Nos. 20-1530, 20-1532, 20-1778, 20-1780

IN THE

Supreme Court of the United States

STATE OF WEST VIRGINIA, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY *et al.*,
Respondents.

On Writs of Certiorari the U.S. Court of Appeals for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS

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THE NORTH AMERICAN COAL CORPORATION,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
et al.,
Respondents.

WESTMORELAND MINING HOLDINGS LLC,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
et al.,
Respondents.

NORTH DAKOTA,
Petitioner,

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U.S. ENVIRONMENTAL PROTECTION AGENCY,
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Respondents.

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QUESTION PRESENTED

In 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, did Congress constitutionally authorize the Environmental Protection Agency to issue significant rules—including those capable of reshaping the nation's electricity grids and unilaterally decarbonizing virtually any sector of the economy—without any limits on what the agency can require so long as it considers cost, non-air impacts and energy requirements?

INTEREST OF AMICUS[1]

The New Civil Liberties Alliance (NCLA) is a non-profit, non-partisan civil rights organization devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (i.e., the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the President, federal administrative agencies, and even sometimes the Judiciary, have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although the American People still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

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[1] Pursuant to Supreme Court Rule 37.6, NCLA states that no counsel for a party authored any part of this brief, and that no one, other than the amicus curiae, its members, or its counsel, financed the preparation or submission of this brief. All parties consented to the filing of this brief.

The decision below is typical of the process by which the People's right to self-government has been eroded: Having failed to achieve a policy goal by convincing Congress to enact a law, the President directed one of his administrative agencies to "enact" by regulation what Congress had refused to legislate, and the Judiciary (the panel below) acquiesced.

The Environmental Protection Agency (EPA) argues that its statutory authority should be read broadly, that the Clean Air Act grants EPA a license to undertake virtually any program it deems appropriate to address climate-change concerns. But if construed so broadly, the Act would divest Congress of its power to legislate on air-quality issues, in violation of Article I, § 1 of the Constitution. Adherence to the separation-of-powers principles embedded in the Constitution is, in NCLA's view, essential to maintenance of our Republic's representative form of government.

STATEMENT OF THE CASE

The continuing use of fossil fuels to generate electricity raises political issues for the American People and their elected representatives to deliberate and decide. Should the electricity-generating industry be decarbonized (fossil fuel powered plants closed and replaced by plants powered by renewable energy)? Should decarbonization occur due to market forces, or should it be imposed by government, or a combination

of the two? What should the timetable be, and who should bear the transition costs? J.A. 220.[2]

In 2009, the American People—acting through Congress—addressed the issue of carbon dioxide emissions. The House passed proposed legislation. The Senate chose not to. App. J.A. 220.

The People's inability to agree and enact legislation displeased then-President Obama. In response, in the words of Judge Walker, dissenting below, the President "ordered the EPA to do what Congress wouldn't." J.A. 222.[3]

EPA complied. In 2015, EPA formulated "regulations and standards that … came to be known as the Clean Power Plan" ("CPP"). J.A. 86. Invoking EPA's Clean Air Act authority, the CPP determined that the "best system" to reduce carbon emissions was radical "generation shifting"—effectively replacing coal-fired power plants with plants fueled by natural gas and replacing all fossil fuel-based electricity with "electricity generated from zero-emitting renewable-energy sources." J.A. 86, 223.

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[2] When using the term "J.A." herein, NCLA refers to the Joint Appendix in No. 20-1530, 20-1531, 20-1778, and 20-1780.

[3] *See* J.A. 222, n.20 ("'But if Congress won't act soon to protect future generations, I will,' Obama said. 'I will direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy.'") (quoting Evan Lehmann & Nathaniel Massey, *Obama Warns Congress to Act on Climate Change, or He Will*, Scientific American (Feb. 13, 2013)).

President Obama and leaders of the environmental movement were ecstatic: *See e.g.*, J.A. 225-226, 227 (terming the CPP "historic" and "the single most important step America has ever taken in the fight against global climate change").

Those opposed to the speed of this EPA-imposed decarbonization were less enthusiastic. They estimated that the CPP would increase electricity costs by $214 billion and cost a further $64 billion to replace shuttered capacity. J.A. 226. The EPA itself "predicted that its rule would cost billions of dollars and eliminate thousands of jobs." *Id.*

In 2016, opponents challenged the CPP in the D.C. Circuit. J.A. 88. They argued that Section 7411(d) did not authorize the EPA to impose generation shifting of such industry-reshaping magnitude. J.A. 226. The appeals court denied a motion to stay implementation of the CPP. J.A. 223.

In "an unprecedented intervention," App. 171a-172a, this Court stayed the enforcement of the CPP, perhaps recognizing that absent a stay companies would have to comply before the constitutional questions could be heard. *West Virginia v. EPA*, 577 U.S. 1126 (2016). The stay implied that the CPP might well not survive constitutional review. J.A. 223.

Following President Trump's election in 2016, EPA repealed the CPP and replaced it with the Affordable Clean Air Energy Rule (the "ACE Rule") in 2019. J.A. 89. EPA determined that it was "statutorily compelled" to repeal the CPP because, in its view, Section

7411(d) "unambiguously" bars generation shifting; that is, it limits the "best system of emission reduction" to only those measures that can be put into operation at an existing power plant. Also premised on section 7411(d) authority to regulate power plant emissions, the ACE Rule addressed only coal-fired generating plants. J.A. 90.

EPA read Section 7411(d) as limiting the "best systems" analysis to physical improvements at a plant, which would preclude off-site measures such as "generation shifting" (a phrase which does not appear in the Clean Air Act). J.A. 89, 106.

In reading the statute to contain this limitation, EPA noted that the alternative reading that allowed generation shifting, such as that required by the repealed CPP, would violate the "major questions doctrine"—a clear-statement principle of statutory construction saying Congress must specifically authorize any rule with vast economic and political consequences. J.A. 89, 135. In EPA's judgment, a CPP-like generation-shifting rule would unquestionably have such vast consequences—billions of dollars of impact on regulated parties and the economy, increased costs for every electricity user, and a re-balancing of authority between federal agencies and the States. J.A. 136.

Those opposing the ACE Rule—largely the same parties who had enthusiastically supported the CPP in 2015—now took their turn to sue in the court below.

J.A. 224.[4] They argued that the ACE Rule was unlawful because it was premised on EPA's mistaken belief that, in enacting section 7411, Congress had precluded generation shifting as an emissions reduction measure. J.A. 95.

The court below agreed with the opponents of the ACE Rule. J.A. 213-214 ("The ACE Rule expressly rests on the incorrect conclusion that the plain statutory text clearly foreclosed the Clean Power Plan …"). In the court's view, Congress, in Section 7411(d), had specifically authorized the EPA to consider and impose generation shifting as a tool of emissions reduction. J.A. 132.

Congress had granted this authorization by directing the EPA to determine the "best system of emission reduction." J.A. 120 (quoting 42 U.S.C. § 7411(a)(1)). The court stated that "Section 7411(a)(1)'s prescription of the 'best system of emission reduction' is striking for its paucity of restrictive language." *Id.* The court also stated that the section's lack of specificity is in marked contrast to other sections of the statute, in which Congress had identified the "specific categories of emission reduction tools" to be applied. *Id.*

The court concluded that Section 7411's grant of authority was not subject to similar limitations. J.A.

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[4] *See also ibid.* ("Arrayed against [those filing suit] were many states and groups that had opposed the old rule. And so once again, politically diverse states and politically adverse special interest groups brought their political brawl into a judiciary designed to be apolitical.")

108 and 120. Section 7411(a)(1) "imposed no limits on the types of measures the EPA may consider beyond three additional criteria: cost, any nonair quality health and environmental impacts, and energy requirements." J.A. 108. Section 7411(a)(1) was a "catch-all" provision, intended to apply to situations that, at the time of enactment, could not be specified. J.A. 119. The "catch-all" provision had been enacted by "a virtually unanimous Congress." J.A. 129.

As to the "so called 'major questions' doctrine," the court found it inapplicable. J.A. 135. "Unlike cases that have triggered the major questions doctrine, each critical element of the Agency's regulatory authority on this very subject has long been recognized by Congress and judicial precedent." J.A. 136, 188.

The court explained that "in enacting the Clean Air Act, 'Congress delegated to EPA the decision whether and how to regulate carbon dioxide emissions from powerplants.'" J.A. 97 (citing *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 426 (2011)). EPA had also made an Endangerment Finding, which "triggered a statutory mandate" for "the EPA to regulate greenhouse gas pollution." J.A. 137. And Congress had empowered the EPA to determine the "best system of emission reduction." J.A. 84.

As for the consequences of de-carbonization—the costs and burdens cited by the EPA in replacing CPP with the ACE Rule—the court characterized the described consequences as not relevant to a "major questions" determination: the anticipated effects were "the

product of the greenhouse gas *problem*, not the best-system's role in the solution." J.A. 148.

"Because promulgation of the ACE Rule and its embedded repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act," the court concluded, "we vacate the ACE Rule and remand to the Agency." J.A. 215.

SUMMARY OF THE ARGUMENT

The Republic rests not on doctrine, but on law. And not merely on law, but on the Constitution and its principles. This case therefore raises questions of profound importance.

It would be a disgrace for this court to uphold section 7411 based on the indefensible nondelegation doctrine. Being misleading and fictional, that doctrine betrays both the Constitution and the truth. It is but a fig leaf for unlawful power and should be acknowledged and repudiated as such.

In its place, what demands recognition is the Constitution and its principles. Under the Constitution, individuals are to be bound only by laws made with their consent through their elected legislature. Confirming this principle is the separation of powers, by which legislative power is kept in the legislature. But that is not all.

It will be seen that the Framers decided against any congressional delegation of power. Their intent found expression in the Constitution's text, where it

says that the legislative powers "shall be vested" in Congress. What shall be vested in Congress cannot be vested elsewhere. This was, in other words, not merely a grant of legislative power, but a statement mandating its location.

Confirming this point, the Constitution requires bicameralism and presentment. And the Executive cannot exercise any power that was not vested in it.

It is time for this Court to stand up for these truths. If it refuses, no other court can or will be able to do so.

ARGUMENT

I. THE NONDELEGATION DOCTRINE IS MISLEADING AND FICTITIOUS AND SHOULD BE ABANDONED

Confucius cautioned against using incorrect names, lest language not be "in accordance with the truth of things."[5] The wisdom of that observation is borne out by the Supreme Court's nondelegation doctrine. The doctrine is misleading, even fictitious. So it offends against the Constitution and the truth.

A. The Doctrine Disguises What It Does and Why

The "nondelegation doctrine" purports to bar Congress from delegating legislative power. In fact, it notoriously permits the wholesale transfer of such power. Although the sign above the gate says "closed," the gate is wide open.

In thus saying one thing and doing another, the doctrine is profoundly misleading. It tells Americans this Court is barring delegations of legislative power even while promiscuously permitting them. Nothing could do more to undermine the confidence of Americans in this Court.

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[5] Confucius, Analects, Book XIII, Chapter 3, verses 4–7, Analect 13.3, in James Legge, Confucian Analects: The Great Learning, and The Doctrine of the Mean, 263-64 (Dover Publications 1971).

The notion of a nondelegation doctrine is also misleading in suggesting that what limits congressional transfers of legislative power is a mere court-created doctrine. Yet as will be seen below, the Constitution itself—indeed, its very text—bars Congress from shifting its legislative powers to the executive. The nondelegation doctrine thus hides the fundamental nature of the obstacle to delegation.

The doctrine offends against the truth and the Constitution. It claims to do what it does not, and in presenting itself as a mere doctrine, it understates its constitutional foundations.

B. The Term "Delegation" Falsely Implies an Easily Revocable Transfer

When a political or governmental entity "delegates" its powers, it always retains the authority to unilaterally revoke its delegation. A cabinet secretary, for example, who "delegates" statutorily authorized powers to his subordinates has the right to terminate that arrangement at any time, for any reason, and without any need to secure the assent of the delegatee or any other person or institution.

That is not the case when a *statute* purports to confer lawmaking powers on executive or agency officials. Although Congress may revoke this arrangement, it may do so only by repealing or amending the statute through the bicameralism-and-presentment process of Article I, § 7. The President is empowered to veto any effort to withdraw powers that a statute vests in

the executive or an administrative agency, so Congress cannot unilaterally revoke a transfer of authority that a predecessor Congress made via statute. Congress must obtain the President's assent, or it must secure veto-proof supermajorities in both houses of Congress, before any previous transfer of authority can be undone.

A statutory transfer of lawmaking power to the executive thus ties the hands of Congress. When Congress by statute transfers legislative power to the executive, it cannot recall the transferred power easily. A statutory transfer of legislative power does not merely delegate legislative power, for it limits Congress' freedom to reassert its legislative powers.

Indeed, it is widely accepted that one Congress cannot bind a future Congress except by passing a statute (or ratifying a treaty). So, for example, neither House of Congress can pass a rule that forces a future Congress to follow certain procedures. Yet permitting delegation to the executive allows this forbidden outcome. By transferring legislative power to an executive or agency official like the EPA Administrator, a current Congress can get that official to enact rules without going through bicameralism and presentment—policies that a future Congress cannot reverse without taking those difficult steps.

It is therefore highly misleading for any court to discuss transfers of legislative power in terms of "delegation." That is not what is at stake.

C. The Doctrine Rests on Legal Fictions

The nondelegation doctrine has been constructed and defended of the basis of a series of fictitious assumptions that deny the reality of agency *lawmaking* and thereby give a patina of constitutional legitimacy to this wayward practice.

1. One such fiction is that agencies are "executing" the law whenever they regulate pursuant to congressional authorization—even when the underlying statute gives the agency vast discretionary power to enact formal rules that carry the force of law. *See, e.g.*, Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1723 (2002) ("[A]gents acting within the terms of such a statutory grant are exercising executive power, not legislative power.").

Not even James Landis, the leading expositor and defender of administrative power during the twentieth century, believed this fiction. Landis wrote that "[i]t is obvious that the resort to the administrative process is not, as some suppose, simply an extension of executive power" and that "[c]onfused observers have sought to liken this development to a pervasive use of executive power." James M. Landis, *The Administrative Process* 15 (1966).

Landis is right. The notion that an agency is merely "executing" the law when making binding rules is a transparent fiction. Agencies act as lawmakers when issuing rules that bind the public, which is why courts and commentators describe their work

product as "legislative rules." *See, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("We described a substantive rule—or a 'legislative-type rule'—as one 'affecting individual rights and obligations.'" (citation omitted)); *Batterton v. Francis,* 432 U.S. 416, 425 n. 9 (1977) ("Legislative, or substantive, regulations are issued by an agency pursuant to statutory authority. … Such rules have the force and effect of law.") (cleaned up); Kenneth Culp Davis, 2 Administrative Law Treatise § 7:8 at 36 (2d ed. 1979) ("A legislative rule is the product of an exercise of delegated legislative power to make law through rules. … [V]alid legislative rules have about the same effect as valid statutes; they are binding on courts.").

This Court describes an agency's rulemaking and adjudicatory powers not as "executive" but as "quasi-legislative" and "quasi-judicial." *See, e.g.*, *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) (describing agency rulemaking as "legislative or quasi-legislative activities."); *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935).

2. A second fiction is the idea that agency lawmaking is merely "specifying" or "filling in the details" of a statutory standard. *See, e.g.*, *United States v. Grimaud*, 220 U.S. 506, 517 (1911) ("[W]hen Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations").

But even where authorizing statutes offer governing standards, the authorized agencies often are not merely specifying or filling in details. As is widely understood, such statutes frequently leave the most difficult legislative questions to the agencies—indeed, members of Congress notoriously use such statutes precisely to avoid making difficult legislative decisions. See *Gundy*, at 2144 (Gorsuch, J., dissenting) ("Because Congress could not achieve the consensus necessary to solve the hard problems … it passed the potato" to an agency, "freed from the need to assemble a broad supermajority for his views"); D. Schoenbrod, *Power Without Responsibility*, 9–19, 55–59, 72–94, 102–05, 157–59 (Yale U. Press 1993).

The notion of "filling in mere details" is especially fictitious here. Had Congress, in the Clean Air Act, unequivocally ordered EPA to decarbonize the generation of electricity, it could be argued that Section 7411 had merely assigned the specifics to the EPA. But that is not what occurred. The Senate did not act, so Congress never made the decision to decarbonize.

Instead, the decision to decarbonize and the specifics of implementing that policy choice were both made by the EPA, on the basis of a generalized "best system" authorization which even the court below characterized as "striking for its paucity of restrictive language." J.A. 120. Indeed, as the court also noted, Section 7411's lack of specificity is in marked contrast to other sections of the statute, in which Congress has in

fact identified the "specific categories of emission reduction tools" to be applied. *Id*.

But the very "paucity of restrictive language" should have cut against reading Section 7411 as a massive grant of power to EPA. Restrictive language directing EPA's handling of a Congressional policy decision to decarbonize would have signaled that Congress had properly asserted its legislative power and made the policy call. *See Yakus v. United States*, 321 U.S. 414, 425 (1944) (a statute must "sufficiently mark[] the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.")

Instead, as interpreted by the appeals court, Section 7411 is a congressional authorization for EPA to decide both whether and how to decarbonize the electricity generating industry. These are hardly "details."

3. A third fiction is that an agency does not exercise legislative power if Congress has provided an "intelligible principle" to inform the agency's discretion.

Justice Gorsuch has accurately recounted how courts have gradually expanded this standard with repeated use to the point that, like a worn-out elastic band, it no longer imposes any meaningful constraints on Congress' divestment of its legislative powers:

> This mutated version of the 'intelligible principle' remark has no basis in the original meaning of the Constitution, in history, or even in the decision from

> which it was plucked. Judges and scholars representing a wide and diverse range of views have condemned it as resting on 'misunderst[ood] historical foundations.' They have explained, too, that it has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional. Indeed where some have claimed to see 'intelligible principles' many 'less discerning readers [have been able only to] find gibberish.' Even Justice Douglas, one of the fathers of the administrative state, came to criticize excessive congressional delegations in the period when the intelligible principle 'test' began to take hold.

Gundy, at 2144 (Gorsuch, J., dissenting) (citations omitted).

Acts of lawmaking and legislation do not depend on whether or not some other entity has supplied an "intelligible principle" that purports to guide the legislative decision. Every lawmaking entity holds powers that were authorized or vested in it by *somebody*, and there is almost always some semblance of an "intelligible principle" that defines the boundaries of those powers. But that does not change the legislative character of the resulting edict.

Every act of Congress, for example, is ostensibly guided and controlled by an "intelligible principle"

supplied by the Constitution's enumerated powers. Congress must always act within the scope of one or more of those "intelligible principles" that define and limit what Congress may do. But Congress is most assuredly "legislating" when it enacts statutes, even though it does so pursuant to a grant of power that limits and controls Congress with a series of "intelligible principles."

The result is no different when an agency issues an edict under a statute that confers powers defined by an "intelligible principle"—such as an instruction to "regulate in the public interest," or, as here, apply "the best system."

As Judge Walker explained in dissent below,

> To be sure, if we frame the question broadly enough, Congress will have always answered it. Does the Clean Air Act direct the EPA to make our air cleaner? Clearly yes. Does it require at least some carbon reduction? According to *Massachusetts v. EPA*, again yes. But *how* should the EPA reduce carbon emissions from power plants? And *who* should pay for it? To these major questions, the Clean Air Act's answers are far from clear.

J.A. 230. Section 7411 illustrates the meaningless of requiring an intelligible principle.

The existence of what this Court calls an "intelligible principle" does not save agency rulemaking from

being legislative. And current doctrine is fictional in suggesting otherwise.

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There should be no place in Supreme Court jurisprudence for a doctrine as misleading and fictional as the nondelegation doctrine. Rather than perpetuate a doctrine so offensive to the Constitution and the truth, this Court should recognize that, if the D.C. Circuit's interpretation of section 7411 is correct, that section divests Congress of its legislative power.

II. Congress May Not Divest Itself of Its Legislative Power

When enacting the Constitution, the people gave to Congress, and to Congress alone, the power to legislate, most centrally the power to make binding rules—those limiting their liberty. The location of this power in Congress was essential because of the fundamental principles of consent and the separation of powers. But it is not only these underlying principles that should guide this Court in barring any relocation of legislative power. Both the drafting debates and the Constitution's very text make clear that legislative power cannot be shared or otherwise transferred.

A. The Principles of Consent and Separation of Powers

The transfer of legislative powers collides with two of the most basic principles underlying the Constitution. These principles alone already caution against any such dislodging of legislative power.

No principle mattered more for the founding of the nation than consent. Without such consent, government would be without legitimacy, and its laws would be without obligation. In the words of the Declaration of Independence, "all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness," and that "to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Decl. of Indep. (1776).

The consent of the people was essential not only for the adoption of the Constitution but also for the enactment of statutes. And in a republic, such as the United States, the consent must come through the election of representatives to the legislature—the body with legislative power. On the basis of this need for elective representation, American colonists declared it "the first principle in civil society, founded in nature and reason, that no law of the society can be binding on any individual[], without his consent, given by himself in person, or by his representative of his own free election."[6]

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[6] Resolutions of the Boston Town Meeting (Sept. 13, 1768), in *A Report of the Record Commissioners of the City of Boston*, (continued…)

The displacement of legislative power to administrative agencies, not least in section 7411, threatens this self-governance. It deprives Americans of their freedom to rule themselves through their elected representatives.

In other words, what scholars call "delegation" (and what this Court quaintly calls "nondelegation") dilutes voting rights.[7] To be sure, the dislocation of legislative power does not deny anyone's right to cast a ballot. But in shifting legislative power out of the elected legislature, it diminishes the value of suffrage. The form remains, but the reality is to reduce the power of the voters—to debase the currency of voting. And if violations of voting rights are worrisome even at a retail level, there should be at least as much concern about this wholesale assault on voting rights.

Reinforcing the need for consent was the principle of separation of powers. The government's tripartite powers were understood to be naturally different, so each could be located in its own branch of government without any overlap.[8] The separation of these different powers seemed essential for both prudent decisionmaking and the protection of liberty. To serve these ends, it was understood that the powers must continue to be separated. The separation, in other

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Containing the Boston Town Records, 1758 to 1769, at 261 (Boston: Rockwell & Churchill, 1886).

[7] *See* Philip Hamburger, *Nondelegation Blues*, sect. XI.A., XI.C. (2021), available at SSRN.com.

[8] *Id.* at sect. IV.

words, was exclusive *vis à vis* other branches of government.[9]

Beginning in 1791, the earliest surviving academic lectures on the Constitution were given by the Virginia judge St. George Tucker at William and Mary. He explained:

> [A]ll the powers granted by the Constitution are either legislative, executive, or judicial; and to keep them forever separate and distinct, except in the Cases positively *enumerated*, has been uniformly the policy, and constitutes one of the fundamental principles of the American Government.[10]

This was only one of many such statements at the time. But it captures the essence of the separation problem with section 7411 and all other statutes that shift to agencies the power to make binding rules.

The Constitution's principles of consent and separation of powers make abundantly clear that the transfer of legislative power out of Congress' hands is profoundly lawless. It violates the Constitution's most fundamental principles.

But that's not all. The drafting and text also have much to say.

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[9] *Id.* at sect. VI.

[10] St. George Tucker, Law Lectures, p. 4 of four loose pages inserted in volume 2, Tucker-Coleman Papers, Mss. 39.1 T79, Box 62, Special Collections Research Center, Earl Gregg Swem Library, College of William and Mary.

B. The Framers' Rejection of All Congressional Delegations

At the Constitutional Convention, the framers had to establish the Executive and its power. In the course of their debates, James Madison proposed a series of powers for the Executive, including the power to execute congressionally delegated powers. His initial suggestion along these lines apparently provoked General Charles Cotesworth Pinckney to express concern that "improper powers" might be delegated.[11] So Madison came back with a proposal that limited the Executive's delegated powers to those that were not legislative or judicial. To be precise, he moved that the Executive be established:

> with power to carry into effect the national laws. to appoint to offices in cases not otherwise provided for. and to execute such other powers not Legislative nor Judiciary in their nature. as may from time to time be delegated by the national Legislature.[12]

In other words, the Executive would have the power to exercise such executive powers as were delegated by Congress.

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[11] Madison's Notes, 1 Farrand, Records of the Federal Convention 67.

[12] *Id*.

But Charles Pinckney moved to strike out the phrase: "and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated."[13] He explained that they "were unnecessary, the object of them being included in the 'power to carry into effect the national laws'."[14] That is, if the Constitution already gave the Executive this power, there was no need for it to get more executive power from Congress. The Convention agreed.[15]

The Framers thus rejected any congressional delegation. It was beyond dispute that there should be no delegation of powers that were "Legislative nor Judiciary in their nature." And the Framers repudiated even delegated executive power.

The delegation of power was to be done by the people in the Constitution, not by Congress. So, it is difficult to understand how Congress—for example, in section 7411—can transfer binding lawmaking power to agencies.

But this point rests not merely on underlying principles, nor merely on the debates in Philadelphia, but on the text.

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[13] *Id.*
[14] *Id.*
[15] *Id.*

C. "Shall Be Vested" Textually Mandates That All Legislative Powers Must Be in Congress, Not Elsewhere

The Constitution says each of its tripartite powers "shall be vested" in its own branch of government. U.S. Const., art. I, §1, art. II, §1, art. III, §1. The Constitution thereby textually emphasizes that its powers cannot be rearranged.

Imagine that the Constitution had used the word "vested" as one might in grant of property, saying merely that the legislative powers *are hereby vested* in Congress. Then there would be a transfer of the powers, but not an express textual indication that the legislative powers must ultimately be located in Congress.

But the Constitution says that its powers "shall be vested." It thereby not only transfers its powers, but says where they "shall" and thus must be located. Of particular interest for section 7411, the legislative powers shall be in Congress.

One might protest that when Congress shares some of its powers with the Executive, those powers remain vested in Congress. But that misses the point. When the Constitution says that the legislative powers *shall be vested* in Congress, it requires them to be there, not elsewhere.

In defense of delegation, one might argue that when Congress shares some of its powers with the Executive, those powers remain vested in Congress. From this perspective, the devolution of the commerce

power to the Department of Agriculture does not deprive Congress of that power. But that misses the point. "When the Constitution says the legislative powers *shall be vested* in Congress, it requires them to be there, not elsewhere. That is, when legislative powers are shared with the Executive, they are no longer vested merely in Congress, and the sharing thus violates the Constitution's injunction that they *shall be vested* in Congress. The Constitution does not say that the legislative powers 'shall be vested in a Congress of the United States *and anyone with whom Congress shares them*.'"[16]

The phrase "shall be vested" reinforces what already should be clear, that "the Constitution's vesting of powers is not just an initial distribution—like an initial dealing out of cards."[17] Rather than merely vest the legislative powers in Congress, the Constitution mandates where they shall remain.

D. The Evasion of Bicameralism and Presentment

When this Court permits Congress to divest itself of legislative power, it weakens accountability to the people by allowing an evasion of bicameralism and presentment. Bicameralism makes lawmaking diffi-

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[16] Hamburger, *supra* note 7, at sect. IX.C.

[17] *Id.*

cult *by design*—to limit corruption and unjust passions and enable prudence. The Federalist No. 62, p. 418-19 (J. Madison) and No. 63, pp. 423-25 (J. Madison) (J. Cooke ed. 1961). Presentment ensures that laws are subject to the possibility of a veto. Together, the requirements place responsibility in the two elected legislative bodies and in an elected President—all of whom are personally accountable to the people.

But when Congress divests itself of its legislative power and an administrative agency legislates, "the people lose control over the laws that govern them. … The public loses the right to have both its elected representatives make the law *and* its elected president take personal responsibility for the law." D. Schoenbrod, *Power without Responsibility,* 99–105 (Yale U. Press 1993). Instead, as with section 7411, only someone appointed by the President takes responsibility—an appointee who is not personally chosen by the public or accountable to them at the next election.

E. The Executive May Not Exercise Legislative Power

At stake is not only legislative power but also the power of the Executive. Binding agency rules are typically analyzed in term of congressional power—the question being whether Congress can delegate or divest itself of legislative power. But the transfer of legislative power to the Executive should also prompt

concern for the Constitution's vesting of executive power in the President.

The Constitution vests the President with executive power (along with the adjustments to it in the rest of Article II). U.S. Const, art. II, §1. It does not vest him with legislative power. He therefore cannot exercise legislative power.

Recall (from *supra*, Part II.B) that when the Constitutional Convention discussed the delegation problem, it did so in the context of asking whether the Executive should have a power to exercise congressionally delegated powers. The assumption was that without such authorization, the Executive could not exercise even congressionally delegated powers that were executive.

The need for each branch to exercise only the power vested in it was recognized by the judiciary in *Hayburn's Case,* 2 U.S. 409 (1792). Three circuits protested that they could not act under the Invalid Pension Act, and all argued that the courts could not exercise a power that had not been vested in them. For example, the Circuit Court for the District of Pennsylvania said that "the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the circuit court must consequently have proceeded without constitutional authority." *Id.*, at 411 (1792) (CC for Dist. Pa.).

This principle applied to all branches of government, including the Executive. The Circuit Court for

the District of North Carolina explained: "the legislative, executive, and judicial departments are each formed in a separate and independent manner," and "the ultimate basis of each is the Constitution only, within the limits of which each department can alone justify any act of authority." *Id.*, at 412 (CC for Dist. NC).

The Executive cannot exercise any power that is not executive. It is yet another reason to doubt whether Congress in section 7411 can give legislative power to the EPA.

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If the D.C. Circuit's interpretation of the Clean Air Act is correct, then the Act divests Congress of legislative powers. This repudiates the principles of consent and separation of powers, it departs from the known views of the framers, it evades bicameralism and presentment, and most concretely it violates the Constitution's mandate that the legislative powers "shall be vested" in Congress. It even invites the Executive to go beyond its power under the Constitution.

III. EFFICIENCY CANNOT JUSTIFY THIS COURT IN FAILING TO UPHOLD THE CONSTITUTION

Those who defend the existing nondelegation doctrine often contend that modern government could not operate effectively if Congress were barred from shifting legislative decisions to Executive Branch officials. That contention, however, is dubious. The problem is

not merely that it elevates necessity, even just efficiency, above the Constitution. Even more curiously, it elevates an unproven claim of efficiency above the Constitution.

As this Court has explained, adherence to the Vesting Clause does not preclude efficient government operations:

> The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisites to the application of the legislative policy to particular facts and circumstances impossible for Congress itself to properly investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct.

Yakus v. United States, 321 U.S. 414, 424 (1944).

It may sometimes be difficult to distinguish between statutes that permissibly authorize agencies to engage in factfinding, *Miller v. Mayor of New York*, 109 U.S. 385, 393 (1883), from those that impermissibly divest Congress' legislative policymaking authority to agencies. Difficult line drawing, however, is not

a reason to abandon the core Constitutional mandate that it is Congress that must legislate.

If it really is insurmountably onerous to comply with the Constitution, there should be some scientifically serious empirical proof of this proposition. There also should be some proof that the only remedy is for the courts to push aside the Constitution—in other words, that the problem cannot be cured by a constitutional amendment. Thus far, no such proof has been offered.

Even if it had been shown that the Constitution cannot meet contemporary needs, it is far from clear that this Court should pay attention to such evidence. As Justice Jackson concluded in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court should not be in a hurry to abandon the Constitution's structures: "Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up."

With respect to section 7411, the efficiency objection to following the Constitution is not merely unproven; it clearly is mistaken. The Clean Air Act itself mandated specific remedial methods for addressing specific emission problems. J.A. 120 (42 U.S.C. § 7651f(b)(2) and § 7491(b)(2)(A),(g)(2). If Congress desires to mandate the vast changes to the power industry necessitated by the CPP, there are no practical difficulties that would prevent it from enacting legislation expressly mandating those changes.

CONCLUSION

It is the duty of judges to speak honestly about the law. This can be difficult. It surely is no pleasure to recognize the misleading and fictional character of a long-established doctrine. When such a task comes before this Court, the Justices have a duty to face up to it. This is not merely their duty; it is their very office.

The Justices therefore must cast aside their nondelegation doctrine and recognize, instead, what is required by the Constitution. Its most basic underlying principle is that individuals cannot be bound by laws not made with their consent—that is, not made by their elected legislature. Almost as fundamental is the separation of powers, which keeps the tripartite powers separate, each in its own branch of government. The Framers clearly rejected any congressional delegation of power, and giving effect to this decision, the Constitution's very text says that each power "shall be vested" in its branch. What shall be vested in Congress cannot be vested elsewhere. Reinforcing this conclusion is the Constitution's requirement of bicameralism and presentment, and the Executive duty to avoid exercising any but executive power.

Each one of these constitutional problems should be enough to prompt a judicial change of heart. Taken together, they should inspire a judicial *mea culpa*. The Constitution's still vital principles, its framing, and its text are aligned in barring any divesting of legislative power. So, it is time for the Court to follow the law and end this unlawful practice.

The Court should reverse the judgment below.

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