

# **State-mandated COVID-19 vaccination is constitutional**

## **Overview**

Public health experts are concerned that the nation will fail to achieve herd immunity against COVID-19 — even after a vaccine becomes available. This is not borrowing trouble: there are already signs that some citizens will refuse inoculations, and states have struggled for years against a public misinformation cabal on vaccines, which has caused resurgent outbreaks of measles and other diseases that only occur when parents refuse to vaccinate their children. Many citizens currently reject even non-invasive disease-fighting techniques like wearing masks in public. Accordingly, it appears certain that at least some will refuse to be inoculated against COVID-19 when a vaccine becomes available. That could cost thousands of lives and extend the titanic economic turmoil engulfing the country. One solution to this problem is a state statute mandating COVID-19 inoculations. This analysis presumes that a coronavirus vaccine is widely available, safe, effective, and affordable.

## **Analysis**

When a COVID-19 vaccine is created, the state legislature can constitutionally enact a law requiring that everyone in California receive it.[1] Such a law would not need to rely on gubernatorial emergency powers.

## **Compulsory vaccination laws are constitutional**

It is well-settled that compulsory vaccinations are a valid exercise of state police power. *Jacobson v. Massachusetts*[2] is instructive, where the U.S. Supreme Court upheld the constitutionality of a Massachusetts law that mandated smallpox vaccinations and punished violators with a fine. The high court affirmed the state's power to pass laws necessary "to protect the public health and secure the public safety," so long as they are not arbitrary, unreasonable, or go "far beyond" what is reasonably required for public safety. Since *Jacobson*, a mandatory vaccination has never been held unconstitutional.[3]

Ignoring more than 100 years of precedent, opponents of compulsory vaccination argue that the practice violates due process,[4] free exercise of religion,[5] the right to attend school,[6] equal protection,[7] and statutes forbidding non-consensual medical experimentation.[8] Others raise moral or philosophical objections, or refuse vaccinations because they believe vaccinations are unsafe. Although courts have rejected these arguments many times, opponents of mandatory vaccination likely will resurrect them to challenge a law requiring COVID-19 vaccinations. Because the current COVID-19 pandemic poses a greater risk to public health and safety than previous outbreaks, we expect courts will uphold a state-mandated COVID-19 vaccination against any of those complaints.

### **A mandatory COVID-19 vaccination is consistent with due process**

A due process challenge to a mandatory COVID-19 vaccine will likely fail. Like any due process analysis, a court will balance the challenger's liberty interest in refusing unwanted medical treatment against the state's interest in promoting public health and safety.[9] Here, the balance overwhelmingly favors public health and safety. So far, as of this article's publication date COVID-19 has killed at least 161,284 people in the United States.[10] And the nation's leading expert on infectious diseases, Dr. Anthony Fauci, has already warned that achieving herd immunity is unlikely if even 25% of the population refuses the vaccine.[11]

The Court of Appeal recently rejected a due process challenge to a law that eliminated the personal belief exemption for mandatory school vaccines.[12] And the state's interest in requiring those vaccines is even less than its interest in requiring the coronavirus vaccine, because the population is already largely immune to those childhood diseases[13] and their mortality rates are lower than COVID-19's.[14] Because the Court of Appeal has already upheld mandatory vaccinations with a lesser state interest, it would likely uphold the greater public safety interest in a mandatory COVID-19 vaccination.

### **A state-mandated COVID-19 vaccine would not violate the free exercise clause**

A challenge based on free exercise rights will similarly fail. More than 50 years ago, the U.S. Supreme Court observed that "the right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." [15] A person refusing a state-mandated COVID-19 vaccination on religious grounds would do exactly that. Even assuming that a mandatory vaccine substantially burdens the free exercise of religion, the Court of Appeal recently held that mandatory vaccinations withstand strict scrutiny (rejecting yet another challenge to compulsory immunizations requirements for children).[16] Any challenge to a compulsory COVID-19 vaccine based on the free exercise clause would therefore be meritless.

### **A mandatory COVID-19 vaccine would not interfere with the right to education**

Unlike the federal constitution, the California constitution provides a right to education that is considered to be a "fundamental interest." [17] If the government required a COVID-19 vaccination to enter or re-enroll in California schools, challenges based on the right to education would undoubtedly follow. But there is

equally little doubt that a court would reject those claims based on long-standing precedent. Even before the U.S. Supreme Court decided *Jacobson* in 1905, California was the first of many states to require students to be vaccinated.[18] Today, all 50 states require students to be immunized. And California is one of five states that does not offer personal or religious exemptions.[19] Since 2016, vaccination challenges based on the right to education have been rejected twice in the Court of Appeal[20] and once by a federal judge.[21] A right-to-education challenge to a mandatory COVID-19 vaccine would also fail.

### **Statutory challenges to compulsory inoculations are groundless**

California's appellate courts have rejected statutory-based challenges that liken mandatory vaccinations to medical experimentation as "patently erroneous." [22] And statutory authority for mandating a COVID-19 vaccination is already in place. Health and Safety Code section 120175 allows local health authorities to "take any action . . . necessary to control the spread of [a] communicable disease" [23] and makes violations of such regulations a misdemeanor. [24] The legislature may constitutionally delegate its police power to make public health policy decisions to local health boards. [25] This existing statutory structure potentially permits state and local health authorities to require vaccinations even without specific legislative authorization for a COVID-19 vaccine program.

### **A state-mandated COVID-19 vaccine would not violate the equal protection clause**

The legislature may provide medical exemptions for the COVID-19 vaccine to immune-compromised individuals without violating the state or federal equal protection clauses. [26] Such medical exemptions are already available for mandatory school vaccinations. [27] The Court of Appeal has held that classifications based on "vaccination status" or "medically exempt students vs. students without

medical exemptions” do not implicate equal protection or are otherwise entirely rational.[28] Importantly, such exemptions are not constitutionally required,[29] though most states grant them for religious or philosophical reasons.[30] The upshot is that California could — but is not required to — permit medical exemptions to an otherwise comprehensive inoculation program.

## **Conclusion**

The United States Supreme Court recognized “the elimination of communicable diseases through vaccination [is] one of the greatest achievements” of public health in the 20th century.[31] For decades, state and federal courts have upheld mandatory vaccinations against a variety of legal challenges. When scientists develop a vaccine for COVID-19, the law is clear that the California legislature can require that every Californian be inoculated.

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[1] We note that we are not the first to examine this issue during the current pandemic. See, e.g., Jason Grant “State Bar Group Calls for ‘Mandatory’ COVID-19 Vaccinations, Regardless of Objections” Law.com May 28, 2020, and Merrill Matthews “Will government mandate COVID-19 vaccinations?” TheHill.com May 20, 2020.

[2] *Jacobson v. Massachusetts* (1905).

[3] *Brown v. Smith* (2018) at 1143 (“it has been settled since 1905 in *Jacobson* that it is within the police power of a State to provide for compulsory vaccination”) (quotations and citation omitted).

[4] Cal. Const., art. I, § 7.

[5] Cal. Const., art. I, § 4.

[6] Cal. Const., art. IX, § 5.

[7] Cal. Const., art. I, § 7.

[8] Health & Saf. Code § 24175.

[9] *Cruzan by Cruzan v. Director, Missouri Dept. of Health* (1990) at 279.

[10] Centers for Disease Control and Prevention, Coronavirus Disease 2019 Cases in the U.S., CDC.gov (as of Aug. 9, 2020); see also Johns Hopkins University of Medicine, Coronavirus Resource Center U.S. Map.

[11] Quinn, *Fauci Warns U.S. “Unlikely” to Reach Herd Immunity If Too Many Refuse Vaccine*, CBS News (June 29, 2020).

[12] *Brown* at 3. California requires school children to be immunized for diphtheria, hepatitis B, haemophilus influenzae type b, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus, and varicella (chickenpox). Health & Saf. Code §§ 120325(a)(1)-(10).

[13] Centers for Disease Control and Prevention, *National Center for Health Statistics: Immunization*, CDC.gov (Jan. 1, 2020).

[14] Roush, Murphy & Vaccine-Preventable Disease Table Working Group, *Historical Comparisons of Morbidity and Mortality for Vaccine-Preventable Diseases in the United States* (2007) 298 J. Am. Medical Assn. 2155.

[15] *Prince v. Massachusetts* (1944) at 167-68.

[16] *Love v. State Dept. of Education* (2018) at 985.

[17] Cal. Const., art. IX, § 5; *Serrano v. Priest* (1971) at 608-09.

[18] *Abeel v. Clark* (1890) 84 Cal. 226; *see also Blue v. Beach* (1900) 155 Ind. 121; *Morris v. Columbus* (1898) 102 Ga. 792; *State v. Hay* (1900) 126 N.C. 999; *Bissell v. Davison* (1894) 65 Conn. 183; *Duffield v. Williamsport School District* (1894) 162 Pa. 476.

[19] *States With Religious and Philosophical Exemptions from School Immunization Requirements*, NCSL (June 26, 2020).

[20] *Brown* at 1145-47; *Love* at 994-95.

[21] *Whitlow v. California* (2016) at 1089-91.

[22] *Brown* at 1148.

[23] Health & Saf. Code § 120175.5(b).

[24] Health & Saf. Code § 120175.

[25] *Jacobson* at 30-35.

[26] *Ibid.*

[27] Health & Saf. Code § 120370(a)(1).

[28] *Brown* at 1147; *see also Whitlow* at 1087-88.

[29] *Zucht v. King* (1922) at 176.

[30] NCSL, *supra* note 19.

[31] *Bruesewitz v. Wyeth LLC* (2011) at 1072.