



## Opponents Of COVID-19 Vaccine Mandates Have A Curious Definition Of ‘Freedom’

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Mandates for the COVID-19 shots are popping up all over the country now, which means you may soon have to show proof of vaccination if you want to go to work, the gym or an indoor public event.

The requirements are a reaction to slowed vaccination rates that have left significant parts of the population without protection from the virus, just as the highly contagious delta variant is spreading. Among those supporting the new requirements is President Joe Biden, who has issued one for federal workers and encouraged both private and public employers to do the same.

The requirements seem to be relatively popular. As many as two-thirds of Americans support them, if some recent polling is correct. But there are plenty of opponents out there. Among the loudest are some high-profile leaders in the Republican Party.

Sen. Ted Cruz (Texas) says vaccine requirements are products of the left’s “authoritarian instincts.” Sen. Rand Paul (Ky.) describes the push for requirements as “vaccine fascism.” House Republican Conference Chair Elise Stefanik (N.Y.) responded to Biden’s announcement by tweeting, “No mandates for anyone,” and vowing that “Americans will stand for freedom” — and then punctuating the line with an American flag emoji.

Republicans at the state level are saying similar things and they are acting too, putting in place prohibitions on vaccine requirements in more than a dozen states. One of them is Florida, where Gov. Ron DeSantis has issued orders and signed legislation that bans vaccine requirements by private companies as well as local government agencies.

“Florida is a free state, and we will empower our people,” DeSantis said in a fundraising letter this week. “We will not allow Joe Biden and his bureaucratic flunkies to come in and commandeer the rights and freedoms of Floridians.”

The virtual flag-waving, appeals to personal liberty, and warnings about “fascism” suggest there is something fundamentally un-American about vaccine mandates. But requirements to get inoculations have been around since the very first days of the republic, claiming broad support and withstanding legal challenges.

This isn't because officials or judges are ignoring freedom. It's because they believe vaccination is a key to securing it. In fact, among those who support vaccine requirements today are some well-known conservative judges and libertarian scholars — in other words, precisely the sort of people you would expect to protest government overreach most vociferously.

### **What Liberals And Conservatives Say About Vaccine Mandates**

A basic justification for vaccine mandates is that your freedom doesn't include the freedom to endanger the rest of your community. The principle is a bedrock of democratic philosophy and the American legal tradition, with courts applying it to a variety of contexts including public health.

“You can't walk around assaulting people just because you feel like it's an important part of your self-expression,” Nicholas Bagley, a University of Michigan law professor, said in an interview. “And you can't dump pollutants into a town's drinking water just because you'd rather not pay for cleanup. By the same token, we require kids to get vaccinated for all sorts of illnesses before they go to public school. Otherwise, their bodies could be used as vectors to harm others.”

The most important legal precedent on vaccines specifically is a 1905 case called Jacobson v. Massachusetts, in which the Supreme Court upheld a state law requiring smallpox vaccination for adults. Just this week, a panel from a federal appeals court cited Jacobson when it upheld, unanimously, a new COVID-19 vaccine requirement for students at Indiana University.

The author of that ruling, Frank Easterbrook, is a well-respected conservative first put on the bench by President Ronald Reagan. In the opinion, Easterbrook argued that the Indiana University requirement was actually less onerous than the old Massachusetts requirement, because it applied only to people who are choosing to enroll at the university.

It's a small burden with a very large benefit. Ilya Somin, George Mason University

“People who do not want to be vaccinated may go elsewhere,” Easterbrook wrote.

That appears to be true for all of the vaccine mandates now in place or under discussion: They are not requirements per se, but rather conditions for some kind of voluntary activity. Although the consequences can still be harsh — say, if it means giving up a job — many of the mandates, including the one Biden introduced for federal workers, offer alternatives like undergoing frequent testing plus a promise to observe social distancing.

That's in addition to exceptions for people who can cite legitimate religious grounds or who can't get shots for medical reasons.

“In the eyes of the law, nothing under discussion is actually a mandate, in the sense of a government command backed up by coercion,” Bagley said.

### **What Some Libertarians Say About Vaccine Mandates**

Bagley is generally thought of as a liberal, but it's not hard to find conservatives and libertarians who take the same view.

In a 2013 paper titled "[A Defense of Compulsory Vaccination](#)," [Jessica Flanigan](#), a University of Richmond professor known for libertarian writings on bioethics, cited the example of people firing guns into the air in order to celebrate Independence Day. Governments can and do prohibit such behavior even though it's a form of expression, Flanigan explained, because the bullet could end up hitting and even killing somebody.

"People are not entitled to harm innocents or to impose deadly risks on others," Flanigan wrote.

Georgetown University professor [Jason Brennan](#) made a similar argument in a 2018 journal article called "[A Libertarian Case for Mandatory Vaccination](#)." That was two years before COVID-19, but, he told HuffPost last week, he thinks the case for mandates now remains strong.

"In my view, people have the right to harm themselves by making bad choices," Brennan said. "This is about protecting others from the undue risk of harm you impose upon them by being unvaccinated. The lower the personal costs/risks of the vaccine — and the higher the risk that the unvaccinated impose upon others — the stronger the case is for mandating vaccines."

And then there is [Ilya Somin](#), whom nobody would mistake for a fan of government power.

A professor at George Mason University and an adjunct scholar at the libertarian [Cato Institute](#), he has spent much of his professional life decrying what he sees as state encroachments on personal liberty, whether it's local authorities [taking property under eminent domain](#) or the federal government [penalizing people for not getting health insurance](#).

But Somin said in an interview that vaccine mandates make sense under certain circumstances and that the present situation qualifies. He described taking the shot as a "small burden" for the sake of much larger benefits, like slowing transmission and reducing the opportunities for new, more dangerous variants to emerge.

"The issue here is not just that it saves lives, but that it potentially saves a great many of them, and not just those of the vaccinated people themselves," Somin said. "It also protects others in the community. That makes it different from primarily paternalistic restrictions on liberty, such as, say, requiring motorcycle riders to wear helmets."

Somin said he would feel differently about imposing a requirement on the public at large, rather than making the vaccines a condition for engaging in certain activities, in part because it would be a "law enforcement nightmare." Somin also noted that many of the mandates are coming from private-sector companies acting on their own.

American laws and courts have long given private companies all kinds of leeway to dictate terms of employment, as well as whom they serve as customers. Libertarians like Somin are especially reluctant to see that erode, because they believe owners, workers and consumers end up better off when corporations operate with fewer restrictions.

## Where The Debate Goes From Here

One group that would be happy to cut down on management discretion over employees are labor unions, and that's a big reason so many unions representing teachers, health care workers and other sectors subject to the mandates have been fighting them.

The unions are also representing workers who, in many cases, are genuinely fearful of the vaccines. This is especially true for the health care unions whose memberships include large numbers of Black Americans, whose vaccination numbers nationwide have lagged in part because of deep distrust of the medical establishment that has built up over the centuries.

This is about protecting others from the undue risk of harm you impose upon them by being unvaccinated. Jason Brennan, Georgetown University

Of course, from a public health perspective, that's all the more reason to impose the mandate: to boost vaccination among people who take the pandemic seriously and are part of communities that have suffered disproportionately from COVID-19. And that's not to mention the biggest reason, which is that unvaccinated health care workers are a direct threat to the safety and well-being of patients.

Still, many of the unions fighting the requirements are focusing more on the specifics of verification and exceptions to the rules. That's different from the categorical rejection of mandates you hear from Cruz, DeSantis and the other Republicans. And although the unions certainly represent a lot of members, those GOP officials have a lot of influence — especially when it comes to the part of the population most hostile to getting vaccinated.