THE MAJOR QUESTIONS DOCTRINE, POST-*CHEVRON*?: *SKIDMORE*, *LOPER-BRIGHT*, AND A GOOD-FAITH EMERGENCY QUESTION DOCTRINE

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INTRODUCTION

When my friends, students, and colleagues have fretted about *Chevron*'s[1] fate, I have said, "Worry less. *Skid-more*."[2]

As we now know from the Roberts Court in *Loper Bright*,[3] they agree: No more *Chevron* deference. More *Skidmore* "weight" or "respect,"[4] to the extent that weight or respect is due. Roberts returned to *Skidmore*'s factors for judges to consider when interpreting a statute: an agency's contemporaneity and consistency, "agency expertise,"[5] and "the agency's 'body of experience and informed judgment.'"[6]

After *Chevron*, one question is: *Quo vadis* major questions doctrine?[7] Where are you going, major questions doctrine?

One answer is that, even after *Chevron* deference is gone, courts still have to decide how much weight or respect to give the agency's interpretation, and the major questions doctrine will play a similar

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1. Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
2. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
3. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).
4. *Id.* at 2257–59.
5. *Id.* at 2262 (quoting *Skidmore*, 323 U.S. at 140).
6. *Id.* at 2267 (quoting *Skidmore*, 323 U.S. at 140).
7. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

role: Instead of majorness as an exception to *Chevron* deference, majorness should be a reason to give less *Skidmore* weight to the agency's interpretation. And in the domain of emergencies, when the statutory texts are open-ended for good reason, majorness means less deference to simple and fast textualism, and more time for courts to engage in deeper purposivism to make sure those emergency powers are being used as intended. Giving less deference or weight to the agency, this hard work to investigate purposes would allow appropriate good-faith emergency measures consistent with those purposes, and it would disallow abuses of those emergency powers.

If the major questions doctrine had been simply a "step zero"[8] exception to *Chevron*, then not much would be left to discuss. However, the major questions doctrine always was more than a Step Zero exception-exit ramp, and it became so much more over the past four years, especially post-Covid.

This short essay first offers "three cheers" for the major questions doctrine, but unfortunately there are four questions. Three out of four is not bad, but the fourth is a big problem for both textualists and pragmatists. Second, in that review of the "three out of four cheers," I will review two less-obvious practical reasons for *Chevron*, which also explain the practical reasons for *Skidmore* respect and weight returning as robust substitutes with similar results, but only when an agency deserves that respect and weight, relative to respect for Congress and the weight of judicial expertise. Third, this essay will argue that the major questions doctrine should continue to function *mostly* similarly to its role under *Chevron*:

> (1) Not as an "exception" to deference, but a reason to give less weight, because "majorness" is:

8. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

(a) Triage: less of a reason for "judicial triage" under a mountain of mid-to-minor-questions.[9] There is a reason *Chevron* has been, by far, the most cited case by American courts, because they are inundated with so many administrative law cases with statutory interpretation questions;[10]

(b) Less of a gap in comparative expertise: less of a reason to defer to agency expertise, when "majorness" puts judges on a similar level of knowledge as agency experts.[11] (For example, major emergency measures deserve more attention.)

(2) The major questions doctrine emphasized "purpose" over "text,"[12] for similar reasons: Majorness justified the effort to go beyond the text and dig into purposes in order to

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9. *See* Eli Nachmany, *There Are Three Major Questions Doctrines*, YALE J. ON REGUL.: NOTICE & COMMENT (July 16, 2022), https://www.yalejreg.com/nc/three-major-questions-doctrines/ [https:// perma.cc/7SFK-MPBT] (interpreting Justice Kavanaugh's statement respecting the denial of certiorari in *Paul v. United States* as a major questions "triage rule": "Apply the nondelegation doctrine to statutes involving major policy questions, but not to provisions of law that are 'less-major' or that permit an agency to fill up the details of a statutory scheme."); *see generally* Michael Reaves, *Major Questions (and Answers): A Call to Quiet the Quartet*, 44 J. NAT'L ASS'N ADMIN. L. JUD. 187, 227 (2023); Matthew B. Lawrence, *Medicare "Bankruptcy"*, 63 B.C. L. REV. 1658, 1686 (2022).

10. Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 9, 2014), https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/ [https://perma.cc/7BJH-82FB].

11. *See* Cass R. Sunstein, Chevron *As Law*, 107 GEO. L.J. 1613, 1625 (2019); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 805 (2010) ("Linguistically, the doctrine is presented, constructed, and elaborated as a method of review for questions of statutory interpretation focusing on statutory meaning, but in many of the cases the real question is whether the agency has employed its delegated power wisely, and one reason offered for deference is agency policy expertise."); s*ee also* Note, *The Two Faces of* Chevron, 120 HARV. L. REV. 1562, 1564 (2007) (describing *Chevron* as a shift away from the expertise-driven *Skidmore* approach, toward a jurisprudence focused on separation of powers); Emily Hammond, *Finding a Place for Expertise After* Loper Bright, 31 GEO. MASON L. REV. 559, 565 (2024) (discussing ways to retain deference to expertise post-*Chevron*).

12. *West Virginia*, *supra* note 7, at 761.

> set limits on the agency; and the context of majorness means the question had more public salience, and thus judges have access to public purposes. (For example, judges are often in a relatively good position to evaluate major emergency measures.)
>
> (3) The major questions doctrine should continue to apply Scalia's common sense: Congress does not "hide elephants in mouseholes."[13] Major questions are elephants. Congress must intend an elephant hole, not a mouse hole (or a giraffe hole or a whale hole). There must be a purposive fit between Congress's statutory purpose and the agency's policy, even when both the statutory language and the policy are big. (For example, broad emergency statutes must fit major emergency measures.)
>
> (4) However, the Roberts Court has mistakenly turned the major questions doctrine into a rule of "no more elephant holes, only specified elephants," a rule that Congress must specify the policy, and cannot purposely write an open-ended statute to delegate flexibility to agencies with broad powers. This is a substantive canon of constitutional avoidance against broad delegation, rather than textualism or purposivism.

This essay applies this fourth problematic aspect of the major questions doctrine to the problem of emergencies, using the Biden student debt case[14] as a case study. Emergency powers are a double-edged sword: The nature of unpredictable emergencies means that Congress needs to delegate flexible open-ended powers to the executive branch to tackle surprises, and thus, ambiguity is necessary. On the other hand, emergency powers are among the most likely tools for executive abuse of power, as Levitsky and Ziblatt

13. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).

14. Biden v. Nebraska, 143 S. Ct. 2355 (2023) (referred to interchangeably as "the Biden student debt case").

documented in *How Democracies Die*.[15] This essay provides examples of salient emergency statutes as frequently relying on textual ambiguities that an executive can exploit through convenient textualism (and even "bad faith" textualism). But purposivism can be an interpretive method to check against those abuses and a check on bad-faith pretexts to invoke those ambiguous emergency powers.

The majority opinion in *Biden v. Nebraska* checked all four boxes. I argue that it should have checked just three (1. Less deference for triage and relative expertise; 2. Purposivism; 3. No elephants in mouseholes), but not the fourth (Congress can enact no more elephant holes, and implicitly no more flexible, open-ended, broad emergency powers).

This essay proposes an "Emergency Question Doctrine" as a particular application of the major questions doctrine, as a way to balance the importance of emergency powers versus the danger of abuses. A solution relies on (2) purposivism, and (3) fit, but not (4) a non-delegation constitutional-avoidance rule against "major" ambiguity, a rule that would hobble the executive's ability to manage emergencies.

On the possibilities of an "Emergency Questions Doctrine," it is worth noting that Justice Brett Kavanaugh, in oral argument, referred to an amicus brief (to be clear, my amicus brief)[16] 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 of presidential emergency power given the Court's history."[17] None of the opinions in the case adopted this approach, but it caught Justice Kavanaugh's attention, and it is a way to return to the three cheers of the MQD, while avoiding the dangers of the fourth.

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15. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 17, 92–96, 109, 130 (2018).

16. *See* Jed Handelsman Shugerman, *Major Questions and an Emergency Question Doctrine*, (Fordham L. Legal Stud. Research Paper No. 4345019, 2023).

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

I. THREE CHEERS FOR THE MAJOR QUESTIONS DOCTRINE (BUT JUST 3 OUT OF 4)

Here is the hand-out I provided during our panel on the separation of powers:

> (1) No *Chevron* deference
>
> Two rationales for *Chevron* (and maybe these rationales are not as accepted as I had thought?) are not as relevant in Major Cases:[18]
>
> > (a) Triage: Deference yields a more efficient process for garden-variety but complicated technical cases of interpretation. But major questions are more like the heart-attack case deserving more attention, and there is more time for those cases as the less significant questions get triaged.[19] ✅
> >
> > (b) Comparative Expertise: *Chevron* assumes agencies generally have greater expertise in their technical/specified/esoteric fields, relative to generalist judges. This is generally true, but the gap approaches zero as the question has more general public salience and was more publicly debated. ✅

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18. This explanation is similar to but more functional than Sunstein's interpretation of the "weak" Major Question Doctrine: Chevron deference applied when Congress implicitly delegates statutory interpretation to the agency, but when Congress addresses "major questions," it does not implicitly delegate statutory interpretation to agencies (or courts do not infer delegation). Cass Sunstein, *There Are Two 'Major Questions' Doctrines*, 73 ADMIN. L. REV. 175, 177–78 (2021). The "triage" and "comparative expertise" factors that I identify here are explanations for why Congress would not implicitly delegate, and why courts should not infer delegation.

19. *See* Nachmany, *supra* note 9. Triage (in the sense of "sorting items according to quality") derives from the French *trier*, meaning "separate out." In World War I, the term came to be used for the military system of assessing the wounded on the battlefield. "The original concepts of triage were primarily focused on mass casualty situations. Many of the original concepts of triage, the sorting into immediate, urgent, and non-urgent . . . remain valid today in mass casualty and warfare situations." Iain Robertson-Steel, *Evolution of Triage Systems*, 23 EMERGENCY MED. J. 154, 154 (2006).

(2) Purposivism, not textualism (sorry, Justice Barrett) ✅

(3) "No elephants in mouseholes" ✅

Common-sense purposivist reading of statutes.[20]

Did Congress clearly delegate this major policy to the agency? (extension of *Chevron* Step Zero)

(4) "No more elephant holes" ❌

If Congress wants an elephant, it needs to specify the elephant.

Did Congress clearly *and specifically* delegate this major policy?

Clear statement rule (substantive canon of constitutional avoidance of the non-delegation problem)[21]

Let's return to Step 1 above: After *Chevron* and *Loper Bright*, courts should often (but not always) give more *Skidmore* weight for these same factors of "triage" (to process more cases by giving weight to the agency) and "comparative expertise" (to recognize areas where the agency has more expertise than the courts). But when the question is major, give less weight to the agency interpretation.

The major questions doctrine tries to address one problem, the Imperial Executive, by escalating another, the Imperial Judiciary. This article proposes a solution, with the Biden student debt case as a case study: An "emergency question" doctrine would apply when the executive branch relies on a statutory emergency clause or invokes an emergency in its application of a statutory provision. First, if the emergency clause is open-ended, interpreters should

20. *See e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (the ambiguous text "drug" and "device" were too broad, but purposes made sense of limiting the statute so it did not apply to tobacco); King v. Burwell, 576 U.S. 473 (2015) (purposivism allowed the Court to override the apparent plain meaning of "state" in favor of a purpose of "federal" exchanges).

21. This is the strong form of the Major Question doctrine identified by Sunstein, and indeed, too strong. Sunstein, *supra* note 18.

emphasize context and purposes to give intelligible meaning and scope to the clause; and second, the means must fit the emergency ends.

This approach would serve as a solution to both problems: First, it solves a longstanding problem in the interpretation of statutory emergency clauses and the executive branch invoking them for major policies. A textual argument based on the word "emergency" gives too much latitude to the executive branch; a purposive approach gives meaningful context for the word "emergency," allowing a broad application when consistent with the underlying purpose of the statute, but also setting limits on executive power when the policy strays beyond those purposes. Second, it would provide a meaningful category of cases where the logic of the major questions doctrine should apply, and it would provide a way to cabin and set important limits on the major questions doctrine.

I suggest that this solution has already emerged from the recent major questions cases, one of three stages of the major questions doctrine:

MQD 1.0, the Good Purposive MQD (2000–2015), establishes a common-sense exception to *Chevron* deference and narrow textualism in favor of purposivism.[22]

MQD 2.0, a Good Emergency MQD (2021–2022) can be understood best as an emergency question doctrine, a check against the overbroad use, the pretextual use, or abuse of the Covid emergency, primarily on excessive substance (elephants in mouseholes or elephants in giraffe holes), but also on circumventing process. The emergency policy needs to fit the emergency clause's purposes and context to have a limiting principle against the long-term problem of abusing emergencies as pretexts.[23]

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22. *See, e.g.*, *Brown & Williamson*, *supra* note 20 and accompanying text; Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014) (holding that the EPA exceeded its statutory authority when it interpreted the Clean Air Act to apply certain permitting requirements for stationary sources based on their greenhouse-gas emissions); *Burwell*, *supra* note 20 and accompanying text.

23. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam) (stating that Congress must speak clearly when authorizing agency

MQD 3.0, the Bad Anti-Major Canon MQD (2022–active), creates the requirement of a super-clear statement for any "major" policy—effectively a substantive canon creating a presumption against significant executive actions. This selective approach allows for "finding friends at a party," cherry-picking post-ratification evidence like "anti-novelty" and tradition, opening a backdoor for a sloppy kind of pseudo-*Chevron* deference to old agency interpretations, but not the recently elected, current administration's agency. Gorsuch described this approach as a kind of Non-Delegation-Lite in his *Gundy* dissent,[24] and it was applied most clearly in *West Virginia v. EPA*.[25]

I do not agree with this recent turn in *West Virginia v. EPA* or this approach in *Biden v. Nebraska*,[26] although I think *Biden v. Nebraska* should have come out the same way against student debt cancellation—just on purposive grounds.

The Biden student debt case fits as MQD 2.0, to limit the pretextual and overbroad use of emergencies powers. This case represented an opportunity to turn back from the extremism of MQD 3.0, in favor of a more legitimate, more limited, more coherent approach, closer to the best reasons for the major questions doctrine as a common-sense exception to thin textualism and as a check against the abuse of executive power. Unfortunately, the Roberts Court's ruling went beyond the good MQD 2.0 and expanded the bad MQD 3.0, otherwise known as reason (4) above: non-textual substantive canons, the rule that Congress cannot legislate "elephant holes."

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powers of vast economic and political significance, especially when applied to traditional domains of state law, such as the landlord-tenant relationship); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661 (2022) (per curiam) (denying agency power to mandate vaccination for 84 million Americans under a Congressionally delegated power to set occupational safety and health standards).

24. Gundy v. United States, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting).

25. 142 S. Ct. 2587, 2609 (2022) ("in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent" counsel against broad delegations).

26. *Supra* note 14.

The Biden administration asked for such a broad interpretation of the word "emergency" that it renders emergency powers dangerously unlimited in scope or timeframe. The invocation of emergencies for broad and attenuated policies is a persistent bipartisan and growing problem, escalating an imperial executive. Emergency powers clauses often have no textual limitation on their scope. A better solution here would be *an emergency questions doctrine*, which already has emerged as a coherent set of precedents, such as *Alabama Association of Realtors* and *NFIB v. OSHA*. Under an emergency questions doctrine, interpreters should turn to the whole act, the purposes, and the context to make the text (an open-ended "emergency" clause) legally intelligible; and they should focus on the means-ends fit, whether the government policy fits the claimed emergency, to avoid overreaches and pretextual abuses of the word "emergency."

In this case, the Higher Education Act of 1965 (HEA) was the appropriate fit for the publicly stated purposes of long-term education access and for the broad policy. The statute required a long and challenging process—a choice by Congress to balance the interests and to value public notice and comment. The Government wanted to move faster, so it cited the Covid emergency as a pretext to circumvent the negotiated regulation under the HEA.

If the government's student debt waiver were a Covid emergency measure, it is both arbitrarily overbroad *and* capriciously over-narrowed. As the government conceded, the statute requires a causal nexus to the emergency, but this policy lacks even a basic step to show mere Covid correlation. Considering this ends-means mismatch and President Biden's public statements, the true motivation is to address long-term structural problems with education finance. The emergency is a pretext, likely to circumvent the regular administrative process required by Congress in a statute with a better fit. The policy does not fit as a HEROES Act "emergency," it is arbitrary and capricious, and it is not "faithful execution" of the laws. This case is an important moment for this Court to set limits to the abuse of executive power, while also clarifying and limiting the scope of the major questions doctrine.

II. THE EMERGENCY PROBLEM: THE OVERREACTIONS AND PRETEXTUAL USES OF EMERGENCY POWERS LEAD TO AN IMPERIAL EXECUTIVE

History teaches us to be wary of open-ended invitations to executive power, either as excessive responses to real emergencies or a pretextual basis for a pre-existing policy goal or political agenda. As political scientists Steven Levitsky and Daniel Ziblatt wrote, "National emergencies can threaten the constitutional balance . . . they can be fatal under would-be autocrats, for they provide a seemingly legitimate (and often popular) justification for concentrating power and eviscerating rights."[27] They note the problem of judicial deference to the executive, "[f]earful of putting national security at risk."[28]

One can identify two categories of abuses: over-reaction abuses, and pretextual abuses of the executive seizing on "emergencies" to pursue a pre-existing policy goal or to consolidate power. While emergencies require immediate and often imprecise reactions, they also create the risk of both over-reactions and pretextual manipulations. "Never let a crisis go to waste" has become a motto during modern emergencies.

This case arises from the executive's exercise of an emergency power based on a broad interpretation of an open-ended emergency clause in an act of Congress with an apparently more limited context and purpose. This case is unfortunately not an isolated legal problem. Many statutes delegate emergency powers to the President or the Executive Branch with little guidance about the scope of those powers. Presidents from both parties exercise emergency powers in increasingly aggressive ways, with less clarity that Congress delegated such powers. Congressionally delegated emergency powers are vital to allow decisive executive action with

27. Steven Levitsky & Daniel Ziblatt, *Why Autocrats Love Emergencies*, N.Y. TIMES (Jan. 12, 2019), https://www.nytimes.com/2019/01/12/opinion/sunday/trump-national-emergency-wall.html.

28. *Id.*

speed and flexibility in the face of sudden crises.[29] On the other hand, open-ended delegations create a risk of abuse of executive power.

Statutes authorizing the executive to act in emergencies are often more open-ended and lack textual constraints on the scope and nature of the emergency relative to other types of statutory delegations.[30] This open-endedness is in the nature of emergencies and emergency delegations. Congress cannot anticipate specifics of future emergencies, their effects, and their remedies. As such, these statutes and emergency clauses present a greater potential for abuse relative to more conventional statutes focused on more specific problems, where Congress can more easily anticipate circumstances and address them in the text.

Recent invocations of presidential emergency powers provide examples of abuses that run contrary to statutory purpose. Most recently, the Biden Administration invoked a statute intended for student debt waiver "in connection with a war or other military operation or national emergency" to advance a student loan forgiveness plan during the COVID-19 pandemic even though there was no war, no military operation, and no genuine national emergency.[31] In other words, Biden tried to shoehorn a policy move through the emergency powers available to him without seriously considering what goals the law was intended to serve.

A few years ago, President Trump did the same. He declared a national emergency to fund a wall at the southern border of the United States,[32] leaning on a statute that allowed reallocation of funds for "military construction" projects. The Military Construction Codification Act of 1982 delegates open-ended emergency

29. THE FEDERALIST NO. 70 (Alexander Hamilton) ("necessity of an energetic executive"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

30. *See* JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., R46379, EMERGENCY AUTHORITIES UNDER THE NATIONAL EMERGENCIES ACT, STAFFORD ACT, AND PUBLIC HEALTH SERVICE ACT 1 (2020), https://crsreports.congress.gov/product/pdf/R/R46379 [https://perma.cc/5JR2-MVXG] ("Congress has historically given the President robust powers to act in times of crisis.").

31. *See Biden*, *supra* note 17, at 485 (2023).

32. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

powers. When the President declares a national emergency that requires use of the armed forces, the Secretary of Defense "may undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces."[33] The purpose to fund military construction that would 'support' ongoing military efforts.[34] In contrast, "[t]he term 'military construction' as used in this chapter or any other provision of law includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road . . . ."[35] Of course, there are many valid uses of these powers. The more major the emergency power, the more appropriate it is for judges not to defer, but to make sure the executive branch is acting consistent with Congress's purposes. And of course, many major emergency military construction projects would fit Congress's purposes.

However, the border wall is the opposite example. Not only was the national emergency manufactured—because there was no need for immediate action at the border—but President Trump's invocation of the statute did not match up with its purpose. The Military Construction Act of 1982 codified a number of laws relating to military construction and military family housing, aiming to support the unique needs of the armed forces.[36] When passing this statute, Congress never imagined, much less intended, for this law to be a loophole in which Trump could push forward a project of immigration policy.

Here are some additional examples of ambiguous emergency statutes, sometimes leading to long-running emergency powers,

33. *See* 10 U.S.C. § 2808(a).

34. *Id.*

35. 10 U.S.C. § 2801(a); *see also* MICHAEL J. VASSALOTTI & BRENDAN W. MCGARRY, CONG. RESEARCH SERV., IN11017, MILITARY CONSTRUCTION FUNDING IN THE EVENT OF A NATIONAL EMERGENCY (2019), https://sgp.fas.org/crs/natsec/IN11017.pdf [https://perma.cc/5BPF-Q3D8].

36. *See* 10 U.S.C. § 2808(b) (Such projects "may be undertaken only within the total amount of funds that have been appropriated for military construction, excluding funds appropriated for family housing" that have not been "obligated.").

without congressional approval, even if for good policy reasons. The Insurrection Act was worded to be flexible, given the nature of insurrections and emergencies.[37] The statute does not define "insurrection" or "rebellion."[38] This flexibility is important, but it is also risky. This statute leads to major questions about the risk of abuse. One can point to legitimate and illegitimate uses of such powers. The text is unclear and ripe for abuse if courts turn to textualism plus deference or weighting of the executive branch's interpretation. Instead of text-plus-weight, the better approach for such a major response is to look at the statute's context and purpose, without deference or weighting the agency interpretation. That approach allows courts to differentiate between the Southern secessions of 1861 and abuses of such emergency powers against more common protest movements, even when some of those protests have become violent.

Similarly, the emergency clause in the post-9/11 HEROES Act is open-ended, if one reads the clause in isolation.[39] If one relies on textualism-plus-deference or weight in favor of agencies, then it delegates too much power and discretion to assert such emergency powers. How can courts distinguish between the legitimate use (e.g., debt waivers for members of the military mobilized during a war or national security crisis) versus other uses with a potential for abuse?

Textualism offers a partial solution: By applying textualism's common-sense whole act canon, the congressional findings offer a clarifying context and scope for the emergency clause. In this case, the HEROES Act, in the aftermath of 9/11, provided a revealing "findings" section, with repeated references to military "active service" or "active duty."[40] The emergency delegation is arguably broader than a military context, but these textual findings and

37. *See* 18 U.S.C. § 2383.

38. *Id.*

39. Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (2003).

40. *Id.*

contexts indicate scope limited to an active emergency and applicable only to claimants concretely affected by the emergency.[41]

A recurring problem, evident in the COVID cases but long preceding them, is administrations invoking emergencies to evade or truncate regular administrative process. The Administrative Procedures Act (APA) provides for a "good cause" exception to section 553's notice-and-comment requirements.[42] Courts have expressed concerns about straining the good cause exception for weak claims of emergencies.[43]

III. A PARALLEL MAJOR PROBLEM: AN IMPERIAL MAJOR QUESTIONS DOCTRINE

The longstanding approach for "questions of vast economic and political importance" began as a narrow common-sense exception to *Chevron* deference. It was a doctrine invoked in special cases for relying on purposes over textualism when a major statute was so historic and widely debated on a national scale that its purposes were sufficiently salient, that it was an appropriate use of judicial resources to examine congressional purposes, when the specialized expertise gap between courts and agencies is de minimis, and where a single word or line may be relatively less reliable out of context.[44]

However, the Court should be wary of the major questions doctrine ballooning into an open invitation for the federal judiciary to substitute its own policy preferences for the executive branch.[45] Unless clarified, the doctrine becomes a novel substantive canon of anti-major policy, "loading the dice," in Justice Scalia's terms, for

41. *See infra* Section V.C.

42. 5 U.S.C. § 553(b)(B).

43. *See, e.g.*, Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706–07 (D.C. Cir. 2014).

44. *See Brown & Williamson*, *supra* note 20 (considering "the manner in which Congress is likely to delegate a policy decision" of vast "economic and political magnitude," such as regulating tobacco); *Burwell*, *supra* note 20 (hesitating to find an implicit delegation where the result would affect "billions of dollars in spending" and "the price of health insurance for millions of people"); *see also Ala. Ass'n of Realtors*, *supra* note 23; *NFIB*, *supra* note 23.

45. *See West Virginia*, *supra* note 7, at 2587 (2022).

preferred outcomes.[46] Every time the Court finds an agency action of "vast political or economic significance,"—i.e., most salient administrative law cases—the Court has a tool to strike it down. It is the non-delegation doctrine "by another name."[47]

While the major questions doctrine can be used to check executive overreach, it also invites judicial overreach,[48] unless it is focused on special areas of overbroad delegations and executive abuses. Auspiciously, a recent subset of "major questions" cases forms a coherent, limited, and crucial body of precedents: an emergency questions doctrine, where courts heretofore had been too deferential. These emergency questions serve as common-sense exceptions to both of *Chevron*'s rationales: (1) the purposes during emergencies are more salient to the public and generalist judges, reducing the need to rely on agency comparative expertise and experience in the domain of statutory interpretation (as opposed to complex policies to address emergencies); and (2) emergency cases are a manageable number of cases, so there is far less need for judicial economy and case management to triage by deference. Emergency questions have vast economic or political significance, and distinguishable dangers, such that they are an appropriate use of additional judicial resources to investigate context and purposes.

IV. A DOUBLE SOLUTION: AN EMERGENCY QUESTIONS DOCTRINE

A. By properly construing emergency statutes, courts can provide an important check against executive abuse of emergency powers, while not substituting their policy preferences for the choices of the democratically elected branches

An "emergency question" doctrine would apply when the Executive Branch relies on a statutory emergency clause or invokes an emergency in its application of a statutory provision. First, if the

46. ANTONIN SCALIA, A MATTER OF INTERPRETATION 27 (Amy Gutmann ed., 1997).
47. *Gundy*, *supra* note 24.
48. Mark Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).

emergency clause is open-ended, interpreters should emphasize context and purposes to give intelligible meaning and scope to the clause; and second, the means must fit the emergency ends. Congress expects emergency powers to be invoked when immediate action from the President is necessary to effectively respond to a disaster or crisis reached by the statute; Congress never intended emergency power provisions to aggrandize the reach of presidential power past the intended reach of a statute. Thus, when an emergency power is invoked, it should typically be permissible only if it does not conflict with statutory purpose. When a President invokes a statute to support action that does not align with—or runs directly contrary to—statutory purpose, that is evidence of an abuse of power. The language, legislative history, and historical context of a statute may shed light on its purpose.

This approach would serve as a solution to both problems: First, it solves a longstanding problem in the interpretation of statutory emergency clauses and the executive branch invoking them for major policies. A textual argument based on the word "emergency" gives too much latitude to the executive branch; a purposive approach gives meaningful context for the word "emergency," allowing a broad application when consistent with the underlying purpose of the statute, while also setting limits on executive power when the policy strays beyond those purposes.

Second, it would provide a meaningful category of cases where the logic of the major questions doctrine should apply, and it would provide a way to cabin the major questions doctrine. Otherwise, if a key rationale for the major questions doctrine is to check executive aggrandizement, the major questions doctrine also risks *judicial* aggrandizement. A solution is to treat "major questions" as a question (or conceptual category) rather than a broad doctrine, and to start to create more limited and coherent "doctrines" as answers to that question. An emergency question doctrine has developed in recent cases: When the executive invokes an emergency power delegated by Congress for a policy of vast economic or political significance, the judiciary should go beyond the textual reference to an emergency and should investigate the congressional intent,

purpose, and context, and the judiciary should ask whether the means fit the stated emergency purpose.

The broad and undefined texts of emergency clauses themselves often provide little-to-no constraint on the power. Thus, narrow textual interpretations too often lead to expansive executive power and abuses of emergency powers. An examination of context and purpose provides meaningful guidance for the appropriate scope and application of such provisions.

Specific emergency powers granted by the HEROES Act were not unlimited grants of emergency powers; they had a specific context with paradigmatic cases and invitations for extensions from those specific purposes, based on reasoning from analogy. When the executive invokes vague emergency clauses at their edges—within penumbras or beyond them—the President acts in the "zone of twilight."[49] According to Justice Jackson, judges consider a range of factors: the "imperatives of events and contemporary imponderables."[50] But when pondering whether Congress had delegated powers to confront the imponderable, an investigation into congressional context, intent, and purpose helps resolve that twilight of ambiguity.

The problem of ambiguous emergency clauses and their abuse warrants an "emergency actions doctrine" as a special case for investigating congressional intent and purposes to give context, to allow flexible executive action where Congress had delegated such emergency powers, but also to limit executive action when it does not fit those purposes and contexts.

B. Recent COVID decisions form a coherent Emergency Question Doctrine

On this foundation of administrative law and statutory interpretation principles, recent Supreme Court cases reflect a coherent approach to emergencies by focusing on the match between congressional purposes for the delegation of an emergency power and the

49. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).
50. *Id.*

executive branch's invocation and application of the emergency power.

In the eviction moratorium case, *Alabama Association of Realtors v. HHS*, the Court also identified the core concern of unbounded textualist emergency interpretations: "Indeed, the Government's read of § 361(a) would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach."[51]

The vaccine-or-test mandate, *NFIB v. OSHA*, was similar, based on a more explicit "emergency" provision: OSHA relied on a statutory exception to ordinary notice-and-comment procedures for "emergency temporary standards" with immediate effect.[52] The Court discussed the textual limits, but also went beyond textualism to discuss the context, purposes, and the post-enactment application of these exceptions.[53] The Court also raised a concern that open-ended textual interpretations create a risk of using the emergency for a policy goal beyond the statute's purpose: "OSHA's indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an 'occupational safety or health standard.' "[54] The decisions on Covid religious gatherings reflect a similar balance on emergency powers. Initially, the courts deferred and allowed broad applications of emergency powers in the face of uncertain danger.[55] But as the emergency was better understood, and as judges were in a position to assess the specific risks against individual liberties, the courts required more narrow tailoring, a closer fit between means and ends, and more balancing to protect those

51. 141 S. Ct. 2485, 2489 (2021).
52. 29 U.S.C. § 655(c)(1).
53. *NFIB*, *supra* note 23.
54. *Id*. at 666.
55. S. Bay Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).

rights.[56] Some Justices have also raised questions about fit in cases about border policy.[57]

V. THE COVID EMERGENCY AS PRETEXT: A MEANS-ENDS MISMATCH

A. Constitutional law and administrative law require good faith reasons and "faithful execution," and they reject pretextual reasons to excuse the misuse of power.

Pretextual execution of powers and bad faith to circumvent the law have been suspect and invalid since the early years of this Court's jurisprudence. "[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government[,] it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."[58] All the more is true of the President, who must "take Care that the laws be faithfully executed" and who takes an oath to faithfully execute the office.[59] "Faithful execution" of the laws requires giving good-faith reasons when invoking statutory powers, not pretexts. Here, under the pretext of an emergency, the Biden administration enacted a policy not entrusted or delegated to it by the HEROES Act.

Consistent with Article II of the Constitution, the Administrative Procedure Act and major administrative law precedents also require the executive branch to give its real basis for its actions, not the "arbitrary and capricious" *post hoc* and *ad hoc* reasons.[60]

This Court recently set forth a foundation of "settled propositions": "First, in order to permit meaningful judicial review, an

56. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); Tandon v. Newsom, 141 S. Ct. 1294 (2021).

57. Arizona v. Mayorkas, 143 S. Ct. 478, 479 (2022) (Gorsuch, J., dissenting) ("But the current border crisis is not a COVID crisis.").

58. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

59. U.S. CONST. art. 2, § 3.

60. 5 U.S.C. § 706(2)(A).

agency must 'disclose the basis' of its action."[61] "[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."[62] "Considering only contemporaneous explanations for agency action … instills confidence that the reasons given are not simply 'convenient litigating position[s].'"[63]

In *Department of Commerce v. New York*, this Court struck down a citizenship question on the census because the Court assessed that the Trump administration's publicly stated reason was pretext for partisan advantage.[64] Even though there is a world of difference between the Trump administration's motives and the motives of this policy, nevertheless administrative law requires that an agency's policy not be "arbitrary and capricious."[65]

This Court found an "incongruence" and a "disconnect" between "the decision made and the explanation given."[66] "The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise."[67] "Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.' "[68] "If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case."[69]

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61. Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167–69 (1962).

62. SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

63. DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020).

64. *Department of Commerce*, 139 S. Ct. at 2574.

65. *See id.* at 2575–76.

66. *Id.* at 2575.

67. *Id.* at 2575–76; *see also* Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

68. *Id.* (citing United States v. Stanchich, 550 F. 2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

69. *Id.* at 2575; *see also* CASS SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN 140 (2020) (citing Lon Fuller's example of "failing legality" of "a failure of congruence

Justice Gorsuch, dissenting in the Title 42 case *Arizona v. Mayorkas*, raised a similar concern about invoking an unrelated crisis when addressing another: "But the current border crisis is not a COVID crisis. And courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected officials have failed to address a different emergency." When the executive branch relies on an emergency clause, it is a proper judicial role to make sure the administration's policy means fit the claimed ends of addressing an emergency.[70]

B. In earlier Covid "emergency" cases, the Court found the mismatch of means to emergency ends as evidence of executive misuse and statutory misfit.

NFIB v. OSHA identified this problem one year ago on a mismatch between the problem (the Covid emergency) and an overbroad solution (a vaccine-or-test mandate even for lower risk workplaces), indicating a broader unstated policy goal of greater political and economic significance. After noting that the vaccine-or-test mandate would apply to outdoor employees, such as landscapers, groundskeepers, and outdoor lifeguards, the Court observed:

> Where the virus poses a special danger because of the particular features of an employee's job or workplace, *targeted regulations are plainly permissible*. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA's *indiscriminate approach* fails to account for this crucial distinction—between occupational risk and risk more generally—and

between the rules as announced and their actual administration"); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006).

70. In the Title 42 case, the Protect Democracy amicus brief raises parallel concerns about emergency powers, and it proposes a similar solution for reining in their abuse. *See* Brief Amicus Curiae the Protect Democracy Project in Support of Respondent, Arizona v. Mayorkas, 143 S. Ct. 478 (No. 22-592).

> accordingly the mandate *takes on the character of a general public health measure*, rather than an "*occupational* safety or health standard."[71]

The Biden announcement of the vaccine mandate was one point of a five-point plan for increasing a national vaccination rate, unrelated to workplace safety.[72]

The vaccine requirement's breadth and absence of tailoring to workplace risk was a mismatch to the ostensible purpose. The Government's goal was to use employment as a lever to increase vaccination, more than a goal of using vaccination to increase workplace safety. The *per curiam* focused on this mismatch: "President Biden announced 'a new plan to require more Americans to be vaccinated'"—as opposed to a plan to make workplaces safer, the purpose of the statute.[73] Of course, there was a significant overlap of the two priorities, but the overbreadth of the policy for outdoor employees indicated that the broader public health goal was the real purpose.

So too in this case, where the Covid emergency had created a specific harm to many student debt-holders, a targeted waiver would have been more permissible. But the Department of Education's "indiscriminate approach" fails to focus on these specific harms and a causal nexus to the emergency, and accordingly the waiver program takes on the character of a general debt waiver based on means-testing and long-term structural problems, rather than the short-term emergency (a likely pretext).

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71. 142 S. Ct. 661, 665–66 (2022) (emphasis added).

72. *Remarks by President Biden on the COVID-19 Response and Vaccination Program*, THE WHITE HOUSE (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/02/remarks-by-president-biden-on-the-covid-19-response-and-vaccination-program/.

73. *NFIB*, *supra* note 23, at 663.

C. *Pretext and a Means-Ends Mismatch*

1. Context and purposes to give legal intelligibility to an emergency clause, and here, the text and purposes of the post-9/11 HEROES Act – and the Government's own lawyers – indicate that concrete impact and causation are necessary.

A crucial question in administrative law: How close is the *nexus* between the purpose and the policy? The hard look doctrine has, in part, addressed this question, to make sure an agency carefully examined means and ends.[74]

An emergency questions doctrine would ask a similar question: When an emergency clause seems open-ended, do other parts of the statute and its purposes offer helpful context and contours to set legally legible limits to those powers?

In this case, the HEROES Act included a "findings" preamble that offered constraining contexts. The text 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." The HEROES Act provided its own textual basis for its context and purposes with a consistent section on "findings." The list of six findings were entirely focused on military contexts, with multiple references to "active service."[75] Even if one can extend the purposes from a military context to a pandemic, the context suggests the emergency powers would be analogous from "active service" to the active pandemic, and a more direct causal impact on the individual, with the emergency having a concrete impact on their education or economic circumstances.

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74. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (holding that administrative agencies must articulate a reasoned, contemporaneous justification for their actions, thereby adding a layer of review under the Administrative Procedure Act known as "hard look" review); DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020) (stating that an agency "must defend its actions based on the reasons it gave when it acted").

75. 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").

The Office of Legal Counsel and the Department of Education's lawyers agreed that there had to be a causal nexus between the emergency and the final program. 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*."[76]

The Department of Education agreed: "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."[77]

However, the Department of Education adopted a policy that did not heed those lawyers' interpretations. It did not create categories taking Covid into account. The program included means-testing for income, but generalized means-testing is not the same thing as asking if Covid had a particular role in reducing income. Not all workers were negatively impacted by Covid. The department could have adopted a simple approach to ask about Covid's effects, or it could have switched to a statute that matched the breadth and purpose of this program. But it did not.[78]

The Biden debt waiver is a case study for the Executive Branch's tendency to exploit emergency powers. A department saw an emergency, saw the word "emergency" in a statute, and latched onto it for a broader policy goal far beyond the timing of the emergency—

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76. Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, Op. O.L.C. 18 (Aug. 23, 2022) (slip op.) (emphasis added); https://www.justice.gov/olc/opinion/use-heroes-act-2003-cancel-principal-amounts-student-loans [https://perma.cc/6AUG-JKY5].

77. *Id.*

78. Elizabeth Goitein, *Biden used 'emergency powers' to forgive student debt? That's a slippery slope*, THE WASHINGTON POST (Sept. 1, 2022), https://www.washingtonpost.com/opinions/2022/09/01/biden-student-debt-emergency-powers-are-slippery-slope/; Jed Shugerman, *Biden's Student-Debt Rescue Plan Is a Legal Mess*, THE ATLANTIC (Sept. 4, 2022) https://www.theatlantic.com/ideas/archive/2022/09/biden-student-debt-forgiveness-covid-relief-legal/671329/ [https://perma.cc/WFA3-CLZ6].

originating long before, and continuing long after. The department adopted its preferred policy on this emergency pretext, without analyzing the rest of the statutory text or context. The OLC and the Department of Education both ignored the recent Covid-era major questions cases, and they interpreted the word "emergency" was a wide open invitation, assuming simplistic textualism plus deference. The OLC memo did not cite *FDA v. Brown & Williamson*; nor *King v. Burwell*; nor even the Covid cases *Alabama Association of Realtors* (the eviction moratorium) and *NFIB v. OSHA* (the vaccine-or-test mandate) or other "major" major questions decisions.

The OLC wrote a 25-page memo that included less than one page on the HEROES Act's purpose and legislative history. The OLC overlooked the statute's findings section that identified a narrower purpose: active emergencies and direct impacts, emphasizing military "active duty," "active" emergencies, and active direct impact on claimants.

Of course, COVID had been a national emergency, but by August 2022, it was no longer an "emergency" comparable to the post-9/11 context of the statute. It is unclear whether the COVID emergency – especially at such a late stage as the emergency had faded – after many rounds of vaccines, the stabilization of the economy, and a return to social normalcy – fits the context and purpose of the post-9/11 HEROES Act. Even if it had been, the emergency had lessened by summer of 2022 so that there was less urgency for administrative speed to skip the statutory steps of establishing causality from Covid to the waivers or to avoid any more specific categories correlated with Covid harms.

The final debt relief program required no basic indicia of causation or even correlation with the Covid emergency. A one-time income threshold does not indicate being "in worse financial position" 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., one can imagine that many in the pharmaceutical industry, remote communications technology, information technology, or food and grocery delivery services fared

well). 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 to the already-required mid-Covid tax return to indicate a worse financial position.

Thus the program's overbreadth and its reliance on categories unrelated to Covid indicate a Covid pretext. The Biden administration could have tailored the program to COVID causation on the basis of this statutory provision, or if it wanted a policy broader than COVID, it could have relied on a broader structural non-emergency statutory provision in the Higher Education Act of 1965.

2. A Pretext Timeline

This timeline of public statements is evidence of the pretext:

> *August 25, 2022*: Soon after the administration announced it would start the administrative process for a waiver program, President Biden gave a speech emphasizing the waiver to serve non-emergency long-term purposes, mentioning the Covid emergency just once.[79]
>
> *September 19, 2022*: Biden on "60 Minutes": "The pandemic is over."[80]
>
> *Oct. 12, 2022*: The Department of Education finalizes and publishes the program, less than a month before Election Day.[81]
>
> *January 31, 2023*: A day after an announcement that the administration would extend the emergency declarations to May 15 and end them thereafter, President Biden answered a press question about the reason for this timing: "We've

79. *Remarks by President Biden Announcing Student Loan Debt Relief Plan*, THE WHITE HOUSE (Aug. 25, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/25/remarks-by-president-biden-announcing-student-loan-debt-relief-plan/ [https://perma.cc/GZP6-QDYT].

80. *Biden says COVID-19 pandemic is "over" in U.S.*, CBS NEWS (Sept. 19, 2022), https://www.cbsnews.com/news/biden-covid-pandemic-over/ [https://perma.cc/FF7Y-PZ2D].

81. *See* 87 Fed. Reg. 61512, 61514 (Oct. 12, 2022).

> extended it to May the 15th to make sure we get everything done. That's all."[82]

Getting policy done should not be the reason for saying whether or not there is an emergency. A debt relief program might be valid as a post-emergency measure, but an ongoing emergency would be the only excuse for finalizing such a broad program with no process for asking if there was a causal nexus to the emergency. If the emergency is over, there is no good excuse for ignoring causation.

3. The emergency was a pretext to evade process.

In the vaccine-or-test mandate cases, the government cited the Covid emergency to bypass regular process.[83] In this case, the Government again invoked emergency powers to bypass administrative process: the Higher Education Act of 1965 had a textual basis for issuing waivers, but it also required a longer process for rescinding regulations from the Obama administration and a year of notice-and-comment process to issue new regulations. Instead of relying on the statute with the better fit and a longer process, the Government invoked an emergency for the misfit statute and an emergency track.

This is a key reason for this Court to grant relief to the petitioners: The executive branch should not be able to cite emergency powers as a pretext for evading regular administrative process. Because the emergency was a pretext to bypass the appropriate administrative process, and because this program is broader and beyond the scope of the HEROES Act, this Court should invalidate the program.

4. The emergency was a pretext for broader policy.

As the Roberts Court had already observed of the Vaccine-or-Test mandate, President Biden's announcement of plans for the vaccine

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82. *Remarks by President Biden Before Marine One Departure*, THE WHITE HOUSE (Jan. 31, 2023), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/01/31/remarks-by-president-biden-before-marine-one-departure-28/ [https://perma.cc/JEX3-RVK4].

83. *NFIB*, *supra* note 23, at 663 (an emergency exception to "ordinary notice-and-comment procedures"); *cf. Ala. Ass'n of Realtors*, *supra* note 23, at 2487.

mandate in September 2021 revealed a broader policy purpose (leveraging a higher national vaccination rate) beyond the statutory basis (workplace safety). The student debt waiver was similar: between announcing the policy through finalizing it, the Biden administration did not discuss a causal link between Covid and applicants' "financial position."[84] The Biden Department of Education did not demonstrate any hard look at causation that would have applied the OLC opinion or its own departmental lawyers' analysis that the HEROES statute required Covid causation.

"Never let a crisis go to waste." This quotation has been invoked by administration allies. It has also been misattributed to historical figures on the left and the right, but it has been used often in the context of Covid. Rahm Emanuel used the aphorism during the Obama administration and during the 2020 campaign about Covid.[85] The phrase has been used repeatedly in other Covid contexts. A crisis can mobilize support for a solution. But sometimes a crisis is merely a pretext for achieving a pre-existing policy goal. Pretexts are a problem that administrative law is supposed to address by requiring reasons – real reasons plus fit. If the crisis is the sincere motivation for a new policy, then the policy must fit the crisis.

VI. BIDEN V. NEBRASKA: A PURPOSIVE DECISION

Chief Justice Roberts seemed to adopt a purposivist approach in *Biden v. Nebraska*.[86] Justice Scalia had frequently warned against finding "elephants in mouseholes,"[87] suggesting a purposive approach to text and context: even if a formally textual reading could lead to a major result, if Congress's purpose was narrow, an administration should not go beyond that purpose to adopt a broad sweeping policy. It is more about the appropriate fit, large or small,

84. *See* Biden v. Nebraska at 2372.

85. Rahm Emanuel, *Let's make sure this crisis doesn't go to waste*, WASH. POST (Mar. 25, 2020), https://www.washingtonpost.com/opinions/2020/03/25/lets-make-sure-this-crisis-doesnt-go-waste/ [https://perma.cc/65TR-4C4A].

86. *See supra* note 14.

87. *Whitman*, *supra* note 13.

rather than a nondelegation rule against largeness. The metaphor implies that Congress may enact elephant-sized holes: broad delegations. I am suggesting that there would be a problem if agencies try to pull giraffes or whales out of those elephant-holes, which is why purposivism is a helpful limitation on such stretches. But if Congress builds a whale hole for whale-sized emergency, as long as the statute has an intelligible whale-shaped principle, then the agency can adopt a whale to address the problem.

Chief Justice Roberts rarely uses the metaphor, but he used a similar reference in *Biden v. Nebraska*: the Biden administration relied on "a wafer-thin reed on which to rest such sweeping power."[88] Roberts then emphasized congressional purpose, parrying the dissenters' purposivist moves with his own purposivist interpretation of the statute. Roberts responded to the dissenters by what powers Congress had "in mind."[89] He concluded with purposivism: "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.'"[90]

In an earlier essay, I critiqued Justice Barrett's concurrence—despite being intended to be a defense of the opinion as consistent with textualism—as actually proving that it is not textualism, but anti-textual constitutional avoidance.[91]

But there is another way, a more balanced approach to emergencies. In oral argument, Justice Kavanaugh asked a question that started with a reference to my amicus brief:

> 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

88. *See supra* note 14, at 2371.

89. *Id.* at 2374.

90. *Id.* at 2375.

91. Jed Handelsman Shugerman, Biden v. Nebraska*: The New State Standing and the (Old) Purposive Major Questions Doctrine*, 2023 CATO SUP. CT. REV. 209, 233–38 (2023).

> 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.[92]

The Solicitor General did not answer this question and instead pivoted. None of the Justices discussed it in their final opinions.

The majority offers one bad outcome on emergencies, and the dissenters offered a bad outcome on the other side. Congress has enacted many deliberately open-ended statutes delegating broad emergency powers. The majority would hobble future administrations in their response to emergencies. However, the dissenters would open the door to future abuses like the Biden administration's student-debt waiver, to give pretexts for their policy goals and to exploit such open-ended statutory texts.

These recent precedents would lead to the invalidation of many emergency policies An alternative is an emergency questions doctrine, following the wise parts of the major questions doctrine (no deference, plus purposivism) granting an appropriate range of flexibility during emergencies. However, in adopting the non-delegation-doctrine-lite,[93] the Roberts Court's decisions leave too many open questions and too much confusion.

92. *Supra* note 17.

93. *See supra* note 21.

CONCLUSION

> "The pandemic is over."
>
> "We've extended it to May the 15th to make sure we get everything done. That's all."
>
> "Never let an emergency go to waste."

The Government offered on the Covid emergency as a pretext for a broader pre-existing policy agenda, as reflected in President Biden's own public statements; and it offered the Covid emergency as a pretext to evade the appropriate statute's procedural requirements. The Waiver program lacks a basic causal nexus to the ostensible emergency purpose under the statute. Longstanding precedents bar *post hoc* rationales as litigation strategy, limiting judicial review to the reasons given for a policy when those decisions were made. Recent Supreme Court decisions also scrutinize and reject *ad hoc* rationales and mismatches between the statutory basis (and the stated goals) and a broader policy. The Biden student debt case is such a case.

But it is not the only case, and it surely will not be the last. In mid-level administrative law cases, when an agency has demonstrated specialized expertise and careful deliberation, courts should give the agency interpretation significant weight and respect under *Skidmore* and *Loper-Bright*. That approach is consistent with the pragmatic explanations for *Chevron* on triage and expertise, but without over-extending those rationales to an overbroad deference rule.

Meanwhile in "major questions" cases, especially major emergency powers questions based so often on ambiguous texts, the combination of the major questions doctrine plus *Skidmore* and *Loper-Bright* lead to a better approach as a matter of statutory construction of the APA and of the separation of powers. First: Don't defer to the executive branch, because such deference creates a risk of abuse of emergency powers. Second: Don't let an administration take advantage of a crisis as a pretext to pull an elephant out of a mousehole or a whale out of an elephant hole. However, Congress still needs to build elephant holes precisely because emergencies

are the unknown, and the executive branch needs latitude to respond to the unknown, as long as the policy is in good faith. Emergencies mean that Congress needs to build an elephant hole so that, when necessary, the executive branch can pull out a necessary elephant. The crucial third step is an appropriate method of interpretation to make sure the executive branch pulled out an elephant from Congress's elephant hole, an open-ended emergency statute: that longstanding "major questions doctrine" test is purposivism, not textualism. These steps are a more balanced form of checks and balances than the non-delegation direction of some of Justices in the majority, a direction that would overextend judicial power over Congress by eliminating elephant holes – and by hobbling the executive branch's ability to address emergencies in good faith.

Post-*Chevron*, let's look to the *Loper-Bright* side: If presidents continue to exploit emergencies *Relentless*-ly, the Major Questions doctrine and a related Emergency Question Doctrine can continue to be purposive checks against pretextual textualism.

As emergency powers are abused more and more, worry more – and use *Skid… more*: Judges should not defer to bad-faith agency interpretations, but still give some weight to agency interpretations as they tackle emergencies in good faith.