

Discuss the consistency and inconsistency between the positions taken with regard to individual right to bodily integrity in the context of the decades-long abortion debate and the very recent litigation against vaccine/mask mandates.

Two major issues facing American jurisprudence right now are questions regarding the appropriate extent of governmental regulation of abortion and preventive healthcare mandates engendered by the COVID-19 pandemic. As with many issues in Constitutional Law, these debates turn on the balance of the rights of individuals against either those of specific other individuals or those of other individuals as members of society. This tension among various individuals and society itself often determines where the balance's fulcrum is established in each issue. The question of abortion balances the rights of the woman against the rights of the embryo or fetus and the interest society has in protecting potential life. The question of COVID-related health mandates balances the rights of unmasked and unvaccinated individuals against the rights of those who wish to avoid the spread of disease and the interest society has in protecting the health of its members. The interest in bodily integrity against governmental interference is precisely the same in both arenas. The varying weight accorded to other factors in each equation causes the disagreements over how these questions should be answered.

The weight of these other factors in each debate stems from the relationship between the individual and society. The only way that any individual can have a legitimate stake in anyone else's behavior is when the other's behavior affects that individual, either in themselves or as a part of the larger society. As members of such a community, individuals can no longer do whatever they want, whenever they want; they owe a responsibility to all other members of the society to

act in a way that protects their wellbeing.¹ The need to avoid unfettered liberty for the holistic maintenance of society is an essential part of American legal theory and relates directly to this balancing of the rights of one against the rights of many. In *Crowley v. Christensen*, the Supreme Court asserted that:

the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will.

137 U.S. 86, 89 (1890). This theory was confirmed in *Jacobson v. Massachusetts*, when the Supreme Court held the Massachusetts legislature had not exceeded its power by mandating that “the board of health of a city or town, if, in its opinion, it is necessary for the public health or safety, shall require and enforce the vaccination and revaccination [against smallpox] of all the inhabitants thereof.” 197 U.S. 11, 12 (1905) (quoting Mass. Revised Laws, c. 75 § 137 (1905)). Both opinions identify the specific need for “public health or safety” as a threshold concern that justifies governmental infringement of individual liberties. *Id.* The idea in *Crowley* that “the governing authority” should maintain the “morals of the community,” though, pinpoints the more disputed ideas in the debates over abortion and preventive healthcare mandates. What are the “morals of the community,” and who defines them?

Richard Posner has described morals as “the set of duties to others . . . that are designed to check our merely self-interested, emotional, or sentimental reactions to serious questions of human conduct.” Richard Posner, *The Problematics of Moral and Legal Theory*, 111 Harv. L. Rev. 1637, 1639 (1998). Though this is a definition framed by a brilliant legal mind, it does not necessarily

¹ According to the Social Contract theory, when individuals join together to form a society, each individual must cede some rights to the society as a whole. See generally Jean-Jacques Rousseau, *The Social Contract* (1762).

reflect the layperson's conception of morality. And, because laypeople are so closely entwined in the selection of legislators, this difference is significant. The way that morality tends to be wielded today seems to be more to impose duties on others with deference to our own "self-interested, emotional, or sentimental reactions." Many have lost the perspective that living in a society is a privilege that confers benefits—for which morality is the price—and they instead view societal protection as a right. But an examination of ethical egoism and its like is well beyond the scope of this essay.² Suffice to say that differing conceptions of morality's societal function contribute to the debates at hand.

Further, the varying viewpoints on how to define that morality add to the conflicts. It is generally accepted that "the community" should define the morals of that community. *See* Yehezkel Dror, *Values and the Law*, 17 *The Antioch Rev.* 440, 440 (1957). But the idea that "the community" can have one comprehensive set of broad-reaching morals is an artifact of a society that overwhelmingly followed a single religious consensus. As society has become more diverse, the set of morals that can be considered "universally held" has necessarily shrunk; the overlap in the Venn diagram diminishes as more circles are added. Thus, tension builds between those who think laws should reflect the broader expanse of morals that may have been appropriate in a circumscribed community and those who recognize that such widespread moral codification no longer reflects the beliefs of modern heterogeneous society. Through the early twenty-first century, the Supreme Court has tended to carefully consider the extent to which morality can be considered a legitimate government interest. *See* Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 *Penn. State L. Rev.* 139, 139 (2012). With the current Court, though, it

² *See generally* *Ethical Egoism*, Seven Pillars Institute (Aug. 26, 2017) <https://sevenpillarsinstitute.org/glossary/ethical-egoism/>.

seems likely this trend may shift. The extent to which that is true is now beginning to come to light.

The recent cases the Court has heard and decided are indicating how this shift toward individual rights and local governance will constrain the power of the federal government. In *Dobbs v. Jackson Women's Health*, Scott G. Stewart, the Solicitor General of the State of Mississippi arguing on behalf of the Petitioners, was careful to leave undisturbed the constitutional basis for personal autonomy and privacy that undergird the arguments against mask and vaccine mandates. See Transcript of Oral Argument at 6, *Dobbs v. Jackson Women's Health*, No. 19-1392 (argued Dec. 1, 2021). In the same breath, though, he argued that abortion regulations should be controlled at the local level. *Id.* This draws on the convictions of the nation for federal protection of bodily integrity but concurrently restricts the argument over abortion to a local issue such that the morals of a smaller (and, presumably, an effectively more homogeneous) community can come to bear and impose harsher regulations. This imbalance in governmental reach is evident in recent vaccine mandate cases as well.

In *NFIB v. OSHA*, the individual's right to bodily integrity simmered beneath the surface when the Court ruled OSHA had exceeded its authority by mandating that those working for employers with more than 100 employees must receive a Covid vaccination. See Nos. 21A244 & 21A247, slip op. at 6 (Jan. 13, 2022). The Court found that "[t]he [Occupational Safety and Health] Act [that created OSHA] empowers the Secretary [of the Department of Labor] to set workplace safety standards, not broad public health measures." *Id.* (citing 29 U. S. C. §655(b) and §655(c)(1)). Mandating a vaccine based on authority over the workplace was deemed untenable in the face of individual autonomy because "[a] vaccination, after all, 'cannot be undone at the end of the workday.'" *Id.* at 7 (quoting *In re MCP No. 165*, 20 F. 4th 264, 274 (2021) (Sutton, C. J.,

dissenting)). This draws a clear line between an individual's right to bodily integrity and the moral authority of OSHA to interfere with it.

On the other hand, in *Biden v. Missouri*, the Court held that the Secretary of Health and Human Services did have the authority to mandate vaccines for healthcare workers in facilities receiving Medicare and Medicaid funding, based on the Department's responsibility for protecting those in its charge. *See* Nos. 21A240 & 21A241, slip op. at 5 & 8 (Jan. 13, 2022). Even in affirming this authority, though, the Court was explicit in limiting the degree to which the COVID-19 emergency could be used to justify the exercise of federal power. *Id.* at 9 ("The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it. At the same time, such unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have.") The juxtaposition in that statement of "unprecedented circumstances" and long-recognized authority is telling; it reflects a devotion to traditional morality and limitations, even in the face of novel challenges. The individual's bodily autonomy is the same in all these debates; it is a constitutionally protected right. The morality imposed on the situation, though, determines how that right balances against the needs of society.