LIBERTY UNIVERSITY

Liberty University Law Review

Volume 18
Issue 2 *Spring 2024*

Article 2

March 2024

Biden v. Nebraska: Student Loan Debt Forgiveness and the Dangers of the Administrative State

Rodney D. Chrisman
Liberty University, rdchrisman@liberty.edu

RODNEY D. CHRISMAN

Biden v. Nebraska: Student Loan Debt Forgiveness and the Dangers of the Administrative State

ABSTRACT

In April of 2020, then-candidate Joe Biden promised that, if he were elected to the Presidency, he would "[i]mmediately cancel a minimum of $10,000 of student debt per person, as proposed by Senator Warren in the midst of the coronavirus crisis." Once in office, the Biden administration found that Congress would not pass the type of extensive student loan debt forgiveness that the President wanted. Accordingly, President Biden did what has become all too common in recent presidential administrations—he acted by executive fiat through an administrative agency to accomplish a policy goal that he could not get passed through Congress. The resultant Biden student loan forgiveness plan was challenged in the federal courts, eventually being decided by the United States Supreme Court as *Biden v. Nebraska*.

In *Biden v. Nebraska*, the Court ruled that the Biden administration had exceeded its statutory authority by promulgating the plan. While this particular attempt to take action by executive fiat was thereby stymied, there is no indication that President Biden and future Presidents will cease trying to enact policy in this way. Further, the administrative state—of which action by executive fiat and the usurpation of legislative power by the Executive Branch is a concomitant part—continues to grow, posing a serious threat to our constitutional order, the rule of law, and our liberties guaranteed thereby. Only by returning to the Christian view of law and policy, which undergirds and provides the foundation for our constitutional system of government, can we hope to address the threat posed by the administrative state and again "secure the Blessings of Liberty to ourselves and our Posterity."

AUTHOR

Professor of Law, Liberty University School of Law. B.B.A. 1998, Eastern Kentucky University; J.D. 2001, University of Kentucky College of Law. The author would like to thank the Editorial Board and staff of the Liberty University Law Review for their hard work above and beyond the call of duty to publish this first ever Supreme Court Issue of the Liberty University Law Review. The author would also like to thank David Thomas for his able and indispensable research assistance, without which this Article would not have been possible.

ARTICLE

BIDEN V. NEBRASKA: STUDENT LOAN DEBT FORGIVENESS AND THE DANGERS OF THE ADMINISTRATIVE STATE

Rodney D. Chrisman[†]

ABSTRACT

In April of 2020, then-candidate Joe Biden promised that, if he were elected to the Presidency, he would "[i]mmediately cancel a minimum of $10,000 of student debt per person, as proposed by Senator Warren in the midst of the coronavirus crisis." Once in office, the Biden administration found that Congress would not pass the type of extensive student loan debt forgiveness that the President wanted. Accordingly, President Biden did what has become all too common in recent presidential administrations—he acted by executive fiat through an administrative agency to accomplish a policy goal that he could not get passed through Congress. The resultant Biden student loan forgiveness plan was challenged in the federal courts, eventually being decided by the United States Supreme Court as Biden v. Nebraska.

In Biden v. Nebraska*, the Court ruled that the Biden administration had exceeded its statutory authority by promulgating the plan. While this particular attempt to take action by executive fiat was thereby stymied, there is no indication that President Biden and future Presidents will cease trying to enact policy in this way. Further, the administrative state—of which action by executive fiat and the usurpation of legislative power by the Executive Branch is a concomitant part—continues to grow, posing a serious threat to our constitutional order, the rule of law, and our liberties guaranteed thereby. Only by returning to the Christian view of law and policy, which undergirds and provides the foundation for our constitutional system of government, can we*

[†] Professor of Law, Liberty University School of Law. B.B.A. 1998, Eastern Kentucky University; J.D. 2001, University of Kentucky College of Law. The author would like to thank the Editorial Board and staff of the Liberty University Law Review for their hard work above and beyond the call of duty to publish this first ever Supreme Court Issue of the Liberty University Law Review. The author would also like to thank David Thomas for his able and indispensable research assistance, without which this Article would not have been possible.

hope to address the threat posed by the administrative state and again "secure the Blessings of Liberty to ourselves and our Posterity."

CONTENTS

I. INTRODUCTION

In April of 2020, then-candidate Joe Biden promised that if he were elected to the Presidency he would "[i]mmediately cancel a minimum of $10,000 of student debt per person, as proposed by Senator Warren in the midst of the coronavirus crisis."[1] Once elected, President Biden and his administration pursued several avenues to fulfill this promise by working through the Department of Education to provide student loan debt relief via the statutory debt relief provisions available to disabled borrowers, defrauded borrowers, borrowers whose schools had closed, and borrowers who qualify for the Public Service Loan Forgiveness program.[2] While the administration made some progress here, it was necessarily limited and did not fulfill Biden's campaign promise or satisfy advocates for student debt relief.[3]

President Biden initially appeared to either want and/or believe that he needed congressional authorization for the type of significant, widespread student loan forgiveness that would be sufficient to fulfill his campaign promise.[4] Many within the President's own party, such as Senators Elizabeth Warren and Chuck Schumer, argued that the President had nearly plenary

---

[1] Joe Biden, *Joe Biden Outlines New Steps to Ease Economic Burden on Working People*, MEDIUM (Apr. 9, 2020), https://medium.com/@JoeBiden/joe-biden-outlines-new-steps-to-ease-economic-burden-on-working-people-e3e121037322. *See also* Cory Turner, *Biden pledged to forgive $10,000 in student loan debt. Here's what he's done so far*, NPR (Dec. 7, 2021), https://www.npr.org/2021/12/07/1062070001/student-loan-forgiveness-debt-president-biden-campaign-promise.

[2] Turner, *supra* note 1; *see, e.g.*, 20 U.S.C. § 1087 (providing rules related to total and permanent disability discharge, closed school discharge, and false certification discharge of student loans); 20 U.S.C. § 1087e(m) (public service loan forgiveness); 34 C.F.R. § 682.402 (providing rules for death, disability, closed school, false certification, unpaid refunds, and bankruptcy payments); 34 C.F.R. § 685.212 (providing rules for various types of discharge); 34 C.F.R. part 674, subpart D (also providing rules for various types of discharge with a focus on public service loan forgiveness).

[3] Turner, *supra* note 1.

[4] *See, e.g.*, Zack Friedman, *Biden Drops Student Loan Forgiveness From Latest Budget*, FORBES (May 21, 2021), https://www.forbes.com/sites/zackfriedman/2021/05/21/biden-drops-student-loan-forgiveness-from-latest-budget/?sh=745da215691e; Turner, *supra* note 1.

authority to cancel student debt.[5] However, others disagreed, most prominently then Speaker of the House Nancy Pelosi who, speaking of mass student loan forgiveness, stated that "[t]he president can't do it . . . [t]hat's not even a discussion."[6] It eventually became clear that Congress would not pass the type of extensive student loan debt forgiveness that the President wanted. Accordingly, President Biden did what has become all too common in recent presidential administrations—he acted by executive fiat through an administrative agency to accomplish a policy goal that he could not get passed through Congress.[7]

---

[5] *See, e.g.*, Zack Friedman, *Student Loan Forgiveness Review Could Lead To Student Loan Cancellation, But There's One Problem*, FORBES (Apr. 5, 2021), https://www.forbes.com/sites/zackfriedman/2021/04/05/student-loan-forgiveness-review-could-lead-to-student-loan-cancellation-but-theres-one-problem/?sh=19a48c9bd3bb; Cory Turner, *Canceling Student Debt Is Easier Than It Sounds*, NPR (Jan. 14, 2020), https://www.npr.org/2020/01/14/796329598/cancelling-student-debt-is-easier-than-it-sounds; Turner, *supra* note 1 (referring to @JoeBiden, X (Mar. 22, 2020, 7:28 PM), https://twitter.com/JoeBiden/status/1241869418981920769); Annie Nova, *Pelosi says Biden doesn't have power to cancel student debt*, CNBC (July 28, 2021), https://www.cnbc.com/2021/07/28/pelosi-says-biden-doesnt-have-authority-to-cancel-student-debt-.html. The dissent in *Biden v. Nebraska* would seem to agree with this position. *See infra* Section II.A.

[6] Turner, *supra* note 1; Nova, *supra* note 5. Here is another quote from then Speaker Pelosi: "People think that the President of the United States has the power for debt forgiveness. He does not. He can postpone. He can delay. But he does not have that power. That has to be an act of Congress." Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023) (quoting Press Conference, Office of the Speaker of the House (July 28, 2021)).

The Office of General Counsel issued similarly conflicting opinions regarding the President's authority to forgive student loans:

> During the first year of the pandemic, the Department's Office of General Counsel had issued a memorandum concluding that "the Secretary does not have statutory authority to provide blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances." Memorandum from R. Rubinstein to B. DeVos, p. 8 (Jan. 12, 2021). After a change in Presidential administrations and shortly before adoption of the challenged policy, however, the Office of General Counsel "formally rescinded" its earlier legal memorandum and issued a replacement reaching the opposite conclusion. 87 Fed. Reg. 52945 (2022).

Id. at 2364.

[7] *See infra* notes 21–39 and accompanying text; *Biden*, 143 S. Ct. at 2362.

To implement its plan[8] to forgive student loans and fulfill the President's campaign promise, the Biden administration chose to use the authority granted to the Secretary of Education (the "Secretary") by the Higher Education Relief Opportunities for Students Act of 2003 (the HEROES Act)[9] to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs . . . as the Secretary deems necessary in connection with a . . . national emergency to provide the waivers or modifications authorized by paragraph (2)."[10] Paragraph (2) provides that the Secretary is authorized to make such waivers or modifications "as may be necessary to ensure that—recipients of student financial assistance . . . who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals."[11] An affected individual is defined as "an individual who . . . resides or is employed in an area that is declared a disaster area . . . in connection with a national emergency; or suffered direct economic hardship as a direct result of a . . . national emergency, as determined by the Secretary."[12]

The debt cancellation plan—promulgated pursuant to the preceding HEROES Act provision—provided for the discharge of a borrower's eligible

---

[8] *See generally* Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512 (Oct. 12, 2022); The Biden-Harris Administration's Student Debt Relief Plan Explained, FED. STUDENT AID, https://studentaid.gov/debt-relief-announcement. The Secretary, the Biden Administration, and President Biden are, to an extent, used interchangeably throughout as the sponsor or author of the student debt relief plan discussed in this Article.

[9] 20 U.S.C. § 1098aa *et seq*. The HEROES Act was passed in the years following the September 11, 2001, terrorist attacks to make permanent certain provisions provided for in an earlier act. For more information, see the Court's discussion of the Act and its history. *See Biden*, 143 S. Ct. at 2363.

[10] 20 U.S.C. § 1098bb(a)(1).

[11] *Id.* § 1098bb(a)(2)(A). There are other subparagraphs in paragraph (2), but they are not relevant to this Article.

[12] *Id.* § 1098ee(2)(C)–(D). The other parts of the definition of an affected individual are not relevant to this Article.

loans[13] up to a maximum of "$10,000 for borrowers who did not receive a Pell Grant and had an [Adjusted Gross Income (AGI)] on a Federal tax return below $125,000 if filed as an individual or below $250,000 if filed as a joint return" and "$20,000 for borrowers who received a Pell Grant" and met the income requirements.[14] This discharge was predicated upon there being a national emergency as required by the HEROES Act, in this instance the COVID-19 pandemic and the related declared national emergency.[15] Since the COVID-19 declared national emergency covered the entirety of the United States, the Secretary concluded that "the 'affected individuals' for purposes of the waivers and modifications described in this document include any person with a Federal student loan under title IV of the [Higher Education Act (HEA)]."[16] As to the HEROES Act requirements that any waivers or modifications be made "to ensure that . . . affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals,"[17] the Secretary concludes "that the financial harm caused by the COVID-19 pandemic has made the waivers and modifications described in this document necessary to ensure that affected individuals are not placed in a worse position financially

---

[13] Eligible loans include "Federal Direct Loans and FFEL Loans held by the Department or subject to collection by a guaranty agency and Federal Perkin Loans held by the Department (covered loans)." Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512, 61513 (Oct. 12, 2022).

[14] Federal Student Aid Programs, 87 Fed. Reg. at 61514.

[15] "On March 13, 2020, by Proclamation 9994, 85 FR 15337, the President [(Donald Trump)] declared a national emergency concerning the COVID-19 pandemic, which was extended on February 24, 2021 (86 FR 11599), and February 18, 2022 (87 FR 10289) [both by President Biden]." *Id.* at 61513. On September 18, 2022, President Biden declared on *60 Minutes* that "[t]he pandemic is over." Scott Pelly, *President Joe Biden: The 2022 60 Minutes Interview*, 60 Minutes, CBS NEWS (Sept. 18, 2022), https://www.cbsnews.com/news/president-joe-biden-60-minutes-interview-transcript-2022-09-18/. On April 10, 2023, the national emergency relative to COVID-19 was finally terminated by a joint resolution of Congress signed by President Biden. H.J.R. Res. 7, 118th Cong. (2023) (enacted).

[16] Federal Student Aid Programs, 87 Fed. Reg. at 61513.

[17] 20 U.S.C. § 1098bb(a)(2)(A). There are other subparagraphs in paragraph (2), but they are not relevant to this Article.

with respect to their student loans because of that harm."[18] Finally, "[p]ursuant to the HEROES Act, . . . the Secretary modifies the provisions of" the relevant statutes and regulations that provide for loan forgiveness in specific situations to provide for the blanket debt forgiveness stated above.[19] The plan later refers to this as a "waiver."[20] The promulgation of this plan set in motion a legal battle that eventually culminated in the case discussed in this Article: *Biden v. Nebraska*.

If *Biden v. Nebraska*, and the student debt forgiveness plan that gave rise to it, were merely a "one-off," then perhaps it would not be of such importance. However, President Biden is not the first President to attempt to achieve his policy goals and/or fulfill campaign promises via executive fiat when Congress has proved uncooperative. In fact, it has become an all-too-common pattern in recent years.

In June 2012, President Barack Obama announced the Deferred Action for Childhood Arrivals (DACA) program following the failure of the DREAM Act in Congress.[21] Relatedly, on November 20, 2014, President Obama, frustrated by continued congressional gridlock surrounding the Border Security, Economic Opportunity, and Immigration Modernization Act, announced, "until that happens [i.e., congressional action on these issues],

---

[18] Federal Student Aid Programs, 87 Fed. Reg. at 61513. The Secretary does not provide any additional support for this determination other than the quoted text that indicates the financial harm caused by COVID-19 would result in the affected individuals being in a worse position financially. This leaves several questions unanswered. For example, it would be fair to ask "worse than what?" Worse implies a comparison. Does this mean worse than others who did not receive financial assistance? Or perhaps just worse than they would have been otherwise? Given that the Supreme Court focused on and resolved the case based upon the words waive or modify, it did not address these questions and therefore they remain unanswered. However, in a footnote, the Supreme Court provided a strong indication that the plan would likely not fare any better on these issues. The Court stated that "[w]hile our decision does not rest upon that reasoning, we note that the Secretary faces a daunting task in showing that cancellation of debt principal is 'necessary to ensure' that borrowers are not placed in 'worse position[s] financially in relation to' their loans." Biden v. Nebraska, 143 S. Ct. 2355, 2371 n.6 (2023).

[19] Federal Student Aid Programs, 87 Fed. Reg. at 61514.

[20] *Id.*

[21] *See* Barack Obama, President of the United States, Remarks by the President on Immigration (June 15, 2012) (transcript available at https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration).

there are actions I have the legal authority to take as President—the same kinds of actions taken by Democratic and Republican presidents before me—that will help make our immigration system more fair and more just."[22] Consequently, the Secretary of Homeland Security published a five-page memo to the United States Citizens and Immigration Services intended to supplement and amend DACA.[23] The memo expanded DACA and, with the expansion, added Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).[24] The expansion of DACA through this memo relaxed the age restrictions, extended work authorization periods from two to three years, and revised the required entry date to January 1, 2010.[25]

Texas and twenty-five other states filed suit arguing that DAPA's creation violated the Administrative Procedure Act and the Take Care Clause of the Constitution.[26] The District Court, in getting to the heart of the issue, stated that "[t]he ultimate question before the Court is: Do the laws of the United States, including the Constitution, give the Secretary of Homeland Security the power to take the action at issue in this case?"[27] In other words, can the President side-step Congress through the Secretary of Homeland Security's action and reshape U.S. immigration policy by executive action? This is the exact same issue presented by the Secretary of Education's loan forgiveness plan: can the President side-step Congress and via executive fiat enact sweeping student loan forgiveness despite congressional inaction? This

---

[22] Barack Obama, President of the United States, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014) (transcript available at https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration).

[23] Jeh Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents*, U.S. DEP'T OF HOMELAND SEC. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf.

[24] *See id.*

[25] *Id.* at 3–4.

[26] Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 579 U.S. 547 (2016).

[27] *Id.* at 606. This is the central question in *Biden v. Nebraska* as well—with regard to student loan debt relief, who has the power to act? *See infra* Section II.

District Court ruled for the states and granted a preliminary injunction that was ultimately affirmed by the Fifth Circuit Court of Appeals.[28] The Obama Administration appealed the Fifth Circuit's decision to the Supreme Court, which split four-four following the death of Justice Scalia, returning a one-sentence decision affirming the Fifth Circuit.[29] While the Court did not address the executive branch's authority to act unilaterally where Congress has not, the actions taken by the Obama Administration demonstrate the trend towards acting by executive fiat when the President is unable to persuade Congress to act.

This type of executive action in answer to congressional inaction is not limited to one party nor to just one side of the political spectrum. In the wake of a partial government shutdown lasting thirty-five days, President Donald Trump signed a spending bill that allocated $1.375 billion, a fraction of the $5.7 billion the President wanted, to fund the continued building of a wall along the United States' southern border with Mexico.[30] President Trump had made building a border wall a central issue in his campaign for the Presidency.[31] In the face of this congressional inaction, President Trump declared that "the Federal Government has failed to discharge this basic sovereign responsibility."[32] He therefore formally declared a national emergency and, on January 25, 2017, signed an executive order allocating funding for the border wall.[33] Specifically, the executive order provided for the identification and allocation of all available sources of federal funding for

---

[28] Texas v. United States, 809 F.3d 134 (5th Cir. 2015) *aff'd*, 579 U.S. 547 (2016).

[29] Texas v. United States, 579 U.S. 547 (2016).

[30] Jessica Taylor & Brian Naylor, *As Trump Declares National Emergency To Fund Border Wall, Democrats Promise A Fight*, NPR (Feb. 15, 2019, 5:00 AM), https://www.npr.org/2019/02/15/695012728/trump-expected-to-declare-national-emergency-to-help-fund-southern-border-wall.

[31] *See, e.g.*, David Jackson, *Trump Promises to Build Border Wall in His First Term*, USA TODAY (Apr. 25, 2017, 4:24 PM), https://www.usatoday.com/story/news/politics/2017/04/25/donald-trump-wall-canada/100894606/; Nolan D. McCaskill, *Trump Promises Wall and Massive Deportation Program*, POLITICO (Aug. 31, 2016, 10:08 PM), https://www.politico.com/story/2016/08/donald-trump-immigration-address-arizona-227612.

[32] Border Security and Immigration Enforcement Improvements (Executive Order 13767), 82 Fed. Reg. 8793 (Jan. 25, 2017).

[33] *Id.*

the building of a wall on the U.S. southern border and the addition of 5,000 U.S. Customs and Border Patrol agents.[34] President Trump was astoundingly transparent about the nature of his actions, stating that "I didn't need to do this [referring to the emergency declaration] . . . . I just want to get it done faster, that's all."[35]

Then House Speaker Nancy Pelosi and then Senate Minority Leader Chuck Schumer issued a joint statement condemning President Trump's actions as exceeding the role of the executive and usurping the power of Congress, which stated "[t]he President's actions clearly violate the Congress's exclusive power of the purse, which our Founders enshrined in the Constitution. The Congress will defend our constitutional authorities in the Congress, in the Courts, and in the public, using every remedy available."[36] Despite this statement, President Trump's actions here were never challenged in the courts.[37] That notwithstanding, President Trump's executive order regarding the border wall is another example of Presidents using executive fiat to fulfill a campaign promise in the face of congressional inaction, only in this instance it is an action taken by a Republican as opposed to a Democratic President and coming from the political right as opposed to the political left.

As noted, these two examples (and many others could be provided[38]), coupled with President Biden's actions regarding student debt forgiveness,

---

[34] *Id.* at 8793–95.

[35] Taylor & Naylor, *supra* note 30. This statement was made "in response to a reporter's question about the emergency declaration." *Id.*

[36] Taylor & Naylor, *supra* note 30. California Governor Gavin Newsom and California Attorney General Xavier Becerra also promised a lawsuit challenging the President's action. *Id.*

[37] President Trump's executive order was eventually revoked by President Biden in his Executive Order 14010. Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 Fed. Reg. 8267, 8270 (Feb. 2, 2021).

[38] *See, e.g.*, Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (addressing an administrative action imposing a nationwide moratorium on evictions during the COVID-19 pandemic); West Virginia v. EPA, 142 S. Ct. 420 (2021) (dealing with administrative action to limit carbon dioxide emissions to combat climate change); Sackett v.

demonstrate that Presidents from both parties and from across the political spectrum are becoming increasingly comfortable with acting in this manner to accomplish their goals. This is a disturbing trend that threatens our constitutional order, the rule of law, and our liberties. It is part of a broader and more ominous threat to our constitutional order and our liberties—the rise and exponential growth of the administrative state.[39] Accordingly, Americans should be aware of the issues raised by the Biden student loan forgiveness plan and the resultant case *Biden v. Nebraska*. This Article hopes to make some contribution to that awareness by discussing the opinion itself in some detail in Section II[40] and providing some thoughts on the issues raised therein from a distinctly Christian perspective in fidelity to the Holy Scriptures in Section III.[41]

II. *BIDEN V. NEBRASKA*

President Biden's use of executive power to attempt to fulfill his campaign promise to provide sweeping student loan forgiveness was destined to result in legal challenges in the federal courts. Numerous cases were filed challenging the plan.[42] Two cases ultimately reached the United States Supreme Court: *Biden v. Nebraska* (a case brought by six states challenging the debt forgiveness plan as exceeding the Secretary's statutory authority under the HEROES Act) and *Department of Education v. Brown*[43] (a case brought by two student loan borrowers who failed to receive the maximum

---

EPA, 143 S. Ct. 1322 (2023) (involving an expansive definition of waters of the United States developed by administrative agencies).

[39] *See infra* Section III.

[40] *See infra* Section II.

[41] *See infra* Section III . This goal aligns with the mission of Liberty University School of Law, which states that the Law School "exists to equip future leaders in law with a superior legal education in fidelity to the Christian faith expressed through the Holy Scriptures." *About Liberty School of Law*, LIBERTY UNIV. SCH. OF L. https://www.liberty.edu/law/about/ (last visited Oct. 15, 2023).

[42] *See, e.g.*, Natalie Schwartz, *A Running List of Lawsuits Against Biden's Student Loan Forgiveness Plan*, HIGHER ED DIVE, https://www.highereddive.com/news/a-running-list-of-lawsuits-against-bidens-student-loan-forgiveness-plan/634707/ (last updated Mar. 2, 2023).

[43] Dep't of Educ. v. Brown, 143 S. Ct. 2343 (2023).

relief under the plan).[44] A unanimous Supreme Court ruled that the plaintiffs in *Department of Education v. Brown* lacked standing to challenge the plan and therefore remanded the case with instructions to dismiss.[45] The six state plaintiffs, on the other hand, fared better as a majority in *Biden v. Nebraska* found Missouri had standing to challenge the plan through its public corporation, the Missouri Higher Education Loan Authority (MOHELA).[46] Having found standing for at least one plaintiff,[47] the majority considered the merits of the case and ultimately concluded that the plan exceeded the authority granted to the Secretary by the HEROES Act.[48] The following provides a discussion of the standing issue,[49] followed by a discussion of the merits of the case,[50] and concludes by considering how the so-called major questions doctrine interrelates with the case.[51]

A. The Standing Issue

The majority opinion began by describing the federal student loan programs, the specific statutory provisions relied upon by the Secretary for the plan, the steps taken by the Secretary in response to COVID-19 pandemic

---

[44] This Article focuses on the Court's opinion in *Biden v. Nebraska* and therefore does not address the "unusual" and "strange" standing arguments made by the plaintiffs in *Dep't of Educ. v. Brown*. *Brown*, 143 S. Ct. at 2352. Further, it is beyond the scope of this Article to address the plaintiffs' arguments on the merits in *Dep't of Educ. v. Brown*. The Supreme Court did not reach these arguments either because the Court concluded that they lacked standing, and, therefore, the plaintiffs' "case beg[an] and end[ed] with standing." *Brown*, 143 S. Ct. at 2343 (quoting Carney v. Adams, 141 S. Ct. 493 (2020)). In *Biden*, the plaintiffs focused on arguing that the Secretary's actions exceeded the authority granted by the HEROES Act. By contrast, the plaintiffs in *Brown* argued that the Secretary failed to follow the proper procedures for rule-making with regard to the plan. These procedural arguments could be important in later cases, assuming the Biden administration moves on from the HEROES Act to attempt to provide broad-based student debt relief pursuant to the Higher Education Act.

[45] *Brown*, 143 S. Ct. at 2355.

[46] Biden v. Nebraska, 143 S. Ct. 2355, 2365–68 (2023). Chief Justice Roberts wrote the majority opinion in which Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined.

[47] "If at least one plaintiff has standing, the suit may proceed." *Id.* at 2365 (quoting Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 52 n.2 (2006)).

[48] *Id.* at 2372–76.

[49] *See infra* Section II.A.

[50] *See infra* Section II.B.

[51] *See infra* Section II.C.

regarding student loans, the Biden plan for student loan forgiveness that gave rise to the case, and the procedural posture of the case.[52] The Court then turned to the issue of standing. Standing requires that a plaintiff have a "'personal stake' in the case."[53] To satisfy this requirement, "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."[54] Given the fact that this involved the conferring of a government benefit, many commentators, myself included, felt that standing would be the most challenging issue for any potential plaintiffs to overcome because it is hard to argue that someone is specifically harmed by having a benefit conferred upon them or someone else.[55]

However, the Court ruled that Missouri had standing through its public corporation MOHELA, allowing the Court to proceed and reach the merits of the case.[56] MOHELA[57] is a nonprofit corporation that was formed by Missouri "to participate in the student loan market."[58] MOHELA "owns over $1 billion in" Federal Family Education Loans, and "services nearly $150 billion worth of federal [student] loans [on behalf of] the Department of

---

[52] *Biden*, 143 S. Ct. at 2362–65.

[53] *Id.* at 2365 (quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021)).

[54] *Id.* (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

[55] Liberty University, Just Liberty: Rodney Chrisman on Student Loan Forgiveness Plan (Part 2), YouTube (Mar. 23, 2023), https://www.youtube.com/watch?v=s3TPaOGFg9Q; *see, e.g.*, Garrison v. U.S. Dep't of Educ., 636 F. Supp. 3d 935 (S.D. Ind. 2022) (rejecting the theory of standing of taxpayers in Indiana who claimed to be harmed by the student loan forgiveness plan because it resulted in taxable income on their Indiana tax returns); *see also* Jeffrey C. Tuomala, The Casebook Companion pt. 2, ch. 6, at 16–20 (Aug. 20, 2020) (unpublished manuscript) (on file with author).

[56] *Biden*, 143 S. Ct. at 2365 (quoting Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 52 n.2 (2006)).

[57] MOHELA serves as the loan servicer for all claims for forgiveness through the Public Service Loan Forgiveness program. *See What is Public Service Loan Forgiveness?*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/ask-cfpb/what-is-public-service-loan-forgiveness-en-641/ (last updated Nov. 17, 2022).

[58] *Biden*, 143 S. Ct. at 2365 (citing MO. REV. STAT. § 173.360).

Education."[59] MOHELA generated "$88.9 million in revenue [in 2022]" from administrative fees for servicing approximately "five million federal [student loan] accounts."[60] Pursuant to the Biden student loan forgiveness plan, as noted previously, "roughly half of all federal borrowers would have their loans completely discharged."[61] Accordingly, MOHELA could no longer generate revenue by servicing such loans, costing MOHELA approximately "$44 million a year."[62] The Court concluded that "[t]his financial harm is an injury in fact directly traceable to the Secretary's plan, as both the Government and the dissent concede."[63]

Further, the Court found that "[t]he plan's harm to MOHELA is also a harm to Missouri [because] MOHELA is a 'public instrumentality' of the State."[64]

> [MOHELA] was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State. The Secretary's plan will cut MOHELA's revenues, impairing its efforts to aid Missouri college students. This acknowledged harm to MOHELA in the performance of its public function is necessarily a direct injury to Missouri itself.[65]

---

[59] *Id.* at 2365–66 (citing MOHELA, FY 2022 Financial Statement 4, 8–9 (Financial Statement)).

[60] *Id.* at 2366.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] Biden v. Nebraska, 143 S. Ct. 2355, 2366 (2023) (citing MO. REV. STAT. § 173.360).

[65] *Id.* The Court offered a number of cases as support for its analysis with regard to standing including *Arkansas v. Texas*, 346 U.S. 368 (1953) (finding that a harm to the University of Arkansas was a harm to the state as well), *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 397 (1995) (finding Amtrak was "subject to the First Amendment because it functioned as an instrumentality of the Federal Government"), and *Department of Transportation v. Association of American Railroads*, 575 U.S. 43 (2015) (finding Amtrak was a governmental entity capable of exercising regulatory power). *Id.* at 2366–67.

Having found this direct injury to Missouri and the Article III requirement of standing to have been satisfied thereby, the Court turned to the merits of the case.[66]

Justice Kagan penned a strident and scathing dissent, in which Justices Sotomayor and Jackson joined, vehemently disagreeing with the Court's ruling on standing and on the merits.[67] The dissent began by declaring that "[i]n every respect, the Court today exceeds its proper, limited role in our Nation's governance."[68] Justice Kagan argued that the six state plaintiffs were "classic ideological plaintiffs [who] th[ought] the plan [was] a very bad idea, but [who] [we]re no worse off because" of it.[69] She chided the majority for "exceed[ing] the permissible boundaries of the judicial role" by agreeing to hear the arguments of the six state plaintiffs who "oppose[d] the Secretary's loan cancellation plan on varied policy and legal grounds" but whose "objections [we]re just general grievances [that] d[id] not show the particularized injury needed to bring suit."[70] In reaching the merits of the case, Justice Kagan said, "[t]he Court act[ed] as though it [wa]s an arbiter of political and policy disputes, rather than of cases and controversies."[71]

Justice Kagan clearly believed that the Court was stretching to find standing here because it wanted to reach the merits of the case for political and policy, as opposed to legal, reasons. Of the arguments for standing offered by the six state plaintiffs, she seemed to agree that Missouri's argument regarding standing via MOHELA is the strongest.[72] However, she was still not impressed, stating that "[t]he most that can be said of the theory . . . is that it is less risible than the others."[73] Justice Kagan apparently found this theory of standing so risible because, in her opinion, MOHELA

---

[66] *Id.* at 2368.

[67] *See id.* at 2384–400 (Kagan, J., dissenting).

[68] *Id.* at 2384.

[69] *Id.* at 2385.

[70] Biden v. Nebraska, 143 S. Ct. 2355, 2386 (2023) (Kagan, J., dissenting). Justice Kagan says that "everyone agrees" with this. *Id.* Of course, it would appear that, by their joining in the majority opinion, at least six Justices on the Supreme Court manifestly do not agree.

[71] *Id.* at 2385.

[72] *Id* at 2386.

[73] *Id.*

was clearly an entity separate and apart from Missouri that can sue in its own name and therefore was, in actuality, the proper plaintiff.[74] She affirmed that "[i]f MOHELA had brought this suit, we would have had to resolve it, [but, i]n adjudicating Missouri's claim, the majority reache[d] out to decide a matter it ha[d] no business deciding."[75]

The majority's opinion and analysis of the standing issue is certainly not beyond criticism. As is often the case, reasonable minds can differ greatly on the issue of standing. However, it is stronger and better supported by the cases cited by the majority than Justice Kagan was willing to grant. While there are differences between the University of Arkansas and Amtrak on the one hand and MOHELA on the other, there is little doubt that these governmental entities are very closely connected with the governments that established them such that it is hardly risible to say that an injury to the governmental entity can be understood, for the purposes of standing, as an injury to the creating government itself. It is probably fair to conclude that the dissent is motivated to reject standing here just as much by its likely agreement with the student loan forgiveness plan as the majority is to find standing here by its likely disagreement with the plan and resultant desire to reach the merits of the case.

It is no secret that the Supreme Court is ideologically divided. While the personal political views of the Justices are not necessarily known, based upon their locations on the ideological spectrum it is safe to conclude that the six Justices in the majority would likely oppose the student loan forgiveness plan while the three Justices in the dissent would likely support the plan. Therefore, human nature being what it is, it is also likely that the majority would be more favorably disposed to find standing and the dissent less likely to do so. Not even United States Supreme Court Justices are free from the effects of the Fall.[76] The Fall's effects on mankind's reasoning abilities are "known as the 'noetic' effect of sin," which "is one aspect of the doctrine of 'total depravity,' which declares that the Fall reaches deep down into a man's

---

[74] *See id.* at 2386–91. Justice Kagan makes much of the fact that MOHELA apparently does not approve of or agree with the suit brought by Missouri's Attorney General and in fact wants to get "[a]s far away from this suit as it can manage." *Id.* at 2387.

[75] *Id.* at 2388.

[76] THE WESTMINSTER CONFESSION OF FAITH ch. VI (Logos Rsch. Sys, Inc. ed. 1996).

very being, even to his mind, his reasoning processes."[77] This concept is perhaps most clearly illustrated in the Bible in *Romans* 1, where Paul states, "that which is known about God is evident" in the world, including "His invisible attributes, His eternal power and divine nature."[78] These things "have been clearly seen, being understood through what has been made."[79] However, rather than recognizing these "clearly seen" and "evident" truths, human beings "suppress the truth in unrighteousness . . . so that they are without excuse."[80] Accordingly, even brilliant jurists, such as members of the United States Supreme Court, are given to err in their reasoning and be influenced by their presuppositions and precommitments, regardless of whether they be rightly or wrongly held.

This seems to be revealed by how Justice Kagan attacked the majority opinion. Rather than citing cases holding contrary to the ones cited by the majority,[81] she instead looked past the theories of standing forwarded by the six state plaintiffs to find fault with their true motives for bringing the suit. Regarding this, Justice Kagan wrote:

> Is there a person in America who thinks Missouri is here because it is worried about MOHELA's loss of loan-servicing fees? I would like to meet him. Missouri is here because it thinks the Secretary's loan cancellation plan makes for terrible, inequitable, wasteful policy. And so too for Arkansas, Iowa, Kansas, Nebraska, and South Carolina. And maybe all of them are right. But that question is not what this Court sits to decide. That question is "more appropriately addressed in the representative branches," and by the broader public.[82]

---

[77] GREG L. BAHNSEN, PUSHING THE ANTITHESIS: THE APOLOGETIC METHODOLOGY OF GREG L. BAHNSEN 28 (Gary DeMar ed. 2007).

[78] *Romans* 1:19–20 (New Am. Standard 1995).

[79] *Romans* 1:20 (New Am. Standard 1995).

[80] *Romans* 1:18–20 (New Am. Standard 1995).

[81] Biden v. Nebraska, 143 S. Ct. 2355, 2368 n.3 (2023) ("The dissent, for all its attempts to cabin these precedents [used by the majority], cites no precedents of its own addressing a State's standing to sue for a harm to its instrumentality.").

[82] *Id.* at 2388 (Kagan, J., dissenting) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

Justice Kagan is no doubt correct that purely political questions should be left to the political branches.[83] However, the accuracy of that general statement does not decide the issue of whether there is standing in any particular case. Further, she is likely correct regarding the true motives of the six state plaintiffs. Missouri is almost certainly not suing primarily to prevent the loss of approximately $88 million of MOHELA's revenue. Rather, the primary motivation for the suit is the disagreement noted by Justice Kagan regarding the wisdom of the plan,[84] and, beyond that, a disagreement also regarding whether the plan comports with the HEROES Act and the Constitution.

However, principally speaking, the true heart motives of the plaintiffs do not appear to be a part of the test for standing under Article III. The Supreme Court has interpreted Article III of the Constitution, which empowers the federal courts to resolve "cases" and "controversies," to require that a plaintiff have standing to bring a suit before a federal court may reach the merits of the case.[85] To have standing, a plaintiff must satisfy three elements: "injury-in-fact, the causal relationship between the illegal conduct and injury, and the likelihood a court can remedy the injury."[86] While the Court focused on injury-in-fact in this case,[87] none of these elements involve examining the true heart motives of the plaintiffs. Rather, they involve examining the facts of the case to determine whether these elements that embody the "irreducible constitutional minimum of standing" have been satisfied.[88]

In the present case, there appear to be sound reasons for concluding that Missouri has suffered an injury-in-fact due to the injury of its instrumentality MOHELA. This is, admittedly, the most controversial part of the Court's analysis as reasonable minds could differ on whether the injury suffered by MOHELA should rightly be viewed as an injury to Missouri. Still, Justice Kagan's assertion notwithstanding, it is hard to say that the Court's analysis here is "risible." Beyond that, the injury in this case was clearly caused by

---

[83] *See* Jeffrey C. Tuomala, The Casebook Companion pt. 2, ch. 2, at 14–20 (Aug. 20, 2020) (unpublished manuscript) (on file with author).

[84] *Biden*, 143 S. Ct. at 2388 (Kagan, J., dissenting).

[85] Tuomala, supra note 55, at 2.

[86] *Id.* at 7.

[87] *Biden*, 143 S. Ct. at 2365–68.

[88] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

what the plaintiffs assert to be the illegal conduct of the Secretary.[89] There is absolutely no question that the plan to forgive student debt caused the injury in question. And, finally, there is every likelihood that the Court can remedy the injury by declaring the Secretary to have exceeded his authority in adopting the plan. The motives of the plaintiffs do not impact this analysis.

As noted by Dean Tuomala, the Supreme Court does not limit itself to these "irreducible constitutional minimum[s]" in standing cases but also examines prudential or policy considerations.[90] While it is debatable whether prudential or policy considerations should be used in the area of standing, it is undeniable that they can be used to have far-reaching effects, including the types of effects that Justice Kagan seems concerned with in her dissent. As Dean Tuomala noted in discussing the use of prudential and policy considerations in the standing analysis, going beyond the constitutional minimums can lead to the Court using standing to reach a conclusion that comports with its policy views without reaching the merits of the case.[91]

> For example, an executive order to forgive student loans is arguably unconstitutional, but the Court may avoid the constitutional question by ruling that taxpayers have no standing to challenge it. On the other hand, if the Court wants to rule on the constitutionality of an appropriation for religious schools the Court may find standing and rule that the appropriation violates the Establishment Clause.[92]

It seems that Justice Kagan would prefer the Court have pursued the first part of Dean Tuomala's example by avoiding the merits of the student loan plan in this case by holding that Missouri, as opposed to the taxpayers in Dean Tuomala's example, has no standing to challenge the plan. She takes umbrage with the majority for doing the opposite.

Recognizing this issue with regard to standing, as the administrative state continues to expand and Presidents grow more willing to act unilaterally through the administrative state to accomplish their policy goals and fulfill

---

89 *See Biden*, 143 S. Ct. at 2365.

90 Tuomala, *supra* note 55, at 7.

91 *Id.* at 6.

92 *Id.* at 7.

their campaign promises, it is hard to see how unconstitutional programs and plans can be thwarted if the courts are unwilling to step in due to policy considerations. As demonstrated herein,[93] both political parties have demonstrated a willingness to act via executive fiat in this way. Further, Congress seems unwilling to check this misuse of executive power and even appears complicit in its use. In addition, once nearly half a trillion dollars of student debt are forgiven, it will be too late to remedy that wrong through the political process. A President or various members of Congress could be voted out of office, but the irreparable harm would already be done. Consequently, it is incumbent upon the federal courts that they use their inherent judicial power to check these abuses, which is exactly what the Court did by finding standing and proceeding to reach the merits in this case.

B. The Statutory Interpretation Issue

Having found that at least one of the six state plaintiffs had standing, the Court turned to the merits of the case, beginning with an analysis of the relevant statutory language. The Court commenced its analysis by recognizing that the HEROES Act authorizes the Secretary to "waive or modify" provisions applicable to federal student loans "as the Secretary deems necessary in connection with a . . . national emergency."[94] However, it notes that this "power has limits."[95] The Court then proceeded to analyze the statutory grant of authority by focusing on the words "modify" and "waive."[96]

To begin its analysis of the statutory grant of authority, the Court considered the definition of the term "modify" by looking to *MCI Telecommunications v. American Telephone & Telegraph Co.*, *Webster's Third International Dictionary*, and *Black's Law Dictionary*.[97] Modify "carries 'a connotation of increment or limitation' and must be read to mean 'to change moderately or in a minor fashion.'"[98] It "is ordinarily used [in a

---

93 *See infra* Section III.

94 *Biden*, 143 S. Ct. at 1068 (quoting 20 U.S.C. § 1098b(a)(1)).

95 *Id.* at 1079.

96 *Id.* at 2368–71.

97 *Id.* at 2368–69.

98 *Id.* at 2368 (quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 225 (1994)).

context such as this to mean] 'to make minor changes in the form or structure of [or] alter without transforming [or] '[t]o make somewhat different; to make small changes to.'"[99] It "does not authorize 'basic and fundamental changes in the scheme' designed by Congress."[100] Therefore, the Court concluded that "[t]he authority to 'modify' statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them."[101]

After reaching this conclusion, the majority turned to an analysis of whether the Secretary's plan can rightly be understood as "modifying" the federal student loans program. The plan states that, "[p]ursuant to the HEROES Act, . . . the Secretary modifies the provisions of" the relevant statutes and regulations that provide for loan forgiveness in specific situations.[102] These "narrowly prescribed" situations include "circumstances limited to a borrower's death, disability, or bankruptcy; a school's false certification of a borrower or failure to refund loan proceeds as required by law; and a borrower's inability to complete an educational program due to closure of the school."[103] In addition, they include "the Government's public service loan forgiveness program and provided for discharges when schools commit malfeasance."[104] The Court found that the "new 'modifications' of these provisions were not 'moderate' or 'minor' [but rather] they created a novel and fundamentally different loan forgiveness program."[105] Continuing, the Court stated that "[f]rom a few narrowly delineated situations specified by Congress, the Secretary has expanded loan forgiveness to nearly every

---

[99] *Id.* at 2368–69 (first quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1952 (2002); and then quoting BLACK'S LAW DICTIONARY 1203 (11th ed. 2019)).

[100] Biden v. Nebraska, 143 S. Ct. 2355, 2368 (2023) (quoting *MCI*, 512 U.S. at 225).

[101] *Id.* at 2369. The Court notes that previous uses of the power granted by the HEROES Act "illustrate the point" in that they are "only minor changes, most of which are procedural." *Id.*

[102] Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512, 61514 (Oct. 12, 2022) (purporting to modify 20 U.S.C. §§ 1087 and 1087dd(g), 34 C.F.R. part 674, subpart D, and 34 C.F.R. §§ 682.402 and 685.212).

[103] *Biden*, 143 S. Ct. at 2369. (citing 20 U.S.C. §§ 1087 and 1087dd(g)).

[104] *Id.* (citing 34 C.F.R. part 674, subpart D; *id.* §§ 682.402, 685.212).

[105] *Id.*

borrower in the country,"[106] claiming what "is in essence . . . unfettered discretion to cancel student loans."[107] Chief Justice John Roberts, writing for the majority and quoting the late Justice Scalia, quipped that this is a modification of the student loan forgiveness "provisions only in the sense that 'the French Revolution "modified" the status of the French nobility'—it has abolished them and supplanted them with a new regime entirely."[108]

Having concluded that "[i]t is 'highly unlikely that Congress' authorized such a sweeping loan cancellation program 'through such a subtle device as permission to "modify,"'"[109] Chief Justice Roberts turned to a consideration of the statutory grant of authority contained in the word "waive."[110] In the notice published in the Federal Register, "the Secretary does not identify any provision that he is actually waiving."[111] Perhaps this is not all that surprising given that

> [n]o specific provision of the [Higher] Education Act [of 1965, which, among other things, established the federal student loan programs at issues in this case,] establishes an obligation on the part of student borrowers to pay back the Government. So as 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 a borrower.[112]

Since loan balances or the obligation to repay cannot be waived, the Secretary was forced to attempt to use the waiver power in a different way—to bolster the argument under the power to modify.[113] The Secretary argued that he began by "waiving whatever 'inapplicable' law would bar his debt

---

106 *Id.*

107 *Id.*

108 *Id.* (quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 228 (1994)).

109 Biden v. Nebraska, 143 S. Ct. 2355, 2369–70 (2023) (quoting *MCI*, 512 U.S. at 231).

110 *Id.* at 2370.

111 *Id.* at 2370, 2370 n.4.

112 *Id.* at 2370 (quoting Transcript of Oral Argument at 9, 64, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No 22-506)).

113 *Id.* (noting that "the Secretary acknowledges that waiver alone is not enough").

cancellation plan, [and] he then 'modif[ied] the provisions to bring [them] in line with this program.'"[114] In response to this, the Court stated that "in the end, the Secretary's plan relies on modifications all the way down. And, as we have explained, the word 'modify' simply cannot bear that load."[115]

The majority then turned to the argument put forth by the Secretary and adopted by the dissent "that the power to 'waive or modify' is greater than the sum of its parts."[116] In other words, viewing these two terms together, the argument is that the Secretary would have greater powers than he would under either of these two words alone. However, the majority rejected this "sleight of hand" by noting that "[t]he Secretary has not truly waived or modified" the provisions providing for student loan forgiveness at all" but rather "[w]hat the Secretary has actually done is draft a new section of the Education Act from scratch."[117] The Secretary and the dissent also argued that 20 U.S.C. § 1098bb(b)(2), which provides abbreviated reporting requirements for actions taken pursuant to the HEREOS Act, grants additional authority to the Secretary beyond that granted by "waive and modify."[118] The Court rejected this argument, stating that a "humdrum reporting requirement" does not "grant[] the Secretary authority to draft new substantive statutory provisions at will . . . ."[119]

In concluding that section of the opinion dealing with its interpretation of the statute, the Court helpfully summarized its analysis of the statutory text as follows:

> The Secretary's comprehensive debt cancellation plan cannot fairly be called a waiver—it not only nullifies existing provisions, but augments and expands them dramatically. It cannot be mere modification, because it constitutes "effectively the introduction of a whole new regime." And it cannot be some combination of the two, because when the Secretary seeks to add to existing law, the fact that he has

---

114 *Id.* (quoting Transcript of Oral Argument at 65).

115 Biden v. Nebraska, 143 S. Ct. 2355, 2370 (2023).

116 *Id.*

117 *Id.* at 2370–71.

118 *Id.* at 2371; *id.* at 2392 (Kagan, J., dissenting).

119 *Id.* at 2371.

> "waived" certain provisions does not give him a free pass to avoid the limits inherent in the power to "modify." However broad the meaning of "waive or modify," that language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here.[120]

Accordingly, based upon an analysis of the statutory language alone, the Court concludes that the Biden student loan forgiveness plan exceeds the power of the Secretary granted by the HEROES Act and, therefore, is invalid.

The dissent views the majority's statutory interpretation analysis as seriously deficient. According to Justice Kagan, the majority's "stilted textual analysis . . . picks the statute apart piece by piece in an attempt to escape the meaning of the whole."[121] Taken as a whole (including both the grant of the power to waive or modify and the reporting requirements), the dissent argues that the HEROES Act provides an "expansive delegation"[122] that provides "capacious" authority.[123] Thus, the dissent concludes that "[t]he Secretary may amend, all the way up to discarding, those provisions [relating to student loan cancellation] and fill the holes that action creates with new terms designed to counteract an emergency's effects on borrows."[124]

While, as Chief Justice Roberts pointed out, "reasonable minds may disagree" as to the proper interpretation of the statute,[125] it does seem to me that the position taken by the dissent is extreme in comparison to the statutory language. It is hard to imagine that Congress really thought that, through the enactment of the HEROES Act, it was giving the Secretary the power to spend approximately half a trillion dollars, "nearly one-third of the Government's $1.7 trillion in annual discretionary spending,"[126] with the stroke of a pen. However, perhaps that gets to the heart of the dispute between these two positions. The majority interprets the statutory language

---

120 *Id.* (quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 234 (1994)).

121 Biden v. Nebraska, 143 S. Ct. 2355, 2391 (2023) (Kagan, J., dissenting).

122 *Id.*

123 *Id.* at 2392.

124 *Id.* at 2393.

125 *Id.* at 2376 (majority opinion).

126 *Id.* at 2373.

more narrowly, with which I agree because the majority and I assume that Congress would not intend to grant the kind of sweeping authority to the Secretary that is needed for his plan to survive review by the Court.[127] The majority and I share "concerns over the exercise of administrative power,"[128] and it is very likely that such concerns color the reading of the statute. By contrast, the dissent, apparently not sharing such concerns over the exercise of administrative power, thought that giving the Secretary broad authority to promulgate such a far-reaching plan is exactly what Congress intended to do.[129] Accordingly, it is not surprising that both the majority and the dissent turned to a consideration of "congressional purpose"[130] and the so-called "major questions doctrine."[131]

C. The Major Questions Doctrine

Jacob A. Stein and Glenn A. Mitchell write in their treatise *Administrative Law* that "[t]he Supreme Court adopted the 'major questions doctrine' in *West Virginia v. Environmental Protection Agency*. The doctrine holds that an agency does not have authority to issue a rule that has major economic and political significance unless its action is supported by clear statutory authorization."[132] This doctrine arises from "concerns over the exercise of administrative power."[133] As the Supreme Court put it in *West Virginia v. EPA*, "'In extraordinary cases . . . there may be reason to hesitate' before accepting a reading of a statute that would, under more 'ordinary' circumstances, be upheld. Or, as we put it more recently, we 'typically greet' assertions of 'extravagant statutory power over the national economy' with 'skepticism.'"[134] Finally, the Court asserted that, while the label of the "major questions doctrine" may be relatively new, the concept is not "because it

---

127 Biden v. Nebraska, 143 S. Ct. 2355, 2369–70 (2023).

128 *Id.* at 2396 (Kagan, J., dissenting) (quoting majority at 2372).

129 *See id.* at 2385.

130 *Id.* at 2372.

131 *Id.* at 2372–74; *Id.* at 2391–98 (dissenting opinion).

132 JACOB A. STEIN & GLENN A. MITCHELL, 6 ADMIN. LAW § 51.01 (2023).

133 *Biden,* 143 S. Ct. at 2372–73.

134 West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting first FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); and then quoting Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014)).

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."[135]

The major questions doctrine interacts with *Biden v. Nebraska* in a somewhat nuanced fashion. "In this case, the Court applies the ordinary tools of statutory interpretation [as described in the previous section herein] to conclude that the HEROES Act does not authorize the Secretary's plan. The major questions doctrine reinforces that conclusion but is not necessary to it."[136] The majority turned to a consideration of the major questions doctrine to respond to the arguments forwarded by the Secretary and adopted by the dissent that appealed to the congressional purpose animating the HEROES Act.[137] To state it succinctly, the Secretary and the dissent assert that the congressional purpose behind the HEROES Act was to delegate to the Secretary broad discretionary powers to respond to national emergencies that cause financial harm to student loan borrowers.[138] Under this "reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act."[139] Accordingly, the dissent averred that the Secretary's plan is a valid exercise of his powers under the Act and the Act's language should be interpreted to reach this result.[140]

---

135 *Id.*

136 *Biden*, 143 S. Ct. at 2376 (Barrett, J., concurring). Justice Barrett joined fully in the majority's opinion, but she wrote separately to express her views on the proper understanding of the major questions doctrine. *Id.* In opposition to other understandings of the major questions doctrine, Justice Barrett asserted that "[t]he doctrine serves as an interpretive tool reflecting 'common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.'" *Id.* at 2378 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)). Justice Barrett's concurrence was not joined by any of the other Justices. Only time and future opinions will tell whether her view or some other view of the major questions doctrine is actually endorsed by the Court.

137 *Id.* at 2372 (majority opinion).

138 *Id.*

139 *Id.* at 2373.

140 *Id.* at 2372.

Chief Justice Roberts responded by stating that "[t]he question here is not whether something should be done; it is who has the authority to do it."[141] He took note of the fact that "Congress is not unaware of the challenges facing student borrowers" and that there has been much debate in and out of Congress as to what should be done concerning student loan cancellation.[142] However, in the face of all of that, Congress has chosen not to act. "The Secretary's assertion of administrative authority has 'conveniently enabled [him] to enact a program' that Congress has chosen not to enact itself,"[143] and the scope "of the Secretary's action is staggering by any measure."[144]

The scope of the federal student loans program itself is truly mind-boggling. "Outstanding federal student loans now total $1.6 trillion extended to 43 million borrowers."[145] And, the scope of the Secretary's plan is, as the Court said, "staggering." "The Secretary's plan canceled roughly $430 billion of federal student loan balances, completely erasing the debts of 20 million borrowers and lowering the median amount owed by the other 23 million from $29,400 to $13,600."[146] Further, "[t]he Department of Education estimates that the program will cover 98.5% of all borrowers."[147] Its total cost to taxpayers is estimated to be "'between $469 billion and $519 billion,' depending upon the total number of borrowers ultimately covered."[148] This cost of approximately half a trillion dollars amounts to "nearly one-third of the Government's $1.7 trillion in annual discretionary spending."[149]

---

141 *Id.*

142 Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023).

143 *Id.* (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2596 (2023)).

144 *Id.*

145 *Id.* at 2362.

146 *Id.*

147 *Id. at* 2369 (citing *White House Fact Sheet: The Biden-Harris Administration's Plan for Student Debt Relief Could Benefit Tens of Millions of Borrowers in All Fifty States*, THE WHITE HOUSE (Sept. 20, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/20/fact-sheet-the-biden-harris-administrations-plan-for-student-debt-relief-could-benefit-tens-of-millions-of-borrowers-in-all-fifty-states/).

148 Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (quoting Joint Appendix at 108, *Biden*, 143 S. Ct. 2355 (No. 22-506)).

149 *Id.*

In the face of such a massive administrative action, the major questions doctrine requires that the acting agency have a clear grant of authority to pursue such action. As the Court put it, "'[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.'"[150] The Court then concluded the opinion by stating

> that "[t]he basic and consequential tradeoffs" inherent in a mass debt cancellation program "are ones that Congress would likely have intended for itself." In such circumstances, we have required the Secretary to "point to 'clear congressional authorization'" to justify the challenged program. And as we have already shown, the HEROES Act provides no authorization for the Secretary's plan even when examined using the ordinary tools of statutory interpretation—let alone "clear congressional authorization" for such a program.[151]

Justice Kagan is opposed to the Court's use of the major questions doctrine in general and its use in this case in particular.[152] She vigorously disagreed with the majority on nearly every aspect and every point in this case, including the majority's use of and understanding of the major questions doctrine.[153] While not stated in exactly these terms, she seems to feel that the

---

[150] *Id.* at 2374 (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2614, 2616 (2023)).

[151] *Id.* at 2375 (quoting *West Virginia*, 142 S. Ct. at 2613). The Secretary also argued that the Biden student loan forgiveness plan was different and not subject to the major questions doctrine because it involved government benefits as opposed to the power to regulate. *Id.* at 2374–75. The Court rejected this argument, noting that it "has never drawn the line the Secretary suggests—and for good reason. Among Congress's most important authorities is its control of the purse." *Id.* at 2375. The Court concluded that the fact that government benefits are involved as opposed to regulation "makes no difference here." *Id.*

[152] *See id.* at 2384, 2391, 2397–99 (Kagan, J., dissenting). Justice Kagan also wrote the dissent in *West Virginia v. EPA*. *West Virginia*, 142 S. Ct. at 2626 (Kagan, J., dissenting). The majority opinion in *Biden* actually accuses Justice Kagan of attempting a misplaced re-litigation of *West Virginia*. *Biden*, 143 S. Ct. at 2374 (majority opinion).

[153] *See Biden*, 143 S. Ct. at 2384, 2391 (Kagan, J., dissenting).

decision regarding which questions are "major" for the purposes of the "major questions doctrine" depends upon the Court's ideological views.[154]

While she is strongly opposed to what she called the majority's "made-up" major questions doctrine,[155] the real difference between her and the majority seems to boil down to a fundamental disagreement regarding who has the authority to act in a situation like this. The dissent saw "the Court [as] substitut[ing] itself for Congress and the Executive Branch in making national policy about student-loan forgiveness."[156] Justice Kagan saw the majority as usurping the power of the political branches by "mak[ing] itself the decisionmaker on, of all things, federal student-loan policy."[157] On the other hand, the majority stated that "[t]he dissent is correct that this is a case about one branch of government arrogating to itself power belonging to another. But it is the Executive seizing the power of the Legislature."[158] This demonstrates a fundamental disagreement about the nature of the separation of powers in our constitutional order and about the proper role of administrative agencies within that order. This disagreement is representative of a similar divide in the nation at large, and it does not appear that it will be resolved any time soon, as the ongoing debate about student loan forgiveness[159] and the response of the Biden Administration to the decision in *Biden v. Nebraska* demonstrate.[160] This Article closes by offering some thoughts and analysis on these issues from a Christian perspective.

---

[154] Given the nature of the Fall and its effects on human reasoning, Justice Kagan may well be correct that what type of question is "major" will be impacted by the political and other views of the Justices. *See supra* notes 73–77 and accompanying text.

[155] *See Biden*, 143 S. Ct. at 2384, 2400 (Kagan, J., dissenting).

[156] *Id.* at 2384–85 (Kagan, J., dissenting).

[157] *Id.* at 2399.

[158] *Id.* at 2373 (majority opinion).

[159] Opinion, *Should Biden Still Be Pursuing Student-Loan Forgiveness?: Students Debate the President's Repayment Plan*, WALL ST. J. (Aug. 1, 2023, 6:47 PM), https://www.wsj.com/articles/should-biden-still-be-pursuing-student-loan-forgiveness-debt-supreme-court-college-university-8ef91086.

[160] *See, e.g.*, Press Release, Joe Biden, President, White House, FACT SHEET: President Biden Announces New Actions to Provide Debt Relief and Support for Student Loan Borrowers (June 30, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/30/fact-sheet-president-biden-announces-new-actions-to-provide-debt-relief-and-support-for-student-loan-borrowers/.

III. *BIDEN V. NEBRASKA*, THE BIBLICAL IDEA OF THE SEPARATION OF POWERS, AND THE DANGERS OF THE ADMINISTRATIVE STATE

Chief Justice Roberts was correct when he stated that "[t]he question [in *Biden v. Nebraska*] is not whether something should be done; it is who has the authority to do it."[161] This question—who has the lawful authority to act—is central in all questions of life, including, perhaps most centrally, questions of law and policy.[162] Only Jesus Christ, as "King of kings and Lord of lords," has all authority in heaven and on earth.[163] All other authorities are therefore necessarily delegated and limited.[164] Some are limited by the Law of Nature and Nature's God, and some are limited by the application of the principles found in the Law of Nature and Nature's God to a particular societal setting.[165]

In the American system, this truth should always lead to asking a series of questions when analyzing any issue of law and policy. First, is a question of jurisdiction. Has the contemplated action been entrusted to the civil

---

[161] *Biden*, 143 S. Ct. at 2362, 2372.

[162] *See, e.g.*, Roger Bern, *A Biblical Model for Analysis of Issues of Law and Public Policy: With Illustrative Applications to Contracts, Antitrust, Remedies, and Public Policy Issues*, 6 REGENT U. L. REV. 103, 116–24 (1995); Rodney D. Chrisman, *Racial Reconciliation: A Biblical Framework*, 17 LIBERTY U. L. REV. 507, 539–40 (2023).

[163] Jesus's unlimited authority is best illustrated by the Great Commission, which states:

> And Jesus came up and spoke to them, saying, "*All authority in heaven and on earth has been given to Me.* Go, therefore, and make disciples of all the nations, baptizing them in the name of the Father and the Son and the Holy Spirit, teaching them to follow all that I commanded you; and behold, I am with you always, to the end of the age."

Matthew 28:18–20 (New Am. Standard) (emphasis added). The Bible is full of such assertions regarding the universal and complete reign of Christ over all people, nations, and rulers. *See, e.g.*, *Deuteronomy* 10:17; *Psalm* 2; *Daniel* 7:13–14; 1 *Corinthians* 15:24–28; *Ephesians* 1:20–22; *Colossians* 2:10; *Philippians* 2:9–10; 1 *Timothy* 6:15; *Revelation* 1:5, 17:14, 19:11–16.

[164] HERBERT W. TITUS, GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES 64–97 (1994). Specifically, in discussing Jesus's words in *Luke* 20:25 that man should "render to Caesar the things that are Caesar's, and to God the things that are God's," Dean Titus states that "Jesus emphatically denied that any human civil government could legitimately exercise total power over its citizens: Not all things belong to Caesar." *Luke* 20:25 (English Standard); TITUS, *supra*, at 64.

[165] *See supra* notes 162–164.

magistrate at all? Or, has the Lord reserved the authority to take such action to Himself? Or, alternatively, entrusted it to some other institution such as the church or the family? These are law of nature questions, and the answers are binding on all people in all places.[166] Essentially, they are asking whether the civil magistrate has the God-granted authority to act in the particular setting. For example, God has reserved to Himself the jurisdiction, or authority, over the human heart.[167] Consequently, the civil magistrate does not have the authority to judge the human heart.[168]

Second, assuming that the contemplated action is within the jurisdiction of the civil magistrate, the particulars of the American constitutional system require answering additional questions. Has the action been reserved to the states or entrusted to the federal government?[169] This is a question of federalism[170] and is a result of the conclusion that liberty is best protected by having competing governmental jurisdictions. Assuming that the authority to act on the particular issue in question has been given to the federal government by the Constitution, one must determine to which of the three branches of the federal government has this authority been entrusted. This is a question of the separation of powers, and it stands on sound biblical foundations.[171]

While the prevailing secular-humanist worldview understands humans to be essentially good and perfectible[172], the biblical worldview truly

---

166 *See Romans* 1:18–25, 2:12–16.

167 *See, e.g.*, *Jeremiah* 17:10; *1 Samuel* 16:7; *Hebrews* 4:12–13.

168 *See, e.g.*, *Genesis* 6:5–6; 1 *Samuel* 16:7; *Psalm* 7:8–10; *Acts* 13:22; Bern *supra* note 162, at 123, 129–30.

169 The federal government is a government of limited and enumerated powers. *See* U.S. CONST. pmbl.; *id.* art. I, § 1. Whatever governmental powers were not entrusted to the federal government by the Constitution, are therefore reserved to the several states. U.S. CONST. amend X.

170 "Federalism" could be thought of as a division of political powers between competing jurisdictions (federal, state, and local in the American system) while "separation of powers" proper normally refers to checks and balances inherent in our Constitution's distinctions between the roles of the executive, legislative, and judicial branches. *See* U.S. CONST.

171 *See, e.g.*, *Jeremiah* 17:9; *Romans* 3:23; 1 *Samuel* 8:10–18.

172 *See, e.g.*, PAUL KURTZ, HUMANIST MANIFESTO II (1973).

understands mankind's fallen condition.[173] Fallen men are prone to selfishness and evil, and all people struggle to act altruistically.[174] To paraphrase *The Federalist No. 51*, men are not angels.[175] Since men are not

---

[173] *See, e.g.*, *Romans* 3:23; *Jeremiah* 17:9.

[174] *See, e.g.*, *Romans* 3:23*; Proverbs* 16:18; *Psalms* 10:2–4.

[175] THE FEDERALIST NO. 51 (James Madison & Alexander Hamilton) (Harold C. Syrett ed., Columbia Univ. Press 1962) (1788). *The Federalist No. 51* focuses on the importance of and need for the separation of powers and the checks and balances it provides. *Id.* Here is the full context from *The Federalist No. 51* for this reference made in the body of this Article:

> But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defen[s]e must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to contro[u]l the abuses of government. But what is government itself but the greatest of all reflections on human nature? *If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal contro[u]ls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to contro[u]l the governed; and in the next place, oblige it to contro[u]l itself.* A dependence on the people is no doubt the primary contro[u]l on the government; but experience has taught mankind the necessity of auxiliary precautions.
>
> This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a [s]entinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the [S]tate.

Id. (emphasis added). The biblical worldview provides the background for these "reflections on human nature" and the surest foundations for their understanding. Given man's fallen nature, he will be tempted to exercise power not entrusted to him. Thus, power should be separated among various branches (Executive, Judicial, and Legislative) and jurisdictions

angels, they are likely to abuse the power they are given and attempt to wield power they are not given. Reacting to this clear biblical reality, a separation of powers approach works to limit the consolidation of power in any one person, branch of government, jurisdiction, or institution. Liberty is better preserved by limiting the power any one person, branch of government, jurisdiction, or institution can wield. Further, abuse of power is frustrated, by the checks and balances that allocate power elsewhere.

In line with this, James Madison famously stated in *The Federalist No. 47* that "[t]he accumulation of all powers[,] legislative, executive[,] and judiciary[,] in the same hands, whether of one, a few[,] or many, and whether hereditary, self[-]appointed, or elective, may justly be pronounced the very definition of tyranny."[176] *Isaiah* 33:22 says: "For the LORD is our judge, The LORD is our lawgiver, The LORD is our king; He will save us . . . ."[177] The Lord God may exercise all of these types of power simultaneously, but when these powers are combined in human hands, whether in the hands of one or of many, it is tyranny.

On March 3, 1817, his last day in office, President James Madison demonstrated his commitment to this idea as it relates to the separation of powers between the federal government and the states when he vetoed the Internal Improvements Bill (also called the Bonus Bill).[178] The Bill was to set aside funds generated by dividends from the Second National Bank (bonus revenue to the federal government) "for constructing roads and canals, and improving the navigation of water courses, in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the

---

(federal, state, and local). As to man's fallen nature in general, *see, e.g.*, *Genesis* 3; *Romans* 3:9–23; and *supra* notes 73–77 and accompanying text.

[176] THE FEDERALIST No. 47 (James Madison) (Robert A. Rutland et al. eds., Univ. Chi. Press 1977).

[177] *Isaiah* 33:22 (New Am. Standard 1995).

[178] *See* James Madison, President, United States, Veto Message on the Internal Improvements Bill (Mar. 3, 1817), https://millercenter.org/the-presidency/presidential-speeches/march-3-1817-veto-message-internal-improvements-bill; Richie Angel, Madison's Last Veto, FEDERALIST SOC'Y (Mar. 4, 2021), https://fedsoc.org/commentary/fedsoc-blog/madison-s-last-veto.

common defense."[179] President Madison vetoed the bill because the Constitution, in his view, did not grant to Congress the power to make internal improvements such as building roads and canals.[180]

Internal improvements such as roads and canals are unquestionably good things, but it is still important to ask the question, as President Madison's veto reminds us: Who has authority to act? Similarly, we could debate whether student loan forgiveness is a good thing and how it should be carried out if so. But, even if it is concluded that student loan forgiveness is a good thing and it was decided how it is to be carried out, who has the authority to enact the program and carry it out would need to be asked and answered. Again, no one but the Lord God has unlimited authority.[181] This is the real problem with the administrative state in general and with President Biden's plan in particular—they both ignore the important questions raised above, thereby undermining our constitutional system.

In his excellent book *Is Administrative Law Unlawful?*, Philip Hamburger discusses how administrative law and the current administrative state violates the American constitutional order, thereby also threatening the rule of law and our liberties.[182] In the introduction to this seminal work, he writes that

> [t]he federal government traditionally bound the people only through acts of Congress and judgments of the courts. In other words, to constrain liberty, the executive ordinarily

---

[179] Madison, *supra* note 178; H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 132 (Univ. Chi. Press 2002).

[180] Madison, *supra* note 178. How quaint and outdated appears President Madison's view of the authority of Congress. Today, the authority of Congress is thought by many to be nearly limitless. Federal legislation and administrate action intrudes into nearly every area of American life in a way that would be unimaginable to those of the founding era. It is sad to see how far the powers of the central government in general and those of Congress in particular have grown beyond what the man often called the "Father of the Constitution" envisioned in these intervening 200-plus years since he vetoed the Internal Improvements Bill. One can only imagine what President Madison would have thought of the massive federal programs today that fund and regulate education, much less of President Biden's plan to forgive nearly a half trillion dollars in student debt generated through those federal programs.

[181] *See supra* note 163 and accompanying text.

[182] *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

> had to rely on the other branches of government—it had to persuade the representatives of the people to enact a rule, and it had to persuade independent judges and juries to apply the rule.
>
> Nowadays, however, the executive acts against Americans through its own legislation and adjudication. . . .
>
> . . . Although this mode of power is unrecognized by the Constitution, it has become the government's primary mode of controlling Americans, and it increasingly imposes profound restrictions on their liberty.[183]

"This mode of power"[184] also involves enormous expenditures of resources, as the Biden student loan plan demonstrates. Such actions are, when taken without the authority to act, tyrannical.

Dean Jeffrey Tuomala, in his *Casebook Companion*, provides an excellent consideration of the separation of powers and the threat posed to our constitutional order by its abandonment in favor of the administrative state. He states that

> [t]here is a proper place for administrative rules and regulations, but that place is in the internal operation of an agency or department. These rules include directives for handling personnel matters, procurement, maintenance of property, training, and for dealing with members of the public and regulated industries, etc. These are all matters necessary for the efficient operation of a household. Because all executive power is vested in the President, he has a very large household to administer, and his subordinate officers are scattered over a vast geographical area of operations. To ensure that members of his household are adequately cared for and are properly trained and equipped to perform their duties—and perform those duties with a unity of purpose and in compliance with the President's will—there is a need

---

183 *Id.* at 1.

184 *See id.*

> to adopt comprehensive administrative directives, regulations, and procedures. *This is the proper role of administrative law—to govern the President's household.*[185]

Unfortunately, as Dean Tuomala capably points out, we have moved far from this proper and limited rule for administrative rules and regulations to an expansive, all-encompassing administrative state:

> The vast expansion of the Administrative State during the twentieth century and into the twenty-first century was made possible only with fundamental changes in constitutional law. These changes include the expansion of powers over nearly every aspect of the economy and society through the [Supreme] Court's reinterpretation of the commerce, spending, and tax powers. The implementation of massive social-welfare programs has required large sources of funding provided by the income tax, social security tax, Medicaid tax, individual mandate tax, peacetime borrowing, and inflation. The way was paved for inflation with the institution of fractional reserve banking and abandonment of the gold standard.
>
> The massive social-welfare programs have not been the only drain on the public treasury. The other great drain has been military spending to fund several major wars, a protective umbrella for most of the "free world," and several costly wars of intervention. . . . [T]his new use for the U.S. military as world policeman and exporter of democracy through force of arms has been accompanied by fundamental changes in the view of constitutional law.

---

[185] Jeffrey C. Tuomala, The Casebook Companion pt. 5, ch. 3, at 5–6 (Aug. 23, 2020) (unpublished manuscript) (on file with author) (emphasis added). Dean Tuomala also recognizes that other branches can have legitimate administrative powers to administer their households as well. For example, writing about the federal courts, he says that "[e]ven without a delegation from Congress, the courts have the power to issue rules of procedure and evidence and to exercise administrative control of their functions. These are incidental household powers." *Id.* at 10.

> There is good reason to label the United States a welfare-warfare state.
>
> As a result, the President's household, with its administrative regulations, is no longer limited to the operation of those agencies within the executive department; it includes the whole American people. Today administrative law is used to regulate the entire nation, treating the entire citizenry in effect as members of the President's household. Like the government of the King of England, our government has become *parens patriae*: father of the people.[186]

As Professor Hamburger and Dean Tuomala have demonstrated, this turn to an administrative state akin to the government of the Kings of England and quite different from the American-constitutional order, has led to the vast expansion of the powers of the President in violation of the Constitution and at the expense of our liberties and the rule of law.

With its major questions doctrine cases, the Supreme Court has recently indicated that it sees, at least in part, the dangers here and is interested in taking some steps to address the situation by attempting to reign in Presidents and administrative agencies.[187] Historically, the Court would have handled many such cases with the nondelegation doctrine, which was based upon the idea "[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[188] Thus, and if applied to *Biden v. Nebraska*, the Court might have analyzed whether the grants of power made to the U.S. Department of Education were legitimate in the first place.

---

[186] *Id.* at 6–7.

[187] *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (addressing an administrative action imposing a nationwide moratorium on evictions during the COVID-19 pandemic); West Virginia v. EPA, 142 S. Ct. 2587, 2599 (2022) (dealing with administrative action to limit carbon dioxide emissions to combat climate change); Sackett v. EPA, 598 U.S. 651, 657–59 (2023) (involving an expansive definition of "the waters of the United States" developed by administrative agencies).

[188] Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892).

However, the Court gutted and abandoned the nondelegation doctrine in *Humphrey's Executor v. United States*, *Mistretta v. United States*, and like cases.[189] In fact, "the Court [has not] struck down a delegation of legislative power to an independent agency or [E]xecutive [B]ranch department for being excessive or improper" since 1935.[190] As Dean Tuomala states, the "nondelegation doctrine" as it has now come to be understood by the Court "may more accurately be termed the delegation doctrine because there is little left in the doctrine that restrains delegation."[191] Therefore, in *Biden v. Nebraska*, there is no consideration at all regarding whether the delegation of powers to the U.S. Department of Education by the HEROES Act (or the HEA) was proper. It is assumed to be proper by nearly everyone involved, as are almost all delegations of power.

Having gutted and abandoned the nondelegation doctrine, the Court is now turning to the major questions doctrine in such situations.[192] Time will tell how this doctrine will fair; however, it seems to me that it is fatally flawed and will not be able to effectively reign in the administrative state and the usurpation of power by the Executive Branch. As much as I welcome any limits on the power of the administrative state, it appears to me that the major questions doctrine will, by its very nature, allow all but the most egregious abuses of power perpetrated by the administrative state to continue apace. As Dean Tuomala and Professor Hamburger indicate, the administrative state, and the related usurpation and abuse of power by the Executive Branch, is nearly in its totality a perversion of our constitutional order and a dire threat to our liberties and the rule of law. It is not just the most egregious abuses of the administrative state that need to be curbed, but, rather, the entirety of the

---

[189] See Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Mistretta v. United States, 488 U.S. 361 (1989); Tuomala, *supra* note 185, at 1–2.

[190] Tuomala, *supra* note 185, at 2. The last two cases to do so are *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). *Id.* at 2.

[191] Tuomala, *supra* note 185, at 2.

[192] *See, e.g.*, *Courthouse Steps Decision:* Biden v. Nebraska (The Federalist Society's Litigation Practice Group Webinar July 11, 2023, 3:00 PM) (transcript on The Federalist Society's website), https://fedsoc.org/events/courthouse-steps-decision-biden-v-nebraska (likening the Supreme Court's abandoning of the nondelegation doctrine to a sort of original sin in this area).

system needs to be dismantled. For this task, the major questions doctrine is, again, inadequate by its very nature. Consequently, unless the American people rise up *en masse* against the administrative state such that it becomes politically untenable for Congress to continue to create, support, and enable it, we are likely to see both the administrative state continue to grow and further expand its control over nearly all areas of American life and executive usurpations and overreaches, such as the Biden plan, continue, checked only sporadically by the courts. And, sadly, in this way, our constitutional order and the God-given liberties that it was designed to protect, will be slowly but surely destroyed.

IV. CONCLUSION

The Biden student loan forgiveness plan demonstrates the disturbing trend of Presidents attempting to enact by executive fiat what amounts to legislation on which they could not get Congress to act. In *Biden v. Nebraska*, the Court ruled that the Secretary had exceeded his statutory authority by promulgating the plan.[193] While this particular attempt to take action by executive fiat was thereby stymied, there is no indication that President Biden and future Presidents will cease trying to enact policy in this way. Further, the administrative state—of which action by executive fiat and the usurpation of legislative power by the Executive Branch is a concomitant part—continues to grow, posing a serious threat to our constitutional order, the rule of law, and our liberties guaranteed thereby. Only by returning to the Christian view of law and policy, which undergirds and provides the foundation for our constitutional system of government, can we hope to address the threat posed by the administrative state and again "secure the Blessings of Liberty to ourselves and our Posterity."[194]

---

[193] Biden v. Nebraska, 143 S. Ct. 2355, 2375–76 (2023).

[194] U.S. CONST. pmbl.