

IDEAS

The weak constitutional case for vaccine mandates

The Supreme Court decision allowing the government to require vaccines is out of sync with dozens of other cases allowing people autonomy over their bodies.

By **Nicholas Tampio** Updated August 25, 2021, 3:00 a.m.



A recent demonstration against mandatory vaccinations at the Capitol in Sacramento, Calif. RICH PEDRONCELLI/ASSOCIATED PRESS

Now that the Food and Drug Administration has given its full approval of the Pfizer-BioNTech COVID-19 vaccine, policymakers anticipate that government agencies,

institutions of higher education, and private companies will feel more [empowered](#) to require vaccines. For those confident in the constitutionality of [mandatory vaccination](#), one Supreme Court case stands above the rest: *Jacobson v. Massachusetts*.

In 1905, the Supreme Court ruled that Massachusetts could fine people who would not take a smallpox vaccine. That case established a precedent for a 1922 case, *Zucht v. King*, that allowed San Antonio to mandate vaccines for all public and private school students. More recently, the Supreme Court cited the *Jacobson* case in its decisions about whether to permit governors in [California](#) and [New York](#) to place occupancy limits on religious services during a pandemic.

The *Jacobson* ruling gives the state nearly unchecked power to decide how to handle a public health emergency. But that decision, old enough to have been written by a Civil War veteran, is jarring today because of the [rights revolution](#) in 20th-century American law. In cases decided after *Jacobson*, the Supreme Court has maintained that the Constitution — particularly the due process and equal protection clauses of the Fourteenth Amendment — limits the power of the state to touch the body. These Supreme Court cases concerning bodily integrity apply to every level of government, and they have also shaped public norms about individuals' right to make crucial decisions about their own bodies.

In 1902, a smallpox outbreak in Cambridge, Mass., led the Board of Health to require people to get vaccinated or pay a \$5 fine. Henning Jacobson, a Swedish-born pastor, argued that compulsory vaccination is hostile to the right of individuals to care for their bodies and health in such a way as seems to them best. The court [ruled](#) that “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.”

ADVERTISING



Replay

In his ruling, Justice [John Marshall Harlan](#) acknowledged that the courts could intervene in cases where the state committed a “palpable invasion of rights secured by the fundamental law” and that the state should carve out medical exemptions for those likely to be harmed by a vaccine. But the ruling established the principle that a state has the power and responsibility to protect the health of the broader public during an epidemic.

Harlan drew an analogy between a draft dodger and a vaccine refuser, writing that compulsory vaccination is a legitimate exercise of the state’s police power. An individual “may be 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.”

In a 1927 Supreme Court case, [Buck v. Bell](#), Justice Oliver Wendell Holmes cited Jacobson in his opinion permitting a state to sterilize the “feeble minded” against their will and consent. “The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes. Three generations of imbeciles are enough.”

For the Supreme Court in the early 20th century, mandatory vaccines, forced conscription, and sterilization of the intellectually disabled were all permissible uses of a state’s police power. But the Supreme Court, like American society in general, changed in the decades that followed because of the New Deal, the libertarian movement, the feminist movement, the disability rights movement, the civil rights movement, and a growing appreciation across the political spectrum for civil liberties.

Here are just a few of the landmark Supreme Court rulings and cases that have established a constitutional right to “bodily integrity” — to maintain control over our bodies — in recent decades. You are allowed to buy and use contraceptives — [Griswold v. Connecticut](#) (1965).

You are allowed to marry anyone regardless of race — [Loving v. Virginia](#) (1967). You are allowed to abort a fetus in the first trimester — [Roe v. Wade](#) (1973). You may not be subjected to experimental drugs or therapies without your consent, even if you are in the military — [United States v. Stanley](#) (1987). You are allowed to refuse medical treatment, including interventions that may save your life — [Cruzan v. Director, Missouri Department of Health](#) (1990). You are allowed to have intimate sexual relations with people of the same sex ([Lawrence v. Texas](#), 2003) and to marry them ([Obergefell v. Hodges](#), 2015).

Though the Supreme Court has not used the phrase “my body, my choice,” as [California health care workers](#) protesting vaccine mandates have, many rulings in federal cases have used language that seems applicable to the question of vaccine mandates. “The forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty” — [Washington v. Harper](#) (Supreme Court, 1990). “The right to be free of unwanted physical invasions has been recognized as an integral part of the individual’s constitutional freedoms” — [United States v. Charters](#) (4th Circuit, 1987).

[Proponents](#) of vaccine mandates say the Supreme Court does not consider a right to bodily integrity as “fundamental” or superseding the state’s interest in public health. Justice Harry A. Blackmun, in his decision in *Roe v. Wade*, explained that the Constitutional right to privacy does not mean “an unlimited right to do with one’s body as one pleases.” For some, vaccine refusers are analogous to [drunk drivers](#) or other [dangerous motorists](#) — that is, people who want freedom without responsibility.

The problem with these analogies is that they treat “conscientious objectors” — a term that [originated](#) in the 19th-century English anti-vaccine movement — as criminals with limited constitutional rights. People [have called](#) for the unvaccinated to be forbidden to fly on airplanes or take Amtrak trains — policies that contravene the [right to travel freely between states](#). People have said the unvaccinated should not be permitted to enter federal buildings — a policy that would violate the [Fourteenth Amendment’s Equal Protection clause](#). I agree with [Boston Acting Mayor Kim Janey](#) that New York City’s policy of requiring proof of vaccination to enter restaurants, gyms, and performances calls to mind the slavery and post-slavery practice of “people needing to show their papers.”

To be sure, the country has a tradition of requiring vaccinations to attend, for example, public schools. But the country also has a tradition that protests mandatory vaccination. According to historian of medicine [Elena Conis](#), the modern anti-vaccine movement arose in response to the measles immunization campaign. Why were people concerned? Because it was no longer acceptable to tell other people what to put into their bodies. Patients in many contexts were demanding informed consent to treatment and care. Women wanted to take control of their own health and bodies. And environmentalists were concerned about the gap between new inventions and their consequences.

It is fine for governments to pay for vaccines and to promote them. It is another thing to deny constitutional rights to people who do not want to get a COVID-19 vaccine whose efficacy is still unclear. We live in a culture, partly shaped by Supreme Court decisions, that celebrates the power of the individual to make decisions about their own body. The Jacobson decision is a relic from another era. Even if the court is [unlikely](#) to revisit the case soon, politicians, judges, and employers should recognize that the logic of Jacobson is out of sync with our times and will create bitterness.

The United States can simultaneously address the pandemic and respect the rights of those who do not want a vaccine injection.

Nicholas Tampio is a professor of political science at Fordham University in New York City.

[Show comments](#)