Today's Issues: Giacometti's Art, The Supreme Court

For this Sunday, July 29, 2018, the Today's Issues group will have a slide presentation by Ernie Novak on the art of Alberto Giacometti, subject of a major exhibition at the Guggenheim in New York. We will then discuss the implications of the likely ideological changes on the US Supreme Court.

The group meets in the parlor of the Religious Education building next to the church at 9:30 on Sunday. Please do the reading and join our lively discussion.

For Giacometti, the reading is by Peter Schjeldahl, "Giacometti's Skinny Sublimity," from the June 18 issue of The New Yorker magazine. You can find the article at
https://www.newyorker.com/magazine/2018/06/18/giacomettis-skinny-sublimity
This is better than my emailing the text since it includes several illustrations.

For the Supreme Court, we will read Noah Feldman, "Tipping the Scales," from the July 19th issue of the New York Review of Books. This can be found online at:
https://www.nybooks.com/articles/2018/07/19/supreme-court-tipping-scales/
I am also pasting it in here.

Tipping the Scales
Noah Feldman JULY 19, 2018 ISSUE
If Donald Trump's nominee to replace Justice Anthony Kennedy, who announced his retirement on June 27, is confirmed by the Senate, the Supreme Court will have a stable majority of conservative justices for the first time since before the New Deal. Kennedy's successor will be Trump's second Surpreme Court pick and may not be his last. Justice Ruth Bader Ginsburg, who is eighty-five, clearly wishes to stay on the Court as long as Trump is president. So does Justice Stephen Breyer, who turns eighty later this year. But neither is immortal. Especially if Trump is reelected, he could potentially replace both of these justices with staunch young conservatives.

Lady Justice
Lady Justice; drawing by Gerald Scarfe
The current Court's four consistent conservatives are all substantially younger than Kennedy, Ginsburg, and Breyer. The oldest, Clarence Thomas, is sixty-nine. Samuel Alito is sixty-eight, Chief Justice John Roberts is sixty-three, and Neil Gorsuch is just fifty. All are self-described constitutional originalists; all favor interpreting statutes based on text rather than their intention; and all have strongly pro-business judicial records. Should Trump appoint a fifth conservative—to say nothing of a sixth or seventh—the conservative majority could easily last a generation.

In light of this prospect, it is not too soon to start asking what a conservative Supreme Court would mean for the country. A conservative jurisprudence, aggressively applied, would reshape

American law and politics. It would reinterpret fundamental issues of individual and privacy rights, health care, employment, national security, and the environment. These changes would in turn affect electoral politics. The range of conservative legislation that could survive judicial review would expand, while the range of progressive legislation that could do so would narrow.

In retrospect, it is remarkable that a strong conservative majority on the Court has not emerged before now. Since 1980, Republicans have held the presidency for twenty-two years and Democrats for sixteen. Ronald Reagan, who campaigned on the platform of choosing conservative judges, appointed three justices—Antonin Scalia, Sandra Day O'Connor, and Kennedy—and elevated William Rehnquist to the chief justiceship. That should have established conservative control. Yet O'Connor turned out to be a centrist, controlling the Court for a quarter-century by casting the decisive fifth vote in controversial cases. When she retired in 2006, Kennedy assumed her position as the swing justice and unexpectedly emerged as a liberal hero, voting, for example, to extend constitutional rights to detainees in Guantánamo Bay and marriage rights to same-sex couples.1

George H.W. Bush also had the chance to consolidate a conservative majority. He appointed Thomas to replace Thurgood Marshall but also replaced William Brennan with David Souter, who underwent a subtle yet significant evolution from Burkean conservative to Burkean liberal. Bill Clinton, George W. Bush, and Barack Obama each got two justices confirmed, which maintained the Court's balance. That conservative control has been so long in coming reflects either miscalculation by Reagan and George H.W. Bush or (more likely) something less than full-throated judicial conservatism on their part.

There is one glaring anomaly in the pattern of appointments. Obama should have been able to get Merrick Garland confirmed after Scalia died in February 2016—which would have provided some insulation against a conservative majority. The Senate's decision to block the moderate Garland purely because Obama nominated him transformed both the composition of the Court and the norms of the confirmation process.

A Senate controlled by Democrats would probably refuse to confirm any Trump Supreme Court nominee, no matter how much time remains in his presidency. If justices can only be confirmed when the president and the Senate majority come from the same party, we will witness a shrinking Supreme Court forced to operate with eight, seven, or even six justices. In this scenario, a president whose party controls the Senate would have the chance to fill all those vacancies with justices who share his or her ideology. The Court's politics would no longer drift gradually but veer suddenly to the left or the right.

One of the first things likely to happen if the Court's majority turns conservative is that state legislatures in heavily Republican states will pass legislation restricting abortion rights. Already, Mississippi has passed a law barring abortions after fifteen weeks—long before viability. A federal court blocked the law, but its passage signals clearly that the Court will come under pressure to revisit Roe v. Wade.

In the past, Chief Justice Roberts has shown a decided preference for changing constitutional law indirectly. Rather than overturning landmark liberal precedents outright, he prefers to minimize their importance by narrowing them and limiting their holdings to factual situations that no longer exist. He would surely prefer that Roe suffer death by a thousand cuts rather than see the Court accused of overturning it in a stroke and casting the country back to the days of coat-hanger and back-alley abortions.

Yet the chief justice is only first among equals. The Court's other conservatives have already shown a willingness not to follow his lead, as occurred in the Affordable Care Act case, NFIB v. Sebelius, when they left Roberts alone in upholding the ACA's individual mandate. Given the assertive ideology, cohesive political views, and no-holds-barred style of many younger judicial conservatives, a conservative majority could be expected to reverse Roe as long as Roberts concurred in the decision, regardless of whether he joined the opinion.

For pro-choice advocates, the fall of Roe would be a disastrous defeat. Brown v. Board of Education was controversial when decided but gained wide acceptance over time. The Roe decision has never achieved a similar consensus. Many Court observers, including Ginsburg, have suggested that it generated lasting controversy because the Court decided it without first laying the foundation with prior incremental decisions. As a result, since 1973, pro-choice advocates have been fighting a rearguard action to defend the right to abortion. For Roe to be overturned would be the ultimate failure of nearly half a century of pro-choice strategy.

The aftermath of a decision striking down the right to abortion would be complicated. Democrats would have to convince majorities in each state to protect abortion. It could become impossible for women to obtain legal abortions in the numerous states that have tried to enact more restrictive abortion laws in recent decades (only to have them struck down by the courts). Abortions could be outlawed in much or all of the South, the Southwest, and the intermountain West. Those with means would still be able to travel to states that permitted them, but women too poor or young to travel would find it vastly harder to end unwanted pregnancies. Many people would probably react by taking to the streets, organizing, and voting against such restrictive laws and the politicians who put them in place. Abortion rights would immediately become a wedge issue for Democrats. Their goal would be to push women who might otherwise vote Republican into the Democratic column.

Once abortion rights were constitutionally recognized, liberal efforts in connection with them were, rationally enough, redirected to preserving the composition of the courts, rather than actively trying to convince those who rejected such rights to change their views. For as long as abortion has been legal, conservatives, for their part, have been able to count on the crucial votes of centrists who prefer conservative candidates but quietly want to preserve the option of abortion. With Roe overturned, Republicans might lose the 34 percent of their voters who believe that abortion should be legal in most or all cases.

Just as liberals would no longer be able to rely on the Supreme Court to strike down anti-abortion measures, they would have to concentrate on winning elections and lobbying members of Congress to secure other rights that they are currently seeking to win in court. At present, the fight for transgender rights is heavily aimed at convincing judges to extend existing antidiscrimination protections to transgender people. Because a conservative Supreme Court would not in the foreseeable future do so, progressives would have to lobby Congress and state legislatures for such protections.

Over time, the fight could well prove successful. As the example of gay marriage shows, changes in values can eventually take place and even come to be broad-based. Support for gay marriage has risen steadily for twenty years, from 27 percent nationally in 1996 to 64 percent in 2017. Remarkably, the shift can be discerned even among evangelicals born after 1964, 49 percent of whom now believe gay marriage should be legal, compared to just 35 percent of all evangelicals.

For this reason, gay marriage may be one significant progressive rights victory that could survive even a conservative majority on the Court. Emboldened conservative state legislators might try to pass new laws contravening the Obergefell precedent and restricting marriage to one man and one woman. Yet the political cost of such efforts would probably be extremely high, as not only liberals but also mainstream corporate interests would respond with state-level boycotts. Some conservative justices could potentially accept gay marriage as a fait accompli, given how quickly attitudes toward it are changing. A conservative Court would no doubt allow religious liberty exemptions for merchants who do not wish to serve gay couples.2 But if gay marriage remains the law of the land, such exemptions will come to be seen as compensatory concessions to the losing side in a culture war, rather than steps toward reversal of the right to marriage.

In addition to rolling back existing constitutional rights, a conservative Supreme Court could block progressive government programs. One example is affirmative action. Over decades, the Court has used the right to equal protection of the laws to whittle down affirmative action until its only important remaining application is in higher-education admissions. In 2016, to the surprise of many observers, Kennedy cast the deciding vote to preserve this practice—despite having dissented thirteen years earlier when O'Connor used her swing vote to reach the same result.3

A conservative majority unconcerned with diversity as a social good in itself would not find it difficult to bar affirmative action altogether on the principle that white or Asian applicants are treated unequally when race is a factor in admissions. Unlike in the case of abortion rights, there would be no way for states to get around a constitutional ban on affirmative action.

Two responses would probably follow such a decision. Progressive students would protest vociferously; and administrators who have come to believe in the value of diversity as a good in itself would seek new ways to create diverse student bodies without formally taking account of race. Economically based affirmative action could be combined with school-based admissions

quotas (such as admitting the top few percent of students from some schools or regions) that are formally race-neutral but track racial demographics. Universities could also invest in college preparation for underprivileged middle and high school students and actively recruit strong minority students.

A conservative Court majority could conceivably seek to limit and even overturn other progressive legislation by restricting the legitimate scope of the states' or Congress's activities. In some respects, it might bring the Court closer to the libertarian, property-protecting constitutional interpretation of the early twentieth century. In the Lochner era, so-called after a 1905 decision blocking a New York State maximum-hours law for bakers, the Court struck down much progressive state legislation as violating the liberty of contract, a right it found in the due process clause of the Fourteenth Amendment. Then and now, libertarian judicial activism entails blocking legislation that is thought to interfere with the ability of supposedly free economic actors to make economic decisions and form contractual relationships as they choose.

Libertarian thinking is alive among the conservative justices. In 2010, for example, the law professor Randy Barnett argued that the individual mandate of the Affordable Care Act was unconstitutional because it required people to do something they were not doing—buying insurance—rather than regulating something they were already doing. Nearly all legal scholars found Barnett's libertarian distinction between action and inaction constitutionally meaningless. The conservative justices embraced it, however, holding the mandate unconstitutional as beyond the authority of Congress under the commerce clause; Roberts and the four liberals voted to sustain the mandate on the grounds that it was part of Congress's taxing power.

But the conservative justices would be very unlikely to go back to Lochner explicitly. The repudiation of the liberty-of-contract jurisprudence that characterized the Lochner era is still an important part of constitutional orthodoxy. Antonin Scalia held up the Lochner decision as the very model of bad jurisprudence, and frequently accused liberals like Kennedy of inventing constitutional rights in the vein of Lochner. A conservative court would be likelier to practice a less radical version of judicial activism, one in which the justices opportunistically use existing doctrinal tools to undermine progressive legislation.

Roberts, for instance, invoked states' rights to block the Medicaid expansion proposed in the ACA. He held that Congress's threat to revoke states' Medicaid funding unless they accepted expansion amounted to an unconstitutional form of coercion. Similarly, in Shelby County v. Holder (2013), Roberts struck down a substantial part of the Voting Rights Act by arguing that Congress had drawn on "forty-year-old facts" about racial discrimination in voting, rather than citing "current conditions," to justify extending the law. As a result, states and municipalities with long histories of racial gerrymandering can now redistrict without first submitting their plan to the Department of Justice for pre-clearance, as the Voting Rights Act requires.

Faced with this sort of conservative judicial activism, liberals could find themselves thwarted in passing progressive social legislation. The hard case would arise if the legislation enjoyed

substantial and durable national support and was nonetheless blocked by the Court. That is not what happened with the ACA; the law passed by a bare partisan majority, and the conservative justices merely helped undermine legislation that already stood on shaky political ground. It is what happened during the New Deal, when the justices' resistance led Franklin Roosevelt to try to pack the Court. The Court folded, and Roosevelt prevailed. Today's Court, however, enjoys more independence and public legitimacy than the Court that Roosevelt confronted did, and it is far from obvious that it would give in to Democratic pressure.

Matters of national security—especially those that concern presidential power—would pose a problem for a conservative Court. Conservatives are torn between two competing views: one that grants the president near-monarchic authority when it comes to national security, and another that allows the president to be constrained by Congress. To complicate matters further, they have tended to support presidential power when the president is a Republican, while sharply limiting it when the president is a Democrat.

This conflict was on view in Zivotofsky v. Kerry (2015), an important case about whether the president or Congress would have the final word about the passports of US citizens born in Jerusalem. Congress wanted passport bearers to be able to list their country of birth as Israel; the Obama administration wanted to maintain the status quo, in which the country of birth was given as "Jerusalem" to avoid taking a stand on the city's status. Ultimately, the Court held that the president could ignore Congress's command to allow Israel to be designated because his authority in foreign affairs includes the right to recognize foreign states.

Unsympathetic to the Obama administration's assertion of executive power, Scalia dissented. He pointed out that under the established doctrinal framework, the president's power is at "its lowest ebb" when Congress has directly spoken. Thomas, also unsympathetic to Obama, dissented separately. But he insisted that the extent of the president's inherent powers, as the Constitution originally defined them, should be determined by looking at the royal prerogatives that the British king in principle possessed in the era of the founding.4

Clarence Thomas
Clarence Thomas; drawing by David Levine
Outraged, Scalia accused Thomas of constructing "a presidency more reminiscent of George III than George Washington." Their disagreement went back to 2004, when Scalia and Thomas split sharply over whether the Bush administration could detain an American citizen without trial on suspicion of affiliation with al-Qaeda. Scalia thought this violated the basic right to habeas corpus; Thomas believed it fell within the president's national security power.

A conservative post-Scalia Supreme Court would probably rule quite differently on presidential power and national security based on who the president was. It would be likely to defer to a conservative president, deploying Thomas's theory of the strong executive. That is essentially what happened in Trump v. Hawaii, the travel ban case, in which the conservative majority relied on what it called "core" executive power as an excuse to avoid the anti-Muslim bias that

actually motivated the ban. If a liberal president tried to deploy unilateral executive power, however, the Court's conservatives might well fall back on the Scalia line of skepticism, insisting that Congress's competing powers are necessary to constrain the president. A Democratic president might then end up blocked by a conservative Court unless the Democrats controlled Congress. If Congress and the president agreed, even a conservative Court could be expected to defer to them on matters of national security. Conservatives might in fact be more deferential under these conditions than a liberal Court would be to a Republican president and Republican-controlled Congress, because they have at hand the Thomas argument for radical deference to the executive, which no liberal justice endorses. Such deference seems especially likely to occur if Trump has appointed the justices who control the outcome.

Environmental regulation is the final area in which an activist conservative Court could have a substantial effect. The source of the Court's power here lies in the relationship between environmental legislation and regulation. In general, Congress has chosen to deal with the environment by passing very general laws and delegating the authority to implement them to regulatory agencies like the Environmental Protection Agency.

An activist conservative Court could make life difficult for a Democratic EPA by blocking regulation directly, declaring it "arbitrary and capricious" under the Administrative Procedure Act. The courts are only supposed to use this tool to block actions that are genuinely irrational or that exceed the agency's legal authority; but the Court could deploy it much more aggressively than has been done in the past.

In practice, environmentalists could try to get around such a judicial barrier by lobbying Congress to pass laws directing that a specific regulation be adopted, rather than delegating so much authority to the EPA. If public opinion were strongly enough in favor of increased environmental protection, a Democratic Congress and president could probably get some regulation adopted despite judicial resistance.

A conservative Court could also impede environmental reform by second-guessing agencies' interpretations of federal law. According to what is known as the "Chevron doctrine," when federal law is ambiguous, the Court will defer to an agency's interpretation of the law provided it is reasonable. This doctrine is intended to give substantial power to agencies, binding the hands of judges who might otherwise disagree with the agencies' policies.

Today Chevron is under attack, most prominently from Gorsuch, who has written disparagingly of the idea that courts would have anything less than full control over the meaning of federal statutes. This is bad news for environmental regulation—and that is almost certainly part of the point. A Court that does not defer to an agency's interpretation of federal law can substitute its own policy judgment for that of the agency. If that agency is the EPA, and its judgment is being used to expand environmental protection, then a conservative Court that overturned Chevron or weakened its rule of deference would stand ready to reverse the agency's course.

The only solution for environmentalists would be to pass new laws that would expressly enact regulation, rather than delegating regulatory authority to the agencies. That would be hard to do, especially given the established norm that agencies rather than Congress do most environmental regulating. But if a conservative Court systematically uses statutory interpretation to block environmental regulation, that division of labor may have to change. Instead of making arguments to the EPA or other agencies, environmentalists would have to direct their efforts more directly toward Congress itself.

A durable conservative majority on the Supreme Court could, then, impose substantial changes in American rights and law, especially in areas where liberals have in recent decades relied on courts and administrative agencies rather than Congress or state legislatures to implement progressive policies. Those who oppose such changes should begin considering the appropriate political responses, such as choosing which issues should be targeted for grassroots organizing and lobbying state legislatures and Congress. Ultimately, Democrats cannot rely on judges for social progress. A functioning liberal democracy requires a liberal populace that is prepared to vote for the policies it wants.

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Kennedy had shown flashes of moderation before. In Planned Parenthood v. Casey (1992), he coauthored an opinion that declined to overrule Roe v. Wade and thus preserved women's right to choose even as it replaced Roe's trimester framework with a new test of whether the state had imposed an "undue burden" on the right. And in Romer v. Evans (1996), Kennedy helped establish a jurisprudential basis for gay rights by striking down a Colorado constitutional amendment that barred antidiscrimination laws protecting homosexuals. ↩

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See David Cole, "This Takes the Cake" in this issue. ↩

3
Fisher v. University of Texas (2016); Gratz v. Bollinger (2003). ↩

4
In fact, by the late Georgian period, the king was by constitutional custom unable to exercise many aspects of royal prerogative that textbooks still ascribe to him. See Eric Nelson, The Royalist Revolution (Harvard University Press, 2016). But Thomas seems blissfully uninterested in this complex historical reality. ↩