



Written by [Elad Hakim](#) on August 5, 2021

Who Gets to Decide Whether to Jab or Not to Jab?

With the alleged emergence of a new, and highly contagious, variant of COVID, talk has, once again, turned to the issue of vaccination. Specifically, there are those who believe in the effectiveness of the available COVID vaccines and others who refuse to get vaccinated for various reasons. The question, then, is whether the states (federal vaccination mandates will not be discussed here) can force Americans to vaccinate, or whether such a mandate would run afoul of the Constitution and/or one or more laws.



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To begin, one thing is perfectly clear: Nobody can be tied down to a table and jabbed with the COVID vaccine without his/her consent. This, in essence, would amount to a mandatory vaccine in the literal sense, and would be impermissible.

Proponents of mandatory vaccinations often point to the case of *Jacobson v. Massachusetts*, where the United States Supreme Court considered the issue of mandatory vaccination with regard to a smallpox outbreak. In discussing the Jacobson case, the [AMA Journal of Ethics](#) explained:

There the Court ruled that the police power of a state absolutely included reasonable regulations established by legislature to protect public health and safety. Such regulations do not violate the 14th Amendment right to liberty because they fall within the many restraints to which every person is necessarily subjected for the common good. Real liberty for all cannot exist if each individual is allowed to act without regard to the injury that his or her actions might cause others; liberty is constrained by law. The Court went on to determine in Jacobson that a state may require vaccination if the board of health deems it necessary for public health or safety.

The Supreme Court in [Jacobson](#) was very cognizant of the liberty that the Constitution secures to every person, yet explained that such liberty was not absolute:

There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.



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Moreover, in [Zucht v. King](#), the Supreme Court upheld a local ordinance requiring vaccination for schoolchildren. There, an unvaccinated child was excluded from school. Her parents sued, arguing that the ordinance violated the 14th Amendment's Equal Protection and Due Process Clauses. In rejecting these arguments, the Supreme Court relied on its earlier decision in *Jacobson*, and stated that "it is within the police power of a State to provide for compulsory vaccination." The court also noted that the ordinance in *Zucht* did not bestow "arbitrary power, but only that broad discretion required for the protection of the public health."

The question, then, is whether the *Jacobson* and *Zucht* cases compel vaccination during the current COVID pandemic. According to a 2021 [Congressional Research Service](#) report on mandatory vaccinations, and pursuant to the Supreme Court precedent, [states/localities](#) have imposed certain types of vaccination mandates, subject to various exemptions and/or limitations that vary from state to state. As stated in the report:

While the Supreme Court's constitutional jurisprudence has evolved substantially since *Jacobson* and *Zucht*, modern courts have continued to rely on these cases to reject due process and equal protection claims against vaccination mandates, giving considerable deference to the states' use of their police power to require immunizations to protect public health. In cases that also challenge a mandate's lack of religious exemption, plaintiffs have typically asserted a claim under the First Amendment's Free Exercise Clause. Courts have generally rejected this claim — which was not available to the plaintiffs in *Jacobson* or *Zucht* because the Supreme Court had not yet held that the First Amendment applied to the states — and concluded that a state is not constitutionally required to provide a religious exemption. The courts reasoned that under *Employment Division, Department of Human Resources of Oregon v. Smith* and its progeny, a vaccination mandate is a neutral, generally applicable law (i.e., one that does not target specific religious groups) that is not subject to heightened scrutiny. Under the lenient rational basis review, courts have held that "the right to free exercise of religion ... [is] subordinated to society's interest in protecting against the spread of disease."

While the Supreme Court emphasized the police powers of the individual states in both cases, there are several key differences between the current COVID outbreak and the circumstances in *Jacobson* and *Zucht*.

To begin, both cases involved smallpox, which was quite lethal. As reported by [Harvard Health Publishing](#), *variola major* (the more common and severe form of the disease), had an overall historical fatality rate of about 30 percent. COVID, on the other hand, is much [less](#) lethal. Also, in *Jacobson*, the vaccination law applied "only when, in the opinion of the Board of Health, that was necessary for the public health or the public safety." The Board was also qualified to make that determination, and vaccination was a reasonable means to control the smallpox epidemic. Conversely, while COVID is highly contagious, the risk to public health is fairly low in relation to smallpox and other very deadly diseases. The mortality rate is also quite low, and most people (especially children and healthy adults) completely recover without incident. Some also question the effectiveness of the COVID vaccines due to the lack of FDA approval (discussed below), the unfortunate politicization of the virus and the vaccines, recent [reports](#) suggesting that vaccinated individuals are getting sick and spreading COVID, and some reports finding that natural immunity (after infection) provides excellent protection against re-infection



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or serious illness.

Another important distinction revolves around the vaccines themselves. The current COVID vaccines are not authorized by the FDA and are, according to some, experimental in nature. As explained in the 2021 [Congressional Research Service](#) report, unlike the COVID vaccines, “the vaccines that are currently subject to governmental mandates were licensed under a biological license application (BLA), the standard regulatory framework under which vaccines are typically introduced into interstate commerce.”

While the high court permitted mandatory vaccinations of the smallpox vaccine in *Jacobson and Zucht*, it is unclear whether a state or locality is permitted to mandate a vaccine that has only received emergency use authorization. Interestingly, some opine that states may not mandate such vaccines because, with such experimental vaccines, every recipient is entitled to provide informed consent (the right to accept or refuse) prior to receiving the COVID vaccine. According to the 2021 [report](#), they cite to Section 564 (e)(1) of the Emergency Use Authorization ([21 U.S.C. § 360bbb-3](#)), which:

directs the HHS Secretary, when issuing an EUA for a medical product, to impose such necessary conditions to protect the public health, including appropriate conditions designed to inform individuals “of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

How, then, they ask, can a state/locality mandate a vaccine when informed consent is required? The two positions appear to be at odds.

In response, some in favor of mandatory “emergency use” vaccinations argue that the law governing emergency use authorization does not run afoul of the informed-consent requirements. Specifically, recipients are still entitled to accept or reject the COVID vaccine. However, as set forth in a July 6, 2021 [Memorandum Opinion for the Deputy Counsel to the President](#), “the language in section 564 specifies only that certain information be provided to potential vaccine recipients and does not prohibit entities from imposing vaccination requirements.” In other words, while people are free to accept or reject the COVID vaccines, the vaccines may be “mandated” by way of secondary consequences (i.e., businesses and other entities can impose them).

Whether or not this argument will succeed remains to be seen. However, it was briefly discussed in the recent [Congressional Research Service](#) report:

While no court has interpreted this provision, making it difficult to predict how one might consider this argument, Section 564(e)(1) might not address the permissibility of a vaccination mandate. As these commentators acknowledge, the provision essentially directs the HHS Secretary to require health care professionals administering an EUA product to provide informed consent as part of the medical procedure, and to provide an “option to refuse” in that context.

As discussed above, existing vaccination mandates — as they are typically structured — generally do not interfere with the medical informed consent process and an individual’s right to refuse in that context. Rather, they impose secondary consequences — often in the form of exclusion from certain desirable activities, such as schools or employment — in the



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event of refusal. Put another way, mandates generally do not require involuntary vaccination, but instead impose consequences on individuals who refuse to get vaccinated. Thus, to the extent a state vaccination mandate for an EUA-authorized vaccine is so structured, Section 564(e)(1) may not address the mandate's permissibility.

If a state mandates COVID-19 vaccination in a neutral, generally applicable manner while the vaccines are still authorized under an EUA, courts are likely to factor the vaccines' EUA status into their rational-basis review. In particular, courts will likely consider whether requiring vaccines subject to an EUA — including the specific steps taken by FDA in issuing the EUA — under the specified conditions of the mandate is reasonably related to a legitimate government interest given the nature of the pandemic.

At the present time, various employers and companies throughout the country have started to impose vaccination requirements on their employees. For example, as reported by the [New York Post](#), Related Companies "told its 4,000 employees Monday that if they have not already been vaccinated they will be required to get at least one jab by Aug. 31 — or be fired." According to [MarketWatch](#), other companies, including the Walt Disney Corporation, Facebook, and Google, have also implemented vaccination policies for some of their workers. As reported by [ABC News](#):

A new guidance document from the [Equal Opportunity Employment Commission](#) said [employers can legally require](#) COVID-19 [vaccines](#) to re-enter a physical workplace as long as they follow requirements to find alternative arrangements for employees unable to get vaccinated for medical reasons or because they have religious objections.

As expected, litigation has ensued as a result of such policies. For example, according to [ABC News](#), a Texas judge recently ruled against 117 employees who refused to get vaccinated in accordance with Houston Methodist Hospital's vaccine mandate. According to U.S. District Judge Lynn Hughes, "This is not coercion.... The public's interest in having a hospital capable of caring for patients during a pandemic far outweighs protecting the vaccination preferences." In rendering the decision, the judge rejected arguments that the COVID vaccine was "experimental," and that the hospital was violating the Nuremberg Code. According to [NPR](#), the judge also denounced the plaintiffs for equating the vaccine mandate to forced experimentation by the Nazis against Jewish people during the Holocaust, stating "Equating the injection requirement to medical experimentation in concentration camps is reprehensible. Nazi doctors conducted medical experiments on victims that caused pain, mutilation, permanent disability, and in many cases, death." Other [cases](#) of this nature are currently pending around the nation. Additional cases can also be found [here](#).

Clearly, the question of whether states and companies/employers may impose mandatory vaccination requirements with respect to "emergency use" vaccinations is an important one. It involves very important legal and constitutional issues, including the right of privacy, the 14th Amendment and due process, informed consent, religious and First Amendment concerns, and potential civil-rights concerns if vaccinated and unvaccinated people are treated differently. While the [Jacobson](#) decision emphasized the police powers of the individual states, the Supreme Court issued a stark warning that this power was not without limits, noting, "The police power of a State, whether exercised by the legislature, or by a local body acting under its authority, may be exerted in such circumstances or by regulations so



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arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression.”

The Supreme Court was right to issue this warning. Mandates of any nature can create dangerous precedent and can lead to significant government overreach. For example, in 1927, the Supreme Court decided the case of [Buck v. Bell](#). There, Carrie Buck, who was deemed a “feeble minded woman,” was institutionalized. This “condition” had been present in her family for three generations. Shortly after Buck had a baby, Virginia passed a law allowing for the sexual sterilization of inmates of institutions to [promote](#) the “health of the patient and the welfare of society.” In light of this law, Buck was forcibly sterilized by the government. In upholding the government’s conduct, and citing *Jacobson*, Supreme Court [Justice Oliver Wendell Holmes, Jr.](#) stated:

The judgment finds the facts that have been recited, and that Carrie Buck “is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health, and that her welfare and that of society will be promoted by her sterilization,”

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

Time will tell how the courts ultimately rule in the so-called COVID-related vaccine mandate cases. Eventually, the Supreme Court might be asked to decide. By that time, however, the COVID vaccines might already be FDA approved, thereby adding another wrinkle to an already difficult, emotional, and hotly debated issue.



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