

In teaching my class on Climate Law, I've been struck by how many new legal questions courts are confronting as a result of the climate crisis. Dealing with these new legal questions is going to put stress on existing legal doctrines and require courts to rethink some basic principles. Unfortunately, the Supreme Court is pushing courts in favor of greater rigidity by embracing backward-looking doctrines like textualism and originalism while disengaging from the *Chevron* doctrine.

One set of issues relates to applying existing statutes to climate change. Here, a host of problems have come up. Consider this list of examples:

- Given that coal has larger carbon emissions than other sources of energy can EPA adopt a strategy of phasing out its use in the electric power sector? If not, what other effective options are available to EPA?
- Since dealing with climate change requires global action, can EPA take into account the harm our emissions cause in other countries when it designs regulations?
- How far ahead can the government look when deciding whether a species is endangered or threatened due to climate change? What kinds of interventions does the law allow in order to save a species?
- How do we figure out the extent to which a project will increase carbon emissions, how direct does the increase have to be, and how do we decide when those emissions are significant enough to require a full-scale environmental impact statement?
- Given that climate change is a global problem, are the impacts on California distinctive enough to justify giving California permission to set its own carbon emission standards for vehicles?
- Can the SEC require major corporations to reveal their carbon emissions to investors?

The *Chevron* doctrine provided agencies room to apply statutes flexibly to deal with new problems. Whether the Supreme Court still endorses the doctrine at all is now unclear, and it has put new limits on agency flexibility with what the Court calls the "major question doctrine."

Another set of issues involves constitutional law. Here are some of the issues that are already in litigation or on the horizon:

- When do the impacts of climate change create a basis for legal standing to bring a lawsuit?

- What happens to property rights when land is located in areas that will be at high risk due to climate change? Can the government prevent development in those areas? And what happens to water rights when climate change eliminates much of the supply?
- Can a state government regulate or tax imported goods or services based on the amount of carbon emitted during production?
- How broadly can Congress delegate power to administrative agencies to deal with the challenges of climate change?
- How far can the federal government go to induce states and cities to take sensible precautions against climate impacts?

The Supreme Court now addresses constitutional problems by asking what the Constitution meant to people 150 or 200 years ago when various provisions were adopted. This is an inherently unhelpful approach when the subject is an issue that those past generations never imagined.

The Court's basic attitude, especially but not only in constitutional cases, is that novel government actions are legally suspect. This would be a fine doctrine in a world where change was slow and almost imperceptible. That isn't our world, not anymore.