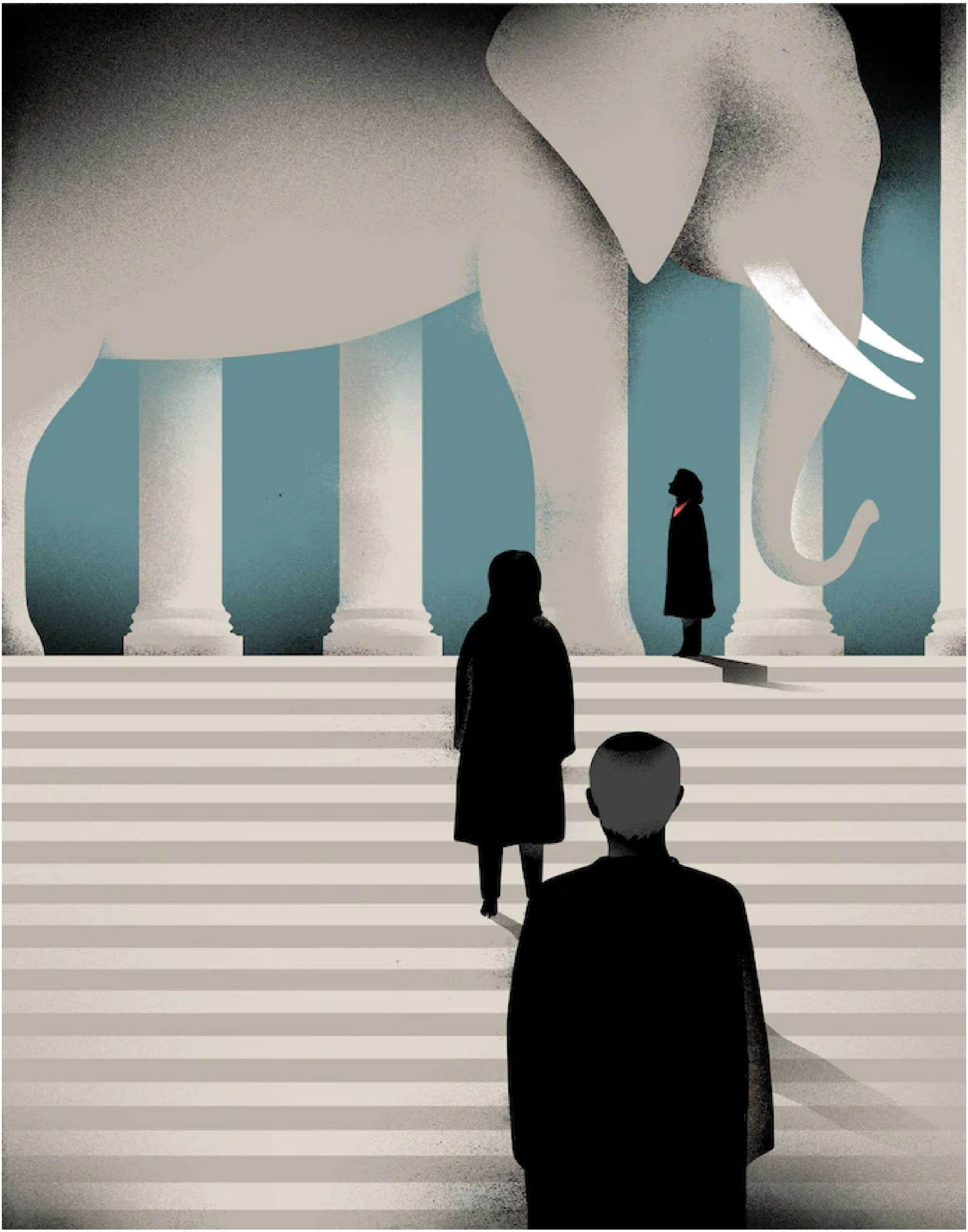
The Rule of Six: A newly radicalized Supreme Court is poised to reshape the nation



(Sébastien Thibault for The Washington Post)

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Supreme Court Justice William J. Brennan Jr., the Eisenhower appointee who became the liberal lion of the Warren Court, had a tradition for introducing every new batch of law clerks to the realities of the institution.

"Brennan liked to greet his new clerks each fall by asking them what they thought was the most important thing they needed to know as they began their work in his chambers," Seth Stern and Stephen Wermiel write in "Liberal Champion," their Brennan biography. "The … stumped novices would watch quizzically as Brennan held up five fingers. Brennan then explained that with five votes, you could accomplish anything."

Brennan, master vote-counter and vote-cajoler, was right — but there is an important corollary to his famous Rule of Five, one powerfully at work in the current Supreme Court. That is the Rule of Six. A five-justice majority is inherently fragile. It necessitates compromise and discourages overreach. Five justices tend to proceed with baby steps.

A six-justice majority is a different animal. A six-justice majority, such as the one now firmly in control, is the judicial equivalent of the monarchy's "heir and a spare." The pathways to victory are enlarged. The overall impact is far greater than the single-digit difference suggests.

On the current court, each conservative justice enjoys the prospect of being able to corral four colleagues, if not all five, in support of his or her beliefs, point of view or pet projects, whether that is outlawing affirmative action, ending constitutional protection for abortion, exalting religious liberty over all other rights or restraining the power of government agencies.

A six-justice majority is emboldened rather than hesitant; so, too, are the conservative advocates who appear before it. Such a court doesn't need to trim its sails, hedge its language, or abide by legal niceties if it seems more convenient to dispense with them.

A conservative justice wary of providing a fifth vote for a controversial position can take comfort in the thought that now there are six; there is strength in that number. Meantime, a court with a six-justice majority is one in which the justices on the other side of the ideological spectrum are effectively consigned to a perpetual minority. They craft dissents that may serve as rebukes for the ages but do little to achieve change in the present. The most they can manage is damage control, and that only rarely.

That is the reality — exhilarating for conservatives, chilling for liberals — as the court, with a membership that has not been this conservative since the 1930s, embarks on what could be its most consequential term in decades. The October 2021 term is the first with six conservatives in place from Day One; the newest, Amy Coney Barrett, was not confirmed until several weeks into the court's previous term, and the first year for any new justice tends to be a time of settling in.

Now, Chief Justice John G. Roberts Jr., who occupies what passes for this court's center, holds the reins but is no longer firmly in control of his horses. Some of his most conservative justices are champing at the bit. Sometimes he can curb them, but not always; sometimes he is delighted to head in the same direction. And if any five agree, they can go galloping off anywhere they choose. If Roberts isn't with them, the court's most conservative member, Justice Clarence Thomas, has the power to assign the majority opinion or write it himself.

"The difference between six and five is exponential," said Mike Davis, president of the Article III Project, which worked to confirm conservative judges during the Trump years. "With five justices to the chief's right, they no longer need to compromise with the chief to win. And this means it is much more likely that the court is going to get to the conservative result most of the time."

The justices have defied some earlier liberal predictions of catastrophe, but there's reason to believe this term may be different — and if not this term, then one not far off.

Republican appointees have been in a majority on the court and at its helm for half a century, since President Richard M. Nixon named Warren E. Burger to be chief justice in 1969, after Earl Warren's retirement. Nixon had the remarkable good fortune to be able to fill three additional seats in the next two years: Justices Harry A. Blackmun, Lewis F. Powell Jr. and William H. Rehnquist, who would eventually succeed Burger as chief justice.

The luck of Republican presidents held. From Gerald R. Ford until Donald Trump's election in 2016, Republicans controlled the White House for 23 years and named nine justices. Democrats were in the presidency for 20 years, nearly as long, but had just four justices confirmed. By 1991, when Clarence Thomas replaced Thurgood Marshall, only one justice nominated by a Democratic president remained on the court, Kennedy appointee Byron R. White, and he was no reliable liberal.

Even so, the Republican-dominated high court failed to produce consistently conservative rulings. A book of essays on the Burger court bore the subtitle, "The counter-revolution that wasn't." Over the following decades, certainly, the court moved steadily and at times sharply to the right, limiting the power of the federal government against the states, reducing criminal defendants' ability to seek redress in federal court, lowering the wall of separation between church and state, hobbling efforts to regulate money in politics, dismantling protection for voting rights and declaring that the Constitution protects an individual right to bear arms.

Still, the court, despite dire predictions to the contrary, protected and reaffirmed abortion rights. It cut back on affirmative action but did not eliminate it. Rehnquist himself, who repeatedly expressed his disdain for *Miranda,* the 1966 decision protecting the rights of suspects in custody, voted as chief justice to reaffirm the ruling. Having found in 1986 that it was constitutional for states to criminally prosecute private homosexual conduct, the court, in the span of a dozen years from 2003 to 2015, reversed itself on that question, overturned the Defense of Marriage Act protecting states from having to recognize same-sex unions and, finally, declared the existence of a constitutional right to same-sex marriage.

Yet over time, and under the tutelage of the conservative Federalist Society, Republican presidents, beginning with George W. Bush and intensifying with Trump, became better at picking reliably conservative justices. There were to be no more David Souters, who turned out to be a solid liberal vote; no more Sandra Day O'Connors, whose background as an Arizona state legislator often inclined her to compromise; no more Anthony M. Kennedys, the pale-pastel conservative named to the court after Ronald Reagan's first choice, Robert H. Bork, was resoundingly defeated.

Future justices would have judicial paper trails to provide assurance of their conservative bona fides on everything from explosive social issues to government regulation, a topic important to legal conservatives and their financial backers. And so the post-Rehnquist years produced the Roberts court, adding not only the chief justice but also Samuel A. Alito Jr. and, with Trump's election and Senate Majority Leader Mitch McConnell's (R-Ky.) stage-managing, three new conservative justices: Neil M. Gorsuch, Brett M. Kavanaugh and Barrett.

"It's not like it was this moderate court and Trump made it conservative," said Elizabeth Wydra, president of the progressive Constitutional Accountability Center. "It was a conservative court and Trump made it extremely conservative."

McConnell's role cannot be overstated. The sudden death of Justice Antonin Scalia in February 2016 offered liberals a glimpse of a court reshaped, with President Barack Obama poised to appoint a justice to join the four liberals: Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan. "When we lost Justice Scalia … it looked like we were fated to lose even more," then-Federalist Society Executive Vice President Leonard Leo recalled in a speech the next year. "It seemed the court would once and for all become the instrument of the progressive liberal agenda. In one of history's sharper turns, however, that proved not to be so inevitable after all."

McConnell's audacious stonewalling of Merrick Garland's nomination, with 10 months remaining in Obama's term, eliminated Leo's worries; McConnell's sprint to confirm Barrett after Ginsburg's death, scarcely seven weeks before the 2020 election, cemented the conservative takeover.

The Rule of Six was about to commence.

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Lawyers and judges are inherently resistant to change. That inclination toward incrementalism is enshrined in the doctrine of stare decisis, the admonition to let what has been decided stand, absent compelling reasons to abandon a past decision. And it is embedded in the DNA of most justices, who prefer to understand themselves as impartial arbiters (umpires calling balls and strikes, in Roberts's famous phrase), not partisan actors.

This is, or has been, a bipartisan urge, undergirded by the justices' concern for preserving the institution's legitimacy. As Breyer noted in his recent book, "The Authority of the Court and the Peril of Politics," the Supreme Court has no power to enforce its decisions other than its own moral and political standing. So justices — and especially chief justices, who consider themselves guardians of the institution — are understandably and appropriately wary of actions that would make it appear as though a mere shift in membership and partisan affiliation suffices to change the meaning of the Constitution.

All that helps explain some of the behavior of the court's conservative majority over the past several years, even as it has been reinforced (Gorsuch), enhanced (Kavanaugh) and re-enhanced (Barrett). Those years have witnessed a contest of wills between the conservative justices who want to get on with it — whether the "it" is expanding gun rights, overruling *Roe* or checking off another item on the right's legal bucket list — and those justices, led by Roberts, who might want to get to the same place but prefer to act more incrementally.

Do not mistake today's lineup for a 3-3-3 court — three conservatives, three moderates, three liberals. There are three extremely conservative, extremely impatient justices — Thomas, Alito and Gorsuch — who would go to extraordinary lengths to undo some of the most entrenched constitutional doctrine. Thomas, for instance, has called for revisiting *New York Times v. Sullivan*, the landmark press freedom case that provides a shield against libel suits brought by public officials; in an enterprise later joined by Gorsuch, Thomas termed *New York Times* and subsequent cases "policy-driven decisions masquerading as constitutional law." Again joined by Gorsuch, he has questioned *Gideon v. Wainwright,* which guaranteed a right to appointed counsel for those who cannot afford to hire their own lawyers. He has said the Constitution does not prohibit states from establishing an official religion.

But even the more patient justices — Roberts, sometimes Kavanaugh, and, at least judging from her first year, Barrett — are no moderates. All three, for instance, joined a particularly radical Alito opinion last term that neutered the remaining major enforcement mechanism in the Voting Rights Act of 1965. "I dislike the fact that journalists refer to the six as conservative," said Harvard Law School professor Charles Fried, who served as solicitor general under Reagan. "They're not. They're reactionaries. That's the only correct term for them."

Yet the Roberts-Kavanaugh-Barrett trio has been willing, at times, to proceed more slowly. When Kavanaugh joined the court in 2018 after confirmation hearings that convulsed the Senate and the country, and that showed the newest justice in an angry, partisan light, Roberts had a simple, and achievable, goal for that term: to ensure that it was as boring as possible. Kavanaugh was, for the most part, eager to oblige.

When the court confronted cases touching on hot social topics — Oregon bakers fined for refusing to create a wedding cake for a same-sex couple, abortion restrictions in Alabama and Indiana, state efforts to cut off public funding for Planned Parenthood — the enhanced conservative majority held back. Four justices are needed to agree to hear a case, and though the Thomas-Alito-Gorsuch wing bristled at "the court's refusal to do its job," as Thomas put it in the *Planned Parenthood* case, Roberts and Kavanaugh took pass after pass.

But it was clear in the 2018-2019 term that Kavanaugh's arrival had shifted the court measurably to the right. On the final decision day of the term, for instance, Kavanaugh voted with the other four conservatives to reject a theory that his mentor, Kennedy, had toyed with for years: that partisan gerrymandering can be so extreme as to violate the Constitution. With Kavanaugh on the court, that door was firmly shut, and with it, a potentially powerful tool to combat political polarization was lost.

While Kavanaugh voted with Roberts 94 percent of the time, more than any other pair of justices, he demonstrated his willingness to break with the chief in several significant cases. In another decision on the term's last day, the court voted 5 to 4, Roberts joining with the liberals, to block the Trump administration's effort to add a question about citizenship to the census; Kavanaugh sided with the conservatives.

The October 2019 term — which would turn out to be the last with Ginsburg on the court — reflected similar tensions. Conservatives continued to chafe, this time over the court's decision to dismiss as moot a gun regulation case from New York — what would have been its first significant Second Amendment case in years. Kavanaugh continued to vote reliably with Roberts even as he broke with the chief on some of the most significant decisions of the term.

With Roberts, but without Kavanaugh, a five-justice majority rebuffed the Trump administration's effort to undo immigration protections for "dreamers." It struck down a Louisiana abortion law, even more surprising, since Roberts had dissented in an almost identical case invalidating a Texas law just four years before. Six justices, including Roberts and Gorsuch, who authored the opinion, ruled that federal employment discrimination law protects gay, lesbian and transgender workers from discrimination; Kavanaugh dissented.

“Roberts has gone full [Anthony] Kennedy,” Curt Levey, president of the conservative Committee for Justice, lamented in an op-ed in The Post. “At least for the moment, the conservative dream of a solid majority on the Supreme Court is dead.”

Levey’s assessment of a term that was “devastating” for conservatives was even then overstated. The conservative majority notched steady victories. It let federal executions resume for the first time in 17 years. And its decisions dramatically moved the law on religion, simultaneously carving out greater protections for religious freedom and lowering the barrier of separation between church and state. Religious institutions received exemptions from having to comply with anti-discrimination laws, even as states were required to provide equal benefits to religious and secular private schools. In other words, churches could discriminate but could not be discriminated against.

Then, on Sept. 18, 2020, Ginsburg died — and with her, the Roberts court. Roberts was still the chief justice, of course, with the authority to assign opinions when he was in the majority. But the majority was no longer his to make — not unless he could persuade Kavanaugh or Barrett to come along.

Barrett’s first term on the court was notable not simply for the cases the court accepted and decided in the regular course of its business but also for the full-blown emergence of a mechanism that let the justices dispose of disputes without having to go through the inconvenience of full briefing, oral argument and written opinions fully explaining their reasoning.

This was the evocatively named “shadow docket,” a term coined by former Roberts clerk William Baude, a University of Chicago law professor. The shadow docket was not an entirely new development; the court has always needed mechanisms for issuing emergency orders: Should an execution be allowed to proceed? Should a decision be put on hold while the lower courts considered the issue?

But the shadow docket was turbocharged by three developments: the Trump presidency, the accompanying aggressive stance of Trump’s Justice Department and the pandemic. As Trump’s orders and regulations were challenged, and often struck down, in the lower courts, the Justice Department increasingly turned to the Supreme Court to intervene at an early stage in the process.

The solicitor general repeatedly asked the court to leapfrog the appeals process and grant emergency relief, often in response to an individual trial-level judge issuing a nationwide injunction that blocked an administration policy, everything from Trump's travel ban to his prohibition on transgender service members to his effort to rescind Deferred Action for Childhood Arrivals, the Obama-era program to provide legal protections to dreamers.

And the court, bolstered by Trump's nominees, often lent a sympathetic ear. By University of Texas law professor Steve Vladeck's count, the Trump administration sought emergency relief at the Supreme Court 41 times, compared with just eight such requests during the previous 16 years. In 28 cases, the court obliged, in whole or in part. Were the conservative justices putting a thumb on the scale for the government because they tended to support the Trump administration or sympathized with its legal views?

At least one of their liberal colleagues seemed to think so. "Perhaps most troublingly, the Court's recent behavior on stay applications has benefited one litigant over all others," Sotomayor wrote in a February 2020 case in which the administration asked the court to let its "public charge" rule limiting green cards for immigrants take effect. Two lower federal courts had put the rule on hold; the conservative justices lifted that stay. Sotomayor tartly noted that the conservative justices were impatient to speed along executions, "where the risk of irreparable harm is the loss of life," while "the Court's concerns over quick decisions wither when prodded by the government in far less compelling circumstances."

Meantime, the coronavirus generated a flood of emergency litigation over restrictions on religious observance — a matter of passionate interest to the conservative justices. Here, the switch of Barrett for Ginsburg had an undeniable impact. Early in the pandemic, the court's response to lockdown rules — even those that affected churches and other religious institutions — was to defer to the decisions of public health officials.

A key ruling came in May 2020, when the justices — the four liberals, plus the chief — upheld California restrictions that limited attendance at places of worship to 25 percent of capacity, up to a maximum of 100 people. Explaining his vote, Roberts noted that "similar or more severe restrictions apply to comparable secular gatherings" and stressed the importance of judicial respect for public health authorities. These "politically accountable officials," he said, "should not be subject to second-guessing by an unelected federal judiciary."

The other conservative justices fumed about what they viewed as the court's disregard for religious rights, and over the following months their anger only grew, expressed in acerbic dissents. Then Barrett arrived — and with her, a dramatic change in the law, on Nov. 25, 2020, just a month after the Senate voted to confirm her. At issue this time was an executive order issued by New York Gov. Andrew M. Cuomo, imposing strict limits on attendance at religious services in areas of high covid spread.

Now, the conservatives had a new justice on their team and little patience for deference to state officials who seemed to favor acupuncture clinics and laundromats over churches and synagogues. "Even in a pandemic, the Constitution cannot be put away and forgotten," the five-justice majority wrote in an unsigned opinion. "The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty."

The case was striking for the public display of hostilities between Gorsuch and Roberts, an unusual glimpse into the tensions that simmered within the conservative camp as well as the internal sniping about Gorsuch, who had arrived at the court without the deferential demeanor of a junior justice.

In a sneering concurring opinion, Gorsuch took aim at the chief justice's concurrence in the California case a few months before. "Mistaken from the start," Gorsuch wrote, and it got uglier from there. The "judicial impulse to stay out of the way in times of crisis … may be understandable or even admirable," he lectured, but "we may not shelter in place when the Constitution is under attack. Things never go well when we do."

The chief's response was subtler but no less acidic, remarkable to those accustomed to Roberts's generally even, above-the-fray temperament. Gorsuch had taken Roberts to task for having "reached back 100 years" to find a supportive precedent, the court's 1905 decision in *Jacobson v. Massachusetts* upholding fines for failing to obtain smallpox vaccines.

In reply, Roberts wrote that Gorsuch was the one who was overreacting to a perfectly logical citation. "While *Jacobson* occupies three pages of today's concurrence, it warranted exactly one sentence" in the California case, Roberts wrote. "What did that one sentence say? Only that '[o]ur Constitution principally entrusts [t]he safety and the health of the people to the politically accountable officials of the States to guard and protect.' It is not clear which part of this lone quotation today's concurrence finds so discomfiting." This was the judicial equivalent of asking, "What's your problem, dude?"

Even more than the tensions between the two men, however, the case underscored two new realities on the court. First, Roberts was no longer the pivotal player. He had been outvoted.

Second, this new majority wasn't about to let prudence get in the way of exercising power. Roberts had voted to leave the New York restrictions in place even though, he said, they "do seem unduly restrictive." Cuomo had redrawn the affected areas, he noted, so that the churches and synagogues that brought the case weren't any longer subject to attendance caps. Therefore, Roberts reasoned, the court had no need to issue "an order telling the Governor not to do what he's not doing."

The new majority wasn't buying it. "The applicants remain under a constant threat," they said. After all, why put off deciding something until tomorrow if you've got the votes today?

Months later, with Joe Biden in office, the partisan tinge to the majority's decision-making became clearer. Having stepped in time and again on behalf of the Trump administration, the court rebuffed a Biden administration request that seemed at least as worthy of emergency intervention. It involved the Trump administration's Migrant Protection Protocols, better known as the "Remain in Mexico" policy, under which tens of thousands of asylum-seekers had been required to wait across the border, often in squalid and dangerous conditions, as they awaited hearings.

The policy had been put on hold during the pandemic; the Biden administration, on taking office, suspended and ultimately terminated the program. In August, a Trump-appointed district judge in Texas took the extraordinary step of ordering the administration to start it back up. The appeals court declined to intervene. So Biden's acting solicitor general, Brian H. Fletcher, turned to the justices with an urgent request, arguing that the injunction "imposes a severe and unwarranted burden on Executive authority over immigration policy and foreign affairs."

The justices had seen this issue before, actually. When immigration rights groups challenged the legality of the Remain in Mexico policy and a different district court judge blocked it from taking effect, the Trump administration raced to the high court seeking a stay. Then, the court, over Sotomayor's objection, granted the request.

Somehow, when the Biden administration asked for a similar accommodation, none was forthcoming. The trial court order remained in place, over the objections of the three liberal justices. If anything, the interference with presidential prerogative and international relations — ordering a new administration to resume its predecessor's policy — seemed more severe than when the Trump administration won its stay. It was hard to see what was different here, except that one petitioner was named Trump and the other Biden.

This much was clear in the smoking ruins of the Voting Rights Act: a court that could do this could do anything.

But if one case from the 2020 term epitomized the brazenness of the new majority, and signaled more to come, it was *Brnovich v. Democratic National Committee*, decided on the last day of the term. This time, in a case about voting rights, the conservatives were united, with Roberts fully on board.

Since his service as a young lawyer in the Reagan administration, Roberts had been a long-time antagonist of a broad reading of the 1965 Voting Rights Act, which he saw as an affront to states' rights and an unnecessary artifact of what he views as a bygone era of explicit discrimination.

In 2013, Roberts wrote the 5-to-4 majority opinion in *Shelby County v. Holder* eviscerating Section 5 of the Voting Rights Act, the critical mechanism that required jurisdictions with a history of voting discrimination to obtain advance approval for voting changes — known as "pre-clearance" — from the Justice Department. For decades, this provision safeguarded the votes of millions of minorities — and drove Republicans in the South and other covered areas to distraction. In *Shelby County*, Roberts led the charge to neuter the law.

"Our country has changed" since the Voting Rights Act was passed, Roberts proclaimed, with arguably excessive optimism. In any event, he assured anyone who might be concerned, "Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in" Section 2.

That would wait for *Brnovich*. Section 2 allows after-the-fact challenges to changes in voting procedures. In a 1980 decision, the court held that Section 2 applied only to *intentional* discrimination, not to practices that have the *effect* of disadvantaging minority voters.

In the aftermath of the 1980 ruling, Congress — yes, it was a different era — passed a new, strengthened version of Section 2 designed to make clear the law barred practices with discriminatory effects, whatever the motive. The new Section 2 prohibited any voting practice that "results in a denial or abridgment of the right … to vote on account of race or color."

For years, that provision had taken a back seat to Section 5, because pre-clearance was such a powerful tool. But in the grim aftermath of *Shelby County,* voting rights advocates sought to expand the use of Section 2.

Brnovich was the high court's first take on this effort — and it did not go well. The case involved two Arizona voting rules: The first was a state policy that disqualified an entire ballot that was cast in the wrong precinct — even if some parts of the ballot, say for candidates for statewide or federal office, were still valid. The second was a law that made it a crime for most third parties to collect and deliver ballots to election officials — what Republicans pejoratively term "ballot harvesting."

It was easy to see — if you cared to look — how both rules had a discriminatory impact on minority voters, in particular on Arizona's population of Native American voters. As Kagan outlined in a scorching dissent, Arizona is a national leader in tossing otherwise valid votes cast in the wrong precinct; in 2012, it accounted for almost 1 in 3 of such discarded ballots, 11 times the rate of the nearest contender, Washington state.

And the Arizona rule clearly operates to disadvantage minority voters. In 2016, Hispanic, Black and Native American voters were twice as likely as Whites to have their ballots discarded. Alito's majority opinion sniffed that this was no big deal — only a sliver of minority voters' ballots (around 1 percent) was affected. Kagan: "A rule that throws out, each and every election, thousands of votes cast by minority citizens is a rule that can affect election outcomes. If you were a minority vote suppressor in Arizona or elsewhere, you would want that rule in your bag of tricks."

The ballot collection rule was even more discriminatory. Most Arizonans vote by mail. But access to mail is severely limited for the state's Native American voters. Just 18 percent of Native Americans in rural counties have home delivery, compared with 86 percent of White voters in those same counties. Getting to a mailbox or post office can mean a drive of up to two hours. Between a quarter and half of Native American households in these communities lack a car, according to evidence before the court. So relying on third parties to collect and deliver ballots was a regular practice for Native American voters — until Arizona, seizing on the opportunities created by *Shelby County* and the end of pre-clearance review — made it illegal to do so. Never mind the absence of evidence that the practice resulted in fraudulent votes.

In his opinion for the six-justice majority, Alito grappled with almost none of this. As Kagan pointed out, "Except in a pair of footnotes responding to this dissent, the term 'Native American' appears once (count it, once) in the majority's five-page discussion of Arizona's ballot-collection ban."

Yet what was particularly astonishing was the majority's disregard of its own supposed principles, such as careful adherence to statutory text. Alito didn't merely ignore Section 2 — he engaged in a total rewrite. He invented new tests, all designed to shrink the reach of the law — a law Congress had already revised to make clear its intent to provide broad coverage crystal clear.

How big was "the burden imposed by a challenged voting rule"? Did the state's "entire system of voting" provide enough other opportunities to cast a ballot? What about "the strong and entirely legitimate state interest in preventing election fraud"? None of this was in the law.

Kagan's dissent pulsated with fury, justifiably so, over the majority's blithe abandonment of its professed commitment to textualism. "The language of Section 2 is as broad as broad can be," she noted. "But the majority today lessens the law — cuts Section 2 down to its own preferred size. … No matter what Congress wanted, the majority has other ideas. This Court has no right to remake Section 2."

No right, perhaps, but all the power. Not a single conservative justice put a limiting construction on Alito's destructive interpretation of Section 2. The only concurrence came from an even more conservative direction: Gorsuch, joined by Thomas, wrote to say it wasn't even clear there was any right for private parties to sue under Section 2 at all.

In the uproar over Alito's majority opinion, the Gorsuch/Thomas concurrence received little attention, but it was an especially dishonest piece of work. To support its unfounded assertion that "lower courts have treated this as an open question," the concurrence cited a single appeals court case that merely raised the issue in passing. The case was from 1981, the year *before* Congress rewrote the law, and in doing so made clear that it allowed private lawsuits. "It is intended that citizens have a private cause of action to enforce their rights under Section 2," the House report on the law stated.

None of this stopped Gorsuch and Thomas. Theirs was no idle observation — it was a bring-it-on invitation for future mischief-making, part of the broader conservative drive to close off access to the federal courts. The offer was eagerly taken up by Texas not many months later, when private plaintiffs sued to challenge the state's new voting law.

The term wasn't a complete disaster for liberals, not by any means. The court also swatted aside yet another challenge to the Affordable Care Act; it managed to unanimously decide a touchy case involving the rights of same-sex couple foster parents, and without overruling a major precedent. As the court closed up shop for the summer, it declined — over the objections of Thomas, Alito and Gorsuch — to hear a case in which a florist claimed that her religious rights were violated when she was ordered to produce custom arrangements for same-sex couples or face fines — an issue the court had sidestepped in its earlier *Masterpiece Cakeshop* ruling.

Still, the majority's boldness in *Brnovich* was a clear harbinger of more to come, and in other areas of the law. This much was clear in the smoking ruins of the Voting Rights Act: a court that could do this could do anything.

By the end of September 2021, the Court's approval rating had dropped to 40 percent, the lowest since Gallup started testing the question in 2000.

Even before the 2020-2021 term had drawn to a close, the court set the stage for the potentially watershed term now underway.

After years of dawdling and ducking, the court agreed in April to decide its first significant gun rights case in a decade, clarifying the scope of its 2008 decision that the Second Amendment protects an individual right to bear arms. The next month, the court agreed to review an abortion law, although the case satisfied none of the usual criteria for review: There was no split in the circuits, no conflict "with relevant decisions of this court," no unsettled question of federal law.

Before leaving for the summer recess, the court added a religion case to its docket that could remove another cornerstone in the separation of church and state. The case comes from Maine, where some areas of the state are so rural there are no public schools; the state instead offers tuition vouchers to attend public schools in other areas or private institutions. Does the Constitution require — not just allow, but require — Maine to make these vouchers available to religious schools, for explicitly religious instruction? The likely answer from this court seems obvious.

Meantime, other high-profile disputes appear headed to the court. Can Trump successfully claim executive privilege to stop the release of documents or prevent former aides from testifying before the House select committee investigating Jan. 6? Is Biden's vaccine-and-testing mandate for private employers legal? Must states with vaccine mandates provide religious exemptions?

Just offstage is the fate of affirmative action, in a case involving Asian students' challenge to Harvard's admissions policies — and asking the court to overrule its 2003 decision letting universities consider race as a factor. The justices, before deciding whether to take the case, asked the Biden administration to weigh in — a move that seemed prompted less by sincere curiosity (the Trump administration sided with the students, but there is little doubt the Biden administration will take a different view) than by a desire to postpone the case until next term. As much as the conservative justices have long had affirmative action in their sights, it requires little imagination to surmise that Roberts and others calculated that the court had enough controversy on its plate for one term.

That anxiety was evident as summer turned to fall. As the first Monday in October approached, a remarkable number of justices felt compelled to speak publicly in defense of the institution. Perhaps they were rattled by the Biden administration's commission on the Supreme Court — even though that panel wasn't intended to do much more than head off demands from the left for radical changes such as expanding the size of the court. Perhaps the polls got to the justices as well. In July 2020, the court's approval rating stood at 58 percent in a Gallup poll, the highest in a decade; by the end of September 2021, that had dropped to 40 percent, the lowest since Gallup started testing the question in 2000.

Whatever the reason, the judicial chorus was unified in its message. Just as the court was letting a flagrantly unconstitutional Texas abortion law take effect, Breyer launched a publicity tour for a book arguing that the justices were not acting politically. Barrett, in her first major public appearance, went to, of all places, the (Mitch) McConnell Center at the University of Louisville with, of all people, the Senate minority leader himself, to declare, "My goal today is to convince you that this court is not comprised of a bunch of partisan hacks."

And Alito, with his typical air of aggrievement, complained that the "catchy and sinister term 'shadow docket' has been used to portray the court as having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its way. And this portrayal feeds unprecedented efforts to intimidate the court or damage it as an independent institution."

In fact, the court's fault lay not, as all three justices had suggested, in its media coverage, but in itself. That the majority might have overplayed its hand was suggested by the court's belated agreement to hear two cases involving the Texas abortion law — one by abortion providers, the other by the Biden administration. The cases did not raise challenges to the state's ban on abortion after six weeks; rather, they concerned Texas's effort to prevent the law from being reviewed in federal court at all by outsourcing enforcement to private vigilantes.

The three-hour oral argument in the cases suggested that the Texas dodge might have been too much even for this court. This wasn't just about the rights of women in Texas who were being denied access to abortions — it was about whether the court itself was going to be consigned to standing by while its precedents were being blatantly evaded. And not just precedents the majority didn't like — the same vigilante-reliant workaround could be used to take away the Second Amendment rights of gun owners in Connecticut or churchgoers in California as was used against pregnant women in Texas, the justices worried openly in the oral argument on Nov. 1.

Conservative lawyers were none too pleased with the squishiness they heard. "The Warren Court Lives?!?" read the headline on a National Review piece by legal blogger Ed Whelan.

Three justices were all but guaranteed votes for overruling ‘Roe.’ But were Roberts, Kavanaugh and Barrett — or any two of those three — prepared to take the momentous step of abandoning a 50-year-old precedent?

This is no Warren court. The new, radicalized court revealed itself earlier this year, when it agreed to review Mississippi’s abortion law prohibiting abortion after 15 weeks. To be sure, 15 weeks was just a step along the way for Mississippi; the state had already enacted another measure, blocked in court, that would bar abortions after six weeks, and it had one prohibiting almost all abortions waiting in the wings if *Roe* were overturned.

In June 2020, when Mississippi first asked the court to hear the case — a court with Ginsburg still alive — it took pains to assure the justices this was no head-on challenge: “To be clear, the questions presented in this petition do not require the Court to overturn *Roe* or *Casey,*” the state’s petition said. The latter referred to the 1992 case, *Planned Parenthood of Southeastern Pennsylvania v. Casey,* in which the court had reaffirmed the right to abortion.

A year later, with the case accepted for review, Ginsburg dead and Barrett in her seat, Mississippi decided to go for broke. Its new brief dispensed with the fiction that the Mississippi ban could be upheld with a bit of tinkering around the edges. “Nothing in constitutional text, structure, history, or tradition supports a right to abortion,” the state argued. “Overruling *Roe* and *Casey* makes resolution of this case straightforward.” A single footnote raising that prospect became almost the entire brief.

This was a bold, and potentially risky, gambit. It was a safe bet that the six conservative justices were no fans of *Roe* and would never have signed on to a finding that the Constitution includes a right to abortion. Three were all but guaranteed votes for overruling.

But were Roberts, Kavanaugh and Barrett — or any two of those three — prepared to take the momentous step of abandoning a 50-year-old precedent, one that had been reaffirmed time after time? That was less clear, especially after confirmation hearings in which Kavanaugh pledged that he considered *Roe* “an important precedent of the Supreme Court” and Sen. Susan Collins (R-Maine) had pronounced herself convinced that Kavanaugh would not vote to overrule it.

Pushing the court to take a step it hadn't agreed to consider — indeed, that Mississippi had at first assured was entirely unnecessary — posed a danger of backfiring. The justices, if they are annoyed by this bait-and-switch, have the power to dismiss the case as "improvidently granted" — to "DIG" it, in the parlance of the court. The Biden administration, in its brief, suggested the justices do precisely that. Mississippi has "now dramatically changed course, devoting their merits brief to a frontal assault on *Roe* and the fifty years of precedent reaffirming its central holding. The Court has previously declined to indulge such tactics," it argued.

This would, in my view, be the prudent thing to do, a step the court could take even after oral argument. Dismissing the case would turn down the volume, for the court and the country; it would extricate the court from a situation in which it has the potential, in Barrett's phrase, to look like "a bunch of partisan hacks," with the meaning of the Constitution shifting on the basis of a single change in the court's membership. But it would take five votes to DIG the case, and it is far from clear that prudence is the driving principle of this majority.

The more probable course is that the court will proceed to decide the case, *Dobbs v. Jackson Women's Health Organization,* and to uphold the 15-week ban. But how? Will it overrule *Roe* outright or do so, as the court says, "sub silentio," eviscerating the right, and setting the stage for future cutbacks, without explicitly acknowledging what it is doing?

That underlines the difficulty presented for abortion rights advocates by Mississippi's audacious strategy. If the court now stops short of explicit overruling, the public might conclude the justices have taken a restrained, middle-ground approach. But it's hard to imagine a decision that stops at 15 weeks. If the court upholds the Mississippi law, there's no logical stopping point.

Here's why. Under the standard set forth in *Casey* — and reaffirmed most recently in the Louisiana abortion case — states can regulate abortion throughout pregnancy. They can impose restrictions, such as waiting periods and informed consent rules, so long as those requirements do not present an "undue burden" on access to abortion or pose a "substantial obstacle" to obtaining an abortion.

Flat-out bans are a different story. Those are not permitted until the fetus is viable outside the womb, now around 24 weeks. As the court explained in *Casey,* "before viability, the State's interests are not strong enough to support a prohibition of abortion." So the question the court actually agreed to hear in the case — "Whether all pre-viability prohibitions on elective abortion are unconstitutional" — is actually a subtle way of asking: Should *Casey* be overruled?

And if viability isn't the dividing line between when an abortion must be permitted and when it can be banned, what is? If a ban at 15 weeks is allowed, why not 12, or 10, or eight, or six? What is the new standard for deciding? As lawyers for the Center for Reproductive Rights, representing the Mississippi clinic note, "this proposal would leave women, state officials, and the lower courts at sea.... Stripped of the viability line, how would federal courts evaluate these arguments on a case-by-case basis?"

Indeed, applying the "undue burden" analysis to abortion bans — as opposed to restrictions — isn't logical: The question is whether the law at issue imposes too much of a burden on that particular woman — not on women in general. So, yes, 90 percent of abortions take place during the first trimester — but that's of no comfort to a woman who finds herself needing an abortion later in pregnancy. For her, the burden is undoubtedly undue because it is a complete prohibition. And let's be clear, no woman would *prefer* to undergo the expense and difficulty of a second-trimester abortion.

Likewise, Mississippi argues that the 15-week ban is tolerable because the clinic challenging the law only performs abortions up to 16 weeks, "so the Act reduces by only one week the time in which abortions are available in Mississippi." Again, that makes no sense as a matter of constitutional law. It can't be that 15 weeks is constitutional in one state but unconstitutional in another where clinics perform even later-term abortions.

In short, the court is on the brink of a mess — doctrinal, practical and political — and it's hard to see how it is going to extricate itself. Overruling *Roe* would get the court largely out of the abortion-deciding business, but it would create a political firestorm, just before the midterm elections. Upholding the law without taking that explicit step would invite more states to enact ever more aggressive restrictions — without any clear standard for judging them.

The correct answer would be for the court to apply its existing precedents and declare flatly that pre-viability prohibitions are unconstitutional. It is all but impossible to imagine five votes on this court for taking that sensible step.

The court's originalists seemed not at all troubled by abundant historical evidence of states restricting guns in public places.

If six conservative votes make abortion the biggest issue at the Supreme Court this term, gun rights are close behind. No issue of constitutional law is simultaneously as politically potent and as legally undeveloped as the Second Amendment.

The clause has been in the Constitution for two centuries, but it was not until 2008, in *District of Columbia v. Heller*, that the court declared it protected an individual right to bear arms. Scalia authored *Heller*, but Kennedy provided the fifth vote. His price was limiting language: "Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."

The opinion left a lot to sort out. Did *Heller* apply outside the home? What test should courts apply in deciding the constitutionality of gun laws? Could assault weapons be banned? What about licensing rules?

For years, the justices were resolutely unhelpful in providing answers — and as lower courts tended to uphold gun regulations, conservative justices expressed increasing frustration that the court's silence meant the Second Amendment was being treated as a "second-class right," in Thomas's words.

In 2019, the court finally agreed to consider a New York City rule that prevented gun owners from transporting weapons to a second home or shooting range outside the city. But the city quickly rewrote the rule, and the court dismissed the case as moot — prompting a furious dissent from Alito, Gorsuch and Thomas complaining that the court was letting itself be "manipulated in a way that should not be countenanced."

Never mind that these justices seemed unperturbed a few years later when Texas passed its abortion law manipulating access to the federal courts. The justices did have a point: It was past time for the court to provide more clarity on the Second Amendment.

That should come this term in *New York State Pistol & Rifle Association v. Bruen*, a challenge to a century-old New York state law that requires those seeking a concealed carry permit to show "proper cause" — a special need for self-protection. Most states have more permissive permitting rules; New York and six others, covering a quarter of the nation's population, require this heightened showing of need.

In the years since *Heller,* lower courts have disagreed about whether the Second Amendment applies outside the home. The justices are all but guaranteed to answer the question with an emphatic yes; even New York, defending its law, no longer disputes this. And for good reason: After all, the amendment's text speaks of the right to "bear" arms.

The fate of the New York law is also hardly a cliff-hanger. The conservative court didn't take up a gun case after all this time to uphold the restriction, as the oral argument made evident. The court's originalists seemed not at all troubled by abundant historical evidence of states restricting guns in public places.

But precisely how the court strikes down the law matters, and here there was some reason for relief on the part of gun safety advocates. Even some conservative justices expressed apprehension about the need to restrict guns in "sensitive places." Barrett worried about Times Square on New Year's Eve. Roberts asked about campuses, football stadiums, "any place where alcohol is served." Justices read the news, too; they worry about their own safety.

So the likely result is a ruling that strikes down the New York law but preserves — or at least leaves for another day — the ability to limit guns in certain public settings. With a court this conservative, what passes for a liberal victory is limiting the scope of the inevitable loss.

What could be the sleeper case of the term concerns the Environmental Protection Agency's power to combat climate change. That's an important topic, but the case is even more significant, as a measure of the court's eagerness to roll back the power of regulatory agencies.

In recent years, conservative justices have been pressing numerous changes in this area: reviving pre-New Deal limits on Congress's ability to delegate its power to agencies; empowering courts to second-guess agencies' decisions rather than defer to their expertise; strengthening presidential control over independent agencies.

Taken together, these initiatives could achieve what Trump adviser Stephen K. Bannon described as the "deconstruction of the administrative state" — at the very time that legislative gridlock makes it hard for Congress to step in to address urgent issues itself or clarify regulators' authority to act.

The EPA case involves an ambitious Obama-era regulation known as the Clean Power Plan, which aimed to cut power emissions by one third by 2030. The plan never took effect, as the Supreme Court stepped in to block the rule while litigation continued, and the Trump administration then sought to replace it with a dramatically watered-down version.

A panel of the U.S. Court of Appeals for the District of Columbia Circuit, acting on Trump's last full day in office, struck down his effort to repeal and replace the rule and cleared the way for the original Obama plan to take effect. Instead, the Biden administration, anticipating a damaging loss at the Supreme Court, announced that it was dropping the plan and would find another way to curb emissions.

That should have been the end of things. With a normal court, it would have been. Biden's acting solicitor general, Elizabeth B. Prelogar, urged the court not to hear the case. "The question whether the Clean Power Plan was lawful has no continuing practical significance," she wrote, "since that Plan is no longer in effect and EPA does not intend to resurrect it."

You can guess what happened next: The court agreed to review the ruling. The case is ominous not just for the EPA's ability to deal with climate change, but more broadly because the court could use it as a vehicle to constrain agencies' ability to tackle "major questions" unless Congress was clear it wanted them to act. "A surprising and very remarkably aggressive grant," said Harvard Law School professor Richard Lazarus, an expert on the court and environmental law.

Or maybe not surprising at all. As the six have demonstrated, together or in shifting alliances, this can be a remarkably aggressive court.

This is an institution transformed, firmly under conservative control. And while anything can happen, the likelihood of that balance shifting meaningfully to the left any time soon is low.

The paradox of the court's current moment is that elements of both sides in the fierce ideological debate over its direction are convinced that they are about to lose. Anticipatory garment-rending is not the province of any single faction.

Those on the left look at six staunchly conservative justices and despair, prompting radical, and, in my view, dangerous, proposals to expand the court's size. That these proposals are unlikely to succeed might be less significant than the intensity with which they are being pressed, and what that augurs for the success of attacks on the court's legitimacy.

Those on the right, especially a younger, impatient group of conservative thinkers, look at Roberts, Kavanaugh and Barrett with a combination of alarm and recognition: Conservatives have been here before, and been disappointed. Lucy always snatches away the football.

One reason for their chagrin is the Gorsuch opinion in *Bostock v. Clayton County*, the 2020 decision finding that the federal job-bias law protects gay and transgender workers. *Bostock* "represents the end of the … conservative legal project as we know it," Sen. Josh Hawley (R-Mo.), who clerked for Roberts, said the day after the decision. "Those of us who call ourselves legal conservatives — if we've been fighting for originalism and textualism, and this is the result of that, then I have to say it turns out we haven't been fighting for very much."

The emergence of the Roberts-Kavanaugh-Barrett bloc has also generated anxiety, if not despair. The notion that a six-justice conservative majority would have the chance to overrule *Roe* and might balk feels unthinkable to some. What was the point of the struggle of the past 30-plus years to build a conservative Supreme Court, if not that?

As much as I would prefer to conclude otherwise, the more justified case for angst falls squarely on the liberal side. This is an institution transformed, firmly under conservative control. And while anything can happen, the likelihood of that balance shifting meaningfully to the left any time soon is low. Even assuming Breyer is ready to retire at the end of this term, adding a new liberal justice, even one to his left, won't change outcomes. None of the six conservatives is leaving voluntarily unless and until a Republican is back in the White House.

And so for those who believe the court has a vital role to play in protecting democracy, promoting civil rights and achieving justice, "the outlook is not good at all," said Donald B. Verrilli Jr., who served as solicitor general in the Obama administration. "Things may unfold more slowly or less completely than our worst fears. But I think most of our worst fears are going to be realized. It's just a question of at what pace."

If that grim diagnosis seems correct, the cure is more elusive. Some treatments, like court-packing, would be worse than the disease. Others, like imposing term limits, are harder to administer and wouldn't be effective for years. Which means: The court is where it is. The Rule of Six is now in force. Conservatives have time to write their views into the law books, where they will remain for decades to come. The change they choose to enact will be swift or slow; it will be open or stealthy.

But make no mistake: It is coming. The court, and the nation, will be worse off for it.

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