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2022]

## Notes

A RAPID AND ACCURATE PCR TEST FOR CONSTITUTIONALITY OF  
COVID-19 VACCINE MANDATES: THE APPROPRIATE  
STANDARD OF REVIEW ADOPTED BY  
*KLAASSEN v. TRUSTEES OF INDIANA UNIVERSITY*

“Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others.”<sup>1</sup>

NATALIE ANDERSON\*

### I. COVID AND THE CONSTITUTION

Tony Roman owns a restaurant in California where an “un-vaccination policy” is in place: to enter the restaurant patrons must show proof that they have *not* been vaccinated.<sup>2</sup> Roman has refused to comply with any and all government restrictions since the beginning of the pandemic, and he refers to the executive branch that creates the restrictions as “tiny tyrants.”<sup>3</sup> Roman feels that the “American way of life is under attack” and has pledged the restaurant as a “Constitutional Battleground[.]”<sup>4</sup>

Meanwhile, Americans are still dying of COVID-19 at alarming rates over a year after the vaccine was made widely available.<sup>5</sup> Death rates

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\* J.D. Candidate, 2023, Villanova University Charles Widger School of Law; B.A., 2016, Boston College. This Note is dedicated to my parents, Drew Anderson and Jane Lee, who are my lifelong editors. It is also dedicated to my favorite conversation partner, Sean Proctor, because without his curiosity and thoughtfulness I would never have decided to write on this topic. I would like to thank all the members of the *Villanova Law Review* who helped me edit this Note. I certainly would not have gotten to this point without you.

1. *Jacobson v. Massachusetts*, 197 U.S. 11, 26–27 (1905).

2. See Vikki Vargas & Jonathan Lloyd, ‘*Proof of Being Unvaccinated Required*’ at *Huntington Beach Restaurant*, NBC L.A., (Jul. 28, 2021, 11:49 AM), <https://www.nbclosangeles.com/news/coronavirus/southern-california-coronavirus/proof-of-being-unvaccinated-required-huntington-beach-restaurant-basilicos-coronavirus-vaccine/2649152/> [<https://perma.cc/3EJV-UCW9>] (reporting on Roman’s belief that mandatory vaccinations threaten the “American way of life”).

3. *Id.* (quoting Roman as saying, “[W]hen the tiny tyrants go on the attack with new mandates, we fire back launching new missiles of defiance”).

4. *Id.* (reporting that Roman “feel[s] blessed to be on the front lines of this battle in defense of Liberty and Freedom” and that he will “put everything at risk for it”).

5. See Julie Bosman & Lauren Leatherby, *U.S. Coronavirus Death Toll Surpasses 700,000 Despite Wide Availability of Vaccines*, N.Y. TIMES, (Nov. 1, 2021), <https://www.nytimes.com/2021/10/01/us/us-covid-deaths-700k.html> [<https://perma.cc/>

among unvaccinated Americans are disturbingly and disproportionately high.<sup>6</sup> The choice to remain unvaccinated has not only affected those who believe it is their right to be free from unwanted vaccination; it has also had dire consequences on the vaccinated population as well.<sup>7</sup>

To say COVID-19 has affected global culture is an understatement—and the legal system is not immune to its effect.<sup>8</sup> COVID-19 will change many different aspects of the legal system, including how the criminal justice system deals with mass incarceration, how regulators perform their duties, how entrepreneurs will launch new ventures, and more.<sup>9</sup> The pandemic will also glaringly affect how courts balance protecting citizens during a public health crisis with protecting people's Fourteenth Amendment rights.<sup>10</sup> This question has not been answered uniformly, with different

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3HYF-KPF5] (noting that 100,000 people have died from COVID-19 since mid-June 2021, although the vaccine was widely available to the general public).

6. *See id.* (“An overwhelming majority of Americans who have died [from COVID-19] in recent months, a period in which the country has offered broad access to shots, were unvaccinated.”).

7. *See* World Health Organization, *The Effects of Virus Variants on COVID-19 Vaccines*, WORLD HEALTH ORG. (Mar. 1, 2021), <https://www.who.int/news-room/feature-stories/detail/the-effects-of-virus-variants-on-covid-19-vaccines> [<https://perma.cc/H8BJ-F78U>] (“When a virus is widely circulating in a population and causing many infections, the likelihood of the virus mutating increases.”); *see also* Bosman & Leatherby, *supra* note 5 (noting that 2,900 of the 100,000 deaths due to COVID-19 were vaccinated persons). The World Health Organization (WHO) notes that changes in the virus could affect the efficacy of the vaccine because the vaccine is based on a particular strain of the virus, and if the strain changes, so does a vaccine's success rate. *See* World Health Organization, *supra*.

8. *See* *Coronavirus Death Toll*, WORLDOMETER, <https://www.worldometers.info/coronavirus/coronavirus-death-toll/> [<https://perma.cc/A5BA-4WCU>] (last visited Feb. 23, 2021) (providing the current death toll globally of the COVID-19 pandemic); *see also* Claire Parins & Claire Stamler-Goody, *How COVID-19 Could Change the Law*, U. CHI. L. SCH. (Oct. 16, 2020), <https://www.law.uchicago.edu/news/how-covid-19-could-change-law> [<https://perma.cc/5YPA-AY27>] (interviewing law school faculty about how they think the pandemic will change the law). At the time of publication, the COVID-19 pandemic has killed over 5.9 million people across the globe. *See* *Coronavirus Death Toll*, *supra*. Over half a million people in the US have died from COVID-19, making it the third leading cause of death in the U.S. in 2021. *See* Joe Murphy & Jiachuan Wu, *Map: Track Coronavirus Deaths Around the World*, NBC NEWS (Feb. 15, 2021, 10:21 AM), <https://www.nbcnews.com/news/world/world-map-coronavirus-deaths-country-covid-19-n1170211> [<https://perma.cc/5DMJ-V8Y5>] (reporting that in the U.S., 945,765 people had died from COVID-19 by February 2022); Jared Ortaliza, Kendal Orgera, Krutika Amin, & Cynthia Cox, *COVID-19 Leading Cause of Death Ranking*, PETERSON-KFF (Feb. 4, 2022) (reporting that in January 2022, COVID-19 was the second leading cause of death in the U.S.), <https://www.healthsystemtracker.org/brief/covid-19-leading-cause-of-death-ranking/> [<https://perma.cc/5AQ3-CGJ8>].

9. *See* Parins & Stamer-Moody, *supra* note 8 (explaining how different law school faculty feel about how COVID-19 will change their field of law).

10. *See* Scott Bomboy, *Current Constitutional Issues Related to Vaccine Mandates*, NAT'L CONST. CTR. (Aug. 6, 2021), <https://constitutioncenter.org/blog/current-constitutional-issues-related-to-vaccine-mandates> [<https://perma.cc/SE4K-XJCN>] (explaining the complexity of the legal questions surrounding vaccine mandates).

states creating varying legislation regarding the reach of mandatory vaccine requirements.<sup>11</sup>

*Klaassen v. Trustees of Indiana University*<sup>12</sup> represents the first time a court has considered the constitutionality of a public institution's mandatory COVID-19 vaccination policy.<sup>13</sup> This Note argues that *Klaassen* presents the correct application of constitutional analysis, which is rational basis review, for questions regarding vaccine mandates during a public health crisis and creates clarity where there is confusion.<sup>14</sup> Further, this Note also asserts that *Klaassen* holds that COVID-19 vaccination mandates are constitutional, which sets an unquestionable precedent for future cases.<sup>15</sup> Part II delves into the history of mandatory vaccination case law and highlights important cases that have been litigated during the COVID-19 pandemic. Next, Part III discusses the facts and procedural history of *Klaassen*. Part IV explores the United States District Court for the Northern District of Indiana's holding that the correct mode of constitutional analysis when addressing a question of health during a pandemic is rational basis review. Then, Part V provides a critical analysis of the district court's holding and asserts that its holding is the correct application of both *Jacobson v. Massachusetts* and *Roman Catholic Diocese v. Cuomo*,<sup>16</sup> which are two Supreme Court decisions on the issue. Finally, Part VI illustrates the impact that the Indiana district court's holding will have on other jurisdictions when faced with similar questions and how its holding will become important precedent in the future.

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11. Compare IND. CODE ANN. § 16-39-11-5 (West 2021) (outlawing the use of “vaccine passports”), with City of New York Office of the Mayor, *Emergency Executive Order No. 225*, NYC.GOV (Aug. 16, 2021), <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2021/eo-225.pdf> [<https://perma.cc/777G-C6EB>] (mandating that all New York City residents must show proof of vaccination if they want to participate in indoor activities) [hereinafter *N.Y.C. Executive Order*].

12. No. 1:21-CV-238 DRL, 2021 WL 3073926 (N.D. Ind. July 18, 2021), *aff'd* 7 F.4th 592 (7th Cir. 2021).

13. See *id.* at \*15 (“No case to date has decided the constitutionality of whether a public university, such as Indiana University, may mandate that its students receive a COVID-19 vaccine.”).

14. See *id.* at \*21 (noting that the correct constitutional mode of analysis for questions regarding a public health crisis is rational basis review, which is inherently what *Jacobson v. Massachusetts* dictated). For further discussion about the correct constitutional review see *infra* notes 158–89 and accompanying text.

15. See *id.* at \*46 (noting that “the Fourteenth Amendment permits Indiana University to pursue a reasonable and due process of vaccination”).

16. 141 S. Ct. 63 (2020).

## II. BEFORE MODERNA, PFIZER, AND JOHNSON & JOHNSON: A HISTORY OF VACCINATION LAW

While society is intently focused on current vaccination litigation, vaccination case law has existed since the early twentieth century.<sup>17</sup> This precedent predates the implementation of modern constitutional analysis but still influences today's litigation.<sup>18</sup> These cases often require courts to analyze the Fourteenth Amendment, which holds that no State shall "deprive any person of life, liberty, or property, without due process of law."<sup>19</sup> Some litigants have argued that the Fourteenth Amendment's protections extend to their refusal of the COVID-19 vaccine under the recognized right to refuse unwanted medical treatment, which the Amendment does protect.<sup>20</sup> Neither the courts nor the legislature have uniformly answered this question of whether mandatory COVID-19 vaccinations violate a person's Fourteenth Amendment right.<sup>21</sup>

For over a century, states have enacted legislation which requires students to be vaccinated against infectious diseases other than COVID-19.<sup>22</sup> For example, in 1903, the New York Supreme Court addressed the constitutionality of the mandatory vaccine statute that the state legislature had enacted in 1893.<sup>23</sup> During World War II, the U.S. government mandated that all men enlisting had to get vaccinated against typhoid, yellow fever, and tetanus.<sup>24</sup> This legislative trend has continued into the twenty-first century; today all fifty U.S. states have some sort of legislation that requires

17. See generally *Viemeister v. White*, 84 N.Y.S. 712 (N.Y. App. Div. 1903) (being the first case to analyze the constitutionality of mandatory vaccine requirements in 1903).

18. See *id.* at 713–14 (deciding a case relating to vaccination requirements in 1903); *Harris v. University of Ma. Lowell*, No. 1:21-cv-11244, 2021 WL 3848012, at \*1 (D. Mass. Jul 30, 2021) (deciding a case on mandatory vaccinations in a public school in 2021).

19. U.S. CONST. amend. XIV, § 1.

20. See *Klaassen*, 2021 WL 3073926, at \*1 (entertaining a claim brought by students that the University's mandatory vaccination requirement violates the students' Fourteenth Amendment rights); see also, *Cruzan by Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 278 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.").

21. See *id.* at \*15 (deciding the constitutionality of the COVID-19 vaccine); IND. CODE ANN. § 20-34-4-2 (West 2015) (requiring vaccinations, not particular to COVID-19, in Indiana schools); IND. CODE ANN. § 16-39-11-5 (West 2021) (outlawing the requirement of proof of vaccination in Indiana).

22. See Dorit R. Reiss, *Litigating Alternative Facts: School Vaccine Mandates in the Courts*, 21 U. PA. J. CONST. L. 207, 208 (2018) (describing the history of vaccination law and how it started over a century ago in the United States).

23. See *Viemeister*, 84 N.Y.S. at 713 (addressing the constitutionality of section 200, c.661, p.1556, Laws 1893, which mandated that school children should be vaccinated to attend school).

24. See *The Long History of Vaccine Mandates in America*, WALL ST. J. (Sept. 17, 2021, 10:58 AM), <https://www.wsj.com/articles/the-long-history-of-vaccine-mandates-in-america-11631890699> (explaining how the war effort spurred vaccination rates as well as vaccination technology).

specified vaccines for students.<sup>25</sup> Yet, when it comes to the COVID-19 vaccine, some states have changed their policies and banned COVID-19 vaccination requirements.<sup>26</sup> With states treating the COVID-19 vaccine differently, Congress has been unable to provide a collective answer to the issue of whether mandating the vaccine would be a violation of a person's Fourteenth Amendment rights.<sup>27</sup>

Similarly, courts have yet to provide a unified answer as to the constitutionality of executive-ordered COVID-19 social distancing and masking mandates.<sup>28</sup> Inconsistent outcomes in litigation deciding the constitutionality of these different executive orders has created confusion as to the constitutionality of any pandemic-related restrictions, including vaccine mandates.<sup>29</sup>

Section A explores the vaccination case law that predates the modern tiers of constitutional analysis of rational basis review, intermediate scrutiny, and strict scrutiny. Then, Section B looks at the Supreme Court's analysis of the constitutionality of COVID-19 restrictions. Lastly, Section C discusses the impact of the Supreme Court's rulings on lower courts and their interpretations of the Supreme Court's holdings.

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25. See *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. OF ST. LEGISLATURES (Jan. 10, 2022), <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [<https://perma.cc/JR57-46JZ>] (noting which states have mandatory vaccine requirements for students and which states allow for certain exemptions).

26. See Elliott Davis, *States Are Banning COVID-19 Vaccine Requirements*, U.S. NEWS (Apr. 30, 2021, 4:54 PM), <https://www.usnews.com/news/best-states/articles/2021-04-30/these-states-are-banning-covid-19-vaccine-requirements> [permalink unavailable] (reporting that Arkansas, Montana, and South Carolina advanced legislation that bans requirements such as proof of COVID-19 vaccination as a condition of employment as of April 2021).

27. Compare *id.* (noting states that have banned vaccine requirements), with *N.Y.C. Executive Order*, *supra* note 11 (mandating that in New York City all residents must show proof of vaccination if they want to participate in indoor activities).

28. Compare *Big Tyme Invs., v. Edwards*, 985 F.3d 456, 460 (5th Cir. 2021) (holding that the governor's restrictions against bars during the COVID-19 pandemic did not violate constitutional rights), with *Agudath Isr. of Am. v. Cuomo*, 983 F.3d 620, 625 (2d Cir. 2020) (holding that the Governor's restriction against places of worship during COVID-19 pandemic did violate constitutional rights). It should be noted that the courts have yet to provide much substance on the issue of the constitutionality of COVID-19 vaccine requirements since litigation is commencing now, and as such the courts' indication as to constitutionality will be analyzed under the scope of COVID-19 restrictions. See *Klaassen v. Trs. of Ind. Univ.*, No.1:21-CV-238 DRL, 2021 WL 3073926, at \*1 (N.D. Ind. July 18, 2021), *aff'd* 7 F.4th 592 (7th Cir. 2021) (being the first to determine the question of constitutionality of a COVID-19 vaccine mandate in public schools).

29. See *Jones v. Cuomo*, 542 F. Supp. 207, 216–18 (S.D.N.Y. 2021) (citing different outcomes in different jurisdictions regarding COVID-19 regulations and how they are handled).

A. *Consumption, Apoplexy, and Blood Letting: Vaccine Case Law Prior to Modern Tiered Constitutional Analysis*

Case law regarding vaccine requirements predates what is considered modern constitutional analysis.<sup>30</sup> As early as 1903, courts grappled with the issue of mandatory vaccine requirements in schools.<sup>31</sup> In *Viemeister v. White*<sup>32</sup> the court considered the lawfulness of a public school's refusal to admit a student due to lack of vaccination.<sup>33</sup> Such a refusal was lawful and was "not in conflict with any of the definitions of the 'law of the land,' for it operate[ed] equally upon every person who is, or who may desire to become, a pupil in our public schools."<sup>34</sup> This determination was not based on modern tiers of constitutional analysis but was concerned with the general applicability of the law and making sure it did not target one group versus another.<sup>35</sup> The court gave extreme deference to the legislature to make decisions that were for the good of all, and if the law was not applied fairly across the public, it was up to the legislature to change it—not the courts.<sup>36</sup>

Two years later, the Supreme Court commented on the validity of mandatory vaccination requirements in *Jacobson v. Massachusetts*.<sup>37</sup> In *Jacobson*, the Court was asked to determine if the City of Cambridge's mandatory vaccination policy that required all residents get the smallpox vaccine or pay a fine of five dollars was constitutional.<sup>38</sup> Such a mandate was deemed constitutional, and the Court recognized a two-pronged test to determine the constitutionality of a claim regarding a public health cri-

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30. See *Klaassen*, 2021 WL 3073926, at \*17 (noting that to answer the question about the constitutionality of a mandatory vaccine mandate the court must assess material that predates the modern tiers of constitutional analysis). The court in *Klaassen* describes modern constitutional analysis as having levels of standard of review such as strict scrutiny and rational basis review. *Id.*

31. See *Viemeister v. White*, 84 N.Y.S. 712, 713 (N.Y. App. Div. 1903) (deciding whether a student could be blocked from attending school because the student was not vaccinated).

32. *Id.*

33. See generally *id.* (considering whether a statute which compelled students to get vaccinated to be admitted to school is in conflict with fundamental law).

34. *Id.* at 716 ("We fail to discover that the statute in question violates any specific guaranty[.]").

35. See *id.* at 714 (holding that the test for constitutionality of a law is based on if the conduct is uniform and affects "alike the legislator, his family, his neighbors and friends").

36. See *id.* (noting that the foundation of representative government is the presumption that the legislature will act wisely and "in the interests of all of the people" and that if a law is not within the interest of the people, then the legislature must remedy it and it "cannot be done by the courts.").

37. 197 U.S. 11, 12 (1905) (deciding a vaccine mandate in 1905).

38. See *id.* at 22–23 ("What, according to the judgment of the state court, are the scope and effect of the statute? What results were intended to be accomplished by it? These questions must be answered.").

sis.<sup>39</sup> First, to address the issue of the constitutionality of a public health policy, the law must have a “real or substantial relation” to “the public health, the public morals, or the public safety,” and, second, must not be a “plain, palpable invasion of rights secured by the fundamental law.”<sup>40</sup> In applying this test in *Jacobson*, the Court first determined that the mandate was related to public health in that it was “employed to stamp out the disease of smallpox[.]”<sup>41</sup> Second, the Court noted that the mandate did not violate any right that is secured by the Constitution because the legislature was in the best position to make choices regarding the majority of citizens in the Commonwealth, and it was not for the judicial branch to second guess those decisions.<sup>42</sup> Again, the Supreme Court gave deference to the state legislature’s actions, noting that “the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases[.]” and that “no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that . . . method was . . . not the best[.]”<sup>43</sup> Finally, the Court noted the importance of exceptions to mandates, explaining that there are some reasons a person may need to assert their own personal will.<sup>44</sup> Yet the Court found that this right to “dispute the authority of any human government” was satisfied because exceptions

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39. *Id.* at 26 (noting that the Constitution “does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint”).

40. *Id.* at 31 (determining that the judiciary can “review legislative action in respect of a matter affecting the general welfare” and that intrusion can only happen when the legislature has created a law that violates the two-pronged test of purpose of the statute and effect on fundamental law).

41. *Id.* (asserting that the methods employed to “stamp out the disease of smallpox” had a “real and substantial relation to the protection of the public health and the public safety”).

42. *See id.* at 38 (recognizing that the safety and health of the people of Massachusetts is best left to the Commonwealth to protect). It is important to note that the plaintiff in error did not assert a clear constitutional right that the mandatory vaccination requirement violated, instead he just purported that the vaccine was dangerous and could cause death. *Id.* at 36. To answer this particular call for relief, the Court would need to decide if the plaintiff in error or the government was right about the danger of the vaccine. *Id.* at 37. The court declined to do so and noted that they were ill situated to make that decision and the legislative branch was more well equipped to make the decision about the safety and effectiveness of the vaccine. *Id.* This language may have informed lower courts that rationalize that *Jacobson* set a lower standard of deference when considering constitutional issues relating to public health crisis. *See Big Tyme Invs. v. Edwards*, 985 F.3d 456, 466 (5th Cir. 2021) (noting that in times of public health crisis, some constitutional rights can be suspended).

43. *See Jacobson*, 197 U.S. at 35 (explaining that because it is the common belief of the public and medical professionals that vaccination stops the spread of smallpox, the legislature is in the best position to determine whether that is a valid reason for enacting a law, not the judiciary).

44. *See id.* at 29 (“There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government . . .”).



were made to the vaccine mandate, including exceptions for children and the exception of paying a fine rather than being vaccinated.<sup>45</sup>

Twenty-two years later, the Supreme Court decided *Buck v. Bell*<sup>46</sup> and relied on *Jacobson* to declare the involuntary sterilization of a woman constitutional.<sup>47</sup> The plaintiff in *Buck* argued that the sterilization order violated substantive due process under the Fourteenth Amendment, and that there were “no circumstances” under which the order could be justified.<sup>48</sup> The Court reasoned that:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.<sup>49</sup>

Modern commentators widely consider *Buck* a misapplication of justice and note that its holding cast doubt upon *Jacobson* and its relevance.<sup>50</sup>

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45. *Id.* at 29–30. The Court importantly noted though that even though there was an exception for children, this did not mean that the vaccine mandate violated an adult’s equal protection of the law. *Id.* It stated that the “statute [was] applicable equally to all in like condition, and there are obviously reasons why regulations may be appropriate for adults which could not be safely applied to persons of tender years.” *Id.*

46. 274 U.S. 200 (1927).

47. *See id.* at 205 (affirming the judgement of the lower court which ordered the performance of salpingectomy which caused sterilization against the patient’s wishes).

48. *Id.* at 205–07 (considering whether the statute which legalized plaintiff’s sterilization is void under the Fourteenth Amendment because it denied her due process of the law and equal protection of the laws).

49. *Id.* at 207 (citation omitted).

50. *See* Wendy K. Mariner, George J. Annas & Leonard H. Glantz, *Jacobson v. Massachusetts: It’s Not Your Great-Great-Grandfather’s Public Health Law*, 95 AM. J. PUB. HEALTH 581, 584 (2005) (noting that “*Jacobson* was cited as support for the general principle that public welfare was sufficient to justify involuntary sterilization”). It should be noted that it is also recognized that *Buck* misapplied the test purported in *Jacobson*, which sought to regulate based on public health necessity “through reasonable regulation.” Rene F. Najera, *Jacobson and the Contemporary Jurisprudence*, C. PHYSICIANS PHILA. (Mar. 7, 2019), <https://www.historyofvaccines.org/content/blog/jacobson-v-massachusetts-reiss-part-two> [<https://perma.cc/D9YV-5U6P>] (emphasis added). It is generally accepted that vaccines provide benefits to those who get them as well as protect society, and the “link between sterilization and public health is speculative, weak, and unsupported with data.” *Id.*

This led some courts to believe that *Buck's* holding endorsed the suspension of personal fundamental rights in pursuit of the greater good.<sup>51</sup>

B. *Modern Medicine: Vaccine Case Law Under Modern Constitutional Analysis*

Over a century after *Jacobson*, the Supreme Court again ruled on the constitutionality of legislative and executive mandates regarding pandemics.<sup>52</sup> In *Roman Catholic Diocese v. Cuomo*,<sup>53</sup> religious leaders asked the Court to grant a preliminary injunction against the Executive Order issued by New York's governor Andrew Cuomo, which limited the number of worshipers at places of worship.<sup>54</sup> In granting the injunction, the Court reasoned that the social distancing mandate was not "neutral because [it] single[ed] out houses of worship for especially harsh treatment."<sup>55</sup> The Court noted that other businesses that were deemed essential such as acupuncture facilities, camp grounds, and garages in the "red" and "orange" zones—could admit as many people as they wanted.<sup>56</sup> The Court stressed that the restrictions were not of "'general applicability'" and therefore "must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest."<sup>57</sup> While the Court admitted that "[s]temming the spread of COVID-19 is unquestionably a compelling interest," the Executive Order was not narrowly tailored because it was

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51. *See*, *Fieger v. Thomas*, 74 F.3d 740, 750 (6th Cir. 1996) (referring to the decision in *Buck* as repudiated); *Chamul v. Amerisure Mutual Ins. Co.*, 486 S.W.3d 116, 117 (Tex. Ct. App. 2016) (referring to *Buck* as "much criticized"); *Matter of Romero*, 790 P.2d 819, 821 (Colo. 1990) (referring to *Buck* and sterilization treatments as "largely discredited").

52. *See* *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63 (2020) (determining the constitutionality of mask mandates in houses of worship).

53. *Id.*

54. *Id.* at 65–66 ("[A]pplications seek relief from an Executive Order issued by the Governor of New York that imposes very severe restrictions on attendance at religious services . . .").

55. *Id.* at 66 (pointing to comments made by the governor, which specifically reference and target the "ultra-Orthodox [Jewish] community" to show the lack of general applicability (alteration in original) (internal quotation marks omitted) (quoting *Agudath Isr. v. Cuomo*, 989 F.3d 620, 625 (2d Cir. 2020) (Park, J., dissenting))).

56. *Id.* (noting that in "red" zones essential businesses can admit as many people as they would like, and in "orange" zones even non-essential businesses can admit whomever they like while houses of worship are limited to 10 and 25 people in "red" and "orange" zones respectively).

57. *Id.* at 67 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)). Notably, this type of analysis at once ushers the pandemic case law into analysis that is governed by modern constitutional analysis by framing it in terms of strict scrutiny, but it also harkens back to *Viemeister v. White* in that it stresses the constitutional test is that it applies equally to all groups. For further discussion about the court's reasoning in *Viemeister*, see *supra* notes 35–36 and accompanying text.

stricter than any other COVID-19 regulation—and stricter than necessary to stop the spread.<sup>58</sup>

In his concurring opinion, Justice Gorsuch commented on the lack of influence that *Jacobson* had on the decision and called into question how it did not provide a novel form of analysis to be employed during a public health crisis.<sup>59</sup> Justice Gorsuch made a clear distinction between the issue at hand in *Roman Catholic Diocese* and the one in *Jacobson*, stating that the right to not be vaccinated is an issue pertaining to bodily autonomy while the one at hand is a violation of the First Amendment.<sup>60</sup> Justice Gorsuch criticized the lower court's interpretations of *Jacobson's* effect on constitutional analysis of public health orders.<sup>61</sup> Notably, Justice Gorsuch instead showed how *Jacobson* and modern constitutional analysis are not different, stating that “this Court essentially applied rational basis review to Henning Jacobson’s challenge to a state law . . . .”<sup>62</sup>

C. *Determining the Best Medical Treatment: Roman Catholic Diocese’s Impact on Lower Courts*

Since the Supreme Court’s decision in *Roman Catholic Diocese*, some lower courts have adopted the strict scrutiny test described in the opinion while others continued to apply lower standards of review for questions of constitutionality of COVID-19 mandates.<sup>63</sup> The Supreme Court’s analysis in *Roman Catholic Diocese* left lower courts to consider whether *Jacobson* had been effectively overruled or not.<sup>64</sup>

After the Supreme Court’s holding in *Roman Catholic Diocese*, the Court of Appeals for the Second Circuit put the final nail in the coffin for

58. *Roman Cath. Diocese*, 141 S. Ct. at 67 (comparing the restrictions to restrictions created by other similarly “hard-hit” areas to show that the Executive Order was too specific to houses of worship).

59. *Id.* at 71 (Gorsuch, J., concurring) (querying as to why some lower courts have mistaken *Jacobson* for “a towering authority that overshadows the Constitution during a pandemic”).

60. *Id.* at 70–71 (Gorsuch, J., concurring) (noting that the right to bodily integrity does not have anything to do with the circumstances addressed, which are concerned with the explicit right to religious exercise).

61. *See id.* at 70 (Gorsuch, J., concurring) (claiming “*Jacobson* hardly supports cutting the Constitution loose during a pandemic”).

62. *Id.* (Gorsuch, J., concurring) (“Put differently, *Jacobson* didn’t seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so.”).

63. *See Big Tyme Invs. v. Edwards*, 985 F.3d 456, 467 (5th Cir. 2021) (holding that *Jacobson* is the ruling standard by which constitutional claims regarding public health should be reviewed); *Agudath Isr. v. Cuomo*, 989 F.3d 620, 625 (2d Cir. 2020) (applying modern constitutional tiered analysis to public health constitutional questions); *Jones v. Cuomo*, 542 F. Supp. 207, 218 (S.D.N.Y. 2021) (applying both modern constitutional evaluation to pandemic executive orders as well as *Jacobson*).

64. *See Jones*, 542 F. Supp. at 218 (“In the wake of the *Roman Catholic Diocese* decision, some courts’ confidence in *Jacobson* has . . . waned.”).

the New York Governor's Executive Order in *Agudath Israel v. Cuomo*.<sup>65</sup> In *Agudath Israel*, the Second Circuit again considered Governor Cuomo's Executive Order, which classified areas of high COVID-19 infection rates as "orange" or "red" zones.<sup>66</sup> Specifically, it again addressed classifying houses of worship as spreaders of COVID-19 and whether the imposition of stricter prohibitions on them was constitutional.<sup>67</sup> Ultimately, the court held that the Executive Order was unconstitutional because it was "not neutral on its face and impose[d] greater restrictions on religious activities[.]"<sup>68</sup> The court utilized the modern mode of tiered constitutional analysis when determining the constitutionality of the Executive Order.<sup>69</sup> It followed the Supreme Court's recommendation of the appropriate mode of analysis and disregarded *Jacobson* as providing a standard of review.<sup>70</sup> Through its opinion, the court endorsed the three-tiered framework for analyzing constitutional violations as the appropriate form of analysis, and the court even went so far as to state that "courts may not defer to the Governor simply because he is addressing a matter involving science or public health."<sup>71</sup> *Agudath Israel* is an example of a lower court determining that the tiered approach is the correct approach constitutional analysis for restrictions related to COVID-19 that are not of general applicability.<sup>72</sup>

Conversely, in an opinion regarding the constitutionality of the Louisiana Governor's Executive Order regarding bar operation at the height of the COVID-19 pandemic, the Court of Appeals for the Fifth Circuit found that such orders were constitutional in *Big Tyme Investments v. Edwards*.<sup>73</sup>

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65. See *Agudath Isr.*, 983 F.3d at 625 (confirming the Supreme Court's injunction and holding that the executive orders were unconstitutional).

66. *Id.* at 626.

67. *Id.* at 625 (noting that the court is tasked with considering a First Amendment question as to whether the COVID-19 restrictions are constitutional).

68. *Id.* (enjoining the Governor from enforcing the Order's ten- and twenty-five-person capacity limits on houses of worship).

69. *Id.* at 631, 633 (noting that strict scrutiny applies, and the restriction must be narrowly tailored to withstand scrutiny). Modern tiers of constitutional analysis are the separation of the standard of scrutiny into rational basis review and strict scrutiny review. See *Klaassen v. Trs. of Ind. Univ.*, No. 1:21-CV-238 DRL, 2021 WL 3073926, at \*17 (N.D. Ind. July 18, 2021), *aff'd* 7 F.4th 592 (7th Cir. 2021).

70. See *Agudath Isr.*, 983 F.3d at 635 (stating that the governor's reliance on *Jacobson* was "misplaced").

71. *Id.* The court rejected deference to the governor during times of public health crises, which can be seen as interpretation of the standard purported in *Jacobson*. See *Big Tyme Invs. v. Edwards*, 985 F.3d 456, 467 (5th Cir. 2021) (noting that plaintiff argued that *Jacobson* called for "elevated deference" to the governor beyond even modern rational basis jurisprudence (internal quotation marks omitted)). By deeming language commonly associated with *Jacobson* as improper modes of analysis, the court in *Agudath Israel* implicitly rejected *Jacobson* as proper precedent. See *Agudath Isr.*, 983 F.3d at 635.

72. See *Agudath Isr.*, 983 F.3d at 635 (noting the three-tiered framework was created to consider exactly these types of constitutional questions).

73. See *Big Tyme Invs.*, 985 F.3d at 460 (affirming the lower court's denial of injunctive relief based of a Fourteenth Amendment claim).

The Fifth Circuit considered whether the Executive Order, which stated that bars, with or without food service, could only be open for take-out services while restaurants could be open for dine-in services, was constitutional under the Fourteenth Amendment.<sup>74</sup> The court held that such an order was constitutional because the closure of bars had a “‘real or substantial relation’ to the public health crisis” because bars created a greater risk of spread of COVID-19 as their primary purpose was for socialization and patrons were more likely to be intoxicated and therefore less likely to maintain appropriate social distance.<sup>75</sup> The court further applied the *Jacobson* test by noting that the Order was not “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”<sup>76</sup> Because the Executive Order was based simply on what type of business permit the owner had, there was no violation of the Equal Protection Clause.<sup>77</sup> By relying on language found in *Jacobson*, the Court endorsed the mode of analysis supported in *Jacobson*.<sup>78</sup> The Fifth Circuit even went as far as endorsing the idea that *Jacobson* allows for greater deference during times of public health crisis, noting “when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights . . . .”<sup>79</sup>

The United State District Court for the Southern District of New York dealt with the confusion of the aftermath of *Roman Catholic Diocese* by analyzing the constitutionality of the Executive Order under a hybrid approach, applying both the *Jacobson* standard and modern tiered analysis, in *Jones v. Cuomo*.<sup>80</sup> The district court determined that New York’s fourteen-day quarantine requirement for out-of-state travelers was constitutional under both the *Jacobson* standard and the modern tiered approach.<sup>81</sup>

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74. *Id.* at 461 (considering whether the Governor’s plan to reopen in phases, which allows for some businesses to be open while others cannot, is constitutional).

75. *Id.* at 463 (detailing the data which indicates that bars are spreaders of COVID-19 for various reasons).

76. *Id.* at 466, 468 (internal quotation marks omitted) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

77. *Id.* (noting that classification due to business permit does not differentiate on the basis of a suspect class). “Such a classification does not ‘run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.’” *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

78. *See id.* at 467 (analyzing the issue with a two-part test that asks (1) whether the order lacks a “real or substantial relation” to the COVID-19 crisis; and (2) whether the order is a “plain, palpable invasion of rights secured by the fundamental law” (citing *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020))).

79. *Id.* at 466 (internal quotation marks omitted) (quoting *In re Abbott*, 954 F.3d at 784).

80. *See Jones v. Cuomo*, 542 F. Supp. 207, 219 (S.D.N.Y. 2021) (holding that “in an abundance of caution, the Court will assess the Executive Order . . . under both *Jacobson* and the traditional tiers of scrutiny”).

81. *See id.* at 214–15 (rejecting the plaintiff’s claims under *Jacobson* and the modern tiered analysis).

While analyzing the issue under the *Jacobson* standard of review, the court considered whether the fourteen-day quarantine requirement for out-of-state travelers entering New York “bore ‘no real or substantial relation’ to the public health or was ‘a plain, palpable invasion of rights secured by the fundamental law[.]’”<sup>82</sup> The court determined that the Executive Order related to public health because it was enacted with the goal of curbing the transmission of COVID-19 from residents of states who possessed “a mathematically heightened risk of spreading COVID-19.”<sup>83</sup> Additionally, the Order did not violate a fundamental right because it did not implicate any component of the right to travel.<sup>84</sup> In utilizing the language from the test used in *Jacobson*, the district court recognized *Jacobson* as good law that should be used in the analysis of constitutional questions regarding a public health crisis.<sup>85</sup>

Yet, while marking *Jacobson* as good law, the district court showed hesitation when it analyzed the issue under the tiered approach and determined that even under modern constitutional analysis, the Executive Order was still constitutional.<sup>86</sup> Not only did the court use the tiered analysis, but it also applied strict scrutiny to the Executive Order.<sup>87</sup> By submitting the mandate to strict scrutiny, the court defers to the standard purported in *Roman Catholic Diocese*.<sup>88</sup>

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82. *Id.* at 219 (alteration in original) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31, 25 (1905)) (“[C]ourts—as well as much of the public—are in agreement that COVID-19 is a highly infectious and potentially deadly disease . . . [and] the quarantine period of fourteen days was reasonable in light of guidance from the WHO.”).

83. *Id.* (internal quotation marks omitted) (stating that New York was one of the only states that was successfully curbing the spread of COVID-19 while other states were still seeing a rise in cases, therefore New York had an interest in keeping its numbers low from a population that is more likely to have positive cases).

84. *See id.* at 220 (recognizing that the right to travel is fundamental but a law “only implicates that right ‘when it actually deters such travel, [or] when impeding travel is its primary objective . . . .’” (internal quotation marks omitted) (quoting *Town of Southhold v. Town of E. Hampton*, 477 F.3d 38, 53 (2d Cir. 2007))).

85. *See id.* at 218 (noting that *Jacobson* is “applicable on *stare decisis* grounds” and “has direct application” (internal quotation marks omitted) (quoting *Hopkins Hawley v. Cuomo*, No. 20 Civ. 10932 (PAC) 2021 WL 1895277, at \*5 n.4 (S.D.N.Y. May 11, 2021))).

86. *See id.* at 222 (determining that the Executive Order withstands both strict scrutiny and rational basis review).

87. *See id.* at 220 (stating that the right to travel is “‘firmly embedded’ in the Supreme Court’s jurisprudence” but the Executive Order has a compelling interest that is narrowly tailored (citing *Saenz v. Roe*, 526 U.S. 489, 498 (1999))).

88. *See id.* at 213 (noting that *Roman Catholic Diocese* called into question the continued applicability of *Jacobson*). This hybrid type of analysis, where the court considered the constitutionality of a pandemic order under both *Jacobson* and modern tiers of constitutional analysis, is a perfect example of the confusion created by *Roman Catholic Diocese*. *See id.* at 213-14. In fact, the court was so uncertain about the valid precedent that it resorted to using both just to be safe. *Id.* at 214.

III. JABS TAKEN AT THE SHOT: THE FACTS OF *KLAASSEN*

On May 21, 2021, Indiana University (“the University”) announced that it was mandating the COVID-19 vaccine for its students, faculty, and staff.<sup>89</sup> This decision came after the University’s President created the University Restart Committee, which the Executive Vice President for University Clinical Affairs and the School of Medicine Dean spearheaded.<sup>90</sup> The University provided exceptions and alternatives to the vaccination mandate, such as medical exemption, religious exemption, medical deferral, taking a semester off, attending online, or attending another university.<sup>91</sup> If members of the University met any of these exceptions and continued to attend in-person, they would be subject to a mask policy, testing, and social distancing.<sup>92</sup>

In response, eight students sued the school and asked the United States District Court for the Northern District of Indiana to enforce a preliminary injunction to halt the imposition of the vaccine mandate until its constitutionality can be determined.<sup>93</sup> The students argued that the vaccine mandate, and the extra measures enforced if the students did qualify for an exception, violated their Fourteenth Amendment rights.<sup>94</sup> Of the eight students who filed the action, six have received exemptions already, one would qualify if she applied, and only one did not seem to qualify for

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89. *See* *Klaassen v. Trs. of Ind. Univ.*, No.1:21-CV-238 DRL, 2021 WL 3073926, at \*1, \*4 (N.D. Ind. July 18, 2021), *aff’d* 7F.4th 592 (7th Cir. 2021) (explaining that as a public institution, the University has statutory power to “pass all bylaws necessary to put into effect its powers” (citing IND. CODE. ANN. § 21-27-4-3 (West 2021))).

90. *Id.* at \*5. This committee was made up of “fifteen members with expertise in public health, epidemiology, virology, data modeling and monitoring, risk mitigation, health equity, health sciences, and law.” *Id.* at \*13. The committee had seven MDs on it who reviewed “guidelines from the CDC, IU Health, the ISDH, the Indiana Governor’s Office . . . scientific literature and data, including COVID-19 case and hospitalization rates for Indiana.” *Id.* (internal quotation marks omitted). The Committee was presented to on new data almost weekly for six months. *Id.*

91. *Id.* at \*6 (determining that exemptions may be given if the University is given a religious reason or is provided proof from a physician of an allergy to the vaccine, the student is pregnant or breastfeeding, receiving an organ transplant, receiving treatment with Rituximab within the past three to six months, or has COVID-19 specific monoclonal antibodies in the past ninety days).

92. *Id.* (“[S]tudents [who are exempt] must participate in more frequent mitigation testing, quarantine if exposed to someone who has tested positive for COVID-19, wear a mask in public spaces, and return to their permanent address or quarantine if there is a serious outbreak of COVID-19.”).

93. *See id.* at \*1 (stating that students are suing not only because of the mandatory vaccine mandate but also because of the extra requirements of masking, social distancing, and testing).

94. *Id.* at \*22. The students argued that they have a fundamental right to refuse unwanted medical treatment based on bodily autonomy. *Id.*

an exemption.<sup>95</sup> The students stated the following issues with the vaccine mandate:

- Ryan Klaassen was concerned that the vaccine was unsafe and was worried that if he had to comply with the testing and masking mandates he would be discriminated against.<sup>96</sup>
- Jaime Carini objected to the mask policy because it interfered with her ability to work out and caused skin problems.<sup>97</sup> Additionally, she did not believe in “surrendering her biological information for testing” and thought the University’s policy was “a cultural harm.”<sup>98</sup>
- Daniel Baumgartner, Ashlee Morris, and Seth Crowder all asserted they had religious objections to wearing a mask and being tested.<sup>99</sup>
- Macey Policka believed that her age group was not at risk for COVID-19 and thought that her dietary habits made her more immune to getting the virus, and she had concerns about wearing a mask while pursuing a theatre degree.<sup>100</sup>
- Margaret Roth “th[ought] masks [we]re silly and she claim[ed] nasal swabs cause cancer.”<sup>101</sup> Additionally, Roth had a religious objection to the vaccine but “did not file for an exemption because she [did not] want to be subject to testing or wear a mask.”<sup>102</sup>
- Natalie Sperazza did not seem to have objections to testing or mask requirements, having already complied with them and having been tested at Amazon, where she worked and sometimes got tested “just to have a break.”<sup>103</sup>

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95. *Id.* at \*13. It is because of the one student who does not qualify that the court has standing on the issue, since all other members have an exception or could have an exception. *Id.* at \*14. Natalie Sperazza must make the choice between getting the vaccine or not attending Indiana University in person. *Id.*

96. *Id.* at \*13 (showing Klaassen complied with the University policy during his freshman year and has worn a mask in most places and undergone testing).

97. *Id.* (remarking that Carini had a doctor’s note which directed her not to take the vaccine, though it has not been presented to the University, but she has qualified for a religious exemption).

98. *Id.*

99. *Id.* (reporting that while Baumgartner, Morris, and Crowder all had religious objections to wearing a mask and testing, they all had previously been tested and conformed with masking policies).

100. *Id.* (showing that Policka admitted to never experiencing judgment or alienation due to wearing a mask).

101. *Id.* (determining that Roth has also worn masks while at school, shopping, and working).

102. *Id.*

103. *Id.* at \*14 (noting that Sperazza complied with the masking and testing requirement during the 2020 school year).



After the students sued the University in the United States District Court for the Northern District of Indiana, South Bend Division, the court denied their application for a preliminary injunction.<sup>104</sup> When denying the preliminary injunction, the court considered (1) whether the students would suffer irreparable harm in the interim prior to final resolution; (2) whether there was no adequate remedy at law; and (3) whether the students had a reasonable likelihood of success on the merits.<sup>105</sup> The court noted that the decision was not a final decision based on the merits, and that the preliminary injunction standard is a “very far-reaching power, never to be indulged . . . except in a case clearly demanding it.”<sup>106</sup> The court reasoned that the students did not meet their burden of proving that they are likely to succeed on the merits of their claims, that they will sustain irreparable harm, and that the balance of harms and the public interest favor such a remedy.<sup>107</sup> First, it explained the students were not likely to succeed on the merits because they could not prove that the right to refuse a vaccination was a fundamental right that was embedded in legal history and tradition, and therefore, the right to refuse a vaccination was merely a liberty interest.<sup>108</sup> Further, the mandate was “rationally related to ensuring the public health of students, faculty, and staff,” which made the student’s claim that the mandate was unconstitutional likely to fail.<sup>109</sup>

Accordingly, the students appealed to the Court of Appeals for the Seventh Circuit, which affirmed the district court’s decision to deny the students’ motion for preliminary injunction.<sup>110</sup> The Seventh Circuit specifically stated that “[g]iven *Jacobson v. Massachusetts* . . . which holds that a state may require all members of the public to be vaccinated against smallpox, there can’t be a constitutional problem with vaccination against SARS-CoV-2.”<sup>111</sup> Again, the appellate court affirmed that the students

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104. *Id.* at \*1 (noting that the students’ request for a preliminary injunction, which is an extraordinary remedy, is denied).

105. *See id.* at \*15 (explaining the preliminary injunction standard).

106. *Id.* at \*15, \*44 (alteration in original) (internal quotation marks omitted) (quoting *Cassel v. Snyders*, 990 F.3d 539, 544 (7th Cir. 2021)).

107. *Id.* at \*15 (focusing on the students’ failure to meet the first burden of the preliminary injunction test, which is to prove they are likely to succeed on the merits).

108. *Id.* at \*23 (“The students . . . offer no preliminary record of such historic rules, laws, or traditions that would facilitate the court’s announcement. . . that a right to refuse a vaccine is anything more than a significant liberty under the Fourteenth Amendment.”)

109. *Id.* at \*27 (“It isn’t unreasonable to believe that, absent concerted vaccination, the fall and winter months will prove more arduous than these summer months for the university. Vastly improved, yes; out of the woods we aren’t . . . .” *Id.* at \*26 (internal citation omitted)).

110. *See Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 594 (7th Cir. Aug. 2, 2021) (affirming the decision made by the lower court to deny the preliminary injunction).

111. *Id.* at 593 (citation omitted) (rejecting plaintiffs’ assertion that the rational-basis standard used in *Jacobson* does not offer enough protection for their

lacked a showing that the right to not be vaccinated is fundamental.<sup>112</sup> Further, the court noted that the case at bar was less restrictive of the students' rights than *Jacobson* was because the University created exceptions for them.<sup>113</sup> Secondly, the mandate was less restrictive because vaccination was not a requirement of living in the state, only of attending the University.<sup>114</sup> Because the University had the right to set other conditions of enrollment, like tuition and following instructions about what to read and write, a vaccination mandate was no different.<sup>115</sup>

In an emergency appeal to the Supreme Court of the United States, the students asked the Court to block the vaccination mandate.<sup>116</sup> Without commenting on the issue, the Supreme Court denied the application for injunctive relief.<sup>117</sup> With this denial, the Supreme Court did not interfere with the University's mandate.<sup>118</sup>

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interests). The court unequivocally depended upon *Jacobson*, clearly stating that *Jacobson* bars any complaint brought against mandatory vaccination requirements. *Id.* This complete dependence is an example of courts bolstering *Jacobson* against attacks that it is no longer valid precedent and shows that this court, in particular, does not consider it overruled. For a discussion of how the court in *Agudath Israel* disregarded *Jacobson* as relevant precedent, see *supra* notes 70–72 and accompanying text.

112. See *Klaassen*, 7 F.4th at 593 (using *Jacobson* to show that plaintiffs lack a right under substantive due process to refuse to get vaccinated).

113. *Id.* (noting that *Jacobson* lacked exceptions for adults from the vaccine mandate, but Indiana University has exceptions for persons who declare vaccination incompatible with their religious beliefs and persons for whom vaccination is medically contraindicated).

114. See *id.* (explaining that in *Jacobson* to live in Massachusetts you had to be vaccinated as an adult or pay a fine, conversely Indiana University only made it a condition of attending the school, and it is well within the school's right to set conditions of attendance).

115. See *id.* at 593–94 (stating that other conditions of enrollment, other than a COVID-19 vaccine are normal and proper). The appellate court noted that while the students do have a right to bodily integrity, they also had a right to hold property, yet they surrendered 11,000 dollars a year to attend the college. *Id.* at 593. Similarly, the court noted that while students have a First Amendment right—meaning the state cannot tell them what to read or write—the University still may demand students read things they do not want to read and write things they prefer not to write. *Id.* Finally, the court succinctly noted “[a] student told to analyze the role of nihilism in Dostoevsky’s *The Possessed* but who submits an essay about Iago’s motivations in *Othello* will flunk.” *Id.* at 594.

116. See *Klaassen v. Trs. of Ind. Univ.*, No. 21A15, 2021 U.S. LEXIS 3677 (U.S. Aug. 12, 2021).

117. See *id.* (denying application for injunctive relief by Justice Barrett without comment).

118. See Amy Howe, *Barrett Leaves Indiana University’s Vaccine Mandate in Place*, SCOTUSBLOG, (Aug. 12, 2021, 9:40 PM), <https://www.scotusblog.com/2021/08/barrett-leaves-indiana-universitys-vaccine-mandate-in-place/> [<https://perma.cc/83HY-XUDR>] (reporting that without commenting on the decision, the Supreme Court left the district court’s decision in place).

IV. IMMUNIZATION AGAINST ARGUMENTS FOR CONSTITUTIONAL VIOLATIONS: A NARRATIVE ANALYSIS OF *KLAASSEN*

In *Klaassen*, the district court denied the students' petition for a preliminary injunction, noting that the students' arguments did not satisfy the standard of a strong showing that they will likely succeed on the merits of their claims, that they will sustain irreparable harm, and that the balance of harms and the public interest favor such a remedy.<sup>119</sup> To assess whether the student's claim was likely to succeed on the merits, the district court had to determine the correct mode of analysis for constitutional questions relating to public health crises.<sup>120</sup> Section A discusses the students' preferred standard of review, which was strict scrutiny under the modern tiered approach. Then, Section B explains how the University argued for a deferential *Jacobson* standard of review. Finally, Section C discusses the standard chosen by the court, rational basis review, and how the court applied the standard.

A. *Stricter than FDA Approval: Rigorous Testing of Vaccine Mandate Constitutionality, the Students' Preferred Standard*

The students urged the court to adopt the modern form of constitutional analysis and advocated for a strict scrutiny standard of review.<sup>121</sup> In arguing that the court should adopt strict scrutiny, the students contended that *Jacobson* should be "confined to its time" and should not be considered precedent because it was overruled by *Roman Catholic Diocese*.<sup>122</sup> The court refused to consider *Jacobson* as overruled, reasoning that the students did not meet the standard of implicit overruling, which requires "certain[ty] or almost certain[ty] that the decision or doctrine would be rejected by the higher court if a case presenting the issue came before it."<sup>123</sup> The court distinguished *Jacobson* from *Roman Catholic Diocese*, stating the two cases "involve[ ] entirely different modes of analysis, entirely different

119. *Klaassen v. Trs. of Ind. Univ.*, No. 1: 21-CV-238 DRL, 2021 WL 3073926, at \*2 (N.D. Ind. July 18, 2021), *aff'd* 7 F.4th 592 (7th Cir. 2021) (explaining the test for preliminary injunctions and the heightened burden needed since they are extraordinary measures).

120. *See id.* at \*16 (stating that the students and the University disagree on the constitutional analysis).

121. *See id.* at \*17. Strict scrutiny is the standard of review courts apply when a person's fundamental rights are at stake. *Id.* at \*16. If the government infringes on a fundamental right, then the Fourteenth Amendment forbids the government to "infringe . . . fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* (alteration in original) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

122. *Id.* at \*18, \*20 ("The students read *Agudath Israel* as implicitly overruling *Jacobson*, or at least as abrogating it.").

123. *Id.* at \*20 (internal quotation marks omitted) (quoting *Olson v. Pain, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731,741 (7th Cir. 1986)) (noting that the Supreme Court may overrule a case without explicitly stating so, but it is a "tall task").

rights, and entirely different kinds of restriction.”<sup>124</sup> The issues were distinct in *Jacobson* because *Jacobson* regarded issues pertaining to public health whereas *Roman Catholic Diocese* regarded the free exercise of religion.<sup>125</sup> The court reasoned that because there was no ideological clash between *Jacobson* and *Roman Catholic Diocese*, it could consider the two authorities “harmoniously, appreciating their respective spheres.”<sup>126</sup>

In another effort to show that the *Jacobson* opinion is flawed and therefore should be “confined to its time,” the students pointed to the court’s application of *Jacobson* in *Buck*.<sup>127</sup> The court severely criticized *Buck*, noting that eugenics is a “repulsive notion.”<sup>128</sup> Additionally, the court characterized the justification “that ‘[t]hree generations of imbeciles are enough’” as “chilling.”<sup>129</sup> *Buck* represented “a over-extension of *Jacobson*,” and that such an over-extension only showed to prove that the “Constitution cannot be cut loose.”<sup>130</sup>

The students also contended that because *Jacobson* predated the modern tiers of constitutional analysis, it should not be applied today.<sup>131</sup> The court rejected this assertion and reasoned that while *Jacobson* technically predated modern constitutional analysis, this fact did not mean *Jacobson* did not fit within its framework.<sup>132</sup> The court noted that *Jacobson*’s “real or substantial relation” test was “effectively rational basis review,” which asked courts to overturn laws only when there was no legitimate state interest.<sup>133</sup>

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124. *Id.* (“*Jacobson* applied what would become the traditional legal test associated with the right at issue[.]” (internal quotation marks omitted) (quoting *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 70 (2020))).

125. *See id.* at \*20–21. The court made clear that the issue in *Agudath Israel* was one relating the First Amendment, a right that was determined to be fundamental well before *Jacobson* was decided. *Id.* On the other hand, *Jacobson* related to interests in public health, which is not a clearly fundamental right. *Id.* In fact, the court notes that *Jacobson* endorses the intervention of the court when a law is “beyond all question, a plain, palpable invasion of rights secured by the *fundamental* law.” *Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).

126. *Id.* at \*20–21 (noting that *Jacobson* and *Roman Catholic Diocese* walk “hand-in-hand”).

127. *See id.* at \*20 (“Unsuccessful thus far, the students turn to *Buck v. Bell*.”) (citing *Buck v. Bell*, 274 U.S. 200 (1927)).

128. *Id.* (describing *Buck* as a “rather infamous case” which upheld the involuntary sterilization of a woman in Virginia).

129. *Id.* (alteration in original) (citing *Buck*, 274 U.S. at 207) (commenting on the inexcusable language used in *Buck* which likened mandatory vaccination requirements to the sterilization order of a woman).

130. *Id.*

131. *Id.* (“*Jacobson* was written before the modern tiers of constitutional scrutiny, so a legitimate question is the extent to which *Jacobson* applies with full force today.”).

132. *Id.* at \*21–22 (noting that though *Jacobson* was decided before tiers of scrutiny it “effectively endorsed” rational basis review of a government’s mandate during a health crisis).

133. *Id.* at \*18 (noting that high courts have used *Jacobson* in a way that reflects rational basis review analysis). The court is adopting the stance taken by Justice Gorsuch in his concurrence in *Roman Catholic Diocese* when it finds that just

The court noted that even if some parties considered their “melding of history and modernity” incorrect, the application of both the *Jacobson* standard and rational basis review yield the same result.<sup>134</sup> The court concluded that the purpose of *Jacobson* was to require a rational relation to a legitimate state interest in public health, exactly what a court considers under the rational basis review test.<sup>135</sup>

B. *Boosting the University’s Immune System: The Deferential Jacobson Standard, the University’s Preferred Standard*

The University urged the court to adopt a deferential mode of analysis and to interpret *Jacobson* as affording greater freedom to entities in regulating activities during a public health crisis.<sup>136</sup> The court rejected this argument, warning that *Jacobson* should not be taken too far.<sup>137</sup> The court advised that while *Jacobson* was not overruled by *Roman Catholic Diocese*, this fact did not mean that *Jacobson* called for “blind deference to the government when it acts in the name of public health or in a pandemic.”<sup>138</sup> The court stated that “a public health emergency does not give . . . public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists.”<sup>139</sup> The court clarifies the reach of *Jacobson*, noting it dictates that governments only have the ability to create health practices that are based in science and popular consensus.<sup>140</sup> The court cautioned that *Jacobson* did not allow states to use a global health crisis as an excuse to make unchanging policy; instead, legislation still needed to be bound by medicine and science, which are continually updated to respond to the current health crisis of the country, therefore limiting the absolute power of the legislature.<sup>141</sup>

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because an opinion predated the modern tiers of analysis this does not mean it is not applicable or relevant case law. For a discussion of Justice Gorsuch’s concurrence in *Roman Catholic Diocese*, see *supra* notes 59–62 and accompanying text.

134. See *Klaassen*, 2021 WL 3073926, at \*21 (stating that comfort should be taken knowing that whether *Jacobson* does or does not follow rational basis review it leads to the same result).

135. *Id.* at \*20–21 (noting that both *Roman Catholic Diocese* and *Jacobson* both applied the correct standard of review for their respective issues).

136. See *id.* at \*21.

137. *Id.* at \*21–22 (“The university seems to argue that *Jacobson* gave even more deference than rational basis review during a public health crisis, not fairly so; and even then, *Jacobson* cannot be taken once more too far.”).

138. *Id.*

139. *Id.* at \*22 (alteration in original) (quoting *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting)).

140. *Id.* (noting that to be reasonably related to the public wellbeing, the practices must be continually updated and tied to science).

141. *Id.*

C. *Accurate Rapid Tests, the Best Way to Combat the Spread: The Court's Chosen Analysis of Rational Basis Review*

The court in *Klaassen* opted to integrate each party's preferred standard.<sup>142</sup> The court held that while *Jacobson* does not provide a more deferential mode of analysis, it also is not overruled by *Roman Catholic Diocese* and the correct middle ground is to apply rational basis review.<sup>143</sup>

Under the chosen standard of rational basis review, the court stated that the right to remain unvaccinated is not a fundamental right but rather simply a liberty interest.<sup>144</sup> The court looked to history and tradition to determine that the students "offer[ed] no preliminary record of such historic rules, law, or traditions that would facilitate the court's announcement . . . that a right to refuse a vaccine is anything more than a significant liberty under the Fourteenth Amendment."<sup>145</sup> The court noted that history and tradition, in fact, supported the constitutionality of a mandatory vaccine.<sup>146</sup>

After establishing that the students have a liberty interest under the Fourteenth Amendment, the court proceeded to balance their liberty against the relevant state interests.<sup>147</sup> *Roman Catholic Diocese* already determined that "[s]temming the spread of COVID-19 is unquestionably a compelling interest."<sup>148</sup> Additionally, the University reasonably believed that

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142. *See id.* (recognizing *Jacobson* as a "precursor" to rational basis review which is consistent with opinions that acknowledge *Jacobson* as good law).

143. For a discussion of the arguments of the students and the University, see *supra* notes 121–41 and accompanying text; see also *Klaassen*, 2021 WL 3073926, at \*22 (noting that rational basis review is the appropriate standard of review to employ).

144. *See Klaassen*, 2021 WL 3073926, at \*24 (ruling that history and case law do not support recognizing the right to refuse vaccination as a fundamental right, therefore the court must deem it a liberty interest).

145. *Id.* at \*23. In particular, the court rejected the students' assertions that *Washington v. Glucksberg* and *Cruzan v. Director, Missouri Department of Health* support the conclusion that the right to refuse a vaccine is a fundamental right in that it relates to the right to refuse unwanted medical treatment. *Id.* (first citing *Washington v. Glucksberg*, 521 U.S. 702 (1997); then citing *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990)). The court noted that *Cruzan* and *Glucksberg* related to the refusal of lifesaving subsistence, which had no ramifications to the physical health of others, while vaccines "address a collective enemy, not just an individual one." *Id.*

146. *See id.* at \*24 (noting that when the Fourteenth Amendment was ratified, England already had a compulsory vaccination law for the smallpox vaccine, and that considerable case law points to rational basis being the correct standard of review).

147. *See id.* at \*26 (explaining that determination of a liberty interest does not end the analysis, and the Court must balance the students' rights against state interests).

148. *Id.* (internal quotation marks omitted) (quoting *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020)). Here, the court refuted the argument that because the pandemic is basically over, the compelling interest is lost. *Id.* Proclamations from the Secretary of Health and Human Services, the Indiana State Department, Governor Eric Holcomb, and the CDC informed the court's holding

the vaccine promotes the safety of its community.<sup>149</sup> It did not make an arbitrary decision to mandate vaccines but relied on extensive studies done by the medical experts on the restart committee.<sup>150</sup> Thus, the court rejected the students' claim that the vaccine is dangerous and therefore the students' right to refuse it should outweigh any state interest.<sup>151</sup> Instead, the court argued that the rarity of health risks caused by the vaccine and the overarching benefits of the vaccine showed that the University had a rational connection between its mandate and its aim of campus health.<sup>152</sup> Therefore, under the courts chosen mode of review, rational basis, the student's claim failed.<sup>153</sup>

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that "vastly improved, yes; out of the woods we aren't[.]" *Id.* In particular, the court relied on data about the Delta variant to show that COVID-19 cases are in fact on the rise cases reaching their greatest heights in July since. *Id.* at \*27. The court further noted that the surge of Delta variant cases was due to the unvaccinated population. *Id.*

149. *See id.* at \*28 (determining that the decision to create a vaccination mandate was not taken lightly and was not a decision that was reached overnight).

150. *See id.* (showing that the restart committee relied on data from CDC, surveillance testing, data based on vaccinated and unvaccinated individuals, efficacy of mitigation efforts on campus and more- all of which was presented in weekly meetings that occurred over six months).

151. *Id.* at \*29–30 (noting that the students argued that the risks of the vaccine outweigh any benefits a vaccine might confer). The risks are identified as myocarditis, clotting, and death yet studies show that eight in one million people have suffered from myocarditis after taking the COVID-19 vaccine. *Id.* at \*30.

152. *Id.* at \*29–37 (illustrating that the students' effort to show that the vaccine is dangerous is not substantial enough to prove that the University did not have a rational basis for implementing the mandatory vaccine requirement).

153. *Id.* at \*38. Additionally, the court rejected arguments that the mandatory mask and testing policy for students who had an exception violated the students' constitutional rights. *Id.* The students argued that the mask mandate infringes on their bodily autonomy, medical privacy, religious beliefs, and essentially the students become a "scarlet letter" targeting them for bullying and scorn. *Id.* at \*39. The court rejected their argument that there is a fundamental right not to be tested for a virus, or a constitutional right to not wear a mask, noting that these rights are not deeply rooted in the nation's history and tradition. *Id.* The court then applied rational basis review to these challenges and determined that the University has a legitimate interest in promoting the health and safety of its students and that masks and testing are rationally related to achieving those measures. *Id.* at \*40. The contention that the mask mandates were a violation of the student's religious freedom was dealt with separately since it involved a fundamental right. *Id.* at \*39. But because the mask mandate was a general regulation that had the effect of incidentally burdening religious practices in general and neutral ways, it only needed to be rationally supported by the University. *Id.* Since the right of free exercise "... does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability. . ." the mandate survived. *Id.* (internal quotation marks omitted). The court also noted that students who got a medical exemption were subject to the same requirements as those who got a religious exemption; therefore, the mandate satisfied the general applicability test. *Id.*

V. NO MORE FALSE NEGATIVES: *KLAASSEN* BECOMES THE MOST ACCURATE CONSTITUTIONAL TEST

*Klaassen* can be viewed as the “just right” application of deference to *Jacobson* against the concern of suspending constitutional rights during a pandemic.<sup>154</sup> The court in *Klaassen* created a clear test for other jurisdictions to follow that incorporates both what is seen as the *Jacobson* standard and the modern tiered constitutional analysis.<sup>155</sup> This is the most accurate constitutional test to employ when faced with Fourteenth Amendment questions regarding regulations during a public health crisis.<sup>156</sup> This Note suggests that *Klaassen* is the correct way to analyze constitutional questions regarding public health crises, and that *Klaassen* definitively states that in most circumstances mandatory vaccination requirements do not violate a person’s Fourteenth Amendment rights.<sup>157</sup> Section A analyzes how *Klaassen* both respects the Supreme Court’s reasoning in *Roman Catholic Diocese* and distinguishes the facts of *Klaassen* from that opinion. Then, Section B explores how the *Klaassen* court reaffirms that *Jacobson* is still good law and does not create a more deferential standard of review.

A. *Limiting the Symptoms of Infection: Klaassen’s Refusal to Elect for Strict Scrutiny*

If *Klaassen* represents the “just right” application of constitutional analysis for issues pertaining to public health crises, then decisions like *Roman Catholic Diocese* and *Agudath Israel* represent cases that could be viewed as “extra firm” decisions.<sup>158</sup> By employing strict scrutiny, these decisions invoked the highest standard of review for constitutional questions regarding COVID-19 regulations—a standard which allows governmental

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154. See generally *id.* at \*21 (determining that *Jacobson* is still relevant precedent but does not let governments declare a public health crisis and regulate indefinitely).

155. See *id.* at \*22 (noting that *Jacobson* effectively endorsed rational basis review of a government’s mandate during a health crisis).

156. See generally *Agudath Isr. v. Cuomo*, 983 F. 3d 620, 631 (2d Cir. 2020) (holding that the COVID-19 regulations imposed by Governor Cuomo were subject to strict scrutiny); see also *Jones v. Cuomo*, 542 F. Supp. 207, 217 (S.D.N.Y. 2021) (stating that some jurisdictions have adopted the *Jacobson* standard, but in *Roman Catholic Diocese v. Cuomo* the Supreme Court applied strict scrutiny stating that *Jacobson* was not a “towering authority that overshadows” the Constitution). These different outcomes are evidence that there was no clarity after *Agudath Israel* was decided. See *Jones*, 542 F. Supp. at 219 (noting that the courts will apply both standards out of an “abundance of caution”).

157. For a discussion of why the court adopted rational basis review, see *supra* notes 125–53 and accompanying text.

158. See *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) (holding that because “the challenged restrictions are not ‘neutral’ and of ‘general applicability,’ they must satisfy ‘strict scrutiny’”); see also *Agudath Isr.*, 983 F.3d at 634 (holding that the challenges to COVID-19 restrictions must satisfy strict scrutiny).



action only in the narrowest of circumstances.<sup>159</sup> The decision in *Roman Catholic Diocese* led lower courts to believe that the *Jacobson* standard was no longer applicable and that constitutional arguments regarding public health crisis should be subject to the strict scrutiny review.<sup>160</sup> Some courts even viewed *Roman Catholic Diocese* as a message that *Jacobson* had been overruled.<sup>161</sup> Many lower courts subjected COVID-19 restrictions that were not relating to religious freedom to strict scrutiny as the courts tried to apply *Roman Catholic Diocese*.<sup>162</sup>

*Klaassen*, on the other hand, should be read as the correct interpretation of *Roman Catholic Diocese* in that it defers to the Supreme Court but notes that it is not applicable precedent to the issue of mandatory vaccinations.<sup>163</sup> *Klaassen* artfully articulates that the issue between *Jacobson* and *Roman Catholic Diocese*'s standards is not because one employs the modern constitutional analysis and one predates modern constitutional analysis.<sup>164</sup> The difference is that one regards a fundamental right—the right to freedom of religion—and one regards a liberty interest—the right not to be vaccinated.<sup>165</sup> Some lower courts may have overlooked this distinction, which may have caused confusion for litigants and other courts.<sup>166</sup>

*Klaassen* cuts through the confusion and creates precedent that outlines a test for what standard to adopt: if the regulation infringes on a fundamental right, then strict scrutiny is appropriate, but if the regulation pertains to a liberty interest, then the *Jacobson* rational basis review standard applies.<sup>167</sup>

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159. See *Klaassen*, 2021 WL 3073926, at \*16 (noting that under strict scrutiny review a government action cannot infringe upon a fundamental right at all unless the action is narrowly tailored).

160. See *Agudath Isr.*, 983 F.3d at 635 (holding that district court's reliance on *Jacobson* was "misplaced").

161. See *Jones*, 542 F. Supp. at 218 (stating that since *Roman Catholic Diocese* "some courts' confidence in *Jacobson* has . . . waned").

162. See *id.* (explaining that two different circuit courts have applied the tiers of scrutiny, including strict scrutiny to issues pertaining to COVID-19 restrictions).

163. See *Klaassen*, 2021 WL 3073926, at \*20 (holding that *Roman Catholic Diocese* and *Jacobson* "involved entirely different modes of analysis, entirely different rights, and entirely different kinds of restrictions").

164. See *id.* ("'*Jacobson* applied what would become the traditional legal test associated with the right at issue'—exactly what *Agudath Israel* did." (quoting *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring))).

165. See *id.* at \*21 (stating that *Jacobson* counseled a rational relation to a legitimate interest in public health while *Roman Catholic Diocese* employed a heightened scrutiny due to the interference of a fundamental right under the First Amendment).

166. See *Jones*, 542 F. Supp. 3d 207, 213-14 (exploring how different circuit courts have adopted different standards when analyzing COVID-19 mandates).

167. See *Klaassen*, 2021 WL 3073926, at \*21 (arguing that *Jacobson* counsels courts to intervene when a fundamental right is at stake, but also noting that the right to not be vaccinated is not a fundamental right); see also Sara M. Cooperrider & Andrew Murphy, *Mandates Exemptions, and Injunctions: the Indiana University Case and U.S. Supreme Court Precedent*, TAFT (Aug. 16, 2021), <https://www.taftlaw.com/>

The court in *Klaassen* expertly uses the *Jacobson* test within the framework of modern tiers of constitutional analysis.<sup>168</sup> The *Jacobson* test was used as a tool to determine if the regulation infringes upon a fundamental right or simply a liberty interest.<sup>169</sup> For example, the second prong of the *Jacobson* test, determining if the regulation is “beyond all question, a plain, palpable invasion of rights secured by the fundamental law[,]” is just another way to ask: is the right at issue a fundamental right or not?<sup>170</sup> Put another way, the court in *Klaassen* demonstrates that if *Roman Catholic Diocese* was decided under the *Jacobson* test, the outcome would have been the same because the claim would have failed under the second prong.<sup>171</sup> Because the regulation at issue in *Roman Catholic Diocese* was a restriction on the right to practice religion and that right was deemed a “right secured by the fundamental law,” and the restriction was clearly an invasion of that right, the regulation would have been unconstitutional.<sup>172</sup>

This test applies the correct deference to new Supreme Court decisions in noting the proper application of strict scrutiny while also deferring to older Supreme Court precedent which is factually on point.<sup>173</sup> *Klaassen* makes clear that *Roman Catholic Diocese* was not an “extra firm” standard, creating a tougher standard to test constitutional issues relating to a public health crisis, but instead shows that it is actually just one iteration of the possible outcomes under the *Jacobson* test.<sup>174</sup>

B. *Masks Still Mandated: Klaassen Confirms that Jacobson Does Not Provide a More Deferential Standard*

Just as the “extra firm” standards of *Roman Catholic Diocese* and *Cuomo* are not the right fit for general questions of mandatory vaccination, *Big*

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news-events/law-bulletins/mandates-exemptions-and-injunctions-the-indiana-university-case-and-u-s-supreme-court-precedent [https://perma.cc/7S75-CCN] (noting that *Klaassen* provides a “timely preview of the issues [COVID-19 vaccination] lawsuits are likely to raise”).

168. See *Klaassen*, 2021 WL 3073926, at \*21 (“Considering the modern tiers of constitutional scrutiny, the court reads *Jacobson* and [*Agudath Israel*] harmoniously[.]”).

169. See *id.* (explaining that *Jacobson* counseled courts to intervene if a state imposes a regulation that is an invasion of fundamental right).

170. *Id.* (internal quotation marks omitted) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)) (showing that the second prong of *Jacobson* demonstrates that the court was considering fundamental rights versus liberty interests).

171. See *id.*

172. *Id.* (explaining that *Jacobson* “presciently contemplated” the differences between a fundamental right, like the right to free exercise of religion, and urged courts to intervene when a fundamental right was at stake).

173. See *id.* (noting that the court reads *Jacobson* and *Roman Catholic Diocese* “harmoniously” and that the Court appreciates their “respective spheres”).

174. See *id.* (stating that even though *Jacobson* predates the modern tiers of analysis it still conforms to what would become the traditional legal test—rational basis review).

*Tyme Investments* and *Jones* can be seen as the “extra soft” approach.<sup>175</sup> Decisions such as these are based on the idea that because *Jacobson* was decided prior to the modern tiers of analysis, it carves out a constitutional exception for issues relating to a public health crisis, giving the state and the legislature more power to enact laws that can curtail one’s constitutional rights.<sup>176</sup> The court in *Jacobson* put so much trust in the legislature to make determinations about what is right to keep the larger population safe during an epidemic, it would be easy to read such deference as permission to cut constitutional rights short.<sup>177</sup>

Just as *Klaassen* proved that the modern tiered analysis wasn’t actually an “extra firm” approach, it again showed that the *Jacobson* standard is not actually an “extra soft” approach and does not counsel courts to cut the constitution loose during a pandemic.<sup>178</sup> Instead of giving state and federal legislatures the power to do whatever they want in the name of the greater good, the first prong in the *Jacobson* test—that the order have a “real or substantial relation” to the purpose of protecting the public health—requires that courts put bounds on the ability of the legislature to create mandates around the pandemic.<sup>179</sup> *Klaassen* notes, by following the *Jacobson* standard, the courts should always consider that mandates must be “written with a mindset that medicine and science, and the circumstances that they create, will evolve, and so must the law or policy evolve or be revisited in amendment.”<sup>180</sup>

The court in *Klaassen* shows that when a court applies the *Jacobson* standard, which it notes is essentially rational basis review, the constitutionality of mandates cannot be considered without the institutional

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175. See *Big Tyme Invs. v. Edwards*, 985 F.3d 456, 466 (5th Cir. 2021) (holding that *Jacobson* allowed for curtailment of constitutional rights in times of an epidemic); see also *Jones v. Cuomo*, 20 Civ 4898 (KPF), 2021 WL 2269551, at \*6 (S.D.N.Y. June 2, 2021) (noting that *Jacobson* granted states and local authorities with “substantial deference in enacting measure to ‘prevent the spread of contagious diseases’”) (quoting *Jacobson*, 197 U.S. 11, 25 (1905)).

176. See *Jacobson*, 197 U.S. at 26 (specifying that the liberty secured by the constitution does not create an absolute right in each person to be free from all restraint in all circumstances).

177. See *id.* at 27. The *Jacobson* court rationalized its deference to the legislature because,

The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question . . . to a Board of Health, composed of persons residing in the locality affected and appointed, presumably, because of their fitness to determine such questions.

*Id.*

178. See *Klaassen*, 2021 WL 3073926, at \*20 (“*Jacobson* merely counsels once more that the Constitution cannot be cut loose even now, in a pandemic’s seeming twilight.” (citing *Roman Cath. Diocese*, 141 S. Ct. 63, 68 (2020))).

179. See *id.* at \*21 (“*Jacobson* doesn’t justify blind deference to the government when it acts in the name of public health or in a pandemic.”).

180. *Id.* at \*22.

bounds of science and rational reasoning.<sup>181</sup> For example, *Klaassen* determined that the University's mandate was rationally related to the state's interest under the *Jacobson*/rational basis review standard.<sup>182</sup> The mandate was rationally related because the school "reasonably believe[d] the vaccine promotes the safety of not only its students, but that of its entire community" and the decision to implement a mandatory vaccination requirement was not "taken lightly."<sup>183</sup> The court continued by citing the numerous scientific studies that the restart committee considered when making the decision to create a mandatory vaccination requirement, including CDC guidelines and updates, testing data, data trends based on vaccinated and unvaccinated individuals, and more.<sup>184</sup> By providing this safeguard of analysis that ensured that mandates were based on science and fact, the court showed that *Jacobson* does not counsel for arbitrary orders that have no reasonable relation to the state interest in protecting public health.<sup>185</sup>

This interpretation of the *Jacobson* standard is the correct one in that it shows that there is no added level of deference found within the opinion.<sup>186</sup> Further, by disproving the fact that *Jacobson* allows for greater deference, the court in *Klaassen* indicates to other jurisdictions that it remains good law, an indication that should be given appropriate weight in constitutional analysis.<sup>187</sup>

*Klaassen* is the true "just right" application of constitutional analysis because it strikes the balance between the standard of "extra firm" and "extra soft" and ends the confusion between the different modes of analysis to show that the standard in *Jacobson*, which it equates to rational basis review, is the correct mode of analysis for considering constitutional claims against vaccine requirements.<sup>188</sup> Because the court delineates ex-

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181. *See id.* at \*26 (stating that no matter how a mandate relating to public health is considered, either under *Jacobson* as a stand-alone test, or a precursor to rational basis, the student's liberty interest must be balanced against the states interest).

182. *Id.* at \*28 ("[The decision to implement a mandatory COVID-19 vaccination] wasn't reached overnight. It wasn't a decision taken by some fly-by-night committee undetached from the current science, the current progress of the fight against the pandemic, or experience and training in relevant fields of study.").

183. *Id.* (reiterating that the decision to mandate vaccines was thoroughly grounded in science as it was led by the University's Executive Vice President for University Clinical Affairs and the School of Medicine's Dean).

184. *See id.* (noting that a "mere sampling of presentations from committee meetings" shows the extensive data that the committee focused on analyzing).

185. *See id.* at \*37 (holding that Indiana University has a rational basis to conclude that the COVID-19 vaccine is safe and efficacious for its students).

186. *See id.* at \*21 (refusing to accept the University's argument that *Jacobson* gave even more deference than rational basis review during a public health crisis).

187. *See id.* at \*22 ("[T]he law today recognizes *Jacobson* as a precursor to rational basis review. This is consistent with statements of many justices who continue to acknowledge *Jacobson* as good law, albeit with constitutional restraint.").

188. *See id.* at \*26 (choosing rational basis review as the correct standard of review for constitutional claims against the vaccine requirement, whether that is in

actly when the Jacobson test is appropriate—whenever rational basis review should be employed—the only symptom of *Klaassen* will be clarity.<sup>189</sup>

#### VI. CONSTITUTIONAL CLARITY: A SYMPTOM OF *KLAASSEN*

With COVID-19 feeling ever-present and the relatively low vaccination rate in the United States, *Klaassen*'s clear application will become a necessary precedent when other public schools and institutions create stricter guidelines.<sup>190</sup> For example, in *Harris v. University of Massachusetts*,<sup>191</sup> which was decided a month after *Klaassen*, a federal judge in the District of Massachusetts denied a preliminary injunction that was filed by students at the University of Massachusetts, Lowell in protest of the mandatory vaccination requirement.<sup>192</sup> The opinion did not discuss which standard should be adopted because the court did not have to engage in a lengthy analysis to determine if a deferential standard or the modern tiered standard was appropriate.<sup>193</sup> However, on multiple occasions, it cited to *Klaassen* as an authority that provides the correct standards for constitutional analysis.<sup>194</sup> Accordingly, the court adopted the constitutional analysis that *Klaassen* endorsed: submitting mandatory vaccination challenges to rational basis review while maintaining the language and tenants of *Jacob-*

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the form of a *Jacobson* analysis or under the modern tiers of constitutional scrutiny).

189. See Jessica L. Galanos, *University Vaccine Mandate Constitutionally: A Review of the US Seventh Circuit's IU Decision*, BRICKER (August 5, 2021), <https://www.bricker.com/resource-center/COVID19/publications/university-vaccine-mandate-constitutionality-a-review-of-the-us-seventh-circuits-iu-decision> [<https://perma.cc/M9G6-PBVL>] (purporting that *Klaassen* will become a signal to other courts that clearly indicates how to analyze similar constitutional challenges to vaccine mandates).

190. See Maria Caspani & Dan Whitcomb, *Rising Coronavirus Cases Fuel Resurgence Fears as Biden Ramps up Vaccination Push*, REUTERS, (July 19, 2021), <https://www.reuters.com/business/healthcare-pharmaceuticals/us-coronavirus-cases-rise-fueling-fears-resurgence-2021-07-19/> [permalink unavailable], (stating in summer 2021 that the Delta variant caused the average number of daily new COVID-19 cases to triple and that the ruling in *Klaassen* could “set a precedent for similar vaccination orders in schools and business”); see also Hannah Ritchie, Edouard Mathieu, Lucas Rodés-Guirao, Cameron Appel, Charlie Giattino, Esteban Ortiz-Ospina, Joe Hasell, Bobbie Macdonald, Diana Beltekian & Max Roser, *Coronavirus Pandemic (Covid-19)*, OUR WORLD IN DATA, <https://ourworldindata.org/covid-vaccinations?country=USA#citation> [<https://perma.cc/47WY-ZRTV>] (last visited February 27, 2022) (noting that sixty-five percent of the US population is fully vaccinated as of February 27, 2022).

191. No. 1:21-cv-11244-DJC, 2021 WL 3848012 (D. Mass., Aug 21, 2021).

192. *Id.* at \*1 (holding that the students did not meet the standard for a preliminary injunction and, therefore, denying their motion).

193. See *id.* at \*6 (proceeding directly from the facts and procedural background to the substantive due process discussion without any mention of the correct standard of review).

194. *Id.* (citing *Klaassen* when determining that the Supreme Court has settled that it is within the police power for states to mandate a vaccine and when determining that there is a legitimate state interest in mandating a vaccine).

*son*.<sup>195</sup> Additionally, the court applied the melded constitutional analysis test *Klaassen* supported by noting in its opinion that *Jacobson* essentially applied rational basis review.<sup>196</sup>

Opinions such as *Harris* are indicators that the mode of analysis adopted in *Klaassen* will be the definitive mode of analysis courts should adopt in the future.<sup>197</sup> Clarity and consensus regarding what mode of constitutional analysis to apply is important especially because the opinion in *Klaassen* can be extended to cover other public institutions, such as police departments and cities, where similar litigation over mandatory COVID-19 vaccinations is occurring.<sup>198</sup>

Another affirmation of the court's reasoning in *Klaassen* arrived when the Supreme Court rejected Indiana University student's application for review. This review was the first time the Supreme court had considered an issue pertaining to mandatory COVID-19 vaccination requirements.<sup>199</sup> While the Court rejected the application for emergency injunctive relief without comment, such an action indicates the Supreme Court's acknowledgment that the reasoning in *Klaassen* was sound and that other claims are unlikely to succeed if they use the same argument as the students.<sup>200</sup> Further, this decision to affirm the appellate court and district court's decisions to deny injunctive relief may indicate that the Supreme Court approves of the district court's interpretation of two important Supreme Court cases, *Jacobson* and *Roman Catholic Diocese*, and the melding of modern tiered analysis with the *Jacobson* standard.<sup>201</sup>

While most signs point to *Klaassen* becoming leading precedent when it comes to questions of constitutionality of mandatory vaccines for public

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195. *See id.* (deciding that the right to not be vaccinated is not a fundamental right and that *Jacobson* "commands a deferential standard for analyzing Fourteenth Amendment challenges to generally applicable public health measures" and that the state showed a "real or substantial relation" to public health and safety).

196. *Id.* (rejecting Plaintiff's attempt to distinguish *Jacobson* and citing to Justice Gorsuch's concurrence in *Roman Catholic Diocese v. Cuomo*, which reasoned that *Jacobson* applied rational basis review).

197. *See Galanos, supra* note 189 (clarifying while *Klaassen* was not decided on the merits, the likelihood of success was decided).

198. *See* Jennifer Piatt, *COVID-19 Vaccination Mandates- Recent Cases*, NETWORK FOR PUB. HEALTH L. (Oct. 26, 2021), <https://www.networkforphl.org/resources/covid-19-vaccination-mandates-recent-cases/> [<https://perma.cc/TH4Y-9TY4>] (detailing the pending cases over mandatory COVID-19 vaccinations, including ones brought by police officers and theater owners against the governor and mayor respectively).

199. *See* *Klaassen v. Trs. of Ind. Univ.*, No. 21A15, 2021 U.S. Lexis 3677, at \*1 (2021) (rejecting an application for emergency injunctive relief by the Supreme Court).

200. *See* *Howe, supra* note 118 (noting that the Supreme Court denied student's request "without comment, without seeking a response from the state, and without referring the request to the full court for a vote").

201. *See id.* (remarking that a denial without comment suggests that the other justices did not regard the dispute as a particularly close case, therefore affirming the reasoning of the lower courts).

institutions, *Klaassen* only reviewed the issues in terms of granting or denying a preliminary injunction.<sup>202</sup> The preliminary injunction standard is quite a high standard to meet and calls for emergency action from the court, rather than decisions based on the merits.<sup>203</sup>

The standard calls for students to make a showing that: (1) absent preliminary injunctive relief, they will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) they have a reasonable likelihood of success on the merits.<sup>204</sup> Because the third prong of the test called for the court to consider the success of the argument on its merits, the court delved into substantial constitutional analysis and determined that success was unlikely.<sup>205</sup> The court's reasoning and analysis of the issue should not be seen as non-exhaustive, but it was limited to what it could review under such emergency time limitations.<sup>206</sup> While the standard calls for the court to determine the success on the merits as would be determined by an ordinary issue, the standard means that *Klaassen* only puts the issue to rest for now, not for good.<sup>207</sup>

While *Klaassen* only represents a decision based on an appeal for a preliminary injunction, its importance cannot be understated. *Klaassen* is the first time a district court, appellate court, and the Supreme Court addressed mandatory COVID-19 vaccinations.<sup>208</sup> By finding vaccine requirements were constitutional in this case, the court created a greater challenge to the next party that wants to challenge mandatory COVID-19

202. See *Klaassen v. Trs. of Ind. Univ.*, No. 1: 21-CV-238 DRL, 2021 WL 3073926, at \*1 (N.D. Ind. July 18, 2021), *aff'd* 7 F.4th 592 (7th Cir. 2021) (announcing that the Court's decision is only in the context of granting or denying a preliminary injunction motion).

203. See *id.* at \*15 (explaining that a preliminary injunction is a “very far-reaching power, never to be indulged [ ] except in a case clearly demanding it” (alteration in original) (internal quotation marks omitted) (quoting *Cassell v. Snyders*, 990 F.3d 539, 544 (7th Cir. 2021))).

204. *Id.* (alteration in original) (quoting *Tully v. Okeson*, 977 F.3d 608, 612-13 (7th Cir. 2020)).

205. See *id.* at \*44 (“The evidence today shows that the students have little chance of success: Indiana University is reasonably pursuing a legitimate aim of public health for its students, faculty, and staff.”).

206. See *id.* (“[N]ot every stone has been unturned by the parties. Not every witness has testified. Although constituting more than 100 exhibits and testimony from many individuals . . . this still is a preliminary record[.]”).

207. See *id.* (stating that the decision is not one “after a final trial on the merits” and that the decision was “based on evidence, testimony, and briefing that the parties produced on an emergent timetable”).

208. See *id.* at \*14 (noting that “[n]o case to date has decided the constitutionality of whether a public university . . . may mandate that its students receive a COVID-19 vaccine”); see also *Howe*, *supra* note 118 (stating that *Klaassen* was the first test of COVID-19 vaccine requirements to arrive at the Supreme Court).

regulations, because the next party must show more than what was offered by the students in this case.<sup>209</sup>

*Klaassen* will not be the last time that the Supreme Court addresses questions about mandatory vaccinations. In fact, the 2022 Supreme Court docket has already been filled with mandatory COVID-19 vaccination questions due to President Biden's Order that over one hundred million Americans get vaccinated.<sup>210</sup> While these cases are paramount to building precedent around mandatory vaccinations, they do not affect the solid, reliable, and clear outcome of *Klaassen*.<sup>211</sup> The Supreme Court overturned Biden's order to have all private employees vaccinated because the Occupational Safety and Health Administration did not meet the burden for an emergency temporary standard—not because it violated a citizen's Fourteenth Amendment right.<sup>212</sup> Additionally, the mandate for all medical professionals to be vaccinated to receive Medicare and Medicaid funding was found lawful not under constitutional claims, but because it was within the power of the Secretary of Health to establish certain standards of health and safety for facilities eligible for Medicare and Medicaid funding.<sup>213</sup>

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209. See *Klaassen*, 2021 WL 3073926, at \*45 (“[T]he students here haven’t established a likelihood of success on the merits on their Fourteenth Amendment due process claim, or that the balance of harms or the public’s interest favors the extraordinary remedy of a preliminary injunction, before a trial on the merits.”).

210. See *Biden’s New Vaccine Requirements Draw Praise, Condemnation and Caution*, N.Y. TIMES, (Sept. 19, 2021), <https://www.nytimes.com/live/2021/09/09/world/covid-delta-variant-vaccine> [<https://perma.cc/BCQ3-FW5J>] (explaining that President Biden’s vaccine orders will mandate that health care workers, federal workers, federal contractors, and some private sector employees get vaccinated); see also *Biden v. Missouri*, 142 S. Ct. 647, 654 (2022) (determining that the Secretary of Health’s mandate for all medical professionals to get a COVID-19 vaccination was permissible); see also *Nat’l Fed’n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 666 (2022) (finding unlawful OSHA’s emergency temporary standard calling for all private employers with more than one hundred employees enforce mandatory COVID-19 vaccinations).

211. For discussion about the issues raised in the Supreme Court cases discussing Biden’s vaccination mandate, see *infra* notes 212–13 and accompanying text.

212. See *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 666 (“Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly.”). An emergency temporary standard can only be lawful when the secretary of labor shows “(1) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or form new hazards and (2) that the emergency standard is necessary to protect employees from such danger.” *Id.* at 663. In this case, the court found that the emergency temporary standard was inappropriate because COVID-19 was not a specific occupational hazard but was more generally a public health hazard, therefore OSHA had extended its reach too far. *Id.* at 665–66.

213. See *Biden*, 142 S. Ct. at 650–51 (noting that the Secretary of Health has already established regulations much of which concern “infection prevention” and preventing “the development and transmission of communicable diseases and infections” therefore the COVID-19 vaccination is within their power).



While the most current litigation around mandatory vaccination has not been brought to the court under Fourteenth Amendment issues, disputes over the validity of mandatory COVID-19 vaccine requirements are sure to be the foremost issue in constitutional law in the future.<sup>214</sup> *Klaassen* will be vital precedent because it not only has explained that such mandates do not violate a person's constitutional rights, but it also does so while applying the correct standard of review.<sup>215</sup>

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214. See Piatt, *supra* note 198 (reporting that as of October 26, 2021 there are fifty-seven pending cases on the constitutionality of COVID-19 vaccination mandates). The article notes that the common issues raised in these cases are constitutional substantive due process arguments alleging violations of fundamental rights of bodily integrity, First Amendment based arguments, and Fourth Amendment unreasonable search arguments. *Id.*

215. See *Klaassen*, 2021 WL 3073926, at \*46 (“[T]he Fourteenth Amendment permits Indiana University to pursue a reasonable and due process of vaccination in the legitimate interest of public health for its students, faculty, and staff.”).