

April 22, 2022

Evaluating Compulsory Covid-19 Vaccination Mandates:

Judicial or Legislative Review is Necessary to Determine Whether Mandates Without Exceptions for Natural Immunity Should Be Allowed to Stand

Julie Parrish

Share:



Introduction

In the time since Covid-19 vaccines became available to the American public, it seemed almost a foregone conclusion that state and federal governments, given their extensive use of executive authority and emergency rulemaking powers since the start of the pandemic,¹ would eventually attempt to exercise police powers to mandate compulsory vaccination. What has become questionable is whether there is a rational basis upon which government can justify a wholesale sweep of large sectors of the workforce and student populations into mandated vaccination under the threat of losing employment, education, or public accommodation access. As the pandemic has evolved, the government's rationale for compulsory vaccination, to achieve herd immunity and stop the spread of Covid-19,² is no longer compelling. Data reflects that Covid-19 is moving towards endemic status,³ and vaccines simply do not stop the transmission of the virus.⁴ Moreover, if the goal really is to achieve community levels of protection against Covid-19, then the government's exclusion of its own past practice of including serological lab testing to prove immunization⁵ further demonstrates that compulsory vaccination, especially upon those who can prove natural immunity using laboratory testing, can no longer pass a rational basis test.⁶

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)[Accept All Cookies](#)

Pfizer struck a deal with German drug manufacturer BioNTech to co-produce an mRNA vaccine the companies believed would stop the transmission of the novel coronavirus.⁹ On December 14, 2020, with clinical trials over and Emergency Use Authorization (EUA) secured from the Food and Drug Administration (FDA), the Pfizer-BioNTech Covid-19 vaccine was rolled out across the country with the first vaccines being administered that same day.¹⁰ By then, there had been over 17 million recorded cases of Covid-19 in the United States, and over 300,000 American lives lost.¹¹ Four days later on December 18, Moderna received its EUA from the FDA,¹² and by February 27, 2021, Johnson & Johnson became the third vaccine manufacturer in the United States to secure an EUA for its one-dose vaccine.¹³

With EUAs in place, and vaccine manufacturing ramping up production, the Centers for Disease Control and Prevention (CDC) issued guidance to state health departments to prioritize healthcare workers and residents in long-term care facilities to be part of the first wave of vaccine distribution (1A group).¹⁴ Subsequent vaccine rollout recommendations included seniors 75 years and older, as well as people deemed essential workers (1B group), followed by people aged 65 and older, essential workers not included in the 1B group, and immune-compromised individuals older than 16 years of age (1C group).¹⁵ Some states, including Oregon, opted to move other categories of workers (like teachers) to the front of the vaccine line, without regard for age, essential-work status (schools were still closed for in-person learning), or health status.¹⁶

As the CDC was expanding its recommendation in May 2021 that all individuals older than 12 years of age were eligible to get a vaccine,¹⁷ state governors and public health agencies were focused on incentivizing vaccination participation by using federal Coronavirus Aid, Relief and Economic Security (CARES) Act money and American Rescue Plan Act (ARPA) funds to give out everything from guns to college scholarships to million-dollar lotteries to entice their residents to obtain a vaccine.¹⁸ But even as the Covid-19 Delta variant began raging across the country in summer 2021, with cases climbing higher than even at the start of the pandemic,¹⁹ vaccine participation was significantly declining.²⁰ From a peak of four and a half million daily doses administered on April 1

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

with booster shots likely needed to maintain protection.²³ These developments further increased vaccine hesitancy among those already disinclined to seek a Covid-19 vaccine. It also fueled a debate about the importance of considering naturally-acquired immunity, validated through positive serological testing, as a means of reaching herd immunity in the United States.²⁴ This could be in lieu of vaccination for those who had already recovered from the disease, and would meet the requirement of having protective antibodies against Covid-19.²⁵

However, as state governors and health departments grew frustrated by stagnating vaccine participation numbers and increasing Covid-19 caseloads driven by the Delta variant, some policymakers decided there would be no more incentives. Instead, they resorted to a proverbial stick approach – vaccine mandates.²⁶ As of November 10, 2021, 22 states had implemented mandates impacting the employment of healthcare workers,²⁷ public employees,²⁸ school volunteers,²⁹ and some public contractors (depending on the state),³⁰ with California the first state in the nation to enact a statewide vaccine mandate on August 2, 2021.³¹ President Joe Biden enacted a similar mandate the following month for federal workers³² as well as for large private companies nationwide with more than 100 employees.³³ Cities,³⁴ counties,³⁵ restaurants,³⁶ and public venues like sporting arenas³⁷ have also enacted vaccine policies that have excluded the unvaccinated and otherwise restricted individuals from public accommodations. None of these vaccine mandates included natural immunity as an alternative to a vaccine requirement,³⁸ and it has left those who have previously recovered from Covid-19 in an untenable position of being forced to choose between the possibility that a Covid-19 vaccine might negatively impact their health,³⁹ or face the loss of valuable benefits like employment or education access.

Historical Vaccination Requirements Treated Vaccine and Naturally-Acquired Immunity Against Communicable Diseases Equally; Post-Covid-19 Policies Disregard Past Practices

At the beginning of the pandemic, Dr. Anthony Fauci, Director of the National Institute of Allergy

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

social distancing, mask-wearing, and hygiene promotion, while vocally opposing any attempts by people to expose themselves to Covid-19 as a means of developing natural immunity.⁴³

Generally speaking, the CDC defines “natural immunity” to a disease as “immunity acquired from exposure to the disease organism through infection with the actual disease” and “vaccine immunity” as “immunity acquired through the introduction of a killed or weakened form of the disease organism through vaccination.”⁴⁴ However, according to the CDC, “A person is considered fully vaccinated against COVID-19 ≥ 2 weeks after receipt of the second dose in a 2-dose series (Pfizer-BioNTech and Moderna) or ≥ 2 weeks after receipt of the single dose of the Janssen Vaccine.”⁴⁵ Though the CDC recognizes that a prior infection likely confers protective antibodies, the agency (1) does not include natural immunity in its lengthy descriptions of vaccine configurations one might take to prove he or she has developed protective antibodies, and (2) recommends strongly that people with prior infection receive the Covid-19 vaccine protocol in order to be considered fully vaccinated.⁴⁶

This stance is contrary to the CDC’s position that naturally-acquired immunity for other communicable diseases generates “long-lasting and sometimes-lifelong” immunity,⁴⁷ including in its analyses of highly contagious and transmissible diseases such as chickenpox,⁴⁸ measles,⁴⁹ and rubella,⁵⁰ all of which the CDC allows the use of positive tests results from laboratory testing as presumptive evidence for proof of natural immunity. The CDC neither requires nor recommends a vaccine for any of those diseases in cases where someone can prove natural immunity through laboratory testing as the CDC has for Covid-19-recovered patients.⁵¹ The CDC’s position to exclude natural immunity is based upon the agency’s position that vaccines are superior to natural immunity because the duration of natural immunity is unknown.⁵² However, a recent Johns Hopkins University study of unvaccinated adults showed that 99 percent of those who had a previously lab-confirmed Covid-19 infection showed antibodies at protective levels.⁵³ The CDC has not updated its position on natural immunity, even though its own study in January 2022 determined that natural immunity “protects against COVID-19 and related hospitalization. and that

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking “Accept All Cookies,” you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on “Customize Settings” to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

vaccination requirements rarely have extended to public school staff.⁵⁹ Only 34 states require some, but not all, vaccinations as a condition of higher education enrollment, and no state has statutorily required a Covid-19 vaccination for college or university admission.⁶⁰ Further, the Occupational Safety and Health Administration (OSHA) which sought to implement a nationwide Covid-19 mandate for employers with 100 or more employees,⁶¹ prior to the pandemic only required that employers pay for a vaccine like the Hepatitis B vaccine, *if* an employee wanted a vaccine to be protected from possible transmission of the disease at work.⁶²

The CDC has significantly diverged from its own historical immunization policies when comparing what is considered immunized for Covid-19 versus the criterion applied to other communicable diseases. In an October 2021 analysis, the CDC cited flawed data to support its position that artificial immunity to Covid-19 through vaccination is better than natural immunity.⁶³ The CDC's messaging that vaccines are better than natural immunity has become an outlying view when contrasted with a growing body of research conducted since the beginning of the pandemic which concludes otherwise.⁶⁴ That includes groundbreaking research from Israel which was one of the first broad-based studies to document waning immunity from mRNA vaccines and lasting immunity from natural infections.⁶⁵ Troublesome with the CDC's release of its own study is the information purposefully lacking from the findings. Missing is how the agency stopped tracking breakthrough cases of Covid-19 among fully vaccinated patients, instead opting to only track breakthrough hospitalizations and deaths.⁶⁶ The CDC's justification for this policy change was so the agency could "maximize the quality of the data collected" but some medical and public health officials questioned whether this choice would negatively impact the ability to predict additional Covid-19 outbreaks. The lack of vaccine breakthrough information for non-hospitalized cases or deaths artificially makes vaccinations look more robust and durable than they actually are. More problematic is that in response to a Freedom of Information Act request by the law firm Siri & Glimstad, LLP to determine whether the agency was monitoring reinfections, the CDC was forced to acknowledge in November 2021 that it had no data to confirm that any individual with a prior Covid-19 infection had become reinfected and transmitted the disease to another patient.⁶⁷ The

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

on the need to reach herd immunity, yet the federal government, for no stated rationale, has not included over 80 million Americans with a prior Covid-19 infection towards that goal.⁷⁰ If those who have naturally recovered from Covid-19 are allowed to demonstrate protective antibodies through serological testing, it could bring America's herd immunity efforts to 80 percent or greater.⁷¹ Yet in November 2021, the CDC finally acknowledged that herd immunity is a near impossibility, even if the nation was fully vaccinated, as the virus continues to mutate and is capable of evading vaccines.⁷² Meanwhile, doctors have begun to ring a bell that treatments, not vaccines, are the country's path out of Covid-19.⁷³

One state whose health department has consistently tracked all vaccination breakthrough cases is Massachusetts. Currently, nearly 80 percent of the state's five years and older population are fully vaccinated (5,381,216 residents); recorded breakthrough Covid-19 cases have occurred in 8.5 percent of vaccinated patients (459,123 cases), resulting in 8,071 hospitalizations and an 11 percent morbidity rate (2,222 deaths).⁷⁴ In Minnesota, where nearly 70 percent of its residents meet the CDC definition of fully vaccinated,⁷⁵ a recently published longitudinal report from the state's department of health showed that as of March 20, 2022, over one in 10 vaccinated Minnesotans has had a breakthrough case of Covid-19 and positive breakthroughs represented 26 percent of all cases recorded since the beginning of the pandemic in 2020 (including cases recorded before the availability of vaccines).⁷⁶ When comparing deaths between vaccinated and unvaccinated residents and benchmarking morbidity rates at a point when vaccines were widely available, 15.6 percent of 12,362 cumulative Covid-19 deaths occurred in fully-vaccinated patients. This phenomenon of breakthrough cases is happening in every state around the nation. The emerging data about breakthrough Covid-19 cases, including an analysis that upwards of 15 percent of breakthrough cases have resulted in hospitalizations⁷⁷ makes clear that as coronavirus transmission is moving from pandemic to endemic, though Covid-19 vaccines may reduce morbidity rates, they have failed at fully stopping coronavirus transmission as vaccines have for other communicable disease vaccines like smallpox and polio.⁷⁸ Comparatively, several states where residents have strongly resisted Covid-19 vaccines, including Idaho with a 55 percent fully-

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

Covid-19 Vaccine Mandates Go Beyond Police Powers Granted by *Jacobson v. Massachusetts*; State Policies No Longer Meet the Rational Basis Test

The source of authority many courts have relied upon in determining whether vaccine mandates are a lawful exercise of state police powers is *Jacobson v. Commonwealth of Massachusetts*.⁸¹ During a smallpox outbreak in 1905, the local board of health in Cambridge, Massachusetts, acting under statutory authority, passed an ordinance that each adult citizen would be required to be vaccinated or face a five-dollar fine⁸² (\$157.15 in today's dollars).⁸³ There were limited exceptions to the mandate for adults who were under guardianship⁸⁴ and children if a physician believed a child was an unfit candidate for a vaccine.⁸⁵

Henning Jacobson, who had had a negative reaction to a vaccine during his childhood, believed that compulsory vaccination was an affront to individual liberty rights and “nothing short of an assault upon his person.”⁸⁶ But the court rejected Jacobson's view, stating that “[s]ociety based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.”⁸⁷ Further, the court made the argument that “[t]he 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.”⁸⁸

Even though levels of tiered scrutiny in judicial decisions relating to due process and equal protection had yet to come into existence in 1905 when *Jacobson* was decided, the holding looks much like the “rational basis” analysis that courts use today.⁸⁹ In *Jacobson*, the court found that the state had a legitimate interest in eliminating the smallpox contagion, and the court rationalized that the community had the right to protect itself through “methods most usually employed to eradicate that disease.” In Jacobson's case, this meant through vaccination.⁹⁰ The court went on to say that while there is a “sphere within” where individuals most certainly have their own will over the government, it was also true that if the government was faced with the “pressure of great dangers” individuals may be subjected to reasonable restraint and regulation.⁹¹ It was clear that at

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking “Accept All Cookies,” you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on “Customize Settings” to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

Covid-19 plaintiffs have no basis from which to seek relief.⁹⁶ Yet there are three points in the *Jacobson* holding worth pointing out which seemingly many lawyers who have argued against vaccine mandate cases have failed to apply.

(1) Judge Harlan, writing for the majority, noted that although the court supported the Massachusetts statute allowing compulsory vaccination, the court would “not be inclined to hold that the statute establishes the absolute right that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject for vaccination” which the court also interpreted to mean if vaccinations could impair one’s health or bring about death.⁹⁷

(2) The court made clear that the decision only covered the immediate case.⁹⁸ It left open that cases with different factual circumstances or future public health crises could allow the police powers in a public health crisis to be revisited judicially using new analyses. The Covid-19 vaccine mandates are in no way similar to the fact pattern in *Jacobson* when evaluating either the rationale for the mandates based on vaccine efficacy, or the severity and proportionality of the punishment for failure to comply with the Massachusetts mandate in 1905 (a five-dollar fine) as compared to the high monetary costs of being terminated from employment and the social burdens of sanctions like being denied access to public accommodation or unemployment benefits related to being terminated for failure to comply with vaccine mandates.⁹

(3) A footnote in *Jacobson* which the court relied upon in its historical analysis about the efficacy of vaccines included data that separated out those who had naturally been exposed to smallpox as its own category of the population.¹⁰⁰ Importantly, one can draw a conclusion from this early study referenced in the *Jacobson* footnote that at a minimum, the court was peripherally aware that those who had survived smallpox developed some level of natural immunity, and that as a matter of policy, the likelihood of those who suffered smallpox were unlikely to suffer again.

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking “Accept All Cookies,” you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on “Customize Settings” to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

Courts and Legislative Bodies Should Work to Further Secure the Rights of Individual Privacy and Medical Choice Free from Compulsory Vaccination Requirements

Henning Jacobson had the right of it in 1905 when he described mandated vaccines as an assault on his person.¹⁰¹ Although the framework of judicial precedence which has since established bodily autonomy and individual privacy rights did not exist at the time, the facts of his case square with the themes embodied in seminal cases which resulted in the application of strict scrutiny when the loss of a fundamental right is implicated by a public policy decision.¹⁰² Even if the courts would not find a reason to apply strict scrutiny to Jacobson's complaint (or to current Covid-19 vaccine mandates), courts should reevaluate what information they use to conduct a rational basis test to determine whether the states' police powers in implementing Covid-19 mandates are still valid. If courts persist in applying *Jacobson* in a manner which gives states the benefit of the doubt that a rational basis exists for upholding vaccine mandates, then state legislatures should vote to change the source of authority for vaccine mandates in their states, and subsequently, pass meaningful legislation to protect privacy and bodily autonomy rights for the voters they represent.

Courts Should Recognize Privacy Rights Regarding Vaccination Decisions and Apply Strict Scrutiny When Evaluating Covid-19 Vaccine Mandate Cases

There is no rational relationship to a legitimate state purpose by states implementing Covid-19 vaccine mandates which demand an individual be required to comply with compulsory vaccination or forgo highly-valuable benefits. This is particularly so when some benefits, such as employment or college admission, are not always conferred by the state or federal government. Nor is the relationship rational when comparing the *Jacobson* decision to the broad overreach of today's Covid-19 vaccine mandates.

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

Second, the court in *Jacobson* relied upon data that contemplated separately the vaccinated and unvaccinated populations from those with natural immunity.¹⁰⁶ As the United States has surpassed 80 million positive Covid-19 cases,¹⁰⁷ today's courts should recall that the *Jacobson* court was unprepared to hold that vaccination mandate statutes as the absolute rule "if it be apparent or can be shown with reasonable certainty that he is not a fit subject of vaccination."¹⁰⁸ For "long-covid" patients,¹⁰⁹ medical professionals report that symptoms are exacerbated for some patients with Post-COVID Syndrome after administering to them a Covid-19 vaccine.¹¹⁰ As a foundational privacy and fundamental rights judicial holding, the court in *Roe v. Wade* wrote that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, or....in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹¹¹ The determination that the medical choice was left to the patient and a "responsible physician" to make during the private consultation of a doctor and a patient¹¹² speaks to the heart of the matter regarding the choice for doctors with legitimate concerns to be able to issue a valid medical exemption which will be recognized by a government agency as meeting the requirement for protective antibody coverage.

Lastly, the majority in *Jacobson* did not foreclose on the possibility of deciding future cases with other fact patterns so that it might arrive at new decisions.¹¹³ Faced with new information such as (1) Covid-19 vaccines do not have the efficacy to "eradicate" the disease, as was the basis for the *Jacobson* holding with smallpox vaccines,¹¹⁴ and (2) Covid-19 vaccines require the possibility of regular boosters to maintain immunity,¹¹⁵ preservation of personal privacy and individual bodily autonomy outweighs the states' interests in compulsory vaccination as the only method to reach herd immunity or stop virus transmission. *Jacobson* should be reevaluated through a strict scrutiny lens of the Fourteenth Amendment's due process and equal protection clauses, and the right to refuse a vaccination without incurring a detrimental loss to personal liberty should be included as one of the penumbræ of privacy rights afforded by the Constitution under the *Roe* court's interpretation of the Ninth Amendment.¹¹⁶

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

strengthened the states' arguments by highlighting *Jacobson* as the source of the states' power to implement such mandates, concluding that the power to direct public health initiatives like vaccine mandates was a state's right, not for the federal government to enact through ETS rulemaking.¹¹⁸ The courts' reluctance to overturn *Jacobson* puts pressure to act instead on state legislatures to protect individual rights.

State Legislatures Should Pass Substantive Vaccine Policies Which Include Language to Better Protect Individual Freedoms and Privacy Rights

Given the short time frame that many of the state vaccine mandates went into effect, it would have been preferable if courts addressed the matter directly and expediently. However, absent any new change in judicial philosophy, it is time for state lawmakers to act. Most of the Covid-19 vaccine mandates were developed through executive order¹¹⁹ leaving the possibility open that state legislatures could pull back executive power and pass legislation that protects people from losing employment, education, and public accommodations access. Thirteen state legislatures so far have taken the affirmative step to either ban vaccine mandates altogether, or include broad exemptions including serological testing demonstrating proof of prior Covid-19 infection¹²⁰ while some 22 states have banned vaccine passports which would otherwise segregate citizens based on their health status.¹²¹ In contrast, nearly a dozen states have gone the opposite direction and have, or will be soon, rolling out digital systems so that residents can provide proof positive of vaccination status on demand.¹²²

Another public policy initiative taking hold in some states, and in Congress, is the idea of statutory inclusion of proof of natural immunity and strengthening other vaccine exemptions as a way of bypassing Covid-19 vaccine mandates while still protecting public health. On November 18, 2021, Florida Governor Ron DeSantis signed House Bill 1B to address employer mandates. Specifically, the measure provided that an employer may not require Covid-19 vaccines as a condition of employment without broad exemptions a worker might claim, including having recovered from a

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

subsequent vaccination.¹²⁵ The measure also directs employers to cover the cost of Covid-19 testing and disallows an employer from keeping any proof of vaccination except in limited circumstances.¹²⁶ Utah's legislation, as passed into law effective November 16, 2021, provides Utah residents with broad protections against compulsory vaccination. West Virginia and Arkansas also have natural immunity carved into their state statutes, and at least seven other states are considering amending their laws to include natural immunity as an exemption to Covid-19 vaccine mandates.¹²⁷

At the federal level, Senator Mike Lee (R-UT) has introduced legislation called the "Natural Immunity is Real Act" designed to require the federal government to include natural immunity as a provision to any mandates enacted when promulgating agency rules.¹²⁸ The bill was introduced and referred to the Senate Committee on Health, Education, Labor and Pensions on September 23, 2021. No action has been taken as of yet.¹²⁹

Although statutory changes provide protections to those residing in states where new laws have been enacted, millions of Americans who have been subjected to workplace vaccine mandates without exemptions, including Covid-recovered patients with serological proof of immunity, do not equally share in having their individual rights to privacy, bodily autonomy, and medical freedom more firmly secured.

Conclusion

In defending the Commonwealth of Massachusetts' police powers to enforce compulsory vaccination under threat of criminal sanction, the Supreme Court majority in *Jacobson* wrote that "[s]ociety based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy." It is unlikely however, that the *Jacobson* court could have foreseen that by conveying such broad police powers to states in a public health emergency, states would use that power in ways that have restricted people's ability to access employment, educational

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

of lost wages, pensions, college scholarships, and loss of access to public accommodations is too severe. Alternatively, if the court will not act, then state legislatures should follow the course of Florida and Utah to secure, at a minimum, protections for the 80 million Americans (and counting) who have recovered with natural immunity to Covid-19.

Nothing in the *Jacobson* decision shows the court contemplated that compulsory vaccination as a requisite to participate in society is an appropriate application of a state's police power. It's time to reconsider whether the grant of such broad authority in 1905 to compel vaccinations, particularly for the naturally-immune population, can be justified in 2022.

Endnotes:

- 1 NATIONAL CONFERENCE OF STATE LEGISLATURES, *Legislative Oversight of Emergency Executive Powers*, NCSL RESOURCES PAGE (Nov. 11, 2021) available at <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx>; *Covid-19 Restrictions: Map of Covid-19 case trends and restrictions*, USA TODAY (Dec. 2, 2021) available at <https://www.usatoday.com/storytelling/coronavirus-reopening-america-map/>.
- 2 Salo, J., *Fauci defends Covid-19 herd immunity goals*, NEW YORK POST (Dec. 27, 2020) available at <https://nypost.com/2020/12/27/fauci-defends-covid-19-herd-immunity-goals/>.
- 3 Higgins-Dunn, N., *Here's how Covid-19 transitions from pandemic to endemic*, CNBC (Mar. 18, 2022) available at <https://www.cnbc.com/2022/03/18/heres-how-covid-19-transitions-from-a-pandemic-to-endemic.html>; Tayag, Y., *From pandemic to endemic: this is how we might get back to normal*, THE GUARDIAN (Dec. 5, 2021) available at <https://www.theguardian.com/us-news/2021/dec/05/covid-19-from-pandemic-to-endemic-this-is-how-we-might-get-back-to-normal>.

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

- 5 CENTERS FOR DISEASE CONTROL AND PREVENTION, *Immunization of Health-Care Personnel: Recommendations of the Advisory Committee on Immunization Practices (ACIP)*, CDC Morbidity and Mortality Weekly Report (Nov. 25, 2011) available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/rr6007a1.htm>.
- 6 When a 14th Amendment due process challenge is brought forward, courts will evaluate and determine whether states have a legitimate policy interest and whether (1) there exists a nexus between the policy goal and the policy outcomes and (2) whether a fundamental right is implicated by the policy. If the interest of a protected class is implicated, courts will apply a higher level of strict scrutiny review to determine whether the policy infringes on a protected right.
- 7 Decker, S., Peele, H., and Riser-Kositsky, M., *The Coronavirus Spring: The Historic Closing of U.S. Schools (A Timeline)*, EDUCATION WEEK (July 20, 2020) available at <https://www.edweek.org/leadership/the-coronavirus-spring-the-historic-closing-of-u-s-schools-a-timeline/2020/07>.
- 8 *Pfizer Outlines Five-Point Plan To Battle Covid-19*, PFIZER, INC. NEWS PAGE (Mar. 13, 2020) available at <https://www.pfizer.com/news/press-release/press-release-detail/pfizer-outlines-five-point-plan-battle-covid-19>.
- 9 Kalia, S. & Erman, E., *Pfizer, BioNTech to co-develop potential coronavirus vaccine*, REUTERS (Mar. 16, 2020) available at <https://www.reuters.com/article/us-health-coronavirus-pfizer-biontech/pfizer-biontech-to-co-develop-potential-coronavirus-vaccine-idUSKBN2140LM>.
- 10 Loftus, P. & West, M.G., *First Covid Vaccine Given to U.S. Public*, THE WALL STREET JOURNAL (Dec. 14, 2020) available at <https://www.wsj.com/articles/covid-19-vaccinations-in-the-u-s-slated-to-begin-monday-11607941806>.

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

- 13 U.S. FOOD & DRUG ADMINISTRATION, *FDA Issues Emergency Use Authorization for Third Covid-19 Vaccine*, FDA News and Events Page (Feb. 27, 2021) available at <https://www.fda.gov/news-events/press-announcements/fda-issues-emergency-use-authorization-third-covid-19-vaccine>. Note that Pfizer and Moderna both required at the time two doses. Later all three brands added a booster shot to the regimen. In March 2022 the CDC recommended a second booster shot for certain individuals.
- 14 Park, A., *Healthcare Workers and Elderly Care Home Residents Will Get First Doses of Covid-19*, CDC Panel Says, TIME MAGAZINE (Dec. 1, 2020) available at <https://time.com/5916925/who-gets-covid-19-vaccine-first/>.
- 15 CENTERS FOR DISEASE CONTROL AND PREVENTION, *How CDC Is Making Covid-19 Recommendations*, CDC Vaccine Resources Page (updated Nov. 15, 2021) available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations-process.html>.
- 16 Ross, E., *With limited doses, many question Oregon's plan to send teachers to the front of the vaccine line*, OREGON PUBLIC BROADCASTING (Jan. 21, 2021) available at <https://www.opb.org/article/2021/01/21/oregon-coronavirus-vaccine-distribution-gov-kate-brown-plan/>.
- 17 Bunis, D. & Rough, J., *List of Coronavirus Restrictions in Every State*, AARP (updated Nov. 30, 2021) available at <https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html>.
- 18 NATIONAL GOVERNORS ASSOCIATION, *Covid-19 Vaccine Incentives* (by state), NGA Publications, (updated Oct. 19, 2021) available at <https://www.nga.org/center/publications/covid-19-vaccine-incentives/>.
- 19 Jones, C., *Pandemic surge hitting Oklahoma more rapidly than a year ago as delta variant is*

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

<https://apnews.com/article/health-coronavirus-pandemic-b0811d7287ef240ae619ba1e385e0a63>.

20 CENTERS FOR DISEASE CONTROL AND PREVENTION, *Trends in Number of Covid Vaccinations in the US*, CDC Covid Data Tracker, available at <https://covid.cdc.gov/covid-data-tracker/#vaccination-trends>.

21 *Id.*

22 Bacon, J., Aspegren, E., & Rice, D., *CDC: 'breakthrough case' numbers show vaccines work; Pfizer CEO says third shot likely needed within 12 months: Live Covid-19 updates*, USA TODAY (Apr. 15, 2021) available at <https://www.usatoday.com/story/news/health/2021/04/15/covid-vaccine-variants-cdc-states/7228601002/>.

23 Guzman, J., *Pfizer-BioNTech booster likely needed as immunity wanes, says scientist who helped develop vaccine*, THE HILL, (Apr. 21, 2021) available at <https://thehill.com/changing-america/well-being/prevention-cures/549558-pfizer-biontech-booster-likely-needed-as>; Sheikh, K., *Who Should Get a 4th Covid Shot?*, NEW YORK TIMES (Mar. 23, 2022) available at <https://www.nytimes.com/article/4th-covid-shot-2nd-booster.html>.

24 Makary, M., MD, MPH, *Why Covid-19 Vaccine Should Not Be Required for All Americans*, US NEWS & WORLD REPORT (Aug. 5, 2021) available at <https://www.usnews.com/news/national-news/why-covid-19-vaccines-should-not-be-required-for-all-americans>.

25 *Id.*

26 While some states allowed unvaccinated workers to continue working upon proof of negative Covid testing, other states, like the author's home state in Oregon, set dates for mandatory vaccinations with few or no exemptions, or face termination of employment. On March 2, 2022, Oregon reversed its compulsory vaccine mandate policy for its 40,000 state workers

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

<https://www.natlawreview.com/article/washington-state-continues-to-mandate-covid-19-vaccination-certain-workers>.

- 29 Salanga, J., *What to know about Sacramento city schools' Covid-19 vaccine requirement*, CAPRADIO (Dec. 1, 2021) available at <https://www.capradio.org/articles/2021/12/01/what-to-know-about-sacramento-city-schools-covid-19-vaccine-requirement/>.
- 30 OREGON DEPT. OF ADMINISTRATIVE SERVICES, *Covid-19 vaccination requirements for state contractors*, DAS Procurement Webpage (retrieved Dec. 6, 2021) available at <https://www.oregon.gov/das/Procurement/Pages/contractorvaccinations.aspx>.
- 31 KAISER FAMILY FOUNDATION, *State Covid-19 Data and Policy Actions* (updated Dec. 2, 2021) available at <https://www.kff.org/report-section/state-covid-19-data-and-policy-actions-policy-actions/>.
- 32 THE WHITE HOUSE, *Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees*, The White House Briefing Room (Sept. 9, 2021) available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/>.
- 33 Mason, M., Aboulenein, A., & Hunnicutt, T., *Attacking anti-vaccine movement, Biden mandates widespread Covid shots, tests*, REUTERS (Sept. 10, 2021) available at <https://www.reuters.com/world/us/biden-deliver-six-step-plan-covid-19-pandemic-2021-09-09/>.
- 34 “No Vax, No Service: Covid Vaccine Mandate Starts Tuesday for NYC Restaurants, Venues,” NBC NEW YORK CHANNEL 4 (Aug. 16, 2021) available at <https://www.nbcnewyork.com/news/coronavirus/no-vax-no-service-covid-19-vaccine-mandates-goes-into-effect-in-new-york-city/3222505/>.

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking “Accept All Cookies,” you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on “Customize Settings” to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

- 36 Mack, M., *If You're Unvaccinated, You're Banned from Restaurants Here as of Next Week*, BEST LIFE (Sept. 6, 2021) available at <https://bestlifeonline.com/news-unvaccinated-restaurants-maui/>.
- 37 Brooks, K., *Sports stadiums asking fans for their "vaccine passports,"* CBS NEWS (May 5, 2021) available at <https://www.cbsnews.com/news/covid-19-vaccine-proof-sports-stadiums/>.
- 38 Keenan, A., *Natural immunity emerges as potential legal challenge to federal Covid-19 vaccination mandates*, YAHOO NEWS! YAHOO FINANCE! (Sept. 25, 2021) available at <https://news.yahoo.com/natural-immunity-covid-19-legality-substitute-vaccination-123106323.html>.
- 39 Researchers are beginning to understand that Covid-19 vaccines can trigger "Long Covid," a condition that leaves patients with a myriad of debilitating symptoms including tachycardia (racing heart rate), "brain fog," inflammation, and fatigue, among other symptoms. See <https://www.science.org/content/article/rare-cases-coronavirus-vaccines-may-cause-long-covid-symptoms>. In a conversation this author had on Feb. 15, 2022 with a family nurse practitioner at Oregon Health Science University's Long Covid specialty clinic, it was discussed that as many as one-third of Long Covid patients who have a vaccine after a previous Covid-19 infection suffer symptoms new to the patient or similar to the symptoms experienced with an initial Covid-19 infection.
- 40 Aguilera, J., *No You Should Not Have or Participate in a Coronavirus Party. Here's what you need to know about herd immunity*, TIME MAGAZINE (Apr. 24, 2020) available at <https://time.com/5825386/herd-immunity-coronavirus-covid-19/>.
- 41 Sample, I., *Immunity to Covid-19 could be lost in months, UK study suggests*, THE GUARDIAN (July 12, 2020) available at <https://www.theguardian.com/world/2020/jul/12/immunity-to-covid-19-could-be-lost-in-months-uk-study-suggests>; Harris, R., *How Long Will Immunity To*

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

- 44 CENTERS FOR DISEASE CONTROL AND PREVENTION, *Vaccines and Immunization, Basic and Common Questions*, CDC Vaccines and Immunizations Webpage (last updated Sept. 24, 2021) available at <https://www.cdc.gov/vaccines/vac-gen/immunity-types.htm>.
- 45 CENTERS FOR DISEASE CONTROL AND PREVENTION, *Interim Clinical Considerations for Use of Covid-19 Vaccines Currently Approved or Authorized in the United States*, CDC Vaccines and Immunizations Webpage (last updated Nov. 29, 2021) available at <https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html>. Note: Janssen is the commercial product name of what is known commonly as the Johnson & Johnson or J&J vaccine.
- 46 *Id.*
- 47 CDC, *supra*, n. 44.
- 48 CENTERS FOR DISEASE CONTROL AND PREVENTION, *Immunity Against (Protection From) Chickenpox*, CDC Vaccines and Immunizations Webpage (updated Apr. 5, 2021) available at <https://www.cdc.gov/vaccines/vpd-vac/varicella/basic-immunity.htm>.
- 49 CENTERS FOR DISEASE CONTROL AND PREVENTION, *Questions About Measles*, CDC Measles Rubella Webpage (updated Nov. 5, 2020) available at <https://www.cdc.gov/measles/about/faqs.html>.
- 50 CENTERS FOR DISEASE CONTROL AND PREVENTION, *For Healthcare Professionals: Clinical Overview*, CDC Rubella (German Measles, Three-Day Measles) Webpage (updated Dec. 31, 2020) available at <https://www.cdc.gov/rubella/hcp.html>.
- 51 *Id.*
- 52 CENTERS FOR DISEASE CONTROL AND PREVENTION, *Myths and Facts about COVID-19*

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

- <https://jamanetwork.com/journals/jama/fullarticle/2788894>. (Note: this author was a participant in the Johns Hopkins University study referenced in the article).
- 54 DeSoto, R., *CDC Study: Natural Immunity Provides Significantly More Protection Against COVID Than Vaccination Only*, INDEPENDENT JOURNAL REVIEW (Jan. 20, 2022) available at <https://ijr.com/cdc-study-natural-immunity-significantly-protection-covid/>.
- 55 Pichel-McGovern, K., MSN, CRNP & Smith, T., MSN, CRNP, *Proof of Immunity Requirements for Health Care Providers and Students: A Guide*, INFECTIOUS DISEASES CONSULTANT, available at <https://www.consultant360.com/blog/hmpprimary/proof-immunity-requirements-health-care-providers-and-students-guide>.
- 56 NATIONAL VACCINE INFORMATION CENTER, *State Law and Vaccine Requirements*, NVIC Law and Policy Page available at <https://www.nvic.org/Vaccine-Laws/state-vaccine-requirements.aspx>.
- 57 *Id.*
- 58 Skinner, E., *State Vaccination Policies: Requirements and Exemptions for Entering School*, NATIONAL CONFERENCE OF STATE LEGISLATURES (December 2017) available at <https://www.ncsl.org/research/health/state-vaccination-policies-requirements-and-exemptions-for-entering-school.aspx>.
- 59 *Teachers Face Different Vaccination Rules*, ASSOCIATED PRESS VIA FLORIDA HEALTH NEWS (Feb. 17, 2015) available at <https://health.wusf.usf.edu/consumer/2015-02-17/teachers-face-different-vaccination-rules>.
- 60 NATIONAL CONFERENCE OF STATE LEGISLATURES, *State Vaccine Requirements for College Entry* (Sept. 1, 2021) available at <https://www.ncsl.org/research/health/state-vaccine-requirements-for-college-entry.aspx>.

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

- 63 CENTERS FOR DISEASE CONTROL AND PREVENTION, *Laboratory-Confirmed Covid-19 Among Hospitalized Adults with Covid-19-Like Illness with Infection-Induced or mRNA Vaccine-Induced SARS-CoV-2 Immunity --- Nine States, January to September 2021*, CDC Weekly Morbidity and Mortality Weekly Report (Nov. 5, 2021) available at https://www.cdc.gov/mmwr/volumes/70/wr/mm7044e1.htm?s_cid=mm7044e1_w.
- 64 Shenai, M., Rahme, R., & Noorchasm, H., *Equivalency of Protection from Natural Immunity in COVID-19 Recovered Versus Fully-Vaccinated Persons: A Systemic Review and Pooled Analysis*, CUREUS (Oct. 28, 2021) available at <https://www.cureus.com/articles/72074-e>. Note that the authors conducted a comparative study of nine peer-reviewed and pre-published studies and concluded in part that “no study could conclude the superiority of vaccination protection over natural immunity, but observational studies endorsed an advantage for protection by natural immunity.” They further conclude that if natural immunity is as efficacious as leading brands of vaccines, then “rigid mandates” create “questionable legal and ethical standing, based on suspect medical necessity and even a potential for harm.”
- 65 Israel, A., Shenhar, Y., & Green, I., et al, *Large-scale study of antibody titer decay following BNT162b2 mRNA vaccine or SARS-CoV-2 infection*, MEDRXIV PREPRINT SERVER (Aug. 22, 2021) available at <https://www.medrxiv.org/content/10.1101/2021.08.19.21262111v1.full>.
- 66 Roubein, R. & Lim, D., *CDC under fire for decision to limit tracking of Covid-19 in vaccinated people*, POLITICO (July 30, 2021) available at <https://www.politico.com/news/2021/07/30/pressure-cdc-breakthrough-cases-501821>.
- 67 CENTERS FOR DISEASE CONTROL AND PREVENTION, *Freedom of Information Act Response Letter to Elizabeth Brehm, attorney for Siri and Glimstad Law Firm*, (Nov. 5, 2021). (Brehm requested public records relating to any documented COVID-19 cases involving individuals with prior COVID-19 infection who had become infected a second time, fell ill, and subsequently transmitted the virus to another individual. In response, the CDC said it was

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking “Accept All Cookies,” you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on “Customize Settings” to learn more about individual cookies and choose settings by category. [Privacy policy](#).

[Cookies Settings](#)

Accept All Cookies

- 69 JOHNS HOPKINS CORONAVIRUS RESEARCH CENTER, *Understanding Vaccine Progress: Vaccine rollout across the United States*, Johns Hopkins University & Medicine webpage (retrieved Mar. 24, 2022) available at <https://coronavirus.jhu.edu/vaccines/us-states>.
- 70 CENTERS FOR DISEASE CONTROL AND PREVENTION, *Answering Patients' Questions About Covid-19 Vaccines and Vaccinations: Information for Health Care Providers, Pharmacists, and Other Vaccine Providers*, CDC Vaccines and Immunizations Webpage (updated Nov. 9, 2021) available at <https://www.cdc.gov/vaccines/covid-19/hcp/answering-questions.html>.
- 71 As of March 23, 2022, 65.4% of the U.S. population, 217,271,157 million people, have been fully vaccinated; see e.g., *States ranked by percentage of population fully vaccinated: March 23*, BECKERS HOSPITAL REVIEW available at <https://www.beckershospitalreview.com/public-health/states-ranked-by-percentage-of-population-vaccinated-march-15.html>) and Johns Hopkins Coronavirus Resource Center, *supra*, n. 69. Combined with 63,824,324 recovered COVID-19 patients as of March 24, 2022, the high end of people with exposure to COVID-19 protective antibodies could be at least 281,113,481 people, or 84% of the nation. (See e.g., COVID-19 recovered data at WORLDOMETER, <https://www.worldometers.info/coronavirus/country/us/> and U.S. population data <https://www.worldometers.info/world-population/us-population>). When excluding 24.8 million children aged 5 and younger who are not vaccine eligible, the country's herd immunity number could be as high as 90% (see e.g., U.S. child population counts at ChildStats.gov).
- 72 Healy, M., *CDC shifts pandemic goals away from reaching herd immunity*, LA TIMES (Nov. 12, 2021) available at <https://www.latimes.com/science/story/2021-11-12/cdc-shifts-pandemic-goals-away-from-reaching-herd-immunity>; Milko, V., *Yes, millions of Americans have caught Omicron. No, we don't have herd immunity*, LA TIMES (Feb. 23, 2022) available at <https://www.latimes.com/world-nation/story/2022-02-23/is-omicron-leading-us-closer-to-herd-immunity-against-covid>

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

- 74 DiGiammerino, T., *2,732 New Breakthrough COVID Cases in Mass.*, NBC BOSTON NEWS 10, (Mar. 22, 2022) available at <https://www.nbcboston.com/news/coronavirus/2732-new-breakthrough-covid-cases-in-mass/2675920/>; *Coronavirus populations and Case Projections* WORLDOMETER (searched Mar. 24, 2022) retrieved from
- 75 <https://www.worldometers.info/coronavirus/usa/massachusetts/>.
- 76 See Johns Hopkins Coronavirus Resource Center, *supra* n. 69.
- 77 MINNESOTA DEPARTMENT OF STATE HEALTH, *Weekly COVID-19 Report* (Mar. 24, 2022) available at <https://www.health.state.mn.us/diseases/coronavirus/stats/covidweekly1222.pdf>.
- 78 Jerich, K., *Nine to 15% of breakthrough COVID-19 infections send patients to hospital, says new Truveta data* HEALTHCARE IT NEWS (Nov. 10, 2021) available at <https://www.healthcareitnews.com/news/nine-15-breakthrough-covid-19-infections-send-patients-hospital-says-new-truveta-data>.
- 79 CENTERS FOR DISEASE CONTROL AND PREVENTION, *Smallpox Prevention and Treatment* (page last reviewed Oct. 18, 2021) available at <https://www.cdc.gov/smallpox/prevention-treatment/index.html>; see also *Polio Elimination in the United States* (page last reviewed Sept. 28, 2021) available at <https://www.cdc.gov/polio/what-is-polio/polio-us.html>.
- 80 Johns Hopkins Coronavirus Resources Center shows Massachusetts at 78.55% of its population fully vaccinated while reporting Idaho at 55.48% fully vaccinated, *supra* at n. 69. However, *Coronavirus populations and Case Projections* WORLDOMETER (searched Mar. 24, 2022) shows Massachusetts with a morbidity rate of 291.1 deaths per 100,000 population while Idaho's morbidity rate was 272.2 deaths per 100,000 residents. Both states participate in expanded Medicaid under the Patient Protection and Affordable Care Act; see e.g., <https://www.healthinsurance.org/states/> for Medicaid participation data by state.

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

rates less than 1 percent for those with severe illness, study finds, SCIENCE DAILY, (June 15, 2021) available at <https://www.sciencedaily.com/releases/2021/06/210615132103.htm> (finding 63 of the 9,119 patients (0.7%) with severe COVID-19 infection contracted the virus a second time, with a mean reinfection period of 116 days); Smith, W., *Study: Natural Immunity Effective at Preventative Severe Reinfection*, NATIONAL REVIEW (Nov. 29, 2021) available at <https://www.nationalreview.com/corner/study-natural-immunity-effective-at-preventing-severe-reinfection/>.

82 *Jacobson*, 25 S.Ct. 358.

83 *Id.* at 358.

84 CPI Inflation Calculator (search for the value of five dollars in 1905 in today's dollars in 2021 conducted December 2, 2021) <https://www.in2013dollars.com/us/inflation/1905?amount=5>.

85 *Jacobson*, 25 S.Ct.at 358.

86 *Id.* at 359.

87 *Id.* at 361.

88 *Id.*

89 *Jacobson*, 25 S.Ct. at 361 (quoting *Crowley v. Christiansen*, 137 U.S. 86, 89, 11 S.Ct. 13, 34 L.Ed. 620, 621 (1890)) (holding that selling alcohol except in a manner prescribed by statute was a valid exercise of state police powers).

90 CORNELL LAW SCHOOL, *Rational Basis Test*, explaining “To pass the rational basis test, the statute or ordinance must have a legitimate state interest, and there must be a rational connection between the statute’s/ordinance’s means and goals. Cornell Legal Information

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking “Accept All Cookies,” you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on “Customize Settings” to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

92 *Id.* at 362.

93 *Id.* at 363.

94 *Id.* at 364.

95 *Id.* at 363.

96 WESTLAW search on Dec. 1, 2021, of all cases citing *Jacobson v. Massachusetts* since Jan. 1, 2020.

97 While cases such as *Tandon v. Newsome*, F.Supp.3d 922 (2021) and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63208 L.Ed.2d 206 (2020) have been successful in overturning executive orders that restricted religious freedoms related to social gathering, this author has found no cases where a petitioner has secured relief against Covid-19 vaccine mandates on the basis that *Jacobson* was ripe to be overturned or warranted a higher level of scrutiny than it was given at the time the case was heard.

98 *Jacobson*, 25 S.Ct. at 366, 367.

99 *Id.* at 367.

100 Jacurci, G., *Fired for refusing a Covid vaccine? You likely can't get unemployment benefits*, CNBC (Oct. 7, 2021) available at <https://www.cnbc.com/2021/10/07/fired-for-refusing-a-covid-vaccine-you-likely-cant-get-unemployment-benefits.html>.

101 (From the *Jacobson* footnotes): *In an evaluation of reinfection rates in the town of Chemnitz, Germany in 1870-71 separated into three categories, vaccinated, unvaccinated, and recovered, the study only noted reinfection in only 1.77% of the vaccinated population (953 people out of 53,891 vaccinated individuals); a 46.3% reinfection rate in the unvaccinated population (2,643*

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

L.Ed.2d. 508 (2003).

104 *Jacobson, supra* n. 81 at 358.

105 *Southwest Airline Pilots Association v. Southwest Airlines*, 2021 WL 4975010.

106 ZIPRECRUITER, *How Much Do Airline Pilots Jobs Pay per Month in 2021?* (ZipRecruiter airline pilot salary search conducted Dec. 7, 2021) available at <https://www.ziprecruiter.com/Salaries/Airline-Pilot-Salary-per-Month>.

107 *Jacobson, supra* n. 81.

108 *Coronavirus populations and Case Projections* WORLDOMETER (searched Mar. 24, 2022) retrieved from <https://www.worldometers.info/coronavirus/country/us/>.

109 *d.* at 367.

110 MERRIAM-WEBSTER DICTIONARY, *Definition of Long Covid: a condition that is marked by the presence of symptoms (such as fatigue, cough, shortness of breath, headache, or [brain fog](#)) which persist for an extended period of time (such as weeks or months) following a person's initial recovery from [COVID-19](#) infection: [POST-COVID SYNDROME](#)*, available at <https://www.merriam-webster.com/dictionary/long%20COVID>.

111 Skrobak, J., *Yale Study Looks at Vaccine Effects on Covid 'Long Haulers,'* NBC CT (Dec. 8, 2021) finding that although 40 to 60 percent of Covid long-haul patients felt better after a receiving a vaccine, 20 percent of patients experienced worsening Covid-related symptoms after receiving a vaccine. A one in five possibility of experiencing worsened long covid symptoms is statistically significant enough to warrant a discussion with a medical provider and merit an individual choice subsequently of whether to proceed in subjecting one's body to a medical procedure which could compound lasting symptoms of Covid-19.

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

- 115 Jacobson, at 362; BLOOMBERG NEWS WIRE, *Omicron raises questions a year after first Pfizer shot*, (Dec. 7, 2021) available at <https://bangordailynews.com/2021/12/07/news/world-news/omicron-raises-vaccine-questions-a-year-after-1st-pfizer-shot/>.
- 116 Kimball, S., *Pfizer CEO says fourth Covid vaccine doses may be needed sooner than expected due to omicron*, CNBC (Dec. 8, 2021) available at <https://www.cnbc.com/2021/12/08/omicron-pfizer-ceo-says-we-may-need-fourth-covid-vaccine-doses-sooner-than-expected.html>.
- 117 *Griswold*, 31 U.S. at 486, (Justice Goldberg concurring “*that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights.*”)
- 118 29 C.F.R. § 1910.501 (Effective Nov. 5, 2021; stayed by the Fifth Circuit on Nov. 12, 2021); see *BST Holdings, L.L.C. v. Occupational Safety and Health Administration*, 17 F.4th 604, 618-189 (2021) (holding that denial of a stay would cause irreparable harm to petitioners and that OSHA as an occupational safety agency did not have in its authority from Congress the power to make health policy). The Supreme Court subsequently stayed the vaccine mandate on January 13, 2022 on the grounds that the applicants were likely to succeed on the merits of their claim that OSHA lacked authority to impose the mandate. OSHA has since withdrawn the mandate.
- 119 *Id.* at 617.
- 120 Pekruhn, D., *Vaccine Mandates by State: Who is, Who isn't, and How?* LEADING AGE (Jan. 19, 2022) available at <https://leadingage.org/workforce/vaccine-mandates-state-who-who-isnt-and-how>; NATIONAL ACADEMY FOR STATE HEALTH POLICY, *State Efforts to Ban or Enforce Covid-19 Vaccine Mandates and Passports* (Mar. 15, 2022) available at <https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/>.
- 121 *Id.*

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking “Accept All Cookies,” you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on “Customize Settings” to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

Republican-controlled states are looking to make the passport technology available for those who want to opt in).

123^{Id.}

124^{FLORIDA LEGISLATURE, 2021 SPECIAL SESSION, House Bill 1B(1) reads in part: “A private employer may not impose a COVID-19 vaccination mandate for any full-time, part-time, or contract employee without providing individual exemptions that allow an employee to opt out of such requirement on the basis of medical reasons, including, but not limited to, pregnancy or anticipated pregnancy; religious reasons; COVID-19 immunity; periodic testing; and the use of employer-provided personal protective equipment.” The law became immediately effective upon passage on Nov. 18, 2021. Measure history and full text of the measure available at <https://www.flsenate.gov/Session/Bill/2021B/1B/?Tab=BillText>.}

125^{UTAH LEGISLATURE, 2021 SPECIAL SESSION, Senate Bill 2004 (Effective Nov. 16, 2021). Measure history available at <https://le.utah.gov/-2021S2/bills/static/SB2004.html>.}

126^{Id.} at Senate Bill 2004 § 2(a).

127^{Id.}

128^{Tin, A., *Some GOP states carving out “natural immunity” exception to Covid vaccine requirements*, CBS NEWS (Nov. 24, 2021) available at <https://www.cbsnews.com/news/covid-natural-immunity-vaccine-exception/>; Browne, E., *The U.S. States Where Covid Vaccine Mandates Are Banned And Allowed*, MSN NEWS (Oct. 20, 2021) available at <https://www.msn.com/en-us/news/us/the-us-states-where-covid-vaccine-mandates-are-banned-and-allowed/ar-AAPKAhSn.com>).}

129^{U.S. CONGRESS 117th SESSION, Senate Bill 2846: Natural Immunity is Real Act, (introduced Sept. 23, 2021). The measure states in part “Pursuant to any regulation promulgated by a}

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking “Accept All Cookies,” you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on “Customize Settings” to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)

Accept All Cookies

130^{Id.}

Authors

**ENTITY:****HEALTH LAW SECTION****TOPIC:****HEALTH**

The material in all ABA publications is copyrighted and may be reprinted by permission only. Request reprint permission [here](#).

ABA American Bar Association |/content/aba-cms-dotorg/en/groups/health_law/publications/aba_health_esource/2021-2022/april-2022/eval-com

We are making improvements to our user experience and offering more transparency and control over cookies. By clicking "Accept All Cookies," you agree to the storing of cookies on your device to enhance site navigation, analyze site usage, and assist in marketing efforts. Click on "Customize Settings" to learn more about individual cookies and choose settings by category. [Privacy policy](#)

[Cookies Settings](#)[Accept All Cookies](#)