

# MAJOR QUESTIONS DOCTRINE: REAL OR FANTASY?

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## I. INTRODUCTION

The U.S. Supreme Court's recent development of the "Major Questions Doctrine" has given rise to various challenges concerning whether the doctrine is truly grounded in Constitutional Law or is it just a disguise for the current Court majority to undermine rules and regulations of federal agencies they disagree with.<sup>1</sup> In this article, I plan to present a justification for the major questions doctrine utilizing a modern philosophical view of separation of powers that looks not only to the form of government the Constitution created, but also takes into account the need for a regulatory state in order to ensure basic human rights are protected. That justification affirms Congress's authority to empower federal agencies, which include "any department, independent establishment, governmental or quasi-governmental agency, authority, board, bureau, commission, department, Government corporation, or other agency of the executive branch"<sup>2</sup> that "are responsible for enforcing laws, regulating industries, and providing public services."<sup>3</sup> Such an approach I believe should impose limits on how the Court views the major questions doctrine going forward.

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<sup>1</sup> See Rachel Reed, *What Critics Get Wrong—and Right—About the Supreme Court's New 'Major Questions Doctrine'*, HARV. L. TODAY (Apr. 19, 2023), <https://hls.harvard.edu/today/what-critics-get-wrong-and-right-about-the-supreme-courts-new-major-questions-doctrine/> [<https://perma.cc/7ZLV-J44Y>].

<sup>2</sup> See 42 U.S.C. § 5122(9); 5 C.F.R. § 2641.104 (2024).

<sup>3</sup> *Government Agency*, LSD, <https://www.lsd.law/define/government-agency> [<https://perma.cc/UC63-2EMD>].

Because the doctrine is perhaps more susceptible than most statutory interpretation frameworks to ideological differences among the Justices,<sup>4</sup> I will focus here on when the doctrine should not be used to undermine an agency's ability to respond to unexpected factual circumstances that Congress may not have anticipated or, even if it had, would not have the expertise with which to effectively respond.<sup>5</sup> In so arguing, I will discuss the doctrine's relationship to the Constitution's separation of powers, as set forth in Articles One through Three and the Preamble, as well as how legislative purposes in the modern era will often require a more exacting and thoroughgoing focus than Congress is presently capable of offering. This broader examination of the doctrine should provide instances where an agency's authority is appropriately extended as well as instances where it is not appropriate to extend an agency's authority to respond to an unexpected situation. While I would not expect the exact details of my analysis to satisfy all possible stakeholders (both on the political left and the political right), I hope it will provide sufficient constitutional basis for

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<sup>4</sup> See Rachel Rothschild, *Why the Supreme Court Avoided Using Traditional Tools of Statutory Interpretation in West Virginia v. EPA*, YALE J. ON REG.: NOTICE & COMMENT (Jan. 12, 2023), <https://www.yalejreg.com/nc/why-the-supreme-court-avoided-using-traditional-tools-of-statutory-interpretation-in-west-virginia-v-epa-by-rachel-rothschild/> [https://perma.cc/389C-39UP].

<sup>5</sup> WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 265–266 (Robert C. Clark et al. eds., 2016). Professor Eskridge describes what an agency's "expertise" consists of by focusing on three of its special forms or characteristics:

First, expertise is specialized, often technical knowledge that allows government officials to perform end-means, "instrumental" analysis: If the country's goal is thus-and-so, will regulating such-and-such be useful at a reasonable cost?

A second form of agency expertise is institutional, namely, how to deploy limited resources to carry out public goals. Agencies operate in a world of limitations; they have budgetary constraints, face discipline and backlash for unpopular decisions, work under the sometimes-watchful eye of the White House, and coordinate their work with that of other agencies.

A third form of expertise is openly normative, that is, an understanding of how public goals evolve with experience and how they interact with other, often emerging, public goals.

*Id.* (footnotes omitted).

affirming Congress’s good judgments in creating various agencies to carry out its Article I obligations, and for the Court’s legitimacy when *properly* ensuring an agency’s judgments are reasonably sound under present circumstances.

Part II sets forth what the major questions doctrine states, how it came to be part of administrative law, and how it is currently understood. Part III then discusses the doctrine’s relation to constitutional separation of powers along with other relevant constitutional norms. Part IV describes how a more modern view of separation of powers would support a justification of a *properly* understood major questions doctrine. Finally, Part V discusses the authority of Congress and how that authority ought to play out in the context of the regulatory state. A brief conclusion then follows.

## II. WHAT THE MAJOR QUESTIONS DOCTRINE MEANS AND HOW IT CAME TO BE PART OF ADMINISTRATIVE LAW

“The major questions doctrine is a . . . principle of statutory interpretation . . . in United States administrative law . . . which states that courts will presume that Congress does not delegate to executive agencies issues of major political or economic significance.”<sup>6</sup> Utilizing this doctrine, “the Supreme Court has rejected agency claims of regulatory authority when (1) the underlying claim of authority concerns an issue of ‘vast “economic and political significance,”’ and (2) Congress has not clearly empowered the agency with authority over the issue.”<sup>7</sup> However, “[t]he Court has not clearly explained when an agency’s regulatory action will raise a question so significant that the doctrine applies, nor has it specified what legislative acts could constitute clear congressional authorization.”<sup>8</sup>

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<sup>6</sup> *Major Question Doctrine*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Major\\_questions\\_doctrine](https://en.wikipedia.org/wiki/Major_questions_doctrine) (March 30, 2024, 3:26 AM) [<https://perma.cc/42LS-8Q2A>].

<sup>7</sup> *The Major Questions Doctrine*, CONG. RSCH. SERV.: IN FOCUS, <https://crsreports.congress.gov/product/pdf/IF/IF12077> (Nov. 2, 2022) [<https://perma.cc/KY79-R7S8>] (citing *Util. Air Regul. Grp. (UARG) v. EPA*, 573 U.S. 302, 324 (2014))

<sup>8</sup> *Id.* See, e.g., the following cases where the Court, with one exception shown at the end, rejected claims of regulatory authority: *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (FCC’s authority to modify tariff requirements did not allow it to waive requirements for certain carriers); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (authority to regulate drugs and devices did not extend to tobacco industry); *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457 (2001) (FAA’s authority to prescribe ambient air quality standards did not extend to costs in regulating air pollutants); *Gonzales* (continued)

This has given rise to a great deal of uncertainty as to when the doctrine will be applied and how much limitation it can legitimately impose on an agency's action.<sup>9</sup>

It appears that the first Supreme Court case to recognize “a distinct doctrinal category of major questions” was *FDA v. Brown & Williamson*,<sup>10</sup> a 2000 case that struck down the FDA attempt to regulate the sale of tobacco and nicotine products to minors. In that case, Justice Sandra Day O'Connor, writing for the majority, stated:

Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority “in a manner that is inconsistent with the administrative structure that Congress enacted into law.” And although agencies are generally entitled to deference

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v. Oregon, 546 U.S. 243 (2006) (attorney general authority over controlled substances did not extend to assisted suicide drugs); *URG* (regulation of greenhouse gases for motor vehicles did not trigger requiring permits for stationary sources); *King v. Burwell*, 576 U.S. 473 (2015) (IRS could extend tax credits of the Affordable Care Act to state exchanges); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam) (CDC could not impose nationwide ban on evictions to prevent spread of COVID-19); *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022) (per curiam) (OSHA could not require COVID-19 vaccination and testing requirements on large portion of the nation's workforce); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (EPA cannot impose environmental and admissions caps on generation shifting electricity transmissions, distributions, and storage); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (rejecting EPA's argument that the Clean Air Act did not require regulation of carbon emissions).

<sup>9</sup> While “[s]ome have characterized the major questions doctrine as a strong-form substantive canon designed to enforce Article I's Vesting Clause,” Justice Barrett, in her concurrence in *Biden v. Nebraska*, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring) states, “I do not see the major questions doctrine that way. Rather, I understand it to emphasize the importance of *context* when a court interprets a delegation to an administrative agency.” *Id.* at 2776. She continues: “The doctrine serves as an interpretative 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.’” *Id.* at 2378 (quoting *Brown & Williamson*, 529 U.S. at 133). “Context also includes common sense, which is another thing that ‘goes without saying.’” *Id.* at 2379.

<sup>10</sup> 529 U.S. 120 (2000). *See also* Reed, *supra* note 1 (“[T]he idea of a distinct doctrinal category of major questions probably started, certainly at the level of the Supreme Court, with [*Brown & Williamson*] . . .”).

in the interpretation of statutes that they administer, a reviewing “court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” In this case, we believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products. Such authority is inconsistent with the intent that Congress has expressed in the [Federal Food, Drug and Cosmetic Act’s] overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA. In light of this clear intent, the FDA’s assertion of jurisdiction is impermissible.<sup>11</sup>

Justice O’Connor continued to say: “[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>12</sup> This statement seems to forerun the Court coming to a “distinct doctrinal category of major questions,” although the Court has never exactly identified what defines an agency’s action as “major.”<sup>13</sup> An interesting citation in the case is the Court’s reference to its earlier *Chevron* case for the point that “a reviewing ‘court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’”<sup>14</sup> However, in *Chevron*, the Court found Congress had never clarified what it meant when it required permits for “stationary sources” of air pollution.<sup>15</sup> Did it mean a permit was required for the creation of a whole new industrial plant or even for just a modification to a single piece of equipment within a plant? In the end, the Court unanimously upheld the EPA’s interpretation that a permit was not required for modifying a piece of equipment.<sup>16</sup>

In *Chevron*, the Court held that the EPA’s interpretation of the Clean Air Act allowing states to install or modify a single piece of equipment

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<sup>11</sup> *Brown & Williamson*, 529 U.S. at 125–26 (citations omitted) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988), then *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

<sup>12</sup> *Id.* at 160.

<sup>13</sup> *Reed*, *supra* note 1.

<sup>14</sup> *Brown & Williamson*, 529 U.S. at 125–26 (quoting *Chevron*, 467 U.S. at 842–43).

<sup>15</sup> *Chevron*, 467 U.S. at 842.

<sup>16</sup> *Id.* at 845. Justices Marshall and Rehnquist took no part in the consideration or decision, while Justice O’Connor took part in the decision itself. *Id.* at 837.

without a permit was reasonable, provided the alteration would not increase the overall pollutant emissions of the plant.<sup>17</sup> The Court noted:

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”<sup>18</sup>

Following *Chevron*, “a court will typically engage in a two-step analysis to determine if it must defer to an agency’s statutory interpretation.”<sup>19</sup> Next, “[a]t step one, the court asks whether the statute directly addresses the precise issue before the court.”<sup>20</sup> Then, “[i]f the statute is ambiguous or silent in that respect, the court must proceed to step two, which instructs the court generally to defer to the agency’s reasonable interpretation.”<sup>21</sup> A difficulty of interpretation arises when the Court decides “an agency’s interpretation of an ambiguous statute concerns an issue of vast economic and political significance.”<sup>22</sup> In that instance, the Court may very well make use of the major questions doctrine to bar the agency from continuing the regulation in question. Regarding what exactly constitutes a matter of “vast economic and political significance,” the Court has availed itself a great deal of freedom not only to offset actions by the agency, but also to undermine past legislative intent of the Congress to write a statute capable of responding to unforeseeable changing circumstances.<sup>23</sup> Might this be an intrusion by the Court on the very separation of powers it is supposed to ensure?

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<sup>17</sup> *Id.* at 840, 866.

<sup>18</sup> *Id.* at 866 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)).

<sup>19</sup> CONG. RSCH. SERV., *supra* note 7.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

Let's consider *West Virginia v. EPA*.<sup>24</sup> This, like *Chevron*, was a case brought under the Clean Air Act, “authoriz[ing] the Environmental Protection Agency to regulate power plants by setting a ‘standard of performance’ for their emission of certain pollutants into the air.”<sup>25</sup> Following a change of administrations, various states and some private actors challenged an EPA decision on the ground that it did not have authority under the statute to regulate greenhouse gas emissions of power plants.<sup>26</sup> That EPA view would change again with the next change of administrations, when the EPA now claimed it had authority to regulate greenhouse issues of electricity transmission, distribution, and storage, even though they were not within its traditional expertise, because Congress meant to confer this authority.<sup>27</sup> Here, the EPA explained its change in policy as necessary to “control[] CO<sub>2</sub> from affected [plants] at levels . . . necessary to mitigate the dangers presented by climate change,” because it could no longer base its emissions limits on “measures that [merely] improve efficiency at the power plants.”<sup>28</sup> The Court, however, disagreed.<sup>29</sup>

Relying on the Court’s earlier major questions cases, Chief Justice Roberts, writing for a six-member majority, noted all its prior regulatory cases that had been rejected by the Court had, at least, “a colorable textual basis” from which to start:<sup>30</sup>

[I]n each case, given the various circumstances, “common sense as to the manner in which Congress [would have been] likely to delegate” such power to the agency at issue, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through “modest words,” “vague terms,” or “subtle device[s].” Nor does Congress typically use oblique or elliptical language to empower an agency to

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<sup>24</sup> 142 S. Ct. 2587 (2022).

<sup>25</sup> *Id.* (quoting 42 U.S.C. § 7411(a)(1)).

<sup>26</sup> *Id.* at 2605.

<sup>27</sup> *Id.* at 2612–13.

<sup>28</sup> *Id.* at 2611 (first quotation’s alterations in original) (quoting Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,728 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60)).

<sup>29</sup> *Id.* at 2606.

<sup>30</sup> *Id.* at 2609.

make a “radical or fundamental change” to a statutory scheme. Agencies have only those powers given to them by Congress, and “enabling legislation” is generally not an “open book to which the agency [may] add pages and change the plot line.”

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As for the major questions doctrine “label[ ],” it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.<sup>31</sup>

Here, the Court expressed the concern that, in the absence of any textual authority present, it should “find it ‘highly unlikely that Congress would leave’ to ‘agency discretion’ the decision of how much coal-based generation there should be over the coming decades.”<sup>32</sup> The Court would go on to state: “we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions ‘had become well known, Congress considered and rejected’ multiple times.”<sup>33</sup> While the EPA’s earlier position changes might be explainable by changes in administrations, it is certainly disquieting that the most the Court could offer against the EPA’s position was to discount what may have been a reasonable conclusion about the Clean Air Act merely because of the failure of Congress to alter the Act.<sup>34</sup>

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<sup>31</sup> *Id.* at 2609 (alterations in original) (citations omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), then *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001), then *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994), then Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1011 (1999)).

<sup>32</sup> *Id.* at 2613 (quoting *MCI*, 512 U.S. at 231) (citing *Brown & Williamson*, 529 U.S. at 160).

<sup>33</sup> *Id.* at 2614 (quoting *Brown & Williamson*, 529 U.S. at 144) (citing *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2486–87 (2021) and *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941)).

<sup>34</sup> *See id.*



Perhaps a better conclusion for the Court to have drawn is that Congress, when it passed the Clean Air Act, charged the EPA with responding to “potentially catastrophic harms” that may arise from fossil-fuel-fired power plants.<sup>35</sup> At the time of this decision, electricity-producing plants were responsible for 25% of the Nation’s greenhouse gases.<sup>36</sup> Yet, as pointed out in dissent:

The limits the majority now puts on EPA’s authority fly in the face of the statute Congress wrote. The majority says it is simply “not plausible” that Congress enabled EPA to regulate power plants’ emissions through generation shifting. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the “best system of emission reduction” for power plants. The “best system” full stop—no ifs, ands, or buts of any kind relevant here. The parties do not dispute that generation shifting is indeed the “best system”—the most effective and efficient way to reduce power plants’ carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system; to the contrary, the Plan’s regulatory approach fits hand-in-glove with the rest of the statute. The majority’s decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111’s general terms. But that is wrong. A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn’t and can’t know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise. That is what Congress did in enacting Section 111. The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases.<sup>37</sup>

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<sup>35</sup> *Id.* at 2627 (Kagan, J., dissenting).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 2628 (quoting 42 U.S.C. § 7411(a)(1)).

There is something concerning to be felt when an agency specifically authorized to respond to problems Congress had recognized, even if only obliquely, cannot now respond to a serious threat because the Court has chosen to require a new piece of legislation even though the purpose behind the original authorizing act is clearly present.<sup>38</sup> Is this really a reading of the law as Congress wrote it or an attempt to undo the broader effects of a previous statute the Court no longer agrees with? Whichever is the right answer, should the effects of climate change, which are no longer seriously in any scientific doubt, be so easily brushed aside?<sup>39</sup> At the very least, shouldn't some attention be afforded when there is a serious potentiality for catastrophic harms?<sup>40</sup> The Court has a legitimate concern to protect the constitutional separation of powers existing between the legislative and executive branches, which are easily subject to short-term political disruptions.<sup>41</sup> But at what cost? Is it worth opening the door to a major environmental catastrophe just to ensure the political branches are on the same page?

Recently, the Supreme Court decided *Biden v. Nebraska*,<sup>42</sup> a case in which six states including the state of Missouri, on behalf of its non-profit governmental corporation, MOHELA, challenged the Secretary of Education's authority to cancel \$10,000 per borrower in federally secured student loan debts (\$20,000 for previous Pell Grant recipients) under the Higher Education Relief Opportunities for Students Act (HEROES Act), a law adopted following the September 11, 2001 attacks on the United States.<sup>43</sup> The cancellation was part of the Biden Administration's effort to respond to the COVID-19 pandemic.<sup>44</sup> The amount of cancellation was estimated by the Congressional Budget Office to be "about \$430 billion in

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<sup>38</sup> *Id.* at 2643.

<sup>39</sup> *Id.* at 2626 (quoting INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SIXTH ASSESSMENT REPORT, THE PHYSICAL SCIENCE BASIS: HEADLINE STATEMENTS 1 (2021)).

<sup>40</sup> *Id.* at 2626–27 (discussing the potential catastrophic impact that climate change could have on future generations).

<sup>41</sup> *Separation of Powers*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/separation\\_of\\_powers\\_0](https://www.law.cornell.edu/wex/separation_of_powers_0) [<https://perma.cc/WY5R-FBB2>].

<sup>42</sup> 143 S. Ct. 2355 (2023).

<sup>43</sup> *Id.* at 2364–65 Of the six states bringing the case, the Eighth Circuit determined only Missouri likely could establish Article III standing given the likely effect of the Secretary's proposal on its Higher Education Loan Authority (MOHELA) to be discussed more fully below. *Id.* at 2365.

<sup>44</sup> *Id.* at 2364 (citing Proclamation No. 9994, 85 Fed. Reg. 15,337–38 (Mar. 18, 2020)).

debt principal.”<sup>45</sup> The Act provided that the Secretary “may waive or modify any statutory or regulatory provision applicable to the student financial program under title IV of the [Higher Education Act of 1965] as the Secretary deems necessary in connection with a war or other military operation or national emergency.”<sup>46</sup> The Act also provided that “[t]he Secretary may issue waivers or modifications only ‘as may be necessary to ensure’ that ‘recipients of student financial assistance under title VI of the [Education Act] who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of [the national emergency].”<sup>47</sup> The Secretary sought to cancel these debts “[f]or borrowers with an adjusted gross income below \$125,000 in either 2020 or 2021 who have eligible federal loans.”<sup>48</sup>

Missouri claimed it had “created MOHELA as a nonprofit government corporation to participate in the student loan market.”<sup>49</sup> “Under the Secretary’s plan,” it posited, “MOHELA could no longer service those closed accounts, costing it, by Missouri’s estimate, \$44 million a year in fees that it otherwise would have earned under its contract with the Department of Education.”<sup>50</sup> As a result, Missouri claimed to satisfy the Article III standing requirement established by the Court before hearing a case on the merits.<sup>51</sup> Based on Missouri’s argument the Court agreed holding: “The Secretary’s plan harms MOHELA in the performance of its public function and so directly harms the State that created and controls MOHELA.”<sup>52</sup>

Before going forward to discuss the merits of Missouri’s claim, it is worth noting the dissent’s view of the Court’s decision regarding whether

<sup>45</sup> *Id.* at 2365.

<sup>46</sup> *Id.* at 2363 (quoting 20 U.S.C. § 1098bb(a)(1)).

<sup>47</sup> *Id.* (first alteration in original) (quoting 20 U.S.C. § 1098bb(a)(2)(A)).

<sup>48</sup> *Id.* at 2364.

<sup>49</sup> *Id.* at 2365 (citing MO. REV. STAT. § 173.360 (2016)).

<sup>50</sup> *Id.* at 2366.

<sup>51</sup> In order to satisfy Article III standing, “a plaintiff needs a ‘personal stake’ in the case. That is, the plaintiff must have suffered an injury in fact—a concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit.” *Id.* at 2365 (citations omitted) (quoting *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021)) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). See *Allen v. Wright*, 468 U.S. 737, 751 (1984).

<sup>52</sup> *Id.* at 2368.

Missouri had satisfied the Court's requirements for Article III standing.<sup>53</sup> The issue is relevant because absent Article III standing, there would have been no case.<sup>54</sup> More importantly, however, was the question of whether Missouri's interests were enough to hold back the Secretary of Education from being able to respond on behalf of those financially imperiled by the COVID-19 pandemic. I am asking whether a state's financial interest alone should be enough to offset a nationwide response to a national emergency that was not caused by any misguided actions of the federal government or the individual borrowers?

Justice Kagan noted that under Missouri law, MOHELA could have brought this suit on its own but chose not to.<sup>55</sup> Indeed, Missouri's attorney general had to file a formal demand under the State's "sunshine laws" for documents related to MOHELA's loan servicing contact, because MOHELA was not willing to cooperate with the AG's efforts.<sup>56</sup> True, MOHELA is a creature of state statute designed to create "a public instrumentality established to serve a state function."<sup>57</sup> But the law afforded it, like it does most public and private corporations, the power to contract, and in MOHELA's case to enter into loan servicing agreements, and collect fees.<sup>58</sup> Perhaps more importantly, any debts incurred by MOHELA are MOHELA's alone; Missouri is not legally responsible for them, suggesting that Missouri is not harmed by any failure to collect fees by MOHELA.<sup>59</sup> Indeed, MOHELA is a "near carbon-copy" of MOHEFA, another Missouri public corporation, that could issue "bonds to various health and educational institutions in the State."<sup>60</sup> In that instance, the Missouri Supreme Court was very dismissive of "a claim that MOHEFA's undertakings should be ascribed to the State."<sup>61</sup> I point this out because it bears on the question why, in light of its usual Article III standing rules which the majority here cited approvingly, is the U.S. Supreme Court even hearing this case? Could it be that allowing the case would trigger a

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<sup>53</sup> *Id.* at 2385 (Kagan, J., dissenting).

<sup>54</sup> *See id.*

<sup>55</sup> *Id.* at 2387 (citing MO. REV. STAT. § 173.385.1(3) (2016)).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (citing MO. REV. STAT. § 173.360 (2016)).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2388 (citing *Menorah Med. Ctr. v. Health & Educ. Facilities Auth.*, 584 S.W.2d 73, 78 (Mo. 1979)).

decision on the merits the Court wanted to engage regarding the scope of its major questions doctrine, and if so, would this be an appropriate way for the Court to have proceeded?

Moving to the merits, the majority explained that the HEROES Act “allows the Secretary to ‘waive or modify’ existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not to rewrite the statute from the ground up.”<sup>62</sup> The term “modify,” the majority stated, “carries ‘a connotation of increment or limitation,’ and must be read to mean ‘to change moderately or in minor fashion.’”<sup>63</sup> With regard to “waive,” “the Secretary does not identify any provision he is actually waiving” and “the Government concedes ‘waiver’—as used in the HEROES Act—cannot refer to ‘waiv[ing] loan balances’ or ‘waiving the obligation to repay’ on the part of the borrower.”<sup>64</sup> Also, the Court refused to accept the Secretary’s claim that he has the right to waive “elements of the discharge and cancellation provisions that are inapplicable to this [debt cancellation] program that would limit eligibility to other contexts.”<sup>65</sup> The majority then noted that “[t]he Secretary has never previously claimed powers of this magnitude under the HEROES Act[.]” and “[n]o regulation premised on’ the HEROES Act ‘has ever begun to approach the size or scope’ of the Secretary’s program.”<sup>66</sup> It also explained that “[t]he “economic and political significance” of the Secretary’s action is staggering by any measure.”<sup>67</sup> From this the Court concluded: “Congress did not unanimously pass the HEROES Act with such power in mind. ‘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.’”<sup>68</sup>

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<sup>62</sup> *Id.* at 2368.

<sup>63</sup> *Id.* (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225 (1994)) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1952 (2002)) (“defining ‘modify’ as ‘to make more temperate and less extreme,’ ‘to limit or restrict the meaning of,’ or ‘to make minor changes in the form or structure of [or] alter without transforming’”).

<sup>64</sup> *Id.* at 2370 (alteration in original).

<sup>65</sup> *Id.* (alteration in original).

<sup>66</sup> *Id.* at 2372 (quoting *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021)).

<sup>67</sup> *Id.* at 2373 (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022)).

<sup>68</sup> *Id.* at 2374 (quoting *West Virginia*, 142 S. Ct. at 2616).

The dissent argued that the HEROES statute gave to the Secretary of Education “broad authority to respond to national emergencies.”<sup>69</sup> “And the Secretary can do only what he determines to be ‘necessary’ to ensure that [affected eligible individuals] ‘are not placed in a worse position financially in relation to’ their loans ‘because of’ the emergency.”<sup>70</sup> “[T]he statutory powers of waiver and modification give the Secretary the means to offer the needed assistance.”<sup>71</sup> The dissent also challenged the majority’s reading of the statute that focused on the dictionary meanings of individual words taken in isolation.<sup>72</sup> The dissent claimed the words needed to be read as a whole.<sup>73</sup> According to the dissent, “[t]he phrase ‘waive or modify’ instead says to the Secretary: ‘Feel free to get rid of a requirement or, short of that, to alter it to the extent you think appropriate.’ Otherwise said, the phrase extends from minor changes all the way up to major ones.”<sup>74</sup> “[T]he statute proceeds on the premise that the usual waiver or modification will, contra the majority, involve adding ‘new substantive’ provisions.”<sup>75</sup> In this context, the majority’s “new major-questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation.”<sup>76</sup> The dissent noted that agencies often “have expertise Congress lacks” and that this statute suggests, especially in cases of a national emergency, “[b]ecause times and circumstances change, . . . agencies are better able to keep up and respond.”<sup>77</sup> As for the Court’s so-called separation of powers concerns, “policy judgments, under [our system], are supposed to come from Congress and the President. But they don’t when the Court refuses to respect the full scope of the delegations that Congress makes to the Executive Branch.”<sup>78</sup>

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<sup>69</sup> *Id.* at 2391 (Kagan, J., dissenting).

<sup>70</sup> *Id.* at 2392 (quoting 20 U.S.C. § 1098bb(a)(2)).

<sup>71</sup> *Id.* at 2393.

<sup>72</sup> *Id.* at 2394.

<sup>73</sup> *Id.* (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 167–69 (2012)).

<sup>74</sup> *Id.* at 2395.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 2397.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

### III. SEPARATION OF POWERS AND OTHER RELEVANT CONSTITUTIONAL NORMS

One justification for the major questions doctrine resides, at least in part, in constitutional separation of powers.<sup>79</sup> Separation of powers refers to “the separation of executive, legislative, and judicial powers, a fundamental characteristic of the United States Government and the state governments as well.”<sup>80</sup> The idea took hold from the 18th century writings of Montesquieu, based on his investigation of those characteristics of a government that are necessary to maintain liberty.<sup>81</sup> It became a central theme of the United States Constitution, ratified in 1788, which provides separate and distinct roles and authority for the Congress (Article I), the President (Article II), and the Judiciary (Article III). James Madison, in *Federalist No. 47*, speaks to “The Particular Structure of the New [United States] Government and the Distribution of Power Among Its Different Parts.”<sup>82</sup> The idea expressed by Montesquieu and found in our Constitution and Madison’s writings, is the need to prevent a consolidation power either in a single person or group, including a majority of citizens.<sup>83</sup> In this context, one sees the major questions doctrine as a means to prevent the Executive from overstepping its proper authority by crossing over into the authority of the legislature.<sup>84</sup>

A second and closely related constitutional source for the major questions doctrine is checks and balances.<sup>85</sup> This is the idea that each branch of the federal government has an avenue to change the acts of the other branches: The President can veto legislation and nominates heads of the federal departments and agencies, and federal judges;<sup>86</sup> Congress confirms or rejects presidential nominees, determines the amount of the

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<sup>79</sup> *Id.* at 2609.

<sup>80</sup> *Separation of powers*, BALLENTINE’S LAW DICTIONARY 1162 (3d ed. 1969).

<sup>81</sup> BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS*, bk. XI, 151–52 (Thomas Nugent trans., Hafner Publishing Co., 1949) (1748).

<sup>82</sup> THE FEDERALIST NO. 47 (James Madison) (beginning discussion on federalism that continued in THE FEDERALIST NOS. 48, 49, 50, & 51).

<sup>83</sup> Compare MONTESQUIEU, *supra* note 81, with THE FEDERALIST NO. 47, *supra* note 82.

<sup>84</sup> See THE FEDERALIST NO. 47, *supra* note 82.

<sup>85</sup> See THE FEDERALIST NO. 48, *supra* note 82; *Checks and Balances*, U.S. GOV’T PUBL’G OFF., <https://bensguide.gpo.gov/j-check-balance> [<https://perma.cc/LC4U-SKHV>].

<sup>86</sup> U.S. CONST. art. I, § 7, cl. 2; *id.* art. II, § 2, cl. 2.

federal purse, and can impeach the President and federal judges,<sup>87</sup> and the Supreme Court can hold legislation and executive decrees unconstitutional.<sup>88</sup> Administrative agencies, including executive departments operating under federal law because they may combine aspects of legislative, executive, and judicial functions, may appear to operate outside the usual checks and balances the Constitution imposes on the branches.<sup>89</sup> To avoid undermining the separation of powers, it is important that agency actions should be overseen by Congress insofar as it is Congress that affords them authority to act.<sup>90</sup> One way to ensure this oversight is not bypassed on matters thought most pressing on the nation's economy and its politics is application of the major questions doctrine.<sup>91</sup>

Two additional constitutional concerns are also worth noting here. The first regards factions. In *Federalist No. 10*, James Madison wrote: "By a faction, I understand a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregated interests of the community."<sup>92</sup> Madison went on to argue "that the *causes* of faction cannot *be* removed and that the relief is only to be sought in the means of controlling its *effects*."<sup>93</sup> While Madison would later come to see the desirability of political parties operating in a representative democracy, especially one as diverse as the United States, he remained acutely aware from the beginning that if left unchecked such parties could undermine the basic liberties of minorities.<sup>94</sup> That fear would eventually ease as governmental leaders came to realize they could protect minority rights via such guarantees as might be expressed in a Bill of Rights or later in the 14th Amendment.<sup>95</sup>

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<sup>87</sup> U.S. CONST. art. I, § 2, cl. 5; *id.* § 3, cl. 6; *id.* § 7, cl. 1; *id.* art. II, § 2, cls. 2, 4.

<sup>88</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>89</sup> See Elizabeth Slattery, *Who Will Regulate the Regulators? Administrative Agencies, the Separation of Powers, and Chevron Deference*, HERITAGE FOUND. (May 7, 2015), <https://www.heritage.org/courts/report/who-will-regulate-the-regulators-administrative-agencies-the-separation-powers-and> [<https://perma.cc/FY63-7GZE>].

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>93</sup> *Id.* (emphasis added).

<sup>94</sup> *Factions and Parties*, BRITANNICA, <https://www.britannica.com/topic/democracy/Factions-and-parties> [<https://perma.cc/9A4G-TZQY>].

<sup>95</sup> *Id.*



Finally, I note an important comment by Alexander Hamilton in *Federalist No. 34*, in which Hamilton discussed the need for the government to have a power of taxation.<sup>96</sup> Hamilton wrote: “Nothing, therefore, can be more fallacious than to infer the extent of any power, proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies . . . as these are illimitable in their nature . . . .”<sup>97</sup> Hamilton was primarily concerned with the treasury of the new government.<sup>98</sup> But the same can be said for many of the operations currently served by the various federal agencies.<sup>99</sup> That with changing conditions, they need a capacity for action often beyond what might have been expected at the time their authorizing statutes were adopted.<sup>100</sup> The limitation being that the capacity to act would have to fit within the broad construction of Congress’s authorizing statute for the agency involved.<sup>101</sup>

Here we need to ask whether the Court-made major questions doctrine, as applied in the 21st century, is really the best way to protect and maintain both the separation of powers and checks and balances.<sup>102</sup> Two options present themselves. Option one is to lay down a holding, which appears on its face to be the Court’s interpretation of the major questions doctrine in *West Virginia v. EPA* and *Biden v. Nebraska*, that whenever an agency attempts to regulate a practice or industry by a process with “economic and political significance,” and the Congress has not spoken clearly to allow

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<sup>96</sup> THE FEDERALIST NO. 34 (Alexander Hamilton).

<sup>97</sup> *Id.*

<sup>98</sup> *Prior Secretaries: Alexander Hamilton (1789-1795)*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/about/history/prior-secretaries/alexander-hamilton-1789-1795> [<https://perma.cc/H3D9-WCNP>].

<sup>99</sup> See generally THE FEDERALIST NO. 34, *supra* note 96.

<sup>100</sup> See Jared Williamson, *The Problems with the Major Questions Doctrine*, PACE UNIV. (Nov. 15, 2023), <https://pelr.blogs.pace.edu/2023/11/15/the-problems-with-the-major-questions-doctrine/> [<https://perma.cc/9SFK-BZ29>].

<sup>101</sup> See KATE R. BOWERS & DANIEL J. SHEFFNER, AGENCY RESCISSIONS OF LEGISLATIVE RULES, REPORT NO. R46673, CONG. RSCH. SERV. (2021), available at <https://crsreports.congress.gov/product/pdf/R/R46673> [<https://perma.cc/XFY5-QCHN>].

<sup>102</sup> See Ian Millhiser, *How the Supreme Court Put Itself in Charge of the Executive Branch*, VOX (July 17, 2023, 6:30 AM), <https://www.vox.com/scotus/23791610/supreme-court-major-questions-doctrine-nebraska-biden-student-loans-gorsuch-barrett> [<https://perma.cc/2PPN-F7Q5>]; see Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1051 (2023).

such action, the determination or regulation will be void.<sup>103</sup> Such a choice would fit the Court's apparent separation of powers concern and its concern with checks and balances.<sup>104</sup> This option, however, may place a heavy cost on the ability of government to act if it prevents the government from being able to adequately respond to any potential military, economic, or natural disaster because the measure to be taken would first have to clear the two houses of Congress and then, in the usual situation, be signed by the President.<sup>105</sup> A second, and I believe far better option, would be to allow the agency, whose expertise it is, to make the determination of whether their proposed resolution to the problem fits within the general contours of the authorizing statute.<sup>106</sup> This option also fits within both separation of powers and checks and balances analyses because Congress could always write a new provision into the law abrogating any agency action it disagrees with.<sup>107</sup> But it is better than the first option because, like with Hamilton's concern about the government's money freezing based on past expectations, this approach allows the agency which is closest to the problem to exercise its expertise<sup>108</sup> in deciding how best to respond to an emergency, even if only tentatively.<sup>109</sup>

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<sup>103</sup> *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022); *id.* (Gorsuch, J., concurring); *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023).

<sup>104</sup> Millhisser, *supra* note 102; Deacon & Litman, *supra* note 102, at 1051.

<sup>105</sup> See U.S. CONST. art. I, § 7, cl. 2.

<sup>106</sup> I think this option is better because it considers both the statute Congress used to create the agency and relevant subsequent statutes.

<sup>107</sup> BOWERS & SHEFFNER, *supra* note 101, at 23.

Congress has a number of options for altering the manner by which agencies or a particular agency may rescind or amend rules, or for rescinding or amending particular rules itself. For example, Congress can overturn or alter a particular rule through exercise of its legislative power. Administrative agencies are creatures of statute and exercise only such authority as has been delegated to them by Congress. Thus, an agency may not issue a legislative rule unless it does so pursuant to a relevant statutory grant of authority. And just as Congress may, by statute, authorize or require an agency to issue rules, it also may rescind or alter an agency's rules through the normal legislative process.

*Id.*

<sup>108</sup> ESKRIDGE JR., *supra* note 5, at 265. Professor Eskridge points out that “[e]ffective governance is the biggest comparative advantage that agencies have in policymaking. The primary governance advantage of agency interpretations comes when administrators are  
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Also, one cannot fail to notice that instead of searching for compromises in which issues are honestly debated, many times debates (on both sides of the political fence) appear to sound more like threats of “my way or the highway.”<sup>110</sup> Such conflicts appear as a modern-day version of the kind of factionalism Madison warned about.<sup>111</sup> Still, to be open to the idea of reasonable compromise, a third possible option, essentially the second one but with some short-term limitations to ensure no one’s liberty is being undercut.<sup>112</sup> The limitations I draw upon here will be part of a forthcoming article in the *Columbia Journal of Transactional Law* by Oren

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applying their ‘expertise,’ which is what the agency officials believe themselves to be doing when they draft rules and guidances.” *Id.*

<sup>109</sup> Professor Eskridge notes that “[i]f the agency wants to take advantage of the rulemaking power, . . . the Administrative Procedural Act requires the agency to give public notice of its proposed rules . . . to afford interested citizens and institutions a chance to submit comments, and to reconsider its proposed rules in light of the comments.” *Id.* (citing 5 U.S.C. § 553). “Additionally, final rules are subject to judicial review, which will reject agency rules that don’t have good answers to important objections raised by commentators.” *Id.* (citing *Motor Vehicle Mfrs. Ass’n, v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983)).

<sup>110</sup> See, e.g., Sam Graves & Rodney Davis, *Bipartisanship on Infrastructure is Possible Unless It’s ‘My Way or the Highway’*, COMM. ON TRANSP. & INFRASTRUCTURE (Apr. 13, 2021), <https://transportation.house.gov/news/documentsingle.aspx?DocumentID=405321> [<https://perma.cc/UF9S-AYEX>].

On November 5, 2021, Congress adopted and sent to President Biden, which he then signed, the Bipartisan Infrastructure Law. At least in this situation, cooler heads prevailed, and a compromise bill was adopted and sent to the president for signature to benefit infrastructure and other needs of the country. Of the additions proposed to the bill, a compromise was reached between Democrats, Republicans and Independents to include money for emergency relief programs, capital improvements for rapid rail service, commuter rail, light rail, streetcars, bus and rapid transit programs, and passenger ferries, along with provisions for better access and mobility for older adults. See Peter DeFazio, *Thanks to President Biden, Infrastructure Is Bipartisan Again – It Needs to Stay that Way*, THE HILL (Nov. 23, 2021, 3:00 PM), <https://thehill.com/blogs/congress-blog/politics/582858-thanks-to-president-biden-infrastructure-is-bipartisan-again-it/?rnd=1637697431> [<https://perma.cc/8WN4-499L>].

<sup>111</sup> THE FEDERALIST NO. 10, *supra* note 92.

<sup>112</sup> The author would treat such a third option as satisfactory in the spirit of reasonable compromise.

Tamir, a post-doctoral fellow at Harvard Law School.<sup>113</sup> Tamir argues the Court’s major questions doctrine “was only a consideration that courts might take when they decide whether to defer to agencies’ construction of the statutes, most prominently under *Chevron*, [as] it arguably fits with the larger structure of admin[istrative] law, though it is hotly disputed as a matter of policy or as a sound principle of statutory construction.”<sup>114</sup> Tamir suggests that, in its place, we first create softer remedies.<sup>115</sup> “The doctrine shouldn’t be used as a kind of freeze on agency action—a ‘full stop, no matter what.’”<sup>116</sup> If a court finds the agency action to raise a “major” issue, he recommends “‘suspend[ing]’ the declaration of invalidity—that is, to allow the agency to work through what it’s doing until X amount of time passes (say, two years), hoping that after that time Congress—despite the difficulties it faces—will step in.”<sup>117</sup> Tamir’s other recommendation is not to suspend invalidity and to again allow for a short-term freeze, “[b]ut if after some time Congress doesn’t eventually act (let’s say, again, after two years), an agency would be able to go back to the Court and ask it to *unfreeze* the action.”<sup>118</sup> While I worry that for some types of emergencies, even a short-term two year freeze may be too long, as with the COVID-19 pandemic and climate change.<sup>119</sup> Still, I like Tamir’s proposal as a middle-of-the-road approach that acknowledges the need for congressional oversight while respecting both the expertise and important work of agencies and assuring that needed governmental action won’t be ideologically bogged down indefinitely in politics.<sup>120</sup> However, I would add one thing more to his approach: a clearer way to evaluate congressional statutes going forward besides just looking to the meanings of words presented in the relevant statutes of the moment.<sup>121</sup>

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<sup>113</sup> Oren Tamir, *Getting Right What’s Wrong with the Major Questions Doctrine*, 62 COLUM. J. TRANSNAT’L L. (forthcoming 2024); see also Reed, *supra* note 1.

<sup>114</sup> Reed, *supra* note 1.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

IV. HOW A MODERN VIEW OF THE SEPARATION OF POWERS PROVIDES  
A JUSTIFICATION FOR A PROPERLY UNDERSTOOD MAJOR QUESTIONS  
DOCTRINE

It is important to identify what role the regulatory state is meant to serve as well as how the regulatory state came into existence. It is generally understood that the role of the various agencies and all of the executive cabinet departments “is to protect the public’s health, safety, property and overall interests.”<sup>122</sup> However, since the beginning of the 21st century, the various agencies have shifted in their roles regarding the economy and society “from positive intervention to arm’s-length regulation and arbitration, particularly in advanced industrial economies” like the United States.<sup>123</sup> At first, during the time of Franklin D. Roosevelt’s New Deal, Washington had squeamishness about delegating lawmaking power to agencies.<sup>124</sup> However, by the 1970s, that squeamishness resolved from an ideological one to an “institutional phenomena” of how to make it work.<sup>125</sup>

Part of the early debate concerned the Congress’s Constitutional authority to set up the regulatory state.<sup>126</sup> “The Constitution was designed to make lawmaking cumbersome, representative, and consensual; the regulatory agency was a workaround, designed to make lawmaking efficient, specialized, and purposeful.”<sup>127</sup> The purpose of the regulatory state was to create a hierarchy of decisionmakers “with much greater dispatch than a [Congressional] committee.”<sup>128</sup> Both the House of Representatives and the Senate have a number of standing committees.<sup>129</sup>

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<sup>122</sup> *Regulatory Agency: What They Are + How They Ensure Compliance*, UNIT21, <https://www.unit21.ai/fraud-aml-dictionary/regulatory-agencies> [https://perma.cc/3KQL-Z9WJ].

<sup>123</sup> David Bach & Abraham Newman, *regulatory state*, BRITANNICA MONEY, <https://www.britannica.com/topic/regulatory-state> [https://perma.cc/6RXC-A3H5].

<sup>124</sup> Christopher DeMuth, *The Regulatory State*, 59 NAT’L AFFS. 70, 72 (2012), available at <https://www.nationalaffairs.com/publications/detail/the-regulatory-state> [https://perma.cc/PJ6D-9P8N].

<sup>125</sup> *Id.* at 71–72.

<sup>126</sup> *Id.* at 72.

<sup>127</sup> *Id.* at 71.

<sup>128</sup> *Id.* at 72.

<sup>129</sup> *Committees of the U.S. Congress*, LIBR. OF CONG., <https://www.congress.gov/committees> [https://perma.cc/QC6W-697F].

The members of these committees often “represent the full spectrum of the nation’s diverse and often conflicting interests and values.”<sup>130</sup> By contrast, the “[r]egulatory agencies,” “with pre-ordained missions [such as] the promotion of clean air, safe products, fair financial practices, women’s sports, and on and on[,]” have “fewer internal conflicts.”<sup>131</sup>

Through “informal rulemaking”—based not on adjudicated facts, but rather on written public comments and internal research—these agencies issued rules covering entire industries or economic sectors. A rule might require that all new automobiles be equipped with air bags designed in a certain manner, or that all packaged foods bear ingredient and nutrition labels of a particular sort. A single rule could impose costs and dispense benefits of hundreds of millions of dollars.

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In the review process, disagreements between OMB and the agencies on the merits of proposed rules are resolved by senior White House staff or the [V]ice [P]resident and occasionally by the [P]resident himself. A cost-benefit analysis, however, is much more abstract and elastic than a spending budget. And the White House review programs are strictly a matter of internal executive-branch management: They have not countered the migration of lawmaking from Congress to the executive branch, but rather have enhanced the [P]resident’s control over that lawmaking.<sup>132</sup>

All this shows that the creation of the regulatory state is not such an albatross on the constitutional separation of powers and checks and balances as some of the Court’s language might seem to suggest.<sup>133</sup> Nor should it necessarily be thought of as a demise of individual freedom, unless freedom means, for example, use of the Senate filibuster to prevent rule making that might be good for the country but would give rise to greater workload or costs in the way certain industries like power plants or

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<sup>130</sup> DeMuth, *supra* note 124, at 72.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*, at 73–74.

<sup>133</sup> *Id.* at 87.

the financial services sector operate.<sup>134</sup> Much of the argument against the growth of the regulatory state may be more ideological, based on old-school libertarianism, than on any real or substantial economic or social harm to society.<sup>135</sup> Still, one should not too easily dismiss arguments that can be related to Montesquieu’s concern about how to ensure government will protect individual liberty.<sup>136</sup>

Here, we arrive at a question of judgment concerning how the Court should apply its major questions doctrine in future cases. For purposes of this article, I will refrain from drawing any final conclusion regarding the Court’s decisions in either *West Virginia v. EPA* or *Biden v. Nebraska*, other than noting, as I have already, that the dissents in both of these cases raised very serious concerns as to how the Court resolved each respective case. One conclusion I am willing to make, at least by the completion of this article, is that the Court’s current understanding of its major questions doctrine needs to be rethought to allow for greater agency and departmental deference, especially concerning matters arising from national emergencies.

In service of a better understanding, the Court should afford greater attention to what regulatory agencies consider, especially when engaged in rule making that lacks obvious clear support in the authorizing statute of the agency or any relevant subsequent statutes. Here the agency asks, or should be asking, whether the existing statutes provide at least background support for the kind of action now under consideration, even if the scope of Congress’s attention at the time the statutes were adopted did not include the kind of proposals currently being considered.<sup>137</sup> Treating words in an authorizing statute like “clean water” or “climate change” should open the door to investigations into, for example, the effects on climate change resulting from unregulated private electrical power plants that may not at the time when the statute was written even been thought relevant. In effect,

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<sup>134</sup> *E.g.*, *How Government Regulation Affects the Financial Services Sector?*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/030315/what-impact-does-government-regulation-have-financial-services-sector.asp> (Aug. 15 2022) [<https://perma.cc/4NZL-GQZA>]; *see also* Marc Davis, *Government Regulations: Do They Help Businesses?*, INVESTOPEDIA, <https://www.investopedia.com/articles/economics/11/government-regulations.asp> (Apr. 10 2024) [<https://perma.cc/M33E-AXFA>].

<sup>135</sup> *See generally* *How Government Regulation Affects the Financial Services Sector?*, *supra* note 134.

<sup>136</sup> MONTESQUIEU, *supra* note 81, at bk. XI, 152.

<sup>137</sup> *See West Virginia v. EPA*, 142 S. Ct. 2587, 2615–16 (2022).

what I am suggesting is that when the words of a statute are unclear or ambiguous, the statutory language should be treated as abstract rather than concrete to allow for all that it could reasonably seeking to accomplish.

To avoid concern of agency overreach, I further recommend determining the scope of the statutory authority in light of the general purposes that gave rise to the legislation. I say “general purposes” here because, absent more limiting provisions in the law, the ultimate purposes to be assigned to any legislative act are those set forth in the Preamble to the Constitution.<sup>138</sup> The founders made clear what they saw as the general and most essential purposes for the government they were creating: “[T]o form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . . .”<sup>139</sup> Granted, these purposes are fairly general as they set forth goals to be achieved by the legislative and the other branches generally, and so for the more narrow goal of deciding whether an agency’s rule or regulation is appropriate under an existing authorization or other relevant statute, the best way to envision the Preamble is as an interpretative device for maximizing what Congress was trying to do without restricting what it did do to only what the members, at the time they wrote the statute, may have thought necessary.<sup>140</sup> In effect, what I suggest is like what Professor Ronald Dworkin recommended and thought correct about Justice Scalia’s interpretation of federal statutes, namely, to focus on the words used (what Justice Scalia called “textualism”<sup>141</sup>) and not on the expectations of what the consequences would be of those who wrote the statute.<sup>142</sup> Where I and

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<sup>138</sup> Erwin Chemerinsky & Michael Stokes Paulsen, *The Preamble*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/preamble/interpretations/37> [<https://perma.cc/7PJ5-TTJP>].

<sup>139</sup> U.S. CONST. pmb1.

<sup>140</sup> Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT’L J. CONST. L., 714, 720 (2010).

<sup>141</sup> Ronald Dworkin, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 115–16 (1997).

<sup>142</sup> *Id.* at 118. Dworkin writes:

Scalia would not agree with my own opinions about [the difficulties encountered when “translating not the utterances of a real person but those of an institution like a legislature,”] [b]ut we do agree on the importance of the distinction . . . between the question of what a legislature intended to say in the laws it enacted, which judges applying

(continued)



Professor Dworkin differ from Justice Scalia is that we believe this same approach should be applied to the Constitution, so as not to restrict its application to only what may have been thought in 1788 when the original Constitution, including its Preamble, was ratified, or 1791 or 1868 when the Bill of Rights or Fourteenth Amendment were ratified respectively.<sup>143</sup>

I am aware there are those, including perhaps some on the Court today, who view the Preamble as merely aspirational.<sup>144</sup> But while the Preamble may not afford a set of specific rights and duties, it clearly provides a distinct set of “declared purposes for the Constitution[’s existence which] can assist in understanding, interpreting, and applying the specific powers listed in the [A]rticles, for the simple reason that the Constitution should be interpreted in a manner that is faithful to its purposes.”<sup>145</sup> The Preamble should not be read as just a hoped-for future state in which its purposes are realized.<sup>146</sup> It is much more than that.<sup>147</sup> The Preamble serves as a set of higher-ordered norms designed to assist the understanding of the more specific principles and rules which follow in the Articles.<sup>148</sup> And while this leaves open for the judicial branch to determine whether any particular actions of the political branches fall under appropriate constitutional norms, it also inputs an obligation on the political branches to adopt appropriate laws, or in the case of an agency, appropriate rules, and regulations, to ensure the basic values behind the Constitution are being met.<sup>149</sup>

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those laws must answer [“semantic intention”], and the question of what the various legislators . . . expected or hoped the consequences of those laws would be, which is a very different matter [“expectation intention”].

*Id.* at 117–18.

<sup>143</sup> See *id.* My own view on constitutional interpretation goes even further to take into account the relevance of human rights norms in constitutional interpretation. See generally Vincent J. Samar, *Rethinking Constitutional Interpretation to Affirm Human Rights and Dignity*, 47 HASTINGS CONST. L.Q. 83 (2019).

<sup>144</sup> *Overview of the Preamble*, LIBR. OF CONG., [https://constitution.congress.gov/browse/essay/pre-1/ALDE\\_00001231/](https://constitution.congress.gov/browse/essay/pre-1/ALDE_00001231/) [<https://perma.cc/4U8L-VRKC>].

<sup>145</sup> Chemerinsky & Paulsen, *supra* note 138.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Legal Effect of the Preamble*, LIBR. OF CONG., [https://constitution.congress.gov/browse/essay/pre-3/ALDE\\_00001235/](https://constitution.congress.gov/browse/essay/pre-3/ALDE_00001235/) [<https://perma.cc/4ELK-6KQC>].

<sup>149</sup> *Id.*

One of the concerns that has not received much attention in the literature goes to the kind of rights and duties the Preamble puts on the political branches. It probably goes without saying that the Preamble supports broad legislative authority to provide not only protections against government interference with basic rights as may be stated in the Bill of Rights and 14th Amendment (called negative liberty or “freedom from” interferences), but also authority to ensure the necessary conditions for ensuring liberty are also made available (positive liberty or “freedom to”).<sup>150</sup> It is, of course, a matter of much debate between libertarians and modern-day liberals or progressives as to how far the positive liberties extend under the Constitution, with the former seeing little role for such liberties,<sup>151</sup> and the latter asserting a great deal of responsibility on the part of government to make sure they are present.<sup>152</sup>

Philosopher Sir Isaiah Berlin points to these two important but different senses of liberty that have much history behind them.<sup>153</sup> The former or negative sense he describes as “the area within which the subject—a person or group of persons—is or should be left to do or be what he is able to do or be, without interference from other persons.”<sup>154</sup> The latter answers the question, “What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that.”<sup>155</sup> He then goes further, arguing this second, positive sense of liberty, as having apparently little connection to the first, is open to all sorts of manipulation taken of “what constitutes a self, a person, a man.”<sup>156</sup> By contrast, philosopher E. F. Carritt argues for a much more stable

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<sup>150</sup> Ian Carter, *Positive and Negative Liberty*, STAN. ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/entries/liberty-positive-negative/> (Nov. 19, 2021) [<https://perma.cc/8JWQ-Y3WY>].

<sup>151</sup> See Jan Narveson, *Liberty and Equality—A Question of Balance?*, in ETHICS: THE BIG QUESTIONS 271, 284 (James P. Sterba ed., 2d ed. 2009) (explaining that discussion of liberty is often contentious and tends to produce arguments at polar extremes).

<sup>152</sup> See JOHN RAWLS, A THEORY OF JUSTICE 204 (1971); Aaron Ross Powell, *What Are Negative and Positive Liberty? And Why Does It Matter?*, LIBERTARIANISM (Nov. 29, 2018), <https://www.libertarianism.org/blog/what-are-negative-positive-liberty-why-does-it-matter> [<https://perma.cc/CY9K-3YGR>].

<sup>153</sup> SIR ISAIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118, 129 (Anthony Quinton ed., Harvard Univ. Press 1973).

<sup>154</sup> *Id.* at 121–22.

<sup>155</sup> *Id.* at 122.

<sup>156</sup> *Id.* at 134.

connection between the two senses.<sup>157</sup> In his article *Liberty and Equality*, Carritt states: “If then we consider [for example] laws and institutions of property merely so far as they directly affect liberty I think we must conclude that those are most favourable to it which most favour equality in proportion to need.”<sup>158</sup> He then goes on to say:

There remains to notice the obvious relation of economic equality with political equality and equality before the law. Clearly, without freedom of speech, discussion, and information, the bare possession of the vote is almost valueless, and great economic inequality gives influence and power of propaganda which are destructive of any real equality of political power as a censorship itself. Even “equality before the law,” that is legal justice itself, is endangered by economic inequality in well-known ways. The expense of expert legal advice and of protracted legislation heavily handicaps the poor. From great economic inequalities rise class differences of education, speech, standard of life, which may make it very difficult for judges to sympathize with some of those who come before them.<sup>159</sup>

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<sup>157</sup> E. F. Carritt, *Liberty and Equality*, 56 L.Q. REV. 71, 73 (1940).

<sup>158</sup> E. F. Carritt, *Liberty and Equality*, in POLITICAL PHILOSOPHY 127, 139 (Anthony Quinton ed., 1967) (footnote omitted); see also BERLIN, *supra* note 153.

<sup>159</sup> Carritt, *supra* note 158, at 139. At this point, I would take note of an important argument Professor Alan Gewirth makes in his book, *The Community of Rights*, in which he notes that “economic and social rights figure only slightly in contemporary political discourse (including political philosophy) in the West, whether national or international.” ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* 348 (1996). He then goes on to say:

The solutions I have proposed for these problems, based on the principle of human rights, have included an espousal of a positive role for the state as the community of rights in effectuating economic and social rights. This espousal raises controversial issues of the proper function of government. Libertarians, conservatives, and others condemn the positive role upheld here both on moral grounds as a violation of the right to individual freedom and on empirical causal grounds as being counterproductive in relation to its avowed aims. I have tried at various points to show how these criticisms are to be answered. Especially important in the answers have been the theses

*(continued)*

I point out this debate between these philosophers not so much to criticize either but to acknowledge that there are real concerns at stake, including for the protection of liberty itself, when government fails to respond to important economic and social differences that exist between peoples supposedly in the name of protecting liberty.<sup>160</sup> The freedom to state an opinion, invest in a business, ensure that the water we drink and the air we breathe are safe from contamination, or to obtain a college education without fear of having our future livelihood cut off by an unexpected economic or health catastrophe affecting the whole nation may all be at stake.<sup>161</sup> These are just some of the kinds of modern-day constraints that can affect not only how we live, but the freedom our life provides (which makes it a thing of great value).<sup>162</sup> There are often many such problems that require attention if they are to be prevented, not just by the individuals most affected but also by the government which will most likely be in a far better position to see that individuals are protected.<sup>163</sup> Nor can one expect any Congress to be able to settle all these issues on its own.<sup>164</sup> The nature of Congress and how it operates does not provide it the expertise nor the time to handle all the serious problems that may come before it.<sup>165</sup> Because the problems are often very complicated or the sources for solutions obscure, they require a system of regulatory agencies to be present, which can provide needed professional experts and resources

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about the degrees of needfulness for action and the limitations of markets in the allocation of resources. I have tried to emphasize that the moral necessities of effectuating the economic and social rights cannot rightly be subjected to the contingencies of market arrangements and outcomes, including the economic inequalities they reflect and foster.

*Id.* at 349.

<sup>160</sup> Carter, *supra* note 150.

<sup>161</sup> BENJAMIN CONSTANT, *THE LIBERTY OF THE ANCIENTS COMPARED WITH THAT OF THE MODERNS* 1–2 (Jonathan Bennett ed., 2015) (1819).

<sup>162</sup> *Id.*

<sup>163</sup> Darren W. Davis & Brian D. Silver, *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, 48 *AM. J. POL. SCI.* 28, 29 (2004).

<sup>164</sup> See Russell W. Mills & Jennifer L. Selin, *Don't Sweat the Details! Enhancing Congressional Committee Expertise Through the Use of Detailees*, 42 *LEGIS. STUD. Q.* 611, 611 (2017).

<sup>165</sup> *Id.*

to handle these issues without too long a set of delays or worse yet, nothing ever being done.<sup>166</sup>

#### V. THE AUTHORITY OF CONGRESS AND HOW THAT AUTHORITY SHOULD BE UNDERSTOOD IN THE REGULATORY STATE

Congress is the source for all policies written into the federal laws of the United States,<sup>167</sup> just as the Supreme Court is the final source for stating what the Constitution means.<sup>168</sup> This means that the authority for any policy established in law ultimately resides with Congress.<sup>169</sup> This is true whether the creator of the regulation is an agency or Congress directly.<sup>170</sup> If Congress disagrees with an agency's waiver or modification of a rule or regulation the agency previously created under its congressional authority, Congress can alter or repeal it.<sup>171</sup> This is within Congress's law making power under Article I.<sup>172</sup>

That said, I want to turn now to a matter of language in how we interpret an agency's right to rescind or amend a past rule or regulation. In *Biden v. Nebraska*, the Court acknowledged that the intervening HEROES Act granted authority to the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance program under title VI of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency."<sup>173</sup> The Court became concerned with what it saw as the Secretary's overbroad proposal to relieve significant portions of student debt following the effects on wages and the economy of the COVID-19 pandemic; this it saw as simply too large an economic and political change from current law to be a decision left solely to the Secretary of the Department of Education.<sup>174</sup> The Court attempted to justify its conclusion

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<sup>166</sup> *Id.*

<sup>167</sup> *See, e.g.*, JOHN V. SULLIVAN, HOW ARE LAWS ARE MADE, H.R. DOC. NO. 110-49, at 4 (2007).

<sup>168</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>169</sup> Daniel Cohen & Peter L. Strauss, *Congressional Reviews of Agency Regulations*, 49 ADMIN. L. REV. 95, 99 (1997).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> BOWERS & SHEFFNER, *supra* note 101, at 10.

<sup>173</sup> *Biden v. Nebraska*, 143 S. Ct. 2355, 2363 (2023) (quoting 20 U.S.C. § 1098bb(a)(1)).

<sup>174</sup> *See id.* at 2373-74.

by treating the words “waiver” and “modify” in the statute separately and inquiring into the usual dictionary meaning of the first and how the second had been used previously.<sup>175</sup> But this seems more like a go-around of what Congress meant in order to strike down the Secretary’s proposal than a honest search for the original statutory meaning.<sup>176</sup> Of course, the word “waiver” may not have been used previously for so large a regulatory change, but that may just as easily be explained by the fact that this country had not faced previously in the lifetime of the Education Act anything like the COVID-19 pandemic crisis and its effects.<sup>177</sup> This was a true emergency the President had declared as such, which arguably gave rise under the statute to the Secretary adopting a broader interpretation of the Department’s authority to address.<sup>178</sup> The Court’s failure to be sympathetic to this overriding fact gives pause to its conclusion that all it was concerned about was protecting the liberty of all Americans by ensuring Congress should have the opportunity to clarify more exactly what choices were available to the Secretary.<sup>179</sup>

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<sup>175</sup> *Id.* at 2368–70.

<sup>176</sup> Here, I would point to Professor Eskridge’s comment that

dueling accounts suggest that agency interpretations and their history are sometimes going to be most valuable for the judicial interpreter’s understanding of statutory terms . . . , the whole act, and the statutory history, as well as the legislative history. The Supreme Court has recognized this general idea in what I should call the “*Skidmore* canon,” after a leading case where the always-quotable Justice Robert Jackson said that the “weight” of an agency interpretation in a particular case will depend upon “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”

ESKRIDGE JR., *supra* note 5, at 274 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (additional citations omitted).

<sup>177</sup> See *CDC Museum COVID-19 Timetable*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/museum/timeline/covid19.html> (Mar. 15, 2023) [<https://perma.cc/TY5E-JFES>].

<sup>178</sup> U.S. DEP’T OF EDUC.: OFF. FOR C.R., *EDUCATION IN A PANDEMIC: THE DISPARATE IMPACT OF COVID-19 ON AMERICA’S STUDENTS* i, (2021), *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf> [<https://perma.cc/FD7H-B3LW>].

<sup>179</sup> *Biden v. Nebraska*, 143 S. Ct. 2355, 2361 (2023).

While it may be too simple to note that the Congress which passed the Education Act and subsequent HEROES Act was not the same Congress present at the time of the Secretary's decision, the laws adopted by that August body remain, even if the membership, leadership, and the political parties that dominate both Houses and the presidency are not the same.<sup>180</sup> Because the Senate's membership at the time was made up of a majority of Democrats and the President was Democratic, it is not out of bounds to believe with respect to the present Congress, where different political parties control, that any action which might make the Democrats look better to the American people is unlikely to gain much support in the other House, even if the action might be thought responsive to the current pandemic problem.<sup>181</sup> This is the type of conflict based on possible group self-interest James Madison worried about in *Federalist No. 10*; it appears to be one the Court is willing to allow to dominate by its current use of the major questions doctrine.<sup>182</sup>

Returning to our earlier discussion of *Chevron*, one can see the Court's use of the major questions doctrine in both *West Virginia v. EPA* and *Biden v. Nebraska* serves to get around deference to the agency and the respective department involved.<sup>183</sup> If that is so, we must ask—was the Court's reasoning in these cases really justified? Putting aside any possible political concerns, was the issue in these cases really a “major” question or perhaps just a “routine” question?

The potential effects of climate change in the *West Virginia* case is a major concern, as is the effect of the COVID-19 pandemic on student borrowers in the *Biden* case.<sup>184</sup> But notice that the major concern in both these cases is not what Congress may have intended when it passed the Clean Air Act or the HEROES Act.<sup>185</sup> Rather, it goes to the reason behind the FDA and the Department of Education proposing the changes they did

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<sup>180</sup> Alia Wong & Chris Quintana, *As Supreme Court Gears Up to Rule on Student Loan Cases, Americans Are Split on Debt Forgiveness*, USA TODAY, <https://www.usatoday.com/story/news/education/2023/05/10/americans-split-on-student-loan-debt-forgiveness/11728846002/> (May 10, 2023, 11:11 AM) [<https://perma.cc/PK4Y-59RH>].

<sup>181</sup> *Id.* (noting “47% of Americans support Biden’s forgiveness plan in its current form, 41% oppose it and 12% are undecided”).

<sup>182</sup> Compare THE FEDERALIST NO. 10, *supra* note 92 with *Biden*, 143 S. Ct. at 2374.

<sup>183</sup> See *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); *Biden*, 143 S.Ct. at 2374.

<sup>184</sup> *Biden*, *passim*.

<sup>185</sup> *Id.* at 2372.

to offset CO<sub>2</sub> emissions or grave financial loss to borrowers of student loans.<sup>186</sup> If anything, those major issues seem ripe to justify the proposed changes rather than undermine them.<sup>187</sup> Moreover, given that the concerns behind making these changes were designed to offset the immediate effects of not doing anything, the changes themselves seem to satisfy the national emergency ground Congress had adopted in the HEROES Act for allowing the Secretary to make changes to the Education Act, as well as its concern to protect air quality when it approved the Clean Air Act.<sup>188</sup> It becomes a major question only on the changes themselves when the Court either criticizes the changes for not providing in the *West Virginia* case any textual basis in the authorizing statute<sup>189</sup> or, in the *Biden* case, because the changes themselves exhibit “staggering by any measure” of “economic and political significance.”<sup>190</sup> But this seems to be putting “the cart before the horse.”<sup>191</sup> Obviously, the changes would require important shifts in policy of what was to be done going forward, *i.e.*, why they were not just part of the FDA past proposals or the Department’s normal routine business.<sup>192</sup> But that is exactly why the HEROES Act made room for a national emergency that would allow for broader considerations to be engaged and the Clean Air Act focused on air quality.<sup>193</sup>

Professor Eskridge described “[t]he major questions canon” as a “potentially elastic loophole to *Chevron*’s broad commitment of judicial deference to agency interpretations pursuant to congressional delegations of lawmaking authority, because many issues can be understood as either ‘major questions’ or ‘routine applications.’”<sup>194</sup> Here appear at least two examples where the so-called major question at stake was, from the

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 2358.

<sup>189</sup> *Id.* at 2373.

<sup>190</sup> *Id.* (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022)).

<sup>191</sup> “Cart before the horse” used metaphorically to illustrate the error in operations with respect to the decision making at hand. Here the Court is trying to limit how the Department of Education and Environmental Protection Agency could respond to what is clearly a new national (if not international) emergency that could not have been anticipated at the time their authorizing statutes were adopted but surely would have been included if known at the time.

<sup>192</sup> *Id.* at 2380 (Kagan, J., dissenting).

<sup>193</sup> *Id.* at 2392.

<sup>194</sup> ESKRIDGE JR., *supra* note 5, at 288–89.



agency’s point of view, an important yet arguably routine change given the purposes of the Clean Air Act and the exception for national emergencies to the Education Act that Congress wrote into the HEROES Act.<sup>195</sup>

One possible exception Professor Eskridge acknowledged is if the change proposed by the agency or department would “disrupt reliance interests”; “continuity [would then be] consistent with rule of law values.”<sup>196</sup> This idea that Eskridge points to is “defensible along precisely the same lines as *Chevron* itself.”<sup>197</sup> “The key reason is the strong presumption of continuity for major policies unless and until Congress has deliberated about and enacted a change in those major policies . . . .”<sup>198</sup> But one must be careful in identifying what the reliance interests are, especially where Congress has already acted to say what purposes the regulatory authorizations were meant to serve.<sup>199</sup> In the *West Virginia* case, the purpose was to prevent harmful pollutants endangering the air we breathe.<sup>200</sup> In the *Biden* case, the purpose of the HEROES Act was to allow for waiver and modifications to the Education Act when confronted with a national emergency.<sup>201</sup> No one can seriously doubt these were respectively Congress’s intentions when passing the Clean Air and HEROES Acts.<sup>202</sup> So, what must be considered are the reliance interests that would be affected by the EPA and Department of Education’s regulatory proposals.<sup>203</sup>

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<sup>195</sup> *The Clean Air Act in a Nutshell: How It Works*, EPA, <https://www.epa.gov/clean-air-act-overview/clean-air-act-nutshell-how-it-works> [<https://perma.cc/Q8KW-HXTJ>]; Katherine Knott, *HEROES Act at Center of Debt-Relief Legal Fight*, INSIDE HIGHER ED (Jan. 9, 2023), <https://www.insidehighered.com/news/government/2023/01/09/experts-disagree-whether-heroes-act-allows-debt-relief> [<https://perma.cc/XA3H-QB76>].

<sup>196</sup> ESKRIDGE JR., *supra* note 5, at 289.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *See, e.g., The Clean Air Act in a Nutshell*, *supra* note 195 (describing Congress’s design of the Clean Air Act).

<sup>200</sup> *West Virginia v. EPA*, 142 S. Ct. 2587, 2599 (2022) (“The Clean Air Act authorizes the [EPA] to regulate power plants by setting a ‘standard of performance’ for their emission of certain pollutants into the air.”).

<sup>201</sup> *Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023).

<sup>202</sup> *See* 42 U.S.C. § 7411(a)(1) (defining “standard of performance” in relation to the regulation of air pollutants); 20 U.S.C. § 1098bb(a)(1).

<sup>203</sup> ESKRIDGE, *supra* note 5, at 289 (emphasizing reliance interests as key to major questions canon).

Regarding the EPA proposed changes for private electrical power plants, this would likely have some effect on electricity costs both on the power plant industry and the consumer.<sup>204</sup> But given the purpose of the authorization statute, this would be expected once it became obvious what effect CO<sub>2</sub> emissions were having on greenhouse gases.<sup>205</sup> With respect to the Department of Education's proposal to reduce student loan debt, it is true that such a proposal is unlikely to have been anticipated, since no one expected anything like the COVID-19 pandemic to so affect world health and economies.<sup>206</sup> Nevertheless, Congress had anticipated the possibility of a national emergency that might arise from a war or some other condition and had specifically set forth in the HEROES Act that the presence of such an emergency would give rise to the Department's authority to waive or modify provisions of the Education Act.<sup>207</sup> The majority attempted to undercut this possibility by reading the statute's words too narrowly, which goes against Congress's intention to ensure the Education Act would not itself give rise to damage when a national emergency was present.<sup>208</sup>

Indeed, that is why Congress wrote in the statute that the Secretary of Education "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title VI of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency."<sup>209</sup> The very language Congress wrote suggests a much broader application of the Secretary's

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<sup>204</sup> EPA's "Good Neighbor Rule" Increases the Cost of Electricity for Consumers, INST. FOR ENERGY RSCH. (Mar. 17, 2023), <https://www.instituteforenergyresearch.org/regulation/epas-good-neighbor-rule-increases-the-cost-of-electricity-for-consumers/> [https://perma.cc/YL7M-TVP6].

<sup>205</sup> See, e.g., Rebecca Lindsey, *Climate Change: Atmospheric Carbon Dioxide*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. CLIMATE.GOV, <https://www.climate.gov/news-features/understanding-climate/climate-change-atmospheric-carbon-dioxide> (Apr. 9, 2024) [https://perma.cc/7S6D-A5M5].

<sup>206</sup> But see Dan Balz, *American Was Unprepared for a Major Crisis. Again.*, WASH. POST (Apr. 4, 2020, 6:09 PM), <https://www.washingtonpost.com/graphics/2020/politics/america-was-unprepared-for-a-major-crisis-again/> [https://perma.cc/2PHG-CDM8].

<sup>207</sup> 20 U.S.C. § 1098bb(a)(1).

<sup>208</sup> *Biden v. Nebraska*, 143 S. Ct. 2355, 2370 (2023) (rejecting the Secretary's argument that the terms can be considered together and proceeding to interpret the waiver power separately).

<sup>209</sup> 20 U.S.C. § 1098bb(a)(1).

authority than the Court was willing to recognize.<sup>210</sup> First, the use of the word “or” between “waive or modify” in the HEROES Act suggests it is meant to be inclusive, not exclusive.<sup>211</sup> That is to say, the Secretary had authority to not only waive any provisions of the Act he or she may have thought necessary (or to modify any provisions of the Act to avoid greater harm), but also to both waive and modify as he or she deemed necessary to meet the current emergency.<sup>212</sup> This is affirmed by the fact Congress added the word “any” before “provision[s] . . . of the Act,” suggesting the Secretary’s power to be broad.<sup>213</sup> “Any” means any, especially when nowhere does Congress limit the authority of the Secretary.<sup>214</sup> All this goes to show that at the time when Congress passed the HEROES Act, it meant to convey a broad authority to the Education Secretary to meet a national

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<sup>210</sup> See Knott, *supra* note 195 (“The department’s current general counsel determined in an August memo that ‘nothing in the statute’s purpose, history, or any other indicia of statutory meaning’ undermines the plain-text interpretation that the HEROES Act allowed the secretary to forgive student loans in response to the COVID-19 pandemic.”).

<sup>211</sup> 20 U.S.C. § 1098bb(a)(1) (2018); Reed Dickerson, *The Difficult Choice Between “And” and “Or”*, 46 A.B.A. J. 310, 311 (1960) (“Observation of legal usage suggests that in most cases ‘or’ is used in the inclusive rather than the exclusive sense . . .”).

<sup>212</sup> 20 U.S.C. § 1098bb(a)(1). Notice that Congress did not write “either” before the phrase “waive or modify” to signal an exclusive use of “or,” *i.e.*, the Secretary could either waive or modify, but not both waive and modify, any provision of the Education Act. Nor did Congress write that the Secretary had authority to “both waive and/or modify,” signaling the Secretary could do both. In this instance, context matters. Congress wrote “waive or modify *any* statutory or regulatory provision”—not just *any existing* regulatory provision, but *any* statutory or regulatory provision. This would obviously include the Education Act, as well as any regulation that might be adopted in pursuance thereof. For a discussion of the difference between inclusive and exclusive “or” and how to decide, see ALAN HAUSMAN ET AL., *LOGIC AND PHILOSOPHY: A MODERN INTRODUCTION* 30–32 (12th ed. 2013).

<sup>213</sup> 20 U.S.C. § 1098bb(a)(1).

<sup>214</sup> See Knott, *supra* note 195 (“[A] plain-text reading of the statute provides all the authorization needed.”).

emergency.<sup>215</sup> A similar argument related to Congress's concern for air purity can be made regarding the Clean Air Act.<sup>216</sup>

Finally, Professor Eskridge points out that, while it is important to be concerned with legal continuity as “consistent with both the rule of law and democratic accountability,” it is often the case that too much concern will prove “inconsistent with effective governance.”<sup>217</sup> “As *Chevron* recognized, a central role of agencies is to update statutory policy to take account of new circumstances.”<sup>218</sup> It follows that “[t]he major questions doctrine ought not disturb the abilities of agencies to carry out this important mission (within the limits imposed by *Chevron*).”<sup>219</sup> Eskridge takes note of the fact that *Chevron* provides an important help in this area.<sup>220</sup> First, beginning with the plain meaning rule, if a court finds “the intent of Congress is clear, that is the end of the matter.”<sup>221</sup> For both the Court and the agencies should give “effect to the unambiguously expressed intent of Congress.”<sup>222</sup> However, if congressional intent is not clear, judges should “consider the statute’s legislative and regulatory history[.]” provided it would help them discover “whether the statutory text and structure ‘directly address’ the issue in the case.”<sup>223</sup>

Assuming Congress remains “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.”<sup>224</sup> Here, “the agency’s exercise of delegated lawmaking authority ought to be upheld by the court so long as it is a reasonable effort to advance the statutory purposes.”<sup>225</sup>

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<sup>215</sup> See *Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (2023) (“The whole point of the HEROES Act, the Government contends, ‘is to ensure that in the face of a national emergency that is causing financial harm to borrowers, the Secretary can do something.’”).

<sup>216</sup> See *West Virginia v. EPA*, 142 S. Ct. 2587, 2599 (2022) (“The Clean Air Act authorizes the [EPA] to regulate power plants by setting a ‘standard of performance’ for their emission of certain pollutants into the air.”).

<sup>217</sup> ESKRIDGE, *supra* note 5, at 289.

<sup>218</sup> *Id.* at 289–90.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 290.

<sup>221</sup> *Id.* (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 497 U.S. 837, 842 (1984)).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 291.

<sup>224</sup> *Id.* at 292–93 (quoting *Chevron*, 467 U.S. at 843).

<sup>225</sup> *Id.* at 293.

Applying Eskridge’s last point to the *West Virginia* and *Biden* cases, no one could have doubted that FDA’s proposal to regulate electricity producing private power plants would further secure the legislative purpose behind the Clean Air Act.<sup>226</sup> The issue was more whether this was an intent actually stated by Congress when it passed the statute.<sup>227</sup> The Court’s note that following passage of the statute, various future Congresses had the opportunity to add to the law what the FDA was proposing is not really helpful, because whatever a future Congress may have wanted or been simply too busy to attend to does not go to what the original Congress that passed the Act intended at the time.<sup>228</sup> As for the *Biden* case, the Secretary’s approach would be consistent with responding to a national emergency that had given rise to very specific economic harms student borrowers were suffering.<sup>229</sup> The fact it would also have economic and political significance does not alter this conclusion.<sup>230</sup> Here, the majority drifted away from what the Department’s experts recommended to ensure compliance with its own standard for the separation of powers notwithstanding that, in passing the HEROES Act, Congress appeared to allow for the kind of response the Department of Education of was proposing.<sup>231</sup>

## VI. CONCLUSION

In this article, I have addressed the Supreme Court’s current understanding of its self-created “major questions doctrine.” I have done so with the intent to show that the Court’s usual justifications for the doctrine, separation of powers and checks and balances, do not really support its current use, as illustrated by its decisions in at least two recent but very important cases, *West Virginia v. EPA* and *Biden v. Nebraska*.<sup>232</sup> This suggests not that the doctrine is unjustified as such, but rather that the Court’s current understanding of its justifications for the doctrine needs to be rethought.<sup>233</sup> At the very least, the doctrine should not be used to

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<sup>226</sup> See *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

<sup>227</sup> *West Virginia*, 142 S. Ct. at 2600.

<sup>228</sup> *Id.* at 2613; see *id.* at 2641 (Kagan, J., dissenting).

<sup>229</sup> *Biden*, 143 S. Ct. at 2385 (Kagan, J., dissenting).

<sup>230</sup> *Cf. id.* at 2373; *id.* at 2384 (Barrett, J., concurring).

<sup>231</sup> *Id.* at 2375.

<sup>232</sup> 142 S. Ct. 2587 (2022); 143 S. Ct. 2355 (2023).

<sup>233</sup> See generally *Biden*, 143 S. Ct. 2355.

undermine prior congressional intents, especially when these intents were designed to “promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”<sup>234</sup> Just because the context in which these obligations may now be challenged was unanticipated at the time Congress passed the requisite statute does not mean they should be too easily brushed aside. Courts must be careful with their own over-investment in specific constitutional language, such as providing a too broad interpretation of the “Blessings of Liberty” to possibly undercut the equally important constitutional language to “promote the general Welfare.”<sup>235</sup> The Constitution provides both of these goals for the courts to balance in a way that protects both individual liberty while also allowing for the government to respond to changing conditions that give rise to unexpected future challenges.<sup>236</sup> Both of these considerations necessitate careful attention.

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<sup>234</sup> See U.S. CONST. pmbl.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*