Today, the Supreme Court decided its most important environmental case since 2007. We didn't dodge the bullet. It's more than a flesh wound but it didn't hit any vital organs . Chief Justice Roberts's majority opinion leaves EPA other options to reduce carbon emissions from coal-fired power plants. It also gives a fairly narrow reading to a legal doctrine that could limit the fallout from the case in terms of other regulatory powers.

Here is the Court's reasoning in a nutshell:

> 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." New York v. United States, 505 U. S. 144, 187 (1992). 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.

I'll post more about this case after there's been time to study the opinions in more depth, but here is some background on the case and a quick reaction.

**Background**

The case has a complicated legal and regulatory background. In order to regulate existing power plants—especially existing coal-fired plants—EPA turned to section 111(d) of the Clean Air Act. Section 111(d) provides that EPA can require states to submit plans to control emissions from existing plants once it has issued a standard for new sources of emissions in the same category. That is, EPA can issue new standards for emissions from existing power plants after it issues standards for emissions from new power plants.

A state's plans are supposed to be based on the standard of performance for the industry—that is, the best "system of continuous emission reduction" (BSER). A crucial issue involved the scope of the term "system". Does it include only plant-specific emission measures, or could it include measures to shift generation from fossil fuel plants to cleaner energy sources? That is, could a "system" be defined more broadly?

The Obama Administration's section 111(d) regulation was known as the Clean Power Plan. EPA determined that the best system of emission reduction for existing units consisted of three building blocks: (1) efficiency improvements in coal-fired plants; (2) substitution of natural gas generation for coal-fired generation when feasible; and (3) increased use of

renewables. The key point to notice is that the Clean Power Plan did not limit itself to measures that could be implemented at a particular coal or natural gas power plant. Instead, it addressed emissions from a state's grid as a whole.

The Clean Power Plan was dead in all but name, even before the Court's ruling today. The deadlines contained in the plan have long since passed, and its national target was met due to other developments. On top of that, it was repealed by the Trump Administration, which took a much more restrictive view of section 111(d). Trump's substitute regulation merely required coal-fired plants to increase their efficiency so as to use less coal per kilowatt.

The Trump Administration's position was that section 111(d) allowed only regulation "inside the fence line" of the power plant, and even within the fence line precluded measures like requiring coal plants to add natural gas or biomass to their fuel mix. The D.C. Circuit held that section 111(d) was not that restrictive and sent the regulation back to EPA for further action.

Given that the issue of how to regulate existing power plants had been sent back to EPA, it was a surprise – and not a happy one – when the Supreme Court decided to reach out and review the D.C. Circuit's decision rather than waiting to see what EPA might do. Today, the other shoe fell.

## The Ruling

As expected, the ruling was based on the major question doctrine. This doctrine applies to questions of great political and economic significance, and requires agencies to have clear authority from Congress in order to decide such questions. This is a doctrine that the Court's conservatives have been steadily expanding and strengthening. Today, the Court used that doctrine to invalidate much of the Clean Power Plan. However, it appears to leave the Biden Administration other regulatory options.

### *What did the Court strike down?*

According to Roberts, EPA went wrong when it "included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources."

Elsewhere: "The point, after all, was to compel the transfer of power generating capacity from existing sources to wind and solar."

In a different place, the Court says:

> 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, Utility Air, 573 U. S., at 324, 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.

So, the upshot is that EPA can't require coal plants to produce less electricity, and it can't order utilities to natural gas, nuclear, or renewables. But ordering coal plants to do other things, such as adding natural gas to their fuel mixes, may still be possible. As I'll explain in a later post, that could be very significant in terms of future climate policy.

***What about the major questions doctrine?***

As expected, the Court relied on the doctrine because this was one of those "'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."

Here are some of the ways the Court explained why this particular regulation was "extraordinary":

- *Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme.*
- *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."*
- *Regulating the grid was outside EPA's expertise just as "we would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration."*

There's a good argument that the major questions doctrine is limited to cases involving sharp departures from past agency practice that take the agency into a new field of regulation in which it has no expertise. So understood, that's a reasonable enough idea and one that we can probably live with.

Also notable: so far as I can tell, the Court never mentioned the projected or actual economic cost of the Clean Power Plan or the political controversy that erupted about it. That's good news because those factors are impossible to apply in any principled way.

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I'll be posting again later today about the implications of the decision for future EPA regulation. What is clear as of now is that EPA's authority under section 111(d) will be seriously hampered but not eliminated.