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## Your Liberty is Not a Right to Jeopardize My Health: How a State COVID-19 Vaccine Mandate Promotes Health Justice

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# **YOUR LIBERTY IS NOT A RIGHT TO JEOPARDIZE MY HEALTH: HOW A STATE COVID-19 VACCINE MANDATE PROMOTES HEALTH JUSTICE**

**By: Rebecca L. Doloski\***

## **ABSTRACT**

The COVID-19 pandemic has once again brought the vaccine debate into the national spotlight. Except this time, whether to be vaccinated or not has become widely politicized and the rapid spread of misinformation has led to a deadly game of those who refuse to be vaccinated not only allowing themselves to be susceptible to a deadly virus, but also putting others at risk. In addition to the misinformation and politicization of this issue, the question of constitutionality of such measures is back in the spotlight as potential state vaccine mandates appear to be on the horizon. This paper seeks to identify and make arguments about how state vaccine mandates promote the concept of health justice, are constitutional, and the enactment of such measures actually promote, and not inhibit, personal liberties and freedoms.

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## INTRODUCTION

Lisa Wilson of Palm Beach County, Florida, has spent months as a staunch advocate for vaccination against COVID-19.<sup>1</sup> She has spent her days trying to promote vaccines and reach those communities who could not easily access them.<sup>2</sup> Despite her efforts to promote the vaccines as safe and effective, her own family did not heed this advice and in the span of six weeks, she had lost six family members to COVID-19.<sup>3</sup> She continues to share their stories in the hopes of preventing other families from enduring the pain that she has experienced.<sup>4</sup>

Teresa Sperry of Virginia was just ten years old when she succumbed to COVID-19 at the end of September.<sup>5</sup> Vaccines for children ages five to eleven, while available now, were not at the time of her illness and subsequent death.<sup>6</sup> Despite her family taking every possible preventative measure necessary (masking, parents getting vaccinated, distancing, etc.) it simply was not enough.<sup>7</sup> Her parents believe that if more people get vaccinated, deaths like Teresa's would be preventable.<sup>8</sup> Her father Jeff also battled a breakthrough case and had to be temporarily hospitalized.<sup>9</sup> Her mother Nicole says, "I never thought my perfectly healthy daughter would die from COVID."<sup>10</sup>

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<sup>1</sup> Amy Simonson, *Florida vaccine advocate loses six unvaccinated family members to Covid-19 within 3 weeks*, CNN (Sept. 16, 2021), <https://www.cnn.com/2021/09/16/us/florida-vaccine-advocate-family-member-deaths/index.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Brendan Ponton, *10-year-old dies after 5-day battle with COVID*, WBTW (Oct. 1, 2021), <https://www.wbtv.com/2021/10/01/10-year-old-dies-after-5-day-battle-with-covid/>.

<sup>6</sup> Andrea Salcedo, *A 10-year-old girl died of covid after her teacher appointed her the 'class nurse.'* *Her parents want answers*, WASHINGTON POST (Feb. 9, 2022), <https://www.washingtonpost.com/nation/2022/02/09/teresa-sperry-girl-virginia-class-nurse-died-covid/>.

<sup>7</sup> *See id.*

<sup>8</sup> *See* Ponton, *supra* note 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

They are sharing her story in the hopes that more people will understand that the virus does not discriminate, and anyone can get it, and sadly, die from it.<sup>11</sup>

What do these stories have in common? Both illustrate that if states had implemented COVID-19 vaccine mandates, their actions could have prevented far too many individuals from falling victim to a global pandemic. For decades, vaccines have been a part of the health regimen of most Americans.<sup>12</sup> Indeed to attend school, travel abroad, and avoid disease, individuals in the United States have been required to be vaccinated to protect both themselves and others.<sup>13</sup>

The entire concept of protecting oneself and, perhaps more importantly, the community, is in complete turmoil due to politicization, misinformation, and downright stubbornness about whether one should be mandated to get a COVID-19 vaccine. The narrative in which science used to be trusted and praised has since turned into a self-centered, argument lacking any substantive understanding of the Constitution and instead asserting infringement upon liberties by government overlords.<sup>14</sup> Something must be done to combat the disinformation narrative as well as the continuous deadly spread of COVID-19. This paper argues that by implementing state vaccine mandates to promote the greater good, the result is a protection of individual liberties and a promotion of health justice, that is, removing barriers and improving health outcomes for all people. It is not a one-size-fits-all approach rather, it is a calculated measure to ensure full access to life, liberty, and the pursuit of happiness while unencumbered by the risks of a deadly disease that will ultimately strip people of those enumerated rights. In other words, specific circumstances such as these highlight that vaccine mandates can be constitutional.

This paper seeks to delineate that for a state vaccine mandate to be constitutional it must be reasonable and necessary. This concept is not inherently novel but is well-established law with years of precedent for support. Having met these requirements, the mandates become a legitimate, constitutional, exercise of a state's police power to protect the public health and safety of its citizens. Part I discusses the

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<sup>11</sup> *Id.*

<sup>12</sup> See generally Water A. Orenstein & Alan R. Hinman, *The immunization system in the United States – the role of school immunization laws*, 17 SCI. DIRECT 19 (1999), [https://doi.org/10.1016/S0264-410X\(99\)00290-X](https://doi.org/10.1016/S0264-410X(99)00290-X) (arguing that vaccine mandates of various types date back to the 19<sup>th</sup> century and have been an effective safety net in mitigating the spread of disease).

<sup>13</sup> See generally *id.*

<sup>14</sup> See generally Jean-Pierre Dube, et al., *News media and distrust in scientific experts*, VOXEU (Jul. 6, 2020), <https://voxeu.org/article/news-media-and-distrust-scientific-experts> (arguing that Americans who relied on televised news as their primary source of information were more persuaded by misinformation and held a more pessimistic, distrustful, view of science).

historical and constitutional backgrounds of liberty and vaccine mandates. Part II then illustrates how vaccine mandates promote the concept of health justice. Part III delves into ethical considerations regarding vaccine mandates, observing implications and negative consequences. And finally, Part IV demonstrates why it is critical to separate politics from healthcare and also illustrates how they can co-exist and be beneficial as a result.

## **PART I: HISTORICAL BACKGROUND OF THE CONCEPT OF LIBERTY AND VACCINE MANDATES**

Vaccine mandates are not a novel concept for the United States. From smallpox in the era of George Washington to the 1949 polio epidemic, and working to combat the measles in the 1950's-60's, states throughout the nation have mandated various vaccines in order to promote the health and well-being of US citizens.<sup>15</sup> Students are required to receive a number of vaccines to attend school, and certain vaccines are required in the workplace, with even some foreign travel requiring that people receive one, or multiple, vaccines.<sup>16</sup> To continue to promote the greater good and ensure full access to each individual's enumerated rights, state-specific vaccine mandates will prove both constitutional and also liberating. This section seeks to provide a constitutional history regarding the health of communities as well as the constitutional foundations for state vaccine mandates while taking the liberties of each individual into account.

### **Constitutional History Regarding Health of Communities and the Nation**

Vaccine mandates, as well as other compulsory public health measures, can be found throughout constitutional and case law history. One of the earliest, and perhaps most widely referenced legal precedents for vaccine mandates is the highly controversial *Jacobson v. Massachusetts* Supreme Court decision.<sup>17</sup> In 1902, the Board of Health of Cambridge, Massachusetts, enacted a compulsory vaccine mandate to combat the spread of deadly smallpox.<sup>18</sup> Jacobson, the

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<sup>15</sup> Andreina Rodriguez, *A History of Vaccine Mandates – And How People Reacted to Them Then and Now*, NBC PHILA. (Oct. 7, 2021), <https://www.nbcphiladelphia.com/news/coronavirus/a-history-of-vaccine-mandate-and-how-people-reacted-then-and-now/2984174/> (highlighting vaccine mandates throughout the years in different life scenarios like school to show the promotion of health and well-being of citizens).

<sup>16</sup> Immunization Action Coalition, *State Laws and Mandates by Vaccine*, IMMUNIZE.ORG (May 24, 2021), <https://www.immunize.org/laws/> (The site includes a number of recommended vaccines as well as some that are mandatory depending on the state and specific vaccine.).

<sup>17</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

<sup>18</sup> *Id.* at 12.

defendant, refused to get vaccinated and refused to pay the five-dollar fine that he incurred as a result of doing so.<sup>19</sup> Jacobson asserted that the state had gone beyond its police power of enacting laws to protect public safety and promote public health and there was a constitutional infringement on his personal liberties regarding whether or not he received a vaccine.<sup>20</sup> After Jacobson lost at the state supreme court level, he appealed to the United States Supreme Court, and the Court took the case up for debate in 1904.<sup>21</sup> In a landmark ruling that would set mandatory vaccine precedent, the Supreme Court ruled that the vaccine mandate of Massachusetts did not violate Due Process and it was within the police power of Massachusetts to enact a mandate that would promote the overall health and safety of the state.<sup>22</sup> Notably, the opinion of the *Jacobson* case states,

The 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. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.<sup>23</sup>

Today, *Jacobson* has been brought up once again<sup>24</sup>, and individuals from both sides of the argument have brought up the issue of whether or not considerations should be made as to exemptions and ability of all to qualify for vaccination.<sup>25</sup> Greater detail will be given to reasonable exemptions for mandatory vaccination in a later section of this paper.

More recently, the 2020 case of *C.F. v. New York City Dept. of Health & Mental Hygiene* reaffirmed the concept of the ability of states to mandate vaccines when a situation is dire enough to call for it.<sup>26</sup> This case dealt with an outbreak of measles in New York City.<sup>27</sup> The issue was whether or not the Board of Health was operating beyond

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<sup>19</sup> *Id.* at 12-13, 19.

<sup>20</sup> *Id.* at 17, 28-29.

<sup>21</sup> *Id.* at 11, 22.

<sup>22</sup> *Id.* at 39.

<sup>23</sup> *Id.* at 26-27. See *Crowley v. Christensen*, 137 U.S. 86, 89-90 (1890) (Justice Field noting that liberties are regulated by the government and in fact not absolute, rather, they are subject to protecting the good and health of the community so long as the government acts within its constitutional boundaries when making such regulations).

<sup>24</sup> Maggie Astor, *Vaccination Mandates Are American Tradition. So is the Backlash*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/2021/09/09/us/politics/vaccine-mandates-history.html>.

<sup>25</sup> *Id.*

<sup>26</sup> *CF v. N.Y.C. Dep't of Health & Mental Hygiene*, 191 A.D.3d 52, 79 (App. Div. 2d Dep't 2020).

<sup>27</sup> *Id.* at 55.

New York's state police power of protecting public safety and promoting public health by enacting a vaccine mandate to combat a measles outbreak.<sup>28</sup> The appellate court ruled that the resolution of the Board was a constitutional exercise of the Board's authority.<sup>29</sup> The appellate court made this determination and indicated that the Board had taken reasonably necessary measures to combat a highly contagious, and often extremely deadly, virus.<sup>30</sup> The court cited the fact that, "Measles is so contagious that each new case of it severely hinders the ability of health officials to curb an outbreak, especially in communities with higher rates of unvaccinated, non-immune individuals."<sup>31</sup> The court also highlighted the fact that the Department of Health took many measures prior to mandating a vaccine (e.g. mitigation measures and outreach) however, these were either disregarded or ignored so they had to move to the next option to protect public health.<sup>32</sup> The court noted that in doing so, even though the Board was not required to use the least restrictive means in mandating a vaccine, the fact that they had gone through all of the previous mitigation steps supported the reasonableness of eventually settling on a vaccine mandate.<sup>33</sup> The legal significance of this case is that the court recognized the implications that a vaccine mandate may have, but also laid the groundwork for how such mandates can be achieved legally and in the promotion of the common good. The holding did not create an arena for entities nationwide to start creating mandates however they pleased, rather, the court emphasized a reasonable and proportional test that should be applied when considering mandates of this nature.

### **Constitutional History Regarding the Liberties of Every Person**

Even though the ideas of liberties and governmental power are two different concepts, it is often hard, if not impossible to find one without the other.<sup>34</sup> This section seeks to identify two amendments that address both liberties and governmental power and then apply them to a state COVID-19 vaccine mandate. These amendments lay the foundation for the case-specific implementation of a COVID-19 vaccine mandates and how they are in fact not a violation of an individuals' rights. The 14<sup>th</sup> Amendment of the United States Constitution addresses Due Process and Equal Protection on the state level,

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 79.

<sup>30</sup> *Id.* at 68-69, 71, 79.

<sup>31</sup> *Id.* at 55.

<sup>32</sup> *Id.* at 68.

<sup>33</sup> *Id.*

<sup>34</sup> Richard H. Fallon Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 343-44 (1992), [https://digitalcommons.law.uga.edu/lectures\\_pre\\_arch\\_lectures\\_sibley/27](https://digitalcommons.law.uga.edu/lectures_pre_arch_lectures_sibley/27).

and the 10<sup>th</sup> Amendment deals with state police powers. Putting them together will illustrate how their application applies to state vaccine mandates in the COVID-19 era.

### *14<sup>th</sup> Amendment Analysis*

The 14<sup>th</sup> Amendment can be viewed from a public health perspective. Generally, when states take action to protect public health, they have to do so in a way that is neither arbitrary nor capricious and is done in a way so as not to infringe on fundamental rights.<sup>35</sup> The Due Process Clause is meant to place limitations on authorities, especially when these authorities attempt to take actions that are not necessary in furtherance of public health.<sup>36</sup> Public health measures have also been viewed as a protective safety measure for communities, therefore promoting the common good.<sup>37</sup> Framing the 14<sup>th</sup> Amendment from a public health perspective allows one to conclude that the government cannot interfere with an individual's freedom unless they ensure they uphold their obligation to also protect and care for that individual.<sup>38</sup>

The 14<sup>th</sup> Amendment deals with Due Process conflicts as they relate to the individual states interfering with the rights of individuals.<sup>39</sup> Procedural and substantive Due Process are often the foundations on which Due Process arguments are built. Procedural Due Process deals with the procedural aspects, such as elements, rules, and methods of enforcement.<sup>40</sup> Substantive Due Process is more complicated, as it deals with determining what are and are not fundamental rights, and whether or not those rights have been violated by a law.<sup>41</sup> Substantive Due Process is the crux of many of the arguments being made for and against mandatory vaccination policies. Some examples of substantive Due Process are the right to privacy, to marry whomever a person wants, and the right to work.<sup>42</sup>

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<sup>35</sup> See generally Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L. Q. 267 (1993), [https://heinonline.org/HOL/Page?handle=hein.journals/hascq20&div=16&gsent=1&casa\\_token=&collection=journals](https://heinonline.org/HOL/Page?handle=hein.journals/hascq20&div=16&gsent=1&casa_token=&collection=journals).

<sup>36</sup> *Id.* at 273.

<sup>37</sup> *Id.* at 313.

<sup>38</sup> *Id.* at 333.

<sup>39</sup> U.S. CONST. amend. XIV.

<sup>40</sup> *Procedural Due Process*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/procedural\\_due\\_process](https://www.law.cornell.edu/wex/procedural_due_process) (last visited Mar. 5, 2022).

<sup>41</sup> *Substantive Due Process*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/substantive\\_due\\_process](https://www.law.cornell.edu/wex/substantive_due_process) (last visited Mar. 5, 2022).

<sup>42</sup> *Fourteenth Amendment of the US Constitution – Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection*, JUSTIA, <https://law.justia.com/constitution/us/amendment-14/> (last visited May 12, 2022).

It is here within the 14<sup>th</sup> Amendment analysis that it becomes clear that vaccine mandates, while not an explicit fundamental right, need to be evaluated to see whether or not there is an argument to be made that the right to decide on vaccination or otherwise be subject to what the authorities view as a protective public health measure is one that can be covered by the scope of the Constitution. Like the right to privacy, perhaps the right to decide on vaccination is one that the Supreme Court and legal scholars will advocate for to shed more light on this ever-developing issue.

### *10<sup>th</sup> Amendment Analysis*

The 10<sup>th</sup> Amendment reads, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>43</sup> Ultimately, this means that so long as the Federal Government is not explicitly given the power, and nothing is saying it is not allowed, States have the power to enact and uphold laws in their respective states, in promotion of the greater good.<sup>44</sup> An example of government overreach and application of the 10<sup>th</sup> Amendment can be seen in the 1997 Supreme Court case of *Pritz v. United States*.<sup>45</sup> The 10<sup>th</sup> Amendment is important to both prevent the government from going beyond its powers, as well as reinforce that states have the power to enact laws and legislation that protect the members of each of their respective states while keeping their overall health and wellbeing in mind. Police powers, while broad, have their limits and states must formulate the use of these so as to respect individual rights while also protecting health and safety.<sup>46</sup>

### *Putting it All Together*

As depicted above, despite the 14<sup>th</sup> amendment illustrating the liberties given to every US citizen and the limits of government and state interference, nowhere in the amendment does it say that one has “absolute rights.”<sup>47</sup> Therefore, while a claim may be made that a

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<sup>43</sup> U.S. CONST. amend. X.

<sup>44</sup> *Id.*

<sup>45</sup> See *Pritz v. United States*, 521 U.S. 898, (1997) (Justice Scalia reinforced the fact that state legislatures are not subject to federal direction, especially when the direction they are trying to push the state is not a power that the federal government has and rather a right that is preserved for the individual states. The ultimate conclusion is that the federal government cannot compel states to fulfill tasks for it.)

<sup>46</sup> Ilya Shapiro, *State Police Powers and the Constitution*, CATO INST. (Sept. 15, 2020), <https://www.cato.org/pandemics-policy/state-police-powers-constitution>.

<sup>47</sup> See Tanya Lovell Banks, *Balancing Competing Individual Constitutional Rights: Raising Some Questions*, UNIV. OF MD. FRANCIS KING CAREY SCH. OF L. (2008), [https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1634&context=fac\\_pubs](https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1634&context=fac_pubs) (arguing

right has been infringed either by states or by the federal government, this assertion does not guarantee that a violation will be found, or that those claiming to have been violated have an absolute protection from whatever it is they feel that has victimized them.<sup>48</sup>

The 10<sup>th</sup> Amendment covers the scope of how the states can use their power and to what limits that power can be pushed.<sup>49</sup> As explained above, state police power does have its limits and it is critical to understand these limits when states are attempting to enforce legislation and laws for the good of their citizens.<sup>50</sup> Even more, it clarifies that the federal government cannot compel state action when not expressly given that right.<sup>51</sup> When it comes to vaccine mandates, a federal mandate would do just that, which is why the only constitutional avenue for such matters is one to be handled by the individual states. Through an application of these two amendments, it becomes clear that a state vaccine mandate is well within the boundaries of the Constitution and in fact, would not be what many continue to claim as an “unconstitutional deprivation of personal liberties.”

## PART II: VIEWING VACCINE MANDATES THROUGH A HEALTH JUSTICE LENS

The health of society is critically important for towns, cities, and entire nations to thrive and flourish. After all, a chain (or in this case a society) is only as strong as its weakest link.<sup>52</sup> However, the well-being of society cannot be achieved if there are inequities and inequality in the distribution of health and life-saving measures.<sup>53</sup> Now, more than ever, it has become apparent that the United States has an incredibly flawed healthcare system, and even when measures are put in place to benefit the nation, certain historically marginalized communities still fall short of receiving appropriate healthcare.<sup>54</sup> To advocate for a vaccine mandate, it must first be illustrated that there

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that in both the United States and several foreign countries, there are no absolute rights delineated by constitutions and where there may be a hierarchy of fundamental rights this still does not guarantee that any of these rights are absolute and that there is complete protection when infringement upon them is presented. Additionally, the author argues that while there may be a hierarchy making some rights seemingly more important than others, this still does not guarantee that any one right is absolute to any individual, both foreign and domestic.).

<sup>48</sup> *Id.*

<sup>49</sup> U.S. CONST. amend. X.

<sup>50</sup> *Printz v. United States*, 521 U.S. 898 (1997). Shapiro, *supra* note 46.

<sup>51</sup> U.S. CONST. amend. X.

<sup>52</sup> *The meaning and origin of the expression: A chain is only as strong as its weakest link*, THE PHRASE FINDER (2021), <https://www.phrases.org.uk/meanings/the-weakest-link.html>.

<sup>53</sup> See generally Wayne J. Riley, *Health Disparities: Gaps in Access, Quality and Affordability of Medical Care*, 123 TRANSACTIONS OF THE AM. CLINICAL & CLIMATOLOGICAL ASS'N 167 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3540621/pdf/tacca123000167.pdf>.

<sup>54</sup> *Id.* at 171.

is a greater need beyond a mandate to ensure that there is no infringement upon liberties and enumerated rights. This section offers a background on the health justice framework, how to strengthen and make it more efficient, and finally, the application of vaccine mandates to the legal world and a health justice framework.

### Overview of the Health Justice Framework

Health justice sometimes referred to as health equity, combines the notions of having fair access to resources and personal agency to achieve social, emotional, and physical well-being.<sup>55</sup> The health justice framework steps back from an individualistic viewpoint, and instead looks at health outcomes through the implementation of policies on the community level.<sup>56</sup> While the health of each individual is critically important, the health justice framework takes a big picture approach to evaluate society as a whole.<sup>57</sup> This framework allows observations that can pinpoint disparities in systems of power, identify health disparities, and then promote health equity through providing fair access to health resources.<sup>58</sup>

The health justice framework is being thrust into the spotlight amidst the ongoing COVID-19 pandemic. The White House has created a specific COVID-19 equity task force and public health officials are sounding the alarm on the increased risk of death for those who live in poverty, suffer from chronic conditions, and are low-income.<sup>59</sup> It should not take a pandemic for people to care about health justice especially given the years of scientific research and developments that have allowed all individuals to live relatively healthy, long lives.

Despite the fact that a person, or their entire family, may have good health, if someone within the population group with whom they live in has poor health, then this affects not only their population group, but others beyond it as well.<sup>60</sup> As a result, there are several health and economic impacts whose improvement is impeded

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<sup>55</sup> Amy Peterson, et al., *The Health Equity Framework: A Science and Justice-Based Model for Public Health Researchers and Practitioners*, 22 HEALTH PROMOTION PRAC. 741, 741-42 (2020), <https://doi.org/10.1177/1524839920950730>.

<sup>56</sup> *Id.* at 742.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 744.

<sup>59</sup> Emily A. Benfer et al., *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. OF HEALTH POL'Y, L., & ETHICS 122, 127-28 (2020), <http://hdl.handle.net/20.500.13051/5966>.

<sup>60</sup> See generally Emily A. Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 AM. UNIV. L. REV. 275 (2015), [https://digitalcommons.wcl.american.edu/aulr/vol65/iss2/1?utm\\_source=digitalcommons.wcl.american.edu%2Faulr%2Fvol65%2Fiss2%2F1&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://digitalcommons.wcl.american.edu/aulr/vol65/iss2/1?utm_source=digitalcommons.wcl.american.edu%2Faulr%2Fvol65%2Fiss2%2F1&utm_medium=PDF&utm_campaign=PDFCoverPages).

by inequitable social structures.<sup>61</sup> Health justice finds itself rooted in the social determinants of health, some of which are transportation, education, access to quality food supply and social relationships.<sup>62</sup> When one has a low socioeconomic status, they have more limited access to resources and less ability to obtain those resources, something that has been a painful problem for many during the COVID-19 pandemic.<sup>63</sup> Many important themes have arisen from this pandemic, but perhaps one of the most critical is the need to prioritize health justice while insisting on eliminating social injustice and health inequity.<sup>64</sup>

### **Applying Vaccine Mandates to the Legal World and a Health Justice Framework**

How then, can the health and legal worlds work together? Public health law seeks to link the two and promote the concepts of the health justice framework in order to promote equity and show how recognizing health justice across a variety of focal points can promote a healthier, and more equal world.<sup>65</sup> According to the Partnership for Public Health Law, its most basic definition of public health law reads, “Public health law is a field that focuses legal practice, scholarship, and advocacy issues involving the government’s legal authorities and duties to ‘ensure the conditions for people to be healthy,’ and how to balance these authorities and duties with ‘individual rights to autonomy, privacy, liberty, property and other legally protected interests.’”<sup>66</sup> The state’s police power, which is recognized as a pre-existing authority under the 10<sup>th</sup> Amendment, can be used by states to promote the general welfare and laws that will benefit their respective societies.<sup>67</sup> There are many examples of state police power being used through the lens of public health laws.<sup>68</sup> A few examples are “response[s] to public health emergencies,” “community vaccinations,” and “licensure of various medical

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<sup>61</sup> *Id.* at 277.

<sup>62</sup> *Id.* at 278.

<sup>63</sup> *Id.* at 281.

<sup>64</sup> *Id.* at 351.

<sup>65</sup> Kathleen Hoke, *What is Public Health Law?*, THE NETWORK FOR PUB. HEALTH L. (2021), [https://www.apha.org/-/media/Files/PDF/factsheets/What\\_is\\_Public\\_Health\\_Law\\_factsheet.ashx](https://www.apha.org/-/media/Files/PDF/factsheets/What_is_Public_Health_Law_factsheet.ashx).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See Jorge E. Galva et al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REP. 20, 20 (2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2569983/> (arguing how police powers have been used to promote public health. “The application of police power has traditionally implied a capacity to (1) promote the public health, morals, or safety, and the general well-being of the community; (2) enact and enforce laws for the promotion of the general welfare; (3) regulate private rights in the public interest; and (4) extend measures to all great public needs.”).

professionals.”<sup>69</sup> All of these measures promote the idea of protecting and preserving the wellbeing of society.

Going hand-in-hand with health justice is the sociological concept of social contract theory.<sup>70</sup> Basically, the theory hypothesizes that people live and work together in society in ways that establish political and moral behaviors.<sup>71</sup> Social contracts are those that can be explicit or implicit, and one widely recognized explicit example would be the United States Constitution.<sup>72</sup> According to social contract theory, people who live in America agree to be governed by obligations outlined in the Constitution regarding how to act both morally and politically.<sup>73</sup> Social contract theory is implicitly discussed in the *Jacobson* case as the court evaluates how persons are subject to a variety of restraints on real liberty in order to secure the general health, prosperity, and comfort of a state.<sup>74</sup>

How then does social contract theory turn to people’s actions and beliefs during the COVID-19 pandemic? Since the onset of state shut-downs, mitigation efforts, and mask requirements, the arguments that continuing to do so will ruin our economy have only grown louder and more volatile. Gary Puckrein of the National Minority Quality Forum asserts that amidst the pandemic, Americans have lost the sense of those moral and political obligations and instead break the long-standing social contracts in order to protect the business interests of a few, and thus elevate the risk of death for many.<sup>75</sup> Instead, social contract theory calls for sustainment of life and aligning the economic life of America will do just that, while also protecting the health and wellbeing of all Americans.<sup>76</sup>

The core premise of the concept of health justice is that all persons have the ability to access opportunity, have the chance to be free from hazards that jeopardize health, and will be able to have full participation in society.<sup>77</sup> These concepts have been thrust into the spotlight with the emergence of the COVID-19 pandemic and also offered a much needed opportunity to explain how states using their police power to protect public health is balanced with protecting liberties rather than seeking to eliminate liberties.<sup>78</sup> Though vaccination has

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<sup>69</sup> Hoke, *supra* note 65.

<sup>70</sup> *Social Contract Theory*, ETHICS UNWRAPPED (2021), <https://ethicsunwrapped.utexas.edu/glossary/social-contract-theory>.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 24 (1905).

<sup>75</sup> Gary Puckrein, *Our Social Contract and the Coronavirus Pandemic*, MILKEN INST. (July 8, 2020), <https://milkeninstitute.org/article/our-social-contract-and-coronavirus-pandemic>.

<sup>76</sup> *Id.*

<sup>77</sup> Benfer, *supra* note 60, at 277-78.

<sup>78</sup> James R. Steiner-Dillon & Elisabeth J. Ryan, *Jacobson 2.0: Police Power in the Time of COVID-19*, ALB. L. REV. 1, 2-3 (Nov. 1, 2020), <https://ssrn.com/abstract=3720083>.

been one of science's greatest achievements and has saved millions of lives, there is always the tension between the individual and the good of the community.<sup>79</sup> In order to meet the second prong of being free from hazards that jeopardize health, not only must vaccination be available to all, but states should mandate the vaccine in order to protect their most vulnerable citizens, as well as offer the opportunity for everyone to be safe and fully return to participating in society.<sup>80</sup> Without vaccination mandates, individuals have the potential to be exposed to breakthrough cases, or worse, those who are unable or who have not yet been vaccinated may contract COVID-19 and die.

Lastly, to meet the goal of providing all individuals with access to opportunity, states who are going to implement vaccine mandates must address the inequities in vaccine distribution. Equitable distribution of life-saving medical mechanisms is sadly not a new issue that came with the COVID-19 pandemic.<sup>81</sup> With the release of several COVID-19 vaccines, disparities were immediately apparent, with high-income countries vaccinating at a faster rate than their low-income neighbors.<sup>82</sup> Cost and distribution need to be immediate matters that are addressed if states are considering a vaccine mandate, and each state will need to formulate a plan for equitable distribution, even if that means implementing internal procedures to provide vaccines to the most vulnerable.<sup>83</sup> The structural determinants of health, discrimination and poverty, must be addressed head on or individuals will never have the opportunity to achieve success in all areas that make up the social determinants of health.<sup>84</sup> Focusing on what is needed to promote health justice will serve as a catalyst to flatten the disparity curve that historically and disproportionately affects marginalized communities as well as providing access to a life-saving vaccine that all people should have the opportunity to receive.<sup>85</sup>

### PART III: ETHICAL CONSIDERATIONS SURROUNDING VACCINE MANDATES

It would be naive to advocate for mandatory vaccination without taking into consideration the ethical concerns that surround a mandate of this magnitude. Though the argument above is made about

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<sup>79</sup> *Id.* at 12-13.

<sup>80</sup> Hoke, *supra* note 65.

<sup>81</sup> Agnes Bingawaho et al., *Equitable and Effective Distribution of the COVID-19 Vaccines – A Scientific and Moral Obligation*, 11 INT'L J. OF HEALTH POL'Y & MGMT. 100 (2022).

<sup>82</sup> *Id.* at 100.

<sup>83</sup> *Id.* at 101.

<sup>84</sup> Befner, *supra* note 60, at 277.

<sup>85</sup> *Id.* at 336.

the legality of such measures, it is important to understand both sides and know how to implement something such as a vaccine mandate in a prudent, ethical way. Doing so takes those enumerated rights and liberties into account and ensures a course of action that is more beneficial than detrimental. This section seeks to advocate for situation-specific mandates while taking exemptions and negative implications of mandates into consideration and evaluating how they play a role in vaccine mandates.

### The Need for Situation-Specific Mandates

The central debate for many months of the COVID-19 pandemic was if and how a COVID-19 vaccine mandate would be possible. Until very recently, there was not full FDA approval for any of the vaccines that had been approved under Emergency Use Authorization, (EUA). The reason that vaccine mandates did not occur prior to the FDA's full approval of the Pfizer vaccine is two-fold.<sup>86</sup> Creating a vaccine mandate that is under an emergency use authorization is both ethically and legally problematic.<sup>87</sup> From an ethical standpoint, EUAs by nature are a sped-up approval process with less time for data gathering and studying long-term effects.<sup>88</sup> This is not to say that vaccines given EUA are not safe and effective, rather, it would be a much steeper hill to climb to convince others that their best interest had been taken into account and that all measures to get to this point were safe and had been researched extensively.<sup>89</sup> While there are many federal and state administrative agencies that do have health and safety regulations in place, it would be hard for them to justify, and legally enforce, vaccine mandates of an EUA vaccine.<sup>90</sup> The ethical and legal issues go hand-in-hand, but it is important to note the differences and the implications that they have.

After a vaccine receives full FDA approval, the entire landscape of vaccine mandates changes. For example, as soon as the FDA announced full approval of the Pfizer vaccine, it was a matter of hours before many companies, school districts, and employers nationwide instituted mandatory vaccines for their employees.<sup>91</sup> This is not to assert that every FDA-approved vaccine would legally be able to be

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<sup>86</sup> Lawrence O. Gostin et al., *Mandating COVID-19 Vaccines*, 325 THE J. OF THE AM. MED. ASS'N (JAMA) 532-33 (2021).

<sup>87</sup> *Id.* at 532.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Errol Barnett, *Nearly all major airlines mandate COVID vaccine for employees*, CBS NEWS (Oct. 11, 2021), <https://www.cbsnews.com/news/covid-19-vaccine-mandate-major-airlines/> (For example, United Airlines, American Airlines, Southwest Airlines, Jet-Blue, Alaska Airlines and Hawaiian Airlines have all said they will comply with the mandate and expect their employees to be vaccinated.).

mandated nationwide, let alone by the states. Notably, from the *Jacobson* case discussed earlier, Justice Harlan made clear that while the vaccine mandate in *Jacobson* was a clear exercise of a state's police power, the ruling by the Supreme Court did not mean that every vaccine mandate by a state would be an appropriate use of that police power.<sup>92</sup> For example, it would likely be arbitrary that every state mandate would require that all residents must be vaccinated against yellow fever, or to put it in a different example, to require that all individuals who reside in the United States must take a Flintstone's vitamin every morning with breakfast. This is because the rule from *Jacobson* makes clear that the use of police power when it comes to vaccine mandates must be done only when it is reasonably necessary to protect public health or public safety.<sup>93</sup> As stated above, the number of businesses and entities that mandated vaccines after full FDA approval were doing so in light of a global pandemic, and not to enforce an arbitrary requirement on their employees.<sup>94</sup> The OSHA mandate and surrounding litigation have muddied this landscape, but the argument as to the necessity of the vaccines to promote public health and safety is even more important now, with the rapid spread of the Omicron variant.<sup>95</sup>

The case for situation-specific, state vaccine mandates make even more sense when viewed through the lens of specific workplaces that would greatly benefit from such mandates. For example, the health care facility setting, which can already be a place where transmission of infectious disease is high, would be able to mitigate both resident and health care worker illness and fatality, as well as combat the health care worker shortage that would result of them falling victim to COVID.<sup>96</sup> State mandates will also allow businesses to return to normal operations as well as in-person education for both college and primary aged school children.<sup>97</sup>

The implementation of situation-specific state vaccine mandates will promote the above-illustrated ideas and allow the United States to return to some sense of normalcy. Without them, the United States, and the world, face the potential of being in a deadly dance

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<sup>92</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

<sup>93</sup> *Id.* at 27.

<sup>94</sup> See generally Barnett, *supra* note 91.

<sup>95</sup> Spencer Kimball, *Biden administration withdraws Covid vaccine mandate for businesses after losing Supreme Court case*, CNBC (Jan. 25, 2022), <https://www.cnbc.com/2022/01/25/covid-vaccine-mandate-osha-withdraws-rule-for-businesses-after-losing-supreme-court-case.html> ("Labor Secretary Marty Walsh has vowed that OSHA will use its existing powers to protect workers from Covid . . . it will shift resources to focus on creating a permanent Covid safety standard for health-care workers.").

<sup>96</sup> Gostin et al., *supra*, note 86.

<sup>97</sup> *Id.*

with a virus that does not discriminate and with variants and mutations that will forever be a looming threat on the horizon.

### Recognizing Potential Exemptions for Vaccine Mandates

Since the advent of vaccines and vaccine mandates, both the United States and countries abroad have allowed for a few specific exemptions.<sup>98</sup> Of course, it would be highly problematic for the United States, or any country for that matter, to overlook potential reasons that an exemption to a vaccine mandate may be necessary.<sup>99</sup> Some of the most common exemptions are medical, religious, and the lesser used, but still recognized personal belief exemption. Medical exemptions to vaccine mandates are recognized in all 50 states.<sup>100</sup> Religious exemptions are almost just as broad however, only 48 states allow an exemption for religious reasons.<sup>101</sup> The Americans with Disabilities Act (ADA) requires certain reasonable accommodations that are required to be satisfied to provide equity to those with disabilities in places such as the workplace, state and local government settings, places of public accommodation and public transportation.<sup>102</sup> In order that individuals be protected by the ADA and thus invoke the reasonable accommodations, the person must have a disability or have a relationship with someone who has a disability.<sup>103</sup> Recognizing these accommodations ensures that those with disabilities neither fall through the cracks, nor have their rights infringed.<sup>104</sup> A reasonable accommodation is not a “get-out-of-jail-free” card because there is not a guarantee that a reasonable accommodation will be approved, and if approved, mechanisms will be put into place to keep others safe while honoring the accommodation.<sup>105</sup> This subsection seeks to distinguish medical and religious exemptions and whether they are necessary when it comes to the application of a COVID-19 vaccine mandate.

#### *Medical Exemptions*

Medical exemptions to vaccines are very real and oftentimes necessary to prevent the adverse effects a vaccine may have on someone

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<sup>98</sup> *Vaccination Exemptions*, THE COLL. OF PHYSICIANS OF PHILA. (Jan. 17, 2018), <https://www.historyofvaccines.org/content/articles/vaccination-exemptions>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Civil Rights Division, *A Guide to Disability Rights Laws*, U.S. DEP'T. OF JUST. (Feb. 2020), <https://www.ada.gov/cguide.htm#anchor62335>.

<sup>103</sup> *Id.*

<sup>104</sup> See generally *Id.*

<sup>105</sup> See generally *id.*

with a medical condition.<sup>106</sup> To claim a medical exemption, it must be written by a doctor and certified to show that receiving the vaccine would be more detrimental to the health of the individual than the benefits of the vaccine.<sup>107</sup> Surprisingly, the ADA does not have an explicit requirement when it comes to medical exemptions. Rather, individual states have taken the language of the ADA and implemented their interpretation in their respective states tailored to what is best to promote the health and safety of their citizens.<sup>108</sup>

While most, if not all, vaccines have come with the option of medical exemptions, the COVID-19 vaccine has led to uncharted territory, with exemptions being claimed and signed off on to allow for adults and children to claim an exemption to both mask-wearing and vaccination.<sup>109</sup> Regardless of whether it is a COVID-19 vaccine or another type of vaccine, medical exemptions are becoming increasingly difficult to obtain given that both the government and medical professionals have all but eliminated the need to delay vaccination through observing scientific and medical developments.<sup>110</sup> Ultimately, the stringent requirements of obtaining a true medical exemption, coupled with those who are fabricating medical conditions and finding doctors willing to sign off on them, will further complicate the process for those who truly need a medical exemption.<sup>111</sup> States will need to closely analyze their policies for implementing vaccine mandates and ensure that there are safeguards in place to protect the most vulnerable, as well as repercussions for those who attempt to abuse the process.

### *Religious Exemptions*

While there is a great deal of scientific evidence and rationale as to why medical exemptions should be implemented with vaccine mandates, the area becomes much grayer when it comes to religious

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<sup>106</sup> *Frequently Asked Questions About Vaccine Exemption Information*, NAT'L. VACCINE INFO. CTR. (2021), <https://www.nvic.org/faqs/vaccine-exemptions.aspx>.

<sup>107</sup> *Id.*

<sup>108</sup> See Salini Mohanty et al., *Experiences With Medical Exemptions After a Change in Vaccine Exemption Policy in California*, 142 AM. ACAD. OF PEDIATRICS 1, 8 (2018), <https://doi.org/10.1542/peds.2018-1051> (For Californians to receive a medical exemption they must: 1) submit a written statement signed by a licensed physician, 2) include "a statement that the physical condition/medical issue of the child is such that vaccination would be unsafe, 3) any, and all, vaccines that are exempt as a result, and 4) a determination of whether the medical exemption is temporary or permanent.).

<sup>109</sup> See Allyson Henning, *Families line up outside Florida chiropractor's office to get medical exemption forms for school mask mandate*, NEWS10 (Aug. 31, 2021), <https://www.news10.com/news/families-line-up-outside-florida-chiropractors-office-to-get-medical-exemption-forms-for-school-mask-mandate/> (discussing how a Sarasota chiropractor signed off on hundreds of exemption forms citing as a Florida Licensed Health Care Provider he has the authority to do so.).

<sup>110</sup> NAT'L. VACCINE INFO. CTR., *supra* note 106.

<sup>111</sup> *Id.*

exemptions. One of the great privileges of living in the United States is the ability to have freedom of religion, speech, and expression.<sup>112</sup> In the area of employment, the right to request a religious exemption arises from the Civil Rights Act of 1964.<sup>113</sup> However, like all liberties and rights discussed above, these freedoms are not “absolute” and certainly not meant to be abused or pushed to the absolute brink.<sup>114</sup> For years, there have been religious exemptions to medical treatments however, during the COVID-19 pandemic, they are now being used and abused widely so that many individuals can have a “way out” of vaccine mandates.<sup>115</sup> Despite this growing abuse, many religious leaders have come forward to state that receiving the vaccine will not go against religious teachings and can be done in good conscience.<sup>116</sup> This concept spreads far and wide across many religious backgrounds. Catholics, Baptists, Latter-day Saints, Greek Orthodox, and the Evangelical Lutheran Church have all made a number of statements in support of vaccination and that it will not go against any moral/ethical teachings of these respective religions.<sup>117</sup>

One argument that raises ethical issues is the alleged use of fetal tissue in the testing of the Johnson&Johnson vaccine and how receiving such vaccine would be morally reprehensible, especially for those of Christian, and specifically, the Catholic, faith.<sup>118</sup> However, this argument is weak when one considers the number of other medications that are taken in which alleged fetal tissue is used in testing.<sup>119</sup> Reverend Robert Jeffress quashes this argument by stating,

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<sup>112</sup> See Constitution Annotated, *Constitution of the United States: First Amendment*, LIBR. OF CONG. (2021), <https://constitution.congress.gov/constitution/amendment-1/> (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

<sup>113</sup> Andrea Hsu & Shannon Bond, *Getting a religious exemption to a vaccine mandate may not be easy. Here’s why*, NAT’L PUB. RADIO (Sept. 20, 2021), <https://www.npr.org/2021/09/28/1041017591/getting-a-religious-exemption-to-a-vaccine-mandate-may-not-be-easy-heres-whyf>.

<sup>114</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

<sup>115</sup> See Colleen Long & Andrew Demillo, *As COVID-19 vaccine mandates rise, religious exemptions grow*, ASSOCIATED PRESS (Sept. 15, 2021), <https://apnews.com/article/joe-biden-health-religion-los-angeles-arkansas-3ba53f2f00e1ab7105d7d128f2b1e65d> (discussing states like Oklahoma who now have a free printable “vaccine exemption form” that their religious leaders will sign, as well as Arkansas where so many have invoked religious exemptions the state has begun to question the validity of these claims).

<sup>116</sup> Peter Smith, *Many faith leaders say no to endorsing vaccine exemptions*, ASSOCIATED PRESS (Sept. 17, 2021), <https://apnews.com/article/health-religion-united-states-coronavirus-pandemic-coronavirus-vaccine-9c947aced6ba26b4c78827b7b87c185>.

<sup>117</sup> *Id.* (discussing how the Greek Orthodox leaders have said, “No clergy are to issue such religious exemption letters,” as well as the Baptists who have said their churches “are neither offering nor encouraging members to seek religious exemptions from the vaccine mandates.”)

<sup>118</sup> See Hsu & Bond, *supra* note 113.

<sup>119</sup> *Id.* (For example, Conway Regional CEO took this approach when considering religious exemptions, “Before granting the religious exemptions, Troup sent the employees

There is no credible religious argument against the vaccines. . . Christians who are troubled by the use of a fetal cell line for the testing of the vaccines would also have to abstain from the use of Tylenol, Pepto Bismol, Ibuprofen, and other products that used the same cell line if they are sincere in their objection.<sup>120</sup>

This point is not meant to assert that there are no religious exemptions recognized for vaccines. Religious exemptions are very real for some people – it is simply a matter of making sure neither the system is abused, nor are people’s religious rights being infringed upon.<sup>121</sup> On CNN’s “State of the Union” in early October, Dr. Anthony Fauci gave an interview in which he said,

There are precious few religions that actually say, you cannot do that, I mean, very, very few, I mean, literally less than a handful. But people sometimes confuse a philosophical objection with a religious objection. When you talk about actually established religions, there are so few of those that actually will not allow you to get vaccinated.<sup>122</sup>

He would go on to say that it will be incredibly difficult to distinguish excuse from firmly held belief but hoped that people would see vaccination as a societal responsibility to promote the health and safety of both themselves and their communities.<sup>123</sup> This is important to note because, even if extremely minimal, there are a small number of established religions who oppose and refuse vaccinations.<sup>124</sup> Like medical exemptions, states will need to closely analyze their policies for implementing vaccine mandates and ensure that there are

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a list of 28 commonly used medicines that also used fetal cells in their research, testing or development — a list that includes Tylenol, Motrin, Tums, Ex-Lax and other medicine cabinet staples. He asked employees to attest to not be using any of those medicines.”)

<sup>120</sup> Smith, *supra* note 116.

<sup>121</sup> See Daniel Wiessner, *New EEOC guidance focuses on religious exemptions from vaccine mandates*, REUTERS (Oct. 26, 2021), <https://www.reuters.com/legal/government/new-eec-guidance-focuses-religious-exemptions-vaccine-mandates-2021-10-26/> (At the end of October, the EEOC released new guidance pertaining to employee’s requests for religious exemptions and clarified, “In Monday’s guidance, the commission said that while Title VII requires employers to consider requests for religious accommodations, the law does not protect workers’ social and political views or personal preferences.”).

<sup>122</sup> *State of the Union Transcripts*, CNN (Oct. 3, 2021), <https://transcripts.cnn.com/show/sotu/date/2021-10-03/segment/01>.

<sup>123</sup> *Id.*

<sup>124</sup> See Clint Rainey, *Religious exemptions to the COVID-19 vaccine: Here’s what faith leaders actually say*, FAST CO. (Sept. 17, 2021), <https://www.fastcompany.com/90677428/religious-exemptions-to-the-covid-19-vaccine-heres-what-faiths-leaders-actually-say> (In a research study by Vanderbilt, a list of religious groups that officially oppose vaccines was compiled: Christian Scientists, the Dutch Reformed Church, and a small subset of Protestant denominations that practice faith healing.)

safeguards in place for those whose First Amendment right to freedom of religion could be violated by too stringent of a mandate.

### *Negative Implications of a Vaccine Mandate*

For years, many have raised ethical issues when the discussion of vaccine mandates is brought to the table. Some notable issues that are raised time and time again are government overreach, access disparities, and psychological implications.

As with any law, mandate, or regulation, there is always a concern with what implications they may have and what path that it paves for the future. One specific concern is how broad measures are and if their implementation gives the government too much power. One result of subsequent court interpretations of the *Jacobson* case was a misunderstanding of dicta, and thus the expansion of the concept, *parens patriae*.<sup>125</sup> The doctrine of *parens patriae* allows for state intervention when it comes to providing health and safety for children.<sup>126</sup> Courts, in applying the use of *parens patriae*, often cite to dicta from previous cases invoking the same principles.<sup>127</sup> This raises the potential for Due Process issues when it comes to how states would procedurally mandate a vaccination and whether there are any substantive fundamental rights infringements that would result from requiring all eligible children and adults be vaccinated.<sup>128</sup> Additionally, invoking this type of requirement has the potential to allow for government overreach when previous dicta is cited as to why states should be able to usurp parents decision making regarding their children.<sup>129</sup> *Parens patriae* is exceedingly relevant with the approval of vaccines for children ages five to eleven and a handful of school districts now mandating a COVID-19 vaccine for in-person school attendance.<sup>130</sup> While it has been stated time and time again that parental rights, in addition to liberties and freedoms, are not absolute, it is important to be aware of potential government overreach and ensure that safeguards are in place to prevent setting such a precedent.

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<sup>125</sup> Katherine Drabiak, *Disentangling Dicta: Prince v. Massachusetts, Police Power and Childhood Vaccine*, 29 ANNALS OF HEALTH L. & LIFE SCI. 173, 178 (2020), [https://www.annalsofhealthlaw.com/annalsofhealthlaw/volume\\_29\\_issue\\_1/MobilePagedArticle.action?articleId=1558497#articleId1558497](https://www.annalsofhealthlaw.com/annalsofhealthlaw/volume_29_issue_1/MobilePagedArticle.action?articleId=1558497#articleId1558497).

<sup>126</sup> *Id.* at 179.

<sup>127</sup> *Id.* at 181. (referring to the *Prince v. Massachusetts* case where it was distinguished that that case did not regard state vaccine mandates although it is often referenced when citing dicta as to explain why they should be enforced.)

<sup>128</sup> *Id.* at 183.

<sup>129</sup> *Id.* at 182.

<sup>130</sup> Associated Press, *New Orleans will be the first major school district to mandate COVID vaccinations*, NAT'L PUB. RADIO (Jan. 31, 2022), <https://www.npr.org/sections/coronavirus-live-updates/2022/01/31/1077131726/new-orleans-will-be-the-first-major-school-district-to-mandate-covid-vaccination>.

As discussed before, the reason that health justice is so vital is that it is meant to ensure fair access to resources as well as the ability to achieve well-being in all areas of life.<sup>131</sup> While access disparities in health care have plagued both the United States and the world for far too long, the COVID-19 pandemic has shown just how detrimental these access disparities are.<sup>132</sup> Without proper remedy and attention, health equity through fair access is unable to be achieved.<sup>133</sup> One area of life that highlighted these access disparities was technology and the ability to make and travel to vaccine appointments. It became, and continues to become, evidently clear that marginalized groups were suffering the most due to the lack of connectivity and availability to access technology.<sup>134</sup> Another issue is that many of these marginalized groups are not technologically literate, so, even with proper access, they struggle to make appointments or even figure out how to do so.<sup>135</sup> Even more problematic is the lack of access to multilingual websites, therefore ostracizing certain minorities who may not speak English fluently or at all.<sup>136</sup>

In addition to the access and technological disparities, adults in the United States with disabilities reported lower vaccination rates even though their hesitancy about getting a vaccine was lower.<sup>137</sup> Despite vaccination sites popping up all over states and counties, the variability in access opportunities left many with disabilities to struggle to find locations that had adequate accessibility options.<sup>138</sup> The Americans with Disabilities Act requires that vaccination sites be compliant with the Act however it does not require having experienced persons who can work with those who have intellectual or other developmental disabilities, and it also does not require having someone who is proficient in American Sign Language.<sup>139</sup> In order to meet the goals of health justice as well as adjust to the inequities that plague adults with disabilities in the United States, vaccination sites must change to become more accessible, provide information in formats such as ASL and braille, and regularly document demographics

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<sup>131</sup> Peterson et al., *supra* note 55.

<sup>132</sup> See Riley, *supra* note 53.

<sup>133</sup> *Id.*

<sup>134</sup> Valerie G. Press et al., *Inequities in Technology Contribute to Disparities in COVID-19 Vaccine Distribution*, 2 JAMA HEALTH F., Mar. 19, 2021, at 1, 1-2, <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2777888>.

<sup>135</sup> *Id.* at 2.

<sup>136</sup> *Id.*

<sup>137</sup> A. Blythe Ryerson et al., *Disparities in COVID-19 Vaccination Status, Intent, and Perceived Access for Noninstitutionalized Adults, by Disability Status – National Immunization Survey Adult COVID Module*, 70 MORBIDITY & MORTALITY WEEKLY REP. 1365, 1365 (Oct. 1, 2021), [https://www.cdc.gov/mmwr/volumes/70/wr/mm7039a2.htm?s\\_cid=mm7039a2\\_w](https://www.cdc.gov/mmwr/volumes/70/wr/mm7039a2.htm?s_cid=mm7039a2_w).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1367.

of the areas of those most in need to ensure that some of the United States most vulnerable populations are not left behind.<sup>140</sup>

Perhaps the most surprising negative implication of a vaccine mandate is one that affects an area of life that is often overlooked, the psychological implications. Researchers from the German Research Foundation conducted a study in early 2021 and found some surprising results.<sup>141</sup> According to their application of psychological reactance theory (reaction to the expansion or limitation of an individual's regarding behavior freedom),<sup>142</sup> they found that by making vaccination mandatory, people would react negatively and, instead of furthering the goal of decreasing vaccine hesitancy, would instead increase it.<sup>143</sup> As predicted, those in the study who had clear intentions of avoiding the COVID-19 vaccine were also more reluctant.<sup>144</sup> What's most shocking is that more than a handful of vaccines are required for children to attend school, for teens to enter college, and even sometimes enter the workforce.<sup>145</sup> It will require more study and long-term research, but it is safe to surmise that due to how politicized and polarized COVID-19 has become, these psychological reactions are only fueled by what is splayed across television screens day in and day out.

Ultimately, the benefits of a state vaccine mandate outweigh the negative implications of such mandates. Promoting the health and wellbeing of society is critical to the survival of individuals all throughout the United States. However, it is also critical that in making these mandates, the negative implications are evaluated state-by-state in the hopes that they can be diminished and the concerns of those who will be affected are adequately addressed. Additionally, light must be shed on these issues in the hopes that they become as important as the vaccine mandate itself.

## SEPARATING POLITICS FROM HEALTH AMIDST A GLOBAL HEALTH CRISIS

The advent and subsequent growth in popularity of social media have caused both politics and healthcare to be thrust onto the public forum, ultimately combining the two. Accessible in a matter of seconds are opinions, scholarly research, and a wealth of misinformation. While important that each of these areas gets attention so

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<sup>140</sup> *Id.* at 1370.

<sup>141</sup> Philipp Sprengholz et al., *Reactance Revisited: Consequences of Mandatory and Scarce Vaccination in the Case of COVID-19*, 13 *APPLIED PSYCH.: HEALTH & WELL-BEING* 986-95 (Apr. 29, 2021), <https://doi.org/10.1111/aphw.12285>.

<sup>142</sup> *Id.* at 987.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 987, 991.

<sup>145</sup> See Orenstein & Hinman, *supra* note 12, at 20-21.

that problems can be addressed and solved, the real issue arises when the two clash and one must suffer at the expense of the other.<sup>146</sup> Especially during a global pandemic, when the need for solid healthcare is more critical than ever, the implementation of vaccine mandates and health justice measures will increase available liberties.<sup>147</sup> This section seeks to identify the damaging effects of political influence and then argue as to how politics and health can co-exist and be beneficial to society.

### The Damaging Effects of Political Influence on Health Justice

While the incredible death toll is certainly one of the most devastating aspects of the COVID-19 pandemic, another glaring issue that often goes hand-in-hand is the damaging influence of politics on health and health justice. Instead of implementing state vaccine mandates and seeking equitable distribution of vaccines, politicians nationwide have created vaccine, mask, and other various bans to “protect liberties and freedoms.”<sup>148</sup> Unlike any health disaster the United States, and even the world, has seen before, COVID-19 has been politicized to the point of dividing families with differing beliefs.<sup>149</sup> Some of the consequences of such politicization has been governors of various states (e.g. Florida, Texas, and South Dakota), lifting mitigation measures, and effectively encouraging their residents to ignore all health and safety measures amidst a continuing deadly global pandemic.<sup>150</sup>

Another problematic argument is the false notion that the federal government is going to make a nationwide mandate for the COVID-19 vaccine for all citizens.<sup>151</sup> However, this has never been done in the history of the United States and likely will not be a move that the Supreme Court would validate, given that it would be an overreach

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<sup>146</sup> Michael K. Gusmano, *Medicine and Society: Power, Politics, and Health Spending Priorities*, 14 AM. MED. ASS'N. J. OF ETHICS, 885, 885-89 (2012), <https://journalofethics.ama-assn.org/sites/journalofethics.ama-assn.org/files/2018-05/msoc1-1211.pdf>.

<sup>147</sup> See generally John Buarotti, *New AAMC Center for Health Justice to Address Health Inequities, Improve Community Health*, ASS'N OF AM. MED. COLLS. (Sept. 21, 2021), <https://www.aamc.org/news-insights/press-releases/new-aamc-center-health-justice-address-health-inequities-improve-community-health>.

<sup>148</sup> Alana Wise, *The political fight over vaccine mandates deepens despite their effectiveness*, NAT'L PUB. RADIO (Oct. 17, 2021), <https://www.npr.org/2021/10/17/1046598351/the-political-fight-over-vaccine-mandates-deepens-despite-their-effectiveness> (“For some of those who have not been vaccinated, the message from conservative leaders like Abbott and DeSantis about choice and liberty resonates, despite public health guidance on how to prevent serious illness and death from the coronavirus. Somehow it has morphed into not getting the vaccine as a way to defend their freedom and resist this ‘tyranny[.]’”).

<sup>149</sup> See Lawrence O. Gostin, *Vaccine Mandates Are Lawful, Effective & Based on Rock-Solid Science*, SCI. AM. (Aug. 5, 2021), <https://www.scientificamerican.com/article/vaccine-mandates-are-lawful-effective-and-based-on-rock-solid-science/>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

of governmental power when such mandates and laws are left to the respective states to implement.<sup>152</sup> The 10<sup>th</sup> Amendment and Supreme Court precedent provide safeguards that keep separate the power of the federal government and individual states. To state otherwise is to illustrate an incorrect understanding of the substance of the Constitution and add fuel to the disinformation campaign that has caused deep mistrust throughout the United States.

The above arguments illustrate the larger issue that for over a year now, there has been a firm belief by a large percentage of Americans who truly believe that most scientific research and recommendations are politically motivated.<sup>153</sup> As a result, those who believe this notion are less likely to follow said recommendations and either become COVID-19 victims or carriers who then infect their family members and communities, leaving devastation in their wake.<sup>154</sup> The only way to counter this devastating effect is for scientists and public health officials to attempt to counteract this misinformation by giving warnings about inaccurate information, a tactic that has thus far had little success.<sup>155</sup>

All of these detrimental effects of politics on the COVID-19 pandemic have also been damaging to health justice.<sup>156</sup> Perhaps one of the most disastrous results of this, besides lack of access to vaccines, job loss, and educational setbacks, is the concept of medical rationing quickly becoming the norm as hospitals battle COVID-19 surges and, as a result, do not have enough beds to treat members of their community.<sup>157</sup> What has medical rationing done to hospitals? It has caused them to invoke “crisis care standards,” meaning resources are allocated only to those patients who are most likely to survive.<sup>158</sup> This not only affects critically ill COVID-19 patients but others who need day-to-day and lifesaving care.<sup>159</sup> For example, the oxygen demand is so high among COVID-19 patients, that hospital administrators are now having to evaluate and decide what hospice and homebound patients are in the greatest need of oxygen and if their current tanks

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<sup>152</sup> *Id.*

<sup>153</sup> Cary Funk, *Key Findings about Americans' confidence in science and their views on scientists' role in society*, PEW RSCH. CTR. (Feb. 12, 2020), <https://www.pewresearch.org/fact-tank/2020/02/12/key-findings-about-americans-confidence-in-science-and-their-views-on-scientists-role-in-society/>.

<sup>154</sup> Danielle M. McLaughlin et al., *The belief that politics drive scientific research & its impact on the COVID-19 risk assessment*, PLOS ONE 1, 9 (Apr. 21, 2021), <https://doi.org/10.1371/journal.pone.0249937>.

<sup>155</sup> *Id.* at 9.

<sup>156</sup> Gusmano, *supra* note 146, at 886-87.

<sup>157</sup> Rebecca Boone, *COVID-19 surge forces health care rationing in parts of the West*, ASSOCIATED PRESS (Sept. 16, 2021), <https://apnews.com/article/health-public-health-coronavirus-pandemic-idaho-a0729894b42af1c3dadecaffeabea0c>.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

can be stretched to last longer.<sup>160</sup> As if this is not terrifying enough, there have now been numerous accounts of people having heart attacks, organ failure, or other emergency needs that simply died due to every ICU and hospital in the area and beyond being at capacity.<sup>161</sup> The United States must do better to protect the individuals that live within its borders and until science and politics can have a symbiotic relationship, many more unnecessary deaths and damage to health justice will occur.

### How Science, Health, and Politics can Co-exist

The clash between science and politics did not start with the COVID-19 pandemic. In fact, it has been around for decades with evidence of scientific manipulation to further political ideologies tracing back to World War II.<sup>162</sup> In order for science to flourish and to continue to obtain funding for research efforts, the scientific community has to maintain an amicable relationship with Congress and the government as they are the main source of funding for scientific research.<sup>163</sup> In order for science and politics to have a symbiotic relationship, it is critical that there is trust and a high level of confidence between these two worlds.<sup>164</sup> This requires an understanding from both sides of the spectrum in order to succeed.<sup>165</sup> Scientists need the politicians to understand that the best way that they can inform policy is to come to conclusions based on best judgments and expert technical facts from other people in the scientific community.<sup>166</sup> Politicians, on the other hand, need scientists to understand that while the technical analysis of scientists is important, they also make decisions based on the good of their constituents and what would be the best for policy and advocacy at that given time.<sup>167</sup> Lewis Branscomb argues that there are rules that both sides can follow in order that both of their goals are achieved and that this is not an impossible concept to implement<sup>168</sup>.

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<sup>160</sup> *Id.*

<sup>161</sup> See Scott Neuman, *A Man Died After Being Turned Away From 43 ICUs At Capacity Due To COVID, Family Says*, NAT'L PUB. RADIO (Sept. 14, 2021), <https://www.npr.org/sections/coronavirus-live-updates/2021/09/13/1036593269/coronavirus-alabama-43-ic-us-at-capacity-ray-demonia> (discussing how a man from Alabama suffered a cardiac emergency, was turned away from forty-three ICUs, and ultimately died at the nearest available hospital, 200 miles away in Mississippi.).

<sup>162</sup> Lewis M. Branscomb, *Science, Politics, and U.S. Democracy*, 21 *ISSUES IN SCI. & TECH.* (2004), <https://issues.org/branscomb-3/>.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See *id.* (The proposal of four potential rules: 1) public documentation of the criteria for selection of scientists to serve on advisory committees, 2) science in key policy and

Ultimately, the country, and the world, need science and politics to have a symbiotic relationship. Without it, scientific evidence that can be implemented to help save lives and promote the common good is overshadowed by political games that end up doing more harm than good to the community.

## CONCLUSION

As of this writing, it has been nearly two years since the COVID-19 pandemic changed the world forever. While the path forward remains unclear, the miracle of science has allowed for the creation of safe and effective COVID-19 vaccines. The United States is now able to implement a formidable tool to hopefully end the pandemic once and for all. Although some people believe that state vaccine mandates steal freedoms, infringe upon personal liberties, and are unconstitutional, this certainly is not the case. As shown in the analysis above, vaccine mandates require the evaluation of vaccine history, health justice, ethical considerations, and the co-existence of politics, health, and science. By implementing situation-specific, state vaccine mandates to promote the greater good, the result is a protection of individual liberties and a promotion of health justice. It is not a one-size-fits-all approach, but rather a calculated measure to ensure full access to life, liberty, and the pursuit of happiness while unencumbered by the risks of a deadly disease that will ultimately strip people of those enumerated rights.

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regulatory decisions must be published before final regulatory decisions, 3) the establishment of an effective system of protection for whistleblowers, and 4) formal documentation by the President of the policies that govern the relationship between science advice and policy.).