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Biden v. Nebraska and the major questions doctrine

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The majority, concurring and dissenting opinions in *Biden v. Nebraska* illustrate the differences of view among the Justices on the major questions doctrine.

Major questions doctrine

In a client update last year on the Supreme Court's decision in *West Virginia v. EPA*,[1] we offered a primer on the major questions doctrine, which the 6-3 majority in an opinion written by Chief Justice John Roberts invoked by name for the first time. *West Virginia v. EPA* cited a series of cases in support of the Court's holding that "in certain extraordinary cases" where there is reason to doubt that Congress authorized a particular agency action, "both separation of powers principles and a practical understanding of legislative intent" require the agency to point to "clear congressional authorization" for its action. Justice Neil Gorsuch wrote a concurring opinion, joined by Justice Samuel Alito, elaborating on when and how the doctrine would be invoked.

On June 30, 2023, exactly one year after *West Virginia v. EPA*, the Court again invoked the major questions doctrine in another 6-3 opinion also written by Chief Justice Roberts[2] that struck down the Biden Administration's plan to forgive approximately $430 billion of federal student loans. Justice Amy Coney Barrett wrote a concurring opinion explaining why the major questions doctrine, properly applied, is consistent with a textualist approach to construing statutes, citing extensively to a law review article she wrote before she was appointed to the Supreme Court. Justice Elena Kagan wrote a dissenting opinion joined by Justices Sonia Sotomayor and Ketanji Brown Jackson arguing that the major questions doctrine inappropriately limits the ability of Congress to make broad delegations of power to administrative agencies. This memo discusses each of these opinions and their implications for the application of the major questions doctrine in future cases.

Biden v. Nebraska

Background

Biden v. Nebraska[3] involved an interpretation of the HEROES Act of 2003, a statute passed in the wake of the September 11 terrorist attacks. It authorized the Secretary of Education to respond to national emergencies by "waiv[ing] or modify[ing] 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." Citing this authority, the Secretary of Education announced a plan to cancel federal student loans to certain borrowers to "address[] the financial harms of the COVID-19 pandemic." Certain states challenged the proposal, arguing that the HEROES Act did not authorize the Secretary to take this action.[4]

Chief Justice Roberts' majority opinion

The Court's holding that the student-loan forgiveness program exceeded the authority of the Secretary of Education under the HEROES Act was organized in two parts. First, the Court applied ordinary tools of statutory interpretation to

interpret the statute's text, without invoking the major questions doctrine or discussing the purpose of the statute. Second, the Court invoked the major questions doctrine, citing extensively to *West Virginia v. EPA*, to argue that its interpretation of the statutory text was consistent with the statute's purpose.

Textual grounds

The Court rejected the Biden Administration's argument that its student-loan forgiveness program was authorized under the Secretary's statutory power to "waive or modify" provisions of the student financial assistance programs. The Court held that the word "modify" has "'a connotation of increment or limitation,' and must be read to mean 'to change moderately or in minor fashion.'" The Court found it "highly unlikely that Congress" meant to authorize the loan forgiveness program "through such a subtle device as permission to 'modify'" and noted that previous modifications issued under the HEROES Act were minor and mostly procedural in nature. The Court likewise held that the word "waive" did not authorize the student-loan forgiveness program. The Court noted that "the Secretary does not identify any provision that he is actually waiving" to forgive student debt. The Court also rejected arguments that the Secretary's authority to "waive or modify" implied a "broader authority" than the word "modify" alone.

In sum, the Court wrote, "[t]he Secretary's comprehensive debt cancellation plan cannot fairly be called a waiver … [nor] mere modification … [nor] some combination of the two." The power to "waive or modify" in the HEROES Act "cannot authorize the kind of exhaustive rewriting of the statute that has taken place here."

Purpose grounds and the major questions doctrine

Having considered and rejected the student-loan forgiveness program on purely textual grounds, the Court then invoked the major questions doctrine in addressing whether its interpretation of the statutory text was consistent with the purpose of the statute.

As in *West Virginia v. EPA*, the Court wrote, there was "reason to hesitate before concluding that Congress meant to confer" the authority to forgive $430 billion of federal student debt "[g]iven 'the history and the breadth of the authority that [the agency] ha[d] asserted' and the 'economic and political significance' of that assertion." The Court noted that the Secretary of Education had "never previously claimed powers of this magnitude under the HEROES Act"—similar to the EPA's invocation of the Clean Air Act to adopt the Clean Power Plan. The Court characterized the forgiveness program as clearly having the "economic and political significance" necessary to invoke the major questions doctrine, noting that the program's estimated cost was "ten times the 'economic impact' that [the Court] found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine" in *Alabama Association of Realtors v. Department of Health and Human Services*. The Court reiterated its holding from *West Virginia v. EPA* that "'[a] decision of such magnitude and consequence' on a matter of 'earnest and profound debate across the country' must 'res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.'"[5]

In summary, the Court concluded that "the HEROES Act provides no authorization for the Secretary's plan even when examined using the ordinary tools of statutory interpretation—let alone 'clear congressional authorization' for such a program." In a footnote, the Court addressed the dissent's assertion that the majority's "application of the major questions doctrine is a 'tell' revealing that 'normal' statutory interpretation cannot sustain [its] decision." The majority rejected this argument, explaining that "the statutory text alone precludes the Secretary's program" and that the opinion "simply reflects this Court's familiar practice of providing multiple grounds to support its conclusions."

Justice Barrett's concurrence

In addition to joining the Opinion of the Court in full, Justice Barrett wrote a concurring opinion. She explained that she wrote a concurring opinion because she "take[s] serious the charge that the [major questions] doctrine is inconsistent with textualism," which seems to have been motivated by Justice Kagan's dissent in *West Virginia v. EPA* and by a law review article on substantive canons of statutory construction that Barrett published in 2010 before she was appointed to the Supreme Court.[6] Notably, her concurrence was not joined by any other Justices and staked out a different view of the major questions doctrine than the one Justice Gorsuch espoused in his concurrence, joined by Justice Alito, in *West Virginia v. EPA*.

Substantive canons

Barrett wrote that she "grant[s] that some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause." Citing extensively to her own 2010 law review article, Barrett explained that substantive canons "are rules of construction that advance values external to a statute." Some of

these canons, like the rule of lenity, "play the modest role of breaking a tie between equally plausible interpretations of a statute." But other substantive canons, such as constitutional avoidance and the presumption against retroactivity, "are more aggressive." Barrett referred to these as "strong-form substantive canons."

Instead of breaking a tie, Barrett wrote, "a strong-form canon counsels a court to *strain* statutory text to advance a particular value." Strong-form canons are "in significant tension with textualism insofar as they instruct a court to adopt something other than the statute's most natural meaning." Barrett therefore wrote that "it is undeniable that [such canons] pose 'a lot of trouble' for 'the honest textualist.'"

Barrett wrote that she would reject the major questions doctrine if it "were a newly minted strong-form canon." But according to Barrett, the major questions doctrine "is neither new nor a strong-form canon." Rather than a substantive canon, Barrett understands the doctrine to emphasize the importance of context when a court interprets a delegation to an administrative agency. Seen in this light, the major questions doctrine is "a tool for discerning—not departing from—the text's most natural interpretation."

The "clear-statement" major questions doctrine

Barrett rejected the view that the major questions doctrine is "a strong-form substantive canon designed to enforce Article I's Vesting Clause" by requiring Congress "to speak unequivocally in order to grant [agencies] significant rulemaking power." Under that view, the major questions doctrine is "essentially a clear-statement rule," a "heightened-specificity requirement," and a "clarity tax." In Barrett's view, this "clear statement" version of the major questions doctrine "'loads the dice' so that a plausible antidelegation interpretation wins even if the agency's interpretation is better."

Barrett agreed that various precedents—including the opinion she joined in *West Virginia v. EPA*—"express an expectation of 'clear congressional authorization' to support sweeping agency action." But she wrote that none of those precedents has required "an 'unequivocal declaration' from Congress authorizing the *precise* agency action under review," unlike a typical clear-statement case. Likewise, none of those precedents "purports to depart from the best interpretation of the text—the hallmark of a true clear-statement rule."

Barrett did not cite to Justice Gorsuch's concurring opinion in *West Virginia v. EPA*, which characterized the major questions doctrine as a clear-statement rule, similar to the clear-statement rules on retroactive liability and waivers of sovereign immunity. Justice Barrett nonetheless signaled a difference of opinion with both Gorsuch and Alito, who joined Gorsuch's concurrence in *West Virginia v. EPA*.

Barrett's contextual major questions doctrine

Barrett wrote that, rather than a clear-statement rule, the major questions doctrine is "an interpretive tool reflecting 'common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.'" The doctrine "situates text in context, which is how textualists, like all interpreters, approach the task at hand." In direct contrast to the "clear statement" view of the major questions doctrine, Barrett argued that her view "does not mean that courts have an obligation (or even permission) to choose an inferior-but-tenable alternative that curbs [an] agency's authority" and conceded that there are circumstances when "a court must adopt the agency's reading [of an authorizing statute] despite the 'majorness' of the question.

In Barrett's view, "context is … relevant to interpreting the scope of a delegation," and the major questions doctrine simply embodies an expectation that Congress "speak[s] clearly if it wishes to assign an agency decisions of vast 'economic and political significance.'" In other words, "in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on 'important subjects' while delegating away only 'the details.'" Thus, "an interpreter should 'typically greet' an agency's claim to 'extravagant statutory power' with at least some 'measure of skepticism.'" The same skepticism should apply when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" Barrett viewed precedent cases as consistent with this contextual approach. She cited, among others, cases where the Court found that an agency was regulating "outside its wheelhouse."

Barrett posited that "[i]f the major questions doctrine were a substantive canon, then the common thread in these cases would be that we 'exchange[d] the most natural reading of a statute for a bearable one more protective of a judicially specified value." Barrett wrote that the Court instead arrived at the most plausible reading of the statute in its major questions cases. Barrett conceded that "some context clues from past major questions cases are absent here"—for example, the Secretary of Education was clearly acting within his typical wheelhouse—but wrote that "the doctrine is not an on-off switch that flips when a critical mass of factors is present" and "enough of [the indicators from prior major questions cases] are present to demonstrate that the Secretary has gone far 'beyond what Congress could reasonably be understood to have granted' in the HEROES Act."

Justice Kagan's dissent

Justice Kagan, joined by Justices Sotomayor and Jackson, criticized the majority's use of the major questions doctrine as "a way for this Court to negate broad delegations Congress has approved, because they will have significant regulatory impacts." Kagan levied numerous critiques of the majority's opinion and the major questions doctrine in general. Kagan accused the majority of "once again substitut[ing] itself for Congress and the Executive Branch—and the hundreds of millions of people they represent—in making this Nation's most important, as well as most contested, policy decisions." Kagan echoed her criticisms from her dissent in *West Virginia v. EPA*, in which she called the major questions doctrine a "get-out-of-text-free card[]" and accused the majority of being "textualist only when being so suits it."

In Kagan's view, "[t]he new major-questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation" and "forces Congress to delegate in highly specific terms." Kagan also criticized the majority as having departed from other recent cases, thereby "mov[ing] the goalposts for triggering the major-questions doctrine."

Kagan and Barrett thus both oppose applying the major questions doctrine in what Barrett characterized as a strong-form clear-statement rule, but Kagan also opposes applying it any form. Kagan views the doctrine as requiring Congress to delegate in "highly specific terms," whereas Barrett does not.

Implications

Biden v. Nebraska clearly reflects the powerful sway that the major questions doctrine has with the current Supreme Court. The ongoing debates between members of the Court on foundational elements of the doctrine and when it is applicable indicate that the law in this area is not settled. Future challenges to major agency actions will likely provide further opportunities for the Court to flesh out the doctrine.

As we noted in our previous client update, it remains to be seen whether *Chevron* deference[7] and its two-step analysis has been supplanted by the major questions doctrine or whether the doctrine forms a new step zero or a component of step one. *Biden v. Nebraska* illustrates the utility of the major questions doctrine for courts to sidestep *Chevron* and continues to broaden its potential application. Though Gorsuch's concurrence in *West Virginia v. EPA* was not cited once in *Biden v. Nebraska*, there were echoes of its rhetorical framework in the majority opinion. It remains to be seen how, if at all, Barrett's views will influence the other members of the Court in future invocations of the doctrine to challenge agency actions.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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1 597 U.S. ____ (2022). A separate Davis Polk client update provided further background on the EPA's Clean Power Plan and the environmental law implications of the *West Virginia v. EPA* decision. See *The Supreme Court uses major questions doctrine to limit EPA's authority to regulate climate change* (July 11, 2022).

2 Chief Justice Roberts's majority opinion was joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett.

3 600 U.S. ____ (2023).

4 This update does not address the Court's discussion of the states' standing to challenge the Secretary's action.

5 The Court also rejected attempts to limit the major questions doctrine to cases involving agency regulations as opposed to the provision of government benefits, writing that "[i]t would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations."

6 Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 117 (2010).

7 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").