# A Major Question of Power: The Vaccine Mandate Cases and the Limits of Executive Authority

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## Introduction

In January 2022, the Supreme Court decided two major cases reviewing the legality of sweeping covid-19 vaccine mandates imposed by the Biden administration. In *National Federation of Independent Business (NFIB) v. Occupational Safety and Health Administration*,[1] a 6-3 ruling invalidated a regulation requiring employers with 100 or more workers to compel nearly all of them to get vaccinated against covid or wear masks on the job and take regular covid tests. In *Biden v. Missouri*, decided the same day, a 5-4 Court upheld a Centers for Medicare and Medicaid Services (CMS) policy requiring health care workers employed by institutions receiving federal Medicare and Medicaid funds to get vaccinated.[2]

Both cases addressed large-scale policies that were significant in their own right. The rule invalidated in *NFIB* would have affected some 84 million workers,[3] while the CMS health care worker mandate covered some 10 million employees of hospitals and other health care facilities around the country.[4] The two cases also have important implications for the scope of executive power to set regulations

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[1] 142 S. Ct. 661 (2022).

[2] 142 S. Ct. 647 (2022).

[3] NFIB, 142 S. Ct. at 670.

[4] Biden v. Missouri, 142 S. Ct. at 656 (Thomas, J., dissenting).

(*NFIB*) and impose conditions on federal grants to state and local governments (*Biden v. Missouri*).

Reaction to the two decisions has been largely polarized along left-right ideological lines, with most on the left believing that the Court should have upheld both vaccination mandates, and most on the right believing both should have been struck down. I am, perhaps, one of the relatively few observers who believe the Court got both cases right. The majority was justified in striking down the Occupational Safety and Health Administration (OSHA) employer mandate because Congress had never clearly authorized it, and also justified in upholding the CMS mandate because it was backed by far more unequivocal statutory authorization.

*NFIB v. OSHA* reaffirmed important constraints on the executive's power to decide a "major question" of policy on its own, while also giving an indirect boost to constitutional nondelegation constraints on the transfer of legislative power to the White House and the administrative state. For its part, *Biden v. Missouri* makes clear that the executive can exercise reasonable discretion when Congress does clearly authorize it, particularly in the context of attaching conditions to federal grants to state and local governments.

At the same time, there are notable flaws and omissions in the majority's reasoning in both cases. In *NFIB*, especially, I believe the majority got the right result in part for the wrong reasons. These mistakes highlight some of the downsides of addressing important issues via the "shadow docket"—the Court's practice of hearing cases on an expedited basis that gives only very limited time to consider arguments and prepare opinions.[5]

Part I of this article provides a brief overview of the history of the two cases, the policies they address, and a summary of the Court's rulings. Of particular note is that both were sweeping emergency measures enacted in response to the covid pandemic, and both reached the Supreme Court on a heavily expedited basis.

Part II defends the outcome in *NFIB v. OSHA* but also criticizes key elements of the Court's reasoning. While the majority was right to invalidate the large-employer vaccination mandate on the basis of the "major questions doctrine," its interpretation of the OSHA Act of

[5] See, e.g., Stephen I. Vladeck, The Supreme Court Needs to Show Its Work, The Atlantic (Mar. 10, 2021), https://bit.ly/3PPHeJy (criticizing the shadow docket on such grounds).

1970 is strained, and it overlooked a stronger statutory rationale for its conclusion.

Part III assesses *Biden v. Missouri*. In this case, the Court's statutory reasoning is compelling. But the justices erred in failing to address some crucial issues related to Congress's Spending Clause authority to set conditions on federal grants to state and local governments. It also overlooked the plaintiffs' argument that the CMS mandate runs afoul of the statutory federalism "clear statement" rule.

Finally, part IV considers some broader implications of the two rulings. While *NFIB* is usually seen as a victory for the right, and *Biden v. Missouri* as one for the left, this need not be the long-term legacy of either case. Rather, Americans across the political spectrum have much to gain from judicial enforcement of limits on executive power. The kind of sweeping unilateral authority the Biden administration claimed in *NFIB* could easily have been misused by a future Republican administration. The Court's sensible statutory interpretation in *Biden v. Missouri* also bodes well for the future. At the same time, the significant missteps in the reasoning of both cases—especially *NFIB*—reinforce arguments for reform of the shadow docket, though there may not be any easy solution for that problem.

## I. Overview of the Vaccine Mandate Cases

The vaccine mandate cases arose out of regulations enacted by the Biden administration in the fall of 2021 after the rise of the more contagious Delta variant led to an increase in covid cases, despite the growing availability of effective vaccines.[6] The spread of Delta, combined with lagging vaccination rates in many parts of the country, led the Biden administration to enact sweeping vaccine mandates in an attempt to curb the spread of the virus.

The most wide-ranging of these mandates was OSHA's use of its emergency temporary standard (ETS) authority under the 1970 OSHA Act to institute a policy requiring employers with 100 or more workers to compel nearly all of them to get vaccinated against covid or wear masks on the job and test on a regular basis.[7] Put in

[6] See, e.g., Zachary Wolf, Biden's Six-Step Covid Plan, Explained, CNN (Sept. 10, 2021), https://cnn.it/3zlI75C (summarizing the administration's plans and the rationales for them).

[7] See COVID–19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021).

place on November 5, 2021, the regulation affected some 84 million workers.[8] Because OSHA used its emergency ETS authority, the regulation could be adopted without going through the normal notice-and-comment process required under the Administrative Procedure Act (APA).[9] While the mandate had a few narrow exceptions, such as those for workers who work exclusively outside or 100 percent remotely,[10] it nonetheless had an extraordinarily broad scope, as the exemptions applied to only a small fraction of otherwise covered employees.[11]

The large-employer mandate went far beyond any measures previously enacted under OSHA's ETS authority.[12] The ETS provision of the 1970 OSHA Act gives the Secretary of Labor—acting through the agency—the authority to impose,

> an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.[13]

The question of whether OSHA's large-employer mandate falls within the scope of this power was the central issue in the litigation that began soon after the agency issued the rule.

Predictably, the ETS rule was challenged by a range of employer groups and conservative Republican state governments. One of these suits led to a decision by a U.S. Court of Appeals for the Fifth Circuit panel staying implementation of the mandate on the grounds that OSHA's regulation exceeded both the agency's authority under the 1970 act and also the scope of Congress's enumerated powers under

[8] NFIB, 142 S. Ct. at 670.

[9] *Id.* at 663.

[10] COVID–19 Vaccination and Testing, 86 Fed. Reg. at 61460.

[11] NFIB, 142 S. Ct. at 663–64.

[12] For an overview of previous uses, see Scott D. Szymendera, Cong. Rsch. Serv., R46288, Occupational Safety and Health Administration (OSHA): COVID-19 Emergency Temporary Standards (ETS) on Health Care Employment and Vaccinations and Testing for Large Employers 18–19 (2022).

[13] 29 U.S.C. § 655(c)(1).

the Constitution.[14] I do not address these constitutional questions here because the Supreme Court did not end up considering them. The stay imposed by the Fifth Circuit was quickly lifted after a statutorily required lottery process consolidated all the cases challenging the mandate into a single case in the U.S. Court of Appeals for the Sixth Circuit.[15] The Sixth Circuit proceeded to lift the stay in a 2-1 ruling upholding the legality of the mandate, in a decision issued on December 17, 2021.[16] Earlier, the circuit rejected a petition for immediate *en banc* consideration of the case by the full Sixth Circuit, despite a forceful dissent by Chief Judge Jeffrey Sutton.[17]

The cases challenging the mandate were then swiftly taken up by the Supreme Court, which overruled the Sixth Circuit in an unsigned *per curiam* shadow docket decision providing expedited consideration. The 6-3 ruling split the Court along ideological lines, with all six conservative justices in the majority, and all three liberals—Stephen Breyer, Elena Kagan, and Sonia Sotomayor—jointly dissenting. The majority concluded that the ETS provision of the OSHA Act did not authorize the mandate because the statutory text gave the agency the power to address only "*workplace* safety standards, not broad public health measures,"[18] and because attempting to address the latter would run afoul of the major questions doctrine, which requires Congress to "'speak clearly when authorizing an agency to exercise powers of vast economic and political significance.'"[19]

The CMS mandate for health care workers in facilities receiving federal Medicare and Medicaid funds was issued at the same time as the OSHA rule. On November 5, 2021, the Department of Health and Human Services (HHS) announced that, "in order to receive Medicare and Medicaid funding, participating facilities must ensure that their staff—unless exempt for medical or religious reasons—are vaccinated against COVID–19."[20] The authorizing statutes for Medicare

[14] BST Holdings, LLC v. OSHA, 17 F.4th 604 (5th Cir. 2021).

[15] 28 U.S.C. § 2112(a)(3).

[16] Mass. Bldg. Trades Council v. U.S. Dep't of Labor (In re MCP No. 165), 21 F.4th 357 (6th Cir. 2021), rev'd, NFIB v. OSHA, 142 S. Ct. 661 (2022).

[17] In re MCP No. 165, 20 F.4th 264 (6th Cir. 2021).

[18] NFIB, 142 S. Ct. at 665 (emphasis in original).

[19] *Id.* (quoting Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021)).

[20] Biden v. Missouri, 142 S. Ct. at 650.

and Medicaid grants to state and private health facilities give the HHS secretary the power to impose such "requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution."[21] The Biden administration cited these provisions as authorization for the health care worker mandate.[22]

The CMS mandate was quickly challenged in two separate lawsuits filed by a total of 25 Republican-controlled state governments; in both cases, district courts issued preliminary injunctions blocking enforcement of the mandate as litigation proceeded.[23] The U.S. Court of Appeals for the Fifth Circuit refused to lift the injunctions as applied to the 14 state plaintiffs in one of the cases, but did lift them as applied to the rest of the country.[24]

Unlike in the OSHA mandate case, the Supreme Court did not divide along ideological lines in *Biden v. Missouri*. Instead, Chief Justice John Roberts and Justice Brett Kavanaugh joined the three liberal justices in upholding the CMS mandate.[25] The majority's unsigned *per curiam* opinion indicates that "[t]he rule . . . fits neatly within the language of the statute" giving CMS the authority to impose regulations "the Secretary [of HHS] finds necessary in the interest of the health and safety of individuals who are furnished services."[26]

Because *Biden v. Missouri* was litigated at the same time as the OSHA mandate case and both rulings were issued on the same date, January 13, 2022, reaction to *Biden v. Missouri* was relatively muted. Nonetheless, it is a highly significant decision—both because it upheld a mandate affecting some 10 million people[27] and because of its implications for future cases.[28]

[21] See 42 U.S.C. § 1395x(e)(9) (hospitals receiving Medicare funds); § 1395x(cc)(2)(J) (outpatient rehabilitation facilities receiving Medicare funds); §§ 1395i–3(d)(4)(B) (nursing facilities receiving Medicare funds); § 1395k(a)(2)(F)(i) (ambulatory surgical centers receiving Medicare funds). See also §§ 1396r(d)(4)(B), 1396d(l)(1), 1396d(o) (similar provisions in Medicaid act).

[22] COVID–19 Vaccination and Testing, 86 Fed. Reg. at 61555.

[23] Louisiana v. Becerra, 571 F. Supp. 3d 516 (W.D. La. 2021), rev'd, 142 S. Ct. 647 (2022); Missouri v. Biden, 571 F. Supp. 3d 1079 (E.D. Mo. 2021), rev'd, 142 S. Ct. 647 (2022).

[24] Louisiana v. Becerra, 20 F.4th 260 (5th Cir. 2021).

[25] Biden v. Missouri, 142 S. Ct. at 652–55.

[26] *Id.* at 652.

[27] *Id.* at 656 (Thomas, J., dissenting).

[28] See discussion *infra*, Parts III, IV.

## II. The OSHA Large-Employer Mandate Case

The Supreme Court's conservative majority reached the right decision in *NFIB v. OSHA*, but in part for the wrong reasons. The Court adopted a strained reading of the ETS provision of the OSHA Act while overlooking a much stronger alternative rationale.

The ETS statute allows OSHA to impose rules bypassing normal notice-and-comment procedures (which give members of the public an opportunity to comment on proposed regulations) only in cases where "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards."[29] The Supreme Court majority contends that the covid vaccination mandate does not fall within this category because "[t]he [OSHA] Act empowers the Secretary to set *workplace* safety standards, not broad public health measures."[30] They emphasize that "[t]he text of the agency's Organic Act . . . repeatedly makes clear that OSHA is charged with regulating 'occupational' hazards and the safety and health of 'employees.'"[31]

This theory is subject to the dissenting justices' rejoinder that "nothing in the Act's text supports the majority's limitation on OSHA's regulatory authority."[32] As the dissenters point out, "[c]ontra the majority, [the text] is indifferent to whether a hazard in the workplace is also found elsewhere."[33] The ETS provision of the OSHA Act only requires that the risk in question pose a "grave danger" within the workplace.[34] It doesn't matter whether similar dangers exist elsewhere.

But there is an alternative justification for the majority's position that both they and the dissenting justices overlook. It is, in fact, doubtful that covid posed a grave danger to employees when the vast majority of them could have easily minimized the risk by getting vaccinated voluntarily, thereby largely eliminating the threat of serious illness and death.[35] By the time OSHA issued its large-employer

[29] 29 U.S.C. § 655(c)(1).

[30] NFIB, 142 S. Ct. at 665.

[31] *Id.* at 664 (quoting 29 U.S.C. §§ 652(8), 654(a)(2), 655(b)–(c)).

[32] *Id.* at 673 (joint dissent).

[33] *Id.*

[34] 29 U.S.C. § 655(c)(1).

[35] For a recent summary, see Julia Ries, Omicron BA.5: Experts See Increase in Mild Cases, Vaccines Continue to Be Effective, Healthline (July 7, 2022), https://bit.ly/3znhe0Y.

vaccination mandate, covid vaccines were readily available for free to adults throughout the United States.

During oral argument, Biden administration Solicitor General Elizabeth Prelogar conceded that OSHA's "grave danger finding is limited to unvaccinated workers."[36] OSHA itself had concluded that "most *unvaccinated* workers across the U.S. economy are facing a grave danger posed by the COVID-19 hazard."[37] By the time of the ruling, workers could easily avoid that danger by getting vaccinated—a simple procedure that usually takes only a short time. The dissenting justices argue that OSHA's rule is justified in part because "in [workplace] environments, more than any others, individuals have little control, and therefore little capacity to mitigate risk."[38] In fact, however, by OSHA's own admission, employees could very easily mitigate risk simply by getting vaccinated. Indeed, the regulation does not even make it significantly easier for them to do so.[39] It merely punishes employers if they retain workers who do not get vaccinated or, alternatively, wear masks and test regularly.

But if a "grave danger" that justifies the use of emergency authority exists even when workers could easily avoid it, OSHA would have near-boundless authority to use its emergency powers to control almost any workplace practice, or indeed almost anything that might affect workplace conditions in any significant way. Virtually any activity poses grave dangers to at least some people if none of them take even minimal precautions. For example, parking a car in the employee parking lot creates a grave danger for people who refuse to move out of the way when they see it coming. Even walking down a flight of stairs can be dangerous if people refuse to slow down or hold on to railings when necessary.

This authority might still be constrained by the ETS statute's limitation to grave dangers caused by "exposure to substances or agents determined to be toxic or physically harmful or from

[36] Tr. of Oral Arg. at 108, NFIB v. OSHA, 142 S. Ct. 661 (2022) (No. 21A244).

[37] COVID–19 Vaccination and Testing, 86 Fed. Reg. at 61433 (emphasis added).

[38] NFIB, 142 S. Ct. at 674 (joint dissent).

[39] The OSHA regulation did require employers to give workers "reasonable" time to get vaccinated and recover from side effects. COVID–19 Vaccination and Testing, 86 Fed. Reg. at 61479. But that accommodation has very limited value, given the agency's own conclusion that getting vaccinated requires a total of only about four hours for the complete two-dose regimen and that side effects are generally minimal. *Id.* at 61479–81.

new hazards."[40] But almost any "substance or agent" can potentially be "physically harmful" if people cannot be expected to use minimal precautions in handling it. Even water could potentially be spilled on the floor, thereby leading people to slip on it and suffer injuries. Food and beverages can cause serious harm if consumed in excessive quantities, and so on. And a very wide variety of changes in workplace conditions could potentially be considered "new hazards" if they can be interpreted as posing a "grave danger" even when the danger might be avoided through simple common-sense precautions.

Of course, covid-19 can pose risks even to the vaccinated, as they too can become infected. But the degree of risk is vastly smaller.[41] Even OSHA itself did not conclude that these risks were severe enough to qualify as a grave danger to the vaccinated. A statement supporting the OSHA mandate endorsed by the American Medical Association and numerous other health care organizations and experts also noted that the danger in question overwhelmingly affected the unvaccinated.[42] The statement emphasized that "[v]accines are effective in preventing COVID cases, hospitalizations and, most importantly, deaths," and that "[c]ompared to the vaccinated, the unvaccinated are 11 times more likely to die."[43]

The argument advanced here is similar to that made by Chief Judge Sutton of the Sixth Circuit in his opinion, urging his court to hear the case *en banc*:

> This emergency power extends only to "necessary" measures, namely measures indispensable or essential to address a "grave" danger in the workplace. But this set of preconditions does not apply (1) when the key population group at risk

[40] 29 U.S.C. § 655(c)(1).

[41] Early data indicate that vaccination reduces transmission of covid-19 even with the more contagious Delta and Omicron variants, though to a lesser degree than with earlier versions of the virus. See, e.g., Chris Stokel-Walker, What Do We Know about Covid Vaccines and Preventing Transmission?, BMJ, Feb. 4, 2022, https://bit.ly/3zthgVf; David Eyre, et al., Effect of Covid-19 Vaccination on Transmission of Alpha and Delta Variants, 386 New Eng. J. of Med. 744 (2022); Nick Andrews et al., Covid-19 Vaccine Effectiveness against the Omicron (B.1.1.529) Variant, 386 New Eng. J. of Med. 1532 (2022).

[42] See Press Release, Health Care Organizations, Leading Health Care Experts and Professional Organizations: Businesses Should Support OSHA's COVID Vaccination Mandate (Nov. 18, 2021), https://bit.ly/3vx688J.

[43] *Id.*

> from COVID-19—the elderly—in the main no longer works, (2) when members of the working-age population at risk—the unvaccinated—have chosen for themselves to accept the risk and any risk is not grave for most individuals in the group, and (3) when the remaining group—the vaccinated—does not face a grave risk by the Secretary's own admission, even if they work with unvaccinated individuals.[44]

While Chief Judge Sutton overstates the extent to which the elderly "no longer work,"[45] the rest of his points are well-taken. Among other things, he is right that the statute indicates that ETS measures must be "necessary" to mitigate the grave danger at issue, and such necessity is highly questionable at a time when vaccination is readily available even without the mandate.

The exceptional emergency nature of the ETS authority further undercuts claims that OSHA has sweeping authority to regulate a vast range of ordinary workplace conditions. Such an interpretation of the law would make emergency power the rule rather than the exception.

The argument that OSHA exceeded its authority is also reinforced by the fact that ETS power had never previously been used so sweepingly in the 50-year history of the OSHA Act. As the majority points out, the ETS power had been used "just nine times before (and never to issue a rule as broad as this one)."[46] Six of the nine previous uses of the ETS power were challenged in court, and five were invalidated, at least in part.[47] This history of aggressive, nondeferential judicial review suggests that the ETS power was generally understood as strictly limited—not as a wide-ranging power for the agency to counter almost any potential threats to worker safety.

In sum, it is more reasonable to interpret "grave danger" as limited to threats that cannot be easily mitigated by simple precautions.

[44] In re MCP No. 165, 20 F.4th at 268 (Sutton, C.J., dissenting from denial of initial hearing en banc).

[45] Some one-third of Americans between the ages of 65 and 74 are in the workforce. See Nat'l Inst. of Occupational Safety & Health, Productive Aging and Work, Ctrs. for Disease Control & Prevention (Sept. 11, 2015), https://bit.ly/3zPDdyV.

[46] NFIB, 142 S. Ct. at 663. See also BST Holdings, 17 F.4th at 609 (reviewing these uses); In re MCP No. 165, 20 F.4th at 276 (Sutton, C. J., dissenting from denial of initial hearing en banc).

[47] See BST Holdings, 17 F.4th at 609 n.1 (summarizing these cases); see also Szymendera, *supra* note 12.

The threat of covid to the unvaccinated does not qualify at a time when it can easily be addressed by getting vaccinated.

At the very least, there is ambiguity over whether such an easily mitigated risk qualifies as a "grave danger" under the ETS authority. Such ambiguity triggers the major questions doctrine, which requires Congress to "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[48] The power to use ETS to address threats that are subject to simple mitigation surely qualifies as a delegation of "decisions of vast economic and political significance," as it would give OSHA the power to use its emergency powers to restrict almost any workplace condition, and do so in a way that bypasses normal administrative-law procedures.

The ETS provision of the OSHA Act does not make clear whether easily mitigated risks qualify as grave dangers. The Court was therefore justified in rejecting the large-employer mandate under the major questions doctrine. Its reliance on the distinction between workplace hazards and general threats to public health is less secure. Undoubtedly, giving the agency the power to use ETS to address easily mitigated risks would allow it to make "decisions of vast economic and political significance," as it would give the agency sweeping control over a vast range of workplace activities. Whether such risks really qualify as grave dangers is not clear.

The major questions doctrine is the subject of significant controversy, with some calling for it to be abolished or significantly scaled back,[49]

[48] Util. Air Reg. Group v. EPA, 573 U.S. 302, 324 (2014); see also FDA v. Brown & Williamson, 520 U.S. 120, 159–60 (2000) (Congress cannot be assumed to have implicitly delegated the power to regulate "a significant portion of the American economy" because "we are confident that Congress could not have intended to delegate a decision of such economic and political significance" without explicitly saying so.).

[49] See, e.g., Jonas Monast, Major Questions about the Major Questions Doctrine, 68 Admin. L. Rev. 445 (2019) (arguing for it to be scaled back); Natasha Brunstein & Richard Revesz, Mangling the Major Questions Doctrine, 74 Admin. L. Rev. 217 (2022) (arguing for its use only in "exceptional" cases); Marla Tortorice, Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power, 67 Buffalo L. Rev. 1075 (2019). A standard criticism of the doctrine is that it is difficult to distinguish between major questions and less significant ones. See, e.g., Cass R. Sunstein, Chevron Step Zero, 92 Va. L. Rev. 187, 243 (2006) ("[T]he difference between interstitial and major questions is extremely difficult to administer.").

even as others defend it.[50] Here, I do not attempt to defend or criticize the doctrine, but merely limit myself to making the point that if courts should use it at all, the OSHA ETS mandate is a relatively easy case. The broad interpretation of ETS authority needed to sustain the mandate would undeniably give the agency control over major issues of economic and social policy, and that broad interpretation is—at the very least—far from clearly required by the text of the statute.

Over the last year, the Supreme Court has used the major questions doctrine to invalidate three major government policies: the OSHA mandate, the Centers for Disease Control nationwide eviction moratorium enacted by the Trump administration and later revived and extended by the Biden administration under the guise of combating the spread of covid-19,[51] and potentially sweeping Environmental Protection Agency regulations intended to combat global warming.[52] The ideological valence of these three decisions has led to concerns that the major questions doctrine is merely a cover for a right-wing political agenda. The most recent ruling, *West Virginia v. EPA*, has drawn especially negative commentary on this score.[53] But a strong major questions doctrine could well benefit liberal causes as well as conservative ones.[54]

[50] See, e.g., Clinton Summers, Nondelegation of Major Questions, 74 Ark. L. Rev. 83, 84 (2021) (arguing that "the 'major questions' test from the major questions doctrine should become the new basis for enforcing the nondelegation doctrine"); Andrew Howayeck, The Major Questions Doctrine: How the Supreme Court's Efforts to Rein in the Effects of Chevron Have Failed to Meet Expectations, 25 Roger Williams U. L. Rev. 173 (2020) (arguing for a more robust version of the doctrine).

[51] Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021). For my assessment and defense of the Court's ruling in this case, see Ilya Somin, Nondelegation Limits on COVID Emergency Powers: Lessons from the Eviction Moratorium and Title 42 Cases, 15 NYU J.L. & Liberty 658 (2022) (symposium on "Responding to Emergency: A Blueprint for Liberty in a Time of Crisis").

[52] West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[53] See, e.g., Blake Emerson, The Real Target of the Supreme Court's EPA Decision, Slate, (June 30, 2022), https://bit.ly/3zL7PRh; Durwood Zaelke, West Virginia vs. EPA: A Political Tragedy Disguised as a Legal Farce, The Hill (July 8, 2022), https://bit.ly/3zQsZhO; Adrian Vermeule, There Is No Conservative Legal Movement, Wash. Post (July 6, 2022), https://wapo.st/3PUhxaG. For more measured assessments, see, e.g., Jonathan H. Adler's article in this volume: Jonathan H. Adler, West Virginia v. EPA: Some Answers about Major Questions, 2021–2022 Cato Sup. Ct. Rev. 37 (2022); Kristin E. Hickman, Thoughts on West Virginia v. EPA, Yale J. on Reg. (July 5, 2022), https://bit.ly/3QhgxNM.

[54] See Somin, *supra* note 51, at 696–97 (making this case); see also *infra* discussion in Part IV.

The major questions doctrine is also often seen as a tool for enforcing the constitutional nondelegation doctrine: The idea that there are limits to the extent to which Congress can delegate power to the executive branch, even if it does speak clearly. Justice Neil Gorsuch—arguably the Court's leading advocate of robust nondelegation rules—has noted that "[a]lthough it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[55] Gorsuch reiterates that position in a concurring opinion in *NFIB v. OSHA*, joined by Justices Clarence Thomas and Samuel Alito.[56] He emphasizes that "the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine" because both seek to ensure that "the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives."[57]

Gorsuch contends that the sweeping nature of OSHA's assertion of authority in this case should lead to the invalidation of the ETS rule under either nondelegation or major questions, especially since both rules serve "a similar function."[58] There is, however, a crucial distinction between the two. A sufficiently clear delegation by Congress can satisfy the demands of the major questions doctrine. By contrast, even the clearest possible statutory text cannot save an otherwise unconstitutional delegation.

Even more than the major questions doctrine, the idea of judicially enforceable nondelegation rules is controversial. The Supreme Court has only recently started to give serious consideration to reviving such rules, and commentators are deeply divided over the question of whether doing so is desirable.[59] As in the case of major questions,

[55] Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

[56] NFIB, 142 S. Ct. at 668–69 (2022) (Gorsuch, J., concurring).

[57] *Id.*

[58] *Id.*

[59] For critiques of nondelegation, see, e.g., Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 Colum. L. Rev. 277 (2021) (claiming there are no nondelegation limits that can be justified on originalist grounds); Nicholas A. Parillo, A Critical Assessment of the Originalist Case against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s, 130 Yale L.J. 1288 (2021) (arguing that original meaning allows broad delegations). For defenses of nondelegation doctrine, see, e.g., Michael McConnell, The President Who Would Not

I do not attempt to resolve this broader debate here. I merely suggest that if nondelegation doctrine should be a meaningful constraint on congressional and executive power at all, it strengthens the case for invalidating the ETS employer vaccination mandate.

In his influential exposition of nondelegation doctrine, Justice Gorsuch argues that the original meaning of Article I of the Constitution requires that "Congress make[] the policy decisions when regulating private conduct," though "it may authorize another branch to 'fill up the details'" and to engage in fact-finding.[60] It seems obvious that the ETS mandate is a policy "regulating private conduct" and that the power to regulate anything that might be considered a "grave danger," even if easily mitigated, is more than a matter of "filling up details" and fact-finding.

It is important to understand that the Court's decision in *NFIB* does not categorically bar the use of ETS authority to mandate vaccination in all cases. To the contrary, the majority specifically notes that "[w]here the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible" and highlights the example of "risks associated with working in particularly crowded or cramped environments."[61] What is impermissible is the kind of wide-ranging, largely indiscriminate mandate adopted by the agency.[62] This weakens claims that the ruling drastically undermines OSHA's authority, or even that of the federal government more generally.[63]

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Be King: Executive Power under the Constitution (2020); Ilan Wurman, Nondelegation at the Founding, 130 Yale L.J. 1490 (2021); Philip Hamburger, Nondelegation Blues, 91 Geo. Wash. L. Rev. (forthcoming 2023), https://bit.ly/3SzhTW2; Ann Woodhandler, Public Rights and Taxation: A Brief Response to Professor Parrillo, Virginia Public Law and Legal Theory Research Paper No. 2022-09 (2022), https://bit.ly/3zV9mp6; Jed Shugerman, Vesting, 74 Stan. L. Rev. (forthcoming 2022), https://bit.ly/3paDkiN.

[60] Gundy, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

[61] NFIB, 142 S. Ct. at 665–66.

[62] For a rare acknowledgement of this distinction by a critic of the Court's ruling, see Simon Lazarus, Biden Misread the Supreme Court's Ruling against the OSHA Vaccine Rule, New Republic (Jan. 19, 2022), https://bit.ly/3JwDJ8w.

[63] See, e.g., William Harrison, The Supreme Court's Vaccine Mandate Decision Is a Deadly Power Grab, Alliance for Justice (Feb. 2, 2022), https://bit.ly/3JqkNYL (claiming the decision will lead to a "dramatic shrinking" of government authority); Stephen I. Vladeck, The Supreme Court's Vaccine Mandate Ruling Shows It's Ready to Second-Guess Government Policy, Wash. Post (Jan. 19, 2022), https://wapo.st/3cOsCv9 (claiming that it heralds a return to the "Lochner era" of supposedly nondeferential judicial review).

Some targeted vaccination mandates might also be permissible under the approach outlined in this article. While I have argued that covid-19 does not generally pose a grave danger of the kind the ETS statute is intended to counter, such a danger could potentially exist in situations with substantial numbers of especially vulnerable employees, particularly if voluntary vaccination is, for some reason, inadequate to protect them against the spread of disease from others around them who remain unvaccinated.

Interestingly, at least as of this writing (summer 2022), the Biden administration has not so far taken up the Court's implicit invitation to draft a narrower workplace vaccine mandate rule. If such a rule were truly as desperately needed as defenders of the initial ETS rule believe, one would think the administration might make at least some effort to salvage as much of it as they can.

Despite my critique of the OSHA policy, I should emphasize that I am not categorically hostile to vaccination mandates. To the contrary, I believe they can sometimes be justified, even from the standpoint of a libertarian approach to public policy that embodies a strong presumption in favor of bodily autonomy.[64] My reservations about the OSHA mandate are mainly focused on the dangers of giving the executive vast discretionary control over workplace activities of the kind that it would have had if the Biden administration had prevailed in this case.

Concentrating such enormous power in one branch of government—ultimately under the control of a single man or woman in the White House—is a dangerous menace. Those who believe President Biden can be trusted with such vast authority should ask whether they will have similar confidence in the next Republican president, and vice versa. Constitutional limits on executive power are an important safeguard against such dangers. As Chief Judge Sutton warned in his opinion unsuccessfully urging the circuit to consider the OSHA case *en banc*, "[s]hortcuts in furthering preferred policies, even urgent policies, rarely end well, and they always undermine, sometimes permanently, American . . . separation of powers, the true mettle of the U.S. Constitution, the true long-term guardian of liberty."[65]

[64] See, e.g., Ilya Somin, A Broader Perspective on "My Body, My Choice," The Volokh Conspiracy (June 30, 2022), https://bit.ly/3oOyc3x; cf. Jason Brennan, A Libertarian Case for Mandatory Vaccination, 44 J. of Med. Ethics 37 (2018).

[65] In re MCP No. 165, 20 F.4th at 269.

### III. The CMS Health Care Worker Vaccination Mandate

The Court's ruling on the CMS vaccination mandate for health care workers in *Biden v. Missouri* attracted much less attention than *NFIB v. OSHA* did. It is nonetheless a significant decision—and one the Court got right.

The most obvious difference between the two cases is that, in the CMS case, the statutory language supports the executive much more clearly. The relevant statutes authorizing federal Medicare and Medicaid grants to hospitals and other medical institutions give the Secretary of Health and Human Services the power to impose such "requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution."[66] Unlike the ETS provision of the OSHA Act, this authorization is not a special emergency power, nor is it limited to countering grave dangers. It seems to cover any regulations that might counter threats to the "health and safety" of patients, even if those dangers are relatively modest in scope.

At the same time, in order to prevail, the government need not adopt an interpretation of its powers broad enough to trigger the major questions doctrine or raise nondelegation concerns. The power to set conditions is limited to institutions receiving Medicare and Medicaid grants and to regulations that protect the "health and safety" of patients within those institutions. It is far from being a general power to address health or safety issues throughout every workplace in the country and therefore does not qualify as a decision of "vast economic and political significance."[67]

Likewise, it is hard to deny that vaccinating medical personnel against a potentially deadly contagious disease can help protect the "health and safety" of vulnerable patients in the Medicare and Medicaid systems. In support of that proposition, HHS cited multiple studies from the United States and abroad indicating that vaccinated health care workers were far less likely to become infected with the

[66] See 42 U.S.C. § 1395x(e)(9) (hospitals receiving Medicare funds); § 1395x(cc)(2)(J) (outpatient rehabilitation facilities receiving Medicare funds); §§ 1395i–3(d)(4)(B) (nursing facilities receiving Medicare funds); § 1395k(a)(2)(F)(i) (ambulatory surgical centers receiving Medicare funds); see also §§ 1396r(d)(4)(B), 1396d(l)(1), 1396d(o) (similar provisions in Medicaid act).

[67] NFIB, 142 S. Ct. at 665 (quoting Ala. Ass'n of Realtors, 141 S. Ct. at 2489).

covid-19 virus to begin with and less likely to transmit it to others if they did.[68]

Notably, a hugely disproportional share of U.S. covid fatalities occurred among long-term care (LTC) and nursing home facility patients, who perished at 10 times the rate of the general population.[69] The situation was likely even worse for Medicare patients, who are, by definition, elderly. The elderly have much higher covid hospitalization and fatality rates than younger people, even if vaccinated.[70] In addition, patients in hospitals and LTC facilities are more likely to be immunocompromised than members of the general population, and such people, too, are at far more risk from covid.[71] Finally, it seems reasonable to assume that the incapacitation of unvaccinated health care workers by covid might further imperil patients as a result of understaffing. Vaccination reduces the risk that workers will contract covid and that they will suffer hospitalization or death if they do.[72]

Adding up all these factors, it seems obvious that the Supreme Court majority was right to conclude that a vaccination mandate for

[68] Medicare and Medicaid Programs; Omnibus COVID–19 Health Care Staff Vaccination, 86 Fed. Reg. 61555, 61557–58 (Nov. 05, 2021).

[69] See, e.g., Priya Chidambaram, Over 200,000 Residents and Staff in Long-Term Care Facilities Have Died from COVID-19, KFF (Feb. 3, 2022), https://bit.ly/3PVKqTW (noting that some 200,000 residents of nursing homes and LTC facilities have died of covid, forming 23 percent of all U.S. covid fatalities as of January 16, 2022). As of early 2022, there were some 8.3 million LTC residents in the U.S. Emma Rubin, Long-Term Care Statistics, Consumer Affairs (Jan. 27, 2022), https://bit.ly/3vDgd3N. That amounts to about 2.5 percent of the total U.S. population of 332 million. See Derick Moore, U.S. Population Estimated at 332,403,650 on Jan. 1, 2022, Census Bureau, (Dec. 30, 2021), https://bit.ly/3PTim3n. Thus, LTC residents have a fatality rate from covid some 10 times higher than the general population. CMS cited this disproportionate death toll in its justification for the rule. See Medicare and Medicaid Programs; Omnibus COVID–19, 86 Fed. Reg. at 61566.

[70] See, e.g., Risk for COVID-19 Infection, Hospitalization, and Death by Age Group, Ctrs. for Disease Control & Prevention (July 29, 2022), https://bit.ly/3zRfbDI (noting that people ages 65–74 are five times more likely to be hospitalized and 60 times more likely to die of covid than those ages 18–29; the ratios for people ages 75–84 and 85 and above are even higher). CMS's justification for the rule cites this factor, as well. Medicare and Medicaid Programs; Omnibus COVID-19, 86 Fed. Reg. at 61566.

[71] See, e.g., Ed Yong, The Millions of People Stuck in Pandemic Limbo, The Atlantic (Feb. 16, 2022), https://bit.ly/3JEHFUR.

[72] See *supra* discussion in Part II.

health care workers "fits neatly within the language of the statute."[73] Indeed, it is hard to think of many rules that more clearly serve the purpose of protecting the "health and safety" of patients.

In his dissenting opinion, joined by three other conservative justices, Justice Thomas describes the statutes giving CMS the power to impose "health and safety" rules as a mere "hodgepodge" of "ancillary" provisions in which Congress would not "hide 'fundamental details of a regulatory scheme.'"[74] To my mind, the rules protecting the health and safety of patients are far from merely "ancillary" provisions of a program intended to facilitate the provision of health care. If anything is "fundamental" to such a program, it is the protection of patient health and safety.

Thomas similarly argues that the "health and safety" requirements actually refer to merely "administrative" requirements similar to other regulations in the same sections, such as "provid[ing] 24-hour nursing service," "maintain[ing] clinical records on all patients," or having "bylaws in effect."[75] But 24-hour nursing services, maintenance of clinical records, and other similar provisions all ultimately serve the same purpose as the vaccination requirement: improving the quality of patient care and reducing health risks.

In a separate dissent, also joined by all those justices who joined Thomas's opinion, Justice Alito argues that CMS was not justified in foregoing the notice-and-comment process normally required by the APA.[76] I must leave the details of this question to analysts with greater relevant expertise on the APA. But it seems to me the majority effectively responds to this argument by pointing to the pressing need to deal with a winter surge of covid cases as sufficient grounds to invoke the "good cause" exception to this requirement.[77]

While the Court's statutory analysis is compelling, insofar as it goes, the majority neglected crucial issues raised by the lower court opinions and the plaintiffs in the case. Many of the latter were state governments suing because many of the facilities subject to the CMS

[73] Biden v. Missouri, 140 S. Ct. at 652.

[74] *Id.* at 656 (Thomas, J., dissenting) (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

[75] *Id.* at 657 (quoting 42 U.S.C. §§ 1395x(e)(2), (3), (5)).

[76] *Id.* at 659–60 (Alito, J., dissenting).

[77] *Id.* at 654.

mandate are controlled by states and localities. Federal grants to state and local governments are subject to constitutional restrictions on Congress's Spending Clause powers. Conditions attached to federal grants to subnational governments must be "unambiguously" spelled out by Congress,[78] "related" to the purposes of the grant,[79] and limited in their scope so as to avoid "coercion" of state and local governments.[80]

Federal courts take these requirements seriously. The Trump administration's repeated violation of them led to numerous defeats in court for its efforts to use grant conditions to pressure "sanctuary cities" that refused to cooperate with federal efforts to deport undocumented immigrants.[81] Spending Clause issues were raised in one of the two trial court decisions the Supreme Court overturned in *Biden v. Missouri*, which cited the clear statement and coercion issues,[82] and in the plaintiffs' brief before the Supreme Court.[83] Yet the Supreme Court majority ignored this important issue.

The same can be said for the plaintiffs' reliance on the longstanding federalism "clear statement" rule that Congress must use "exceedingly clear language if it wishes to significantly alter the balance between state and federal power."[84] The plaintiffs also emphasized this rule in their brief.[85] Justice Thomas cited it in his dissent as well.[86] A plausible argument can be made that the federalism canon is implicated in this case because vaccination and public health are traditionally functions of state government.[87]

[78] See, e.g., Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[79] South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

[80] *Id.* at 211; see also NFIB v. Sebelius, 567 U.S. 519, 580–83 (2012) (Roberts, C.J.).

[81] For an overview, see Ilya Somin, Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy, 97 Tex. L. Rev. 1247 (2019).

[82] Louisiana, 571 F. Supp. 3d at 542.

[83] Plaintiffs' Response to Application for Stay at 23–24, Biden v. Missouri, 142 S. Ct. 647 (2022) (No. 21A240).

[84] Ala. Ass'n of Realtors, 141 S. Ct. at 2489; cf. Gregory v. Ashcroft, 501 U.S. 452, 458–62 (1991) (leading case emphasizing the importance of this rule).

[85] Plaintiffs' Response to Application for Stay, *supra* note 83, at 23–24.

[86] Biden v. Missouri, 142 S. Ct. at 658 (Thomas, J., dissenting).

[87] *Id.*

But the majority ignores the problem, just like it did with the Spending Clause issues.

In my view, both the Spending Clause requirement of an "unambiguous" statutory authorization and the federalism clear statement rule are satisfied by the very clear connection between vaccination of staff members against deadly contagious diseases and the statutorily authorized protection of the "health and safety" of patients. We can easily imagine borderline cases where the connection between a regulatory condition and health and safety is tenuous in nature and therefore difficult for grant recipients to foresee ahead of time. For example, imagine a rule requiring health care workers to jog five miles every day, on the theory that doing so would increase their health and stamina, which in turn would improve their job performance and benefit patients. In such situations, the Spending Clause clear statement rule and federalism canon might bar CMS from imposing the condition in question. But covid-19 vaccination is not such a borderline case.

The coercion issue is more complicated. The Supreme Court has never clearly explained what qualifies as unconstitutional "coercion" in the Spending Clause context. In the famous case of *NFIB v. Sebelius*, which partly invalidated Affordable Care Act conditions on Medicaid grants, Chief Justice Roberts's controlling opinion concluded that "coercion" is present in a situation where the amount of federal funding at issue is so large that the threat to remove it amounts to a "gun to the head" of the state.[88] No such gun to the head is present in this case, as failure to comply with the CMS mandate would only threaten funding given to the specific facilities in question, not all the Medicare and Medicaid funding given to the state government as a whole.[89]

The CMS rule probably meets the requirements of the Supreme Court's Spending Clause jurisprudence and federalism clear statement rule. But the Court would have done well to address these issues explicitly, rather than ignore them (with the exception of a brief mention in Justice Thomas's dissent).

[88] NFIB v. Sebelius, 567 U.S. at 581 (Roberts, C.J.).

[89] Medicare and Medicaid Programs; Omnibus COVID–19, 86 Fed. Reg. at 61612–14 (describing penalties for noncompliance).

*Biden v. Missouri* is an important case not only because it upheld a large-scale vaccination mandate affecting millions of health care workers, but because it is likely to set a precedent for future CMS staff vaccination mandates. At least in the case of deadly contagious diseases, such mandates are amply justified by the statutory text. But the Supreme Court should have also addressed the associated Spending Clause and federalism canon issues. Sweeping the latter under the rug, as the justices did, could well cause confusion in future cases.

**IV. Broader Implications**

*NFIB v. OSHA* and *Biden v. Missouri* have significant implications that go beyond the specific policies at issue in these cases, which are both important in and of themselves. Both the OSHA large-employer vaccination mandate struck down by the Court and the CMS health care worker mandate upheld by it affected millions of people. The Court's resolution of these cases therefore had a large-scale immediate effect. But it also set important precedents for the future.

The Court's ruling in *NFIB* ensures that future ETS measures will be limited to those that target workplace-specific risks rather than "public health more generally."[90] The extent to which this decision genuinely constrains OSHA's authority remains to be seen. It doesn't necessarily prevent the agency from using the ETS authority to impose either large-scale measures generally or vaccination mandates specifically. OSHA could still do so in situations where such measures target a situation where a virus or other health risk poses "a special danger because of the particular features of an employee's job or workplace."[91] In some cases, the "special danger" could affect large numbers of workers in a specific industry or sector of the economy.

The distinction between what qualifies as a "special danger" caused by "particular features of the workplace" and what counts as a general public-health risk is far from completely clear. Can the agency impose restrictions to counter a risk that is 10 percent greater in the workplace than outside it? What about five percent or two percent? This sort of question might well come up in future litigation, if OSHA again tries to use its ETS authority to regulate dangers that exist in both the workplace and outside it.

[90] NFIB, 142 S. Ct. at 665; see also *supra* discussion in Part II.

[91] NFIB, 142 S. Ct. at 665.

Despite this uncertainty, the Court has clearly signaled that the agency bears the burden of proving that there is a "special danger" in the workplace. That will make it more difficult for OSHA to use ETS to enact sweeping rules that affect a wide swathe of workers in different occupations. Proving that "special dangers" exist in the many industries covered by the regulation in question will often be difficult or impossible.

The Court's limitations on OSHA ETS authority also help to ensure that this power will remain a relatively rarely used emergency measure, as opposed to a commonplace end-run around normal notice-and-comment requirements. ETS cannot and should not be a blank check for OSHA or the White House to enact large-scale workplace regulations as it sees fit.

In my view, the Court's interpretation of the ETS power—based on the distinction between workplace risks and general public-health dangers—has significant flaws; it would have been preferable to instead focus on the requirement that ETS can only be used to counter a "grave danger." But the Court's approach does still have the virtue of placing meaningful constraints on what might otherwise have become near-boundless agency authority to regulate a vast range of workplace activities.

The Court's ruling in *Biden v. Missouri* also has important implications for future health care policy. By upholding the CMS vaccination mandate, the majority made clear that CMS's power to protect the "health and safety" of patients in institutions receiving federal Medicare and Medicaid funds includes the authority to require health care workers to be vaccinated against deadly contagious diseases. That power could well be used in the future, if new covid variants or the spread of other contagious diseases leads the agency to conclude that additional vaccinations are needed to protect patients.

As I write these words in the late summer of 2022, there is concern about the spread of monkeypox in the United States and elsewhere.[92] Unlike covid-19, monkeypox generally spreads only through prolonged close physical contact between individuals.[93] But such contact may be unavoidable between some types of health care providers and their patients. If so, CMS could potentially use the same power

[92] See, e.g., Jason Gale, Understanding Monkeypox and How Outbreaks Spread, Wash. Post (July 26, 2022), https://wapo.st/3bnznDS.

[93] *Id.*

at issue in *Biden v. Missouri* to justify requiring some health care workers to get vaccinated against the monkeypox virus as well.

In combination with other recent decisions, *NFIB* also signals that the Court is serious about enforcing the major questions doctrine as a constraint on delegation. This obviously will make it difficult for the executive to use vague statutes as justifications for sweeping assertions of authority.

*NFIB* also heralds a potential revival of the nondelegation doctrine as a serious constraint on Congress's authority to delegate power to the executive branch. Whether a majority favors such an approach is not clear, though it seems like at least four justices—Gorsuch, Thomas, Roberts, and Alito—have embraced the idea in recent years.[94] If the doctrine is revived, it could potentially constrain the executive more than the major questions doctrine alone would. Unlike the latter, nondelegation constraints could not be overcome merely by enacting a statute that delegates power more clearly.

Critics claim that major questions and nondelegation constraints could hobble executive power to address public-health emergencies and other societal problems. But, as I have argued in greater detail elsewhere, such limitations are actually valuable to avoiding abuses of executive power and protecting civil liberties in times of crisis.[95] The experience of the covid pandemic shows that presidents of both parties have strong incentives to exploit emergencies to adopt dubious policy measures that inflict significant harm while doing little to actually address the emergency in question. Examples include the eviction moratorium invalidated by the Supreme Court on major question grounds and the Trump administration's policy (later continued by Biden) of using Title 42 powers to expel hundreds of thousands of asylum seekers at the southern border.[96]

Strong enforcement of nondelegation and other limits on executive power would not completely obviate this danger. But pushing severely abusive policies through Congress is relatively more difficult than adopting them through White House or executive agency action.[97]

[94] Somin, *supra* note 51, at 681.

[95] *Id.* at 694–98.

[96] *Id.*

[97] *Id.* at 696–98.

Critics of the *NFIB* decision and other major question rulings argue that they provide insufficient deference to the expertise of specialized executive agencies. The joint dissent by the three liberal justices emphasizes that "[a]n agency with expertise in workplace health and safety" is in a better position to judge "how much protection, and of what kind, American workers need from COVID–19" than a "court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes."[98] Similarly, legal scholar Steven Vladeck takes the Court to task for failing to "defer to the political branches" on a matter of "economic" policy on which the latter have superior expertise.[99]

But, as Vladeck himself pointed out in an earlier article (coauthored with Lindsay Wiley), nondeferential judicial review of the government's use of emergency powers during a crisis is a valuable tool for ensuring that the claims to "expertise" aren't merely a pretext for undermining civil liberties and constitutional constraints on government power.[100] A policy of judicial deference to supposed expertise will predictably lead to gross abuses.

In addition, claims of expertise often can be pretexts for other purposes, as likely occurred in the eviction moratorium and Title 42 cases. If the government's policy is truly justified by evidence derived from superior expertise, it should be able to prove it in court without any special deference. Indeed, a nondeferential approach by the judiciary can strengthen the government's incentives to do just that.[101]

Even the most expert of government agencies may lack expertise on all the issues raised by large-scale policy measures. The CDC may have scientific expertise on the spread of viruses, but it does not have expertise on economic and social policy sufficient to evaluate the full societal impact of policies such as a nationwide eviction moratorium or the expulsion of hundreds of thousands of migrants. Similarly, it is questionable whether OSHA really had relevant knowledge

[98] NFIB, 142 S. Ct. at 676 (joint dissent).

[99] Vladeck, *supra* note 63.

[100] Lindsay Wiley & Stephen I. Vladeck, Coronavirus, Civil Liberties, and the Courts: The Case against "Suspending" Judicial Review, 133 Harv. L. Rev. Forum 179, 183 (2020); cf. Somin, *supra* note 51 (making similar arguments); cf. Ilya Somin, The Case for "Regular" Judicial Review of Coronavirus Emergency Policies, Volokh Conspiracy (Apr. 15, 2020), https://perma.cc/4U9F-XF6Z.

[101] See Somin, *supra* note 100.

sufficient to assess the economic and social effects of imposing a vaccine mandate on tens of thousands of employers in widely varying circumstances, affecting over 80 million workers.

Sadly, the ideological valence of the most high-profile recent major question and nondelegation rulings by the Supreme Court have raised fears that these doctrines are merely tools of the political right to use against the left. But it is important to emphasize that strong enforcement of these doctrines can be used to constrain Republican abuses of power no less than Democratic ones. President Donald Trump used the covid pandemic as a pretext for adopting the most sweeping immigration restrictions in American history. Many of his policies were vulnerable to nondelegation challenges,[102] and a federal district court invalidated his sweeping suspension of work visas partly on that basis.[103] In an age where many on the left rightly worry that Trump (in the event that he returns to power) and other Republicans might use executive power for authoritarian purposes, the left has at least as much to gain from rigorous judicial enforcement of limitations on sweeping assertions of executive authority as the right.[104]

While progressives are understandably disappointed with *NFIB*'s invalidation of the OSHA vaccination mandate, they have reason to support the separation-of-powers principles on which the ruling was based. The Supreme Court's strengthening of those principles could help constrain Republican power grabs no less than Democratic ones.

In addition to their implications for health care policy and separation-of-powers doctrine, the vaccine mandate rulings also highlight some weaknesses of the Supreme Court's growing use of the shadow docket. Scholars have criticized the practice of deciding important issues on an accelerated timetable with relatively limited

[102] For an overview, see Ilya Somin, The Dangers of America's Coronavirus Immigration Bans, The Atlantic (June 28, 2020), https://bit.ly/3zroRUi.

[103] See Nat'l Ass'n of Mfrs. v. DHS, 491 F. Supp. 3d 549, 563 (N.D. Cal. 2020), appeal dismissed, 2021 WL 1652546 (9th Cir. 2021).

[104] See Somin, *supra* note 51, at 695–98. For an argument that progressives should embrace nondelegation principles as a safeguard against Trump and others like him, see Carlos A. Ball, Principles Matter: The Constitution, Progressives, and the Trump Era 178–82 (2021).

briefing.[105] In a recent dissenting opinion in another shadow docket case, Justice Kagan took the majority to task for using the shadow docket as just "another place for merits determinations—except made without full briefing and argument."[106]

Both *NFIB* and *Biden v. Missouri* arguably exemplify some of the risks of using the shadow docket to resolve major substantive issues. The decisions in both cases were issued on January 13, 2022, just six days after oral argument, and only about two months after the OSHA and CMS rules were promulgated on November 5, 2021. That gave the Court little time to consider the arguments and issues at stake.

While I believe the Court nonetheless reached the right outcomes in both cases, the majority opinion in each one suffers from significant errors and omissions. In *NFIB*, the Court relied on a dubious distinction between workplace risks and general public-health dangers, while overlooking the much stronger rationale for its decision offered by focusing on the meaning of the requirement that ETS authority may only be used to counter a "grave danger." This despite the fact that the latter argument was highlighted by Chief Judge Sutton's lower-court opinion in the Sixth Circuit. And in *Biden v. Missouri*, the Court neglected important Spending Clause and federalism clear statement rule issues, even though these questions had been raised in the brief of the plaintiffs and in one of the lower court rulings the Court ended up overturning. Would the Court have avoided these errors if it had had more time for consideration? That question is hard to answer. But these mistakes do seem like the kind of slipshod errors that are more likely to occur when judges and their clerks work under extreme time pressure.

It doesn't necessarily follow that the Court should abolish or severely curtail its use of the shadow docket. The dangers of swift decisions made without time for careful consideration must be weighed against the costs of letting illegal policies remain in force, which can

[105] For criticisms of the shadow docket, see, e.g., Vladeck, *supra* note 5; The Supreme Court's Shadow Docket: Hearing before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary, 117th Cong. *3–4 (2021) (statement of Stephen I. Vladeck); Stephen I. Vladeck, The Solicitor General and the Shadow Docket, 133 Harv. L. Rev. 123 (2019). Professor Vladeck is the leading academic critic of the Court's use of the shadow docket.

[106] Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1349 (2022) (Kagan, J., dissenting).

sometimes cause grave harm that is difficult or impossible to repair. There is also sometimes value in quickly and definitively resolving disputes in favor of the government, thereby allowing key policies to proceed without a cloud of legal uncertainty hanging over them. The Court's swift upholding of the CMS health care worker vaccination mandate may be an example of the latter. I do not attempt to resolve these difficult tradeoffs here. But I note that the use of the shadow docket may have significantly reduced the quality of the Court's work in these two important cases.

**Conclusion**

The Supreme Court's January 2022 vaccine mandate rulings correctly resolved legal disputes over two important policies adopted for the purpose of combatting the covid-19 pandemic. In the process, they also set valuable precedents for future cases and strengthened separation-of-powers constraints on executive power. There is much to applaud in both rulings.

At the same time, however, there are also significant limitations and omissions in both decisions. The Court's decisions reached the right results and were certainly "good enough for government work." But the justices should have done still better.