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

For this Sunday, August 4, 2018, the Today's Issues group will discuss two or three articles (depending on how far we get) from the New York Review of Books.

From the July 19th Issue, page 8: Noah Feldman, "Tipping the Scales, This can be found online at https://www.nybooks.com/articles/2018/07/19/supreme-court-tipping-scales/ I am also attaching it here

From the July 19 issue, page 24, "This Takes the Cake," This is paywalled on the NYR site so I am attaching it here.

From the August 19 issue, the first article, Michael Tomasky, "Hail to the Chief" about developments in the ongoing investigations of the Trump administration. This one is also paywalled on the NYR site so I am attaching it here.

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.

This Takes the Cake
David Cole JULY 19, 2018 ISSUE

Chip Somodevilla/Getty Images
David Mullins and Charlie Craig, the couple who filed a complaint after a Colorado baker refused to sell them a wedding cake, at the Supreme Court, Washington, D.C., December 2017
"It is a general rule that [religious and philosophical] objections do not allow business owners…to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." So wrote Justice Anthony Kennedy for the majority in Masterpiece Cakeshop v. Colorado Civil Rights Commission, which was decided by the Supreme Court on June 4. The case, which I argued in the Court on behalf of Charlie Craig and David Mullins, a gay couple denied a wedding cake by a Denver-area bakery, posed the question of whether the bakery owner had a First Amendment right to refuse to sell the couple a wedding cake because he objected on religious grounds to same-sex marriage.

The answer, at least according to Justice Kennedy's "general rule," would seem to be no. Colorado's public accommodations law, like those of forty-four other states and the federal government, is a "neutral and generally applicable public accommodations law" that forbids discrimination against customers based on race, sex, sexual orientation, and the like. Accordingly the baker's religious objections do not permit him to deny "equal access to goods and services."

And yet the Court ruled, by a vote of 7–2, in favor of Masterpiece Cakeshop and its owner/baker, Jack Phillips, with Justices Elena Kagan and Stephen Breyer joining their five conservative colleagues. It did so on the case-specific ground that, regardless of the legality of the baker's refusal to serve the gay couple, the Colorado Civil Rights Commission that considered their claim of discrimination was infected by antireligious bias, which independently violated the baker's constitutional right to the free exercise of religion. Because it decided the case on this narrow ground, the Court did not formally rule on the question of whether businesses open to the public could ever rely on the First Amendment to justify discrimination.

The decision has caused confusion among advocates and commentators on all sides. Rachel Tiven, the CEO of the LGBT civil rights organization Lambda Legal, said, "The Court today has offered dangerous encouragement to those who would deny civil rights to LGBT people." The lawyer for the baker, Kristen Waggoner of Alliance Defending Freedom, an anti-gay advocacy organization, proclaimed that "the court's decision announced that the government was wrong to punish Phillips for living according to his beliefs about marriage." And the constitutional law professors Larry Sager and Nelson Tebbe wrote that "in Masterpiece, the Court released a baker from the requirement that he serve all customers, including same sex wedding celebrants."

All of these pronouncements are wrong. The decision does not encourage discrimination against LGBT people; on the contrary, it strongly reaffirmed the importance of antidiscrimination laws and declined to adopt claims of a First Amendment right to discriminate. Nor did the Court say it was "wrong to punish Phillips for living according to his beliefs." It simply found that the particular process used to determine whether he had violated the law was biased against religion. And the Court did not release a baker "from the requirement that he serve all customers." Masterpiece Cakeshop remains just as subject to Colorado's public accommodations laws after the decision as it was before. If Charlie Craig and David Mullins walked into the shop today and asked for a cake to celebrate their anniversary, the baker would have no right to turn them away.

Waggoner and the Trump administration had argued for just such a sweeping First Amendment exemption. They contended that because the baker's wedding cakes were "expressive," requiring him to make one for a gay couple would impermissibly compel him to express views with which he disagreed. Such an exemption would have had radical consequences, because a wide range of services and products can be viewed as "expressive." Architects, lawyers, chefs, bookstores, hairdressers, tailors, nail salons, and interior decorators all offer "expressive" goods and services. If the Court had endorsed this exemption, a baker could refuse to sell a birthday cake to a black family if he objected to celebrating black lives, or an architect could refuse to provide plans for a Muslim couple's home if he objected to Islam.*

Because such results would be so plainly unacceptable, the justices pressed the lawyers for the baker and the Trump administration during oral arguments on whether the First Amendment exemption they were seeking could be limited in any principled way. The lawyers had no good

answers. Solicitor General Noel Francisco argued that Phillips's cakes should be protected, unlike, say, grocery store cakes, because "people pay very high prices for these highly sculpted cakes." But he never explained why the First Amendment should protect only "highly sculpted" and expensive cakes. Waggoner, also seeking ways to limit the unappealing consequences of her argument, insisted that architects, chefs, and makeup artists were not expressive, and therefore would not be protected under the First Amendment exemption she claimed for her client—prompting Justice Breyer to ask whether Michelangelo's Laurentian Steps were not expressive. Waggoner had no response.

In his decision for the Court, Justice Kennedy made clear that the arguments advanced by the Trump administration and the baker raised serious concerns. He acknowledged that a minister could not be compelled to perform a wedding that violated his religious tenets, but warned that

if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

(Ministers are not businesses open to the public, so they are not obligated by public accommodations laws.) And he noted that the baker's sweeping argument could lead to unacceptable results, in which

all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect [would] be allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages," something that would impose a serious stigma on gay persons.

The Court thus plainly refused to accept the baker's and the Trump administration's invitation to create a First Amendment right to discriminate. Nonetheless, Attorney General Jeff Sessions appears not to have gotten the message. In remarks to a group of religious leaders in Washington on June 13, he said, "There is no need for the power of the government—no need for the state's power—to be arrayed against an individual who is honestly attempting to live out—to freely exercise—his sincere religious beliefs." But of course, as the Supreme Court recognized, there is a need for antidiscrimination laws, many of which the Justice Department itself is responsible for enforcing. And exempting those who object on religious grounds to providing equal treatment would open a gaping loophole in our nation's commitment to equality.

The Court's finding that the commission's antireligious bias had nonetheless violated the baker's free exercise rights was strained, to put it mildly. It cited one commissioner who said that "it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others," and another who said that Phillips can believe "what he wants to believe," but cannot act on that belief "if he decides to do business in the state." "Despicable" was an unfortunate choice of words, but the statement that one cannot invoke religion to harm others is actually

straightforward constitutional law, as is the principle that one cannot invoke religion to avoid complying with a generally applicable business regulation.

The Court also saw bias in the fact that while the commission ruled that Masterpiece Cakeshop had impermissibly discriminated by refusing to sell a wedding cake to a gay couple, the commission found no discrimination when three other bakers refused to bake cakes bearing homophobic messages for William Jack, a Christian activist. But the cases are easily distinguished, and the commission rightly treated them differently. Masterpiece Cakeshop refused to sell to a gay couple a product it would happily sell to a straight couple; it therefore discriminated on the basis of sexual orientation. The three other bakers refused to sell to Jack cakes they would not make for anyone. As there was no evidence that they treated Jack differently from any other customer because he was Christian, they did not violate Colorado's law. In fact, each of the bakers had regularly made Christian-themed cakes, and agreed to Jack's request to make cakes in the shape of a Bible and declined only to write messages on them that they deemed offensive.

Public accommodations law does not require businesses to make any particular products, and allows them to refuse to make products they deem offensive. It only bars them from refusing, on the ground of a customer's identity, to sell a product they would sell to others. As Justice Ruth Bader Ginsburg explained in her dissent, "Change Craig and Mullins' sexual orientation (or sex), and Phillips would have provided the cake. Change Jack's religion, and the bakers would have been no more willing to comply with his request."

The Court's labored finding of "bias" looks like an attempt to avoid squarely confronting the issue it originally intended to resolve when it took the case. Certainly the Court did not grant review merely to scold a low-level state civil rights commissioner for an infelicitous remark. And the difference between the Masterpiece Cakeshop case and those involving the other bakers is too easily stated to have been a genuine basis for concern about bias.

Why, then, did the Court reach this result? The justices may well have considered this a "statesmanlike" resolution. Rather than rule definitively on perhaps the most controversial case of the year, the Court gave something to both sides, and by doing so managed to cobble together a seven-justice majority. In a starkly divided nation, it avoided a sharply divided result. The Court handed a nominal victory to the baker, but it was a one-time-only decision that signaled no enthusiasm for the sweeping First Amendment right to discriminate that the baker and the Trump administration had sought.

Future disputes of this sort will almost certainly be guided by the Court's "general rule," as expressed by Justice Kennedy, that there is no First Amendment right to deny "equal access to goods and services" under public accommodations law. That is, unless changes in the Court's personnel cause it to veer sharply to the right. For now, however, the "general rule" applies. Indeed, just three days after the Masterpiece Cakeshop decision, an Arizona appellate court cited that very language in rejecting a Phoenix-based business's claim that it had a First

Amendment right not to provide artwork to same-sex weddings on the same terms as it serves opposite-sex weddings. Masterpiece Cakeshop is reportedly considering getting back into the business of making wedding cakes, which it halted rather than have to serve gays and lesbians. But if it does so, it will have to sell them to everyone.

Letters
More Cake? August 16, 2018

Noah Feldman, David Cole “Tipping the Scales,” from the July 19th issue of the New York Review of Books.
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.

1
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. ↩

2
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. ↩

Hail to the Chief
Michael Tomasky AUGUST 16, 2018 ISSUE

Win McNamee/AFP/Getty Images
Donald Trump delivering the State of the Union address, Washington, D.C., January 2018
Soon, according to a June report in The Washington Post, the moment of truth will arrive. Robert Mueller, the special counsel investigating the president, his administration, and his campaign, will deliver his verdict on whether Donald Trump obstructed justice.

On the larger and more complicated question of his campaign's possible collusion with Russia, Mueller may take longer to issue a second report. But it is widely expected in Washington—which has been wrong about such matters before—that a first report, on obstruction, will drop before Labor Day. Assuming it happens, it will follow shortly after Mueller's July 13 indictment of twelve Russian military intelligence officers. Those indictments have to do

with the larger collusion story, and they suggest that more indictments might well be on the way. Even as Trump gave Putin the benefit of the doubt in Helsinki, a Russian woman, Maria Butina, was charged with trying to illegally influence the 2016 election.

It seems inconceivable that Mueller will absolve the president in that first report. Trump has obstructed justice right in front of our noses, and more than once, either because he doesn't know what obstruction of justice is or because he knows and doesn't care. The most notable instance was his interview with Lester Holt of NBC in May 2017, right after he fired FBI Director James Comey. Deputy Attorney General Rod Rosenstein had prepared a letter laying out the president's reasons for the dismissal. The reasons included, rather laughably, the charge that Comey was unfair to Hillary Clinton in his handling of the probe of her State Department e-mails. Holt asked Trump about the reasons stated in the letter, and eventually Trump acknowledged that they hadn't a thing to do with it:

I was going to fire Comey knowing there was no good time to do it. And in fact when I decided to just do it, I said to myself, I said, you know, this Russia thing with Trump and Russia is a made-up story.

That is obviously Trump saying, as directly as Trump can say anything, that he fired Comey because of the FBI's investigation into his campaign's possible Russia ties. But it's hardly the only example we know of. Two months before that, in March 2017, he'd berated Attorney General Jeff Sessions in a meeting about Sessions's earlier decision to recuse himself from the Russia probe and urged him to reverse course. He also made requests to both Director of National Intelligence Dan Coats and National Security Agency director Michael Rogers to issue statements proclaiming that there was no collusion (both refused). There is more along these lines. Arguably every single tweet the president writes about the investigation, attacking Mueller's "13 Angry Democrats" and denouncing it as an invariably upper-cased Witch Hunt, is an attempt to obstruct justice; if you don't think so, get yourself placed under federal investigation and try mimicking Trump's Twitter habits and see what happens to you.

All of this doesn't begin to detail what Mueller and his team have learned from interviews about what took place in private. It's a reasonable bet, then, that Mueller will find that Trump and others around him—former press aide Hope Hicks, possibly his son Donald Jr., maybe Jared Kushner, other campaign associates and hangers-on—have lied or tried to quash or in some way compromise the investigation.

If that happens, what comes next? Three days before Trump's inauguration, the neoconservative Bush administration official Eliot A. Cohen wrote that "this will be a slogging match until the end." He felt confident, however, that "the institutions will contain him and the laws will restrain him if enough people care about both, and do not yield to fear of him and whatever leverage he tries to exert from his mighty office."

Of those forty-five words of Cohen's, the most important is "if." When Cohen wrote his piece, there may have been reason for optimists to hope that the Republicans who control Congress and the conservative jurists who constitute the majority on the Supreme Court, as well as rank-and-file Republicans, would tire of this vulgar burlesque and would find ways to check Trump, to communicate to him that even a president can't just do whatever he wants.

But what has actually happened over the last year and a half has been the opposite. Two Republican legislators who have criticized him in a way that bared any teeth, Senators Jeff Flake and Bob Corker, are giving up the fight and retiring, while much of the congressional GOP is instead laying the groundwork for an all-out assault on Mueller when a report hits. The Supreme Court, which will presumably soon have two Trump appointees, is far more political and less independent than the Supreme Court that in 1974 ordered Richard Nixon to hand over his tapes. Trump's base, as long as he is deporting asylum-seekers and inveighing against knee-taking football players and fake news journalists, grows more and more besotted. And undergirding it all is the Fox News Channel, now a pure propaganda network, from which Republicans take their cues and get their talking points. What will they do when Mueller's first allegations appear?

It's worth stepping back here to review quickly the steps by which the Republican Party became this stewpot of sycophants, courtesans, and obscurantists. It's easy to forget these things, but it's not as if Trump announced his candidacy in mid-2015 and all this self-abasement suddenly happened. In a May 2015 Washington Post–ABC poll, his favorable-to-unfavorable numbers among Republicans were 23 to 65 percent. Then he announced his candidacy in mid-June, warning us about those Mexican rapists. By mid-July, another Washington Post–ABC News poll gave Trump a 57 percent favorable rating among Republicans, with 40 percent seeing him unfavorably—a big improvement, but still far from Dear Leader territory.

That August brought the first Republican debate, at which Megyn Kelly confronted Trump over his "disparaging comments about women's looks." The day after that debate, Trump said that Kelly had "blood coming out of her eyes, blood coming out of her wherever." The war that resulted between Trump and Fox News foreshadowed his subsequent takeover of the Republican Party as a whole.

Trump had known Rupert Murdoch, Roger Ailes, Bill O'Reilly, and Sean Hannity for years, and occasionally appeared on Fox to natter on about Barack Obama's birth certificate. Now, however, he grandly announced a boycott of the network and put out a flurry of tweets like this one, which reads strangely (except for the grammatical error) in light of all we know today: ".@oreillyfactor was very negative to me in refusing to to [sic] post the great polls that came out today including NBC. @FoxNews not good for me!" Who knows the extent to which this was all show. Murdoch and Ailes no doubt felt that they had to at least appear to be defending Kelly, their top female star at the time, who has since decamped to NBC (this was months before Ailes was exposed as a serial sexual predator).

It now seems as if what we were witnessing then was really a cautious waltz of alpha-male lions loosed upon an unfamiliar savannah, fighting to determine which one would lead the pride. And Trump clearly won. I'm not sure this qualifies as something for which he deserves credit, but it's a fact that Trump is the only Republican politician I can think of since the network has been on the air (1996) to take it on and bend it to his will rather than the other way around.

As Trump began piling up primary victories, Republicans started coming around. Some stopped short of endorsing him, but they found ways to signal that they would do nothing to stop him. In late April 2016, Tennessee's Bob Corker announced his support for Trump. The day before, Trump had given a foreign policy address that Corker praised as "challenging the foreign policy establishment that has been here for so long." That June, when Trump delivered a racist tirade against the judge (of Mexican heritage) who was presiding over the Trump University case, Senator Lindsey Graham said, "There'll come a time when the love of country will trump hatred of Hillary." But for most Republicans—very much including Graham himself, who just three months into Trump's term announced himself "the happiest dude in America right now" over the administration's anti-Iran saber-rattling—that time never came.

The release of the Access Hollywood tape in early October 2016 provided another look-in-the-mirror moment for Republicans. More than forty elected Republicans did back away from Trump at that point—a significant number, no doubt, but still a small minority. Big donors like Robert and Rebekah Mercer announced they were sticking with him. The Never-Trumpers, which at the time included those forty, along with a number of conservative writers and intellectuals and conservative TV pundits, stood their ground, but they were overwhelmed and warned by their constituents that they had better fall into line: Trump, Rudy Giuliani, Roger Stone, Julian Assange, and Fox News were now fully in charge of the Republican Party.

None of this was inevitable. I used to argue, in these pages and elsewhere, that the Republicans could have stopped Trump, and I still believe it. Doing so would have required three elements: a bit of leadership from Reince Priebus, then the party chairman and later the easily steamrolled White House chief of staff; an agreement (this was the hard part) among the other major presidential candidates to check their egos and coalesce behind one of them; and a commitment by a few major donors to support that candidate.

But they didn't do this, and no one stood up to Trump. His only forceful critic was Mitt Romney, who called him "a phony, a fraud" in a scathing speech; but he delivered that speech in March 2016, two days after Trump had swept the Super Tuesday voting, i.e., after he was already well on his way to the nomination. The time for that speech was before the Iowa caucuses. Today, Romney, running for the Senate in Utah, cheerily predicts that Trump will "be reelected solidly." This is at least the fourth political incarnation of Romney, from the moderate who gave Massachusetts a health care plan in the early 2000s to the "severe" conservative who ran for president in 2012 to the anti-Trump spokesman of two years ago to the capitulator of today.

Donald Trump

Donald Trump; drawing by Siegfried Woldhek

This is the remarkable thing we have witnessed: the Republican Party has essentially ceased to be a political party in our normal understanding of the term and has instead become an instrument of one man's will. Fifty years ago, the GOP was an amalgam of different factions that often disagreed among themselves—New England liberals, the heirs of the "Free Soil" moderates, prairie conservatives, Wall Street money people. Then in 1980, the new "movement conservatives" gained the upper hand. Incrementally, they took over. Incrementally, they moved ever more rightward, egged on by the new right-wing media.

All that was bad enough for the country—it led us to a war waged under false pretenses against an "enemy" that hadn't attacked us and a campaign to dismantle a social compact carved out over the course of a century. But at least through all those phases, the Republican Party remained committed to the basic idea of democratic allocation of power. Since the Civil War, Democrats and Republicans have fought sometimes fiercely over their ideological goals, but they always respected the idea of limits on their power.

No one had come along to suggest that power should be unlimited. But now someone has, and we have learned something very interesting, and alarming, about these "conservatives," both the rank and file and holders of high office: their overwhelming commitment is not to democratic allocation of power, but to their ideological goals—the annihilation of liberalism, the restoration of a white ethno-nationalist hegemony. They know better than to speak of such things openly, but every once in a while they have allowed a piece of the cat's anatomy to slip out of the bag, a tail here, a hind leg there. In June 2016, for example, Senate Majority Leader Mitch McConnell said:

For all of his obvious shortcomings, Donald Trump is certainly a different direction, and I think if he is in the White House he'll have to respond to the right-of-center world which elected him, and the things that we believe in. So I'm comfortable supporting him.

In other words, to McConnell, that "right-of-center world" predated Trump, and on most important questions—taxes, deregulation, cultural issues, and the judges who have the power to nullify so many liberal achievements—Trump would do just what McConnell wanted a Republican president to do.

It has often been written, and I've written it myself, that the Republicans have been weak in the face of Trumpism. But I've come to think that's wrong. They're not weak at all. Most of them are perfectly happy to have become Trump's vassals. They were waiting for just such a man.

Trump's popularity among Republicans now stands at close to 90 percent. This is a fairly recent development—since the early part of this year. No doubt it is a function in part of certain accomplishments, notably the tax cut and the reshaping of the courts. But I think it's tied most directly to the increasing awareness of what a serious threat Mueller poses to the president. Hence the ferocious pushback, orchestrated by Fox. Most nights, if I'm watching Rachel

Maddow at 9 PM on MSNBC, I'll flip over for a few moments to watch Hannity on Fox. If you don't do this, I recommend that you do. It's like being transported to a parallel universe. Hours continue to be devoted to why Hillary belongs in jail. The Mueller probe is discussed only for the purpose of telling viewers how corrupt it is.

A quick timeline will help us to understand how and when the Republican campaign against Mueller grew. Comey was fired on May 9, 2017. On May 17, Deputy Attorney General Rosenstein appointed Mueller as special counsel. The very next month, Trump ordered the firing of Mueller (something he could not directly do; he could fire Rosenstein and replace him with a lackey who would then fire Mueller). But the White House counsel, Donald McGahn, said he would resign if Trump ordered such moves. Trump backed off.

That wasn't known publicly until The New York Times broke the story early this year, but even so, rumors of a firing circulated widely last summer—widely enough that many Republican senators warned of grave consequences for the president if he did so. Two bills to protect Mueller, actually bipartisan, were written and introduced by early August 2017. It seemed then at least that some Republicans understood their constitutional responsibility.

Trump ordered that firing after The Washington Post revealed that Mueller had expanded the probe from collusion with Russia to possible obstruction of justice by Trump. Also after that, Newt Gingrich opened up a line of attack that quickly became familiar. Mueller, he tweeted, is "the ti[p [sic] of the deep state spear aimed at destroying or at a minimum undermining and crippling the Trump presidency." Three minutes later he tweeted, "The brazen redefinition of Mueller's task tells you how arrogant the deep state is and how confident it is it can get away with anything." I'm not 100 percent sure Gingrich—who didn't think it particularly brazen when Ken Starr expanded his probe from Whitewater to Bill Clinton's sex life—was the first to use the phrase "deep state" in the United States (it originated in Turkey in the 1990s to describe the links between the government, the police, and the criminal underworld). But that is exactly the sort of boundary-pushing that has been his tactic for forty years now—he once blamed a mother's drowning of her two young sons on liberals and the Democratic Party. In any event, to the right, it's all been a hoax, a charade, and a deep-state conspiracy ever since.

The right-wing media's uber-villain of the hour is Peter Strzok, the FBI agent who, in the course of investigating the Clinton e-mail matter in 2016, wrote some certainly ill-advised text messages to an FBI attorney, Lisa Page, with whom he was having an affair, calling Trump an "idiot," an "enormous douche," and a "fucking idiot," and expressing grave alarm at the prospect of a Trump presidency. A report issued this June by the Justice Department's inspector general was highly critical of Strzok and unearthed one new exchange between him and Page, in which she pleads with him in 2016 to reassure her that Trump will never be president, and he replies, "No. No he won't. We'll stop it."

Mueller learned of these e-mails last July and dismissed Strzok immediately (the messages' contents weren't publicly known until early this year), and the IG report did not conclude that

Strzok's bias affected the outcome of the Clinton investigation. But those texts are manna from heaven to Republicans in Congress. Ohio congressman Jim Jordan, who was a cofounder of the hard-right House Freedom Caucus, has been an especially ferocious attack dog on Trump's behalf, browbeating witnesses who meekly rebut his conspiratorial premises.

Strzok testified once to the House Judiciary Committee, in private, in late June. On July 12 he testified publicly, and defiantly, before a joint meeting of two House committees. He insisted that his personal beliefs "at no time" interfered with his decision-making and that attacks on him and the FBI were "deeply destructive." He was hounded by South Carolina's Trey Gowdy repeatedly over the text messages. Bob Goodlatte, the Republican chairman of the Judiciary Committee, at one point threatened him with criminal contempt for refusing to answer questions about the Mueller investigation that he is ethically obligated not to answer.

In response, Strzok did what too few people do—he stood up to his questioners and embarrassed them:

I think it's important when you look at those texts that you understand the context in which they were made and the things that were going on across America. In terms of…"We will stop it"…it was in response to a series of events that included then candidate Trump insulting the immigrant family of a fallen war hero. And my presumption, based on that horrible, disgusting behavior, that the American population would not elect somebody demonstrating that behavior to be president of the United States.

I'm not sure what the Republicans can do to Strzok from here, but it seems unlikely that he will be permitted to serve out his career in peace (he was transferred to human resources).

Beyond Strzok, another Trump–GOP talking point revolves around those thirteen angry Democrats mentioned so frequently by Trump and Giuliani, at least before Giuliani suddenly disappeared from public view. Mueller made public the names and identities of seventeen lawyers he had hired, and researchers found that thirteen were registered Democrats. Five had made donations to Clinton (two large, three small). It's a complaint that in fairness one could imagine either party lodging. At the same time, it's worth noting that it's a violation of Justice Department rules, under which a special counsel operates, for Mueller to ask the political affiliations of people he hires. And Mueller is himself a Republican, but that is dismissed now, because in the Fox version of events he has capitulated to the deep-staters.

Thus has the table been set for full-blown legislative assault on Mueller if and when he delivers a damning report. Its extent will depend on the nature of the charges. If they're explosive enough, perhaps some Republicans will be checked. But right now, no Republican seems interested in defending Mueller. Those two Senate bills died. Last fall, their Democratic sponsors, Chris Coons and Cory Booker, thought they were making progress in negotiations with their GOP counterparts, Lindsey Graham and Thom Tillis, until they walked away. It

wouldn't have mattered in any case, as McConnell made it clear the bills wouldn't get to the floor.

And what will Trump do, in the event of such a report? Deny everything, of course, and fight any attempt at sanctioning him, even if Congress attempts to levy one (if, that is, the Democrats recapture the House). And that's when Eliot Cohen's slogging match will really begin.

It is possible that Mueller will issue a report so damning and so ironclad that Republicans will have no realistic choice but to abandon Trump. But that seems very unlikely. The party as a whole—and let us not fail to mention Ronna Romney McDaniel, current chairwoman of the Republican National Committee, niece of Mitt, and as slavish a Trumper as exists—has spent a year and a half rehearsing for the big moment.

Past practice suggests all too clearly what will happen. Some of the more senior and respected Republicans, the Lindsey Grahams and Orrin Hatches, will hop onto the Sunday shows to express their "grave concern" or some such as they did after the Helsinki conference. A few will be one or two careful ticks more forceful—young Nebraska senator Ben Sasse, say, who has a history of writing tweets and Facebook posts that denounce Trump (and then doing nothing else). These reproaches will generate a round of respectful headlines in places like Politico, enough to convince a few of the first-tier talking heads that these men (and possibly some women; Alaska senator Lisa Murkowski springs to mind) are serious, that this will finally be the moment they will do the honorable thing. And then they'll return to their pro-Trump states and districts, lie low for a few days, and come back to Washington hoping they can quietly let the whole thing drop.

Other Republicans, of course, will serve as Fox News's legislative flacks and unload on Mueller. This will include Gowdy, although he is retiring; Jordan, assuming he is not felled in the meantime by a scandal engulfing him on the question of whether he knew, as a wrestling coach at Ohio State University, that a team doctor was taking sexual liberties with the young athletes; Arkansas senator Tom Cotton; California congressman Devin Nunes, who has used the House Intelligence Committee to promote blatantly false pro-Trump narratives; and Florida congressman Matt Gaetz, who last November introduced a resolution calling on Mueller to resign and has in the short months since become Trump's most comically reliable groveler.

The bulk of the rest of them will swim with the tide. The one who might be worth watching is North Carolina senator Richard Burr. As chairman of the Senate Intelligence Committee, Burr has at least led an investigation that was not dedicated solely to the enterprise of cherry-picking evidence that would exculpate the president, as Nunes has. A Burr committee report issued in early July backed up the findings of US intelligence agencies that Russia did meddle in the election to benefit Trump. Burr said during a successful 2016 run that he would not seek reelection. If that is still his thinking, he may feel free to speak frankly.

It's doubtful he would influence many of his colleagues, though. Most feel no pressure to denounce Trump. But, after a year and a half of this, we may fairly conclude that it's worse than that. They have no wish to denounce Trump. He does things they disagree with sometimes. There's the family separation policy, which one suspects they'd have been fine with if the polls weren't so overwhelmingly bad. And there's the matter of tariffs, on which most Republicans do genuinely disagree, and which could produce real tension later on. But in the meantime, all evidence tells us that the Republican Party is delighted with Trump, as we will see in the upcoming hearings for Brett Kavanaugh's nomination to the Supreme Court.

Barring a bolt of unexpected lightning, Kavanaugh will win confirmation. Eventually, the question of whether this president (or any president) can face legal punishment while in office will make its way to the Court. We will see then whether the tumor that afflicts the legislative branch has also consumed the judicial. In 1974 no one had to worry seriously that the Supreme Court would issue a "political" decision on such a matter, and indeed the Court ruled 8–0 that Richard Nixon was not above the law (Nixon appointee William Rehnquist recused himself because he had worked in the administration, but Lewis Powell, Nixon's other appointee, ruled with the majority). We can permit ourselves no such sanguinity now. The conservative movement is a few Supreme Court decisions away from having unlimited power, and one sees no Cincinnatus among them.

—July 19, 2018