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April 14, 2017: The Judicial-Industrial Complex

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4/14/2017—Justice Gorsuch was sworn in one week ago. Because of my age and his, this is the first nominee about whom I had the thought—he will still be on the Court when I am dead. Conservatives who did not like Trump were right to vote for him because they are going to get a conservative Supreme Court for a generation. Presidents who serve 8 years generally get to nominate 2 Justices—that was true for Obama because of the refusal of the Republican Senate to consider Merrick Garland, otherwise he would have nominated 3. But President Trump will likely nominate 2 in his first 4 years and perhaps 4 in 8 years. This is unprecedented since FDR. And they will all be ideologues like Gorsuch. Previously, no one could be sure how Justices would evolve over time. But the conservative movement has transformed law into algorithm--the judicial industrial complex. Ironically, the algorithm is not originalism or textualism. It is only that when convenient. The algorithm is actually the usual conservative one—pro-business/anti-government. Justice Alito's position that unions violate free speech and association has no historical justification at all, for example. It is just anti-union. If Trump stays in office, it will be Roberts, Alito, 5 Justice Thomas's, Kagan and Sotomayor. What will that mean? Of course it will mean that Roe and Obergefell are overturned. But those decisions just leave abortion and gay marriage to the voters, who will favor both to differing extents. The real change will be in the power of Congress and the protection of the market. Conservatives today want to overturn the New Deal and bring back the Lochner era. They want to end regulation that protects the environment. Climate change? Forget about it. And remember. They will not have to defend any of this on the merits. For conservatives, it is always just the law. They claim their values have nothing to do with it. That is not so, but liberals who agree that values are just opinion have no foundation to object. The American people are in for a reign of error. Ross Douthat claimed the other day that if Justice Souter had remained a moderate conservative instead of becoming a liberal vote, the Supreme Court would not have become such a prize and none of this would have happened. He may be right. But he did and it did and Trump won.