BIDEN V. NEBRASKA AND THE CONTINUED REFINEMENT OF THE MAJOR QUESTIONS DOCTRINE

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INTRODUCTION

The major questions doctrine, which requires the Executive Branch to point to clear congressional authorization to issue economically or politically significant regulations, is transforming administrative law by limiting the power of administrative agencies. The Supreme Court applied the doctrine most recently in *Biden v. Nebraska*, holding that the Biden Administration lacked authority to cancel "roughly $430 billion of federal student loan[s]" under the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act").[1] Recognizing that mass loan cancellation was both politically and economically significant, the Court concluded the government needed—and lacked—clear congressional authorization for such an action in the HEROES Act.[2]

Biden v. Nebraska is significant because of what it illuminates about the evolving scope of the major questions doctrine. As discussed in a prior article, how the Court "distinguish[es] between major and nonmajor questions" and assesses whether Congress has provided sufficiently clear statutory authority will play an important role in defining the administrative state's power in coming years.[3] *Biden v. Nebraska* provides important insights into those developing tests.

This essay analyzes *Biden v. Nebraska* and its implications for the scope of the major questions doctrine. Part I provides a background of the Biden Administration's student loan cancellation program and the Supreme Court's decision. Part II identifies some key takeaways from the Court's opinion. Part III discusses open questions.

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[1] Biden v. Nebraska, 143 S. Ct. 2355, 2362, 2368 (2023).

[2] *Id.* at 2373, 2375.

[3] Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 227 (2023).

I. BACKGROUND

A. The Biden Administration's Student Loan Relief Program

While running for President in 2020, Joe Biden repeatedly promised he would eliminate $10,000 in student-loan debt for those earning less than $125,000.[4] After taking office, President Biden asked Congress to pass a bill authorizing such an action.[5] Indeed, Congress "considered … [m]ore than 80 student loan forgiveness bills" during Biden's first term.[6] But the proposals aroused serious opposition—among other things, critics argued it was unfair to make taxpayers divert money to college graduates[7]—and none of those bills passed.

In response to such opposition, high-ranking congressional Democrats urged President Biden to instead use executive powers to cancel student debt.[8] Around the same time, in February 2021, the White House said it would ask the Department of Justice to assess whether President Biden could unilaterally cancel student loans, but that it would wait until Biden's nominees to the DOJ were confirmed.[9]

In August 2022, the White House and Department of Education announced a plan to discharge $10,000 in student loans ($20,000 for Pell Grant Recipients) for individuals earning under $125,000—fulfilling President Biden's campaign promise.[10] Concurrently, the Office of Legal Counsel (OLC) released an opinion concluding that the HEROES Act, which allows the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs . . . as the Secretary deems necessary in connection with a war or other military operation or national emergency," could be used for loan forgiveness.[11] OLC argued the "waive or modify" language provided "expansive authority" to discharge student debts during the late stages of the COVID-19 pandemic.[12] Notably, OLC's position contradicted

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[4] Adam S. Minsky, *Biden Affirms: "I Will Eliminate Your Student Debt"*, FORBES (Oct. 7, 2020), https://www.forbes.com/sites/adamminsky/2020/10/07/biden-affirms-i-will-eliminate-your-student-debt/?sh=c0fe74958a7f.

[5] Annie Nova, *Biden will call on Congress to forgive $10,000 in student debt for all borrowers*, CNBC (Jan. 8, 2021), https://www.cnbc.com/2021/01/08/student-loan-forgiveness-could-be-more-likely-but-challenges-remain-.html.

[6] *Nebraska*, 143 S. Ct. at 2373.

[7] *See, e.g.*, Preston Cooper, *The Case Against Student Loan Forgiveness,* FORBES (Nov. 17, 2020), https://www.forbes.com/sites/prestoncooper2/2020/11/17/the-case-against-student-loan-forgiveness/?sh=12735653464c.

[8] Katie Lobosco, *Biden again rejects $50,000 student loan debt forgiveness plan pushed by other top Democrats*, CNN (Feb. 17, 2021), https://www.cnn.com/2021/02/16/politics/student-loan-forgiveness-biden/index.html.

[9] Press Briefing by Press Secretary Jen Psaki and Deputy National Security Advisor for Cyber and Emerging Technology Anne Neuberger, THE WHITE HOUSE (Feb. 17, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/02/17/press-briefing-by-press-secretary-jen-psaki-and-deputy-national-security-advisor-for-cyber-and-emerging-technology-anne-neuberger-february-17-2021/.

[10] FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most, THE WHITE House (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/; *see also* Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512, 61513 (Oct. 12, 2022).

[11] 20 U.S.C. § 1098bb(a)(1); *see* Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, 46 O.L.C. ___, slip op. (Aug. 23, 2022), at 4, https://www.justice.gov/d9/2022-11/2022-08-23-heroes-act.pdf [hereinafter "OLC Op."].

[12] OLC Op., *supra* note 11, at 1.

a January 2021 memorandum from the Education Department's General Counsel's office—which opined that the HEROES Act did not authorize discharging student loan debt.[13]

Assessing the Biden Administration's claimed authority to cancel student debt requires a closer look at the Act's history.

B. The HEROES Act's Legislative History

Enacted in 2003, the HEROES Act was part of a series of reforms passed in response to the September 11, 2001 terrorist attacks.[14] The statute revised the HEROES Act of 2001, another post-9/11 law, which had a similar waive-or-modify provision in response to national emergencies "by reason of terrorist attacks."[15] The 2003 statute removed the "terrorist attack" qualifier, applying the provision to all national emergencies.[16] The bill's congressional sponsor suggested the statute's "intent" was to grant "flexibility" to prevent "financial difficulty generated" when U.S. armed forces or reserves "are called to serve" in response to "a war, military contingency operation, or national emergency."[17] He also argued the Act would empower the Secretary to "minimize administrative requirements without affecting the integrity of the programs," "adjust the calculation used to determine financial need," and grant "the authority to address issues not yet foreseen."[18] Statements during the congressional debate suggest the waive-or-modify provision aimed to "to make sure that [servicemembers'] families are not harassed by collectors and that their loan payments are deferred until they return."[19]

Framed in that way, the bill received nearly unanimous congressional support, passing by a 421-to-1 vote in the House of Representatives and a unanimous voice vote in the Senate.[20] President Bush signed the bill shortly thereafter.

Although the 2003 HEROES Act initially had a sunset provision, Congress permanently extended it in 2007.[21] The modification's sponsor explained that the legislation was designed "to provide the Secretary of Education with the permanent authority to ensure that active duty military personnel are not financially harmed by the service that they perform."[22] The final legislation included a provision expressing "the sense of Congress" that the Act "addresses the unique situations that active duty military personnel and other affected individuals may face in connection with their enrollment in postsecondary institutions and their Federal student loans."[23]

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[13] *Id.*; Memorandum from Reed D. Rubinstein, Principal Deputy General Counsel of the U.S. Department of Education, to Betsy DeVos, Secretary of Education (Jan. 12, 2021), https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf.

[14] EDWARD C. LIU & SEAN M. STIFF, CONG. RSCH. SERV., R47505, STUDENT LOAN CANCELLATION UNDER THE HEROES ACT 6 (2023), https://crsreports.congress.gov/product/pdf/R/R47505/2 [hereinafter "CRS REPORT"].

[15] Higher Education Relief Opportunities for Students Act of 2001, Pub. L. No. 107-122, § 2(a)(2), 115 Stat. 2386, 2386 (2002).

[16] CRS REPORT, *supra* note 14, at 6.

[17] 149 CONG. REC. H2522, H2524 (daily ed. April, 1, 2003) (statement of Rep. Kline).

[18] *Id*.

[19] 149 CONG. REC. H2522, H2524 (daily ed. April, 1, 2003) (statement of Rep. Isakson).

[20] Biden v. Nebraska, 143 S. Ct. 2355, 2363 n.1 (2023) (citing 149 CONG. REC. 7952–53 (2003); *id.* at 20809; 147 CONG. REC. 20396 (2001); *id.* at 26292–93).

[21] CRS REPORT, *supra* note 14, at 6.

[22] 153 CONG. REC. H10789, H10789 (daily ed. Sept. 25, 2007) (statement of Rep. Sestak).

[23] Higher Education—Permanent Extension of Waiver Authority, Pub. L. No. 110-93, § 2, 121 Stat. 999 (2007).

C. Prior Agency Practice under the HEROES Act

Prior to the Covid-19 pandemic, the Secretary had used the HEROES Act to expand forbearance relief, suspend collections, alter loan deferral requirements, extend loan forbearance periods, and waive student overpayment return requirements.[24] In addition to servicemembers, these waivers were limited to individuals who "[r]eside or are employed in an area that is declared a disaster area" or "[s]uffered direct economic hardship as a direct result of a . . . national emergency, as determined by the Secretary."[25] Notably, none of these past acts included canceling student loan debt.[26]

During the Covid-19 pandemic, the Secretary's waivers under the HEROES Act expanded in scope.[27] In March 2020, the Secretary paused the accrual of interest and suspended payments for all student loan borrowers by approximately 60 days.[28] Soon afterwards, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which statutorily extended these policies until October 1, 2020.[29] When the direct statutory provision expired, Secretaries, in both the Trump and Biden Administrations, extended the waiver of interest accrual and payments, but relied on HEROES Act authority.[30] In December 2020, the Secretary loosened eligibility requirements for all borrowers and expanded repayment defenses for certain borrower categories.[31] In 2021, the Secretary also ceased certain collection activity and waived some administrative requirements for existing discharge programs.[32] Although their scope included far more individuals than prior regulations, none of the Covid-19 era waivers canceled student debt.[33]

D. Procedural History of Biden v. Nebraska

In September 2022, six States (led by Nebraska) challenged the Biden Administration's student loan forgiveness program in court.[34] The district court dismissed the suit for lack of standing.[35] On appeal, the Eight Circuit stayed the district court's decision and granted a preliminary injunction pending an appeal to the Supreme Court.[36] The Supreme Court granted

[24] OLC Op., *supra* note 11, at 5; CRS REPORT, *supra* note 14, at 7.

[25] *See id.*; Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, Federal Direct Loan Program, Federal Family Education Loan Program and the Federal Pell Grant Program), 68 Fed. Reg. 69312, 69312 (Dec. 12, 2003).

[26] CRS REPORT, *supra* note 14, at 7.

[27] *Id*.

[28] *Id.* at 7–8; OLC Op., *supra* note 11, at 6.

[29] *Id.*; *see also* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3513, 134 Stat. 281, 404 (2020).

[30] CRS REPORT, *supra* note 14, at 8; OLC Op., *supra* note 11, at 6; *see also* Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512, 61513–14 (Oct. 12, 2022).

[31] OLC Op., *supra* note 11, at 6.

[32] *Id.* at 7.

[33] CRS REPORT, *supra* note 14, at 7.

[34] *Id.* at 17.

[35] Nebraska v. Biden, 636 F. Supp. 3d 991, 1002 (E.D. Mo. 2022).

[36] Nebraska v. Biden, 52 F.4th 1044, 1048 (8th Cir. 2022).

certiorari before judgment[37]—a rare maneuver the Court reserves for cases of substantial public importance.[38]

E. The Supreme Court's Opinion

In a 6–3 opinion by Chief Justice Roberts, the Court ruled against the Biden Administration. First, the Court agreed that Missouri had standing because of the policy's financial effects on the Missouri Higher Education Loan Authority, a state "instrumentality."[39] On the merits, the Court held that the HEROES Act did not authorize the Biden Administration's student-loan cancellation plan.[40] The Court read the phrase "waive or modify" narrowly to permit only "modest adjustments."[41] Canceling so many student loans, the Court reasoned, could not "fairly be called a waiver" because "it not only nullifies existing provisions, but augments and expands them."[42] And it could not be deemed "a mere modification, because it constitutes effectively the introduction of a whole new regime."[43]

The Court also invoked the major questions doctrine, focusing on "concerns over the exercise of administrative power."[44] The Court identified loan forgiveness as a question of "economic and political significance," emphasizing the program's cost and politically controversial nature.[45] Having concluded a major question was at issue, the Court held that the Biden Administration needed "clear congressional authorization to justify the challenged program."[46] The Court concluded the government could not meet that standard.[47]

Two Justices wrote separately. Justice Barrett wrote a concurrence defending the major questions doctrine not as a substantive canon, but as "a tool for discerning—not departing from—[a statute's] most natural interpretation."[48] More on that below. Justice Kagan dissented, arguing the statute provided "broad authority to give emergency relief to student-loan borrowers," and that the student-loan cancellation "fit[] comfortably within that delegation."[49] And she faulted the Court for reading statutes narrowly "when Congress enacts broad delegations allowing agencies to take substantial regulatory measures."[50]

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[37] Biden v. Nebraska, 143 S. Ct. 477 (2022).
[38] SUP. CT. R. 11.
[39] Biden v. Nebraska, 143 S. Ct. 2355, 2365–69 (2023).
[40] *Id.* at 2375.
[41] *Id.* at 2369.
[42] *Id.* at 2371.
[43] *Id.*
[44] *Id.* at 2372.
[45] *Id.* at 2373.
[46] *Id.* at 2375 (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2609, 2614 (2022)).
[47] *Id.*
[48] *Id.* at 2376 (Barrett, J., concurring).
[49] *Id.* at 2385 (Kagan, J., dissenting).
[50] *Id.*

II. TAKEAWAYS

With respect to the future of the major questions doctrine, *Biden v. Nebraska* offers several important takeaways.

1. *First*, the major questions doctrine applies to "all corners of the administrative state" and "the conferral of benefits is no exception to that rule."[51] The Court had already made clear that the doctrine applies to regulations that impose *burdens* on regulated entities.[52] But the Solicitor General's brief in *Biden v. Nebraska* had argued that the major questions doctrine does not apply to "the provision of government benefits," because they pose no "risk of 'significant encroachment into the lives' of individuals and the affairs of entities."[53]

The Court refused to entertain this proposed limitation, explaining that it "has never drawn the line" at government benefits "for good reason."[54] Namely, "[a]mong Congress's most important authorities is its control of the purse."[55] And the major questions doctrine, the Court reasoned, ensures Congress retains the "useful and salutary check" conferred by the Appropriations Clause.[56] Just as the doctrine prevents the "Executive from seizing the power of the Legislature" generally, it also prevents the usurpation of Congress's appropriation power in particular.[57] If nothing else, *Biden v. Nebraska* suggests the Court will not be receptive to artificial attempts to narrow the doctrine's domain.

2. *Second,* the Court reaffirmed that the dollar amount of a regulation's economic impact is important to identifying an economically significant question.[58] The Court reaffirmed that the $50 billion economic impact cited in *Alabama Ass'n of Realtors*—a 2021 case addressing a federal eviction moratorium—was economically significant.[59] That benchmark, the Court explained, made *Biden v. Nebraska* easy because the student-loan cancellation plan had an aggregate economic impact of "between $469 billion and $519 billion," or almost "ten times the 'economic impact'" in *Alabama Ass'n of Realtors*.[60] Going forward, courts should swiftly conclude that any regulation with an aggregate economic impact above $50 billion constitutes a major question.

3. *Third*, the Court identified evidence relevant to the political-significance prong of the major questions doctrine, orienting the inquiry around concerns that the Executive Branch will try to enact policies circumventing Congress.

Consistent with prior cases,[61] much of *Biden v. Nebraska*'s political-significance discussion focused on circumvention of the *current* Congress and concluded the Biden Administration likely

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[51] *Id.* at 2375 (majority opinion).

[52] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2612 (2022); Capozzi, *supra* note 3, at 229.

[53] Brief for Petitioners at 48–49, Biden v. Nebraska, 143 S. Ct. at 2355 (2023) (No. 22-506), 2022 WL 18146216 (quoting NFIB v. OSHA, 142 S. Ct. 661, 665 (2022)).

[54] *Nebraska*, 143 S. Ct. at 2375.

[55] *Id*.

[56] *Id.* (quoting Off. of Personnel Mgmt. v. Richmond, 496 U.S. 414, 427 (1990)).

[57] *Id.* at 2373.

[58] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2604 (2022); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021); King v. Burwell, 576 U.S. 473, 485 (2015) ("billions of dollars").

[59] *Nebraska*, 143 S. Ct. at 2373 (citing *Alabama Ass'n of Realtors*., 141 S. Ct. at 2489).

[60] *Id.*

[61] *See, e.g.*, *West Virginia*, 142 S. Ct. at 2587; *id.* at 2621–22 (Gorsuch, J., concurring); Capozzi, *supra* note 3, at 233.

could not gain legislative sanction to cancel student loans. The Court used Congress's extensive debates on over "80 student loan forgiveness bills" as evidence that Congress "is not unaware of the challenges facing student borrowers."[62] The Court also noted resolutions calling for the President to unilaterally resolve the loan forgiveness issue failed to receive a vote on the congressional floor.[63] The Court even referenced a speech by then-House Speaker Nancy Pelosi, suggesting Congress would be unwilling to give the Biden Administration the power it was claiming.[64] All this evidence reinforces that the major questions doctrine protects the power of the *current* Congress from attempts by the Executive Branch to repurpose old statutes to solve new problems.[65]

In a somewhat novel move, the Court also expressed concern about the Executive Branch exploiting vague statutory language to frustrate the will of the enacting Congress. Consistent with several prior cases,[66] the Court emphasized the "earnest and profound debate across the country" over student-loan cancellation.[67] But, the Court immediately stressed the "contrast" between the "unanimity with which Congress passed the HEROES Act" and the controversial "debates generated by the Secretary's extraordinary program."[68] Responding to a similar purposivist argument by the dissent, the Court asked readers to "imagine . . . asking the enacting Congress" if the Secretary could "use his powers to abolish $430 billion in student loans, completely cancelling loan balances for 20 million borrowers, as a pandemic winds down to its end."[69] The Court could not "believe the answer would be yes."[70]

The Court's political-significance discussion highlights two important functions of the major questions doctrine. The statute books are full of vague, open-ended delegations from past Congresses.[71] When a President repurposes one of those delegations, the *current* Congress is disempowered.[72] And such presidential maneuvers also risk frustrating the will of the *past* Congress. *Biden v. Nebraska* reaffirms that the major questions doctrine guards against both types of executive-branch infringements.

4. *Fourth*, the Court stressed that agency "past practice" plays a substantial role in the major-questions-doctrine analysis.[73] In *Biden v. Nebraska*, the Court placed substantial weight on the fact that the Secretary had not "previously claimed powers of [that] magnitude under the HEROES Act," and "past waivers and modifications" were "extremely modest and narrow in scope."[74]

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[62] *Nebraska*, 143 S. Ct. at 2373.

[63] *Id.* at 2373 n.8.

[64] *Id.* at 2374.

[65] *Cf.* NFIB v. OSHA, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring).

[66] *See, e.g.*, *West Virginia*, 142 S. Ct. at 2614; Gonzales v. Oregon, 546 U.S. 243, 248–49 (2006).

[67] *Nebraska*, 143 S. Ct. at 2374 (citation omitted).

[68] *Id*.

[69] *Id.*

[70] *Id.*

[71] *See, e.g.*, Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 853 (2018); Louis J. Capozzi III, *In Defense of the Major Questions Doctrine*, 100 NOTRE DAME L. REV. (forthcoming 2024) (manuscript at 43-46, on file with SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4234683).

[72] *Id.*

[73] *Nebraska*, 143 S. Ct. at 2372.

[74] *Id.*

Indeed, during oral arguments, Justice Kavanaugh specifically suggested that this indicator was important.[75]

It remains somewhat unclear precisely where past agency practice fits into the two-step major questions doctrine analysis. I have previously suggested it is relevant at the second step, as part of the inquiry into whether Congress has provided clear authorization.[76] But in *Biden v. Nebraska*, the Court seemed to consider past practice as part of the threshold inquiry as to whether a major question is at issue.[77] Such past-practice evidence, then, might be more relevant to the political-significance than the clear-statement inquiry. Regardless of where it fits, *Biden v. Nebraska* reaffirms that past agency practice is important.

5. *Fifth*, the major questions doctrine applies even when the relevant administrative agency plausibly has the expertise to issue the regulation. Prior cases suggested that mismatches between a regulation and the issuing agency's expertise are evidence that Congress did not clearly authorize the regulatory authority.[78] In *West Virginia v. EPA*, for example, the Court expressed skepticism that Congress intended for the EPA to make energy-policy decisions in lieu of the Federal Energy Regulatory Commission.[79]

In *Biden v. Nebraska*, by contrast, the Education Department seemed to be the agency with the most on-point expertise to address student loans.[80] Instead of rebutting Justice Kagan's argument to that effect, the Court insisted student-loan cancellation was "in the 'wheelhouse' of the House and Senate Committee on Appropriations."[81] Agency expertise, the Court apparently believed, must yield to Congress's lawmaking primacy. *Biden v. Nebraska* thus makes clear that the major questions doctrine applies even when the issuing agency does have relevant expertise.[82]

III. OPEN QUESTIONS

Although it provides some important doctrinal clarity, *Biden v. Nebraska* also raises several important questions about the future of the major questions doctrine.

A. Once a court concludes a major question is at issue, how much textual analysis is required?

It is important to remember that a federal agency does not necessarily lose when a major question is at issue. An important characteristic of clear-statement rules is that Congress *can* provide a clear-statement of authority to achieve a particular end.[83]

Yet uncertainty remains as to *how clear* Congress's statement must be. Other clear-statement rules have varying levels of strength.[84] And after *West Virginia v. EPA*, several commentators

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[75] *See* Transcript of Oral Argument at 116–17, Biden v. Nebraska, No. 22-506 (argued Feb. 28, 2023).

[76] Capozzi, *supra* note 3, at 240.

[77] *Nebraska*, 143 S. Ct. at 2372; *cf.* N.C. Coastal Fisheries Reform Grp. v. Capt. Gasson LLC, 76 F.4th 291, 299 (4th Cir. 2023) (applying past practice similarly as part of threshold conclusion that major questions doctrine applied to claimed EPA power).

[78] Capozzi, *supra* note 3, at 241.

[79] *West Virginia*, 142 S. Ct. at 2612–13; *id.* at 2623 (Gorsuch, J., concurring).

[80] *Nebraska*, 143 S. Ct. at 2398 (Kagan, J., dissenting).

[81] *Id.* at 2374 (majority opinion).

[82] *Id.* at 2384 (Barrett, J., concurring) (observing this).

[83] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 174–77 (2010).

[84] Capozzi, *supra* note 3, at 236–37; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 638–39 (1992).

observed that the Court's analysis was sparse and quite succinct—suggesting (perhaps) that the major questions doctrine is a particularly strong clear-statement rule.[85]

But in *Biden v. Nebraska*, the Court offered more extensive textualist analysis. Part of the reason for the contrast with *West Virginia* is the Court's insistence that the government would lose *even without* the major questions doctrine.[86] The Court's textual analysis thus does not purport to be affected by the major questions doctrine, making *Nebraska* distinct from *West Virginia*. Going forward, it is worth watching whether the Court continues to conduct extensive textual analyses when applying the major questions doctrine.

B. Does Justice Barrett's approach to the major questions doctrine lead to different results?

Justice Barrett's rationale for the major questions doctrine is different than the Court's. Most scholars agree the major questions doctrine is a substantive canon.[87] Justices Gorsuch and Alito have explicitly defended the doctrine as a substantive canon enforcing Article I of the Constitution and its requirement that Congress make important laws.[88] Although Justice Barrett left herself room to accept that approach,[89] she offered a different rationale in her *Nebraska* concurrence.

For Justice Barrett, the major questions doctrine is a linguistic canon which reflects the context necessary for a sensible reader to understand a statute's plain meaning.[90] Context, she explained, "is not found exclusively within the four corners of a statute," but also includes "[b]ackground legal conventions."[91] Among those are "the basic premise that Congress normally 'intends to make major policies itself, not leave those decisions to agencies.'"[92] "[C]onstitutional structure" and the framers' decision to vest Congress with "all legislative power" also provide important context.[93] With that context, Justice Barrett argues "a reasonably informed interpreter" in our "system of separated powers" would "expect Congress to legislate on important subjects" while delegating away only "the details."[94] That is why courts approach agency claims to major powers "with at least some 'measure of skepticism.'"[95] To "overcome" that skepticism, the agency must

[85] *See, e.g.*, Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1037–38 (2023).

[86] *Nebraska*, 143 S. Ct. at 2375 n.9.

[87] *See, e.g.*, Deacon & Litman, *supra* note 85, at 1041 ("[A]fter the October 2021 term, the 'new' major questions doctrine operates as a clear statement rule."); Mila Sohoni, Comment, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 275 (2022); Daniel Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 510 (2023) ("[T]he major questions doctrine is now clearly a substantive canon of statutory construction.").

[88] West Virginia v. EPA, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring).

[89] Both in her opinion and in an academic article, Justice Barrett acknowledged that judges since the Founding have used substantive canons to enforce the Constitution. *Nebraska*, 143 S. Ct. at 2377 n.2 (citing Barrett, *supra* note 83, at 155, 176). Nevertheless, she expressed "war[iness]" at adopting "new" constitutional clear-statement rules because they depart from ordinary textualist rules. *Id.* But she then insisted that the major questions doctrine is not "new," *id.*, suggesting she is open to conceptualizing the major questions doctrine as a substantive canon enforcing the Constitution. *See also id.* at 2381 n.3 (citing 1897 case and suggesting the major questions doctrine may "have even deeper roots").

[90] *Id.* at 2378

[91] *Id.* at 2376.

[92] *Id.* at 2380 (quoting United States Telecom. Assn v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J, dissenting from the denial of rehearing en banc)).

[93] *Id.* at 2380.

[94] *Id.* at 2380–81 (quoting Wayman v. Southard, 23 U.S. 1, 20 (1825)).

[95] *Id.* at 2381.

point to "text directly authorizing the agency action or context demonstrating that the agency's interpretation is convincing."[96] Consequently, for Justice Barrett, "the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation."[97]

Although the theoretical differences between the Majority and Justice Barrett are interesting,[98] it is unclear whether Justice Barrett's approach will lead to different results. With respect to the doctrine's first step—assessing whether a major question is at issue—it is hard to see any difference. Justice Barrett's concurrence purported to accept and apply the same traditional markers identifying a major question that the Court has used in the past.[99]

A potential difference at the second step—assessing whether "clear congressional authorization" exists—is more plausible. Justice Barrett emphasized her approach does not justify choosing "an inferior-but-tenable alternative [interpretation] that curbs the agency's authority."[100] As a substantive canon, by contrast, a strong clear-statement rule might require courts to rule against the government when a challenger identifies any plausible statutory interpretation that does not grant an agency authority.[101]

However, Justice Barrett's concurrence suggests she will usually align with the Majority when assessing "clear congressional authorization."[102] Once a court determines a major question is at issue, Justice Barrett says an agency can still win by pointing to "specific words in the statute" or statutory "context."[103] But "specific words in the statute" sounds like a clear-statement rule.[104] And it's unclear what Justice Barrett means by context "also do[ing] the trick" when, under her approach, context ordinarily suggests that Congress would not delegate major powers to agencies without clear language.[105] If that's right, then Justice Barrett's concurrence may end up being more theoretically important than practically significant.

C. How much money must be at stake for a major economic question to exist?

In *Biden v. Nebraska*, the Court used $50 billion—the amount at issue in *Alabama Ass'n of Realtors*—as a benchmark for economic significance.[106] The Court's opinion made clear that a regulatory impact of this amount—or anything above it—is economically significant.[107] The $50 billion threshold provides much needed guidance for federal courts in cases of that magnitude.[108]

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[96] *Id.* at 2381.

[97] *Id.* at 2376.

[98] I defend both approaches in a forthcoming article. *See* Capozzi, *supra* note 71.

[99] *Nebraska*, 143 S. Ct. at 2381–83 (Barrett, J., concurring).

[100] *Id.* at 2382.

[101] Some clear-statement rules are that strong. *See, e.g.*, Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). Others are weaker. *See, e.g.*, Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 332 (2015). The Court has not yet made clear what kind of clear-statement is required under the major questions doctrine. *See* Capozzi, *supra* note 3, at 236–37.

[102] West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).

[103] *Nebraska*, 143 S. Ct. at 2380.

[104] *Id.* at 2380.

[105] *Id.* at 2380–81.

[106] *Id.* at 2373 (citing Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021)).

[107] *Id*.

[108] *Id*.

The question going forward is when a regulation presents a major question with an aggregate economic impact *below* $50 billion. Notably, nothing in the *Biden v. Nebraska* opinion suggests that amount serves as a floor.[109] Indeed, the Executive Branch uses a substantially lower amount—$200 million—to determine whether a regulation is significant for Office of Information and Regulatory Affairs (OIRA) review.[110] And Congress itself identifies regulations as significant when they impose $100 million in costs.[111] Since *West Virginia v. EPA*, only one district court has meaningfully elaborated on this question.[112] Going forward, the precise threshold for economic significance is an important question that courts will need to refine through case-by-case adjudication.

CONCLUSION

Critics of the major questions doctrine have suggested "[t]he line between major and nonmajor questions is not exactly clear and crisp,"[113] with some even claiming the doctrine is incapable of principled application.[114] While there are undoubtedly open questions about the scope and application of the major questions doctrine, that is nothing new or unique in American law.[115] For example, courts assess whether a government official is an "Officer of the United States" for purposes of the Appointments Clause by asking if they exercise "significant" power.[116] Just as courts have refined that doctrine in a case-by-case process over the past few decades, courts can do the same for the major questions doctrine.

Biden v. Nebraska was an important step in that case-by-case elaboration process. The opinion provided substantial guidance as to what constitutes a question of political or economic significance. Future decisions by the Supreme Court and lower courts should do the same.

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[109] *Id.*

[110] Exec. Order No. 14,094, 88 Fed. Reg. 21879, 21879 (April 6, 2023).

[111] 5 U.S.C. § 804(2) (2018); *see* Chad Squitieri, *"Recommend . . . Measures": A Textualist Reformulation of the Major Questions Doctrine*, 75 BAYLOR L. REV. 706, 743 n. 221 (2024).

[112] *See* Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966, at *8 (D. Ariz. Jan. 6, 2023) (finding regulation's financial impact, estimated at $1.7 billion, too small to constitute a major question).

[113] Cass R. Sunstein, *Zombie Chevron: A Celebration*, 82 OHIO ST. L.J. 565, 581 (2021)

[114] *See, e.g.*, Josh Chafetz, *Gridlock?*, 130 HARV. L. REV. FORUM 51, 55 (2016); Blake Emerson, *Major Questions and the Judicial Exercise of Legislative Power*, YALE J. REG. (Feb. 28, 2020), *available at* https://www.yalejreg.com/nc/major-questions-and-the-judicial- exercise-of-legislative-power-by-blake-emerson/.

[115] *See, e.g.*, FDA v. All. for Hippocratic Medicine, 602 U.S.__, 2024 WL 2964140, at *8 (U.S. June 13, 2024) ("Like 'most legal notions, the standing concepts have gained considerable definition from developing case law.'" (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 377 (2003).

[116] Lucia v. SEC, 138 S. Ct. 2044, 2051–52 (2018).