# Biden v. Nebraska

## 600 U.S. (2023)[[1]](#footnote-1)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

JUSTICE BARRETT, concurring.

I join the Court’s opinion in full. I write separately to address the States’ argument that, under the “major questions doctrine,” we can uphold the Secretary of Education’s loan cancellation program only if he points to “‘clear congressional authorization’” for it. In this case, the Court applies the ordinary tools of statutory interpretation 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.

Still, the parties have devoted significant attention to the major questions doctrine, and there is an ongoing debate about its source and status. I take seriously the charge that the doctrine is inconsistent with textualism. And I grant that some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause.

Yet for the reasons that follow, I do not see the major questions doctrine that way. Rather, I understand it to emphasize the importance of *context* when a court interprets a delegation to an administrative agency. Seen in this light, the major questions doctrine is a tool for discerning—not departing from—the text’s most natural interpretation.

## I A

Substantive canons are rules of construction that advance values external to a statute. A. Barrett, Substantive Canons and Faithful Agency, 90 B. U. L. Rev. 109, 117 (2010) (Barrett). Some substantive canons, like the rule of lenity, play the modest role of breaking a tie between equally plausible interpretations of a statute. Others are more aggressive—think of them as strong-form substantive canons. Unlike a tie- breaking rule, a strong-form canon counsels a court to *strain* statutory text to advance a particular value. There are many such canons on the books, including constitutional avoidance, the clear-statement federalism rules, and the presumption against retroactivity. Such rules effectively impose a “clarity tax” on Congress by demanding that it speak unequivocally if it wants to accomplish certain ends. J. Manning, Clear Statement Rules and the Constitution, 110 Colum. L. Rev. 399, 403 (2010). This “clear statement” requirement means that the better interpretation of a statute will not necessarily prevail. Instead, if the better reading leads to a disfavored result (like provoking a serious constitutional question), the court will adopt an inferior-but-tenable reading to avoid it. So to achieve an end protected by a strong- form canon, Congress must close all plausible off ramps.

While many strong-form canons have a long historical pedigree, they are “in significant tension with textualism” insofar as they instruct a court to adopt something other than the statute’s most natural meaning. Barrett 123–124. . . .

## B

Some have characterized the major questions doctrine as a strong-form substantive canon designed to enforce Article I’s Vesting Clause. On this view, the Court overprotects the nondelegation principle by increasing the cost of delegating authority to agencies—namely, by requiring Congress to speak unequivocally in order to grant them significant rulemaking power. This “clarity tax” might prevent Congress from getting too close to the nondelegation line, especially since the “intelligible principle” test largely leaves Congress to self-police. (So the doctrine would function like constitutional avoidance.) In addition or instead, the doctrine might reflect the judgment that it is so important for Congress to exercise “[a]ll legislative Powers,” Art. I, § 1, that it should be forced to think twice before delegating substantial discretion to agencies—even if the delegation is well within Congress’s power to make. (So the doctrine would function like the rule that Congress must speak clearly to abrogate state sovereign immunity.) No matter which rationale justifies it, this “clear statement” version of the major questions doctrine “loads the dice” so that a plausible antidelegation interpretation wins even if the agency’s interpretation is better.

While one could walk away from our major questions cases with this impression, I do not read them this way. No doubt, many of our cases express an expectation of “clear congressional authorization” to support sweeping agency action. But none requires “an ‘unequivocal declaration’” from Congress authorizing the *precise* agency action under review, as our clear-statement cases do in their respective domains. And none purports to depart from the best interpretation of the text—the hallmark of a true clear-statement rule.

So what work is the major questions doctrine doing in these cases? I will give you the long answer, but here is the short one: The 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.” *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000).

## II

The major questions doctrine situates text in context, which is how textualists, like all interpreters, approach the task at hand. After all, the meaning of a word depends on the circumstances in which it is used. To strip a word from its context is to strip that word of its meaning.

Context is not found exclusively “‘within the four corners’ of a statute.” Background legal conventions, for instance, are part of the statute’s context. Thus, courts apply a presumption of *mens rea* to criminal statutes, and a presumption of equitable tolling to statutes of limitations. . . .

Context also includes common sense, which is another thing that “goes without saying.” Case reporters and casebooks brim with illustrations of why literalism—the antithesis of context-driven interpretation—falls short. Consider the classic example of a statute imposing criminal penalties on “‘whoever drew blood in the streets.’” *United States* v. *Kirby*, 7 Wall. 482, 487 (1869). Read literally, the statute would cover a surgeon accessing a vein of a person in the street. But “common sense” counsels otherwise, because in the context of the criminal code, a reasonable observer would “expect the term ‘drew blood’ to describe a violent act,” Manning 2461. Common sense similarly bears on judgments like whether a floating home is a “vessel,” *Lozman* v. *Riviera Beach*, 568 U. S. 115, 120–121 (2013), whether tomatoes are “vegetables,” *Nix* v. *Hedden*, 149 U. S. 304, 306–307 (1893), and whether a skin irritant is a “chemical weapon,” *Bond*, 572 U. S., at 860–862.

Why is any of this relevant to the major questions doctrine? Because context is also relevant to interpreting the scope of a delegation. Think about agency law, which is all about delegations. [I]magine that a grocer instructs a clerk to “go to

the orchard and buy apples for the store.” Though this grant of apple-purchasing authority sounds unqualified, a reasonable clerk would know that there are limits. For example, if the grocer usually keeps 200 apples on hand, the clerk does not have actual authority to buy 1,000—the grocer would have spoken more directly if she meant to authorize such an out-of-the-ordinary purchase. A clerk who disregards context and stretches the words to their fullest will not have a job for long.

This is consistent with how we communicate conversationally. Consider a parent who hires a babysitter to watch her young children over the weekend. As she walks out the door, the parent hands the babysitter her credit card and says: “Make sure the kids have fun.” Emboldened, the babysitter takes the kids on a road trip to an amusement park, where they spend two days on rollercoasters and one night in a hotel. Was the babysitter’s trip consistent with the parent’s instruction? Maybe in a literal sense, because the instruction was open-ended. But was the trip consistent with a *reasonable* understanding of the parent’s instruction? Highly doubtful. In the normal course, permission to spend money on fun authorizes a babysitter to take children to the local ice cream parlor or movie theater, not on a multiday excursion to an out-of-town amusement park. If a parent were willing to greenlight a trip that big, we would expect much more clarity than a general instruction to “make sure the kids have fun.” . . .

In my view, the major questions doctrine grows out of these same commonsense principles of communication. Just as we would expect a parent to give more than a general instruction if she intended to authorize a babysitter-led getaway, we also “expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” That clarity may come from specific words in the statute, but context can also do the trick. Surrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency. . . .

This expectation of clarity is rooted in the basic premise that Congress normally “intends to make major policy decisions itself, not leave those decisions to agencies.” *United States Telecom Assn.* v. *FCC*, 855 F. 3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc). Or, as Justice Breyer once observed, “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters [for agencies] to answer themselves in the course of a statute’s daily administration.” S. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986); see also A. Gluck & L. Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 1003–1006 (2013). That makes eminent sense in light of our constitutional structure, which is itself part of the legal context framing any delegation. Because the Constitution vests Congress with “[a]ll legislative Powers,” Art. I, § 1, a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch.

Crucially, treating the Constitution’s structure as part of the context in which a delegation occurs is *not* the same as using a clear-statement rule to overenforce Article I’s nondelegation principle (which, again, is the rationale behind the substantive-canon view of the major questions doctrine). My point is simply that in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on “important subjects” while delegating away only “the details.” *Wayman* v. *Southard*, 10 Wheat. 1, 43 (1825). . . .

Given these baseline assumptions, an interpreter should “typically greet” an agency’s claim to “extravagant statutory power” with at least some “measure of skepticism.” . . . Still, this skepticism does not mean that courts have an obligation (or even permission) to choose an inferior-but-tenable alternative that curbs the agency’s authority—and that marks a key difference between my view and the “clear statement” view of the major questions doctrine. . . .

Just as an instruction to “pick up dessert” is not permission to buy a four-tier wedding cake, Congress’s use of a “subtle device” is not authorization for agency action of “enormous importance.” . . . Another telltale sign that an agency may have transgressed its statutory authority is when it regulates outside its wheelhouse. . . . The shared intuition behind these cases is that a reasonable speaker would not understand Congress to confer an unusual form of authority without saying more.

We have also pumped the brakes when “an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy.’” *Utility Air*, 573 U. S., at 324. Of course, an agency’s post- enactment conduct does not control the meaning of a statute, but “this Court has long said that courts may consider the consistency of an agency’s views when we weigh the persuasiveness of any interpretation it proffers in court.” *Bittner* v. *United States*, 598 U. S. 85, 97 (2023) (citing *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944)). The agency’s track record can be particularly probative in this context: A longstanding “want of assertion of power by those who presumably would be alert to exercise it” may provide some clue that the power was never conferred. . . .

[B]y my lights, the Court arrived at the most plausible reading of the statute in these cases. With the full picture in view, it became evident in each case that

the agency’s assertion of “highly consequential power” went “beyond what Congress could reasonably be understood to have granted.” *West Virginia*.

## III

As for today’s case: The Court surely could have “hi[t] the send button,” after the routine statutory analysis set out in Part III–A. But it is nothing new for a court to punctuate its conclusion with an additional point, and the major questions doctrine is a good one here. It is obviously true that the Secretary’s loan cancellation program has “vast ‘economic and political significance.’” That matters not because agencies are incapable of making highly consequential decisions, but rather because an initiative of this scope, cost, and political salience is not the type that Congress lightly delegates to an agency. . . .

Granted, some context clues from past major questions cases are absent here—for example, this is not a case where the agency is operating entirely outside its usual domain. But the doctrine is not an on-off switch that flips when a critical mass of factors is present . . . .

Here, enough of those indicators are present to demonstrate that the Secretary has gone far “beyond what Congress could reasonably be understood to have granted” in the HEROES Act. Our decision today does not “trump” the statutory text, nor does it make this Court the “arbiter” of “national policy.” Instead, it gives Congress’s words their best reading.

The major questions doctrine has an important role to play when courts review agency action of “vast ‘economic and political significance.’” But the doctrine should not be taken for more than it is—the familiar principle that we do not interpret a statute for all it is worth when a reasonable person would not read it that way.

**JUSTICE KAGAN, with whom JUSTICE SOTOMAYOR and JUSTICE JACKSON join, dissenting.**

. . . . Some 20 years ago, Congress enacted legislation, called the HEROES Act, authorizing the Secretary of Education to provide relief to student-loan borrowers when a national emergency struck. The Secretary’s authority was bounded: He could do only what was “necessary” to alleviate the emergency’s impact on affected borrowers’ ability to repay their student loans. 20 U.S.C. § 1098bb(a)(2). But within that bounded area, Congress gave discretion to the Secretary. He could “waive or modify any statutory or regulatory provision” applying to federal student-loan programs, including provisions relating to loan repayment and forgiveness. And in so doing, he could replace the old provisions with new “terms and conditions.” §§ 1098bb(a)(1), (b)(2). The Secretary, that is, could give the relief that was needed, in the form he deemed most appropriate, to counteract the effects of a national emergency on borrowers’ capacity to repay. That may have been a good idea, or it may have been a bad idea. Either way, it was what Congress said.

When COVID hit, two Secretaries serving two different Presidents decided to use their HEROES Act authority. The first suspended loan repayments and interest accrual for all federally held student loans. The second continued that policy for a time, and then replaced it with the loan forgiveness plan at issue here, granting most low- and middle-income borrowers up to $10,000 in debt relief. Both relied on the HEROES Act language cited above. In establishing the loan forgiveness plan, the current Secretary scratched the pre-existing conditions for loan discharge, and specified different conditions, opening loan forgiveness to more borrowers. So he “waive[d]” and “modif[ied]” statutory and regulatory provisions and applied other “terms and conditions” in their stead. That may have been a good idea, or it may have been a bad idea. Either way, the Secretary did only what Congress had told him he could. . . .

The HEROES Act’s text settles the legality of the Secretary’s loan forgiveness plan. The statute provides the Secretary with broad authority to give emergency relief to student-loan borrowers, including by altering usual discharge rules. What the Secretary did fits comfortably within that delegation. But the Court forbids him to proceed. As in other recent cases, the rules of the game change when Congress enacts broad delegations allowing agencies to take substantial regulatory measures. See, *e.g.*, *West Virginia* v. *EPA*. Then, as in this case, the Court reads statutes unnaturally, seeking to cabin their evident scope. And the Court applies heightened- specificity requirements, thwarting Congress’s efforts to ensure adequate responses to unforeseen events. The result here is that the Court substitutes itself for Congress and the Executive Branch in making national policy about student-loan forgiveness.

. . .

[The dissent’s discussion of standing is omitted.—Ed.]

## II

. . . . The majority picks the statute apart piece by piece in an attempt to escape the meaning of the whole. But the whole—the expansive delegation—is so apparent that the majority has no choice but to justify its holding on extra-statutory grounds. So the majority resorts, as is becoming the norm, to its so-called major-questions doctrine. And the majority again reveals that doctrine for what it is—a way for this Court to negate broad delegations Congress has approved, because they will have significant regulatory impacts. Thus the Court once again substitutes itself for Congress and the Executive Branch—and the hundreds of millions of people they represent—in making this Nation’s most important, as well as most contested, policy decisions.

## A

. . . . Instead of specifying a particular crisis, that [HEROES Act] enables the Secretary to act “as [he] deems necessary” in connection with any military operation or “national emergency.” § 1098bb(a)(1). But the statute’s greater coverage came with no sacrifice of potency. When the law’s emergency conditions are satisfied, the Secretary again has the power to “waive or modify any statutory or regulatory provision” relating to federal student-loan programs.

Before turning to the scope of that power, note the stringency of the triggering conditions. Putting aside military applications, the Secretary can act only when the President has declared a national emergency. See § 1098ee(4). Further, the Secretary may provide benefits only to “affected individuals”—defined as anyone who “resides or is employed in an area that is declared a disaster area . . . in connection with a national emergency” or who has “suffered direct economic hardship as a direct result of a . . . national emergency.” §§ 1098ee(2)(C)–(D). And the Secretary can do only what he determines to be “necessary” to ensure that those individuals “are not placed in a worse position financially in relation to” their loans “because of” the emergency. § 1098bb(a)(2). That last condition, said more simply, requires the Secretary to show that the relief he awards does not go beyond alleviating the economic effects of an emergency on affected borrowers’ ability to repay their loans.

But if those conditions are met, the Secretary’s delegated authority is capacious. As in the prior statutes, the Secretary has the linked power to “waive or modify any statutory or regulatory provision” applying to the student-loan programs. § 1098bb(a)(1) “Any” of the referenced provisions means, well, any of

those provisions. And those provisions include several relating to student-loan cancellation—more precisely, specifying conditions in which the Secretary can discharge loan principal. Now go back to the twin verbs: “waive or modify.” To “waive” means to “abandon, renounce, or surrender”—so here, to eliminate a regulatory requirement or condition. Black’s Law Dictionary 1894 (11th ed. 2019). To “modify” means “[t]o make somewhat different” or “to reduce in degree or extent”—so here, to lessen rather than eliminate such a requirement. *Id.*, at 1203. Then put the words together, as they appear in the statute: To “waive or modify” a requirement means to lessen its effect, from the slightest adjustment up to eliminating it altogether. Of course, making such changes may leave gaps to fill. So the statute says what is anyway obvious: that the Secretary’s waiver/modification power includes the ability to specify “the terms and conditions to be applied in lieu of such [modified or waived] statutory and regulatory provisions.” § 1098bb(b)(2). Finally, attach the “waive or modify” power to all the provisions relating to loan cancellation: The Secretary may amend, all the way up to discarding, those provisions and fill the holes that action creates with new terms designed to counteract an emergency’s effects on borrowers.

Before reviewing how that statutory scheme operated here, consider how it might work for a hypothetical emergency that the enacting Congress had in the front of its mind. . . . A terrorist organization sets off a dirty bomb in Chicago. Beyond causing deaths, the incident leads millions of residents (including many with student loans) to flee the city to escape the radiation. They must find new housing, probably new jobs. And still their student-loan bills are coming due every month. To prevent widespread loan delinquencies and defaults, the Secretary wants to discharge

$10,000 for the class of affected borrowers. Is that legal? Of course it is; it is exactly what Congress provided for. . . .

How does the majority avoid this conclusion? By picking the statute apart, and addressing each segment of Congress’s authorization as if it had nothing to do with the others. For the first several pages—really, the heart—of its analysis, the majority proceeds as though the statute contains only the word “modify.” It eventually gets around to the word “waive,” but similarly spends most of its time treating that word alone. Only when that discussion is over does the majority inform the reader that the statute also contemplates the Secretary’s addition of new terms and conditions. . . .

The majority’s cardinal error is reading “modify” as if it were the only word in the statutory delegation It is one part of a couplet: “waive or modify.” The first

verb, as discussed above, means eliminate—usually the most substantial kind of change. So the question becomes: Would Congress have given the Secretary power to wholly eliminate a requirement, as well as to relax it just a little bit, but nothing in between? The majority says yes. But the answer is no, because Congress would not have written so insane a law. The phrase “waive or modify” instead says to the Secretary: “Feel free to get rid of a requirement or, short of that, to alter it to the extent you think appropriate.” Otherwise said, the phrase extends from minor changes all the way up to major ones. . . .

As noted earlier, the statute refers expressly to “the terms and conditions to be applied in lieu of such [modified or waived] statutory and regulatory provisions.”

§ 1098bb(b)(2). In other words, the statute expects the Secretary’s waivers and modifications to involve replacing the usual provisions with different ones [T]he

statute proceeds on the premise that the usual waiver or modification will, contra the majority, involve adding “new substantive” provisions. . . .

When COVID struck, Secretary DeVos immediately suspended loan repayments and interest accrual for all federally held student loans. The majority claims it is not deciding whether that action was lawful. Which is all well and good, except that under the majority’s reasoning, how could it not be [unlawful]? The suspension too offered a significant new benefit, and to an even greater number of borrowers. (Indeed, for many borrowers, it was worth much more than the current plan’s $10,000 discharge.) So the suspension could no more meet the majority’s pivotal definition of “modify”—as make a “minor change[ ]”—than could the forgiveness plan. . . .

## B

The tell comes in the last part of the majority’s opinion. When a court is confident in its interpretation of a statute’s text, it spells out its reading and hits the send button. Not this Court, not today. This Court needs a whole other chapter to explain why it is striking down the Secretary’s plan. And that chapter is not about the statute Congress passed and the President signed, in their representation of many millions of citizens. It instead expresses the Court’s own “concerns over the exercise of administrative power.” Congress may have wanted the Secretary to have wide discretion during emergencies to offer relief to student-loan borrowers. Congress in fact drafted a statute saying as much. And the Secretary acted under that statute in a way that subjects the President he serves to political accountability—the judgment of voters. But none of that is enough. This Court objects to Congress’s permitting the Secretary (and other agency officials) to answer so-called major questions. Or at least it objects when the answers given are not to the Court’s satisfaction. So the Court puts its own heavyweight thumb on the scales. . . .

The new major-questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation. Here is a fact of the matter: Congress delegates to agencies often and broadly. And it usually does so for sound reasons. Because agencies have expertise Congress lacks. Because times and circumstances change, and agencies are better able to keep up and respond. Because Congress knows that if it had to do everything, many desirable and even necessary things wouldn’t get done. In wielding the major-questions sword, last Term and this one, this Court overrules those legislative judgments. The doctrine forces Congress to delegate in highly specific terms—respecting, say, loan forgiveness of certain amounts for borrowers of certain incomes during pandemics of certain magnitudes. Of course Congress sometimes delegates in that way. But also often not. Because if Congress authorizes loan forgiveness, then what of loan forbearance? And what of the other 10 or 20 or 50 knowable and unknowable things the Secretary could do? And should the measure taken—whether forgiveness or forbearance or anything else—always be of the same size? Or go to the same classes of people? Doesn’t it depend on the nature and scope of the pandemic, and on a host of other foreseeable and unforeseeable factors? You can see the problem. It is hard to identify and enumerate every possible application of a statute to every possible condition years in the future. So, again, Congress delegates broadly. Except that this Court now won’t let it reap the benefits of that choice.

And that is a major problem not just for governance, but for democracy too. Congress is of course a democratic institution; it responds, even if imperfectly, to the preferences of American voters. And agency officials, though not themselves elected, serve a President with the broadest of all political constituencies. . . .

The majority is therefore wrong to say that the “indicators from our previous major questions cases are present here.” . . . In this case, the Secretary responsible for carrying out the student-loan programs forgave student loans in a national emergency under the core provision of a recently enacted statute empowering him to provide student-loan relief in national emergencies. . . .

To justify *this* use of its heightened-specificity requirement, the majority relies largely on history: “[P]ast waivers and modifications,” the majority argues, “have been extremely modest.” But first, it depends what you think is “past.” One prior action, nowhere counted by the majority, is the suspension of loan payments and interest accrual begun in COVID’s first days. That action cost the Federal Government over $100 billion, and benefited many more borrowers than the forgiveness plan at issue. . . .

Similarly unavailing is the majority’s reliance on the controversy surrounding the program. Student-loan cancellation, the majority says, “raises questions that are personal and emotionally charged,” precipitating “profound debate across the country.” I have no quarrel with that description. . . . [A] political controversy is resolved by political means, as our Constitution requires. . . .

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1. Thanks to Professor Ilan Wurman for the initial edit of the case. [↑](#footnote-ref-1)