

Governments are constitutionally permitted to provide ‘vaccine passports’ – some may also be constitutionally obligated to do so

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In early April, as daily U.S. vaccine doses reached 4 million, Florida Governor Ron DeSantis banned private businesses from requiring proof of COVID-19 vaccination – so-called “vaccine passports” – as a condition of service. DeSantis echoed the concerns of some other conservative pundits and policymakers, arguing that the passports would “reduce individual freedom” and “create two classes of citizens.” In March, Ohio Republican U.S. Senate candidate Josh Mandel tweeted that “Vaccine Passports trample on human liberty.” These arguments hint that vaccine passports would offend fundamental freedoms, and possibly even constitutional ones, if implemented with the government’s blessing. Some groups, including a Canadian anti-vaccination organization, have [made this argument](#) explicitly.

These views notwithstanding, government-provided vaccine passports would most certainly pass muster under many national legal systems, including under Israeli Basic law, [British law](#), and [U.S. constitutional law](#). But more than that, we believe that, assuming governments do not lift COVID restrictions for everybody, exempting vaccinated people from COVID-related restrictions might even be *required* under some constitutional systems. Given the policy choice between: (1) a vaccine passport program – which would soon allow vaccinated people to, e.g., travel, attend political events, and congregate for religious services freely – and (2) ongoing, blanket government bans on those activities – which allow *no one* to do those things – the former is less constitutionally problematic.

All modern constitutional systems recognize that citizens enjoy a set of fundamental rights. In general, governments can restrict certain fundamental rights only if no less-restrictive alternatives exist for accomplishing the same objectives. In countries like Germany, Austria, and Switzerland, this argument holds generally under the so-called “proportionality test.” In the United States, governments may not tread on fundamental rights unless the policy is “the least restrictive means” to achieve a “compelling” government interest. Even some rights considered non-fundamental [may not be infringed](#) without a rational or non-arbitrary reason.

While full restrictions on certain fundamental life activities typically trigger the highest level of U.S. constitutional scrutiny, treating people differently based on engaging in certain voluntary acts, like not receiving a vaccination, often involve the lowest level. In fact, U.S. courts have repeatedly upheld schools’ and [state requirements](#) that exclude or penalize those who do not receive certain vaccinations.

Throughout 2020, when temporary bans on certain high-risk, non-essential activities like [high-density religious services](#), [political rallies](#), public dining, theater attendance, and international travel were challenged, they generally ([though not always](#)) passed constitutional muster. For good reason, national legal systems tend to defer to officials’ policy judgements when it comes to combating public-health crises. And indeed, many of those measures represented the best available means to slow the virus.

As we approach wider vaccine availability, however, that is no longer the case. Now, facilitating mass immunity – and exempting the immunized from restrictions – is not only the least liberty-restricting method for ending the pandemic through herd immunity, but the most effective one. Some vaccines are over 90% effective at preventing infection (and nearly 100% effective at preventing serious cases). There is a [growing](#) body of [evidence](#) that fully vaccinated people with no COVID symptoms pose little risk of transmitting the virus to others. Given this evidence, governments will be hard-pressed to maintain that continued universal lockdowns are the least-restrictive way – or even a rational one – of fighting the pandemic.

Introducing a vaccine passport regime would be justified on civil-liberty principles alone, at least until societies reach herd immunity (at which point unvaccinated people would be less of a threat to others, and discriminating by vaccination status would become harder to justify). But, as public-health experts and [others have argued](#), vaccine passports would have the positive side-effect of promoting vaccination, protecting many more from the virus. Throughout the world, [vaccine hesitancy](#) is a barrier to achieving herd immunity. Up to [30% of Americans](#) say they are unlikely to get vaccinated. By offering an additional “carrot” of expanded freedom, vaccine passports would nudge at least some to overcome their hesitancy.

Sadly, many countries in the Global South currently have little vaccine access. The inequitable global distribution of vaccine access is deeply troubling, but not introducing vaccine passports on fairness grounds would do nothing to promote global access – if anything, it would do the opposite by deepening the adverse economic impact of the pandemic. Another difficult issue is the case of people who cannot be vaccinated for health reasons. The European Union [is planning](#) to provide the passports not only to the vaccinated, but also to those who exhibit antibodies from a previous infection or who have a recent negative test. Options like these would further blunt the argument that vaccine passports unfairly discriminate by providing benefits to only part of the population.

Constitutional choices sometimes involve trading liberty for safety. This is not one of those times. Vaccine passports bridging the period to herd immunity would increase both liberty and safety, while responsibly catalyzing a return to (near) normalcy.