Is *WV v. EPA* a Landmark?

In light of the unique circumstances that led to the Supreme Court's decision last term in reviewing an agency rulemaking, and the chief justice's careful caveats on "major questions," we caution against overstating the case's likely long-term impacts on environmental law

Stan Meiburg is executive director of the Center for Energy, Environment and Sustainability at Wake Forest University and was acting deputy administrator of EPA between 2014-17.
Scott Schang is director of the Environmental Law and Policy Clinic and professor of practice at Wake Forest Law, and senior advisor at Landesa.

.

UPON its release, the Supreme Court's decision last term in *West Virginia v. EPA* was trumpeted as a watershed moment in environmental law. The Sierra Club described it as a "dangerous decision . . . that deals a major blow to the government's ability to tackle the climate crisis." Another progressive group said that the Court's majority justices "could not contain their zeal to hollow out EPA's ability to lessen suffering from climate change in ways that impinge the profits of entrenched fossil fuel interests." A common sentiment was that this was only an opening salvo in an attempt by the Court's new conservative majority to greatly restrain the agency.

Our purpose in this article is not to relitigate whether *West Virginia* was rightfully decided, but to put it into the context of the Clean Air Act and the Supreme Court's approach to that statute and, with the benefit of several months' reflection, consider the merits of these alarms.

We agree that *West Virginia* is a landmark case, but we doubt it will have the force and effect that some fear. In fact, our reading of the case is that it very narrowly defines the new "major questions doctrine" to help sequester that doctrine's effect. In addition, Chief Justice Roberts' approach may signal that attempts of some justices to significantly restrict EPA authority have not found fertile ground in the new Court. In light of the unique circumstances that led to the decision, we caution against overstating the case's likely long-term impacts on environmental law.

West Virginia has to be read and understood in context. The Clean Air Act is a complex, highly technical statute that has been the subject of continuous litigation, both as a bold effort that affected the entire economy and as a pioneering new approach to legislation. The 1970 amendments were the first substantive media statute enacted by Congress to clean up the environment by creating a system of cooperative federalism in an area that had traditionally been the primary responsibility of states.

As such, the new CAA contained features, such as agency- and state-forcing deadlines, citizen suits, federal enforcement authority, and delegation authorities, that were later adopted in other environmental laws. In addition, the law set the table for the new Environmental Protection Agency, formed one month before the act passed. While members of Congress and their staffs in the 1970s showed a remarkable degree of expertise in clean air regulation, some issues necessarily had to be decided by EPA and state technical staff based upon industry-specific or even facility-specific factors.

The *West Virginia* case is the latest in a long series of litigation that stems from the simple fact that many of EPA's major actions under the CAA involve the utility sector. Coal and other fossil fuels are massive sources of ambient, hazardous, and climate-warming pollutants. As a result, the agency's actions often impact this industry, which is not shy about taking EPA to court or lobbying Congress and the agency.

When EPA started to implement the CAA, virtually all of its major regulatory actions wound up in front of reviewing courts. The D.C. Circuit, which received many of these cases, initially struggled with how to oversee the act, but over time developed expertise in handling many complex cases under the statute.

However, the Supreme Court did not let the D.C. Circuit have all the fun. Over the past 50 years, the high court has reviewed CAA cases over a dozen times. The cases line up like a row of paintings on an art gallery wall, and many of them created significant law far beyond environmental law. In *Chevron v. NRDC,* decided in 1984, the Court upheld EPA's bubble approach to deciding what a stationary source was. In the process, it explained that judges should not subject expert agencies' authorized rulemakings to death by judicial parsing of words and should instead defer to reasonable interpretations of the act. The Court found more expansive standing principles in *Massachusetts v. EPA,* a 2007 case, and clarified displacement of federal common law around climate change in the 2011 case *American Electric Power v. Connecticut*.

Despite the number of CAA cases the Supreme Court has reviewed, it is probably fair to say that such cases are not the favorite flavor for many justices. After being corrected about a scientific term, Justice Scalia famously remarked during one air case: "I told you before I'm not a scientist. That's why I don't want to have to deal with global warming, to tell you the truth." Yet over time, the Supreme Court's opinions on the act favored EPA and/or environmental protection by roughly a three-to-one margin.

More recently, however, the agency has run into strong headwinds on air issues, losing three straight cases including *West Virginia* at the high court. Two of these losses involved EPA's attempt to use the

CAA to address greenhouse gas emissions, which most seasoned observers understand is a challenging proposition no matter how much one might want to take action on climate change. The result in *West Virginia* is a consequence of the agency's trying to use the act, the most obvious tool available to it, to undertake a task for which the tool is a poor fit—like using a Phillips screwdriver to tighten a flat-head screw. Representative John Dingell (D-MI), one of the act's stewards across 45 years in Congress, predicted that using the CAA to address climate change would result in "a glorious mess." Using the act to reduce greenhouse gas emissions indeed resulted in complex regulatory paths that led to the Court's recent decisions.

Using the act to reduce greenhouse gas emissions indeed resulted in complex regulatory paths that led to the Court's recent decisions

For example, when EPA in 2009 found that greenhouse gases as mobile source pollutants did endanger public health under the CAA, it triggered a series of related steps based on the act's stationary source provisions. One such step was requiring permits for new or modified sources that would emit more than 100 or 250 tons per year of greenhouse gases. This would have brought untold numbers of smaller sources into the coverage of the act.

EPA sought to curtail this effect in 2010 by creating the Tailoring Rule to note that the statutory limits of 100 or 250 tons would be regulatorily replaced with limits of 75,0000 to 100,000 tons. Even though one could appreciate the agency's pragmatism, directly contradicting statutory language is a bold move for any agency in front of any court. Not surprisingly, in *UARG*, a case decided in 2014, the Supreme Court required EPA to read the statute in such a way that it did not contradict the plain language of the law. Perhaps surprisingly, under Justice Scalia's reinterpretation of the statute for EPA, his opinion retained agency jurisdiction over the vast majority of sources it in fact did want to regulate.

A second, more consequential element in the Obama administration's clean air regulatory approach to greenhouse gases rested on finding a way to quickly reduce carbon emissions from existing coal-fired electric utilities, at that time the largest category of emitting sources. But the act lacked a clear hook for achieving this goal until EPA concluded that it could use Section 111(d) to require existing fossil-fired plants to use the "best system of emissions reduction" to reduce greenhouse gases, a strategy that the agency issued in 2015 as the Clean Power Plan. This was possible because greenhouse gases are neither criteria pollutants nor hazardous pollutants under the act.

EPA's usual, but not exclusive, approach under Section 111(d) was to use cost and technology considerations in identifying emissions reductions that would be required of individual existing sources subject to the rule. For coal-fired utilities, this approach would have resulted in minimal carbon reductions. So EPA decided that under the CPP, in addition to the technology fixes, it would also calculate the emissions reductions achievable if states took two other steps. First, the agency calculated statewide GHG emissions limits that would have the effect of compelling the placement into service of natural gas-fired plants over coal-fired plants when being dispatched by the grid operator. Normally, plants are dispatched based upon cost to the system, not this regulatory innovation. Second, EPA assumed states would require replacement of fossil fuel plants with renewable energy plants. Adding these two so-called "building blocks" to the first building block of technology fixes at the plants allowed the agency to find a "best system of emission reduction" that would result in a 32 percent reduction in utility greenhouse gas emissions by 2030, to assist in meeting the administration's Paris Agreement climate pledges.

WHILE EPA's approach under the Clean Power Plan was a master class in using existing regulatory language to meet urgent and vitally important needs, many clean air experts saw it as substantial departure from past practice. The agency's actions relied upon a portion of the act that was meant to fill gaps in other parts of the statute. Greenhouse gas emissions from existing sources fell into precisely this kind of gap, but it was another thing to use this provision to calculate potential emissions reductions by invoking utility dispatch rules that are not under EPA's control and to project the replacement of the very plants being regulated by the agency with renewable power plants. Although EPA was merely calculating how

Continued on page 42

SIDEBAR

The Decision Is a Naked Power Grab

Rena Steinzor
Edward M. Robertson Professor
University of Maryland
Carey Law School

"The Supreme Court's majority ignored the urgency of mitigating climate change—a major problem if there ever was one"

FORMER President Donald Trump got 234 federal judges confirmed, including three Supreme Court justices, out of 865 life-term positions. He did considerably better than his two-term predecessors. Pro-rated, President Reagan got 201 per term; Clinton, 193; George W. Bush, 170; and Obama, 167. Despite Trump's judicial legacy, and even though the 631 judges appointed by other presidents are aging out of the system, ultra-conservatives do not dominate the federal courts.

These statistics are vital in predicting the impact of *West Virginia v. EPA*. They mean that lower court judges will dispute the implications of the opinion, especially the scope and depth of the so-called "major questions" doctrine. They also mean that the reactions—or overreactions—of the civil service at health and safety agencies will tell the final story.

This reality could be a good thing or it could be a bad thing. But it is more likely to end up on the downside for five reasons.

First, every industry lawyer doing administrative—and not just environmental—law will argue that they should win on the basis of the major questions doctrine. Thousands of hours will be wasted because *West Virginia* relies on criteria that are fuzzy at best and are determined by the conservative justices' gut sense of what economic and social ramifications are too much. The doctrine does not emphasize—and often ignores—the intent of Congress, as discovered through statutory interpretation and legislative history. This "you know it when you see it" test is extraordinarily unfortunate. No one can say with any precision what qualifies as a major question. The possibilities are magnified because its application means ignoring agency expertise.

Second, plaintiff forum shopping in the administrative law space will intensify beyond anything we have seen before, as it has in other areas. Get before a Trump judge groomed at the Federalist Society and you are far more likely to win. Also, avoid the D.C. Circuit at all costs because it has a high number of thoughtful, non-Trump judges. Unfortunately, legislation distributing the D.C. Circuit's jurisdiction among other federal appellate courts is a possibility.

Third, we are in danger of forgetting too soon that the electric utility industry supported EPA in *West Virginia*. It achieved the reductions mandated by the Obama rule voluntarily. This development was a huge landmark. The conservative majority not only glossed over this point, but forbade the agency from taking such a flexible, cost-effective, beyond-the-fence-line approach again. Eliminating incentives for business to cooperate with health and safety agencies are at the heart of the opinion.

Fourth, *West Virginia* and the pandemic cases on agency authority set an impossible task for Congress. Absolutely disdainful of the institution they claim they wish to save, the conservative justices have set an impossibly high standard for determining whether a law is sufficiently detailed and recent. Even if Congress was functioning in peak form, it could not fix the "old" laws fast enough.

During the oral argument on the OSHA's vax or test case last term, Chief Justice Roberts observed that the authorizing statute was too old a law to apply to a new pandemic. The OSH Act is 53, about at the halfway point between the Spanish flu and Covid19, pandemics with much in common. This idea—that laws get too old if they are not constantly refreshed by Congress—is so far outside what the Constitution prescribes regarding the making of laws as to be terrifying. Until and unless Congress acts, laws of any age must be applied and not repealed by a power hungry Court.

Fifth, years of underfunding and the Trump-inspired brain drain have decimated EPA. The agency is getting nowhere fast on climate. Its staff have internalized bad news from the courts to an excessive degree. The majority ignored the urgency of mitigating climate change—a major problem if there ever was one. The conservative majority's power grab will be remembered by our children as they cope with drought, floods, excessive heat, food shortages, and climate refugees. How could the impact of *West Virginia* get worse?

much greenhouse gas reduction could be attained using "the best system" and not strictly requiring adoption of either building block, this approach was quite novel.

The dramatic nature of the agency's action was not lost on the judiciary. In an unprecedented step, the Supreme Court stayed the plan in 2016 before any judicial review by a lower court. The D.C. Circuit then took two full days to hear oral arguments en banc on challenges to the CPP. Yet the circuit court never issued an opinion because the Trump administration repealed the CPP and promulgated its own rule, the Affordable Clean Energy plan. In turn, the Affordable Clean Energy plan was remanded and vacated by the D.C. Circuit, and that action was the source of the *West Virginia* case.

When the Supreme Court accepted the case in 2021, there were many questions about the Court's intent in taking it. Some thought the Court would find that the case was moot, because there was no rule in effect for parties to challenge. The Trump administration had replaced the CPP with its own rule, which had been struck down, and the Biden administration indicated it would not revive the CPP, which technically remained in abeyance before the D.C. Circuit. Others thought that the Court would use this case to overturn the landmark *Massachusetts vs. EPA* ruling, a 5-4 decision that held that greenhouse gases could be regulated as pollutants under the CAA if the agency found that they endangered public health or welfare. The high court did neither of these things.

The chief justice went out of his way to stress the narrowness of the major questions doctrine as limited to "extraordinary cases"

Instead, it offered an opinion on the legality of the CPP, even though that plan was not in effect at the time the case was brought and, ironically, the stated 2030 goals of the plan for carbon reductions in the utility sector had already been achieved. The Court held that the language of Section 111(d) of the CAA, specifically the phrase "best system of emission reduction," did not authorize a regulatory scheme that relied upon large scale generation shifting between different types of power plants. The opinion concluded that if EPA were to exercise such authority, there would have to have been a clearer indication from Congress that it intended the agency to have that authority than the language contained in Section 111(d).

IN doing so the Court invoked the "major questions doctrine," which marked the first time a majority Supreme Court opinion invoked this doctrine and provided some explanation of its application and limits. Although past concurrences and dissents had hinted at the doctrine, it had never been invoked by name before. In authoring the majority opinion, the chief justice explained that EPA had asserted in the Clean Power Plan "a highly consequential power beyond what Congress could reasonably be understood to have granted" in Section 111(d). As a result, the Court required "clear congressional authorization" for the claimed authority.

The chief justice went out of his way to stress the narrowness of the major questions doctrine as limited to "extraordinary cases." His opinion outlines several factors that appear to be required to invoke the doctrine, including, first, discovery of a new power in a long-existing regulatory regime that, second, represented a "transformative expansion" in regulatory authority that, third, Congress had considered and rejected. The opinion also notes that EPA was seeking to regulate the energy mix of the U.S. power grid, which as a fourth factor the chief justice sees as far outside EPA's remit. Similarly, last summer during the Covid pandemic, the Court was critical of the Centers for Disease Control involving itself in housing policy and OSHA involving itself in vaccination policy.

Chief Justice Roberts appears to have been providing some guardrails to keep jurists from riding roughshod over regulatory agencies with the new doctrine. While lawyers and law students have been quick to invoke the new doctrine, it is hard to find factual scenarios that match what the Court faced in reviewing the CPP and that meet the criteria above. Deciding what constitutes a "water of the United States" comes nowhere near meeting these requirements for invoking the doctrine, for example.

Would EPA's finding that greenhouse gases can be regulated under the CAA have survived this doctrine if it existed at the time of *Massachusetts*? Maybe. A skeptical Court might have bridled at the agency's expanded CAA authority under the first three factors, but the fourth, an agency acting outside of its

Continued on page 44

SIDEBAR

The Limitations of Existing Statutes

Jeff Holmstead
Partner and Co-chair, Environmental Strategies Group
Bracewell LLP

"The Court held that it is not enough for an agency to show that its regulation is based on a 'textually plausible' interpretation of an authorizing statute"

THE high court's decision in *West Virginia v. EPA* has been the subject of great debate, but it rests upon the undisputed proposition that federal regulatory agencies are entirely "creatures of Congress." An agency may not take any action unless Congress has given it authority to do so.

In its decision, the Supreme Court embraced the "major questions doctrine," holding that, if a federal agency wants to create an "extraordinary" new regulatory program, it must show that Congress clearly authorized it to do so. In such cases, the Court held, it is not enough for an agency to show that its regulation is based on a "textually plausible" interpretation of an authorizing statute. In a term more familiar to administrative lawyers, even a "reasonable interpretation" would presumably not be sufficient.

There has been much debate about the extent to which the decision will curtail the regulatory ambitions of agencies across the federal government on a variety of issues. Certainly, it does not bode well for the Biden administration's "whole-of-government" approach for dealing with climate change, which has encouraged federal agencies and departments to use existing statutes to find new ways to reduce GHG emissions from companies that fall within their purview.

In particular, it seems likely that the Supreme Court may be skeptical of recent proposals to require government contractors to set "science-based targets" for reducing their GHG emissions; to allow the Federal Energy Regulatory Commission to reject applications for natural gas pipelines based on climate change concerns; and to require public companies to make extensive disclosures about their emissions. If these proposals are finalized and pass muster with lower courts, they may well be important enough to attract the Supreme Court's attention.

Some environmental advocates have argued that the Clean Air Act provides EPA with broad authority to regulate GHG emissions by setting "national ambient air quality standards" for them. To be sure, clever lawyers have developed a textually plausible interpretation of Clean Air Act provisions to support the idea, but if EPA officials have ever seriously considered it (which I doubt), they have certainly abandoned it in the wake of *West Virginia*.

The Biden EPA has made it clear that it has three priorities for regulating GHG emissions under the Clean Air Act—from power plants, from oil and gas operations, and from the transportation sector.

For power plants, EPA officials are reportedly considering whether carbon capture and sequestration—CCS—is a "system of emission reduction" on which they can base their regulations. Some claim that this is defensible because of the generous tax subsidies for CCS that Congress recently enacted. However, even with subsidies, any reasonable analysis would show that the costs are so high that most existing fossil fuel power plants would shut down before they would install the technology. In this case, a CCS mandate would look like a pretext for the kind of generation shifting that the Supreme Court rejected in *West Virginia*.

For oil and gas operations, this decision is not likely to have any impact. EPA's regulatory approach—requirements to reduce methane leaks from many different operations—is squarely within the agency's regulatory authority. This is not to say that EPA's regulations won't be vulnerable in court. The agency must still show that its requirements are based on demonstrated and cost-effective approaches for reducing emissions, but these issues are unrelated to the major questions doctrine.

What about EPA's efforts to regulate greenhouse gas emissions from the transportation sector? The agency's GHG vehicle standards are designed to shift new cars, trucks, and other heavy-duty vehicles from petroleum fuels to electricity. The Supreme Court may well believe that an attempt by a regulatory agency to phase out the fuels and technologies that have powered U.S. transportation for more than one hundred years is the sort of major question that necessitates explicit authority from Congress.

remit, was not satisfied. EPA had been clearly and fully charged with addressing emissions of pollutants like greenhouse gases from mobile sources, which was the issue under consideration in *Massachusetts*.

It is also important to note that the Court's framing of the doctrine is far narrower than the explanation of the doctrine provided by the Trump EPA when it repealed the CPP. There, EPA said major rules could be identified by "the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue." This framing would have brought a far broader swath of cases into the doctrine, which Roberts did not accept.

Another critical aspect of the *West Virginia* opinion is that the major questions doctrine is not framed as a constitutional principle based on separation of powers, a path down which Gorsuch, Alito, and Thomas are itching to take the Court. These three justices have a very narrow view of the kind of authority and discretion that Congress may delegate to agencies, one that might nullify many EPA rulemakings based on the agency's expert interpretation of congressional delegations of power. The fact that only Alito joined Gorsuch's concurrence may bode poorly for future attempts to promote this view.

The major questions doctrine is not framed as a constitutional principle based on separation of powers, a path down which Gorsuch, Alito, and Thomas itch to go

WE do not mean to downplay the importance of the major questions doctrine, but instead to put it in context. Litigants are certain to seize upon the doctrine to parry EPA's and other agencies' attempts to regulate, particularly on major issues of national importance. Yet the degree to which the Obama EPA was stretching the text of the CAA to meet a modern imperative for which it had no other good alternative is likely why the chief justice cautioned about overreacting to this single case or framing of the doctrine.

The decision will certainly cause EPA and other agencies to very clearly and carefully consider where they find their regulatory authority and to explain why the factors the chief justice set forth for application of the doctrine are found only in the most extreme cases. On the topic of climate change, the recently adopted Inflation Reduction Act gives EPA and other federal agencies a new range of tools that are manifestly intended to address climate change through incentives. For the first time in black letter law, the IRA defines the term "greenhouse gases." This would seem to forestall any further effort to overturn this aspect of *Massachusetts*.

In addition to carrying out its responsibilities under the new Inflation Reduction Act, EPA may now consider other rulemaking options consistent with the *West Virginia* opinion to address GHG emissions. Any such actions will doubtless be controversial and will be debated on their merits, but this is business as usual.

The *West Virginia* opinion seems to have little effect on states or the cooperative federalism relationship. Nothing in the opinion affects strategies such as the carbon market in California, or the actions of the RGGI states in adopting carbon limits under their own state authorities. Although some state courts might adopt the opinion's formulation of the major questions doctrine into their jurisprudence, it is not clear that would have a major impact either. California's legislature granted the Air Resources Board significant discretion in crafting the state's greenhouse gas trading market. But the doctrine would not apply because the legislature was clear in granting the authority to undertake this effort—it is not a power the board had to stretch statutory language to discover. Had the Supreme Court in *West Virginia* taken the separation of powers approach called for by Gorsuch, then authority such as that granted to the board would be under serious threat of nullification.

States have to continue to decide what they want to do in areas that lie within their sole jurisdiction. If that jurisdiction shifts, as it may in the *Sackett* case this term, states have to decide what they want to do with areas no longer subject to Clean Water Act jurisdiction. Indeed, that is exactly what our own state of North Carolina did when the Trump WOTUS rule removed some areas from jurisdiction. Similarly, the North Carolina state legislature adopted its own state law, H.B. 951, setting carbon-reduction targets and a mechanism for achieving them. That said, if federal authority over environmental issues continues to be narrowly interpreted by courts, laws in many states that provide

that state regulatory provisions may be no more stringent than federal provisions or otherwise limit state regulation may come under sharper scrutiny.

ON the federal side, however, this decision will have three effects, all of which will pose real challenges.

It will make it harder for agencies to undertake rulemaking to address exigent circumstances and emergencies such as climate change and the pandemic. Even though agency lawyers will give the same careful scrutiny to the statutory underpinnings of rules, culturally, lawyers are risk averse. This generally delays decisionmaking. Further, in the inevitable litigation on such rules, even if major questions claims are spurious, it still takes time and effort to deal with them. Thus, the doctrine may well have the effect likely intended by the majority of justices that endorsed it by cooling and restraining federal regulatory authority.

West Virginia will also make it harder for Congress to legislate. Strategic ambiguity is an essential part of the legislative process. When members cannot agree on the details of an important issue, one of the most useful tools is to write in general language that everyone can agree on, language that contains studied ambiguity. The purpose of this is to postpone the resolution of very contentious matters to a later time and a later forum. This serves many congressional interests. But *West Virginia*'s injunction that language has to more clearly direct agencies will make it harder to use this tool, thus hindering rapid legislating.

Under this new doctrine, Congress may find that it needs to start declaring affirmatively that it is leaving certain issues in the expert hands of agencies to decide and regulate. This will likely inflame the debate at the Court around the degree to which, if any, the legislature can entrust agencies with what looks like legislative authority.

Perhaps the Court's insistence on clear congressional action might provoke exactly that. Perhaps Congress could address unclear or imprecise statutory language and delegations of authority. With a few exceptions, Congress has not undertaken a full review and update of the core environmental laws since the passage of the CAA Amendments of 1990. Any urging that could get Congress to step up to its stewardship duties over this body of law would be welcome, though we may be slipping into the realm of wishful thinking.

Still, disclaimers of intent to the contrary notwithstanding, it is clear that this decision gives more power to the courts and represents a shift in the balance of power among the three branches. Even if it acts in a restrained way, the Court has reserved for itself the power to determine what is a "major question." The *West Virginia* majority seems to see no role for Congress when an agency oversteps its legislative authority. Yet it is Congress's job to make the law, and it has full powers of oversight and control over agency budgets. It is hardly some weakling branch in need of the Court's protection.

The irony is that we have been to this movie before, and the CAA was the theater. Few now remember the litigation over the Prevention of Significant Deterioration program in the late 1970s, where the centerpiece was the 1979 decision *Alabama Power vs. Costle*. The D.C. Circuit in that case issued an opinion that went over every detail of the regulations in excruciating detail, and the opinion was so long and complex that they had to issue it in two parts that were written piecemeal by three judges. Essentially, it was the D.C. Circuit who decided what Part C of the 1977 Amendments said.

The idea that federal authority has shifted toward judicial dominance is not one that should enable believers in democratic governance to sleep better at night

From this perspective, the *Chevron* decision in 1984, an enduring legacy of the Anne Gorsuch era at EPA, was a useful corrective to what had been judicial overreach. Today, with *Chevron* deference under attack, we may be looking back to the future, and it's not pretty. Under *West Virginia*, agencies will need to be able to point to clear congressional authorizations to act when addressing major issues not previously addressed. And if *Chevron* weakens or is overturned, agencies' interpretation of the statutes authorizing their action will likely come under increasing court scrutiny. Even if the *West Virginia* dissent's claim that the Court has now appointed itself as the decisionmaker on climate policy seems a little over the top, the idea that federal authority has shifted toward judicial dominance is not one that should enable believers in democratic governance, whether conservative or progressive, to sleep better at night. **TEF**