

Health Choice or Health Coercion?

The OSHA Emergency Temporary Standard COVID-19 Vaccination Mandates: Ax or Vax

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Note: This paper was constructed in December 2021 prior to the rulings issued by the United States Supreme Court in *Biden v. Missouri*. Although largely consistent with the oral arguments in *Biden v. Missouri*, this paper examines the debate through the lenses of medical and bodily autonomy, constitutionality, and pragmatism.

On September 9, 2021, the Biden administration announced its “Path Out of the Pandemic” plan, wherein the administration declared that it would mandate COVID-19 vaccinations for all employers with one hundred or more employees.¹ The COVID-19 Vaccination and Testing Emergency Temporary Standard was published on November 5, 2021.² Upon further consultation of the document, it is abundantly clear that the measure is an egregious overreach of federal authority. Businesses covered under the mandate are forced to present two choices to their employees: get the vax or get the ax. If the business fails to bend to the whims of the government, the Biden administration threatens financial penalties ranging from \$9,753 to \$136,532. The mandate fails to pass constitutional muster and fails to answer practical questions relative to vaccine efficacy and workplace diversity. Should the courts uphold the mandate, the constitutional framework of the United States will be perpetually altered, shifting the balance of power in the favor of the federal government and destroying the fabric of federalism. There are reasonable alternatives to challenge the mandate so as to prevent irreparable harm.

ISSUE IDENTIFICATION

The five-hundred-page document detailing the COVID-19 Vaccination and Testing mandate is designed to be cumbersome, oppressive, invasive, and totalitarian. The Occupational Safety and Health Administration, hereafter referred to as OSHA, is designed to assure Americans with healthy working conditions and to preserve our human resources. OSHA was not given the authority to issue public health pronouncements for all of society on behalf of the federal bureaucracy. Even if the mandate is deemed constitutional, the mandate fails to account for workplace differences such as those between a janitor cleaning alone and a textile factory employee working shoulder to shoulder with other employees. The mandate is also underinclusive, as it fails to capture employers with ninety-nine employees and thus allows some to spare themselves the burdens and costs of compliance. The “emergency” of COVID-19 has been here for over two years. Despite claims of urgency, the President and his administration took two months to draft and publish the Emergency Temporary Standard. As argued in the Fifth Circuit of the United States Court of Appeals, OSHA is acting well beyond its statutory authority.³ The Biden administration looked for a workaround to allow for a national vaccine mandate after they voiced their dissatisfaction over vaccination rates in September. The statute allows OSHA to bypass traditional 6-month notice-and-comment proceedings in light of an Emergency Temporary Standard in order for the provision to be placed on the Federal Register immediately. However, in order to achieve an ETS, it must be “determined (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 danger.”⁴

¹ “President Biden’s COVID-19 Plan.” The White House. The United States Government, September 9, 2021. <https://www.whitehouse.gov/covidplan/>.

² 29 CFR Parts 1910, 1915, 1917, 1918, 1926, and 1928.

³ “BST Holdings v. OSHA.” United States Court of Appeals for the Fifth Circuit, November 12, 2021.

⁴ 29 USC § 655(c)1.

ETEs are unusual responses to exceptional circumstances and courts have often thought that OSHA's authority should be delicately exercised in limited contexts. In order for an ETS to be enacted, it must (1) address "substances or agents determined to be toxic or physically harmful"—or "new hazards"—in the workplace; (2) show that workers are exposed to such "substances," "agents," or "new hazards" in the workplace; (3) show that said exposure places workers in "grave danger"; and (4) be "necessary" to alleviate employees' exposure to gravely dangerous hazards in the workplace.

The Texas brief argues relative to § 655(c)(1)'s phrases "substances or agents" and "toxic or physical harmful" sets the airborne virus of COVID-19 beyond the purview of the ETS. OSHA attempts to manipulate these phrases to include the virus, which is widely present in our communities and non-life-threatening to majority of employees. The mandate connotes COVID-19 with toxicity and poisonousness. OSHA may not claim that COVID-19 is a "new hazard" either, as such a statement would contradict that which they issued to the D.C. Circuit remarking COVID-19 as a "recognized hazard."

In order to enact a legally sound ETS, there must be incontrovertible evidence that employees under the scope of the ETS are exposed to these dangerous substances, agents, or hazards in question. However, OSHA fails to meet this threshold. While OSHA has presented evidence of outbreaks and clusters relative to transmission, it fails to evidence that such instances are present in *all* covered workplaces. The evidence regarding the "grave danger" that results from COVID-19 remains inconclusive. The mandate concedes that COVID-19 effects may lie on a spectrum from "mild" to "critical." The mandate fails to account for the changes in the rates of transmission since the President's announcement of a mandate in early September. It is generally "arbitrary and capricious" to deviate from a previous policy *sub silentio*, and agencies must provide a "detailed explanation" for their contradictions of previous policy, especially when the prior policy was associated with certain serious reliance interests.

There are also relevant questions as to the necessity and overbreadth of the mandate. The mandate fails to account for differences between workplaces relative to COVID-19 danger yet attempts to apply a one-size-fits-all solution for nearly two-thirds of the private sector workforce. Unvaccinated workers with natural immunity are arguably of a smaller risk than an unvaccinated worker with no history of infection. By their own admission, OSHA conceded that erecting a tailored and effective ETS for COVID-19 would be a practical impossibility. In these same comments, OSHA stated that since COVID-19 knowledge keeps increasing, setting rules through an ETS has the possibility of undercutting worker protections by mandating certain precautions that may soon prove to be ineffective. The ETS could only institute broad legal standards that are already in affect and doing so would be unnecessary and indistinctive in light of ongoing state, local, and private relief efforts. The ETS could be "informed by incomplete or ultimately inaccurate information."

OSHA reasoned that companies with 100 or more employees would be able to better administer and sustain the mandate. However, this reasoning undermines the assertion that the mandate is really about an emergency response and thus hinders the persuasiveness of their claims. While courts have asserted that protection of workers via an ETS should supersede efforts to protect an industry from economic consequences, the mandate fails to provide more benefits than costs. The mandate exceeds the federal government's authority relative to the Commerce Clause,

as it attempts to regulate noneconomic inactivity that rests within a state's police power. A person's choice to receive or decline vaccination and forgo regular testing is a noneconomic inactivity.⁵ Regarding statutory authority, the law requires Congress to "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." The mandate draws on a dated statute used in a nuanced case, imposes over \$3 billion in compliance costs, involves broad medical considerations that lie beyond the bounds of OSHA's areas of competence, and claims to deliver a certain solution to a highly contested issue.

The continuance of the mandate without injunctions would have posed irreparable harm, as the mandate seeks to suppress the individual liberties and interests of those reluctant to choose between getting the ax at work and getting the vaccine. The loss of constitutional freedoms "for even minimal periods of time... unquestionably constitutes irreparable injury." Should the stays be denied, businesses will experience financial harms from indefinite employee absences or firings, compliance costs to obey the mandate, diversion of resources to comply, or from OSHA's threat to punish noncompliant businesses who refuse to fire or test employees with steep financial penalties. If such a regulation is then deemed to be invalid after its costly imposition has already taken affect, there will be irreparable harm of unrecoverable costs of compliance. Issuing stays does nothing to harm OSHA, but the absence of stays will certainly cause harm to countless Americans.

The stay remains in the public interest as the alternative would bring economic uncertainty with workplace conflicts, as the mere mention of the mandate upended the labor environment within the United States. However, the public interest also includes the maintenance of our constitutional structure via federalism and the maintenance of individual liberty relative to personal decisions regarding privately held convictions regardless of how inconvenient these may be for government. Congress has long loaned out their authority to various executive agencies tasked with implementing those principles constructed within the halls of Congress. In the same way that health agencies do not make housing policy, OSHA cannot make health policy.

CRITERIA

When enacting a measure to protect the general citizenry from an infectious disease, it is important that our government officials never seek to prioritize safety over freedom. Individual liberties are a foundational pillar of our nation and have been since its inception. The government must not abuse the Constitution's divisions and delegations of authority, as our structure is designed to safeguard against the hubris of those who declare themselves the saviors of the nation. It is through liberty and other constitutional freedoms that live our lives with quality and purpose. It is through liberty that we can receive answers to our medical concerns and exercise bodily and medical autonomy with full confidence in our doctors. It is through liberty that our citizenry can walk through life largely unmolested by government regulations pertaining to privacy. Coerced consent shatters these bonds and sews despondence in the American spirit.

It is paramount for states to recognize their role in opposing federal overreach. These abuses of power threaten the sovereignty of states and the unity of the nation. The preservation of federalism affords states the opportunity to solve local problems locally and build amicable, tight-knit communities. Moreover, states have an obligation to protect their citizens and to make policy

⁵ "*National Federation of Independent Business v. Sebelius*." Oyez. <https://www.oyez.org/cases/2011/11-393>.

decisions that will improve quality of life and provide opportunities. Confronting American workers with medical coercion or unemployment is hardly honoring the faith that the public places in our republic. States must allow for individual liberty and free enterprise without allowing the vice-like grips of government to intrude into state affairs. All powers not explicitly vested or granted are to reside within the states and the people, as stated in the Tenth Amendment.⁶

Finally, the Fourteenth Amendment requires that no one be deprived life, liberty, or property without due process of law.⁷ The mandate is violative of these principles as the government attempts to demonize, threaten, and ostracize citizens for making personal choices about their bodies. The federal government and its actions set national precedents. Stripping Americans of education, employment, travel, medical autonomy, and security is undemocratic. It is the duty of every American to resist such injustices and oppose tyranny in every instance by upholding the rule of law.

PERTINENT EVIDENCE

The systemic problem of the vaccination mandate lies in its imposition on businesses.⁸ This private-sector mandate threatens the livelihoods of over 100 million people. The first issue to consider relative to the constitutionality of the vaccine mandate is that of separation of powers. The regulation is subject to scrutiny in that the actions of Biden and OSHA are “arbitrary and capricious.” There is evidence to support this claim in that there is substantial doubt that the mandate was drawn in a manner with enough care given the scientific evidence regarding transmission and harm risk, threat to the vaccinated population from the inactions of the unvaccinated population, burdens created by test-regime alternatives that attempt to cajole and coerce vaccination, and failure to consider natural immunity.

The second issue relates to the issue of federal authority relative to the imposition of the law and its relationship to interstate commerce or other enumerated powers found within the Constitution. Unlike the feds, states enjoy general police powers for public health and safety regulation. A vaccination mandate as a condition to operating a business is even more radical in its relationship with commerce than mandates to purchase health insurance, a matter that the Supreme Court held was not justified by the Commerce Clause. The mandate is being forced on those businesses that operate only in one state and on employees that are not travelers or channel users of interstate commerce.

Forcing a private business to do all the heavy lifting for government officials is not a reasonable pursuit of limiting the pandemic. The Supreme Court similarly recognized this principle in the first Obamacare suit, which was found to have no independent power to force noncommercial activities within states as part of a larger regulatory framework. The federal government has no authority to force businesses to impose these mandates on their employees that it cannot implement directly. These issues of constitutionality relative to the federal mandates are different than those that are currently in litigation for state, municipal, and private vaccine mandate

⁶ U.S. Const. amend. X.

⁷ U.S. Const. amend. XIV.

⁸ Ilya Shapiro, “Federal Vaccine Mandates Pose a Constitutional Triple Threat.” Cato.org, September 10, 2021. <https://www.cato.org/blog/federal-vaccine-mandates-pose-constitutional-triple-threat>.

challenges. It is important to recognize which division and authoritative body of government is infringing on the liberties of the people, the manner in which these infringements occur, and what outcomes they are designed to achieve.

White House Chief of Staff Ron Klain retweeted, “OSHA doing this vaxx mandate as an emergency workplace safety rule is the ultimate work-around for the Federal govt to require vaccinations.”⁹ The underlying premise for the mandate is that unvaccinated employees present a grave danger to other employees. The mandate is intended to cajole businesses to harass their employee to vaccinate, test, or get the ax. It is important to distinguish the requirements of masks or safety equipment like donning a hard hat. A vaccination is a medical procedure that involves the injection of a substance by a medical professional, and all medical procedures come with risks. The Vaccine Adverse Advent Reporting System, a database that records such experiences, is maintained by the government and reports hundreds of thousands of vaccine-induced complications. While rare, they are a necessary consideration for the patient.

The Supreme Court held in 1989 in *Cruzan v. Director, Missouri Department of Health* that “a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.” While this right is not absolute, there must exist a sufficient and compelling government interest to overcome it. The lack of federal police power is directly attributable to the public distrust of federal politicians compared to state officials that are more directly accountable to local communities. The 1905 *Jacobson v. Massachusetts* case extends a window of opportunity for states to require vaccination or require the payment of a fine. There is no general federal power relative to healthcare.¹⁰ The Constitution extends authority for the government to “provide for ... the general Welfare of the United States.” These provisions are not for generous interpretation. Our federalist system necessitates that the states enjoy authority to effectively govern their internal concerns, and Congress’ enumerated powers are designed to ensure that state authorities are not trampled by governmental overreach.

The issue in contest is the federal authority to regulate interstate commerce. While the federal government does indeed regulate medical care, it only does so with indirect limitations regarding health insurance. Even if one were to grant merit to the Court’s blessings to Congress’ pretextual invocations of commerce interference, specifically if we look since the establishment of the New Deal, the justices still issued the 2012 Obamacare decision declining a mandate to buy medical insurance. This ruling lies on the logical reasoning that the Constitution allows Congress to regulate enduring interstate commerce, not to cajole participation in such transactions. Even so, a vaccine is hardly commerce, let alone interstate commerce.

These overreaches of federal power are seldom recognized and even more scarcely contested. If such powers for medical mandates are indeed granted to the federal government, it logically follows that there is nothing the federal government cannot do. Without the assurance of

⁹ Devin Watkins, “OSHA Cannot Constitutionally Coerce People into Vaccinations.” Competitive Enterprise Institute, September 15, 2021. https://cei.org/opeds_articles/osha-cannot-constitutionally-coerce-people-into-vaccinations/.

¹⁰ Andrew C. McCarthy, “Biden’s Unconstitutional Vaccine Mandate.” National Review. National Review, September 10, 2021. <https://www.nationalreview.com/corner/bidens-unconstitutional-vaccine-mandate/>.

internal controls within the states, it can be argued that the Constitution never would have achieved ratification. Justices noticed a similar trend relative to the eviction moratorium, observing that these voluntary transactions between tenants and landlords are traditionally concerns for state law and that federal action “intrudes into an area that is the particular domain of state law.” The Court requires Congress to submit unambiguous language if they wish to change current balances of power between the federal government and state governments. Even if the language were perspicuous, however, the issue is a priori in that Congress does not have the power to make such changes. If they did, OSHA would not have needed to dig from the archives an Emergency Testing Standard that has not been publicly submitted since its rejection in the courts over forty years ago.

Biden promised on the campaign trail to “shut down the virus,” but COVID-19 is still abounding eleven months into his presidency.¹¹ Seeking to secure an approval rating surge, Biden desperately exceeded his entrusted authority. Vaccination requirements on the books today are those imposed by state or individual school districts, none of which are as boundless as this mandate. This mandate forces employers to not only police who has gotten the shot, but also break the bank to fund weekly testing for workers. The Congressional Research Service even commented on the rare and selective exercise of OSHA’s authority in its July report, citing the courts’ denial of an ETS for asbestos in 1983. In the case of asbestos, the federal appeals court decided OSHA did not have sufficient support to advance its claim that 80 workers would die if the rule were not imposed. Biden acknowledged the extremely low risk for vaccinated individuals in the workplace, and it is clear that anyone who wants the shot can make that personal health choice to protect themselves. With these considerations, the justifications of such a mandate begin to falter. In December of 2020, Biden stated that he did not believe vaccination should be mandatory and that he would not make it so. The Biden administration has no regard for the rule of law, as evidenced by his extension of the eviction moratorium following the declaration that such an extension would be illegal.

While Biden mirrored Trump’s actions relative to international travel bans to slow the transmission of COVID-19, Biden seeks an extension.¹² U.S. citizens, permanent residents, and their immediate family members stand exempt from travel bans in current effect. However, the Washington Post reported that the Biden administration is considering a mandatory seven-day quarantine period for anyone returning from travels abroad no matter your citizenship status, vaccination status, or ability to produce a negative COVID-19 test. Some officials have been whispering into the President’s ear to ban unvaccinated citizens or those returning from high-risk countries. While the government may impose certain health evaluations at the border, these measures have no precedent. The right to enter one’s country is a fundamental tenet of citizenship. The Supreme Court declared that liberties of which citizens cannot be deprived without due

¹¹ The Editors, “Biden's Desperate COVID Overreach.” National Review. National Review, September 10, 2021. <https://www.nationalreview.com/2021/09/bidens-desperate-covid-overreach/4>.

¹² Eugene Kontorovich, “COVID-19 and the Right to Travel.” The Wall Street Journal. Dow Jones & Company, December 2, 2021. <https://www.wsj.com/articles/covid-19-and-travel-ban-restrictions-unconstitutional-international-abroad-omicron-biden-11638458140>.

process of law under the Fifth Amendment includes the right to travel, as “freedom of movement is basic in our scheme of values.”

Reentry can be subject to certain restrictions so long as they are reasonable, such as passport requirements and health inspections. Current law allows the federal government to isolate or quarantine citizens returning from travels abroad, but they must know that the individual has been exposed to a communicable disease and provide affected individuals with a detailed explanation of the factual considerations that solidified the CDC’s belief in individual exposure. A blanket quarantine deprives citizens of their individual liberties without due process of law and certainly without credible evidence to substantiate such claims. Infectious disease will never be eradicated, so it is essential to avoid granting the federal government free rein to treat citizens as disease-ridden threats to society.

One of the practical problems that arises with the ETS’ bypass of the regulatory process is the inability of implementers to voice their concerns relative to the mandate’s consequences.¹³ Businesses now have to devise and implement a new system for monitoring the vaccination statuses of employees, facilitate weekly testing for the unvaccinated, and store records of negative tests. It is unclear what workers have to do while awaiting results. Businesses also need answers for those employees who will not test or vaccinate and how that will affect the ability for them to keep these employees on payroll. The enforcement of the mandate is also botched. Questions about whether businesses have to submit the catalogs of negative tests and vaccination records or undergo OSHA audits for these records remain unanswered. If the government comes to require booster shots, the status of previously vaccinated persons may change.

One of the issues that galvanizes liberal voters is the left’s purported solidarity with working class Americans.¹⁴ The Democratic platform often touts its historical favor for labor improvements such as paid vacations, minimum wage, and unemployment insurance. At least from an electorate perspective, it is baffling that so many Democratic politicians endorse vaccine mandates that threaten working class jobs. On September 9, Biden spoke on the hesitance of the eighty million unvaccinated workers who said they were waiting for FDA approval. Since the approval was granted, Biden decided “the time for waiting” was over. Biden insisted that the vaccination was not about freedom or personal choice. There are countless anecdotal testimonials of workers experiencing a career and financial crisis as a result of government interference. Karen Mason, a New York public schoolteacher of twenty-one years expressed her suspicion of the vaccination campaign in light of America’s historical experimentation on African Americans. Mason was forced on unpaid leave as a result of de Blasio’s mandate and believes she will likely retire in order to avoid compliance with the mandates.

The unvaccinated are left without advocates. Labor unions are increasingly refusing to support their employees as they cave to government tyranny. The government is willing to condemn workers to poverty for their medical decisions. If we look at the Bronx, which is heavily

¹³ Philip Klein, “The Practical Problems with Biden’s Employer Vaccine Mandate.” National Review. National Review, September 10, 2021. <https://www.nationalreview.com/corner/the-practical-problems-with-bidens-employer-vaccine-mandate/>.

¹⁴ Ted Rall, “Opinion | the Left Betrays the Working Class on Covid Mandates.” The Wall Street Journal. Dow Jones & Company, November 21, 2021. <https://www.wsj.com/articles/left-betrays-working-class-covid-mandates-vaccine-religious-approval-exemption-nyc-osha-11637505203>.

populated by Democratic minorities, we see citizens taking precautions by wearing masks but refusing vaccination. This refusal can often be attributed to a distrust of American institutions. Another teacher Ricardo Alexander, who has previously applied for and received vaccination exemptions, applied to the New York City Board of Education for religious exemption but was summarily denied. The board claimed the application failed to meet their criteria for religious-based accommodations, citing the Order of the Commissioner of Health that unvaccinated employees simply could not work alongside others in a Department of Education building without posing a “direct threat to health and safety.” Another worksite would also cause “undue hardship” on the DOE. Registered nurse Donna Schmidt was placed on unpaid leave from her job. She cited religious and scientific objections to the vaccinations, stating that mRNA vaccinations had “never been used in human beings before” and that the COVID-19 vaccine was actually “gene therapy.”

First responders are also warning of a “mass exodus” of front-line workers following the mandate.¹⁵ LA County Sheriff Alex Villanueva described increased rates of early retirement for investigators and other deputies. In his county alone, over half of the homicide service could walk right off the line after over twenty years of service. Workers’ compensation claims also rose by 21.9%. Sheriff Villanueva candidly attributed his county’s suboptimal vaccination rates to a lack of faith in the vaccine and political opinions.

Citizens are already feeling betrayed by hospital systems in light of current COVID-19 policies. Colorado resident Leilani Lutali was denied a life-saving kidney transplant surgery on the basis of her unvaccinated status.¹⁶ Lutali, a stage five kidney disease patient, was forced to choose her religious convictions over her health. Lutali refused vaccination, stating that she simply could not agree to a vaccine that used fetal cell lines in its development. These cell lines were created decades ago and are widely used in medical product development. UHealth issued a statement arguing that their requirements are based on the notion that transplant recipients who contract COVID-19 have a mortality rate of at least twenty percent. Transplant patients undergo powerful medical regimens that suppress their immune system in order to prevent organ rejection. Lutali feels the hospital is willing to gamble with her life to protect her from COVID-19.

The ETS may only remain in effect for six months before being replaced by a permanent OSHA standard that is subject to the formal and conventional rulemaking process that allows for a notice and comment period.¹⁷ Some employers may simply decide that cataloging vaccination statuses and tests results would be far more burdensome than imposing a mandatory vaccination policy as a condition of employment. Some states have laws on their books prior to COVID-19 requiring employers to finance mandatory medical tests or reimburse their employees for such tests. The Fair Labor Standards Act requires employers to pay nonexempt employees for testing time during the workday and likely includes those tests that must occur on an employee’s day off

¹⁵ *Los Angeles County Sheriff Alex Villanueva Warns Of 'Mass Exodus' Over Vaccine Mandate*. Youtube.com. Forbes Breaking News, 2021. <https://youtu.be/HvoJGviRRXA>.

¹⁶ “Colorado Woman Who Won't Get Vaccinated Denied Transplant.” USNews. Associated Press, October 8, 2021. <https://www.usnews.com/news/health-news/articles/2021-10-07/colorado-woman-who-wont-get-vaccinated-denied-transplant>.

¹⁷ Lisa Nagele-Piazza, “What to Expect from OSHA on COVID-19 Vaccine and Testing Rules.” SHRM. SHRM, November 8, 2021. <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/what-to-expect-from-osha-on-covid-19-vaccine-and-testing-rules.aspx>.

if the test is deemed necessary to allow the worker to operate safely in the workplace during the pandemic.

Some have voiced concern regarding vaccination requirement for those with natural immunity. The CDC urges vaccination and points to a study that emphasizes the risk of reinfection, which concluded that the unvaccinated were 2.34 times more likely to experience reinfection than the vaccinated. It's unclear how the 100-employee threshold will be accounted for, whether employers must seek proof of vaccination, what tests are acceptable, and if the mandate extends to remote employees.

Previous COVID-19 infection will not excuse employees from the vaccine mandate.¹⁸ Marty Makary of the Johns Hopkins University Schools of Medicine affirmed the superiority of natural immunity over vaccinated immunity for both robustness and durability. Moreover, those who have recovered from COVID-19 are at a higher risk of vaccine adverse events due to augmented inflammatory responses. The Biden administration's interpretation of OSHA's statutory language brings forth a delegation issue. Congress may only delegate discretion to an agency if it provides a proper limiting principle. Otherwise, the delegation would violate the doctrine of separation of powers. To avoid issues of constitutionality, the courts will be required to interpret the statute in a more restrictive manner. In the last 50 years, OSHA has only bypassed the notice-and-comment rulemaking period ten times by using the ETS. However, courts have challenged six of these, striking five and upholding one. These subjugation efforts violate the procedural integrity of our institutions by prioritizing partisan political agendas.

Director of the CDC Rochelle Walensky, MD, issued remarks during a media briefing regarding the future of the COVID-19 pandemic.¹⁹ Walensky informed reporters, "For the amount of virus circulating in this country right now largely among unvaccinated people, the largest concern that we in public health and science are worried about is that the virus... [becomes] a very transmissible virus that has the potential to evade our vaccines in terms of how it protects us from severe disease and death. She warned that a more evasive variant may only be "just a few mutations away."

Responding to Dr. Walensky's remarks, Dr. Lewis Nelson, professor and clinical chair of emergency medicine and chief of the Division of Medical Toxicology at Rutgers New Jersey Medical School called the comments prescient. He commented on the variants we have already seen and stated that each one gets more transmissible. However, this competition is a natural result of natural selection. This mutation possibility has been predicted for some time. He claims that the more infections that take place, the more options the virus has for diversification and adaptation. He cautioned that circumstances would turn darker should the virus change in a manner that would affect how the spike protein binds and destroys the virus, as this would allow the virus to escape immune surveillance. Nelson claims that the best way to prevent viral mutations is to prevent

¹⁸ David B. Rivkin, and Robert Alt. "Opinion | Biden's Lawless Vaccine Mandate." The Wall Street Journal. Dow Jones & Company, September 28, 2021. <https://www.wsj.com/articles/biden-lawless-vaccine-mandate-constitution-occupational-safety-11632841737>.

¹⁹ Damian McNamara, "A Few Mutations Away!: The Threat of a Vaccine-Proof Variant." WebMD. WebMD, July 30, 2021. <https://www.webmd.com/vaccines/covid-19-vaccine/news/20210730/threat-of-vaccine-proof-covid-variant>.

infection with immunizations and masks. Mutation is not the only concern for the medical community. Recombination, or the process in which an individual is infected with two different strains of the same virus, could allow viral cells to swap genetic materials and yield a third unique strain. Such practices were seen in influenza, with H and N genetic segments being swapped. Recombination was not nearly as concerning at the beginning of the pandemic, but increased strain differentiation allows more attention for these issues. Dr. Walensky, however, assures her audience that we have not yet arrived at this issue yet, as the vaccines operate “really well in protecting us from severe disease and death.

A variant is an altered form of a virus.²⁰ COVID-19 currently has thousands of mutations worldwide. There is evidence that currently accessible vaccines will not work as well against Omicron. In South Africa, there were reports suggesting an increase in the number of people repeatedly contracting COVID-19, which suggests that the variant may be advanced in its evasion of vaccine-induced or natural immunity from past infection. Studies show that even two doses of the vaccine may not prove to be a formidable defense against the virus, so many are pointing to boosters to enhance immune responses. While data suggests that Omicron is more infectious and transmissible, there is no significant evidence to support claims that the variant is more serious than other variants. In fact, some say that it may be milder. Moderna has publicly announced its hopes for an Omicron vaccine by March 2022.

In a recent piece in the Wall Street Journal, Dr. Lapado and Dr. Risch (associate professor of medicine at UCLA’s David Geffen School of Medicine and professor of epidemiology at Yale School of Public Health, respectively) raise questions regarding the reporting of COVID-19 adverse events. Scientists are concerned that the risks of COVID-19 vaccinations have been woefully underestimated.²¹ Political angling, however, excludes much of these concerns from public discourse. Upon examination of historical trends, it is clear that the safety of medicines is not substantially understood until such medicines are deployed for the mass populace. Once such example was rofecoxib (Vioxx), which was a pain reliever that increased heart attack and stroke risk. Other examples could include antidepressants that were associated with an increase of suicide attempts for young adults and the influenza vaccine deployed during the swine flu epidemic that was accused of causing child febrile convulsions and narcolepsy. It is not uncommon for clinic trials to enroll patients that fail to represent the general population.

The Vaccine Adverse Event Reporting System, or VAERS, catalogs within a database for the consideration of Americans documentations of adverse events after vaccination. While the FDA and CDC state that these figures and data plots are not designed to assess vaccine-event causation, the data can be assessed for considerations of vaccine strengths and weaknesses. The VAERS data shows several adverse events are reported at high rates within a few days of vaccination across 310 million doses and fall rapidly afterward. The large clustering of certain adverse events directly following the vaccination should concern us, and the political warring

²⁰ Michelle Roberts, “What Are the COVID Variants and Will Vaccines Still Work?” BBC News. BBC, December 9, 2021. <https://www.bbc.com/news/health-55659820>.

²¹ Joseph A. Ladapo, and Harvey A. Risch. “Are Covid Vaccines Riskier than Advertised?” The Wall Street Journal. Dow Jones & Company, June 22, 2021. <https://www.wsj.com/articles/are-covid-vaccines-riskier-than-advertised-11624381749>.

inside Washington does not help to quell public fear. Stigmatization undermines integrity and could even induce harm.

There are four dire adverse events that are evidenced in these clusters: low platelets, noninfectious myocarditis, deep-vein thrombosis, and death. Myocarditis accounts for 321 cases occurring within five days following vaccination and declining beyond ten days. Research asserts that only a fraction of these events are reported, so the true measure is undoubtedly higher. It is essential to conduct analyses to evaluate these findings, and we can do so by using large data sets from health-insurance companies and healthcare organizations. Without thorough analysis, it seems that the risks of the vaccination seek to dwarf the benefits for low-risk groups, specifically children, young adults, and those who have recovered from prior COVID-19 infection. There is not a single study showing the benefits of vaccination for patients with prior infection. The Norwegian Medicines Agency combed through the files for the first 100 reported deaths of nursing-home residents post vaccination with the Pfizer vaccine. They found that the vaccine “likely” contributed to the deaths of ten through side effects like fever and diarrhea and “possibly” contributed to the deaths of twenty-six more.

While the pandemic has inspired droves of scientific investigative inquiries, these inquisitive sentiments have not inspired better public policy approaches. One such approach was mask wearing, which had only a modest impact on the spread of COVID-19.²² Lockdowns were shown to increase overall deaths but were still touted as viable solutions.²³ This trend of poor policy enactment continues with these mandates as public officials report that the vaccination will not stop the spread of COVID-19.²⁴ Moreover, these mandates infringe on medical and personal autonomy, which may sow doubts in institutions and promote unrest. Good policy making should prioritize the value of personal autonomy and seek to implement the least harmful policies to achieve benefits for the nation.

The prevailing argument in favor of vaccine mandates is that the unvaccinated have no right to infect others. The credibility of the argument is undermined by the fact that cases are partially attributable to asymptomatic and presymptomatic spread, which describes those unaware of their infection.²⁵ It is nonsensical to punish people when they have no reason to suspect they are infected. Other diseases that are characterized by asymptomatic spread are met with voluntary vaccination initiatives and screenings.

²² Wei Lyu, and George L. Wehby. “Community Use of Face Masks and Covid-19: Evidence from a Natural Experiment of State Mandates in the US.” *Health Affairs* 39, no. 8 (2020): 1419–25. <https://doi.org/10.1377/hlthaff.2020.00818>.

²³ Virat Agrawal, Jonathan H. Cantor, Neeraj Sood, and Christopher M. Whaley. “The Impact of the COVID-19 Pandemic and Policy Responses on Excess Mortality.” NBER, June 21, 2021. <https://www.nber.org/papers/w28930>.

²⁴ Joseph A. Ladapo, “Vaccine Mandates Can't Stop Covid's Spread.” *The Wall Street Journal*. Dow Jones & Company, September 16, 2021. <https://www.wsj.com/articles/vaccine-mandate-covid-19-unvaccinated-breakthrough-delta-boosters-fluvoxamine-antibodies-11631820572>.

²⁵ Bianca Nogrady, “What the Data Say about Asymptomatic COVID Infections.” *Nature News*. Nature Publishing Group, November 18, 2020. <https://www.nature.com/articles/d41586-020-03141-3>.

There is still an important distinction that needs to be made: the vaccines may reduce transmission, but they cannot prevent transmission. Vaccine protection wanes after three to four months, as evidenced by a study of 300,000 people in the United Kingdom. Multiple clinical studies attest that vaccinated individuals can contract and spread the disease.²⁶ Vaccine effectiveness fell from 91% efficacy to just 66% following Delta's appearance.²⁷ Israel studies show an even more pessimistic number of just 40% efficacy for some. People who have recovered from COVID-19 infection still enjoy the most durable protection.

None of these facts are worthy ruminations for policymakers. Misinformation continues to spew from the mouths of public officials. New York Governor Kathy Hochul stated that her mission for expanding mandates to state-regulated facilities was to let people know that the workers surrounding them and caring for them are "safe themselves and will not spread this." The data does not support her claims. The vaccines are reported to significantly reduce the likelihood of severe illness. Monoclonal antibodies, while not fielded as widely as the vaccines, show substantial reductions of risk for hospitalization. Other medications such as hydroxychloroquine and ivermectin have been touted for their low rates of hospitalization and death by experienced professionals who treat COVID-19 patients, including those of the Early COVID Care Experts group. Given that the science of COVID-19 is far from concrete, it is completely illogical to coerce Americans to submit to unending vaccinations and boosters or face indefinite employment.

POLICY ALTERNATIVES

The nation witnessed numerous legal contests in the circuit courts as states sought to make their case relative to the harms of the OSHA ETS vaccination mandate. While there was a temporary stay in the Fifth Circuit, the evidence overwhelmingly supported the continuance of the injunction. States need to advocate on behalf of their residents, protecting their livelihoods from oppression and humiliation. Because the courts issued differing rulings on challenges with similar case facts, the matter escalated to the Supreme Court.²⁸ These cases receive national attention and serve to illustrate solidarity among states in their resistance. The Supreme Court found that the oral argument, which parallels much of the legal theory alluded to here, had considerable merit relative to their decision to invalidate the authority of the mandate.

²⁶ Katharine Sanderson, "Covid Vaccines Protect against Delta, but Their Effectiveness Wanes." Nature News. Nature Publishing Group, August 19, 2021. <https://www.nature.com/articles/d41586-021-02261-8#ref-CR1>.

²⁷ "Effectiveness of COVID-19 Vaccines in Preventing SARS-COV-2 Infection among Frontline Workers before and during B.1.617.2 (Delta) Variant Predominance - Eight U.S. Locations, December 2020–August 2021." Centers for Disease Control and Prevention. Centers for Disease Control and Prevention, August 26, 2021. <https://www.cdc.gov/mmwr/volumes/70/wr/mm7034e4.htm>.

²⁸ *Biden v. Missouri*, 595 U. S. 1 (2022).

In defiance of the Fifth Circuit’s order for OSHA to pause attempts to enforce the mandate, the President told businesses days later that they should move forward with the requirements.²⁹ This action could constitute contempt of court, but the ability of imposing fines for such conduct is dwarfed by questions of legality.³⁰ Are fines barred by federal sovereign immunity? Sovereign immunity can be waived and may be overridden via separation of powers via 5 U.S.C. § 702. Congress would have to consent to the suspension of sovereign immunity in that case to provide for pursuits of relief. However, if an agency disobeys an injunction and the court imposes fines on the agency, it is unclear if the case would be considered a pursuit of “money damages.” One could argue that fines in this sense serve to discourage the disobedience of injunctions. If the fine were found to be collectible, the fine could come from the agency’s appropriations. If fines were not found to be a viable response, imprisonment of an agency official responsible for the contempt could be preferred. To avoid sanctions for contempt, the individual must have made every reasonable effort to comply.

States could also begin to devise legislative solutions to insulate citizens from the clutches of the mandate. States such as Alabama, Arkansas, Florida, Utah, Texas, and Wyoming are drafting and enacting legislation that would require employer to allow employees to claim exemptions by citing personal matters of conscience, medical concerns, natural immunity from previous COVID-19 infection, or religious convictions.³¹ These legislative measures also bar termination due to vaccine refusal, make available funding for employee testing, and prohibit recordkeeping of employee vaccination proof. Governor Abbott of Texas issued an executive order prohibiting entities within Texas from coercing or compelling individuals, regardless of their status as an employee or consumer, to receive the vaccination if they object to any of the aforementioned reasons.

PROJECTED OUTCOMES & TRADEOFFS

In the matter of legal challenges, states have a wealth of evidence supporting their claims of federal abuses of power. Unlike the federal government, states have long enjoyed police powers, including specific police power relative to vaccines. Keeping such personal decisions away from the dictates of the government is in the best interest of the people. These challenges, however, do take considerable time and resources to fight, and the result may not always be positive. Moreover, the involvement of the Supreme Court may create interbranch quarreling as members of Congress and White House correspondents attempt to influence the decisions of the Court.

²⁹ Spencer Kimball, “White House Tells Businesses to Proceed with Vaccine Mandate despite Court-Ordered Pause.” CNBC. CNBC, November 9, 2021. <https://www.cnbc.com/2021/11/08/biden-vaccine-mandate-white-house-tells-business-to-go-ahead-despite-court-pause.html>.

³⁰ Nicholas R. Parrillo, “The Endgame of Administrative Law: Governmental Disobedience and The Judicial Contempt Power.” *Harvard Law Review* 131, no. 3 (January 2018): 687–738.

³¹ “State Action on Coronavirus (COVID-19).” National Conference of State Legislatures, n.d. <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx>.

Court contests may also awaken debates over *Chevron* deference, a theory that arose from *Chevron U.S.A. v. Natural Resources Defense Council*.³² In instances where Congress has not spoken directly about an issue in a given federal statute, the Court must defer to the regulators' interpretation of the law. This allows executive agencies to issue their own interpretations of the law despite being unelected officials constructing and enforcing laws that Congress never passed. The existence of *Chevron* deference is an affront to justice and accountability. It is possible that this COVID-19 challenge may pave the way to its abolition, but the stances of all Justices relative to this specific mandate and its relation to *Chevron* are difficult to predict.

It is possible, however, that states supportive of the mandate will begin to cry foul at the dissonance between COVID-19 vaccination policy across the nation relative to legislative measures. Following the expiration of the federal mandate, these dissenting states may adopt measures into their state legislatures to make these mandates permanent or more damaging, building upon the destructive and approach to noncompliant workers and businesses in an effort to challenge the actions of other states and add to the political divide that COVID-19 has created. These incongruences may exacerbate issues of economic growth as businesses consider the possibility of mass firings and regulatory costs. However, residents vote with their feet and will relocate if conditions are not conducive to their interests, especially if conditions are more of hindrance than anything else. Legislative measures at the state level transcend governor elections, can achieve bipartisan support, and are enacted by elected representatives chosen by the people of the state to reflect their needs.

RECOMMENDATIONS

In sum, the state legislative measures regarding COVID-19 vaccination exemptions best achieves the aforementioned criteria. Legal challenges consume considerable capital and time, and the justice system is not uniform across the nation. As such, an unfavorable outcome is possible if assigned a politically motivated judge. While these contests are important to illustrate abuses of power, these cases could end poorly for plaintiffs if the Court chose to uphold *Chevron*. Court precedents can be overruled as well and carry sweeping consequences for the nation. State legislation allows for voter participation and representation as lawmakers attempt to protect their jobs, educational access, and individual liberties. This alternative provides for faith in political institutions, due process, and the preservation of federalism. The states, while capable of issuing vaccine mandates, refrain from doing so at this time out of respect for persons and their rights to life, liberty, and the pursuit of happiness. While there is a possibility of adverse state relations following the enactment of COVID-19 vaccination exemptions, the degree to which these events would increase the polarization our already divisive political climate is marginal and not of astounding concern.

³² Lee, Mike. "Reforming Executive Discretion, Part I - the End of Chevron Deference." Scribd. Scribd, March 17, 2016. <https://www.scribd.com/document/312417259/Reforming-Executive-Discretion-Part-I-The-End-of-Chevron-Deference>.

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