Hard Cases

US Employers Can't Be Required to Test or Vaccinate for Covid – Tough Road Ahead for Workplace Regulation

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Abstract

The United States Supreme Court has struck down rules of the Occupational Safety and Health Administration (OSHA) in a universally mocked decision, *National Federation of Independent Business* v *Department of Labor, Occupational Safety and Health Administration* (NFIB), that suggests that future regulation of health, safety, and the environment will face similar difficulties before a Supreme Court unwilling to grant any deference to regulatory expertise.

I. The US Occupational Safety and Health Administration

Federal responsibility for occupational safety and health was created in 1970 with passage of the Occupational Safety and Health Act of 1970.[1] Before that time, workplace safety and health was regulated, if at all, separately by each of the fifty states. Federal regulation was limited to a few ad hoc programs. Proposals for a federal approach began circulating in the 1960s during the presidential administration of Lyndon Johnson. A federal agency was finally created by Congress during the Richard Nixon administration.[2] Two factors are normally given credit for the surprising support by Republicans for a federal occupational safety and health agency. First, environmental regulation was taking place simultaneously. The Environmental Protection Agency (EPA) also was created in 1970, in this case by executive order from President Nixon. The EPA reflects simultaneous concern with cleaning up polluted air and water. Most of the United States (US) environmental policy apparatus was created during the Nixon administration. Second, Nixon believed that workers represented by labor unions could be induced to support the Republican party. His administration advanced other policies designed to appeal to organized working people, notably federal regulation of private retirement plans in the Employee Retirement Income

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[1] 29 USC paras 651-667.

[2] The history is reviewed in C. Noble, *Liberalism at Work: The Rise and Fall of OSHA* (Philadelphia: Temple University Press, 1986).

Security Act (ERISA) of 1974.[3] On Nixon's resignation in 1974, this wave of new federal agencies came to an end. Today most federal regulatory agencies date either from President Franklin D. Roosevelt's New Deal of the 1930s, or the environmental wave of the Nixon years. This is relevant because, as we shall see, the current Supreme Court lacks understanding of the process by which agencies were created and the expectations that Congress and the Executive had for them. The Court demands retroactively that Congressional delegation include magic incantations of which no one had heard.

Section 6 of the Occupational Safety and Health Act (hereafter the Act) sets out three distinct methods for creating federal occupational safety and health standards.[4] Subsection (a) permits the Secretary of Labor immediately to implement 'national consensus standards' already promulgated by nationally-recognized standards-setting organizations after consideration of diverse views.[5] Subsection (b) sets out the normal process for creating future standards. It is a cumbersome process, involving formal notice, public comment, employer applications for exemption, and judicial review.[6] As early observers noted, it creates a regulatory process slower and less responsive than some European models.[7]

Recognizing the possibilities for protracted standard setting under subsection (b), Congress also created subsection (c), Emergency temporary standards. It is this section that was severely damaged by the Supreme Court's decision in the Covid case. The statutory text authorizes such emergency temporary standards on determination by the Secretary of Labor:

> '(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.'[8]

The statutory language is broad, non-technical, and includes no limits on the Department of Labor's authority.

II. The Covid Rules

It is unnecessary here to review the history of the global Covid-19 pandemic, still ongoing as this is written. Effective vaccines were made available to

[3] 29 USC §§1001-1461.

[4] 29 USC §655.

[5] 29 USC §655 (a) (authorization for national consensus standards); 29 USC §652 (9) (definition of national consensus standards).

[6] 29 USC §655 (b).

[7] S. Kelman, Regulating America, Regulating Sweden: A Comparative Study of Occupational Safety and Health Policy (Cambridge MA: MIT Press, 1981).

[8] 29 USC §655 (c)(1).

Americans in December 2020, but by the end of that year, only two point eight million people had been vaccinated.[9] Increasing vaccination distribution was a major priority of the Biden administration when it took office the following month. An initial goal of one hundred million vaccinations in the first one hundred days of the administration was achieved in fifty-eight days.[10] Vaccination was highly effective. New cases fell as half the population became vaccinated.[11] However, resistance to vaccination, even though free and readily available, slowed vaccination rates. By summer 2021, other countries had passed the US in vaccination rates.[12] Low vaccination rates directly caused high numbers of new Covid cases.

This was the situation addressed by the President on 9 September 2021, in remarks that became the basis for the Department of Labor's emergency temporary standard.[13] The President observed that eighty million people, almost a quarter of the US population, had yet to receive any vaccination. While few fully vaccinated individuals would ever contract the virus - the President estimated only one in one hundred sixty thousand per day - the large number of unvaccinated individuals had led to 'a pandemic of the unvaccinated.' The President announced plans to increase vaccinations, including the emergency rule that would reach the Supreme Court, requiring businesses employing over one hundred people to require employees either to be fully vaccinated or display weekly negative tests. The President also remarked:

> 'So here's where we stand: The path ahead, even with the Delta variant, is not nearly as bad as last winter. But what makes it incredibly more frustrating is that we have the tools to combat COVID-19, and a distinct minority of Americans - supported by a distinct minority of elected officials - are keeping us from turning the corner. These pandemic politics, as I refer to, are making people sick, causing unvaccinated people to die.
>
> We cannot allow these actions to stand in the way of protecting the large majority of Americans who have done their part and want to get back

[9] R. Spalding and C. O'Donnell, 'U.S. vaccinations in 2020 fall far short of target of 20 million people' *Reuters*, available at https://tinyurl.com/2c2xzpry (last visited 30 June 2022); B. Lovelace Jr., 'The U.S. has vaccinated just 1 million people out of a goal of 20 million for December' *CNBC*, available at https://tinyurl.com/bdfc5uy2 (last visited 30 June 2022).

[10] B. Lovelace Jr, 'Biden will reach goal of having 100 million Covid vaccine 'shots in arms' in his first 100 days as early as Thursday' *CNBC*, available at https://tinyurl.com/46tv273a (last visited 30 June 2022).

[11] 'New HHS Report: Vaccination Linked to a Reduction of Over a Quarter Million COVID-19 Cases, 100,000 Hospitalizations, and 39,000 Deaths Among Seniors' *HHS.gov*, available at https://tinyurl.com/5ewhrppp (last visited 30 June 2022).

[12] A. Shah et al, 'How Can the U.S. Catch Up with Other Countries on COVID-19 Vaccination?' *The Commonwealth Fund*, available at https://tinyurl.com/3auta3ze (last visited 30 June 2022).

[13] 'Remarks by President Biden on Fighting the COVID-19 Pandemic' *The White House*, available at https://tinyurl.com/mr49926p (last visited 30 June 2022).

to life as normal.'

He would soon have occasion to add the unelected Supreme Court to the 'distinct minority of elected officials' standing in the way of protecting the large majority of Americans.

The Department of Labor announced the emergency temporary standard on 5 November 2021.[14] The standard contains two hundred sixty-one pages of detailed medical and economic analysis, analysis of the feasibility of the proposed standard, surveys of workers and employers, and analysis of existing regulation and its inadequacy. It is difficult to imagine that the Congress that delegated power to promulgate 'emergency temporary standards' contemplated such an extensive regulatory record. One wonders how the Department of Labor might respond to even more pressing emergencies than pandemic, even had it won this case in the Supreme Court.

III. The Decision of the Supreme Court

The Supreme Court took two pages to strike down the Department of Labor's two hundred sixty-one pages analysis.

The opinion, unusually, is not signed.[15] It is five pages long, of which three recount the procedural history of the case and summarized the standard:

> 'Covered employers must "develop, implement, and enforce a mandatory COVID-19 vaccination policy." (86 Fed Reg) at 61402. The employer must verify the vaccination status of each employee and maintain proof of it. *Id., at 61552*. The mandate does contain an "exception" for employers that require unvaccinated workers to "undergo (weekly) COVID-19 testing and wear a face covering at work in lieu of vaccination". Id, at 61402. But employers are not required to offer this option, and the emergency regulation purports to pre-empt state laws to the contrary. Id, at 61437. Unvaccinated employees who do not comply with OSHA's rule must be "removed from the workplace." Id, at 61532. And employers who commit violations face hefty fines: up to thirteen point six five three dollars for a standard violation, and up to one hundred point five three two dollars for a willful one. 29 CFR §1903.15(d) (2021).'

[14] 86 Fed Reg 61402 (5 November 2021), available at https://tinyurl.com/2p88yk47 (last visited 30 June 2022)..

[15] Brief, unsigned opinions are not as unusual as formerly, when they used to be reserved for routine matters without dissent. Increasingly, major decisions are made in unsigned opinions granting or denying stays of judicial decisions. The Committee on the Judiciary of the House of Representatives held hearings in February 2021 on the Court's increasing 'shadow docket,' which usefully review its history, but thus far has not proposed legislation, available at https://tinyurl.com/y46enhc3 (last visited 30 June 2022).

This left two pages for legal analysis staying the standard. It makes two points. First, the Court held that the Occupational Safety and Health Act authorizes only 'workplace safety standards, not broad public health measures'.[16] The standard was described as 'broad public health regulation … addressing a threat that is untethered, in any causal sense, from the workplace.'[17] Of course this is untrue, and the Court admitted as much. A contagious and unvaccinated employee is most definitely a threat in, and enabled by, the workplace, to use the Court's preferred, though unstatutory term. The Court stated in dictum:

> 'We do not doubt, for example, that OSHA could regulate researchers who work with the COVID-19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments'.[18]

Such risks are precisely the risks that the holding denies: a virus spread at work. The Court insisted that the difference was 'OSHA's indiscriminate approach.'[19] However, the statute itself permits any employer to apply for a variance from standards.[20] The Court did not mention either variance provision.

The Court thus concluded that, since the standards was a forbidden public health measure and not an occupational health matter, the businesses challenging it had demonstrated likely success if the standard were to be challenged on the merits. The second point made by the majority opinion is that the standard must therefore be stayed. Earlier Supreme Court decisions hold that four factors must be considered in issuing a stay: likelihood of success on the merits, irreparable injury to the petitioner (these are said to be the most important), effects on third parties, and the public interest.[21] The Court made no mention of

[16] National Federation of Independent Business v Department of Labor v Department of Labor, Occupational Safety and Health Administration, 142 S Ct 661, 211 L Ed 2d 448 (2022), 665 (emphasis original). The Court is not quoting from the actual statute, which does not contain the word 'workplace' or limit its reach to workplaces. See, eg, the General Duty clause: 'Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees', 29 USC §654(a)(1) (emphasis supplied). More to the point, the statutory language that the Department claimed authorized the standard, Sec 655(c)(1)(A) on emergency temporary standards, reads: 'The Secretary shall provide, without regard to the requirements of (the Administrative Procedure Act), for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines that employees are exposed to grave danger from exposure to substance or agents determined to be toxic or physically harmful for from new standards…'. The standard thus contained extensive analysis of 'grave danger', 'exposure', 'substance or agents', and 'physically harmful' since these are the statutory terms. The statute does not require any analysis of 'workplace' or 'occupational'. The Court engages in close reading of nonexistent statutory language and ignores the statute that Congress enacted.

[17] ibid

[18] ibid

[19] ibid

[20] 29 USC §655(d). The statute also provides for temporary variances in 29 USC §655(b)(6).

[21] See, eg, *Nken* v *Holder*, 556 US 418, 426 (2009), quoting *Hilton* v *Braunskill*, 481 US 770, 776 (1987).

this familiar four-factor analysis, or of any precedents on analyzing requests for a stay. Instead, the Court noted the employers' claims that implementing the standard would cost 'billions of dollars', and the Department's claim that the standard 'will save over 6,500 lives and prevent hundreds of thousands of hospitalizations'. The Court then stated: 'It is not our role to weigh such tradeoffs'.[22] This is both legally incorrect and inhumane. The Court's precedents require it to weigh such tradeoffs. OSHA weighed them, in a portion of the emergency standard to which the Court did not refer, and found employer claims of cost to be considerably exaggerated. Of course, many jurists around the world would refuse to weigh employer costs against workers' lives because it is obvious in most of the world that workers' lives are more important.

Three members of the Court joined a separate concurrence written by Justice Gorsuch that provided two additional related arguments in support of the result. First, the concurrence noted that state and local governments retain authority over public health.[23] The concurrence failed to note that control of environmental and occupational hazards became a federal responsibility in the 1970s precisely because of demonstrated inadequacy of state and local regulation. Second, the existence of concurrent state and local authority somehow suggested to the concurring justices an argument said to be based on federalism: that Congressional delegation of rule-making power to a federal administrative agency must be construed not to grant authority to regulate 'major questions.'[24] On their view, a vaccination standard would have to be expressly authorized by Congress and is not included in a general delegation to an agency to promulgate emergency temporary standards.

Three justices dissented in an opinion written by Justice Breyer. The dissent was organized around the traditional four-factor analysis of judicial stays.[25] First, the dissent objected that the employers are not ' "likely to prevail" under any proper view of the law. OSHA's rule perfectly fits the language of the applicable statutory provision'.[26] Tracking the actual statutory language, the dissent noted that the emergency temporary standard provision 'commands – not just enables, but commands' OSHA to issue a standard when, as with Covid, 'employees' are 'exposed' to a 'new hazard' or 'agent' that presents 'grave danger' that is not addressed by existing regulation.

> 'The Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard. In other words, the

[22] National Federation of Independent Business v Department of Labor n 16 above, 666.

[23] ibid 667 (J. Gorsuch, concurring). The concurrence followed the majority in treating public health and occupational health as mutually exclusive, instead of overlapping, as is obviously the case.

[24] ibid 667-669 (J. Gorsuch, concurring).

[25] n 21 above.

[26] National Federation of Independent Business v Department of Labor n 16 above, 671 (J. Breyer, dissenting).

> majority does not contest that COVID-19 is a "new hazard" and "physically harmful agent"; that it poses a "grave danger" to employees; or that a testing and masking or vaccination policy is "necessary" to prevent those harms'.[27]

The dissent noted that nothing in the language of the statute required or suggested that public health emergencies are for that reason excluded from OSHA's mandate. 'OSHA has long regulated risks that arise both inside and outside of the workplace'[28], including emergency exits, noise, and unsafe water. OSHA specifically noted that, in the dissent's paraphrase:

> 'COVID-19 spreads more widely in workplaces than in other venues because more people spend more time together there. And critically, employees usually have little or no control in those settings'.

Second, according to the dissent, even if the merits of the argument against agency authority were strong, which they are not, the balance of equities required by precedent requires that lives be saved even if employers incur costs.

IV. Critique of the Decision

The decision has met universal derision in the first wave of online commentary.

1. Restricted Definition of Hazard

The decision rests on a supposed distinction between 'workplace' hazards and 'public health' hazards. But the decision nowhere explains the origin of this distinction, the criteria for its implementation, or the implications of what could turn out to be a major limitation on the power of OSHA and similar environmental regulatory agencies created at the same time. Certainly these uncertainties are an inducement to any regulated industry to resist regulation, not merely on the traditional grounds, but by attacking agency jurisdiction, creating a factitious distinction between agency jurisdiction and general public hazards.

Almost every hazard ever regulated by OSHA is found outside workplaces. OSHA regulates them because they affect employees, and because employees have little control over working conditions (unlike consumers who are free to select safer places of business or entertainment). But all these hazards at work are obviously a subset of public health hazards, not the antithesis in some kind of crackpot Hegelian dialectic.

If the Court is serious about confining OSHA to a set, possibly a null set, of

[27] National Federation of Independent Business v Department of Labor n 16 above, 673 (J. Breyer, dissenting).

[28] ibid

hazards found at work but not in general life activities, it will have to provide criteria for making this distinction. The distinction is not found in the statute, which, as noted, speaks of hazards, agents, and dangers, without the slightest suggestion that these are not often found outside of workplaces and regulated in parallel by other agencies. Nor is the alleged distinction between 'workplace' and 'public' hazards a part of OSHA practice during its first half-century, which, as noted by the dissent, includes extensive regulation of health and safety risks also regulated by other agencies and found in various settings. Nor does the law of the US, or any other jurisdiction, contain criteria making workplaces 'private' instead of 'public.'[29]

There are signs that the Court is not serious about its impossible quest to separate workplace hazards from public health hazards. As noted, it stated in dictum that OSHA could regulate research facilities or crowded environments. This concession does not add clarity to the distinction, which is the sole basis of the majority opinion, between workplace and public hazards. Obviously the worker exposed to Covid in a research facility or crowded workplace is also exposed to a general public hazard.[30]

The Court thus faces a major dilemma of its own making. It can assume the task of creating, out of thin air and without any guidance from the relevant statutes, highly subjective boundary lines to prevent federal agencies from carrying out the tasks that Congress assigned them. This project will be highly conducive to future litigation. Or it could retreat from the absurd and indefensible distinction between two kinds of hazards, one the subset of the other, and re-interpret its decision in NFIB as if it adopted the different, though equally absurd, rationale of the concurrence.

2. The 'Major Questions' Doctrine

Justices with an agenda of disabling regulatory agencies have long explored variations on the idea that the Constitution limits Congress's ability to 'delegate' law-making authority to expert agencies. This history cannot be explored here except to note that decades of beating the 'delegation' drum have failed to yield any principles limiting Congressional authority.[31]

The opponents of environmental, health, and safety regulation have thus retreated to doctrines of statutory interpretation, rather than Constitutional competence. A recent variant, without precedent in American law, is the 'major

[29] eg K. Klare, 'Public/Private Distinction in Labor Law' 130 *University of Pennsylvania Law Review*, 1358 (1981-1982).

[30] Indeed, on the same day as the NFIB decision, the Court upheld, as against a temporary stay, regulations by the federal Department of Health and Human Services, requiring vaccination against Covid for employees of hospitals and other health care facilities, *Biden* v *Missouri*, 142 S Ct 647 (2022) (5-4 decision).

[31] G. Metzger, 'Foreword: 1930s Redux: The Administrative State Under Siege' 131 *Harvard Law Review*, 1, 22-28 (2017)

questions' doctrine, under which a normal regulatory statute is interpreted not to delegate to the administrative agency the power to decide 'major questions.' These apparently require some kind of unspecified, more specific, delegation. In NFIB, only three justices expressly adopted the theory that Covid vaccination was a 'major question' by OSHA that falls outside its Congressional mandate.

Even if this doctrine existed, it would be inapposite to NFIB. As noted, and as the next section of this Note will show in more detail, the actual language of the Occupational Safety and Health Act enacted by Congress clearly authorizes an emergency temporary standard of the type before the Court.

However, apart from the specific statute, the entire 'major questions' doctrine is absurd. It is like saying

> 'that the bigger the emergency is, the less power OSHA has. OSHA can move fast to prevent a few bad injuries, but not if hundreds of thousands are dying'.[32] '(I)t makes little sense to say Congress must explicitly authorize the precise kind of measure OSHA took. The statutory provision concerns "emergenc(ies)," which, by definition, involve unforeseen circumstances. The appropriate response to an emergency cannot be minutely prescribed in advance'.[33]

There is no doctrine of US administrative law that states that statutes conferring authority on the executive branch must be read narrowly. A Cold War provision of the immigration laws delegates to the President:

> 'Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate'.[34]

This delegation was held to give the President largely unreviewable authority to exclude all migrants from certain Muslim-majority countries, even where the President's contemporaneous statements described a plan to exclude Muslims as such.[35] The Court was unconcerned by the absence of any executive study demonstrating any danger posed by Muslim migrants, unlike the hundreds of pages of executive study of Covid vaccination. The Court denied that the President had to produce reasons to enable judicial review. Instead, it assumed

[32] A. Koppelman, 'The Supreme Court, Vaccination, and Government by Fox News' *The Hill*, available at https://tinyurl.com/duks8pwd (last visited 30 June 2022).

[33] B. Emerson, 'Seven Reactions to NFIB V. Department of Labor' *LPE Project*, available at https://tinyurl.com/y84b38tt (last visited 30 June 2022).

[34] 8 USC §1182(f).

[35] *Trump* v *Hawaii*, 138 S Ct 2392 (2018).

arguendo that the religious freedoms of Americans seeking to sponsor relatives were infringed, but held that this could be done so long as the government produced a 'facially valid', though unsupported, security concern. There was no invocation of any doctrine calling for narrow readings of delegation and certainly no mention of any supposed doctrine that the statute did not delegate 'major questions' but only routine immigration administration.

As of this writing, the 'major questions' doctrine is just rhetoric, not a meaningful part of US administrative law.[36] Indeed, only three justices adopted it in the NFIB decision. If the Court pursues this project, it will have to develop a definition of 'major question,' criteria for distinguishing major from normal decisions, and various presumptions about how to read regulatory statutes, all enacted between fifty and ninety years ago, when neither Congress, nor anyone else, had ever heard of the supposed need for a clear statement of authority over 'major questions.' The only safe guide to these questions in any particular case, is examining the actual statute that Congress enacted. But that is what the Court did not do in NFIB.

3. The Demise of Reading Statutes for Their Plain Meaning

Various techniques for reading labor law and other regulatory statutes have been used over the decades. Between the 1940s and 1960s, it was common to argue that regulatory statutes should be read 'broadly' 'in order to achieve the Congressional purpose,' although Karl Klare showed that this was never consistent practice in the Supreme Court and co-existed with a kind of conceptualism.[37] Since the 1980s, the Court has abandoned any talk of Congressional purpose and retreated to a stultifying statutory literalism.[38]

This literalism was associated in particular with the late Justice Antonin Scalia, and it is easy to imagine how he would have written the decision striking down OSHA's vaccination rules. He would have placed heavy emphasis on the definition of 'emergency' found in whatever dictionary used the narrowest definition, and insisted without evidence that Congress must have intended this narrow 'plain meaning' of the word emergency.

The broader significance of the NFIB decision may be the demise of any

[36] While this Note was in press, a majority of the Court relied on the 'major questions' doctrine to invalidate regulation of carbon emissions by the Environmental Protection Agency, *West Virginia* v *Environmental Protection Agency*, 142 S Ct 2487 (2022).

[37] K. Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941' 62 *Minnesota Law Review*, 265 (1977-1978).

[38] eg *Nationwide Mutual Insurance Co.* v *Darden*, 503 US 318 (1992) (the term 'employee', when used in a federal labor statute, must mean 'employee' under a common law analysis looking to control of work; it is reversible error to adopt a definition of 'employee' in order to achieve statutory purpose). The US is probably alone in its absolute rejection of purposive reading of labor law statutes, G. Davidov, *A Purposive Approach to Labour Law* (Oxford: Oxford University Press, 2016).

attention to statutory texts at all.[39] As the dissent notes:

> 'The Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard. In other words, the majority does not contest that COVID-19 is a 'new hazard' and 'physically harmful agent'; that it poses a 'grave danger' to employees; or that a testing and masking or vaccination policy is 'necessary' to prevent those harms.'[40]

The Court makes no effort to construe this language, with a dictionary or anything else. Instead it substitutes the two absurd, and universally derided, approaches we have noted: that, without regard to the actual language of a regulatory statute, it must be construed to apply only to a narrow subset of problems encompassed by its text, and, among that narrow subset, only to routine, not major questions.

It is likely that we will see this approach applied much more frequently, to any regulatory initiatives emerging from Democratic administrations such as the current administration. Congress has stopped enacting major regulation of any kind, since supermajorities are now routinely required in the Senate and Congress is usually evenly divided between Democrats and Republicans, neither with a supermajority in the Senate. President Biden, like Presidents Clinton and Obama before him, knows that regulatory legislation is unlikely, and that he will have to govern through federal agencies. In this political context, the Republican Supreme Court is the cross-punch that, following the jab of the Senate filibuster, creates the classic 'one-two punch combination' in boxing. The jab takes out legislation. The cross-punch takes out administration.

We may predict that any Biden administration regulatory initiative on global warming, climate change, carbon emissions, or any other environmental or health regulation, will be held to be a 'major decision' not expressly delegated by Congress and falling outside some limits to agency jurisdiction that the Court will pull from the air, not found in the applicable enabling statute. Health agencies will be said to have power to protect only health, not the environment. Environmental agencies will be held to narrowly defined hazards, and denied authority to regulate greenhouse gas emissions.[41]

4. Issuing a Stay Without the Required Analysis

Finally, the Court's willingness to stay the vaccination rule without any consideration of the competing equities has drawn particular scorn. As stated

[39] A. Krishnakumar, 'Some Brief Thoughts on Gorsuch's Opinion in NFIB v OSHA' *Election Law Blog*, available at https://tinyurl.com/mtff9kje (last visited 30 June 2022).

[40] National Federation of Independent Business v Department of Labor v Department of Labor n 16 above, 673 (J. Breyer, dissenting).

[41] A. Liptak 'Supreme Court Considers Limiting E.P.A.'s Ability to Address Climate Change', available at https://tinyurl.com/536xj3ms (last visited 30 June 2022).

by Mark Lemley:

> 'The question before the Court is whether to overrule the court below and grant an emergency stay of the rule preventing it from going into effect even temporarily. Under well-established Supreme Court precedent, even if the Court thinks the challenger will ultimately win, stays are granted only after balancing the hardships to each party, if the petitioner can show irreparable injury, and if the public interest requires it.
>
> None of those things is true here. Indeed, the Court doesn't even try to pretend that it satisfied the dictates of the law. And there is no way it could. There is no dispute that the Court's decision will kill tens of thousands of Americans a year and overwhelm our hospitals with half a million unnecessary new COVID cases. The Court's response is to say "It is not our role to weigh such tradeoffs." That is false. It is literally their ONLY job in deciding whether the Sixth Circuit abused its discretion in denying a stay.
>
> This is a lawless order driven by nothing other than politics. The Court should be embarrassed. And I think it will come to regret abandoning even the pretense of following the law.'[42]

Or, to quote Andrew Koppelman again:

> '(Justice) Alito demanded of Solicitor General Elizabeth Prelogar that, if the Court puts the regulation on hold, 'Are you going to say, well, they're causing people to die every day?' If you want to avoid being accused of killing people, you might try not killing people.'[43]

V. Conclusion

There is no dispute that the current Supreme Court lines up with the extreme right wing in American politics. Media coverage normally focuses on such important issues as abortion and reproductive rights, gun rights, voting rights, and ability to redress racism and segregation. Equally important, however, is the Court's agenda to give businesses the legal tools to resist any kind of regulation.[44] Future courts might retreat from some of the evident absurdities of NFIB, particularly its failure to make any kind of argument from the text of the statute and substituting factitious definitions that no court will be able to administer, or even make sense of. American law professors, including those

[42] The reference is to a Facebook post dated 13 January 2022.
[43] A. Koppelman, n 32 above.
[44] G. Metzger, n 31 above, is a good introduction.

quoted here, already invoke the case as an example of how foolish the Court looks when it deviates from its own precedents and pretends not to know what everyone knows. It is likely, however, that the decision will instead be expanded by the Court as it further impedes regulatory initiatives by elected Democratic administrations.