With Romney's announcement this morning that he would support consideration of a nominee before the election, it now seems virtually certain that Trump will be able to appoint a sixth conservative Justice. How will that affect future climate policy? Here is a preliminary threat assessment.

The answer varies, depending on what policies we're talking about. Overall, the implications of a 6-3 Court are bad. But they're probably not as dire for environmental law as for other issues like racial equality or reproductive rights.

As a quick preliminary take on this, I'll sort heightened legal risks of climate actions into high, medium, low, and wildcard. The wildcard risks actually worry me the most.

High Risk

Innovative regulations like Obama's Clean Power Plan. Regulations by EPA that use existing statutory provisions in novel ways are at high risk. The Court has already leaned hard against anything it views as an unprecedented expansion of regulatory power without clear authority from Congress. An additional conservative makes it all the less likely that such regulations will be upheld.

Standing for individuals to sue based on the threat of climate change. The Supreme Court upheld this kind of standing, at least for state governments, in Massachusetts v. EPA. In a 6-3 conservative Court, there's a high chance that the Court will either limit standing to state governments or eliminate climate standing entirely.

The Chevron Doctrine. This doctrine gave leeway to agencies in interpreting statutes. It was already under serious attack from conservatives. I think we can expect to see either major cutbacks in this doctrine or outright overruling. Though if Trump wins again, it may occur to conservatives that this doctrine actually gives him more leeway to do rollbacks.

Medium Risk

Clean Air Act coverage of greenhouse gases. In *Massachusetts v. EPA*, the Court also ruled that EPA has authority to regulate greenhouse gases under the Clean Air Act. There are three Justices who have made it clear they'd like to overrule this, and it would be at risk in a conservative Court. But there are some significant reasons why it might be upheld, including the fact that the Court is typically reluctant to overruled past decisions interpreting a statute. I *think* Roberts would uphold the decision based on precedent; the question is whether there would be an additional, fifth vote.

Denial of California's Clean-Car Waiver. California had a strong argument against Trump's denial of the waiver. A more conservative Court may be harder to persuade. California still has a good chance of winning, but it had a better chance a week ago. This would matter less if Biden wins, but a loss on this issue would be a major blow if Trump remains in control of federal regulations.

Low Risk

Conventional types of federal regulations. Assuming the Court doesn't eliminate EPA coverage of greenhouse gases entirely, regulations of carbon emissions from new cars and of methane emissions from the oil and gas industry should be o.k. So should other types of regulations such as more stringent air quality standards, which indirectly impact the use of fossil fuels, or FERC rules that make it easier for renewables to access the grid.

Most state regulatory actions. Apart from claims that a federal statute expressly preempts state law, whatever anti-regulatory zeal that conservative Justices feel seems to be balanced out by their belief in federalism. This is also true for most express preemption cases. The reason I worry about the California car standards is that they have such major national impact. That may convince conservative Justices that car standards should be exclusively set by the federal government.

A Green *Stimulus*. Biden's climate plan calls for massive spending to improve energy efficiency and reduce carbon emissions. That spending seems free from any significant constitutional risk. The one issue to beware of relates to conditions on spending. Using the spending as leverage to change state policies will need to be done very careful to avoid charges that Congress is coercing the states.

Wildcards

Nondelegation Doctrine. The conservatives have been flirting with the idea of reviving the nondelegation doctrine. Doing so would make broad delegations of power to agencies like EPA unconstitutional. The problem is that there's no way of knowing what's "too broad." That would make it harder for Congress to write new climate-related laws. It also poses a threat to existing laws that five of the six conservative Justices might think are too broad.

Other attacks on the administrative state. Conservative legal scholars have been assembling arguments for tearing down modern government. For example, the concept of private property could be expanded so that almost any regulation would require government

compensation to the owner. Or Congress's power over interstate commerce could be restricted so it could no longer regulate many forms of pollution. I think these are unlikely, but they're not impossible.

Unexpected successes for marginal arguments. We're more likely to see occasions where attacks on particular laws or regulations that seem initially implausible that end up winning five votes. We saw that, for instance, with the argument that Congress lacks the power under the commerce clause to create an insurance mandate. We'll see more of those in the future.

Caveats

Here's a list of reasons why these threat assessments are tentative:

1. There hasn't been much time for any of us to think about this, given Justice Ginsburg's recent tragic death.
2. We don't know who Trump will nominate, which could matter.
3. We don't know if the Democrats will win power in November and respond by expanding the Supreme Court or limiting its jurisdiction.
4. We can't be sure that Trump's nominee will be confirmed.
5. The issues facing the Court change over time, and the views of Justices can evolve. The further we look down the road, the less certainty we can have.

If I had to put it in a sentence, I'd say that having six conservative Justices will definitely create headwinds for climate policy, but let's hope it won't be a game ender.