**Introduction**

With the resurgence of measles outbreaks and a correlating increase in legal confrontations over state law mandates on vaccinations, and in the context of the covid-19 pandemic and the race for a vaccine, which has already spawned controversy, protests, and conspiracy theories,[[1]](#footnote-2) a brief examination of state and federal authority to mandate vaccinations could prove prescient.

1. **Federal Authority to Protect Public Health**

Although the federal government does have the authority to protect the public health of the nation, it must do so through its enumerated powers, such as quarantine of travelers into the country to protect against diseases of foreign origin;[[2]](#footnote-3) the ability to tax and spend to incentivize or disincentivize risky health behavior;[[3]](#footnote-5) or the regulation of commerce and travel between states. Most Americans may be surprised to learn that the Constitution does not include an affirmative obligation for the federal government to ensure the public health. Yet, as Justice Rhenquist has argued, the Due Process Clause

is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without “due process of law,” but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.[[4]](#footnote-6)

Thus, the federal government has no Constitutionally-mandated affirmative *obligation* to protect the public health. But it is hard to argue that a global pandemic, with cases and deaths in every state in the nation, would not legally *support* a vigorous federal response, even under the most conservative reading of its Constitutionally-enumerated powers. However, should Washington choose not to pursue policies to incentivize or require comprehensive nation-wide covid-19 vaccinations, implementation of vaccination mandates would fall to the states.

1. **State Authority to Protect Public Health**

Indeed, most public health authority falls within states’ police powers established by the 10th amendment of the Constitution,[[5]](#footnote-7) and supported by a robust history of legal precedent. The power of states to require vaccination has been traditionally grounded in circumstances of extreme danger, described as “an epidemic threatening the safety of all,” and couched in conditions requiring the protection of the general public.[[6]](#footnote-8)

1. **Public Health Trumps Individual Liberty**

In *Jacobson v. Massachusetts*, a classic public health case, the Supreme Court recognized that mandatory vaccination is an infringement on the liberty interest of the individual but argued:

[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.[[7]](#footnote-9)

The Court emphasized that it is the presence of such “great dangers,” that permits a state to exercise its power over the rights of the individual in the interest of the public health and safety. Yet the Court recognized the potential for abuse and cautioned that this power might be exercised

in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.[[8]](#footnote-10)

This last highlights recent disparities in negative covid-19 outcomes for patients by race, and also recalls a grim history of the mistreatment of African Americans in medical research.[[9]](#footnote-11)

1. **Potential Exceptions**

Plaintiffs from marginalized groups with a history of disparate medical treatment, negative covid-19 outcomes,[[10]](#footnote-12) and specifically, a history of exploitation in medical studies, could potentially successfully request the courts to intervene against mandatory vaccination of these groups with an early or insufficiently proven version of the vaccine.

However, as the above-described legal precedent makes clear, courts will tend to find most regulations of general application to protect the public health “reasonable,” and within the powers of the states.

**Conclusion**

Although there is clear legal precedent for the states to mandate vaccination when necessary to protect the public health, and all 50 states have some form of mandatory vaccination regime, every state also provides exceptions for medical reasons and many also provide opt-out provisions for religious or moral reasons. Therefore, if covid-19 vaccination is driven by state policies, rates of compliance will vary across the country and could potentially undermine the possibility of achieving herd immunity. [[11]](#footnote-13)

1. One of the most prominent conspiracy theories in May 2020 unifies conspiracy theories about the purported dangers of childhood vaccinations with an assertion that the covid-19 pandemic is a plot to increase vaccination rates. Numerous social media sites have removed the film from their platforms for spreading “harmful and misleading health information.” Katie Shepherd, *Who is Judy Mikovits in ‘Plandemic,’ the Coronavirus Conspiracy Video Just Banned From Social Media?* Wash. Post (May 8, 2020), https://www.washingtonpost.com/nation/2020/05/08/plandemic-judy-mikovits-coronavirus/ [↑](#footnote-ref-2)
2. Mandatory quarantine for immigrants with potential symptoms of illness was a common feature of immigration through Ellis Island in the late 19th and early 20th centuries. More recently, a national quarantine was the subject of some public interest and controversy during the 2014 Ebola outbreak in the United States when then-President Barack Obama rejected calls to quarantine public health workers returning from volunteering in Ebola-affected countries in West Africa. *See* Juliet Eilperin, Brady Dennis & Joel Achenbach, *Obama Assails Ebola Quarantines, Saying They are Based on Fear, Not Facts*, Wash. Post (Oct. 18, 2014), https://www.washingtonpost.com/national/health-science/amber-vinson-dallas-nurse-leaving-hospital-after-ebola-cure/2014/10/28/d37e7fae-5e95-11e4-8b9e-2ccdac31a031\_story.html [↑](#footnote-ref-3)
3. Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design,* 11 Health Matrix, 265, 275 (2001), https://scholarlycommons.law.case.edu/healthmatrix/vol11/iss2/4 [↑](#footnote-ref-5)
4. DeShaney v. Winnebago County Dep’t of Soc. Serv., 489 U.S. 189, 195-96 (1989). [↑](#footnote-ref-6)
5. U.S. Const. amend. X. [↑](#footnote-ref-7)
6. Jacobson v. Commonwealth of Massachusetts*,* 197 U.S. 11 (1905). In a deadly smallpox epidemic, the court upheld a Massachusetts law requiring all residents to receive the vaccine, even though such a requirement was an infringement on an individual’s liberty. [↑](#footnote-ref-8)
7. *Id.* [↑](#footnote-ref-9)
8. *Id.* [↑](#footnote-ref-10)
9. There is deep suspicion of medical research among communities of color as a result of studies such as the *Tuskegee Study of Untreated Syphilis in the Negro Male*, in which researchers recruited African-American syphilis patients, but did not inform them they had the disease or provide them treatment in order to study the natural progression of the disease. [↑](#footnote-ref-11)
10. ## APM Research Lab Staff, *The Color of Coronavirus: Covid-19 Deaths by Race and Ethnicity in the U.S.* (May 8, 2020), <https://www.apmresearchlab.org/covid/deaths-by-race>. “The latest available COVID-19 mortality rate for Black Americans is 2.3 times higher than the rate for Asians and Latinos, and 2.6 times higher than the rate for Whites.”

    [↑](#footnote-ref-12)
11. U.S. Dept. of Health & Human Services, Centers for Disease Control & Prevention & the World Health Organization, “Herd Immunity Thresholds for Selected Vaccine-Preventable Diseases,” *History and Epidemiology of Global Smallpox Eradication*, Smallpox: Disease, Prevention, and Intervention (Aug. 25, 2014) at 17, https://stacks.cdc.gov/view/cdc/27929. The threshold for many of the other diseases requiring mandatory vaccination hovers around and above 80%: *e.g*. the percentage of a population that must be vaccinated to halt the spread of Diphtheria is 85%; Pertussis requires that 92-94%; polio, rubella, and smallpox require vaccination of 80-86% of the population. [↑](#footnote-ref-13)