

Supplemental Notes to Lecture III

I. The Social Contract and *Jacobson v. Massachusetts*

As discussed in Lecture III, the Supreme Court argued in *Jacobson* that “[t]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import **an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint.** There are manifold restraints to which every person is necessarily subject for the **common good.**” In articulating this conception of conditional freedom, Justice Harlan alludes to the theory of the Social Contract that forms an integral part of Lockean liberalism.

What is the theory of the Social Contract, and why would parties agree to sign one? Locke asks readers to imagine what our lives would be like if there were no government to protect us. In such a condition, individuals would find themselves in a so-called state of nature. They would not find such a situation intolerable or necessarily life-threatening, which is the argument made by an earlier political philosopher, [Thomas Hobbes](#).

For Locke, the state of nature would, however, be filled with “inconveniences.” Too many, in fact, for most people’s liking. These inconveniences arise because there is no governmental authority in a state of nature that is empowered to settle disputes, which inevitably arise among individuals (they are inevitable, given the inherent selfishness of humanity). In other words, everyone’s right to do whatever they want can end up leading to the sort of lawlessness that makes it likely that many will feel as though they have too few liberties and too much to fear from others (Locke’s use of the term, “inconveniences,” understates the gravity of the situation as he himself describes it). So, everyone agrees to form a compact, which is made legally binding by the signing of a social contract.

According to the terms of this contract, which creates a government, the right everyone had to everything in the state of nature (which led to a condition in which too many were left with hardly any rights) is given up in exchange for accepting *some* constraints on their liberty. This exchange is acceptable, since it means the government will provide its citizens with the sort of protection that was lacking in the state of nature. The government, in turn, is also bound by the contract in the sense that its authority will be accepted only so long as it safeguards individual rights, which still furnish citizens with plenty of freedom. What do they gain from the contract? Protection, peace, and the enjoyment of freedoms that are considerable but not “absolute.” What do they lose from the contract? The ability to do whatever they want, which is not really a loss, since it meant everyone else also had the ability to do whatever *they* wanted, which meant no one was really secure.

According to the Court, *Jacobson*, as a signatory to the social contract, is no longer entitled to do whatever he wants, especially when that freedom threatens the safety of others, which the government is legally bound to preserve.

Jacobson's heirs, who today oppose compulsory vaccination laws, appear, in this instance, unwilling to abide by the terms of the Lockean social contract. As depicted in the image below, the protesters' message seems to be: when it comes to mandates issued to protect the public health, individuals should remain "wholly free from restraint." Of course, they would most likely also dispute the Court's contention that Jacobson's freedom was restricted in furtherance of the "common good." That is, they do not necessarily reject the idea of a "common good" (though some radical libertarians do); they just think, as do elective officials in states banning vaccine mandates, that the common good is *not* promoted through the enactment of compulsory vaccination laws.



To put the Lockean conception of freedom underlying the social contract in metaphorical terms: you are free to swing your arm wherever you like, so long as in doing so, you do not strike someone else.

As discussed last week, however, this conception of freedom and the social contract is fatally flawed. And why? Because, given how much arm-swinging takes place in our society, some will inevitably strike others. The question then becomes, who will at times be allowed to strike others, and who will not?

II. American Federalism and the promotion of Public Health

The following question was raised toward the conclusion of Lecture III: could the police powers utilized by a state clash with, and thus be forced to give way to, a federal law regulating public health? After all, as our text points out on page 69: “Some of the states’ reserved powers are no longer exclusively within state domain For example, since the 1940s, the federal government has also engaged in administering health, safety, income security, education, and welfare to state residents.”

In a report published last April, the Congressional Research Service took up this question, specifically in relation to mandatory vaccination laws. It came up with two plausible scenarios in which the federal government could give a vaccination mandate the force of law, which would thereby prevent the states from banning vaccine mandates. First, the Biden Administration could mandate vaccines by issuing an Executive Order that invokes the Public Health Service Act of 1944 (the very law upon whose basis the CDC claimed to have the authority to issue an Eviction Moratorium), which authorizes the US Secretary of Health and Human Services to “take measures to prevent the entry and spread of communicable diseases from foreign countries into the United States and *between states*.”

The issuance of such an order is unlikely in the extreme, however, above all because, in blocking the Biden Administration’s extension of the eviction moratorium, the Supreme Court gave a very narrow reading to the Public Health Service Act that greatly limited its power. In the words of the court, it “strains credulity to think that a decades-old statute that authorizes the CDC to implement measures like fumigation and pest extermination” could somehow also empower it to issue an eviction moratorium. Given the Court’s dismissive if not contemptuous characterization of the Public Health Service Act, it is safe to say it would rule unconstitutional a federal vaccination mandate that cited that law as the basis for its authority. (It should be noted, however, that in his dissent, Justice Breyer found the eviction moratorium to lie within the scope of the Public Health Service Act, whose authors had contemplated the possibility of giving Congress the authority to pass quarantine laws amid a pandemic.)



Second, the Congressional Research Service suggests that while there is no precedent for Congress to force states to pass compulsory vaccination laws, it could use its Spending Clause authority to “incentive” states to use their police powers to pass such laws. “Incentivize” is a

polite way of saying that what is under consideration here is an act of Congress that would essentially coerce states into passing vaccination laws by threatening to withhold funds needed for the maintenance of public health programs, like Medicaid.

As discussed in Chapter 3 of our text, there are certainly precedents that Congress would follow in taking such action. For instance, prior to 1984, the drinking age was set by each state, acting on its authority to use the police power to establish laws regulating public health and morality. However, in 1984, the federal government passed the National Minimum Drinking Age Act (NMDAA), “a crosscutting mandate that gradually reduced federal highway grant money to any state that failed to increase the legal age for alcohol purchase and possession to twenty-one. After losing a legal battle against the NMDAA, all states were in compliance by 1988” (90).



Given our current political landscape, it would likely to take longer than four years after the passage of a comparable bill on vaccine mandates for all states to be in compliance. And even then, many states would likely refuse, since over the last several decades, some have actually [rejected](#) federal funding for health services. Moreover, given current political alignments, such legislation would have to overcome a Republican filibuster in the Senate, for reasons that we will explore further when we cover Congress in Chapter 11.

III. The Constitutionality of Vaccine Mandates Today (So Far)

As discussed in this week’s lecture, vaccine mandates affecting state and health industry workers have appeared throughout the country in recent months, and none to date have been ruled unconstitutional. This summer, in the name of protecting public health, a federal judge in Texas,

Lynn Hughes, dismissed a lawsuit filed by employees of a hospital in Houston who had challenged the hospital's mandatory coronavirus vaccination policy.

Rejecting the claim made by the lead plaintiff that the vaccines are dangerous and experimental, Hughes declared that "the hospital's employees are not participants in a human trial. The hospital is trying to do their business of saving lives without giving people the Covid-19 virus. It is a choice made to keep staff, patients and their families safer."

Hughes added that the lead plaintiff, a nurse at the hospital, has the freedom to choose whether or not to accept a COVID-19 vaccine, and should she refuse to get one, she will have an opportunity to find work someplace else. Of course, Justice Hughes's statement is a bit disingenuous, since the hospital's policy is *meant* to be coercive. That is, the hospital obviously hopes its employees will get vaccinated; it does not *want* many of them to quit. And most probably won't be in a position to quit, especially since doing so renders you ineligible to receive already meager state unemployment benefits. So, the hospital is clearly pressuring its workers to get vaccinated, in the name of protecting public health. (Several weeks ago, the US Supreme Court cleared the way for colleges and universities to institute such a policy by refusing to block the one that was enacted this summer at Indiana University. And just this week, [a school district in Los Angeles](#) became the first in the country to mandate a vaccine for students aged 12 or older.)

Quiz Question 5: According to Locke, why do "inconveniences" arise in the state of nature?

Quiz Question 6: In your view, should state governments be allowed to use their police powers to provide for the public safety, health, welfare, and morals by setting their own drinking ages, at whatever age they deem fit?