

WEDNESDAY, DECEMBER 2, 2020

PERSPECTIVE

## Mandatory vaccinations and the Constitution

By David Belcher  
and Michael Belcher

Moderna and Pfizer recently published preliminary data showing their COVID-19 vaccines are over 90% effective and both are expeditiously seeking emergency FDA approval. That's exciting, because despite months of lockdowns, COVID-19 infections in California continue to rise exponentially. Our inability to stem the tide flows partly from the fact that many citizens have rejected even the least invasive disease-fighting techniques. Given that, we expect even more resistance to injections. Although Americans' willingness to receive a COVID-19 vaccine has increased in recent weeks, current levels of support are unlikely to produce herd immunity. That leaves us with just one viable policy path to ending this pandemic: California should make it compulsory for every immuno-capable resident to be inoculated against COVID-19.

A mandatory COVID-19 vaccine is constitutional and would fit seamlessly within California's existing statutory framework for mandatory vaccinations. The constitutionality of mandatory vaccines is well-settled. Since the California Supreme Court upheld a mandatory smallpox vaccination in *Abeel v. Clark* in 1890 and the U.S. Supreme Court did the same in *Jacobson v. Massachusetts* in 1905, mandatory vaccines have survived numerous challenges. In fact, no vaccination mandate has ever been held unconstitutional. Opponents of compulsory vaccination have argued that the practice violates due process, free exercise of religion, the right to attend school, equal protection, and statutes forbidding non-consensual medical experimentation. Courts rejected all those arguments, often relying on the government's broad police

power authority to protect citizen health and safety.

Although courts have rejected these stale liberty arguments many times, opponents of mandatory vaccination likely will resurrect them to challenge a California statute requiring COVID-19 vaccinations. Because the COVID-19 pandemic poses an even greater risk to public health and safety than past disease eradication programs that courts have already upheld, courts will likely uphold a state-mandated COVID-19 vaccination program against any constitutional challenge. To rule otherwise would ignore more than 100 years of precedent, amid an infectious disease crisis that has hobbled the nation.

California's legislature can efficiently enact a mandatory COVID-19 vaccine by merging it with existing laws. Mandatory vaccinations are common in the education context: currently all 50 states require students to be immunized. In California, Health & Safety Code sections 120335(b)(1)–(10) already require that all students in public and private elementary and secondary schools be vaccinated against ten different diseases. Adding COVID-19 to that list before the 2021–2022 school year will protect millions of children, and prevent them from infecting their parents. But the legislature should not limit itself to adding to existing statutes. Instead, it should seize the public health policy opportunity this crisis presents to pass new laws requiring COVID-19 and other vaccines for all adults in California. The program can start with the state's public employees and schoolchildren.

When the legislature mandates a COVID-19 vaccine, it should exempt only individuals whose health would be legitimately threatened by receiving it. That exception can be narrowly tailored — even persons with compromised immune systems need

not be exempted, because monoclonal antibody treatments will be available as a vaccine substitute. And to ensure herd immunity, the legislature should not allow exemptions for religious or philosophical reasons. Such exemptions, though common in other states, are not constitutionally required. California is one of five states that permits no personal or religious exemptions for vaccines in the education context, and it should remain so.

The law should not condition receipt of government benefits on vaccination — even the police power has limits. Courts might uphold an aggressive spare-no-one approach, but the relevant authorities do not necessarily rule out an unconstitutional conditions argument. In *Abeel* the California Supreme Court upheld the state's power to require vaccination for school children, making the public benefit directly related to the targeted group. And in *Jacobson* the vaccination program was publicly funded and free, and the penalty was a modest fine. Those facts, and the concerns about imposing unconstitutional conditions, counsel some restraint here.

Although the governor could likely require COVID-19 vaccinations using emergency powers, he should not do so. Under Government Code Section 8595, the governor could order a state agency to mandate the vaccine as a “preventative measure ... necessary to protect the public health.” People violating such an order could be charged with a misdemeanor under Health & Safety Code Section 120551. But criminalizing non-compliance with an executive order is likely to backfire. And lockdown fatigue is making even reasonable citizens grumble about the most basic precautions required by emergency orders.

Thus, the governor would be wise not to act through executive order.

Nor should he impose criminal penalties on those who refuse to vaccinate. Successfully implementing a comprehensive mandatory vaccination program will require public trust that can be built only through the ordinary policymaking process: deliberated legislative action. Certainly, the governor should use his constitutional powers to quickly sign any mandatory vaccination bills that arrive on his desk. And the governor should use his platform as California's most visible politician to demonstrate the safety and benefits of vaccines — for example, by being the first Californian to get injected, along with his family, on live video.

And carrots are better than sticks. The vaccine should be free, and indeed the federal government announced Monday that it is buying vaccines from both Moderna and Pfizer and will provide them to the public free of charge. California can sweeten the deal by offering rewards for proof of vaccination. And a public health campaign to soothe public concerns is probably necessary.

The U.S. Supreme Court recognized in *Bruesewitz v. Wyeth LLC* that “the elimination of communicable diseases through vaccination [is] one of the greatest achievements” of modern public health. Ending the COVID-19 pandemic, which has cost more than 265,000 American lives and engulfed the country in titanic economic turmoil, will require quick and bold leadership from elected officials. The best way for California's legislature to protect the state is by requiring every immuno-capable resident to be inoculated against COVID-19. ■

**David Belcher** is an attorney in private practice, and his twin brother **Michael Belcher** is an attorney in public service. Both are senior research fellows at the California Constitution Center.