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Expert Analysis - Opinion

To Vax Or Not To Vax Is Not A Constitutional Question

By Daniel Karon and Giliann Karon November 19, 2021, 6:04 PM EDT

Over 300 years ago, Benjamin Franklin struggled with the vaccination question when he considered whether to variolate his remaining sons against smallpox.[1]

The smallpox death of Franklin's 4-year-old son fueled his support of inoculation through variolation, as he described sadly in his autobiography:

In 1736 I lost one of my sons, a fine boy of four years old, by the small-pox, taken in the common way. I long regretted bitterly, and still regret that I had not given it to him by inoculation. This I mention for the sake of parents who omit that operation, on the supposition that they should never forgive themselves if a child died under it, my example showing that the regret may be the same either way and that, therefore, the safer should be chosen.[2]

But Franklin's sobering observation of the efficacy of vaccinations has yielded to faux-textual partisanship promoted by scores of Americans who mistakenly insist that government mandates requiring vaccinations offend their constitutional rights. These faux-textualists are wrong.



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Where did the anti-vaccine movement come from?

Though vaccination skepticism was hot in the 1990s, via unsubstantiated efforts to link the increasing number of vaccines mandated for children to unexplained afflictions, especially autism,[3] today's anti-vax movement seems to have sprung from anti-maskers' alleged constitutional violations, which arguments anti-vaxxers have thrust into the vaccination space:

- State of Missouri v. Joseph Biden, a joint lawsuit filed by Arkansas, Alaska, Missouri, Iowa, Montana, Nebraska, New Hampshire, North Dakota, South Dakota and Wyoming in the [U.S. District Court for the Eastern District of Missouri](#); State of Texas v. [U.S. Department of Labor](#), a lawsuit in the [U.S. Court of Appeals for the Fifth Circuit](#); and State of Florida v. Nelson, a lawsuit in the [U.S. District Court for the Middle District of Florida](#), accuse the Biden administration's vaccination effort of being unconstitutional and unlawful.[4]
- An op-ed by Justin Haskins in The Hill insisted that President Joe Biden's vaccination mandate "violate[s] both the spirit and explicit language of the Constitution. If the president is permitted to run roughshod over our constitutional liberties in such a reckless manner, future presidents could further erode our freedoms and undermine the protections guaranteed to every citizen by the Constitution." [5]
- An Arkansas resident interviewed about vaccinations by [CNN](#) reporter Elle Reeve in July remarked, "It's a freedom issue. ... If [COVID-19] is so communicable, why am I still standing?" [6]

The constitutional arguments against compulsory vaccinations are as unfounded as they are plentiful. But cramming the vaccination debate into the constitutional space does not make compulsory vaccinations unconstitutional.

What does the Constitution direct about compulsory vaccinations?

The U.S. Constitution contains no language concerning vaccines. For this reason, the Constitution doesn't — indeed, can't — make compulsory vaccinations constitutional. Rather, vaccinations aren't unconstitutional.

Anti-vaxxers often rest their unconstitutionality argument on the 14th Amendment, which proclaims that "[n]o state shall ... deprive any person of life, liberty, or property, without due process of law." But, as U.S. Circuit Judge Frank Easterbrook of the [U.S. Court of Appeals for the Seventh Circuit](#) said in his decision earlier this year in *Klaassen v. Trustees of Indiana University*, the success of a 14th Amendment argument "depends on the existence of a fundamental right ingrained in the American legal tradition"[7] — and the right to get your neighbor sick is not.

What's more, all constitutional rights, those protected by the 14th Amendment included, are subject to the government's police power — that is, the government's authority to protect the community's health, safety and welfare.

Indeed, the [U.S. Supreme Court](#) has long held that protecting the public health is a sufficient reason to institute measures that might otherwise affront the First Amendment or other provisions in the Bill of Rights.[8]

Anti-vaxxers' insistence that compulsory vaccinations violate their right to liberty — "my body, my choice" — withers when channeled through the Supreme Court's 1905 decision in *Jacobson v. Massachusetts*,[9] which explains why vaccination mandates do not violate any constitutional right to privacy, health or bodily integrity.

During a 1904 smallpox outbreak, Massachusetts law allowed cities to require residents' vaccination against smallpox. Cambridge adopted such an ordinance, with some exceptions. Henning Jacobson refused to comply, and the city fined him \$5. Jacobson went to court, arguing that the mandatory vaccination law violated his 14th Amendment right to liberty.

The Supreme Court held that the vaccination requirement was a legitimate exercise of the state's police power to protect its citizens' public health and safety. And because local boards of health had determined that mandatory vaccinations were needed, the vaccination requirement was neither unreasonable nor arbitrarily imposed.

The court instructed that the vaccination requirement did not violate Jacobson's right to liberty, or "the inherent right of every freeman to care for his own body and health in such way as to him seems best,"[10] adding that "[t]here are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members."[11]

Yet former Justice John Marshal Harlan remained mindful of naysayers. To impose a truce between the warring vaccination camps, he acknowledged the need for medical exemptions, and explained that "we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if ... he is not at the time a fit subject of vaccination or that vaccination ... would seriously impair his health or probably cause his death."[12]

Instead, the court explained that only a public health emergency, as the state defined in consultation with medical experts, justified compulsory vaccinations. The court's discussion confirmed that the ideals of limited government do not absolve us of our social obligation to protect each other.

The court made it clear that we do not have a constitutional right to infect others. Jacobson has been the go-to authority in similar cases ever since.

Are compulsory vaccinations still constitutional?

In 1922, the Supreme Court, in *Zucht v. King*,^[13] cited Jacobson when it upheld a San Antonio ordinance providing that "no child or other person shall attend a public school or other place of education without having first presented a certificate of vaccination."^[14] The fact that San Antonio wasn't facing a public health emergency didn't seem to matter.

Five years later, in *Buck v. Bell*,^[15] the court again cited *Jacobson* when notoriously upholding Virginia's policy of sterilizing women deemed unfit to bear children. "The principle that sustains compulsory vaccination," explained Justice Oliver Wendell Holmes, "is broad enough to cover cutting the Fallopian tubes."^[16]

Indeed, the idea of compulsory vaccinations became so commonplace that during World War II, the U.S. military made vaccinations mandatory for several diseases, including typhoid, yellow fever and tetanus. Soon after, vaccinations were developed to combat polio, measles, mumps and chickenpox. Guided by *Jacobson*, all 50 states enacted laws mandating vaccinations — laws that now include medical and religious exemptions — for school children.

Just the other month, the Supreme Court found itself involved again in the compulsory vaccination discussion. In *Klaassen v. Trustees of Indiana University*,^[17] eight students argued, as occurred in *Jacobson*, that Indiana University's compulsory vaccination policy "violate[d] the Due Process Clause of the Constitution's 14th Amendment."^[18]

Affirming the [U.S. District Court for the Northern District of Indiana](#)'s order denying the students' request for an injunction, Judge Easterbrook, for a unanimous panel of the Seventh Circuit, turned to *Jacobson*.

He explained that "Jacobson sustained a vaccination requirement that lacked exceptions for adults[, while] Indiana University has exceptions for persons who declare vaccination incompatible with their religious beliefs and persons for whom vaccination is medically contraindicated."^[19]

He added that "Indiana does not require every adult member of the public to be vaccinated, as Massachusetts did *in Jacobson*. Vaccination is instead a condition of attending Indiana University. People who do not want to be vaccinated may go elsewhere."^[20]

Judge Easterbrook observed that "[h]ealth exams and vaccinations against other diseases (measles, mumps, rubella, diphtheria, tetanus, pertussis, varicella, meningitis, influenza, and more) are common requirements of higher education,"^[21] and "[v]accination protects not only the vaccinated persons but also those who come in contact with them, and at a university close contact is inevitable."^[22]

Dissatisfied with the Seventh Circuit's ruling, the students filed an emergency petition for injunctive relief with the Supreme Court. But within days, Justice Amy Coney Barrett, the justice responsible for emergency appeals from Indiana, rejected their request without comment, without seeking a response from the state or without referring the request to the full court for a vote. Her quick rejection suggested that she and the other justices didn't regard the case as a particularly close one.

From *Jacobson* through *Klaassen*, we see that the protection of our constitutional liberties rides on the crucial assumption that the exercise of our rights must not endanger others. Last year, in *South Bay United Pentecostal Church v. Newsom*,^[23] Chief Justice John Roberts said as much, explaining that constitutional rights are conditioned on public safety:

Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). When those officials "undertake ... to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." ... Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.^[24]

With *Jacobson* as its guide, the court has consistently held that the government can act if its restrictions advance a compelling state interest in the least restrictive manner.^[25] Indeed, government oversight touches every part of our lives.

Each morning, we eat food made from ingredients approved by the [U.S. Food and Drug Administration](#), and take FDA-approved medications. We climb into our cars and fasten our federally mandated seatbelts.

While driving the speed limit, we turn on the radio to hear stations broadcasting according to [Federal Communications Commission](#) guidelines, and perhaps see motorcyclists wearing state-required helmets. We then spend the day at our offices bound by state no-smoking requirements, and with U.S. [Occupational Safety and Health Administration](#) posters plastered about the lunchroom.

Few question these so-called restrictions. And should anti-vaxxers do so, insisting that these examples are inapt, these examples are only different in their degree, not their nature — they all involve the government imposing its mandates on individuals for the sake of the common good.

Like these safeguards, a vaccination mandate is not governmental overreach, but a reasonable policy intended to help keep us safe. And so long as a government safety measure is neutral, generally applicable and promotes medical necessity, it does not violate the Constitution.

Are states requiring vaccinations, as the Constitution allows?

By now, everyone knows about the president's effort to channel compulsory vaccinations, with exemptions, through OSHA.[26] He's doing this because the states, via the 10th Amendment, aren't suitably addressing the anti-vaccination crisis, which neglect is stemming herd immunity.

The 10th Amendment declares that all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The 10th Amendment empowers state and local officials to pass and enforce necessary laws.[27]

For the states to impose not-unconstitutional vaccination requirements, the 10th Amendment is their textual portal. But if the states were slow to impose mask mandates, they've been even more reluctant to impose general vaccination requirements.

Still, despite the politicization driving states' decisions not to require vaccinations in the same manner as they've required vaccinations of K-12 students for decades, and are requiring of many public colleges,[28] many states are making some progress.

Surveying the states indicates that many require the vaccination of certain workers — notably, teachers, health care workers and workers in high-risk congregate settings.[29] Generally, under these states' mandates, workers who decline vaccination must submit to weekly COVID-19 testing or mask-wearing. But despite Jacobson, 27 states have no vaccination requirements.

Importantly, these states' efforts don't pertain to their general citizenry. Whether these states will do their job as allowed by the 10th Amendment and permitted by Jacobson — which would largely spare Biden the hardship of litigating his OSHA regulation — isn't so much anybody's guess as it is simply unlikely to happen.

Conclusion

In "A Few Good Men," Tom Cruise declared, "It's not what I believe but what I can prove." Though anti-vaxxers insist that the Constitution supports their argument, they can't prove it does.

Using the Constitution to support an argument against compulsory vaccinations with exemptions is insincere and would turn that sacred document into a suicide pact. The Supreme Court has never interpreted the Constitution as anti-vaxxers would require.

Anti-vaxxers, including several states' governors, offer no textual support for their position — because none exists. If anti-vaxxers are ever able to put aside the ugly politics that infect this straightforward discussion, maybe they will understand that the call for compulsory vaccinations with exemptions isn't a step toward governmental tyranny so much as it's a constitutionally based step toward preserving humankind.

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[1] Three hundred years ago, variolation, not vaccination, was the accepted means for mass inoculation from smallpox. Variolation, which was then cutting-edge technology, involved scraping the pustule of an infected smallpox victim and transferring the contents to an uninfected person. While this process often caused a mild form of the illness, it also produced lifelong immunity.

[2] Franklin, B., *Autobiography*, New York: Modern Library, 1950 113–114.

[3] See, e.g., Dr. Andrew Wakefield's landmark 1998 paper, published in the British medical journal *The Lancet*, that turned parents worldwide against the measles, mumps and rubella vaccine because of an implied link between vaccinations and autism. In 2010, *The Lancet* retracted Wakefield's paper because "several elements [were] incorrect [and] contrary to the findings of an earlier investigation." <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2831678/>.

[4] <https://www.reuters.com/world/us/eleven-states-sue-us-government-over-vaccine-mandate-federal-contractors-2021-10-30/>.

[5] <https://thehill.com/opinion/judiciary/572149-bidens-wildly-unconstitutional-vaccine-mandate>.

[6] <https://www.youtube.com/watch?v=rq1-MWAiqPU>.

[7] [Klaassen v. Trustees of Indiana University](#), 7 F.4th 592 (2021) (Easterbrook, J.).

[8] See, e.g., [Prince v. Massachusetts](#), 321 U.S. 158, 170 (1944) ("[W]ith reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children ... has not been crossed in this case").

[9] [Jacobson v. Massachusetts](#), 197 U.S. 11 (1905).

[10] *Id.* at 26.

[11] Id. See also Matter of City of New York v. Antionnete R., 630 N.Y.S.2d 1008, 1018 (1995) ("[R]espondent shall continue to be detained in a hospital setting until the petitioner or the court determines that the respondent has completed an appropriate course of medication for tuberculosis").

[12] Jacobson, 197 U.S. at 39.

[13] Zucht v. King, 260 U.S. 174 (1922).

[14] Id. at 175.

[15] Buck v. Bell, 274 U.S. 200 (1927).

[16] Id. at 204.

[17] 7 F.4th 592 (2021).

[18] Id.

[19] Id. 593.

[20] Id.

[21] Id.

[22] Id.

[23] South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).

[24] Id. at 1613–14.

[25] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end").

[26] <https://www.whitehouse.gov/covidplan/>.

[27] See, e.g., [U.S. v. Oregon](#), 366 U.S. 643, 649 (1961) (recognizing the 10th Amendment allows certain laws to be "normally left to the States").

[28] <https://universitybusiness.com/state-by-state-look-at-colleges-requiring-vaccines/>.

[29] See <https://www.littler.com/publication-press/publication/mandatory-employee-vaccines-coming-state-near-you> (last accessed Oct. 30, 2021).