AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Nondelegation of Legislative Powers

**West Virginia v. Environmental Protection Agency, \_\_ U.S. \_\_** (2022)

*Near the end of the Barack Obama presidency in October 2015, the Environmental Protection Agency issued new rules relating to carbon dioxide emissions. Having found that carbon dioxide is an “air pollutant,” the EPA used its existing statutory authority to impose limits on carbon dioxide emissions for most new coal and gas power plants and a related set of guidelines regulating emissions by existing power plants. Central to that plan was a goal of shifting power generation away from coal and gas plants entirely. The EPA estimated that implementing its regulations would impose billions of dollars in compliance costs, require the retirement of dozens of coal-fired plants, and significantly increase retail electricity prices. It expected that this would come at the cost of a significant number of existing jobs.*

*A lawsuit was immediately filed in D.C. circuit court by several states and numerous private parties. The circuit court declined to issue a temporary stay of the regulations, but the Supreme Court did. When the Trump administration assumed office, it announced that it was reconsidering the rules relating to carbon dioxide, and the case was dismissed as moot. In 2019, the EPA repealed its rule, concluding that the regulations exceeded its statutory authority. It instead issued a more modest rule relating to existing power plants. The Trump administration’s repeal of the Obama administration’s policies was then challenged in court, while other states intervened to defend the new rule. The D.C. circuit court held that the repeal was based on a misreading of the EPA’s statutory authority. It directed the EPA to reconsider its regulation given that opinion. By that time, the Biden administration had assumed office. The parties defending the Trump-era rule appealed to the Supreme Court, which reversed the D.C. circuit court in a 6-3 ruling.*

*The majority deployed what has been called “major questions doctrine.” Major questions doctrine is a canon of statutory interpretation that the Court has developed that requires “clear congressional authorization” when it makes an innovative claim to power to make police decisions of extreme “economic and political significance.” The rule is motivated in part by constitutional concerns relating to separation of powers that discourages the executive from seizing legislative powers and discourages Congress from making excessive delegations of legislative power to administrative agencies. The doctrine creates a stricter standard of statutory interpretation than might be applied in more ordinary cases where less is at stake. In this case, the majority concluded that the EPA was making innovative claims to power on a highly contested and consequential policy issue with inadequate statutory support. Some have characterized the major questions doctrine as an alternative means of enforcing the non-delegation doctrine though the mechanism of statutory interpretation rather than constitutional review. Like other clear statement rules of statutory interpretation, the major questions doctrine leaves the door open to Congress revisiting the policy and creating more explicit statutory authorization for the action that the agency wants to take. But precisely because the controversial nature of the policy is what sparks the Court’s review, Congress is often unable to muster the legislative will to draft clearer statutory language in such cases.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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In devising emissions limits for power plants, EPA first “determines” the “best system of emission reduction” that—taking into account cost, health, and other factors—it finds “has been adequately demonstrated.” The Agency then quantifies “the degree of emission limitation achievable” if that best system were ap­plied to the covered source. The BSER [Best System of Emission Reduction], therefore, “is the central determination that the EPA must make in formulating [its emission] guidelines” under Section 111 [of the Clean Air Act]. The issue here is whether restructuring the Nation’s overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the “best system of emission reduction” within the meaning of Section 111.

“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Davis v. Michigan Department of Treasury* (1989). 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*. (2000). . . . [O]ur 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.

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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, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely ac­complished through “modest words,” “vague terms,” or “subtle device[s].” *Whitman v. American Trucking Associations, Inc.* (2001). 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 Telegraph & Telephone Co.* (1994). . . . We presume that “Congress intends to make major policy decisions itself, not leave those decisions to agencies.”

Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legisla­tive intent make us “reluctant to read into ambiguous stat­utory text” the delegation claimed to be lurking there. *Utility Air Regulatory Group v. EPA* (2014). To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to “clear congressional authorization” for the power it claims.

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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.” . . . And the Agency’s discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. . . .

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.* (1941).

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But, the Agency explained, in order to “control[] CO2 from affected [plants] at levels . . . necessary to mitigate the dan­gers presented by climate change,” it could not base the emissions limit on “measures that improve efficiency at the power plants.” “The quantity of emissions reductions resulting from the application of these measures” would have been “too small.” . . .

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. 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.

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There is little reason to think Congress assigned such de­cisions to the Agency. For one thing, as EPA itself admitted when requesting special funding, “Understand[ing] and project[ing] system-wide . . . trends in areas such as elec­tricity transmission, distribution, and storage” requires “technical and policy expertise *not* traditionally needed in EPA regulatory development.” “When [an]agency has no comparative expertise” in making certain policy judgments, we have said, “Congress presumably would not” task it with doing so. *Kisor v. Wilkie* (2019).

We also find it “highly unlikely that Congress would leave” to “agency discretion” the decision of how much coal- based generation there should be over the coming decades. 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).

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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. 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. . . . “The importance of the issue,” along with the fact that the same basic scheme EPA adopted “has been the subject of an earnest and profound debate across the country, . . . makes the oblique form of the claimed delegation all the more sus­pect.” *Gonzales v. Oregon* (2006).

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.” . . . Such a vague statutory grant is not close to the sort of clear author­ization required by our precedents.

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*Reversed*.

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

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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. In this way, these clear-statement rules help courts “act as faithful agents of the Constitution.”

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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* (1825). Doubt­less, what qualifies as an important subject and what con­stitutes a detail may be debated. But no less than its rules against retroactive legislation or protecting sovereign immunity, the Constitu­tion’s rule vesting federal legislative power in Congress is “vital to the integrity and maintenance of the system of gov­ernment ordained by the Constitution.” *Marshall Field & Co. v. Clark* (1892).

It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable “ministers.” . . .

Admittedly, lawmaking under our Constitution can be difficult. But that is nothing particular to our time nor any accident. The framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty. . . .

The difficulty of the design sought to serve other ends too. By effectively requiring a broad consensus to pass legisla­tion, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time. The need for compromise inher­ent in this design also sought to protect minorities by en­suring that their votes would often decide the fate of pro­posed legislation—allowing them to wield real power alongside the majority. . . .

Permitting Congress to divest its legislative power to the Executive Branch would “dash [this] whole scheme.” Leg­islation would risk becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him. . . .

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. Some version of this clear-statement rule can be traced to at least 1897, when this Court confronted a case involving the Interstate Commerce Commission, the federal government’s “first modern regulatory agency.” . . .The deemed that claimed authority “a power of supreme deli­cacy and importance,” given the role railroads then played in the Nation’s life. Therefore, the Court ex­plained, a special rule applied:

“That Congress has transferred such a power to any ad­ministrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and if Congress had intended to grant such a power to the [agency], it cannot be doubted that it would have used language *open to no misconstruction*, but *clear and direct*.”

With the explosive growth of the administrative state since 1970, the major questions doctrine soon took on spe­cial importance. . . . In the years that followed, the Court routinely enforced “the non-delegation 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* (1989). . . .

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[T]his 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.” *NFIB v. OSHA* (2022). . . .

[T]his 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. *King v. Burwell* (2015). . . .

[T]his 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.” Of course, another longstanding clear-statement rule—the federalism canon—also applies in these situations. To pre­serve the “proper balance between the States and the Fed­eral Government” and enforce limits on Congress’s Com­merce Clause power, courts must “‘be certain of Congress’s intent’” before finding that it “legislate[d] in areas tradi­tionally regulated by the States.” *Gregory v. Ashcroft* (1991). . . .

While this list of triggers may not be exclusive, each of the signs the Court has found significant in the past is pre­sent here, making this a relatively easy case for the doc­trine’s application. . . .

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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.

[C]ourts must look to the legislative provisions on which the agency seeks to rely “‘with a view to their place in the overall statutory scheme.’” . . .

[C]ourts may examine the age and focus of the stat­ute the agency invokes in relation to the problem the agency seeks to address. . . .

[C]ourts 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. *United States v. Philbrick* (1887). . . .

[S]kepticism 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. . . .

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. Echoing Woodrow Wilson, the dissent seems to think “a modern Nation” cannot afford such sentiments. . . .

. . . . The dissent next suggests that the Court strays from its commitment to textualism by relying on a clear-statement rule (the major questions doctrine) to resolve today’s case. But our law is full of clear-statement rules and has been since the founding. Our colleagues do not dispute the point. In fact, they have regularly invoked many of these rules.

If that’s not the problem, perhaps the dissent means to suggest that the major questions doctrine does not belong on the list of our clear-statement rules. . . . But then again, the dissent also acknowledges that the major questions doctrine should “sensibl[y]” apply in at least some situations. The dissent even fa­vorably highlights one application of the doctrine that our colleagues criticized less than a year ago. And, of course, our colleagues have joined other applications of the major questions doctrine in the past. Nor does the dissent really seem to dispute that a major ques­tion is at stake in this case. As the dissent observes, the agency’s challenged action before us concerns one of “the greatest . . . challenge[s] of our time.” If this case does not implicate a “question of deep economic and political significance,” it is unclear what might.

In the end, our disagreement really seems to center on a difference of opinion about whether the statute at issue here clearly authorizes the agency to adopt the CPP. . . .

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.” . . .

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* (2007).

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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.” Carbon di­oxide and other greenhouse gases fit that description. EPA thus serves as the Na­tion’s “primary regulator of greenhouse gas emissions.” . . .

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. . . .

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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. 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.

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. . . . 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.” . . . Con­gress used an obviously broad word . . . to give EPA lots of latitude in deciding how to set emissions limits. And contra 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. (Once again, dictionaries would tell the tale.) So EPA was quite right in stating in the Clean Power Plan that the “[p]lain meaning” of the term “system” in Section 111 refers to “a set of measures that work together to reduce emis­sions.” . . .

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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. . . .

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.” But for existing sources, the word “technological” was struck out: EPA could select the “best system of continuous emission reduction.” . . .

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“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* (2013). In Section 111, Congress spoke in capacious terms. It knew that “without regulatory flexibility, changing circumstances and scien­tific developments would soon render the Clean Air Act ob­solete.” *Massachusetts v. EPA* (2007). So the provision enables EPA to base emissions limits for existing stationary sources on the “best system.” That system may be techno­logical in nature; it may be whatever else the majority has in mind; or, most important here, it may be generation shifting. The statute does not care. . . .

. . . . 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. . . .

“[T]he words of a statute,” as the majority states, “must be read in their context and with a view to their place in the overall statutory scheme.” *FDA* v. *Brown & Williamson To­bacco Corp.* (2000). We do not assess the meaning of a single word, phrase, or pro­vision in isolation; we also consider the overall statutory de­sign. And that is just as true of statutes broadly delegating power to agencies as of any other kind. In deciding on the scope of such a delegation, courts must assess how an agency action claimed to fall within the provision fits with other aspects of a statutory plan.

So too, a court “must be guided to a degree by common sense as to the manner in which Congress is likely to dele­gate.” Assume that a policy decision, like this one, is a matter of significant “economic and political magnitude.” We know that Congress delegates such decisions to agencies all the time—and often via broadly framed provisions like Section 111. But Congress does so in a sensible way. To decide whether an agency action goes beyond what Con­gress wanted, courts must assess (among other potentially relevant factors) the nature of the regulation, the nature of the agency, and the relationship of the two to each other. . . .

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 The eyebrow-raise is indeed a consistent presence in these cases, responding to something the Court found anomalous—looked at from Congress’s point of view—in a particular agency’s exercise of authority. In each case, the Court thought, the agency had strayed out of its lane, to an area where it had neither expertise nor experience. The At­torney General making healthcare policy, the regulator of pharmaceutical concerns deciding the fate of the tobacco in­dustry, and so on. And in each case, the proof that the agency had roamed too far afield lay in the statutory scheme itself. The agency action collided with other statu­tory provisions; if the former were allowed, the latter could not mean what they said or could not work as intended. FDA having to declare tobacco “safe” to avoid shutting down an industry; or EPA having literally to change hard num­bers contained in the Clean Air Act. There, according to the Court, the statutory framework was “not designed to grant” the authority claimed. The agency’s “singular” assertion of power “would render the statute unrecognizable to the Congress” that wrote it.

The Court today faces no such singular assertion of agency power. As I have already explained, nothing in the Clean Air Act (or, for that matter, any other statute) con­flicts with EPA’s reading of Section 111. Notably, the ma­jority does not dispute that point. Of course, it views Sec­tion 111 (if for unexplained reasons) as less clear than I do. But nowhere does the majority provide evidence from within the statute itself that the Clean Power Plan conflicts with or undermines Congress’s design. That fact alone makes this case differ­ent from all the cases described above. As to the other crit­ical matter in those cases—is the agency operating outside its sphere of expertise?—the majority at least tries to say something. 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.

Start with what this Court has said before on the subject, reflecting Congress’s view of the matter. About a decade ago, we recognized that Congress had “delegated to EPA” in Section 111 “the decision whether and how to regulate carbon-dioxide emissions from powerplants.” . . . . In making that delega­tion, we explained, Congress knew well what it was doing. Regulating power plant emissions is a complex undertak­ing. To do it right requires “informed assessment of com­peting interests”: “Along with the environmental benefit po­tentially achievable, our Nation’s energy needs and the possibility of economic disruption must weigh in the bal­ance.” *American Electrical Power v. Connecticut* (2011). . . .

. . . . This is not the Attorney General regulat­ing medical care, or even the CDC regulating landlord tenant relations. It is EPA (that’s the Environmental Pro­tection Agency, in case the majority forgot) acting to ad­dress the greatest environmental challenge of our time. So too, there is nothing special about the Plan’s “who”: fossil-fuel-fired power plants. . . .

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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.” Congress makes broad delegations in part so that agencies can “adapt their rules and policies to the demands of changing circumstances.” To keep faith with that congressional choice, courts must give agen­cies “ample latitude” to revisit, rethink, and revise their regulatory approaches. . . .

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Some years ago, I remarked that “[w]e’re all textualists now.” 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.” 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.” . . .

It is not surprising that Congress has always delegated, and continues to do so—including on important policy is­sues. As this Court has recognized, it is often “unreasona­ble and impracticable” for Congress to do anything else. 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.” . . .

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. . . . 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.

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The subject matter of the regulation here makes the Court’s intervention all the more troubling. 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 decision-maker on climate policy. I cannot think of many things more frightening.