

West Virginia v. EPA
597 U.S. (2022) (edited)

Chief Justice ROBERTS delivered the opinion of the Court.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a “standard of performance” for their emission of certain pollutants into the air. 84 Stat. 1683, 42 U. S. C. §7411(a)(1). That standard may be different for new and existing plants, but in each case it must reflect the “best system of emission reduction” that the Agency has determined to be “adequately demonstrated” for the particular category. §§7411(a)(1), (b)(1), (d). For existing plants, the States then implement that requirement by issuing rules restricting emissions from sources within their borders. Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the “best system of emission reduction” for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources. The question before us is whether this broader conception of EPA’s authority is within the power granted to it by the Clean Air Act.

I
A

The Clean Air Act establishes three main regulatory programs to control air pollution from stationary sources such as power plants. One program is the New Source Performance Standards program of Section 111, at issue here. The other two are the National Ambient Air Quality Standards (NAAQS) program, . . . and the Hazardous Air Pollutants (HAP) program. To understand the place and function of Section 111 in the statutory scheme, some background on the other two programs is in order.

The NAAQS program addresses air pollutants that “may reasonably be anticipated to endanger public health or welfare,” and “the presence of which in the ambient air results from numerous or diverse mobile or stationary sources.”

§7408(a)(1). After identifying such pollutants, EPA establishes a NAAQS for each. The NAAQS represents “the maximum airborne concentration of [the] pollutant that the public health can tolerate.” EPA, though, does not choose which sources must reduce their pollution and by how much to meet the ambient pollution target. Instead, Section 110 of the Act leaves that task in the first instance to the States, requiring each “to submit to [EPA] a plan designed to implement and maintain such standards within its boundaries.”

The second major program governing stationary sources is the HAP program. The HAP program primarily targets pollutants, other than those already covered by a NAAQS, that present “a threat of adverse human health effects,” including substances known or anticipated to be “carcinogenic, mutagenic, teratogenic, neurotoxic,” or otherwise “acutely or chronically toxic.” §7412(b)(2).

EPA’s regulatory role with respect to these toxic pollutants is different in kind from its role in administering the NAAQS program. There, EPA is generally limited to determining the maximum safe amount of covered pollutants in the air. As to each hazardous pollutant, by contrast, the Agency must promulgate emissions standards for both new and existing major sources. §7412(d)(1). Those standards must “require the maximum degree of reduction in emissions . . . that the [EPA] Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable . . . through application of measures, processes, methods, systems or techniques” of emission reduction. §7412(d)(2). In other words, EPA must directly require all covered sources to reduce their emissions to a certain level. And it chooses that level by determining the “maximum degree of reduction” it considers “achievable” in practice by using the best existing technologies and methods. §7412(d)(3). . . .

This . . . “ . . . requires the agency to . . . ensur[e] that regulated firms adopt the appropriate cleanup technology.”

The third air pollution control scheme is the New Source Performance Standards program of Section 111. §7411. That section directs EPA to list “categories of stationary sources” that it determines “cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.”

§7411(b)(1)(A). Under Section 111(b), the Agency must then promulgate for each category “Federal standards of performance for new sources,” §7411(b)(1)(B). A “standard of performance” is one that

“reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated.” §7411(a)(1).

Thus, the statute directs EPA to (1) “determine[],” taking into account various factors, the “best system of emission reduction which . . . has been adequately demonstrated,” (2) ascertain the “degree of emission limitation achievable through the application” of that system, and (3) impose an emissions limit on new stationary sources that “reflects” that amount. Generally speaking, a source may achieve that emissions cap any way it chooses; the key is that its pollution be no more than the amount “achievable through the application of the best system of emission reduction . . . adequately demonstrated,” or the BSER. EPA undertakes this analysis on a pollutant-by-pollutant basis, establishing different standards of performance with respect to different pollutants emitted from the same source category.

Although the thrust of Section 111 focuses on emissions limits for new and modified sources—as its title indicates— the statute also authorizes regulation of certain pollutants from existing sources. Under Section 111(d), once EPA “has set new source standards addressing emissions of a particular pollutant under . . . section 111(b),” 80 Fed. Reg. 64711, it must then address emissions of that same pollutant by existing sources—but only if they are not already regulated under the NAAQS or HAP programs. §7411(d)(1). Existing power plants, for example, emit many pollutants covered by a NAAQS or HAP standard. Section 111(d) thus “operates as a gap-filler,” empowering EPA to regulate harmful emissions not already controlled under the Agency’s other authorities. . . .

Reflecting the ancillary nature of Section 111(d), EPA has used it only a handful of times since the enactment of the statute in 1970. For instance, the Agency has established emissions limits on acid mist from sulfuric acid production; sulfide gases released by kraft pulp mills; and emissions of various harmful gases from municipal landfills. It was thus only a slight overstatement for one of the architects of the 1990 amendments to the Clean Air Act to refer to Section 111(d) as an “obscure, never-used section of the law.” [Citing legislative history].

B

Things changed in October 2015, when EPA promulgated two rules addressing carbon dioxide pollution from power plants—one for new plants under Section 111(b), the other for existing plants under Section 111(d). Both were premised on the Agency’s earlier finding that carbon dioxide is an “air pollutant” that “may reasonably be anticipated to endanger public health or welfare” by causing climate change. Carbon dioxide is not subject to a NAAQS and has not been listed as a toxic pollutant.

The first rule announced by EPA established federal carbon

emissions limits for new power plants of two varieties: fossil-fuel-fired electric steam generating units (mostly coal fired) and natural-gas-fired stationary combustion turbines. Following the statutory process set out above, the Agency determined the BSER for the two categories of sources. For steam generating units, for instance, EPA determined that the BSER was a combination of high-efficiency production processes and carbon capture technology. EPA then set the emissions limit based on the amount of carbon dioxide that a plant would emit with these technologies in place.

The second rule was triggered by the first: Because EPA was now regulating carbon dioxide from new coal and gas plants, Section 111(d) required EPA to also address carbon emissions from existing coal and gas plants. It did so through what it called the Clean Power Plan rule.

In that rule, EPA established “final emission guidelines for states to follow in developing plans” to regulate existing power plants within their borders. To arrive at the guideline limits, EPA did the same thing it does when imposing federal regulations on new sources: It identified the BSER.

The BSER that the Agency selected for existing coal-fired power plants, however, was quite different from the BSER it had chosen for new sources. The BSER for existing plants included three types of measures, which the Agency called “building blocks.” The first building block was “heat rate improvements” at coal-fired plants—essentially practices such plants could undertake to burn coal more efficiently. But such improvements, EPA stated, would “lead to only small emission reductions,” because coal-fired power plants were already operating near optimum efficiency. On the Agency’s view, “much larger emission reductions [were] needed from [coalfired plants] to address climate change.”

So the Agency included two additional building blocks in its BSER, both of which involve what it called “generation shifting from higher-emitting to lower- emitting” producers of electricity. Building block two was a shift in electricity production from existing coal-fired

power plants to natural-gas-fired plants. Ibid. Because natural gas plants produce “typically less than half as much” carbon dioxide per unit of electricity created as coal-fired plants, the Agency explained, “this generation shift [would] reduce[] CO₂ emissions.” Building block three worked the same way, except that the shift was from both coal- and gas-fired plants to “new low- or zero-carbon generating capacity,” mainly wind and solar. “Most of the CO₂ controls” in the rule came from the application of building blocks two and three.

The Agency identified three ways in which a regulated plant operator could implement a shift in generation to cleaner sources. First, an operator could simply reduce the regulated plant’s own production of electricity. Second, it could build a new natural gas plant, wind farm, or solar installation, or invest in someone else’s existing facility and then increase generation there. Finally, operators could purchase emission allowances or credits as part of a cap-and-trade regime. Under such a scheme, sources that achieve a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it toward their own applicable emissions caps.

EPA explained that taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables. Given the integrated nature of the power grid, “adding electricity to the grid from one generator will result in the instantaneous reduction in generation from other generators,” and “reductions in generation from one generator lead to the instantaneous increase in generation” by others. So coal plants, whether by reducing their own production, subsidizing an increase in production by cleaner sources, or both, would cause a shift toward wind, solar, and natural gas.

Having decided that the “best system of emission reduction . . . adequately demonstrated” was one that would reduce carbon pollution mostly by moving production to cleaner sources, EPA then set about determining “the degree of emission limitation achievable through the application” of that system. 42 U. S. C. §7411(a)(1). The Agency recognized that—given the nature of generation shifting—it could choose from “a wide range of potential stringencies for the BSER.” 80

Fed. Reg. 64730. Put differently, in translating the BSER into an operational emissions limit, EPA could choose whether to require anything from a little generation shifting to a great deal. The Agency settled on what it regarded as a “reasonable” amount of shift, which it based on modeling of how much more electricity both natural gas and renewable sources could supply without causing undue cost increases or reducing the overall power supply. Based on these changes, EPA projected that by 2030, it would be feasible to have coal provide 27% of national electricity generation, down from 38% in 2014.

From these significant projected reductions in generation, EPA developed a series of complex equations to “determine the emission performance rates” that States would be required to implement. The calculations resulted in numerical emissions ceilings so strict that no existing coal plant would have been able to achieve them without engaging in one of the three means of shifting generation described above. Indeed, the emissions limit the Clean Power Plan established for existing power plants was actually stricter than the cap imposed by the simultaneously published standards for new plants.

Ed. Note:

While the Clean Power Plan never went into effect, market forces caused utilities to replace coal with cheaper natural gas. By 2021, the CPP 2040 goal had been met and electricity prices were not increased.

The point, after all, was to compel the transfer of power generating capacity from existing sources to wind and solar. The White House stated that the Clean Power Plan would “drive a[n] . . . aggressive transformation in the domestic energy industry.” EPA’s own modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors. EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule 3–22, 3–30, 3–33, 6– 24, 6–25 (2015). The Energy Information Administration reached similar conclusions, projecting that the rule would cause retail electricity prices to remain persistently 10% higher in many States, and would reduce GDP by at least a trillion 2009 dollars by 2040. Dept. of Energy, Analysis of the Impacts of the Clean Power Plan 21, 63–64 (May 2015).

C

These projections were never tested, because the Clean Power Plan never went into effect [B]efore [the D.C. Circuit] could issue a decision [on the plan’s lawfulness], there was a change in Presidential administrations. . . .

EPA eventually repealed the rule in 2019, concluding that the Clean Power Plan had been “in excess of its statutory authority” under Section 111(d). Specifically, the Agency concluded that generation shifting should not have been considered as part of the BSER. The Agency interpreted Section 111 as “limit[ing] the BSER to those systems that can be put into operation at a building, structure, facility, or installation,” such as “add-on controls” and “inherently lower-emitting processes/practices/designs.” It then explained that the Clean Power Plan, rather than setting the standard “based on the application of equipment and practices at the level of an individual facility,” had instead based it on “a shift in the energy generation mix at the grid level”—not the sort of measure that has “a potential for application to an individual source.” . . . EPA argued that under the major questions doctrine, a clear statement was necessary to conclude that Congress intended to delegate authority “of this breadth to regulate a fundamental sector of the economy.” It found none. . . .

A number of States and private parties immediately filed petitions for review in the D. C. Circuit, challenging EPA’s repeal of the Clean Power Plan [T]he [D.C. Circuit] concluded[that] the statute could reasonably be read to encompass generation shifting. As part of that analysis, the Court of Appeals concluded that the major questions doctrine did not apply, and thus rejected the need for a clear statement of congressional intent to delegate such power to EPA. Having found that EPA misunderstood the scope of its authority under the Clean Air Act, the Court vacated the Agency’s repeal of the Clean Power Plan and remanded to the Agency for further consideration. . . .

[Because there was a third presidential administration by this time, which had asked to stay the D.C. Circuit’s ruling so that it could assess for itself what Section 111(d) standard it wanted to adopt, the Court proceeded to address whether the case had become moot and concluded that it had not and therefore the Court could proceed to the merits.—Ed.]

II
I
A

. . . Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be “shaped, at least in some measure, by the nature of the question presented”—whether Congress in fact meant to confer the power the agency has asserted. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159 (2000). In the ordinary case, that context has no great effect on the appropriate analysis. Nonetheless, our precedent teaches that there are “extraordinary cases” that call for a different approach—cases in which the “history and the breadth of the authority that [the agency] has asserted,” and the “economic and political significance” of that assertion, provide a “reason to hesitate before concluding that Congress” meant to confer such authority. *Id.* at 159–160.

Such cases have arisen from all corners of the administrative state. In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over “drugs” and “devices” included the power to regulate, and even ban, tobacco products. We rejected that “expansive construction of the statute,” concluding that “Congress could not have intended to delegate” such a sweeping and consequential authority “in so cryptic a fashion.” In *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 594 U. S. __, __ (2021), we concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures “necessary to prevent the . . . spread of ” disease, institute a nationwide eviction moratorium in response to the COVID–19

pandemic. We found the statute’s language a “wafer-thin reed” on which to rest such a measure, given “the sheer scope of the CDC’s claimed authority,” its “unprecedented” nature, and the fact that Congress had failed to extend the moratorium after previously having done so.

Our decision in *Utility Air* addressed another question regarding EPA’s authority—namely, whether EPA could construe the term “air pollutant,” in a specific provision of the Clean Air Act, to cover greenhouse gases. [*UARG v. EPA*, 573 U.S. 302, 310 (2014)]. Despite its textual plausibility, we noted that the Agency’s interpretation would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements. We declined to uphold EPA’s claim of “unheralded” regulatory power over “a significant portion of the American economy.” In *Gonzales v. Oregon*, 546 U. S. 243 (2006), we confronted the Attorney General’s assertion that he could rescind the license of any physician who prescribed a controlled substance for assisted suicide, even in a State where such action was legal. The Attorney General argued that this came within his statutory power to revoke licenses where he found them “inconsistent with the public interest.” We considered the “idea that Congress gave [him] such broad and unusual authority through an implicit delegation . . . not sustainable.” Similar considerations informed our recent decision invalidating the Occupational Safety and Health Administration’s mandate that “84 million Americans . . . either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense.” *National Federation of Independent Business v. Occupational Safety and Health Administration*, 595 U. S. __, __ (2022). We found it “telling that OSHA, in its half century of existence,” had never relied on its authority to regulate occupational hazards to impose such a remarkable measure.

All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, “common sense as to the manner in which Congress [would have been] likely to delegate” such power to the agency at issue, *Brown & Williamson*, 529 U.S. at 133, made it very unlikely that Congress had actually done so.

Justice Scalia memorably called this finding elephants in mouse holes.

Extraordinary grants of regulatory authority are rarely accomplished through “modest words,” “vague terms,” or “subtle device[s].” *Whitman*, 531 U.S. at 468. Nor does Congress typically use oblique or elliptical language to empower an agency to make a “radical or fundamental change” to a statutory scheme. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U. S. 218, 229 (1994). Agencies have only those powers given to them by Congress. We presume that “Congress intends to make major policy decisions itself, not leave those decisions to agencies.”

The dissent criticizes us for “announc[ing] the arrival” of this major questions doctrine, and argues that each of the decisions just cited simply followed our “ordinary method” of “normal statutory interpretation.” But in what the dissent calls the “key case” in this area, *Brown & Williamson*, the Court could not have been clearer: “In extraordinary cases there may be reason to hesitate” before accepting a reading of a statute that would, under more “ordinary” circumstances, be upheld. . . . The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of “clear congressional authorization,” *ibid.*—confirms that the approach under the major questions doctrine is distinct.

As for the major questions doctrine “label[ing],” it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions. So have we.

B

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American

energy market, EPA “claim[ed] to discover in a long-extant statute an unheralded power” representing a “transformative expansion in [its] regulatory authority.” It located that newfound power in the vague language of an “ancillary provision[]” of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency’s discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. Given these circumstances, there is every reason to “hesitate before concluding that Congress” meant to confer on EPA the authority it claims under Section 111(d).

Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. It had never devised a cap by looking to a “system” that would reduce pollution simply by “shifting” polluting activity “from dirtier to cleaner sources.” And as Justice Frankfurter has noted, “just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.” *FTC v. Bunte Brothers, Inc.*, 312 U. S. 349, 352 (1941). . . .

Indeed, EPA nodded to this history in the Clean Power Plan itself, describing the sort of “systems of emission reduction” it had always before selected—“efficiency improvements, fuel-switching,” and “add-on controls”—as “more traditional air pollution control measures.” . . .

This view of EPA’s authority was not only unprecedented; it also effected a “fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation” into an entirely different kind. *MCI*, 512 U.S. at 231. Under the Agency’s prior view of Section 111, its role was limited to ensuring the efficient pollution performance of each individual regulated source. Under that paradigm, if a source was already operating at that level, there was nothing more for EPA to do. Under its newly “discover[ed]” authority, however, EPA can demand much greater reductions in emissions based on a very different kind of policy judgment:

that it would be “best” if coal made up a much smaller share of national electricity generation. And on this view of EPA’s authority, it could go further, perhaps forcing coal plants to “shift” away virtually all of their generation—i.e., to cease making power altogether. . . .

EPA [argues that it] must limit the magnitude of generation shift it demands to a level that will not be “exorbitantly costly” or “threaten the reliability of the grid.” But this argument does not so much *limit* the breadth of the Government’s claimed authority as *reveal* it. On EPA’s view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy. EPA decides, for instance, how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030 before the grid collapses, and how high energy prices can go as a result before they become unreasonably “exorbitant.”

There is little reason to think Congress assigned such decisions to the Agency. The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself. Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d). . . .

Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions “had become well known, Congress considered and rejected” multiple times. *Brown & Williamson*, 529 U.S. at 144. At bottom, the Clean Power Plan essentially adopted a cap-and-trade scheme, or set of state cap-and-trade schemes, for carbon. Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program. . . .

C

Given these circumstances, our precedent counsels skepticism toward EPA’s claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must— under the major questions doctrine—point to “clear congressional authorization” to regulate in that manner.

All the Government can offer, however, is the Agency’s authority to establish emissions caps at a level reflecting “the application of the best system of emission reduction adequately demonstrated.” As a matter of “definitional possibilities,” generation shifting can be described as a “system”—“an aggregation or assemblage of objects united by some form of regular interaction”—capable of reducing emissions. But of course almost anything could constitute such a “system”; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents. . . .

The key question in the case: Is this analysis restricted to Sec. 111(d) or does this apply to the CAA in general?

Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible “solution to the crisis of the day.” But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.

JUSTICE GORSUCH, with whom JUSTICE ALITO joins,
concurring.

. . . . I join the Court’s opinion and write to offer some additional observations about the doctrine on which it rests.

One of the Judiciary’s most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us. To help fulfill that duty, courts have developed certain “clear-statement” rules. These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. . . .

The Constitution prohibits Congress from passing laws imposing various types of retroactive liability. Consistent with this rule, Chief Justice Marshall long ago advised that “a court . . . ought to struggle hard against a [statutory] construction which will, by a retrospective operation, affect the rights of parties.” . . .

The Constitution also incorporates the doctrine of sovereign immunity. To enforce that doctrine, courts have consistently held that “nothing but express words, or an insurmountable implication” would justify the conclusion that lawmakers intended to abrogate the States’ sovereign immunity. . . .

The major questions doctrine works in much the same way to protect the Constitution’s separation of powers. In Article I, “the People” vested “[a]ll” federal “legislative powers . . . in Congress.” As Chief Justice Marshall put it, this means that “important subjects . . . must be entirely regulated by the legislature itself,” even if Congress may leave the Executive “to act under such general provisions to fill up the details.” *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825). . . .

Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I’s

Vesting Clause has its own: the major questions doctrine. . . . [T]he Court [has] routinely enforced “the nondelegation doctrine” through “the interpretation of statutory texts, and, more particularly, [by] giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.” *Mistretta v. United States*, 488 U.S. 361, 373, n. 7 (1989). . . .

Turning from the doctrine’s function to its application, it seems to me that our cases supply a good deal of guidance about when an agency action involves a major question for which clear congressional authority is required.

First, this Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great “political significance,” or end an “earnest and profound debate across the country”

Second, this Court has said that an agency must point to clear congressional authorization when it seeks to regulate “a significant portion of the American economy,” or require “billions of dollars in spending” by private persons or entities.

Do Gorsuch’s standards for the application of the MQD mean that Congress cannot give broad authority to agencies for major problems?

. . . .
Third, this Court has said that the major questions doctrine may apply when an agency seeks to “intrud[e] into an area that is the particular domain of state law.” . . .

The EPA claims the power to force coal and gas-fired power plants “to cease [operating] altogether.” Whether these plants should be allowed to operate is a question on which people today may disagree, but it is a question everyone can agree is vitally important. Congress has debated the matter frequently. . . .

Other suggestive factors are present too. “The electric power sector is among the largest in the U. S. economy, with links to every other sector.” . . . Finally, the CPP unquestionably has an impact on federalism, as “the regulation of utilities is one of the most important of

the functions traditionally associated with the police power of the States.”

...

At this point, the question becomes what qualifies as a clear congressional statement authorizing an agency’s action. Courts have

long experience applying clear-statement rules throughout the law, and our cases have identified several telling clues in this context too.

Look carefully at Gorsuch’s standards for applying the MQD. To what extent are these objective tests?

First, courts must look to the legislative provisions on which the agency seeks to rely ““with a view to their place in the overall statutory scheme.”” *Brown & Williamson*, 529 U. S. at 133. “[O]blique or elliptical language” will not supply a clear statement.

...

Second, courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address. . . . [A]n agency’s attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority.

Third, courts may examine the agency’s past interpretations of the relevant statute. A “contemporaneous” and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute’s original charge to an agency. . . .

Fourth, skepticism may be merited when there is a mismatch between an agency’s challenged action and its congressionally assigned mission and expertise. . . .

Asking these questions again yields a clear answer in our case. As the Court details, the agency before us cites no specific statutory authority allowing it to transform the Nation’s electrical power supply. Instead, the agency relies on a rarely invoked statutory provision that was passed with little debate and has been characterized as an “obscure, never-used section of the law.” Nor has the agency previously interpreted the relevant provision to confer on it such vast authority; there is no original, longstanding, and consistent interpretation meriting

judicial respect. Finally, there is a “mismatch” between the EPA’s expertise over environmental matters and the agency’s claim that “Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy.” Such a claimed power “requires technical and policy expertise not traditionally needed in [the] EPA’s regulatory development.” . . .

In places, the dissent seems to suggest that we should not be unduly “concerned” with the Constitution’s assignment of the legislative power to Congress. . .1. . .

When Congress seems slow to solve problems, it may be only natural that those in the Executive Branch might seek to take matters into their own hands. But the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people’s representatives. In our Republic, “[i]t is the peculiar province of the legislature to prescribe general rules for the government of society.” *Fletcher v. Peck*, 6 Cranch 87, 136 (1810). Because today’s decision helps safeguard that foundational constitutional promise, I am pleased to concur.

¹ [fn. 6] In the course of its argument, the dissent leans heavily on two recent academic articles. But if a battle of law reviews were the order of the day, it might be worth adding to the reading list. See, e.g., I. Wurman, *Nondelegation at the Founding*, 130 *Yale L. J.* 1490, 1493-1494 (2021); D. Candeub, *Preference and Administrative Law*, 72 *Admin. L. Rev.* 607, 614–628 (2020); P. Hamburger, *Delegation or Divesting?*, 115 *Nw. L. Rev. Online* 88, 91–110 (2020); M. McConnell, *The President Who Would Not Be King* 326–335 (2020); A. Gordon, *Nondelegation*, 12 *N. Y. U. J. L. & Liberty* 718, 719 (2019); R. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 *Harv. J. L. & Pub. Pol’y* 147, 155–161 (2017); G. Lawson & G. Seidman, “A Great Power of Attorney:” *Understanding the Fiduciary Constitution* 104–129 (2017); P. Hamburger, *Is Administrative Law Unlawful?* 377–402

(2014); L. Alexander & S. Prakash, Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated, 70 U. Chi. L. Rev. 1297, 1298–1299 (2003); G. Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 335–343 (2002); D. Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance? 83 Mich. L. Rev. 1223, 1252–1255, 1260–1261 (1985); see generally P. Wallison & J. Yoo, *The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine* (2022).

In a non-emergency rule, does the seriousness of the danger affect the legal authority?

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

Today, the Court strips the Environmental Protection Agency (EPA) of the power Congress gave it to respond to “the most pressing environmental challenge of our time.” *Massachusetts v. EPA*, 549 U. S. 497, 505 (2007).

Climate change’s causes and dangers are no longer subject to serious doubt. Modern science is “unequivocal that human influence”—in particular, the emission of greenhouse gases like carbon dioxide—“has warmed the atmosphere, ocean and land.” Intergovernmental Panel on Climate Change, Sixth Assessment Report, The Physical Science Basis: Headline Statements 1 (2021). The Earth is now warmer than at any time “in the history of modern civilization,” with the six warmest years on record all occurring in the last decade. U. S. Global Change Research Program, Fourth National Climate Assessment, Vol. I, p. 10 (2017); Brief for Climate Scientists as Amici Curiae 8. The rise in temperatures brings with it “increases in heat-related deaths,” “coastal inundation and erosion,” “more frequent and intense hurricanes, floods, and other extreme weather events,” “drought,” “destruction of ecosystems,” and “potentially significant disruptions of food production.” *American Elec. Power Co. v. Connecticut*, 564 U. S. 410, 417 (2011). If the current rate of emissions continues, children born this year could live to see parts of the Eastern seaboard swallowed by the ocean. See Brief for Climate Scientists as Amici Curiae 6. Rising waters, scorching heat, and other severe weather conditions could force “mass migration events[,] political crises, civil unrest,” and “even state failure.” Dept. of Defense, Climate Risk Analysis 8 (2021). And by the end of this century, climate change could be the cause of “4.6 million excess yearly deaths.” See R. Bressler, The Mortality Cost of Carbon, 12 *Nature Communications* 4467, p. 5 (2021).

Congress charged EPA with addressing those potentially catastrophic harms, including through regulation of fossil fuel-fired power

plants. Section 111 of the Clean Air Act directs EPA to regulate stationary sources of any substance that “causes, or contributes significantly to, air pollution” and that “may reasonably be anticipated to endanger public health or welfare.” 42 U. S. C. §7411(b)(1)(A). Carbon dioxide and other greenhouse gases fit that description. See *American Elec. Power*, 564 U.S. at 416–417; *Massachusetts*, 549 U.S. at 528–532. EPA thus serves as the Nation’s “primary regulator of greenhouse gas emissions.” *American Elec. Power*, 564 U. S., at 428. And among the most significant of the entities it regulates are fossil-fuel-fired (mainly coal- and natural-gas-fired) power plants. Today, those electricity-producing plants are responsible for about one quarter of the Nation’s greenhouse gas emissions. Curbing that output is a necessary part of any effective approach for addressing climate change.

To carry out its Section 111 responsibility, EPA issued the Clean Power Plan in 2015. The premise of the Plan—which no one really disputes—was that operational improvements at the individual-plant level would either “lead to only small emission reductions” or would cost far more than a readily available regulatory alternative. That alternative—which fossil-fuel-fired plants were “already using to reduce their [carbon dioxide] emissions” in “a cost effective manner”—is called generation shifting. As the Court explains, the term refers to ways of shifting electricity generation from higher emitting sources to lower emitting ones—more specifically, from coal-fired to natural-gas-fired sources, and from both to renewable sources like solar and wind. A power company (like the many supporting EPA here) might divert its own resources to a cleaner source, or might participate in a cap-and-trade system with other companies to achieve the same emissions-reduction goals.

This Court has obstructed EPA’s effort from the beginning. Right after the Obama administration issued the Clean Power Plan, the Court stayed its implementation. That action was unprecedented: Never before had the Court stayed a regulation then under review in the lower courts

[T]he Biden administration announced that, instead of putting the Plan into effect, it would commence a new rulemaking. Yet this Court determined to pronounce on the legality of the old rule anyway. . . .

The limits the majority now puts on EPA’s authority fly in the face of the statute Congress wrote. The majority says it is simply “not plausible” that Congress enabled EPA to regulate power plants’ emissions through generation shifting. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the “best system of emission reduction” for power plants. §7411(a)(1). The “best system” full stop—no ifs, ands, or buts of any kind relevant here. The parties do not dispute that generation shifting is indeed the “best system”—the most effective and efficient way to reduce power plants’ carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system; to the contrary, the Plan’s regulatory approach fits hand-in-glove with the rest of the statute. The majority’s decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111’s general terms. But that is wrong. A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn’t and can’t know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise. That is what Congress did in enacting Section 111. The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases.

I

The Clean Air Act was major legislation, designed to deal with a major public policy issue. As Congress explained, its goal was to “speed up, expand, and intensify the war against air pollution” in all its forms. . .

Section 111(d) . . . ensures that EPA regulates existing power plants’ emissions of all pollutants. When the pollutant at issue falls

within the NAAQS or HAP programs, EPA need do no more. But when the pollutant falls outside those programs, Section 111(d) requires EPA to set an emissions level for currently operating power plants (and other stationary sources). That means no pollutant from such a source can go unregulated. That something is a backstop does not

make it a backwater. Even if they are needed only infrequently, backstops can perform a critical function—and this one surely does. Again, Section 111(d) tells EPA that when a pollutant—like carbon dioxide—is not regulated through other programs, EPA must undertake a further regulatory effort to control that substance’s emission from existing stationary sources. In that way, Section 111(d) operates to ensure that the Act achieves comprehensive pollution control.

Section 111 describes the prescribed regulatory effort in expansive terms.

EPA must set . . .

“the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated.”

§7411(a)(1).

To take that language apart a bit, the provision instructs EPA to decide upon the “best system of emission reduction which . . . has been adequately demonstrated.” The provision tells EPA, in making that determination, to take account of both costs and varied “nonair” impacts (on health, the environment, and the supply of energy). And the provision finally directs EPA to set the particular emissions limit achievable through use of the demonstrated “best system.” Taken as a

whole, the section provides regulatory flexibility and discretion. It imposes, to be sure, meaningful constraints: Take into account costs and nonair impacts, and make sure the best system has a proven track record. But the core command—go find the best system of emission reduction—gives broad authority to EPA.

If that flexibility is not apparent on the provision’s face, consider some dictionary definitions—supposedly a staple of this Court’s supposedly textualist method of reading statutes. A “system” is “a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose.” Webster’s Third New International Dictionary 2322 (1971). Or again: a “system” is “[a]n organized and coordinated method; a procedure.” American Heritage Dictionary 1768 (5th ed. 2018) [C]ontra the majority, a broad term is not the same thing as a “vague” one. A broad term is comprehensive, extensive, wide-ranging; a “vague” term is unclear, ambiguous, hazy. . . .

[G]eneration shifting fits comfortably within the conventional meaning of a “system of emission reduction.” Consider one of the most common mechanisms of generation shifting: the use of a cap-and-trade scheme. Here is how the majority describes cap and trade: “Under such a scheme, sources that receive a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it toward their own applicable emissions caps.” Does that sound like a “system” to you? It does to me too. . . .

Other statutory provisions confirm the point. The Clean Air Act’s acid rain provision, for example, describes a cap-and-trade program as an “emission allocation and transfer *system*.” §7651(b) (emphasis added). . .

There is also a flipside point: Congress declined to include in Section 111 the restrictions on EPA’s authority contained in other Clean Air Act provisions. Most relevant here, quite a number of statutory sections confine EPA’s emissions- reduction efforts to technological controls—essentially, equipment or processes that can be put into place at a particular facility. So, for example, one provision tells EPA to set

standards “reflect[ing] the greatest degree of emission reduction achievable through the application of technology.” §7521(a)(3)(A)(i). Others direct the use of the “best available retrofit technology,” or the “best available control technology,” or the “maximum achievable control technology.” §§7491(b)(2)(A), (g)(2), 7475(a)(4), 7479(3), 7412(g)(2). There are still more. None of those provisions would allow EPA to set emissions limits based on generation shifting, as the Agency acknowledges. But nothing like the language of those provisions is included in Section 111. That matters under normal rules of statutory interpretation. As Justice Scalia once wrote for the Court: “We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.” *Jama v. Immigration and Customs Enforcement*, 543 U. S. 335, 341 (2005).

Statutory history serves only to pile on: It shows that Congress has specifically declined to restrict EPA to technology-based controls in its regulation of existing stationary sources. The key moment came in 1977, when Congress amended Section 111 to distinguish between new sources and existing ones. For new sources, EPA could select only the “best technological system of continuous emission reduction.” Clean Air Act Amendments, §109(c)(1)(A), 91 Stat. 700 (emphasis added). But for existing sources, the word “technological” was struck out: EPA could select the “best system of continuous emission reduction.” *Ibid.* The House Report emphasized Congress’s deliberate choice: Whereas the standards set for new sources were to be based on “the best technological” controls, the “standards adopted for existing sources” were “to be based on available means of emission control (not necessarily technological).” H. R. Rep. No. 95–564, p. 129 (1977). . . .

“Congress,” this Court has said, “knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.” *Arlington v. FCC*, 569 U. S. 290, 296 (2013). In Section 111, Congress spoke in capacious terms. . . . And when Congress uses “expansive language” to authorize agency action, courts generally may not “impos[e] limits on [the] agency’s discretion.”

That constraint on judicial authority—that insistence on judicial modesty—should resolve this case.

I A

The majority thinks not, contending that in “certain extraordinary cases”—of which this is one—courts should start off with “skepticism” that a broad delegation authorizes agency action. The majority labels that view the “major questions doctrine,” and claims to find support for it in our caselaw. But the relevant decisions do normal statutory interpretation: In them, the Court simply insisted that the text of a broad delegation, like any other statute, should be read in context, and with a modicum of common sense. Using that ordinary method, the decisions struck down agency actions (even though they plausibly fit within a delegation’s terms) for two principal reasons. First, an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience. And second, the action, if allowed, would have conflicted with, or even wreaked havoc on, Congress’s broader design. In short, the assertion of delegated power was a misfit for both the agency and the statutory scheme. But that is not true here. The Clean Power Plan falls within EPA’s wheelhouse, and it fits perfectly—as I’ve just shown—with all the Clean Air Act’s provisions. . . .

The majority today goes beyond those sensible principles. It announces the arrival of the “major questions doctrine,” which replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules. Apparently, there is now a two-step inquiry. First, a court must decide, by looking at some panoply of factors, whether agency action presents an “extraordinary case[.]” If it does, the agency “must point to clear congressional authorization for the power it claims,” someplace over and above the normal statutory basis we require. The result is statutory interpretation of an unusual kind. It is not until page 28 of a 31-page opinion that the majority begins to seriously discuss the

meaning of Section 111. And even then, it does not address straight-up what should be the question: Does the text of that provision, when read in context and with a commonsense awareness of how Congress delegates, authorize the agency action here?

How might you push back on the dissent's assertion that *Brown and Williamson* is fundamentally different from this case?

The majority claims it is just following precedent, but that is not so. The Court has never even used the term “major questions doctrine” before. And in the relevant cases, the Court has done statutory construction of a familiar sort. It has . . . considered—without multiple steps, triggers, or special presumptions—the fit between the power claimed, the agency claiming it, and the broader statutory design. The key case here is *FDA v. Brown & Williamson*. There, the Food and Drug Administration (FDA) asserted that its power to regulate “drugs” and “devices” extended to tobacco products. The claim had something to it: FDA has broad authority over “drugs” and drug-delivery “devices,” and the definitions of those terms could be read to encompass nicotine and cigarettes. But the asserted authority “simply [did] not fit” the overall statutory scheme. FDA’s governing statute required the agency to ensure that regulated products were “safe” to be marketed—but there was no making tobacco products safe in the usual sense. So FDA would have had to reinterpret what it meant to be “safe,” or else ban tobacco products altogether. Both options, the Court thought, were preposterous . . . [T]here was “simply” a lack of “fit” between the regulation at issue, the agency in question, and the broader statutory scheme. . . .

For anyone familiar with this Court’s *Chevron* doctrine, that language [in *Brown & Williamson*] will ring a bell. The Court was saying only—and it was elsewhere explicit on this point—that there was reason to hesitate before giving FDA’s position *Chevron* deference. In reaching that conclusion, the Court relied (as I’ve just explained) not on any special “clear authorization” demand, but on normal principles of statutory interpretation: look at the text, view it in context, and use what the Court called some “common sense” about how Congress delegates. . . .

In *Gonzales v. Oregon*, 546 U. S. 243 (2006), we doubted Congress would have delegated such a “quintessentially medical judgment[]” to “an executive official who lacks medical expertise.” Later, in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), the Court relied on similar reasoning to reject EPA’s efforts to regulate “millions of small” and previously unregulated sources of emissions. Key to that decision was the Court’s view that reading the delegation so expansively would be “inconsistent with” the statute’s broader “structure and design.” The Court explained that allowing the agency action to proceed would necessitate the “rewriting” of other “unambiguous statutory terms”—indeed, of “precise numerical thresholds.”

And last Term, the Court concluded that the Centers for Disease Control and Prevention (CDC) lacked the power to impose a nationwide eviction moratorium. The Court raised an eyebrow at the thought of the CDC “intrud[ing]” into “the landlord-tenant relationship”—a matter outside the CDC’s usual “domain.” . . .

In each case, the Court thought, the agency had strayed out of its lane, to an area where it had neither expertise nor experience. . . .

B

The Court today faces no such singular assertion of agency power. It claims EPA has no “comparative expertise” in “balancing the many vital considerations of national policy” implicated in regulating electricity sources. But that is wrong. . . .

As the Plan noted, generation shifting has a well-established pedigree as a tool for reducing pollution; even putting aside other federal regulation, both state regulators and power plants themselves have long used it to attain environmental goals. The technique is, so to speak, a tool in the pollution-control toolbox. And that toolbox is the one EPA uses. So that Agency, more than any other, has the desired “comparative expertise.” [T]he majority protests that Congress would not have

wanted EPA to “dictat[e],” through generation shifting, the “mix of energy sources nationwide.” But that statement reflects a misunderstanding of how the electricity market works. Every regulation of power plants—even the most conventional, facility-specific controls—“dictat[es]” the national energy mix to one or another degree. . . .

The Clean Power Plan was not so big. It was not so new. And to the extent it was either, that should not matter.

As to bigness—well, events have proved the opposite: The Clean Power Plan, we now know, would have had little or no impact. The Trump administration’s repeal of the Plan created a kind of controlled experiment: The Plan’s “magnitude” could be measured by seeing how far short the industry fell of the Plan’s nationwide emissions target. Except that turned out to be the wrong question, because the industry didn’t fall short of the Plan’s goal; rather, the industry exceeded that target, all on its own. And it did so mainly through the generation-shifting techniques that the Plan called for. . . .

The majority’s claim about the Clean Power Plan’s novelty—the most fleshed-out part of today’s opinion—is also exaggerated. As EPA explained when it issued the Clean Power Plan, an earlier Section 111(d) regulation had determined that a cap- and-trade program was the “best system of emission reduction” for mercury. A decade earlier, EPA had determined that States could comply with a Section 111(d) regulation for municipal waste combustors by establishing cap-and-trade programs. . . .

In any event, newness might be perfectly legitimate— even required—from Congress’s point of view. I do not dispute that an agency’s longstanding practice may inform a court’s interpretation of a statute delegating the agency power. But it is equally true, as *Brown & Williamson* recognized, that agency practices are “not carved in stone.” . . . In selecting [its] words, Congress understood—it had to—that the “best system” would change over time. Congress wanted and instructed EPA to keep up. . . .

And contra the majority, it is that Congress’s choice which counts, not any later one’s. The majority says it “cannot ignore” that Congress in recent years has “considered and rejected” cap-and-trade schemes. But under normal principles of statutory construction, the majority *should* ignore that fact

III

Some years ago, I remarked that “[w]e’re all textualists now.” Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015). It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the “major questions doctrine” magically appear as get-out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority opinion, and it suffuses the concurrence.

The kind of agency delegations at issue here go all the way back to this Nation’s founding. “[T]he founding era,” scholars have shown, “wasn’t concerned about delegation.” E. Posner & A. Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1734 (2002) (Posner & Vermeule). The records of the Constitutional Convention, the ratification debates, the *Federalist*—none of them suggests any significant limit on Congress’s capacity to delegate policymaking authority to the Executive Branch. And neither does any early practice. The very first Congress gave sweeping authority to the Executive Branch to resolve some of the day’s most pressing problems, including questions of “territorial administration,” “Indian affairs,” “foreign and domestic debt,” “military service,” and “the federal courts.” J. Mortenson & N. Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 349 (2021) (Mortenson & Bagley). That Congress, to use a few examples, gave the Executive power to devise a licensing scheme for trading with Indians;

to craft appropriate laws for the Territories; and to decide how to pay down the (potentially ruinous) national debt. See *id.*, at 334–338, 340–342, 344–345; C. Chabot, *The Lost History of Delegation at the Founding*, 56 *Ga. L. Rev.* 81, 113–134 (2021) (Chabot). Barely anyone objected on delegation grounds. . . . In all times, but ever more in “our increasingly complex society,” the Legislature “simply cannot do its job absent an ability to delegate power under broad general directives.” *Mistretta v. United States*, 488 U. S. 361, 372 (1989). Consider just two reasons why.

First, Members of Congress often don’t know enough—and know they don’t know enough—to regulate sensibly on an issue. Of course, Members can and do provide overall direction. But then they rely, as all of us rely in our daily lives, on people with greater expertise and experience. Those people are found in agencies. Congress looks to them to make specific judgments about how to achieve its more general objectives. And it does so especially, though by no means exclusively, when an issue has a scientific or technical dimension. Why wouldn’t Congress instruct EPA to select “the best system of emission reduction,” rather than try to choose that system itself? . . .

Second and relatedly, Members of Congress often can’t know enough—and again, know they can’t—to keep regulatory schemes working across time. Congress usually can’t predict the future—can’t anticipate changing circumstances and the way they will affect varied regulatory techniques. Nor can Congress (realistically) keep track of and respond to fast-flowing developments as they occur. Once again, that is most obviously true when it comes to scientific and technical matters. The “best system of emission reduction” is not today what it was yesterday, and will surely be something different tomorrow. . . .

Are there additional reasons for general delegations of authority?

Over time, the administrative delegations Congress has made have helped to build a modern Nation. Congress wanted fewer workers killed in industrial accidents. It wanted to prevent plane crashes, and reduce the deadliness of car wrecks. It wanted to ensure that consumer products didn’t catch fire. It wanted to stop the routine adulteration of food and

improve the safety and efficacy of medications. And it wanted cleaner air and water. If an American could go back in time, she might be astonished by how much progress has occurred in all those areas. It didn't happen through legislation alone. It happened because Congress gave broad-ranging powers to administrative agencies, and those agencies then filled in—rule by rule by rule—Congress's policy outlines.

This Court has historically known enough not to get in the way. Maybe the best explanation of why comes from Justice Scalia. See *Mistretta*, 488 U.S. at 415–416 (dissenting opinion). The context was somewhat different. He was responding to an argument that Congress could not constitutionally delegate broad policymaking authority; here, the Court reads a delegation with unwarranted skepticism, and thereby artificially constrains its scope. But Justice Scalia's reasoning remains on point. He started with the inevitability of delegations: “[S]ome judgments involving policy considerations,” he stated, “must be left to [administrative] officers.” Then he explained why courts should not try to seriously police those delegations, barring— or, I'll add, narrowing—some on the ground that they went too far. The scope of delegations, he said, “must be fixed according to common sense and the inherent necessities of the governmental co-ordination. Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the necessities of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political . . . it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”

In short, when it comes to delegations, there are good reasons for Congress (within extremely broad limits) to get to call the shots. Congress knows about how government works in ways courts don't. More specifically, Congress knows what mix of legislative and administrative action conduces to good policy. Courts should be modest. . . .

In rewriting [the] text, the Court substitutes its own ideas about

delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's. . . .

Whatever else this Court may know about, it does not have a clue about how to address climate change. And let's say the obvious: The stakes here are high. Yet the Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decisionmaker on climate policy. I cannot think of many things more frightening. Respectfully, I dissent.

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