

Cocktails, Covid Vaccines, and the Constitution

By Larry Stuart

One of the joys of being a lawyer is that people frequently ask us questions about legal issues, and, more frequently, express strong opinions to us about legal conclusions they've reached in the course of their "Google Law" studies. (Note: Learned Hand was an influential appellate judge, not the form of arthritis you get from obsessive Google searching. Google him.)

Here are a few Covid gems from 2020:

- "I have a Constitutional right not to wear a mask."
- "Can I sue ____ for refusing me service when I didn't have my mask on?"
- "I have a Constitutional right to drink my beer wherever I want, and bartenders are essential workers." (To be clear, I agree with the latter.)
- "You can't force me to take an experimental vaccine to prevent an infection with a 99.99% recovery rate."
- "I will be physically disfigured if I am forced to take the vaccine."
- "The vaccine contains a government microchip that will monitor everything about me." (News flash: Apple, Google and/or Facebook probably already do.)
- "This is America; I can do whatever I please." (Ah, the pursuit of happiness. . .)

It might surprise people to know that the United States Supreme Court ruled in 1905 that **the government can require people to be vaccinated in response to a public health crisis**. Yes, you read that right – mandatory vaccines are a legally permissible thing.

In *Jacobsen v. Massachusetts*, the U.S. Supreme Court considered the case of a man named Henning Jacobson who challenged his conviction under a regulation adopted by the city of Cambridge pursuant to Massachusetts law, which required all inhabitants of the city to be vaccinated for smallpox. Jacobson was fined \$5 (equivalent to \$150 now) for his violation. He claimed the statute violated the 14th Amendment, which provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court rejected Jacobson's arguments and upheld his conviction. In doing so, it made clear that the broad notion of unlimited individual liberty and personal choice baked into the Covid quotes above is not actually what the U.S. Constitution guarantees. Here is language from the Court's decision:

"The authority of the state to enact this statute is to be referred to what is commonly called the police power, a power which the state did not surrender when becoming a member of the Union

under the Constitution. . . . According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”

“But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. . . . Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.”

“[A] community has the right to protect itself against an epidemic of disease which threatens the safety of its members. . . . But it is equally true that in 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.”

Earlier this year, in *In re Abbott*, the ultra-conservative Fifth Circuit Court of Appeals succinctly summarized the import of the Supreme Court’s decision:

“Jacobson instructs that all constitutional rights may be reasonably restricted to combat a public health emergency.”

Based on these rulings, it appears states and the federal government can require masks and mass vaccination. It likely means that broad, generally applicable restrictions on public assembly and interaction will also be found constitutional

Sadly, there is no constitutional right to a cocktail from our favorite barkeeps, even though this year I really wish there was.

This article provides an overview of specific developing law. It is not intended to be, and should not be construed as, legal advice for any particular scenario.

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