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NFIB v. OSHA: Nondelegation, Major Questions, and Chevron's No Show

by

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Much already has been written regarding the Supreme Court's stay of OSHA's vaccine and testing emergency mandate in *National Federation of Independent Business v. OSHA*, and, most certainly, however much that is, it's only the tip of the fast-forming iceberg. To be sure, many administrative and constitutional law scholars already have law review articles in the works.

But here, briefly, are two observations that strike me as worthy of comment, if only to provoke further comment.

First observation. I am not aware of a more clear and concise explanation of the linkage between the nondelegation and major questions (or major rules if you prefer) doctrines – and the grounding of both doctrines in separation of powers principles – than the exposition found in Justice Gorsuch's concurring opinion in *NFIB*. I know this linkage has been suggested previously by judges, law professors, and others. But not usually so tightly in a unified theory.

Here is the nub of what Justice Gorsuch said:

> [T]he major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine. Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.

The nondelegation doctrine ensures democratic accountability by preventing Congress from *intentionally* delegating its legislative powers to unelected officials. . . . The major questions doctrine serves a similar function by guarding against *unintentional*, oblique, or otherwise unlikely delegations of the legislative power. [Citations omitted and emphasis added.]

The close juxtaposition of *intentionality* as a key aspect of the nondelegation doctrine with *unintentionality* as a key aspect of the major questions doctrine serves to highlight the way in which the two doctrines are distinct yet two sides of the same coin.

Second observation. I found it a bit jarring, or at least interesting, that the *per curiam*, concurring, and dissenting opinions in *NIFB* did not mention or cite *Chevron*, even in passing. After all, at bottom, the *NFIB* case involves the lawfulness of an authoritative interpretation of a statute by the agency charged with executing it. And many decisions invoking the major questions doctrine do address *Chevron*.

This is from Justice O'Connor's majority opinion in FDA v. Brown & Williamson Tobacco Corporation:

> A threshold issue is the appropriate framework for analyzing the FDA's assertion of authority to regulate tobacco products. Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). Under *Chevron*, a reviewing court must first ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress has done so, the inquiry is at an end; the court "must give effect to the unambiguously expressed intent of Congress." But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible. [Citations omitted.]

That's the standard formulation you've read a hundred (okay, maybe a thousand) times. But it's missing from all the *NFIB* opinions.

In *Brown & Williamson*, in one of the Supreme Court's early explicit formulations of the major questions doctrine, after reciting the standard *Chevron* blackletter, Justice O'Connor went to say: "In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such *economic and political*

magnitude to an administrative agency." [Emphasis added.] Thus, the major questions doctrine.

Now I understand that, conceptually, it's possible to address major questions doctrine claims without expressly discussing or citing *Chevron*. If the theory of the case is that a statute clearly – unambiguously – delegates authority to the agency to act as it did, then there is no need to plead *Chevron* deference. That, in fact, is the government's position in the *NFIB* case. So Solicitor General Prelogar's brief never breathes a word about *Chevron*, even in the context of refuting claims by the OSHA challengers that the question of the agency's authority to act as it did involves, as Justice Gorsuch put it in his concurring opinion, a decision "of vast economic and political significance."

But, not infrequently, the major questions doctrine has been linked to *Chevron*, as in then-Judge Kavanaugh's notable dissent from the denial of the petitions for rehearing *en banc* in *US Telecom Association v. FCC*. There Kavanaugh explained: "In short, while the *Chevron* doctrine *allows* an agency to rely on statutory ambiguity to issue *ordinary* rules, the major rules doctrine *prevents* an agency from relying on statutory ambiguity to issue *major* rules." There are other examples of such tying together as well.

All in all, I'd say that Justice Gorsuch's concurrence in *NFIB*, is likely to be long studied for its clear exposition of the linkage between the nondelegation and major questions doctrines and both of these to advancing fundamental separation of powers principles. And perhaps the lack of any reference to *Chevron* deference in any of the opinions may be a portent of *Chevron's* eclipse, either partial or full.

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