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### Biden v. Nebraska: The New State Standing and the (Old) Purposive Major Questions Doctrine

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# *Biden v. Nebraska*: The New State Standing and the (Old) Purposive Major Questions Doctrine

*Jed Handelsman Shugerman\**

The last decision standing at the end of the October 2022 term was *Biden v. Nebraska*.<sup>1</sup> By a vote of 6–3, the Supreme Court invalidated the Biden administration’s student-debt waiver as an executive overreach of the emergency powers delegated by Congress in the HEROES Act of 2003.<sup>2</sup> Chief Justice John Roberts’s majority opinion was just the second time that a Supreme Court majority opinion used the phrase “major questions case” or “major questions doctrine,” following his use in *West Virginia v. EPA* one year earlier.<sup>3</sup>

The climactic set of opinions in the case fit its end-of-term timing. A case about emergency powers produced a tone of emergency about the Court’s legitimacy, a blistering exchange between Chief Justice Roberts and Justice Elena Kagan about tensions that had built up over the Term. It also included a concurrence by Justice Amy Coney Barrett attempting an end-of-term big-picture methodological review, which also seemed concerned with the Court’s legitimacy. The substance on the major questions doctrine received the most attention, but it also had hidden significance with an implicit

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<sup>1</sup> 143 S. Ct. 2355 (2023).

<sup>2</sup> Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). 117 Stat. 904.

<sup>3</sup> 142 S. Ct. 2587, 2605, 2610 (2022).

new rule on procedure and standing. Furthermore, it is an appropriate end-of-term decision because it was shaped by, and makes sense of, some earlier cases this term.

In other words, one way to interpret *Biden v. Nebraska* is to understand what is *not* in it. Some of the clarifications of what the Court was really doing are found in unpersuasive counterarguments in other opinions, even different cases from the October 2022 term. Another clarification was a question posed by a Justice in oral argument, but no Justices were willing to answer that question in writing.

First, Chief Justice Roberts's majority opinion does not explain how Missouri would have standing under the traditional test (where is the concrete and particularized injury?). In a different case decided just a week earlier, *United States v. Texas*, Justice Neil Gorsuch concurred (joined by Justice Barrett) and made a special point of rejecting "the special solicitude of states" for standing.<sup>4</sup> That "special solicitude" seems to be the best explanation for letting Missouri stand in for the insulated corporation that it created. Thus, *Biden v. Nebraska* should be reconciled as a new state-standing precedent, despite (or because of) its avoiding this explanation.

Second, Chief Justice Roberts did not explain the interpretive basis for the new major questions doctrine (MQD), but he implied that it is purposive. Justice Barrett wrote a solo concurrence arguing that the MQD is based on neither purposivism nor a substantive canon (the constitutional avoidance of a nondelegation problem), but rather is simply textualism. Her opinion is so counter-persuasive that it confirms that the major questions doctrine is still an exception in favor of purposivism, as well as an exception to *Chevron* deference. The view of MQD as a substantive canon (previously espoused by Justice Gorsuch) is still an alternative explanation that remains more descriptively accurate than Barrett's pseudo-textualism, but none of the Justices wrote to say so.

Third, in oral argument, Justice Brett Kavanaugh cited an amicus brief (in fact, mine)<sup>5</sup> and asked, "A professor says this is a case study in abuse of executive emergency powers. . . . And I want to get your assessment . . . of how we should think about our role in assertion

<sup>4</sup> 143 S. Ct. 1964, 1977 (2023) (Gorsuch, J., concurring).

<sup>5</sup> See Jed Handelsman Shugerman, *Major Questions and an Emergency Question Doctrine*, (Fordham Law Legal Studies Research Paper No. 4345019, 2023), <https://tinyurl.com/53td7sdp>.

of presidential emergency power given the Court's history."<sup>6</sup> Indeed, as this article will recount, the Biden administration's reliance on COVID-19 was a pretext to exploit an emergency provision in the statute it relied upon, the post-9/11 HEROES Act of 2003, to achieve its longer-term policy goal of student-debt relief. The Biden administration arguably had a better legal basis in the Higher Education Act of 1965, but that statute required the far longer and less predictable administrative process of negotiated regulation. The Biden administration seemed to prioritize the political calendar, wishing to finalize the policy in time for the November 2022 midterm election.

The Biden debt-waiver political backstory is just one of many examples of the ongoing bipartisan abuse of emergency executive powers, but no one addressed Justice Kavanaugh's question—not the parties and not even the Justices themselves in their final opinions. This article focuses on how the Supreme Court may have solved one problem but created another. A solution is beyond the scope of this genre, but I will tease that a solution connects the second and third themes of interpretation and emergencies: methods of statutory interpretation to address the tricky problem of delegating power for real but unspecified future emergencies.

Part I is a slightly different summary of the case than what one might read in a standard article: It tells the story of the Biden student-debt relief as a story about the use of COVID-19 as a pretext and about the abuse of emergency powers. Part II jumps to the unsatisfactory majority opinion on standing and Justice Kagan's valid questions. Part II then discusses Justice Gorsuch's rejection of "state" standing a week earlier—an out-of-place proxy battle about what was likely the best explanation behind closed doors for Missouri's standing, despite no concrete injury. Part III suggests that the Chief Justice's approach to the major questions doctrine was more purposive than anything else, and it also suggests that Justice Barrett's argument for textualism against purposivism and substantive canons was so unpersuasive that it backfired. As a solo concurrence with such marginal and muddled arguments, it confirmed that Roberts's purposive approach is the definitive doctrine. Part IV returns to the unresolved problem of emergencies and the ongoing bipartisan abuse of emergency powers and sketches a solution to the Roberts Court's overcorrection.

<sup>6</sup> Transcript of Oral Argument at 60–61, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (No. 22-505).

A commentary on *Biden v. Nebraska* would default if it failed to account the Justices' concluding sharp exchanges, and no one had the legal capital to suggest the other side was morally bankrupt.

### **I. A COVID-19 Emergency Pretext and a Standing Dodge**

The student-debt case was not the first or second time that the Supreme Court has reviewed emergency executive action responding to the COVID-19 pandemic. In the Vaccine-or-Test Mandate cases, the government cited the COVID-19 emergency to bypass regular process.<sup>7</sup> In this student-debt case, the government again invoked emergency powers to bypass administrative process. Although the Higher Education Act of 1965 provided a textual basis for issuing waivers, it also required a longer process for rescinding regulations from the Obama administration and a year of notice-and-comment process in order to issue new regulations.<sup>8</sup> Instead of relying on the statute with the better fit and a longer process, the government invoked an emergency to use the misfit statute and put the action on an emergency track.

A key question for whether agency action was properly delegated or was *ultra vires*: How close is the nexus between the emergency and the action allegedly taken pursuant to the emergency? If the nexus is close to the claimed ends in the statute, then it is more likely that the action was congressionally authorized. If the nexus is strained—and if the policy is broader in scope than the emergency—then the agency has gone beyond the congressional delegation from that statute.

A second key question here, as posed by the emergency questions doctrine that I wish to develop, is whether other parts of the statute and its purposes give legally intelligible context and contours to an otherwise open-ended emergency clause. The HEROES Act of 2003 helpfully contains a “findings” section to provide some limiting principles and constraints. The Act allows the Secretary of Education to make major changes to policy if “a national emergency” caused student borrowers to be “placed in a worse position financially.”<sup>9</sup>

<sup>7</sup> See, e.g., *NFIB v. DOL, OSHA*, 142 S. Ct. 661, 663 (2022) (an emergency exception to “ordinary notice-and-comment procedures”); cf. *Alabama Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2487 (2021).

<sup>8</sup> See 20 U.S.C. § 1082(a).

<sup>9</sup> 20 U.S.C. § 1098bb(a)(2)(A).

The HEROES Act provided its own textual basis for its context and purposes with a consistent section on “findings.” The list of six findings is entirely focused on military contexts, with multiple references to “active service.”<sup>10</sup> Even if one can logically extend the purposes from a military context to a pandemic, this context suggests that the emergency powers would have to be analogous from “active service” to the active pandemic. This would require a more direct causal impact on the individuals receiving relief, with the emergency having a concrete impact on their education or economic circumstances.

The Office of Legal Counsel’s (OLC) and the Department of Education’s own lawyers agreed with the bottom line that a causal nexus was necessary, but the Department of Education promulgated a program that did not even follow its own lawyers’ interpretation. Both the OLC and the Department of Education issued memoranda in August validating the legality of the proposed policy, and both memos conceded that the program would have to be tailored to the COVID emergency in order to fit the statute. The OLC memo concludes, “Thus, to invoke the HEROES Act in the context of COVID-19, the Secretary would need to determine that the COVID-19 pandemic *was a but-for cause of the financial harm to be addressed by the waiver or modification.*”<sup>11</sup>

The Department of Education memo suggests the same limitation: The HEROES Act emergency authority is not “boundless” but is rather “limited *inter alia* . . . to certain categories of eligible individuals or institutions . . . and to a defined set of purposes.”<sup>12</sup> The memo acknowledges a causation requirement: “The Secretary’s determinations regarding the amount of relief, and the categories of borrowers for whom relief is necessary, should be informed by evidence regarding the financial harms that borrowers have experienced, or will likely experience, *because of the COVID-19 pandemic.*”<sup>13</sup>

<sup>10</sup> See 20 U.S.C. § 1098aa(b)(1)-(6) (listing four references to “active service” or “active duty,” as well as reference to members of the military “put[ting] their lives on hold”).

<sup>11</sup> OLC memorandum, “Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans,” at 21 (Aug. 23, 2022) (emphasis added), <https://tinyurl.com/ypva98jy>.

<sup>12</sup> Lisa Brown, General Counsel, Department of Education, “The Secretary’s Legal Authority for Debt Cancellation,” at 2–3 (Aug. 23, 2022) (citations omitted), <https://tinyurl.com/yrev38y9>.

<sup>13</sup> *Id.* (emphasis added)

The Department of Education noted that the authority under the statute “can be exercised categorically to address the situation at hand; it does not need to be exercised ‘on a case-by-case basis.’”<sup>14</sup> The program “may provide relief on a categorical basis as necessary to address the financial harms of the pandemic.”<sup>15</sup>

However, when the program was announced, there was no hint that the categories created were related to COVID. Eligibility for the program was based on a means-tested income threshold, but a category based solely on income does not indicate whether COVID itself had a negative impact on the class of claimants’ financial position. These problems of causation were immediately apparent, and there was ample time to tailor the program to COVID causation or to switch to a statute that matched the breadth and purpose of this program.<sup>16</sup>

The regulatory process here is a case study for how the executive branch abuses emergency powers: The government lawyers seized onto the word “emergency” in the statute and interpreted it as a broad delegation, without examining the rest of the statutory text or putting it in context. Notably, neither the OLC nor the Department of Education engaged with recent precedents on COVID emergencies or major questions. They assumed that the word “emergency” was an open-ended delegation. The OLC memo failed to cite any of the recent major question doctrine cases: not *FDA v. Brown & Williamson Tobacco Corp.*,<sup>17</sup> not *King v. Burwell*,<sup>18</sup> not even the COVID cases *Alabama Ass’n of Realtors v. HHS*<sup>19</sup> (the eviction moratorium) and *NFIB v. DOL, OSHA*<sup>20</sup> (the vaccine-or-test mandate). Instead, the OLC assumed that invoking the word “emergency” and narrow textual arguments would be sufficient. In a 25-page memo, less than one page focused on the HEROES Act’s purpose and legislative history.

<sup>14</sup> *Id.* at 3 (quoting 20 U.S.C. § 1098bb(b)(3)).

<sup>15</sup> *Id.*

<sup>16</sup> See Elizabeth Goitein, *Biden used ‘emergency powers’ to forgive student debt? That’s a slippery slope*, WASH. POST (Sept. 1, 2022), <https://tinyurl.com/bd55xy5u>; Jed Shugerman, *Biden’s Student-Debt Rescue Plan is a Legal Mess*, THE ATLANTIC (Sept. 4, 2022), <https://tinyurl.com/mra4wh7z>.

<sup>17</sup> 529 U.S. 120 (2000).

<sup>18</sup> 576 U.S. 473 (2015).

<sup>19</sup> 141 S. Ct. 2485 (2021).

<sup>20</sup> 142 S. Ct. 661 (2022).



The OLC did not acknowledge the Act's findings section, which indicates a narrower purpose related to active emergencies and direct impacts. The obvious context of the 2003 law was the September 11 terrorist attacks and the subsequent wars in Afghanistan and Iraq. That is consistent with the preamble of statutory findings, which emphasizes military "active duty," "active" emergencies, and active direct impacts on claimants. And as noted above, the textual or common-sense linguistic canons *eiusdem generis* and *noscitur a sociis* provide guidance for interpreting the associated list "war or other military operation or national emergency."<sup>21</sup> Even if "emergency" generalizes beyond the military contexts, this list is consistent with the finding's emphasis on "active duty," and "active service,"—i.e., an active emergency.

Of course, COVID was a national emergency from March 2020 into 2021. However, it was already doubtful by August 2022, when the program was announced, that COVID was still a national emergency comparable to post-9/11 and the military action that followed. The HEROES Act's findings section repeatedly refers to "active duty" and "active service," which provides a context and purpose for the term "active emergencies." The late stages of the COVID emergency—after many rounds of vaccines, the stabilization of the economy, and a return to social normalcy—did not fit the context and purpose of "active" emergencies.

During this period of normalcy, the government also could not excuse its overbroad policy on the urgency of the emergency. No exigent circumstances forced the government to skip the statutory requirements of establishing causality. Yet the final debt-relief program required no basic indicia of causation or even correlation with the COVID emergency. The one-time income threshold established by the program did not indicate whether a borrower was "in a worse position financially" because of the emergency. Surely many middle-class Americans with student loans are worse off, but many are not. Some sectors of the economy improved during COVID, and some improved *because of* COVID (e.g., many fared well in industries like pharmaceuticals, remote communications technology, information technology, and food and grocery delivery). It would have been feasible to create categories along these lines or, even simpler, to ask for a single pre-COVID tax return to compare with the already-required mid-COVID tax return.

<sup>21</sup> See 20 U.S.C. § 1098aa(b)(1)-(6) (listing four references to "active service" or "active duty," as well as reference to members of the military "put[ting] their lives on hold").

Thus, the program's overbreadth and its reliance on categories unrelated to COVID indicated that COVID was only a pretext. The Biden administration could have tailored the program to COVID causation in accordance with the HEROES Act's statutory provision. Or, if the administration wanted a policy broader than just relief from the effects of COVID, it could have relied on a broader structural non-emergency statutory provision in the Higher Education Act of 1965. But it did neither.

At a late stage, the Department of Education added a new rationale: When debt payment requirements are restarted after long moratoria, many debtors default or go bankrupt.<sup>22</sup> Again, the total waiver is a much broader means for that stated ends. A gradual phase-in of payments would have been a better fit than a total waiver. Again, the Biden administration's shifting to new reasons indicates a precommitment to a broad policy and then a search for a *post hoc* emergency rationale.

This timeline of public statements is further evidence of pretext and further corroborates the need for a new approach to emergency powers:

August 25, 2022: Soon after the administration announced it would start the administrative process for a waiver program, President Joe Biden gave a speech emphasizing that the waiver would serve non-emergency long-term purposes. Biden mentioned the COVID emergency just once.<sup>23</sup>

September 19, 2022: Biden stated on *60 Minutes*: "The pandemic is over."<sup>24</sup>

October 12, 2022: The Department of Education finalized and published the program, less than a month before Election Day.<sup>25</sup>

January 31, 2023: One day after the administration announced that it would extend the emergency declarations to May 15 and end them thereafter, President Biden answered a press question about

<sup>22</sup> *Nebraska*, 143 S. Ct. at 2393 & n.2 (Kagan, J., dissenting).

<sup>23</sup> The White House, "Remarks by President Biden Announcing Student Loan Debt Relief Plan" (Aug. 25, 2022), <https://tinyurl.com/ym4eb744>.

<sup>24</sup> *Biden says Covid-19 pandemic is "over" in U.S.*, CBS NEWS (Sept. 19, 2022), <https://tinyurl.com/3m34zzad>.

<sup>25</sup> See 87 Fed. Reg. 61512, 61514.

the reason for this timing: “We’ve extended it to May the 15th to make sure we get everything done. That’s all.”<sup>26</sup>

This is backwards: The existence of an emergency should be the reason for an emergency policy. A desire to achieve policy goals should not be the reason for deciding whether or not there is an emergency. Again, if the emergency is over, there is no good excuse for ignoring the HEROES Act’s requirement to show that recipients of relief suffered harm *caused* by the emergency.

On the one hand, COVID-19 was clearly an emergency, and there is good reason to think that COVID-19 played a role in the Biden campaign’s March 2020 endorsement of student-debt cancellation. Many other candidates for the 2020 Democratic nomination had campaigned on this proposal well before the pandemic began.<sup>27</sup> However, it appears from public records that then-candidate Biden did not endorse student-debt cancellation until March 13, 2020. That was several days after five states had declared a state of emergency, two days after the World Health Organization declared COVID-19 a pandemic, and the same day President Donald Trump issued the Proclamation on Declaring a National Emergency. Biden expanded on this proposal in late March and early April 2020.

On the other hand, there is a pattern of emergency pretexts and overbreadth, used for both circumventing process and stretching substance.

The public record of contradictions and pretexts in the student-debt case is even more stark. From the official announcement in August 2022 through the finalization of the program, the Biden administration never hinted that it was considering eligibility questions that would establish a causal link between COVID and a borrower’s “financial position.” There is no evidence that this basic statutory requirement was discussed but set aside for pragmatic reasons. There is no sign that the Department of Education took seriously its own lawyers’ memo or the OLC opinion that the HEROES Act required COVID causation.

<sup>26</sup> The White House, “Remarks by President Biden Before Marine One Departure” (Jan. 31, 2023), <https://tinyurl.com/2ppw38mx>.

<sup>27</sup> See, e.g., Press Release, Elizabeth Warren, Senator, “Senator Warren, House Majority Whip Clyburn Introduce Legislation to Cancel Student Loan Debt for Millions of Americans” (July 23, 2019), [perma.cc/L9D4-ASRY](https://perma.cc/L9D4-ASRY); Annie Nova, *Where the 2020 Democratic Candidates Stand on Student Debt*, CNBC (Sept. 21, 2019), [perma.cc/AF47-JRNY](https://perma.cc/AF47-JRNY).

The administration’s advocates have often invoked the phrase, “Never let a crisis go to waste.” This quotation has been misattributed to historical figures on the left and the right, but the administration’s surrogates have used it often in the context of COVID.<sup>28</sup> The phrase has been used repeatedly in other COVID contexts. A crisis can sharpen, clarify, highlight, and exacerbate a pre-existing social problem, and it can mobilize support for a solution. But sometimes the crisis is merely a pretext for achieving a pre-existing policy goal, after the crisis has shifted power to a new administration. When it is the latter, the pretext is an administrative law problem.

No matter which party is in power, the political logic of leveraging a crisis to implement a longstanding policy agenda makes sense. But the *legal* logic of administrative law requires that the executive must give the real reasons for taking an action, and the policy must fit those real reasons. If the crisis is the real reason, the policy must be tailored to fit the crisis. That is where the Biden administration fell short.

## II. Standing: The New “Special Solitude for States”

Eight states sued to challenge the administration’s debt-cancellation plan, but the district court concluded that none of the eight had standing. On appeal, the Eighth Circuit then concluded that Missouri would likely have standing through the Missouri Higher Education Loan Authority (MOHELA), a public corporation created by the state of Missouri to hold and service student loans.<sup>29</sup> And the Supreme Court agreed with the Eighth Circuit. In the majority opinion written by Chief Justice Roberts, the Court first acknowledged:

Under Article III of the Constitution, a plaintiff needs a “personal stake” in the case. That is, the plaintiff must have suffered an injury in fact—a concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit.<sup>30</sup>

<sup>28</sup> See Rahm Emanuel, *Let’s make sure this crisis doesn’t go to waste*, WASH. POST (March 25, 2020), <https://tinyurl.com/yc2f793k>.

<sup>29</sup> *Nebraska v. Biden*, 52 F.4th 1044, 1047 (8th Cir. 2022).

<sup>30</sup> *Nebraska*, 143 S. Ct. at 2365 (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021); *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992)).

It is important to note that because of the expedited nature of this “lightning docket” case and because the district court did not find standing, the factual record about MOHELA’s losses and its relationship to Missouri remains unclear. However, it seems clear that MOHELA would have suffered an injury in fact if the plan had gone into effect, estimated at about \$44 million per year in lost fees that it otherwise would have received without the debt waivers.<sup>31</sup> Chief Justice Roberts next made a key logical move, reasoning that MOHELA’s losses could be treated as losses to Missouri: “[W]e conclude that the Secretary’s plan harms MOHELA and thereby directly injures Missouri—conferring standing on that State.”<sup>32</sup> This sentence appears to sum up the Court’s analysis: If the plan harms MOHELA, it thereby injures Missouri.

The problem is that Missouri incorporated and designed MOHELA to be completely financially independent. In dissent, Justice Kagan reviewed the precedents on standing:

A court may address the legality of a government action only if the person challenging it has standing—which requires that the person have suffered a “concrete and particularized injury.” It is not enough for the plaintiff to assert a “generalized grievance[.]” about government policy. And critically here, the plaintiff cannot rest its claim on a third party’s rights and interests. The plaintiff needs its own stake—a “personal stake”—in the outcome of the litigation. If the plaintiff has no such stake, a court must stop in its tracks. To decide the case is to exceed the permissible boundaries of the judicial role.<sup>33</sup>

Turning to the facts of this case, she observed,

But not even Missouri, and not even the majority, claims that MOHELA’s revenue loss gets passed through to the State. . . . MOHELA is financially independent from Missouri—as corporations typically are, the better to insulate their creators from financial loss. So MOHELA’s revenue decline—the injury in fact claimed to justify this suit—is not

<sup>31</sup> *See id.* at 2366

<sup>32</sup> *Id.* at 2365.

<sup>33</sup> *Id.* at 2386 (Kagan, J., dissenting) (citations omitted).

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in fact Missouri's. The State's treasury will not be out one penny because of the Secretary's plan. The revenue loss allegedly grounding this case is MOHELA's alone.<sup>34</sup>

Kagan showed that, as a matter of Missouri state statutes and corporate design, "MOHELA's assets, including the fees gained from that contract, are not 'part of the revenue of the [S]tate' and cannot be 'used for the payment of debt incurred by the [S]tate.' On the other side of the ledger, MOHELA's debts are MOHELA's alone; Missouri cannot be liable for them."<sup>35</sup> She cited a Missouri Supreme Court case holding that another state corporation with the same design was "'not the [S]tate,' and that its activities are not state activities."<sup>36</sup>

Kagan asked rhetorically:

[This] leads to an obvious question: Where's MOHELA? The answer is: As far from this suit as it can manage. . . . MOHELA was "not involved with the decision of the Missouri Attorney General's Office" to file this suit. And MOHELA did not cooperate with the Attorney General's efforts. When the AG wanted documents relating to MOHELA's loan-servicing contract, to aid him in putting forward the State's standing theory, he had to file formal "sunshine law" demands on the entity. MOHELA had no interest in assisting voluntarily.<sup>37</sup>

And that's not all, for Kagan did not even mention some other problematic details: From the beginning of this case, it was widely understood that Missouri's relation to MOHELA was the key to standing. But only *Nebraska's* solicitor general James Campbell represented the plaintiffs at oral argument, leading to some predictably awkward exchanges along the lines of "Where's MOHELA?" It was convenient that Missouri officials did not have to answer. It is unclear why Missouri Solicitor General Josh Divine was unavailable.<sup>38</sup>

<sup>34</sup> *Id.* at 2386–87.

<sup>35</sup> *Id.* at 2387 (citations omitted).

<sup>36</sup> *Id.* (citing *Menorah Medical Ctr. v. Health and Ed. Facilities Auth.*, 584 S.W.2d 73, 78 (Mo. 1979)).

<sup>37</sup> *Id.*

<sup>38</sup> I noted at the time that Missouri's Solicitor General appeared to be well qualified to argue the case. See Jed Shugerman (@jedshug), TWITTER (Mar. 9, 2023, 11:20 AM), <https://tinyurl.com/47yfjzvw>.

Missouri state officials dodged these questions, and Chief Justice Roberts also avoided answering Justice Kagan's questions. He recounted a long list of effects that would spill over from MOHELA to Missouri's citizens, but those effects were hard to distinguish from the generalized, widespread, and diffuse kinds of harms that the Court has held insufficient to establish Article III standing. Roberts offered a long passage that seemed to deliberately avoid describing the harms as "concrete" or "imminent," even though, in the preceding pages on standing law, Roberts had pulled out those words as the standing requirements from precedents like *Lujan*.<sup>39</sup>

Note that Roberts's analysis did not discuss the likelihood, nor immediacy, nor concreteness of the harm to Missouri. The theme of his standing analysis was that the state's status as a public entity with special public interests and performing public functions permits the state to serve as a stand-in for possible widespread harms to the state's citizens. It is most appropriate to let Roberts speak for himself (and for the specialness of states):

The plan's harm to MOHELA is also a harm to Missouri. MOHELA is a "public instrumentality" of the State. Missouri established the Authority to perform the "essential public function" of helping Missourians access student loans needed to pay for college . . . see *Todd v. Curators of University of Missouri*, 347 Mo. 460, 464, 147 S. W. 2d 1063, 1064 (1941) ("Our constitution recognizes *higher education as a governmental function*."). To fulfill this public purpose, the Authority is empowered by the State to invest in or finance student loans . . . Its profits help fund education in Missouri: MOHELA has provided \$230 million for development projects at Missouri colleges and universities and almost \$300 million in grants and scholarships for Missouri students.<sup>40</sup>

Let's pause and observe that there is still no sign of any harm yet, concrete or not. These sentences are all descriptions of the lofty public services that MOHELA provides.

Roberts next moved on to the close governing relationship between the state of Missouri and MOHELA, but this special relationship still provided no evidence of likely harm:

<sup>39</sup> *Nebraska*, 143 S. Ct. at 2366 (citing *Lujan*, 504 U.S. at 560–561).

<sup>40</sup> *Id.* (emphasis added).

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The Authority is subject to the State's supervision and control. Its board consists of two state officials and five members appointed by the Governor and approved by the Senate. The Governor can remove any board member for cause. MOHELA must provide annual financial reports to the Missouri Department of Education, detailing its income, expenditures, and assets. The Authority is therefore "directly answerable" to the State. The State "set[s] the terms of its existence," and only the State "can abolish [MOHELA] and set the terms of its dissolution." By law and function, MOHELA is an instrumentality of Missouri: It 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.<sup>41</sup>

Roberts was much more interested in describing MOHELA as an extension of the state of Missouri than in describing any harm. When Roberts eventually got to the point about Missouri's injuries, it was a speculative leap:

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.<sup>42</sup>

The first problem with this argument is that Roberts's harm analysis was more or less the same as what a Missouri citizen and taxpayer would argue: "MOHELA's losses may have some effect on my access to education funding." A thousand Missouri citizens could sue, or dozens of Missouri non-profits could sue, all claiming standing based on their potential lost opportunity caused by MOHELA's marginal losses of funds—and they would all lose. These standing claims are classic examples of the "generalized grievances" and "attenuated" harms that Supreme Court precedents reject as beyond Article III "cases and controversies."<sup>43</sup> The most plausible way to understand how Roberts was able to distinguish Missouri's general and attenuated harms from those of a

<sup>41</sup> *Id.* (internal citations omitted).

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014); *Allen v. Wright*, 468 U.S. 737, 750, 752 (1984).



thousand hypothetical Missourian individual plaintiffs is that the state of Missouri serves to collect their private harms into a recognized public entity with special constitutional status. Yet in several ways, Missouri's harms are more attenuated and more abstract than a thousand private Missouri citizens: Those citizens are more concretely and directly injured by losing access to education funding, whereas Missouri's losses amount to budgetary items that can be moved around on state ledgers.

Another problem with Roberts's standing argument is that the record lacks any indication that Missouri citizens would lose educational opportunities if MOHELA lost revenue. MOHELA is a heavily regulated non-profit established by the state. As long as MOHELA has sufficient assets, it would seem to be able to continue to execute its role in the public interest. It is unclear whether or how losses to MOHELA would get passed down to Missourians. If the state of Missouri lost tax revenue, it is certainly imaginable that Missourians might lose some resources. But the record is far from clear how and when Missourians would be concretely hurt.

This unaddressed question is a problem under the Court's standing doctrine. As the Court recently held in *Spokeo, Inc. v. Robins*, an injury must "actually exist" or there must be a "risk of real harm" for the injury to be "concrete" enough to establish standing.<sup>44</sup> True, a harm can be "widely shared" yet still concrete enough to be a sufficient injury in fact.<sup>45</sup> Although some past precedents required that the concrete harm must be "real, immediate, and direct,"<sup>46</sup> those qualifications do not seem to have been as salient. A more repeated and salient rule is that the Court has required "sufficient likelihood" of a "real and immediate" injury, and even a "certainly impending" real harm, one that is not mere conjecture or speculation.<sup>47</sup> But standing in this case *was* based on merely speculative and conjectured harms.

<sup>44</sup> 136 S. Ct. 1540, 1548–49 (2016).

<sup>45</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 517, 522 (2007).

<sup>46</sup> See *Davis v. FEC*, 554 U.S. 724, 734 (2008).

<sup>47</sup> See *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *Rizzo v. Goode*, 423 U.S. 362, 372 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410–11 (2013) (holding that, in order to demonstrate Article III standing, a plaintiff seeking injunctive relief must prove that the future injury, which is the basis for the relief sought, must be "certainly impending"; a showing of a "reasonable likelihood" of future injury is insufficient).

It was unclear from the evidence before the courts whether a cut in MOHELA's revenue would concretely harm Missouri's present and future college students—or the state of Missouri. Possible? Imaginable? Of course—but not established as likely from this lightning docket and thin and hasty record. Missouri's statehood was doing the work in this analysis, not the specific facts nor the concreteness of any harm.

Roberts and Kagan also engaged in a debate over the meaning of a 1953 case, *Arkansas v. Texas*,<sup>48</sup> which concerned the state of Arkansas's capacity to stand in for a state university. Roberts ultimately came to the same point: "But we concluded that Arkansas was in fact seeking to protect its *own* interests because the University was 'an official state instrumentality.' . . . Because the Authority is part of Missouri, the State does not seek to 'rely on injuries suffered by others.' . . . It aims to remedy its own."<sup>49</sup> Again, statehood is doing the work. In Roberts's account of both cases, the special relationship between a state as public-interest-entity and its instrumentality serving the public interest creates a special standing rule.

If we were reading about these diffuse, general, indirect impacts on a *private* plaintiff caused by a policy's effect on a corporation, the private plaintiff's claim for standing would be dismissed as a paradigmatic "generalized" widespread harm. It would be rejected as a claim akin to taxpayer standing, which is insufficient to get into federal court. Or suppose a corporation had spun off an entirely independent new corporation with a separate corporate board, but the two boards shared many of the same members. And suppose the new corporation affected the original corporation in close but indirect ways. If the original corporation attempted to sue on the basis of injuries to the spin-off, the courts would dismiss the original corporation's claim to stand in for the spin-off's injuries. But here, Missouri has standing on behalf of its independent spin-off because of its collective institutional capacity to stand in for the people of Missouri—a more significant status than its capacity to stand in for MOHELA.

<sup>48</sup> 346 U.S. 368 (1953).

<sup>49</sup> *Nebraska*, 143 S. Ct. at 2367 (quoting Justice Kagan's dissent in *Nebraska*) (emphasis in original).

If Missouri's special status as a state was the real reason that the Court lowered the threshold for a concrete "certainly impending" or "sufficiently likely" harm to Missouri itself, then why didn't Roberts just say so and cite a precedent like *Massachusetts v. EPA*<sup>50</sup> for the "special solicitude" of states? One possible answer is that Roberts had vigorously dissented in that case 16 years earlier.

Another answer is that there was no majority for such an explanation, as we know from *United States v. Texas*,<sup>51</sup> decided exactly one week before *Biden v. Nebraska*. In that case, Texas and Louisiana had sued to challenge the Biden administration policy pausing deportations in cases without a threat to "national security, public safety, and border security." The Fifth Circuit had ruled in favor of the states, finding that they had standing and blocking the Biden administration policy. The Supreme Court reversed the Fifth Circuit 8–1, finding that the states did not have standing. Justice Kavanaugh, joined by Chief Justice Roberts and Justices Sonia Sotomayor, Kagan, and Ketanji Brown Jackson, wrote the majority opinion, which focused on the established limits on challenges to prosecutorial discretion. Justice Samuel Alito dissented, writing that he would have found the states had standing based on what he called "the obvious parallel" of *Massachusetts v. EPA*.<sup>52</sup> Alito cited its reasoning about states' "'quasi-sovereign interes[t]' in avoiding the loss of territory" and quoted its rule of "special solicitude" for states' standing.<sup>53</sup> Alito also cited other decisions with similar reasoning, and concluded:

I understand that what we have called "'drive-by jurisdictional rulings'" are not precedents, see *Arbaugh v. Y & H Corp.*, 546 U. S. 500, 511 (2006), but the Court should not use a practice of selective silence to accept or reject prominently presented standing arguments on inconsistent grounds.<sup>54</sup>

<sup>50</sup> 549 U.S. 497, 520 (2007).

<sup>51</sup> 143 S. Ct. 1964 (2023).

<sup>52</sup> *Id.* at 1996 (Alito, J., dissenting) (observing that *Massachusetts v. EPA* "has been called 'the most important environmental law case ever decided by the Court'" (quoting RICHARD LAZARUS, *THE RULE OF FIVE: MAKING CLIMATE HISTORY AT THE SUPREME COURT 1* (2020))).

<sup>53</sup> *Id.* at 1996–97 (citing *Massachusetts*, 549 U.S. at 520).

<sup>54</sup> *Id.* at 1998.

This sentence is telling, and perhaps a “tell” (in the poker sense) of behind-the-scenes deliberation. Was Alito commenting on the “selective silence” and “inconsistent grounds” about state standing not only in *United States v. Texas*, but also in the then-forthcoming *Biden v. Nebraska* opinion? Should *Biden v. Nebraska* also be considered a “drive-by jurisdictional ruling” of selective convenience?

Justice Gorsuch concurred in *United States v. Texas*, joined by Justices Clarence Thomas and Barrett, in part to respond to Justice Alito and contest his standing arguments. The math becomes clear: one Justice went on record in *United States v. Texas* endorsing “special solicitude” for state standing, and three Justices went on record against it—covering four of the six Justices in the *Biden v. Nebraska* majority. Roberts and Kavanaugh would exercise their right to remain silent in both majorities. And Gorsuch, like Alito, called out the *Texas* majority’s silence regarding “special solicitude.” Like Alito, Gorsuch was not explicitly talking about Missouri’s standing in the student-debt case (since *Nebraska* had then not yet been issued). But reading between the lines, Gorsuch’s derisive references to silence seem loud enough.

In his *United States v. Texas* concurrence, Gorsuch wrote that the same standing rules apply “whether the plaintiff is a private person or a State. After all, standing doctrine derives from Article III, and nothing in that provision suggests a State may have standing when a similarly situated private party does not.”<sup>55</sup> For that proposition, Gorsuch cited Chief Justice Roberts’s dissent in *Massachusetts v. EPA*.<sup>56</sup> Gorsuch continued, taking aim more at Justice Kavanaugh (and perhaps Chief Justice Roberts) than at Justice Alito’s dissent:

Before *Massachusetts v. EPA*, the notion that States enjoy relaxed standing rules “ha[d] no basis in our jurisprudence.” [549 U.S.] at 536 (ROBERTS, C. J., dissenting). Nor has “special solicitude” played a meaningful role in this Court’s decisions in the years since. *Even so, it’s hard not to wonder why the Court says nothing about “special solicitude” in this case. And it’s hard not to think, too, that lower courts should just leave that idea on the shelf in future ones.*<sup>57</sup>

<sup>55</sup> *Id.* at 1976 (Gorsuch, J., concurring).

<sup>56</sup> *Id.* (citing *Massachusetts*, 549 U. S. at 536–38 (Roberts, C.J., dissenting)).

<sup>57</sup> *Id.* (emphasis added).

Indeed: “It’s hard not to wonder why the Court says nothing about ‘special solicitude’” in either *United States v. Texas* or *Biden v. Nebraska*, issued a week apart. Was Gorsuch reading the student-debt draft opinions as he wrote this concurrence in June 2023, noting the double silence on “special solicitude” across both cases? Had there been memos or drafts in which “special solicitude” for state standing had been discussed in either (or both)? Had Gorsuch written a response and a potential concurrence in *Biden v. Nebraska* arguing against state standing, only to see those arguments dropped? This is conjecture and speculation (standing reference intended), but it would explain both Alito’s and Gorsuch’s unusually sharp focus on the silence in the *Texas* majority opinion, when the same silence is unmistakable in *two* different majority opinions.

One role of legal commentators is to make sense of judicial opinions and elucidate the rules that emerge from common law case-by-case decision making. Those rules often have gaps—gaps that are sometimes inevitable due to the case-by-case nature of adjudication, sometimes the product of negotiation on a multi-member court, and sometimes deliberate gaps left open as a kind of compromise. It seems the Roberts Court was more interested in getting to the substance of the legality of the student debt waiver and developing the major questions doctrine, and less interested in developing standing doctrine. The majority’s silence on state standing seems deliberate, but that avoidance should not obscure the underlying reasoning that makes sense of the result.

The best way to understand the majority opinion’s standing reasoning is that it did, in fact, lower its Article III standards to grant Missouri standing, recognizing an even less concrete, more attenuated, and more indirect harm to the state of Missouri than it would have recognized for a parallel claim by thousands of Missouri citizen-plaintiffs, who would have lost. And that lower standard is a “special solicitude for states” in our federal system.

### *B. In Defense of “Special” State Standing*

The “special solicitude” of state standing is the way to understand what the majority was actually doing. It is not just a better fit descriptively, but also has normative virtues.<sup>58</sup> An amicus brief from

<sup>58</sup> *Massachusetts*, 549 U.S. at 520.

Professors Samuel Bray and William Baude supporting the Biden administration raised concerns about “extravagant theories” of state standing.<sup>59</sup> However, this case was no extravagant extension of the “special solicitude” doctrine. In fact, allowing states slightly more latitude in establishing standing to raise constitutional questions and to challenge the abuse of executive power strikes an appropriate balance through federalism: States can seek access to justice and enforce the rule of law on behalf of their constituents, without the problems that would come from opening up the courts to many more attenuated and unmanageable cases. Given the concerns about the abuses of federal executive power, it is important to affirm that states do indeed have “special solicitude” in our federal system.

Let’s go back to first principles and *Marbury v. Madison*: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . . [I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.”<sup>60</sup> Constitutional rights and the protections of the laws become a dead letter if standing law raises artificially high parchment barriers to the courts. If the executive branch can shield itself from legal challenges by arguing for high thresholds for standing after reverse-engineering and gerrymandering its policies to make sure no one has standing, the executive would be above the law. Here, the Biden administration attempted to simultaneously circumvent both administrative law and standing law. Granting the states special solicitude to challenge the administration’s policy ensured that the debt-cancellation plan’s legality would not be insulated from judicial review.

### III. The *Biden v. Nebraska* MQD as Old Purposivism

What is the interpretive basis for the major questions doctrine? Where does it come from? *Biden v. Nebraska* helped answer these questions, in part through the majority opinion’s silence and in part through its implied reasoning.

<sup>59</sup> Brief for Samuel L. Bray and William Baude as Amici Curiae in Support of Petitioners at 9–15, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (No. 22-506).

<sup>60</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

There has been a recent debate among scholars as to whether the major questions doctrine that has developed over the past two decades is simply an exception to *Chevron* deference, or whether it also triggers a shift in methods of statutory interpretation. Does the major questions doctrine trigger a shift from textualism to purposivism? Many legal scholars have argued that it does, and have usually been more critical of this shift or its inconsistency.<sup>61</sup> In fact, in her *West Virginia v. EPA* dissent, Justice Kagan suggested that earlier MQD cases were purposive: “[I]n the relevant cases, the Court . . . has asked, in a common-sensical (or call it purposive) vein, about what Congress would have made of the agency’s view—otherwise said, whether Congress would naturally have delegated authority over some important question to the agency, given its expertise and experience.”<sup>62</sup>

Kagan is still skeptical of this convenient selectivity of methods and its vulnerability to cherry-picking. Nevertheless, she is right about the common sense of purposivism, especially for major questions, as I argued in my amicus brief.<sup>63</sup> When the questions are major,

<sup>61</sup> See Shugerman, *supra* note 5, at 3, 6 (discussing *Brown & Williamson* and *King v. Burwell* as “MQD 1.0”); see also Jonathan H. Adler & Michael F. Cannon, *King v. Burwell and the Triumph of Selective Contextualism*, 2014–2015 CATO SUP. CT. REV. 35 (2015); David Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine?*, 2024 U. ILL. L. REV. (forthcoming 2024) (manuscript at 6–12), <https://tinyurl.com/mr3kjp6> (placing the MQD in the Holy Trinity “spirit” method of statutory interpretation); Edward Rubin, *A Major Answer to the Major Questions Doctrine*, JOTWELL (Jan. 25, 2023) (reviewing David M. Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine?* (2022), and highlighting Driesen’s reading of an anti-textual “spirit” method), <https://tinyurl.com/yvx4dy5p>; Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent “Major Questions” Doctrine*, 49 CONN. L. REV. 355, 406 (2016); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 45–46 (2010); cf. Richard M. Re (@RichardMRe), TWITTER (Mar. 3, 2023, 8:30 AM), <https://tinyurl.com/ybbu2t2f> (Richard Re on a more general assumed purpose, like a substantive canon—“Example: ‘We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies.’”) (quoting *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

<sup>62</sup> *West Virginia v. EPA*, 142 S. Ct. 2634 (Kagan, J., dissenting). See also Lisa Schultz Bressman, *The Jurisprudence of “Degree and Difference”*: Justice Breyer and Judicial Deference, 132 YALE L.J. FORUM 729, 748 (2022); Kevin Tobia, *We’re Not All Textualists Now*, 78 N.Y.U. ANN. SURV. AM. L. 243, 258–59 & n.73 (2023).

<sup>63</sup> See the draft article formatted version of the brief, Shugerman, *supra* note 5, at 1, 3, 6.

with “vast” significance and robust national salience: (1) There is less reason to engage in judicial interpretive triage via *Chevron*, unlike the thousands of mid-to-low-level cases where deference and simpler textualism is more appropriate than spending the judicial time and effort to dig into purposes; and (2) judges are more similarly situated, relative to agency experts, to know or discern the broader major public purposes of a statute, unlike in mid-to-low-level cases raising esoteric and technical textual issues. Others argue that the major questions doctrine is primarily a substantive canon of constitutional avoidance, invoked to avoid potential nondelegation problems. In the recent past, Gorsuch has been most vocal in offering this justification.<sup>64</sup>

The best way to understand the early MQD cases was as an exception to textualism, in favor of purposivism. The Roberts Court inherited one major-questions-doctrine precedent, *FDA v. Brown & Williamson*, a case about whether tobacco was a “drug” and whether cigarettes were “devices.” As a matter of 1930s dictionary definitions and basic textualism, the answer would have been yes—with or without *Chevron* deference. But as a matter of purpose and political common sense, the 1930s Congress would not have imagined that it was effectively banning tobacco (or anything like tobacco) when it passed the law in question.<sup>65</sup> The Supreme Court was avoiding the result dictated by *Chevron* deference plus textualism, so it created a special exception to both. In questions of “vast ‘economic and political significance,’”<sup>66</sup> the Court had less reason to defer, and it preferred to rule on such questions with a mix of common sense and purposivism, rather than a thin textualism.

*King v. Burwell* was similar. Neither *Burwell* nor *Brown & Williamson* established anything like a “clear statement” rule, and in fact, their emphasis on purposivism was very much unlike the textualism of “clear statement” rules. The Affordable Care Act (ACA) had the

<sup>64</sup> See *NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (“Whichever the doctrine [MQD or nondelegation], the point is the same. Both serve to prevent ‘government by bureaucracy supplanting government by the people.’”); *West Virginia*, 577 U.S. at 2619 (Gorsuch, J., concurring).

<sup>65</sup> If tobacco were classified as a “drug,” the FDA would have to find it was “safe and effective” to allow it to be sold, and tobacco’s side effects clearly outweigh its benefits.

<sup>66</sup> See *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (coining this phrase).



opposite of a clear statement as to whether “state exchanges” could include “federal exchanges” (the question at issue in the case). And yet the Court in *Burwell* found its way to concluding that “state exchanges” could indeed include “federal exchanges” by emphasizing purpose over text. The Court introduced its analysis with roughly four pages about the broader purposes of the ACA statute, its complicated market-oriented mechanisms, and its interrelated policy goals.<sup>67</sup> *Burwell* eventually made some textual moves in the tradition of the “whole act” canon, but those ancillary moves distinctly followed the purposive framing that opened and drove the decision.<sup>68</sup>

Thus, after *Brown & Williamson* and *King v. Burwell*—and continuing with the Eviction Moratorium<sup>69</sup> and the Vaccine Mandate decisions<sup>70</sup>—the original major questions doctrine was (1) an exception to *Chevron* deference; and (2) an apparent exception to the rule that text is normally emphasized over purpose. In *West Virginia v. EPA* in 2022, Roberts continued those two rules, and also added a clear-and-specific statement rule more clearly and specifically than before,<sup>71</sup> which was more suggestive of the nondelegation doctrine problem and constitutional avoidance.

In *Biden v. Nebraska*, Chief Justice Roberts implicitly endorsed the purposivism approach to major questions. Justice Barrett wrote a concurrence to justify and explain the MQD as regular textualism. Her concurrence was mostly intended to reject Justice Gorsuch’s substantive canon approach, but also seemingly to reject Chief Justice Roberts’s purposivism. The fact that Justice Barrett wrote on her own—and wrote so unpersuasively in ways that backfired—suggests that Roberts’s implied purposive approach is more likely the majority’s governing rule. Gorsuch’s nondelegation substantive

<sup>67</sup> *Burwell*, 576 U.S. at 479–83.

<sup>68</sup> See Adler & Cannon, *supra* note 61, at 35. Roberts has hinted at purposive sympathies before in *City of Arlington* and in *West Virginia v. EPA*. See Jonathan H. Adler, *West Virginia v. EPA: Some Answers about Major Questions*, 2021–2022 *CATO SUP. CT. REV.* 37, 58–59, 64.

<sup>69</sup> *Ala. Ass’n of Realtors v. Dep’t of Health & Human Serv.*, 141 S. Ct. 2485 (2021) (focusing on the mismatch between the broad moratorium and the more limited purposes of the statute).

<sup>70</sup> *NFIB v. DOL, OSHA*, 142 S. Ct. 661 (2022) (focusing on the mismatch between the OSHA broader policy to increase national vaccination rates and the statute’s purposes to focus on workplace safety).

<sup>71</sup> See Adler, *supra* note 68, at 64.

canon seems to be a stronger alternative framework than Barrett's isolated pseudo-textualism, but Gorsuch's decision not to write a concurrence in *Nebraska* suggests some degree of acquiescence to Roberts's purposivism, at least for now.

Gorsuch has frequently adopted Justice Scalia's old aphorism that courts should be skeptical of finding "elephants in mouseholes."<sup>72</sup> That phrase primarily reflects a purposive approach (Congress's purpose was small, and the agency is trying to pull off something big and out of step with that purpose) more than it hints at a non-delegation problem. Indeed, the phrase implies that it is *permissible* for Congress to enact elephant-sized holes, so long as it does so in clear statutory delegation. Chief Justice Roberts does not wield that metaphor very often, but in *Biden v. Nebraska*, he offered a similar metaphor about matching sizes. Roberts referred to the clause of the HEROES Act that the Biden administration relied upon as "a wafer-thin reed on which to rest such sweeping power."<sup>73</sup> Roberts then engaged in a back-and-forth about "congressional purpose,"<sup>74</sup> contrasting the dissenters' interpretation of purpose with his own arguments about purpose. Notably, he did not criticize purposivism as in any sense less legitimate relative to textualism. Instead, he took the "congressional purpose" argument as legitimate and worth as much analysis as any other point about statutory interpretation. Of course, there is the usual question about the separation of powers:

The question here is not whether something should be done; it is who has the authority to do it. Our recent decision in *West Virginia v. EPA* involved similar concerns over the exercise of administrative power. . . . Under the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act. . . . The 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 . . . .<sup>75</sup>

These are arguments not against congressional power, but against executive power exceeding congressional delegations. And Roberts

<sup>72</sup> See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

<sup>73</sup> *Nebraska*, 143 S. Ct. at 2371.

<sup>74</sup> *Id.* at 2372.

<sup>75</sup> *Id.* at 2372–73.

engaged in a debate about the valid scope of those delegations in distinctly purposive terms, focusing on congressional intent rather than text:

The dissent asks us to “[i]magine asking the enacting Congress: Can the Secretary use his powers to give borrowers more relief when an emergency has inflicted greater harm?” The dissent “can’t believe” the answer would be no. But imagine instead asking the enacting Congress a more pertinent question: “Can the Secretary use his powers to abolish \$430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?” We can’t believe the answer would be yes. Congress did not unanimously pass the HEROES Act with such power in mind.<sup>76</sup>

Roberts summed it up again using purposive terms about congressional intent, not text: “All this leads us to conclude that ‘[t]he basic and consequential tradeoffs’ inherent in a mass debt cancellation program ‘are ones that Congress *would likely have intended* for itself.’”<sup>77</sup>

Many commentators have already criticized Justice Barrett’s unpersuasive and confusing concurrence, which argued that the MQD is simply textualism with appropriate “context.”<sup>78</sup> In particular, her textual argument suggested a series of assumptions about what Congress should do, a normative interpretation. But textualism asks judges to follow what Congress actually wrote as text—a descriptive-and-not-normative approach to statutory interpretation. One of the defining features of textualism is that it asks judges to set aside their normative views and policy preferences. In his seminal 1997 lectures, Scalia argued that textualism was a guard against “judicial lawmaking,” against “look[ing] over the heads of the crowd and pick[ing] out your friends” to get to the result “desired by the Court,” rather than the one enacted by the legislature.<sup>79</sup> Scalia questioned

<sup>76</sup> *Id.* at 2374

<sup>77</sup> *Id.* at 2375 (emphasis added).

<sup>78</sup> See Kevin Tobia, Daniel Walters, & Brian G. Slocum, *Major Questions, Common Sense?*, 97 *So. Cal. L. Rev.* (forthcoming 2023), <https://tinyurl.com/42t342vb>; see also Adrian Vermeule, *Text and “Context,”* *YALE J. ON REG.: NOTICE & COMMENT* (July 13, 2023), <https://tinyurl.com/4yxp83f>.

<sup>79</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 21–22, 36 (1997).

such “dice-loading rules,”<sup>80</sup> and Barrett even cited this passage in her own opinion, which was even more critical of what she calls “strong-form” rules<sup>81</sup>—yet the next section of her concurrence then loads the dice with a series of “strong-form” normative claims about what Congress should do (or less generously, her own preferences about what Congress should do). Even Barrett’s opening misfires and backfires:

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.” (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).<sup>82</sup>

Her “short answer” quoting *FDA v. Brown & Williamson* is a strange start for a textualist, for reasons discussed above. To reiterate: As a matter of text, general dictionaries, and technical usage, tobacco plainly is a “drug” and cigarettes plainly are “devices.” Instead of relying on the four-cornered text or on general statute-writing norms, the *Brown & Williamson* Court turned to circa 1930s America and its background socio-political realities of tobacco usage. Specifically, it looked to legislative history and purposes on the subject of drug regulation. And after favorably citing *Brown & Williamson*, Barrett’s concurrence gets even more muddled. She asks the reader to “imagine that a grocer instructs a clerk to ‘go to the orchard and buy apples for the store,’” suggesting that “a reasonable clerk would know that there are limits” to this authority based on context.<sup>83</sup> This statutory interpretation set piece clearly leads to context-as-purposeive interpretation, not textual context.<sup>84</sup> As a text, grocers generally might mean their employees to go buy dozens or hundreds, even thou-

<sup>80</sup> *Id.* at 27–29.

<sup>81</sup> *Nebraska*, 143 S. Ct. at 2377 (Barrett, J., concurring) (“But a strong-form canon ‘load[s] the dice for or against a particular result’ in order to serve a value that the judiciary has chosen to specially protect.”) (citing ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 27 (1997); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. REV. 109, 124, 168–169 (2010)).

<sup>82</sup> *Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring).

<sup>83</sup> *Id.* at 2378–79.

<sup>84</sup> *Id.*

sands of apples. The “context” would not be in the text or discernable from “genre” text—grocers-speak does not clarify whether it might be a dozen or a thousand. The employee would know from specific purpose and background details about the store—in other words, purposivism and legislative history.

The babysitter set piece also goes off the textualist rails. Barrett paints a picture: A parent tells a babysitter “Make sure the kids have fun.”<sup>85</sup> What “fun” is appropriate? She cites no text or “genre” or general parenting norm. The context is specific to the family and the timing—the parents, their kids, their values, the specifics of a daytime babysitting schedule, a nighttime schedule, whether the kids have to be up early for school or some other event the next day. Again, her examples demand purposivism and legislative history, beyond the text and the context of the genre. Unwittingly, Barrett stumbled into some good explanations for the necessity of purposivism and the inevitable limits of textualism.

Perhaps the biggest problem with Barrett’s argument is her conflation of the normative and descriptive in the last half of her concurrence.<sup>86</sup> Textualism is supposed to be descriptive: What did Congress actually enact in writing, what did Congress vote on, and what did that text mean? And purposivism is also supposed to be descriptive: What did Congress intend, what mischief did it aim to solve,<sup>87</sup> and what solution did it enact? But Barrett did not engage in a descriptive analysis of Congress; she instead put forward a normative prescription, driven by a sympathy for nondelegation. Nondelegation theories ask what Congress *should* be doing, as a matter of Article I design and the original public meaning of “legislative Powers” in the Constitution. Defenders of nondelegation argue that this design requires Congress to decide major questions and not delegate them.

Barrett may indeed be right as a matter of constitutional law. My study of the word “vesting” lends some historical weight to her intuitions: the Constitution’s Legislative Vesting Clause uses the word “all” (“All legislative Powers . . . shall be vested in a Congress.”)<sup>88</sup>

<sup>85</sup> *Id.* at 2379–80

<sup>86</sup> *Id.* at 2380–84.

<sup>87</sup> See Beau Baumann, *The Mischief Rule vs. the Major Questions Doctrine*, ADMINWANNABE (Oct. 5, 2022), <https://tinyurl.com/yc7vk6xm> (reviewing Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. 967 (2021), in the context of the major questions doctrine).

<sup>88</sup> U.S. CONST. art. I, § 1.

whereas the Executive Vesting Clause does not (“The executive Power shall be vested in a President . . .”).<sup>89</sup> Justices Thomas and Gorsuch have emphasized the word “all” as part of their nondelegation arguments, and the historical usage of “vesting” supports their intuition.<sup>90</sup> My study of the usage of “vest” in the historical databases suggests that there was a difference between “vested,” “fully vested” (“vesting all”), and “partially vested” and the like.<sup>91</sup> This study of “vesting” usage between 1776 and 1789 is no slam dunk, but reasonable people can point to it for a more restrictive nondelegation doctrine—as a *normative* constitutional argument about what Congress may and may not do.

That normative argument matters precisely because of what Congress actually does: punt with excessively ambiguous delegations. As a historical and empirical matter, Barrett is wrong that Congress “normally ‘intends to make major policy decisions itself, not leave those decisions to agencies.’”<sup>92</sup> Her analysis tracks Ilan Wurman’s proposal of a “linguistic canon” of presumed clarity for any major policy, which is also more normative than prescriptive.<sup>93</sup> Legisla-

<sup>89</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>90</sup> See Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1556 (2022) (citing Gorsuch and Thomas).

<sup>91</sup> See *id.*

<sup>92</sup> *Nebraska*, 143 S. Ct. at 2380 (Barrett, J., concurring) (quoting U.S. Telecom Ass’n v. Fed. Comm’ns Comm’n, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh’g en banc)).

<sup>93</sup> Ilan Wurman, *Importance and Interpretive Questions*, VA. L. REV. (forthcoming 2023), <https://tinyurl.com/47tash4s>. Wurman posits: “[O]rdinarily, lawmakers and private parties tend to speak clearly, and interpreters tend to expect clarity, when those lawmakers or parties authorize others to make important decisions on their behalf.” *Id.* at 7. Unfortunately, the empirical basis for this claim is unclear. Wurman first claims, “There is no empirical evidence to suggest that Congress legislates on important matters through ambiguity, however; the only available study suggests the opposite.” *Id.* at 37. The Civil Rights Act was famously ambiguous on “discrimination.” Many open-ended emergency clauses have also been collected by the Brennan Center. See *A Guide to Emergency Powers and Their Use: The 148 statutory powers that may become available to the president upon declaration of a national emergency*, BRENNAN CTR. FOR JUST. (last updated Feb. 8, 2023), <https://tinyurl.com/yynn8x8r>. And see below for more “opposite” historical examples. To his credit, Wurman later concedes recent work showing the opposite. Wurman, *supra*, at 40 (citing Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 U. VA. L. REV. ONLINE 174, 201 (2022); and Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 NYU L. REV. 575, 594–97 (2002)).

tures often deliberately speak unclearly, sometimes out of necessity to delegate power to address unclear future problems like emergencies (more below), and sometimes out of political reality, sometimes out of the reality of limited time and limited consensus.

Historians and political scientists who study major legislation have explained that Congress often likes to punt.<sup>94</sup> For example, the classic studies of the Interstate Commerce Act of 1887, which created the Interstate Commerce Commission (ICC), reflect Congress's political interest in punting tough detailed questions to agencies. Political scientists like Morris Fiorina saw Congress so clearly punting a major thorny question that they coded Congress's move as "SR": "Shifting Responsibility."<sup>95</sup> My study offered a slightly different take on the Interstate Commerce Act: Yes, Congress punted (as in, it ambiguously delegated) major substance to the ICC, but the Senate insisted on a commission of members appointed to six-year terms that it could control more than life-tenured Article III judges, which would have had more power in the House's bill.<sup>96</sup> There are too many examples of Congress punting to other branches to list here. There is a growing literature on "strategic ambiguity," borrowing from the world of diplomacy and national security, where parties derive an advantage from being unclear in order to deter, to retain flexibility, to have plausible deniability, etc.<sup>97</sup> Private parties bargaining contracts derive similar advantages, especially given limited time and resources to spell out all details. Of course, Congress would behave the same way, too. It seems there is an equally plausible descriptive linguistic

<sup>94</sup> Kevin Tobia, Daniel Walters, & Brian G. Slocum, *Major Questions, Common Sense?*, 97 So. Cal. L. Rev. (forthcoming 2023).

<sup>95</sup> Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 Pub. Choice 33, 46–49 (1982); Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J. L. Econ. & Org. 33, 46–47 (1986); Thomas W. Gilligan, William J. Marshall & Barry R. Weingast, *Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887*, 32 J. L. & Econ. 35, 47–48 (1989) (linking Fiorina's "SR" observation to the historical literature on the development of the administrative state and independent agencies).

<sup>96</sup> Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Repeal of the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & Pol. 139, 146 (2016).

<sup>97</sup> Roderick Hills, *Strategic Ambiguity and Article VII: Why the Framers Decided Not to Decide*, 1 Am. J. Const. Hist. 379 (2023); Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. Pa. L. Rev. 753 (2023).

canon that parties engage in ambiguity balanced with clarity, and observers expect parties to engage in ambiguity. Whether one thinks such punting is good, bad, or a necessary evil, as a descriptive historical matter, Congress is often unclear, and it seems fair to say that the public often expects a lack of clarity, for better or for worse.

The bottom line is that Barrett's lone concurrence was so unpersuasive a challenge to Roberts's purposivism and to Gorsuch's substantive canon-ism that it clarified that those two approaches are (at least descriptively) the number 1 and number 2 explanations for what the Roberts Court is doing. Barrett merely clarified that her approach is isolated and appropriately marginal.

#### IV. The Emergency Problem

In oral argument, Justice Kavanaugh asked a question that started with a reference to my amicus brief:

JUSTICE KAVANAUGH: Last question. Broadening it out and thinking about, you mentioned emergencies, the history of this Court with respect to executive assertions of emergencies. Some of the biggest mistakes in the Court's history were deferring to assertions of executive emergency power. Some of the finest moments in the Court's history were pushing back against presidential assertions of emergency power. And that's continued not just in the Korean War but post-9/11 in some of the cases there. So, given that history, there's a concern, I suppose, that I feel at least about how to handle an emergency assertion. You know, some of the amicus briefs, one of them from a professor says this is a case study in abuse of executive emergency powers. I'm not saying I agree with that. I'm just saying that's the assertion. And I want to get your assessment – this is a big-picture question, so I'll give you a little time – of how we should think about our role in assertion of presidential emergency power given the Court's history.<sup>98</sup>

Unfortunately, the Solicitor General did not address the question directly, and in the end, none of the Justices discussed it. And we are left in between two bad outcomes when it comes to emergencies. The United States Code is full of statutes delegating emergency powers

<sup>98</sup> Transcript, *supra* note 6, at 60–61.



in deliberately ambiguous and open-ended terms.<sup>99</sup> Such is the nature of planning for emergencies, the proverbial known unknowns and the unknown unknowns. On the one hand, the HEROES Act of 2003 and the Biden administration's student-debt waiver was one of far too many examples of Presidents and bureaucrats exploiting those open-ended statutory texts as pretexts for their policy goals:<sup>100</sup> "Never let a crisis go to waste."<sup>101</sup> To its credit, the Roberts Court set limits on that problem in *Biden v. Nebraska*. But did it go too far? In the next emergencies, will the Supreme Court keep expanding the major questions doctrine and strike down any measure that Congress did not explicitly and clearly specify? For better or for worse, most significant emergency policies would be invalidated by the rules in *West Virginia v. EPA* and *Biden v. Nebraska*. But there is an alternative, which was the point of my amicus brief and which will be explored in a future essay: An *emergency* questions doctrine, following the original MQD combination of no-*Chevron* plus purposivism, would seem manageable and would allow flexibility.<sup>102</sup> Unfortunately, the Roberts Court's silence on this emergency problem—on top of its deliberate silence on state standing and its merely implicit embrace of purposivism—leaves too many open questions and too much confusion. If the Court's activism in questions of "vast political and economic significance" is leading to so many major questions about legitimacy, consistency, and predictability, maybe the emergency is the Roberts Court itself.

### **Conclusion: Sound and Fury, Signifying . . .**

It would be a major oversight to comment on *Biden v. Nebraska* without noting the Justices taking bank shots at each other, and without noting the debts owed to early precedents. Kagan began,

<sup>99</sup> See the many open-ended emergency clauses collected by the Brennan Center, *supra* note 93.

<sup>100</sup> Jonathan Adler has also called these cases the problem of "regulatory pretext." Adler, *supra* note 68, at 64 ("If, however, the agency decides to address A for the purpose of B—and Congress has not authorized B—this raises the prospect of what we might call "regulatory pretext.").

<sup>101</sup> See *supra* Part I.

<sup>102</sup> Jed Handelsman Shugerman, *Major Questions and an Emergency Question Doctrine: The Biden Student Debt Case Study*, (Fordham Law Legal Studies Research Paper No. 4345019, 2023), <https://tinyurl.com/53td7sdp>.

“In every respect, the Court today exceeds its proper, limited role in our Nation’s governance.” On standing; this Court “violates the Constitution” and “blows through a constitutional guardrail intended to keep courts acting like courts.” Kagan concludes, “[N]o proper party is before the Court. A court acting like a court would have said as much and stopped. [Roberts] ends by applying the Court’s made-up major-questions doctrine . . . .”<sup>103</sup> One can understand her frustration with Roberts’s own standing dodges, but she was silent about the Biden administration’s own standing dodges. Given the implicit background of *Massachusetts v. EPA*, a majority opinion formed from a broad ideological coalition of Justices John Paul Stevens, Anthony Kennedy, David Souter, Ruth Bader Ginsburg, and Stephen Breyer, it was hyperbole to say that the Roberts Court “violates the Constitution” or Article III, even if Roberts would not invoke the precedent. As for the substance, yes, *West Virginia v. EPA* and *Biden v. Nebraska* went further than earlier MQD cases. But given the long line of major questions cases over a quarter century—and cutting in different ideological directions—it is also hyperbole to suggest that the doctrine is “made-up,” relative to *Chevron* or the various flavors of “arbitrary and capricious” interpretations over the years. And given Kagan’s appropriate votes against Trumpian overreach and/or pretexts in *Trump v. Hawaii*, *New York v. Department of Commerce*, and *Regents v. DHS*, and even with the plaintiffs’ own standing or procedural stretches in each of those cases, it is disappointing that she had sharp words for Roberts about “constitutional guardrails” but only deference to the Biden administration. The abuse of emergency powers as a pretext for a broader political or policy agenda is a bipartisan problem. Kagan rejected the Trump administration’s arbitrary and capricious *ad hoc* pretexts, but she defended the Biden administration’s.

Meanwhile, Roberts did not cloak himself in glory or grace in his overreaction. “It has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary. . . . It is important that the public not be misled either. Any such misperception would be harmful to this institution and our country.”<sup>104</sup> Talk about judicial overreach. If Roberts deliberately avoided explaining how he could rec-

<sup>103</sup> *Nebraska*, 143 S. Ct. at 2385, 2388, 2400 (Kagan, J., dissenting).

<sup>104</sup> *Id.* at 2375–76 (majority op).

oncile standing with past precedents without invoking special state standing, and if he avoided explaining whether the major questions doctrine is textualism, purposivism, or a substantive canon, then the public can be forgiven if they feel misled by such a laconic opinion, another standing dodge. Congress is not the only multi-member body that turns to “strategic ambiguity.” Building consensus is hard, and ambiguity and strategic silence can bridge many gaps inside and outside of law. Nevertheless, as a judge, Chief Justice Roberts had a rule-of-law duty to give consistent reasons, and he did not have much of a leg or a moral high ground to stand on. Nor did Justice Barrett in her confusing concurrence, and nor did Justices Gorsuch and Alito, who had vigorously taken opposing sides on state standing in *Texas* a week earlier, but then retreated to uncharacteristic silence in *Biden v. Nebraska*, just when the question was even more salient and dispositive.

In the end, the Roberts Court majority reached the right result, but it does not seem apt to say “Right result, wrong reasons.” More like, “Right result, but for what reasons?” And one could also ask if the 2022–2023 term ended “full of sound and fury, signifying what exactly?”