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The Ultimate Congressional Workaround: Why Businesses Should Advocate the Return of a Robust and Originalist Nondelegation Doctrine after *NFIB v. OSHA* and *Biden v. Missouri*

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ABSTRACT

At the height of the COVID-19 pandemic, the Biden administration looked for a way to stop the spread of the virus. To stop the spread, the Biden administration announced a COVID-19 vaccine mandate for all businesses with over 100 employees and for all healthcare facilities receiving funds from the Center for Medicare and Medicaid Services ("CMS"). OSHA and CMS would administer the mandates, respectively. The agencies needed to administer the vaccine mandate because Congress failed to enact a mandate, and the agencies had broad and indefinite regulatory power in enacting public health measures. In *NFIB v. OSHA* the United States Supreme Court put the business vaccine mandate on hold relying on the major questions doctrine, which states that administrative agencies may not decide questions of economic or political significance without clear congressional authorization. In *Biden v. Missouri*, the Court allowed the vaccine mandate to go into effect for healthcare workers. The Court was satisfied that the Secretary of Health and Human Services had adequate statutory authority to implement the mandate for healthcare workers. These two decisions left unclear implications for businesses within the realm of the nondelegation and major questions doctrines. Then in *West Virginia v. EPA*, the Supreme Court added some clarity to the major questions doctrine but failed to fully explain when the doctrine applies. This article posits that the United States Supreme Court should adopt an originalist and more robust nondelegation doctrine to protect businesses from overreaches by the federal government and administrative agencies. While the Court's recent use of the major questions doctrine was a step in the right direction, a more robust nondelegation doctrine is needed.

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I. INTRODUCTION

"OSHA doing this [vaccine] mandate as an emergency workplace safety rule is the ultimate workaround for the [f]ederal [government] to require vaccinations,"[1] tweeted Stephanie Ruhle, a contributor to NBC news. President Biden's Chief of Staff, Ron Klain, retweeted Mrs. Ruhle's tweet.[2] Ultimately, Klain's retweet garnered the attention and ire of both the Fifth Circuit and Justice Neil Gorsuch in opinions on the vaccine mandate litigation.[3]

This "ultimate workaround" was needed because Congress had never mandated the vaccination of American civilians and was not likely to act.[4] With Congress's failure to act, the Biden administration tried to work around Congress by having the mandate enforced by the Occupational Safety and Health Administration ("OSHA").[5] This was because Congress had "delegated broad powers to . . .OSHA to protect worker safety, including the power to require worker vaccinations."[6] Relying on scattered sections of statutes delegating power from Congress, the Biden administration pushed forward and announced the mandate.[7]

The United States Supreme Court in *National Federation of Independent Business* ("NFIB") *v. Department of Labor, Occupational Safety and Health Administration* was not impressed with the "ultimate workaround" and held that NFIB was likely to succeed on the merits in their claim that OSHA exceeded its statutory authority.[8] The Court reasoned that the vaccine mandate for businesses involved a question of major political or economic significance, therefore the mandate's enactment required clear congressional authorization.[9] This holding renewed the debate over the future of the nondelegation doctrine[10] and major questions doctrine.[11]

1. Stephanie Ruhle (@SRuhle), TWITTER (Sept. 9, 2021 3:25 PM), https://twitter.com/sruhle/status/1436063357958823940?lang=en.

2. Jordan Boyd, *Supreme Court Cites Biden Chief of Staff Ron Klain's Twitter Feed in Smackdown of Illegal Vaxx Mandate*, THE FEDERALIST (Jan. 13, 2022), https://thefederalist.com/2022/01/13/supreme-court-cites-biden-chief-of-staff-ron-klains-twitter-feed-in-smackdown-of-illegal-vaxx-mandate.

3. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) ("It seems, too, that the agency pursued its regulatory initiative only as a legislative 'work-around.'"); BST Holdings, L.L.C. v. Occupational Safety and Health Admin, 17 F. 4th 604, 612, 612 n. 13 (5th Cir. 2021) ("After the President voiced his displeasure with the country's vaccination rate in September, the Administration pored over the U.S. Code in search of authority, or a 'work-around,' for imposing a national vaccine mandate. The vehicle it landed on was an OSHA ETS.").

4. David B. Rivkin Jr. & Andrew M. Grossman, *The Vaccine Mandate Case May Mark the End of the 'Work Around' Era*, WALL ST. J. (Jan. 6, 2022), https://www.wsj.com/articles/end-of-work-arounds-biden-executive-order-vaccine-mandate-covid-omicron-supreme-court-11641505106; Evan Gerstmann, *How A White House Tweet May Doom Biden's Workplace Vaccine Mandate*, FORBES (Jan. 8, 2022), https://www.forbes.com/sites/evangerstmann/2022/01/08/how-a-white-house-tweet-may-doom-bidens-workplace-vaccine-mandate/?sh=70cba9205e5d.

5. Gerstmann*, supra* note 4.

6. *Id*.

7. *Id.*

8. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 664–65 (2022) (per curiam).

9. *Id.* at 665.

10. The nondelegation doctrine "prevent[s] Congress from intentionally delegating its legislative power to unelected officials," *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

11. The major questions doctrine requires "'[c]ongress to speak clearly' if it wishes to assign to an executive agency decisions 'of vast economic and political significance,'" *Id*. at 667 (Gorsuch, J., concurring) (quoting Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)).

Many would classify the nondelegation doctrine as a "dead letter."[12] Professor Cass Sunstein aptly stated that the doctrine has had "one good year, and 211 bad ones (and counting)."[13] The United States Supreme Court has not struck down a delegation of congressional authority on nondelegation grounds since 1935, the one good year.[14] That year, the Court decided *Panama Refining Co. v. Ryan*[15] and *A.L.A. Schechter Poultry Corp. v. United States*.[16] In both cases, the Court held that Congress had unconstitutionally delegated its power to the executive branch under the National Industrial Recovery Act.[17] Since 1935, there have been more challenges under the nondelegation doctrine, but none have been successful in the Supreme Court.[18]

That may be changing. In 2019, the Supreme Court in *Gundy v. United States* seemed poised to take a serious look at reforming the nondelegation doctrine.[19] In that case, decided by an eight-member Court without a majority opinion, cracks in the nondelegation jurisprudence began to show. Four justices called for the Court to revisit the nondelegation doctrine.[20] But again, as in every case in the prior 84 years, the nondelegation challenge failed.[21]

The call to revisit the doctrine is part of the "never-ending hope" to reinvigorate the doctrine.[22] Professor Gary Lawson called the nondelegation doctrine "the Energizer Bunny of constitutional law: No matter how many times it gets broken, beaten, or buried, it just keeps going and going."[23] With the recent change in the composition of the Court, the hope may yet become reality.[24]

With the habitual non-enforcement of the nondelegation doctrine, some courts have used the major questions doctrine to protect the separation of powers between the legislative and executive branches.[25] This doctrine requires that when administrative agencies make decisions involving matters of major economic or political

12. Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 145 (2005); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2364 (2001) ("It is, after all, a commonplace that the nondelegation doctrine is no doctrine at all.").

13. Cass R. Sunstein, *Nondelegation Canons*, 67 UNIV. OF CHICAGO L. REV. 315, 322 (2000).

14. *Id.* at 315.

15. Panama Refining Co. v. Ryan, 293 U.S. 388, 388 (1935).

16. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 495 (1935).

17. *Id.* at 537–38 ("Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."); *Panama Refining Co.*, 293 U.S. at 433 ("We see no escape from the conclusion that the Executive Orders of July 11, 1933, and July 14, 1933, Nos. 6199, 6204 and the regulations issued by the Secretary of the Interior thereunder, are without constitutional authority.").

18. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 437 (2001); Touby v. United States, 500 U.S. 160 (1991); Mistretta v. United States, 488 U.S. 361 (1989).

19. Mila Sohoni, *Argument Preview: Justices Face Nondelegation Challenge to Federal Sex-Offender Registration Law*, SCOTUSBLOG (Sept. 25, 2018, 10:11 AM), https://www.scotusblog.com/2018/09/argument-preview-justices-face-nondelegation-challenge-to-federal-sex-offender-registration-law.

20. Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment); *id.* at 2131 (Gorsuch, J., dissenting).

21. *Id.* at 2121.

22. Daniel E. Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us about What to Expect When We're Expecting*, 71 EMORY L. J. 417, 423 (2022).

23. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002).

24. Walters, *supra* note 22, at 420 ("While Justice Kavanaugh did not participate in *Gundy*, he later indicated that he too was persuaded by Justice Gorsuch's dissent. . . With the passing of Justice Ginsburg and her replacement by Justice Barrett, who is likely sympathetic to Justice Gorsuch's views as well.").

25. *See infra* notes 47–75 with accompanying text.

significance, there must be congressional authorization supporting the agency's authority to make the decision.[26] The most recent application of this doctrine came from the litigation in *NFIB v. OSHA*, *Biden v. Missouri*, and *West Virginia v. EPA*.[27]

Following the decisions in *NFIB, Missouri*, and *West Virginia*, how should businesses view the Court's decisions on the nondelegation and major questions doctrines? This article proposes that the Supreme Court is poised to advance a stronger major questions doctrine in lieu of a more traditional nondelegation doctrine. Even with a strengthened major questions doctrine, the doctrine fails to protect businesses from broad and unsupported government regulations because the doctrine cannot be consistently administered. Part II of the article addresses the history of the nondelegation doctrine and major questions doctrine. Part III discusses the United States Supreme Court's decisions in *NFIB v. OSHA, Biden v. Missouri,* and *West Virginia v. EPA*. Part IV argues that the future of protecting business, a purely private activity, from the overreach of the federal government lies within a robust and originalist nondelegation doctrine rather than a stronger major questions doctrine. Part V concludes.

II. THE HISTORICAL FOUNDATIONS FOR THE NONDELEGATION AND MAJOR QUESTIONS DOCTRINE

A. The Historical Foundations of the Nondelegation Doctrine

The judicial recognition of the nondelegation doctrine can be traced back to the opinion of Chief Justice John Marshall in *Wayman v. Southard*.[28] In that case, Chief Justice Marshall wrote that "[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[29] Chief Justice Marshall further explained that Congress itself must regulate the important subjects, but those who act under the power given by Congress may "fill up the details."[30]

Before *Panama Refining Co*. and *A.L.A. Schechter Poultry*, the Supreme Court decided *J.W. Hampton, Jr., & Co. v. United States*, which introduced the modern

26. Daniel J. Sheffner, *The Major Questions Doctrine*, CONG. RSCH. SERV. (Apr. 6, 2022), https://crsreports.congress.gov/product/pdf/IF/IF12077.

27. *NFIB v. OSHA* was a legal challenge by states, businesses, and nonprofit organizations to OSHA's COVID-19 vaccine mandate for businesses that had more than 100 employees, Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 662–63 (2022) (per curiam). *Biden v. Missouri* was a legal challenge by the State of Missouri and various other states to CMS's COVID-19 vaccine mandate for healthcare workers, Biden v. Missouri, 142 S. Ct. 647, 651 (2022) (per curiam). *West Virginia v. EPA* was a legal challenge by West Virginia and other states to the EPA's regulatory power to limit coal emissions under the Clean Air Act, West Virginia v. EPA, 142 S. Ct. 2587, 2599–2600 (2022).

28. Wayman v. Southard, 23 U.S. 1, 42–43 (1825).

29. *Id.*

30. *Id.* at 43. (The Court further propounded this view in 1892 in Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892). "Congress cannot delegate legislative power to the president[.] [It] is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.").

framework by which all delegations of power are analyzed.[31] The Court announced an "intelligible principle" test, which states that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[32] This test proffered by Chief Justice Taft remains good law today.[33]

Before an agency can make a rule, Congress must pass an enabling statute giving the administrative agency the power to promulgate the rule.[34] In most situations, this is where Congress articulates an intelligible principle for an agency to follow.[35] An intelligible principle must describe the way "the person or body authorized to act is directed to conform."[36] More simply, Congress passes a law that gives the head of an administrative agency the authority to create rules and regulations for a specified reason.

As with any judicial standard, the intelligible principle test has earned some praise and some criticism. In support of the intelligible principle test, Justice Harry Blackmun reasoned in *Misretta v. United States* that, in "applying this 'intelligible principle' test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[37] Justice Blackmun understood the complexities of government, and the use of the intelligible principle test allowed Congress to set the general policies, determine which agency received the congressional delegation, and place any limits on the delegated power.[38] And it was up to the administrative agencies to do the requisite fact-finding to support the broad congressional policy.[39] A plurality of the Court reaffirmed this view in *Gundy v. United States*.[40] Justice Elena Kagan noted that under the intelligible principle test, Congress can give the administrative agency some degree of flexibility "to deal with real-world constraints" in carrying out its delegated functions.[41] Justice Blackmun's observation about the complexities of government and its functionality in *Mistretta* and the reaffirmance by Justice Kagan in *Gundy* are key in supporting the intelligible principle test because the test allows Congress to set broad policy goals and the agency has the ability and flexibility to best achieve the congressional policy goals.

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31. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
32. *Id.*
33. *Id*.; Gundy v. United States 139 S. Ct. 2116, 2123 (2019).
34. *Enabling Statute*, BLACK'S LAW DICTIONARY (5th pocket ed. 2016) ("A law that permits what was previously prohibited or that creates new powers; esp., a congressional statute conferring powers on an executive agency to carry out various delegated tasks.").
35. Touby v. United States, 500 U.S. 160, 165 (1991).
36. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 458 (2001); *Touby*, 500 U.S. at 165; *J.W. Hampton,* 276 U.S. at 409.
37. Mistretta v. United States, 488 U.S. 361, 372 (1989).
38. *Id*. at 372–73 (quoting Am. Power & Light, Co. v. SEC, 329 U.S. 90, 105 (1946)).
39. *Id*. at 372 (citing Opp Cotton Mills v. Adm'r, of Wage & Hour Div. of Dep't of Labor, 312 U.S. 126, 145 (1941)).
40. Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) (quoting *Mistretta*, 488 U.S. at 372) ("Consider again this Court's long-time recognition: 'Congress simply cannot do its job absent an ability to delegate power under broad general directives.'").
41. *Id*.

But of course, the intelligible principle test has its detractors. Many academics and judges alike have called the test toothless, because it allows nearly all delegations to stand.[42] Ultimately, this has led to many calls for reform of the test.[43] Some of these reforms would directly involve congressional action where Congress could invalidate a major agency rule with a majority vote in both chambers and approval by the president.[44] Others involve judicial remedies where courts apply clear statement rules or other statutory construction canons to handle nondelegation questions.[45] Regardless of the form, reformation on the nondelegation doctrine and the intelligible principle test is highly sought after.

The intelligible principle test gives Congress and federal agencies wide discretion in the delegation of legislative power. The Supreme Court has generally held that so long as there is a guiding principle for the agency in the promulgation of its rules, the nondelegation doctrine will not be violated. This amorphous test has led to calls for more robust enforcement of the nondelegation doctrine through the enforcement of the major questions doctrine which requires "Congress to speak clearly if it wishes to assign to an executive agency decisions 'of vast economic and political significance.'"[46]

B. The Historical Foundation of the Major Questions Doctrine

The judicial origins of the major questions doctrine can be traced to the decision in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co*.,[47] and the doctrine began to develop in *FDA v. Brown & Williamson Tobacco Corp.*[48] In *Brown & Williamson*, the FDA relied on a few provisions within the Food, Drug, and Cosmetic Act when trying to regulate the use of tobacco products for children

42. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 77 (2015) (Thomas, J., concurring in the judgment); Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1947 (2020) ("In practice, the 'intelligible principle' requirement has not done much to constrain delegation to administrative agencies. While Congress may not grant an administrative agency a 'blank check' to do anything and everything, virtually anything short of that will do."); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1508 (2015) ("Hesitant to intrude in policy-making, the Court applies the 'intelligible principle' test, which finds nearly all statutory standards to be 'intelligible.'").

43. *Gundy*, 139 S. Ct. at 2131 (2019) (Alito, J., concurring); *id.* at 2131 (Gorsuch, J., dissenting); Adler & Walker, *supra* note 42, at 1934–35.

44. Adler & Walker, *supra* note 42, at 1934–35. (Discussing application of the Congressional Review Act and the Regulations from the Executive in Need of Scrutiny Act).

45. *Id.* at 1934. ("Clear statement rules and various canons of construction serve to address nondelegation concerns."). S*ee also* Whitman v. Am. Trucking Assn's, 531 U.S. 457, 487 (Thomas, J., concurring) ("On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.").

46. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

47. MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231–32 (1994) (finding that the regulation promulgated was "a fundamental revision of the statute" which "was not the idea Congress enacted into law in 1934.").

48. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("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.")).

and adolescents.[49] The Court found the FDA's reliance on these statutory provisions in the act ran contrary to Congress's intent, which prohibited the FDA's regulation of tobacco, and held the FDA did not have the ability to regulate the use of tobacco products.[50] The Court noted that even though the issue in front of the FDA was important, any agency regulatory action "must always be grounded in a valid grant of authority from Congress."[51] In 2014, the Court again addressed the doctrine—this time, in the context of the EPA's regulatory power—in *Utility Air Regulatory Group v. EPA*.[52] In that case, the Court grappled with a claim of a vast delegation of regulatory power over greenhouse gases and determined the EPA's understanding of the statute would massively overhaul the EPA's regulatory authority without congressional authorization.[53] The expansion of authority would have given EPA extravagant power over the national economy while being "unrecognizable to the Congress that designed it."[54] For such a vast claim of authority to be valid, the Court held, there must have been clear congressional authorization.[55] Since the EPA's regulatory action involved a decision of "vast economic and political significance" and there was no clear authorization from Congress, the Court rejected the expansion of power under the statute.[56]

Then, in 2019's *Gundy v. United States*, the doctrine made another appearance.[57] Though his opinion did not garner a majority of the Court, Justice Gorsuch reasoned in dissent that "under [the Supreme Court's] 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."[58] *Gundy* was decided with an eight-member court,[59] and only had four members of the Court fully sign onto Justice Kagan's opinion.[60] The crucial fifth vote came from Justice Samuel Alito who concurred only in the judgment.[61] In his

49. *Brown & Williamson Tobacco Corp*., 529 U.S. at 125.

50. *Id*. at 133. *See also id.* at 160–61 (The Court was "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. . . . It is therefore clear, based on the FDCA's overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.").

51. *Id.* at 161.

52. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 323–24 (2014).

53. *Id.* at 324.

54. *Id*.

55. *Id.*

56. *Id.* ("Since, as we hold above, the statute does not compel EPA's interpretation, it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.").

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

58. *Id.* (internal quotation marks omitted).

59. *Id.* at 2116 (Justice Kavanaugh did not participate in the decision. He joined the Court roughly a week after oral argument.).

60. *Id.* at 2118.

61. *Id.* at 2130 (Alito, J., concurring in the judgment).

concurrence in the judgment only,[62] Justice Alito called for a reexamination of the nondelegation doctrine.[63]

The onset of the COVID-19 pandemic spawned a new round of cases involving the major questions doctrine. The first case was *Alabama Association of Realtors v. HHS*.[64] This case involved a challenge to the nationwide eviction moratorium imposed by the Centers for Disease Control ("CDC"). The United States District Court for the District of Columbia found the nationwide eviction moratorium exceeded the CDC's statutory authority[65] but stayed its order pending appeal.[66] The issue of the stay made its way to the United States Supreme Court.[67] The Court initially denied a motion to vacate the stay as the moratorium was set to expire within a few weeks of the Court's decision.[68] The CDC then extended the eviction moratorium and further litigation ensued over the district court's stay.[69] Ultimately, the Supreme Court vacated the stay, holding that the plaintiffs had a likelihood of success on the merits because the CDC likely exceeded its statutory authority in enforcing the moratorium.[70] The Court invoked the major questions doctrine based on the impact the moratorium had on landlords.[71] The Court concluded that the CDC's expansive claim of authority to impose the eviction moratorium was unprecedented.[72] The Court further noted that there had never been any regulation of the same size or scope of the moratorium premised on the statutory source from which the CDC claimed its power.[73] This lack of statutory authority and the requirement that

62. *Id*. at 2131 ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment. Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.").

63. *Id*. at 2130–31 ("The Constitution confers on Congress certain 'legislative powers,' and does not permit Congress to delegate them to another branch of the Government. Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards.") (internal citations omitted).

64. Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2320 (2021).

65. Alabama Ass'n of Realtors v. United States Dep't of Health & Hum. Servs., 539 F. Supp. 3d 29, 42 (D.D.C. 2021), *appeal dismissed*, No. 21-5093, 2021 WL 4057718 (D.C. Cir. Sept. 3, 2021) ("In sum, the Public Health Service Act authorizes the Department to combat the spread of disease through a range of measures, but these measures plainly do not encompass the nationwide eviction moratorium set forth in the CDC Order. Thus, the Department has exceeded the authority provided in § 361 of the Public Health Service Act, 42 U.S.C. § 264(a).").

66. Alabama Ass'n of Realtors v. United States Dep't of Health & Hum. Servs., 539 F. Supp. 3d 211, 217–18 (D.D.C. 2021) (The district court found that it was unlikely HHS would be successful on the merits in its appeal, but it stayed its decision because the CDC's eviction moratorium "raised serious legal questions", the CDC would suffer an irreparable injury in protecting people from COVID, and the plaintiffs, the landlords, could suffer the risk of economic injury based upon the enforcement of the moratorium. The district court wanted to ensure further legal review before the ruling went into effect.).

67. Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2320, 2320 (2021).

68. *Id.* (Kavanaugh, J., concurring) (Justice Kavanaugh concluded that the moratorium clearly exceeded the CDC's statutory authority and would require congressional authorization to extend the stay. Since it was only a few weeks until the moratorium would expire and during this process congressionally allocated rent funds were being distributed, the denial was warranted.).

69. Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2487 (2021) (per curiam).

70. *Id.* at 2488 ("The applicants not only have a substantial likelihood of success on the merits—it is difficult to imagine them losing.").

71. *Id*. at 2489.

72. *Id.*

73. *Id*.

Congress speak when authorizing an agency to make decisions of vast economic and political significance required that the stay be vacated.[74] Only Congress itself could authorize the continuation of the moratorium.[75]

After the battle over the nationwide eviction moratorium, the nation's attention then turned to the looming Supreme Court fight over the COVID vaccine mandate for businesses and healthcare workers, imposed by the Biden administration.[76]

III. THE UNITED STATES SUPREME COURT TAKES ON ADMINISTRATIVE AGENCIES WITH THE MAJOR QUESTIONS DOCTRINE

A. NFIB v. OSHA

NFIB v. OSHA arose from OSHA's rule that required businesses with 100 or more employees to be vaccinated against COVID-19, or if not vaccinated, to test weekly at their own expense.[77] Before the Supreme Court agreed to hear the case, various states and private plaintiffs had petitioned for review of the vaccine mandate in their respective United States Courts of Appeal.[78] All of these petitions were consolidated in the Sixth Circuit.[79] The Sixth Circuit held that a stay of the vaccine mandate rule was not justified, finding that vaccine mandate was not a major question because "OSHA ha[d] regulated workplace health and safety on a national scale since 1970, including controlling the spread of disease."[80] The court further held the nondelegation challenge would fail on the merits because OSHA followed the intelligible principle set forth by Congress, and the intelligible principle gave the Secretary of Labor the ability to set "emergency temporary standards" which protected workers from an infectious disease in the workplace.[81]

After briefing and oral argument, the Supreme Court stayed the vaccine mandate.[82] In support of granting the stay, the Court reasoned that the states and other plaintiffs would likely succeed on the merits of their claim that the Secretary of Labor lacked authority to impose the mandate because the mandate exceeded the statutory authority given to him.[83] The Court posed the question of "whether the Act plainly authorizes the Secretary's mandate?"[84] The Court in its answer wrote clearly and unambiguously that "It does not."[85] As the Court explained, "[t]he Act

74. *Id*. at 2489–90.
75. *Id.* at 2490.
76. Amy Howe, *Biden Vaccine Policies Face Supreme Court Test Amid Nationwide COVID-19 Surge*, SCOTUSBLOG (Jan. 6, 2022), https://www.scotusblog.com/2022/01/biden-vaccine-policies-face-supreme-court-test-amid-nationwide-covid-19-surge.
77. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 662 (2022) (per curiam).
78. *Id*. at 664.
79. *Id*. (The consolidation was done pursuant to 28 U.S.C. § 2112(a) which allows the federal courts of appeal to directly review the orders or actions of an administrative agency.).
80. In re: MCP No. 165, 21 F.4th 357, 372 (6th Cir. 2021).
81. *Id.* at 387.
82. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666–67.
83. *Id.* at 664–65.
84. *Id*. at 665.
85. *Id.*

empowers the Secretary to set workplace safety standards, not broad public health measures."[86]

The Court reasoned that OSHA does have the ability to regulate some aspects of the workplace with regard to COVID-19,[87] but for OSHA to require vaccines, it needed clear congressional authorization because the mandate was a "significant encroachment into the lives— and health—of a vast number of employees."[88] OSHA had not received this authorization, and, in fact, the U.S. Senate had passed a resolution condemning the mandate making it abundantly clear the house of Congress did not approve of this use of OSHA's regulatory power.[89] In conclusion, the Court clearly drew the line of administrative power over OSHA when writing that "It is telling that OSHA, in its half-century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace."[90] Furthermore, the Court reasoned that, "this 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach."[91]

Justice Neil Gorsuch joined the per curiam majority but also wrote a separate concurrence.[92] Justice Gorsuch emphasized how OSHA's mandate failed under the major questions doctrine.[93] After discussing the doctrine, Justice Gorsuch then framed the interaction between the major questions doctrine and nondelegation doctrine.[94] He pointed out that the "major questions doctrine serves a similar function [as the nondelegation doctrine] by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power."[95] Applying the two doctrines to the OSHA mandate, he concluded that either doctrine precluded the administration of the rule.[96] Justice Gorsuch suggested the power to issue such a mandate rests with the states and Congress and not with OSHA.[97]

The dissent reasoned that OSHA was exercising the power Congress gave it: the ability to ensure health and safety in the workplace.[98] OSHA, through the emergency temporary standard that required either vaccination or masking and testing, believed the measure would have saved many lives and prevented thousands of hospitalizations.[99] The dissent articulated that OSHA's rule fit perfectly into the congressional authorization that allowed OSHA to take action to prevent workplace

86. *Id*.
87. *Id*. at 665–66.
88. *Id*. at 665.
89. *Id*. at 666 (citing S. J. Res. 29, 117th Cong., 1st Sess. (2021)).
90. *Id*.
91. *Id*.
92. *Id.* at 667 (Gorsuch, J., concurring).
93. *Id*. ("By any measure, that is a claim of power to resolve a question of vast national significance. Yet Congress has nowhere clearly assigned so much power to OSHA.").
94. *Id*. at 668.
95. *Id*. at 669.
96. *Id*. ("And both hold their lessons for today's case. On the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really did endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority. Under OSHA's reading, the law would afford it almost unlimited discretion—and certainly impose no 'specific restrictions' that 'meaningfully constrain' the agency.").
97. *Id*. at 670.
98. *Id.* at 670 (Breyer, Sotomayor, Kagan, JJ., dissenting).
99. *Id.* at 671.

harm.[100] The dissent concluded that "OSHA . . . responded in the way necessary to alleviate the 'grave danger' that workplace exposure to the 'new hazard' of COVID-19 poses to employees across the Nation."[101]

B. Biden v. Missouri

Biden v. Missouri arose from CMS's final rule requiring healthcare care workers to be vaccinated against COVID-19.[102] The State of Missouri, along with other states, sued to enjoin the final rule.[103] The United States District Court for the Eastern District of Missouri granted the states' request for a preliminary injunction against the enforcement of the mandate.[104] When discussing the plaintiff's likelihood of success on the merits, the district court held that Congress did not provide "CMS the authority to enact the regulation at issue here."[105] In support of that premise, the court invoked the major questions doctrine.[106] In addition to the major questions doctrine, the court reasoned that "because [the] mandate significantly altered the balance between state and federal power, only a clear authorization from Congress would empower CMS" to issue the vaccine mandate.[107]

The district court limited the injunction to the plaintiffs in the lawsuit.[108] The Biden administration sought a stay of the injunction, but the administration's stay request was denied by the district court and the Eighth Circuit.[109] Following the two stay request denials, the United States Supreme Court granted review of the denial of the stay.[110] Ultimately, the Supreme Court granted the stay of the district court's injunction and allowed the mandate to go into effect.[111] In granting the stay, the Supreme Court concluded that the "Secretary's rule falls within the authorities that Congress has conferred upon him."[112] To support the conclusion, the Court

100. *Id.* at 671–72. (quoting 29 U.S.C. § 655(c)(1)) ("Once again, that provision commands—not just enables, but commands—OSHA to issue an emergency temporary standard whenever it 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.").
101. *Id*. at 676.
102. Missouri v. Biden, 571 F. Supp. 3d 1079, 1085 (E.D. Mo. 2021).
103. *Id.*
104. *Id.* at 1086.
105. *Id*.
106. *Id.* at 1087–88 ("First, Congress must speak clearly when authorizing an agency to exercise powers of vast economic and political significance. [ ] The mandate's economic cost is overwhelming. CMS estimates that compliance with the Mandate—just in the first year—is around 1.38 billion dollars. [ ] Those costs, though, do not take into account the economic significance this mandate has from the effects on facilities closing or limiting services and a significant exodus of employees that choose not to receive a vaccination. Likewise, the political significance of a mandatory coronavirus vaccine is hard to understate, especially when forced by the heavy hand of the federal government. Indeed, it would be difficult to identify many other issues that currently have more political significance at this time. Had Congress wished to assign this question fraught with deep economic and political significance to CMS, it surely would have done so expressly. [ ] It is especially unlikely that Congress would have delegated this decision to [CMS], which has no expertise in crafting' vaccine mandates. [ ]) (internal citations and quotation marks omitted).
107. *Id.*
108. *Id.* at 1105.
109. Biden v. Missouri, 142 S. Ct. 647, 651–52 (2022) (per curiam).
110. *Id.*
111. *Id.* at 652.
112. *Id*.

reasoned that, under 42 U.S.C. § 1395x(e)(9), "Congress has authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that 'the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.'"[113]

In dissent, Justice Thomas reasoned that the federal government failed to show on the merits that a stay was warranted.[114] Justice Thomas would have concluded that CMS lacked the statutory authority to impose the mandate and that the cited provisions allowed only for rules regarding the administration of the CMS programs.[115] He explained that "the Government has not made a strong showing that this hodgepodge of provisions authorizes a nationwide vaccine mandate."[116] In conclusion, Justice Thomas invoked the major questions doctrine.[117] Justice Thomas noted that if Congress wanted to give CMS the ability to impose a nationwide mandate, Congress would have given the authority explicitly.[118] Since Congress failed to give the authority, CMS's mandate failed under the major questions doctrine.[119] Also in dissent, Justice Alito concluded that the statutory authority the government relied on should be stronger, which implicitly alluded to the need for direct congressional authorization for the mandate.[120]

After the dust settled on the vaccine mandate litigation, it granted business owners the ability to operate their businesses without the watchful eye of the federal government looking over their shoulders to enforce a mandate that would have crushed the operations of a business. The Court left in place the mandate in the medical field, based upon a vast array of statutory provisions that allowed CMS to withhold funding unless it complied with the mandate. The Biden administration effectively cudgeled healthcare and medical providers into enforcing the will of the federal government at the potential expense of millions of dollars. One recurring theme appeared in both decisions: the major questions doctrine. After these decisions, there remains uncertainty about the contours—if not the importance—of the nondelegation and major questions doctrines. Businesses acutely feel this uncertainty.

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113. *Id*.
114. *Id*. at 655 (Thomas, J., dissenting).
115. *Id*.
116. *Id*. at 656.
117. *Id*. at 658 ("Finally, our precedents confirm that the Government has failed to make a strong showing on the merits. 'We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.' [ ] And we expect Congress to use 'exceedingly clear language if it wishes to significantly alter the balance between state and federal power.' [ ] The omnibus rule is undoubtedly significant—it requires millions of healthcare workers to choose between losing their livelihoods and acquiescing to a vaccine they have rejected for months. Vaccine mandates also fall squarely within a State's police power, [ ] and, until now, only rarely have been a tool of the Federal Government. If Congress had wanted to grant CMS authority to impose a nationwide vaccine mandate, and consequently alter the state-federal balance, it would have said so clearly. It did not.") (internal citations omitted).
118. *Id.*
119. *Id.*
120. *Id*. at 659 ("The support for the argument that the Federal Government possesses such authority is so obscure that the main argument now pressed by the Government—that the authority is conferred by a hodgepodge of scattered provisions—was not prominently set out by the Government until its reply brief in this Court. Before concluding that the Federal Government possesses this authority, we should demand stronger statutory proof than has been mustered to date.").

C. West Virginia v. EPA

After the uncertainty of the major questions doctrine in the vaccine mandate cases, the Court added one final piece to the doctrine in *West Virginia v. EPA*.[121] *West Virginia* involved a challenge to the EPA's rule promulgated under the Clean Air Act.[122] The rule, the Clean Power Plan, announced emission limits for new and existing coal-fired power plants and natural gas plants.[123] The goal of the EPA's rule was to shift electric power production from coal to "natural gas and renewables."[124] After the rule was promulgated, various states petitioned the United States Court of Appeals for the District of Columbia Circuit to review the rule.[125] Following changes in presidential administrations and three changes in the rule, litigation over the Clean Power Plan and its replacement, the Affordable Clean Energy Rule, eventually made its way to the Supreme Court where the Court grappled with the question of "whether th[e] broader conception of EPA's authority is within the power granted to it by the Clean Air Act."[126]

After finding that the states satisfied Article III standing requirements,[127] the Court turned to the application of the major questions doctrine to the EPA's rule.[128] The Court found that the EPA's rule was "a major questions case."[129] The Court reasoned that the EPA's authority under the rule "effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind."[130] The EPA's authority could have required coal plants to "cease making power altogether."[131]

The Court concluded that "Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. "[132] The Court also noted that Congress, on multiple occasions, had rejected similar programs to what the EPA was trying to enact in their rule.[133] The Court finally concluded that "it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d)."[134] This was because "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[135] Since the EPA's rule involved a major question, and the EPA failed to "point to clear congressional authorization for the power

121. West Virginia v. EPA, 142 S. Ct. 2587 (2022).
122. *Id.* at 2599-2600.
123. *Id.* at 2602.
124. *Id*. at 2603.
125. *Id.* at 2604.
126. *Id.* at 2600.
127. *Id.* at 2606.
128. *Id*. at 2607.
129. *Id*. at 2610.
130. *Id*. at 2612 (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994)).
131. *Id*. at 2612.
132. *Id.* at 2613.
133. *Id.* at 2614. ("Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions 'had become well known, Congress considered and rejected' multiple times.").
134. *Id.* at 2616.
135. *Id*.

it claim[ed],"[136] the Court determined the EPA's promulgated rule exceeded the authority of the EPA under the Clean Air Act.[137]

Justice Neil Gorsuch joined the Court's majority decision and authored a concurring opinion to add some clarity to the major questions doctrine.[138] Starting out, Justice Gorsuch reasoned the doctrine requires administrative agencies "to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance."[139] He further reasoned the doctrine ensures that "when agencies seek to resolve major questions, they at least act with clear congressional authorization and do not 'exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond' those the people's representatives actually conferred on them."[140]

Justice Gorsuch then proffered three guidelines for when there is a major question that requires clear congressional authorization.[141] The first guideline "applies when an agency claims the power to resolve a matter of great political significance or end an earnest and profound debate across the country."[142] The second guideline requires "an agency . . . [to] point to clear congressional authorization when it seeks to regulate a significant part of the American economy or require billions of dollars in spending by private persons or entities."[143] The final guideline states "that the major questions doctrine may apply when an agency seeks to intrude into an area that is the particular domain of state law."[144] Justice Gorsuch then elucidated what "qualifie[d] as a clear congressional statement authorizing an agency's action."[145] Applying his guidelines for the application of the doctrine, and reviewing for clear congressional statements, Justice Gorsuch concluded that the EPA's rule involved a major question[146] and that the EPA lacked clear congressional authorization to promulgate the rule.[147]

Justice Elena Kagan in dissent reasoned that the Clean Air Act gave broad authority to the EPA to "find the best system of emission reduction."[148] Justice Kagan relied on various statutory provisions to show that the EPA had the authority to regulate emissions.[149] She then discussed the application of the major questions doctrine.[150] Justice Kagan stated that the major questions doctrine was a new arrival and replaced the "normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules."[151] The traditional "text-in-context" interpretation required

136. *Id.* at 2609 (internal quotation marks omitted).
137. *Id*. at 2616.
138. *Id.* at 2616 (Gorsuch, J., concurring).
139. *Id.* (internal quotation marks omitted).
140. *Id*. at 2620 (quoting NFIB v. OSHA, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring)).
141. *Id*. at 2620 (Gorsuch, J., concurring).
142. *Id*. (internal quotations marks and citations omitted).
143. *Id.* at 2621 (internal quotation marks and citations omitted).
144. *Id*.
145. *Id.* at 2622–23 (These factors include viewing the legislative provision within its overall statutory scheme, looking at the age and focus of the statute, reviewing the "agencies past interpretations of the relevant statute," and harboring skepticism "when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise.").
146. *Id.* at 2621.
147. *Id.* at 2624 ("As the Court details, the agency before us cites no specific statutory authority allow it to transform the Nation's electrical power supply.").
148. *Id*. at 2629 (Kagan, J., dissenting).
149. *Id*. at 2630–32.
150. *Id.* at 2633–34.
151. *Id.* at 2634.

courts to look at the statutory language of a delegation and see if "the agency's view of that text works–or fails to do so–in the context of a broader statutory scheme."[152] After looking at the text and broader statutory scheme, a court would determine whether "Congress would naturally have delegated authority over some important question to the agency, given its expertise and experience."[153] The dissent then rejected the nondelegation doctrine and concluded that "Congress has always delegated, and continues to do so–including on important policy issues."[154] The dissent finally concluded that "the Court prevent[ed] [a] congressionally authorized agency action to curb power plants' carbon dioxide emissions."[155] This made the Court, "instead of Congress or the expert agency the decision maker on climate policy."[156]

In sum, the Court in *West Virginia* further expounded on the application of the major questions doctrine and determined that any time an agency takes an action that involves a question of political or economic significance, clear congressional authorization is required. But the Court's majority failed to fully flesh out how to determine if something is a "major question." Justice Gorsuch, in his concurrence, attempted to give the doctrine's application some substance. Yet again, the Court failed to resolve the uncertainty that businesses may face when an agency takes a measure that could severely impact the operations of businesses across the country.

IV. WHAT DO THE DECISIONS IN *NFIB V. OSHA, BIDEN V. MISSOURI,* AND *WEST VIRGINIA V. EPA* MEAN FOR BUSINESS?

After President Biden announced the vaccine mandate for all businesses with over 100 employees, many businesses across the country scrambled to understand what the mandate required and whether it was even legal.[157] Eventually, the Supreme Court answered many of those questions.[158] In both *NFIB* and *Missouri*, members of the Court relied explicitly on the major questions doctrine,[159] but the Court's inattention to the nondelegation doctrine left open one key problem: businesses cannot hold administrative agencies politically accountable when the agencies promulgate regulations that are damaging to the business environment and business operations.

When an agency promulgates a rule, in most cases the Administrative Procedures Act requires that there must be a notice and comment period.[160] The comment period, typically 30 days, allows "interested persons an opportunity to comment on the proposed rule."[161] After the public comment period ends, "[t]he agency is

152. *Id*.
153. *Id.*
154. *Id.* at 2642.
155. *Id.* at 2644.
156. *Id.*
157. Lauren Hirsch et al., *Biden's Vaccine Mandate Leaves Businesses Relieved but Full of Questions*, N.Y. TIMES, https://www.nytimes.com/2021/09/10/business/vaccine-mandate-business.html (last modified Nov. 9, 2021).
158. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (per curiam); Biden v. Missouri, 142 S. Ct. 647 (2022) (per curiam).
159. *Nat'l Fed'n of Indep. Bus*., 142 S. Ct. at 668 (Gorsuch, J., concurring); *Missouri*, 142 S. Ct. at 657–58 (Thomas, J., dissenting).
160. Maeve P. Carey, *An Overview of Federal Regulations and the Rule Making Process*, CONG. RSCH. SERV. https://sgp.fas.org/crs/misc/IF10003.pdf (last updated Mar. 19, 2021).
161. *Id.* (internal quotation marks omitted).

required to review the public comments and respond to 'significant' comments received, and . . . *may* make changes to the proposal based on those comments."[162] During the thirty-day comment period for the OSHA vaccine mandate, the Department of Labor received around 122,000 comments.[163] Many of the comments made it very clear that people, businesses, and business advocacy groups were vehemently opposed to the vaccine mandate.[164] Yet with vast opposition to the mandate, the Biden administration pushed forward with the mandate forcing businesses to bear the brunt of any issues that arose.

Political accountability requires that elected officials listen to the feedback of their constituents and adjust their policies accordingly.[165] With administrative agencies, there is no constituency except for the President of the United States and the head of the agency. This insulates any decision that an agency makes from direct public scrutiny.[166] This is exactly what happened with OSHA's vaccine mandate. The delegation from Congress to the Department of Labor, and in turn, the director of OSHA, provided two levels of insulation from direct public scrutiny and the blowback that ensued from the promulgation of the rule. Many individuals, businesses, and business advocacy groups strongly advocated against the vaccine mandate, but it was for not when OSHA failed to account for public sentiment and did not make any changes to the vaccine mandate following the close of the comment period.

With a robust nondelegation doctrine, businesses can hold policymakers accountable. The doctrine would require that Congress make the decision when the private rights and obligations of businesses are changed. Since Congress is directly accountable to the people it serves, Congress and its members are subjected to the political processes where all voices can be heard, and legislation can be amended to best fit the wishes of the American electorate.[167] This satisfies the need for political accountability for businesses.[168]

The decisions in *NFIB* and *West Virginia* point to the Court's renewed interest in pushing back on the authority of administrative agencies and the federal executive branch in issuing rules that impact the nation as whole. The question remains whether the Court will continue its application of the major questions doctrine or whether it will return to a more robust nondelegation doctrine, or both. While the Court seems poised to enforce a vigorous major questions doctrine in the future,

162. *Id.* (emphasis added).

163. *COVID-19 Vaccination and Testing: Emergency Temporary Standard,* REGULATIONS.GOV (Nov. 4, 2021), https://www.regulations.gov/document/OSHA-2021-0007-0001/comment.

164. *See Comment from National Beer Wholesalers Association*, REGULATIONS.GOV (Jan. 19, 2022), https://www.regulations.gov/comment/OSHA-2021-0007-121423 (arguing the implementation of the mandate is arbitrary and capricious and citing labor shortages and supply chain issues as challenges that will be further deepened with the vaccine mandate); *Comment from National Federation of Independent Business*, REGULATIONS.GOV (Dec. 22, 2021), https://www.regulations.gov/comment/OSHA-2021-0007-45814 (reasoning that "America's small and independent business owners should remain free to decide for themselves whether they will or will not impose upon employees in their businesses, as a condition of employment, a requirement to undergo vaccination or testing and masking.").

165. *See generally Accountability*, DICTIONARY.COM, https://www.dictionary.com/browse/accountability (last visited Nov. 6, 2022) ("the state of being accountable, liable, or answerable").

166. This generally encompasses the ability for the American electorate themselves or their representatives in Congress to vote on a potentially devastating rule to the liberty of themselves or in the operation of their businesses.

167. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring).

168. *Id*. (discussing how "many States have robust nondelegation doctrines designed to ensure democratic accountability in their state lawmaking processes.").

that doctrine cannot meet the challenge by itself. By placing its emphasis solely on the major questions doctrine, the Court fails to fully reinforce the separation of powers between Congress and the executive branch, which is critical to protect the private rights of individuals and businesses. To best protect business operations, a purely private activity, from an overreaching federal government, the Court should return to a more robust nondelegation doctrine.

A. The Return to the Originalist Nondelegation Doctrine

The return to originalist nondelegation principles requires the government to enact changes to private rights and duties through Article I, Section 7's process of bicameralism and presentment. More specifically, this approach would require that any changes to employment matters or business requirements across the nation be passed by Congress and signed by the president. This view, the private rights version of the nondelegation doctrine, was advocated by Justice Thomas in his 2015 concurrence in *Department of Transportation v. Association of American Railroads*.[169] Justice Thomas reasoned that the Court should "return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power."[170] He conceded that "this would inhibit the Government from acting with the speed and efficiency Congress has sometimes found desirable."[171] Then, citing Alexander Hamilton in Federalist 73, Justice Thomas concluded that he was "comfortable joining [Hamilton's] conclusion that 'the injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.'"[172]

Justice Thomas's originalist view on private conduct was buttressed by Justice Gorsuch's dissent in *Gundy v. United States*.[173] Justice Gorsuch reasoned that the "framers went to great lengths to make lawmaking difficult."[174] He further explained that "the framers insisted that any proposed law must win the approval of two Houses of Congress—elected at different times, by different constituencies, and for different terms in office—and either secure the President's approval or obtain enough support to override his veto."[175] This was because the framers viewed Congress's legislative power as the "power to adopt generally applicable rules of conduct governing future actions by private persons."[176] The vested legislative power allowed only Congress to "prescribe rules limiting . . . liberties."[177] This power, which allowed restrictions to be placed on the individual liberty of private people, could not be delegated to the executive branch since it was "strictly and exclusively

169. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 86 (2015) (Thomas, J., concurring in the judgment).
170. *Id. See also* Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L. J. F. 94, 98–99 (2015) (Justice Thomas viewed the core private rights as life, liberty, and property. These rights are not allowed to be adjudicated by administrative agencies.).
171. *Id*.
172. *Id*. at 87 (quoting THE FEDERALIST NO. 73 (Alexander Hamilton)).
173. Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).
174. *Id*.
175. *Id*.
176. *Id.* at 2133.
177. *Id*.

legislative."[178] In conclusion, Justice Gorsuch stated that the Article I processes of bicameralism and presentment "were bulwarks of liberty."[179]

Any alterations to the private rights of individuals or the rights of businesses[180] must be debated by Congress, passed by Congress, and signed into law by the president. This is to protect the liberty of both individuals and businesses because government agencies can "churn out new laws more or less at [a] whim" making "intrusions on liberty . . . easy and profuse."[181] Though there may be less legislation and fewer administrative rules regulating businesses with an originalist nondelegation doctrine, it would be much better to enjoy liberty and freedom in operating a business rather than having the government telling a business owner how to run their own business or excessively regulating the business. Justices Thomas and Gorsuch are the most recent proponents of the bicameralism and presentment requirement, and both agree that the framers of the Constitution intended to protect privacy rights and the liberties involved with those rights through the action of the legislative branch.

In addition to the private rights version of the originalist nondelegation doctrine, there is also the "important subjects" version of the doctrine.[182] This theory, explored by Professor Ilan Wurman in his article *Nondelegation at the Founding*, proffers that "there are 'important subjects' with respect to which Congress must make the relevant decisions, and there are matters of 'less interest' with respect to which the executive may 'fill up the details.'"[183] Under Professor Wurman's view of the doctrine "private rights and certain types of decisions (such as overt goals and jurisdiction) are more important than other types of matters or decisions."[184] Facing the reality that some private conduct will inevitably be regulated by the administrative state, the important subjects view of the nondelegation doctrine requires that any delegation by Congress be expressly authorized and the private conduct covered in the delegation must be narrow.[185]

Under the important subjects version of the doctrine, the practicalities of governance are accounted for and the version tries to best limit the power of the government over private conduct, including the conduct of businesses. But in considering practicality, the important subjects version of the nondelegation doctrine still allows for some delegation over private rights which can allow for the liberty of individuals and businesses to be quashed. A robust nondelegation should be absolute in protecting both the legislative power under Article I of the Constitution and the liberty interests of people and businesses. Though the important subjects version of the nondelegation seems like a viable alternative, the Court should focus more on the private rights version of the doctrine.

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178. *Id.* (quoting Wayman v. Southard, 20 U.S. 1, 42–43 (1825)).
179. *Id*. at 2134.
180. *See Small Business Bill of Rights*, U.S. CHAMBER OF COM. (Apr. 26, 2022), https://www.uschamber.com/small-business/small-business-bill-of-rights ("Small business owners have the right to be heard in the development of rules and regulations that affect their livelihoods, their employees, and their communities and for government to take into consideration the disproportionate impact regulations can have on small businesses.").
181. West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring).
182. *See* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L. J. 1490, 1502 (2021).
183. *Id.*
184. *Id.* at 1502–03.
185. *Id.* at 1555.

B. Why the Major Questions Doctrine Is a Step in the Right Direction, But Not the Solution to the Problem

While the Court's application of the major questions doctrine and thinly disguised nondelegation doctrine in *NFIB* and the minor clarification in *West Virginia* was a step in the right direction, the major questions doctrine suffers a chronic defect: administrability. This stands in stark contrast to a robust nondelegation doctrine, which suffers no administrability problem.[186] Any time the private rights of businesses or individuals are invoked, the doctrine is required to be enforced.

Scholars have revealed several indicia for invocation of the major questions doctrine. For example, Professor Nathan Richardson has suggested at least four situations in which the doctrine should apply: a major shift in regulatory scope, economic significance, political controversy, and a thin statutory basis.[187] The shift in regulatory scope focuses on effectuating change through regulatory practice rather than legislative change.[188] Economic significance looks at the economic impact of the agency's actions, which tends to be rather amorphous due to the slipperiness of how the agency classifies its own economic impact.[189] For political controversy, it must be related to the continual question of political concern.[190] The thin statutory basis colloquially named the "elephants in mouseholes" doctrine,[191] focuses on an agency's interpretation of its own agency power on thin or ancillary statutory grounds.[192] But some others would classify the "elephants in mouseholes" doctrine as separate from the major questions doctrine.[193]

Similarly, Justice Neil Gorsuch in *West Virginia* gave some additional guidance on when the major questions doctrine should apply.[194] The first two factors, an agency exercising authority on matters involving great political or economic significance without clear congressional approval, follow the traditional view of the major questions doctrine.[195] The third factor, agency intrusion into areas typically reserved for state law, seems to be a newer addition to the major questions calculus

186. Justice Antonin Scalia in *Whitman v. American Trucking Associations* noted that "[i]t is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001). The intelligible principle test gives Congress and in turn agencies a degree of flexibility when promulgating rules leaving it unclear where legislative power ends and administrative power begins.

187. Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 381–85 (2016).

188. *Id*. at 382.

189. *Id.*

190. *Id*.

191. *Whitman*, 531 U.S. at 468 (2001) ("Congress, we have held, 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.").

192. Richardson, *supra* note 187, at 384.

193. *See* Biden v. Missouri, 142 S. Ct. 647, 656 (2022) (Thomas, J., dissenting) ("[T]he Government proposes to find virtually unlimited vaccination power, over millions of healthcare workers, in definitional provisions, a saving clause, and a provision regarding long-term care facilities' sanitation procedures."); *Whitman*, 531 U.S. at 468.

194. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2620–21 (2022) (Gorsuch, J., concurring).

195. *Id. See* Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring). (quoting 42 U.S.C. § 264(a)) (disapproving of the CDC's statutory basis which prohibited the spread of communicable diseases "from one State or possession into another any other state or possession.").

with its initial appearance being alluded to in *Alabama Association of Realtors v. HHS*.[196]

Justice Thomas's dissent in *Missouri* and the majority's decision granting the stay in *NFIB* tends to support the "elephants in mouseholes" doctrine, and what I would likely classify as a safety valve on delegations of congressional power. An example of the United States Supreme Court using the safety valve theory came in *FDA v. Brown & Williamson Tobacco Corporation*, where the Court found the FDA exceeded its regulatory authority to regulate tobacco products because Congress had directly spoken on the issue of tobacco regulation.[197] In other words, Congress did not intend to delegate the amount of power as construed by the FDA in the statutory provisions.[198]

Justice Gorsuch in *West Virginia* seems to give the safety valve theory some credence without explicitly identifying it as a safety valve.[199] He made two observations on the role of the doctrine.[200] First, the doctrine "protect[s] against unintentional, oblique, or otherwise unlikely intrusions" on the interests of federalism and separation of powers.[201] Second, "the doctrine addresses a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[202] The doctrine is invoked when an agency uses a statute in a way that Congress would not have intended or if the use infringes on certain constitutional principles such as the separation of powers and federalism.

Until the Court fully adopts the private rights version of the nondelegation doctrine, the Court should use the safety valve theory of the major questions doctrine. The safety valve theory should be broadly applied: either closely mirroring the "elephants in mouseholes" doctrine[203] or when an agency violates the separation of powers and federalism. This application of the major questions doctrine is meant to fulfill gaps when an executive branch agency oversteps its granted authority from Congress. It is not meant to serve as a permanent solution to administrative agencies exercising broad amounts of regulatory power which infringes upon the liberty of a person or business. A robust nondelegation doctrine properly protects those liberty interests.

As Jacob Loshin and Aaron Nielson point out, this application of the major questions doctrine "is designed to be a more judicially manageable and less controversial method of limiting excessive delegation."[204] Nevertheless, Loshin and Nielson argue this doctrine should be rejected due to concerns involving judicial

196. *West Virginia*, 142 S. Ct. at 2621. *See generally* Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2487 (2021) (per curiam) (quoting 42 U.S.C. § 264(a)) (disapproving of the CDC's statutory basis which allowed the Surgeon General to prohibit the spread of communicable diseases "from one State or possession into another any other state or possession.").

197. *See supra* notes 48 through 51 and accompanying text.

198. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000).

199. *See West Virginia*, 142 S. Ct. at 2620.

200. *Id*.

201. *Id.* (quoting Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring)).

202. *Id*. (internal quotation marks omitted).

203. *See* Jacob Loshin and Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 61 (2010) ("The elephants-in-mouseholes doctrine purports to apply whenever there is a broad exercise of power (2) premised upon an ancillary statutory provision.").

204. *Id*.

legitimacy and administration.[205] Arguing against its administrability, they posit that "there is no consistent way to determine when the doctrine should apply."[206] Effectively, judges must become political, technical, or moral arbiters when determining what is a major question.[207] But of course, within this area of the law, it has been notoriously hard to develop a workable test that actually fulfills its role.[208]

Outside of the nondelegation doctrine, it has been difficult to create a workable test for courts to analyze the major questions doctrine.[209] Justice Kavanaugh's proffered equal application of the major questions doctrine to the nondelegation doctrine in *Paul v. United States* would increase the robustness of the major questions doctrine.[210] But it still leaves one fundamental question left unanswered, which Chad Squitieri attempted to answer: who determines majorness? Under the current doctrine, Squitieri theorizes that courts "exercise [their] own political discretion to determine whether a policy question is major."[211] Addressing a strengthened doctrine, Squitieri argues that the doctrine would similarly "empower courts to selectively prohibit Congress from delegating the authority to answer those questions that courts determine to be major."[212] If the Court continually exercises this political discretion in determining what is a major question, it raises questions involving institutional competence and arbitrary administration of the major questions doctrine. It is within Congress's institutional competence to make political decisions on whether they will delegate non-legislative power to any agency and the scope of the power they want to delegate. The Court should not be deciding political questions involving delegation that Congress can resolve itself. With the potentially changing composition of the Court, this can also lead to the arbitrary implementation of the doctrine based upon the ideological view of the Court. A strong nondelegation doctrine based upon originalist principles takes this decision out of a court's or administrative agency's hands, and only vests Congress with the ability to regulate business on major issues.

C. What Does All This Mean for Business Going Forward?

To properly protect businesses from burdensome administrative regulations that could cost millions or billions of dollars,[213] the Court should return to a more robust nondelegation doctrine. If businesses rely on the Court's application of the major questions doctrine, they would be subject to the whims of administrability

205. *Id*. at 63.
206. *Id*. at 65.
207. *Id*. at 67.
208. *Id*. at 55, 67 (discussing how the intelligible principle and the nondelegation doctrine have failed to invalidate statues that have given very broad regulatory authority).
209. *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting denial of certiorari) (Justice Kavanaugh proposed that the major questions doctrine test should be fairly similar to the standards set forth in Justice Gorsuch's dissent in *Gundy*. With Justice Kavanaugh's updated view of the major questions doctrine it effectively turned the doctrine into a more robust form of the nondelegation doctrine.).
210. *Id.*
211. Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J. L. & PUB. POL'Y 463, 495 (2021).
212. *Id*. at 496.
213. *The Economic Impact of Vaccine Mandates*, U.S. SENATE COMM. ON SMALL BUS., AND ENTREPRENEURSHIP, https://www.sbc.senate.gov/public/index.cfm/vaccine-mandates (last visited May 1, 2022) (The vaccine mandate would put roughly 45 million jobs at risk and cost businesses over a billion dollars to comply.).

differences due to the changing composition of courts and would likely be subject to a value-based judgment on whether something is major. Additionally, by ceding to the application of the major questions doctrine, businesses are subject to the impulses of the party in power of the federal executive branch and administrative agencies. Also, businesses are dependent on courts finding an agency's action to be of such "political and economic significance" to invoke the doctrine. Thankfully for most business owners, the Supreme Court found the vaccine mandate was a major question and stayed in its enforcement. However, it begs the question of whether the Court would have found it to not be a major question. In other words, how many businesses would have been forced to close because of labor shortages or the financial burden of the mandate?

With a robust nondelegation doctrine, businesses would not have to hope and rely on the courts or even try to answer those questions. Anytime the government seeks to change or inhibit the private rights of individuals or businesses, the government must do so legislatively.[214] While some may argue that this method is too formalistic and will take too long to implement change, bicameralism and presentment should be a necessary requirement before altering the rights and obligations of private individuals and businesses. Bicameralism and presentment protect the liberty interests of individuals and businesses.[215] Further, legislative action by Congress allows for policy to reflect the diversity of people it represents.[216] Congressional legislation can even "capture the wisdom of the masses."[217]

If businesses across the country can be shut down by the federal government or can be regulated to the point of shutting down by federal administrative action, without any input whatsoever from the business owners, it runs contrary to the democratic norms of this country.[218] Congress is meant to speak for the will of the country and requires a majority vote in each house to change the rights and obligations of citizens in society.[219] Any changes for business will go through a refining process in Congress, with only the best and compromised policies and laws making it through.[220] This is the proper way to change what impacts businesses across the country—not a single administrative act. Nondelegation of legislative power protects businesses across the country from massive regulation from the federal government that alters the inherently private contexts and relationships in the business environment.

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214. Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 87 (2015) (Thomas, J., concurring in the judgment).

215. West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring).

216. *Id.*

217. *Id.*

218. *See id.* (By ceding legislative power to executive agencies "[l]egislation would risk becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him.").

219. *Id*. ("By effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time.").

220. *See* THE FEDERALIST NO. 10 (James Madison) (A republican form of government allows for "refine[ment] and enlarge[ment of] the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.").

V. CONCLUSION

When the Biden administration announced the employer COVID vaccine mandate through administrative action, it was considered the ultimate workaround of Congress, which was not likely to act on a vaccine mandate. The ill-advised workaround was to have OSHA issue the vaccine mandate under the guise of workplace safety standards. The workaround had potential because the Supreme Court had not struck down a delegation of legislative power since 1935—the one good year for the nondelegation doctrine. Ultimately, the Court did not buy the ultimate workaround and stayed the vaccine mandate requirement for businesses across the country.

The Court's decision again renewed the discussion on the nondelegation doctrine and the major questions doctrine. This article looked at the applications of the two doctrines in *NFIB*, *Missouri*, and *West Virginia*. Although the Court seems to be interested in pursuing a stronger major questions doctrine, the Court should instead revive the nondelegation doctrine. A revived nondelegation doctrine would require that Congress act affirmatively to make any changes that would impact the privacy rights or obligations of businesses. Additionally, the use of the nondelegation doctrine alleviates any concerns with the administrability of the major questions doctrine.

Once again, the Supreme Court stirred up the never-ending hope to reinvigorate the nondelegation doctrine, to the delight of some and the chagrin of others. While the Court's current composition seems favorable to potential reform, it is unknown whether the Energizer Bunny will keep hopping along, or finally find a suitable burrow within American constitutional and administrative law jurisprudence.