

Free Enterprise, Employer Vaccine Mandates, and Bans on Employer Mandates

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Abstract

Private companies have often mandated COVID-19 vaccines for employees, with workers facing vaccination or loss of their job. State legislatures have considered bills that limit private mandates. Is this anti-free enterprise? I conclude that private sector COVID-19 vaccine mandates can be legitimately called into question from a free-enterprise perspective. There are two primary reasons: (1) many private firms are incentivized and/or pressured into following government “recommendations” for such mandates and; (2) there are serious common law contract rights for employee privacy and autonomy that are likely violated. Due to the widespread adoption of vaccine mandates, employees have reduced options to avoid vaccination. This raises the issue of whether legislatures should intervene and limit private mandates. I discuss various options in this respect and, though all are imperfect, they may be the “lesser of evils.”

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I. Introduction

During much of 2021, numerous private companies imposed, or considered imposing, COVID-19 vaccination requirements on their employees, aligning themselves with many government pronouncements, policies, and recommendations. This placed a great deal of pressure on many employees to either be vaccinated or lose their job. In response, numerous state legislatures considered bills that would limit private firms in this regard. An initial reaction to this from a free-enterprise perspective is that private firms ought to be able to establish whatever workplace standards they wish, within the constraints of Constitutional and employment law, and legislatures should keep hands off. I have come to conclude that this initial reaction is not correct as it misses a good deal of the picture.

Fundamentally, the status quo is not one where private firms are simply making their own choices in a market economy. Instead, many firms are dependent on government contracts, tax breaks, subsidies, assistance, and favors, and also face a host of government regulations. Thus, they are incentivized to remain in the good graces of government, which may include following government pronouncements by issuing COVID-19 directives to employees. It seems that many firms are acting with a tacit and invisible (to outsiders) set of regulations and incentives, largely established by executive branch agencies, to follow government “recommendations.”

Thus, a legislature’s intervention to limit private vaccine mandates can be helpful to offset or undo undesirable tacit regulations set by the executive branch. Such intervention may be fraught with dangers, e.g., possibly strengthening the (mis)perception that increased government interference in private contracting is appropriate or might backfire and generate more bad policy on top of existing bad policy. But “doing nothing” is not really free-enterprise friendly; it simply cements-in the status quo of tacit regulatory pressure. Legislative action may be the best option among unattractive alternatives.

Moreover, it seems that private COVID-19 vaccine mandates may run afoul of common law doctrines regarding employee privacy and autonomy. The latter are largely consistent with free enterprise. Employer COVID-19 vaccine mandates are likely beyond what employees would reasonably expect in their jobs, thus violating employment contracts.

Resolving such employment law disputes is time consuming and expensive. Establishing statutory law regarding employee privacy and autonomy with respect to COVID-19 vaccines might serve to reinforce the common law, but in a more immediate way. However, this too has difficulties since statutory law forgoes the nuance of common law, the latter of which is often tailored to what is “reasonable” for the case at hand.

This paper discusses these issues in more detail. A host of related matters arise, including the role of government in a society, Constitutional issues, as well as tradeoffs regarding various statutes that limit private firms’ vaccination policies. These, too, are discussed below.

Section II of the paper begins with background regarding the basic reasons for government intervention in markets and discusses the “presumption of liberty” that is a hallmark of free enterprise, i.e., that individuals decide for themselves. Section III applies this analysis to government policy regarding COVID-19. I conclude that the presumption of liberty is not rebutted regarding heavy government mandates concerning COVID-19, such as economic shutdowns and vaccine mandates, i.e., such mandates are highly inappropriate. This is related Constitutional law issues and these are discussed as well.

While the above applies to government mandates, section IV deals with private sector vaccine mandates. I describe the political economy underlying tacit government regulation that can pressure private firms to adopt vaccine mandates. I argue that since direct government

mandate of vaccines is inappropriate, then surely inducing it indirectly is as well. The upshot is that it seems that many private firms are, in an opaque manner, acting in the government's stead by imposing these mandates. This raises the Constitutional issue of whether a private entity is a "state actor" arises and is discussed here. This section also discusses how employer vaccine mandates are likely to be contrary to the common law of employment contracts, thus are inconsistent with free enterprise.

Section V considers various types of proposed (and enacted) state laws that ban or deter private organizations' use of COVID-19 vaccine mandates. Issues and tradeoffs with this approach is presented. Lastly, section VI concludes. An ideal legislative approach, from a free-enterprise perspective, is to strip away the excesses of the big spending, regulatory state that incentivizes and pressures private businesses to adopt government "recommendations." While a desirable outcome, this would take a very long time to implement. More immediate steps to deal with COVID-19 mandates likely entails less-than-ideal legislative intervention. However, this may be the "lesser evil" compared to the status quo of tacit regulation.

II. Background: Government Mandates, Free Enterprise, and the Presumption of Liberty

A. Free Enterprise as the Rebuttal Presumption

Discussions of free enterprise almost always stem – though often implicitly – from the presumption of individual liberty. By individual liberty, I mean that individuals, or their assignees, have decision-making authority regarding what to do and how to do it, as long as the like rights of other are respected.¹ The reasons for the desirability of this are well-known: central authorities have neither the knowledge nor the incentives to make good decisions for individuals. Thus, the presumption is that individuals make decisions for themselves. A

¹ There are other aspect of individual liberty as well. See Garen (2020), and the references cited therein, on the defining aspects of free enterprise and other economic systems.

government's role primarily is to facilitate the interaction of individuals who are acting on their own.

To economists, this typically implies facilitating private production and trade, though the same mechanisms also support voluntary social interactions generally. There are two keys to this. One is determining who owns what, i.e., property rights. Second, is enabling and supporting honest exchanges, that is, contract law. The first determines what you own, thus what you may sell (your stuff) and what you have to buy (other people's stuff). The second works to assure that exchanges are voluntary and that people trade as anticipated.

It is also well known that there are conditions under which these institutions, and their reliance on private action, have difficulty. This is where it is problematic to define and enforce property rights, as well as their exchange. One of the most well-known cases is external costs, where one party imposes costs on another person who is not a party to the transaction. Air pollution is a common example, where producers of a good that pollutes the air harm individuals downwind who have nothing to do with the good and who are not compensated for the harm. This stems from the difficulty in determining the rights to use of the air and the exchange of these rights.

However, these and other related examples are special cases. The presumption is the desirability of free enterprise – with its individual decision making – but this presumption is rebuttal. And indeed, long experience has generated convincing rebuttals in these special cases. Of course, there is always the question of how well the alternative of government intervention works to deal with these cases. Long experience, and careful analysis, also has shown that increased government control over private individual action has difficulties as well, e.g., the

problem of rational ignorance of voters, the influence of special interests, and voting paradoxes.² Naturally, any discussion of government action should take these problem into account.

B. Disease, Externalities, and “Assumption of Risk”

A related example is communicable disease. Those with such a disease may suffer harm and may infect and cause harm to others. The imposition of harm to others makes it analogous to external costs. This comparability is the case for government intervention in the form of “public health” regarding communicable disease.

Of course, modern living, especially in cities, seems chock full of externalities at some level. There is congestion, air pollution, noise, unpleasant visual scenes, as well as numerous interactions that expose you to the risk of catching a disease from someone else. Naturally, there are offsetting benefits to modern urban life that make city/town life attractive. Moreover, a host of policies and practices – such as traffic management, pollution restrictions, noise ordinances, nuisance law, and zoning, as well as social norms – serve to limit, though not eliminate, the external costs. Thus, the presumption of the desirability of complete individual action is rebutted and the above government activity is often undertaken. These polices do impose some limits on individual freedom of action but, if limited to externality-causing activities, still leaves the individual with the lion’s share of decision-making authority over their lives. Of course, the previous comments regarding the problems of government action apply to city government as well. There are numerous cases where local government becomes dominated by special interest politics and overly impedes individual choices.

The upshot is that there is a degree of noise, pollution, congestion, and exposure to disease that comes with modern life, particularly city life. As long as these are within reasonable

² For a concise review of these issues, see Gwartney and Wagner (1988).

bounds of what individuals anticipate, one can presume that people are “assuming the risk” of engaging with life. Living in a city is essentially “coming to the nuisance.” Expecting pure air, no congestion, and no chance of catching a virus is not reasonable.

III. COVID-19 and Government Policy

A. Can the Presumption of Liberty be Rebutted?

The above argument is that there should be a presumption of liberty. It can be rebutted but only under compelling circumstances and with broadly accepted reasons. To meet this standard, it is critical that the COVID-19 epidemic be far outside the bounds of anticipated risks such that severe government policy (e.g., lockdowns and vaccine mandates) is called for. Another key criteria is whether the expected and actual effects of COVID-19 policies are credible and broadly accepted.

Regardless of one’s position, there is little doubt that a great deal of contention surrounds COVID-19 issues. Many distinguished physicians, scientists, medical researchers, and data analysts take opposing positions in this debate.³ Though it is clear that COVID-19 is a serious disease, there is serious disagreement and debate regarding: (i) the accuracy of the data on COVID-19 fatalities and of COVID-19 cases; (ii) the origin of COVID-19; (iii) methods to mitigate its spread (e.g., masking, distancing, business closures, vaccines); (iv) non-vaccine treatments for COVID-19; and (v) the safety and effectiveness of the vaccines, especially long-term safety.

My reading of this debate is that there is not convincing and broadly accepted evidence that justifies extensive intrusion on people’s everyday lives, including the broad-based economic

³ As two examples of opposing viewpoints, see The Great Barrington Declaration (<https://gbdeclaration.org/>) and The John Snow Memorandum (<https://www.johnsnowmemo.com/john-snow-memo.html>).

shutdowns of 2020 or the push for requiring vaccinations and masking. It is inconsistent with a free society, as well as common sense, to mandate a vaccine where there are reasonable concerns by many people, including reputable experts, about its safety and efficacy.

In short, the standard for rebuttal of the presumption of liberty is not met. This implies that government should not mandate actions in these respects.

B. Constitutional Issues

Though the above analysis implies that the government should not mandate vaccines regarding COVID-19, a question that arises as to what prevents a government from doing so. Constitutional law speaks to this. There have been a number of attempts by federal agencies to directly imposed vaccine mandates on private employers. Most have been enjoined by courts, largely on the grounds that the agencies issuing the mandate likely exceeded their statutory authority.⁴ What about Constitutional issues?

I only address this briefly since this is an extensive topic, much of which is beyond the scope of this paper. It seems that the powers of the U.S. government to intervene regarding pandemics is quite limited. However, Constitutional law apparently allows a good deal of state government intervention. How much is allowed turns on the interpretation of *Jacobson v. Massachusetts* (1905) and several following cases. My brief discussion relies a good deal on *Blackman* (2022), with all quotes drawn from *Blackman* (2022).

The case stems from a Massachusetts law that allowed cities, under certain conditions, to require vaccination of their citizenry. Cambridge, Massachusetts mandated a smallpox vaccination, with a \$5 fine upon failure to do so. Jacobson refused, was fined, and appealed his

⁴ For example, in regards to the U.S. Occupational Safety and Health Administration's vaccine mandate, see Supreme Court of the United States, https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf.

case all the way to the U.S. Supreme Court. In the Supreme Court decision, Justice Harlan wrote, “The liberty secured by the Constitution of the United States . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.” The Court ruled that the law was justified by the necessities of the situation. However, such police power cannot be “exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner.” If so, it “might go so far beyond what was reasonably required for the safety of the public,” and would “not [be] justified by the necessities of the case.” This would “authorize or compel the courts to interfere for the protection of such persons,” i.e., the law could be struck down as unconstitutional.

To determine this, Harlan established two tests; (i) whether the law has a substantial relation to its intended object, and if so (ii) whether the law invades a fundamental right. Noting that the Cambridge law did not actually require a vaccination – rather it required the payment of a nominal fine of \$5 upon refusal of a vaccination – it was ruled that no fundamental right was violated.

Blackman (2022) argues that a proper interpretation of *Jacobson* is that it actually puts significant limits on state powers regarding public health measures, but that it has been misread by many subsequent courts and analysts to justify extensive powers in this respect. Moreover, it is argued that many recent commentaries on *Jacobson* have not taken account of the more expansive views of individual rights taken by more modern Court rulings.⁵

State-level COVID-19 restrictions and mandates have yet to be found unconstitutional. Yet, from my non-lawyer perspective, it seems that a case can be made that they are, depending on the particular law and circumstances.

⁵ See, for example, Center for Constitutional Jurisprudence (2020) and *We the Patriots USA, Inc.* (2021).

IV. Private Sector Vaccine Mandates

The above argues that government mandated COVID-19 vaccines is inappropriate policy. But what about for private firms and organizations? Owners and managers, as individuals acting on behalf of their organizations, have liberties as well. Should they be allowed to impose masking and vaccination mandates on their employees? Part A of this section takes up the contention summarized in the introduction that there are many tacit government pressures on private organizations to impose vaccine mandates. If so, then since government vaccine mandates are inappropriate, then so are private ones that are induced by government pressure. This leads to the implication that private firms are “state actors” and part B discusses legal aspects of this. Part C consider the common law of employment and how this impinges on private vaccine mandates.

A. Regulation, Politics, and Quid Pro Quos

The issue noted above is that private businesses seem to be tacitly regulated to pursue employment policies that favor the government line, but without use of direct regulation. Many companies issuing COVID-19 employee mandates are dependent on government contracts, tax breaks, subsidies, assistance, and favors. It is sensible for them to remain in good graces of government, thus are incentivized to follow government pronouncements by issuing COVID-19 directives to employees. Other firms that are less favorably connected most likely feel various forms of pressure by government agencies to follow the government line and to issue employee mandates. Thus, it seems that many private firms are, in an opaque manner, acting in the government’s stead. With enough firms thus constrained by the government, firms offer employment conditions biased toward vaccine mandates. This, in turn, short circuits the competitive labor market response to unpopular working conditions, that is, workers seeking

other jobs having more desirable conditions. With more and more firms tacitly pressured to have COVID-19 vaccine mandates, this becomes less and less feasible.

If the above is correct, firms are not simply making choices via the exercise of their rights and liberty. Firms are acting with a tacit and invisible (to outsiders) set of regulations and incentives to follow government “recommendations.” Such tacit regulation is difficult to quantify; the very nature of tacit understandings makes them hard to detect and measure. Yet for firms that attain preferred government treatment – via benign or favorable regulation, government programs that subsidize and/or assist them, advantageous tax treatment, or government contracts – there is an implicit quid pro quo, i.e., there is a “price” of gaining such favors. It comes in the form of campaign contributions and related political support – but also in the form of public support of policies of one’s benefactor. Moreover, firms that are not well-ensconced cronies have to beware of the consequences of pushing back against or ignoring regulators’ and government officials’ recommendations.

The upshot is that there is tacit pressure to go along with the government pronouncements. The extent of the pressure is difficult to say. This is due to the implicit nature of the quid pro quos. However, there can be no doubt that the federal government dangles a large carrot and wields a big stick over private economic activity. Even setting aside the COVID-19 spending surges, the U.S. government has a budget of over one-fifth of the entire economy (and forecasted to go higher), coupled with powerful regulatory authority. Its influence is large, creating a great deal of reliance on government. State government programs, taxes, and regulation add to this reliance even further

Reliance on government, with the incentives that go along with it, became even stronger with the passage of the large federal infrastructure bill in the fall of 2021. Though the initial

Build Back Better bill failed, the Inflation Reduction Act recently passed into law. This, too, ramps up both government spending and regulatory activity. The “carrot” of government contracts/assistance and the “stick” of regulatory scrutiny, already sizeable, now loom even larger.

It is possible that some private firms, in an assessment of what their employees’ and/or customers’ desires, would adopt masking and vaccination mandates. Moreover, some business owners and managers may have the earnest belief that such mandates are the best way to deal with COVID-19, though other owner/managers likely disagree. Even granting this, it still is true that federal and state governments each have a large budgetary scope and regulatory powers over private firms. It is not plausible that the influence of such power has an insubstantial effect on firms’ policies.

Essentially, I am arguing that many private firms, under government pressure, are tacitly carrying out a government mandate when imposing a vaccine mandate on their employees. In legal terms, this implies that private organizations doing so are “state actors.” We turn to more discussion of this next.

B. Are Firms State Actors?

The Constitution protects many rights of individuals from state action, e.g., impinging on freedom of speech, privacy rights, and so on. It does not do so regarding private action. Unless a private entity is a “state actor,” that is, acting for the state, the typical Bill of Rights and other protections are absent. Thus, if vaccine mandates are unconstitutional for government, they are unconstitutional for private entities only if they are state actors.

There are a host of court rulings that determine whether a private entity is taking state action.⁶ Essentially, this occurs, for Constitutional purposes, in a few limited circumstances, including: (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity. Also, being state licensed, heavily regulated, or receiving most of its budget from public funds does not automatically qualify a private entity as a state actor in the legal sense. It must be shown that the state was involved in the complained of actions, either through coercion or encouragement.

This is a high legal standard to meet. In the above, I argue that private firms are being coerced and encouraged to issue vaccine mandates, but by using implicit means. The tacit nature of this government pressure makes it very difficult to meet the above conditions in a legal proceeding. However, this does not mean that such pressure is not occurring, but that it is difficult to prove in a court of law.

There is a good deal of evidence showing government pressure on private companies to limit “misinformation” on COVID-19, that is, content contrary to the U.S. government narrative.⁷ This is closely related to the analysis by Duffield (2022) of “jawboning,” where government officials issue statements “encouraging” private entities to engage in particular actions. Duffield (2022) cites the jawboning of Facebook regarding COVID-19 misinformation as a particular example. Jawboning on COVID-19 misinformation that applies to a host of private organization is illustrated in comments by The White House (2021). Also, there apparently is a good deal of concern by state medical licensing boards about physicians who

⁶ See Constitution Annotated (undated (a), (b)).

⁷ For commentary on this, and claims that Twitter is behaving as a state actor, see Ramaswamy and Rubinfeld (2022).

practice and make recommendations that are counter to those of government officials, suggesting pressure to conform. See Rubin (2021).

None of this may be sufficient to establish that various private entities are state actors in the legal sense. However, in May of 2022, the Attorneys General of Missouri and Louisiana filed suit against the Biden Administration alleging collusion with social media companies regarding censoring speech regarding COVID-19, among other topics.⁸ Thus, a legal ruling seems to be forthcoming. However, this does not apply specifically to private organizations' decisions on whether or not to mandate COVID-19 vaccinations. It seems clear, though, that there is government pressure on private organizations regarding COVID-19. How much it influences those organizations is difficult to determine.

C. The Common Law of Employment

Another important consideration regarding employer vaccine mandates is the common law of employment. The common law offers protections for workers' privacy and autonomy. It seems clear that vaccination impinges on workers regarding both. There is a great deal of statutory law on the employment relationship as well, but I wish to focus on the common law.

One reason for this focus is that the common law is often thought, on the whole, to be market friendly. Violations of common law of employment doctrines effectively violates employment contracts. Adherence to voluntary contracts is an essential of free enterprise.

The common law frequently establishes default provisions for agreements and contracts for circumstances that contracts are silent on. The usual narrative is that, over the years, dispersed courts seek resolution to disputes by establishing default rules that are typically

⁸ See Missouri Attorney General (2022) for the announcement and description of the suit.

thought to be reasonable and workable. The decisions of the courts evolve over time and establish various defaults as precedent.

It is noteworthy, though, that parties are free to override these default provisions simply by putting their preferred alternative in the contract. In this way, the common law allows parties wide freedom to find and execute mutually preferred activities, but those arrangements different from the defaults must be stipulated. Commonly understood and expected aspects of jobs do not have to be contractually specified, thus saving on contracting costs. Only those aspects that differ need to be made explicit. This legal arrangement thus is consistent with free enterprise: the individual choices of participants in the labor market (employers and employees) are respected, where information about the job conditions is either widely known or explicitly provided.

Regarding employee privacy and autonomy, there are a number of default provisions in common law. Generally, an employee has the rights to privacy and autonomy that can reasonably be expected in their particular workplace setting. Unreasonable and offensive intrusions by employers violates these rights. Basically, the default is these respects is what the reasonable person expects in the job, as well as what is reasonably considered to be inoffensive. To engage in any unusual intrusions that are not explicitly in the contract, employers must have a legitimate business justification. Otherwise, the employer is in violation of the employment contract.

In a COVID-19 context, maintaining a safe work environment is a legitimate business interest. However, trying to attain it via a COVID-19 vaccine mandate is not something a reasonable person would expect given the realistic concerns and lack of broad acceptance about the vaccine's safety and efficacy. From my non-lawyer perspective, private COVID-19 vaccine

mandates seem to present strong grounds for an employment law-based suit. Working against such a lawsuit, though, is the Food and Drug Administration approval of the vaccines as safe and effective.

There has been a good deal of discussion of the legality of private employer mandates, with most commentary suggesting that, under certain conditions, they are legal. However, these treatments typically focus on statutory law issues, e.g., potential violations of laws regarding discrimination, accommodation of disability, health privacy, and collective bargaining.⁹ This differs from the common law-based approach discussed above.

V. Legislative Action

A. The Legislative Setting

During much of 2021, private vaccine mandates put many workers into the situation of having to be vaccinated against their judgment or losing their job. Some people obtained exemption from their firm's mandate, some had exemption requests under consideration, while others worried that their employer would impose a mandate. In response, many state assemblies considered legislation that would limit both public and private sector vaccine mandates. With the fading of the seriousness of COVID-19 in spring 2022, there seemed to be less of a push to mandate vaccination. Nevertheless, there remains considerable concern about this issue, so I discuss the measures to limit private-sector COVID-19 vaccine mandates ("anti-mandate mandates") in this section.

Even in the absence legal assurances, economists argue that a competitive labor market is a great protection for workers. If a worker doesn't like conditions at one employer, the option of finding employment elsewhere puts substantial limit on what each employer might expect of

⁹ See Smith and Magele-Piazza (2022) for a general discussion of these issues. Also, see MSN (2022) for the overturning of a vaccine mandate in the context of a union contract.

workers. However, it seems that many private firms are or have been pressured to impose vaccine mandates. With enough firms thus constrained by the government, the competitive process for employees is stifled on this margin. Employers offer working conditions distorted toward vaccine mandates.

With diminished protection from the competitive labor market, workers might turn to the legal system. As noted above, it seem as though there are legitimate grounds for a lawsuit to stop private sector vaccine mandates either on Constitutional or employment law grounds. However, such suits take a long time to resolve and are quite expensive. Unless an injunction is issued, workers still gain no immediate relief from mandates.

B. Legislative Policy

As noted above, the situation is not one where private firms are simply making their own choices in a market economy but rather seem to be acting with a tacit set of regulations and incentives to follow government “recommendations.” Thus, a legislature taking a “hands off” approach is not consistent with free enterprise. This simply lets the tacit regulatory process continue and administrative agencies get their way, albeit in a murky and clumsy way.

Note that much of this tacit regulation comes via executive branch agencies. This is certainly true of regulatory and business licensing activity, both at the federal and state levels. Likewise for legal compliance issues. Government contracts also are solicited and awarded by the executive branch. It is through these avenues that firms can be pressured. If executive branch agencies become unmoored from the sentiment of the electorate and legislatures, then legislation could be used to curb regulatory actions of the executive branch. Thus, in states with more anti-vaccine sentiment, state legislation would counter actions of the federal executive

agencies, though the state executive branch may or may not be on the side of the legislature. In states with pro-vaccine sentiments, this issue is unlikely to arise.

An ideal legislative approach, from a free-enterprise perspective, is to strip away the excesses of the big spending, regulatory state that incentivizes and pressures private businesses to adopt government “recommendations.” This is would take a very long time, so provides no immediate relief to workers.

Another free-enterprise friendly approach is for a state legislature develop a statute allowing private vaccine mandates, but only if they are not pressured, coerced, or incentivized by government, and with full agreement of employees. Thus, in principle, firms may choose their employment policies without government interference. However, this would be hard to enforce because, with tacit regulation, establishing whether a business acted due to government influence is difficult.

States have considered other options that involve more direct intervention in the employer-employee relationship, so are not ideal. A state-by-state overview of such legislation is in National Academy for State Health Policy (2022). Below, I summarize general legislative approaches.

One option is legislation that places an immediate ban on private sector vaccine mandates. Normally, such bans on private parties is objectionable from a free-enterprise perspective. Legislative interference in business and employment activity is generally a bad idea and, in most cases, putting more regulations on top of bad regulations makes things worse. Moreover, such legislation may establish further precedent for an even larger role for government. However, it offsets and undoes the tacit interference in the market by

administrative agencies already in place and offers immediate relief to workers, so it may be the lesser of evils.

Another alternative is to allow businesses to mandate employee vaccination, but require broad exemptions for religious, health, or conscientious reasons. The three exempt categories could encompass virtually everyone and, if easy to obtain, could make business mandates nearly meaningless. Once again, however, this intervenes in the employment relationship.

An alternative way to view these options, though, is to think of them as establishing statutory law regarding employee privacy and autonomy that reinforces the common law. In this light, they are less objectionable from a free-enterprise perspective. However, statutory law paints with a broad brush, while the common law can be more nuanced and tailored to what is “reasonable” for the case at hand. The latter is forgone with statutory law.

A third alternative is to require businesses that mandate vaccinations to assume liability for any subsequent harm that they cause. Since those who cause the harm (employers who mandate vaccines) must assume financial responsibility for it, this is more consonant with a free enterprise approach. However, it is often difficult to determine the cause of a harm and it is almost impossible to fully compensate someone for a devastating medical event. Suffering severe paralysis from a vaccine reaction but gaining “compensation” of, for example, a half a million dollars is a bad deal in many peoples’ minds, I suspect. Also, requiring a vaccine exposes people to such a risk. The intent of this approach, though, is to deter businesses from mandating vaccines in the first place.

Each of the alternatives is imperfect. But “doing nothing” is not really free-enterprise friendly, but simply cements-in the status quo of tacit regulatory pressure.

VI. Conclusion

I conclude that private sector COVID-19 vaccine mandates can be legitimately called into question from a free-enterprise perspective. The primary reasons are twofold: (1) many private firms are incentivized and/or pressured into following government “recommendations” for such mandates and; (2) there are serious common law contract rights for employee privacy and autonomy that are likely violated. Ideally, companies’ handling of this issue would evolve and unfold over the course of years as more information develops and expectations change, as typically happens with common law doctrines. However, many employees, at present, have limited options to avoid vaccination, raising the issue of whether legislatures should intervene and limit private mandates. I discuss various options in this respect and, though all are imperfect, they may be the “lesser evils” relative to the status quo.

References

American Law Institute, *Restatement of the Law, Third: Employment Law*, Preliminary Draft No. 8, May 26, 2011. <http://laborlawgroup.org/wp-content/uploads/2015/03/EmploymentLawPD86-11.pdf>.

Blackman, Josh, “The Irrepressible Myth of *Jacobson v. Massachusetts*,” *Buffalo Law Review*, v. 70, no. 1, 2022, <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol70/iss1/3/>.

Center for Constitutional Jurisprudence, Amicus Curiae Brief, *The Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo*, November 17, 2020. https://www.supremecourt.gov/DocketPDF/20/20A87/161047/20201117173045314_CCJ%20Motion%20and%20Amicus%20Brief.pdf

Constitution Annotated, “Procedural Matters and Freedom of Speech: State Action,” https://constitution.congress.gov/browse/essay/amdt1_2_2_4/, undated (a).

Constitution Annotated, “State Action Doctrine,” https://constitution.congress.gov/browse/essay/amdt14-2/ALDE_00000810/, undated (b).

Duffield, Will, “Jawboning Against Speech: How Government Bullying Shapes the Rules of Social Media,” *Cato Policy Analysis*, Number 934, September 12, 2022, <https://www.cato.org/policy-analysis/jawboning-against-speech#>.

Garen, John, “The Allocation and Exchange of Property Rights as a Way to Understand Comparative Economics Systems and Managerial Economics,” *Journal of Private Enterprise*, 35(4), Winter 2020, pp. 43-59.

Gwartney, James and Wagner, Richard, “The Public Choice Revolution,” *The Intercollegiate Review*, Spring 1988.

Missouri Attorney General, “Missouri, Louisiana AGs File Suit Against President Biden, Top Admin Officials for Allegedly Colluding with Social Media Giants to Censor and Suppress Free Speech,” May 5, 2022, <https://ago.mo.gov/home/news/2022/05/05/missouri-louisiana-ags-file-suit-against-president-biden-top-admin-officials-for-allegedly-colluding-with-social-media-giants-to-censor-and-suppress-free-speech>.

MSN, “NY Supreme Court Rules Vaccine Mandate Invalid for NYPD Union Members; City to Appeal,” September 24, 2022, <https://www.msn.com/en-us/news/us/ny-supreme-court-rules-vaccine-mandate-invalid-for-nypd-union-members-city-to-appeal/ar-AA12avIM>.

National Academy for State Health Policy, “State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports,” July 11, 2022, <https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/>.

Ramaswamy, Vivek and Rubinfeld, Jed, “Twitter Becomes a Tool of Government Censorship,” *Wall Street Journal*, August 17, 2022, <https://www.wsj.com/articles/twitter-becomes-a-tool-of-government-censors-alex-berenson-twitter-facebook-ban-covid-misinformation-first-amendment-psaki-murthy-section-230-antitrust-11660732095>.

Rubin, Rita, “When Physicians Spread Unscientific Information About COVID-19,” *Medical News & Perspectives*, February 18, 2022, <https://jamanetwork.com/journals/jama/fullarticle/2789369>.

Smith, Allen and Magele-Piazza, Lisa, “Employers React to Workers Who Refuse a COVID-19 Vaccination,” *Society for Human Resource Management*, February 2, 2022, <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/if-workers-refuse-a-covid-19-vaccination.aspx>.

Supreme Court of the United States, https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf.

The Great Barrington Declaration, <https://gbdeclaration.org/>.

The John Snow Memorandum, <https://www.johnsnowmemo.com/john-snow-memo.html>.

The White House, “Press Briefing by Press Secretary Jen Psaki and Surgeon General Dr. Vivek H. Murthy,” July 15, 2021, <https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/15/press-briefing-by-press-secretary-jen-psaki-and-surgeon-general-dr-vivek-h-murthy-july-15-2021/>.

We the Patriots USA, Inc., Amicus Curiae Brief, National Federation of Business, et. al. v. Department of Labor, Occupational Safety and Health Administration, et. al., December 30, 2021. https://www.supremecourt.gov/DocketPDF/21/21A244/206843/20211230102947463_21A243%20Amicus%20Brief.pdf