Homeland Sec'y v. Regents of the University of California, 140 S. Ct. 1891 (2020).

[58] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); June Medical Services v. Russo, 140 S. Ct. 2103 (2020).

[59] Jeffery Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sep. 23, 2021), https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx.

[60] THE WHITE HOUSE, *Presidential Commission on the Supreme Court of the United States*, https://www.whitehouse.gov/pcscotus/ (last visited Jan. 1, 2022).

by making the Court something other than it seems to many of us to be at this moment—the ultimate political prize. Anyone who cares about the Court should wish the commission well. Its mission is to advise the president, but its most important audience may be the Court itself.