

Federalism Committee

September 22, 2021

Federalism

- System of government
- Constitutionally based
 - Two systems:
 - National Government
 - Express authority set forth in Article 1, § 8
 - Implied Authority: **“To make all Laws which shall be necessary and proper** for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”
 - Inherent Authority
 - State Governments
 - Express authority—e.g. Article 1, §4
 - The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof
 - 10th Amendment reserves powers not delegated to the federal government to the states
 - Includes: police powers, schools, public safety, local government oversight
 - Concurrent Powers
 - Courts, Roads, Taxes

Vaccines

- Traditionally state authority
 - *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)
 - Involved the constitutionality of a local government vaccine requirement for small pox.
 - Statute authorizing local regulation was a police power of state (197 US at 24-25).
 - Idaho: Title 39, Chapter 48 Immunization

President's Announcement

- Executive Order requiring all federal employees to be vaccinated
 - EO 14043: <https://www.federalregister.gov/documents/2021/09/14/2021-19927/requiring-coronavirus-disease-2019-vaccination-for-federal-employees>
- Executive Order requiring all employees of federal contractors
 - Includes workers at facilities receiving funds from Medicaid and Medicare
 - EO 14042: <https://www.federalregister.gov/documents/2021/09/14/2021-19924/ensuring-adequate-covid-safety-protocols-for-federal-contractors>
- Announced that he would be directing the Labor Department to issue an Emergency Temporary Standard under OSHA to require vaccination of all employees in businesses with 100 or more employees.

Asbestos Information Assoc. v. OSHA

- 727 F.2d 415 (5th Cir. 1984).
- Addressed an ETS issued by OSHA in 1983 to address worker exposure to asbestos.
 - ETS is an extraordinary power used in limited situations in which a grave danger exists and then delicately exercised. *Public Citizen Health Research Group v. Aughter*, 702 F.2d 1150 at 1155 (D.C.Cir.1983). *See also Taylor Diving & Salvage v. Department of Labor*, 537 F.2d 819, 820–21 (5th Cir.1976) (additional citations omitted).
 - Court assesses the harm likely to accrue or “grave danger”