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The Coming Storm Over the Supreme Court

If it swings too far to the right, expect a response.

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In 1937, President Franklin Roosevelt went after the Supreme Court. He was infuriated that a conservative majority of justices kept striking down New Deal measures he felt were essential to pull the country out of the Great Depression. So, fresh from his overwhelming second-term electoral victory, Roosevelt proposed adding as many as six additional justices to the nation's highest bench.

Filling those new vacancies would give him a clear majority on the court, presumably ensuring his future legislative proposals would be upheld. Roosevelt's "court-packing" plan cast the country into six months of furious debate over the propriety of such a move. In the end the plan evaporated, but not before the court capitulated. Roosevelt's proposal set off a genuine constitutional crisis, with little else on the national agenda getting any attention.

Why should we care about what happened some 80 years ago?

Because with the appointment of Brett Kavanaugh, an extremely conservative majority now is fully in control of the court, which, at some point in the future — perhaps five or 10 years from now — could lead to another crisis much like the one in 1937.

Anyone watching the deeply troubled, and troubling, confirmation process for Justice Kavanaugh surely understands the depth of anger on the left, which is unlikely to dissipate anytime soon. If the country moves left in the next few years, as the court moves right, we have the makings for a serious collision.

Justice Kavanaugh replaces Justice Anthony Kennedy, long the swing vote on the court. Justice Kennedy was a conservative, but he voted with the liberal wing of the court on some issues that typically split the right and the left. Justice Kavanaugh is not likely to follow suit. Based on a study of his record as an appeals court judge, three political scientists argue that he is likely to be almost as conservative as Justice Clarence Thomas, on the court's far, far right.

The future direction of the country is, of course, harder to predict, but there are signs that despite Donald Trump's victory in 2016, the country is indeed moving left, as reflected in his loss of the popular vote. The political scientist James Stimson's national "mood" thermometer shows a swing to the left since 2012. Polling on issues from the economy to immigration to same-sex marriage supports this view; surveys show, for example, that a solid majority of Americans support legal abortion under any or some circumstances, and very much oppose overturning *Roe v. Wade*.

Some progressives already have suggested that as soon as the Democrats can win back the White House and Congress, they should add seats to the court to turn it to the left. But there are other ways of getting the court's attention as well. In the past, Congress has brought impeachment charges against justices, stripped the court of jurisdiction to hear particular cases, changed the size of the court to ensure favorable majorities, and even frozen the justices' salaries out of spite.

What seems clear is that any future attack from the left will include claims that the court's current majority is illegitimate. Democrats argue that a seat was stolen when the Senate majority leader, Mitch McConnell, refused to consider President Barack Obama's nomination of Judge Merrick Garland and held the seat open for 10 months, until Donald Trump was inaugurated. What's more, they note, the country was denied access to Mr.

Kavanaugh's full record as an aide to President George W. Bush, limiting the ability to question him during the confirmation hearings. Then there was the truncated investigation into allegations of sexual assault years ago. Throughout it all, serious voices argued Justice Kavanaugh was (at best) not being fully candid in his answers.

Historically, when big collisions between public opinion and the Supreme Court have occurred, the justices lose and the public gets its way. That is because, as Abraham Lincoln put it a few years after the justices decided the infamous Dred Scott decision, which deprived Congress of authority over slavery in the territories, "If the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court," then "the people will have ceased to be their own rulers."

During the Civil War and Reconstruction, Republicans in Congress addressed their concerns about a bench that might be hostile to Union interests by changing the size of the court three times to try to secure a favorable majority. Once, they even stripped the justices of jurisdiction over a case that threatened Reconstruction itself.

You may be waiting impatiently to point out that Roosevelt's plan to pack the court ultimately failed. In the heat of the battle, Roosevelt's key ally, the Senate majority leader, Joe Robinson, dropped dead, and at that point, Congress and country apparently had enough of the struggle and Roosevelt dropped it.

But that misses what really happened. Before the fight in Congress ended, the justices already had rolled over. Entirely. In decisions in the spring of 1937 they made clear they would stop blocking economic measures. Headlines screamed in bold type about the court's flip-flop, which became known as "the switch in time that saved nine." Right-wing justices, chastened, began leaving the court. By 1941, Roosevelt had filled seven of the nine seats on the court. He may have lost his battle to pack the court, but he won the war.

Of course, the justices have learned this lesson over time, and so we have since avoided any really serious crises involving the court. Chief Justice John Roberts clearly

understands the political implications of a court out of step with the populace. Though his views are profoundly conservative, the chief justice nonetheless has done an admirable job of moderating the impact of his colleagues on the right, even voting “left” himself at critical moments, as he did to uphold President Obama’s health care plan and to limit law enforcement searches of cellphone records. Still, it’s hard to know if he can continue to pull this off as the court drifts ever farther right — just as it is hard to see him denying conservatives the votes to overturn *Roe v. Wade*.

The more the justices are perceived as partisan and ideological, the more the public will treat them in precisely that way. Which includes bringing them to heel when they get seriously out of line.

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