PRACTICAL APPLICATIONS OF THE MAJOR QUESTIONS DOCTRINE

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INTRODUCTION

According to the major questions doctrine, Congress must speak clearly if it wishes to delegate to an administrative agency the power to decide an issue of great economic or political significance. This represents a marked shift away from the deferential approach the federal courts had generally taken when interpreting statutes in the post-New Deal era. But as others have noted, it arguably harkens back to an earlier mode of analysis.[1]

What matters for present purposes is that the doctrine favors congressional rather than executive resolution of major policy issues, while disavowing (without necessarily prohibiting) certain types of momentous agency rules that may be statutorily plausible. Drawing from those insights, one should expect the following two factors to principally govern when the major questions doctrine will be employed successfully: (1) The agency interpretation raises an issue that is particularly suited to congressional resolution—as opposed to executive resolution; and (2) The agency interpretation raises a troubling issue of constitutionality—at least as a matter of originalism, even if the constitutional claim is doubtful under modern case law.[2]

These two factors are the common denominator in the Supreme Court's major questions decisions. Where they are both in play, one should expect the Court to apply the doctrine. Likewise, one can anticipate the sort of issues that are likely to implicate the doctrine, some even on a per se basis.

I. DIVINING THE MAJOR QUESTIONS DOCTRINE

A. Confronting Bold Claims of Power

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[1] *See, e.g.*, Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, CATO SUP. CT. REV., 2021–2022 37, 60 (2022) (observing that the Supreme Court has never repudiated its holding in ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 497, 505 (1897), that "the power to issue rules mandating or prohibiting private conduct [in this case, rates for rail transport] 'is not to be presumed or implied from any doubtful and uncertain language.'").

[2] As we shall clarify, the first factor implicates subjects that are innately political because of the significance of the power asserted or their practical import.

West Virginia v. EPA[3] was the first Supreme Court opinion to refer to the major questions doctrine by name.[4] But the Court had employed the major questions rationale several times previously.[5] And it did so with increased frequency in its 2021 and 2022 Terms.

FDA v. Brown & Williamson Tobacco Corp. (*Brown & Williamson*) is sometimes viewed as the seminal major questions case.[6] At issue was the Food and Drug Administration's claim that Congress had authorized the agency to regulate—and to potentially ban—tobacco products under the Food, Drug, and Cosmetic Act of 1938 because the statute authorized regulation of "drugs" and "devices."[7] This was at least a plausible statutory interpretation because tobacco products contain nicotine, which is notoriously addictive.[8] But the Court concluded that the Act had to be interpreted as excluding tobacco products in large part because the Court was skeptical that Congress meant to authorize regulation of a product that had long been the subject of political controversy.[9]

In rejecting FDA's interpretation, *Brown & Williamson* explained that courts "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[10] Justice O'Connor relied heavily on the Court's approach in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,[11] which rejected the Federal Communications Commission's claim of discretion to "modify" a requirement that long distance carriers must file their rates.[12] *MCI* had stressed that "[i]t [wa]s highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through [] a subtle device . . ."[13] In keeping with that approach, *Brown & Williamson* held that it was improper to infer authority to regulate tobacco products from "subtle" or "cryptic" text.[14]

In a similar manner the Supreme Court in *Gonzales v. Oregon* rejected the U.S. Department of Justice's interpretation of the Controlled Substances Act of 1970, because it would have cut off an "'earnest and profound debate' across the country" over physician-assisted suicide.[15] Once again, the Court affirmed that an agency cannot rely on "oblique" language to resolve matters of political contention.[16] Or in more colorful terms, Congress does not "hide elephants in

[3] 142 S. Ct. 2587 (2022).

[4] Prior to that, some had suggested that there really was no such thing. *See* Resp't. Br. in Opp'n. to Cert. at 12, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (No. 20–1530), (referring to the doctrine in air quotes).

[5] *See* Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (referencing major question doctrine precedent).

[6] 529 U.S. 120, 159 (2000).

[7] 21 U.S.C. §§ 321(g)–(h), 393.

[8] *See Drug* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/drug (defining "drug" as "something . . . that causes addiction, habituation, or a marked change in consciences.") [https://perma.cc/U53Q-AWCQ].

[9] *Brown & Williamson*, 529 U.S. at 159 (stressing tobacco's "political history").

[10] *Id.* at 133.

[11] MCI Telecomms. Corp. v. AT&T, 512 U. S. 218 (1994).

[12] *Brown & Williamson*, 529 U.S. at 160 (explaining the "instructive" value of *MCI*). *See MCI*, 114 S. Ct. 2223, 2229 (1994).

[13] *MCI*, 512 U.S. at 231.

[14] *Brown & Williamson*, 529 U.S. at 160.

[15] 546 U.S. 243, 267 (2006) (quoting Washington v. Glucksberg, 521 U. S. 702, 735 (1997)).

[16] *Gonzalez*, 546 U.S. at 267.

mouseholes."[17] And notably, there was no suggestion that the doctrine hinged on the economic impact of DOJ's assertion of regulatory power.[18] Rather, it was the inherently political nature of the subject matter that triggered the doctrine.[19]

Likewise, in *Utility Air Regulatory Group v. EPA* (*UARG*), the Supreme Court rejected an aggressively broad interpretation of nebulous language in the Clean Air Act (CAA) that would have brought "about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[20] EPA argued that the term "air pollutant" should be construed broadly to encompass greenhouse gases for the purpose of the CAA's permitting regime for stationary sources.[21] This construction would have given EPA the "power to require [costly] permits for construction and modification of tens of thousands, and the operation of millions," of ordinary business facilities.[22] By contrast, this regime had only previously applied to "a total of several thousand facilities nationwide," at a time when the statutory term "pollutant" was understood only as covering traditional air pollutants like sulfur dioxide or nitrogen oxides.[23]

Even EPA acknowledged that its interpretation was unwieldy.[24] Hence, the agency sought to "tailor" its regulation to limit the number of new sources that would have to apply for permits to ensure administrative feasibility.[25] The Court concluded that Congress would have spoken more clearly if it had intended the CAA's stringent control measures for stationary sources to be triggered by the emission of any "pollutant."[26]

Notably, the Court had previously declined to apply the major questions doctrine in *Massachusetts v. EPA*, when interpreting the term "pollutant" to include greenhouse gas emissions under other provisions of the CAA.[27] At first blush, the *Massachusetts* decision appears inconsistent *UARG*. Whereas the Court in *UARG* had little trouble concluding that regulation of greenhouse gas emissions was a matter of "vast 'economic and political significance'" that requires a clear statement from Congress, the *Massachusetts* Court thought it abundantly clear that Congress intended to include greenhouse gas emissions within the CAA's regulatory ambit, at least with respect to mobile sources.[28] But as other scholars have observed:

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[17] *Id.* (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468, (2001)).

[18] *Gonzalez*, 546 U.S. at 268 (stressing only that "[t]he idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation . . . is not sustainable.").

[19] The Court stressed that euthanasia was a matter of "earnest and profound debate." *Id*.

[20] 573 U.S. 302, 324 (2014).

[21] *Id.* at 308.

[22] *Id.* at 324.

[23] Adler, supra note 1, at 43.

[24] *UARG*, 573 U.S. at 325 ("EPA . . . essentially admitted that its interpretation would be unreasonable without 'tailoring'").

[25] *Id.* at 312 (explaining that EPA sought to "tailor" the rule because greatly expanding the CAA permitting regime would "mak[e] [the regime] both unadministrable and 'unrecognizable to the Congress that designed' them.").

[26] *Id.* at 324 (concluding that EPA's assertion of power over millions of small sources "falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text.").

[27] EPA had argued "that climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the agency to address it." 549 U.S. 497, 512 (2007).

[28] *Compare UARG*, 573 U.S. 302, 324 (quoting *Brown & Williamson*, 529 U.S. at 159); *with Massachusetts*, 549 U.S. 497, 531 (seeking to distinguish *Brown & Williamson*).

> The Court in *Massachusetts v. EPA* paid little attention to the [practical] difficulty of applying the CAA's provisions to GHGs. Had they done so, they would have discovered that the CAA 'is not especially well designed for controlling GHG pollution.'[29]

The Court's decision in *West Virginia* should now put to rest any lingering question as to whether federal agencies can rely on nebulous language in the CAA (or elsewhere) to justify politically fraught regulation to address climate change.[30] As in *Brown & Williamson* and *UARG*, the Court rejected a statutorily plausible interpretation.[31] This time it was EPA's assertion that it could compel energy producers to shift away from reliance on coal—based on an elastic reading of its charge to decide upon the "best system of emission reduction" when developing "standards of performance" for stationary sources under Section 111 of the Act.[32]

West Virginia's emphatic reliance on the major questions doctrine is best understood as a bookend for a string of cases in which the Court had repeatedly rebuffed extravagant assertions of administrative rulemaking powers on politically divisive matters in 2021–22. First, in *Alabama Realtors Association v. HUD*, the Court rejected CDC's claim that it could impose a nationwide eviction moratorium under its delegated authority to "prevent the . . . spread of communicable diseases."[33] Second, in *NFIB v. OSHA*, the Court rejected OSHA's controversial rule mandating vaccination for most employees under its emergency authority to promulgate rules to ensure safe workplaces.[34] In these cases, as in *West Virginia*, the executive branch had a plausible basis for asserting regulatory authority; however, given the practical significance of the subject matter and the lack of clarity in the text, the Court was (appropriately) skeptical.[35]

These decisions all represent data for charting when the major questions doctrine should apply. The common denominator is that Congress is presumed to provide commensurate direction and meaningful guardrails when authorizing an agency to regulate more politically significant matters. Matters of profound economic impact are of such great consequence that they are inherently political in nature. Therefore, delegations on such matters cannot lightly be presumed from "oblique" language. Likewise, Congress presumably wants to decide for itself other regulatory subjects that "significant[ly] encroach[] into [our] lives . . ."[36]

From all of this, we may say that the doctrine applies when highly politicized issues are in play. This does not mean that the judiciary needs to wade into political theory. The doctrine

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[29] Adler, *supra* note 1, at 42 (quoting Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 20 (2014)).

[30] Adler, *supra* note 1, at 37, 39 (stating that *West Virginia* "make[s] it more challenging for the EPA or other agencies to develop new climate change policies relying on pre-existing statutory authority directed at other problems.").

[31] West Virginia v. EPA, 142 S. Ct. 2587, 2629 (2022) (Kagan, J., dissenting) (construing the text as giving "broad authority" for EPA to "go find the best system of emission reduction . . .").

[32] 42 U.S.C. §§ 7411(a)(1), 7411(b)(5).

[33] "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." 141 S. Ct. 2485, 2489 (2021).

[34] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) (concluding that a "significant encroachment into the lives—and health—of a vast number of employees" implicates the major questions doctrine).

[35] *West Virginia*, 142 S. Ct. 2587, 2609 (affirming that the court will "'typically greet' assertions of 'extravagant statutory power over the national economy' with 'skepticism.'") (quoting *UARG*, 573 U.S. at 324).

[36] *NFIB*, 142 S. Ct. 661, 665.

merely requires the Court to recognize when an agency is asserting authority to weigh competing public values on highly consequential matters.[37]

The Court has had little problem recognizing when the judiciary has been asked to weigh competing public values in the past. For example, as Justice Gorsuch explained in *National Pork Producers Council v. Ross*, the Court cannot embrace a Dormant Commerce Clause test that would require it to weigh incommensurable values like economic impacts versus moralistic judgments over the treatment of animals.[38] Likewise, the Court has rejected statutory arguments that have called upon the judiciary to weigh competing public values because "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice . . ."[39] And in the same manner, the major questions doctrine merely requires a court to recognize when the executive branch seeks to arrogate the power to weigh competing public values without the sort of direction we would expect from Congress.[40]

B. Hydraulic Forces at Work

There is yet another implicit force at work. The Court's increasing reliance on the major questions doctrine may be understood as a manifestation of "the hydraulic pressures of our constitutional system," *i.e.*, the notion that the legal system shifts to using alternative doctrines when an otherwise apt and available doctrine is not currently practicable.[41] For example, as we shall see below, variants of the major questions doctrine have been deployed in several of the Court's prominent Clean Water Act (CWA) decisions to allow the Court to rein in implausible agency claims to vast regulatory authority without having to justify those outcomes under the Court's existing government-friendly Commerce Clause jurisprudence. In this way, the doctrine reinforces both separation of powers and federalism values, with a degree of protection beyond what existing case law might otherwise afford, by serving as a sort of jurisprudential weigh station on the Court's road to fuller implementation of these constitutional values.[42] Thus, a second important criterion for predicting application of the major questions doctrine is whether the agency action is of a type that the Court might well be disposed to deem unconstitutional—but for which the argument for unconstitutionality would require the Court to directly address

[37] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring) (emphasizing that the "expectation of clarity is rooted in the basic premise that Congress normally 'intends to make major policy decisions itself, not leave those decisions to agencies.'") (quoting United States Telecom Assn. v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

[38] Justice Gorsuch emphasized that this is properly the role of the People's "elected representatives . . ." 598 U.S. 356, 382 (2023).

[39] Rodriguez v. United States, 480 U.S. 522, 525–26 (1987).

[40] *See Nebraska*, 143 S. Ct. 2355, 2379–80 (Barrett, J., concurring) (explaining that context is essential for interpreting any delegation of authority).

[41] Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting). An example of such hydraulic pressures is the Court's incorporation of the Second Amendment through the Due Process Clause rather than the Privileges or Immunities Clause. *See id.* at 2141 n.68.

[42] *See* Eric Berger, *Constitutional Conceits in Statutory Interpretation*, 75 ADMIN. L. REV. 479, 545 (2023) (suggesting that the doctrine operates more as a "foreshadow[ing of] future constitutional change more than [as a tool of] statutory interpretation").

an area of law that at least some Justices are, perhaps for strategic reasons, at present unwilling to do.[43]

For example, five sitting Justices have expressed interest in reinvigorating the nondelegation doctrine.[44] Yet, the Court has, thus far, balked at squarely taking on that project—likely because the major questions doctrine accomplishes much the same result operating as a shadow of the nondelegation doctrine.[45] And in this manner, the major questions doctrine operates (like many other clear-statement rules) to provide a margin of legal safety around a core of constitutional law, "to ensure that the government does 'not inadvertently cross constitutional lines.'"[46]

But the constitutional avoidance concerns animating the major questions doctrine are not limited to preventing improper delegations of power.[47] Federalism and the need to keep Congress to its enumerated powers are of paramount importance as well.[48] For that matter, Justice Gorsuch has suggested that the long-established federalism canon represents a special application of the major questions doctrine.[49]

This view of the major questions doctrine—as a strong-form avoidance canon—bears out if we examine the Supreme Court's three decisions limiting the geographic scope of the CWA since 2000.[50] While the Court was not explicitly invoking the major questions doctrine in these cases, a variant of major questions played a prominent role in each and, therein, offers further direction in understanding when Congress is expected to speak in especially clear terms.

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[43] *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (emphasizing that the doctrine "works . . . to protect the Constitution's separation of powers" by strengthening "the Constitution's rule vesting federal legislative power in Congress.").

[44] *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J.) ("In the wake of Justice Rehnquist's opinion [in Indus. Union Dept., AFL–CIO v. Am. Petroleum Inst., 448 U.S. 607, 685–686 (1980) (Rehnquist, J., concurring in judgment)], the Court has not adopted a nondelegation principle for major questions. But the Court has applied a closely related statutory interpretation doctrine.").

[45] Other scholars have suggested that the Court is employing the major questions doctrine where the "challenged policies [do] not violate constitutional *law* so much as the conservative Justices' constitutional *sensibilities*." *See* Berger, *supra* note 42, at 504.

[46] *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 175 (2010)).

[47] Justice Gorsuch suggests a lengthy list of constitutional values that the major questions doctrine protects. *See West Virginia*, 142 S. Ct. at 2620 ("At stake [are] but basic questions about self-government, equality, fair notice, federalism, and the separation of powers.").

[48] Berger, *supra* note 42, at 508 ("Though *NFIB* and *West Virginia* focused on separation of powers concerns, a federalism thread ran through them as well.").

[49] *See West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) ("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."). *Cf.* Gregory v. Ashcroft, 501 U.S. 452, 459–460 (1991) (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").

[50] We refer to the major questions doctrine as a strong-form avoidance canon because it places the burden on the agency to point to clear authority even without need for a plaintiff to argue that the statute raises serious constitutional problems. Put differently, the major questions doctrine contemplates background constitutional principles at the outset in its very approach to statutory construction. *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021); *See also* Eli Nachmany, *There Are Three Major Questions Doctrines*, YALE J. ON REG. (July 16, 2022), https://www.yalejreg.com/nc/three-major-questions-doctrines [https://perma.cc/3ZBA-J2AN].

To begin, the CWA prohibits the "discharge of any pollutant" from a "point source" to "navigable waters."[51] For most pollutants, one must seek a permit from EPA, but for the discharge of dredged or fill material, the permit must come from the Army Corps of Engineers.[52] Such permits can be very expensive, and the process to obtain them is often "arduous, expensive, and long."[53] Proceeding without a permit is not a viable option: the statute imposes "crushing" consequences "even for inadvertent violations."[54] Given the statute's "capacious definition of 'pollutant,' its low *mens rea* requirement, and its severe penalties, regulated parties have focused particular attention on the Act's geographic scope."[55] But while the statutory text provided painfully little direction as to what lands are affected, the EPA and Army Corps aggressively sought to extend their jurisdiction.[56] All of this culminated in a trilogy of cases that rejected expansive assertions of CWA jurisdiction.

Our first case is *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*").[57] The petitioner was a consortium of Chicago-area municipalities that needed land for a new landfill. They thought they had found what they wanted in a 533-acre parcel that had been the site of a sand- and gravel-mining operation but which had long since been abandoned, its remaining excavated areas "evolving into a scattering of permanent and seasonal ponds of varying size."[58] The Army Corps asserted jurisdiction over the landfill project, contending that the site's ponds qualified as "navigable waters" because they were used as habitat by migratory birds that crossed state lines.[59]

The Supreme Court held that the Act did not reach such "isolated" waters: "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this."[60]

As the federal government conceded, to adopt the Corps' position would read "navigable" out of the statute.[61] That would be particularly inappropriate because that term was an important interpretative signal as to "what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[62]

So much for the statutory analysis. Where does the major questions doctrine come in? The Corps asked for *Chevron* deference, but the Court said no because the text was clear, yet the Court

[51] *See* 33 U.S.C. §§ 1311(a), 1362(6), (7), (12), (14).

[52] *See* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 265 (2009).

[53] Army Corps of Engineers v. Hawkes Co., 578 U.S. 590, 594–95, 601 (2016).

[54] *Id.* at 602 (Kennedy, J., concurring).

[55] Sackett v. EPA, 598 U.S. 651, 661 (2023).

[56] *See id.* at 666 ("The agencies never defined exactly what they regarded as the 'full extent of their authority.' They instead encouraged local field agents to make decisions on a case-by-case basis.").

[57] 531 U.S. 159 (2001).

[58] *Id.* at 163.

[59] *Id.* at 162–65.

[60] *Id.* at 168.

[61] *Id.* at 172.

[62] *Id.*

hastened to add that it would still say "no" even if the text were not clear.[63] That is because the Corps' interpretation would invoke the outer limits of Congress's power to regulate interstate commerce, something that the Court, for reasons of prudence, would not lightly attribute to Congress.[64] Such prudential concern, the Court pointed out, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power" such as land-use regulation.[65] That indeed would be this case, the Court explained, because allowing "respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the States' traditional and primary power over land and water use."[66] But the Court could find no "clear statement from Congress" that it intended the CWA to achieve such a result.[67]

SWANCC thus substantiates both of our predictive criteria for successful deployment of the major questions doctrine. Land-use regulation traditionally belongs to the domain of the states, and the decision whether to intrude upon that domain is something the Court expects Congress, not the executive, to make.[68] Similarly, profound Tenth Amendment concerns were raised by the Corps' broad interpretation, especially its shaky justification under the "substantially affects" component of modern Commerce Clause jurisprudence. But those concerns were perhaps not great enough to justify directly invalidating as unconstitutional the Corps' assertion of jurisdiction.[69] Indeed, just a few years later, in *Gonzales v. Raich*,[70] only three of the Justices in the *SWANCC* majority would vote to hold unconstitutional federal regulation of intrastate, noncommercial activity.[71] Hence, the Court availed itself of a federalism-major questions canon to avoid having to address the Commerce Clause question directly while still achieving a result consistent with a limited conception of the commerce power.

Our second case is *Rapanos v. United States*.[72] The petitioner had "backfilled wetlands on a parcel of land in Michigan that he owned and sought to develop."[73] Because he did so repeatedly without a permit, federal officials brought civil and criminal charges against him. At the Supreme Court, the issue was the same as in *SWANCC*: to what extent can nonnavigable waters be regulated as "navigable waters" under the Act? And just as the *SWANCC* majority, the *Rapanos* plurality opinion resolved the question mainly by looking to the text of the Act, concluding that wetlands some dozen or so miles from the nearest navigable body of water cannot plausibly be regulated.[74]

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[63] *Id.*

[64] *Id.* at 172–73.

[65] *Id.* at 173.

[66] *Id.* at 174.

[67] *Id.*

[68] *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000).

[69] *See also* William W. Buzbee, *The Antiregulatory Arsenal, Antidemocratic Can(n)ons, and the Water Wars*, 73 CASE W. RSRVE L. REV. 293, 303–04 (2022) ("[C]onstitutionally weighted 'clear statement' arguments could perhaps weaken or shrink environmental laws by trimming their scope under the guise of constitutional avoidance efforts, especially focused on impingements on state turf.").

[70] 545 U.S. 1 (2005).

[71] *Id.* at 42–43 (O'Connor, J., dissenting).

[72] 547 U.S. 715 (2006).

[73] *Id.* at 719–20.

[74] *See id.* at 742.

But the *Rapanos* plurality also relied on "canons of construction" to show that EPA and the Corps' interpretation was impermissible.[75] As for federalism, the plurality observed that "[r]egulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power."[76] Yet the government's "hydrological connection" theory "would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board."[77] That consequence triggered the requirement of "a 'clear and manifest' statement from Congress to authorize [such] an unprecedented intrusion into traditional state authority."[78] The plurality could find no such statement. And as for constitutional envelope-pushing, the plurality concluded that "the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power,"[79] a position requiring "a clearer statement from Congress" than what the text provided.[80]

Just as the majority in *SWANCC*, the plurality in *Rapanos* employed major-question-doctrine variants precisely where we would expect them. Present in *Rapanos* is a concern about federal law operating as land-use regulation, and thus limiting the prerogatives of the states. That is a concern weighty enough, and sufficiently afield from a traditional understanding of the federal-state balance of power, for the Court to expect Congress itself to decide expressly and exclusively. Present as well is the related concern that Congress does not have the Article I power to dictate land use as such, but rather only to the extent that such activity is sufficiently connected to interstate commerce or another of Congress's enumerated powers. And also present is the fact that constitutional law has not yet caught up with some Justices' constitutional sensibilities, as demonstrated by the prominent Tenth Amendment loss the prior term in *Raich*.[81] To be sure, Justice Scalia's *Rapanos* opinion, as a plurality, was not generally adopted by the lower courts. But it—and in particular its major-questions-doctrine-related discussion—would ultimately prove to have decisive influence in the Court's next decision addressing the geographic scope of the CWA.

That final case is *Sackett v. EPA*.[82] The petitioners sought to develop a small vacant residential lot.[83] EPA then asserted jurisdiction on the ground that the site contained wetlands that were regulable as "navigable waters."[84] In a 5-4 decision, the Court adopted Justice Scalia's plurality

[75] *See id.* at 737–38.
[76] *Id.* at 738.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *See* Buzbee, *supra* note 69, at 305–06. It is shown as well by the *Rapanos* concurring opinion of Justice Kennedy, who was in the majority in *SWANCC*. In *Rapanos*, Justice Kennedy provided the fifth vote for vacatur of the lower court's judgment, but he did not agree with the plurality's test for wetlands jurisdiction. And in defending his own "significant nexus" test, he suggested that the agencies' interpretation wasn't nearly as constitutionally suspect as that which the Court had invalidated in *SWANCC*, while also being more consistent with federalism. *Rapanos*, 547 U.S. at 777 (Kennedy, J., concurring in the judgment).
[82] 143 S. Ct. 1322 (2023).
[83] *See id.* at 1331.
[84] *Id.* at 1332–33.

opinion from *Rapanos* and rejected EPA's alleged CWA authority over the Sacketts' lot.[85] Just as in *Rapanos*, the Court's analysis in *Sackett* was principally textual. Citing dictionary definitions, the Court concluded that "the CWA's use of 'waters' encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes."[86] The Court employed a similar analysis with respect to wetlands. Beginning with the proposition that wetlands are not, in ordinary parlance, considered to be waters, the Court concluded that "'waters' may fairly be read to include only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.' In other words, a wetland can be regulated only when it is 'difficult to determine where the 'water' ends and the 'wetland' begins."[87]

But in rejecting EPA's "significant nexus" theory of statutory authority, the Court relied heavily on three major-questions-related canons. First, as to federalism, the Court observed that "Congress [must] enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[88] As the Court had repeatedly held, the regulation of land and water "lies at the core of traditional state authority." Yet EPA's interpretation of the Act would "impinge on this authority" because it would end up regulating a "truly staggering" amount of land.[89] And yet far from containing a clear statement, the CWA's text nowhere mentions "significant nexus."[90]

Second, as to constitutional avoidance, the Court observed that "the EPA's interpretation gives rise to serious vagueness concerns," especially in light of the criminal penalties that can be triggered by illegal discharges of pollutants into "navigable waters."[91] Under the Due Process Clause, Congress must define penal statutes "with sufficient definiteness that ordinary people can understand what conduct is prohibited" and "in a manner that does not encourage arbitrary and discriminatory enforcement."[92] But the geographic scope of the CWA, as interpreted by EPA's significant-nexus standard, "remains 'hopelessly indeterminate.'"[93] That is because the test turns upon several "vague" and "open-ended" considerations that "evolve as scientific understandings change," which results in a "freewheeling inquiry [that] provides little notice to landowners of their obligations."[94] That consequence underscores both the need for a clear statement and the deficiency in the significant-nexus standard; for "[w]here a penal statute could sweep so broadly as to render criminal a host of what might otherwise be considered ordinary activities, we have been wary about going beyond what 'Congress certainly intended the statute to cover.'"[95]

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[85] *See id.* at 1340–41, 1344.
[86] *Id.* at 1336.
[87] *Id.* at 1341 (quoting Rapanos v. United States, 547 U.S. 715 (2006)).
[88] *Sackett*, 143 S. Ct. at 1341.
[89] *Id.* at 1341–42.
[90] *Id.* at 1342.
[91] *Id.*
[92] *Id.* (quoting McDonnell v. United States, 579 U.S. 550, 576 (2016)).
[93] *Id.* (quoting Sackett v. EPA, 566 U.S. 120, 133 (2012) (Alito, J., concurring)).
[94] *Id.* at 1340, 1342.
[95] *Id.* at 1342 (quoting Skilling v. United States, 561 U. S. 358, at 404 (2010)).

Finally, the Court relied upon major questions doctrine expressly to reject EPA's argument that a broad wetlands jurisdiction was effectively ratified when, in 1977, Congress authorized EPA to transfer permitting authority from the Corps to the states, except for certain types of "navigable waters," "including wetlands adjacent thereto."[96] As the Court explained, "it would be odd indeed if Congress had tucked an important expansion to the reach of the CWA into convoluted language in a relatively obscure provision concerning state permitting programs."[97] That would be an unjustified inference because, as the Court "ha[s] often remarked that Congress does not 'hide elephants in mouseholes' by 'alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'"[98]

Both of our predictive criteria are present again in *Sackett*. EPA's expansive significant-nexus test would thwart states' traditional authority to regulate land and water. The interpretation's vagueness would raise due process concerns considering the statute's significant penalties. Yet the Court might have been reluctant to address these constitutional difficulties directly, given the Court's recent Commerce Clause jurisprudence, as well as the sometimes-confusing overlap between nondelegation and void-for-vagueness doctrines.[99] The question of how far the Act goes is an important political one as well,[100] and thus one that Congress would not likely have addressed in an obscure provision unrelated to the Act's scope.[101]

II. FEDERAL LAND-USE REGULATION AS PRESUMPTIVELY IMPLICATED SUBJECT MATTER

If the major questions doctrine is triggered by the two criteria outlined above, we may anticipate that the courts should begin applying the doctrine whenever certain issues are presented. Indeed, after *UARG* and *West Virginia*, it is now settled that the major questions doctrine applies when the executive branch claims that oblique statutory language authorizes regulation geared toward controversial climate-change policy goals. For example, the Securities and Exchange Commission's claim to authority to compel climate-change related disclosures should be met with skepticism in the absence of a clear statutory charge. And we can identify other regulatory subjects that are inherently politicized and that implicate significant constitutional concerns, which should give rise to *per se* applications.

Federal land-use regulation is particularly fertile ground for the major questions doctrine for two reasons. First, such regulation will require politically contentious policy judgments. Second, with land-use regulation there is always potential to trench upon the traditional prerogatives of the states, or to otherwise threaten arrogation of Congress's exclusive prerogative to "make all

[96] 33 U.S.C. § 1344(g)(1).

[97] *Sackett*, 143 S. Ct. at 1340.

[98] *Id.* (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

[99] *See* Gundy v. United States, 139 S. Ct. 2116, 2141-42 (2019) (Gorsuch, J., dissenting).

[100] *See* Nat'l Ass'n of Mfrs. v. Dep't of Def., 583 U.S. 109, 113–114 (2018) ("What are the 'waters of the United States'? As it turns out, defining that statutory phrase—a central component of the Clean Water Act—is a contentious and difficult task.").

[101] *See Sackett*, 143 S. Ct. at 1355 n.9 (Thomas, J., concurring) ("To infer Congress' intent to upend over a century of settled understanding and effect an unprecedented transfer of authority over land and water to the Federal Government, based on nothing more than a negative inference from a parenthetical in a subsection that preserves state authority, is counterintuitive to say the least.").

needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[102]

A. USDA's Assertion of Power to Prohibit Roads Across 58 Million Acres

In *Inside Passage Electric Cooperative v. United States Department of Agriculture* (*IPEC*), an electric cooperative is suing the U.S. Department of Agriculture (USDA) over a rule that prevents it from pursuing geothermal and hydroelectric projects that promise to reduce its dependence on diesel fuel and to lower exorbitant utility costs in its community.[103] At issue is the so-called "Roadless Rule," which prohibits the construction of virtually any new roads across 16.8 million acres in the Tongass National Forest.[104] More broadly, the Roadless Rule prohibits roads across 58.5 million acres throughout the United States.[105] "This constitutes approximately two percent of America's land mass."[106]

The Cooperative contends that the Roadless Rule is *ultra vires* because no statute specifically delegates authority to bluntly cut off meaningful access to vast swaths of public lands. For its part, the agency claims that it has broad rulemaking authority under the Organic Act of 1871,[107] and the Multiple Use Sustained Yield Act.[108] And admittedly, these statutes have language that, as a matter of "definitional possibilities,"[109] could be interpreted as granting the USDA the power to issue something like the Roadless Rule. But "construing statutory language is not merely an exercise in ascertaining . . . definitional possibilities," especially where "only one meaning produces a substantive effect that is compatible with the rest of the law."[110] And consistent with the avoidance component of the major questions doctrine, the Cooperative appends its *ultra vires* claim with a claim that these statutes violate the nondelegation doctrine if construed as allowing discretion to issue the Roadless Rule without any clear statement of authority.[111]

Thus, the Cooperative's nondelegation claim reenforces its *ultra vires* arguments. Indeed, the USDA principally relies on a nebulous delegation to manage federal forestlands for "multiple use and sustainable yield."[112] This is a standard that the agency says "breathe[s] discretion at every pore."[113] Accordingly, the agency has justified the Roadless Rule merely by emphasizing its chosen policy priorities.[114] The USDA has decided for itself that its preferred ecological values are more important than *any* economically or socially beneficial project that might require roads. But of course, a question as to whether to cut off meaningful access to vast swaths of land is politically

[102] U.S. CONST, art. IV, § 3.
[103] No. 3:23-cv-00204-SLG (D. Ak. Filed Sept. 8, 2023) [hereinafter IPEC Compl.].
[104] 88 Fed. Reg. 5252 (Jan. 27, 2023).
[105] *See* 66 Fed. Reg. 3243 (Jan. 12, 2001) (codifying 36 CFR 294).
[106] Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1211 (D. Wyo. 2003), *vacated and remanded*, 414 F.3d 1207 (10th Cir. 2005).
[107] 16 U.S.C. § 478.
[108] 16 U.S.C. §§ 528–531.
[109] FCC v. AT&T Inc., 562 U. S. 397, 407 (2011).
[110] Sackett v. EPA, 598 U.S. 651, 676 (2023).
[111] IPEC Compl. ¶¶ 59–67.
[112] *See* 86 Fed. Reg. 66498, 66501.
[113] 86 Fed. Reg. 66498 (quoting Perkins v. Bergland, 608 F.2d 803, 806–07 (9th Cir. 1979).
[114] *Id.*

significant. Such a decision requires legislative judgment (i.e., a weighing of competing values), which implicates our first criterion.

Likewise, our second criterion is met because—without something more guiding the exercise of discretion—there is a serious nondelegation question lurking. After all, the agency's interpretation appears to be unmoored from any legislatively established intelligible principle. Yet a court need not address the constitutional issue because major questions doctrine allows breathing room to achieve the same end in a minimalist fashion.

B. U.S. Fish & Wildlife Services as Chief Land Use Administrator

In *Kansas Natural Resources Coalition v. United States Fish & Wildlife Service*,[115] a coalition of western Kansas local governments and property owners are challenging a rule issued by the U.S. Fish & Wildlife Service in connection with the agency's listing of a population of lesser prairie chickens as a "threatened species" under the Endangered Species Act (Lesser Prairie Chicken Rule).[116] When the Service determines that a species qualifies as "threatened," Section 4(d) of the Act authorizes the agency to issue a rule prohibiting the "take" of such species[117]—with "take" being broadly defined as essentially any harmful activity directed at the species.[118] In this case the Lesser Prairie Chicken Rule substantially limits ordinary land use activities like grazing, conversion of grassland to row crops, use of herbicides and insecticides, installation of power lines and fences, and various motor vehicle and machinery uses.[119]

Properly construed, the statute cabins the Service's power by requiring a finding that a "take" rule must be "necessary and advisable to provide for the conservation" of the species.[120] Yet, in issuing its Lesser Prairie Chicken Rule, the Service disclaimed any obligation to establish that the prohibition on various land-use activities was "necessary and advisable" under, for example, any form of cost-benefit analysis.[121] This is consistent with the Service's longstanding (errant) position.[122]

But because the Service claims power to regulate land use without any meaningful guardrails, the plaintiffs in *Kansas Natural Resources Coalition* have invoked the major questions doctrine to bolster their *ultra vires* claim. They argue that, in "rejecting any suggestion that it analyze the costs and benefits of the 4(d) Rule, the Service claims breathtakingly broad authority to regulate," yet the agency "has identified no clear statement authorizing it to exercise this sweeping power."[123]

Just as with *IPEC*, here we can see why, consistent with our two predictive criteria, the doctrine should apply. First, the Service is purporting to exercise a power to control all development on lands containing habitat for the lesser prairie chicken, so as to cut off all sorts of economically and socially beneficial uses "across a region spanning Colorado, Kansas, Oklahoma,

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[115] No. 6:23-CV-01147 (D. Kan. filed July 20, 2023), transferred to W.D. Tex. 7:23-cv-00159-DC-RCG [hereinafter KNRC Compl.].

[116] 87 Fed. Reg. 72674, 72748–55 (Nov. 25, 2022).

[117] 16 U.S.C. § 1533(d).

[118] *Id*. § 1532(19).

[119] 87 Fed. Reg. at 72748–52.

[120] 16 U.S.C. § 1533(d).

[121] *See* 87 Fed. Reg. at 72749. *See also* KNRC Compl. ¶¶ 91–93.

[122] *See* Sweet Home Chapter of Cmtys. for a Great Or. v. Babbitt, 1 F.3d 1, 8 (D.C. Cir. 1993), *rev'd*, 515 U.S. 687 (1995).

[123] KNRC Compl. ¶¶ 132, 134.

and Texas."[124] Plainly this is a highly politicized subject, and a regulatory subject (i.e., land-use planning) that is traditionally the domain of state and local governments.[125] Second, the Service's interpretation raises classic major-questions-avoidance concerns. "It would authorize the agencies to forbid or exert regulatory control over any activity that affects any threatened species, for any reason or no reason whatsoever," and hence it would be "difficult to imagine a more obvious example of the delegation of legislative power to administrative agencies."[126]

CONCLUSION

Other commentators have criticized the major questions doctrine on the view that there is no workable standard for delineating between major and nonmajor questions. But as demonstrated here, the common thread is that the doctrine is implicated when an agency asserts rulemaking authority on an inherently political matter for which there are lurking constitutional concerns—either explicitly or implicitly—in play. With that understanding, litigants can anticipate both proper applications and limits to the doctrine. And, with time, we can expect that the Supreme Court will further crystalize these concepts, while also perhaps articulating further *per se* applications of the doctrine.

[124] *Id.* ¶ 133.

[125] *See* U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020) ("Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.").

[126] Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 PACE ENV'T L. REV. 23, 38 (2015) (emphasis omitted).