THE FAILED LEGAL CASE AGAINST STUDENT DEBT JUBILEE

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This paper reviews and rebuts the arguments presented to date that the Executive lacks authority to engage in mass student loan cancellation. Legality skeptics have presented no compelling argument that the relevant statutory text, which authorizes the Secretary of Education to "waive ... or release . . . , any claim," is ambiguous. Without such a showing, all other arguments against the legality of jubilee fail.

INTRODUCTION

Media accounts frequently recite the claim that mass cancellation of student loan debt, or jubilee, is legally dubious or risky.[1] But it appears that no jubilee legality skeptic has made a compelling argument that the Secretary of Education lacks constitutional and statutory jubilee authority. This piece succinctly reviews and rebuts the major arguments that have been offered to date on the point.

Begin with the argument that jubilee authority exists. It is simple: The Higher Education Act provides that the Secretary of Education may "compromise, waive, or release any"[2] federal student loan "claim" and may "consent to modification"[3] of student loan obligations.[4] The conclusion that the Secretary

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1. *See, e.g.*, Gabriel T. Rubin, *Mass Student Debt Cancellation Legally Risky, Says Top Obama Education Lawyer*, WALL ST. J. (May 4, 2022, 7:01 PM), https://www.wsj.com/articles/mass-student-debt-cancellation-legally-risky-says-top-obama-education-lawyer-11651689489 [https://perma.cc/FQH4-FWC7]; Stacy Cowley & Zolan Kanno-Youngs, *The Biden Student Debt Question: Will He or Won't He?*, N.Y. TIMES. (Apr. 26, 2022), https://www.nytimes.com/2022/04/26/business/biden-student-loans.html [https://perma.cc/G9D7-8NDV] ("Mr. Biden's power to act unilaterally remains an open legal question.").

2. 20 U.S.C. § 1082(a)(6).

3. *Id.* § 1082(a)(4).

4. Other provisions of federal law may also authorize mass cancellation, but it is unnecessary to rely on them to find the requisite authority. *See, e.g.*, *id.* § 1098bb(a)(1) (authorizing waiver of "any statutory or regulatory provision" of the student loan programs "as the Secretary deems necessary" in connection with national emergencies).

can cancel student debt by "waiv[ing]" or "releas[ing]" federal claims seems clear.[5]

The author is aware of four pieces of publicly available legal research that question this conclusion. The first is a memorandum apparently prepared between mid-December 2020 and January 20, 2021, and signed by Reed Rubinstein, then Principal Deputy General Counsel of the Department of Education.[6] It advises then-Secretary Betsy DeVos that "the Secretary does not have the statutory authority" to declare a jubilee.[7]

The second is a Policy Brief dated April 2021, written by Harvard Law School student Colin Mark under the supervision of Professor Howell Jackson.[8] It concludes, "Administrative forgiveness of student loan debt may be legal, but it faces myriad legal obstacles, any one of which might derail the program."[9]

The third is a memorandum dated May 7, 2021, prepared by Charlie Rose, former General Counsel of the Department of Education, for an unknown client.[10] It concludes, "[T]he more persuasive analyses tend to support the conclusion that the Executive Branch does not have the unilateral authority to engage in mass student debt cancellation."[11]

The fourth is an Internet post, updated April 27, 2022, by financial-aid expert (and nonlawyer) Mark Kantrowitz.[12] It concludes, "The President does not have the legal authority to forgive student loans on his own."[13]

This paper shows that these jubilee skeptics have no convincing argument that the apparently clear statutory authorization of jubilee is in fact ambiguous. It begins with the statutory points because the clarity of the statute resolves the constitutional issues.

5. 20 U.S.C. § 1082(a)(6).

6. Memorandum from Reed D. Rubinstein, Principal Deputy Gen. Couns., Dep't of Educ., to Betsy DeVos, Sec'y of Educ. (Jan. 12, 2021) [hereinafter "Rubinstein Memo"].

7. *Id*. at 1.

8. Colin Mark, *May the Executive Branch Forgive Student Loan Debt Without Further Congressional Action?*, 42 J. NAT'L ASS'N ADMIN. L. JUDICIARY 97 (2022) [hereinafter "HLS Paper"].

9. *Id.* at 159.

10. Memorandum from Charlie Rose to Unknown Addressee 4 (May 17, 2021) (on file with author) [hereinafter "Rose Memo"].

11. *Id.*

12. Mark Kantrowitz, *Is Student Loan Forgiveness By Executive Order Legal*?, THE COLL. INVESTOR, https://thecollegeinvestor.com/35892/is-student-loan-forgiveness-by-executive-order-legal/ (last updated April 27, 2022) [https://perma.cc/5WJY-PAVF].

13. *Id.*

I. STATUTORY ARGUMENTS

A. "Jubilee Power Renders Specific Forgiveness Provisions Surplusage"

The Rubinstein Memo,[14] HLS Paper,[15] and Rose Memo[16] all make variations of the following argument: Because the Higher Education Act provides several types of targeted loan forgiveness (for example, Public Service Loan Forgiveness for borrowers who work in public service for 10 years),[17] the Secretary must not have plenary authority to forgive federally held loans. The idea seems to be that if plenary authority actually existed, the specific authorities would be lesser included grants, and therefore surplusage.

However, this argument is misplaced. Most of the targeted provisions these papers cite are mandatory,[18] while the Secretary's jubilee authority is permissive: the Secretary "*may"* compromise, waive, release, or modify claims.[19] There is no tension between one provision's saying that the Secretary *may* forgive all loans and another's saying that the Secretary *must* forgive some loans.

Even the few apparently discretion-granting provisions that skeptics cite probably lie partly or completely outside the scope of the power to "waive" or "release" claims, and thus are not lesser included grants of power with respect to those provisions.[20] Plenary jubilee power therefore does not make them surplusage.

Moreover, the provisions that might be lesser included grants of the power to "compromise" or "modify" claims actually constrain the Secretary's plenary authority, and thus are not actually permissive.[21] Finally, the language of one of

14. *See* Rubinstein Memo, *supra* note 6, at 2, 3–4.

15. *See* HLS Paper, *supra* note 8, at 122–24.

16. *See* Rose Memo, *supra* note 10, at 7–8, 13

17. *See* 20 U.S.C. § 1087e(m).

18. *See id.* § 1087e(f)(1) (certain borrowers "shall be eligible for deferment"); *id.* § 1087e(h) (Secretary "shall specify" criteria for borrower defense); *id.* § 1087e(m)(1) (Secretary "shall cancel" debt of borrowers who meet PSLF requirements, § 1098e(b)(7) (Secretary "shall repay or cancel" loans of borrower who complete IBR program); *id.* § 1087e(f)(3) (certain borrowers "shall be eligible" for deferment because of receipt of cancer treatment); Consolidated Appropriation Act, 2018, Pub. L. 115-141, § 315, 122 Stat. 348, 752 (2018) (Secretary "shall develop and make available a simple method for borrowers to apply for loan cancellation" under TEPSLF.).

19. *See id*. § 1082(a)(6).

20. Two of the cited provisions, § 1087e(b)(9)(A) and § 1087e(b)(9)(C), deal with incentives for on-time repayment. Another, §1087e(d)(4), addresses case-by-case alternative repayment plans. It would seem that all these authorities lie beyond the power to "waive" or "release" claims. The last provision, 20 U.S.C. § 1098bb(a)(2), authorizes the Secretary, under certain circumstances, to "waive or modify any statutory or regulatory provision" of the federal student-loan programs, not just repayment-related provisions. For example, the Secretary has used this provision to expand the permissible use of remote instruction during the covid-19 pandemic. *See* Federal Student Aid Programs, 85 Fed. Reg. 79, 856, 79,857 (2020); *see also* John Patrick Hunt, *Jubilee Under Textualism*, 48 J. LEGIS. 31, 43 (2022) (collecting similar examples). This too likely lies beyond the power to "waive" or "release" (or, for that matter, to "compromise" or "modify") claims, so the provision in question does not make a lesser included grant of power.

21. Case-by-case alternative repayment plans under § 1087e(d)(4) must not exceed certain cost thresholds. *See id.* Repayment incentives under § 1087e(b)(9)(A), when they were permitted, had to be "cost neutral and in the best financial interest of the federal government." *See id.*

the provisions skeptics cite, 20 U.S.C. § 1087e(b)(9)(C), actually cuts against their contention: "Notwithstanding any other provision of law," the provision "prohibit[s]" certain repayment incentives.[22] If there were no plenary power to forgive elsewhere in the statue, the language of prohibition would be unnecessary.[23]

Indeed, the opponents' argument creates its own serious problem of statutory interpretation, as § 1082(a)(6)'s grant of authority to "waive … or release any … claim" must be harmonized with the unstated limit on this authority supposedly arising from the existence of the specialized forgiveness programs. In short, provisions that the Secretary must forgive loans in some circumstances coexist comfortably with provisions that the Secretary may forgive loans in others.

B. "Jubilee Power Covers Defaulted or Nonperforming Loans Only"

The Rose Memo argues that the Secretary's power to forgive extends only to defaulted loans;[24] the HLS Paper similarly suggests that forgiveness authority is limited to nonperforming loans.[25] The basis for these assertions seems to be that the executive can forgive only loans in federal hands, and that loans under one program (FFELP) typically come into federal hands only if they are in default[26] or at least nonperforming.[27] This argument ignores the plain language of the statute, which provides for forgiveness of federally held claims "however acquired."[28] Even if the typical channel for certain types of loans to come into federal hands is through default or other nonperformance, the statute explicitly forecloses any argument that forgiveness authority is limited to loans in federal hands through that, or any, channel.

The Rose Memo makes a more aggressive factual assertion, citing an e-mail for the proposition that default is not just the typical channel, but the "only" channel, for FFELP loans to come into federal hands.[29] That, however, is wrong. Under the Ensuring Continued Access to Student Loans Act of 2008[30] ("ECASLA") and its extension statute,[31] the Department of Education acquired over $100 billion of FFELP loans[32] without any requirement that the loans be in

22. 20 U.S.C. § 1087e(b)(9)(C).

23. It appears that Congress adopted 20 U.S.C. § 1087e(b)(9)(C) to reverse the grant of authority to offer repayment incentives it had earlier made in § 1087e(b)(9)(A). Although the existence of (b)(9)(A) may explain the "notwithstanding any other provision" language in (b)(9(C), it does not explain the use of language of prohibition rather than that of withdrawal of authority.

24. Rose Memo, *supra* note 10, at 11–12.

25. *See* HLS Paper, *supra* note 8, at 130–31.

26. Rose Memo, *supra* note 10, at 11–12.

27. HLS Paper, *supra* note 8, at 30.

28. 20 U.S.C. § 1082(a)(6).

29. Rose Memo, *supra* note 10, at 12.

30. Pub. L. 110-227, 122 Stat. 740.

31. Extension of Student Loan Purchase Authority, Pub. L. 110-350, 122 Stat. 3947 (2008).

32. *See* DEP'T OF EDUC., ENSURING CONTINUED ACCESS TO STUDENT LOANS ACT: ANNUAL REPORT TO CONGRESS 17 (2011).

default or nonperforming.[33] In fact, ECASLA's reports indicate that most of the loans the Department acquired had been recently issued,[34] so it is unlikely that those loans were even in repayment, much less nonperforming or defaulted.

C. "Jubilee Power Is an 'Elephant in a Mousehole'"

The Rubinstein Memo[35] argues and the HLS Paper[36] suggests that jubilee power does not exist because Congress "does not hide elephants in mouseholes." As explained elsewhere,[37] this metaphor expresses the idea that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[38] But here, the critical provision is neither vague (it provides that the Secretary "may … waive … or release .. any … claim")[39] nor ancillary (it is titled "Legal powers and responsibilities" and contains basic rules of the student-loan programs, such as the Secretary's power to prescribe regulations to operate them).[40] Section 1082(a)(6) is "less a mousehole and more a watering hole—exactly the sort of place we would expect to find this elephant,"[41] as Chief Justice Roberts described another agency-empowering provision.

D. "Preamble Limits Forgiveness to PSLF-Like Programs"

Kantrowitz makes the idiosyncratic argument that the preamble language of § 1082 limits forgiveness authority to targeted programs such as PSLF.[42] Section 1082 provides, "In the performance of, and with respect to, the functions, powers, and duties, vested in him [sic] by this part, the Secretary may— . . . (6) enforce, pay, compromise, waive, or release any . . . claim . . . ."[43] Kantrowitz quotes this provision and argues, "[W]hen Congress authorizes a loan forgiveness program, such as Public Service Loan Forgiveness, Teacher Loan Forgiveness, or the Total and Permanent Disability Discharge, the U.S. Secretary of Education has the authority to forgive student loans as authorized under the terms of these loan forgiveness programs."[44]

33. *See* Ensuring Access to Student Loans Act, Pub. L. 110-227, § 7 (providing for purchase of FFELP loans "on such terms … as are in the best interest of the United States" without any requirement that the loans be nonperforming of defaulted); Extension of Student Loan Purchase Authority, Pub. L. 110-350 (2008) (extending ECASLA purchase authority without changing program terms). The author thanks Eileen Connor for this point.

34. *See* DEP'T OF EDUC., *supra* note 32, at 4 (reporting that Department purchased approximately $108 billion of loans under ECASLA through programs that required that the loans be made for the 2008-09 and 2009-10 years); *id.* at 17 (reporting that these loans were purchased in calendar years 2009 and 2010).

35. Rubinstein Memo, *supra* note 6, at 2.

36. HLS Paper, *supra* note 8, at 126 n.166.

37. *See* Hunt, *supra* note 20, at 48.

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

39. 20 U.S.C. § 1082(a)(6).

40. *See id*.

41. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1355 (2020).

42. Kantrowitz, *supra* note 12.

43. 20 U.S.C. § 1082(a)(6).

44. Kantrowitz, *supra* note 12.

Kantrowitz provides no support or explanation for this conclusion. The preamble cannot mean that all the powers granted in § 1082 are limited to PSLF and like programs. That would lead to the absurd result that the Secretary can prescribe regulations,[45] sue,[46] and be sued[47] only in connection with PSLF-like programs and not other aspects of the student loan programs. Kantrowitz's reading also makes the authority of 1082(a)(6) to waive or release claims unnecessary, because each of the provisions he cites independently directs the Secretary to cancel or assume loans when the appropriate conditions are met.[48] It would have made no sense for Congress to adopt a provision saying, as Kantrovitz argues, "The Secretary may waive student loan claims when independently granted the power to do so."[49]

What the preamble actually means is that the Secretary can cancel loans in the course of operating the student loan program, that is, "perform[ing]" the "functions" and duties" and exercising the "powers" the statute confers on the Secretary in that respect.[50] The quoted language means that the Secretary cannot cancel, say, tax debt unrelated to student loans under 1082(a)(6). It does not limit the Secretary's power to cancel student loan debt.

E. Avoidance of Constitutional Doubt

The Rubinstein Memo[51] and HLS Paper[52] invoke the principle of avoidance of constitutional doubt as a reason to interpret the HEA not to grant broad cancellation authority. However, the skeptics do not argue that there is constitutional doubt that Congress could authorize mass cancellation. And, as explained below, there is no such doubt. Constitutional problems arise only if the Secretary purports to cancel student debt without clear authority. But, as shown above, the statutory authorization here appears clear, and the skeptics' arguments fail to show otherwise. Thus, there is no constitutional doubt to avoid here.

45. *See* 20 U.S.C. § 1082(a)(1).

46. *See id*.

47. *Id.*

48. *See id*. § 1087e(m)(1) (Secretary "shall cancel" debt of borrowers who meet PSLF requirements); *id*. § 1078-10(b) (Secretary "shall carry out a program … of assuming the obligation to repay" when Teacher Loan Forgiveness requirements are met); *id*. § 1087(a)(1) (Secretary "shall discharge the borrower's liability" when Total and Permanent Discharge conditions are met).

49. Kantrowitz, *supra* note 12.

50. 20 U.S.C. § 1082(a)(6).

51. Rubinstein Memo, *supra* note 6, at 2.

52. HLS Paper, *supra* note 8, at 126–27.

II. CONSTITUTIONAL ARGUMENTS

A. Major Question/Nondelegation Doctrine

The HLS Paper,[53] and the Rose Memo[54] both raise the possibility that the nondelegation and/or major questions doctrines may bar the Secretary from carrying out mass forgiveness. As many commentators have noted, the nondelegation doctrine itself, with its "intelligible criterion" requirement, has been moribund for decades.[55] The current incarnation of nondelegation is the "major questions doctrine," which prohibits executive agencies from deciding issues of "vast economic and political significance" unless Congress "speak[s] clearly."[56] Here, as shown, the delegation of power is clear. Congress has authorized the Secretary to "waive . . . or release . . . any . . . claim."[57] The clear-statement rule is therefore satisfied.

The Supreme Court's recent decision in *West Virginia v. EPA* rejected an EPA interpretation of the Clean Air Act on major-question grounds.[58] Although Chief Justice Roberts's majority opinion expresses some ideas that should concern debt-forgiveness advocates,[59] the case is distinguishable on several grounds.[60] The most important one is the clarity of the statutory language in question.

53. *Id*.

54. Rose Memo, *supra* note 10, at 14–15.

55. *See*, *e.g.*, 33 CHARLES ALAN WRIGHT & ARTHUR D. MILLER, FEDERAL PRACTICE AND PROCEDURE JUDICIAL REVIEW § 8440 (2d ed.) ("famously moribund nondelegation doctrine"); Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Robert Court's Political Theory*, 73 HASTINGS L.J. 371, 381 (2022) (doctrine "has long been moribund"); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (nondelegation doctrine "has had one good year [1935], and 211 bad ones (and counting)").

56. *See* Nat'l Fed. of Indep. Bus v. OSHA, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring); *see also* Dep't of Homeland Sec. v. Regents of Univ. of Calif., 140 S. Ct. 1891, 1925 (2020) (Thomas, Alito & Gorsuch, JJ., concurring).

57. 20 U.S.C. § 1082(a)(6).

58. No. 20-1530, 142 S. Ct. 1587 (2022).

59. The opinion suggests that an agency's claim of authorization to act is suspect if the agency "claim[s] to discover in a long-extant statute an unheralded power." *Id.*, slip op. at 20, 30-31. Mass student-loan cancellation based on Section 1082(a)(6) could fit that description. Moreover, the court expressed skepticism about agency interpretations that work a "fundamental revision" of a statute, "changing it from one sort of scheme of regulation into an entirely different kind," *id*. slip op. at 24 (internal quotation marks, brackets, and ellipses omitted). This description might apply to mass cancellation, if one accepts the framing that cancellation turns loans into grants. Notably, these two points bear primarily, if not exclusively, on the characterization of an issue as a "major question" to which the clear-statement rule applies, not to the determination whether authorization is clear. *See id*., slip op. at 20-28 (finding that case presented a major question); *id.*, slip op. at 28-31 (finding that statute did not clearly authorize EPA's action).

60. Justice Gorsuch's concurrence grounds the major-questions doctrine in a fear of "[i]ntrusions on liberty," *id.*, slip op. at 6, and therefore suggests that agency action is more likely to present a major question when it "seeks to regulate a significant portion of the American economy or require billions of dollars in spending by private persons or entities." *Id.,* slip op. at 10 (internal citation and quotation marks omitted). Mass cancellation involves spending government money, not "intruding on liberty" by regulating private actors. Likewise, as mass cancellation involves federal claims against individuals, it does not "intrude into an area that is a particular domain of state law" and thus does not deserve scrutiny on that ground. *Id.*

In *West Virginia v. EPA,* the EPA was authorized to set emissions standards for already-existing coal plants based on the "best system of emission reduction…. that has been adequately demonstrated."[61] In that context, it is certainly possible that "system" means only technological systems for reducing emissions at operating plants, and the Court found that the agency had in fact exercised its power in a way consistent with such a limitation for decades.[62] In the challenged action, however, the EPA determined that the "best system of emission reduction" included a "generation shift" away from coal power[63] and therefore adopted emission standards that no existing coal plant could meet by adding technological devices.[64] The Court decided that the power to base emission standards on the "best system of emission reduction" did not clearly enough authorize the agency to adopt the generation-shifting plan.[65] Although EPA's interpretation of "system" certainly may have been reasonable,[66] it was far more contestable than an interpretation of "waive … or release .. any claim" under which the Secretary may in fact waive or release any claim. It is impossible to rule out the possibility that the conservative Supreme Court majority may revive the nondelegation doctrine by making the major-questions doctrine a flat prohibition rather than a mere clear-statement rule. Indeed, *West Virginia v. EPA* may (or may not)[67] be a step along that path. But under existing doctrine, the clarity of the statutory text should prevail.

B. Appropriation/Spending

The Rubinstein Memo,[68] HLS Paper,[69] and Rose Memo[70] all suggest that the Appropriations[71] and Spending[72] Clauses of the U.S. Constitution may prohibit executive debt cancellation. A clear argument on this point would explain both how debt cancellation entails "spending" and why existing appropriations

61. *Id.*, slip op. at 4-5.

62. *Id.*, slip op. at 20-23.

63. *Id.*, slip op. at 7-8.

64. *Id.*, slip op. at 10.

65. *Id.*, slip op. at 28-31.

66. *See* Am. Lung Ass'n v. EPA. 985 F.3d 914, 995-98 (D.C. Cir. 2021), *rev'd and remanded*, *West Virginia v. EPA*, *supra* (finding "erroneous" the contention that the statute clearly foreclosed EPA's interpretation).

67. Commentators feared that the Court might use *West Virginia* itself as a vehicle to revive the doctrine. *See* Erwin Chemerinsky, *SCOTUS Could Make Significant Ruling on EPA's Authority to Fight Climate Change – Or Not*, ABA JOURNAL, March 3, 2022, https://www.abajournal.com/columns/article/chemerinsky-scotus-could-make-significant-ruling-on-epas-authority-to-fight-climate-change-or-not. That the Court declined to do so, as it has in other recent cases, *see, e.g.,* Gundy v. United States, 139 S. Ct. 2116 (2019) (rejecting nondelegation challenge to Attorney General's authority to impose certain sex-offender registration requirements) suggests that such a move may not be coming.

68. Rubinstein Memo, *supra* note 6, at 1–2.

69. HLS Paper, *supra* note 8, at 125–128.

70. Rose Memo, *supra* note 10, at 18. A memorandum from the Freedom to Prosper organization makes a similar point, and likewise does not elaborate on the argument. *See* Memo to Interested Parties from Freedom to Prosper, Nov. 2020 (on file with author).

71. U.S. CONST., art. I, § 9, cl. 7.

72. U.S. CONST., art. I, § 8, cl. 1.

statutes do not provide for that spending. No cancellation skeptic has presented such an argument.

The HLS Paper contains the most lucid discussion of the issue, and it concludes that "FFELP and the Direct program are entitlements exempt from the annual appropriations process,"[73] and that "forgiving a student loan is tantamount to an expenditure of the value of that loan, yet this expenditure requires no new appropriation."[74]

The HLS Paper nevertheless expresses skepticism. The paper argues that it is incongruous not to require an appropriation for the large quasi-expenditures that mass cancellation would entail and concludes that giving effect to the plain statutory text might be "contrary to clear congressional intent."[75] It argues that courts would be reluctant to "infer appropriations from ambiguous statutory text."[76] But, at the risk of repetition, the text here actually does not seem ambiguous, and the HLS Paper makes no effort to show that it is. Although arguments about Congress's larger intentions have a place in purposive statutory interpretation, under the prevailing textualist approach employed by the Supreme Court, they are unavailing.

As for the Rubinstein and Rose Memos, they make only the question-begging argument that appropriated money must be spent for authorized purposes;[77] the point is answered by pointing to the clear authorization for forgiveness cited above.[78]

CONCLUSION

Congress's grant of authority to the Secretary of Education to cancel student loans on a mass basis is unusually clear, and skeptics of the authority have made no compelling counterargument. The Department of Education has analyzed the issue, and although the memo reporting its conclusions is heavily redacted, it appears more likely than not that the Department concluded that it possesses the authority in question.[79] The wisdom of exercising this authority and the manner in which the Department should do so are open to debate, but at this

73. HLS Paper, *supra* note 8, at 125 (citing and quoting 20 U.S.C. § 1087a(a) ("There are hereby made available, in accordance with the provisions of this part, such sums as may be necessary … to make [Direct] loans … [and to] purchas[e] [Direct] loans under … this title."); 2 U.S.C. § 661c(c)(1) (exempting from annual appropriations any "direct loan or loan guarantee program that – (1) constitutes an entitlement (such as the guaranteed student loan program …)").

74. *Id.* at 26.

75. *Id.*

76. *Id*.

77. *See* Rubinstein Memo, *supra* note 6, at 1; Rose Memo, *supra* note 10, at 18.

78. *See* discussion *supra* Part I.

79. *See* e-mail from Gregory Schmidt to Joanna Darcus (Apr. 2, 2021) ("If this is intended to be public-facing, we may want to engage more with the Rubinstein memo [redacted] … Our Rubinstein countering in the original was [redacted]"). Given that the Rubinstein memo concluded that mass cancellation was unlawful, the references to "engag[ing] … with" and "countering" it suggest that the Department reached the opposite conclusion.

point no one has raised real doubts under existing law that mass forgiveness lies outside executive authority.

As has been noted elsewhere,[80] the skepticism about jubilee authority may arise from the fact that actors in the system apparently have not assumed the authority exists. But the rise of what has been called "formalistic textualism"[81] at the Supreme Court means that the Court has now bound itself to apply clear statutory language, even if that leads to unexpected places. As Justice Gorsuch wrote for the majority in *Bostock v. Clayton County*, interpreting the Civil Rights Act of 1964, "[I]n the context of an unambiguous statutory text, whether a specific application was anticipated by Congress is irrelevant."[82] The Court thus rejected the contention that ""because few in 1964 expected today's *result*, we should not dare admit that it follows ineluctably from the statutory text."[83] Similarly, in holding that a large part of Oklahoma is an Indian reservation, the Court rejected arguments that it was common knowledge that the reservation did not exist and that settled practice treated it as nonexistent.[84] It wrote, tersely, "There is no need to consult extratextual sources when the meaning of a statute's terms is clear."[85]

Jubilee legality skeptics might be on stronger ground if the Court were not so wedded to enforcing plain statutory meaning. But under currently existing doctrine and currently existing interpretive approaches, they have raised no real doubt as to jubilee's constitutional and statutory legality.

80. *See* Hunt, *supra* note 20, at 48–49.
81. Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 269 (2020).
82. 140 S. Ct. 1731, 1751 (2020).
83. *Id*. at 1750.
84. McGirt v. Oklahoma, 140 S. Ct. 2452, 2481 (2020).
85. *Id*. at 2469.