

ADMINISTRATIVE LAW — MAJOR QUESTIONS DOCTRINE —
FOURTH CIRCUIT HOLDS BYCATCH REGULATION WOULD BE
MAJOR QUESTION. — *North Carolina Coastal Fisheries Reform Group
v. Capt. Gaston LLC*, 76 F.4th 291 (4th Cir. 2023).

The major questions doctrine (MQD) has been a topic of considerable debate in recent years¹ — from when² and how³ it applies, to what it is⁴ and what purposes it is intended to serve.⁵ Two Justices on the Supreme Court recently weighed in on one of these debates, with Justice Gorsuch describing the MQD as a clear statement rule,⁶ and Justice Barrett describing it as a semantic canon.⁷ Recently, in *North Carolina Coastal Fisheries Reform Group v. Capt. Gaston LLC*,⁸ the Fourth Circuit applied the MQD as a blend of those two canons. But the MQD cannot be both a semantic and a substantive canon, and the Fourth Circuit’s application of the MQD was overly broad as a result. If the Supreme Court does not provide guidance on the nature of the MQD, more unconvincingly “major” cases like *Capt. Gaston* will follow.

In August 2020, the North Carolina Coastal Fisheries Reform Group and individuals who work and recreate near North Carolina coastal waters (together, “Reform Group”) brought suit against commercial shrimp trawlers (“Shrimp Trawlers”) in the United States District Court for the Eastern District of North Carolina.⁹ Shrimp Trawlers harvest shrimp by dragging weighted trawl nets along the bottom of North Carolina’s Pamlico Sound.¹⁰ For each pound of shrimp that is harvested, roughly four pounds of unwanted fish and marine life — known as “bycatch” — is snared, often injured or killed, and thrown back into the water.¹¹ Reform Group brought two claims against Shrimp Trawlers under the

¹ See Beau J. Baumann, *The Major Questions Doctrine Reading List*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 18, 2023), <https://www.yalejreg.com/nc/the-major-questions-doctrine-reading-list-by-beau-j-baumann> [<https://perma.cc/F4EK-5Z53>] (collecting MQD scholarship).

² See, e.g., Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent “Major Questions” Doctrine*, 49 CONN. L. REV. 355, 406 (2016) (describing majorness as ill defined).

³ See, e.g., Natasha Brunstein & Donald L.R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENV’T L. & POL’Y REV. 47, 47 (2022) (describing MQD test after *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), as two prongs: “unheralded” and “transformative”).

⁴ See, e.g., Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 4 (2023) (arguing the “MQD label” has been applied to “quite distinct doctrinal techniques”). See generally Ilan Wurman, *Importance and Interpretive Questions*, 109 VA. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381708 [<https://perma.cc/JZ7H-U9ZD>] (analyzing MQD as a quasi-linguistic canon).

⁵ Wurman, *supra* note 4 (manuscript at 3–7) (collecting sources describing MQD and its goals).

⁶ *West Virginia v. EPA*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

⁷ See *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring).

⁸ 76 F.4th 291 (4th Cir. 2023).

⁹ *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 560 F. Supp. 3d 979, 986–87 (E.D.N.C. 2021).

¹⁰ *Id.* at 988.

¹¹ Complaint ¶¶ 39–41, *Capt. Gaston*, 560 F. Supp. 3d 979 (No. 20-CV-00141).

citizen-suit provision¹² of the Clean Water Act¹³ (CWA). The first was brought under 33 U.S.C. § 1311(a), which prohibits the “discharge of any pollutant” into “navigable waters” without a permit.¹⁴ Reform Group argued that Shrimp Trawlers discharged two pollutants: (1) bycatch and (2) sediment from the floor of the Sound that trawl nets re-suspended in the water.¹⁵ The second claim was brought under 33 U.S.C. § 1344, which prohibits the unpermitted discharge of “dredged or fill material,”¹⁶ on the grounds that Shrimp Trawlers’ nets discharged sediment from the bottom of the Sound.¹⁷ Shrimp Trawlers moved to dismiss for lack of standing¹⁸ and failure to state a claim.¹⁹

The district court rejected the first motion, holding that Reform Group had standing.²⁰ Turning to the second motion, the court explained that whether Reform Group had stated a claim presented a “question of statutory interpretation” as to whether the CWA reached bycatch or sediment.²¹ The court began with the Act’s prohibition on the “discharge of any pollutant.”²² The CWA defines “pollutant” to include “biological materials,” “dredged spoil,” “rock,” and “sand.”²³ The court found that sediment fell within the plain meaning of “dredged spoil,” but that it was not covered by the Act because it had not been discharged *into* the water.²⁴ Turning to bycatch, the court reasoned that bycatch might, in its “literal sense,” fall within the meaning of “biological materials” — but counseled against an “overly literal reading” of the CWA inconsistent with its context, history, and purpose.²⁵ After analyzing the CWA, the court ultimately concluded that “context,” “indicia of congressional intent, and canons of statutory interpretation” indicated “biological materials should not reach . . . bycatch.”²⁶ Turning to the second claim, the court held that Shrimp Trawlers’ “de minimis”

¹² 33 U.S.C. § 1365; *Capt. Gaston*, 560 F. Supp. 3d at 993.

¹³ 33 U.S.C. §§ 1251–1389.

¹⁴ *Id.* §§ 1311(a), 1362(12), 1342; *Capt. Gaston*, 560 F. Supp. 3d at 995.

¹⁵ Complaint, *supra* note 11, ¶¶ 61–62.

¹⁶ 33 U.S.C. § 1344; *Capt. Gaston*, 560 F. Supp. 3d at 1006–07.

¹⁷ Complaint, *supra* note 11, ¶¶ 69–70. Reform Group also brought a common law claim under the public trust doctrine, alleging that the state failed to act as a “trustee of natural resources,” *id.* ¶ 72, by permitting Shrimp Trawlers’ operations, *id.* ¶¶ 78–79. This claim was directed at North Carolina’s Division of Marine Fisheries, *id.* ¶¶ 30, 79, a party voluntarily dismissed by the plaintiffs. *Capt. Gaston*, 560 F. Supp. 3d at 979 n.1.

¹⁸ See *Esther Joy, Inc.’s Memorandum in Support of Motion to Dismiss the Complaint for Lack of Standing Pursuant to Rule 12(b)(1) at 1*, *Capt. Gaston*, 560 F. Supp. 3d 979 (No. 20-CV-151).

¹⁹ *Capt. Gaston*, 560 F. Supp. 3d at 986.

²⁰ *Id.* at 994.

²¹ *Id.* at 995.

²² 33 U.S.C. § 1311(a).

²³ *Id.* § 1362(6).

²⁴ *Capt. Gaston*, 560 F. Supp. 3d at 996 (“[T]he Clean Water Act does not regulate . . . all pollutants anywhere. Rather, it regulates ‘the discharge . . . of any pollutant *into* navigable waters.’” (quoting *United States v. Deaton*, 209 F.3d 331, 334 (4th Cir. 2000))).

²⁵ *Id.* at 997.

²⁶ *Id.* at 1006.

dredging did not require a permit.²⁷ The court dismissed all claims,²⁸ and Reform Group appealed.²⁹

The Fourth Circuit affirmed.³⁰ Writing for a unanimous panel, Judge Richardson³¹ began by analyzing whether bycatch was a pollutant. He found it “plausible” that bycatch fell within the plain meaning of “biological materials,”³² but emphasized that a statute’s meaning might be “contextually inform[ed]” by certain “background principles” — including the major questions doctrine.³³ Judge Richardson then moved into a two-prong MQD analysis. First, he found that whether bycatch was a pollutant under the CWA was “a major question”³⁴ because: (1) it implicated a “distinct regulatory scheme”;³⁵ (2) such a holding would “alter[] the federal-state framework”³⁶ and “raise significant federalism concerns”;³⁷ (3) the EPA had “never sought [such] authority”;³⁸ and (4) the court’s ruling “would have significant political and economic consequences.”³⁹ After finding the MQD applicable, Judge Richardson moved to prong two, where he sought “clear congressional authorization” for the EPA to regulate bycatch.⁴⁰ He concluded that the Act’s “expansive, vaguely worded definition” was insufficient to provide such authorization.⁴¹ The court then indicated that even if bycatch were a pollutant, it was not clearly *discharged* because discharge is defined as an “addition,” while “bycatch adds nothing to the water that was not already there.”⁴² The court then held that sediment was not “dredged spoil” because dredging regards “excavation or land-altering activity”;⁴³ and even if it was “rock and sand,” it was not “discharge[d]” because no sediment had been “*added*” to the Sound.⁴⁴ Finally, the Act’s permitting

²⁷ *Id.* As to the state law claim, the court held that only the state Attorney General had authority to bring a claim under the public trust doctrine. *Id.* at 1009.

²⁸ *Id.* at 1009.

²⁹ Notice of Appeal, *Capt. Gaston*, 560 F. Supp. 3d 979 (No. 20-CV-151).

³⁰ *Capt. Gaston*, 76 F.4th at 294.

³¹ Judge Richardson was joined by Judge Rushing and District Judge Lydon of the District of South Carolina, sitting by designation.

³² *Capt. Gaston*, 76 F.4th at 295–96.

³³ *Id.* at 296 (citing *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–14 (2022)).

³⁴ *Id.* at 297.

³⁵ *Id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143–46 (2000)) (explaining that Congress intended to “address the bycatch problem” through the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. §§ 1801–1884).

³⁶ *Id.* at 298 (alteration in original) (quoting *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172–73 (2001)).

³⁷ *Id.*

³⁸ *Id.* at 299 (“The EPA’s own lack of confidence . . . suggests that this is a major-questions case.”).

³⁹ *Id.* (citing *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022)).

⁴⁰ *Id.* at 301 (quoting *West Virginia v. EPA*, 142 S. Ct. at 2609).

⁴¹ *Id.* at 302.

⁴² *Id.* n.14.

⁴³ *Id.* at 303 (citing 33 C.F.R. § 323.2(c) (2022)).

⁴⁴ *Id.* at 304.

requirement was found inapplicable since sediment was not “dredged.”⁴⁵ The court affirmed the district court’s dismissal of both claims.⁴⁶

The Fourth Circuit applied two conflicting versions of the MQD simultaneously in *Capt. Gaston*. Though the court acknowledged the “ongoing debate” over whether the MQD is a clear statement rule, it did not clarify its own position on that debate,⁴⁷ and its application of the MQD in *Capt. Gaston* resembled both a clear statement rule and a semantic canon. But the MQD cannot, and should not, be both. Combining those canons lowers the MQD’s threshold for “majorness” while raising its threshold for authorization. That formulation will lead to more cases being disposed of under the MQD, contrary to the Supreme Court’s insistence that it applies in only “extraordinary” circumstances,⁴⁸ which may entrench distrust of the doctrine.

Justices Gorsuch and Barrett have advanced competing characterizations of the MQD over the past two Terms, with Justice Gorsuch describing it as a clear statement rule and Justice Barrett describing it as a semantic canon.⁴⁹ Their concurrences distill what the MQD might look like as one canon or the other, and thus provide a guide for analyzing the nature of the MQD.⁵⁰ In *West Virginia v. EPA*,⁵¹ Justice Gorsuch set forth his view that the MQD is a clear statement rule⁵² that operates in two parts: first, a court must determine whether an issue is “major”;⁵³ if it is, the court must ask whether Congress provided a “clear statement” to the agency to exercise such authority.⁵⁴ This clear-statement MQD is seen as protecting normative goals — by requiring Congress to address “important subjects” itself, it guards against broad

⁴⁵ *Id.* at 303.

⁴⁶ *Id.*

⁴⁷ *See id.* at 296 n.5. The court acknowledged the uncomfortable fit between clear statement rules and a “commitment to textualism,” but said lower courts “must simply apply” the MQD. *Id.*

⁴⁸ *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

⁴⁹ *Id.* at 2616 (Gorsuch, J., concurring); *see Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring). Clear statement rules are substantive canons, which “stretch statutory text in the direction of favored values,” while semantic (or “linguistic”) canons are “generalizations” about how language is “used and understood.” Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 516 (2023).

⁵⁰ The Court has not endorsed either position. Some argue that *West Virginia* cemented the MQD as a substantive canon, *see Daniel T. Deacon & Leah M. Litman, The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1041 (2023), and others suggest the Court could still walk this position back, *see Freeman & Stephenson, supra* note 4, at 19–20.

⁵¹ 142 S. Ct. 2587.

⁵² *Id.* at 2616 (Gorsuch, J., concurring). Clear statement rules create presumptions that only “clear statutory text” can overcome. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992).

⁵³ *West Virginia v. EPA*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

⁵⁴ *Id.* at 2622. How “clear” a statement must be is up for debate. *See id.* at 2622–24 (describing “clues,” *id.* at 2622, including subtlety, past interpretations, and mismatch); Deacon & Litman, *supra* note 50, at 1012 (requiring “explicit and specific congressional authorization”); *Biden v. Nebraska*, 143 S. Ct. at 2397 (Kagan, J., dissenting) (forcing Congress “to delegate in highly specific terms”).

legislative delegations that undermine separation of powers principles.⁵⁵ Recently, in *Biden v. Nebraska*,⁵⁶ Justice Barrett advanced her competing view that the MQD is not a clear statement rule, but an “interpretive tool”⁵⁷ — commonly referred to as a “semantic” canon.⁵⁸ There, she explained that clear statement rules are in tension with textualism because they require courts to “*strain* statutory text to advance a particular value”⁵⁹ when a “better interpretation” of the text is available.⁶⁰ She disclaimed the clear-statement characterization of the MQD, instead describing it as a “common sense” interpretive principle⁶¹ based on the presumption that “Congress normally ‘intends to make major policy decisions itself.’”⁶² This semantic canon MQD is structurally quite distinct from the clear-statement MQD. Justice Barrett rejected a formalized analysis that siloes the majorness and authorization prongs, contending that the MQD is “not an on-off switch that flips when a critical mass of factors is present,” but instead a sort of sliding scale where authorization might be more or less specific to overcome a more or less unlikely delegation.⁶³ While this articulation of the MQD advances some of the same values as Justice Gorsuch’s,⁶⁴ Justice Barrett described its purpose as faithful interpretation of text, rather than advancement of “values external to a statute.”⁶⁵

To illustrate how these doctrines operate in practice, it’s helpful to compare each to the Fourth Circuit’s reasoning in *Capt. Gaston* in turn. The first prong of Justice Gorsuch’s framework, “majorness,” has three factors: (1) political significance, (2) economic significance, and (3) federalism.⁶⁶ The political significance factor refers to political disagreement and debate, such as “considered and rejected” bills⁶⁷ or signs that

⁵⁵ *West Virginia v. EPA*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

⁵⁶ 143 S. Ct. 2355.

⁵⁷ *Id.* at 2378 (Barrett, J., concurring).

⁵⁸ *See id.* at 2376 n.1 (contrasting clear statement rules with “linguistic” canons); Chad Squitieri, *Presidents Are Parents Too: Proposing a Reformulated MQD*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 23, 2023), <https://www.yalejreg.com/nc/presidents-are-parents-too-proposing-a-reformulated-mqd-by-chad-squitieri> [<https://perma.cc/LSR6-S6LK>] (describing Justice Barrett’s MQD as a linguistic canon).

⁵⁹ *Biden v. Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring) (citing Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 168 (2010)).

⁶⁰ *Id.* at 2377 (citing *Boechler, P.C. v. Comm’r*, 142 S. Ct. 1493, 1499 (2022)).

⁶¹ *Id.* at 2378.

⁶² *Id.* at 2380 (quoting *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc)).

⁶³ *Id.* at 2384 (“Common sense tells us that as more indicators . . . are present, the less likely it is that Congress would have delegated the power . . . without saying so more clearly.”).

⁶⁴ *See* Eidelson & Stephenson, *supra* note 49, at 541–42 (explaining Justice Barrett’s “baseline assumptions” appear to reflect constitutional principles rather than legislative practice).

⁶⁵ *See Biden v. Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring); *see also id.* at 2380–81 (distinguishing interpretive tools from normative rules that *discourage* congressional delegation).

⁶⁶ *West Virginia v. EPA*, 142 S. Ct. 2587, 2620–22 (2022) (Gorsuch, J., concurring).

⁶⁷ *Id.* at 2620–21 (citing *id.* at 2613–14 (majority opinion)).

an agency is “attempting to ‘work [a]round’ the legislative process.”⁶⁸ The economic significance factor might be satisfied if a rule impacts “a significant portion of the American economy”⁶⁹ or results in “billions of dollars in spending.”⁷⁰ And the federalism factor is concerned with agency action that “seeks to ‘intrud[e] into an area that is the particular domain of state law.’”⁷¹ Under an independent analysis of these factors, *Capt. Gaston* is not convincingly major. The regulation of bycatch is not “politically significant,” since there is no political disagreement or evidence that the EPA was “work[ing] around” the legislative process.⁷² As to economic significance, the Fourth Circuit remarked that “[f]ishing in America generates hundreds of billions of dollars, employs millions of people, and provides recreational sport for millions more.”⁷³ But given the court’s footnote suggesting that bycatch might not be *discharged* since no fish are *added*, most fishermen would not become subject to the CWA even if bycatch were a pollutant, because most fishermen would not *discharge* that pollutant. By this reasoning, a bycatch regulation would be unlikely to impact a “significant portion” of the American economy or to require “billions of dollars in spending.”⁷⁴ As to the federalism factor, the Fourth Circuit found it significant that states have “traditional and primary power over land and water use,”⁷⁵ and that the Clean Water Act contains a states’ rights savings clause.⁷⁶ This federalism prong could be satisfied, but it’s not clear that federalism alone is enough to invoke the MQD rather than the federalism clear statement rule.⁷⁷ Taking these three factors together, Justice Gorsuch’s version of the MQD seems to suggest that bycatch regulation is not “major” — and thus, a court properly applying this framework would not move to the second, “clear authorization” prong.

In practice, the Fourth Circuit did not endorse either a clear statement or semantic canon version of the MQD.⁷⁸ But there are two reasons why its application resembled the former. First, its MQD utilized a rigid, two-prong structure as described by Justice Gorsuch in *West*

⁶⁸ *Id.* at 2621 (quoting *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring)).

⁶⁹ *Id.* (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

⁷⁰ *Id.* (quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)).

⁷¹ *Id.* (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)).

⁷² *Capt. Gaston*, 76 F.4th at 299 n.8 (“[This] suit is designed to compel EPA action.”).

⁷³ *Id.* at 300.

⁷⁴ It’s also unclear that a permitting scheme would *impose* billions of dollars in costs even if it did apply to all fishermen. *Cf. Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023) (“\$430 billion in student loans”); *West Virginia v. EPA*, 142 S. Ct. at 2604 (“billions of dollars in compliance costs”).

⁷⁵ *Capt. Gaston*, 76 F.4th at 298 (quoting *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001)).

⁷⁶ *Id.* (quoting 33 U.S.C. § 1251(b)).

⁷⁷ *See, e.g., Sackett v. EPA*, 143 S. Ct. 1322, 1328 (2023) (applying federalism clear statement rule, which requires “exceedingly clear language . . . to alter the federal/state balance,” to the CWA).

⁷⁸ *See Capt. Gaston*, 76 F.4th at 296 n.5.

Virginia.⁷⁹ And second, the court introduced the MQD, alongside other substantive canons, as protecting “other legal interests” — suggesting it saw the MQD as serving normative, rather than purely interpretive, goals.⁸⁰ But the Fourth Circuit’s analysis differed from Justice Gorsuch’s in an important respect: the court considered extra factors in its majorness prong, including the “distinct regulatory scheme” for fishing, and the fact that the EPA had “never sought” to “regulate bycatch.”⁸¹ Those factors fall into Justice Gorsuch’s second, clear authorization prong.⁸² By relying on additional factors in the first stage of its analysis, the court seemed to be slipping into some version of a semantic canon, which does not formalistically silo those considerations.⁸³

Indeed, the Fourth Circuit’s application of the MQD resembled Justice Barrett’s version in several respects. In *Biden v. Nebraska*, Justice Barrett emphasized several types of “mismatches” that are significant to an MQD analysis, including broad power from narrow statutory provisions, regulations outside an agency’s traditional wheelhouse, and unheralded authority from long-extant provisions.⁸⁴ These factors are implicated in *Capt. Gaston*. The “distinct regulatory scheme” for fishing in the Magnuson-Stevens Fishery Conservation and Management Act⁸⁵ might reveal a mismatch between fishing and the EPA’s traditional “wheelhouse,” and the regulation of bycatch might be “unheralded” authority that the EPA had not previously sought. As for economic and political significance, the impact of a bycatch rule and the unique political history of the fishing industry could be considered background “context” as to the likelihood of congressional delegation.⁸⁶ Thus, taking these additional factors into consideration might suggest that Congress did not intend for the EPA to regulate bycatch. But this is where the analyses diverge. The Fourth Circuit’s intermediate conclusion was that bycatch regulation presented a “major question,” which made *Capt. Gaston* a “major-questions case.”⁸⁷ This is inconsistent with Justice Barrett’s description of the MQD as a broad consideration of text and context rather than “an on-off switch.”⁸⁸

Considering these analyses together suggests that the Fourth Circuit applied both a semantic and substantive MQD simultaneously in *Capt. Gaston*. Seen one way, it applied the MQD as a clear statement rule, but used the semantic canon MQD *as* its first prong by importing

⁷⁹ *Id.* at 297, 301.

⁸⁰ *Id.* at 296.

⁸¹ *Id.* at 297–99.

⁸² *West Virginia v. EPA*, 142 S. Ct. 2587, 2623 (2022) (Gorsuch, J., concurring).

⁸³ *See Biden v. Nebraska*, 143 S. Ct. 2355, 2384 (2023) (Barrett, J., concurring).

⁸⁴ *Id.* at 2382–83.

⁸⁵ 16 U.S.C. §§ 1801–1884.

⁸⁶ *See Biden v. Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring).

⁸⁷ *Capt. Gaston*, 76 F.4th at 297, 301 (quoting *West Virginia v. EPA*, 142 S. Ct. at 2610).

⁸⁸ *Biden v. Nebraska*, 143 S. Ct. at 2384 (Barrett, J., concurring).

additional factors into its majorness analysis. Or, viewed another way, the court applied the semantic canon MQD, but proceeded to the second prong of the clear statement rule by conducting an authorization analysis isolated from other factors. Either application is flawed. The MQD cannot be both a clear statement rule and a semantic canon, because a single doctrine cannot advise both straining text toward a normative goal and remaining true to the text regardless of the outcome.⁸⁹ This distinction matters. The clear-statement MQD has a high authorization threshold,⁹⁰ but it also restricts factors at the majorness threshold inquiry. So while it is harder to overcome, it is also, in theory, harder to trigger. When courts combine those canons as the Fourth Circuit did, they create from two distinct frameworks a super-MQD that is more likely to be triggered and more difficult to survive.

If the Supreme Court does not step in, lower courts are likely to continue applying these incompatible MQDs simultaneously. Many have already applied Justice Gorsuch's framework from *West Virginia*,⁹¹ perhaps because it provides structure to a "radically indeterminate"⁹² doctrine. Courts are likely to reach for Justice Barrett's MQD in the wake of *Biden v. Nebraska* for the same reason. Because the Court has not articulated a limit on the factors that should be considered under the majorness inquiry,⁹³ nor foreclosed a clear-statement authorization standard,⁹⁴ it's inevitable that these doctrines will seep into one another as they did in *Capt. Gaston*. That will lead courts to decide more cases under the MQD, despite the Court's insistence that it applies in only "extraordinary" cases,⁹⁵ which may enhance perceptions that the MQD is being used as a tool of judicial advocacy.⁹⁶ Guidance from the Court on the nature of the MQD would thus go a long way toward not only defining the boundaries of that doctrine, but also shoring up its legitimacy.

⁸⁹ Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. (forthcoming 2024) (manuscript at 49), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4348024 [<https://perma.cc/9XNF-WTXX>] (describing tension between substantive canons and "faithful agency to the statutory text"). Professor Ilan Wurman, drawing on the work of Professors Kevin Tobia and Brian Slocum, suggests the MQD may be a "hybrid" semantic/substantive canon. See Wurman, *supra* note 4 (manuscript at 37). Even under this view, the MQD cannot be both a "strong-form" and a more "modest" substantive canon, *Biden v. Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring), for the same reasons. See *id.* at 2377–78.

⁹⁰ Justice Kagan describes the clear-statement MQD as requiring Congress to "delegate in highly specific terms." *Biden v. Nebraska*, 143 S. Ct. at 2397 (Kagan, J., dissenting).

⁹¹ See, e.g., *United States v. Freeman*, No. 21-cr-41, 2023 WL 5391417, at *9–10 (D.N.H. Aug. 22, 2023); *Louisiana v. Becerra*, 629 F. Supp. 3d 477, 492–95 (W.D. La. 2022).

⁹² Deacon & Litman, *supra* note 50, at 1010.

⁹³ See *Biden v. Nebraska*, 143 S. Ct. at 2372–76; *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–16 (2022).

⁹⁴ See Deacon & Litman, *supra* note 50, at 1012.

⁹⁵ *West Virginia v. EPA*, 142 S. Ct. at 2609.

⁹⁶ See Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 100 (2022).