

**NFIB v. OSHA: A UNIFIED SEPARATION OF POWERS DOCTRINE AND
CHEVRON’S NO SHOW**

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I. INTRODUCTION

NFIB v. Department of Labor, OSHA suggests that a revitalized, more coherent separation of powers doctrine may be emerging at the Supreme Court. This more coherent doctrinal approach appears to include both a more exacting application of the nondelegation doctrine, as it is presently understood, and a more assertive judicial role in reviewing agency interpretations of their own statutory authority.¹ Based on a close reading of *NFIB*, we offer two insights regarding how the Court might treat a key aspect of separation of powers going forward, specifically the protection of the legislative power vested in Congress by Article I of the Constitution.

The first observation: Justice Neil Gorsuch's concurrence in *NFIB* articulated a novel, unified theory of separation of powers doctrine unseen in prior Court opinions and literature. In a nutshell, Gorsuch explained that the "nondelegation doctrine" protects the legislative power from *intentional* overly broad delegations of authority by Congress while the "major questions doctrine" protects the legislative power from *unintentional* congressional delegations of authority.² The latter may also be characterized as the executive branch usurping Congress's authority.³ This unified theory fuses the doctrines into two distinct sides of the same separation-of-powers-protective coin. In existing case law, the major questions doctrine has almost always been framed as a limit on *Chevron*⁴ deference rather than as a standalone canon of interpretation.⁵ And scholarly commentary on the subject generally concludes that the major questions doctrine is nondelegation by a different name or a less extreme replacement.⁶

Justice Gorsuch's unified theory is important because it clarifies the major questions doctrine's role in protecting the separation of powers, the most fundamental structural feature of the Founders' Constitution. Separation of powers ensures that the power to make laws remains with the people's elected representatives. Gorsuch's concurrence explains that the major questions doctrine will continue to police abuse of delegated authority in derogation of separation of powers when executive branch agencies try to expand their realms by adopting statutory interpretations beyond what the text of the law can justify.⁷ Many commentators, including Justice Gorsuch

1. See *NFIB v. Dep't of Lab., OSHA*, 142 S. Ct. 661, 667–70 (2022), (Gorsuch, J., concurring) (per curiam).

2. *Id.* at 669.

3. See *id.* (quoting *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (mem.) (per curiam) (Kavanaugh, J., dissenting)).

4. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

5. See, e.g., *U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting).

6. See discussion *infra* Section II.B.2.

7. See *NFIB*, 142 S. Ct. at 668–69 (Gorsuch, J., concurring).

himself dissenting in *Gundy v. United States*,⁸ previously characterized the major questions doctrine as a replacement for nondelegation that polices Congress's implicit delegation of broad authority to the executive through ambiguities produced by statutory gaps.⁹ But the unified theory in *NFIB* charts a new course—the major questions doctrine will continue to protect Congress's legislative power from executive abuse, in accord with both the doctrine's descriptive maxim that Congress “does not . . . hide elephants in mouseholes”¹⁰ and the Founders' concerns about the overreach of legislative power. The Founders largely feared that Congress might grow too powerful, but if the executive branch is able to conscript the legislative power by ignoring the textual limits of laws enacted by Congress, the same overreach concern arises despite the fact that the identity of the perpetrator is different.¹¹

The second observation: The total absence of any references to *Chevron* deference in the Court's opinions in *NFIB*, as well as in the parties' briefings, could possibly signal *Chevron's* demise or at least the shrinking of its domain.¹² Usually, agencies argue for *Chevron* deference in judicial disputes over statutory authority. But here, OSHA did not plead for *Chevron* deference in its brief.¹³ And OSHA did not argue that the Occupational Safety and Health Act (OSH Act) was ambiguous, despite some potentially ambiguous terms.¹⁴ Moreover, the Court did not cite *Chevron* a single time in the per curiam opinion or concurrence.¹⁵ This is quite significant because, in the past, the major questions doctrine, on which basis *NFIB* was decided, has been framed as a limitation on *Chevron* deference rather than as a standalone canon of statutory interpretation.¹⁶ While certainly not conclusive, together, these facts could indicate that the Court may be closer to overruling or at least limiting the reach of *Chevron*, and that the major questions doctrine would outlive *Chevron* as a standalone canon of statutory interpretation.

8. 139 S. Ct. 2116 (2019).

9. *Id.* at 2131–48 (Gorsuch, J., dissenting).

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

11. *See Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).

12. This Article's primary focus is on *NFIB*. After acceptance of this Article for publication, the Supreme Court decided *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). That case applied the major questions doctrine to hold that the EPA lacked authority to adopt its far-reaching “Clean Power Plan.” *Id.* at 2615–16. Like *NFIB*, the majority and concurring opinions in *West Virginia* did not even reference *Chevron*, lending further credence to this Article's observations regarding *Chevron's* eclipse. *Compare NFIB*, 142 S. Ct. 661, *with West Virginia*, 142 S. Ct. 2587.

13. *See generally* Response in Opposition to the Applications for a Stay, *NFIB*, 142 S. Ct. 661 (Nos. 21A243–21A252, 21A258–21A260, 21A267), 2021 WL 8945197.

14. *Id.* at 5.

15. *See NFIB*, 142 S. Ct. 661.

16. *See, e.g., U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (mem.) (per curiam) (Kavanaugh, J., dissenting).

The unified theory of the separation of powers in Justice Gorsuch's *NFIB* concurrence and the absence of the appearance of *Chevron* deference in *NFIB* hint that a majority of the Court may be looking to clarify and reinvigorate the Constitution's structural safeguards that separation of powers embodies.¹⁷

II. THE FIRST OBSERVATION: JUSTICE GORSUCH'S CONCURRENCE PRESENTS A NOVEL, UNIFIED THEORY OF THE SEPARATION OF POWERS

Justice Gorsuch's concurrence in *NFIB* links the nondelegation and major questions doctrines together in a way that posits a novel, unified theory of the separation of powers with the aim of protecting the legislative power vested in Congress by the Constitution.¹⁸ In our view, Gorsuch's theory hinges on intentionality. The nondelegation doctrine protects against *intentional* delegations by Congress to the executive branch via overly broad grants of authority.¹⁹ Separately, the major questions doctrine protects against *unintentional* delegations of authority by Congress that occur when the executive branch engages in strained interpretations of pertinent statutory provisions.²⁰ This unified theory, as articulated by Justice Gorsuch, is absent from prior court opinions and the vast scholarly literature on separation of powers principles.²¹ But it provides a basis for understanding how the Court, or at least Justices Gorsuch, Thomas, and Alito, may intend to treat the separation of powers doctrine in future cases.

Particularly, it shows that the major questions doctrine may now be a standalone canon of statutory interpretation rather than, as many previously have characterized it, a limit on or exception to *Chevron* deference.²² And this shift is broadly consistent with the Founders' fears of an overzealous

17. We emphasize that while we are inclined to favor, as a normative matter, some form of reinvigoration of the nondelegation doctrine and narrowing of *Chevron*'s domain, our purpose here is largely descriptive and analytical in the service of suggesting what is new in the *NFIB* opinions and what the opinions may foretell.

18. See *NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring); U.S. CONST. art. I, § 1.

19. See *NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

20. *Id.*

21. See Jonathan Hall, Note, *The Gorsuch Test: Gundy v. United States, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 178 (2020) ("The scholarship on nondelegation is voluminous."). Jonathan Hall's note contains citations to a considerable amount of this literature and leading cases for those wishing to do a deep dive into the subject. See generally *id.*

22. Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (Or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593, 598 (2008) (referring to early major questions cases, Professor Moncrieff states that "the Court gave birth to a discrete *Chevron* exception for agency interpretations that effect major changes, a rule that Sunstein termed the major questions exception to *Chevron* deference").

legislature. These same fears regarding abuse of power should apply to the executive branch's overreaching use of delegated rulemaking authority which, in effect, is lawmaking. This section describes the *NFIB v. OSHA* opinions, previous cases and commentary involving the major questions doctrine, and the implications of Justice Gorsuch's unified separation of powers theory.

A. NFIB v. OSHA

In *NFIB*, the per curiam Supreme Court stayed the Biden administration's COVID-19 vaccine mandate.²³ The vaccine mandate required employees²⁴ to receive the COVID-19 vaccine or, at work, wear a mask and take a weekly COVID-19 test, both of which would be enforced by employers.²⁵ OSHA found authority to issue the mandate in the "emergency temporary standards" provision in Section 655(c)(1) of the Occupational Health and Safety Act, which allows a narrow class of workplace health and safety rules to take effect immediately without compliance with Administrative Procedure Act requirements when "(1) 'employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards,' and (2) the 'emergency standard is necessary to protect employees from such danger.'"²⁶

With separation of powers principles as the foundational backdrop, the Court stayed the vaccine mandate as violative of the major questions doctrine because OSHA lacked clear authorization from Congress to implement the mandate.²⁷ The per curiam opinion recited the "clear statement" maxim best known to describe the major questions doctrine: "'We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.'"²⁸ This clear statement rule allows broad delegations but only when Congress expressly permits.²⁹ Rather than expressly granting authority for a vaccine mandate or similar actions, the OSH Act authorized OSHA to set "workplace safety standards."³⁰ The Court reasoned that COVID-19 is a universal risk, similar in nature to "crime, air

23. *NFIB*, 142 S. Ct. at 666–67.

24. The vaccine mandate applied to employers with at least 100 employees. *Id.* at 662.

25. *Id.*

26. *Id.* at 663 (quoting 29 U.S.C. § 655(c)(1)).

27. *See id.* at 664–66.

28. *Id.* at 665 (quoting *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)); *see also* *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (mem.) (per curiam) (Kavanaugh, J., dissenting) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)) (noting that the major rules doctrine can be summarized as the clear statement rule).

29. *See U.S. Telecom*, 855 F.3d at 419 (Kavanaugh, J., dissenting) (indicating that an agency may issue a major rule if clearly authorized to do so by Congress).

30. *NFIB*, 142 S. Ct. at 665 (emphasis omitted).

pollution, [and] any number of communicable diseases” other than COVID-19, rather than an “occupational hazard.”³¹ And critically, the vaccine mandate did not address a particular occupational hazard that could increase the likelihood of COVID-19 infections, such as cramped spaces.³² Further, the sheer breadth of the vaccine mandate and “lack of historical precedent” for broad public health mandates issued by OSHA indicated the agency exceeded its authority.³³

Justice Gorsuch, joined by Justices Alito and Thomas, published a concurring opinion that addressed the Court’s separation of powers precedents.³⁴ First, he articulated the broad purpose of the major questions doctrine: to protect the separation of powers by “ensur[ing] that the national government’s power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people’s elected representatives.”³⁵ He then explained the close relationship between the major questions doctrine and the nondelegation 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.”³⁶ This much isn’t new.

But then, critically, Justice Gorsuch explained how the two doctrines fit into a unified theory of separation of powers protections that ensure the authority vested in Congress stays with Congress.³⁷ Both doctrines perform this function, but the nondelegation doctrine prevents *intentional* unlawful delegation of authority by *Congress*, while the major questions doctrine does so by preventing *unintentional* unlawful delegation of authority conceived and implemented by an overreaching *executive branch*.³⁸

The nondelegation doctrine ensures democratic accountability by preventing Congress from *intentionally* delegating its legislative powers to unelected officials. Sometimes lawmakers may be tempted to delegate power to agencies to “reduc[e] the degree to which they will be held accountable for unpopular actions.” But the Constitution imposes some boundaries here. If Congress could hand off all its legislative powers to unelected agency officials, it “would dash the whole scheme” of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives.

31. *Id.*

32. *Id.* at 665–66.

33. *Id.* at 666 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)).

34. *See generally id.* at 667–70 (Gorsuch, J., concurring).

35. *Id.* at 668.

36. *Id.* at 668–69.

37. *See id.* at 669.

38. *Id.*

The major questions doctrine serves a similar function by guarding against *unintentional, oblique, or otherwise unlikely delegations* of the legislative power. Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility by recognizing that Congress does not usually "hide elephants in mouseholes." In this way, the doctrine is "a vital check on expansive and aggressive assertions of executive authority."³⁹

To summarize Justice Gorsuch's insight, the nondelegation doctrine prevents Congress's intentional abuse of its legislative powers by deliberately handing virtually unbounded authority to the executive, while the major questions doctrine prevents the executive branch from abusing its power by interpreting statutory provisions in ways that Congress clearly did not intend.⁴⁰ This insight is a novel theory of the two doctrines' interaction for protecting separation of powers. As this Article discusses below, it is absent from precedents and literature addressing the nondelegation doctrine.

B. *Prior Formulations*

Now that we have in mind Justice Gorsuch's unified theory for the separation of powers, a survey of the prior pertinent cases and the literature addressing the major questions and nondelegation doctrines shows that this theory is novel. Prior cases applying the major questions doctrine typically have framed it as a limit on *Chevron* deference. And the prior literature usually has described the nondelegation and major questions doctrines as substitutes for each other rather than as complements that, in a unified theory, protect separation of powers in different ways. Together, these past writings demonstrate that Justice Gorsuch's concurrence, if adopted by a majority of the Court, would mark a shift in separation of powers jurisprudence.

39. *Id.* (alteration in original) (emphasis added) (citations omitted).

40. Under Gorsuch's theory, the major questions doctrine would prevent what some scholars call "agency aggrandizement," which is "the risk that the agency will exercise a power Congress did not intend for it to have, or that it will extend its power more broadly than Congress envisioned." Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1503–04 (2009).

I. Cases

To demonstrate the novelty of Justice Gorsuch’s unified theory of the separation of powers, we review prior major questions doctrine cases, almost all of which treat the doctrine as a limit on the application of *Chevron* deference.⁴¹ As a refresher, *Chevron* established a two-step process for reviewing agency interpretations of statutory provisions that grant authority.⁴² Step One asks “whether Congress has directly spoken to the precise question at issue.”⁴³ If so, then the plain meaning of the law controls, and the inquiry ends.⁴⁴ But if the underlying statute is silent or ambiguous, then the Court moves to Step Two and determines whether the agency’s interpretation of the statutory provision is reasonable.⁴⁵ If it is reasonable, the agency’s interpretation must be accorded “controlling weight,” so that a court may not “simply impose its own construction on the statute.”⁴⁶ Additionally, the Court sometimes applies what has been called *Chevron* “Step Zero,” in which the Court determines whether Congress delegated to an agency the power to interpret a statutory provision in the first place, if this fact is in doubt.⁴⁷ Justice Gorsuch’s *NFIB* concurrence elevates the major questions doctrine from its prior role as a limitation on *Chevron* to an independent interpretative canon for preserving the legislative power.

a. FDA v. Brown & Williamson Tobacco Corp. (2000)

FDA v. Brown & Williamson Tobacco Corp., the first case to explicitly apply the major questions doctrine, was primarily a *Chevron* deference case.⁴⁸ In *Brown & Williamson*, the Court held unlawful the Food and Drug Administration’s (FDA) regulation of tobacco products due to lack of a grant of clear authority from Congress for the FDA to regulate tobacco.⁴⁹ At the outset of its opinion, the Court immediately invoked *Chevron*: “A threshold

41. We do not include *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), decided after *NFIB*, in our case summary. But we note that the Court’s majority opinion and the concurrence by Justices Gorsuch and Alito in *West Virginia* add further weight to our observation that the Court’s increasing reliance on the major questions doctrine as a basis for holding unlawful agency actions is further proof of *Chevron*’s shrinking domain. See discussion *infra* Section III.C.

42. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

43. *Id.*

44. *Id.*

45. *Id.* at 843–44.

46. *Id.*

47. See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006); see also discussion *infra* Parts II.B.1.d and II.B.1.f.

48. 529 U.S. 120, 132 (2000).

49. *Id.* at 161.

issue is the appropriate framework for analyzing the FDA's assertion of authority to regulate Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chevron*"⁵⁰

The Court applied *Chevron*'s Step One, which asks whether the relevant statutory provision at hand is ambiguous or silent,⁵¹ and it determined that Congress unambiguously precluded the FDA from regulating tobacco for a multitude of reasons.⁵² There was an incompatible tension between the statute's command for the FDA to remove unsafe products from the market and the FDA's choice to allow cigarette sales despite its finding that tobacco products are never safe.⁵³ Congress also previously passed a law declaring that "'stable conditions'" in the tobacco market are "'necessary to the general welfare.'"⁵⁴ And six other federal laws explicitly regulated tobacco without banning it.⁵⁵ Further, for decades, the FDA maintained the position that it lacked authority to regulate tobacco, and the laws Congress passed regulating tobacco were informed by that position.⁵⁶ Accordingly, Congress repeatedly had rejected bills to grant the FDA authority over tobacco.⁵⁷

After its *Chevron* Step One analysis, the Court separately addressed the major questions doctrine, concluding that it also justified striking the FDA's tobacco rules.⁵⁸ The Court stated that "extraordinary cases" warrant caution before granting deference based on ambiguity.⁵⁹ For support, it cited Justice Breyer's 1986 law review article on deference, which was the first to state what we now call the major questions doctrine: "A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."⁶⁰

50. *Id.* at 132 (citation omitted).

51. *Id.*

52. *Id.* at 133; accord VALERIE C. BRANNON & JARED P. COLE, *CHEVRON DEFERENCE: A PRIMER* 9–10 (2017), <https://crsreports.congress.gov/product/pdf/R/R44954> [<https://perma.cc/LW7S-QRVL>] ("However, the Court resolved the matter at *Chevron* step one, concluding that Congress had 'directly spoken to the issue' and 'precluded the FDA's jurisdiction to regulate tobacco products.'").

53. See *Brown & Williamson*, 529 U.S. at 133–37.

54. *Id.* at 137 (quoting 7 U.S.C. § 1311(a) (repealed 2004)).

55. *Id.*

56. *Id.* at 144.

57. *Id.* at 144–48, 155.

58. *Id.* at 160 ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

59. *Id.* at 159.

60. *Id.* (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)); see also *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (mem.) (per curiam) (Kavanaugh, J., dissenting) (explaining that Justice Breyer's

Applying that principle, the Court concluded that the FDA's jurisdiction over tobacco was a major question because the FDA asserted jurisdiction to ban products comprising a "significant portion" of the American economy and did so despite decades of legislation and agency interpretations that concluded otherwise.⁶¹ Thus, Congress almost certainly did not intend to delegate authority to regulate tobacco to the FDA.⁶² And the Court found support for this in its earlier opinion in *MCI Telecommunications Corp. v. AT&T Co.*, in which it denied an agency *Chevron* deference to deregulate an entire industry in a "cryptic" fashion through a statutory subtlety.⁶³

b. *MCI Telecommunications Corp. v. AT&T Co.* (1994)

The Court's opinion in *MCI Telecommunications Corp. v. AT&T Co.* similarly lacked any unified theory of the separation of powers resembling Justice Gorsuch's insight in *NFIB*.⁶⁴ Granted, *MCI* came before *Brown & Williamson*, but the *Brown & Williamson* Court relied on *MCI* as implicit support for the doctrine.⁶⁵ Like *Brown & Williamson*, *MCI* applied the major questions doctrine as a *Chevron* deference limit and did not invoke the separation of powers.⁶⁶

MCI held unlawful an FCC order that removed tariffing requirements for certain non-dominant providers of long-distance telephony.⁶⁷ At the time, Section 203 of the Communications Act required all common carriers to file tariffs and allowed the FCC, "in its discretion and for good cause shown, [to] modify any requirement made by or under the authority of this section."⁶⁸ The FCC justified its order by interpreting "modify any requirement" to mean that the Commission could eliminate tariff filings altogether for a designated class of carriers.⁶⁹

The Court disagreed, instead reading "modify" to mean "change moderately or in minor fashion."⁷⁰ The Court also observed that reading "modify" to permit radical change would have rendered meaningless the law's

Judicial Review of Questions of Law and Policy article was the first administrative law writing to distinguish between ordinary and major rules as a principle of statutory interpretation).

61. *Brown & Williamson*, 529 U.S. at 159–60.

62. *See id.* at 160–61.

63. *Id.*

64. *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994).

65. *See Brown & Williamson*, 529 U.S. at 160.

66. *Compare Brown & Williamson*, 529 U.S. at 132, *with MCI*, 512 U.S. at 229.

67. *MCI*, 512 U.S. at 234.

68. *Id.* at 224 (quoting 47 U.S.C. § 203(b)(2)).

69. *Id.* at 225 (quoting 47 U.S.C. § 203(b)(2)).

70. *Id.*

exception to modification.⁷¹ Section 203(b) explicitly prevented the Commission from modifying the notice period for tariff filings to extend longer than 120 days.⁷² If “modify” empowered the Commission to scrap tariff filings altogether, it would make no sense to preserve a 120-day notice period for nonexistent filings.⁷³

With this in mind, the Court denied *Chevron* deference to the FCC’s contrary interpretation of the statute, observing that tariffing was the “heart” of common carrier regulation under the Communications Act because many of the regulatory powers contained in Title II of the Act depended on information collected from tariff filings.⁷⁴ And the Court found that it would be “highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”⁷⁵

Until *Brown & Williamson* later clarified that the analysis in *MCI* reflected the precepts of the major questions doctrine, the opinion appeared simply to apply *Chevron* Step One and to find the statutory text unambiguous. Like *Brown & Williamson*, *MCI* lacked the unified separation of powers theory that Justice Gorsuch advanced in *NFIB*.

c. *Whitman v. American Trucking Associations* (2001)

Whitman v. American Trucking Associations is notable because, unlike other cases discussed here, it involved application of both the major questions and nondelegation doctrines.⁷⁶ Yet, it still lacked a unified theory of the separation of powers such as that presented by Justice Gorsuch. *American Trucking* involved a challenge to the Environmental Protection Agency’s (EPA) national ambient air quality standards for ozone particulate matter.⁷⁷ The relevant statute charged EPA with setting standards “the attainment and maintenance of which . . . are requisite to protect the public health,” with “an

71. *See id.* at 228–29. *See generally* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 167–69 (2012) (explaining that statutes should be construed as a whole).

72. *MCI*, 512 U.S. at 229.

73. *See id.*

74. *Id.* at 229–31.

75. *Id.* at 231. The Court said the FCC certainly could “modify the form, contents, and location of required [tariff] filings . . .” *Id.* at 234. “But what we have here goes well beyond that. It is effectively the introduction of a whole new regime of regulation (or of free-market competition), which may well be a better regime but is not the one that Congress established.” *Id.*

76. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468, 472 (2001).

77. *Id.* at 462.

adequate margin of safety.”⁷⁸ Many prior D.C. Circuit cases had interpreted that portion of the statute to preclude EPA from weighing economic considerations such as the costs of the regulations adopted.⁷⁹

Justice Scalia, writing for the Court, interpreted the statutory provision to preclude cost considerations by applying the major questions doctrine.⁸⁰ The Court applied *Chevron* Step One, emphasizing the context of the statute as a whole, which explicitly required cost considerations in many other portions of the law.⁸¹ Given that Congress spoke clearly elsewhere when it commanded cost considerations, the Court interpreted this nonspecific provision to reject them.⁸²

The next section of the Court’s opinion in *American Trucking* rejected petitioners’ claims that the Clean Air Act provision at issue violated the nondelegation doctrine for lack of an “intelligible principle” to guide the agency’s exercise of discretion.⁸³ That section paid homage to separation of powers, but it did not link its nondelegation analysis and its application of the major questions doctrine from the prior section.⁸⁴ Put simply, the Court in *American Trucking* still treated the major questions doctrine as a check on the extent of *Chevron* deference, rather than as an integrated part of a broader theory on the separation of powers.

d. *Gonzales v. Oregon* (2006)

Gonzales v. Oregon also lacked a unified theory of separation of powers.⁸⁵ It also marked the first time that the Court cited the major questions doctrine to deny applying *Chevron* at all, a development in the *Chevron* doctrine known as “Step Zero.”⁸⁶ In *Gonzales*, the Court reviewed the Attorney General’s interpretation of the Controlled Substances Act (CSA) that preempted state laws legalizing assisted suicide.⁸⁷ That interpretation

78. *Id.* at 465 (quoting 42 U.S.C. § 7409(b)(1)).

79. *Id.* at 464.

80. *Id.* at 468.

81. *Id.* at 468–72.

82. *Id.* at 468.

83. *Id.* at 472–76.

84. *See id.*

85. *Gonzales v. Oregon*, 546 U.S. 243 (2006).

86. *See id.* at 258 (“*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved [T]he rule must be promulgated pursuant to authority Congress has delegated to the official.”); VALERIE C. BRANNON & JARED P. COLE, *CHEVRON DEFERENCE: A PRIMER* 9 n.89 (2017) (stating *Gonzales* precluded application of *Chevron* by applying the major questions doctrine); Sunstein, *supra* note 47, at 191 (“*Chevron* Step Zero [is] the initial inquiry into whether the *Chevron* framework applies at all.”).

87. *Gonzales*, 546 U.S. at 248–49.

preempted Oregon's Death with Dignity Act (DWDA), which legalized assisted suicide induced by federally regulated drugs.⁸⁸

The CSA permitted the Attorney General to add, remove, or reschedule substances in limited circumstances.⁸⁹ Additionally, the CSA required that registered physicians "obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him."⁹⁰ The Attorney General could deny, revoke, or suspend that registration if the registration is "inconsistent with the public interest."⁹¹

Many years prior, the Attorney General promulgated a rule requiring that prescriptions for controlled substances under the CSA "be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."⁹² The term "legitimate medical purpose" came directly from the text of the CSA.⁹³ Later, responding to Oregon's DWDA, the Attorney General issued an administrative interpretation of the earlier rule determining that it is not a "legitimate medical purpose" to prescribe drugs for assisted suicide.⁹⁴

The Court denied deference to the Attorney General's interpretation of "legitimate medical purpose" in the CSA's text despite finding this term ambiguous.⁹⁵ The Court reasoned that Congress never granted the Attorney General blanket rulemaking power to implement the CSA, and the specific rulemaking powers in the CSA did not contain authority for the Attorney General to define "legitimate medical purposes," which Congress left to the states.⁹⁶ Therefore, *Chevron* did not apply at all because Congress never granted the Attorney General the power to interpret "legitimate medical purpose."⁹⁷

Nor did the CSA's text giving the Attorney General power to register or deregister physicians justify according deference.⁹⁸ The Court read the Attorney General's interpretation, which established criminal offenses that applied to presently registered physicians, to go far beyond the CSA's text, which solely concerned registration and deregistration of physicians.⁹⁹

88. *Id.* at 249.

89. *Id.* at 250.

90. *Id.* at 251 (quoting 21 U.S.C. § 822(a)(2)).

91. *Id.* (quoting 21 U.S.C. § 824(a)(4); § 822(a)(2)).

92. *Id.* at 250 (quoting 21 C.F.R. § 1306.04(a) (2005)).

93. *See id.* at 257 (quoting 21 U.S.C. § 830(b)(3)(A)(ii)).

94. *Id.* at 253–54.

95. *See id.* at 258–59.

96. *Id.* at 259.

97. *Id.* at 268.

98. *Id.* at 261.

99. *Id.* at 262.

The Court invoked the major questions doctrine as another reason for striking the Attorney General's rule.¹⁰⁰ In doing so, the Court recited the doctrine's "hid[ing] elephants in mouseholes" maxim, adding: "The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable."¹⁰¹ And unlike Justice Gorsuch's *NFIB* opinion, there was essentially no discussion of separation of powers in either the Court's opinion or the dissents.¹⁰²

e. *Utility Air Regulatory Group v. EPA* (2014)

Utility Air Regulatory Group v. EPA marks a slight divergence from the prior cases in that the Court mentioned separation of powers, but still while paying homage to *Chevron*, and without articulating a unified theory.¹⁰³ It also differs from past cases, as it applies the major questions doctrine at *Chevron* Step Two.¹⁰⁴ The facts of this case are drenched in federal environmental law jargon, so here we present then-Judge Kavanaugh's light summary from his *U.S. Telecom* dissent from the D.C. Circuit's denial of *en banc* review:

Various parts of the Clean Air Act gave the Environmental Protection Agency authority to regulate "any air pollutant." It was not clear whether greenhouse gases were air pollutants for all Clean Air Act programs. The EPA nonetheless promulgated a rule subjecting millions of previously unregulated emitters of greenhouse gases to burdensome permitting regulations under the Clean Air Act's Prevention of Significant Deterioration and Title V permitting programs. It would have been a major step for EPA to regulate the

100. *See id.* at 267.

101. *Id.* (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

102. *Compare id.* at 248–75 (limiting federal authority primarily through statutory interpretation while recognizing "the background principles of our federal system" that prohibit federal regulation of state-supervised areas), *and id.* at 275–99 (Scalia, J., dissenting), *and id.* at 299–302 (Thomas, J., dissenting) (merely mentioning "this Court's . . . separation-of-powers jurisprudence"), *with NFIB v. Dep't of Lab., OSHA*, 142 S. Ct. 661, 667–70 (2022) (Gorsuch, J., concurring) (discussing at length the major question doctrine's separation-of-powers role as a guard "against unintentional, oblique, or otherwise unlikely delegations of the legislative power").

103. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 327 (2014).

104. *Id.* at 321–24 ("EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.").

greenhouse gas emissions of so many large and small facilities. But there was no clear statutory authorization for the EPA to do so.¹⁰⁵

In reviewing the EPA's regulation of greenhouse gas emissions from automobiles, the Court applied *Chevron*.¹⁰⁶ Here, the term "air pollutant" was determined to be ambiguous under Step One because its meaning oscillated throughout the statute.¹⁰⁷ However, invoking the major questions doctrine, the Court found the interpretation unreasonable under Step Two, largely because the EPA's jurisdiction would have been expanded one-thousand-fold, increasing annual permitting applications from roughly 800 to 82,000 and compliance costs from \$12 million to \$1.5 billion.¹⁰⁸

The fact that the EPA's interpretation brought vast swaths of the economy under stringent permitting requirements, and that the context of the overall statute indicated the requirements would apply only to large regulated entities, weighed heavily against deference.¹⁰⁹ Applying the clear statement requirement of the major questions doctrine, the Court said: "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."¹¹⁰

Unlike in *Brown & Williamson*, *MCI*, *American Trucking*, and *Gonzales*, the Court discussed the separation of powers in its application of the major questions doctrine, albeit still within the *Chevron* framework.¹¹¹ The Court said that upholding the EPA's regulation "would deal a severe blow to the Constitution's separation of powers" by allowing the executive branch to "rewrite clear statutory terms to suit its own sense of how the statute should operate."¹¹² The Court finished by remarking that the need to "rewrite" the underlying statute should have put the EPA on notice that it had exceeded its authority to interpret the law under *Chevron*.¹¹³ So, *Utility Air* lacked Justice Gorsuch's unified theory of the separation of powers.

105. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 420–21 (D.C. Cir. 2017) (mem.) (per curiam) (Kavanaugh, J., dissenting).

106. *Util. Air*, 573 U.S. at 315.

107. *See id.* at 320. "Air pollutant" sometimes applied to greenhouse gases in other provisions, but decades-worth of previous EPA regulations had interpreted "air pollutant" to exclude greenhouse gases under the relevant provision. *Id.* at 316–19.

108. *Id.* at 321–24.

109. *Id.*

110. *Id.* at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

111. *Compare Brown & Williamson*, 529 U.S. 120, and *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994), and *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001), and *Gonzales v. Oregon*, 546 U.S. 243 (2006), with *Util. Air*, 573 U.S. at 327–28.

112. *Util. Air*, 573 U.S. at 327–28.

113. *Id.* at 328.

f. King v. Burwell (2015)

King v. Burwell likewise lacked any articulation resembling Justice Gorsuch's unified theory of separation of powers.¹¹⁴ However, *Burwell* differed from prior cases by applying the major questions doctrine at the front of the opinion to deny the IRS *Chevron* deference regarding the interpretation of the Patient Protection and Affordable Care Act (PPACA).¹¹⁵ The key issue was whether the word "state," as used in a PPACA provision involving health insurance tax credits, excluded customers of health insurance exchanges established by the federal government from receiving those tax credits.¹¹⁶

The Court cited *Brown & Williamson* to deny the IRS *Chevron* deference: "'In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.' . . . It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort."¹¹⁷ The Court then interpreted the statute to reach the merits.¹¹⁸ *Burwell* looked slightly more like *NFIB* and diverged from prior cases by invoking the major questions doctrine before any *Chevron* analysis rather than including it as part of that analysis.

Yet, in *Burwell*, there was still no discussion of separation of powers principles as they relate to the nondelegation and major questions doctrines.¹¹⁹ Chief Justice Roberts' opinion, which relied heavily on an analysis of the structure and context of the PPACA, led with the major questions doctrine as a reason to deny *Chevron* deference.¹²⁰ All prior cases, except for *Gonzales* (though even that case reviewed the statutory provisions at length in a way that resembles Step One) performed a *Chevron* analysis and thereafter invoked the major questions doctrine as an additional reason to deny deference or hold an agency interpretation unreasonable.¹²¹ But *Burwell*, too, did not articulate a unified theory of separation of powers resembling the one Justice Gorsuch introduced in *NFIB*.

114. 576 U.S. 473 (2015).

115. *See id.* at 485–86. *Burwell* dispenses with *Chevron* almost immediately, rather than after a detailed analysis of deference law and the pertinent statutory provisions. *Compare id.* at 485–86 (applying major questions doctrine at Step Zero to preclude further *Chevron* analysis), with *Gonzales*, 546 U.S. at 267 (applying major questions doctrine after a typical two-step *Chevron* analysis).

116. *Burwell*, 576 U.S. at 479.

117. *Id.* at 485–86 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

118. *Id.* at 486.

119. *See id.* at 473–98.

120. *Id.* at 485–86.

121. *See supra* Sections II.B.1.a–e.

g. Alabama Association of Realtors v. HHS (2021)

The Court's recent COVID-related decision in *Alabama Association of Realtors v. HHS* likewise lacks any discussion of separation of powers.¹²² Implicitly framing the major questions doctrine as a limitation on *Chevron*, it followed *Burwell* by applying the doctrine upfront at *Chevron* Step Zero.¹²³ In a per curiam opinion, the Court granted an application to vacate the stay of the Center for Disease Control's "eviction moratorium" policy.¹²⁴ While the Court technically did not rule on the merits of the case, there is strong reason to treat this decision as binding precedent.¹²⁵ The Court made its views on the merits plain while evaluating the *Nken* factors for issuing a stay, which are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."¹²⁶ The Court did not mince words regarding the first factor: "The applicants not only have a substantial likelihood of success on the merits—it is difficult to imagine them losing."¹²⁷

Congress, as part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), imposed a 120-day eviction moratorium on rental properties that participated in federal assistance programs or were subject to federally backed loans.¹²⁸ After the congressional moratorium expired, the CDC issued an even broader moratorium, relying on authority in Section 361(a) of the Public Health Service Act (PHSA), which states:

The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General

122. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (per curiam) (granting Realtors' application to vacate an administrative stay placed on the district court's order enjoining the CDC's eviction moratorium).

123. *Id.* at 2489.

124. *Id.* at 2490.

125. See Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 835–36 (2021) ("[E]mergency decisions [such as vacation of a stay] . . . can have significant precedential weight.").

126. *Ala. Realtors*, 141 S. Ct. at 2487 (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

127. *Id.* at 2488.

128. *Id.* at 2486.

may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.¹²⁹

Congress acknowledged this administrative moratorium by reference in the Consolidated Appropriations Act of 2021 but fixed its expiration date at January 31, 2021, a one-month extension.¹³⁰ After the expiration date, Congress did not act further. Nevertheless, the CDC revived the moratorium multiple times, again relying on Section 361(a) to extend it.¹³¹ The Alabama Realtors Association challenged the moratorium, in response to which the District Court for the District of Columbia vacated the moratorium on the basis that the CDC exceeded its authority under Section 361(a).¹³² The District Court, however, stayed its judgement while the government appealed the decision.¹³³ The D.C. Circuit denied the Realtors' emergency motion to vacate the stay.¹³⁴

Likewise, the Supreme Court, in an earlier 5-4 ruling, denied the Realtors' application to vacate the stay but did so on the narrowest of grounds.¹³⁵ Justice Kavanaugh wrote that he believed the CDC lacked authority to issue the moratorium.¹³⁶ But because the moratorium would expire the next month, and because refusing to grant the stay would "allow for additional and more orderly distribution of congressionally appropriated rental-assistance funds," he joined four other justices in denying the stay by balancing the equities pursuant to the public interest factor under *Nkem*.¹³⁷ By agreeing with the district court on the CDC's authority, though, Kavanaugh made clear that the CDC would not prevail if it extended its moratorium again absent congressional authorization.¹³⁸

That is exactly what the CDC did, so the Supreme Court vacated the District Court's original stay in the opinion we review here.¹³⁹ The Court invalidated the moratorium because, unsurprisingly, it determined the plain

129. *Id.* at 2487 (alteration in original) (quoting 42 U.S.C. § 264(a)).

130. *Id.* (citing Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, § 502, 134 Stat. 1182, 2078-79 (2020)).

131. *Id.* at 2486-87.

132. *Id.* at 2486.

133. *Id.*

134. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, No. 21-5093, 2021 WL 2221646 (D.C. Cir. June 2, 2021).

135. *Id.* (Kavanaugh, J., concurring).

136. *Ala. Realtors*, 141 S. Ct. at 2488.

137. *Id.*

138. *See id.*

139. *See id.*

text of the PHSA did not authorize the Surgeon General to issue it.¹⁴⁰ Section 361(a) provides a list of specific terms before ending with a general clause describing actions the Surgeon General can take to isolate and destroy infectious diseases.¹⁴¹ Applying the canon of statutory interpretation, *ejusdem generis*, a Latin phrase meaning “of the same kind,” the Court found that an eviction moratorium was unlike the kinds of actions specified in the statute.¹⁴²

The Court then declared that, even if Section 361(a) was ambiguous, the major questions doctrine would warrant striking the CDC’s moratorium, because “the sheer scope of the CDC’s claimed authority under § 361(a) would counsel against the Government’s interpretation.”¹⁴³ And the Court recited the “clear statement” maxim that defines the major questions doctrine: “We expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.’”¹⁴⁴ By referring to ambiguity, the Court indicated that it still, at this time, viewed the major questions doctrine as a limitation on *Chevron* deference. The Court employed the same approach as *Brown & Williamson* and *MCI*—it applied *Chevron*’s Step One by first interpreting the statute’s plain text and then invoked the major questions doctrine as another reason to reject the agency’s interpretation within that analysis.¹⁴⁵

The Court determined that the eviction moratorium was far too sweeping: it encroached on an area that, traditionally, has been considered the subject of state law and affected 80% of the country’s population, including between 6–17 million tenants at risk of eviction.¹⁴⁶ No such sweeping rule had been issued under Section 361(a) in the past, and the Court postulated that the government’s interpretation had no limits, possibly justifying additional all-encompassing pandemic rules such as, for example, government-mandated grocery delivery for elderly residents.¹⁴⁷

Thus, *Alabama Realtors* followed in the footsteps once again of the past major questions doctrine cases—a decision within the context of a *Chevron* frame, with no mention of separation of powers. So still, even as recently as less than one year before *NFIB*, Supreme Court jurisprudence on the major questions and nondelegation doctrines did not foretell the articulation of Justice Gorsuch’s unified theory on the separation of powers.

140. *See id.* at 2487–89.

141. *See id.* at 2487.

142. *See id.* at 2488; SCALIA & GARNER, *supra* note 71, at 199–213.

143. *Ala. Realtors*, 141 S. Ct. at 2489.

144. *Id.* (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

145. *See* discussion *supra* Sections II.B.1.a–b. (describing application of the major questions doctrine in *FDA v. Brown & Williamson Tobacco Corp.* and *MCI Telecommunications Corp. v. AT&T Co.*).

146. *Ala. Realtors*, 141 S. Ct. at 2489.

147. *Id.*

h. Nonprecedential Opinions—Gundy, Paul, and U.S. Telecom

Unlike those reviewed above, the opinions in this section are nonprecedential. But they are relevant because they demonstrate prior articulations of the major questions doctrine written or joined by sitting Supreme Court Justices. These opinions appear to advocate for a *substantive* version of the major questions doctrine that would hold unlawful delegations of “major” policy issues, rather than requiring a clear statement from Congress for major delegations.

Justice Gorsuch’s dissent in *Gundy v. United States*, joined by Chief Justice Roberts and Justice Thomas, for the first time connected the major questions doctrine to the nondelegation doctrine in a separation of powers context.¹⁴⁸ But Gorsuch’s dissent did not articulate the same unified theory suggested by his *NFIB* concurrence. It instead supported the idea that the major questions doctrine and nondelegation doctrine are interchangeable.¹⁴⁹

Justice Gorsuch’s dissent in *Gundy* is a jeremiad about the Supreme Court’s failure to meaningfully protect the legislative power vested in Congress. He first reviewed the importance the Founders placed in creating a legislature with limited and enumerated powers that can only be exercised through bicameralism and presentment.¹⁵⁰ Then, he lamented the Court’s failure to enforce that process by allowing Congress to delegate virtually boundless lawmaking power to the executive branch under the existing “intelligible principle test” for nondelegation cases.¹⁵¹ This portion of Gorsuch’s dissent in *Gundy* has drawn much scholarly commentary and appears likely to influence the Court’s views on nondelegation.¹⁵²

148. *Gundy v. United States*, 139 S. Ct. 2116 (2019), involved the proper interpretation of the Sex Offender Registration and Notification Act (SORNA), but the case facts solely involved the nondelegation doctrine, making them irrelevant for our purposes. See also Hall, *supra* note 21, at 194–202, for a review of SORNA and the factual context of *Gundy*.

149. *Gundy*, 139 S. Ct. at 2141–42 (Gorsuch, J., dissenting).

150. *Id.* at 2134–35.

151. *Id.* at 2138–41.

152. See, e.g., Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1498 n.28 (2021) (“[Gorsuch’s *Gundy* dissent and subsequent commentary by other Justices demonstrate that] at least five Justices on the Supreme Court have now expressed interest in resurrecting the nondelegation doctrine . . . on the basis of originalist principles.”); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 287 (2021) (“[Other Justices’ espousing Gorsuch’s *Gundy* dissent amounts to] counter-majoritarian tampering with the cornerstone of American governance [that] could prove immensely destabilizing.”); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL’Y 463, 472 (2021) (describing acts of four other Justices expressing a desire to revisit the nondelegation doctrine under the major questions doctrine); Randolph J. May, *Delegation, Deference, and the FCC*, FREE STATE FOUND. (July 12, 2019), <http://freestatefoundation.blogspot.com/2019/07/delegation-deference-and-fcc.html> [<https://perma.cc/9H6W-TKZM>] (“[Though Gorsuch’s

But Gorsuch's dissent in *Gundy* goes further, addressing the relationship between the nondelegation and major questions doctrines.¹⁵³ A close reading shows the evolution of his thinking from that case to the unified theory of the two doctrines presented in his *NFIB* concurrence. In *Gundy*, Justice Gorsuch seemed convinced by, or at least accepting of, commentary that described the doctrines as identical rather than thinking of them as related but separate tools that protect the legislative power vested in Congress in distinct contexts.

While it's been some time since the Court last held that a statute improperly delegated the legislative power to another branch—thanks in no small measure to the intelligible principle misadventure—the Court has hardly abandoned the business of policing improper legislative delegations. When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. And that's exactly what's happened here. We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names.

Consider, for example, the “major questions” doctrine. Under our precedents, an agency can fill in statutory gaps where “statutory circumstances” indicate that Congress meant to grant it such powers. But we don't follow that rule when the “statutory gap” concerns “a question of deep ‘economic and political significance’ that is central to the statutory scheme.” So we've rejected agency demands that we defer to their attempts to rewrite rules for billions of dollars in healthcare tax credits, to assume control over millions of small greenhouse gas sources, and to ban cigarettes. Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.¹⁵⁴

This is not what Gorsuch suggested in *NFIB*. In *Gundy*, he said the Court's embrace of the major questions doctrine is an instance of the Constitution's “hydraulic pressures” shifting to police “improper *legislative* delegations” because the nondelegation doctrine is “unavailable” in its present form.¹⁵⁵ By invoking the major questions doctrine, Gorsuch writes in *Gundy*,

Gundy dissent was not precedent,] it appears there are now five Justices prepared to [reconsider the nondelegation doctrine] – Chief Justice Roberts, and Justices Thomas, Alito, Gorsuch, and Kavanaugh.”); Hall, *supra* note 21, at 177 (“[With the *Gundy* dissent,] strikingly, for the first time since 1935, four Justices expressed a willingness to revisit a doctrine that had been undisturbed for over eighty years.”); Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 199 (2019) (“[T]he plurality nature of [the *Gundy* decision] signals further development ahead.”).

153. *Gundy*, 139 S. Ct. at 2141–42 (Gorsuch, J., dissenting).

154. *Id.* (footnotes omitted).

155. *Id.* at 2141 (emphasis added).

the Court is “still rein[ing] in *Congress’s efforts* to delegate legislative power”¹⁵⁶ He then characterized the major questions doctrine as upholding the principle that “Congress may not divest itself of its legislative power by transferring that power to an executive agency.”¹⁵⁷ In other words, for Gorsuch, the major questions doctrine is merely a different moniker for the nondelegation doctrine. So, in *Gundy*, Justice Gorsuch had not yet articulated the unified theory he presented in *NFIB*: that the two doctrines perform distinct but related functions.

Justice Kavanaugh, a longtime proponent of expanded application of the major questions doctrine, has also opined on it in two statements, though never in a merits-stage opinion.¹⁵⁸ But neither of these opinions included the novel, unified theory of the separation of powers that Justice Gorsuch developed in *NFIB*.

Shortly after Justice Kavanaugh joined the Court, he wrote a statement regarding the denial of certiorari in *Paul v. United States*.¹⁵⁹ He urged the Court to consider, in future cases, issues raised by Justice Gorsuch’s dissenting opinion in *Gundy*, which the Court considered just prior to Kavanaugh joining the bench.¹⁶⁰ Justice Kavanaugh wrote that Gorsuch’s dissent in *Gundy* expands on the views laid out in Justice Rehnquist’s concurrence in *Industrial Union Department, AFL–CIO v. American Petroleum Institute*, a 1980 case involving benzene regulation in which Justice Rehnquist argued in a concurrence that separation of powers requires Congress itself to decide major questions rather than delegating them to the executive branch.¹⁶¹

Kavanaugh acknowledges the Court never adopted Rehnquist’s views on nondelegation but instead adopted a “closely related statutory interpretation doctrine,” the major questions doctrine.¹⁶² Then, Kavanaugh summarizes the Court’s precedents on separation of powers for the legislative power vested in Congress: “Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to

156. *Id.* (emphasis added).

157. *Id.* at 2142.

158. See *Paul v. United States*, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari) (“Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine [and major questions doctrine] in his *Gundy* dissent may warrant further consideration in future cases.”), *denying cert. to* 718 Fed. App’x 360 (6th Cir. 2017); *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (mem.) (per curiam) (Kavanaugh, J., dissenting) (“[T]he major rules doctrine constitutes an important principle of statutory interpretation in agency cases.”).

159. 140 S. Ct. at 342.

160. *Id.*

161. *Id.* (citing *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring in judgment)).

162. *Id.*

regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce.”¹⁶³ In his view, if the Court heeded Justice Gorsuch’s *Gundy* dissent, delegation of authority for major questions would also be prohibited.¹⁶⁴

Still, despite providing an effective restatement of the Court’s separation of powers jurisprudence for the delegation of legislative power, and urging a more stringent prohibition on delegation, Kavanaugh’s statement in *Paul* lacked a unified theory of the relationship between the nondelegation and major questions doctrines that Justice Gorsuch provided in *NFIB*.

Prior to *Paul*, and prior to his tenure as a Supreme Court justice, then-Judge Kavanaugh of the D.C. Circuit dissented from the denial of rehearing *en banc* in *U.S. Telecom v. FCC*.¹⁶⁵ In that case, Kavanaugh urged holding unlawful the FCC’s 2015 *Open Internet Order*, which adopted “net neutrality” regulations, for violating the major questions doctrine.¹⁶⁶ Kavanaugh grounded his *U.S. Telecom* dissent heavily on protection of separation of powers, more explicitly so than the Supreme Court’s precedents involving the major questions doctrine.¹⁶⁷ Still, because it relied chiefly on the *Chevron* framework, Kavanaugh’s dissent was not put in the context of the novel theory of separation of powers Justice Gorsuch presented in *NFIB*.¹⁶⁸

Judge Kavanaugh began his discussion of the major questions doctrine by addressing the importance of separation of powers in our Constitution’s framework.¹⁶⁹ Kavanaugh explained that the Founders divided the powers of government between three branches because they “viewed the separation of powers as the great safeguard of liberty.”¹⁷⁰ They vested the legislative power in Congress and the executive power, which includes the power to implement and enforce laws, but not “a general, free-standing authority to issue binding legal rules,” in the President.¹⁷¹ The executive can “issue rules only pursuant

163. *Id.*

164. *Id.*

165. *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017) (mem.) (per curiam) (Kavanaugh, J., dissenting).

166. *Id.* at 417–418.

167. *Id.* at 418–19.

168. *Compare id.* at 419–26 (“Because the net neutrality rule is a major rule, the next question is whether Congress *clearly* authorized the FCC to issue the net neutrality rule and impose common-carrier regulations on Internet service providers.”), *with NFIB v. Dep’t of Lab., OSHA*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) (“[The major questions doctrine] ensures that the national government’s power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people’s elected representatives.”).

169. *U.S. Telecom*, 855 F.3d at 418–19 (Kavanaugh, J., dissenting).

170. *Id.* at 418.

171. *Id.* at 419.

to and consistent with a grant of authority from Congress (or a grant of authority directly from the Constitution).¹⁷²

But then, as Kavanaugh began to discuss the judiciary's role in policing the executive branch's reliance on authority granted by Congress, he immediately restates the consensus of the prior cases: that the major questions doctrine is a limitation, or a sort of constraining cap, on *Chevron's* reach.¹⁷³ "When the Judiciary exercises its Article III authority to determine whether an agency's rule is consistent with a governing statute, *two competing canons of statutory interpretation come into play*," *Chevron* deference and the major questions doctrine.¹⁷⁴ He then describes their interaction: "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."¹⁷⁵ Judge Kavanaugh concluded that the *Open Internet Order's* stringent regulations constituted a major rule due to their vast economic and political significance and because Congress did not clearly authorize the agency's action.¹⁷⁶

While important in their own right, and as portents, Kavanaugh's non-precedential writings still do not provide support for Justice Gorsuch's unified theory presented in *NFIB*. Neither does the scholarly literature on the matter, which we address in the next subsection.

2. Literature

It should now be clear that, as far as we can determine, the unified theory of separation of powers Justice Gorsuch formulates in his *NFIB* concurrence has not appeared in precedent.¹⁷⁷ Likewise, it also does not directly derive from the literature on the major questions or nondelegation doctrines. Instead, the scholarly literature on this issue has tended to fall into two camps. One camp believes that the major questions doctrine is a mirror image of the nondelegation doctrine.¹⁷⁸ That is, the major questions doctrine accomplishes the same goal as the nondelegation doctrine's prohibition on overly broad delegations of power. The other camp believes that the major questions doctrine is a more limited version of nondelegation.¹⁷⁹ That is, the major questions doctrine breathes new life into the nondelegation doctrine but with a narrower scope. Justice Gorsuch's *NFIB* concurrence contrasts the

172. *Id.*

173. *See id.*

174. *Id.* (emphasis added).

175. *Id.* (emphasis omitted).

176. *See id.* at 435.

177. *See supra* Section II.B.1.

178. *See infra* Section II.B.2.a.

179. *See infra* Section II.B.2.b.

prevailing view in the literature because he integrates the two doctrines into a unified theory of separation of powers, where both aim at accomplishing the same objective in different contexts.

a. Major Questions as a Revived Nondelegation Doctrine

Many commentators have characterized the Court's major questions doctrine precedents as a revival of sorts of the nondelegation doctrine. A large portion of scholarly writings make this point.¹⁸⁰ Cass Sunstein appears to be one of the earliest scholars to claim that statutory interpretation had displaced, to some extent, the role that otherwise might have been assumed by the nondelegation doctrine as a vehicle for enforcing separation of powers.¹⁸¹ Just months before *Brown & Williamson*, Sunstein wrote the following in his article *Nondelegation Canons*:

But is the nondelegation doctrine really dead? On the contrary, I believe that the doctrine is alive and well. It has been relocated rather than abandoned. Federal courts commonly vindicate not a general nondelegation doctrine, but a series of more specific and smaller, though quite important, nondelegation doctrines. Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so. The relevant choices must be made legislatively rather than bureaucratically. As a technical matter, the key holdings are based not on the nondelegation doctrine but on certain "canons" of construction.¹⁸²

180. See, e.g., Marla D. Tortoise, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1078–79 (2019) (describing the major questions doctrine as a "facade" to reduce the administrative state's power).

181. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000). However, we note that Justice Blackmun did so briefly in a footnote much earlier. See *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

182. Sunstein, *supra* note 181, at 315–16. See also John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228, for a criticism of using statutory canons to enforce the nondelegation doctrine. Professor Manning posits that narrowly construing a statute "in light of an imputed background purpose" (as in *Brown & Williamson*), "threatens to unsettle the legislative choice implicit in adopting a broadly worded statute." *Id.* He argues that this "undermines, rather than furthers, the constitutional aims of [the nondelegation] doctrine." *Id.*

Years after the Court decided *Brown & Williamson*, which first explicated the major questions doctrine as understood today,¹⁸³ Sunstein wrote that the major questions doctrine seemed to accomplish nondelegation goals: “For those who are enthusiastic about the nondelegation doctrine, this background principle will have considerable appeal, above all because it requires Congress, rather than agencies, to decide critical questions of policy”¹⁸⁴ Professor Abigail Moncrieff articulates this view pointedly:

Whatever status the nondelegation principle ought to hold in modern law, as a positive matter it might explain the major questions cases. That is, the intuition driving *Brown & Williamson* may be that the [FDA’s jurisdictional law], if understood to authorize the FDA’s regulations, would represent an unconstitutionally broad delegation of policymaking authority. This understanding would explain the Court’s tortured analysis in the case, which might just be the interpretive acrobatics necessary to avoid striking down the statute on constitutional grounds.¹⁸⁵

Commentary written after *Gundy v. United States* makes the same point in a new context—to argue that a substantive, expanded major questions doctrine would be an affront to textualism.¹⁸⁶ Specifically, Professor Chad Squitieri argues that proponents of a more exacting application of nondelegation principles by way of the major questions doctrine are, in reality, endorsing judicial policymaking and judicial aggrandizement.¹⁸⁷ He argues that empowering the judiciary to decide which policy issues are “major,” and thus nondelegable, would exceed the judicial power in Article III and trespass into the legislative power that the Constitution vests in the people’s representatives.¹⁸⁸ Squitieri goes even further, claiming that the present clear statement version of the major questions doctrine suffers from the same flaw and should likewise be rejected by textualists.¹⁸⁹ He claims it is instructive that the Court has never once invoked Congress’s definition of “major rules” contained in the Congressional Review Act when applying the major

183. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In articulating the major questions doctrine, Justice O’Connor’s opinion for the Court cited then-Judge Breyer’s article. *Id.* at 159 (citing Breyer, *supra* note 60, at 370 (“Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”)).

184. Sunstein, *supra* note 47, at 245.

185. Moncrieff, *supra* note 22, at 617 (footnote omitted).

186. Squitieri, *supra* note 152, at 466.

187. See *id.*

188. *Id.* at 465–69.

189. *Id.* at 502–03.

questions doctrine, instead offering its own arguments to determine “majorness.”¹⁹⁰

This view—that the major questions doctrine is nondelegation by a new name—differs from Justice Gorsuch’s concurrence in *NFIB* and looks more like Justice Gorsuch’s earlier writing in *Gundy*. Rather than the two doctrines acting together to accomplish distinct separation of powers functions with Congress’s *intention* demarking the distinction, these commentators assume the doctrines are relatively equivalent. In other words, there is no unified theory of the separation of powers that binds the doctrines. The major questions doctrine, according to these commentators, is perhaps more appropriately considered an effort to limit the administrative state without directly addressing the stare decisis effect of the Court’s decades of precedents allowing overly broad, even unintelligible, delegations.¹⁹¹ As shown in the next subsection, some commentators take a narrower view.

b. Major Questions as a Less Stringent Nondelegation Doctrine

Other scholars have opined that the major questions doctrine provides a relatively moderate alternative to the nondelegation doctrine.¹⁹² This view assumes a premise perhaps best articulated by Justice Kagan’s controlling opinion in *Gundy*: that most of today’s federal government would be unconstitutional if the Supreme Court put teeth behind the nondelegation doctrine.¹⁹³ To these commentators, because abolishing most of the federal government could be absurd or cataclysmic in effect, the major questions doctrine is much preferable because it does not entirely eliminate overly broad—or “unintelligible”—delegations on any wholesale basis.¹⁹⁴ This view

190. *Id.* at 500–02.

191. See, e.g., Kristin E. Hickman, *Gundy, Nondelegation, and Never-Ending Hope*, REGUL. REV. (July 8, 2019), <https://www.theregreview.org/2019/07/08/hickman-nondelegation/> [https://perma.cc/4DE3-2CSE] (“Yet clearly, any more rigorous nondelegation standard that the Court might adopt would immediately call into question the ongoing validity of more than a few existing statutes, some quite longstanding, as well as regulations implementing those statutes and an even larger number of enforcement actions based on those regulations.”).

192. See, e.g., Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2024–25, 2044 (2018); Squitieri, *supra* note 152, at 478; Clinton T. Summers, Note, *Nondelegation of Major Questions*, 74 ARK. L. REV. 83, 95 (2021); Aaron Gordon, *Nondelegation*, 12 N.Y.U.J.L. & LIBERTY 718, 823 (2019).

193. See *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019).

194. See, e.g., Gordon, *supra* note 192, at 816–17 (“Resurrecting the Nondelegation Doctrine may require a major reworking of the modern administrative state, and even if the transition is feasible, many may be unwilling to take the risk.”).

may be a reaction to the strict formalist view on nondelegation that would ban delegations entirely, a view that the Constitution likely does not support or require.¹⁹⁵

For example, Professor Blake Emerson characterizes the major questions doctrine as a “less extreme approach” that “reinforces the nondelegation doctrine.”¹⁹⁶ Professor Squitieri recognizes that some proponents of an expanded major questions doctrine take this view.¹⁹⁷ Echoing this point, a recent note by Clinton T. Summers proposes replacing the “sledgehammer” nondelegation doctrine with the “utility knife” major questions doctrine because the major questions doctrine is less destructive.¹⁹⁸ Likewise, Aaron Gordon supports reviving the nondelegation doctrine, but recognizes that doing so “may require a major reworking of the modern administrative state, and even if the transition is feasible, many may be unwilling to take the risk.”¹⁹⁹ Recognizing this risk, he offers “modest proposals” to revive the nondelegation doctrine, one of which is adopting a nondelegation doctrine similar to the major questions doctrine.²⁰⁰ He calls this a “watered-down” nondelegation doctrine, and it would constitutionally bar Congress from making delegations on policy issues that the courts deem to be major questions.²⁰¹

The idea that the major questions doctrine is a mere replacement for nondelegation is inconsistent with the unified theory of separation of powers Justice Gorsuch set forth in *NFIB*. The two doctrines, as Justice Gorsuch lays out, are complementary. One—the nondelegation doctrine—prevents

195. See *Gundy*, 132 S. Ct. at 2136 (Gorsuch, J., dissenting) (“[A]s long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to ‘fill up the details.’”) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)); Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. (forthcoming 2022) (manuscript at 3–4).

196. Emerson, *supra* note 192, at 2024–25, 2044. Along the same lines, shortly after the release of the Court’s *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), decision, Professor Hickman wrote this with regard to Justice Gorsuch: “[A]lthough his concurring opinion in *WV v. EPA* claims separation of powers principles as the conceptual basis for the major questions doctrine as a substantive canon, he seems somewhat resigned to living with the major questions doctrine as a subconstitutional limitation on congressional delegations in lieu of reinvigorating the nondelegation doctrine itself.” Kristin E. Hickman, *Thoughts on West Virginia v. EPA*, YALE J. ON REGUL.: NOTICE & COMMENT (July 5, 2022), <https://www.yalejreg.com/nc/thoughts-on-west-virginia-v-epa/> [https://perma.cc/6G5B-3GHP]. While we do not agree that Justice Gorsuch’s concurrence in *West Virginia* indicates that he is resigned to living with the major questions doctrine as a substitute for reinvigorating the nondelegation doctrine, Professor Hickman’s view is worth noting.

197. Squitieri, *supra* note 152, at 467–68.

198. Summers, *supra* note 192, at 95.

199. Gordon, *supra* note 192, at 816–17.

200. *Id.* at 816–25.

201. *Id.* at 823.

Congress from abusing its legislative power by abdicating its lawmaking role, and the other—the major questions doctrine—prevents the executive branch from usurping Congress’s power by acting as if it were the legislature through overly aggressive assertions of its executive authority.²⁰² In Gorsuch’s view, choosing not to enforce the major questions doctrine only because of its impact on the administrative state is choosing, in effect, to reduce the scope of the Court’s separation of powers protections and, hence, the abuse of unchecked power.²⁰³ Justice Gorsuch, in *NFIB*, seeks to restore these separation of powers protections which, in his view, are central to the preservation of liberty and democratic accountability.²⁰⁴

C. Implications of Gorsuch’s Concurrence—The Unified Theory

The unified theory of the separation of powers in Justice Gorsuch’s *NFIB* concurrence clarifies the Court’s separation of powers doctrines by making the major questions and nondelegation doctrines complementary. Nondelegation prevents *intentional* delegation of authority by Congress, while major questions prevents *unintentional* delegation by Congress, or put another way, agency aggrandizement. The clarity in Justice Gorsuch’s unified theory is needed because his own dissent in *Gundy* and commentary equating the two doctrines contradict the reasoning of the Court’s major questions precedents.

As we saw in Section II.B.1, the Supreme Court has articulated the major questions doctrine with the now familiar “clear statement” maxims.²⁰⁵ Namely, that Congress must “speak clearly when authorizing an agency to exercise powers of vast economic and political significance,” that Congress does not “hide elephants in mouseholes,” and that Congress does not “delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”²⁰⁶ Implicit in these maxims is the notion that Congress itself is not creating or causing improper delegations in major questions cases. Rather, executive agencies, in implementing statutes under their delegated authority, are acting improperly by interpreting the statutes in ways that stretch their meaning beyond what Congress intended, or as Justice Scalia might assert, agencies are pulling elephants out of mouseholes.²⁰⁷

The Court’s precedents would make no sense if the major questions doctrine were a mere replacement or a lesser version of the nondelegation

202. See *NFIB v. Dep’t of Lab., OSHA*, 142 S. Ct. 661, 668–69 (2022) (Gorsuch, J., concurring).

203. See *id.*

204. See *id.* at 670.

205. See *supra* Section II.A.

206. See *supra* Section II.B.1.

207. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

doctrine, which prevents Congress from *intentionally* delegating its power. All of the major questions cases involved a stretching, or aggrandizement, of executive power beyond that which Congress intended to delegate. Justice Gorsuch's *NFIB* concurrence harmonizes the two doctrines by reconciling them in a way that addresses the abuses that any derogation of separation of powers may create. The nondelegation and major questions doctrines both serve distinct functions within the context of the same overall goal—protecting the legislative power from being abused, as a result of a lack of checks and balances and political accountability, in a way that threatens liberty.²⁰⁸ The distinction between the two complementary doctrines is the particular “abuser”—in one instance, it is Congress *intentionally* shirking its legislative role, and in the other, it is the executive overstepping its bounds and acting, through its implementation of law, in contravention of Congress's intent.

Further, Professor Squitieri's textualist criticism of the existing major questions doctrine, which Gorsuch's *NFIB* concurrence (but not his *Gundy* dissent) supports, is inapposite. Squitieri fears that the major questions doctrine calls on the judiciary to determine which policy issues are important or impactful enough to amount to major questions, but this is not how the doctrine works in effect.²⁰⁹ Rather, the Court determines whether the challenged rule is “major” *in light of the cryptic statutory provision* the executive branch relies on for authority to issue a rule.²¹⁰ In other words, the judiciary does not state, for example, that a “vaccine mandate is major” by itself. Rather, the vaccine mandate is major in light of the narrow workplace safety authority that supposedly authorized it. A vaccine mandate might not be “major” if it were promulgated pursuant to a statute that authorized public health measures in broader settings. Because the statute itself would cover a broader scope of public health measures, it may not be considered such a “mousehole” or “cryptic” provision. Remember, the major questions doctrine prohibits pulling elephants through mouseholes, but not elephants themselves.²¹¹

More broadly, Justice Gorsuch's unified theory of the separation of powers generally accords with the views of the Founders. While they did not endorse a particular formulaic legal test for securing the separation of powers, it is universally acknowledged that the Founders viewed the separation of

208. See, e.g., *NFIB*, 142 S. Ct. at 668–69 (Gorsuch, J., concurring).

209. See Squitieri, *supra* note 152, at 466.

210. See *NFIB*, 142 S. Ct. at 668–69 (Gorsuch, J., concurring).

211. See *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (mem.) (per curiam) (Kavanaugh, J., dissenting).

powers as a critical protection of liberty in the Constitution.²¹² While James Madison's fears that Congress could "[extend] the sphere of its activity, and [draw] all power to its impetuous vortex" thus far have turned out to be unfounded, Justice Gorsuch's unified theory of the separation of powers nevertheless addresses Madison's general concerns.²¹³ Madison's primary concern related to what he conceived as the overweening extent of the legislative power. But if the executive, through overly broad delegation by Congress or through stretched interpretation of the law, begins legislating broadly (through the exercise of its rulemaking authority), Madison's concern regarding the threat to liberty would still apply.

Absent some judicially enforceable constraint, the executive branch, too, through the promulgation of binding regulations, can wield overweening lawmaking powers without political accountability. The Constitution's separation of powers is intended to prevent this, too. In sum, Gorsuch's unified theory of the separation of powers, if faithfully followed and enforced, would prevent Congress from intentionally equipping the executive branch with overly broad legislative authority, as well as prevent executive agencies, by virtue of reliance on improper legal interpretations, from exercising power in ways unintended by Congress.

212. See, e.g., THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 126 (Frank Shuffelton ed., 1999) (1785) ("All the powers of government, legislative, executive, and judiciary, result to the legislative body [in the Virginia Constitution of 1776]. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one."). Section 5 of the Virginia Declaration of Rights, primarily authored by George Mason, with contributions from James Madison, stated: "That the Legislative & executive powers of the State shou'd be separate & distinct from the judicial . . ." THE VIRGINIA DECLARATION OF RIGHTS § 5 (Va. 1776). Further, Section 7 provided that: "[A]ll power of suspending Laws, or the Execution of Laws, by any Authority, without Consent of the Representatives of the People, is injurious to their Rights, and ought not to be exercised." *Id.* § 7. Section 7 was a direct response to the colonial Governor's ability to indefinitely dissolve the House of Burgesses and refuse to hold elections. See Matthew S. Gottlieb, *House of Burgesses*, ENCYCLOPEDIA VA. (Dec. 7, 2020), <https://encyclopediavirginia.org/entries/house-of-burgesses/> [<https://perma.cc/TFB2-5G2X>]. Ilan Wurman reviews evidence of the founding generation's belief in adherence to separation of powers, including the legislative debates about the unadopted "Nondelegation Amendment" to the Constitution, a postal bill in the Second Congress, and the Alien and Sedition Act. Wurman, *supra* note 152, at 1504, 1507, 1512. He further explains that John Locke's Second Treatise, which included writings opposing the delegation of legislative power, had a strong influence on the Founders. *Id.* at 1518.

213. THE FEDERALIST NO. 48, *supra* note 212, at 309.

III. THE SECOND OBSERVATION: *CHEVRON*'S NO SHOW

Our second observation from *NFIB* is the stunning absence of *Chevron* in the opinion and OSHA's brief despite its obvious applicability as traditionally understood. Generally, more often than not, cases decided since *Chevron* that involved statutory authority questions have contained a common formulation based on *Chevron*.²¹⁴ Agencies would argue that *Chevron* applies, so that even if the statutory provision at issue did not unambiguously support their position, the challenged agency action nevertheless should be upheld because their interpretation constitutes a reasonable reading of the statute and, therefore, should be accorded deference under *Chevron*.²¹⁵

That traditional plea for *Chevron* deference did not appear in *NFIB*. OSHA simply argued that its reading of the OSH Act was the best reading of the statute.²¹⁶ And the Court did not grant or even mention *Chevron* deference. This may indicate that the Court is ready to overrule *Chevron* or somehow meaningfully curtail its reach. And if the Court does so, *NFIB* likely means that the major questions doctrine would be a standalone canon of statutory interpretation decoupled from its status as *Chevron*'s competing canon, or, put another way, a limit or exception to *Chevron*'s applicability.

To illustrate the significance of *Chevron*'s absence from *NFIB*, we review agency briefs from two Supreme Court cases involving statutory authority questions—*Brown & Williamson* and *City of Arlington v. FCC*.²¹⁷ These cases show that OSHA's argument in *NFIB*, by avoiding invocation of *Chevron*, constituted a serious divergence from typical agency practice.

A. *Brown & Williamson / City of Arlington Agency Briefs*

We consider the structure of the FDA and FCC briefs in *Brown & Williamson* and *City of Arlington v. FCC*, respectively, to show how agencies typically argue for deference under *Chevron*—an approach totally absent in *NFIB*.

214. See discussion *supra* Section II.B.1 (discussing cases involving statutory authority based on *Chevron*).

215. Of course, if the Supreme Court or another federal appellate court had already ruled that a statute is ambiguous, then parties may instead argue solely over whether the agency's interpretation at hand is reasonable. See, e.g., Brief for Respondents at 29–30, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (No. 18-1051).

216. See Response in Opposition to the Applications for a Stay, *supra* note 13, at 4–5.

217. We selected *Brown & Williamson* because it is the primordial major questions doctrine case. And we selected *City of Arlington v. FCC* because both authors are telecommunications lawyers, and *City of Arlington* is a prominent statutory authority case in the telecommunications field.

In *Brown & Williamson*, the FDA argued that its interpretation of the law allowing the agency to regulate tobacco products was reasonable under *Chevron*.²¹⁸ The brief's argument opened by claiming deference under *Chevron* to its interpretation of the statutory provision at issue.²¹⁹ The FDA's brief then proceeded through a statutory analysis by arguing why the law's text, context, structure, and history support its contention that Congress can regulate tobacco as either a "drug" or "device."²²⁰ This is the typical formulation for an agency brief arguing under *Chevron*: pleading for deference and then offering an interpretation of the relevant statute.

In *City of Arlington*, the Supreme Court granted certiorari on the question of whether *Chevron* deference applied to an agency's interpretation of the bounds of its own jurisdiction to regulate.²²¹ The brief for the FCC followed the familiar formulation for arguing about statutory interpretation under *Chevron*.²²² The FCC's brief opened by arguing that *Chevron* applied to the challenged regulation.²²³ Then, it subsequently argued that the FCC's interpretation of the statutory provision at hand is reasonable under "any standard of review," or in other words, even absent *Chevron* deference.²²⁴ In that section, the agency offered arguments about the plain meaning of the statute in question.²²⁵

This brief is in line with common agency litigation practice when defending challenged regulations. The parties argue over whether *Chevron* applies and supply their own interpretations of the statute at issue. The courts then engage in an analysis under the traditional *Chevron* two-step formulation and, unless the statutory text is unambiguous, decide whether the agency's interpretation is entitled to deference because it is reasonable.

Both of these briefs are in contrast with the "don't mention" *Chevron* strategy taken by OSHA in *NFIB*.

B. OSHA's Brief in NFIB

Despite the broad wording in the statute that OSHA relied upon as authority for issuing the vaccine mandate in *NFIB*, OSHA's brief, written by

218. Brief for the Petitioners at 16–17, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (No. 98-1152).

219. *Id.*

220. *Id.* at 17–23.

221. *City of Arlington*, 569 U.S. at 293.

222. See Brief for the Federal Respondents at 10, *City of Arlington v. FCC*, 569 U.S. 290 (2013) (Nos. 11-1545, 11-1547).

223. *Id.* at 11–12.

224. *Id.* at 38–43.

225. See *id.*

Solicitor General Elizabeth Prelogar, did not invoke *Chevron* deference.²²⁶ The relevant provision of the statute reads:

The Secretary shall provide . . . for an emergency temporary standard to take immediate effect . . . if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.²²⁷

While we do not seek to offer our own interpretation of the OSH Act here, we note that “grave danger” and other terms with potentially broad meanings are not defined in the Act and could be considered ambiguous or at least provide a gap for the agency to fill.²²⁸ Other relevant provisions of the statute for the Court’s decision, such as the definition of “occupational safety and health standard,” arguably might also contain ambiguities or gaps.²²⁹

But rather than pleading for *Chevron* deference based on ambiguity regarding the statutory interpretive issue, OSHA’s brief argued that the OSH Act’s plain meaning permitted the vaccine mandate and, erroneously, that the major questions doctrine applies only to ambiguous text.²³⁰ OSHA’s brief cited *Alabama Realtors*, *Utility Air*, and *Brown & Williamson* as support for this errant claim.²³¹

Only one of these cases, *Utility Air*, found that the statute in question was ambiguous.²³² The Court resolved both *Brown & Williamson* and *Alabama Realtors* at *Chevron* Step One.²³³ The *Alabama Realtors* decision had made explicit that the statute in question was not ambiguous:

Reading both sentences together, rather than the first in isolation, it is a stretch to maintain that § 361(a) gives the CDC the authority to impose this eviction moratorium.

226. Response in Opposition to the Applications for a Stay, *supra* note 13.

227. 29 U.S.C. § 655(c)(1).

228. *See* 29 U.S.C. § 652 (failing to provide a definition for the term “grave danger”).

229. *See id.* § 652(8).

230. Response in Opposition to the Applications for a Stay, *supra* note 13, at 59–60.

231. *Id.*

232. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 326 (2014).

233. *See supra* Sections II.B.1.a, g.

Even if the text were ambiguous, the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation.²³⁴

While *Brown & Williamson* did not explicitly state, in so many words, that the statute at hand was unambiguous, the lack of ambiguity is implied from the Court's language: "In this case, we believe that *Congress has clearly precluded* the FDA from asserting jurisdiction to regulate tobacco products."²³⁵

It is unclear to us why OSHA's brief eschewed pleading for the application of *Chevron* deference, and we do not pretend to practice telepathy. But given the long—and understandable—history of agencies routinely arguing for deference for their regulations, it is at least notable. Perhaps the Solicitor General was worried about providing the conservative justices of the Supreme Court with a possible opportunity to overturn *Chevron* or narrow its scope. But this reason is not entirely persuasive because the Court could have applied *Chevron* on its own, if appropriate, as long as the agency offered an interpretation susceptible to *Chevron*'s application. Perhaps the Solicitor General thought that the mere appeal to the plain meaning of the OSH Act would be sufficient to find favor with a majority of the Justices. We do not know what, ultimately, was in the mind of the government's lawyers as they devised their litigation strategy or the Supreme Court Justices as they fashioned their opinions. But the absence of *Chevron* in *NFIB*, in our opinion, is sufficiently noteworthy to provoke speculation about *Chevron*'s staying power.

C. Implications of the Lack of *Chevron* in *NFIB*

The Court's opinion and the litigation strategy employed by the Solicitor General in *NFIB* may indicate the much-anticipated downfall of the *Chevron* deference doctrine, or at least a narrowing of its application. As this Article explained above, it is standard practice for agency lawyers to argue for *Chevron* deference with respect to the interpretation of the statutory issues at hand, absent clear controlling precedent denying it.²³⁶ And as explained in Section II.B.1, the bulk of major questions doctrine decisions have applied the doctrine within the context of the *Chevron* framework.²³⁷

234. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2488–89 (2021) (emphasis added).

235. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000) (emphasis added).

236. See *supra* Section III.A.

237. See *supra* Section II.B.1.

That the *NFIB* Court ignored *Chevron* deference in its per curiam and other opinions is a divergence from all prior major questions doctrine opinions.²³⁸ The prior major questions doctrine cases at least referenced *Chevron*, even if indirectly, as in *Alabama Realtors*.²³⁹ The fact that neither the per curiam nor concurring opinion in *NFIB* even referenced *Chevron* could indicate that the Court sought to insulate the major questions doctrine from the *Chevron* context. *NFIB* could mean that the major questions doctrine is now a standalone canon of statutory interpretation within the Court's separation of powers doctrine, not just a *Chevron* "anticanon."²⁴⁰ If true, this idea would be consistent with Justice Gorsuch's unified theory of the separation of powers doctrine, because he envisions the major questions doctrine as a method for preventing *unintended* delegations of legislative power irrespective of *Chevron*'s application.

IV. CONCLUSION

We have made two notable observations based upon our reading of the Court's recent opinion in *NFIB v. OSHA*. One is that Justice Gorsuch's concurrence proposes a new unified theory of the separation of powers that is absent in existing caselaw and literature. That theory posits that the nondelegation doctrine prevents *intentional* delegation of legislative power by Congress, while the major questions doctrine prevents *unintentional* delegations of Congress's power deriving from the executive branch's interpretations of statutes that stretch agencies' actions beyond Congress's intent. Gorsuch's theory clarifies the Court's separation of powers doctrines by assigning a specific role to the major questions doctrine—that is, policing separation of powers abuses as a means of protecting liberty and ensuring political accountability.

This contrasts with assertions, or at least suggestions, that the major questions doctrine revives the nondelegation doctrine, or a less severe version of it. Justice Gorsuch's theory also comports with the Founders' fears of an overzealous legislative branch extending its reach into every corner of society,

238. As previously noted, the Court continued ignoring *Chevron* in *West Virginia v. EPA*, a decision handed down on June 30, 2022, after the preparation of this Article. For a quick post-decision take on the implications of the *West Virginia* case, see Randolph J. May, *A Major Ruling on Major Questions*, REGUL. REV. (July 15, 2022), <https://www.theregview.org/2022/07/15/may-major-questions/> [<https://perma.cc/8NNB-MLCF>].

239. See *supra* Section II.B.1.g.

240. See Asher Steinberg, *Another Addition to the Chevron Anticanon: Judge Kavanaugh on the "Major Rules" Doctrine*, NARROWEST GROUNDS (May 7, 2017), <https://narrowestgrounds.blogspot.com/2017/05/another-addition-to-chevron-anticanon.html> [<https://perma.cc/P9UK-R7Q7>].

or, as Madison put it in Federalist No. 48, “drawing all power into its impetuous vortex.”²⁴¹ For Gorsuch, empowering the executive branch to do the same thing—“drawing all power into its impetuous vortex”—by usurping authority the Constitution assigns to Congress would be just as much a threat to liberty.

Our other observation is that the absence of the *Chevron* deference doctrine in the *NFIB* opinion and briefings is worthy of note. It could presage that *Chevron* is on the verge of falling from grace one way or the other. The Court’s opinions and OSHA’s brief, in stark contrast to decades of administrative law practice, did not reference *Chevron*. If the Court does eventually overturn *Chevron* or meaningfully shrink its domain, then *NFIB* suggests that the major questions doctrine will continue to protect the separation of powers in a post-*Chevron* world despite having originated, in the eyes of many, as a *Chevron* limitation or exception.

241. THE FEDERALIST NO. 48, *supra* note 212, at 309.