OSHA's COVID-19 Vaccine Mandate: Why Justice Gorsuch's Analysis of the Mandate as an Elephant in a Mousehole Misses the Mark

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OSHA’s COVID-19 Vaccine Mandate: Why Justice Gorsuch’s Analysis of the Mandate as an Elephant in a Mousehole Misses the Mark

Wyatt Rex Allred*

Administrative law doctrines such as Chevron seek to strike a balance between adequate delegated power and sufficient checks on such power. The major questions doctrine reinforces the latter. Recent decisions finding major questions, however, have shown a departure from textualist principles, which formed the doctrine’s foundation. Justice Gorsuch’s opinion in NFIB v. OSHA is an example of this desertion of textualist principles and should thus be viewed as an improper application of the major questions doctrine. Rather than remodeling the major questions doctrine, textualist judges should acknowledge that this form of anti-textual analysis is nothing short of a revival of the nondelegation doctrine. Failing to return the doctrine to textualist principles weakens the reliability of the major questions doctrine as a tool for statutory interpretation and damages the credibility of textualist judges’ opinions that employ the doctrine in administrative law cases.

CONTENTS

INTRODUCTION ................................................................................................................................. 2282

I. HISTORY OF MAJOR QUESTIONS AND ELEPHANTS IN MOUSEHOLES .............................. 2285

II. BACKGROUND FOR OSHA COVID-19 VACCINE MANDATE ........................................... 2287

A. Majority Opinion in NFIB v. OSHA (Per Curiam Opinion) .................................................. 2287
B. Justice Gorsuch Concurrence (Justices Alito and Thomas Joining) .................................. 2288
C. Justice Breyer Dissent (Justices Kagan and Sotomayor Joining) ....................................... 2290

III. OSHA’S MOUSEHOLE VS. OTHER MOUSEHOLES ............................................................ 2291

A. NFIB v. OSHA Compared to Whitman and Gonzales ......................................................... 2291
B. OSHA Mandate Compared to CMS Mandate ....................................................................... 2294

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INTRODUCTION

For nearly a century, courts have struggled to balance two ideas in administrative law: (1) “the need for regulation” and (2) “the need for checks and controls” on regulators. In an attempt to mitigate this tension, the Supreme Court established the well-known principles of Chevron deference in 1984.

Chevron involves a two-step inquiry for courts to review agencies’ interpretations of their delegated statutory authority. First, courts ask “whether Congress has directly spoken to the precise question at issue.” If so, courts must give effect to the “unambiguously expressed intent of Congress.” But if the statutory provision is ambiguous, the second step asks “whether the agency’s answer is based on a permissible construction of the statute.” If it is, then courts must defer to the agency’s interpretation of its own statutory authority.

More recently, courts have bypassed Chevron’s second step if they consider a delegation to be a major question or, in other words, if they discover an “elephant in a mousehole.” The elephant-in-a-mousehole framing of the major questions doctrine was introduced

3. Id. at 843.
4. Id.
5. The phrasing of “elephants in mouseholes” is often used interchangeably with “major questions.” While both describe the same type of improper congressional delegation, elephants in mouseholes provides a visual for the analysis. When this canon is invoked, the purported statutory authority of the agency is the elephant, and the statutory language is the mousehole.
by Justice Scalia in *Whitman v. American Trucking Ass’ns*. That case held that deference is not granted when the question is one that, due to its outsized impact, courts presume Congress would have either decided itself or clearly and explicitly delegated the power to decide to an agency, rather than hiding the delegation in an ambiguous mousehole. The major questions doctrine historically demanded a textual analysis to identify statutory ambiguity (the mousehole) before rejecting deference. If (1) the agency’s action was one of large significance, and (2) the action was only supported by vague statutory terms, courts did not need to defer to the agency’s reasonable interpretation, as *Chevron* would ordinarily require. Additionally, claimed authority in “ancillary provisions” may have been considered vague, thereby qualifying as a mousehole. Both these versions of the doctrine purported to satisfy basic textualist tenets.

The handful of Supreme Court cases that have considered “elephants in mouseholes” have followed this rubric. But a third version of the major questions/elephants-in-mouseholes doctrine, aligned with the largely abandoned nondelegation doctrine, has emerged. In the 2022 case *NFIB v. OSHA*, Justice Gorsuch’s analysis of the agency mandate as a major question in his concurrence adopted this third version. Rather than investigating the textual ambiguity of OSHA’s purported authority, Justice Gorsuch argued that the agency’s action is simply too weighty to be delegated. Justice Gorsuch’s reputation as a textualist makes his endorsement of the third version peculiar.

Several problems arise with this approach to the major questions doctrine. For example, stripping the doctrine of its fragment of supposed objectivity propels textualist doubters to double down on their criticisms that the doctrine provides judges a

7. See *Breyer, supra* note 1, at 370. In his 1986 article, then-Judge Breyer described the concept of major questions: “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.” *Id.*
10. See *infra* Section IV.B for more discussion on the nondelegation doctrine.
basis for justifying whatever outcome they prefer. Additionally, a non-textualist major questions doctrine will not only potentially create bad law, it may also have a chilling effect on agencies’ promulgation of rules in important areas for fear of courts striking them down despite clear statutory support.

In the Supreme Court’s most recent major questions case, West Virginia v. EPA, the majority takes one step closer to this third version. In evaluating the Clean Power Plan, a major climate policy regulation from the EPA, Chief Justice Roberts’ majority opinion focuses less on the textual ambiguity of the agency’s delegation, and more on the sheer magnitude of agency power. Examining Justice Gorsuch’s concurrence in NFIB v. OSHA, which was published approximately six months before West Virginia v. EPA, helps explain how a majority of the Court reached this point.

This Note does not intend to weigh the economic, moral, or political implications of vaccine mandates. Instead, it discusses the consequences of condemning the OSHA vaccine mandate under the major questions/elephants-in-mouseholes doctrine without grounding the analysis in fundamental textualist considerations. To avoid accusations of legislating from the bench, courts should maintain—at minimum—the requirement of identifying statutory ambiguity when applying the major questions doctrine.

This Note proceeds in five Parts. Part I reviews the history of the major questions doctrine. Part II provides background and summarizes the three opinions in NFIB v. OSHA. Part III compares the Occupational Safety and Health (OSH) Act to other statutory delegations that were found to be major questions. It then compares it to the Center for Medicare and Medicaid Services (CMS) vaccine mandate upheld on the same day the OSHA mandate was stayed. Part IV discusses the threshold question that courts have historically asked before invoking the major questions doctrine: “Is there statutory ambiguity?” It provides one explanation for the concurrence’s failure to probe this question, analyzes the effects in the Court’s most recent major questions case, West Virginia v. EPA, and discusses the potential consequences of eliminating statutory ambiguity altogether from the analysis. Part V concludes the Note.

I. HISTORY OF MAJOR QUESTIONS AND ELEPHANTS IN MOUSEHOLES

Ten years after the Chevron decision, in MCI Telecommunications Corp. v. AT&T Co., the Supreme Court foreshadowed the emergence of the major questions doctrine. Congress granted the Federal Communications Commission (FCC) the power to “modify any requirement” of the Telecommunications Act. Under this statutory authorization, the FCC eliminated tariffs for all telecommunications companies, except AT&T. Despite the seeming clarity of the statute, the Court held that the word “modify” unambiguously did not allow the FCC to make “basic and fundamental changes” to the statutory scheme. The FCC’s failure to make it past Chevron step one was all that was needed for the Court to reject deference under Chevron. But the Court also noted that it is “highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.” This hinted at the forthcoming emergence of the major questions canon.

Four years later, the Court struck down a Food and Drug Administration (FDA) rule that regulated the sale of cigarettes and tobacco products. The statutory language analyzed in Brown & Williamson authorized the FDA to regulate “drugs” and “devices.” Notwithstanding this broad grant of authority, the Court declined to extend Chevron deference and struck down the regulation. The majority believed that the FDA’s lack of tobacco regulation in the past, and Congress’s steady involvement in passing legislation relating to the tobacco industry, signified that

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14. Id. at 225.
15. Id. at 231.
16. Id. at 225. The Court found that the Communications Act unambiguously did not allow the FCC to make this change despite one dictionary defining “modify” as “to make a basic or important change in.” Id. at 226. In response, Justice Scalia wrote, “[I]n 1934, when the Communications Act became law – the most relevant time for determining a statutory term’s meaning . . . Webster’s Third was not yet even contemplated.” Id. at 228.
17. Id. at 231.
19. Id. at 148 (citing 21 U.S.C. § 352 (1964 ed. and Supp. IV)).
20. See id. at 161.
Congress had never authorized the FDA to regulate tobacco.\textsuperscript{21} Again, just as in \textit{MCI}, the Court further noted that “[t]his is hardly an ordinary case . . . [T]he FDA has now asserted jurisdiction to regulate an industry constituting a \textit{significant portion} of the American economy.”\textsuperscript{22} While the textual analysis was enough to withhold deference, the Court again alluded to the future major questions doctrine.

\textit{MCI} and \textit{Brown & Williamson} were precursors to the introduction of the concept of hiding “elephants in mouseholes,” which emerged in the 2001 case \textit{Whitman v. American Trucking Ass’ns}.\textsuperscript{23} In that case, the Clean Air Act granted power to the Environmental Protection Agency (EPA) to set ambient air quality standards.\textsuperscript{24} The administrator of the EPA at the time, Whitman, promulgated a rule in 1997 governing particulate matter and ozone.\textsuperscript{25} In response, challengers to the EPA’s regulation asserted that the agency had not considered the immense economic consequences of such regulation.\textsuperscript{26} Writing for the majority, Justice Scalia declared, “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”\textsuperscript{27} Thus, the EPA performing a cost-benefit analysis when setting ambient air quality standards (the elephant) required more than weak textual support from the Act (the mousehole). Under this framework, the Court rejected the notion that the EPA needed to consider the economic costs of its regulation.\textsuperscript{28}

Various cases since \textit{Whitman} have considered whether statutory delegations qualify as major questions.\textsuperscript{29} The process has remained

\begin{itemize}
\item[21.] \textit{Id.} at 146 (“As the FDA concedes, it never asserted authority to regulate tobacco products as customarily marketed . . .”). Fighting this notion, Justice Breyer’s dissent argued that tobacco product regulations not only fall squarely into the statutory language, but also the broader contextual purpose of the FDA, namely, “the protection of public health.” \textit{Id.} at 162 (Breyer, J., dissenting).
\item[22.] \textit{Id.} at 159 (emphasis added).
\item[24.] \textit{Id.} at 465 (citing 42 U.S.C. § 7409(b)(1)).
\item[25.] \textit{Id.} at 463.
\item[26.] \textit{See id.}
\item[27.] \textit{Id.} at 468.
\item[28.] \textit{See id.} at 486.
\end{itemize}
II. BACKGROUND FOR OSHA COVID-19 VACCINE MANDATE

On November 4, 2021, President Biden announced two new policies to combat COVID-19 through vaccine mandates: (1) a vaccine mandate from OSHA, and (2) a vaccine mandate from CMS.

The OSHA vaccine mandate was projected to cover eighty-four million working Americans. OSHA claimed authority to issue such a regulation under the OSH Act of 1970.30 Charged to ensure “safe and healthful working conditions,”31 the agency could promulgate standards “reasonably necessary or appropriate to provide safe or healthful employment.”32 Ordinarily, the agency must accomplish this through a process that includes notice, comment, and a public hearing.33 But the Act included an exception to those usual procedures: “emergency temporary standards” (ETS), which may “take immediate effect upon publication in the Federal Register,” thereby skirting notice and comment from the public.34 For a policy to qualify as an ETS, the Secretary of Labor (who is over OSHA) must show two things. First, “that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards.”35 And second, that the “emergency standard is necessary to protect employees from such danger.”36 Various parties, including the National Federation of Independent Businesses (NFIB), challenged this mandate as exceeding OSHA’s policymaking authority under the Act.

A. Majority Opinion in NFIB v. OSHA (Per Curiam Opinion)

The majority opinion in NFIB v. OSHA held that OSHA lacked authority to issue the ETS under the plain meaning of the Act. The Act permits the Secretary of Labor to establish “workplace safety

31. Id. § 651(b).
32. Id. § 652(8).
33. Id. § 655(b).
34. Id. § 655(c)(1).
35. Id.
36. Id.
standards, not broad public health measures.” Reasoning that COVID-19 can spread “at home, in schools, during sporting events, and everywhere else that people gather,” the majority concluded that “it is not an occupational hazard in most [workplaces].” As a result, OSHA’s attempt to issue the vaccine mandate was not entitled to deference because the statute unambiguously did not authorize such action.

Even though it did not rely on the major questions doctrine as a basis for its decision, the majority alluded to it. The opinion affirmed that the Court “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.” The mandate was “no ‘everyday exercise of federal power’” and represented a “significant encroachment into the lives — and health — of a vast number of employees.” The per curiam opinion declined to even mention the words “Chevron” or “deference.”

B. Justice Gorsuch Concurrence (Justices Alito and Thomas Joining)

While the majority opinion did not rely on the major questions doctrine, Justice Gorsuch’s opinion did. Yet, in his concurrence, Justice Gorsuch avowed that “[t]he Court rightly applie[d] the major questions doctrine” by ruling that the Act “d[id] not . . . authorize OSHA’s mandate.”

The primary question focused on in the concurrence was “[w]ho decides” major questions—Congress or executive agencies? Unlike the majority opinion, Justice Gorsuch’s

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38. Id.
39. Some would argue that the majority did more than allude to the doctrine by “[i]nvoking the major questions doctrine, but without calling it that. . . .” See Andrew Michaels, OSHA Case Shows Fluidity of Major Questions Doctrine, LAW360 (Jan. 26, 2022, 5:26 PM), https://www.law360.com/articles/1458155/osha-case-shows-fluidity-of-major-questions-doctrine. Even Justice Gorsuch alleged that the majority “rightly applie[d] the major questions doctrine . . .” NFIB, 142 S. Ct. at 668. (Gorsuch, J., concurring).
40. NFIB, 142 S. Ct. at 665. (quoting Ala. Ass’n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021)) (hinting to the major questions doctrine without fully embracing it as the majority’s main argument).
41. Id. (quoting In re MCP No. 165, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting)).
42. Id.
43. Id. at 668 (Gorsuch, J., concurring).
44. Id. at 667.
concurrency did not start with the text of the OSH Act. In fact, Justice Gorsuch never directly addressed whether the statutory language was ambiguous. In one of the only suggestions of a textual analysis, Justice Gorsuch referenced another COVID case from 2021: “‘We expect Congress to speak clearly’ if it wishes to assign to an executive agency decisions ‘of vast economic and political significance.’” Then the concurrence stated that “Congress has nowhere clearly assigned so much power to OSHA.” Yet, overall, the opinion largely fails to analyze how the OSH Act falls short of this requirement.

Instead, Justice Gorsuch focused on the significance of the OSHA mandate and characterized it as an elephant. At the same time, he also acknowledged the relationship between the major questions canon and the nondelegation doctrine and even argued that “the nondelegation doctrine [was] a reason to apply the major questions doctrine.” Whether OSHA lacked the claimed authority to issue a vaccine mandate under the nondelegation doctrine or the major questions canon, the point is the same for the concurrence: both are a check on executive agencies’ independent regulatory authority on matters of immense economic or political significance.

While the concurrence identified the elephant, it neglected to grapple with the Act’s supposed mousehole of ambiguity. Rather, Justice Gorsuch pointed to legislative action that did not include vaccine requirements as evidence of it being a major question. Vaccines had been available for more than a year, and Congress “ha[d] adopted several major pieces of legislation” aimed at

45. Id. (quoting Ala. Ass’n of Realtors, 141 S. Ct. at 2489).
46. Id.
47. See infra Part IV for a discussion on the interplay between major questions and nondelegation.
48. NFIB, 142 S. Ct. at 668 (Gorsuch, J., concurring).
49. First, OSHA claims authority to issue a nationwide vaccine mandate “but cannot trace its authority to do so to any clear congressional mandate.” Id. at 669. Or, if the statute that enables OSHA “really did endow” the agency with power to do so, “that law would likely constitute an unconstitutional delegation of legislative authority.” Id.
50. See id. (“[O]n no one’s account does this mandate qualify as some ‘detail.’”). See also Miriam Becker-Cohen & Praveen Fernandez, Justice Gorsuch’s Abandonment of Textualism in NFIB v. OSHA, CONST. ACCOUNTABILITY CTR. (Jan. 20, 2022) (discussing how despite Gorsuch’s reputation as a textualist, “that commitment was nowhere to be found” in this case), https://www.theusconstitution.org/blog/justice-gorsuchs-abandonment-of-textualism-in-nfib-v-osh/
51. See NFIB, 142 S. Ct. at 668 (Gorsuch, J., dissenting).
COVID-19 but not granted “authority to issue a vaccine mandate”; suggesting that it was not Congress’s intent to allow OSHA to promulgate the ETS. Additionally, Justice Gorsuch highlighted that “a majority of the Senate even voted to disapprove OSHA’s regulation[,]” and that “in rare instances when Congress has sought to mandate vaccinations, it has done so expressly.” By replacing analysis of the statute’s text with inferences of congressional intent, Justice Gorsuch concluded that OSHA’s actions were not authorized.

Aside from acknowledging that the Court expects Congress to speak clearly and stating that the emergency provision “does not clearly authorize OSHA’s mandate,” Justice Gorsuch’s concurrence ducked a direct textual analysis of the OSH Act. While Justice Gorsuch might have intended to lean on the majority’s textual interpretation, the majority’s ruling held that the text unambiguously did not allow OSHA’s authority to issue the mandate, ostensibly making it unfit for a major questions analysis.

C. Justice Breyer Dissent (Justices Kagan and Sotomayor Joining)

Unlike Justice Gorsuch, Justice Breyer began with the text of the OSH Act. Justice Breyer observed that ETSs are not just permitted, but ordered by Congress when OSHA 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.” The dissent addressed both points.

First, the virus presented grave danger as a “physically harmful agent” given that, at the time of the rule’s promulgation, “725,000 Americans had died . . . and millions more had been hospitalized” because of COVID-19. Justice Breyer reasoned that if a “physically harmful agent” was an insufficient grounds for a mandate, COVID-19 certainly qualified as a “new hazard.”

52. Id. at 667–68.
53. Id. at 668 (citing S.J. Res. 29, 117th Cong., 1st Sess. (2021) (emphasis removed)).
54. Id. (citing 8 U.S.C. § 1182(a)(1)(A)(ii)).
55. Id. at 671 (Breyer, J., dissenting) (citing 29 U.S.C. § 655(c)(1)).
56. Id. at 672–73.
57. Id. at 672.
observed that “the disease spread[] in shared indoor spaces” and therefore “present[ed] heightened dangers in most workplaces.”

Second, the ETS was necessary to protect employees from this danger, mainly because the science had proven that “testing, mask wearing, and vaccination [were] highly effective—indeed, essential—tools for reducing the risk of transmission, hospitalization, and death . . .” Under these considerations, “OSHA’s rule perfectly fit[] the language of the applicable statutory provision” and the majority “seriously misapplie[d] the applicable legal standards.”

Out of the three opinions, the dissent arguably wrestled with the text the most. This is problematic for proponents of the major questions doctrine who also consider themselves textualists.

III. OSHA’S MOUSEHOLE VS. OTHER MOUSEHOLES

Comparing Justice Gorsuch’s concurrence in NFIB v. OSHA to other elephant-in-mousehole cases underlines the analytical inconsistencies. This Part first examines NFIB v. OSHA compared to the elephants and mouseholes in two prior Supreme Court cases, Gonzales v. Oregon and King v. Burwell. Next, it points out that the other vaccine mandate case, Biden v. Missouri, more closely resembled an elephant in a mousehole than NFIB v. OSHA, but was not analyzed as such.

A. NFIB v. OSHA Compared to Whitman and Gonzales

Justice Gorsuch’s concurrence in NFIB v. OSHA did not even attempt to perform a textual analysis to consider statutory ambiguity. If it had, it would have revealed that the OSHA delegation lacked ambiguity, which may be why the concurrence declined to engage in a textual analysis. To further illustrate the significance of the omission of an honest textual analysis from the majority opinion and Justice Gorsuch’s concurrence in NFIB v. OSHA, this section compares OSHA v. NFIB with two other

58. Id.
59. Id. Justice Breyer adds that “unvaccinated employees of all ages face a substantially increased risk from COVID-19 as compared to their vaccinated peers.” Id.
60. Id. at 670–71.
Supreme Court cases in which the majority did identify an elephant in a mousehole: Gonzales v. Oregon\textsuperscript{61} and King v. Burwell.\textsuperscript{62}

In Gonzales, the Court addressed “whether the Controlled Substances Act [(CSA) permitted] the United States Attorney General to prohibit doctors from [using] regulated drugs [to aid] in physician-assisted suicide,” even though the State of Oregon had legalized the procedure.\textsuperscript{63} According to the CSA, physicians had to obtain registrations from the Attorney General “[t]o issue lawful prescriptions . . . .”\textsuperscript{64} The statutory delegation granted that “[t]he Attorney General may deny, suspend, or revoke this registration if . . . the physician’s registration would be ‘inconsistent with the public interest.’”\textsuperscript{65} Since the 1970s, the Justice Department had interpreted the public interest section to “require[] that every prescription for a controlled substance ‘be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.’”\textsuperscript{66}

Because of the intense nationwide debate over physician-assisted suicide, the Court considered the Attorney General’s purported authority to be an elephant. In identifying the mousehole, the majority rejected the notion that “Congress gave the Attorney General such broad and unusual authority through an implicit delegation . . . .”\textsuperscript{67} Like Whitman, this vague commission “in the CSA’s registration provision [was] not sustainable” to support the claimed authority.\textsuperscript{68} Despite the Justice Department’s past interpretation of the statute, the Court’s textual analysis prevailed. The majority ruled that the vague delegation, “in the public interest,” could not support the Attorney General’s asserted power to “make an independent assessment of the meaning of federal law” by simply declaring procedures “illegitimate medical practices.”\textsuperscript{69}

\textsuperscript{63} See Gonzales, 546 U.S. at 248–49.
\textsuperscript{64} Id. at 250–51 (citing 21 U.S.C. § 822(a)(2)).
\textsuperscript{65} Id. at 251 (quoting 21 U.S.C. §§ 824(a)(4), 822(a)(2)).
\textsuperscript{66} Id. at 250 (emphasis added) (quoting 21 C.F.R. § 1306.04(a) (2005)).
\textsuperscript{67} Id. at 267.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 263–64. Justice Kennedy also described the interplay between the size of an elephant and the appearance of a mousehole: “The importance of the issue of physician-
Compared to the CSA’s cryptic delegation in *Gonzales*, the language in OSHA’s delegation is arguably much more straightforward. In *Gonzales*, the Justice Department’s long-held belief was that the statute permitted the Attorney General to declare medical purposes legitimate or not. But the Court rejected this by finding the actual text ambiguous. In contrast, the OSHA Court argued that, because six prior OSHA ETSs had been challenged and only one was upheld, the delegated power under the OSH ACT was limited.\(^70\) This rationale not only disregarded the text of the statute, it directly reflected the Justice Department’s rejected proposition in *Gonzales* that the Court consider the history of use rather than the terms of the Act. The *Gonzales* Court’s treatment of both the agency’s and prior courts’ understandings of the law began with the plain text before declaring it an elephant in a mousehole. Although the majority in *NFIB v. OSHA* at least purported to also start its analysis by engaging with the statutory text, Justice Gorsuch’s concurrence stopped short of even making such a claim.\(^71\)

In the 2015 case, *King v. Burwell*, the Supreme Court found a portion of the tax provision in the Affordable Care Act (ACA) to be an elephant in a mousehole.\(^72\) Amid the many provisions within the ACA, the Act offered tax credits to purchasers of insurance plans “established by the State . . .”.\(^73\) Under this provision, the Internal Revenue Service (IRS) claimed authority to manage this process by granting tax credits to purchasers for enrolling in an insurance plan through “an [e]xchange,” whether federal or state.\(^74\) The Court did

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\(^70\) *NFIB v. OSHA*, 142 S. Ct. 661, 663 (2022).

\(^71\) Even dissenters invoking the major questions doctrine provide a textual analysis first. See, e.g., *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 237 (2009) (Stevens, J., dissenting) (arguing that “the EPA ha[d] misinterpreted the plain text” of the Act and that when compared to other provisions, the challenged provision clearly did not authorize the EPA’s actions).

\(^72\) *King v. Burwell*, 576 U.S. 473 (2015). While this case ultimately upheld the ACA, the Court did not defer to the IRS’s interpretation of the tax provision because it was a major question.

\(^73\) *Id.* at 483 (quoting 42 U.S.C. § 18031(f)(3)(A) (2012)).

\(^74\) *Id.* (emphasis added). The IRS defined this as “an Exchange serving the individual market . . . regardless of whether the Exchange is established and operated by a State . . . or by HHS.” *Id.* at 474 (quoting 45 CFR § 155.20 (2014)).
not defer to this interpretation. First, the tax credits “involve[d] billions of dollars” and “millions of people,” making it a question of vast economic significance. Second, the language “established by the State” was “properly viewed as ambiguous,” especially considering that the IRS “has no expertise in crafting health insurance policy of this sort.” Since this constituted an elephant in a mousehole, the Court did not defer to the IRS’s interpretation of the ACA.

Again, the OSH Act was less ambiguous than the “established by the state” language in King. Like the ACA, vaccine mandates involve millions of people and include extreme economic consequences, making it a worthy elephant. Yet the two Acts’ texts differed in degrees of ambiguity. While the ACA tax provision’s language, “established by the state,” was seemingly straightforward, the IRS’s interpretation would have been incongruous with the rest of the ACA’s provisions. This makes interpreting the OSH Act appear less complicated than the interpretive question in King because there is no evidence that other provisions of the OSH Act would contradict the purported authority granted to OSHA in the emergency provision. The OSH Act’s language clearly stated what the agency was charged to do in emergency situations—follow the two-step ETS process.

To be fair, as the IRS had “no experience” in crafting health policy, OSHA admittedly does not have expertise in preventing the spread of disease. But this argument contradicts the plain language of the Act, which demands emergency standards for “physically harmful agents.” The Occupational Safety and Health organization is much more tied to disease prevention than the Internal Revenue Service is to health policy. Thus, compared to Gonzales and King, the OSH Act does not have the same “mousehole” characteristics.

B. OSHA Mandate Compared to CMS Mandate

In Biden v. Missouri, another vaccine mandate case argued the same day as NFIB v. OSHA, the Court analyzed a CMS vaccine

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75. Id. at 486 (“This is not a case for the IRS.”).
76. Id. at 485–86.
77. Id. at 486, 490.
78. Nonetheless, the Court found that, when read in context with the whole act, tax credits should be available through both Federal and State Exchanges. See id. at 487.
mandate that applied to all healthcare workers. The same justices who concurred in \textit{NFIB v. OSHA} wrote a dissent in \textit{Biden v. Missouri} but did not rely on the major questions doctrine. Ironically, the CMS mandate might have been more of an elephant in a mousehole than the OSHA mandate.

The majority (in another per curiam opinion) upheld CMS’s mandate requiring that all health care facilities that receive Medicaid and Medicare funding must ensure that their employees are vaccinated. OSHA’s mandate would have covered eighty-four million Americans. In contrast, CMS intended to cover ten million healthcare workers.

The dissent, which included Justices Gorsuch, Thomas, and Alito, makes strong points in its textual analysis. And while referring to the major questions doctrine in several instances, it focused largely on the lack of textual support for the CMS mandate instead of its elephant characteristics. Two statutory provisions enabled CMS to act. The first stated that the agency could publish rules that “may be necessary to the efficient administration of the [agency’s] functions.” The second authorized CMS to establish rules that “may be necessary to carry out the administration of the insurance programs” under Medicare. For such a significant action as the mandate, these provisions appear imprecise. In fact, the dissent writes that “[a]t oral argument, the Government largely conceded” that these two provisions alone “do not authorize the omnibus rule.” Instead, the Government relied on “a constellation of statutory provisions” and treats them as “a singular (and unqualified) delegation . . . ” Although this seems to fit the mold

80. \textit{See id.} at 651.
81. \textit{Id.} at 655 (Thomas, J., dissenting).
82. Justice Barrett also joined the dissent. \textit{Id.}
83. \textit{See id.} at 656 (“We presume that Congress does not hide ‘fundamental details of a regulatory scheme in vague or ancillary provisions.’”) (citing \textit{Whitman v. Am. Trucking Assn’s, 531 U.S. 457, 468 (2001)} (suggesting the government’s proposed power is “virtually unlimited vaccination power”) (describing the mousehole: “[t]he Government has not explained why Congress would have used these ancillary provisions to house what can only be characterized as a ‘fundamental detail’ of the statutory scheme).
84. \textit{Id.} at 655 (quoting 42 U.S.C. § 1302(a)).
85. \textit{Id.} (quoting 42 U.S.C. § 1395hh(a)(1)).
86. \textit{Id.} at 656.
87. \textit{Id.}
of an elephant in a mousehole perfectly, the dissent, which again included the same justices from the concurrence in NFIB v. OSHA, avoided this discussion.

The dissent’s decision not to declare the CMS mandate an elephant in a mousehole is unsurprising given that, in their view, the plain text did not authorize CMS to issue the mandate, meaning it was unnecessary to find an elephant. That said, it is strange that the dissent relied on the major questions doctrine so heavily in NFIB v. OSHA without even mentioning it by name in Biden v. Missouri.88

Cynically, one could argue that the dissent deliberately avoided discussing major questions in Biden v. Missouri. Though unclear, maybe the Biden v. Missouri dissent (and concurrence in NFIB v. OSHA) hoped to reshape the future of major questions applications to adopt a new version. To some degree, if Justices Gorsuch, Alito, and Thomas had ruled the CMS mandate an elephant in a mousehole, this may have undercut their argument that the OSHA mandate was a major question because—unlike the former—in the latter they arrived at their conclusion without a textual analysis. Whether or not the dissent in Biden v. Missouri dodged the question altogether to avoid undercutting their concurrence in NFIB v. OSHA, the CMS mandate appears less clear-cut than the OSH Act.

IV. THE MAJOR QUESTIONS DOCTRINE HAS HISTORICALLY ASKED, “IS THERE AMBIGUITY?”

Perhaps more important than comparing other “mouseholes” to the OSH Act is an examination of the concurrence’s process for arriving at its conclusion. Other cases involving major questions have maintained a textualist framework by asking whether the statutory text is ambiguous. When textualist opinions stray from established patterns, the criticism that “textualism is . . . used as a smokescreen by conservative judges to reach ideologically acceptable outcomes” becomes more credible.89 This Part argues that textualist principles have historically formed the backbone of

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88. Although Justice Thomas cites Whitman by saying “[w]e presume that Congress does not hide ‘fundamental details of a regulatory scheme in vague or ancillary provisions,’” id. (citing Whitman v. Am. Trucking Ass’n, 531 U.S. 457, 468 (2001)), there is not a single mention of a “major question” or an “elephant.”

the major questions doctrine; that merging the nondelegation and major questions doctrines may disrupt the doctrine’s textualist framework; that the Supreme Court took one step closer to this approach in West Virginia v. EPA; and that continuing to do so would diminish the legitimacy of the major questions doctrine.

A. Textualism and the Major Questions Doctrine

When an elephant and a mousehole are both present, agency deference is withheld under the major questions doctrine since “Congress could not have intended to delegate a decision of such . . . significance to an agency in so cryptic a fashion.”90 Yet Justice Gorsuch’s analysis in NFIB v. OSHA forged a new path in the realm of major questions that simply considers whether an elephant exists.

The Court stated in Chevron, “[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . .”91 Accordingly, when the major questions doctrine emerged, the Court continued to ask whether there is statutory ambiguity before concluding that it involves a major question or an elephant in a mousehole, thereby following the first step of the Chevron analysis.92 Admittedly, Chevron’s legitimacy in the Supreme Court is waning.93 But regardless of Chevron’s future viability, identifying statutory ambiguity—before concluding it constitutes a major question—grounds the analysis (at least to some degree) in a textualist framework.

Justice Kavanaugh articulated this notion during NFIB’s oral argument proceeding: “You’re relying on the major questions canon in saying that when an agency wants to issue a major rule that resolves a major question, it can’t rely on statutory language

that is cryptic, vague, oblique, ambiguous.”

Based on this approach to major questions, the Court must follow *Chevron*’s first step before it declares that the agency action is a major question.

But both the per curiam opinion in *NFIB v. OSHA*, and Justice Gorsuch’s concurrence, which relied on the major questions doctrine, failed to reference *Chevron*. Again, this may not be surprising given the Court’s recent reluctance to rely on *Chevron*. That said, the lack of textual analysis in the concurrence, and failure to pinpoint ambiguity before moving into a discussion on the major questions doctrine, is surprising. Divorcing major questions from an analysis of statutory ambiguity altogether weakens the legitimacy of elephants in mouseholes. Even if *Chevron* is not technically used as the baseline, the Court should still demand statutory ambiguity to maintain a textualist framework within the major questions doctrine. The alternative may simply entail judicial policy judgements on whether a question is major enough to be struck down.

Perhaps for this very reason, Justice Kavanaugh did not join the concurrence. Despite Justice Kavanaugh’s vocal support for a robust major questions exception, he joined the per curiam opinion, which focused on the textual analysis of “work-related dangers” as a justification for striking down OSHA’s mandate. Justice Kavanaugh has supported the use of the major questions

94. Oral argument at 31:33, *NFIB v. OSHA*, 142 S. Ct. 661 (2022) (Nos. 21A244 and 21A247), https://www.oyez.org/cases/2021/21A244. Justice Kavanaugh expressed this same notion as a Circuit Court Judge. U.S. Telecom Ass’n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (“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.”).

95. See *Joshua Matz, The Imminent Demise of Chevron Deference, TAKE CARE* (June 21, 2018), https://takecareblog.com/blog/the-imminent-demise-of-chevron-deference (“The Judiciary may be good at interpreting laws, but it is poorly suited to the kinds of value and policy judgements inherent to statutory interpretation in this field.”). Commentators were already worried following cases such as *King v. Burwell* that the Court was “depriv[ing] agencies of authority to resolve precisely the kinds of major questions that agencies are best equipped to resolve.” Mila Sohoni, *King’s Domain*, 93 NOTRE DAME L. REV. 1419, 1424 (2018); see also Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 2003–04 (2017) (cautioning that unbridled use of the major questions canon will “make Congress uncertain of the words it must use to set in motion an active regulatory program and to make agencies rather than courts the interpreters of first resort, and they make the agencies uncertain of their interpretive authority.”).

96. See *U.S. Telecom Ass’n*, 855 F.3d at 417 (Kavanaugh, J., dissenting).

doctrine because “[t]he lack of clear congressional authorization matters” when there is an elephant.98 For example, in U.S. Telecom Ass’n v. FCC, the Federal Communications Commission (FCC) tried to promulgate a rule on net neutrality, which marked a major move by the agency.99 Referencing cases such as MCI, Brown & Williamson, and Gonzales v. Oregon, then-Judge Kavanaugh unmistakably asserted that “an ambiguous grant of statutory authority is not enough” when there is a major question.100 Refraining from discovering an elephant in a mousehole in NFIB v. OSHA may suggest that Justice Kavanaugh felt the concurrence’s use of the major questions doctrine was unjustified without a discovery of statutory ambiguity.

On the flip side, maybe Justice Gorsuch withheld his approval of the per curiam majority opinion because he did not believe the text contained ambiguity. On its surface, this is negated by his statements that the Court “expects Congress to speak clearly if it wishes” for an agency to make a significant decision, and that “Congress has nowhere clearly assigned so much power to OSHA.”101 Yet the absence of any textual analysis in Justice Gorsuch’s concurrence suggests the opposite. Accepting this would damage Justice Gorsuch’s reputation as a staunch textualist, but it is conceivable that he resisted a real textual analysis because he did not think there was any ambiguity. If he could not, in good faith, disqualify OSHA’s mandate under a textual analysis, Justice Gorsuch could simply conclude that the question being major was sufficient for striking down the mandate. This not only achieves the result he hoped for, it also sets forth the blueprint for the major questions doctrine to be more malleable in future cases and serve as a stronger check on the administrative state in general.

Whatever the concurrence’s intentions were, ignoring text, while finding an elephant in a mousehole, is not only fundamentally anti-textualist, but it also sidesteps the history of administrative jurisprudence. The Court has historically determined that “[t]he key question for the major questions doctrine is the extent to which there is a mismatch between the

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98. U.S. Telecom Ass’n, 855 F.3d at 417 (Kavanaugh, J., dissenting).
99. Id. at 382.
100. Id. at 421.
101. NFIB, 142. S. Ct. at 667 (Gorsuch, J., concurring).
statutory language and the claimed authority.” If the purported authority is massive (an elephant), and the delegated power small (a mousehole), then it may be a major question. By ignoring the text, Justice Gorsuch ostensibly discarded the second half of this analysis. By his reasoning, it does not matter whether the statutory authority delegated to an agency is a mousehole or an elephant—all that matters is whether there is an elephant. The concurrence seems to stand alone in this proposition. Despite Justice Gorsuch writing that the majority as a whole “rightly applies the major questions doctrine,” the per curiam opinion does far less than conclude that OSHA’s elephant alone meant it lacked authority to issue a vaccine mandate.

B. Nondelegation and Major Questions: An Explanation for the Concurrence’s Textual Abandonment

One explanation for Justice Gorsuch’s new application of the major questions doctrine is the widely studied relationship between major questions and nondelegation. The nondelegation doctrine existed long before the emergence of major questions. Like the major questions doctrine, nondelegation is a principle in administrative law that Congress cannot delegate its legislative powers to other branches.

Beginning around the 1930s, the nondelegation doctrine was used as a check on the rapidly growing regulatory state. It safeguarded against Congress passing off unlimited power to a body that could act more quickly than Congress itself. The nondelegation doctrine asks one question: Is there an “intelligible

102. Andrew Michaels, OSHA Case Shows Fluidity of Major Questions Doctrine, LAW360 (Jan. 26, 2022); see also Asher Steinberg, Another Addition to the Chevron Anticanon, THE NARROWEST GROUNDS (May 7, 2017), http://narrowestgrounds.blogspot.com/2017/05/another-addition-to-chevron-anticanon.html (discussing the cases that have invoked the elephants-in-mouseholes doctrine, “this small handful of cases didn’t solely turn on gauging the size of the elephant; they also came down, just as much, to the size of the mousehole”).

103. See Major Question Objections, 129 HARV. L. REV. 2191, 2198 (2016) (arguing that “the ‘just too big’ rationale is incoherent” and that “[a]gencies decide ‘big’ questions all the time”); Chad Squitieri, Who Determines Majorness, 44 HARV. J.L. & PUB. POL’y 463, 495 (2016) (referencing the trend of purely analyzing the majorness of a question, he states, “[t]extualists should reject this understanding of the major questions doctrine as impermissibly permitting courts to insert themselves into the Article I, Section 7 lawmaking process.”).

104. See NFIB v. OSHA, 142 S. Ct. 661, 668 (Gorsuch, J., concurring).

principle” in the act containing delegation? If so, the delegation of congressional power to an agency is permissible. This broad and undefined standard led to only two cases—both of which were decided in 1935—that struck down agency power based on nondelegation. In *Panama Refining*, Congress passed the National Recovery Act (NRA), which permitted the president to limit petroleum commerce in the United States. The Court held that this delegation violated the nondelegation doctrine because there was no intelligible principle that limited the president’s authority to control an entire industry.

*A.L.A. Schechter Poultry* involved the same Act. This time, a poultry slaughterhouse challenged a section in the NRA that permitted the president to approve “codes of fair competition,” which had apparently burdened the slaughterhouse’s operations. Again, the phrase “codes of fair competition” seemingly contained unlimited delegated power, and therefore had no intelligible principle. Since 1935, however, the doctrine has not been argued successfully a single time at the Supreme Court.

Many scholars assert that the major questions/elephants-in-mouseholes doctrine is the nondelegation doctrine reincarnated. In fact, Justices Gorsuch and Kavanaugh have voiced support for this idea. Despite Justice Kavanaugh’s absence in Justice Gorsuch’s concurrence in *NFIB v. OSHA*, he has shown openness to merging the nondelegation and major questions doctrines in the

106. See id. at 409.
109. See id. at 430 (stating that the challenged NRA provision “goes beyond [the] limits” of an intelligible principle).
111. See id. at 530.
112. Id. at 530-31 (questioning whether “there is any adequate definition of the subject” which would serve as a limit or intelligible principle).
113. This is at least partially due to one particular case, *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980). In this case, the Court elected to construe a broad statute in a narrow manner rather than strike it down based on nondelegation principles, thereby avoiding the nondelegation analysis altogether. See id. In a subsequent case, the Court explained that this was the new application of the nondelegation doctrine. See Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).
115. See Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (arguing that when separation of powers is threatened, “we don’t just throw up our hands”).
past. In *Paul v. United States*, for example, Justice Kavanaugh stated, “I write separately because Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.” Thus, when the OSHA vaccine mandate was announced, some believed that this would be Justice Gorsuch’s and Justice Kavanaugh’s opportunity to officially merge the two doctrines.

Both justices probed the idea during oral argument. Like Justice Kavanaugh, Justice Gorsuch asked during oral argument whether a statute must be ambiguous to apply the major questions canon. Directing his question to NFIB’s counsel, who characterized the mandate as a major question, he asked: “The government says that the major questions doctrine . . . [does not] apply to this Court’s consideration of this case . . . unless the statute before us is first found to be ambiguous. What’s your understanding?” Counsel responded that “the major questions doctrine is also a doctrine that would avoid non-delegation concerns.” This response revealed the counsel’s hope for major questions and nondelegation to merge without a requirement of statutory ambiguity—a desire Justice Gorsuch apparently shared. In other words, all that is required is to show that a delegated decision is large enough that Congress should be deciding it directly instead of delegating policymaking authority to an agency. The delegation’s clarity is unimportant, making it more similar to the original, flexible applications of the nondelegation doctrine.

Justice Gorsuch’s questions during oral argument, and subsequent concurrence, reveal his seeming intention to merge nondelegation with major questions. Justice Kavanaugh’s reluctance to join the concurrence, however, signifies he may disagree with how to get there. Both asked similar questions about how statutory ambiguity fit into the equation, but they came out

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117. See Lee A. Steven, *Non-Delegation, Major Questions, and the OSHA Vaccine Mandate*, YALE J. ON REG. (Nov. 8, 2021), https://www.yalejreg.com/nc/non-delegation-major-questions-and-the-osha-vaccine-mandate-by-lee-a-steven/ (“[A]n intriguing aspect of the case would be how Gorsuch and Kavanaugh might frame the case. Given their stated desire to revisit non-delegation, such a case might be another vehicle to do just that.”).


119. *Id.* at 17:24.
two ways. On the one hand, Justice Kavanaugh appears willing to marry the two doctrines, but still require statutory ambiguity as a baseline before determining something is a major question. On the other hand, Justices Gorsuch, Thomas, and Alito appear ready to create a more flexible doctrine that simply identifies and strikes down questions of great “economic and political significance” on which Congress defers to administrative agencies.\textsuperscript{120}

Although some believe that the major questions doctrine began to merge with nondelegation in \textit{King v. Burwell},\textsuperscript{121} the concurrence in \textit{NFIB v. OSHA} takes the next step by dodging the statutory ambiguity requirement. And despite his reluctance to join Justice Gorsuch’s concurrence in \textit{NFIB v. OSHA}, Justice Kavanaugh shifted course somewhat by joining the majority opinion almost six months later in \textit{West Virginia v. EPA}.

\textbf{C. The Court Takes One Step Closer – West Virginia v. EPA}

Nearly six months after \textit{NFIB v. OSHA}, the Court took one step closer to Justice Gorsuch’s approach to the major questions doctrine in \textit{West Virginia v. EPA}, but stopped short of reviving the nondelegation doctrine.\textsuperscript{122} \textit{West Virginia} dealt with a historic EPA regulation that “restructure[ed] the Nation’s overall mix of electricity generation . . .”\textsuperscript{123}

The EPA’s own projections of the regulation represented an obvious elephant. As of 2014, coal provided thirty-eight percent of the Nation’s electricity.\textsuperscript{124} Through agency rulemaking, the EPA hoped to reduce that number to twenty-seven percent by 2030.\textsuperscript{125} To accomplish this, existing coal plants would need to undertake “heat rate improvements” to burn coal more cleanly, shift from coal-fired power plants to natural-gas-fired plants, or shift from coal and gas to renewables such as wind and solar.\textsuperscript{126} The EPA’s own projection estimated “billions in compliance costs, raise[d]...
retail electricity prices . . . retirement of dozens of coal plants . . . and elimination of tens of thousands of jobs.”

While the elephant was obvious, the mousehole was not. The Clean Air Act authorizes the EPA to set “standard[s] of performance” for the emission of certain pollutants. Section 111 of the Act governs pollution control from existing sources, directing the EPA to regulate according to the “best system of emission reduction.” As Chief Justice Roberts put it, “[t]he issue here is whether restructuring the Nation’s overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the ‘best system of emission reduction . . . .’”

Chief Justice Roberts’ majority opinion provides little textual explanation for why “the best system of emission reduction” cannot support the EPA’s “generation shifting” plan. Rather, he turns to an argument similar to Justice Gorsuch’s concurrence in NFIB v. OSHA: that “a decision of such magnitude rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.” But “specific” might be a better word than “clear.” After all, “the best system of emission reduction,” while broad, is not ambiguous.

Justice Kagan’s dissent squares in on this half-hearted textual analysis. She notes that the “best system” encapsulates the EPA’s actions—“no ifs, ands, or buts of any kind relevant here.” She also points out that even the parties do not dispute that generation shifting is the best system to combat carbon dioxide emissions. The majority, she says, “announces the arrival” of this new major questions doctrine, which rests on one claim alone: “that generation

127. Id.
129. Id.
130. West Virginia, 142 S. Ct. at 2607.
131. As one critic put it, “after engaging in a bit of traditional interpretive throat-clearing about how to conduct statutory interpretation in an ‘ordinary case,’ the Chief noted that ‘these are extraordinary cases that call for a different approach . . . .’” Jonathan H. Adler, West Virginia v. EPA: Some Answers About Major Questions, CATO SUP. CT. REV. 2021–2022, at 52–53 (quoting West Virginia, 142 S. Ct. at 2608).
132. West Virginia, 142 S. Ct. at 2616 (emphasis added).
133. Id. at 2628 (Kagan, J., dissenting).
134. Id.
shifting is just too new and too big a deal for Congress to have
authorized it in Section 111’s general terms.” 135

As one observer put it, “West Virginia v. EPA represents a
missed opportunity to clarify and ground the major questions
doctrine . . . “136 Rather than declare how the major questions
doctrine might inform statutory interpretation, the Court largely
overlooked the need for a mousehole. By doing so, West Virginia
stopped short of suggesting a marriage between the major
questions and nondelegation doctrines, but it moved closer to
Justice Gorsuch’s approach in NFIB v. OSHA.

D. Categorizing OSHA’s Mandate as a Major Question Without
Textual Analysis Weakensthe Doctrine as a Legitimate
Canon of Interpretation

The problem with eliminating an analysis of statutory
ambiguity from the major questions doctrine is that it calls for a
subjective inquiry to which opponents of the major questions
doctrine often point: “When is a question major enough?”137 For
example, would Justice Gorsuch consider the OSHA mandate a
major question if it covered ten million people instead of eighty-
four million? Two million? Two million is still a substantial number
of Americans. Without exploring the statutory language, the
major questions doctrine ceases to follow an objective and
textualist framework.

For textualists such as Justice Gorsuch, this is problematic.138 An
objective framework served as a shield (whether effective or not)

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135. Id. at 2633–34.
137. Justice Kavanaugh identifies this problem following his statement that the major
questions doctrine first asks whether the statutory language was ambiguous. “[T]he critique
of that canon and the difficulty in applying it is figuring out when something is major
eough.” Oral argument at 31:08, NFIB v. OSHA, 142 S. Ct. 661 (2022) (No. 21A244),
https://www.oyez.org/cases/2021/21A244. See also Major Questions Objections, 129 HARV.
L. Rev. 2191, 2192 (quotation omitted) (suggesting that the major questions doctrine is
already a fruitless quest and that it simply represents situations “where the Court’s olfactory
sense detects the odor of administrative waywardness”); Jacob Loshin & Aaron
Nielson, Hiding Nondelegation in Mouseholes, 62 ADMIN. L. REV. 19, 45 (2010) (“It should be no surprise,
then, that the Court applies the elephants-in-mouseholes doctrine seemingly haphazardly;
those in the majority one day are in the dissent the next, and vice versa.”).
138. In Justice Breyer’s dissent, he states that the majority “substitutes judicial diktat
for reasoned policymaking.” NFIB, 142 S. Ct. at 674 (Breyer, J., dissenting). Had he addressed
the concurrence, those remarks might have been more scathing.
from critics who argue that the doctrine already deprives agencies of power to solve precisely the kinds of major questions they are equipped to address. The vaccine mandates were doubtless questions of great economic and political significance. Performing a textual analysis of OSHA’s authority might not have changed the result in NFIB v. OSHA, but deciding that the presence of an elephant itself disqualifies agency action without analyzing the size of the “mousehole” detracts from the major questions doctrine as a legitimate means of interpretation. Even before recent cases like NFIB v. OSHA and West Virginia v. EPA, many questioned the major questions/elephant-in-mousehole doctrine’s sincere application. According to some critics, the doctrine’s poorly drawn boundaries led to a standard that is subjective at best, and totally manipulable at worst. This viewpoint often suggested that the doctrine was nothing more than a tool to achieve ideological outcomes. For example, following the NFIB v. OSHA decision, one commentator concluded: 

"It is hard to view this case as anything other than a sign that at least in high-stakes political cases, the conservative Justices on the modern Roberts Court no longer feel the need to follow a textualist or formalist approach to statutory interpretation even as a pretext to justify reaching their preferred interpretive outcomes."

140. See Becker-Cohen & Fernandes, supra note 50 (“Textualism’s absence from the per curiam opinion, which Gorsuch joined, was certainly notable, but the lack of close textual analysis in the concurring opinion that he separately penned was downright conspicuous.”).
141. See Sohoni, supra note 95, at 1421 (footnotes omitted) (“King’s use of the major questions exception has provoked a great deal of commentary, much of it negative. A growing body of scholarship has criticized the major questions exception on a variety of scores—for its uncertain contours, its susceptibility to judicial manipulation, and its capacity to corrode the powers of agencies.”).
142. See Nathan Richardson, Keeping Big Cases From Making Bad Law: The Resurgent “Major Questions” Doctrine, 49 CONN. L. REV. 355, 381–82 (2016) (asserting that that poorly drawn boundaries “is one of the most important flaws in the doctrine”).
143. Anita Krishnakumar, Some Brief Thoughts on Gorsuch’s Opinion in NFIB v. OSHA, ELECTION LAW BLOG (Jan. 15, 2022, 8:06 AM), https://electionlawblog.org/?p=126944. See also Wendy Parmet & Dorit Reiss, Major Questions About Vaccine Mandates, the Supreme Court, and the Major Questions Doctrine, BILL OF HEALTH (Jan. 5, 2022), https://blog.petrieflom.law.harvard.edu/2022/01/05/major-questions-vaccine-mandates-supreme-court/ (“In the absence of principled guidelines, the doctrine serves as a major transfer of federal policymaking power from the elected branches to an unelected and unaccountable judiciary, which gets to pick which questions are major and which are not.”).
To avoid accusations of this type, the Court should maintain—at minimum—the requirement of identifying statutory ambiguity, characterized as a mousehole. Anything less cannot pretend to align with textualist principles.

Admittedly, requiring ambiguity is not a high bar itself and may do little to curtail inconsistent adjudication because judges have differing opinions on when text becomes “ambiguous.” Indeed, some have observed that “the word [ambiguous] itself is ambiguous.” 144 Others, more cynically, pose that ambiguity is a smokescreen allowing judges to consult their own views on policy, whether openly, quietly, or unconsciously. 145 On top of concerns about judicial restraint, some also worry that eliminating this step will have a chilling effect on agency action. 146 With these criticisms in mind, taking away the small piece of supposed objectivity in major questions, which requires a discovery of textual ambiguity, weakens the legitimacy of the canon. 147

There must exist a boundary that agency authority cannot cross given that Congress cannot delegate its legislative powers. This is what the nondelegation doctrine intended to control, but the major questions doctrine entailed more than just inventing an imaginary guideline for when something becomes a major question. Vague language or ancillary provisions (mouseholes) that tried to hide delegation of these powers surfaced amid the rise of textualism on the Court. Thus, the doctrine was founded on textualist principles.

Maybe textualists have moved on from these types of self-regulating principles for administrative law. Indeed, for many, the

144. Ward Farnsworth, Dustin F. Guzar & Anup Malani, Ambiguity About Ambiguity: An Empirical Inquiry Into Legal Interpretation, 2 J. LEGAL ANALYSIS 257, 258 (2010). Another scholar, Lisa Heinzerling, has pointed out that there is no “general presumption that Congress speaks clearly when it delegates big questions to agencies; many prior cases expose the factual accuracy of such a presumption.” Heinzerling, supra note 95, at 1959. This highlights another hole that already existed with the major questions doctrine.


146. See Jonas J. Monast, Major Questions About the Major Questions Doctrine, 68 ADMIN. L. REV. 445 (2016). In discussing the implications of the major questions doctrine for agency rulemaking, Monast argues that agency rulemaking requires deliberate calculations and “[i]f the agency believes that the courts will apply the major questions doctrine rather than Chevron step one and two, it may lack the confidence necessary to proceed.” Id. at 476.

147. If there is no objectivity, it becomes impossible for people to know the law. “This uncertainty is unacceptable for a judicial doctrine.” Loshin & Nielson, supra note 137, at 45. See also NetworkIP, LLC v. FCC, 548 F.3d 116, 122 n.5 (D.C. Cir. 2008) (citing George Orwell, ANIMAL FARM 102-03 (1946)) (“The . . . notion of unknowable law is literally Orwellian.”).
collection of existing regulatory law is evidence enough that agencies already exercise substantial legislative power, and therefore require more judicial oversight than what Chevron facilitates.\footnote{See Sean P. Sullivan, Powers, But How Much Power? Game Theory and the Nondelegation Principle, 104 VA. L. REV. 1229, 1229 (2018) ("How can a constitutional limitation on Congress’s ability to delegate legislative power be reconciled with the huge body of regulatory law that now governs so much of society?").} In any event, the Court must continue to look for judicially manageable principles in administrative law. Justice Breyer’s simplified assertion that the Court must find balance between the need for regulation and the need for checks and controls is a useful starting point. Textualists should not discard textualist principles with major questions.

CONCLUSION

In 2015, Justice Kagan famously expressed that, when it comes to statutory interpretation, “we are all textualists now.”\footnote{Harvard Law School, The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg; see also Marjorie O. Rendell, 2003 — A Year of Discovery: Cyborgenics and Plain Meaning in Bankruptcy Cases, 49 VILL. L. REV. 887, 887 (2004) (“We are all textualists now. No doubt the major methodological development in Supreme Court jurisprudence over the last few decades has been the ascendancy of the plain meaning approach to interpreting statutes.”).} Perhaps nobody on the Court has been more dedicated to this idea than Justice Gorsuch. In his first case on the Supreme Court in 2017, he remarked, “[w]ouldn’t it be a lot easier if we just followed the plain text of the statute? What am I missing?”\footnote{Oral argument at 43:7, Perry v. Merit Sys. Bd., 137 S. Ct. 1975 (2017) (No. 16-399), https://www.oyez.org/cases/2016/16-399.} Such a reputation invites the question: How can Justice Gorsuch justify his new version of the major questions doctrine?

Despite its fading credibility, Chevron sought to provide the appropriate controls for a rapidly growing administrative state. The major questions doctrine then emerged as another check to be used alongside Chevron, but the contemporaneous combination of nondelegation and major questions, at least according to Justices Gorsuch, Alito, and Thomas, effectively divorces major questions from Chevron.

A requirement to identify ambiguity before declaring a major question may be entirely ineffective. It can be manipulated by
judges who seemingly create statutory ambiguity when there may be none, thereby diminishing agencies’ ability to create needed regulation. Indeed, the architect of elephants in mouseholes, Justice Scalia, confessed that policy canons such as the major questions doctrine can be “dice loading rules” that are “a lot of trouble” to “the honest textualist.” But, at least to some degree, analyzing statutory ambiguity grounds the major questions doctrine in textualist principles.

Thus, while substantive canons themselves may be shaky tools of interpretation, textualists like Justice Gorsuch should not complicate matters by eliminating this shred of textualist foundation. Failure to maintain this requirement may disrupt the balance of administrative law by providing excessive discretion to courts to determine when a question is “major enough.”
