

Supplemental Notes to Lecture 4

I. “It’s Not About Freedom.”

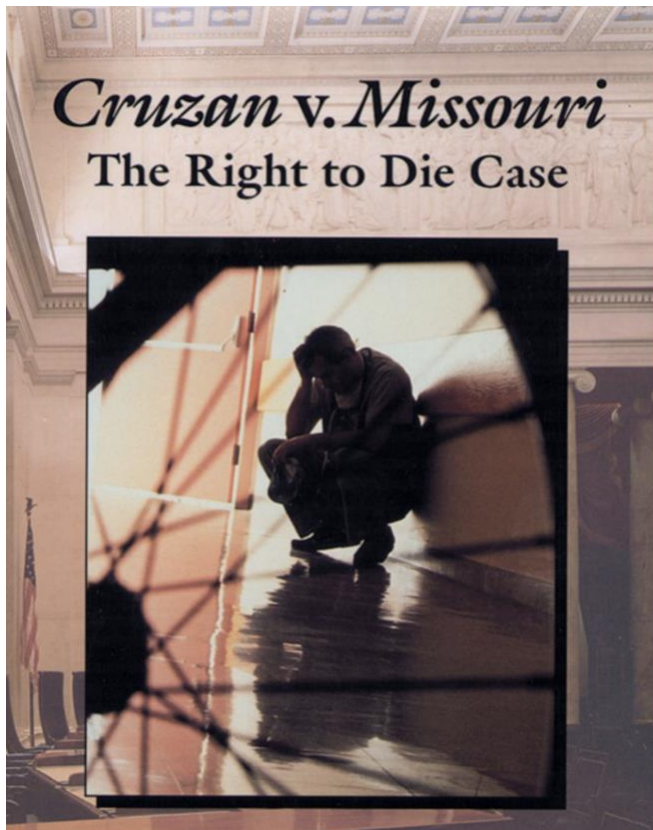
“It’s not about freedom,” Biden quipped at one point in the speech delivered on September 9th. That was his contribution to the question of how to both “promote the general welfare and secure the blessings of liberty” during a pandemic.

Such a dismissive approach left him open to the sort of attack that then ensued, as several governors immediately denounced the mandate as nothing less than an act of tyranny. In the words of Governor Reeves of Mississippi:

The president has no authority to require that Americans inject themselves because of their employment at a private business. The vaccine itself is life-saving, but this unconstitutional move is terrifying. This is still America, and we still believe in freedom from tyrants.

Let’s linger over the statement that “the vaccine is life-saving, but this unconstitutional move is terrifying.” Now, if viewed strictly from the perspective of the individual’s bodily integrity, Reeves appears to have the support of legal precedent.

Specifically, in its 1990 ruling in *Cruzan v. Director, Missouri Department of Health*, a so-called right to die case, the late Chief Justice Rehnquist declared that legally “competent” individuals have the freedom or right to refuse medical treatment under the Due Process Clause.



In that precise sense, it would seem to be unconstitutional to require that Americans inject themselves with a life-saving vaccine.

However, worth considering in this context is a critical point raised in the 2005 article published in the *American Journal of Public Health*, which I quoted from in Lecture 4.

In [that piece](#), the authors point out that, in legal terms, there is “an important difference between laws that are intended to prevent a person from harming other people, which can be a justified exercise of police power, and laws that are intended to protect only the health of the individual herself, which are unjustified violations of liberty.”

According to this cardinal legal distinction, a law that intends to protect only the life of the individual, by mandating a vaccine, even if it is life-saving, would be an unjustifiable violation of liberty.

But what about a law, like Biden’s mandate, that intends to prevent a person from harming *other people* by mandating a vaccine?

The Court held in *Jacobson* that such a law would be constitutional because it protects the public health by helping to prevent the spread of a highly transmissible and dangerous disease.

Now, *Jacobson* also ruled that infringements on individual liberty in the name of promoting the public health have to be “reasonable.” As discussed in Lecture 3, forcible injection was deemed unreasonable. Seemingly in acknowledgment of that distinction are two provisions in Biden’s Executive Order: one, medical exemptions are granted for those who have contraindications to the vaccine, and, two, no private employees covered by the mandate are actually forced to inject themselves; they can opt for regular testing instead of getting a vaccine.

Or they can do neither, but at the cost of facing unspecified disciplinary action, including, presumably, the loss of a job, a penalty that, as discussed in last week’s Supplemental Notes, was upheld when a federal judge dismissed a lawsuit filed by employees of a hospital in Houston.

Now, if dismissal is indeed a consequence of the Executive Order, we can see how that goes well beyond imposing a financial penalty on those who refuse to comply, which was found constitutional under *Jacobson*. Moreover, the loss of a job is all the more devastating during a pandemic, on account of the fact that, given the way our health care system works, it also often means the loss of health insurance.

It should be noted that, as stipulated in Biden’s Executive Order, it is the employer, and not the employee, who is fined for not following the mandate, but that still doesn’t address the question of what, precisely, the disciplinary actions taken against certain employees will consist of. (Clearly, making accommodations for employees to be able to “work from home” can apply only to certain types of jobs.)

Toward the end of Lecture 4, it was pointed out how we have no true precedent in US history when it comes to imposing a vaccine mandate in response to a national pandemic. (We can,

however, analyze how *other nations* are currently responding to the pandemic. Along these lines, this week I have added to Week 3's Supplemental Reading Materials two articles published on September 16th that discuss Italy's new "health pass law."¹). Nonetheless, supporters of vaccine mandates can claim that they have worked well in the US when imposed on public schools. When compared to the challenges facing an attempt to enforce a compulsory vaccination law for the general population, a school vaccination policy (which, as we know from Lecture 3 was upheld in *Zucht*) sounds relatively simple: if you want to attend a public or private school, you must first receive a vaccine.

By contrast, we've seen what sort of difficulties arise when it comes to enforcing mandates in the workplace. What's important to point out here is that, as indicated in Lecture 3, the financial penalty levied against Jacobson (which he eventually paid) was obviously not meant to serve as a means of raising government funds. The hope was that the threat of a penalty would "coerce" individuals into taking the vaccine. That arguably works for things like enforcing "voluntary" compliance with speeding laws, but vaccination is another matter. (For the sake of thoroughness, we should note that in his September 9 speech, Biden did specify that employees will be given paid leave to both get the vaccine and recover from any side-effects they receive from it.)

We saw in Lecture 4 that the harshest critics of the vaccine mandates announced on September 9 have likened them to decrees issued by a tyrant.² But no side in this conflict (we can't rightly call it a "debate") has a monopoly on drawing poor analogies. For instance, Dr. William Schaffner, an infectious disease expert at Vanderbilt University who supports the vaccine mandate, likened receiving the vaccine to performing military service in a defensive war. "To date we have relied on a volunteer army," [Dr. Schaffner said](#). "But particularly with the Delta variant, the enemy has been reinforced, and now a volunteer army is not sufficient. We need to institute a draft."

¹ Closer to home, the system of American Federalism could prove invaluable if the states are allowed to function as "laboratories of democracy," a concept discussed on page 91 of our text.

The innovative capacity of the states was celebrated by US Supreme Court Justice Louis Brandeis, who in a famous dissenting opinion to a 1932 case having to do with economic regulation, described state governments as laboratories of democracy. As Brandeis saw it, state governments could function as laboratories of democracy by conducting experiments whose aim was the discovery of novel solutions to economic and social problems. Ideally, the best of these policies would then be taken up and supported by the federal government—for instance, Massachusetts was the first state to pass a minimum wage law, in 1912, two and a half decades before the federal minimum wage was established.

Since March of 2000, such experiments have been taking place with regards to state government responses to COVID-19, which creates the opportunity for the federal government to conduct a careful and thorough comparative analysis of the effects the imposition of mandates and bans on mandates have had on each state's public health.

² Although the media often decries political polarization, it simultaneously exacerbates it. In this instance, it is evident that, on the one hand, the Biden Administration has framed Republican opposition to the vaccine mandates as pure opportunism, an unprincipled and demagogic way for the governors to rally the "base" and boost their chances of electoral success. On the other hand, several governors have described the mandates as a pure power grab, an attempt to rally the *other* base, thereby improving the Democratic Party's chances of staving off disaster in the 2022 midterms and distracting the nation from the situation in Afghanistan.

"America, Here's My Boy"



Schaffner would have been hard-pressed to come up with a worse example. Aside from the fact that there is nearly universal support for the all-volunteer army that was instituted when President Nixon ended the draft in 1973, the analogy implies that those who take a shot for their country are performing an act of self-sacrifice—they are putting their lives on the line for the greater good. But, of course, the Biden Administration and the CDC have gone to great lengths to emphasize that the vaccine is safe.

(We should note in this context that such a comparison also lies buried in the *Jacobson* ruling. It appears as a brief aside, when Harlan stated that the “liberty of the 14th amendment” does not protect individuals from being “compelled by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.”)

II. Talk of Secession

Our text's discussion of state "nullification" on page 132 of Chapter 4 evokes the principle of secession, the act of formally withdrawing from a nation or independent territorial unit. Though of course associated with the Civil War, the principle recently gained traction in California, following the 2016 presidential election, and another secessionist movement attracted media attention in Texas, soon after Biden was sworn into office.

However, the California Independence Referendum in 2021 Initiative, which would have let Californians decide whether or not to secede from the US, did not collect enough signatures to get on the ballot last November.

**California
Independence
Referendum in 2021
Initiative**



Election date
November 3, 2020

Topic
Statehood

Status
Not on the ballot

Type
State statute

Origin
Citizens

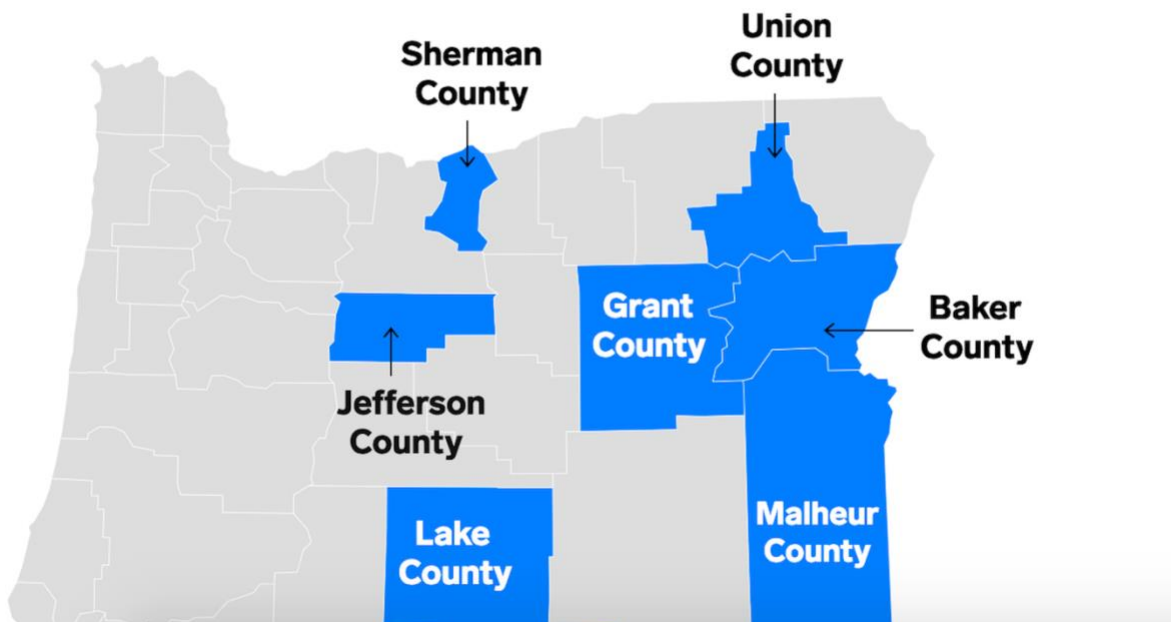
Similarly, earlier this year in Texas, state representative Kyle Biedermann filed a bill that would allow residents to vote on whether the state should become an independent republic, though that bill failed to get a hearing last month in the House Committee on State Affairs.

Standing in the way of those burgeoning secessionist efforts are the current leaders of both national parties, as well as the case of *Texas v. White*, an 1869 US Supreme Court ruling that

declared the union between Texas and the rest of the United States is "as complete, as perpetual, and as indissoluble as the union between the original States."

And yet, in the recently published, *Break It Up*, [Richard Kreitner](#) argues that the idea of secession has deep roots in US history. Before and after the Civil War, the idea found receptive audiences spanning the ideological spectrum, as indicated most recently by the Calexit and Texit movements. In fact, it is not inconceivable that larger segments of the population might become increasingly sympathetic to secessionist ideas, or at least to plans for reimagining our political geography. This summer, for instance, five counties in eastern Oregon voted to leave the state, in order to create a "Greater Idaho."

Oregon counties have voted to become part of Idaho



Quiz Question 5:

What did the US Supreme Court rule in *Cruzan v. Director, Missouri Department of Health*?

Quiz Question 6:

What did the US Supreme Court rule in the case of *Texas v. White*?