Liberty Tree

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Authorizing Medical Rape

Supreme Court falls short

On January 13, 2022, the U.S. Supreme Court blocked the Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard (ETS) "mandating" employees[1] of entities employing more than 100 people to receive COVID-19 jabs or wear masks and get tested for COVID every week. The 6–3 decision halts this OSHA "mandate" until the Sixth Circuit hears and decides the challenges to the ETS on the merits.

At the same time, the Supreme Court, by a 5-4 ruling, refused to uphold a preliminary injunction effective in about half the States against the Centers for Medicare and Medicaid Services' (CMS) Interim Final Rule (CMS IFR), which "mandates" healthcare workers in institutions receiving Medicare and Medicaid funds receive the jabs unless they obtain a medical or religious exemption. The 5-4 decision allows CMS to continue harassing medical institutions until courts of appeals decide the challenges to the IFR on the merits.

This meme was published on Facebook circa 2015 by the Australian Vaccination Skeptics Network. Immedately, critics deplored the comparison of the trauma of rape to compulsory vaccination. Replace the word "doctor" with "government official" and the message is even more urgent today. Do you own your own body? If you do not, you are a slave. Forced injections are violations akin to rape, and requiring submission to injections in order to work, is, as radio host David Knight has put it, just like Harvey Weinstein's casting couch.

The Supreme Court has thus spoken out of both sides of its mouth: some workers will not be made to take a jab in order to continue to exercise their right to work, and some workers will be made to take a jab in order to continue to exercise that right. How did the Court subject some to administrative medical rape, and not others? It did so by ignoring the Declaration of Independence and the Constitution.

Deferring to administrative tyrants

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made ... under their authority..." Article III, Sec. 2 of the Constitution.

While it is the justices' duty to decide cases arising under the Constitution and the Laws made pursuant to the Constitution, the Supreme Court has developed a judicial policy to avoid constitutional questions whenever possible. "Where a case in this [Supreme] court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons." *Siler v. Louisville & Nashville Railroad Co.*, 213 U.S. 175, 192 (1909). As the Ninth Circuit succinctly stated in *Life Insurance Co. of North America v. Reichardt*, 591

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1. The OSH Act defines employee at 29 U.S.C.652 (6): "The term 'employee' means an employee of an employer who is employed in a business of his employer which affects commerce." In sum, a circular definition "employing" the very terms it allegedly defines!

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F.2d 499, 506 (1979), " ... few propositions are better established than that constitutional adjudication should be avoided *wherever possible*."[2]

A key part of this avoidance involves deference to the executive and legislative branches of government. Justice Sutherland, in *Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525, 544 (1923), stated the "rule" of deference to the legislature thusly:

> "The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. The statute here in question has successfully borne the scrutiny of the legislative branch of the government, which, by enacting it, has affirmed its validity, and that determination must be given great weight. This court ... has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt."

This 'deference' avoids the duty of the judicial branch to provide a check against U.S. laws which usurp power never granted by the Constitution.

The Supreme Court "rules" of deference to the executive branch, that is, administrative agencies such as the CMS and OSHA, likewise shirk their duty to check tyranny in favor of the limits imposed by the people's Constitution. A key decision, authored by Justice Breyer in *Chevron USA v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), was that agency interpretations of laws passed by Congress, even if Congress did not use statutory language which directly spoke to the issue in controversy, would be accepted if such interpretations were "reasonable."

> "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provison for a reasonable interpretation made by the administrator of an agency." *Id.,* at 844.

Clearly, this doctrine allows an agency to take whatever language Congress employed, and stretch it to encompass as much tyranny as it can imagine, so long as it can justify it under "reasonable" sounding rules. In the case of the OSHA and CMS jab mandates, unfortunately, the agencies have cited the usual bogus case[3] and "death with COVID" figures, coupled with ignoring the VAERS figures showing massive adverse reactions and death as a result of the clotshots, to justify emergency procedures which involve stabbling individuals with these experimental concoctions authorized for emergency use only.

No deference on "major questions"

Despite earlier deference to tyranny, however, the Supreme Court has articulated a "major questions" doctrine which has resurrected some semblance of the notion that Congress is vested with "all legislative powers" granted by the Constitution (see Art. I, Sec. 1), and thus cannot delegate its law-making powers to the executive branch, whose function is to only to "take care that the laws [as passed by Congress] be faithfully executed." (Art. II, Sec. 3).

The "major questions" doctrine holds that Congress must speak clearly if it wishes to assign to an agency decisions of vast economic and political significance:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," Brown & Williamson, 529 U. S., at 159, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance." *Util. Air Regulatory Grp. V. EPA*, 573 U.S. 302 (2014).

It is apparent from the briefs submitted to the Supreme Court in favor of a stay of the OSHA mandate that the applicants, including the States and business associations, desired the Court to recognize that the mandate would have huge economic significance in the businesses and lives of the American people. They also argued that the OSH Act, a "long-extant" act promulgated in 1970, did not contemplate or speak about delegating power to OSHA to declare a commonplace disease to be a particular workplace "hazard." In other words, Congress did not delegate specifically or clearly any authority to OSHA to issue a broad mandate on a public health matter, only to issue regulations on hazards specific to employment in the workplace. Largely on this basis, the Supreme Court imposed a stay of the OSHA ETS so that it cannot be enforced at the present time.

No authority? Just make it up!

Unlike the OSHA ETS, in the CMS ruling, the Supreme Court determined, by a 5–4 majority, that the HHS Secretary had regulated within the statutory authority delegated by Congress in issuing

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2. All emphases added unless otherwise noted. For more on this judicial policy, see Greb, D. "Steering clear of the Constitution, Part II: Rules for sharing power," *Liberty Tree*, Vol. 11, No. 1 (January, 2009).
3. See "The probable case game," *Liberty Tree*, Vol. 22, No. 7 (July, 2020).

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the CMS IFR. Thus, the CMS is free to now enforce its IFR vaccine mandate — which does at least allow for medical and religious exemptions, unlike the OSHA ETS — while the Fifth and Eighth Circuits make decisions on the merits.

The majority used the excuse that HHS has long issued regulations governing the qualifications and duties of healthcare workers in facilities that participate in Medicare and Medicaid, and protecting the "health and safety" of patients:

> Congress has authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services." 42 U. S. C. §1395x(e)(9). COVID–19 is a highly contagious, dangerous, and—especially for Medicare and Medicaid patients—deadly disease. The Secretary of Health and Human Services determined that a COVID–19 vaccine mandate will substantially reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients. 86 Fed. Reg. 61557–61558. He accordingly concluded that a vaccine mandate is "necessary to pro-mote and protect patient health and safety" in the face of the ongoing pandemic. *Id.*, at 61613.
>
> The rule thus fits neatly within the language of the statute. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm. It would be the "very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID–19." *Florida v. Department of Health and Human Servs.*, 19 F. 4th 1271, 1288 (CA11 2021).[4]

We see the majority deferred to, and accepted, everything that CMS claimed about the so-called virus emergency and the purported efficacy of the "vaccines." At least one amicus brief before the Court, submitted by America's Frontline Doctors on the OSHA matter, went into great detail, with copious reference to scientific papers, showing that the vaccines, contrary to government claims, ***do not work***. Yet the thugs on the Court carefully picked just two lawyers for oral argument — lawyers they knew would never raise this issue, or object to the government's claims. The majority apparently can thus pretend to practice medicine: it equated forced injections of experimental drugs to "doing no harm"!

Returning to the "major questions" doctrine, we find that Congress did not clearly speak to grant authority to CMS to impose vaccine 'mandates.' Instead, the Court majority found the "authority" through a "hodgepodge of provisions,"[5] beginning with the general authority to publish rules and regulations "as may be necessary to the efficient administration of [the agency's] functions," 42 U. S. C. §1302(a), and "to carry out the administration of the insurance programs [under the Medicare Act]." 42 U. S. C. §1395hh(a)(1). As Justice Thomas pointed out in his dissent, these authorizations are for nothing more than "the practical management and direction" of those programs.

Thus, in order to find any authority related to "health and safety" of Medicare and Medicaid patients, and to impose medical treatment on those who serve them, the government cobbled together "definitional provisions, a saving clause, and a provision regarding [nursing homes'] sanitation procedures," said Thomas. After showing, one by one, that none of these provisions authorizes CMS to force healthcare providers to fire unvaccinated workers, Thomas points out that the Court didn't rely on those provisions anyway, but found vaccine-mandating authority in a handful of CMS regulations — "laws" written by CMS itself, not the Congress!

Indeed, what Congress has actually written appears to completely *prohibit* the actions taken by CMS to control the medical decisions of healthcare workers. At Title 42 U.S.C. § 1395, related to Medicare, Congress stated:

> **Prohibition against any Federal interference.** Nothing in this subchapter shall

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"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."
— Thirteenth Amendment

4. Opinion in Nos. 21A240 and 21A241, https://www.supremecourt.gov/opinions/21pdf/21a240_d18e.pdf
5. Justice Thomas' description, in his dissent.

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> be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services; or to exercise any supervision or control over the administration or operation of any such institution, agency, or person.

An ordinary, reasonable person can clearly see that Congress, as the elected representatives of the people, forbade any control over the practice of medicine, or the operation of any institution receiving funds. The *per curium*[6] majority stated that this directive of Congress does not stop a vaccine mandate, however. If it did, then that "would mean that nearly every condition of participation the Secretary has long insisted upon is unlawful." A revealing admission: nearly everything CMS prescribes to healthcare providers to receive funds *is* unlawful! And the Court blesses this departure from the laws.

The avoided arguments

In reaching their decisions, the Supreme Court avoided, as per usual, directly addressing the fundamental constitutional infirmities of both the OSHA and CMS "mandates."

First, Congress simply has no power to regulate public health, or mandate vaccination. As pointed out in *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) the police powers over safety and health (to the extent that they exist at all), are reserved to the States, and were never granted to Congress.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Tenth Amendment. The Supreme Court has adhered to that understanding for more than 100 years. As Justice Roberts has stated, "[o]ur constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020).

If, under the pretext of workplace safety, or the pretext of the health and safety of patients, federal agencies enact medical rape in the form of forced vaccination, then they are usurping a federal police power *not* enumerated in the Constitution. And if Congress cannot enact such medical rape directly, then it cannot enact it under the pretext of protecting certain workers or certain patients. "[W]hat cannot be done directly cannot be done indirectly[,]" *Cummings v.Missouri*, 71 U.S. 277, 325 (1866).

Second, the fundamental quality of liberty for every individual is guaranteed by the Constitution in the Fifth Amendment. The Declaration of Independence also declares: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

Liberty is the right to self-determination; that is, control over one's own fundamental property — his body. As John Stuart Mill stated, "Over himself, over his own body and mind, the individual is sovereign."

"Anglo-American law starts with the premise of thorough-going self-determination. It follows that each man is *considered to be master of his own body*, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment." *Natanson v. Kline*, 186 Kan. 393 (1960).

If a person can only exercise certain inherent liberty rights, such as the right to travel or work, by submitting his body to be controlled by another, and even, in the case of a vaccine, to be invaded and poisoned by another, then he or she is a ***slave***, not a free person. The Thirteenth Amendment forbids slavery: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Failing to recognize the most fundamental principle of all, that the body of a person is his own sacred property, and that he alone controls it, the Supreme Court demonstrates a certain level of contempt for the laws of nature and nature's God, and the Constitution of these united States. We must not forget these principles, however, or give in to tyranny, no matter how fierce, because the liberty of millions is at stake.

6. *Per curium* means "by the court," and refers to an opinion that does not identify any specific judge as having written it. Generally, it is a sign that no judge wants to be responsible for the opinion.