STUDENT LOAN FORGIVENESS: A MAJOR QUESTION THE PRESIDENT COULDN'T ANSWER

ZACHARY M. ROBESON*

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* J.D. Candidate, December 2023, Elon University School of Law. I would like to thank my family and friends for their unwavering support. Also, I express my sincerest gratitude to Professor Tom Molony for his guidance and advice on this Note. Last, thank you to the members of *We the People* for their work on this Note.

I. INTRODUCTION

President Biden's student loan forgiveness program was wildly popular—twenty-five million people applied for debt relief.[1] The program, however, was not without controversy and sparked heated political and economic debate.[2] Perhaps more importantly, it posed serious constitutional concerns.[3]

The Supreme Court of the United States has utilized the major questions doctrine in prior cases to restrain administrative agencies unless there is a "clear congressional statement authorizing an agency's action."[4] It is not, as some have suggested, a restriction of the diffusion of legislative power from Congress.[5] It is, however, a limitation on the modality of legislative delegation—if Congress wants an agency to act, it must tell it to do so clearly.[6] Doing so prevents usurpations of congressional authority, and best maintains the constitutional separation of powers.[7] The basic premise of the doctrine is quite simple and well-settled in American democracy—the legislators should legislate, and the executive branch should enforce the laws.[8]

Part II explains the contours of the President's student loan forgiveness plan and why it is so controversial. In Part III, this Note discusses the evolution of the major questions doctrine jurisprudence, with particular attention to the Supreme Court's recent discussion of the doctrine in *West Virginia v. EPA*.[9] Part IV then examines whether and how the major questions doctrine applies in relation to the student loan forgiveness plan, analyzing (1) past congressional rejection of similar loan forgiveness bills; (2) the economic consequences of the plan; (3) the vagueness of the statutory language in the Higher Education Relief Opportunities for Students Act of

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[1] Michael Stratford, et al., *What We Know About the 25M Americans Who Signed Up for Biden's Student Debt Relief*, POLITICO (Feb. 16, 2023, 7:50 PM), https://www.politico.com/news/2023/02/16/joe-biden-student-debt-relief-00083243.

[2] *See* Conner Reagan, *Student Loan Forgiveness: The Current Debate*, MICH. J. ECONOMICS (Apr. 24, 2023), https://sites.lsa.umich.edu/mje/2023/04/24/student-loan-forgiveness-the-current-debate/ ("The controversy over Biden's debt forgiveness program appears to highlight broader structural issues regarding . . . the fairness (or unfairness) of debt relief . . . .").

[3] *See* Clark Neily & Neal McCluskey, *SCOTUS Tackles Unconstitutional, and Unwise, Student Loan Cancelation*, CATO INST. (Feb. 27, 2023, 1:40 PM), https://www.cato.org/blog/scotus-tackles-unconstitutional-unwise-student-loan-cancelation.

[4] West Virginia v. EPA, 142 S. Ct. 2587, 2622 (2022) (Gorsuch, J., concurring).

[5] *See, e.g.*, Michael Sebring, *The Major Rules Doctrine*, GEO. J. L. & PUB. POL'Y (Sept. 17, 2018), https://www.law.georgetown.edu/public-policy-journal/blog/the-major-rules-doctrine/.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *West Virginia*, 142 S. Ct. 2587 (2022).

2003 (the "HEROES Act");[10] (4) the age and focus of the HEROES Act; (5) the Department of Education's prior interpretation of the HEROES Act; (6) the Department of Education's congressionally assigned mission; and (7) the Supreme Court's recent decision in *Biden v. Nebraska*,[11] in which the Court held President Biden's loan forgiveness plan was unconstitutional under the major questions doctrine.

II. THE PRESIDENT'S LOAN FORGIVENESS PLAN

President Biden vowed throughout his 2020 presidential campaign to forgive student loan debt.[12] Then aspirational, President Biden announced in 2022 that the federal government would forgive up to $20,000 worth of federal student loans per qualifying applicant.[13] An applicant who was single and earned an adjusted gross income of less than $125,000 would qualify for $10,000 in debt cancellation.[14] An applicant who was married and filed his or her taxes jointly with a spouse or who filed as head of household would qualify only if his or her adjusted gross income was under $250,000.[15] If the applicant met the income requirements and received a Pell Grant, he or she would qualify for an additional $10,000 in cancellation.[16]

The plan was expected to affect more than 43 million people in the United States who hold roughly $1.6 trillion in student-loan debt,[17] and economists predicted that the plan would have significant consequences.[18]

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[10] 20 U.S.C. §§ 1098aa–1098ee.

[11] 143 S. Ct. 2355 (2023).

[12] *See* Adam S. Minsky, *Biden Affirms: "I Will Eliminate Your Student Debt,"* FORBES (Oct. 7, 2020, 12:59 PM), https://www.forbes.com/sites/adamminsky/2020/10/07/biden-affirms-i-will-eliminate-your-student-debt/?sh=6775747958a7.

[13] Ron Lieber & Tara Siegel Bernard, *What You Need to Know About Biden's Student Loan Forgiveness Plan*, N.Y. TIMES (Mar. 1, 2023), https://www.nytimes.com/article/biden-student-loan-forgiveness.html.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Gabriel T. Rubin & Julia Carpenter, *Student-Loan Forgiveness: What to Know About Biden's Plan and the Supreme Court Case*, WALL ST. J. (Feb. 28, 2023, 7:26 AM), https://www.wsj.com/articles/bidens-student-loan-forgiveness-plan-who-qualifies-and-how-much-debt-will-be-canceled-11661362340.

[18] *See, e.g.*, Kyle Shaner, *How Student Loan Forgiveness Could Affect the Economy*, U. CIN. NEWS (Mar. 8, 2023), https://www.uc.edu/news/articles/2023/03/how-student-loan-forgiveness-could-affect-the-economy.html; Gabriel T. Rubin, *Biden Student-Loan Forgiveness Raises Inflation, Budget Risks*, WALL ST. J. (Aug. 25, 2022, 4:28 PM), https://www.wsj.com/articles/biden-student-loan-forgiveness-raises-inflation-budget-risks-11661457157.

For example, according to Michael Jones, Associate Professor of Economics at the University of Cincinnati, "[i]f the debt forgiveness program [wa]s permitted to move forward, at a time when consumer spending already is high, it could lead to more inflation."[19] The cost of the program was also enormous. The Congressional Budget Office estimated that "the cost of student loans w[ould] increase by about an additional $400 billion in present value as a result of the action canceling . . . debt . . . ."[20]

The plan also sparked strong division.[21] Proponents decried the massive amounts of debt associated with higher education and financial barriers to attending college.[22] Those in opposition pointed to the plan's extreme cost, claimed that it was unfair because those without a college degree or who had paid back their loan debt would be ineligible for forgiveness,[23] and challenged the President's constitutional authority to implement it.[24]

III. THE MAJOR QUESTIONS DOCTRINE

From a constitutional perspective, a key question was whether President Biden's plan violated the major questions doctrine. The United States Supreme Court formally recognized this doctrine in 2022.[25] The doctrine, however, dates back to an article that Justice Stephen Breyer, who at the

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[19] *See, e.g.*, Shaner, *supra* note 18.

[20] Letter from Phillip L. Swagel, Dir., Cong. Budget Off., to Richard Burr, Ranking Member, S. Comm. on Health, Educ., Lab., & Pensions, and Virginia Fox, Ranking Member, H. Comm. on Educ. & Lab. (Sept. 26, 2020).

[21] *Compare* Joey Sills, *OPINION: Student Loan Forgiveness Shouldn't Be a Debate*, IND. DAILY STUDENT (Mar. 9, 2023, 6:05 PM), https://www.idsnews.com/article/2023/03/opinion-student-loan-forgiveness-supreme-court-joe-biden, *with* Adam Looney, *Putting Student Loan Forgiveness in Perspective: How Costly is it and Who Benefits?*, BROOKINGS INST. (Feb. 12, 2021), https://www.brookings.edu/blog/up-front/2021/02/12/putting-student-loan-forgiveness-in-perspective-how-costly-is-it-and-who-benefits/.

[22] Jared Quigg, *OPINION: Thank You Mr. President, But You Should Cancel it All*, IND. DAILY STUDENT (Aug. 29, 2022, 11:27 AM), https://www.idsnews.com/article/2022/08/bidens-student-debt-cancellation-plan-is-helpful-but-it-doesnt-go-far-enough.

[23] *See* Lindsey M. Burke & Adam Kissel, *Why Biden's Student Loan Bailout is Unfair*, HERITAGE FOUND. (Aug. 29, 2022), https://www.heritage.org/education/commentary/why-bidens-student-loan-bailout-unfair.

[24] Looney, *supra* note 21; Derek W. Black, *What Are the Limits of Presidential Power to Forgive Student Loans?*, U. S.C. (Mar. 13, 2023), https://www.sc.edu/uofsc/posts/2023/03/conversation_loans.php#.ZF5M1ezMIUQ.

[25] West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022) (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)) ("To overcome that skepticism, the Government must—under the major questions doctrine—point to 'clear congressional authorization' to regulate in that manner.").

time was a judge on the First Circuit Court of Appeals, wrote in 1986.[26] Justice Breyer stressed that, "[i]f a 'reasonable' interpretation of law by an agency is due 'respect' or 'deference,' . . . the agency [must] . . . have an opportunity to *make* its interpretation."[27] Justice Breyer emphasized, however, that "Congress . . . likely . . . focuse[s] upon, and answer[s], major questions . . . ."[28]

The Court latched on this principle in 1994 when it decided *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*[29] The Federal Communications Commission (the "FCC") asserted the authority under 47 U.S.C. § 203(b), which granted the FCC the ability to "modify" any requirement of § 203 to make tariff filing optional for "nondominant long-distance carriers."[30] Bearing in mind the "enormous importance" of a tariff-filing provision,[31] the *MCI* Court distinguished the FCC's authority to "modify any requirement" under 47 U.S.C. § 203(a) and the FCC's asserted ability to make tariff filing optional.[32] According to the Court, the rule the FCC had adopted represented a "fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist."[33] "That may be a good idea," the Court observed, "but it was not the idea Congress enacted into law in 1934." Thus, the Court held that the FCC had exceeded its statutory authority.[34]

The *MCI* decision reflects the principles underlying the major questions doctrine, but the Court articulated it more directly in its 2000 decision in *FDA v. Brown & Williamson Tobacco Corp.*[35] Assessing whether

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[26] *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

[27] *Id.* at 378. "Breyer approached the questions through the lens of legal pragmatism, pursuant to which a judge considers a statute's purpose and, with an eye towards practical consequences, asks how a reasonable legislator would pursue that purpose." Chad Squitieri, *Major Problems with Major Questions*, L. & LIBERTY (Sept. 6, 2022), https://lawliberty.org/major-problems-with-major-questions/.

[28] Breyer, *supra* note 26, at 370.

[29] 512 U.S. 218 (1994).

[30] *Id.* at 220.

[31] *Id.* at 231.

[32] *Id.* at 231–32.

[33] *Id.*

[34] *Id.* at 232.

[35] 529 U.S. 120 (2000).

the FDA had the authority under the Food, Drug, and Cosmetic Act to regulate tobacco products, the Court explained:

> [O]ur inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron*[36] to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. *In extraordinary cases*, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.[37]

The Court concluded that "Congress could not have intended to delegate a decision of such *economic and political significance* to an agency in so cryptic a fashion."[38]

The Court revisited the topic in 2022 in *West Virginia v. EPA*.[39] In the Clean Air Act, Congress authorizes the Environmental Protection Agency (the "EPA") to regulate power plants by setting a "standard of performance" for their emission of certain pollutants into the air.[40] The statute specifies that the standard must reflect the "best system of emission reduction" that the agency determines to be "adequately demonstrated."[41] At issue in *West Virginia* was the EPA's issuance of a rule concluding that the "best system of emission reduction" for existing coal-fired power plants "included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources."[42] Citing *Brown & Williamson*, the Court reasoned that "'common sense as to the manner in which Congress [would have been] likely to delegate' such power to the agency at issue . . . ma[kes] it very unlikely that Congress has actually done so."[43] According to the Court, Congress rarely, if ever, grants vast amounts of regulatory authority "through 'modest words,' 'vague terms,' or 'subtle device[s].'"[44] The Court explained that agencies are limited to the express delegation of Congress, and legislation generally is not an "open book to which the agency [may] add pages and change the plot line."[45]

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[36] *See* Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984). The *Chevron* Court held that an agency's reasonable interpretation of an ambiguous statute is entitled to a degree of deference. *Id.* at 844.

[37] *Brown & Williamson*, 529 U.S. at 159 (emphasis added).

[38] *Id.* at 160 (emphasis added).

[39] 142 S. Ct. 2587 (2022).

[40] *Id.* at 2599; 42 U.S.C. § 7411(a)(1).

[41] *West Virginia*, 142 S. Ct. at 2599.

[42] *Id.*

[43] *Id.* at 2609 (quoting *Brown & Williamson*, 529 U.S. at 133).

[44] *Id.* (citing Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)) (internal quotations omitted).

[45] *Id.*

The Court has recognized three instances in which the major questions doctrine is implicated to counteract broad agency action. First, the Court has indicated the doctrine applies when an agency claims the power to resolve a matter of great "political significance"[46] or end an "earnest and profound debate across the country."[47] Particularly telling in this inquiry is when Congress has considered and rejected bills akin to the agency's conduct at issue, evidencing a work-around the legislative process.[48] Next, the major questions doctrine applies when the agency seeks to regulate a "significant portion of the American economy"[49] or require "billions of dollars in spending" by private persons or entities.[50] The final circumstance in which the Court has applied the doctrine is when an agency seeks to "intrud[e] into an area that is the particular domain of state law."[51]

After concluding the doctrine is implicated by the agency action at issue, the inquiry then becomes whether the agency's proposed course of conduct is supported by a "clear congressional statement authorizing [the] agency's action."[52]

First, a court will look to the legislative provisions on which the agency relies "with a view to their place in the overall statutory scheme."[53] Particularly telling is when the agency seeks to hide "elephants in

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[46] *See* Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 117 (2022) (per curiam) (holding a vaccine mandate expected to affect 84 million Americans constituted great "political significance" and thus the major questions doctrine applied); *see also West Virginia*, 142 S. Ct. at 2620–21 (Gorsuch, J., concurring).

[47] *See* Gonzales v. Oregon, 546 U.S. 243, 249 (2006) (holding the issue of "physician-assisted suicide" had been the subject of an "earnest and profound debate"); *see also West Virginia*, 142 S. Ct. at 2620–21 (Gorsuch, J., concurring).

[48] *See Brown & Williamson*, 529 U.S. at 144; *see also West Virginia*, 142 S. Ct. at 2620–21 (Gorsuch, J., concurring).

[49] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (requiring the agency to point to clear congressional authorization when the EPA sought to regulate a significant portion of the American economy in setting greenhouse gas regulations for stationary sources); *see also West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

[50] *See* King v. Burwell, 576 U.S. 473, 485–86 (2015) (reasoning the Court should hesitate when the action in question will require billions of dollars in spending); *see also West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

[51] *See* Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (holding the doctrine applied to an eviction moratorium since it intruded into the domain of state law); *see also West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

[52] *West Virginia*, 142 S. Ct. at 2622 (Gorsuch, J., concurring).

[53] *Brown & Williamson*, 529 U.S. at 133 (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)); *West Virginia*, 142 S. Ct. at 2622 (Gorsuch, J., concurring).

mouseholes"[54] or relies on "gap filler" provisions.[55] As a threshold matter, however, "oblique or elliptical language" will not suffice as a clear statement.[56]

Second, to guard against an agency's extraction of broad authority from vague language in "a long-extant statute,"[57] a court will look to the age and focus of the statute at issue in comparison to the problem the agency seeks to address.[58] For example, in *Nat'l Fed'n of Indep. Bus. v. OSHA*,[59] the Supreme Court found it unlikely that Congress intended to grant OSHA the authority to implement a nationwide COVID-19 vaccine mandate through a statutory provision that was enacted forty years before the pandemic.[60]

Third, a court will consider the agency's past interpretations of the statute at issue.[61] "A 'contemporaneous' and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute's original charge to an agency."[62] When the agency claims to have found "unheralded authority" when it has previously acted to the contrary, the court will "greet its announcement with a measure of skepticism."[63]

Finally, courts have been skeptical when the agency's proposed regulatory action conflicts with its congressionally assigned mission and expertise.[64] When the agency has "no comparative expertise in making

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[54] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); *West Virginia*, 142 S. Ct. at 2622 (Gorsuch, J., concurring).

[55] *West Virginia*, 142 S. Ct. at 2610 (citing *Whitman*, 531 U.S. at 468); *see also id.* at 2622 (Gorsuch, J., concurring).

[56] *Id.* at 2622 (Gorsuch, J., concurring) (citing Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 139 (2005) (plurality opinion) (cautioning against reliance on "broad or general language")).

[57] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014); *Brown & Williamson*, 529 U.S. at 159.

[58] *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

[59] 595 U.S. 109 (2022) (per curiam).

[60] *See id.* at 114, 117–20; *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

[61] *West Virginia*, 142 S. Ct. at 2602 ("Reflecting the ancillary nature of Section 111(d), EPA has used it only a handful of times since the enactment of the statute in 1970."); *see also id.* at 2623 (Gorsuch, J., concurring).

[62] *Id.* at 2623 (Gorsuch, J., concurring) (quoting United States v. Philbrick, 120 U.S. 52, 59 (1887)).

[63] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

[64] *See* Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (striking down a public health agency's attempt to regulate housing); *see also NFIB*, 595 U.S. at 117 (holding vaccine mandates were outside of OSHA's "sphere of expertise").

certain policy judgments, . . . Congress presumably would not task it with doing so."[65]

IV. PRESIDENT BIDEN'S LOAN FORGIVENESS PLAN IMPLICATES THE MAJOR QUESTIONS DOCTRINE

The President's loan forgiveness plan sought to resolve a matter of great "political significance"[66] and to end an "earnest and profound debate across the country."[67] The loan forgiveness plan also sought to regulate a "significant portion of the American economy."[68] The plan, however, did not pose a risk of usurping the domain of state law because the plan only applied to federal student loans.[69] Thus, the Supreme Court applied the major questions doctrine to counteract the President's loan forgiveness plan.

A. The President's Loan Forgiveness Plan Involves a Matter of Great Political Significance Subject to Earnest and Profound Debate

In attempting to implement the loan forgiveness plan, the Department of Education asserted authority to resolve a matter of "great political significance" and end an "earnest and profound debate."[70] Congress's repeated rejection of loan forgiveness legislation makes this point manifest.[71] Particularly telling are the similarities between the President's plan and other proposed loan forgiveness legislation. The most recent bill,

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[65] *West Virginia*, 142 S. Ct. at 2612–13 (quoting Kiser v. Wilkie, 139 S. Ct. 2400, 2417 (2019)).

[66] *See NFIB*, 595 U.S. at 117; *see also West Virginia*, 142 S. Ct. at 2620–21 (Gorsuch, J., concurring).

[67] *See* Gonzales v. Oregon, 546 U.S. 243, 249 (2006) (citing Washington v. Glucksberg, 521 U.S. 702, 735 (1997)); *see also West Virginia*, 142 S. Ct. at 2620–21 (Gorsuch, J., concurring).

[68] *See Utility Air*, 573 U.S. at 324 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)); *see also West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

[69] *The Biden-Harris Administration's Student Debt Relief Plan Explained*, FED. STUDENT AID, https://studentaid.gov/debt-relief-announcement (last visited Dec. 5, 2023) (noting the plan helps federal student loan borrowers).

[70] *See West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

[71] *See* Income-Driven Student Loan Forgiveness Act, H.R. 2034, 117th Cong. § 2 (2021) (authorizing the Secretary of Education to forgive federal student loans for individual borrowers with an income under $100,000); HEROES Act, H.R. 6800, 116th Cong. §§ 110501, 150117 (2020) (amending the Truth in Lending Act to authorize the Secretary of the Treasury to forgive up to $10,000 of student loan debt for each individual borrower); Student Loan Debt Relief Act of 2019, S. 2235, 116th Cong. § 101 (2019) (providing $50,000 in loan forgiveness to individuals whose adjusted gross income is less than $100,000).

entitled the Income-Driven Student Loan Forgiveness Act, sought to give the Secretary of Education the authority to forgive the "outstanding balance of principal, interest, and fees due on the eligible Federal student loans of borrowers."[72] To be eligible for forgiveness, borrowers who were single would have needed to have an "adjusted gross income . . . [that] d[id] not exceed $100,000."[73] Borrowers who were married and filed jointly must have had an "adjusted gross income of the borrower and the borrower's spouse [that] d[id] not exceed $200,000."[74] The bill never made it out of the House.[75]

Additionally, Rep. Nita Lowey introduced a similar bill in 2020 to address economic hardship caused by the COVID-19 pandemic.[76] If it had been enacted, Rep. Lowey's bill would have forgiven $10,000 of student loan debt for each "economically distressed borrower,"[77] defined as an individual who had defaulted on his or her student loans; failed to make a payment that was at least ninety days past due; or had his or her payments deferred due to economic hardship, unemployment, cancer treatment, or forbearance.[78] Although the bill passed in the House, it failed in the Senate.[79]

B. The President's Loan Forgiveness Plan Seeks to Regulate a Significant Portion of the American Economy

In addition to being a matter of grand political scale, the Biden Administration's plan also sought "to regulate a significant portion of the American economy"[80] and posed monumental economic consequences. Approximately forty-five million borrowers owe more than $1.6 trillion in student loan debt.[81] Nearly sixty-three percent of the United States population has enrolled in some level of postsecondary education, and approximately seventeen percent of the population aged eighteen or older has

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[72] H.R. 2034, § 2.

[73] *Id.*

[74] *Id.*

[75] *H.R. 2034 – Income-Driven Student Loan Forgiveness Act*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/2034/all-actions (last visited Dec. 5, 2023).

[76] H.R. 6800.

[77] *Id.* §§ 110501, 150117.

[78] *Id.* § 150117.

[79] *H.R. 6800 – The HEROES Act*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/6800/all-actions (last visited Dec. 5, 2023).

[80] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2621 (2022) (Gorsuch, J., concurring).

[81] CONG. RSCH. SERV., R47196, FEDERAL STUDENT LOAN DEBT CANCELLATION: POLICY CONSIDERATIONS 1 (2022).

taken out federal student loans.[82] Canceling a large swath of federal student loan debt would impose significant costs on the government.[83]

A Congressional Budget Office report estimated that about $430 billion of the total $1.6 trillion outstanding federal student loan debt would be forgiven under President Biden's plan.[84] Moreover, the report estimated that approximately ninety-five percent of the nearly thirty-seven million borrowers with direct federal loans met the income eligibility criteria, ninety percent of income-eligible borrowers would apply for debt cancellation, sixty-five percent have received at least one Pell grant, and forty-five percent would have their entire outstanding debt canceled.[85] The report also noted that the debt forgiveness plan would reduce cash inflows to the Treasury and thereby increase the amount that the federal government borrows over time.[86] Prior congressional rejection of the policies aside, the grave economic consequences alone were sufficient to warrant application of the major questions doctrine.

Having concluded that the Biden Administration's student loan forgiveness plan implicated the major questions doctrine, the Court then had to determine whether Congress had spoken clearly to authorize the agency to exercise powers of "vast 'economic and political significance.'"[87] It hadn't.

C. The Statutory Language of the HEROES Act Does Not Authorize the Department of Education to Take Such Widespread and Expansive Action

The statutory language of the HEROES Act,[88] upon which the Secretary of Education relied to implement its loan forgiveness plan, was "oblique [and] elliptical," and did not supply a clear congressional statement of authority.[89] The Department of Education principally pointed to the HEROES Act as a delegation of congressional authority to "effectuate

[82] *Id.*

[83] *Id.* at 35.

[84] Letter from Phillip L. Swagel to Richard Burr & Virginia Fox, *supra* note 20, at 3.

[85] *Id.*

[86] *Id.* at 2.

[87] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

[88] 20 U.S.C. §§ 1098aa–1098ee.

[89] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2622 (Gorsuch, J., concurring) (citing Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 139 (2005) (plurality opinion) (cautioning against reliance on "broad or general language")).

a program of targeted loan cancellation directed at addressing the financial harms of the COVID-19 pandemic."[90]

The HEROES Act authorizes the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs . . . the Secretary deems necessary in connection with a war or other military operation or national emergency . . . ."[91] Under the Act, the Secretary may effect waivers or modifications to ensure "recipients of student financial assistance . . . who are affected individuals are not placed in a worse position financially . . . ."[92]

A court must construe a statute "as a symmetrical and coherent regulatory scheme," and must "fit, if possible, all parts into [a] harmonious whole . . . ."[93] When deciding on the proper construction: "[E]very word and every provision is to be given effect. . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."[94]

The overall scheme and structure of the HEROES Act, and the meaning of the words "waive or modify," become clear when considering how Congress has previously delegated authority to forgive student loan debt. The Secretary believed the operative language of the HEROES Act, the authority to "waive or modify" federal loan regulations, authorized the Department of Education to forgive droves of student loan debt.[95] The *MCI* Court interpreted "modify" to mean "to change moderately or in minor fashion, . . . hav[ing] a connotation of increment or limitation."[96] It was clear, however, from the economic impact of the Secretary's loan forgiveness that this was not a minor modification.

Congress has delegated authority to forgive student loans in other areas that differ from the language contained in the HEROES Act. For example, in the context of forgiving loan debt for those employed in public service, Congress ordered the Secretary to "*cancel* the balance of interest

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[90] Letter from Lisa Brown, Gen. Couns., U.S. Dep't of Educ., to Miguel A. Cardona, Sec'y of Educ., U.S. Dep't of Educ. (Aug. 23, 2022), https://www2.ed.gov/policy/gen/leg/foia/secretarys-legal-authority-for-debt-cancellation.pdf.; Notice of Debt Cancellation Legal Memorandum, 87 Fed. Reg. 52943, 52944 (Aug. 30, 2022).

[91] 20 U.S.C. § 1098bb(a)(1).

[92] *Id.* § 1098bb(a)(2)(A).

[93] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995); FTC v. Mandel Brothers, Inc., 359 U.S. 385, 389 (1959)).

[94] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012).

[95] *See* discussion *infra* Part IV.E.

[96] MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 225 (1994).

and principal due . . . on any eligible Federal Direct Loan not in default for a borrower who . . . is employed in a public service job at the time of such *forgiveness*."[97] The Secretary followed Congress' command, promulgating regulations with language in stark contrast to that of the HEROES Act. 34 C.F.R. § 685.219, titled "Public Service Loan *Forgiveness* Program,"[98] states if "[a] borrower . . . obtain[s] *loan forgiveness* under this program,"[99] the Secretary will "*forgive*[] the principal and accrued interest that remains on all loans" for which loan *forgiveness* is requested by the borrower.[100] Congress' intent regarding discharging public service loan debt is apparent—it uses operative terms associated with forgiving debt.[101] One must conclude that "[i]f Congress provided *clear* congressional authorization for $400 billion in student loan forgiveness via the HEROES Act, it would have mentioned loan forgiveness."[102]

Additionally, even if Congress had somehow delegated vast authority to the Secretary through modest words like "waive or modify," the Secretary's actions are limited to those which ensure "recipients of student financial assistance . . . who are affected individuals are not placed in a worse position financially . . . ."[103] Yet under the President's forgiveness plan, "affected individuals" would receive a windfall. As the Office of General Counsel itself interpreted the provision in 2021, Congress "narrowly cabined the scope of the Secretary's discretion"[104] by imposing a standard upon the Secretary's authority that the recipient be placed in the position he or she would have been but for the national emergency. The forgiveness plan, however, failed to show that recipients of debt relief would be placed in the position they would have been had the COVID-19 pandemic not occurred. Even if the Secretary could have overcome the showing that Congress clearly authorized it to forgive student loan relief through operative words such as "waive and modify," without this prerequisite showing, the Secretary exceeded its authority under the HEROES Act.

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[97] 20 U.S.C. § 1087e(m)(1)(B)(i) (emphasis added).

[98] 34 C.F.R. § 685.219 (2023).

[99] *Id.* § 685.219(c)(1).

[100] *Id.* § 685.219(d).

[101] *See* 20 U.S.C. § 1087e(m)(1)(B)(i); 34 C.F.R. § 685.219.

[102] Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 665 (N.D. Tex. 2022), *vacated*, 600 U.S. 551 (2023).

[103] 20 U.S.C. § 1098bb(a)(2)(A).

[104] Memorandum from Reed D. Rubinstein, Principal Deputy Gen. Couns., U.S. Dep't of Educ., to Betsy DeVos, Sec'y of Educ., U.S. Dep't of Educ. 5 (Jan. 12, 2021), https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf.

D. The Focus of the HEROES Act Weighs Against Unlimited Authority to Forgive Student Loans

The focus of the HEROES Act weighs against the Secretary's asserted authority to forgive student loan debt.[105] Congress passed the HEROES Act in the wake of the September 11 attacks on the World Trade Center and subsequent military operations in Iraq.[106] But the HEROES Act confers broad power upon the Secretary to act "in connection with a war or other military operation or national emergency"[107] and does not limit it only to one particular instance or time frame.

The Supreme Court previously has recognized that Congress may delegate authority to an agency in a manner that could apply to new and unanticipated situations.[108] But the Court has scrutinized an agency's claim of broad authority when the statute is "long-extant."[109] While the age of the HEROES Act does not necessarily weigh in favor or against the Secretary's authority, the focus weighs against the Secretary's authority to forgive loan debt.[110] The purpose of the HEROES Act was to ensure those serving abroad in the military were not concerned with repaying their student loans.[111] The statute itself manifests this intent. In its findings,

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[105] West Virginia v. EPA, 142 S. Ct. 2587, 2623 (2022) (Gorsuch, J., concurring).

[106] 149 CONG. REC. 7919 (2003) (statement of Rep. Scott Garrett) ("Since September 11 and now with the activities of the war in Iraq, this Nation is sending our men and women, our young sons and daughters, into harm's way . . . .").

[107] 20 U.S.C. § 1098bb(a)(1).

[108] *See West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring); *see also* Mistretta v. United States, 488 U.S. 361, 372 (1989) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)) ("So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'").

[109] *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring); *see id.* at 2599 (majority opinion) (considering the Clean Air Act, which Congress had enacted nearly fifty years prior at the time the EPA's action was challenged); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 117 (2022) (holding that the Occupational Safety and Health Act of 1970, which was over forty years old at the time the agency action was challenged, did not authorize OSHA to implement COVID-19 vaccine and testing mandates for nearly 84 million people).

[110] 149 CONG. REC. 7919 (2003) (statement of Rep. Scott Garrett) ("Since September 11 and now with the activities of the war in Iraq, this Nation is sending our men and women, our young sons and daughters, into harm's way . . . .").

[111] *See id.* (statement of Rep. Scott Garrett) ("[T]his legislation will now grant to the Secretary of Education the authority and the power to grant to the students who are overseas now the relief that they need. . . . [I]t provides to the Reservists who are leaving from their jobs to go overseas right now relief from making student loan payments for a period of time while they are away."); *Id.* at 7922 (statement of Rep. John Isakson) ("[T]he HEROES Act of 2002, which gives the Secretary authority. . . to make those waivers and deferrals that are necessary to ensure that our troops whose lives have been disrupted suddenly, and now serve us in the Middle East and in Iraq, to make sure that their families are not harassed by collectors and that their loan payments

Congress stated: "[h]undreds of thousands of Army, Air Force, Marine Corps, Navy, and Coast Guard reservists and members of the National Guard have been called to active duty or active service"[112]; "[t]he men and women of the United States military put their lives on hold, leave their families, jobs, and postsecondary education in order to serve their country and do so with distinction"[113]; and "[t]here is no more important cause for this Congress than to support the members of the United States military and provide assistance with their transition into and out of active duty and active service."[114] Unsurprisingly, the record is devoid of any evidence that Congress considered a pandemic as a prerequisite to the Secretary's authority under the HEROES Act.

E. The Department of Education Previously Interpreted the HEROES Act as Devoid of Authority to Forgive Student Debt

The Department of Education has never invoked the HEROES Act to forgive student loan debt. In fact, during the Trump Administration, the Department's view was that it had no authority to do so.[115] The Department reasoned that it was "obligated to recognize and give effect to the principle Congress 'does not . . . hide elephants in mouseholes.'"[116] Recognizing that finding authority in the HEROES Act would present serious constitutional problems[117] and that an alternative interpretation was "fairly possible,"[118] the Department construed the statute in a limited way.[119] According to the Department in January 2021, the "language and context strongly

are deferred until they return[.]"); *Id.* at 7923 (statement of Rep. Max Burns) ("The HEROES bill would excuse military personnel from their Federal student loan obligations while they are on active duty in service to the United States. While these men and women are fighting for our freedom overseas, they should not be worrying about repaying their student loans."); *Id.* at 7922–23 (statement of Rep. John Boehner) ("None of us believe that our active duty soldiers should be in a position where they are going to have to make payments on their student loans while in fact they are not here. This discretion has been given to the Secretary under the Higher Education Act Amendments . . . .").

[112] 20 U.S.C. § 1098aa(b)(4).

[113] *Id.* § 1098aa(b)(5).

[114] *Id.* § 1098aa(b)(6).

[115] Memorandum from Reed D. Rubinstein to Betsy DeVos, *supra* note 104, at 1.

[116] *Id.* at 2 (quoting Gonzales v. Oregon, 546 U.S. 243, 267 (2006)).

[117] *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").

[118] Memorandum from Reed D. Rubinstein to Betsy DeVos, *supra* note 104, at 2 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

[119] *Id.* (citing Ashwander v. Tenn. Valley. Auth., 297 U.S. 288, 341, 345–48 (1936) (Brandeis, J., concurring)).

suggest Congress never intended the HEROES Act as authority for mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or to materially modify repayment amounts or terms."[120] Instead, the Department concluded that its delegated authority is limited "to the waiver or modification of statutory requirements" to put "affected individuals" in the "same position financially in relation to their Title IV loans as if the national emergency had not occurred."[121] Moreover, the Department determined that the reference to "'defaults' in § 1098bb(a)(2)(B), and the cross-cite to § 1091b(b)(2) dealing with 'return' of student loan funds, together provide a strong textual basis for concluding Congress intended loans to be repaid, even after the exercise of HEROES Act authority."[122] Finally, the Department decided that the authority to make modifications does not sweep broadly enough to allow "the Department to make major changes to the repayment provisions of loans made pursuant to Title IV."[123] Rather, the power to "modify" only confers authority "to change moderately or in minor fashion."[124]

The Department added that it had never used the HEROES Act, or any other statutory, regulatory, or interpretative authority, for the mass cancellation of student loan debt.[125] According to the Department, it was "impossible to escape the conclusion that Congress funds student loans with the expectation that such loans will be repaid in full with interest, except in identified circumstances, and did not authorize [the Department] to countermand or undermine that expectation."[126]

With changes in the Department of Education following President Biden's election, the Office of General Counsel issued a new Memorandum reaching the opposite conclusion:[127]

> In present circumstances, th[e] authority [conferred in the HEROES Act] could be used to effectuate a program of categorial debt cancellation directed at addressing the financial harms caused by the COVID-19 pandemic. The Secretary could waive or modify statutory and regulatory provisions to effectuate a certain amount of cancellation for borrowers who have been financially harmed because of the COVID-19 pandemic. The Secretary's determinations regarding the amount of relief, and the categories of borrowers for whom relief is necessary, should be informed by evidence regarding the financial harms that borrowers have experienced, or will likely experience, because of the

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[120] *Id.* at 6.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.* (quoting MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 225 (1994)) (internal quotations omitted).

[125] *Id.*

[126] *Id.*

[127] Letter from Lisa Brown to Miguel A. Cardona, *supra* note 90.

> COVID-19 pandemic. But the Secretary's authority can be exercised categorically to address the situation at hand; it does not need to be exercised on a case-by-case basis.[128]

Whatever the extent of the Secretary's authority under the HEROES Act, the Court has indicated it is not sufficient alone to draft a new Memorandum to override the Department's prior interpretation—the prior interpretation will still be assigned some degree of weight under the major questions analysis.[129]

F. The Department of Education's Congressionally Assigned Mission Conflicts with its Attempt to Forgive Student Loan Debt

Finally, the student loan forgiveness plan was inconsistent with the Department of Education's mission.[130] Congress established the Department of Education in 1979 to "strengthen the Federal commitment to ensur[e] access to equal educational opportunity for every individual . . . ."[131] More specifically, Congress sought to "improve the management and efficiency of Federal education activities, especially with respect to the process, procedures, and administrative procedures, and administrative structures for the dispersal of Federal funds . . . ."[132] To achieve that end, Congress transferred to the Department all "functions of the Attorney General and of the Law Enforcement Assistance Administration with regard to the student loan and grant programs"[133] and all functions "relating to college housing loans of the Secretary of Housing and Urban Development . . . ."[134] These statutes evidence an understanding that one of the Department's primary purposes, along with ensuring equality of access to education, is the *enforcement and execution* of legislation—not the establishment of policy.[135] This interpretation of the Department's role best aligns with the purpose of the Executive.[136] The purpose of the Department of

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[128] *Id.* at 2–3.

[129] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2623 (2022) (Gorsuch, J., concurring).

[130] 20 U.S.C. § 3402; *see also West Virginia*, 142 S. Ct. at 2623 (2022) (Gorsuch, J., concurring) (noting "skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise").

[131] 20 U.S.C. § 3402(1).

[132] *Id.* § 3402(6).

[133] *Id.* § 3445.

[134] *Id.* § 3446.

[135] *See id.* § 3402.

[136] U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . ."); *see* THE FEDERALIST NO. 78 (Alexander Hamilton) ("The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated."); *see*

Education, as well as the Executive more broadly, contradicts the Department's alleged authority to forgive droves of student loan debt.

G. The Supreme Court Held President Biden's Loan Forgiveness Plan was Unconstitutional Under the Major Questions Doctrine

In June 2023, the United States Supreme Court issued its opinion in *Biden v. Nebraska*,[137] holding the Secretary lacked the authority under the HEROES Act to implement President Biden's loan forgiveness plan.[138] Missouri established the Missouri Higher Education Loan Authority (the "MOHELA") as a nonprofit government corporation which would participate in the student loan market.[139] As such, the MOHELA services nearly $150 billion worth of federal loans, having been hired by the Department of Education to collect payments and provide customer service to borrowers.[140] Under the President's loan forgiveness plan, however, the MOHELA could no longer service the 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."[141]

After concluding the MOHELA had standing to sue, the Court turned to the substance of the HEROES Act and the Secretary's asserted authority. As a threshold matter, the Court held 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 that statute from the ground up."[142] Quoting *MCI Telecommunications*[143] and a 2002 Webster's Dictionary, the Court interpreted "modify" as carrying a "connotation of increment or limitation," concluding it must be read to mean "to change moderately or in minor fashion."[144] The Department of Education had done just that in the past. "Prior to the COVID-19 pandemic," the Court explained, "'modifications' issued under the Act implemented only minor changes, most of which were procedural. Examples include reducing the number of tax forms borrowers are required to file, extending time periods in which borrowers must take certain

also U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]").

[137] 143 S. Ct. 2355 (2023).

[138] *Id.* at 2375.

[139] *Id.* at 2365; MO. REV. STAT. § 173.360 (2023).

[140] *Nebraska*, 143 S. Ct. at 2365.

[141] *Id.* at 2366.

[142] *Id.* at 2368.

[143] 512 U.S. 218 (1994).

[144] *Nebraska*, 143 S. Ct. at 2368 (quoting *MCI Telecommunications*, 512 U.S. at 225).

actions, and allowing oral rather than written authorizations."[145] In assessing the Secretary's prior "modifications," the Court found the scheme at issue to be starkly different. "The Secretary's new 'modifications,'" the Court explained, "created a novel and fundamentally different loan forgiveness program."[146] Rather, the Court stated, "[t]he Secretary's plan ha[d] 'modified' the cited provisions only in the same sense that 'the French Revolution "modified" the status of the French nobility'—it has abolished them and supplanted them with a new regime entirely."[147]

The Secretary's waiver authority fared no better. The Court found no resemblance between the Secretary's prior waivers and the loan forgiveness plan at issue.[148] The Secretary in the past had "identified a particular legal requirement and waived it, making compliance no longer necessary."[149] For instance, the Secretary had previously waived "the requirement that a student provide a written request for a leave of absence"[150] and "the regulatory provisions requiring schools and guaranty agencies to attempt collection of defaulted loans for the time period in which students were affected individuals."[151] Here, however, the Secretary failed to identify any provision to be waived.[152] The Court reasoned:

> Because the Secretary cannot waive a particular provision or provisions to achieve the desired result, he is forced to take a more circuitous approach, one that avoids any need to show compliance with the statutory limitation on his authority. He simply waiv[es] the elements of the discharge and cancellation provisions that are inapplicable in this [debt cancellation] program that would limit eligibility to other contexts.[153]

But this approach, the Court explained, "cannot justify the Secretary's plan, which does far more than relax existing legal requirements. The plan specifies particular sums to be forgiven and income-based eligibility requirements,"[154] additions to the statutory and regulatory provisions which exceed the Secretary's ability to waive *pre-existing* provisions.

Thus, the Court concluded the Secretary's "comprehensive debt cancellation [could not] fairly be called a waiver—it not only nullifie[d]

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[145] *Id.* at 2369.

[146] *Id.*

[147] *Id.* (quoting *MCI Telecommunications*, 512 U.S. at 228).

[148] *Id.* at 2370.

[149] *Id.*

[150] *Id.* (citing 77 Fed. Reg. 59314).

[151] *Id.* (citing 68 Fed. Reg. 69316).

[152] *Id.*

[153] *Id.* (internal quotations and citation omitted).

[154] *Id.*

existing provisions, but augment[ed] and expand[ed] them dramatically."[155] Likewise, it could not be classified as a "mere modification, because it constitute[d] 'effectively the introduction of a whole new regime.'"[156] And it could not be a combination of the two, the Court reasoned, "because when the Secretary seeks to *add* to existing law, the fact that he has 'waived' certain provisions does not give him a free pass to avoid the limits inherent in the power to 'modify.'"[157] Central to the Court's holding were the Secretary's past invocations of the Act,[158] the vast economic consequences of the loan forgiveness plan,[159] prior congressional consideration of loan forgiveness bills,[160] and the foundational principles of American democracy.[161]

Citing *West Virginia v. EPA*,[162] the Court stated, "[t]he question here is not whether something should be done; it is who has the authority to do it."[163] A quote from the Court provides an unequivocal answer:

> [I]magine . . . asking the enacting Congress a more pertinent question: "Can the Secretary use his powers to abolish $430 billion in student loans, completely cancelling loan balances for 20 million borrowers, as a pandemic winds down to its end?" We can't believe the answer would be yes. Congress did not unanimously pass the HEROES Act with such power in mind.[164]

The obvious answer was that the Secretary lacked authority under the HEROES Act to implement loan forgiveness. "A decision of such magnitude and consequence on a matter of 'earnest and profound debate

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[155] *Id.* at 2371.

[156] *Id.* (quoting MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 234 (1994)).

[157] *Id.*

[158] *Id.* at 2372 ("The Act has been used only once before to waive or modify a provision related to debt cancellation: In 2003, the Secretary waived the requirement that borrowers seeking loan forgiveness under the Education Act's public service discharge provisions 'perform uninterrupted, otherwise qualifying service for a specified length of time (for example, one year) or for consecutive periods of time, such as 5 consecutive years.'" (quoting 68 Fed. Reg. 69317)).

[159] *Id.* at 2373 ("A budget model issued by the Wharton School of the University of Pennsylvania estimates that the program will cost taxpayers between $469 billion and $519 billion, depending on the total number of borrowers ultimately covered. That is ten times the economic impact that [the Court] found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine." (internal citations and quotations omitted)).

[160] *Id.* ("More than 80 student loan forgiveness bills and other student loan legislation were considered by Congress during its 116th session alone." (internal quotations and citation omitted)).

[161] *Id.* at 2375 ("Among Congress's most important authorities is its control of the purse . . . . It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations.").

[162] 142 S. Ct. 2587 (2022).

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

[164] *Id.* at 2374.

across the country' must 'rest with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.'"[165]

V. CONCLUSION

Applying the major questions doctrine, one is forced to conclude that the HEROES Act did not give the Secretary the requisite authority to forgive over $400 billion in student loan debt. "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself . . . ."[166] As Justice Scalia wrote in *Morrison v. Olson*:[167]

> [T]his . . . is about[] Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that a gradual concentration of the several powers in the same department . . . can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. *But this wolf comes as a wolf.*[168]

Many attempt to tether the loan forgiveness plan to a moral foundation—whether the plan is a good one. But the Constitution requires more. If allowed to stand, the policy would signal a substantial alteration of the constitutional balance of authority. Congress no doubt has the authority to implement a loan forgiveness program. But Congress has wrestled with, and rejected on multiple occasions, loan forgiveness. Allowing the Executive Branch to use the HEROES Act in the manner it proposed is inconsistent with the delicate balance of power the Constitution establishes. "None of this is to say the policy the agency seeks to pursue is unwise or should not be pursued. It is only to say that the agency seeks to resolve for itself the sort of question normally reserved for Congress. As a result, [the Court must] look for clear evidence that the people's representatives in Congress have actually afforded the agency the power it claims."[169] It is clear, in this instance, Congress had not, and the Secretary's plan amounted to nothing more than a subversion of the legislative process.

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[165] *Id.* (quoting *West Virginia*, 142 S. Ct. at 2616.

[166] Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845).

[167] 487 U.S. 654 (1988).

[168] *Id.* at 699 (Scalia, J., dissenting) (internal citation and quotations omitted) (emphasis added).

[169] *West Virginia*, 142 S. Ct. at 2622 (Gorsuch, J., concurring).