

6-20-2022

## Subsidizing the Unvaccinated: Considering the Legality and Practicality of Vaccine Mandates for Those on Public Assistance

Michael Conklin

Follow this and additional works at: <https://scholarship.law.nd.edu/jleg>



Part of the [Legislation Commons](#)

---

### Recommended Citation

Michael Conklin, *Subsidizing the Unvaccinated: Considering the Legality and Practicality of Vaccine Mandates for Those on Public Assistance*, 48 J. Legis. 201 (2021).

Available at: <https://scholarship.law.nd.edu/jleg/vol48/iss2/2>

This Article is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized editor of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# SUBSIDIZING THE UNVACCINATED: CONSIDERING THE LEGALITY AND PRACTICALITY OF VACCINE MANDATES FOR THOSE ON PUBLIC ASSISTANCE

Michael Conklin\*

## INTRODUCTION

Starting in early 2020, the COVID-19 pandemic affected nearly every aspect of American life. Curfews were implemented,<sup>1</sup> schools were closed,<sup>2</sup> restaurants were forced to shut down,<sup>3</sup> face-mask mandates were established,<sup>4</sup> and even the Supreme Court temporarily closed.<sup>5</sup> In less than two years, over 800,000 Americans have died from the virus.<sup>6</sup> Operation Warp Speed was announced on May 1, 2020 in an effort to expedite the creation and distribution of COVID-19 vaccines.<sup>7</sup> In December of 2020, the first COVID-19 vaccine received emergency authorization from the FDA and was administered.<sup>8</sup> Initially, there was limited supply of the vaccine, leading to contentious debates as to who should be prioritized for vaccination.<sup>9</sup> Soon thereafter, supply exceeded demand, and the issue transitioned into incentivizing the unvaccinated to get vaccinated. In response, the federal government arranged free

---

\*Powell Endowed Professor of Business Law, Angelo State University. I would like to thank Professor Josh Blackman for his invaluable feedback on this topic.

1. Ronn Blitzer, *Curfews, Closures and More: What the Government Can and Can't Do in a Health Emergency*, FOX NEWS (Mar. 19, 2020, 3:35 PM), <https://www.foxnews.com/politics/curfews-closures-and-more-what-the-government-can-and-cant-do-in-a-health-emergency>.

2. See Erin Richards, *Trump: States Can Cancel Standardized Tests*, USA TODAY (Mar. 20, 2020, 2:37 PM), <https://www.usatoday.com/story/news/education/2020/03/20/coronavirus-trump-standardized-tests-canceled-school-closing/2885842001/>.

3. Anna Wiederkehr, *Coronavirus Is Hitting Restaurants Hard, Even in States That Haven't Shut Them Down*, FIVETHIRTYEIGHT (Mar. 19, 2020, 2:58 PM), <https://fivethirtyeight.com/features/coronavirus-is-hitting-restaurants-hard-even-in-states-that-havent-shut-them-down/>.

4. Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (Mar. 14, 2022), <https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus/>.

5. Katie Bart & Kalvis Golde, *Supreme Court's Closure Could Be First Disease-Related Shuttering in a Century (Updated)*, SCOTUSBLOG (Mar. 12, 2020, 5:27 PM), <https://www.scotusblog.com/2020/03/supreme-courts-closure-could-be-first-disease-related-shuttering-in-a-century/>.

6. *United States Coronavirus Cases*, WORLDOMETER (Mar. 14, 2022), <https://www.worldometers.info/coronavirus/country/us/>.

7. Jon Cohen, *Unveiling 'Warp Speed,' the White House's America-First Push for a Coronavirus Vaccine*, SCIENCE (May 12, 2020), <https://www.science.org/content/article/unveiling-warp-speed-white-house-s-america-first-push-coronavirus-vaccine>.

8. Jacqueline Howard, *FDA Issues Emergency Use Authorization for Pfizer/BioNTech Covid-19 Vaccine*, CNN HEALTH (Dec. 12, 2020, 3:40 AM), <https://www.cnn.com/2020/12/11/health/covid-vaccine-fda-eua/index.html>.

9. See, e.g., Michael Conklin, *Racial Preferences in COVID-19 Vaccination: Legal and Practical Implications*, 5 HOW. HUM. & C.R. L. REV. 141 (2021).

childcare and rides to vaccination clinics; private companies offered paid time off and sweepstakes; and states offered scholarships, free food, and multi-million-dollar lotteries.<sup>10</sup> Some judges began requiring vaccination as a condition of probation<sup>11</sup> while others offered reduced sentences if defendants received their COVID-19 vaccine.<sup>12</sup>

Despite the high efficacy of the vaccines, the high death toll of the virus, and the incentives in place, millions of Americans refused to get vaccinated.<sup>13</sup> In response, on September 9, 2021, President Joe Biden announced that companies with more than 100 employees will be fined \$14,000 per instance of an employee either not being fully vaccinated or not producing a weekly negative test result and wearing a mask.<sup>14</sup> This mandate<sup>15</sup> is enforced by the Occupational Safety and Health Administration (“OSHA”) under its emergency temporary standard (“ETS”) powers.<sup>16</sup> Despite containing both medical and religious exemptions,<sup>17</sup> the vaccine mandate immediately sparked debate as to its constitutionality.<sup>18</sup> And some further questioned why the employed were targeted rather than those on public assistance.<sup>19</sup>

Immediately after the promulgation of OSHA’s ETS—which bypasses typical notice-and-comment proceedings—numerous states, employers, religious

10. Devon Delfino, *Incentives for COVID-19 Vaccination: Food, Cash, & Other Perks*, GOODRX HEALTH (June 24, 2021), <https://www.goodrx.com/health-topic/vaccines/covid-19-vaccination-incentives>.

11. Christine Hauser, *Get a Covid-19 Vaccine or Face Prison, Judges Order in Probation Cases*, N.Y. TIMES (Aug. 9, 2021), <https://www.nytimes.com/2021/08/09/us/ohio-judge-covid-vaccine.html>.

12. Tony Thomas, *Some Local Judges Offering Sentence Reductions to Offenders Who Get Vaccinated*, WSB-TV (May 20, 2021, 6:58 PM), <https://www.wsbtv.com/news/local/hall-county/some-judges-offering-sentence-reductions-offenders-who-get-vaccinated/6OCVPVEBXRCE TMV3XCNTJCJKP4/>.

13. In late August 2021—shortly before President Biden announced the mandate—nearly seventy million adults were unvaccinated in America. Elliot Ramos, *Map: See How Many Adults in the U.S. Have Not Been Vaccinated, by State*, NBC NEWS (Aug. 23, 2021, 5:52 PM), <https://www.nbcnews.com/news/us-news/map-see-how-many-unvaccinated-adults-united-states-n1277487>.

14. President Joseph Biden, *Remarks by President Biden on Fighting the COVID-19 Pandemic*, WHITE HOUSE (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>. For the purposes of this Article, it is presumed that paying for weekly COVID tests is not a feasible option for the majority of workers affected by the mandate and therefore refusal to be vaccinated will result in being fired.

15. It is important to define the difference between the often-confused difference between a vaccine *mandate* and *compulsory* vaccination. A mandate sets conditions on participation in activities, such as work, school, or travel, to incentivize vaccination. A compulsory vaccine is required regardless of consent. Jennifer L. Piatt et al., *When Can You Be Required to Get a COVID-19 Vaccine?*, SLATE: FUTURE TENSE (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3819788](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3819788).

16. Rich Mendez, *What You Need to Know About President Joe Biden’s New Covid Vaccine Mandates*, CNBC (Sept. 10, 2021, 4:49 PM), <https://www.cnbc.com/2021/09/10/what-you-need-to-know-about-president-joe-bidens-new-vaccine-mandates.html>.

17. *Id.*

18. *See, e.g.*, John Yoo & Robert J. Delahunty, *Why Biden’s Vaccine Mandate Fails the Constitutional Test*, NAT’L REV. (Sept. 23, 2021, 6:30 AM), <https://www.nationalreview.com/2021/09/why-bidens-vaccine-mandate-fails-the-constitutional-test/>.

19. *See, e.g.*, Chris Talgo, *Why Does Biden’s Vaccine Mandate Not Apply to Welfare Recipients and Others?*, THE HILL (Sept. 18, 2021, 1:00 PM), <https://thehill.com/opinion/healthcare/572858-why-does-bidens-vaccine-mandate-not-apply-to-welfare-recipients-and-others>.

institutions, and other entities moved to stay the mandate.<sup>20</sup> The claims bypassed district court under 29 U.S.C. § 655(f)<sup>21</sup> and were filed in each of the twelve regional circuit courts.<sup>22</sup> This implicated the Multicircuit Petition Statute, 28 U.S.C. § 2112(a), which requires one appellate court to be randomly selected to hear all of the cases.<sup>23</sup> The Sixth Circuit was randomly selected out of a drum containing ping pong balls with numbers corresponding with all of the circuits; recently, the Sixth Circuit “upheld the injunction for the three states in a 2-1 ruling.”<sup>24</sup>

This Article provides an overview of the polarizing responses to the mandate. The Article then conducts a brief analysis of the legality of such a mandate. It then focuses on the potential legality of vaccine mandates as a requirement for receiving public assistance. Finally, it concludes by considering potential reasons for implementing a mandate on employees instead of—or in addition to—those on public assistance.

### CRITICISM AND PRAISE OF PRESIDENT BIDEN’S VACCINE MANDATE

Policies regarding COVID-19 have been a continuous source of controversy and vehement disagreement.<sup>25</sup> Therefore, it is not surprising that the announcement of President Biden’s vaccine mandate sparked praise by some and criticism from others. Infectious disease expert Dr. William Schaffner praised the policy by comparing it to a military draft.<sup>26</sup> Democratic politicians largely praised the mandate and believe it will prove beneficial to their reelection efforts.<sup>27</sup> Some even claim that the large companies who will now have to enforce President Biden’s mandate are pleased with it because it creates uniformity (companies do not have to worry that their fired unvaccinated workers will go to a competitor), reduces the risk of losing valuable

---

20. Colter Paulson & Shams Hirji, *The Sixth Circuit and the OSHA Vaccine Mandate*, SIXTH CIR. APP. BLOG (Nov. 17, 2021), <https://www.sixthcircuitappellateblog.com/news-and-analysis/the-sixth-circuit-and-the-ohsa-vaccine-mandate/>.

21. 29 U.S.C. § 655(f). This portion of the statute allows anyone who will be adversely affected by an OSHA standard to file a petition in a U.S. Circuit Court for pre-enforcement review of the standard; a petition doing so must be filed within sixty days of the standard being promulgated. *Id.*

22. *Id.*

23. 28 U.S.C. § 2112(a).

24. Geoff Mulvihill, *GOP-Majority Court Chosen to Consider Biden Vaccine Mandate*, ASSOC. PRESS (Nov. 16, 2021), <https://apnews.com/article/coronavirus-pandemic-joe-biden-us-supreme-court-business-health-62a918becbcd80a77fbc12ca56dd14ad>. Associated Press, *Appeals court keeps vax mandate ban in place for Ohio, Kentucky and Tennessee*, CINCINNATI.COM (Jan. 6, 2022), <https://www.cincinnati.com/story/news/2022/01/06/sixth-circuit-us-court-cincinnati-appeals-upholds-vaccine-mandate-injunction-ohio-kentucky-tennessee/9122506002/>.

25. *See, e.g.*, German Lopez, *How Political Polarization Broke America’s Vaccine Campaign*, VOX (July 6, 2021, 7:00 AM), <https://www.vox.com/2021/7/6/22554198/political-polarization-vaccine-covid-19-coronavirus>.

26. Lauren McCarthy, *Biden’s New Vaccine Requirements Draw Praise, Condemnation and Caution*, N.Y. TIMES (Nov. 4, 2021), <https://www.nytimes.com/live/2021/09/09/world/covid-delta-variant-vaccine>.

27. Max Greenwood, *Democrats Lean into Vaccine Mandates Ahead of Midterms*, THE HILL (Sept. 18, 2021, 4:53 PM), <https://thehill.com/homenews/campaign/572781-democrats-lean-into-vaccine-mandates-ahead-of-midterms>.

workers to COVID-19, and provides them cover with workers who dislike the policy (i.e., the decision is out of the company's hands).<sup>28</sup>

Criticism of President Biden's vaccine mandate varies. The constitutionality of the mandate is discussed later. The following are examples of non-constitutionally related criticism:

- The mandate contains conspicuous exceptions, such as those for Congress and their staff.<sup>29</sup>
- The mandate provides an exception for those who receive a weekly negative COVID-19 test result but not for those who have documented proof that they have already been infected. This is a seemingly inconsistent provision because some studies suggest that people who have already overcome COVID-19 may be less likely to transmit it than someone who has never been infected and is tested weekly.<sup>30</sup>
- Young people with no comorbidities are extremely unlikely to die from COVID-19.<sup>31</sup> Therefore, this mandate is essentially forcing them to inject an unwanted chemical agent into their bodies for the purpose of benefiting other people.
- The mandate will contribute to harmful distortions in the labor market. For example, a growing company with ninety-nine or slightly fewer employees will be highly incentivized to cease hiring additional workers to avoid incurring the additional compliance costs and the risk of having to pay \$14,000 fines. Likewise, a business with 101 or slightly more employees is incentivized to lay off some workers for the same reason.
- The legal challenges and all of these listed problems with the mandate could have likely been avoided by instead linking some of the \$4.6 trillion in federal monies budgeted for COVID-19 relief to incentivize vaccination.<sup>32</sup> And this would have had the added benefit of saving thousands of lives by increasing vaccinations in 2020 as opposed to waiting until 2022.

---

28. David Goldman, *Here's Who Loves Biden's Vaccine Mandate: The Companies That Have to Enforce It*, CNN BUS. (Sept. 10, 2021, 1:10 PM), <https://www.cnn.com/2021/09/10/business/biden-vaccine-mandate/index.html>.

29. Darragh Roche, *Members of Congress and Their Staff Are Exempt from Biden's Vaccine Mandate*, NEWSWEEK (Sept. 10, 2021, 11:02 AM), <https://www.newsweek.com/members-congress-staff-exempt-biden-covid-vaccine-mandate-1627859>.

30. Some studies even show that natural immunity from a past infection is greater than the immunity from being fully vaccinated. See Meredith Wadman, *Having SARS-CoV-2 Once Confers Much Greater Immunity Than a Vaccine—but Vaccination Remains Vital*, SCIENCE (Aug. 26, 2021, 8:00 PM), <https://www.science.org/content/article/having-sars-cov-2-once-confers-much-greater-immunity-vaccine-vaccination-remains-vital>.

31. See, e.g., Kristen French, *Why Do Young, Healthy People Die from COVID-19?*, PROTOMAG. (Apr. 14, 2020), <http://protomag.com/articles/why-do-young-healthy-people-die-covid-19> ("For those aged 20 to 54, the death rate was less than 1% . . . . Nearly all COVID-19 patients who have died in the United States (94%) . . . had at least one underlying health condition . . .").

32. *The Federal Response to COVID-19*, USASPENDING, <https://www.usaspending.gov/disaster/covid-19?publicLaw=all> (last visited May 22, 2022). Allotting only half of this four-point-five trillion dollars to vaccination incentivization would have resulted in over \$10,000 per adult American.

- The mandate would lead to the peculiar result that people fired for refusing the vaccine would likely not qualify for unemployment, but people already on unemployment who cannot find work because they refuse the vaccine would continue receiving full benefits.<sup>33</sup>
- The mandate punishes working minors whose parents refuse to consent to their vaccination.<sup>34</sup>
- The timing of the mandate is odd. By the time it takes effect, President Biden would have been in office for a year. Furthermore, highly effective therapeutics, which reduce the chance of death in the most vulnerable populations by ninety percent, will have likely be approved for widespread use before the mandate takes effect.<sup>35</sup>
- President Biden was elected on the express platform that he would not implement vaccine mandates.<sup>36</sup>

Additionally, mandating vaccines as a precondition for receiving public assistance has numerous benefits over the alternative of a mandate for workers. Noncompliance with the latter would lead to a job loss and therefore reduced government revenue, while noncompliance with the former would result in less government expenditures. Recipients of public assistance are disproportionately less likely to be vaccinated.<sup>37</sup> Income is correlated with morbidity;<sup>38</sup> a number of comorbidities increase the risk of a severe COVID-19 infection,<sup>39</sup> which would likely put low-income individuals at a higher risk of death from a COVID-19 infection. The advantages of targeting workers over those on public assistance are discussed later in the Pragmatic, Political Implications section.

## LEGALITY OF PRESIDENT BIDEN'S VACCINE MANDATE

---

33. Lisa Rowan, *Fired for Not Following Biden's Vaccine Mandate? It's Unlikely You'll Get Unemployment*, FORBES (Nov. 4, 2021, 12:25 PM), [<https://web.archive.org/web/20211105140119/https://www.forbes.com/advisor/personal-finance/biden-vaccine-mandate-unemployment-eligibility/>].

34. See James G. Hodge, Jr. et al., *Legal Challenges Underlying COVID-19 Vaccinations*, 49 J. L., MED. & ETHICS 495, 496 (2021).

35. Karen Weintraub, *Pfizer Antiviral Drug Could Nearly End Deaths from COVID-19, Company Study Suggests*, USA TODAY (Nov. 5, 2021, 6:45 AM), <https://www.usatoday.com/story/news/health/2021/11/05/pfizer-antiviral-therapy-prevents-covid-deaths-drug-study/6284097001/>.

36. Jacob Jarvis, *Fact Check: Did Joe Biden Reject Idea of Mandatory Vaccines in December 2020?*, NEWSWEEK (Sept. 10, 2021, 6:47 AM), <https://www.newsweek.com/fact-check-joe-biden-no-vaccines-mandatory-december-2020-1627774>.

37. Sandhya Raman, *Medicaid Beneficiaries Less Likely to Get COVID-19 Shots*, ROLL CALL (June 30, 2021, 5:45 AM), <https://www.rollcall.com/2021/06/30/medicaid-beneficiaries-less-likely-to-get-covid-19-shots/>.

38. Dhruv Khullar & Dave A. Chokshi, *Health, Income, & Poverty: Where We Are & What Could Help*, HEALTHAFFAIRS (Oct. 4, 2018), <https://www.healthaffairs.org/doi/10.1377/hpb20180817.901935/full/>.

39. *People with Certain Medical Conditions*, CTNS. FOR DISEASE CONTROL & PREVENTION (Oct. 14, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

Mandates imposed by private employers have been held to be permissible even when the vaccines only had emergency authorization as opposed to the full FDA approval they later obtained.<sup>40</sup> However, the federal government has never enacted such a widespread vaccine mandate before. Consequently, there is no legal precedent directly addressing the legality of such a mandate. However, existing Supreme Court precedent, recent Supreme Court dicta, new therapeutics, and prior statements by OSHA all shed light on how a challenge to the mandate would likely be adjudicated by the Supreme Court. While nothing is certain, the totality of the evidence points to the most likely outcome of a legal challenge to President Biden's vaccine mandate being that it would be struck down—at least with the current makeup of the Supreme Court.

In the 1905, Supreme Court case of *Jacobson v. Massachusetts*, the Court upheld a state smallpox vaccination law that imposed a five-dollar fine.<sup>41</sup> This precedent was then reaffirmed in the 1922 Supreme Court case of *Zucht v. King*, in which the Court upheld the expulsion of an unvaccinated public-school student.<sup>42</sup>

The *Jacobson* precedent has been referenced to support a variety of pandemic-related cases, including those involving COVID-19. For example, in *South Bay Pentecostal Church v. Newsom*, the Supreme Court declined to enjoin state restrictions on places of worship.<sup>43</sup> While there was no reasoning in the unsigned opinion, Chief Justice Roberts's concurring opinion cited to the over 100-year-old precedent in *Jacobson*.<sup>44</sup> Roberts's opinion was then cited in 140 cases in the next six months, thus establishing a high level of deference for nearly all pandemic-related constitutional challenges.<sup>45</sup> One court claimed that “[d]uring an epidemic, the *Jacobson* Court explained, the traditional tiers of constitutional scrutiny do not apply.”<sup>46</sup> And another court cited Roberts's concurrence to claim that “[t]raditional doctrine does not control during a pandemic; *Jacobson* does.”<sup>47</sup>

However, this expansive interpretation of *Jacobson* ended when, in November 2020, the Supreme Court held in *Roman Catholic Diocese of Brooklyn v. Cuomo* that New York's restrictions on places of worship were unconstitutional.<sup>48</sup> For example, Justice Gorsuch explained in his concurrence that “*Jacobson* hardly supports cutting the Constitution loose during a pandemic.”<sup>49</sup> This recent turn of events weakens the claim that *Jacobson* supports President Biden's vaccine mandate. And there are

---

40. See Jennifer Piatt, *Guidance: COVID-19 Vaccine and Employer Mandates*, NETWORK FOR PUB. HEALTH L. (July 27, 2021), <https://www.networkforphl.org/resources/guidance-covid-19-vaccine-and-employer-mandates/>.

41. 197 U.S. 11 (1905).

42. 260 U.S. 174 (1922).

43. 140 S. Ct. 1613 (2020).

44. *Id.* (Roberts, C.J., concurring).

45. Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, 70 BUFF. L. REV. 131, 235 (2022).

46. *Cassell v. Snyders*, 458 F. Supp. 3d 981, 993 (N.D. Ill. 2020).

47. *4 Aces Enter., LLC v. Edwards*, 479 F. Supp. 3d 311, 323 (E.D. La. 2020).

48. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). Note that, unlike most other COVID-19-related interpretations of *Jacobson*, this opinion was largely limited to its analysis of the Free Exercise Clause issue.

49. *Id.* at 70 (Gorsuch, J., concurring).

additional aspects of *Jacobson* that cast serious doubt as to its applicability in the present context. *Jacobson* was explicitly about state vaccine mandates, not federal vaccine mandates.<sup>50</sup> This is relevant because states have a general police power, while the federal government does not.<sup>51</sup> The liberty interest at stake in *Jacobson*—a five dollar fine—is far less than that of losing one’s livelihood, which is at stake in the present case. To this point, *Jacobson* explicitly held that vaccine mandates should not lead to “injustice, oppression, or an absurd consequence.”<sup>52</sup> It is easy to see how a five-dollar fine could satisfy this requirement but that the loss of one’s livelihood would not.

The method of implementation through an OSHA ETS is further problematic. In its fifty-year history, only one of OSHA’s ETS’ that was challenged in court survived.<sup>53</sup> Previous statements by OSHA support the notion that it is beyond its power to enforce a vaccine mandate.<sup>54</sup> And in June of 2020, OSHA stated that an ETS was not necessary to “protect working people from occupational exposure to infectious disease, including COVID-19.”<sup>55</sup>

If the Fifth Circuit’s stay prohibiting OSHA from enforcing the mandate is any indication, President Biden’s mandate will likely be struck down.<sup>56</sup> The Fifth Circuit held that the mandate is both overinclusive and underinclusive.<sup>57</sup> It is overinclusive in that it makes no distinction for how different jobs face different COVID-19 exposure risks; it is underinclusive in that it makes no attempt to save employees in jobs with ninety-eight or fewer coworkers from the “grave danger.”<sup>58</sup>

On the matter of how the mandate is enforced by OSHA, the Fifth Circuit determined that an airborne virus is likely beyond the purview of OSHA’s emergency powers in that it does not constitute a “substance[.]” or “agent[.]”<sup>59</sup> The Fifth Circuit even went so far as to state that “it remains unclear that COVID-19—however tragic and devastating the pandemic has been—poses the kind of grave danger” required under OSHA emergency powers.<sup>60</sup>

The Fifth Circuit went on to posit that the mandate also likely fails on constitutional grounds. It explained how it “exceeds the federal government’s

---

50. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (holding that it is within the police power of a state to enact a compulsory vaccination law).

51. *Police Powers*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/police\\_powers](https://www.law.cornell.edu/wex/police_powers) (“[I]n the United States, the federal government does not hold a general police power but may only act where the Constitution enumerates a power. It is the states, then, who hold the general police power.”) (last visited May 22, 2022).

52. *Jacobson*, 197 U.S. at 39.

53. *BST Holdings, LLC v. OSHA*, No. 21-60845, 17 F.4th 604, 609 (5th Cir. 2021).

54. *Id.* at 611.

55. *In re AFL-CIO*, 2020 WL 3125324, at \*1 (D.C. Cir. June 11, 2020).

56. However, note that the Fifth Circuit is one of the most conservative circuits. See Emma Platoff, *Trump-Appointed Judges Are Shifting the Country’s Most Politically Conservative Circuit Court Further to the Right*, TEX. TRIB. (Aug. 30, 2018, 12:00 AM), <https://www.texastribune.org/2018/08/30/under-trump-5th-circuit-becoming-even-more-conservative/>.

57. *BST Holdings*, 17 F.4th at 611 (explaining that it is overinclusive in that it makes no distinction for how different jobs face different COVID-19 exposure risks and underinclusive in that it makes no attempt to save employees in jobs with ninety-eight or fewer coworkers from the “grave danger.”).

58. *Id.*

59. *Id.* at 619.

60. *Id.* at 613.



authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power."<sup>61</sup> And the Fifth Circuit expressed concerns that the mandate may violate separation of powers principles.<sup>62</sup>

### LEGALITY OF VACCINE MANDATES FOR PUBLIC ASSISTANCE

The federal government has never made public assistance contingent upon receiving a vaccination. Therefore, the Supreme Court has never issued a ruling on the matter. Assuming the inclusion of religious and health exceptions as in President Biden's vaccine mandate,<sup>63</sup> existing case law strongly supports the position that such a mandate would be enforceable.

- The Supreme Court has upheld the denial of food stamps to any new applicants engaged in striking.<sup>64</sup>
- Case law supports mandatory vaccinations for in-person college education. For example, the U.S. Court of Appeals for the Seventh Circuit upheld the rejection of a preliminary injunction sought by unvaccinated students at Indiana University upon the university's mandate.<sup>65</sup> The circuit justice for the Seventh Circuit, Amy Coney Barrett, then denied the students' request for injunction.<sup>66</sup>
- The Supreme Court upheld a warrantless, suspicion-less search of a welfare recipient's home, maintaining that it was not a search within the meaning of the Fourth Amendment.<sup>67</sup>
- Anti-Drug Abuse Act of 1988 denies federal benefits—excluding welfare—to convicted drug possessors.<sup>68</sup> And in extreme cases it can deny federal benefits to those convicted of a drug crime for life.<sup>69</sup>
- The Anti-Drug Abuse Act of 1988 prohibited any housing tenant, any member of that tenant's household, or their guest, from engaging in "criminal activity" near public housing premises, which would seem to include drug involvement.<sup>70</sup>

---

61. *Id.* at 617.

62. *Id.*

63. Allie Reed, *Covid Vaccine Mandate Religious Exemptions Give Hospitals Leeway*, BLOOMBERG L. (Feb. 25, 2022, 4:35 AM), <https://news.bloomberglaw.com/health-law-and-business/covid-vaccine-mandate-religious-exemptions-give-hospitals-leeway>.

64. *Lyng v. United Auto. Workers*, 485 U.S. 360 (1988).

65. *Klaassen v. Tr. of Ind. Univ.*, 7 F.4th 592 (7th Cir. 2021).

66. *No. 21A15*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a15.html> (last visited Dec. 3, 2021).

67. *Wyman v. James*, 400 U.S. 309, 317–18 (1971). The Court arrived at this seemingly counterintuitive result based on a theory of consent. It reasoned that the welfare recipient could have simply refused to consent to the search, and therefore the Fourth Amendment is not applicable even though such a refusal would result in the loss of welfare benefits. *Id.*

68. 21 U.S.C. § 862(a) (2018).

69. *Id.*

70. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5301, 102 Stat. 4181, 4300 (1998).

- The government can make public assistance contingent on factors related to getting a job. It can require recipients to apply for jobs and attend classes to increase their employability.<sup>71</sup>
- A number of states have enacted “family cap” policies for welfare benefits, under which families are denied additional benefits or have their benefits reduced upon having additional children.<sup>72</sup>
- Some scholars note that the poor often face second-class status when it comes to constitutional protections, such as the Fourth Amendment’s privacy right.<sup>73</sup> If true, this supports the notion that mandatory vaccination for those on public assistance would be adjudicated permissible.

But there is some evidence to suggest that mandatory vaccination as a prerequisite for public assistance may be struck down. For example, despite numerous efforts to mandate suspicion-less drug testing of welfare recipients,<sup>74</sup> the two federal district courts that have addressed the issue have both struck down such mandates.<sup>75</sup> This could be used as an argument against the legality of a vaccine mandate on the ground that urinalysis drug testing is less intrusive than the injection of a vaccine. Additionally, the drugs tested for are illegal to consume, while it is not illegal to refuse the vaccine. Therefore, it could be argued that since it is improper for the government to test welfare recipients for illegal drugs without suspicion, it should therefore be even more improper to force a more intrusive vaccine mandate on them.

However, precedent of prohibiting suspicion-less drug testing of public assistance recipients is distinguishable from a vaccine mandate in numerous, relevant ways. Mandatory vaccination is likely not a search for Fourth Amendment purposes,

---

71. *SNAP Work Requirements*, U.S. DEP’T OF AGRIC., <https://www.fns.usda.gov/snap/work-requirements> (last visited Dec. 3, 2021); Eli Hager, *Six States Where Felons Can’t Get Food Stamps*, MARSHALL PROJECT (Feb. 4, 2016), <https://www.themarshallproject.org/2016/02/04/six-states-where-felons-can-t-get-food-stamps>.

72. *See Welfare Reform: Family Cap Policies*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 31, 2011), <https://www.ncsl.org/research/human-services/welfare-reform-family-cap-policies.aspx> (providing a summary of state statutes); Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J. L. & GENDER 151, 152–86 (2006) (summarizing a number of unsuccessful court challenges to family caps).

73. *See, e.g.*, Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL RTS. J. 751, 753 (2011).

74. Personal Responsibility and Work Opportunities Reconciliation Act of 1996, Pub. L. No. 104-193, § 902, 110 Stat. 2105, 2347 (1996). The Personal Responsibility and Work Opportunities Reconciliation Act of 1996 explicitly allows states to drug test welfare recipients. Florida attempted to enact a drug testing program requiring all applicants for Temporary Assistance for Needy Families (“TANF”) to pay for their own urinalysis. *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1275–76 (M.D. Fla. 2011), *aff’d sub nom. Lebron v. Sec’y Fla. Dep’t of Children & Families*, 710 F.3d 1202 (11th Cir. 2013). Those who received a negative result would be reimbursed while those who had positive results were rendered ineligible for TANF benefits for a year. *Id.* at 1290. Michigan attempted to implement suspicion-less drug testing of welfare recipients. *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1136 (E.D. Mich. 2000), *rev’d*, 309 F.3d 330 (6th Cir. 2002).

75. Ilan Wurman, Note, *Drug Testing Welfare Recipients as a Constitutional Condition*, 65 STAN. L. REV. 1153, 1166–68 (2013) (referring to *Lebron*, 820 F. Supp. 2d at 1279–80, and *Marchwinski*, 113 F. Supp. 2d at 1134).

while a drug test is.<sup>76</sup> During the COVID-19 pandemic, people are far less likely to die from illegal drug use than from COVID-19.<sup>77</sup> Likewise, while the widespread cessation of illegal drug use would bring about numerous positive benefits to society, widespread vaccination during this pandemic crisis is a higher priority.<sup>78</sup> Of particular significance to the present issue, one of the two district courts that struck down suspicionless drug testing for public assistance recipients expressly did so on the ground that it was not an issue of public safety<sup>79</sup>—something that is not true regarding mandatory vaccinations.

### PRAGMATIC, POLITICAL IMPLICATIONS

Interrelated, but ultimately separate from the issue of public assistance vaccine mandate legality, is the question of practicality. The Biden Administration was no doubt aware of the option to either mandate vaccines for those on public assistance instead of workers or to mandate the vaccine for both. This is especially intriguing when one considers the numerous benefits to be derived from mandating vaccines for those on public assistance as compared to workers. For example, the former would be less likely to be struck down and be better targeted to the group with lower vaccination rates. Additionally, it would not incur harmful market distortion effects. And such a policy could avoid the perception of giving preferential treatment to those on public assistance over those who work.

Counterbalancing these practical arguments in favor of mandatory vaccinations for public assistance recipients are practical arguments for why such a policy may not be politically expedient. Indeed, as early as November 2020, the Biden Administration was already fighting back against false stories that public assistance is being withheld for those who refuse to be vaccinated.<sup>80</sup> Imposing additional requirements on public assistance recipients may be viewed as kicking those who are already down. For this same reason, it may be viewed as an act of desperation, which

---

76. *Lebron v. Secretary, Florida Dept. of Children and Families*, 710 F.3d 1202, 1219 (2013) (“It is undisputed that a drug test is a search under the Fourth Amendment . . .”) (Jordan, J., concurring). For further reading on the debate regarding whether or not a COVID-19 vaccination constitutes a Fourth Amendment violation, see Andre J. Ellington, *GOP Iowa State Rep. Says Vaccine Mandates Violate Fourth Amendment*, NEWSWEEK (Oct. 5, 2021, 6:17 PM), <https://www.newsweek.com/gop-iowa-state-rep-says-vaccine-mandates-violate-fourth-amendment-1635927>; *Fourth Amendment > Vaccinations*, JD SUPRA (May 31, 2022), <https://www.jdsupra.com/topics/fourth-amendment/vaccinations/>.

77. *Overdose Death Rates*, NAT’L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/drug-topics/trends-statistics/overdose-death-rates> (last visited Dec. 3, 2021). About 70,000 people die a year from drug overdoses, including from overdoses of prescription medications. Meanwhile over 800,000 people have died from COVID-19 in less than two years. *United States Coronavirus Cases*, *supra* note 6.

78. *Overdose Death Rates*, *supra* note 77.

79. *Marchwinski*, 113 F. Supp. 2d at 1140.

80. See, e.g., Sandra Rose, *Food Stamps, Rent Assistance May Be Withheld from Those Who Refuse Covid-19 Vaccinations*, SANDRAROSE.COM (Nov. 13, 2020), <https://sandrrose.com/2020/11/food-stamps-rent-assistance-may-be-withheld-from-those-who-refuse-covid-19-vaccinations/> [https://archive.vn/Ellhv]. For an explanation of why these claims are false, see *Fact Check: People Will Not Have to be Vaccinated Against COVID-19 to Receive Food Stamps and Rent Assistance*, REUTERS (Nov. 20, 2020, 3:07 PM), <https://www.reuters.com/article/uk-factcheck-food-stamps-vaccine/fact-check-people-will-not-have-to-be-vaccinated-against-covid-19-to-receive-food-stamps-and-rent-assistance-idUSKBN2802LY>.

implies initial policies for controlling COVID-19 were insufficient. Such a mandate may evoke images of America's reprehensible past with medicine and vulnerable populations, such as the Tuskegee syphilis experiments<sup>81</sup> and forced sterilization.<sup>82</sup> And mandating vaccines for those on public assistance and not workers could be interpreted as placing a higher value on the lives of the former over the latter.

The Biden Administration may have favored targeting the employed over those on public assistance for scientific reasons as well. On average, those with jobs likely come into contact with more people than those on public assistance and are therefore more likely to spread COVID-19. Additionally, the knowledge that everyone working at large companies is vaccinated may function to instill confidence in consumers, a benefit that would not be incurred by public assistance mandates.

Perhaps the decision by the Biden Administration was made in part because the loss of a job was determined to be a greater motivator than the loss of temporary public assistance. Denying public assistance would not only negatively affect the adults who choose not to be vaccinated but also their children—something that could create disastrous optics. Another benefit is that a worker is more likely to be able to pay the weekly testing fee as an alternative to getting vaccinated. Finally, perhaps relying on corporations to do much of the enforcement was deemed more efficient than relying on government agents to enforce a policy on public assistance recipients.

A similar debate has arisen regarding a potential vaccine mandate for immigrants to the United States. Those immigrants seeking to be lawful, permanent U.S. residents are required to be fully vaccinated against COVID-19 as of October 1, 2021.<sup>83</sup> However, all other immigrants are not required to be vaccinated.<sup>84</sup> Critics of the Biden administration have attempted to use this to allege that President Biden is giving preferential treatment to undocumented immigrants over working Americans.<sup>85</sup>

## CONCLUSION

In less than two years, COVID-19 has elicited numerous, diverse, and substantial legal questions.<sup>86</sup> The legality of a federal government mandate may be the most

---

81. Elizabeth Nix, *Tuskegee Experiment: The Infamous Syphilis Study*, HIST. (Dec. 15, 2020), <https://www.history.com/news/the-infamous-40-year-tuskegee-study>.

82. Alexandra Stern, *Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities—and Lasted into the 21<sup>st</sup> Century*, MICH. INST. FOR HEALTHCARE POL'Y & INNOVATION (Sept. 23, 2020), <https://ihpi.umich.edu/news/forced-sterilization-policies-us-targeted-minorities-and-those-disabilities-and-lived-21st>.

83. *COVID-19 Vaccination Required for Immigration Medical Examinations*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 14, 2021), <https://www.uscis.gov/newsroom/alerts/covid-19-vaccination-required-for-immigration-medical-examinations>.

84. *Id.*

85. See, e.g., Steven Nelson, *Biden Orders Most US Workers Get Vaxxed—but Not Illegal Border Crossers*, N.Y. POST (Sept. 10, 2021), <https://nypost.com/2021/09/10/biden-wont-order-illegal-immigrants-to-get-covid-vaccine/>. Of course, given the efficacy of the vaccine and high death rates from COVID-19, it could also be argued that such policies demonstrate preferences for U.S. workers over undocumented immigrants.

86. See, e.g., Michael Conklin, "*The Most Demanding Test Known to Constitutional Law*": *Do COVID-19 Bans on Church Services Satisfy Religious Freedom Restoration Act Requirements?*, 60 WASHBURN L.J. 63

significant precedent to come out of the pandemic. As illustrated by the importance of the 1905 case of *Jacobson* today, this precedent has the potential to affect not only millions of lives in the present pandemic but millions more in pandemics over 100 years in the future.

The outcome of this litigation will likely be influenced by the conservative bent of the courts that will hear the case. The Sixth Circuit, which won the Multidistrict Litigation lottery to hear the consolidated challenges to the vaccine mandate, is considered a conservative circuit.<sup>87</sup> The Sixth Circuit contains a total of eight Democratic appointees and twenty Republican appointees among their active and senior status judges.<sup>88</sup> And the current makeup of the Supreme Court, with six Republican-appointed justices and three Democratic-appointed justices, may likewise be an ominous indication for the likelihood of President Biden's vaccine mandate surviving judicial scrutiny.

The analysis in this Article reviews numerous legal considerations regarding a potential vaccine mandate for those on public assistance and invites future scholarship on related issues. By comparing such a mandate with one for workers, this Article also provides a better understanding as to the likely pragmatic considerations regarding why President Biden chose not to implement the latter but not the former mandate. As some have speculated, perhaps the mandate was never intended to survive judicial scrutiny.<sup>89</sup> Even if eventually struck down by the courts, it could still be beneficial because some will get vaccinated in anticipation of the mandate's application. Also, Democrats could use a judicial ruling striking down the mandate as a powerful talking point in the 2022 midterm and 2024 presidential elections, effectively shifting the blame of COVID-19 onto the conservative courts.

---

(2020); *Reducing Jail and Prison Populations During the Covid-19 Pandemic*, BRENNAN CTR. FOR JUST. (Nov. 18, 2021), <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic>; Chad G. Marzen & Michael Conklin, *Coronavirus "Cures" and the Courts*, 12 WM. & MARY BUS. L. REV. 1 (2020); Conklin, *supra* note 9.

87. Ballard Spahr, *6th Circuit Wins OSHA ETS Lottery*, JD SUPRA (Nov. 18, 2021), <https://www.jdsupra.com/legalnews/6th-circuit-wins-osha-ets-lottery-3226993/>.

88. Ryan Golden, *6th Cir. Lottery Pick a 'Favorable' Draw for OSHA Vaccine Mandate's Challengers*, HR DIVE (Nov. 16, 2021), <https://www.hrdiver.com/news/6th-cir-wins-lottery-to-hear-osha-vaccine-mandate-challenge/610157/>. Note that the three-judge panel that ultimately decides the case will be selected randomly. *Id.*

89. Andrew C. McCarthy, *Biden Knows His Vax Mandate Is Unconstitutional—but Just Doesn't Care*, N.Y. POST (Sept. 10, 2021, 8:07 PM), <https://nypost.com/2021/09/10/biden-knows-his-vax-mandates-are-unconstitutional-but-doesnt-care/> (comparing the Biden vaccine mandate to the Biden eviction moratorium, alleging that Biden knew both were unconstitutional). Also, some claim that Biden is using the judicial order to reinstate the remain in Mexico policy as a conveniently politically expedient "cover" for reinstating the policy while publicly being able to maintain opposition to the policy. *Omicron Spreading, Remain in Mexico, Alec Baldwin Speaks Out*, NPR (Dec. 3, 2021), <https://www.npr.org/2021/12/01/1060593890/omicron-spreading-remain-in-mexico-alec-baldwin-speaks-out>.