

*Biden v. Nebraska*, the student loan case, provided a new opportunity for the Court to apply the major question doctrine. Does this decision increase the threat that EPA's proposed new regulations will be struck down under this doctrine? A careful reading of the majority opinion is at least somewhat reassuring. The Court painted a picture of the loan forgiveness program that is worlds away from the regulations EPA is considering.

In determining that the student loan program presented a major question, the Court cited the following factors:

- "The Secretary has never previously claimed powers of this magnitude under the HEROES Act. As we have already noted past waivers and modifications issued under the Act have been extremely modest and narrow in scope."
- The Secretary's interpretation of the statute would provide "virtually unlimited power to rewrite the Education Act."
- "Practically every student borrower benefits, regardless of circumstances," and the cost may be "between \$469 billion and \$519 billion."
- "There is "no serious dispute that the Secretary claims the authority to exercise control over a 'significant' portion of the American economy.'"
- "More than 80 student loan forgiveness bills and other student loan legislation" were considered by Congress during its 116th session alone."

Both the car and power plant regulations involve major portions of the economy, but that is a normal attribute of Clean Air Act regulations. And both involve large compliance costs, though again that isn't unusual. But any resemblance to the student loan program seems to stop there.

EPA does *not* claim "virtually unlimited power to rewrite" the Clean Air Act. The power plant rule is very conventional in relying heavily on a technology to remove a pollutant after combustion. The car rule implicitly requires heavy use of low- and zero-emission technologies, but there's nothing in the statute to indicate that Congress considered those technologies to be off-limits, and EPA has a history of supporting their use. For instance, as far back as the George W. Bush Administration, EPA approved a waiver for California's zero-emission vehicle program.

What about prior regulations? In terms of the car program, it is far from true that prior regulations were "extremely modest and narrow in scope"—EPA has imposed ambitious, expensive regulations on carmakers in the past. In terms of the power plant rule: Past uses of section 111(d) itself (other than the Clean Power Plan) were modest, but 111(d) requires use of the "best system of emission reduction (BSER), the same standard used elsewhere in

section 111. Past applications of BSER under section 111 have not been particularly modest and have often been expensive.

Most importantly, there is every indication in the Inflation Reduction Act and bipartisan Infrastructure Act that Congress itself made the basic policy decision to dramatically expand the use of clean technologies relied on by EPA: carbon capture and use of hydrogen as a fuel (the power plant rule), and electric vehicles (the car rule). This should count heavily in favor of these regulations.

In particular, the approach taken by Justice Barrett in her concurring opinion should clearly favor these regulations. In the student loan case, she characterizes the major question doctrine as a form of textualism that emphasizes context in deciding whether an interpretation of a statute is plausible. She argues that part of this context is the general emphasis on congress as the source of major policies. Fair enough. Here we have Congress spending hundreds of billions of dollars to promote the energy transition, and that's a context that Justice Barrett should take very seriously.

Maybe the Court is now so political that it will reject *any* significant effort by EPA to reduce greenhouse gases. But we should give them the chance to prove otherwise. Their ultimate reaction to EPA's car and power plant regulations will put their adherence to the rule of law to the acid test.