Summer 2022 Update

LEGAL METHODS

CASE ANALYSIS AND STATUTORY INTERPRETATION

FIFTH EDITION

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PART II. CASE LAW: THE ANALYSIS AND SYNTHESIS OF JUDICIAL DECISIONS

B. HOW PRECEDENT WORKS OVER TIME

2. OVERRULING

[The following excerpt should be read and discussed immediately following the discussion of *Lawrence v. Texas*.]

As of the date of this writing, August 2022, only one of the nine U.S. Supreme Court Justices who decided *Lawrence* 19 years earlier remains on the Court (Justice Thomas). Given this significant change in the composition of the Court, it is perhaps natural to wonder whether an almost entirely new bench of Justices may seek to reconsider decisions made by their predecessors. In particular, during the 2016 presidential election, President Donald Trump campaigned on a promise to appoint Justices who would overturn *Roe v. Wade*, remarking that "the overturning of the landmark Supreme Court decision giving women the right to abortion 'will happen, automatically,'" since he would likely "get to nominate potentially several justices to the court." Dan Mangan, *Trump: I'll appoint Supreme Court justices to overturn* Roe v. Wade *abortion case,* CNBC, Oct. 19, 2016, https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html.

Sure enough, between spring 2017 and fall 2020, President Trump appointed three new Justices—Justices Gorsuch, Kavanaugh, Barrett. Prior to Justice Barrett's appointment, in June 2020, the State of Mississippi filed a cert petition in the case of *Dobbs v. Jackson Women's Health Org.*, seeking review of a Fifth Circuit decision striking down Mississippi's ban on abortion, with limited exceptions, after fifteen weeks' gestational age. When Mississippi filed its cert petition in June 2020, it presented the following question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." For reasons not publicly explained, the Court did not take action on Mississippi's petition until nearly a year later, in May, 2021—at which point Justice Barrett had been appointed to the Court—when it granted cert on that question.

Consider this context as you read the following excerpt of *Dobbs*.

* The latter author clerked at the U.S. Supreme Court during the October Term 2020, during which the Court granted cert in both *Dobbs* and *Wooden*. Nothing in these excerpts and case discussions draws on any non-public information.

Dobbs v. Jackson Women's Health Organization

Supreme Court of the United States, 2022
No. 19-1392.

■ JUSTICE ALITO delivered the opinion of the Court[, joined by JUSTICE THOMAS, JUSTICE GORSUCH, JUSTICE KAVANAUGH, and JUSTICE BARRETT].

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.

* * *

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." [Citation.]

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."

Stare decisis, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Casey* (Scalia, J., concurring in judgment in part and dissenting in part). That is what the Constitution and the rule of law demand.

I

The law at issue in this case, Mississippi's Gestational Age Act, see Miss. Code Ann. §41-41-191 (2018), contains this central provision: "Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." §4(b). . . .

We granted certiorari [citation] to resolve the question whether "all pre-viability prohibitions on elective abortions are unconstitutional," [citation]. Petitioners' primary defense of the Mississippi Gestational Age Act is that *Roe* and *Casey* were wrongly decided and that "the Act is constitutional because it satisfies rational-basis review." [Citation]. Respondents answer that allowing Mississippi to ban pre-viability abortions "would be no different than overruling *Casey* and *Roe* entirely." [Citation]. They tell us that "no half-measures" are available: We must either reaffirm or overrule *Roe* and *Casey*. Brief for Respondents 50.

II

We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. Skipping over that question, the controlling opinion in *Casey* reaffirmed *Roe*'s "central holding" based solely on the doctrine of *stare decisis*, but as we will explain, proper application of *stare decisis* required an assessment of the strength of the grounds on which *Roe* was based.

[The majority's discussion of the lack of constitutional basis for a right to abortion has been omitted.]

III

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of those who have taken action in reliance on a past decision. [Citations.] It "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." [Citation.] It fosters "evenhanded" decisionmaking by requiring that like cases be decided in a like manner. [Citation.] It "contributes to the actual and perceived integrity of the judicial process." [Citation.] And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. "Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges." N. Gorsuch, A Republic, If You Can Keep It 217 (2019).

We have long recognized, however, that *stare decisis* is "not an inexorable command," [citation], and it "is at its weakest when we interpret the Constitution," [citation]. It has been said that it is sometimes more important that an issue "'be settled than that it be settled right.'" [Citation.] But when it comes to the interpretation of the Constitution—the "great charter of our liberties," which was meant "to endure through a long lapse of ages," [citation]—we place a high value on having the matter "settled right." In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. See Art. V; [citation]. Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

Some of our most important constitutional decisions have overruled prior precedents. . . . [Discussion of these cases has been omitted.] On many other occasions, this Court has overruled important constitutional decisions. . . . Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country.

No Justice of this Court has ever argued that the Court should *never* overrule a constitutional decision, but overruling a precedent is a serious matter. It is not a step that should be taken lightly. Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision. [Citation.]

In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.

A

The nature of the Court's error. An erroneous interpretation of the Constitution is always important, but some are more damaging than others. . . .

Roe was also egregiously wrong and deeply damaging. For reasons already explained, *Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.

Roe was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people. Rather, wielding nothing but "raw judicial power," [citation], the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side . . . the Court has previously overruled decisions that wrongly removed an issue from the people and the democratic process. As Justice White later explained, "decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken." [Citation.]

B

The quality of the reasoning. Under our precedents, the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered. [Citation.] In Part II, *supra* [omitted], we explained why *Roe* was incorrectly decided, but that decision was more than just wrong. It stood on exceptionally weak grounds. . . . [Discussion of "the weaknesses in *Roe*'s reasoning" has been omitted.]

C

Workability. Our precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner. [Citations.] *Casey*'s "undue burden" test has scored poorly on the workability scale.

1

Problems begin with the very concept of an "undue burden." As Justice Scalia noted in his *Casey* partial dissent, determining whether a burden is "due" or "undue" is "inherently standardless." [Citation.]

The *Casey* plurality tried to put meaning into the "undue burden" test by setting out three subsidiary rules, but these rules created their own problems. . . [Discussion of the majority's criticisms of the *Casey* test has been omitted.]

2

. . . This Court's experience applying *Casey* has confirmed Chief Justice Rehnquist's prescient diagnosis that the undue-burden standard was "not built to last." [Citation.]

3

The experience of the Courts of Appeals provides further evidence that *Casey*'s "line between" permissible and unconstitutional restrictions "has proved to be impossible to draw with precision." [Citation.]

Casey has generated a long list of Circuit conflicts. . . .

Casey's "undue burden" test has proved to be unworkable. "[P]lucked from nowhere," [citation], it "seems calculated to perpetuate give-it-a-try litigation" before judges assigned an unwieldy and inappropriate task. [Citation.] Continued adherence to that standard would undermine, not advance, the "evenhanded, predictable, and consistent development of legal principles." [Citation.]

D

Effect on other areas of law. *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions. [Citations.]

Members of this Court have repeatedly lamented that "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." [Citations.]

[Discussion of the impact on other doctrines has been omitted.]

When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine "has failed to deliver the 'principled and intelligible' development of the law that *stare decisis* purports to secure." [Citation.]

E

Reliance interests. We last consider whether overruling *Roe* and *Casey* will upend substantial reliance interests. [Citations.]

1

Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." *Casey,* [citation] (joint opinion); [citation]. In *Casey*, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally "unplanned activity," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." [Citation.] For these reasons, we agree with the *Casey* plurality that conventional, concrete reliance interests are not present here.

2

Unable to find reliance in the conventional sense, the controlling opinion in *Casey* perceived a more intangible form of reliance. It wrote that "people [had] organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail" and that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Ibid.* But this Court is ill-equipped to assess "generalized assertions about the national psyche." [Citation.] *Casey*'s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in "cases involving property and contract rights." [Citation.]

When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. . . . This Court has neither the authority nor the expertise to

adjudicate those disputes, and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies." [Citation.]

Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so. In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi, constituted 55.5 percent of the voters who cast ballots.

3

Unable to show concrete reliance on *Roe* and *Casey* themselves, the Solicitor General suggests that overruling those decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights." Brief for United States 26 (citing *Obergefell, 576 U. S. 644*; *Lawrence, 539 U. S. 558*; *Griswold, 381 U. S. 479*). That is not correct for reasons we have already discussed. As even the *Casey* plurality recognized, "[a]bortion is a unique act" because it terminates "life or potential life." [Citation.]; see also *Roe, [citation]* (abortion is "inherently different from marital intimacy," "marriage," or "procreation"). And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

IV

Having shown that traditional *stare decisis* factors do not weigh in favor of retaining *Roe* or *Casey*, we must address one final argument that featured prominently in the *Casey* plurality opinion.

The argument was cast in different terms, but stated simply, it was essentially as follows. The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not "social and political pressures." [Citation.] There is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial "watershed" decision, such as *Casey* [citation]. A decision overruling *Roe* would be perceived as having been made "under fire" and as a "surrender to political pressure," [citation], and therefore the preservation of public approval of the Court weighs heavily in favor of retaining *Roe*, [citation].

This analysis starts out on the right foot but ultimately veers off course. The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work. [Citation.] That is true both when we initially decide a constitutional issue *and* when we consider whether to overrule a prior decision. As Chief Justice Rehnquist explained, "The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task." *Casey,* [citation] (opinion concurring in judgment in part and dissenting in part). In suggesting otherwise, the *Casey* plurality went beyond this Court's role in our constitutional system.

The *Casey* plurality "call[ed] the contending sides of a national controversy to end their national division," and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying that the matter was closed. [Citation.] That unprecedented claim exceeded the power vested in us by the Constitution. . . . Our sole authority is to exercise "judgment"—which is to say, the authority to judge what the law means and how it should apply to the case at hand. *Ibid.* The Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. . . . . That is not how *stare decisis* operates. . . .

We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly.

We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.

V

A

1

The dissent argues that we have "abandon[ed]" *stare decisis*, but we have done no such thing, and it is the dissent's understanding of *stare decisis* that breaks with tradition. The dissent's foundational contention is that the Court should never (or perhaps almost never) overrule an egregiously wrong constitutional precedent unless the Court can "poin[t] to major legal or factual changes undermining [the] decision's original basis." . . .

The Court has never adopted this strange new version of *stare decisis*—and with good reason. . . . Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong. When that happens, *stare decisis* is not a straitjacket. And indeed, the dissent eventually admits that a decision *could* "be overruled just because it is terribly wrong," though the dissent does not explain when that would be so.

2

Even if the dissent were correct in arguing that an egregiously wrong decision should (almost) never be overruled unless its mistake is later highlighted by "major legal or factual changes," reexamination of *Roe* and *Casey* would be amply justified. We have already mentioned a number of post-*Casey* developments, but the most profound change may be the failure of the *Casey* plurality's call for "the contending sides" in the controversy about abortion "to end their national division," [citation]. That has not happened, and there is no reason to think that another decision sticking with *Roe* would achieve what *Casey* could not.

The dissent, however, is undeterred. It contends that the "very controversy surrounding *Roe* and *Casey*" is an important *stare decisis* consideration that requires upholding those precedents. The dissent characterizes *Casey* as a "precedent about precedent" that is permanently shielded from further evaluation under traditional *stare decisis* principles. But as we have explained, *Casey* broke new ground when it treated the national controversy provoked by *Roe* as a ground for refusing to reconsider that decision, and no subsequent case has relied on that factor. Our decision today simply applies longstanding *stare decisis* factors instead of applying a version of the doctrine that seems to apply only in abortion cases.

3

Finally, the dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed "potential life." [Citations.] Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by "appeals to a broader right to autonomy." It is hard to see how we could be clearer. Moreover, even putting aside that these cases are distinguishable, there is a further point that the dissent ignores: Each precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence.

B

1

[Discussion of CHIEF JUSTICE ROBERTS's concurrence has been omitted.]

* * *

VII

We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[The concurring opinions of JUSTICE THOMAS and JUSTICE KAVANAUGH have been omitted.]

■ CHIEF JUSTICE ROBERTS, concurring in the judgment.

We granted certiorari to decide one question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." [Citation.] That question is directly implicated here: Mississippi's Gestational Age Act, Miss. Code Ann. §41-41-191 (2018), generally prohibits abortion after the fifteenth week of pregnancy—several weeks before a fetus is regarded as "viable" outside the womb. In urging our review, Mississippi stated that its case was "an ideal vehicle" to "reconsider the bright-line viability rule," and that a judgment in its favor would "not require the Court to overturn" [*Roe* and *Casey* Citations.]

Today, the Court nonetheless rules for Mississippi by doing just that. I would take a more measured course. I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further—certainly not all the way to viability. Mississippi's law allows a woman three months to obtain an abortion, well beyond the point at which it is considered "late" to discover a pregnancy. [Citation.] I see no sound basis for questioning the adequacy of that opportunity.

But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide

more. Perhaps we are not always perfect in following that command, and certainly there are cases that warrant an exception. But this is not one of them. Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*. The Court's opinion is thoughtful and thorough, but those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us. . . .

Whether a precedent should be overruled is a question "entirely within the discretion of the court." [Citations.] (*stare decisis* is a "principle of policy"). In my respectful view, the sound exercise of that discretion should have led the Court to resolve the case on the narrower grounds set forth above, rather than overruling *Roe* and *Casey* entirely. The Court says there is no "principled basis" for this approach, but in fact it is firmly grounded in basic principles of *stare decisis* and judicial restraint.

The Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case.

Our cases say that the effect of overruling a precedent on reliance interests is a factor to consider in deciding whether to take such a step, and respondents argue that generations of women have relied on the right to an abortion in organizing their relationships and planning their futures. [Citations.] The Court questions whether these concerns are pertinent under our precedents, but the issue would not even arise with a decision rejecting only the viability line: It cannot reasonably be argued that women have shaped their lives in part on the assumption that they would be able to abort up to viability, as opposed to fifteen weeks. . . .

The Court says we should consider whether to overrule *Roe* and *Casey* now, because if we delay we would be forced to consider the issue again in short order. There would be "turmoil" until we did so, according to the Court, because of existing state laws with "shorter deadlines or no deadline at all." But under the narrower approach proposed here, state laws outlawing abortion altogether would still violate binding precedent. And to the extent States have laws that set the cutoff date earlier than fifteen weeks, any litigation over that timeframe would proceed free of the distorting effect that the viability rule has had on our constitutional debate. The same could be true, for that matter, with respect to legislative consideration in the States. We would then be free to exercise our discretion in deciding whether and when to take up the issue, from a more informed perspective. . . .

Both the Court's opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share. I am not sure, for example, that a ban on terminating a pregnancy from the moment of conception must be treated the same under the Constitution as a ban after fifteen weeks. A thoughtful Member of this Court once counseled that the difficulty of a question "admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case." *Whitehouse v. Illinois Central R. Co., 349 U. S. 366, 372-373 (1955)* (Frankfurter, J., for the Court). I would decide the question we granted review to answer—whether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful. The answer to that question is no, and there is no need to go further to decide this case.

I therefore concur only in the judgment.

■ JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, dissenting.

For half a century, *Roe* and *Casey* have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself

whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. See *Casey*, 505 U. S., at 853; *Gonzales v. Carhart*, 550 U. S. 124, 171-172 (2007) (Ginsburg, J., dissenting). Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

* * *

One piece of evidence on that score [that "Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat."] seems especially salient: The majority's cavalier approach to overturning this Court's precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion. The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. Indeed, the Court in *Casey* already found all of that to be true. *Casey* is a precedent about precedent. It reviewed the same arguments made here in support of overruling *Roe*, and it found that doing so was not warranted. The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. *Stare decisis*, this Court has often said, "contributes to the actual and perceived integrity of the judicial process" by ensuring that decisions are "founded in the law rather than in the proclivities of individuals." [Citations.] Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent. . . .

I

[The joint dissent's discussion of the constitutional merits of *Roe* and *Casey* has been omitted.]

II

By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law. "*Stare decisis*" means "to stand by things decided." Black's Law Dictionary 1696 (11th ed. 2019). Blackstone called it the "established rule to abide by former precedents." 1 Blackstone 69. *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles." [Citation.] It maintains a stability that allows people to order their lives under the law. See H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 568-569 (1994).

Stare decisis also "contributes to the integrity of our constitutional system of government" by ensuring that decisions "are founded in the law rather than in the proclivities of individuals." [Citation.] As Hamilton wrote: It "avoid[s] an arbitrary discretion in the courts." The Federalist No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton). And as Blackstone said before him: It "keep[s] the scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 Blackstone 69. . . .

That means the Court may not overrule a decision, even a constitutional one, without a "special justification." [Citation.] *Stare decisis* is, of course, not an "inexorable command"; it is sometimes appropriate to overrule an earlier decision. [Citation.] But the Court must have a good reason to do so over and above the belief "that the precedent was wrongly decided." [Citation.]

"[I]t is not alone sufficient that we would decide a case differently now than we did then." [Citation.]

The majority today lists some 30 of our cases as overruling precedent, and argues that they support overruling *Roe* and *Casey*. But none does, as further described below . . . In some, the Court only partially modified or clarified a precedent. And in the rest, the Court relied on one or more of the traditional *stare decisis* factors in reaching its conclusion. The Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. (The majority is wrong when it says that we insist on a test of changed law or fact alone, although that is present in most of the cases.) None of those factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives.

First, . . . *Roe* and *Casey* were correct. In holding that a State could not "resolve" the debate about abortion "in such a definitive way that a woman lacks all choice in the matter," the Court protected women's liberty and women's equality in a way comporting with our Fourteenth Amendment precedents. [Citation.] Contrary to the majority's view, the legal status of abortion in the 19th century does not weaken those decisions. And the majority's repeated refrain about "usurp[ing]" state legislatures' "power to address" a publicly contested question does not help it on the key issue here. To repeat: The point of a right is to shield individual actions and decisions "from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." [Citation.] However divisive, a right is not at the people's mercy.

In any event "[w]hether or not we . . . agree" with a prior precedent is the beginning, not the end, of our analysis—and the remaining "principles of *stare decisis* weigh heavily against overruling" *Roe* and *Casey*. [Citation.] *Casey* itself applied those principles, in one of this Court's most important precedents about precedent. After assessing the traditional *stare decisis* factors, *Casey* reached the only conclusion possible—that *stare decisis* operates powerfully here. It still does. The standards *Roe* and *Casey* set out are perfectly workable. No changes in either law or fact have eroded the two decisions. And tens of millions of American women have relied, and continue to rely, on the right to choose. So under traditional *stare decisis* principles, the majority has no special justification for the harm it causes.

And indeed, the majority comes close to conceding that point. The majority barely mentions any legal or factual changes that have occurred since *Roe* and *Casey*. It suggests that the two decisions are hard for courts to implement, but cannot prove its case. In the end, the majority says, all it must say to override *stare decisis* is one thing: that it believes *Roe* and *Casey* "egregiously wrong." That rule could equally spell the end of any precedent with which a bare majority of the present Court disagrees. So how does that approach prevent the "scale of justice" from "waver[ing] with every new judge's opinion"? 1 Blackstone 69. It does not. It makes radical change too easy and too fast, based on nothing more than the new views of new judges. The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.

A

Contrary to the majority's view, there is nothing unworkable about *Casey*'s "undue burden" standard. Its primary focus on whether a State has placed a "substantial obstacle" on a woman seeking an abortion is "the sort of inquiry familiar to judges across a variety of contexts." *June Medical Services L.L.C. v. Russo,* 591 U. S. ___, ___, 140 S. Ct. 2103 (2020) (Roberts, C. J., concurring in judgment). And it has given rise to no more conflict in application than many standards this Court and others unhesitatingly apply every day.

General standards, like the undue burden standard, are ubiquitous in the law, and particularly in constitutional adjudication. When called on to give effect to the Constitution's broad principles, this Court often crafts flexible standards that can be applied case-by-case to a myriad of unforeseeable circumstances. See [citation.] . . . The *Casey* undue burden standard is the same. It also resembles general standards that courts work with daily in other legal spheres—like the "rule of reason" in antitrust law or the "arbitrary and capricious" standard for agency decisionmaking. See [citations]. Applying general standards to particular cases is, in many contexts, just what it means to do law.

And the undue burden standard has given rise to no unusual difficulties. Of course, it has provoked some disagreement among judges. *Casey* knew it would: That much "is to be expected in the application of any legal standard which must accommodate life's complexity." 505 U. S., at 878 (plurality opinion). Which is to say: That much is to be expected in the application of any legal standard. . . .

Anyone concerned about workability should consider the majority's substitute standard. The majority says a law regulating or banning abortion "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." And the majority lists interests like "respect for and preservation of prenatal life," "protection of maternal health," elimination of certain "medical procedures," "mitigation of fetal pain," and others. This Court will surely face critical questions about how that test applies. Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur, before the Fourteenth Amendment's protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment's protection of liberty and equality? Further, the Court may face questions about the application of abortion regulations to medical care most people view as quite different from abortion. What about the morning-after pill? IUDs? In vitro fertilization? And how about the use of dilation and evacuation or medication for miscarriage management? [Citation.]

Finally, the majority's ruling today invites a host of questions about interstate conflicts. [Citation.] Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-state abortions or helping women get to out-of-state providers? Can a State interfere with the mailing of drugs used for medication abortions? The Constitution protects travel and speech and interstate commerce, so today's ruling will give rise to a host of new constitutional questions. Far from removing the Court from the abortion issue, the majority puts the Court at the center of the coming "interjurisdictional abortion wars."

In short, the majority does not save judges from unwieldy tests or extricate them from the sphere of controversy. To the contrary, it discards a known, workable, and predictable standard in favor of something novel and probably far more complicated. It forces the Court to wade further into hotly contested issues, including moral and philosophical ones, that the majority criticizes *Roe* and *Casey* for addressing.

B

When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision's original basis. . . . Most "successful proponent[s] of overruling precedent," this Court once said, have carried "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." [Citation.] Certainly, that was so of the main examples the majority cites. . . . But it is not so today. Although nodding to some arguments others have made about "modern developments," the majority does not really rely on them, no doubt seeing their slimness. The majority briefly invokes the current controversy over abortion. But it has to acknowledge

that the same dispute has existed for decades: Conflict over abortion is not a change but a constant. (And as we will later discuss, the presence of that continuing division provides more of a reason to stick with, than to jettison, existing precedent.) In the end, the majority throws longstanding precedent to the winds without showing that anything significant has changed to justify its radical reshaping of the law.

1

Subsequent legal developments have only reinforced *Roe* and *Casey*. The Court has continued to embrace all the decisions *Roe* and *Casey* cited, decisions which recognize a constitutional right for an individual to make her own choices about "intimate relationships, the family," and contraception. [Citation.] *Roe* and *Casey* have themselves formed the legal foundation for subsequent decisions protecting these profoundly personal choices. As discussed earlier, the Court relied on *Casey* to hold that the Fourteenth Amendment protects same-sex intimate relationships. See *Lawrence*, 539 U. S., at 578. The Court later invoked the same set of precedents to accord constitutional recognition to same-sex marriage. See *Obergefell*, 576 U. S., at 665-666. In sum, *Roe* and *Casey* are inextricably interwoven with decades of precedent about the meaning of the Fourteenth Amendment. While the majority might wish it otherwise, *Roe* and *Casey* are the very opposite of "'obsolete constitutional thinking.'" [Citation.]

Moreover, no subsequent factual developments have undermined *Roe* and *Casey*. Women continue to experience unplanned pregnancies and unexpected developments in pregnancies. Pregnancies continue to have enormous physical, social, and economic consequences. Even an uncomplicated pregnancy imposes significant strain on the body, unavoidably involving significant physiological change and excruciating pain. For some women, pregnancy and childbirth can mean life-altering physical ailments or even death. Today, as noted earlier, the risks of carrying a pregnancy to term dwarf those of having an abortion. Experts estimate that a ban on abortions increases maternal mortality by 21 percent, with white women facing a 13 percent increase in maternal mortality while black women face a 33 percent increase. Pregnancy and childbirth may also impose large-scale financial costs. The majority briefly refers to arguments about changes in laws relating to healthcare coverage, pregnancy discrimination, and family leave. Many women, however, still do not have adequate healthcare coverage before and after pregnancy; and, even when insurance coverage is available, healthcare services may be far away. Women also continue to face pregnancy discrimination that interferes with their ability to earn a living. Paid family leave remains inaccessible to many who need it most. Only 20 percent of private-sector workers have access to paid family leave, including a mere 8 percent of workers in the bottom quartile of wage earners.

The majority briefly notes the growing prevalence of safe haven laws and demand for adoption, but, to the degree that these are changes at all, they too are irrelevant. Neither reduces the health risks or financial costs of going through pregnancy and childbirth. Moreover, the choice to give up parental rights after giving birth is altogether different from the choice not to carry a pregnancy to term. The reality is that few women denied an abortion will choose adoption. The vast majority will continue, just as in *Roe* and *Casey*'s time, to shoulder the costs of childrearing. Whether or not they choose to parent, they will experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose.

Mississippi's own record illustrates how little facts on the ground have changed since *Roe* and *Casey*, notwithstanding the majority's supposed "modern developments." Sixty-two percent of pregnancies in Mississippi are unplanned, yet Mississippi does not require insurance to cover contraceptives and prohibits educators from demonstrating proper contraceptive use. The State neither bans pregnancy discrimination nor requires provision of paid parental leave. [Citation.] It has strict eligibility requirements for Medicaid and nutrition assistance, leaving many women and families without basic medical care or enough food. [Citation.] Although 86 percent of pregnancy-related deaths in the State are due to postpartum complications, Mississippi rejected

federal funding to provide a year's worth of Medicaid coverage to women after giving birth. [Citation.] Perhaps unsurprisingly, health outcomes in Mississippi are abysmal for both women and children. Mississippi has the highest infant mortality rate in the country, and some of the highest rates for preterm birth, low birthweight, cesarean section, and maternal death. It is approximately 75 times more dangerous for a woman in the State to carry a pregnancy to term than to have an abortion. [Citation.] We do not say that every State is Mississippi, and we are sure some have made gains since *Roe* and *Casey* in providing support for women and children. But a state-by-state analysis by public health professionals shows that States with the most restrictive abortion policies also continue to invest the least in women's and children's health. [Citation.]

The only notable change we can see since *Roe* and *Casey* cuts in favor of adhering to precedent: It is that American abortion law has become more and more aligned with other nations. The majority, like the Mississippi Legislature, claims that the United States is an extreme outlier when it comes to abortion regulation. The global trend, however, has been toward increased provision of legal and safe abortion care. A number of countries, including New Zealand, the Netherlands, and Iceland, permit abortions up to a roughly similar time as *Roe* and *Casey* set. [Citation.] Canada has decriminalized abortion at any point in a pregnancy. [Citation.]Most Western European countries impose restrictions on abortion after 12 to 14 weeks, but they often have liberal exceptions to those time limits, including to prevent harm to a woman's physical or mental health. [Citation.] They also typically make access to early abortion easier, for example, by helping cover its cost. Perhaps most notable, more than 50 countries around the world—in Asia, Latin America, Africa, and Europe—have expanded access to abortion in the past 25 years. [Citation.] In light of that worldwide liberalization of abortion laws, it is American States that will become international outliers after today.

In sum, the majority can point to neither legal nor factual developments in support of its decision. Nothing that has happened in this country or the world in recent decades undermines the core insight of *Roe* and *Casey*. It continues to be true that, within the constraints those decisions established, a woman, not the government, should choose whether she will bear the burdens of pregnancy, childbirth, and parenting.

C

The reasons for retaining *Roe* and *Casey* gain further strength from the overwhelming reliance interests those decisions have created. The Court adheres to precedent not just for institutional reasons, but because it recognizes that stability in the law is "an essential thread in the mantle of protection that the law affords the individual." [Citation.] So when overruling precedent "would dislodge [individuals'] settled rights and expectations," *stare decisis* has "added force." [Citation.] *Casey* understood that to deny individuals' reliance on *Roe* was to "refuse to face the fact[s]." [Citation.] Today the majority refuses to face the facts. "The most striking feature of the [majority] is the absence of any serious discussion" of how its ruling will affect women. By characterizing *Casey*'s reliance arguments as "generalized assertions about the national psyche," it reveals how little it knows or cares about women's lives or about the suffering its decision will cause.

In *Casey*, the Court observed that for two decades individuals "have organized intimate relationships and made" significant life choices "in reliance on the availability of abortion in the event that contraception should fail." [Citation.] Over another 30 years, that reliance has solidified. For half a century now, in *Casey*'s words, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." Indeed, all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*'s and *Casey*'s protections.

The disruption of overturning *Roe* and *Casey* will therefore be profound. Abortion is a common medical procedure and a familiar experience in women's lives. About 18 percent of pregnancies in this country end in abortion, and about one quarter of American women will have an abortion before the age of 45. Those numbers reflect the predictable and life-changing effects of carrying a pregnancy, giving birth, and becoming a parent. As *Casey* understood, people today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. Women may count on abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life. See Brief for Economists as *Amici Curiae* 13 (showing that abortion availability has "large effects on women's education, labor force participation, occupations, and earnings" (footnotes omitted)).

The majority's response to these obvious points exists far from the reality American women actually live. The majority proclaims that "'reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.'" [Citation.] The facts are: 45 percent of pregnancies in the United States are unplanned. [Citation.] Even the most effective contraceptives fail, and effective contraceptives are not universally accessible.[24] Not all sexual activity is consensual and not all contraceptive choices are made by the party who risks pregnancy. [Citation.] The Mississippi law at issue here, for example, has no exception for rape or incest, even for underage women. Finally, the majority ignores, as explained above, that some women decide to have an abortion because their circumstances change during a pregnancy. Human bodies care little for hopes and plans. Events can occur after conception, from unexpected medical risks to changes in family circumstances, which profoundly alter what it means to carry a pregnancy to term. In all these situations, women have expected that they will get to decide, perhaps in consultation with their families or doctors but free from state interference, whether to continue a pregnancy. For those who will now have to undergo that pregnancy, the loss of *Roe* and *Casey* could be disastrous. . . .

Finally, the expectation of reproductive control is integral to many women's identity and their place in the Nation. See *Casey, 505 U. S., at 856*. That expectation helps define a woman as an "equal citizen[ ]," with all the rights, privileges, and obligations that status entails. *Gonzales, 550 U. S., at 172* (Ginsburg, J., dissenting). It reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government. It helps define a sphere of freedom, in which a person has the capacity to make choices free of government control. As *Casey* recognized, the right "order[s]" her "thinking" as well as her "living." [Citation.] Beyond any individual choice about residence, or education, or career, her whole life reflects the control and authority that the right grants.

Withdrawing a woman's right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of today's Court has wrenched this choice from women and given it to the States. To allow a State to exert control over one of "the most intimate and personal choices" a woman may make is not only to affect the course of her life, monumental as those effects might be [Citation]. It is to alter her "views of [herself]" and her understanding of her "place[ ] in society" as someone with the recognized dignity and authority to make these choices. [Citation.] Women have relied on *Roe* and *Casey* in this way for 50 years. Many have

never known anything else. When *Roe* and *Casey* disappear, the loss of power, control, and dignity will be immense.

The Court's failure to perceive the whole swath of expectations *Roe* and *Casey* created reflects an impoverished view of reliance. According to the majority, a reliance interest must be "very concrete," like those involving "property" or "contract." While many of this Court's cases addressing reliance have been in the "commercial context," [citation] none holds that interests must be analogous to commercial ones to warrant *stare decisis* protection. This unprecedented assertion is, at bottom, a radical claim to power. By disclaiming any need to consider broad swaths of individuals' interests, the Court arrogates to itself the authority to overrule established legal principles without even acknowledging the costs of its decisions for the individuals who live under the law, costs that this Court's *stare decisis* doctrine instructs us to privilege when deciding whether to change course.

The majority claims that the reliance interests women have in *Roe* and *Casey* are too "intangible" for the Court to consider, even if it were inclined to do so. This is to ignore as judges what we know as men and women. The interests women have in *Roe* and *Casey* are perfectly, viscerally concrete. Countless women will now make different decisions about careers, education, relationships, and whether to try to become pregnant than they would have when *Roe* served as a backstop. Other women will carry pregnancies to term, with all the costs and risk of harm that involves, when they would previously have chosen to obtain an abortion. For millions of women, *Roe* and *Casey* have been critical in giving them control of their bodies and their lives. Closing our eyes to the suffering today's decision will impose will not make that suffering disappear. The majority cannot escape its obligation to "count[ ] the cost[s]" of its decision by invoking the "conflicting arguments" of "contending sides." [Citation.] *Stare decisis* requires that the Court calculate the costs of a decision's repudiation on those who have relied on the decision, not on those who have disavowed it. [Citation.].

More broadly, the majority's approach to reliance cannot be reconciled with our Nation's understanding of constitutional rights. The majority's insistence on a "concrete," economic showing would preclude a finding of reliance on a wide variety of decisions recognizing constitutional rights—such as the right to express opinions, or choose whom to marry, or decide how to educate children. The Court, on the majority's logic, could transfer those choices to the State without having to consider a person's settled understanding that the law makes them hers. That must be wrong. All those rights, like the right to obtain an abortion, profoundly affect and, indeed, anchor individual lives. To recognize that people have relied on these rights is not to dabble in abstractions, but to acknowledge some of the most "concrete" and familiar aspects of human life and liberty.

All those rights, like the one here, also have a societal dimension, because of the role constitutional liberties play in our structure of government. See, *e.g.*, *Dickerson*, 530 U. S., at 443 (recognizing that *Miranda* "warnings have become part of our national culture" in declining to overrule *Miranda v. Arizona*, 384 U. S. 436 (1966)). Rescinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight. *Roe* and *Casey* have of course aroused controversy and provoked disagreement. But the right those decisions conferred and reaffirmed is part of society's understanding of constitutional law and of how the Court has defined the liberty and equality that women are entitled to claim.

After today, young women will come of age with fewer rights than their mothers and grandmothers had. The majority accomplishes that result without so much as considering how women have relied on the right to choose or what it means to take that right away. The majority's

refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision.

D

One last consideration counsels against the majority's ruling: the very controversy surrounding *Roe* and *Casey*. The majority accuses *Casey* of acting outside the bounds of the law to quell the conflict over abortion—of imposing an unprincipled "settlement" of the issue in an effort to end "national division." But that is not what *Casey* did. As shown above, *Casey* applied traditional principles of *stare decisis*—which the majority today ignores—in reaffirming *Roe*. *Casey* carefully assessed changed circumstances (none) and reliance interests (profound). It considered every aspect of how *Roe*'s framework operated. It adhered to the law in its analysis, and it reached the conclusion that the law required. True enough that *Casey* took notice of the "national controversy" about abortion: The Court knew in 1992, as it did in 1973, that abortion was a "divisive issue." *Casey*, 505 U. S., at 867-868; see *Roe*, 410 U. S., at 116. But *Casey*'s reason for acknowledging public conflict was the exact opposite of what the majority insinuates. *Casey* addressed the national controversy in order to emphasize how important it was, in that case of all cases, for the Court to stick to the law. Would that today's majority had done likewise.

Consider how the majority itself summarizes this aspect of *Casey*:

"The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not 'social and political pressures.' There is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial 'watershed' decision, such as *Roe*. A decision overruling *Roe* would be perceived as having been made 'under fire' and as a 'surrender to political pressure.'" *Ante*, at 66-67 (citations omitted).

That seems to us a good description. And it seems to us right. The majority responds (if we understand it correctly): well, yes, but we have to apply the law. To which *Casey* would have said: That is exactly the point. Here, more than anywhere, the Court needs to apply the law—particularly the law of *stare decisis*. Here, we know that citizens will continue to contest the Court's decision, because "[m]en and women of good conscience" deeply disagree about abortion. *Casey*, 505 U. S., at 850. When that contestation takes place—but when there is no legal basis for reversing course—the Court needs to be steadfast, to stand its ground. That is what the rule of law requires. And that is what respect for this Court depends on.

"The promise of constancy, once given" in so charged an environment, *Casey* explained, "binds its maker for as long as" the "understanding of the issue has not changed so fundamentally as to render the commitment obsolete." [Citation.] A breach of that promise is "nothing less than a breach of faith." *Ibid.* "[A]nd no Court that broke its faith with the people could sensibly expect credit for principle." *Ibid.* No Court breaking its faith in that way would *deserve* credit for principle. As one of *Casey*'s authors wrote in another case, "Our legitimacy requires, above all, that we adhere to *stare decisis*" in "sensitive political contexts" where "partisan controversy abounds." *Bush v. Vera,* 517 U. S. 952, 985 (1996) (opinion of O'Connor, J.).

Justice Jackson once called a decision he dissented from a "loaded weapon," ready to hand for improper uses. *Korematsu v. United States*, 323 U. S. 214, 246 (1944). We fear that today's decision, departing from *stare decisis* for no legitimate reason, is its own loaded weapon. Weakening *stare decisis* threatens to upend bedrock legal doctrines, far beyond any single decision. Weakening *stare decisis* creates profound legal instability. And as *Casey* recognized, weakening *stare decisis* in a hotly contested case like this one calls into question this Court's commitment to legal principle. It makes the Court appear not restrained but aggressive, not modest but grasping. In all those ways, today's decision takes aim, we fear, at the rule of law.

III

"Power, not reason, is the new currency of this Court's decisionmaking." [Citation.] *Roe* has stood for fifty years. *Casey*, a precedent about precedent specifically confirming *Roe*, has stood for thirty. And the doctrine of *stare decisis*—a critical element of the rule of law—stands foursquare behind their continued existence. The right those decisions established and preserved is embedded in our constitutional law, both originating in and leading to other rights protecting bodily integrity, personal autonomy, and family relationships. The abortion right is also embedded in the lives of women—shaping their expectations, influencing their choices about relationships and work, supporting (as all reproductive rights do) their social and economic equality. Since the right's recognition (and affirmation), nothing has changed to support what the majority does today. Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court.

. . . Now a new and bare majority of this Court—acting at practically the first moment possible—overrules *Roe* and *Casey*. It converts a series of dissenting opinions expressing antipathy toward *Roe* and *Casey* into a decision greenlighting even total abortion bans. It eliminates a 50-year-old constitutional right that safeguards women's freedom and equal station. It breaches a core rule-of-law principle, designed to promote constancy in the law. In doing all of that, it places in jeopardy other rights, from contraception to same-sex intimacy and marriage. And finally, it undermines the Court's legitimacy.

Casey itself made the last point in explaining why it would not overrule *Roe*—though some members of its majority might not have joined *Roe* in the first instance. Just as we did here, *Casey* explained the importance of *stare decisis*; the inappositeness of *West Coast Hotel* and *Brown*; the absence of any "changed circumstances" (or other reason) justifying the reversal of precedent. [Citation.] "[T]he Court," *Casey* explained, "could not pretend" that overruling *Roe* had any "justification beyond a present doctrinal disposition to come out differently from the Court of 1973." [Citation.] And to overrule for that reason? Quoting Justice Stewart, *Casey* explained that to do so—to reverse prior law "upon a ground no firmer than a change in [the Court's] membership"—would invite the view that "this institution is little different from the two political branches of the Government." [Citation.] No view, *Casey* thought, could do "more lasting injury to this Court and to the system of law which it is our abiding mission to serve." [Citation.] For overruling *Roe*, *Casey* concluded, the Court would pay a "terrible price." [Citation.]

The Justices who wrote those words—O'Connor, Kennedy, and Souter—they were judges of wisdom. They would not have won any contests for the kind of ideological purity some court watchers want Justices to deliver. But if there were awards for Justices who left this Court better than they found it? And who for that reason left this country better? And the rule of law stronger? Sign those Justices up.

They knew that "the legitimacy of the Court [is] earned over time." [Citation.] They also would have recognized that it can be destroyed much more quickly. They worked hard to avert that outcome in *Casey*. The American public, they thought, should never conclude that its constitutional protections hung by a thread—that a new majority, adhering to a new "doctrinal school," could "by dint of numbers" alone expunge their rights. [Citation.] It is hard—no, it is impossible—to conclude that anything else has happened here. One of us once said that "[i]t is not often in the law that so few have so quickly changed so much." S. Breyer, Breaking the Promise of *Brown*: The Resegregation of America's Schools 30 (2022). For all of us, in our time on this Court, that has never been more true than today. In overruling *Roe* and *Casey*, this Court betrays its guiding principles.

With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.

QUESTIONS

1. As between *Lawrence v. Texas* and *Dobbs*, which is a "correct" overruling and which incorrectly applies the doctrine on overruling? (The correct/incorrect description could apply to either decision.)

2. On what grounds could both overrulings be justified on the same terms? Alternatively, on what grounds could both overrulings be criticized on the same terms?

3. Are the majorities in *Lawrence* and *Dobbs* applying the same framework for assessing *stare decisis*?

4. Are you persuaded by the majority's distinction between the strength of *stare decisis* for *Casey* versus *Lawrence*, *Obergefell*, and *Griswold* (*i.e.*, the right to abortion is different because it "uniquely involves what *Roe* and *Casey* termed 'potential life.'")? How else might you distinguish these four cases, and/or group them together?

5. Whose reliance interests should count when considering the strength of *stare decisis*? The majority suggests property or contract interests weigh more heavily when assessing *stare decisis* reliance interests, presumably because once such rights are set in place, a long causal chain of subsequent events all rely upon that initial determination. By contrast, the majority suggests women's reliance interests in *Casey* is minimal, since "reproductive planning could take virtually immediate account of any sudden restoration of state authority ban abortions." What about a college sophomore who signed a contract, paid tuition, and has already been enrolled for a year in a university in a state whose trigger law instantly banned abortion in the wake of *Dobbs*? What about a woman of reproductive age who just purchased a house in the same state? Are those property and contract interests somehow different? If so, why?

6. What do these decisions tell you about the role of U.S. judges in articulating or safeguarding human rights?

7. Recall that President Trump campaigned on a promise to appoint Justices who would overturn *Roe*, and all three of the Justices appointed by him joined the majority. The joint dissent is not shy about pointing this out, closing by remarking that "Power, not reason, is the new currency of this Court's decisionmaking" and that "[t]he American public . . . should never conclude that its constitutional protections hung by a thread—that a new majority, adhering to a new 'doctrinal school,' could 'by dint of numbers' alone expunge their rights." Does the context surrounding *Dobbs* change how you view the legitimacy of that decision? Should it? Why or why not?

PART II. THE INTERPRETATION OF STATUTES

C. THE CONTEXT OF STATUTES AND THEIR INTERPRETATION

2. INTERPRETING A STATUTE IN LIGHT OF LEGISLATIVE HISTORY

[The following excerpt should be read and discussed immediately following the Notes and Questions following *Securities and Exchange Commission v. Robert Collier & Co.* on page 413.]

Wooden v. United States

Supreme Court of the United States, 2022
142 S.Ct. 1063

■ JUSTICE KAGAN delivered the [unanimous] opinion of the Court.

In the course of one evening, William Dale Wooden burglarized ten units in a single storage facility. He later pleaded guilty, for that night's work, to ten counts of burglary—one for each storage unit he had entered. Some two decades later, the courts below concluded that those

convictions were enough to subject Wooden to enhanced criminal penalties under the Armed Career Criminal Act (ACCA). That statute mandates a 15-year minimum sentence for unlawful gun possession when the offender has three or more prior convictions for violent felonies like burglary "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The question presented is whether Wooden's prior convictions were for offenses occurring on different occasions, as the lower courts held, because the burglary of each unit happened at a distinct point in time, rather than simultaneously. The answer is no. Convictions arising from a single criminal episode, in the way Wooden's did, can count only once under ACCA.

I

Begin in 1997, when Wooden and three confederates unlawfully entered a one-building storage facility at 100 Williams Road in Dalton, Georgia, next door to Wooden's home. The burglars proceeded from unit to unit within the facility, "crushing the interior drywall" between them. [Citation.] The men stole items from, all told, ten different storage units. So Georgia prosecutors charged them with ten counts of burglary—though, as state law prescribes, in a single indictment. See Ga. Code Ann. § 16–1–7(b) (1996) (requiring "crimes arising from the same conduct" to be prosecuted together). Wooden pleaded guilty to all counts. The judge sentenced him to eight years' imprisonment for each conviction, with the ten terms to run concurrently.

Fast forward now to a cold November morning in 2014, when Wooden responded to a police officer's knock on his door. The officer asked to speak with Wooden's wife. And noting the chill in the air, the officer asked if he could step inside, to stay warm. Wooden agreed. But his good deed did not go unpunished. Once admitted to the house, the officer spotted several guns. Knowing that Wooden was a felon, the officer placed him under arrest. A jury later convicted him for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g).

The penalty for that crime varies significantly depending on whether ACCA applies. Putting ACCA aside, the *maximum* sentence for violating § 922(g) is ten years in prison. See § 924(a)(2). But ACCA mandates a *minimum* sentence of fifteen years if the § 922(g) offender has three prior convictions for "violent felon[ies]" (like burglary) or "serious drug offense[s]" that were "committed on occasions different from one another." § 924(e)(1). In Wooden's own case, the record reveals the discrepancy as especially stark. Before the Government decided to seek an ACCA enhancement, its Probation Office recommended a sentence of 21 to 27 months. [Citation.] The ACCA minimum sentence is about 13 years longer.

The District Court's sentencing hearing focused on whether Wooden's ten convictions for breaking into the storage facility sufficed to trigger ACCA. Wooden said they did not because he had burglarized the ten storage units on a single occasion, rather than "on occasions different from one another." § 924(e)(1). The burglaries, he explained, happened "during the same criminal episode," "at the same business location, under the same roof." [Citation.] And given those facts, he continued, the burglaries were "charged in a single indictment." [Citation.] But the District Court accepted the Government's view that every time Wooden busted into another storage unit, he commenced a new "occasion" of criminal activity. The court reasoned, relying on Circuit precedent, that the entry into "[e]ach separate [unit] provides a discrete point at which the first offense was completed and the second began and so on." [Citation.] Based on the ACCA enhancement, the court sentenced Wooden to 188 months (almost 16 years) in prison for unlawfully possessing a gun.

The Court of Appeals for the Sixth Circuit affirmed the sentence, on the same reasoning. . . . The Courts of Appeals have divided over the meaning of ACCA's "occasions" clause. Some Circuits, like the Sixth, deem the clause satisfied whenever crimes take place at different moments in time—that is, sequentially rather than simultaneously. . . . Other Circuits undertake a more holistic inquiry, considering not merely the precise timing but also other circumstances of the crimes. . . . We granted certiorari, [citation], to resolve that split of authority.

II

Framed in terms of this case, the disputed question is whether Wooden committed his crimes on a single occasion or on ten separate ones.

The Government answers ten . . . . In the ACCA context, the Government argues, an "occasion" happens "at a particular point in time"—the moment "when [an offense's] elements are established." [Citation.] So offenses "occur on different 'occasions' when the criminal conduct necessary to satisfy the offense elements occurs at different times." [Citation.] Applying that elements-based, "temporal-distinctness test" to this case, the Government explains that Wooden's burglaries were "quintessentially sequential, rather than simultaneous." [Citation.] After all, a person can satisfy the elements of burglary only by entering (or remaining in) a structure with criminal intent. See, *e.g.*, Ga. Code Ann. § 16–7–1(a). And it would have been "physically impossible" for Wooden to have entered (or remained in) multiple storage units "at once." [Citation.] Each of Wooden's ten entries thus counts (so says the Government) as another "occasion," triggering ACCA's stringent penalties more than three times over.

We think not. The ordinary meaning of the word "occasion"—essentially an episode or event—refutes the Government's single-minded focus on whether a crime's elements were established at a discrete moment in time. And ACCA's history and purpose do so too: The origin of the "occasions" clause confirms that multiple crimes may occur on one occasion even if not at the same moment. Wooden's night of crime is a perfect case in point. His one-after-another-after-another burglary of ten units in a single storage facility occurred on one "occasion," under a natural construction of that term and consistent with the reason it became part of ACCA.

A

Consider first how an ordinary person (a reporter; a police officer; yes, even a lawyer) might describe Wooden's ten burglaries—and how she would not. The observer might say: "On one occasion, Wooden burglarized ten units in a storage facility." By contrast, she would never say: "On ten occasions, Wooden burglarized a unit in the facility." Nor would she say anything like: "On one occasion, Wooden burglarized a storage unit; on a second occasion, he burglarized another unit; on a third occasion, he burglarized yet another; and so on." She would, using language in its normal way, group his entries into the storage units, even though not simultaneous, all together—as happening on a single occasion, rather than on ten "occasions different from one another." § 924(e)(1).

That usage fits the ordinary meaning of "occasion." The word commonly refers to an event, occurrence, happening, or episode. See, *e.g.*, American Heritage Dictionary 908 (1981); Webster's Third New International Dictionary 1560 (3d ed. 1986). And such an event, occurrence, happening, or episode—which is simply to say, such an occasion—may itself encompass multiple, temporally distinct activities. The occasion of a wedding, for example, often includes a ceremony, cocktail hour, dinner, and dancing. Those doings are proximate in time and place, and have a shared theme (celebrating the happy couple); their connections are, indeed, what makes them part of a single event. But they do not occur at the same moment: The newlyweds would surely take offense if a guest organized a conga line in the middle of their vows. That is because an occasion may—and the hypothesized one does—encompass a number of non-simultaneous activities; it need not be confined to a single one.

The same is true (to shift gears from the felicitous to the felonious) when it comes to crime. In that sphere too, an "occasion" means an event or episode—which may, in common usage, include temporally discrete offenses. Consider a couple of descriptions from this Court's cases. "On one occasion," we noted, "Bryant hit his live-in girlfriend on the head with a beer bottle and attempted to strangle her." [Citation.] "*On one occasion*"—regardless whether those acts occurred at once (as the Government would require) or instead succeeded one another. [Citation.] Likewise, we said: "[T]he State has stipulated that the robbery and murder arose out of 'the same set of

facts, circumstances, and the same occasion.' " [Citation.] "*[T]he same occasion*"—irrespective whether the murder took place during (as the Government insists on) or instead just after the robbery. [Citation.] Or take a hypothetical suggested by oral argument here: A barroom brawl breaks out, and a patron hits first one, then another, and then a third of his fellow drinkers. The Government maintains those are not just three offenses (assaults) but also three "occasions" because they happened seriatim. [Citation.] But in making the leap from three offenses to three occasions, based on a split-second separation between punches, the Government leaves ordinary language behind. The occasion in the hypothetical is the barroom brawl, not each individual fisticuff.

By treating each temporally distinct offense as its own occasion, the Government goes far toward collapsing two separate statutory conditions. Recall that ACCA kicks in only if (1) a § 922(g) offender has previously been convicted of three violent felonies, and (2) those three felonies were committed on "occasions different from one another." § 924(e)(1); [citation.] In other words, the statute contains *both* a three-offense requirement *and* a three-occasion requirement. But under the Government's view, the two will generally boil down to the same thing: When an offender's criminal history meets the three-offense demand, it will also meet the three-occasion one. That is because people seldom commit—indeed, seldom can commit—multiple ACCA offenses at the exact same time. Take burglary. It is, just as the Government argues, "physically impossible" for an offender to enter different structures simultaneously. [Citation.] Or consider crimes defined by the use of physical force, such as assault or murder. Except in unusual cases (like a bombing), multiple offenses of that kind happen one by one by one, even if all occur in a short spell. The Government's reading, to be sure, does not render the occasions clause wholly superfluous; in select circumstances, a criminal may satisfy the elements of multiple offenses in a single instant. But for the most part, the Government's hyper-technical focus on the precise timing of elements—which can make someone a career criminal in the space of a minute—gives ACCA's three-occasions requirement no work to do.

The inquiry that requirement entails, given what "occasion" ordinarily means, is more multi-factored in nature. From the wedding to the barroom brawl, all the examples offered above suggest that a range of circumstances may be relevant to identifying episodes of criminal activity. Timing of course matters, though not in the split-second, elements-based way the Government proposes. Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events. Proximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event. And the character and relationship of the offenses may make a difference: The more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion.

For the most part, applying this approach will be straightforward and intuitive. In the Circuits that have used it, we can find no example (nor has the Government offered one) of judges coming out differently on similar facts. In many cases, a single factor—especially of time or place—can decisively differentiate occasions. Courts, for instance, have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart, or at a "significant distance." [Citation.] In other cases, the inquiry just as readily shows a single occasion, because all the factors cut that way. That is true, for example, in our barroom-brawl hypothetical, where the offender has engaged in a continuous stream of closely related criminal acts at one location. Of course, there will be some hard cases in between, as under almost any legal test. When that is so, assessing the relevant circumstances may also involve keeping an eye on ACCA's history and purpose, which we next discuss. [Citation.] But in law as in life, it is usually not so difficult to identify an "occasion": Given that the term in ACCA has just its ordinary meaning, most cases should involve no extra-ordinary work.

And surely, this one does not. Here, every relevant consideration shows that Wooden burglarized ten storage units on a single occasion, even though his criminal activity resulted in double-digit convictions. Wooden committed his burglaries on a single night, in a single uninterrupted course of conduct. The crimes all took place at one location, a one-building storage facility with one address. Each offense was essentially identical, and all were intertwined with the others. The burglaries were part and parcel of the same scheme, actuated by the same motive, and accomplished by the same means. Indeed, each burglary in some sense facilitated the next, as Wooden moved from unit to unit to unit, all in a row. And reflecting all these facts, Georgia law treated the burglaries as integrally connected. Because they "ar[ose] from the same conduct," the prosecutor had to charge all ten in a single indictment. Ga. Code Ann. § 16–1–7(b); [citation]. The indictment thus confirms what all the circumstances suggest: One criminal occasion notwithstanding ten crimes.[4]

B

Statutory history and purpose confirm our view of the occasions clause's meaning, as well as our conclusion that Wooden is not a career offender. For the first four years of its existence, ACCA asked only about offenses, not about occasions. Its enhanced penalties, that is, kicked in whenever a § 922(g) offender had three prior convictions for specified crimes—in the initial version, for robbery or burglary alone, and in the soon-amended version, for any violent felony or serious drug offense. [Citation.] Congress added the occasions clause only after a court applied ACCA to an offender much like Wooden—a person convicted of multiple counts of robbery arising from a single criminal episode.

In that precipitating case, Samuel Petty received ACCA's minimum 15-year penalty for gun possession based on his earlier stickup of a Manhattan restaurant. Petty and three associates had entered the establishment brandishing an assortment of guns and ordered the patrons and employees to the floor. [Citation.] The gunmen then made their way around the premises, collecting money and other valuables from the prostrate victims. [Citation.] For his role in the crime, Petty was convicted of six counts of robbery—one count for each of six individuals whose property had been taken—and served concurrent 5-year sentences. See *United States v. Petty*, 798 F.2d 1157, 1159–1160 (CA8 1986). Some years later, Petty was caught possessing a firearm and convicted of violating § 922(g). Federal prosecutors asked for heightened penalties under ACCA, pointing to his six robbery convictions from the restaurant incident. The District Court sentenced Petty on that basis, and the Court of Appeals for the Eighth Circuit affirmed. That court held it irrelevant under ACCA that the six convictions "ar[ose] out of the same transaction." [Citation.]

But when Petty sought this Court's review, the Solicitor General confessed error, stating that ACCA should not be construed "to reach multiple felony convictions arising out of a single criminal episode." [Citation.] In taking that position—requiring the convictions to come instead from "multiple criminal episodes"—the Solicitor General could not rely on ACCA's text. [Citation.] He acknowledged that ACCA lacked language found in other penalty-enhancement laws requiring prior crimes to have occurred on "occasions different from one another." [Citation.] But in the Solicitor General's view, the legislative history showed that Congress intended ACCA to have the same scope as those other laws. The Solicitor General highlighted "references throughout the legislative reports and the floor debates to 'career criminals,' 'repeat offenders,' 'habitual offenders,' 'recidivists,' 'revolving door' offenders, [and] 'three time loser[s].' " [Citation.]

[4] Justice Gorsuch asserts that a multi-factor test provides too "little guidance," including in this very case. But to begin with, we did not choose the test; Congress did. By directing an inquiry into whether prior offenses were "committed on occasions different from one another," Congress required consideration of the varied factors that may define an "occasion." And while the test Congress chose will produce some hard cases, Wooden's is not one of them. The courts below reached a different conclusion in this case only because they applied a categorical rule that sequential offenses always occur on different occasions (a rule Justice Gorsuch agrees has no basis). [Citation.] Once that mistake is corrected, Wooden's case becomes an easy one.

Those references, along with the very "title of the Act—the Armed Career Criminal Act," made clear that the courts in Petty's case had read ACCA too broadly. [Citation.] According to the Solicitor General, Petty's six robbery convictions—because they arose from "a single criminal episode"—should have counted as just one. In light of that changed position, this Court remanded the case to the Court of Appeals for "further consideration." [Citation.] And this time, the Eighth Circuit found in Petty's favor. [Citation.]

More important here, Congress amended ACCA to prevent future Pettys from being sentenced as career criminals. Just one year after the Solicitor General confessed error, Congress added the occasions clause—demanding, exactly as in the other laws he had cited, that the requisite prior crimes occur on "occasions different from one another." [Citation.] In placing the amendment on the Senate calendar, Senator Robert Byrd introduced an analysis, on behalf of the Judiciary Committee, setting out the genesis and purpose of the new language. "The proposed amendment," the analysis explained, "would clarify the armed career criminal statute to reflect the Solicitor General's construction" in *Petty*. [Citation.] His "interpretation plainly expresses," the analysis continued, "what is meant by a 'career criminal,' that is, a person who over the course of time commits three or more of the enumerated kinds of felonies." [Citation.] The statement concluded that "clarify[ing] the statute in this regard" would "insure that its rigorous sentencing provisions apply only as intended in cases meriting such strict punishment." *Ibid.* Congress enacted the amendment with near-unanimous support. [Citation.][5]

That statutory change, rejecting the original outcome in *Petty* in light of the Solicitor General's confession of error, is at odds with the Government's current view of the occasions clause. After all, that view does not (as the former Solicitor General's did) demand "multiple criminal episodes" as ordinarily understood: To the contrary, it enables ACCA "to reach multiple felony convictions arising out of a single criminal episode" so long as the crimes' elements are not satisfied at once. [Citation.] To be sure, the Government proposes a way to reconcile its test with the rejection of the enhanced sentence given to Petty: The restaurant robberies, the Government says, happened on one occasion because "the defendants ordered all the victims to turn over their belongings at once, under a continuous show of force, and multiple gunmen gathered the victims' items simultaneously." [Citation.] But even if that is true—the briefs and opinions in the case do not clearly say—the Government's theory makes the "how many occasions" question turn on trifles. Suppose Petty and his cohorts had proceeded without all this purported simultaneity. Suppose they had robbed everyone in the dining room first, then everyone in the kitchen. Or suppose the robbers had gone from booth to booth to booth, turning their guns on their victims in turn. The Government says that with any such "sequenc[ing]," a different result would obtain. [Citation.] What it does not do, except in the most technical sense, is explain why. Nothing about the Solicitor General's confession of error, or the action Congress took in its wake, suggests any concern for the exact ordering of Petty's actions. Each was based instead on another idea: A person who has robbed a restaurant, and done nothing else, is not a "habitual offender[ ]" or "career criminal[ ]." [Citation.]

The history of the occasions clause thus aligns with what this Court has always recognized as ACCA's purpose. Congress enacted ACCA to address the "special danger" posed by the eponymous "armed career criminal." [Citation.] The theory of the statute is that "those who commit a large number of fairly serious crimes as their means of livelihood" are especially likely to inflict grave harm when in possession of a firearm. [Citation.] And so the statute targets "a particular subset of offenders"—those who have repeatedly committed violent crimes. . . . And it was that focus to which Congress itself returned in adding the occasions clause—once again, "to

[5] Contrary to Justice Barrett's characterization, we do not claim that Congress ratified every jot and tittle of the Solicitor General's brief. [Citation.] But neither do we blind ourselves to the fact—which even the Government here fully accepts—that Congress added the occasions clause to ACCA "in response" to "the government's confession of error" in *Petty*. [Citation.]

insure that [ACCA's] rigorous sentencing provisions apply only as intended in cases meriting such strict punishment." [Citation.]

Wooden's burglary of a storage facility does not create that kind of case, any more than Petty's robbery of a restaurant did. Wooden's convictions, much like Petty's, arose from a closely related set of acts occurring on the same night, at the same place—making up, just as the former Solicitor General said, "a single criminal episode." [Citation.] Wooden did not become a career criminal when he moved from the second storage unit to the third, as Petty did not when he moved from the second to the third of the restaurant's patrons. Wooden and Petty both served significant sentences for their crimes, and rightly so. But in enacting the occasions clause, Congress made certain that crimes like theirs, taken alone, would not subject a person to a 15-year minimum sentence for illegally possessing a gun.

III

For the reasons stated, Wooden's ten burglary convictions were for offenses committed on a single occasion. They therefore count only once under ACCA. We reverse the judgment of the Sixth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

■ JUSTICE SOTOMAYOR, concurring.

I join the opinion of the Court because on the facts of this case, it is clear that Wooden's prior convictions did not take place "on occasions different from one another," as required for the sentencing enhancement to apply. [Citation.] Justice Gorsuch raises questions about the clarity of the record below, but in my view, those questions only underscore the Government's failure to carry its burden of proving the enhancement's application. [Citation.] I agree with Justice Gorsuch, however, that the rule of lenity provides an independent basis for ruling in favor of a defendant in a closer case, and I join Parts II–IV of his opinion concurring in the judgment.

■ JUSTICE KAVANAUGH, concurring.

I join the Court's opinion in full. In light of Justice Gorsuch's thoughtful concurrence in the judgment, I write separately to briefly explain why the rule of lenity has appropriately played only a very limited role in this Court's criminal case law. And I further explain how another principle—the presumption of *mens rea*—can address Justice Gorsuch's important concern, which I share, about fair notice in federal criminal law.

A common formulation of the rule of lenity is as follows: If a federal criminal statute is grievously ambiguous, then the statute should be interpreted in the criminal defendant's favor. [Citation.] Importantly, the rule of lenity does not apply when a law merely contains some ambiguity or is difficult to decipher. As this Court has often said, the rule of lenity applies only when " 'after seizing everything from which aid can be derived,' " the statute is still grievously ambiguous. [Citation.] (quoting *Muscarello v. United States*, 524 U.S. 125, 138–139 (1998)); [citation]. The rule "comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." [Citation.] Our repeated use of the term "grievous ambiguity" underscores that point. [Citations.]

Properly applied, the rule of lenity therefore rarely if ever plays a role because, as in other contexts, "hard interpretive conundrums, even relating to complex rules, can often be solved." [Citations.] And if "a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the [law] at issue." [Citation.]

In short, because a court must exhaust all the tools of statutory interpretation before resorting to the rule of lenity, and because a court that does so often determines the best reading of the statute, the rule of lenity rarely if ever comes into play. In other words, "if lenity invariably

comes in 'last,' it should essentially come in never." [Citation.] As I see it, that explains why this Court rarely relies on the rule of lenity, at least as a decisive factor.

I would not upset our rule of lenity case law by making the ambiguity trigger any easier to satisfy. For example, I would not say that any front-end ambiguity in the statute justifies resort to the rule of lenity even before exhausting the tools of statutory interpretation. One major problem with that kind of ambiguity trigger is that ambiguity is in the eye of the beholder and cannot be readily determined on an objective basis. Applying a looser front-end ambiguity trigger would just exacerbate that problem, leading to significant inconsistency, unpredictability, and unfairness in application. See B. KAVANAUGH, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2136–2139 (2016).

For those reasons, I would not alter our rule of lenity case law. That said, I very much agree with Justice GORSUCH about the importance of fair notice in federal criminal law. But as I see it, that concern for fair notice is better addressed by other doctrines that protect criminal defendants against arbitrary or vague federal criminal statutes—in particular, the presumption of *mens rea*.

The deeply rooted presumption of *mens rea* generally requires the Government to prove the defendant's *mens rea* with respect to each element of a federal offense, unless Congress plainly provides otherwise. [Citations.] In addition, with respect to federal crimes requiring "willfulness," the Court generally requires the Government to prove that the defendant was aware that his conduct was unlawful. [Citations.]

To be sure, if a federal criminal statute does not contain a "willfulness" requirement and if a defendant is prosecuted for violating a legal prohibition or requirement that the defendant honestly was unaware of and reasonably may not have anticipated, unfairness can result because of a lack of fair notice. That scenario could arise with some *malum prohibitum* federal crimes, for example. But when that fair notice problem arises, one solution where appropriate could be to require proof that the defendant was aware that his conduct was unlawful. Alternatively, another solution could be to allow a mistake-of-law defense in certain circumstances—consistent with the longstanding legal principle that an act is not culpable unless the mind is guilty. [Citation.]

In sum, I would not invite the inconsistency, unpredictability, and unfairness that would result from expanding the rule of lenity beyond its very limited place in the Court's case law. I would, however, continue to vigorously apply (and where appropriate, extend) *mens rea* requirements, which as Justice Robert Jackson remarked, are "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." [Citation.]

■ JUSTICE BARRETT, with whom JUSTICE THOMAS joins, concurring in part and concurring in the judgment.

I join all but Part II–B of the Court's opinion. I agree with the Court's analysis of the ordinary meaning of the word "occasion" and its conclusion that Wooden's burglaries count only once under the Armed Career Criminal Act. But I do not share the Court's view that Congress ratified the Solicitor General's brief confessing error in *United States v. Petty*, 798 F.2d 1157 (CA8 1986), when it amended the Act to add the occasions clause. This argument depends on two flawed inferences: first, that Congress specifically intended to reject the Eighth Circuit's initial decision in *Petty*, and second, that it embraced the former Solicitor General's reasoning for why that decision was wrong. The latter error, in particular, is likely to work mischief down the line. . . .

As an initial matter, the Court errs in asserting that the occasions clause was crafted to reject the result that the Eighth Circuit initially reached in *Petty*. (Recall that the Eighth Circuit changed its view on remand after the Solicitor General confessed error in this Court.) The Court's

evidence for that proposition consists of nothing but a short analysis that Senator Byrd submitted for the Congressional Record in calendaring the proposed amendment. [Citation.]

Petty's tenuous tie to the statute distinguishes this case from the many in which we have recognized that a judicial decision or line of decisions has provided the impetus for legislation. In some instances, enacted findings have explicitly connected the statute to a prior decision. [Citation.] In others, a well-established legal backdrop has revealed Congress' reasons for acting. [Citation.] But here, no enacted language mentions *Petty*, and the Court wisely does not portray the case—a single, subsequently vacated court of appeals opinion—as part of the settled legal landscape against which ACCA was amended. The only thread connecting the occasions clause to *Petty* is legislative history, and the problems with legislative history are well rehearsed. See, *e.g., American Broadcasting Cos. v. Aereo, Inc.*, 573 U.S. 431, 458 (2014) (Scalia, J., dissenting) (arguing that the Court had treated "a few isolated snippets of legislative history" as "authoritative evidence of congressional intent even though they come from a single report issued by a committee whose members make up a small fraction of one of the two Houses of Congress").

The Court needs the *Petty* backstory, though, to make its second, more significant leap: that Congress endorsed the reasoning behind the Solicitor General's confession of error in that case. [Citation.] This move goes bigger than legislative history because it goes beyond the standard error of treating legislators' views about statutory language as authoritative. It presents Senator Byrd's statement as definitive approval of the Solicitor General's position in *Petty* (an error of the standard variety), and then uses that approval to graft the particulars of the Solicitor General's brief onto the statute (which is really a bridge too far).

Again, I will not belabor why this approach is flawed. See, *e.g., Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part and concurring in judgment) ("That the Court should refer to the citation of three District Court cases in a document issued by a single committee of a single house as the action *of Congress* displays the level of unreality that our unrestrained use of legislative history has attained"); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 386 (2012) ("Even if the members of each house wish to do so, they cannot assign responsibility for making law—or the details of law—to one of their number, or to one of their committees"). But it is worth discussing the Court's jump from legislative history to litigation history because of what it might mean in later cases.

The Court elevates the Solicitor General's brief to the status of a governing test. Consider how that choice plays out in this case. The Government argues that Wooden's burglaries occurred on separate occasions because they were committed sequentially (unlike Petty's robberies, which the Government says were committed simultaneously). That argument fails for the reasons that the Court explains in Part II–A of its opinion, which I join: Such close-in-time crimes, even if sequential, happen on the same "occasion." But rather than resting only on the statutory language, the Court also invokes the reasoning in the *Petty* brief. . . . [I]n the Court's view, the Government's argument fails not only because of the statutory text but also because the Solicitor General's 35-year-old brief, which the statute supposedly incorporates, rules it out. That is not how statutory interpretation is supposed to work. . . .

The Court's approach will likely have downstream effects because it invites both litigants and lower courts to mine the Solicitor General's brief for guidance on the scope of the occasions clause—as the parties did in this case. To be sure, the most important indicators of whether crimes occurred on a single "occasion"—proximity in time and location—will matter most. But on top of that, lower courts may place weight on the buzzwords that the Court highlights in the Solicitor General's brief: "repeat offenders," "habitual offenders," "recidivists," "revolving door offenders," and "three time loser[s]." [Citation.] And that could sow unnecessary confusion.

Take a case involving three drug sales that occurred at 8 o'clock on three consecutive evenings at three different locations. Applying the ordinary meaning of the text seems straightforward enough: The three offenses are separate occasions because they occurred a day apart and at

different locations, notwithstanding the similarity of the crimes. Yet factor in the details of the Solicitor General's brief, and the result is not so clear. Is a defendant who committed three crimes over the course of three days really a "revolving door offende[r]" or a true "recidivis[t]"? [Citation.] Maybe not—those labels evoke a distinct inquiry. And though the labels may capture what Congress was getting at, the statute chooses a particular way of getting there: the text of the occasions clause. We should leave it at that. . . .

■ JUSTICE GORSUCH, with whom JUSTICE SOTOMAYOR joins as to Parts II, III, and IV, concurring in the judgment.

. . . . We took this case hoping to bring some clarity to at least this particular corner of the ACCA.

I

. . . The Court's multi-factor balancing test may represent an earnest attempt to bring some shape to future litigation under the Occasions Clause. But it is still very much a judicial gloss on the statute's terms—and one that is unnecessary to resolve the case at hand. Multi-factor balancing tests of this sort, too, have supplied notoriously little guidance in many other contexts, and there is little reason to think one might fare any better here. In fact, many lower courts faced with Occasions Clause cases already look to the same "multiplicity of factors" the Court prescribes today, including geographic location, the nature of the offenses, the number of victims, the means employed, and time. [Citation.] So far the results have proven anything but predictable given the almost infinite number of factual permutations these cases can present. And all of this has yielded a grave problem: Some individuals face mandatory 15-year prison terms while other similarly situated persons do not—with the results depending on little more than how much weight this or that judge chooses to assign this or that factor.

. . . [T]he key to this case does not lie as much in a multiplicity of factors as it does in the rule of lenity. Under that rule, any reasonable doubt about the application of a penal law must be resolved in favor of liberty. Because reasonable minds could differ (as they have differed) on the question whether Mr. Wooden's crimes took place on one occasion or many, the rule of lenity demands a judgment in his favor. The rule seems destined as well to play an important role in many other cases under the Occasions Clause—a setting where the statute at issue supplies little guidance, does not define its key term, and the word it does use ("occasions") can lead different people to different intuitions about the same set of facts. No list of factors, however thoughtful, can resolve every case under a law like that. Many ambiguous cases are sure to arise. In them, a rule of decision is required—and lenity supplies it.

II

The "rule of lenity" is a new name for an old idea—the notion that "penal laws should be construed strictly." [Citation.] The rule first appeared in English courts, justified in part on the assumption that when Parliament intended to inflict severe punishments it would do so clearly. [Citations.] In the hands of judges in this country, however, lenity came to serve distinctively American functions—a means for upholding the Constitution's commitments to due process and the separation of powers. Accordingly, lenity became a widely recognized rule of statutory construction in the Republic's early years. [Citations.]

. . . But lenity's emphasis on fair notice isn't about indulging a fantasy. It is about protecting an indispensable part of the rule of law—the promise that, whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance. . . .

Closely related to its fair notice function is lenity's role in vindicating the separation of powers. Under our Constitution, "[a]ll" of the federal government's "legislative Powers" are vested in Congress. Art. I, § 1. Perhaps the most important consequence of this assignment concerns the

power to punish. . . . In this way, the rule helps keep the power of punishment firmly "in the legislative, not in the judicial department." [Citation.]

Doubtless, lenity carries its costs. If judges cannot enlarge ambiguous penal laws to cover problems Congress failed to anticipate in clear terms, some cases will fall through the gaps and the legislature's cumbersome processes will have to be reengaged. But, as the framers appreciated, any other course risks rendering a self-governing people "slaves to their magistrates," with their liberties dependent on "the private opinions of the judge." [Citation.] From the start, lenity has played an important role in realizing a distinctly American version of the rule of law—one that seeks to ensure people are never punished for violating just-so rules concocted after the fact, or rules with no more claim to democratic provenance than a judge's surmise about legislative intentions.

III

It may be understandable why the Court declines to discuss lenity today. Certain controversies and misunderstandings about the rule have crept into our law in recent years. I would take this opportunity to answer them.

Begin with the most basic of these controversies—the degree of ambiguity required to trigger the rule of lenity. Some have suggested that courts should consult the rule of lenity only when, after employing every tool of interpretation, a court confronts a "grievous" statutory ambiguity. [Citation.] But ask yourself: If the sheriff cited a loosely written statute as authority to seize your home, would you be satisfied with a judicial explanation that, yes, the law was ambiguous, but the sheriff wins anyway because the ambiguity isn't "grievous"? If a judge sentenced you to decades in prison for conduct that no law clearly proscribed, would it matter to you that the judge considered the law "merely"—not "grievously"—ambiguous?

This "grievous" business does not derive from any well-considered theory about lenity or the mainstream of this Court's opinions. Since the founding, lenity has sought to ensure that the government may not inflict punishments on individuals without fair notice and the assent of the people's representatives. . . . So where did the talk about "grievous" ambiguities begin? The problem may trace to *Huddleston v. United States*, 415 U.S. 814, 831 (1974). That decision came during a "bygone era" characterized by a more freewheeling approach to statutory construction. [Citation.] Nor did the decision pause to consider, let alone overrule, any of this Court's pre-existing cases explaining lenity's original and historic scope. Indeed, in the years that followed *Huddleston*, this Court routinely returned to a more traditional understanding. [Citations.] . . .

A second and related misunderstanding has crept into our law. Sometimes, Members of this Court have suggested that we possess the authority to punish individuals under ambiguous laws in light of our own perceptions about some piece of legislative history or the statute's purpose. See, *e.g.*, *Moskal v. United States*, 498 U.S. 103, 109–111 (1990); *United States v. R. L. C.*, 503 U.S. 291, 305 (1992) (plurality opinion). Today's decision seemingly nods in the same direction. In a sentence in Part II–A, the Court says that statutory purpose is one factor a judge may "kee[p] an eye on" when deciding whether to enhance an individual's sentence under the Occasions Clause. The Court then proceeds to discuss the Clause's legislative history at length in Part II–B. It may be that the Court today intends to suggest only that judges may consult legislative history and purpose to limit, never expand, punishment under an ambiguous statute. But even if that's so, why take such a long way around to the place where lenity already stands waiting? The right path is the more straightforward one. Where the traditional tools of statutory interpretation yield no clear answer, the judge's next step isn't to legislative history or the law's unexpressed purposes. The next step is to lenity. . .

At least one more misconception has arisen in recent years. In debating the merits of the rule of lenity, some have treated the rule as an island unto itself—a curiosity unique to criminal cases. But in truth, lenity has long applied outside what we today might call the criminal law.

And it is just one of a number of judicial doctrines that seek to protect fair notice and the separation of powers. Vagueness doctrine and others besides spring from similar aspirations. From time to time and for historically contingent reasons, one or another of these doctrines has come into or gone out of fashion. But narrow one avenue and the same underlying rule-of-law imperatives will eventually find another way to express themselves. None of these doctrines should be artificially divorced from the others; all are worthy of our respect.[6]

IV

The rule of lenity has a critical role to play in cases under the Occasions Clause. The statute contains little guidance, and reasonable doubts about its application will arise often. When they do, they should be resolved in favor of liberty. Today, the Court does not consult lenity's rule, but neither does it forbid lower courts from doing so in doubtful cases. That course is the sound course. Under our rule of law, punishments should never be products of judicial conjecture about this factor or that one. They should come only with the assent of the people's elected representatives and in laws clear enough to supply "fair warning . . . to the world." [Citation.][7]

NOTES AND QUESTIONS

1. Notwithstanding the resort to typical evidence of plain meaning—dictionary definitions and examples of ordinary usage—the majority goes on to discuss the Solicitor General's confession of error in *Petty*, as well as the subsequent Congressional amendment adding the Occasions" Clause. In particular, the majority recalls the unenacted legislative history indicating that the purpose of the amendment was to ensure ACCA's career offender enhancement would be limited in the manner the SG outlined in his brief in *Petty*. How persuasive did you find this evidence in understanding the statutory meaning? Even if you found it persuasive, is there a principled cause for concern with a Court relying on the SG's brief in this manner?

2. As applied here, does the majority's resort to legislative history appear to raise the concerns identified in Justice Barrett's concurrence, namely, that "a few isolated snippets of legislative history" should not be treated as "authoritative evidence of congressional intent"? Why or why not? Do you think courts have the tools to police effectively the opportunistic cherry-picking of legislative history? And is this problem any worse than the cherry-picking of dictionary definitions?

3. In particular, note that here, the majority cites only two dictionaries: *American Heritage*, and *Webster's Third*. Recall David Foster Wallace's discussion of *Webster's Third*'s controversial lexicography from subsection III.C.4, *supra*. In light of that discussion, should Justice Barrett's concern about picking and choose "a few isolated snippets" apply with equal force to dictionary definitions? Why or why not?

4. Justice Kavanaugh suggests the need to prove a *mens rea* element assuages much of the concern motivating the rule of lenity. What was the *mens rea* element to Wooden's Occasions Clause penalty

[6] Justice Kavanaugh does not contest lenity's grounding in our history or its connection to our Constitution's commitments. Nor does he offer any reason to believe the "grievous" ambiguity standard is anything other than a modern phenomenon grounded in dicta. Even so, he insists that lenity should "rarely if ever" apply, because judges " 'will almost always reach a conclusion about the best interpretation' " that resolves ambiguity. I agree that judges sometimes jump too quickly to ambiguity. But doctrines like lenity and *contra proferentem* have played an essential role in our law for centuries, resolving ambiguities where they persist. Likewise, while I agree with Justice Kavanaugh about the importance of the *mens rea* presumption, I do not see it as a substitute for the rule of lenity so much as one instantiation of it. Indeed, this Court has often observed that "requiring *mens rea* is in keeping with our longstanding recognition of" lenity's demands. [Citations.]

[7] A constitutional question simmers beneath the surface of today's case. The Fifth and Sixth Amendments generally require the government in criminal cases to prove every fact essential to an individual's punishment to a jury beyond a reasonable doubt. [Citation.] In this case, however, only judges found the facts relevant to Mr. Wooden's punishment under the Occasions Clause, and they did so under only a preponderance of the evidence standard. Because Mr. Wooden did not raise a constitutional challenge to his sentence, the Court does not consider the propriety of this practice. But there is little doubt we will have to do so soon. . . . And it is hard not to wonder: If a jury must find the facts supporting a punishment under the Occasions Clause beyond a reasonable doubt, how may judges impose a punishment without equal certainty about the law's application to those facts?

enhancement? Did the *mens rea* element help settle the ambiguity that prompted the Court to grant cert in Wooden?

5. Like most sentencing enhancements, the trial court decides whether ACCA's Occasions Clause applies to a given defendant during the sentencing phase. As Justice Gorsuch notes in footnote 7 of his concurrence, this means that no jury has found the defendant guilty "beyond a reasonable doubt" of the specific conduct leading to the enhanced sentence. Does this lower standard of proof alter how persuasive Justice Kavanaugh's rejoinder is?

6. Recall, from the discussion of the Rule of Lenity as an example of a substantive canon in subsection III.A.3.b, *supra*, that the Court has articulated as many as four different versions of the rule of lenity. Justice Gorsuch criticizes the "grievous ambiguity" articulation. Which of the four alternative formulations do you think is most justifiable, and why?

7. The majority looks to how "an ordinary person (a reporter; a police officer; yes, even a lawyer) might describe Wooden's ten burglaries." Here, all such individuals would seem to use the word "occasion" the same way. But in a different case, would it matter if a reporter would understand a term differently than a lawyer? If so, whose understanding should prevail, and why? Consider these questions in light of the next subsection on the role of audience in statutory interpretation.

F. AGENCY INTERPRETATION OF STATUTES

Page 521. Insert after the Questions following *FDA v. Brown & Williamson*

1. LEGISLATING ANSWERS TO MAJOR QUESTIONS

The "*Chevron* 'step zero' analysis" described in the note on main Casebook page 521, preceding *FDA v. Brown & Williamson*, has evolved into a predicate inquiry known as the "major questions doctrine." How clear and specific must Congress's delegation be for the agency to warrant *Chevron* deference for its interpretations of the statute? And if the nature of the delegation itself remains ambiguous, who should prevail when the agency and the courts disagree about the statute's meaning? What if the agency's desired regulatory ambit seems to exceed the statutory delegation altogether? To resolve this question, the Supreme Court has, along with the "major questions" doctrine, invoked the related "Elephants in Mouseholes" quasi-canon:

> The [major questions] approach aims to address a long-standing challenge for courts—determining whether and to what degree Congress intended to delegate authority to federal agencies. Although the challenge is long-standing, the role of the major questions doctrine in addressing the challenge remains uncertain. . . .
>
> A 1986 law review article by then-First Circuit Judge Stephen Breyer examining the judicial deference and statutory interpretation in the aftermath of *Chevron* is credited as one of the early sources contributing to the development of the current major questions doctrine. Breyer, writing in the immediate aftermath of *Chevron*, noted the tension between expecting federal judges to allow agencies to tackle complex problems, such as protecting public health and the environment on the one hand and the need for vigilant judicial oversight to ensure that administrators do not "exercise their broad powers [in a manner that] lead[s] to unwise policies or unfair or oppressive behavior" on the other. Breyer predicted that the doctrine calling for these conflicting judicial roles was "inherently unstable and likely to change." Attempting to reconcile the competing signals, Breyer concluded that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." . . .
>
> The Court explicitly articulated the major questions doctrine in *Brown & Williamson*, citing . . . Breyer's 1986 article. . . . Breyer dissented, contradicting his 1986 article by arguing that tobacco regulation is such a major political question that it is appropriately addressed by one of the politically-accountable branches—whether it be Congress or the

> Executive Branch—rather than the courts. Breyer reasoned that the public was well aware of such a controversial issue as tobacco use, and therefore the check on agency authority would come in the form of elections.
>
> While Whitman v. American Trucking Ass'n[, 531 U.S. 457 (2001),] did not directly invoke the "major political and economic significance" language of *Brown & Williamson*, the holding articulated a similar standard under the *Chevron* doctrine: Congress does not "hide elephants in mouseholes." Evaluating whether the EPA could consider the costs of implementing National Ambient Air Quality Standards (NAAQS) under § 109(b)(1) of the Clear Air Act (CAA), the Court started with the section's plain language, which "instructs the EPA to set primary ambient air quality standards 'the attainment and maintenance of which . . . are requisite to protect the public health' with 'an adequate margin of safety.' " Relying on § 109 and the broader context of the NAAQS provisions, the Court noted the EPA's statutory mandate to "identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an 'adequate' margin of safety, and set the standard at that level" does not include consideration of "the costs of achieving such a standard [as] part of that initial calculation." Furthermore, numerous other sections of the CAA contained express grants of authorization that permit the EPA to consider costs. Citing *MCI*, the Court "[found] it implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards."
>
> Five years after *American Trucking*, the Court again applied the major questions doctrine in a case considering whether the Controlled Substances Act allows the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure. . . .

Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 Admin. L. Rev. 445 (2016).

Prior to the appointment of Justice Barrett at the start of the Supreme Court's October Term 2020, the Court had only infrequently applied what is called the major questions doctrine. In the last year, however, the Court has appeared to apply the doctrine on no less than three occasions.

First, in *Alabama Association of Realtors v. Department of Health and Human Services*, decided on the Court's emergency docket (often referred to as the "shadow docket") without argument, a *per curiam* Court struck down the Centers for Disease Control and Prevention's (CDC) nationwide moratorium on evictions of any tenants who live in a county that was experiencing substantial or high levels of COVID-19 transmission and who make certain declarations of financial need. See 86 Fed. Reg. 43244 (2021). The *per curiam* concluded that it "strains credulity to believe that [42 U.S.C. § 264(a)] grants the CDC the sweeping authority that it asserts." That section reads in relevant part:

> The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.
>
> For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

Citing *FDA v. Brown & Williamson Tobacco Corp.*, the *per curiam* concluded that "even if the text were ambiguous, the sheer scope of the CDC's claimed authority under §361(a) would

counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.' That is exactly the kind of power that the CDC claims here. At least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls within the moratorium."

In dissent, Justice Breyer, joined by Justice Sotomayor and Justice Kagan, contested the *per curiam*'s interpretation:

> The statute's first sentence grants the CDC authority to design measures that, in the agency's judgment, are essential to contain disease outbreaks. The provision's plain meaning includes eviction moratoria necessary to stop the spread of diseases like COVID–19. When Congress enacted [the provision in question], public health agencies intervened in the housing market by regulation, including eviction moratoria, to contain infection by preventing the movement of people. See, e.g., *5,589 New Cases in One Day Break Influenza Record*, N. Y. Times, Jan. 29, 1920, section 1, pp. 1–2, col. 1 ("'[T]he Health Department . . . instruct[s] all landlords that no person suffering from [influenza and pneumonia] can be removed under any condition whatever without the sanction of the Health Department . . . '"). If Congress had meant to exclude these types of measures from its broad grant of authority, it likely would have said so.

Thus, while the *per curiam* did not expressly invoke the major questions doctrine by name, its rationale played a role in both the *per curiam*'s decision and the dissent's objection to its interpretation of the statute in question.

Six months later, in *National Federal of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, the Court, also by *per curiam*, struck down the Occupational Safety and Health Administration's (OSHA) vaccine or test mandate requiring all covered worked to receive a COVID-19 vaccine or obtain a medical test each week and wear a mask each workday. At issue was the Occupational Safety and Health Act of 1970, which permits the Secretary of Labor to enforce occupational safety and health standards "reasonably necessary or appropriate to provide safe or healthful employment." 29 U.S.C. § 652(8). Although the statute typically requires ordinary notice and comment rulemaking pursuant to the APA, it provides an exception for "emergency temporary standards" where "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" where the emergency standard "is necessary to protect employees from such danger." § 655(c)(1).

Once again, the *per curiam* did not expressly cite the major questions doctrine, but it applied the major questions rationale first articulate in *Brown & Williamson* and quoted in *Alabama Association of Realtors*:

> This is no 'everyday exercise of federal power.' [Citation.] It is instead a significant encroachment into the lives—and health—of a vast number of employees. 'We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.'" *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (per curiam) (slip op., at 6) (internal quotation marks omitted). There can be little doubt that OSHA's mandate qualifies as an exercise of such authority. The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set workplace safety standards, not broad public health measures.

In a concurrence joined by Justice Thomas and Justice Alito, Justice Gorsuch said the quiet part out loud:

> "We expect Congress to speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance." *Alabama Assn. of Realtors*. We

> sometimes call this the major questions doctrine. [Citation.] OSHA's mandate fails that doctrine's test.

In a joint dissent, Justice Breyer, Justice Sotomayor, and Justice Kagan took issue with the fact that

> [t]he Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard. In other words, the majority does not contest that COVID–19 is a "new hazard" and "physically harmful agent"; that it poses a "grave danger" to employees; or that a testing and masking or vaccination policy is "necessary" to prevent those harms. Instead, the majority claims that the Act does not "plainly authorize[]" the Standard because it gives OSHA the power to "set workplace safety standards" and COVID–19 exists both inside and outside the workplace. In other words, the Court argues that OSHA cannot keep workplaces safe from COVID–19 because the agency (as it readily acknowledges) has no power to address the disease outside the work setting. But nothing in the Act's text supports the majority's limitation on OSHA's regulatory authority. Of course, the majority is correct that OSHA is not a roving public health regulator. It has power only to protect employees from workplace hazards. But as just explained, that is exactly what the Standard does.

Thus, although neither *per curiam* expressly invoked the major questions doctrine by name, the rationale motivating the doctrine was central to both decisions. Meanwhile, the possibility of *Chevron* deference was not considered by either *per curiam* or dissent—indeed, *Chevron* was not cited once by either set of opinions.

A few months later, the same six-Justice majority solidified the emergence of the major questions doctrine in *West Virginia v. EPA*. As you read the following decision, consider how you (or how judges) would know whether the issue to be adjudicated poses a "major question" preempting a *Chevron* inquiry, or whether the matter implicates only a normal, garden-variety question, to which *Chevron* analysis would apply (at least in theory).

West Virginia, et al. v. Environmental Protection Agency, et al.

Supreme Court of the United States, 2022
No. 20-1530, No. 20-1531, No. 20-1778, No. 20-1780

■ CHIEF JUSTICE ROBERTS delivered the opinion of the Court[, joined by JUSTICE THOMAS, JUSTICE ALITO, JUSTICE GORSUCH, JUSTICE KAVANAUGH, and JUSTICE BARRETT].

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. Clean Air Amendments of 1970, 84 Stat. 1676, 42 U. S. C. § 7401 *et seq.* 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, set out in Sections 108 through 110 of the Act, 42 U. S. C. §§ 7408–7410, and the Hazardous Air Pollutants (HAP) program, set out in Section 112, § 7412. 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." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 465 (2001); see § 7409(b). 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." *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 65 (1975); § 7410.

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).

Thus, in the parlance of environmental law, Section 112 directs the Agency to impose "*technology-based* standard[s] for hazardous emissions,"[citation]. This sort of " 'technology-based' approach focuses upon the control technologies that are available to industrial entities and requires the agency to ... ensur[e] that regulated firms adopt the appropriate cleanup technology." [Citation.] Such "technologies" are not limited to literal technology, such as scrubbers; "changes in the design and operation" of the facility, or "in the way that employees perform their tasks," are also available options. [Citation.]

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. *Ibid.*; see also 80 Fed. Reg. 64538 (2015). 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. § 7411(a)(1); see § 7411(b)(5). . . . .

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. [Citation.]

Although the States set the actual rules governing existing power plants, EPA itself still retains the primary regulatory role in Section 111(d). The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved. . . . . The States then submit plans containing the emissions restrictions that they intend to adopt and enforce in order not to exceed the permissible level of pollution established by EPA. [Citation.]

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." [Citation.]

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. [Citation.] 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. [Citation.] 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. [Citation.] EPA then set the emissions limit based on the amount of carbon dioxide that a plant would emit with these technologies in place. [Citation.]

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. [Citation.] 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. . . .

. . . [T]he 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. 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[ ] CO_2 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 CO_2 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." 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. [Citation.]

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. . . .

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. [Citation.] 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. [Citation.]

C

These projections were never tested, because the Clean Power Plan never went into effect. The same day that EPA promulgated the rule, dozens of parties (including 27 States) petitioned for review in the D. C. Circuit. After that court declined to enter a stay of the rule, the challengers sought the same relief from this Court. We granted a stay, preventing the rule from taking effect. [Citation.] The Court of Appeals later heard argument on the merits en banc. But before it could issue a decision, there was a change in Presidential administrations. The new administration requested that the litigation be held in abeyance so that EPA could reconsider the Clean Power Plan. The D. C. Circuit obliged, and later dismissed the petitions for review as moot.

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). [Citation.] 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."

The Agency determined that "the interpretative question raised" by the Clean Power Plan—"*i.e.*, whether a 'system of emission reduction' can consist of generation-shifting measures"—fell under the "major question doctrine." Under that doctrine, EPA explained, courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." [Citation.] The Agency concluded that the Clean Power Plan was such a decision, for a number of reasons. Its "generation-shifting scheme was projected to have billions of dollars of impact." "[N]o section 111 rule of the scores issued ha[d] ever been based on generation shifting." And that novel reading of the statute would empower EPA "to order the wholesale restructuring of any industrial sector" based only on its discretionary assessment of "such factors as 'cost' and 'feasibility.'"

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. . . .

In the same rulemaking, the Agency replaced the Clean Power Plan by promulgating a different Section 111(d) regulation, known as the Affordable Clean Energy (ACE) Rule. Based on its view of what measures may permissibly make up the BSER, EPA determined that the best system would be akin to building block one of the Clean Power Plan: a combination of equipment

upgrades and operating practices that would improve facilities' heat rates. The ACE Rule determined that the application of its BSER measures would result in only small reductions in carbon dioxide emissions.

D

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 and its enactment of the replacement ACE Rule. Other States and private entities—including petitioners here West Virginia, North Dakota, Westmoreland Mining Holdings LLC, and The North American Coal Corporation (NACC)—intervened to defend both actions.

The Court of Appeals consolidated all 12 petitions for review into one case. It then held that EPA's "repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act"—namely, that generation shifting cannot be a "system of emission reduction" under Section 111. [Citation.] To the contrary, the court concluded, 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. It also vacated and remanded the replacement rule, the ACE Rule, for the same reason.

The court's decision, handed down on January 19, 2021, was quickly followed by another change in Presidential administrations. One month later, EPA moved the Court of Appeals to partially stay the issuance of its mandate as it pertained to the Clean Power Plan. The Agency did so to ensure that the Clean Power Plan would not immediately go back into effect. [Citation.] EPA believed that such a result would not make sense while it was in the process of considering whether to promulgate a new Section 111(d) rule. *Ibid*. No party opposed the motion, and the court accordingly stayed its vacatur of the Agency's repeal of the Clean Power Plan.

Westmoreland, NACC, and the States defending the repeal of the Clean Power Plan all filed petitions for certiorari. We granted the petitions and consolidated the cases. [Citation.]

II

[The Court's conclusion that plaintiffs have standing to sue and the case does not satisfy the Court's mootness doctrine has been omitted.]

III

A

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." 42 U. S. C. § 7411(a)(1). The Agency then quantifies "the degree of emission limitation achievable" if that best system were applied to the covered source. [Citation.] The BSER, therefore, "is the central determination that the EPA must make in formulating [its emission] guidelines" under Section 111. 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." [Citation.] 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. [Citation.]

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. [Citation.] 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." [Citation.] In *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ——, ——, 141 S.Ct. 2485, 2487 (2021) (*per curiam*), 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. [Citation.]

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. [Citation.] 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. [Citation.] We declined to uphold EPA's claim of "unheralded" regulatory power over "a significant portion of the American economy." [Citation.] 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," 21 U. S. C. § 823(f). We considered the "idea that Congress gave [him] such broad and unusual authority through an implicit delegation . . . not sustainable." [Citation.] 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. ——, ——, 142 S.Ct. 661, 665 (2022) (*per curiam*). 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. [Citation.]

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. 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, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." [Citation.] We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." [Citation.]

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*, 573 U.S. at 324. 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. [Citation.]

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*, [citation,] 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. [Citation.] Or, as we put it more recently, we "typically greet" assertions of "extravagant statutory power over the national economy" with "skepticism." *Utility Air*, 573 U.S. at 324. The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of "clear congressional authorization," [citation]—confirms that the approach under the major questions doctrine is distinct.

As for the major questions doctrine "label[ ]," [citation,] 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. See *Utility Air*, 573 U.S. at 324 (citing *Brown & Williamson* and *MCI*); *King v. Burwell*, 576 U.S. 473, 486 (2015) (citing *Utility Air*, *Brown & Williamson*, and *Gonzales*).

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." *Utility Air*, 573 U.S. at 324. It located that newfound power in the vague language of an "ancillary provision[ ]" of the Act, *Whitman*, 531 U.S. at 468, 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. [Citations.] 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). *Brown & Williamson*, 529 U.S. at 159–160.

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. [Citation.] (requiring "degree of control achievable through the application of fiber mist eliminators"); [Citation.] 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." [Citation.] . . . .

The Government quibbles with this description of the history of Section 111(d), pointing to one rule that it says relied upon a cap-and-trade mechanism to reduce emissions. [Citation.] (Mercury Rule). The legality of that choice was controversial at the time and was never addressed by a court. [Citation.] Even assuming the Rule was valid, though, it still does not help the Government. In that regulation, EPA set the actual "emission cap"—*i.e.*, the limit on emissions that sources would be required to meet—"based on the level of [mercury] emissions reductions that w[ould] be achievable by" the use of "technologies [that could be] installed and operational on a nationwide basis" in the relevant timeframe—namely, wet scrubbers. [Citation.] In other words, EPA set the cap based on the application of particular controls, and regulated sources could have complied by installing them. By contrast, and by design, there is no control a coal plant operator can deploy to attain the emissions limits established by the Clean Power Plan. [Citation.] The Mercury Rule, therefore, is no precedent for the Clean Power Plan. To the contrary, it was

one more entry in an unbroken list of prior Section 111 rules that devised the enforceable emissions limit by determining the best control mechanisms available for the source. . . ,

This consistent understanding of "system[s] of emission reduction" tracked the seemingly universal view, as stated by EPA in its inaugural Section 111(d) rulemaking, that "Congress intended a technology-based approach" to regulation in that Section. [Citation.] ("degree of control to be reflected in EPA's emission guidelines" will be based on "application of best adequately demonstrated control technology"). . . . A technology-based standard, recall, is one that focuses on improving the emissions performance of individual sources. EPA "commonly referred to" the "level of control" required as a "best demonstrated technology (BDT)" standard, [citation.] and consistently applied it as such. [Citation.] . . .

[T]he Agency [has] explained, in order to "control[ ] CO_2 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." [Citation.] "The quantity of emissions reductions resulting from the application of these measures" would have been "too small." [Citation.] Instead, to attain the necessary "critical CO_2 reductions," EPA adopted what it called a "broader, forward-thinking approach to the design" of Section 111 regulations. [Citation.] . . .

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 its newly "discover[ed]" authority, [citation,] 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. . . .

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." [Citation.] "When [an] agency has no comparative expertise" in making certain policy judgments, we have said, "Congress presumably would not" task it with doing so. [Citation.]

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. [Citation.] The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself. [Citation.] 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).

The dissent contends that there is nothing surprising about EPA dictating the optimal mix of energy sources nationwide, since that sort of mandate will reduce air pollution from power plants, which is EPA's bread and butter. [Citation.] But that does not follow. Forbidding evictions may slow the spread of disease, but the CDC's ordering such a measure certainly "raise[s] an eyebrow." [Citation.] We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration. And no one would consider generation shifting a "tool" in OSHA's "toolbox," [citation,] even though reducing generation at coal plants would reduce workplace illness and injury from coal dust. . . .

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. . . .

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. [Citation.]

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." 42 U. S. C. § 7411(a)(1). As a matter of "definitional possibilities," *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011), generation shifting can be described as a "system"—"an aggregation or assemblage of objects united by some form of regular interaction," [citation,]—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 Government, echoed by the other respondents, looks to other provisions of the Clean Air Act for support. It points out that the Act elsewhere uses the word "system" or "similar words" to describe cap-and-trade schemes or other sector-wide mechanisms for reducing pollution. [Citation.] The Acid Rain program set out in Title IV of the Act establishes a cap-and-trade scheme for reducing sulfur dioxide emissions, which the statute refers to as an "emission allocation and transfer *system*." § 7651(b) (emphasis added). And Section 110 of the NAAQS program specifies that "marketable permits" and "auctions of emissions rights" qualify as "control measures, means, or techniques" that States may adopt in their state implementation plans in order "to meet the applicable requirements of " a NAAQS. § 7410(a)(2)(A). If the word "system" or similar words like "technique" or "means" can encompass cap-and-trade, the Government maintains, why not in Section 111?

But just because a cap-and-trade "system" can be used to reduce emissions does not mean that it is the kind of "system of emission reduction" referred to in Section 111. Indeed, the Government's examples demonstrate why it is not.

First, unlike Section 111, the Acid Rain and NAAQS programs contemplate trading systems as a means of *complying* with an *already established emissions limit*, set either directly by Congress (as with Acid Rain, see 42 U. S. C. § 7651c) or by reference to the safe concentration of the pollutant in the ambient air (as with the NAAQS). . . .

Second, Congress added the above authorizations for the use of emissions trading programs in 1990, simultaneous with amending Section 111 to its present form. At the time, cap-and-trade was a novel and highly touted concept. The Acid Rain program was "the nation's first-ever emissions trading program." [Citation.] And Congress went out of its way to amend the NAAQS statute to make absolutely clear that the "measures, means, [and] techniques" States could use to meet the NAAQS included cap-and-trade. § 7410(a)(2)(A). Yet "not a peep was heard from Congress about the possibility that a trading regime could be installed under § 111." [Citation.]

Finally, the Government notes that other parts of the Clean Air Act, past and present, have "explicitly limited the permissible components of a particular 'system' " of emission reduction in some regard. . . . The comparatively unadorned use of the phrase "best system of emission reduction" in Section 111, the Government urges, "suggest[s] a conscious congressional" choice *not* to limit the measures that may constitute the BSER to those applicable at or to an individual source. [Citation.]

These arguments, however, concern an interpretive question that is not at issue. We have no occasion to decide whether the statutory phrase "system of emission reduction" refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER. To be sure, it is pertinent to our analysis that EPA has acted consistent with such a limitation for the first four decades of the statute's existence.

But the only interpretive question before us, and the only one we answer, is more narrow: whether the "best system of emission reduction" identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no.

* * *

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." [Citation.] 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. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

■ JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

To resolve today's case the Court invokes the major questions doctrine. Under that doctrine's terms, administrative agencies must be able to point to " 'clear congressional authorization' " when they claim the power to make decisions of vast " 'economic and political significance.' " [Citation.] Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees. I join the Court's opinion and write to offer some additional observations about the doctrine on which it rests. . . .

With the explosive growth of the administrative state since 1970, the major questions doctrine soon took on special importance. . . . In 1980, this Court held it "unreasonable to assume" that Congress gave an agency "unprecedented power[s]" in the "absence of a clear [legislative] mandate." [Citation.] 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[Citation.] In fact, this Court applied the major questions doctrine in "all corners of the administrative state," whether the issue at hand involved an agency's asserted power to regulate tobacco products, ban drugs used in physician-assisted suicide, extend Clean Air Act regulations to private homes, impose an eviction moratorium, or enforce a vaccine mandate. [Citations.]

The Court has applied the major questions doctrine for the same reason it has applied other similar clear-statement rules—to ensure that the government does "not inadvertently cross constitutional lines." [Citation. . . The major questions doctrine seeks to protect against "unintentional, oblique, or otherwise unlikely" intrusions on these interests. [Citation.] The doctrine does so by ensuring that, when agencies seek to resolve major questions, they at least act with clear congressional authorization and do not "exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond" those the people's representatives actually conferred on them. [Citation.] As the Court aptly summarizes it today, the doctrine addresses "a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." [Citation.] . . .

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," [citation], or end an "earnest and profound debate across the country," [Citation.] So, for example, in *Gonzales*, the Court found that the doctrine applied when the Attorney General issued a regulation that would have effectively banned most forms of physician-assisted suicide even as certain States were considering whether to permit the practice. [Citation.] And in *NFIB* v. *OSHA*, the Court held the doctrine applied when an agency sought to mandate COVID–19 vaccines nationwide for most workers at a time when Congress and state legislatures were engaged in robust debates over vaccine mandates. [Citation.] Relatedly, this Court has found it telling when Congress has " 'considered and rejected' " bills authorizing something akin to the agency's proposed course of action. [Citation.] That too may be a sign that an agency is attempting to " 'work [a]round' " the legislative process to resolve for itself a question of great political significance.[4]

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,' " [citation,] (quoting *Utility Air*, 573 U.S. at 324), or require "billions of dollars in spending" by private persons or entities, *King v. Burwell*, 576 U.S. 473, 485 (2015). The Court has held that regulating tobacco products, eliminating rate regulation in the telecommunications industry, subjecting private homes to Clean Air Act restrictions, and suspending local housing laws and regulations can sometimes check this box. [Citations.]

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." [Citation.] 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." [Citation.] But unsurprisingly, the major questions doctrine and the federalism canon often travel together. When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States. [Citation.]

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. 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. [Citation.] And so far it has "conspicuously and repeatedly declined" to adopt legislation similar to the Clean Power Plan (CPP). [Citation.] It seems that fact has frustrated the Executive Branch and led it to attempt its own regulatory solution in the CPP. [Citation.]

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." [Citation.] . . . 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.

[4] In the dissent's view, the Court has erred both today and in the past by pointing to failed legislation. But the Court has not pointed to failed legislation to resolve what a duly enacted statutory text means, only to help resolve the antecedent question whether the agency's challenged action implicates a major question. The dissent endorses looking to extrinsic evidence to resolve that question too. [Citation] (discussing whether there is a "mismatch" between an agency's expertise and its challenged action).

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.' " [Citation.] "[O]blique or elliptical language" will not supply a clear statement. [Citation.] Nor may agencies seek to hide "elephants in mouseholes," [citation], or rely on "gap filler" provisions, [citation]. . . .

Second, courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address. As the Court puts it today, it is unlikely that Congress will make an "[e]xtraordinary gran[t] of regulatory authority" through "vague language" in " 'a long-extant statute.' " [Citation.] . . .

Third, courts may examine the agency's past interpretations of the relevant statute. [Citation.] 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. [Citation.] Conversely, in *NFIB* v. *OSHA*, the Court found it "telling that OSHA, in its half century of existence, ha[d] never before adopted a broad public health regulation" under the statute that the agency sought to invoke as authority for a nationwide vaccine mandate. [Citation]; see also *Brown & Williamson* (noting that for decades the FDA had said it lacked statutory power to regulate cigarettes). As the Court states today, " 'the want of [an] assertion of power by those who presumably would be alert' " to it is " 'significant in determining whether such power was actually conferred.' " When an agency claims to have found a previously "unheralded power," its assertion generally warrants "a measure of skepticism." [Citation.]

Fourth, skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise. [Citation.] As the Court explains, "[w]hen an agency has no comparative expertise in making certain policy judgments, . . . Congress presumably would not task it with doing so." *Ibid.* (internal quotation marks and alterations omitted). So, for example, in *Alabama Assn. of Realtors*, this Court rejected an attempt by a public health agency to regulate housing[Citation.] And in *NFIB* v. *OSHA*, the Court rejected an effort by a workplace safety agency to ordain "broad public health measures" that "f[ell] outside [its] sphere of expertise." [Citation.] [5]

Asking these questions again yields a clear answer in our case. [Citation.] As the Court details, the agency before us cites no specific statutory authority allowing it to transform the Nation's electrical power supply. . . . 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." . . .

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." [Citation.] Because today's decision helps safeguard that foundational constitutional promise, I am pleased to concur.

[5] The dissent not only agrees that a mismatch between an agency's expertise and its challenged action is relevant to the major questions doctrine analysis; the dissent suggests that such a mismatch is necessary to the doctrine's application. [Citation.] But this Court has never taken that view. [Citations.]

■ 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." [Citation.] 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. [Citation]. 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." [Citation.] If the current rate of emissions continues, children born this year could live to see parts of the Eastern seaboard swallowed by the ocean. [Citation.] Rising waters, scorching heat, and other severe weather conditions could force "mass migration events[,] political crises, civil unrest," and "even state failure." [Citation.] And by the end of this century, climate change could be the cause of "4.6 million excess yearly deaths." [Citation.]

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. [Citation.] 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[Citation.] 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. [Citation.] . . .

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. [Citation.] The effect of the Court's order, followed by the Trump administration's repeal of the rule, was that the Clean Power Plan never went into effect. The ensuing years, though, proved the Plan's moderation. Market forces alone caused the power industry to meet the Plan's nationwide emissions target—through exactly the kinds of generation shifting the Plan contemplated. [Citation.] So by the time yet another President took office, the Plan had become, as a practical matter, obsolete. For that reason, the 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 Court may be right that doing so does not violate Article III mootness rules (which are notoriously strict). But the Court's docket is discretionary, and because no one is now subject to the Clean Power Plan's terms, there was no reason to reach out to decide this case. The Court today issues what is really an advisory opinion on the proper scope of the new rule EPA is considering. That new rule will be subject anyway to

immediate, pre-enforcement judicial review. But this Court could not wait—even to see what the new rule says—to constrain EPA's efforts to address climate change.

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. . . . The Act, as the majority describes, established three major regulatory programs to control air pollution from stationary sources like power plants. The National Ambient Air Quality Standards (NAAQS) and Hazardous Air Pollutants (HAP) programs prescribe standards for specified pollutants, not including carbon dioxide. Section 111's New Source Performance Standards program provides an additional tool for regulating emissions from categories of stationary sources deemed to contribute significantly to pollution. As applied to existing (not new) sources, the program mandates—via Section 111(d)—that EPA set emissions levels for pollutants not covered by the NAAQS or HAP programs, including carbon dioxide.

Section 111(d) thus 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: As the Senate Report explained, Section 111(d) guarantees that "there should be no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." [Citation.] Reflecting that language, the majority calls Section 111(d) a "gap-filler." [Citation.] It might also be thought of as a backstop or catch-all provision, protecting against pollutants that the NAAQS and HAP programs let go by. But the section is *not*, as the majority further claims, an "ancillary provision" or a statutory "backwater." [Citation.] That characterization is a non-sequitur. That something is a backstop does not make it a backwater. Even if they are needed only infrequently, [citation,] 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 for the relevant source (here, fossil-fuel-fired power plants) and the relevant pollutant (here, carbon dioxide) an emission level—more particularly, "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). The majority complains that a similar definition—cited to the Solicitor General's brief but originally from another dictionary—is just too darn broad. [Citation.] "[A]lmost anything" capable of reducing emissions, the majority says, "could constitute such a 'system' " of emission reduction. [Citation.] But that is rather the point. Congress used an obviously broad word (though surrounding it with constraints, 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. [Citation.] 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." [Citation.] Another of this Court's opinions, involving a matter other than the bogeyman of environmental regulation, might have stopped there.

For generation 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." [Citation.] Does that sound like a "system" to you? It does to me too. And it also has to this Court. In the past, we have explained that "[t]his type of 'cap-and-trade' *system* cuts costs while still reducing pollution to target levels." [Citation.] So what does the majority mean when it says that "[a]s a matter of definitional *possibilities*, generation shifting *can* be described as a 'system' "? [Citation.] Rarely has a statutory term so clearly applied. . . .

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. [Citation.] 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. See, *e.g.*, §§ 7411(h), 7511a(c)(7), 7651f(b)(2). None of those provisions would allow EPA to set emissions limits based on generation shifting, as the Agency

acknowledges. [Citation.] 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." [Citation.]

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)." [Citation.] The Report did not further explain the distinction. But presumably Congress gave EPA more flexibility over existing plants because imposing technological controls on old facilities is often not cost-effective. . . . Thirteen years later, Congress followed up by deleting from Section 111 the technological limitation applying to new facilities. See Clean Air Act Amendments of 1990, 403(a), 104 Stat. 2631. Once again, then, Congress faced a choice: confine EPA to technological controls, or not. And replicating its earlier action for existing sources, Congress chose not.

The majority breezes past that congressional choice on the ground that today's opinion does not resolve whether EPA can regulate in some non-technological ways; instead, the opinion says only that the Clean Power Plan goes too far. [Citation.] That is a puzzling point. As an initial matter, it recharacterizes what this case has always been about. The Trump administration repealed the Clean Power Plan for one central reason: because (in its view) Section 111 confines EPA to facility-specific, technological measures. [Citation.] In reviewing that repeal, the court below thus addressed that limit alone. [Citation.] So add to the oddity of the Court's declaring a defunct regulation unlawful, the irregularity of its suggesting some kind of non-technological limit that no one (not EPA, not the parties, not the court below) has ever considered. More important here, both the nature and the statutory basis of that limit are left a mystery. If the majority is not distinguishing between technological controls and all others, what is it doing—and how far does its opinion constrain EPA? The majority makes no effort to say. And because that is so, the majority cannot even attempt to ground its limit in the statutory language. I've just shown that restricting EPA to technological controls is inconsistent with Section 111, especially when read in conjunction with other statutory provisions. And the majority provides no reason to think that its (possibly) different limit fares any better. Section 111 does not impose *any* constraints—technological or otherwise—on EPA's authority to regulate stationary sources (except for those stated, like cost). In somehow (and to some extent) saying otherwise, the majority flouts the statutory text.

"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. It knew that "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." *Massachusetts*, 549 U.S. at 532. . . . And when Congress uses "expansive language" to authorize agency action, courts generally may not "impos[e] limits on [the] agency's discretion." [Citation.] That constraint on judicial authority—that insistence on judicial modesty—should resolve this case.

II

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. [Citation.] The majority labels that view the "major questions doctrine," and claims to find support for it in our caselaw. [Citation.] 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. That the Plan addresses major issues of public policy does not upend the analysis. Congress wanted EPA to do just that. Section 111 entrusts important matters to EPA in the expectation that the Agency will use that authority to combat pollution—and that courts will not interfere.

A

"[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." [Citation.] 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." *Brown & Williamson*, 529 U.S. at 133. Assume that a policy decision, like this one, is a matter of significant "economic and political magnitude." *Ibid.* We know that Congress delegates such decisions to agencies all the time—and often via broadly framed provisions like Section 111. [Citation.] 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. [Citation.] In particular, we have understood, Congress does not usually grant agencies the authority to decide significant issues on which they have no particular expertise. So when there is a mismatch between the agency's usual portfolio and a given assertion of power, courts have reason to question whether Congress intended a delegation to go so far.

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. [Citation.] 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[ ]." [Citation.] 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. [Citation.] 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 common-sense awareness of how Congress delegates, authorize the agency action here?

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 looked to the text of a delegation. It has

addressed how an agency's view of that text works—or fails to do so—in the context of a broader statutory scheme. And it has asked, in a common-sensical (or call it purposive) vein, about what Congress would have made of the agency's view—otherwise said, whether Congress would naturally have delegated authority over some important question to the agency, given its expertise and experience. In short, in assessing the scope of a delegation, the Court 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. [Citation.] 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. [Citation.]So FDA would have had to reinterpret what it meant to be "safe," or else ban tobacco products altogether. [Citation.]Both options, the Court thought, were preposterous. Until the agency action at issue, tobacco products hadn't been spoken of in the same breath as pharmaceuticals (FDA's paradigmatic regulated product). And Congress had created in several statutes a "distinct regulatory scheme" for tobacco, not involving FDA. [Citation.] So all the evidence was that Congress had never meant for FDA to have any—let alone total—control over the tobacco industry, with its "unique political history[Citation.] Again, there was "simply" a lack of "fit" between the regulation at issue, the agency in question, and the broader statutory scheme. [Citation.]

The majority's effort to find support in *Brown & Williamson* for its interpretive approach fails. [Citation.] It may be helpful here to quote the full sentence that the majority quotes half of. "In extraordinary cases," the Court stated, "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." [Citation.] For anyone familiar with this Court's *Chevron* doctrine, that language 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. [Citation.] And what was that reason? The Court went on to explain that it would not defer to FDA because it read the relevant statutory provisions as negating the agency's claimed authority. [Citation] ("[W]e are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power"); [citation] (finding at *Chevron*'s first step that "Congress has directly spoken to the issue here and precluded the FDA's" asserted power). 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. [Citation.] *That* is how courts are to decide, in the majority's language, whether an agency has asserted a "highly consequential power beyond what Congress could reasonably be understood to have granted." [Citation.]

The Court has applied the same kind of analysis in subsequent cases—holding in each that an agency exceeded the scope of a broadly framed delegation when it operated outside the sphere of its expertise, in a way that warped the statutory text or structure. In *Gonzales v. Oregon* (2006), we rejected the Attorney General's assertion of authority (under a broad "public interest" standard) to rescind doctors' registrations for facilitating assisted suicide, even in States where doing so was legal. [Citation.] We doubted Congress would have delegated such a "quintessentially medical judgment[ ]" to "an executive official who lacks medical expertise." [Citation.] And we pointed to statutory provisions in which Congress—in opposition to the claimed

power—had "painstakingly described the Attorney General's limited authority" to deregister physicians. [Citation.][3]

Later, in *Utility Air Regulatory Group v. EPA* (2014), the Court relied on similar reasoning to reject EPA's efforts to regulate "millions of small" and previously unregulated sources of emissions—"including retail stores, offices, apartment buildings, shopping centers, schools, and churches." [Citation.] 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." [Citation.] The Court explained that allowing the agency action to proceed would necessitate the "rewriting" of other "unambiguous statutory terms"—indeed, of "precise numerical thresholds." [Citation.] (In quoting one cryptic sentence of *Utility Air* as supporting its new approach, the majority ignores the nine preceding pages of analysis of the statute's text and context.)

And last Term, the Court concluded that the Centers for Disease Control and Prevention (CDC) lacked the power to impose a nationwide eviction moratorium. *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.* (2021). The Court held that other statutory language made it a "stretch" to read the relied-on delegation as covering the CDC's action. [Citation.] And 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." [Citation.]

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. . . .

B

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. [Citation.] But that is wrong. . . .

Consider the Clean Power Plan's component parts—let's call them the what, who, and how—to see the rule's normalcy. The "what" is the subject matter of the Plan: carbon dioxide emissions. This Court has already found that those emissions fall within EPA's domain. We said then: "[T]here is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter." *Massachusetts*, 549 U.S. at 531. 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. In *Utility Air*, we thought EPA's regulation of churches and schools highly unusual. [Citation.] But fossil-fuel-fired plants? Those plants pollute—a lot—and so they have long lived under the watchful eye of EPA. That was true even before EPA began regulating carbon dioxide. [Citation.]

[3] Similarly, in *King v. Burwell* (2015), we relied on *Brown & Williamson* in declining to defer to the Internal Revenue Service's construction of the Affordable Care Act. We thought it highly "unlikely that Congress would have delegated" an important decision about healthcare pricing to an agency with "no expertise in crafting health insurance policy." [Citation.]

Finally, the "how" of generation shifting creates no mismatch with EPA's expertise. 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. [Citation.] 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." [Citation.] The majority cannot contest that point frontally: It knows that cap and trade and similar mechanisms are an ordinary part of modern environmental regulation. Instead, the majority protests that Congress would not have wanted EPA to "dictat[e]," through generation shifting, the "mix of energy sources nationwide." [Citation.] 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. That result follows because regulations affect costs, and the electrical grid works by taking up energy from low-cost providers before high-cost ones. Consider an example: Suppose EPA requires coal-fired plants to use carbon-capture technology. That action increases those plants' costs, and automatically (by virtue of the way the grid operates) reduces their share of the electricity market. So EPA is always controlling the mix of energy sources. In that sense (though the term has taken on a more specialized meaning), everything EPA does is "generation shifting." The majority's idea that EPA has no warrant to direct such a shift just indicates that courts sometimes do not really get regulation. . . .

Why, then, be "skeptic[al]" of EPA's exercise of authority? [Citation.] When there is no misfit, of the kind apparent in our precedents, between the regulation, the agency, and the statutory design? Although the majority offers a flurry of complaints, they come down in the end to this: The Clean Power Plan is a big new thing, issued under a minor statutory provision. [Citation.] labeling the Plan "transformative" and "unprecedented" and calling Section 111(d) an "ancillary" "backwater"). I have already addressed the back half of that argument: In fact, there is nothing insignificant about Section 111(d), which was intended to ensure that EPA would limit existing stationary sources' emissions of otherwise unregulated pollutants (however few or many there were). [Citation.] And the front half of the argument doesn't work either. 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. [Citation.] And it did so mainly through the generation-shifting techniques that the Plan called for. [Citation.] In effect, the Plan predicted market behavior, rather than altered it (as regulations usually do). [Citation.] And that fact has been understood for some years. At the time of the repeal, the Trump administration explained that "there [was] likely to be no difference between a world where the [Clean Power Plan was] implemented and one where it [was] not." [Citation.] It is small wonder, then, that the power industry overwhelmingly supports EPA in this case. See Brief for Power Company Respondents 2–3. In the regulated parties' view, the rule aimed to achieve what most power companies also want: substantial reductions in carbon dioxide emissions accomplished in a cost-effective way while maintaining a reliable electricity market. [Citation.]

The majority thus pivots to the massive consequences generation shifting *could* produce—but that claim fares just as poorly. On EPA's view of its own authority, the majority worries, some future rule might "forc[e] coal plants to 'shift' away virtually all of their generation—*i.e.*, to cease making power altogether." But looking at the text of Section 111(d) might here come in handy. For the statute imposes, as already shown, a set of constraints—particularly involving costs and energy needs—that would preclude so extreme a regulation. [Citation.] And if the majority thinks

those constraints do not really constrain, then it has a much bigger problem. For "traditional" technological controls, of the kind the majority approves, can have equally dramatic effects. [Citation.] , for example, the "fuel-switching" regulation the majority mentions. [Citation.] Such a rule does just what you might think: It requires a plant to burn a different kind of fuel—say, natural gas instead of coal. So it too can significantly "restructur[e] the Nation's overall mix of electricity generation." [Citation.] Or take an even more technological-sounding approach: the use of carbon-capture equipment. Order the installation of that equipment, the Trump administration concluded, and the "exorbitant" costs "would almost certainly force the closure" of all affected "coal-fired power plants." [Citation.] The point is a simple one: If generation shifting can go big, so too can technological controls (assuming, once again, that the statute's text is ignored). The problem (if any exists) is not with the channel, but with the volume.[7]

The majority's claim about the Clean Power Plan's novelty—the most fleshed-out part of today's opinion——is also exaggerated. . . . 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." [Citation.] Congress makes broad delegations in part so that agencies can "adapt their rules and policies to the demands of changing circumstances." [Citation.] To keep faith with that congressional choice, courts must give agencies "ample latitude" to revisit, rethink, and revise their regulatory approaches. So it is here. Section 111(d) was written, as I've shown, to give EPA plenty of leeway. The enacting Congress told EPA to pick the "best system of emission reduction" (taking into account various factors). In selecting those words, Congress understood—it had to—that the "best system" would change over time. Congress wanted and instructed EPA to keep up. To ensure the statute's continued effectiveness, the "best system" should evolve as circumstances evolved—in a way Congress knew it couldn't then know. See *Massachusetts*, 549 U.S. at 532. EPA followed those statutory directions to the letter when it issued the Clean Power Plan. It selected a system (as the regulated parties agree) that achieved greater emissions reductions at lower cost than any technological alternative could have, while maintaining a reliable electricity market. Even if that system was novel, it was in EPA's view better—actually, "best." So it was the system that accorded with the enacting Congress's choice.

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. [Citation.] But under normal principles of statutory construction, the majority *should* ignore that fact (just as I should ignore that Congress failed to enact bills barring EPA from implementing the Clean Power Plan). As we have explained time and again, failed legislation "offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress" adopted. *Bostock* v. *Clayton County*, 590 U. S. ——, ——, 140 S.Ct. 1731, 1747 (2020) (internal quotation marks omitted); see *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history" should "not be taken seriously, not even in a footnote"). Return to *Brown & Williamson*, which all agree is the key case in this sphere. It disclaimed any reliance on "Congress' failure" to grant FDA jurisdiction over tobacco. [Citation.] Instead, the Court focused on the statutes Congress "*ha[d]* enacted," which created "a distinct regulatory scheme" for tobacco, incompatible with FDA's. [Citation.] Here, as I've shown and the majority effectively concedes, there is nothing equivalent. [Citation.] Search high and low, nothing in current law conflicts with, or otherwise

[7] The majority dismisses these hypotheticals as fantastical, protesting that "EPA has never ordered anything remotely like [them], and we doubt it could." [Citation.] But that's just the point. EPA hasn't forced the elimination of coal plants—whether through technological controls or generation shifting—because the statutory constraints prevent it from doing so. The majority offers no reason to think that those constraints suffice for the measures it approves (fuel switching and carbon capture) but not for the measure it rejects (generation shifting). Either the constraints are enough or they are not. The majority cannot have it both ways.

casts doubt on, the Clean Power Plan. That leaves the Court in much the same place it was when deciding *Massachusetts* v. *EPA*. Said the Court then: "That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant" when it enacted the Clean Air Act. [Citation.] And so the Court recognized EPA's authority to regulate carbon dioxide. But that Court was not this Court; and this Court deprives EPA of the authority Congress gave it in Section 111(d) to respond to the same environmental danger.

III

Some years ago, I remarked that "[w]e're all textualists now." [Citation.] 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.[8] 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. [Citation.]

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. [Citations]; 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. [Citations.]

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. *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). 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." [Citation.] 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?

[8] The majority opinion at least addresses the statute's text, though overstating its ambiguity and approaching the action taken under it with unwarranted "skepticism." [Citation.] The concurrence, by contrast, concludes that the Clean Air Act does not clearly enough authorize EPA's Plan without ever citing the statutory text. [Citation.] Nowhere will you find the concurrence ask: What does the phrase "best system of emission reduction" mean? § 7411(a)(1). So much for "begin[ning], as we must, with a careful examination of the statutory text." [Citation.]

Congress knows that systems of emission reduction lie not in its own but in EPA's "unique expertise." [Citation.]

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. . . .

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." [Citation.] 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." [Citation.]

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. . .

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. Respectfully, I dissent.

QUESTIONS

1. The majority says the "the major questions doctrine . . . 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." Why do you think neither *per curiam* in *Alabama Association of Realtors* nor *NFIB* invoked the doctrine by name, given that both rejected agencies

asserting highly consequential power beyond what the Court thought Congress could reasonably be understood to have granted, and the Court in *EPA* cited both decisions as examples of the doctrine's application?

2. The oldest case the majority can cite referencing the major questions doctrine is *Brown & Williamson*, decided just two decades ago, in 2000. Prior to that case, the Court had never required Congress to provide a "clear statement" of regulatory delegation in order to imbue the agency with the authority to regulate. Should it matter that the Clean Air Act—like most of the statutes interpreted under the major questions doctrine—was enacted before that doctrine came into existence? What are the arguments in support of, or that might countenance against, the application of a judge-made interpretive doctrine developed years (and even decades) after the statutes it is used to interpret were enacted? Could a member of Congress reasonably retort that *it* was not given a "clear statement" concerning the magic words it is required to use to enact a permissible delegation?

3. The majority relies heavily on *Brown & Williamson*, and specifically its admonition that "[i]n extraordinary cases . . . there may be reason to hesitate" before accepting a reading of a statute that would, under more "ordinary" circumstances, be upheld. In *Brown & Williamson*, however, subsequent legislation had negated the FDA's authority to regulate tobacco products. Does the majority point to any equivalent "extraordinary" circumstances that here warrant similar "reason to hesitate"?

4. Assume, *arguendo*, that the EPA's estimates are correct—that unchecked carbon dioxide emissions and the accompanying rise in temperatures will, in the words of the dissent, "bring[] 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." On that basis, what do you make of the majority's skepticism that Congress would implicitly task an agency called the "Environmental Protection Agency" "with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy"? If not that agency, what government department would you expect to tackle this problem?

5. The dissent contends that prior major questions cases "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." By contrast, the dissent suggests, the majority "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 an additional two-step inquiry preceding (or preempting) the *Chevron* two-step analysis. 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." In other words, the dissent draws a distinction between using the doctrine to resolve ambiguity in a statute, as compared to declining to read into the statute an interpretation that is technically within the bounds of the text but that seems to defy "common sense" in light of purpose, context, and history.

But couldn't that approach simply be called purposivism by other means? In other words, couldn't *Alabama Association of Realtors* be explained on the basis that, notwithstanding the CDC's broadly worded mandate, Congress's purpose in giving the CDC emergency powers was not to regulate residential rents? Couldn't *OSHA* be explained on the basis that, notwithstanding OSHA's broadly worded powers, Congress's purpose in giving OSHA *temporary* emergency powers was not to so closely regulate the lives of 82-million+ people a year and a half into a pandemic? If so, is the tension the dissent highlights between other major questions doctrine cases and *EPA* that here, *both* the text and purpose of the statute arguably align to support the agency's interpretation?

6. Consider the dissent's distinction between using the major questions doctrine to resolve statutory ambiguity versus using it to cabin broadly worded text in the context of textualism—a doctrine that at least four members of the six-member majority in *EPA* have on at least one occasion purported to adhere to. At its core, textualism counsels that the statute "means what it says." Of course, if the words of the statute mean what they say, then the words may yield outcomes Congress did not clearly intend.

Or, as Justice Scalia argued, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998). If so, as the dissent skeptically asks, can the majority's decision be defended on textualist grounds alone? Could it be justified on textualist grounds as a narrowing default rule in instances where ambiguous text could lead to very broad outcomes? *Is* the text ambiguous? ?

7. The majority concludes that despite the statute's broad ambit to the EPA to impose the "best system of emission reduction," it nonetheless fails to confer on the *EPA* the authority it exercised in putting forth the challenged "generation-skipping" regulation? Under *Chevron*, the agency should be entitled to *Chevron* deference, since the provision is ambiguous and the agency is granted rulemaking authority over it. How does that language compare to "stationary source," the ambiguously phrased provision that spawned *Chevron* deference in the first place? What do you make of neither the majority nor concurring opinions mentioning *Chevron* even once? If the statutory term is ambiguous, shouldn't the Court at least have considered whether *Chevron* should resolve the ambiguity?

8. Justice Gorsuch's concurrence does not explain how to determine when an agency's claims to power aim to resolve "a matter of great 'political significance', or end an 'earnest and profound debate across the country'"—the kinds of agency action that "involves a major question." Can you think of any cognizable criteria?