

The OSHA COVID-19 Case and the Scope of the Occupational Safety and Health Act

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Mark A. Rothstein

UNIVERSITY OF LOUISVILLE SCHOOL OF MEDICINE IN LOUISVILLE, KENTUCKY, USA

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Abstract: The Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard (ETS) for COVID-19 applicable to private sector employers with 100 or more employees. Among other things, the ETS required employers either to mandate employee vaccination or weekly testing and wearing masks.

The pandemic of COVID-19 raged largely out of control in the United States for much of 2020.¹ The Food and Drug Administration (FDA) emergency use authorization for (and later approval of) extremely safe and highly effective vaccines was not greeted with the widespread acceptance that many researchers, clinicians, public health experts, and government officials expected. For various personal, social, and political reasons a vocal minority of the population expressed extreme skepticism, indifference, or antipathy to the new vaccines.² As a result, vaccination rates in the United States lagged other high-income countries and were inadequate to meet the challenge of even less infectious and milder variants of SARS-CoV-2.³ The Biden Administration, which took office on January 20, 2021, was determined to increase vaccination rates. Unfortunately, exhortation, encouragement, inducements, and other measures in

the private and public sectors had only limited success.⁴ Public health and bioethics experts asserted it was necessary and appropriate to mandate vaccination in various settings, including workplaces,⁵ but the legal basis for doing so was unclear.

Tracing the constitutional origins of governmental authority to regulate public health requires a brief foray into American legal history. During the colonial period, public health laws in each colony predated the federal Constitution and helps to explain why public health was not one of the enumerated powers granted to the federal government in the Constitution.⁶ Pursuant to the Tenth Amendment,⁷ the “police power” to safeguard the health, safety, and morals of the community was vested in the states.⁸ Consequently, states and their political subdivisions retain the primary responsibility for vaccination, quarantine, isolation, and other public health measures.⁹ The federal government has limited constitutional authority for public health, mainly under the commerce clause, but it is limited to international and interstate threats to public health.¹⁰

Some states enacted laws mandating vaccination or frequent testing of some or all state employees or health care workers against COVID-19.¹¹ Other states, by legislation or executive order, prohibited vaccination mandates for state or local government employees, health care workers, or all private sector employees.¹² In short, the nation’s response to COVID-19, including in the workplace, has been inconsistent and insufficient to prevent the deaths of over 900,000 Americans; and tragically, most of these deaths were preventable.¹³

About This Column

Mark A. Rothstein serves as the section editor for *Currents in Contemporary Ethics*. Professor Rothstein is the Herbert F. Boehl Chair of Law and Medicine and the Director of the Institute for Bioethics, Health Policy and Law at the University of Louisville School of Medicine in Kentucky. (mark.rothstein@louisville.edu)

Mark A. Rothstein, J.D., is the Herbert F. Boehl Chair of Law and Medicine and the Director of the Institute for Bioethics, Health Policy, and Law at the University of Louisville School of Medicine in Louisville, Kentucky, USA.

The federal government, without constitutional authority to impose a population-wide vaccination mandate,¹⁴ in 2021 issued regulations and executive orders to require vaccination for five categories of workers subject to federal regulation: (1) federal government employees;¹⁵ (2) employees, contractors, and volunteers in the federally-funded Head Start program;¹⁶ (3) employees of federal government contractors and subcontractors;¹⁷ (4) employees of health care employers participating in the Medicare and Medicaid

standards under the OSH Act²⁰ is arduous, resource intensive, and excruciatingly slow.²¹ The OSH Act contains a provision to expedite this process in extraordinary situations. If the Secretary of Labor determines that employees are “exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards” an ETS may be issued.²² The standard becomes effective immediately upon publication in the *Federal Register* without further rulemaking. An ETS may remain in effect for only

to prove that an ETS, the “most dramatic weapon in its enforcement arsenal,” was necessary to achieve the projected benefits.²⁷

After the *Asbestos* case imposed a heavy burden on the Secretary of Labor to establish the validity of an ETS, OSHA did not issue an ETS for nearly 40 years — until 2021.²⁸ In his first day on the job, President Biden pledged that OSHA would issue an ETS to address the workplace hazards of COVID-19, especially as they pertained to “essential workers,” such as health care workers, meat and poultry workers, and transportation workers.²⁹ The delay in researching, drafting, and issuing the ETS,³⁰ until June 21, 2021, appeared to lessen the need for a comprehensive measure. By then, the first two vaccines received emergency use authorization from the FDA, people were being vaccinated, and the number of cases, hospitalizations, and fatalities were declining.³¹ Consequently, the Secretary issued a limited ETS applicable only to health care employers. Along with requirements to use personal protective equipment and implement hazard controls, the ETS merely “encouraged” vaccination of workers. The ETS was not challenged in court, and it expired at the end of six months, on December 21, 2021.

Each of these federal vaccination mandates has been challenged in court, but this article focuses on the challenge to the OSH Act emergency temporary standard (ETS) decided by the Supreme Court on January 13, 2022.

The article begins by considering the OSH Act’s provision for issuing an ETS, followed by a discussion of the ETS for COVID-19, the *OSHA COVID-19 Case*, the major questions doctrine, Congressional Review Act, and the implications of judicial entry into major economic and political questions.

programs;¹⁸ and (5) employees of employers subject to the Occupational Safety and Health Act (OSH Act).¹⁹ Each of these federal vaccination mandates has been challenged in court, but this article focuses on the challenge to the OSH Act emergency temporary standard (ETS) decided by the Supreme Court on January 13, 2022. The article begins by considering the OSH Act’s provision for issuing an ETS, followed by a discussion of the ETS for COVID-19, the *OSHA COVID-19 Case*, the major questions doctrine, Congressional Review Act, and the implications of judicial entry into major economic and political questions.

Emergency Temporary Standards

The procedure for promulgating new occupational safety and health

six months, and then the OSH Act’s detailed rulemaking process must be followed to promulgate a permanent standard.

As with all OSHA standards, an ETS is subject to judicial review,²³ and the courts of appeals have struck down five of the six original ETS’s challenged in court.²⁴ In *Asbestos Information Association / North America v. OSHA*,²⁵ the Fifth Circuit invalidated an ETS for asbestos. The court held that in weighing the risks and benefits of a proposed ETS, OSHA may consider only the benefits of the ETS during the six-month period in which it would be in effect. At the same time, the court said it was troubled by the possible inaccuracy of using risk assessments for such a short period of time.²⁶ The court concluded that OSHA failed

The OSHA COVID-19 Case

The optimism of the spring of 2021 was short lived, and it ended in the summer when the United States was overwhelmed by the more transmissible and lethal Delta variant and the resulting resurgence of cases, hospitalizations, and fatalities. At the same time, opposition to vaccine mandates was hardening. On September 9, 2021, President Biden announced plans to require vaccination of five categories of workers subject to federal regulation,³² and he announced that an OSHA ETS would be forthcoming.

On November 5, 2021, OSHA issued an ETS for COVID-19,³³ applicable to employers with 100 or more employees, including part-time employees and those who worked at all locations across the country.³⁴ The requirements did not apply to

employees who worked at home or other locations where others are not present, or to employees who worked exclusively outdoors.³⁵ The ETS did not apply to employees of the federal government, federal contractors, or health care workers, who were subject to a separate ETS or executive order.³⁶ OSHA estimated that the ETS applied to 84.2 million employees.³⁷

Covered employers were required to establish and enforce a policy that was either (1) a written, mandatory vaccination policy requiring vaccination for current and new employees, unless they were entitled to a reasonable accommodation under the Americans with Disabilities Act³⁸ (based on a medical reason for not being vaccinated) or Title VII of the Civil Rights Act of 1964³⁹ (based on a sincerely held religious belief, practice, or observance); or (2) a written policy allowing employees, in lieu of vaccination, to provide proof of a negative COVID-19 test at least every seven days and wearing a face mask while at the workplace.⁴⁰ Employers also were required to adopt policies to determine the vaccination status of employees, provide paid time off for vaccination and any vaccine side effects, enforce face mask requirements, and provide information to employees about vaccinations and relevant laws regarding anti-retaliation protections and providing false information.⁴¹

The OSHA ETS explicitly preempted any contrary state laws, including legislation or executive orders prohibiting vaccination mandates. State plan states were required to implement the new federal ETS or promulgate their own comparable ETS “at least as effective” as the federal OSHA ETS.⁴² As with any ETS, it was to remain in effect only for six months.

The ETS was challenged in 34 cases, with at least one case filed in every circuit. A lottery, pursuant to federal law,⁴³ placed the consolidated case in the Sixth Circuit. The court’s first order of business was to consider the government’s motion to dissolve a stay issued by the Fifth Circuit, which had decided the case on an emergency basis and held that the

petitioners challenging the ETS were likely to succeed on the merits.⁴⁴

A Sixth Circuit panel dissolved the stay and held that OSHA had explicit statutory authority under the OSH Act to regulate health risks in the workplace, which Congress reaffirmed in the Needlestick Safety and Prevention Act⁴⁵ and the American Rescue Plan.⁴⁶ Judge Stranch’s majority opinion stated that OSHA’s finding of a “grave danger” was heightened by the emergence of the Delta variant. “Fundamentally, the ETS is an important step in curtailing the transmission of a deadly virus that has killed over 800,000 people in the United States, brought our healthcare system to its knees, forced businesses to shut down for months on end, and cost hundreds of thousands of workers their jobs.”⁴⁷ Judge Larsen’s dissent asserted that OSHA exceeded its statutory authority in promulgating the ETS.⁴⁸

The Supreme Court granted emergency review to consider whether the Sixth Circuit erred in dissolving the stay imposed by the Fifth Circuit. In *National Federation of Independent Business v. Department of Labor*,⁴⁹ the Supreme Court stayed the ETS pending a decision on the merits by the Sixth Circuit. The Court’s rationale for reimposing the stay, the challengers’ likelihood of success on the merits, was a *de facto* invalidation of the ETS.

The *per curiam* opinion of six justices stated that the Secretary of Labor lacked statutory authority to issue such a sweeping standard in the absence of an explicit congressional directive. “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 casual sense, from the workplace.”⁵⁰

In articulating this narrow view of the permissible scope of OSHA’s authority to regulate workplace hazards, the Court’s rhetoric and reasoning may be questioned. First, the opinion asserted that “[t]he Act empowers the Secretary to set *workplace* safety standards, not broad public health measures.”⁵¹ The OSH Act not only empowers the Secretary

to set “workplace safety standards,” it authorizes the Secretary to set workplace safety *and health* standards. After all, it is the Occupational Safety and Health Act, and the legislative history of the OSH Act clearly indicates that occupational illness was a major concern of Congress in enacting the OSH Act.⁵² The statute also created the National Institute for Occupational Safety and Health in the Department of Health and Human Services to conduct research on occupational health hazards such as asbestosis, byssinosis, lead, and pesticides.⁵³

Second, the opinion used and repeated an oversimplified characterization of the ETS as a “vaccine mandate.” Although vaccination was its most controversial element, the ETS contained many other measures designed to protect workers, such as personal protective equipment and testing. Vaccination was the preferred option of the ETS, but as an alternative to vaccination, employers could implement a policy of allowing employees to have weekly testing and wear a face mask while at the workplace.

Third, the opinion stated that OSHA is limited to regulating hazards unique to or at least especially problematic in the workplace. “Although COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather.”⁵⁴ This assertion overlooks the fact that OSHA regulates many safety and health hazards that exist both in and beyond the workplace, including fire, noise, asbestos, lead, and toxic chemicals. Furthermore, in the “Rationale for the ETS” section of its *Federal Register* filing, OSHA described the particular workplace risks of transmission. “Workplace factors that exacerbate the risk of transmission of SARS-CoV-2 include working in indoor settings, working in poorly ventilated areas, and spending hours in close proximity with others.”⁵⁵ The background text of the ETS discussed several workplace-based COVID-19 disease clusters documented in vari-

ous industries and in multiple states, including the heightened risks posed by the Delta variant.⁵⁶

The opinion added that where the virus “poses a “special danger because of the particular features of an employee’s job or workplace, targeted regulations are plainly permissible.”⁵⁷ This statement aligns the OSHA case with the Court’s decision upholding the healthcare workplace regulation of COVID-19 issued by the Centers for Medicare and Medicaid Services and decided by the Supreme Court the same day.⁵⁸

Justice Gorsuch (joined by Justices Thomas and Alito) wrote a concurring opinion that emphasized the role of the major questions doctrine in determining whether the ETS was beyond the scope of authority delegated by Congress. “The question before us is not how to respond to the pandemic, but who holds the power to do so. The answer is clear: Under the law as it stands today, that power rests with the States and Congress, not OSHA.”⁵⁹ That conclusion is based on the major questions doctrine. “We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”⁶⁰

Justice Breyer (joined by Justices Sotomayor and Kagan) dissented, writing that OSHA demonstrated in “meticulous detail” that close contact between infected and uninfected individuals spreads disease and shared indoor workplaces present “heightened dangers.”⁶¹ Responding to the majority’s assertion that OSHA lacked the authority to impose a broad standard regulating a health threat that exists widely beyond workplaces, Justice Breyer stated that “[t]he statute does not require that employees are exposed to those dangers only while on the workplace clock.”⁶² Finally, the dissent used the majority’s argument that OSHA acted beyond its authority to assert that it was the Supreme Court that was acting beyond its authority in striking down the ETS.⁶³

Major Questions Doctrine

Several of the judicial opinions hold or advocating for a narrow view

of OSHA’s statutory authority rely on the major questions doctrine.⁶⁴ However, this is a relatively recent, ill-defined, and largely unexamined judicial canon with major implications. The origins of the doctrine go back to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,⁶⁵ in which the Supreme Court held that unless Congress has said otherwise, the courts should defer to administrative agencies if the agency’s interpretation of the enabling legislation is not unreasonable. The major questions doctrine emerged as a way to limit deference to administrative agencies. Thus, in two subsequent cases the Court said that in extraordinary cases agency interpretations carry little weight and are not entitled to *Chevron* deference.⁶⁶ Then, in *King v. Burwell*,⁶⁷ in upholding the constitutionality of the Affordable Care Act, the Supreme Court relied on the major questions doctrine to hold that *Chevron* deference did not apply. Nevertheless, the Court did its own statutory analysis and reached the same result as the agency.

In its two most recent applications of the major questions doctrine, both dealing with COVID-19, the Court extended the doctrine beyond the issue of whether deference should be afforded to the agency to ruling on whether the agency action was beyond the scope of its statutory authority. In *Alabama Association of Realtors v. Department of Health and Human Services*,⁶⁸ the Supreme Court applied the major questions doctrine to invalidate a nationwide moratorium on evictions in counties with high levels of COVID-19 transmission. The Court held that there was no evidence that Congress intended for a vague section of the Public Health Service Act to authorize the Centers for Disease Control and Prevention to regulate landlord-tenant relations, a traditional domain of state law. Then, in applying the doctrine to strike down the OSHA COVID-19 ETS, the Court expanded the doctrine to strike down a workplace safety and health regulation imposed by an agency explicitly created by Congress to regulate workplace safety and health.⁶⁹

There are two main problems with the expansive major questions doctrine. First, it is not clear what a major question is.⁷⁰ As Judge Stranch wrote in her majority opinion for the Sixth Circuit panel, “The doctrine itself is hardly a model of clarity, and its precise contours — specifically, what constitutes a question concerning deep economic and political significance — remain undefined.”⁷¹ Furthermore, using the number of public comments submitted as a metric for “political significance” is an invitation to mass, fraudulent, and computer-generated comments.⁷²

Second, the major questions doctrine represents an extraordinary level of judicial activism that undermines fundamental aspects of the separation of powers. “The doctrine has nothing to do with preserving self-government and everything to do with increasing the reach of the juristocracy.”⁷³ In the *OSHA COVID-19 Case*, the Supreme Court attacked the fundamental principle that Congress establishes federal administrative agencies with the expertise to design and implement specific measures to complete a regulatory picture only sketched by Congress. There are vast implications for health policy of this unconstrained constitutional doctrine. “By limiting the federal government’s ability to flexibly protect public health, the justices gave themselves an outsize role in formulating health policy, with significant ramifications that will remain long after the pandemic ends.”⁷⁴

Congressional Review Act

The Supreme Court’s *per curiam* opinion asserted that Congress never authorized OSHA to issue such a broad and far-ranging standard. “In fact, the most noteworthy action concerning the vaccine mandate by either House of Congress has been a majority vote of the Senate disapproving the regulation on December 8, 2021. S.J. Res. 29, 117th Cong., 1st Sess. 2021.”⁷⁵ The Court’s reference to a vote under the Congressional Review Act⁷⁶ as evidence of congressional sentiment appears to vary from the legislative intent.

The Congressional Review Act of 1996 provides a mechanism for Congress to consider, and then approve or disapprove, major federal regulations. The first use of the law was in 2001 when President Bush signed a congressional resolution of disapproval of the OSHA ergonomics standard.⁷⁷ In 2017, President Trump signed a joint resolution revoking the OSHA recordkeeping rule finalized in the last days of the Obama Administration.⁷⁸ The language and legislative history of the Congressional Review Act make it clear that “courts were not to intervene during the legislative process or assume congressional intent from failing to adopt a resolution of disapproval.”⁷⁹ According to the Senate sponsors of the law: “Subsection 801(g) prohibits a court or agency from inferring any intent of the Congress only when ‘Congress does not enact a joint resolution of disapproval’ or by implication, when it has not yet done so.”⁸⁰ Similarly, passage of a resolution by one chamber of Congress does not support an inference of congressional sentiment.

Conclusion

The *per curiam* opinion in the *OSHA COVID-19 Case* stated that the COVID-19 ETS was unprecedented. “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.”⁸¹ The Court did not mention that in the last century the United States has never faced such a dire threat to public health, one in which deaths directly attributable to COVID-19 in the United States could reach one million. Nor did the Court mention that many — if not most — of the fatalities could have been prevented if millions more Americans were vaccinated, including with booster shots, at no cost to them and using vaccines with an unprecedented level of safety and efficacy.⁸² The Court also was unpersuaded by evidence that the workplace played a significant role in the transmission of COVID-19.⁸³

The essence of public health is balancing the interests of the public

and the individual. With the extraordinary severity of the pandemic self-evident, judicial decisions opposing vaccination requirements have emphasized the supposed burdens of vaccination. A Sixth Circuit opinion characterized vaccination as “permanent and physically intrusive” and asserted that a “vaccine may not be taken off when the workday ends.”⁸⁴ According to the Fifth Circuit, “the Mandate threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their job(s).”⁸⁵

The reasonable liberty interests of individuals deserve protection in the workplace and beyond, but they do not trump the interests of the population. As Justice John Marshall Harlan wrote, “There are manifold restraints to which every person is necessarily subject for the common good of its members. On any other basis, organized society could not exist with safety to its members.”⁸⁶

The immediate implication of the *OSHA COVID-19 Case* is to prohibit OSHA from comprehensive regulation of working conditions that contribute to transmission of COVID-19. But the repercussions extend beyond this case. The Supreme Court has unabashedly entered the realm of politics and embraced a doctrine that ostensibly shifts power from federal agencies to Congress and the states. In reality, at least for the foreseeable future, instead of a shift in regulatory responsibility there will be a void in essential public health protections.

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2. See P. Krugman, “Of Vaccine Mandates and Facing Reality,” *The New*

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3. See J. Bosman and L. Leatherby, “U.S. Coronavirus Death Toll Surpasses 700,000 Despite Wide Availability of Vaccines,” *The New York Times*, Oct. 1, 2021, available at <<https://www.nytimes.com/2021/10/01/us/us-covid-deaths-700k.html>> (last visited April 7, 2022). See also D. Thompson, “How America Dropped to No. 36: The U.S. Has Fallen Far Behind in Distributing the Vaccines that It Has Pioneered,” *The Atlantic*, Sept. 26, 2021, available at <<https://www.theatlantic.com/ideas/archive/2021/09/how-america-lost-its-lead-vaccination/620201/>> (last visited April 7, 2022).
4. See R. Thebault and P. Firozi, “Beer, Bouquets and Free Rounds at a Gun Range: How Local Governments Promote Vaccines,” *The Washington Post*, May 6, 2021, available at <<https://www.washingtonpost.com/health/2021/05/06/covid-vaccine-incentives/>> (last visited April 7, 2022). See also A. Smith, “Some Employers Offer COVID-19 Vaccine Incentives despite Lack of Guidance,” *Society for Human Resource Management (SHRM)*, Feb. 18, 2021, available at <<https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/employers-offer-covid-19-vaccine-incentives.aspx>> (last visited April 7, 2022).
5. See D. Diamond, “‘A Tipping Point’: Government Officials, Health Groups Move to Require Coronavirus Vaccines for Workers,” *The Washington Post*, July 26, 2021, available at <https://www.washingtonpost.com/health/2021/07/26/mandatory-vaccinations-urged-health-workers> (last visited April 7, 2022). See also S. Berg, “What Doctors Wish Employers Knew about COVID-19 Vaccine Mandates,” *American Medical Association (AMA)*, Oct. 8, 2021, available at <<https://www.ama-assn.org/delivering-care/public-health/what-doctors-wish-employers-knew-about-covid-19-vaccine-mandates>> (last visited April 7, 2022); A.E. Carroll, “Vaccine Mandates Are Coming. Good.” *The New York Times*, June 28, 2021, available at <<https://www.nytimes.com/2021/06/28/opinion/covid-vaccine-mandate.html>> (last visited April 7, 2022).

6. See L.O. Gostin, *Public Health Law: Power, Duty, Restraint* (Berkeley, CA: University of California, 2d ed. 2008): at 79, 424-425.
7. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the State respectively or to the people." U.S. Const. Amend. X. See Gostin, *supra* note 6, at 79-80. See also J.A. Tobey, "Public Health and the Police Power," *New York University Law Review* 4, no. 1 (1927): 126-133.
8. See *Gibbons v. Ogden*, 22 U.S. 1 (1824).
9. Gostin, *supra* note 6, at 91-95.
10. See "Responsibilities in a Public Health Emergency," *National Conference of State Legislatures*, Oct. 29, 2014, available at <<https://www.ncsl.org/research/health/public-health-chart.aspx>> (last visited April 7, 2022). See also "Two Centuries of Law Guide Legal Approach to Modern Pandemic," American Bar Association, April 2020, available at <<https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic>> (last visited April 7, 2022); L. Rutkow and J.S. Vernick, "The U.S. Constitution's Commerce Clause, the Supreme Court, and Public Health," *Public Health Reports* 126, no. 5 (2011): 750-753, doi:10.1177/0033335491112600518.
11. California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.
12. Arizona, Arkansas, Georgia, Indiana, Montana, Oklahoma, Tennessee, Texas, and Utah.
13. See B. Mueller and E. Lutz, "U.S. Has Far Higher Death Rate than Other Wealthy Countries," *The New York Times*, Feb. 2, 2022, at A1, A11 (last visited April 7, 2022), available at <<https://www.nytimes.com/interactive/2022/02/01/science/covid-deaths-united-states.html?url=share>> (only 64% of the population is fully vaccinated and only 27% of the population has received a booster dose).
14. State and local governments, however, have this authority. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).
15. Exec. Order 14043 (2021).
16. 86 Fed. Reg. 68052-68101 (2021).
17. Exec. Order 14042 (2021).
18. 86 Fed. Reg. 61555-61627 (2021).
19. 86 Fed. Reg. 61402-61555 (2021).
20. OSH Act § 6(b), 29 U.S.C. § 655(b).
21. See M.A. Rothstein, *Occupational Safety and Health Law* (Eagan, MN: Thomson Reuters, 2022), at ch. 4.
22. OSH Act § 6(c), 29 U.S.C. § 655(c).
23. OSH Act § 6(f), 29 U.S.C. § 655(f).
24. *BST Holdings, L.L.C. v. Occupational Safety and Health Administration*, 17 F.4th 604, 609 (5th Cir. 2021).
25. 727 F.2d 415 (5th Cir. 1984).
26. *Id.* at 426-427.
27. *Id.* at 426.
28. See M.A. Rothstein, "OSHA's Fatal Flaws Exposed by COVID-19 Pandemic," *The Hill*, May 4, 2020, available at <<https://thehill.com/opinion/civil-rights/495999-oshas-fatal-flaws-exposed-by-covid-19-pandemic/>> (last visited April 7, 2022).
29. During the Trump Administration, OSHA declined to issue an ETS. In *In re AFL-CIO*, 2020 WL 3125324 (D.C. Cir. 2020), the labor organization filed a petition for mandamus in the D.C. Circuit to compel the Department of Labor to issue an ETS addressing the workplace transmission of COVID-19. In denying the petition, the court deferred to OSHA's assertion that an ETS is not necessary "at this time." Some state plans, such as California, Michigan, Oregon, and Virginia, promulgated an ETS for COVID-19 exposure.
30. 86 Fed. Reg. 32376-32412 (2021).
31. See "Coronavirus in the U.S.: Latest Map and Case Count," *The New York Times*, Feb. 9, 2022, available at <<https://www.nytimes.com/interactive/2021/us/covid-cases.html>> (last visited April 7, 2022). See also C. Zimmer et al., "Coronavirus Vaccine Tracker," *The New York Times*, Feb. 8, 2022, available at <<https://www.nytimes.com/interactive/2020/science/coronavirus-vaccine-tracker.html#pfizer>> (last visited April 7, 2022).
32. See notes 15-19 *supra*.
33. Occupational Safety and Health Administration, COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402-61555 (2021).
34. *Id.* at 61551.
35. *Id.*
36. *Id.*
37. *Id.* at 61467.
38. 42 U.S.C. §§ 12101-12213.
39. 42 U.S.C. § 2000e. See M.A. Rothstein, "Covid Vaccine Mandates and Religious Accommodation in Employment," *Hastings Center Report* 52, no. 1 (2022): 8-9.
40. 86 Fed. Reg. at 61552.
41. *Id.* at 61552-61553.
42. Pursuant to section 18 of the OSH Act, 29 U.S.C. § 667, states may elect to submit a state plan for approval by OSHA. States having their own legislation, standards, enforcement, and adjudication procedures are able to displace federal OSHA jurisdiction. As of 2022, there are approved state plans in the following jurisdictions: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico,
- South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. See M.A. Rothstein, *supra* note 21, at ch. 3.
43. 28 U.S.C. § 2112(a).
44. *BST Holdings, L.L.C. v. Occupational Safety and Health Administration*, 17 F.4th 604 (5th Cir. 2021).
45. Needlestick Safety and Prevention Act, Pub. L. No. 106-430, 114 Stat. 190 (2000) (directing OSHA to expand its bloodborne pathogen standard).
46. American Rescue Plan, Pub. L. No. 117-2, § 2101, 135 Stat. 4, 30 (2021) (including funding for OSHA "to carry out COVID-19 related worker protection activities").
47. *In re MCP No. 165*, 21 F.4th 357, 388 (6th Cir. 2021), reversed sub nom. *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661 (2022).
48. *Id.* at 390-391 (6th Cir. 2021) (Larsen, J., dissenting).
49. 142 S.Ct. 661 (2022) (per curiam).
50. *Id.* at 666.
51. *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661, 665 (2022) (emphasis in original).
52. "In the field of occupational health the view is particularly bleak, and, due to the lack of information and records, may well be considerably worse than we currently know." Senate Report No. 91-1282, 91st Cong., 2d Sess. (1970), at 2. The Report goes on to note that there are 390,000 new cases of occupational disease each year, and describes the special dangers of byssinosis, asbestosis, toxic chemicals, and other health hazards. *Id.* at 2-4.
53. OSH Act § 22, 29 U.S.C. § 671. In a somewhat obscure section of the OSH Act, Congress described the permissible scope of occupational health research, including immunization. "Nothing in this or any other provision of this Act shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others." OSH Act § 20(a)(5), 29 U.S.C. § 669(a)(5).
54. 142 S. Ct. at 665 (emphasis in original).
55. 86 Fed. Reg. at 61411.
56. *Id.* at 61411-61417.
57. *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661, 666 (2022).
58. In *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam), the Supreme Court upheld a rule of the Centers for Medicare and Medicaid Services providing that health care facilities receiving Medicare and Medicaid funding must ensure that their staff members are vaccinated against COVID-19. In a *per curiam* opinion of five justices, the Court imposed a stay on lower

- court rulings enjoining enforcement of the new rule. As with the OSHA ETS, the Supreme Court's decision decided the underlying legal challenge to the rule. The majority held that the Secretary of Health and Human Services had the statutory authority to impose such a rule to protect the health and safety of health care personnel and their patients. In two dissenting opinions, Justices Thomas, Alito, Gorsuch, and Barrett argued that the rule failed under the major questions doctrine, *id.* at 658 (Thomas, J., dissenting), and failed to afford an opportunity for notice and comment, *id.* at 659 (Alito, J., dissenting).
59. *Id.* at 667 (Gorsuch, J., concurring).
 60. *Id.*, quoting *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (invalidating eviction moratorium of the Centers for Disease Control and Prevention designed to limit the spread of COVID-19).
 61. *Id.* at 672 (Breyer, J., dissenting).
 62. *Id.* at 673 (Breyer, J., dissenting).
 63. "Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID-19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?" *Id.* at 676 (Breyer, J., dissenting).
 64. *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661 (2022) (per curiam) (majority opinion); *Id.* at 667 (Gorsuch, J., concurring); *In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021) (Larsen, J., dissenting), *reversed sub nom.* *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661 (2022); *BST Holdings, L.L.C. v. Occupational Safety and Health Administration*, 17 F.4th 604 (5th Cir. 2021) (unanimous panel opinion). See also *Biden v. Missouri*, 142 S. Ct. 647, 668 (2022) (Thomas, J., dissenting) (criticizing the vaccination mandate for health care workers promulgated by the Centers for Medicare and Medicaid Services).
 65. 467 U.S. 837 (1984).
 66. *MCI v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).
 67. 576 U.S. 988 (2015).
 68. 141 S. Ct. 2485 (2021).
 69. See L. Greenhouse, "What the Supreme Court's Vaccine Case Was Really About," *The New York Times*, Jan. 17, 2022, available at <<https://www.nytimes.com/2022/01/17/opinion/supreme-court-vaccine-osha.html>> (last accessed April 7, 2022). See also I. Millhiser, "The Supreme Court Showdown over Biden's Vaccine Policies, Explained," *VOX*, Dec. 22, 2021, available at <<https://www.vox.com/2021/12/22/22848155/supreme-court-vaccine-mandate-osha-cms-covid-joe-biden>> (last visited April 7, 2022).
 70. See C. Squitieri, "Who Determines Majorness?" *Harvard Journal of Law and Public Policy* 44, no. 2 (2021): 463-522.
 71. *In re MCP No. 165*, 21 F.4th 357, 372 (6th Cir. 2021), *reversed sub nom.* *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661 (2022).
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 74. L.O. Gostin, "The US Supreme Court's Rulings on Large Business and Health Care Worker Vaccine Mandates: Ramifications for the COVID-19 Response and the Future of Federal Public Health Protection," *Journal of the American Medical Association*, Jan. 21, 2022, available at <<https://www.jama-network.com/journals/jama/fullarticle/2788481?resultclick=1>> (last visited April 7, 2022).
 75. *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661, 666 (2022).
 76. 5 U.S.C. §801.
 77. See Presidential Statement on Signing Legislation to Repeal Federal Ergonomics Regulations, 37 WCPD 477 (Mar. 20, 2001), available at <<https://www.govinfo.gov/app/details/WCPD-2001-02-26/WCPD-2001-03-26-pg477>> (last visited April 7, 2022). See also Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001), *invalidating* 65 Fed. Reg. 68261 (Nov. 14, 2000).
 78. See Joint Resolution Disapproving the Rule Submitted by Labor Relating to "Clarification of Employer's Continuing Obligation to Make Accurate Record of Each Recordable Injury and Illness," Pub. L. 115-21, 131 Stat. 87 (2017), *invalidating* 81 Fed. Reg. 91792 (Dec. 19, 2016).
 79. S. Batkins, "Congress Strikes Back: The Institutionalization of the Congressional Review Act," *Mitchell Hamline Law Review* 45 (2019), available at <<https://open.mitchellhamline.edu/mhlr/vol45/iss2/1>> (last visited April 7, 2022). See also C. Buble, "Congressional Republicans Attempt to Overturn OSHA Vaccine Rule," *Government Executive*, Nov. 18, 2021, available at <<https://www.governmentexec.com/oversight/2021/11/congressional-republicans-attempt-to-overturn-osha-vaccine-rule/186953>> (last visited April 7, 2022); B.C.E. Dooling, D. Perez, and S.J. Balia, "Where Are the Congressional Review Act Disapprovals?" *Brookings*, March 24, 2021, available at <<https://www.brookings.edu/research/where-are-the-congressional-review-act-disapprovals>> (last visited April 7, 2022).
 80. Statement for the Record by Senators Nickles, Reid, and Stevens, Congressional Record — Senate S3683, S3686 (April 18, 1996).
 81. 141 S. Ct. 666 (Gorsuch, J., dissenting), quoting *Free Enterprise Fund v. Public Accounting Oversight Board*, 561 U.S. 477, 505 (2010).
 82. See J. Ortaliza, K. Amin, and C. Cox, "COVID-19 Preventable Mortality," *Peterson-KFF Health System Tracker*, Oct. 13, 2021, available at <<https://www.healthsystemtracker.org/brief/covid19-and-other-leading-causes-of-death-in-the-us>> (updated Dec. 2021) (last visited April 7, 2022).
 83. See note 60 *supra*.
 84. *In re MCP No. 165*, 21 F.4th Cir. 357, 397 (6th Cir. 2021) (Larsen, J., dissenting), *reversed sub nom.* *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661 (2022).
 85. *BST Holdings, L.L.C. v. Occupational Safety and Health Administration*, 17 F.4th 604, 618 (5th Cir. 2021) (footnote omitted).
 86. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).