For the first time since Franklin D. Roosevelt battled the Supreme Court over the New Deal, a Democratic President is seeking to strengthen and expand the regulatory power of the federal government, and his opponents, as in the nineteen-thirties, are fighting back in the courts. A legal assault on President Obama’s agenda has begun, and his adversaries have already won several important victories. Last month, Royce C. Lamberth, a federal judge in Washington, D.C., ruled that Obama’s directive to expand federal funding for stem-cell research violated existing law. Earlier in the summer, Martin Feldman, a federal judge in New Orleans, rejected Obama’s six-month moratorium on deep-water oil drilling in the Gulf of Mexico; and Henry Hudson, a federal judge in Virginia, declined to throw out the first constitutional challenge to the health-care-reform law, the centerpiece of Obama’s domestic policy. That case still has a long way to go, but the Justice Department failed to get it dismissed, and there are at least a dozen similar lawsuits in the pipeline.

In all three cases, judges appointed by Republican Presidents have ruled against Obama. One or more of them will almost certainly wind up in the Supreme Court, which is as evenly divided on the scope of federal power as it is on many other issues, such as abortion and the war on terror. When the cases do reach the Court, the key figure is likely to be the Justice who heretofore could safely be described as the most obscure: Stephen Breyer.

Breyer’s new prominence was apparent on June 28th, when the Supreme Court’s most recent term ended. Breyer shouldn’t have been the story that day. John Paul Stevens was retiring, at the age of ninety, and took his seat on the bench for the last time. In bidding a public farewell to Stevens, Chief Justice John G. Roberts, Jr., noted that Stevens had served with one-sixth of all the Justices ever to sit on the Court. It was also the day after Martin Ginsburg, Ruth Bader Ginsburg’s husband of fifty-six years, died, at their
home in Washington, after a battle with cancer. Ginsburg startled her colleagues by showing up for work despite her husband’s death; she wore a black velvet bow in her hair. Roberts paid a warm tribute to Marty Ginsburg, who was as jovial as his wife is reserved. As Roberts spoke, Antonin Scalia, who, with his wife, spent every New Year’s Eve with the Ginsburgs, wept.

The Justices never reveal in advance when they will hand down the opinions in any given case, so the audience for the announcement of many decisions consists of the bewildered tourists who happen to be passing through at the time. But everyone knows which day is the last of the term, and the Court saves its most controversial decisions for that day. On June 28th, a knowledgeable and expectant crowd had gathered early, and they were not disappointed.

During the past few years, Roberts, Scalia, Clarence Thomas, Samuel A. Alito, Jr., and (usually) Anthony M. Kennedy have cut through the Court’s liberal precedents. In McDonald v. Chicago, Alito issued an opinion that was the culminating achievement in the legal crusade against gun control. Two years earlier, in the Heller decision, the Court had ruled that the federal government was bound, under the Second Amendment, to respect an individual’s right to keep and bear arms; in the current case, the Court expanded that holding to prohibit most gun-control laws in the states as well. The final opinion of the year, by Roberts, struck down as unconstitutional a portion of the Sarbanes-Oxley law, which had been passed in 2002 to tighten accounting regulations in the wake of the collapse of Enron.

Breyer is tall and twitchy, and unskilled in the art of the poker face. As Alito and then Roberts announced their decisions, Breyer rubbed his mostly bald head and widened his eyes at passages that drew his ire. Occasionally, he’d look off to his left, toward the seating area for law clerks, and roll his eyes. Stevens had long been the leader of the Court’s liberal bloc, and he usually wrote the principal dissenting opinions for himself, Ginsburg, Breyer, and David Souter (who was replaced this year by Sonia Sotomayor, his ideological kinswoman). But also on June 28th, a few steps away on Capitol Hill, the confirmation hearings for Elena Kagan, Stevens’s successor, had begun. Ginsburg is a loner; Sotomayor and Kagan are new. On this day, Breyer led the left, as he likely will for years to come.
It is the custom at the Court for Justices to read condensed versions of their majority opinions and, if they feel strongly about the case, their dissents. Breyer was a law professor at Harvard when President Jimmy Carter appointed him to the First Circuit, in 1980 (President Clinton nominated him to the Supreme Court in 1994), and he uses this forum to explain the stakes and, especially lately, to raise the alarm. “Since Heller was decided, numerous historians and scholars have expressed the view that the Court got its history wrong,” he said. “Why should the Court now broadly extend Heller’s applicability?”

But Breyer’s heart was really in the Sarbanes-Oxley case, notwithstanding what appeared to be its arcane subject matter. The cases that usually generate the most interest at the Court involve civil liberties—abortion, free speech, Guantánamo—but, as a scholar and a judge, Breyer has been most interested in the less glamorous field of administrative law, which is now, suddenly, at the center of the Court’s agenda. Sarbanes-Oxley directed the Securities and Exchange Commission to appoint five members to a new body called the Public Company Accounting Oversight Board (PCAOB, pronounced “peekaboo”), which was established to supervise accounting firms. A conservative group, the Free Enterprise Fund, filed a suit arguing that the structure of the PCAOB was unconstitutional, because its members could be removed only by the S.E.C., and not by the President. In an opinion by the Chief Justice, for the customary five-to-four majority, the Court agreed.
To Breyer, the stakes in the case were immense, because the framework of the PCAOB was similar to that of many other components of the contemporary administrative state—“the Federal Trade Commission, the Federal Communications Commission, the Social Security Administration, including also more than fifteen hundred administrative law judges, and including as well most of the military officer corps.” The decision put the actions of all these administrators at legal risk. “Unless today’s principle of constitutional law is cabined, it can become virulent, running like a computer virus through the halls of government,” Breyer warned.

The PCAOB case had an unmistakable subtext: the legal fate of health-care reform and, indeed, of much of the Obama Administration’s work. In the majority opinion, Roberts wrote, with customary élan, “One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts”—a sentiment that could have served as a Republican talking point in the health-care debate. The Chief Justice went on, “The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people. This concern is largely absent from the dissent’s paean to the administrative state.”
Unlike Roberts, who is a gifted stylist, Breyer is a plodder in print, who writes in a kind of judicial PowerPoint. (He likes to begin sentences with an italicized “First,” then “Second,” and so on.) Critics on the left and the right regard Breyer as more of a technocrat than an ideologue. “His dream job would be as a European Union commissioner, reviewing cheese quotas from around the region,” M. Edward Whelan III, the president of the right-leaning Ethics and Public Policy Center, said. Akhil Reed Amar, a professor at Yale Law School, who clerked for Breyer on the First Circuit, said, “Believe it or not, the thing that most excites him is administrative law.”

If the Court had remained basically the same as the one Breyer joined in 1994, he might well have served out his tenure in genial anonymity. (With typical self-deprecation, Breyer often boasts that he possesses the record for the longest tenure as the nine-member Court’s junior Justice—eleven years.) But his new colleagues and their allies are different from the conservatives who dominated the Court during the Rehnquist years. They are reviving a set of constitutional issues that looked, to Breyer and others, as though they had long been settled. And on these issues Breyer is not so cautious and not so cheerful, and he has sailed, with uncharacteristic zeal, straight into the fight.

“Do you want to see the beaver dam?” Breyer asked me. “Come on. You should. It’s fun.” With that, I teetered into the bow of a battered canoe, Breyer took the stern, and we started paddling out into a pristine pond in New Hampshire, where his family has owned a spacious log cabin for decades.

Breyer, who recently turned seventy-two, lives like a gentleman scholar. In addition to the vacation retreat, he keeps a home in Georgetown and a big house in the toniest part of Cambridge, where he lives with his wife, Joanna. She has long worked as a psychologist who counsels young cancer patients and their families. She is a daughter of the British aristocracy—her father was John Hare, the first Viscount Blakenham and a prominent Tory politician—and her family includes the founders of Pearson, the media conglomerate.

Breyer grew up in San Francisco, where his father was a lawyer for the public-school system and his mother a volunteer for Democratic campaigns. (His younger brother Charles is a federal judge, appointed to the trial bench in San Francisco by Clinton.) The Breyers have three grown children; their daughter Chloe and her two children
were visiting when I was there. An Episcopal priest affiliated with a church in West Harlem, Chloe is the executive director of the Interfaith Center in New York, where she has been a vocal supporter of the plans to build an Islamic center near Ground Zero. Stephen Breyer is Jewish, and there is a menorah amid the clutter of the New Hampshire cabin. “We’re very ecumenical,” he said. (Their daughter Nell is an artist affiliated with M.I.T., and their son, Michael, works for a legal-technology firm in California.)

Breyer has a sunny disposition and a distracted air, both of which were in evidence on our canoe trip. The beaver dam, an impressive pyramid of sticks and mud about ten feet high, was across the pond from his house. As we turned to head home, the blade of Breyer’s paddle broke off and sank. Unperturbed—indeed, barely noticing the disintegration of his equipment—Breyer asked me, “Do you remember the J-stroke, from camp?” I did, vaguely, and guided the vessel to shore.

Breyer’s congeniality was the key to the start of his judicial career. In the late nineteen-seventies, he took a leave from Harvard to serve as chief counsel to the Senate Judiciary Committee, which was then chaired by Edward M. Kennedy. (Breyer was reading the late Senator’s autobiography when I arrived at the cabin.) The ranking Republican on the committee was Strom Thurmond, the arch-conservative from South Carolina, and Breyer’s tenure coincided with the last period of genuine bipartisanship in the Senate. “Thurmond’s chief counsel and I had breakfast every single morning—every morning,” Breyer told me. “And at that breakfast we would plan the day. And the rule was no secrets, no surprises. The idea was to try to be coöperative and to try to get things through,” he said. “I loved it.”

This connection proved important, because Carter nominated Breyer to the First Circuit after Ronald Reagan had won the 1980 election. Republicans, who had also taken back control of the Senate that year, could have stalled for a few weeks and turned the seat over to Reagan to fill. But, in an act of magnanimity unimaginable in the current Senate, the Republicans let Breyer’s nomination proceed. “I was very lucky to be there at that time,” Breyer told me.

Breyer has a disposition that lends itself to compromise. He has a passion, if that’s possible, for splitting the difference. In 2005, the Court heard two cases about governmental displays of the Ten Commandments, one in a public park and the other
in a courthouse. Four Justices thought that both were permissible; four thought that both were unlawful; Breyer approved of the park display and rejected the courthouse.

But Breyer has been unable to surmount partisan politics on the Court. In his sixteen-year tenure, he has written a handful of important majority opinions, the most famous in the 2000 case that struck down a Nebraska law banning a particular kind of late-term abortion. In one of the clearest examples of the conservative ascendancy, Breyer’s decision was effectively overruled seven years later, in a Kennedy opinion upholding a similar federal law.

“When people look back forty years from now, they will see Breyer as smart and scholarly and a good judge,” Eugene Volokh, a law professor at U.C.L.A. and the proprietor of a widely read legal blog, said. “But they probably will not see him as someone who left much of a distinctive mark, at least so far.”

Breyer now knows that he is likely to be better remembered for his dissents. Characteristically, he tries to see the bright side, but it’s a tough sell. “I am dissenting more now than I was, say, five years ago—a lot more—and I’d prefer not to dissent. Every dissent is a failed opinion,” he said. “But what you never see is sometimes the dissents accomplish something, in that the majority has to respond. I think the dissent has a role of holding the majority’s feet to the fire. If I’ve written an opinion and there’s a dissent, I have to answer those arguments, so I have to think about them. And often I’ll make a modification. And so will others. So the modified opinion is what you see.”

I asked him if it was frustrating.

“I would prefer more often to be in the majority,” he said. “So would everyone.”

There is a kind of romance to the history of dissents at the Supreme Court. At various times, some of the giants of the Court, including the first John Marshall Harlan, Oliver Wendell Holmes, Jr., and Louis Brandeis, were known as “the Great Dissenter.” Implicit in that designation, however, has been the ultimate vindication of the dissenter, as with Harlan on segregation and with Holmes and Brandeis on free speech. The truth, though, is that most dissents are not vindicated, and the experience of losing too often can prove toxic. Two new books, to be published this fall, underline this point. In “Scorpions,” a group biography of the Justices appointed by Franklin D.
Roosevelt, Noah Feldman chronicles Felix Frankfurter’s descent into querulous irrelevance as the Court moved left under Earl Warren. In the nineteen-eighties, the rightward shift of the Court had a similar effect on William J. Brennan, Jr., as Seth Stern and Stephen Wermiel write in “Justice Brennan, Liberal Champion,” their long-awaited authorized biography. “Years of dissenting had taken a toll on Brennan’s enthusiasm for his job,” they write. “It was not nearly as exciting as when he was regularly in the majority.”

Breyer has dealt with the frustration by writing books. As a law professor, he turned out a series of volumes in his academic specialties, but as a Justice he has been trying to persuade the public in a way that he has not succeeded in persuading a majority of his colleagues. Five years ago, Breyer published “Active Liberty,” a slim volume that gave an introduction to his views on the Constitution, which emphasize pragmatism and compromise. The book was well received, but it has not been terribly influential among his fellow-judges. This month, Breyer will publish “Making Our Democracy Work: A Judge’s View,” in which he gives a full account of his judicial philosophy, one that allows the federal government wide latitude in addressing society’s problems.

“I’ve been on the Court sixteen years, and I wanted to really look back and see if the way I’d been deciding cases, and how I thought the Court worked and everything, whether it formed a coherent whole, whether it stuck together,” he told me. “I wanted to see whether I was jumping from one thing to another, or just following the political winds, or whether there was a vision that’s rather coherent.”
Not surprisingly, Breyer concludes that he does have a vision, and that at its heart is a word that he uses a great deal in both his writing and his conversation: “workable.” It is not an especially inspiring term, and I asked Breyer why he seemed so preoccupied with it.

“One danger when you use the word ‘workable’ is people think ‘political.’ Wrong. Another thing they think is, Oh, this is just a Fourth of July speech. But to a person who is a member of our Court it’s not a Fourth of July speech. And it’s not political,” he said.

Breyer is clearest on what his approach is not. The most striking part of his book is his denunciation of originalism, the interpretative technique embraced by Scalia and Thomas (whose names do not appear in the text). Originalists assert that the meaning of the Constitution was fixed at the time of its ratification, and that the understanding of the framers should bind judges for all time. In practice, originalism often proves fatal to claims that the Constitution offers broad protections of civil liberties—say, the right to choose abortion. As championed by Scalia and Thomas, originalism complements and reinforces conservative politics.

Originalism now holds powerful sway in the broader Republican Party. As Senator John Cornyn, of Texas, framed the issue at the Kagan hearings, constitutional law amounted to a contest between “traditionalists” who feel bound “to a written Constitution and written laws and precedent” and judges who believe in “empathy, as the President has talked about it, or a living Constitution, which has no fixed meaning.” Tom Coburn, of Oklahoma, said that any view of the Constitution except “original intent is going to give a lot of people in this country heartburn, because what it says is our intellectual capabilities are better than what our original founding documents were, and so we’re so much smarter as we’ve matured that they couldn’t have been right. And that’s dangerous territory for confidence in the Court.”

Even Souter, the reclusive former Justice, joined the fray. In the commencement address at Harvard this year, Souter rejected the idea that “the Court is making up the law, that the Court is announcing constitutional rules that cannot be found in the Constitution, and that the Court is engaging in activism to extend civil liberties.” Souter said that the originalist premise “devalues our aspirations, and attacks our confidence, and diminishes us.” The only true way to interpret the Constitution, Souter said, is “by relying on
reason, by respecting all the words the framers wrote, by facing facts, and by seeking to understand their meaning for living people.”

With less eloquence but more specificity, Breyer builds a similar case in “Making Our Democracy Work.” He gives a comprehensive denunciation of a purely originalist approach, noting first the difficulty of divining what the framers might regard as the legal status of “the automobile, television, the computer, or the Internet.” And he argues that the framers themselves wanted the application of the Constitution to change with the times. They gave Congress a great deal of flexibility in regulating interstate commerce, and “intended the scope of that word to expand, covering more and more items, as commerce itself expands, as technology advances, and as commercial activities in one state affect those in another.”

If not originalism, then what? Here Breyer is less compelling. “I belong to a tradition of judges who approach the law with prudence and pragmatism,” he told me. “And that is a tradition that has existed throughout American legal history. That’s the tradition of judges whom I admire—Cardozo, Brandeis, Holmes, Learned Hand. That tradition is not subjective, and that tradition is not politics. It is a tradition that tries to understand the values and purposes underlying the Constitution and the laws. It’s a tradition that says there’s a need to maintain stability in the law, without freezing the law in a way that would prevent Brown v. Board of Education”—which overturned the case of Plessy v. Ferguson and its notorious doctrine of separate but equal.

Breyer’s embrace of this centrist, “workable” approach does not always win him allies in contemporary constitutional debates. Notably, he does not associate himself with the liberal tradition of Brennan and Thurgood Marshall, who saw the Constitution as a vehicle for social change. Brennan and his allies recognized the right to privacy in the Constitution and, if they had had the votes, might well have found a right to education, housing, or even a livable income. “I don’t think of Breyer as a liberal,” Pamela S. Karlan, a professor at Stanford Law School and an outspoken progressive, said. “He’s a liberal only by comparison to a Court that doesn’t have a liberal wing.” For example, Breyer has voted with conservatives on state aid to parochial schools and on some freedom-of-speech issues; he ruled that it was permissible for the federal government to give aid to local libraries only if they agreed to install anti-pornography filters on their computers.
At the same time, conservatives regard Breyer’s talk of pragmatism as little more than a smoke screen to cover his embrace of such liberal-agenda items as abortion rights and affirmative action. “It’s only been a handful of occasions when he’s deviated from the liberal line,” Edward Whelan said. “His so-called pragmatic approach just leaves him wherever he wants to go.”

Breyer is less a Brennan liberal than a New Dealer, who believes that courts should stay out of the way when the government tries to solve problems. This, basically, is what Breyer means by “workable.” As he told me, “The Constitution sets up an entire group of institutions—of which the Court is one—that are supposed to work together to produce a government that works. We translate the principles and values within the Constitution into people’s lives, into the way they govern the country, into the way the country works. And workable has a lot to it. It’s easy to write a Constitution that has glorious principles in it, compared to the task of getting it to be carried out in practice. Madison and Hamilton and the others tried to think of how we can set up institutions that will be carried out in practice.”

Peter Berkowitz, a senior fellow at Stanford’s Hoover Institution, said, “Breyer is always saying that these judgments should not be controversial, because he’s merely applying the values in the Constitution. But conservatives see different values than he does. And then he says that he’s deciding cases on a pragmatic assessment of what the consequences will be. But conservatives care about different consequences than he does.”

Breyer is desperate to prove that his constitutional views are rooted in something more than his political preferences in any given case. His conservative adversaries on the Court make the same claim—that they are led by principle, not politics. Neither side is persuasive on that score. Many judges, especially those on the Supreme Court, seem to have an intellectual superstructure built to fit their political foundation, and Breyer is no exception. Like Bill Clinton, who appointed him, Breyer is a cautious, pragmatic liberal on social issues and civil liberties—pro-choice, pro-affirmative action, steadfast on the separation of church and state, suspicious of wide claims for executive power in wartime. He votes accordingly.

Obama used to teach constitutional law at the University of Chicago Law School, and has well-defined views on many legal issues—which happen to be congruent with
Breyer’s. Both have disappointed some liberal allies by expressing caution about the Courts’ aggressively expanding rights or bringing about social change. More than many liberals, Obama believes in judicial restraint when it comes to civil liberties. Notably, in the most intense civil-rights controversy of the moment, Obama opposes a constitutional right to same-sex marriage. (Breyer’s views on the subject are so far unknown.)

For more than a generation during the past century, constitutional law was largely defined by Roosevelt’s feud with the conservative Supreme Court of the early nineteen-thirties. During F.D.R.’s first term, the Court invalidated several of his signature New Deal initiatives as unconstitutional expansions of the regulatory powers of the federal government. Roosevelt struck back with a plan to expand the number of Justices, ostensibly to assist the elderly members of the Court with their workload. Even some of F.D.R.’s allies rebelled at what was seen as a transparent power grab, and the Court-packing scheme met an unmourned demise. But Roosevelt, having lost that battle, still won his war against the Supreme Court. At the height of the controversy, one of his erstwhile adversaries on the Court, Owen Roberts, unexpectedly started voting to uphold the New Deal; this “switch in time that saved nine” took the urgency out of the Court-packing plan. More important, F.D.R. remained in office so long that he had the chance to appoint eight of the nine Justices on the Court.

“To be a constitutional liberal in the Roosevelt era was to believe that the government has to regulate the economy, and the Constitution allows it,” Noah Feldman, the author of “Scorpions” and a professor at Harvard Law School, said. “And the reason that they wanted the regulation was not that they were socialist but they thought capitalism had to be regulated effectively or it would be overthrown.” All the Roosevelt Justices, without exception, believed in what they called judicial restraint, at least when it came to allowing broad regulatory powers for the federal government. Over time, as Feldman writes, the Roosevelt Justices split bitterly with one another over issues like civil rights and free speech, but they achieved what seemed to be a permanent consensus in allowing Congress and the White House virtually unlimited power to regulate the economy.

Under John Roberts, that consensus is breaking down. Roberts, in his confirmation hearings, embraced what he called judicial modesty, and offered the now famous
metaphor of the Supreme Court Justice as a baseball umpire, who does nothing more than call balls and strikes. In the subsequent half decade, however, Roberts and his fellow-conservatives have been anything but modest and have revived their own brand of judicial activism. The political branches produced campaign-finance restrictions, Sarbanes-Oxley, and even gun control, and the current Court majority, led by Roberts, imposed its own contrary judgment.

“We now have a Court with five members who are prepared to interfere with the result of the regulatory process,” Feldman said. “You would have thought the Roosevelt Court’s rejection of that would have been permanent, but it’s coming back. Just like in the Roosevelt era, the conservatives are using individual rights like free speech to say that the government can’t regulate.” This is evident in cases like the Sarbanes-Oxley decision, and in what has become the salient ruling of the Roberts era, Citizens United v. Federal Election Commission. In that case, decided earlier this year, Kennedy’s opinion for the five conservatives reversed decades of precedent in order to overturn a portion of the McCain-Feingold campaign-finance law, and held that corporations had an unlimited right to spend money on behalf of political candidates.

In his new book, Breyer uses Citizens United, in which he joined Stevens’s ninety-page dissent, to take a shot at Roberts. Breyer notes that William Rehnquist (for whom Roberts clerked) had, in his last years on the Court, written an opinion endorsing the Miranda rule of criminal procedure, even though he had long opposed the decision, which dates from 1966. Rehnquist found that Miranda had “become well embedded in national culture,” and decided—wisely, Breyer believes—to leave the case alone. In contrast, Breyer writes that the majority in Citizens United “disregarded a traditional legal view that stretched as far back as 1907.” This is a frequent theme for Breyer, who, in 2007, on the last day of Roberts’s second term, stared right at the Court’s press gallery as he denounced the new Chief Justice and his allies for failing to honor the Court’s precedents.

The scope of federal power—and thus the Obama agenda—is at issue in many current cases before the Court. The President, once again in sympathy with Breyer, believes in the Roosevelt-era idea of judicial restraint. (Obama has written that the Constitution also permits legislative “log-rolling, deal-making, self-interest, pork barrels, paralysis and inefficiency”—without second-guessing from the courts.) Earlier this year, Breyer
wrote the opinion for the Court in United States v. Comstock, upholding a federal law that allowed the government to detain dangerous sex offenders after their prison terms had expired. The question in the case was whether the law was permissible under Article I of the Constitution, which states that Congress can “make all Laws which shall be necessary and proper” to execute its other powers. Breyer used the case to meditate at length on the Necessary and Proper Clause, which, he said, “grants Congress broad authority to enact federal legislation.”

Karlan, of Stanford, observed that Comstock was “really a case about health-care reform—if Breyer’s view of the Necessary and Proper Clause is correct, then the health-care reform is O.K.” That may be an overstatement. In the first legal challenge to the health-care law, however, Kenneth T. Cuccinelli II, the Republican attorney general of Virginia, raised arguments similar to those made against the New Deal legislation, seventy-five years ago. He said that the law intruded on states’ rights and exceeded Congress’s authority to pass legislation under the Commerce Clause of the Constitution. In the government’s brief, the Justice Department cited several opinions by the Roosevelt Justices (and Breyer’s opinion in Comstock) to argue that “regulation of a vast interstate market that consumes more than 17.5% of the annual gross domestic product is well within the compass of congressional authority under the Commerce Clause.” Judge Hudson’s opinion declining to dismiss the Virginia case did not address the merits of these arguments, but the constitutionality of health-care reform must, at this point, be seen as an open question that can be resolved only by the Supreme Court.

Obama’s agenda, at its core, relies on the administrative state to solve problems—in health care, the economy, and the environment. As a scholar and a judge, Breyer has spent his career trying to justify what this President is trying to do. “Every piece of important legislation that’s been passed so far will be challenged on constitutional grounds,” Noah Feldman said. “With Stevens gone, Breyer is now the critical figure. He will remind everyone that regulation is a necessary component, when properly deployed, of good government.”

Comstock allowed Breyer to take up, for a moment, Stevens’s mantle of leadership at the Court. He managed to persuade Roberts to join his opinion, though Kennedy and Alito wrote a separate concurrence, dissociating themselves from Breyer’s
broad reading of the Necessary and Proper Clause. (Scalia and Thomas dissented.) The question is whether Breyer can use his new prominence to assemble winning liberal coalitions on the Court, as Stevens did occasionally. In truth, the current Court consists of independent operators of strongly defined views, who don’t do a lot of lobbying of one another.

That’s often been the case throughout the Court’s history. Brennan was usually regarded as a master coalition builder during his long tenure, but, as Stern and Wermiel make clear in their biography, he was most successful during the Warren years, when liberals dominated the Court. (Breyer clerked for Arthur J. Goldberg in 1964-65, at the height of Brennan’s influence.) “Brennan was famous for saying the most important rule at the Supreme Court was how to count to five,” Akhil Amar, Breyer’s former clerk, said. “Breyer likes to point out that that was easy for Brennan to say, because he started with seven votes.”

Breyer today has at most four votes, but he does have a bully pulpit of sorts, which he has used to carve out another distinctive niche for himself on the Court. He is the only Justice to make a point of attending every State of the Union address. Until this year, that would have rated as a bit of trivia. But this past January, Obama launched an unusual attack on the Court. “With all due deference to separation of powers,” Obama began, in an ad-lib that suggested he knew how unusual his attack was, “last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections.”

At that moment, a television camera panned to the six Justices in attendance and caught Alito shaking his head and mouthing the words “Not true.” (Citizens United is ambiguous on whether it applies to foreign companies.) The exchange provided the most electric moment in the speech. A few weeks later, Roberts, at a talk in Alabama, called the scene during the address “troubling.” He went on, “To the extent the State of the Union has degenerated into a political pep rally, I’m not sure why we’re there.”

“I have always gone. I hope everyone now goes,” Breyer told me. “Some people may think I shouldn’t go to a ‘political pep rally,’ but I don’t agree. I like to see people go, because it’s a visible sign that we are part of the United States government. In that room, there are gathered officials of the government of the United States. And the
Court’s part of that, and I don’t want people to forget that. . . . Most Americans get their news from television, and I think they should see us there. It helps people to understand that the Court has a role to play, though it’s not a role of bossing people. We’re there to patrol the boundaries, the constitutional boundaries, to interpret statutes. We’re not there to tell people what to do. The democratic process is there for that.”

As always, Breyer is reluctant to use the word “politics” to describe what is going on at the Court. “There is a tremendous temptation for journalists, for readers, and the average person who thinks about the Court, particularly today, to think these are a group of junior-league politicians, and what they are doing is deciding things on a political basis,” he told me. “That, I think, plays virtually no role in what we do at the Court.” Breyer persists in this idealistic conception, even if five Republican appointees will now be lining up with regularity against four Democratic appointees. The only thing that will save Breyer from a future of writing more dissents is politics: more colleagues appointed by a Democratic President. ♦