In *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the Supreme Court resolved a single, narrow issue: when the Environmental Protection Agency (EPA) reduces climate pollution from power plants under § 111(d) of the Clean Air Act, it cannot set guidelines premised on shifting electricity generation from dirtier sources to cleaner sources as a best technological approach to reduce emissions. While this holding is very specific, many see the Court’s reliance on the “major questions doctrine” to reach that determination as a broader warning shot across regulators’ bow.

The major questions doctrine boils down to the following: under rare circumstances that would transform the underlying statute, the Court may depart from its normal approach to agency deference and look more skeptically on agency authority in the absence of clear congressional authorization. Many have noted the ill-defined parameters of this interpretive principle, but one key feature is not reasonably in dispute: it remains the exception, not the rule. By the Court’s own words, the major questions doctrine applies only in “extraordinary cases.” *West Virginia*, 142 S. Ct. at 2595.

This has not stopped opponents of regulatory safeguards from seizing on the opportunity to argue that a wide swath of agency action is now unlawful. See Alex Guillén, *Impact of Supreme Court’s Climate Ruling Spreads, POLITICO* (July 20, 2022). Often, they invoke isolated, decontextualized language from *West Virginia* to suggest that the major questions doctrine applies whenever regulatory issues are important and contentious. This unfettered interpretation would cause the exception to swallow the rule by ignoring the doctrine’s limited applicability to regulatory transformations. It would also undermine the flexibility that Congress intentionally gave many agencies to protect the public against a wide range of harms and abuses—from pollution to bank fraud—and could chill future executive activity.

But *West Virginia* does not—by itself—wreak such chaos. *West Virginia* is best understood as a relatively narrow decision that does not expand the reach of the major questions doctrine beyond the pre-existing threshold for an extraordinary case.

**West Virginia’s Focus on Exceptional Cases of “Unheralded” and “Transformative” Regulatory Power**

Since its origins a few decades ago, the Court has employed the major questions doctrine only a handful of times. *West Virginia* borrowed heavily from these earlier cases that set a very high threshold for the doctrine’s application. Quoting its decisions in *Utility Air Regulatory Group v. EPA* and *FDA v. Brown & Williamson*, the Court explained that the major questions doctrine applies in “extraordinary cases” when an agency claims “to discover in a long-extant statute an unheralded power representing a transformative expansion in [its] regulatory authority.” *West Virginia*, 142 S. Ct. at 2610. Lawyers can debate the precise meanings of “extraordinary,” “unheralded,” and “transformative,” but they surely connote only the rare and unusual case.

At issue in *West Virginia* was whether the Clean Power Plan, an Obama-era policy to reduce greenhouse gas emissions from power plants, crossed this high threshold through its use of “generation shifting.” Essentially, EPA set emission limits premised on the shifting of electricity generation from coal-fired sources to cleaner natural gas-fired sources, and from fossil fuel-fired...
sources to renewables. The Court did not delineate a precise doctrinal test to resolve this question, but its answer focused primarily on EPA’s regulatory history and the Clean Air Act’s statutory structure.

First, the Court found that the Clean Power Plan’s use of generation-shifting was unprecedented under § 111(d). It distinguished EPA’s closest precedent under that provision—a 2005 regulation creating a cap-and-trade program for mercury emissions—by finding that, while the mercury rule contemplated generation shifting, EPA had still identified compliance tools that utilities could technically (if not cost-effectively) employ at individual coal-fired plants.

Second, the Court concluded that the Clean Power Plan clashed with the design and intent of § 111(d). It stressed that “Congress intended a technology-based approach” under this section “that focuses on improving the emissions performance of individual sources.” *West Virginia*, 142 S. Ct. at 2611 (citation omitted). The majority said that the Clean Power Plan’s reliance on generation shifting to determine emissions limits would transform EPA’s authority from its intended and longstanding focus on pollution control to the novel role of setting the nation’s electricity generation mix.

Even if the majority’s analysis was wrong on both of these counts, see *West Virginia*, 142 S. Ct. at 2633–41 (Kagan, J., dissenting), it does not change the majority’s narrow framing of the major questions doctrine. By the majority’s characterization, *West Virginia* is a textbook major questions case that applies traditional factors to discern whether Congress intended to delegate a claimed authority to an administrative agency.

While the majority focused on regulatory history and statutory design to divine legislative intent, its analysis is also notable for what it omits. Its background section highlighted some of the Clean Power Plan’s projected regulatory costs, but those costs did not factor into the legal analysis. Nor did the majority emphasize the political salience of climate change as an independent reason to require clearer statutory authorization. The majority briefly referenced these factors, but unlike the concurrence, it did not put such considerations near the heart of its analysis. And for good reason—these considerations reveal little or nothing about what the enacting Congress intended.

The significance of these omissions from the majority opinion becomes more apparent considering Justice Gorsuch’s concurrence.

### The Concurrence Attempts to Expand the Major Question’s Doctrine Far Beyond the Majority’s Version

Justice Gorsuch’s concurrence outlined various factors that he claimed align with the majority’s approach, but a closer analysis reveals that his approach would expand the major questions doctrine beyond the majority’s narrower application—and in ways that could potentially invite chaos. The most notable thing about the concurrence is that only Justice Alito joined it. That fact alone demonstrates that it did not resonate with most of the majority. And it is of course the majority’s analysis and holding that controls, not the concurrence’s editorializing.

First, the concurrence drew from *NFIB v. OSHA* and *Gonzales v. Oregon* in concluding that the major questions doctrine applies when “an agency claims the power to resolve a matter of great political significance or end an earnest and profound debate across the country.” *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (internal quotations omitted). Each of these prior cases, however, considered a regulatory transformation or an expansion of authority (in line with the majority’s emphasis on transformative or unheralded power). Just like the *West Virginia* majority opinion, neither used political salience as a free-floating consideration.

Justice Gorsuch’s attempted inclusion of political salience as a trigger for major questions treatment would turn statutory interpretation on its head. Political salience in isolation reveals little about congressional intent. Congress routinely delegates broad authority to agencies to address issues of considerable significance or controversy—consider, for instance, immigration, energy, and financial policy. A narrow focus on political significance would also cause agency authority to wax and wane depending on public attention. If courts invoke this factor in the concurrence’s undisciplined manner, it could cause the major questions exception to swallow the rule while subverting congressional intent to delegate broadly.

That should come as no surprise: Congress frequently grants agencies broad authority over large industries, often creating substantial compliance costs (and even larger benefits enjoyed by the public). Hamstringing these routine exercises of agency authority would frustrate statutory design.

An emphasis on regulatory cost could even cut diametrically against the majority’s approach in some situations. Based on cost, regulatory actions using tried-and-true methods of authority, such as the Federal Reserve raising interest rates, could potentially become subject to the major questions doctrine. Yet actions that transform agency authority without imposing large economic costs may not invite similar scrutiny—like the Clean Power Plan, which the Trump Administration found would not have imposed meaningful obligations on the power sector. Id. at 341–42.

Third, the concurrence stated that a regulatory intrusion into a “particular domain of state law” may trigger the major questions doctrine. West Virginia, 142 S. Ct. at 2621 (Gorsuch, J. concurring). But the majority did not mention intrusions on state prerogatives—yet one more sign that the concurrence sought to revise rather than restate the majority opinion. And an intrusion onto state power hardly spells inconsistency with legislative intent, as Congress often legislates in areas of dual sovereignty.

The Role of Extra-Textual Considerations and Judicial Restraint Moving Forward

The majority offered a narrow vision of an extraordinary case primarily focused on statutory design and divergence from prior regulation, but what falls within the goal posts of these criteria will be shaped by judicial framing and judgment. As illustrated above, these factors are malleable enough that judges applying them may reach different conclusions about a particularly policy. To be faithful to the majority’s restriction of the doctrine to truly exceptional cases, courts must apply restraint when identifying a regulatory transformation, particularly when determining how to weigh extra-textual evidence.

For instance, in one paragraph the majority referenced the fact that Congress has previously rejected climate legislation that allegedly resembled the Clean Power Plan. Courts should not read too much into this kind of negative inference from legislative inaction. For one thing, it surfaces at the end of the analysis as an add-on that does little work in the majority’s reasoning. For another, Congress considers and rejects thousands of bills every year on practically every major issue. Nothing in the majority’s description of “extraordinary cases” merits such sweeping inclusion. Broad application of this type of extra-textual reasoning would also create problematic inconsistencies. Just two years ago in Bostock v. Clayton County, the Court found that post-enactment legislative failures offer a “particularly dangerous basis on which to rest an interpretation of an existing law” and rejected their use. 140 S. Ct. 1731, 1747 (2020). In contrast, contemporaneous legislative history has long been considered a better indicator of congressional intent and could be used carefully in future major questions analyses.3

Keeping the major questions doctrine within the narrow lane identified by the majority also obligates a measure of restraint when identifying exceptional cases of “unheralded” and “transformative” action based on regulatory history. Regulations are usually in some fashion novel—otherwise they would be unnecessary. See Leah Litman, Debunking Antinovelty, 66 Duke L. J. 1407 (2017) (discussing statutory novelty). Precedents evincing that the agency has used similar tools or pursued similar ends should thus suffice to establish that a new claim of authority is not “unheralded.” The suggestion that regulatory novelty is particularly problematic under an older statute should also receive cautious treatment, since there is no reason to believe that Congress intended to grant agencies only “use-it-or-lose-it” authority with an expiration date.

Ultimately, the majority’s narrow vision of an extraordinary case will only remain as such with judicial restraint. For decades, judicial restraint has limited the major questions doctrine to exceptional circumstances by counterbalancing the expansion that could otherwise occur under the principle’s amorphous boundaries. Judicial restraint will remain necessary going forward to stay true to the Court’s confirmation in West Virginia that the doctrine continues to apply only in extraordinary cases.

Conclusion

Congress has granted many agencies broad, adaptive authority to deal with big problems. To ensure that this intent is honored, courts and litigants should take West Virginia at its word: the major questions doctrine applies only in truly extraordinary cases. To discern those extraordinary cases, courts should employ established tools for discerning congressional intent and not resort to the grab-bag of additional considerations touted in the two-justice concurrence.

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3 For instance, the Court considered the legislative history of the operative statute in the seminal major questions case of FDA v. Brown & Williamson Tobacco Corp. 529 U.S. 120, 147–48 (2000). The Court also reviewed relevant legislation that Congress subsequently enacted, id. at 143–56, but did not rely on “Congress’ … consideration and rejection of bills that would have given the FDA [its claimed] authority,” id. at 155.