Dead in the Water: A Critique of the Fourth Circuit's Major Questions Analysis in *North Carolina Coastal Fisheries Reform Group v. Capt. Gaston LLC*[*]

The major questions doctrine is an emergent principle of statutory interpretation which counsels increased skepticism toward agency interpretations which raise "major questions," likely going so far as requiring a showing of "clear authorization" in a governing statute to support such interpretations. It is not yet clear what circumstances will or will not raise a major question. In North Carolina Coastal Fisheries Reform Group v. Capt. Gaston LLC*, the Fourth Circuit applied the major questions doctrine (absent any agency interpretation) to a definition at the heart of the Clean Water Act—what counts as a water pollutant. While the case itself is unlikely to make waves, it demonstrates the malleability of the major questions doctrine and its effectiveness as an antiregulatory tool. Without more clearly defined guardrails, the major questions doctrine could be used to disrupt the core functions of regulatory schemes like the Clean Water Act, which create and maintain a safe and healthy environment for us all.*

INTRODUCTION

In *North Carolina Fisheries Reform Group v. Capt. Gaston LLC*,[1] the Fourth Circuit applied the major questions doctrine to answer whether discarded bycatch from fishing vessels could be considered a "pollutant" under the Clean Water Act ("CWA"),[2] which makes discharge of a pollutant by a point source into navigable waters illegal without a permit.[3] The major questions doctrine is an emerging interpretive tool that counsels skepticism of agency constructions of ambiguous statutory language when such constructions raise a "major question"—often one of major economic or political consequence.[4]

The Fourth Circuit concluded that such skepticism was warranted based on the cost of regulating discharges of bycatch, among other things.[5] In keeping with recent Supreme Court precedent, the Fourth Circuit then demanded "clear authorization" within the text of the CWA for a conclusion that "bycatch" is a

1. 76 F.4th 291 (4th Cir. 2023).
2. *See id.* at 295–302.
3. 33 U.S.C. § 1311(a).
4. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2373–74 (2023).
5. *See Capt. Gaston*, 76 F.4th at 300–02. The court also considered whether Congress had established a "distinct regulatory scheme" and whether the interpretation raised "significant federalism concerns." *Id.* at 297–98.

pollutant.[6] But the CWA's definition of "pollutant" is vague and expansive.[7] Thus, nearly any Environmental Protection Agency ("EPA") determination that a substance is a water pollutant could fail a major questions analysis for lack of clear authorization.[8] The Fourth Circuit's application of the major questions doctrine in *Capt. Gaston* provides a framing that, if taken to its logical extreme, could threaten the CWA's core point source regulation program, despite its Congressional mandate. To avoid this consequence, *Capt. Gaston* should be largely constrained to its facts. Future courts should be wary of applying the major questions doctrine to core statutory definitions like the one in the CWA, particularly on the basis of the economic and political consequences of a challenged interpretation.

This Recent Development proceeds in four parts. Part I summarizes the holdings in the district and circuit court in *Capt. Gaston*. Part II offers a brief summary of the major questions doctrine and the various conceptions of its purpose, nature, and scope. Part III discusses the potential implications of applying *Capt. Gaston*'s version of the major questions doctrine to EPA actions under the CWA. Finally, Part IV provides arguments as to how future cases could move away from the reasoning in *Capt. Gaston*.

I. SUMMARY OF *NORTH CAROLINA COASTAL FISHERIES REFORM GROUP V. CAPT. GASTON LLC*

In *Capt. Gaston*, the North Carolina Coastal Fisheries Reform Group ("Reform Group") argued that the defendants—several operators of shrimp trawling vessels—violated the CWA when they discarded bycatch into the waters of the Pamlico Sound.[9] The CWA prohibits the discharge of any pollutant from a point source into waters of the United States without a permit.[10] The parties did not dispute that the fishing vessels constituted point

6. *Id.* at 297.

7. *See* 33 U.S.C. § 1362(6) (defining pollutant as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water").

8. And nearly any such determination risks raising a "major question," given the nationwide scope of CWA regulation. *See infra* text accompanying notes 98–121.

9. N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 560 F. Supp. 3d 979, 995 (E.D.N.C. 2021). Plaintiffs also argued that the defendants violated the CWA by discharging dredged spoil into the Pamlico Sound when their trawler nets kicked up sediment from the bottom of the Sound. *Id.* at 995–96. This argument was rejected as a matter of statutory interpretation by the district court and the Fourth Circuit. *Id.* at 1006–08; N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 302–04 (4th Cir. 2023). It will not be considered further in this Recent Development.

10. *See* 33 U.S.C. § 1311(a) (prohibiting the "discharge of any pollutant"); *id.* § 1362(7), (12) (defining "navigable waters" and "discharge of a pollutant"). In particular, the EPA issues National Pollutant Discharge Elimination System ("NPDES") permits, *see id.* § 1342, which require the application of the "best practicable control technology" to limit discharges of effluent, *see* § 1311(b).

sources and that the Pamlico Sound was part of the waters of the United States.[11] Nor was it disputed that defendants had obtained none of the permits that might authorize a point source discharge.[12] So the primary question at issue was whether the discarded bycatch was a "pollutant" under the CWA.[13]

"Bycatch" is created when fishers "catch and discard animals they do not want, cannot sell, or are not allowed to keep."[14] The Reform Group alleged that animals caught as bycatch are "routinely . . . caught, injured, killed, and discarded," leading to "large-scale disposal of dead and decomposing fish and marine species" in the Pamlico Sound and in North Carolinian waters generally.[15] The decomposition of these fish allegedly increases the nutrient load and biological oxygen demand on the affected waters,[16] a phenomenon known as "eutrophication" which can lead to algae blooms, hypoxic waters, and mass fish die-off.[17]

The CWA defines a "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, *biological materials*, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into

11. *Capt. Gaston*, 76 F.4th at 295 n.1.

12. *See id.* at 295 ("[Defendant] alleges that . . . the shrimpers are operating without these permits . . . .").

13. *Id.* at 295 n.1. The Fourth Circuit also questioned whether returning bycatch to water fell within the CWA definition of "discharge." *Id.* at 302 & n.14. It applied the same "major questions" analysis discussed below, albeit in a more summary fashion. *See id.* at 302. Its analysis was also somewhat muddled by a focus on whether the return of still-living fish constituted a "discharge," with little consideration of the fact that bycatch often results in the return of dead and dying fish. *See id.* at 302 n.14 (comparing the discharge of bycatch to "taking a ladle of soup from a pot, lifting it above the pot, removing some vegetables, and pouring the ladle back into the pot"). As a matter of biological reality, returning dead fish to water is different from returning living ones. *See infra* note 17 (discussion of eutrophication). To avoid muddying the metaphorical waters with what factual allegations the courts did or did not consider, this Recent Development focuses on the major questions analysis concerning the meaning of "pollutant" in the CWA.

14. *Bycatch*, NOAA FISHERIES, https://www.fisheries.noaa.gov/topic/bycatch/overview [https://perma.cc/77PV-9G54]; *see also* 16 U.S.C. § 1802(2) (defining "bycatch" in the context of fisheries).

15. N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 560 F. Supp. 3d 979, 988 (E.D.N.C. 2021) (alteration in original). The Reform Group asserted that "for every one pound of shrimp harvested in North Carolina coastal waters, roughly four pounds of bycatch are discarded." *Id.*

16. *Id.*

17. *See Eutrophication*, ENCYC. BRITTANICA, https://www.britannica.com/science/eutrophication [https://perma.cc/C42P-BPX8] (last updated Nov. 14, 2024). In the Pamlico Sound in particular, eutrophication has been identified as a significant source cause of decline in submerged aquatic vegetation—underwater plant life "which are vital to the ecological health" of the estuary. *See generally* ERIC EDWARDS, SARA SUTHERLAND, EMMA WILSON & SYDNEY BECK, SUBMERGED AQUATIC VEGETATION IN THE ALBEMARLE-PAMLICO ESTUARY: CAUSES OF DECLINE AND ECONOMIC IMPORTANCE (2023), https://content.ces.ncsu.edu/submerged-aquatic-vegetation-in-the-albemarle-pamlico-estuary [https://perma.cc/9F9L-3CJ2] (discussing various environmental factors impacting the survival of submerged aquatic vegetation).

water."[18] The Reform Group argued that since bycatch indisputably consists of biological materials, it falls within the plain language of the CWA's definition of pollutant.[19] Both the district court and the Fourth Circuit disagreed.

A. *The District Court's Statutory Interpretation Analysis*

The district court recognized that "[i]n its literal sense, the term biological materials could reach" bycatch.[20] But the court was wary of giving the definition an "overly literal" reading.[21] It felt that "[t]he potential breadth of the term 'biological materials' alone" created, rather than resolved, ambiguity.[22] To decipher Congress's intent, the court considered the definition in the context of the CWA as a whole.[23] In particular, it looked to 33 U.S.C. § 1370, which directs courts not to construe any provision of the CWA as "impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."[24] Since federal law recognizes "management of fisheries within state coastal waters" as "squarely within that state's rights and jurisdiction,"[25] and "management of fisheries . . . implicates bycatch and bycatch mortality,"[26] the court held that adopting the Reform Group's interpretation of the CWA would impermissibly "extend the Act into an area of traditional state management and jurisdiction."[27]

Moreover, the court held that the canon of *lex specialis derogat legi generali*, the notion that "the specific governs the general,"[28] cautions against including

18. 33 U.S.C. § 1362(6) (emphasis added).

19. *See Capt. Gaston*, 560 F. Supp. 3d at 997.

20. *Id.* (citing Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1016 (9th Cir. 2002)).

21. *Id.* (first citing Andrus v. Charlestone Stone Prod. Co., 436 U.S. 604, 616 (1978); and then citing Alvord v. Comm'r, 277 F.2d 713, 719 (4th Cir. 1960)).

22. *Id.* (citing Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 441 (4th Cir. 2003)).

23. *See id.* at 998.

24. 33 U.S.C. § 1370. The Fourth Circuit did not rely on this particular provision of the CWA, though it articulated a similar states'-rights-based theory of Congressional intent. *See* N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 298–99 (4th Cir. 2023) (describing a "states'-rights saving clause" at 33 U.S.C. § 1251(b) and an analogous provision recognizing the title and ownership of states to lands and natural resources under and within navigable waters at 43 U.S.C. § 1311(a)). This may be because the section of the United States Code that the district court references appears to allude to states' rights to and jurisdiction over *state* waters, *see* 33 U.S.C. § 1370, as opposed to "waters of the United States," *see id.* § 1362(7), federal regulation of which supersedes less stringent state regulation. And, of course, the waters at issue here were unambiguously "waters of the United States." *See Capt. Gaston*, 76 F.4th at 295 n.1.

25. *Capt. Gaston*, 560 F. Supp. 3d at 998 (collecting statutory provisions supporting this proposition).

26. *Id.* at 999 (same).

27. *Id.* (citing Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1471 (2020)).

28. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992); *see also* Varity Corp. v. Howe, 516 U.S. 489, 511 (1996) (warning against "applying a general provision when doing so would undermine limitations created by a more specific provision").

bycatch within the definition of biological materials.[29] The court noted that "[t]here is extensive federal regulation of fisheries," particularly through the Magnuson-Stevens Fishery Conservation and Management Act of 1976 ("Magnuson-Stevens Act"), and that federal and state fishery regulatory programs contain extensive provisions regarding the treatment and reduction of bycatch.[30] These "more specific regulatory provisions contemplate[] the realities of bycatch, related mortality, and discard and, in certain parts, expressly requir[e] what [the Reform Group] would prohibit."[31] The court thus declined to allow the general definition in the CWA to nullify the more specific provisions within the Magnuson-Stevens Act and its state and regional corollaries.[32]

Finally, the court noted that the Reform Group's interpretation would produce absurd results. Since the term "biological materials" draws no distinction between living and dead materials, and the CWA contains no *de minimis* exception,[33] the Reform Group's interpretation would cause "any person on a dinghy off of Ocracoke Island who picks up a floating crab out of the water and, moments later, places it back in" (without a permit to do so, of course) to violate the CWA.[34] On these grounds, the court dismissed the Reform Group's CWA claim for failure to state a claim upon which relief may be granted.[35]

B. *The Fourth Circuit's Major Questions Analysis*

On appeal, the Fourth Circuit reached the same conclusion as the district court but charted a different course to get there. It, too, recognized that the literal definition of "pollutant" in the CWA would permit the Reform Group's interpretation.[36] But instead of using the more traditional tools of statutory interpretation as the district court did, the Fourth Circuit determined that the "background principle" of the major questions doctrine was instructive in this

29. *Capt. Gaston*, 560 F. Supp. 3d at 1000.
30. *Id.* at 1000–02.
31. *Id.* at 1003.
32. *Id.*
33. *See* 33 U.S.C. § 1311(a).
34. *Capt. Gaston*, 560 F. Supp. 3d at 1003–04.
35. *Id.* at 1006.
36. N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 295–96 (4th Cir. 2023) ("[C]onsidering only the statutory text, [the Reform Group] makes a plausible case for why returning bycatch to the ocean fits within the ordinary meaning of a 'discharge' of 'biological materials.'"). The court also recognized that the Sixth Circuit agreed with the Reform Group's interpretation. *Id.* at 296 n.4 (first citing Nat'l Cotton Council of Am. v. EPA, 553 F.3d 927, 937–38 (6th Cir. 2009); and then citing Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 583 (6th Cir. 1988)). The district court in *North Carolina Coastal Fisheries Reform Group v. Capt. Gaston LLC*, 560 F. Supp. 3d 979 (E.D.N.C. 2021), considered the Sixth Circuit's analysis and found it unpersuasive, *see id.* at 1004–06, and the Fourth Circuit made no further reference to these cases.

case.[37] Though the precise contours of the major questions doctrine are as of yet indeterminate, it generally requires courts to apply heightened scrutiny to interpretations of a statute that ask or answer particularly significant (or "major") questions.[38]

The court held that the Reform Group's interpretation presented one such "major question" for four distinct reasons. First, "Congress has erected a 'distinct regulatory scheme' to address the bycatch problem," under which the states, National Marine Fisheries Service, and Regional Fishery Management Councils—and not the EPA—regulate bycatch.[39] Second, the Reform Group's interpretation would upset the existing balance between state and federal regulations in this area, raising "significant federalism concerns."[40] Third, the court noted that "the EPA has never sought the authority to regulate bycatch in the fifty years since the Clean Water Act was passed," and in fact still did not seek such authority.[41] Fourth, and finally, the court asserted that adopting the Reform Group's interpretation "would have significant political and economic consequences," giving the EPA "power over 'a significant portion of the American economy.'"[42] Fishing is a hundred-billion-dollar industry and a recreational activity for countless millions of people.[43] The court reasoned that requiring all fishers to carry an expensive permit for something as simple and

37. *See Capt. Gaston*, 76 F.4th at 296–97.

38. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (describing in general terms the common threads of major questions doctrine in Supreme Court precedent); *see also id.* at 2616 (Gorsuch, J., concurring) (summarizing major questions doctrine: "[A]dministrative agencies must be able to point to 'clear congressional authorization' when they claim the power to make decisions of vast 'economic and political significance.'"). For a breakdown of the divergent views on the form and function of the doctrine, see *infra* Part II.

39. *Capt. Gaston*, 76 F.4th at 297 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000)).

40. *Id.* at 298 (citing Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001)). In raising this argument, the court recognized that "Congress has repeatedly confirmed that states have the primary authority to regulate fishing in their waters" and identified this policy in the CWA's "states'-rights saving clause." *Id.* (citing 33 U.S.C. § 1251(b)).

41. *Id.* at 299. The court recognized that the lack of agency interpretation made this case distinct from most major questions cases, but since adopting the Reform Group's reading of the statute would essentially force the EPA to do so as well, the court found that "[t]he economic and separation-of-powers stakes" at hand were sufficiently analogous to other major questions cases to warrant applying the doctrine here. *Id.* at 299 n.8. This Recent Development will not consider the propriety of this move.

42. *Id.* at 299 (first citing *West Virginia*, 142 S. Ct. at 2608; and then quoting *Brown & Williamson*, 529 U.S. at 159).

43. *Id.* at 300. In 2022, commercial and recreational fishing produced approximately $321 billion in sales, as well as approximately 2.3 million jobs. U.S. DEP'T OF COMM., NAT'L MARINE FISHERIES SERV., NMFS-F/SPO-248, FISHERIES ECONOMICS OF THE UNITED STATES 2022, at 3 (2024), https://s3.amazonaws.com/media.fisheries.noaa.gov/2024-04/FEUS-2022-v03.pdf [https://perma.cc/8F5F-JHAG]. In North Carolina, commercial and recreational fishing produced approximately $2.6 billion in sales and 21,631 jobs. *See id.* at 9, 15.

commonplace as returning an unwanted creature to the water "would work an enormous effect" on individuals, businesses, and the economy.[44]

After concluding that this case presented a "major question," the court looked to precedent, which "rejected the idea that literal readings of . . . the Clean Water Act's definitional section . . . supply clear authorization to regulate something under the Act."[45] So, although the Reform Group could present a colorable argument that bycatch fell within the definition of "biological materials," and thus was a pollutant, they could not point to clear Congressional authorization in favor of such an interpretation.[46] Since the major questions doctrine demands clear authorization,[47] the court rejected the Reform Group's interpretation.[48]

II. LEGAL BACKGROUND

The major questions doctrine emerged within administrative law and has shifted the balance of power between executive agencies, Congress, and the courts. Until recently, when an agency interpreted its governing statute, courts employed *Chevron* deference—they upheld the agency's interpretation so long as the statute was "ambiguous with respect to the specific issue" and the interpretation was "based on a permissible construction of the statute."[49] But in some "extraordinary cases"—those "in which 'the history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate'"—courts did not defer.[50] In these "major questions" cases, courts instead look to the statute for "clear congressional authorization" that supports the agency's interpretation.[51] Of course, after the Supreme Court's ruling in *Loper-Bright Enterprises v.*

44. *Capt. Gaston*, 76 F.4th at 300 (citing Sackett v. EPA, 143 S. Ct. 1322, 1335–36 (2023)).

45. *Id.* at 301 (first citing Train v. Colo. Pub. Int. Rsch. Grp., Inc., 426 U.S. 1 (1976); and then citing *Solid Waste Agency*, 531 U.S. 159). *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), excluded "radioactive materials" that were regulated under the Atomic Energy Act from the definition of "radioactive materials" in 33 U.S.C. § 1362(6). *Id.* at 7–8, 23–25. Similarly, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), held that the literal definition of "waters of the United States" did not provide clear authorization for the U.S. Army Corps of Engineers to regulate isolated intrastate wetlands, even though those wetlands arguably fell within that definition. *Id.* at 172–73.

46. *Capt. Gaston*, 76 F.4th at 302.

47. *West Virginia*, 142 S. Ct. at 2609 ("[I]n certain extraordinary cases, . . . [an] agency . . . must point to 'clear congressional authorization' for the power it claims." (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))); *accord* Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023).

48. *Capt. Gaston*, 76 F.4th at 302.

49. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984), *overruled by* Loper-Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); *see also Util. Air*, 573 U.S. at 315 (restating and summarizing *Chevron*'s holding).

50. *West Virginia*, 142 S. Ct. at 2595 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

51. *Id.* at 2614 (quoting *Util. Air*, 573 U.S. at 324); *see also Biden*, 143 S. Ct. at 2374–75 (2023).

Raimondo,[52] courts will likely not defer to agency interpretations in most cases.[53] But even post-*Chevron*, the question of why, when, and how courts may continue to apply major questions doctrine to statutory interpretation issues remains a matter of debate.

A. *What Is the Nature of the Major Questions Doctrine?*

Professor Cass Sunstein has identified a "strong" and "weak version" of the major questions doctrine.[54] The "weak version" at least initially operated as a "carve-out" from *Chevron*—an acknowledgement that Congress is unlikely to have delegated the authority to answer "a question of deep 'economic and political significance' that is central to [a] statutory scheme."[55] A court's application of the "weak version" of the major questions doctrine does not necessarily doom an agency's interpretation; the reviewing court simply determines the meaning of the statute independently.[56] In contrast, the "strong version" is a "clear statement principle," in which an agency cannot enact policy changes which trigger major questions review *at all* without "clear congressional authorization."[57]

The "strong version" of the major questions doctrine has prevailed in recent Supreme Court decisions.[58] In *West Virginia v. EPA*,[59] the Court considered whether statutory language permitting the EPA to cap emissions

52. 144 S. Ct. 2244 (2024).

53. *See id.* at 2273 ("[C]ourts need not and under the [Administrative Procedure Act] may not defer to an agency interpretation of the law simply because a statute is ambiguous.").

54. Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021).

55. *Id.* at 482 (quoting King v. Burwell, 576 U.S. 473, 484–86 (2015)). There are good reasons to doubt the substantive assumptions about Congress's intentions at play for this theory. First, one of the rationales for a strong nondelegation doctrine is that Congress is willing—perhaps too willing—to punt on questions of great political and economic significance and leave them to relatively less politically scrutinized agencies. *See* Gundy v. United States, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., dissenting) ("[B]y directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear . . . . If Congress could pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'" (third and fourth alterations in original)). Second, it is not clear why Congress, if it intended to reserve authority to decide major questions *to itself*, would want the courts to ultimately decide the meaning of ambiguous statutes.

56. Sunstein, *supra* note 54, at 482. For example, the Court in *King v. Burwell*, 576 U.S. 473 (2015), refused to defer to the agency's interpretation but nevertheless found that its action was within the bounds of the statute. *Id.* at 498.

57. Sunstein, *supra* note 54, at 483 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

58. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022); Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023). For an argument that the move from the major questions doctrine as one tool of statutory interpretation among many to a clear statement rule started with *King v. Burwell*, see Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1035–36 (2023).

59. 142 S. Ct. 2587 (2022).

based on "the application of the best system of emission reduction"[60] allowed the EPA to "devise carbon emission caps based on a generation shifting approach."[61] The Court noted that generation shifting certainly could be described as a "system"—but without adequate context, so could nearly anything else.[62] "Such a vague statutory grant," said the Court, "is not close to the sort of clear authorization" the agency needed for its program.[63] In *Biden v. Nebraska*,[64] the Court reaffirmed the "clear authorization" standard from *West Virginia*.[65] It held that language permitting the Secretary of Education to "waive or modify" loan provisions did not clearly authorize mass student debt relief.[66]

The "strong version" is not without critics on the Court. Justice Amy Coney Barrett, for instance, has argued that the "clear statement" rule it presents is "in significant tension with textualism."[67] Instead, she posited that the major questions doctrine is a "common sense" interpretive tool—a semantic canon[68]—based on an understanding of, and giving effect to, "the manner in which Congress is likely to delegate a policy decision . . . to an administrative agency."[69] Essentially, the major questions doctrine presents some outer bound of economic and political significance beyond which an agency action may, while remaining within the letter of a congressional delegation, diverge from the authority Congress actually delegated, understood in its proper context.[70] Thus, in Justice Barrett's view, when an agency takes an action of dramatic scope, courts will search for greater-than-average evidence of congressional authorization, whether from the text of the statute itself or the context of the delegation.[71]

60. 42 U.S.C. § 7411(a)(1).

61. *West Virginia*, 142 S. Ct. at 2614.

62. *Id.*

63. *Id.*

64. 143 S. Ct. 2355 (2023).

65. *See id.* at 2375.

66. *Id.* at 2372, 2375.

67. *Id.* at 2377 (Barrett, J., concurring) (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123–24 (2010)).

68. Semantic canons are "generalizations about how the English language is conventionally used and understood." JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 202 (2d ed. 2013). They are used by judges to interpret statutory language, and, theoretically, by legislators to draft said language. *Id.*; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 61 (2012) ("The canons influence not just how courts approach texts but also the techniques that legal drafters follow in preparing those texts.").

69. *Biden*, 143 S. Ct. at 2378 (Barrett, J., concurring) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)). This description mirrors Professor Sunstein's "weak version" of the doctrine, although it is not cabined to a mere "carve-out" from *Chevron* deference. *See supra* notes 54–57 and accompanying text. As such, it retains its relevance even now that *Chevron* deference is a thing of the past. Loper-Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

70. *See Biden*, 143 S. Ct. at 2379–81 (Barrett, J., concurring).

71. *Id.* at 2380.

These divergent explanations of the major questions doctrine may in part be due to the doctrine's connection to principles of nondelegation and separation of powers.[72] The nondelegation doctrine has been toothless for almost ninety years, requiring only that Congress provide an "intelligible principle" for an agency to follow.[73] But a tentative majority of Supreme Court Justices have expressed an interest in revisiting and potentially strengthening the doctrine.[74] While the Court has yet to do so, major questions doctrine achieves some of the same antidelegation policy outcomes in the meantime. Justice Neil Gorsuch in particular has explicitly linked the major questions doctrine to principles of nondelegation, separation of powers, and federalism.[75] Justice Barrett has, in her critiques of the "strong" or "clear statement" version of the major questions doctrine, asserted that it "overprotects the nondelegation principle."[76]

B. *What Is a "Major Question"?*

Even more variability arises in how courts attempt to determine what questions are sufficiently "major" to trigger major questions analysis. In a classic example of the doctrine, an agency's interpretation worked "a fundamental revision of the statute."[77] In another case, an agency "asserted jurisdiction to regulate an industry constituting a significant portion of the American economy" for which Congress had "created a distinct regulatory scheme" and

72. *See* Sunstein, *supra* note 54, at 484 ("The strong version, then, is a nondelegation canon."); *see also* Deacon & Litman, *supra* note 58, at 1044–45 ("One possible justification for the doctrine is that it is a means of enforcing a revived nondelegation doctrine."); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 265–66 (2022) ("[A] sufficiently robust major questions doctrine greatly reduces the need to formally revive the nondelegation doctrine."). Professors Daniel T. Deacon and Leah M. Litman argue that the major questions doctrine is not a particularly good means of achieving this end. *See* Deacon & Litman, *supra* note 58, at 1046–47.

73. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)); *see also* Deacon & Litman, *supra* note 58, at 1017–18 (collecting cases and describing the limited application of nondelegation doctrine throughout U.S. history).

74. *See* Deacon & Litman, *supra* note 58, at 1018.

75. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2617–19 (2022) (Gorsuch, J., concurring) ("[N]o less than its rules against retroactive legislation or protecting sovereign immunity, the Constitution's rule vesting federal legislative power in Congress is 'vital to the integrity and maintenance of the system of government ordained by the Constitution.' . . . Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine." (citations omitted) (quoting Field v. Clark, 143 U.S. 649, 692 (1892))).

76. *Biden*, 143 S. Ct. at 2377 (Barrett, J., concurring).

77. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994). Per the Court, the agency action here would have changed the statute "from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation *only where effective competition does not exist*." *Id.* at 231–32 (emphasis added).

consistently rejected "proposals to give [the agency] jurisdiction."[78] Recently, however, the Court has also emphasized the "economic and political significance" of agency actions as a trigger for major questions analysis.[79] For instance, the Court in *Biden v. Nebraska* stressed the approximately $500 billion price tag for the Secretary of Education's debt relief program, comparing it to the scope of previous Department of Education actions as well as previous agency actions deemed "major."[80] Other scenarios which could trigger major questions analysis include when the agency's interpretation is based on "oblique or elliptical language,"[81] when the action is outside the agency's purview or area of expertise,[82] and when the action could "alter the balance between federal and state power."[83]

The imprecision of the major questions doctrine is reflected in the lower courts. Professor Natasha Brunstein's survey of recent major questions decisions found that courts apply diverse permutations of the above factors, affording each different weights and drawing lines in different places.[84] Of particular relevance, Professor Brunstein's study found that courts considering the "economic and political significance" of an agency action varied in their placement of the "majorness" threshold from millions to billions of dollars.[85] Sometimes, courts even diverge from their own stated analytical frameworks.[86]

78. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000).

79. *See Biden*, 143 S. Ct. at 2373 (quoting *West Virginia*, 142 S. Ct. at 2608); *see also* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U.S. at 160).

80. *See Biden*, 143 S. Ct. at 2373 (citing Ala. Ass'n of Realtors v. Dept. of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)).

81. *West Virginia*, 142 S. Ct. at 2609 (citing *MCI Telecomms.*, 512 U.S. at 229); *see also Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 ("Section 361(a) is a wafer-thin reed on which to rest such sweeping power.").

82. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (per curiam) ("The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures." (citing 29 U.S.C. § 655(b), (c)(1))); *see also West Virginia*, 142 S. Ct. at 2612–13 ("'When [an] agency has no comparative expertise' in making certain policy judgments, we have said, 'Congress presumably would not' task it with doing so." (quoting Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019) (alteration in original))).

83. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1850 (2020)).

84. *See* Natasha Brunstein, *Major Questions in Lower Courts*, 75 ADMIN. L. REV. 661, 663–65 (2023).

85. *Id.* at 664. Other judges found major questions based not on the costs of agency action, but the benefits; one judge "considered the scale of the relevant regulated industry as opposed to the agency action itself." *Id.* at 664–65.

86. *Id.* at 664 ("For example, some judges that advanced a multi-prong framework involving the 'history and the breadth of the authority that [the agency] asserted,' did not actually discuss regulatory history." (quoting Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 50 F.4th 164, 206 (D.C. Cir. 2022) (Henderson, J., concurring in part and dissenting in part))); *see also id.* at 672–73 (discussing in more detail the varied applications of the major questions doctrine in the D.C. Circuit).

Perhaps most concerningly, courts often appear to "appl[y] the doctrine in line with the political party of their appointing President."[87]

III. IMPLICATIONS

The Fourth Circuit's application of a "clear statement" version of the major questions doctrine[88] is consistent with the recent Supreme Court major questions opinions.[89] It is thus difficult to argue that the Fourth Circuit's application of the doctrine was incorrect.[90] However, the malleability of the major questions doctrine, coupled with the broad language and nationwide scope of the CWA, could allow courts to question previously uncontroversial aspects of the EPA's regulation of point source discharges. At its most extreme, the major questions doctrine could make it nearly impossible for the EPA to identify pollutants for point source regulation.

The regulatory heart of the CWA's point source discharge program is 33 U.S.C. § 1311(a): without proper permits, "the discharge of any pollutant by any person shall be unlawful."[91] The EPA sets out, "in terms of constituents and chemical, physical, and biological characteristics of pollutants," the "degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources."[92] To obtain a National Pollutant Discharge Elimination System ("NPDES") permit, a prerequisite for a lawful discharge of effluent,[93] a point source must apply the best practicable control technology applicable to its

87. *Id.* at 665–67. In Professor Brunstein's study of twenty-one recent cases that explicitly invoked major questions doctrine, "eight involved Democratic appointees upholding Biden Administration agency actions or executive orders, and nine of these cases involved Republican appointees invalidating Biden Administration agency actions or executive orders." *Id.* at 667.

88. *See* N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 301–02 (4th Cir. 2023).

89. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023); West Virginia v. E.P.A., 142 S. Ct. 2587, 2614 (2022). The court itself noted the considerable scholarly debate about the propriety of the "clear statement" version but concluded that it was constrained to apply the doctrine this way as a matter of vertical precedent. *Capt. Gaston*, 76 F.4th at 296–97, 296 n.5.

90. For a brief argument that *Capt. Gaston* nevertheless impermissibly elides between the semantic and substantive canon versions of the major questions doctrine, see Recent Case, North Carolina Coastal Fisheries Reform Group v. Capt. Gaston LLC*, 76 F.4th 291 (4th Cir. 2023)*, 137 HARV. L. REV. 1256, 1262–63 (2024). It is worth acknowledging that as of 2023, *Capt. Gaston* was the only case to apply the doctrine without "any agency action whatsoever." Brunstein, *supra* note 84, at 668 & n.39.

91. 33 U.S.C. § 1311(a). For a more precise definition of "discharge of a pollutant," see *supra* text accompanying notes 9 & 18.

92. 33 U.S.C. § 1314(b)(1)(A); *see, e.g.*, 40 C.F.R. pt. 432 (2023) (describing the effluent limitations applicable to process wastewater created by meat and poultry processing facilities).

93. *See* 33 U.S.C. § 1311(a) (requiring compliance with 33 U.S.C. § 1342, among other sections).

category.[94] These technological standards allow the EPA (and coordinate state environmental agencies) to prevent water pollution, as much as practicable, at the source. And the EPA may impose further limitations on point source discharges when doing so is necessary to achieve or maintain certain water quality standards for a given body of water.[95] These limitations might include a total maximum daily load of a given pollutant.[96] To function, this regulatory structure requires the identification of pollutants.[97]

The reasoning in *Capt. Gaston* could be extended in future cases to attack the EPA's ability to engage in this core CWA regulatory process.[98] The court held that while a literal reading of the CWA's text might justify defining a substance as a "pollutant," courts must look further and ask whether that definition constitutes a "major question."[99] The court found several reasons that the Reform Group's proposed definition did just that: (1) Congress's delegation of regulatory power to another agency; (2) federalism concerns; (3) the EPA's previous practices; and (4) the economic and political consequences of the definition.[100] The opinion is unclear as to which of these reasons or combinations thereof would be sufficient to trigger major questions doctrine review, although its rundown of the doctrine puts the economic and political significance first.[101]

Of these reasons, the "economic and political consequences" angle has the potential to sweep the broadest. The determination that a substance is a "pollutant" is a fundamental prerequisite to a host of regulatory activity.[102] This regulatory activity will ultimately require polluting entities across the country to go through an expensive permitting process. And to actually obtain a permit, they may need to apply expensive technology to their facilities to limit total pollutant discharge levels or otherwise maintain water quality. It is difficult to see how the EPA's determination that *anything* is a pollutant (other than a

94. *See id.* § 1342(a)(1) (conditioning issuance of a NPDES permit upon compliance with requirements of § 1311, among other sections); *id.* § 1311(b)(1)(A) (requiring achievement of "effluent limitations for point sources . . . which shall require the application of the best practicable control technology currently available").

95. *See id.* § 1313(d).

96. *See id.* § 1313(d)(C).

97. *See, e.g.*, *id.* § 1314(a)(4) (requiring the EPA to identify "conventional pollutants").

98. *North Carolina Fisheries Reform Group v. Capt. Gaston LLC*, 76 F.4th 291 (4th Cir. 2023), did not involve actual EPA action, but the fact that the citizen suit "[was] designed to compel EPA action" motivated the Fourth Circuit to apply the major questions doctrine in the first place. *Id.* 299 n.8. That, and the fact that major questions is an administrative law doctrine, strongly suggest that this decision has consequences for future EPA actions.

99. *Id.* at 295–96.

100. *See id.* at 297–300.

101. *See id.* at 296–97, 300. As discussed above, there is considerable variability among courts as to just what factors will trigger major questions analysis. *See supra* Section II.B.

102. For an *extremely* simplified description of that regulatory activity, see *supra* notes 91–97 and accompanying text.

highly uncommon substance) could avoid creating the sort of massive economic consequences that might trigger major questions doctrine.[103] The reach of this potential argument is amplified by the fact that the Fourth Circuit considered the maximum conceivable economic and political consequences of the challenged interpretation when determining if it triggered major questions analysis.[104]

For an example of how this sort of analysis could impact typical EPA activity, consider the EPA's guidelines for the Meat and Poultry Products ("MPP") point source category.[105] Wastewater from MPP facilities contains a host of potential pollutants.[106] The EPA selected a few representative pollutant categories for monitoring and effluent limitation, including nitrogen and ammonia.[107] Neither of these chemicals are explicitly named in the CWA's definition of "pollutant,"[108] and thus their status as pollutants of concern is an interpretation of that definition—perhaps the "chemical wastes" category.[109] In order to obtain a NPDES permit, the EPA requires that certain MPP facilities apply technological processes that reduce their discharge of nitrogen or

103. The EPA's CWA regulatory sweep is somewhat restricted by the fact that it covers only discharges by "point sources." *See* 33 U.S.C. § 1362(12)(A). But point sources are themselves a very broad category, being "*any* discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 1362(14) (emphasis added); *see also* Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1477 (2020) (holding that CWA's point source permitting requirements applied even when point source discharges travelled through groundwater to navigable waters, so long as that discharge was a "functional equivalent of a direct discharge").

104. *See Capt. Gaston*, 76 F.4th at 299–300. The court's discussion of "economic and political consequences" focused primarily on the somewhat more tangible economic angle—the cost of imposing NPDES permitting on every fisher in the United States. *Id.* The court's read of the potential political consequences at hand was more nebulous, appearing as a discussion both of the breadth of control the EPA could exert under the asserted interpretation and the potentially "crushing consequences" individuals could face for a CWA violation. *Id.* But neither the CWA's scope nor the consequences for violating it were necessarily changed by the interpretation here—undoubtedly, the shrimp trawlers and Judge Richardson's daughter alike could be liable under the statute for illegal point source discharges of some other water pollutant. *Id.*

105. 40 C.F.R. pt. 432 (2024).

106. *See* U.S. ENV'T PROT. AGENCY, EPA-821-R-04-011, TECHNICAL DEVELOPMENT DOCUMENT FOR THE FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE MEAT AND POULTRY PRODUCTS POINT SOURCE CATEGORY (40 CFR 432), at 7-6 to 7-15 (2004) [hereinafter MPP REPORT], https://www.epa.gov/sites/default/files/2015-11/documents/meat-poultry-products_tdd_2004_0.pdf [https://perma.cc/WZ33-HFM4].

107. *Id.* at 7-21. Other selected pollutants of concern here were conventional pollutants like suspended solids or fecal coliforms, which are specified by statute at 33 U.S.C. § 1314(a)(4), rather than being expressly derived from the definition of "pollutant" at 33 U.S.C. § 1362(6). *Id.*

108. *See* 33 U.S.C. § 1362(6).

109. *Id.*

ammonia.[110] The EPA is currently considering imposing more stringent limitations on nitrogen, as well as new limitations on phosphorus discharges.[111]

The costs of imposing effluent limitations on something like nitrogen, ammonia, or phosphorus are enormous. In the context of MPP facilities alone, the EPA's proposed 2024 amendments are projected to cost between $210 and $995 million per year in private compliance costs.[112] Those amendments are only projected to apply to some 850 of the approximately 5,000 MPP facilities across the country.[113] The current regulations, last updated in 2004, are estimated to cost approximately $60 million per MPP facility.[114]

Hundreds of millions of dollars in compliance costs (in the context of federal regulation) may not necessarily raise an eyebrow. The direct economic consequences in the recent major questions decisions were orders of magnitude higher.[115] But the court in *Capt. Gaston* looked at the costs of interpreting the CWA to cover bycatch not in terms of shrimp trawlers, or commercial fishing generally, but every imaginable "discharge" of bycatch into covered waters.[116] And it expressly rejected the Reform Group's argument that the EPA would not actually exercise its authority that way.[117]

Turn back to the EPA's regulation of nitrogen discharges. The cost estimates described above are based on the EPA's estimate of the costs of its relatively restrained MPP permitting program, which applies effluent limitations on nitrogen primarily to "major" MPP facilities slaughtering more

110. *See, e.g.*, 40 C.F.R. §§ 432.12(b)(1), 432.13, 432.112.

111. *See* Clean Water Act Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category, 89 Fed. Reg. 4474, 4476 (proposed Jan. 23, 2024) (to be codified at 432 C.F.R. pt. 432).

112. U.S. ENV'T PROT. AGENCY, OFF. OF WATER, EPA-821-R-23-014, REGULATORY IMPACT ANALYSIS FOR REVISIONS TO THE EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE MEAT AND POULTRY PRODUCTS POINT SOURCE CATEGORY, at 4-1 (2023), https://www.epa.gov/system/files/documents/2023-12/mpp_regulatory-impact-analysis_proposed_dec-2023.pdf [https://perma.cc/VH5J-VPDL]. The EPA's preferred regulatory option would result in approximately $232 million in social costs (including compliance costs). Guidelines and Standards for the MPP Point Source Category, 89 Fed. Reg. at 4476.

113. *Meat and Poultry Products Effluent Guidelines - 2024 Proposed Rule*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/eg/meat-and-poultry-products-effluent-guidelines-2024-proposed-rule [https://perma.cc/CWV5-48H8] (last updated May 30, 2024).

114. *See* MPP REPORT, *supra* note 106, at 10-21, tbl.10-7.

115. *E.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (approximately $50 billion); Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (between $469 billion and $519 billion). *But see, e.g.*, Chamber of Com. of the U.S. v. CFPB, 691 F. Supp. 3d 730, 740 (E.D. Tex. 2023) (finding major economic and political significance from unspecified "millions of dollars per year" in compliance costs), *appeal docketed*, No. 23-40650 (5th Cir. Nov. 8, 2023).

116. *See* N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 299–300 (4th Cir. 2023). Of course, without actual EPA regulation to refer to, it is hard to fault the court for considering the economic implications of what the Reform Group, unconstrained by administrative pragmatism, sought—a court determination that discharging bycatch *always* requires a permit.

117. *See id.* at 300 ("At argument, Fisheries sought to assure me that the EPA would not exercise its discretion to lock [my daughter] up or take her allowance. Small comfort." (citations omitted)).

than 50 or 100 million pounds of product.[118] But if the challenged interpretation is that nitrogen is a pollutant, a court following *Capt. Gaston*'s reasoning would not stop at considering the cost of the effluent limitations on major MPP facilities, or MPP facilities at all.[119] It would instead consider the economic and political costs of extending the EPA's regulatory authority to all discharges of nitrogen, however small, across all industries. That cost might well be uncountable.[120] Thus, under this reasoning, whether discharges of nitrogen are CWA pollutants is likely a "major question." And as the Fourth Circuit made clear, the broad definition of pollutant in 33 U.S.C. § 1362(6) does not provide the requisite "clear authorization" to define anything as a pollutant when the major questions doctrine applies.[121]

One could replace "nitrogen" with nearly any other common substance the EPA regulates under the CWA, even those (like nitrogen) it has regulated since the 1970s.[122] The nationwide scope and significant expenses associated with regulating point source discharges of that substance could fairly justify a court's application of the major questions doctrine. Once a court decided to apply major questions doctrine, the EPA would need to point to a "clear statement" that a given substance is a pollutant. Without something more than the CWA's "expansive, vaguely worded definition,"[123] the EPA would be unable to provide

118. *See, e.g.*, 40 C.F.R. §§ 432.12(b)(1), 432.13, 432.112 (2024).

119. *See Capt. Gaston*, 76 F.4th at 299–300 ("Almost every commercial or recreational fisher[] would be subject to the EPA's new regulatory control."). The court did not discuss the fact that typical EPA action is like that for MPP facilities described above—restrained to those point sources who contribute enough pollutants to make regulation cost-effective. *See supra* note 110 and accompanying text.

120. The major questions doctrine does not mandate such an approach, and one could fairly argue that no reasonable court would apply it in the hypothetical laid out above. But neither does the doctrine preclude this approach. *Cf.* Brunstein, *supra* note 84, at 663–65 (discussing the dramatic variety of approaches courts use to answer the "majorness" question).

121. *Capt. Gaston*, 76 F.4th at 302.

122. *See* Clean Water Act Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category, 89 Fed. Reg. 4474, 4475 (proposed Jan. 23, 2024) (to be codified at 40 C.F.R. pt. 432) ("EPA initially promulgated the MPP ELGs in 1974."). This concern is made all the more significant by the Supreme Court's recent decision on when injury accrues for statute of limitations purposes in Administrative Procedure Act ("APA") suits. *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2450 (2024) (holding that the APA statute of limitations does not begin to run when an agency action is finalized, but rather when the plaintiff is injured). This decision will subject longstanding regulations to potential challenge. John P. Elwood, Jeffrey L. Handwerker, Daniel A. Kracov, Eva Temkin & Phillip V. DeFedele, *When APA Claims Accrue Under* Corner Post, ARNOLD & PORTER (July 9, 2024), https://www.arnoldporter.com/en/perspectives/advisories/2024/07/when-apa-claims-accrue-under-corner-post [https://perma.cc/9LBS-ZCTA].

123. *Capt. Gaston*, 76 F.4th at 302; *see also* 33 U.S.C. § 1362(6).

that "clear statement" to support its authority, and the attempt at regulation would likely fail.[124]

Of course, there are important distinctions between the *Capt. Gaston* case and a hypothetical EPA determination that a substance is a pollutant. As the court noted, treating bycatch as a CWA pollutant would be more than just potentially expensive.[125] It would disturb a "distinct regulatory scheme" granting authority to other agencies, shift established EPA practice dramatically, and tread upon traditional state power.[126] These factors, which also contributed to the court's decision to apply the major questions doctrine,[127] are not necessarily present in every case where the EPA determines it should regulate a given pollutant. But the as-of-yet nebulous nature and application of the major questions doctrine makes it unclear which, if any, of these factors must be present (and to what degree) for the doctrine to apply.[128] In an era already marked by dramatic changes in the ways agencies regulate and organizations challenge them,[129] the major questions doctrine, thus unconstrained, may present an enticing tool for courts and parties seeking to effect deregulatory aims.[130]

An aggressive application of major questions doctrine, particularly one emphasizing the economic and political consequences of the proposed interpretation, could curtail the EPA's ability to achieve the objective at the core of the CWA: "[T]o restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[131] Without guidance from the Supreme Court drawing more particular lines around what counts as a "major question," the risk that the doctrine will potentially be overused—to the

124. At the very least, the EPA would likely be able to impose regulations on "conventional pollutants," such as those which are "biological oxygen demanding, suspended solids, fecal coliform, and pH," as those are specified by statute. 33 U.S.C. § 1314(a)(4). Theoretically, the EPA can designate new conventional pollutants, *see id.*, although such a designation would likely face major questions scrutiny for the same reasons outlined above.

125. *See Capt. Gaston*, 76 F.4th at 297–99.

126. *See id.*

127. *Id.* at 296–97.

128. *See supra* Section II.B.

129. *E.g.*, Loper-Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); *see also* Dylan Tokar, *The Regulatory State Is in Flux Like Never Before, and Businesses Are Hating It*, WALL ST. J. (Sept. 3, 2024, 5:30 AM), https://www.wsj.com/articles/the-regulatory-state-is-in-flux-like-never-before-and-businesses-are-hating-it-e7c7444a [https://perma.cc/GNW4-UG22 (staff-uploaded, dark archive)].

130. *See* Deacon & Litman, *supra* note 58, at 1086 (major questions doctrine is "well tailored to effect deregulation"); Richard W. Murphy, *Democracy,* Chevron *Deference, and Major Questions Anti-Deference*, 58 GA. L. REV. 987, 1013 (2024) (major questions doctrine "neatly reflects the preferences of persons hostile to the administrative state").

131. 33 U.S.C. § 1251(a).

detriment of longstanding regulatory schemes—remains salient.[132] Maintaining the regulatory structure Congress created in the CWA will require courts to exercise restraint when asked to apply the major questions doctrine to core statutory definitions like 33 U.S.C. § 1362(6), or at least to apply a more lenient version of the doctrine than the "clear statement" version. The following part considers ways in which future courts could avoid that potential overuse of the major questions doctrine.

IV. ALTERNATIVES

Moving forward, courts could distinguish future cases from *Capt. Gaston* itself. As discussed above, there were a plethora of reasons for the Fourth Circuit to conclude that a major question existed here, beyond just the economic and political consequences of the interpretation.[133] Due to the broad scope of the EPA's authority under the CWA, it might make less sense to apply the major questions doctrine in every case where the EPA's interpretation merely has substantial economic and political costs. *Capt. Gaston* also did not involve actual EPA action. The arguments at play might differ when the EPA makes regulatory decisions, rather than having the arguments of environmental groups potentially foisted upon them. The EPA's effluent limitations are often far less stringent or widely applicable than the hypothetical limitation contemplated in *Capt. Gaston*.[134] A court could then apply the "majorness" analysis in the context of the EPA's action with respect to the regulated subset of point sources, rather than the set of all potential polluters, and conclude that the regulatory action

132. *Cf.* Biden v. Nebraska, 143 S. Ct. 2355, 2377–78 (2023) (Barrett, J., concurring) (expressing concern that the major questions doctrine "overprotects the nondelegation principle"); *see also supra* Section II.B. For further argument that *Capt. Gaston* foreshadows a major questions doctrine "that can be invoked by any party to apply to almost any statute and that nonetheless decisively rejects any reading of a statute that does not have 'clear congressional authorization,'" see Jeremiah Scanlan, Case Comment, *Exploring the Future of Major Questions' Murky Waters:* North Carolina Coastal Fisheries Reform Group v. Capt. Gaston, 48 HARV. ENV'T L. REV. 599, 619–20 (2024).

133. *See supra* text accompanying notes 125–28.

134. *Compare, e.g.*, 40 C.F.R. § 432.32(b)(1) (2024) (imposing effluent limitations for ammonia only on "[f]acilities that slaughter more than 50 million pounds per year"), *with* N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 299–300 (4th Cir. 2023) (describing the EPA's hypothetical authority as covering every single person who fishes with live bait or catches and releases even a single fish).

did not raise a major question.[135] However, the holding in *Capt. Gaston* does not walk such a narrow line.[136]

Courts could apply Justice Barrett's "semantic canon" version of the major questions doctrine,[137] or rely on other rules of statutory interpretation entirely, when broad application of the "clear statement" version threatens the overall function of a statutory scheme.[138] Justice Barrett's concern that the "clear statement" version of the doctrine "overprotects the nondelegation principle" rings especially true in a case like *Capt. Gaston*; an EPA interpretation of 33 U.S.C. § 1362(6), however reasonable, is likely to fail against any "plausible antidelegation interpretation."[139] The "semantic canon" version of the major questions doctrine would likely not have resulted in a different outcome in *Capt. Gaston* itself, especially since the district court rejected the Reform Group's interpretation using standard tools of statutory interpretation alone.[140] But in a case where the EPA is regulating an obvious, yet statutorily unspecified, water pollutant (like nitrogen in MPP wastewater), the "semantic canon" approach would allow courts to use context and common sense rather than striking the regulation down out of hand for lack of "clear authorization."[141]

Finally, courts could distinguish interpretations of the meaning of "pollutant," or similarly core statutory definitions, from the interpretations in the key major questions cases. For example, interpreting the meaning of "pollutant" is not an instance of the EPA arrogating sweeping regulatory power

135. To return to the nitrogen example, courts could consider the economic impact of the EPA regulating nitrogen discharges for just MPP facilities, or even just the subset of MPP facilities covered by the regulation, rather than looking at the set of all potential nitrogen dischargers. But even then, courts vary quite significantly in terms of what economic threshold will trigger major questions analysis. *See* Brunstein, *supra* note 84, at 664–65.

136. *See Capt. Gaston*, 76 F.4th at 300 & n.11 (discussing the overall effect of a potential EPA bycatch regulatory scheme and rejecting arguments that the EPA could allow a *de minimis* exception to the permitting requirement). Moreover, the first case to cite the Fourth Circuit's *Capt. Gaston* decision described it as holding that "an Environmental Protection Agency regulation that would impact every commercial or recreational fisherman raised a major question," despite absolutely no EPA regulation being at issue in *Capt. Gaston*. United States v. Stratics Networks Inc., 721 F. Supp. 3d 1080, 1111 (S.D. Cal. 2024).

137. For a summary of the different versions of the major questions doctrine, see *supra* Section II.A.

138. Moreover, courts should also consider whether judicial restraint directs them to apply a more lenient version of major questions doctrine or to use different interpretive tools entirely. *Capt. Gaston* presents an obvious example, where the question could be answered without resort to major questions doctrine. *See* N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 560 F. Supp. 3d 979, 997–1004 (E.D.N.C. 2021); *cf.* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2311 (2022) (Roberts, C.J., concurring) (articulating "a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more").

139. Biden v. Nebraska, 143 S. Ct. 2355, 2377–78 (2023) (Barrett, J., concurring); *see supra* notes 105–124 and accompanying text (applying the analysis in *Capt. Gaston* to hypothetical EPA activity).

140. *See Capt. Gaston*, 560 F. Supp. 3d at 997–1004.

141. *See Biden*, 143 S. Ct. at 2378–79 (Barrett, J., concurring) (discussing the role of context in statutory interpretation).

to itself on the back of statutory language that is wafer thin or hardly ever used.[142] The definition of "pollutant" is core to the CWA and is intentionally expansive, in service of the broad policy goals the CWA sets out to achieve.[143] However, the court in *Capt. Gaston* rejected this sort of argument, and it has been unsuccessful in other contexts.[144] The fact that core definitions of statutes are still subjected to major questions review might be another reason to defer from the "clear statement" version of the doctrine.

One could argue that *Capt. Gaston* puts authority over the United States' waters back where it belongs: in the hands of Congress, rather than the EPA. And Congress is certainly capable of providing more specific direction, both in the CWA context and elsewhere.[145] But we must ask whether reallocating that authority comes at too high a cost. Statutes like the CWA, and the regulations which implement them, represent generations of hard work by policymakers and subject-area experts, as well as a continuing commitment to ensuring the world we live in is safe, secure, and sustainable. Forcing Congress to "not only be clear, but also clairvoyant"[146] with respect to fundamental (and highly complex) questions, like "What is a water pollutant?," threatens to grind that project to a halt, subjecting minute and obscure scientific questions to the slow and unpredictable whims of the legislative process. Perhaps this is what the Constitution demands, but our planet will pay the price for it.

CONCLUSION

In *Capt. Gaston*, the Fourth Circuit applied the major questions doctrine to the question of whether returning bycatch to the ocean could be a discharge of a pollutant under the CWA. By doing so, it revealed a vulnerability in the point source regulatory scheme that the EPA has used to purify and maintain our nation's waters. The scope of the decision's impact, and that of the major questions doctrine, has yet to be fully realized. But at the very least, the CWA's broad and vaguely worded definition of "pollutant" will likely struggle to

142. *Compare* West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022) (applying the major questions doctrine because the EPA found sweeping regulatory authority in a rarely used statutory provision "designed to function as a gap filler" (citing 42 U.S.C. § 7411(d))), *with* 33 U.S.C. § 1362 (providing the foundational definitions used to understand and apply the CWA).

143. *See* 33 U.S.C. § 1251(a); *see also* City of Milwaukee v. Illinois, 451 U.S. 304, 317–19 (1981) (surveying the history of the enactment of the CWA and describing it as a "self-consciously comprehensive," "all-encompassing program of water pollution regulation").

144. *See* N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston, 76 F.4th 291, 301–02 (4th Cir. 2023) (summarizing Supreme Court cases in which definitional clauses have been subject to major questions analysis and failed to show clear authorization).

145. *See, e.g.*, 33 U.S.C. § 1314(a)(4) (specifying certain substances as "conventional pollutants"). Additionally, many of the items on the list are not even specific pollutants, but themselves broad categories like "biological oxygen demanding" pollutants or metrics that can identify a spectrum of pollutants like "suspended solids" or "pH." *Id.*

146. Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1948 (2017).

overcome the "clear statement" version of the major questions doctrine, should it apply. Amid increasing legal challenges to regulatory authority, the nebulous boundaries of what counts as "major" could subject a great deal of CWA regulation to the major questions doctrine. Aggressive application of the doctrine would protect principles of nondelegation, but at the expense of our nation's waters. To avoid throwing the proverbial baby out with the bathwater, courts should walk no further down the path laid out in *Capt. Gaston*, and they should apply the major questions doctrine with great restraint.

DYLAN T. SILVER**

** J.D. Candidate, University of North Carolina School of Law. Far too many people helped bring this piece to fruition to name them all. But I'm naming them anyway, because they can't stop me. I thank Professors Maria Savasta-Kennedy and Donald Hornstein for their guidance and critique. For their tireless editorial work, I thank Jacob Bregman, Sam W. Scheipers, Sam Lahne, Gabrielle Schust, Connor Fraley, Drew Alexander, William White, Juliana Bird, Gabrielle Sigmon, Megan Rash, John Choi, Andrew Parco, Adam Webster, Chiara Cominelli, Sarah Daugherty, Alexandra Rivenbark, Jackson Guernsey, Joy Aikens, Lily Burdick, Emma Santizo, and Daniel "Nebraska" Stainkamp. Last, and never least, I thank my husband, Lucian Silver, for his endless support of my endeavors, even when they don't make any sense to him.