JUDICIAL PROTECTION OF MEDICAL LIBERTY

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INTRODUCTION

The United States Supreme Court historically has carefully reviewed state laws that require unwanted medical treatment. Whether the rights are deemed fundamental or not, the Court has engaged heightened if not strict scrutiny to protect individuals' interests in medical autonomy. This Article focuses on liberty challenges to state action that forces medical choices on individuals and concludes that the standard of review for all such challenges should be strict scrutiny.

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The Court has sometimes characterized the right of autonomous medical choices in terms of constitutional privacy that is implicit in the Liberty Clause, particularly in reproductive rights cases. Other cases protect a right of "bodily integrity" also implicit in the Liberty Clause. A subset of both the Supreme Court's privacy cases and bodily integrity cases involve state action that mandates unwanted medical treatment or prohibits access to desirable medical treatment or products that enormously impact medical autonomy such as contraceptives. This Article refers to this body of law as "medical liberty" jurisprudence, a subset of both privacy and bodily autonomy jurisprudence. Despite the very broad protection of individual medical choice—and the Court's repeated recognition that the right to be "let alone" is fundamental—there is one glaring exception to the normal extraordinary protection of medical liberty: compulsory vaccination laws.

Jacobson v. Massachusetts was the seminal Supreme Court case that balanced individual liberty against medically invasive state action.[1] In 1902 Massachusetts passed a law mandating smallpox vaccination upon penalty of prosecution and a $5.00 fine in an attempt to control the devastating smallpox pandemic.[2] The Court took care to explain the balance of powers involved when a state's exercise of police power is challenged as a liberty violation.[3] Deference to state health policy has been the general rule, but the judicial branch must be a check on the political branches to protect individual liberty, particularly where state action usurps medical prerogative. The Court analyzed and chronicled the medical research and upheld the state law, comparing the vaccination mandate to a form of community "self-defense," necessary and justified by the exigent circumstances.[4] Even under a strict scrutiny standard of review, the law in *Jacobson* would have survived, based on the Court's terminology and careful analysis of the medical evidence that justified the law.

Twenty-two years later, the Supreme Court relied on *Jacobson* to uphold forced sterilization of a "feeble-minded" woman in *Buck v. Bell*,[5] a case viewed as among the most erroneous decisions in Supreme Court history. The Court quickly retreated from deference to state-ordered medical procedures, and *Buck v. Bell* was drastically limited though not overruled in *Skinner v. Oklahoma*,[6] where the Court defined the right to avoid unwanted sterilization as fundamental and applied strict scrutiny to strike down the Oklahoma law. Numerous other Supreme Court decisions since *Skinner* discuss the historical liberty

1. *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905).
2. *Id*. at 12-13.
3. *Id*. at 25-27.
4. *Id*. at 27-34, n.1.
5. Buck v. Bell, 274 U.S. 200, 202 (1927).
6. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

interest in controlling one's own physical body and declare unconstitutional state action that requires an unwanted medical procedure.[7]

While the Court's past century of medical liberty jurisprudence generally shows extraordinary concern for medical autonomy, the lower courts' vaccination jurisprudence since *Jacobson* exists in stark contrast. Early lower courts did not follow *Jacobson*'s separation-of-powers analysis and careful review of the medical evidence necessitating vaccination but instead deferred vaccination policy to the legislative branch.[8] The early cases involved smallpox, and the Court had already reviewed the smallpox medical evidence and found that it was justified in requiring smallpox vaccination or suffer a penalty.[9] Over time, the lower courts largely abdicated their role as protectors of individual liberty and broadly deferred vaccination policy to the legislative branch, even as the number of vaccinations required of children grew and vaccine-injury lawsuits threatened to bankrupt the vaccine manufacturing industry.

Congress responded in 1986 with the National Childhood Vaccine Injury Act (NCVIA) to immunize vaccine manufacturers from "unavoidable" injuries caused by vaccines.[10] The NCVIA created a compensation scheme similar to worker's compensation with an intent to administer vaccine injury claims efficiently, but the compensation administration has been characterized by experts and scholars as highly dysfunctional and unfair.[11] In 2011 a majority of the Supreme Court greatly expanded the immunity provided to vaccine manufacturers by interpreting the NCVIA to cover all design defects—avoidable or not.[12] The enactment of the NCVIA and the Court's expansive interpretation of its immunity operated to limit judicial review of vaccination law and policy even further. Indeed, the so-called "Vaccine Court" proceedings are largely confidential and hidden from public scrutiny.[13]

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7. *See infra* § III (A).

8. *See infra* § I (D), § IV.

9. *See infra* § I (B)-(C).

10. *See* Bruesewitz v. Wyeth LLC, 562 U.S. 223, 223 (2011).

11. *See, e.g.,* James G. Hodge, Jr. & Lawrence Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L. J. 831, 885 (2002) (citing Laura Gregario, *The Smallpox Legacy: A History of Pediatric Immunization*, PHAROS 1, 7 (1996)); Allen Tate, *The Greater Good*, *in* VACCINE EPIDEMIC 99 (Louise Kuo Habakus and Marry Holland, eds., 2012); Wendy K. Mariner, *The National Vaccine Injury Compensation Program*, 11 HEALTH AFF. 255, 262-63 (1992).

12. *Bruesewitz,* 562 U.S. at 223.

13. For example, there is no right to discovery, no right to a jury trial, and the proceedings are not public. *See, e.g.,* The Office of Special Masters, *Guidelines for Practice Under the National Vaccine Injury Compensation Program*, UNITED STATES COURT OF FEDERAL CLAIMS, (2004) 1, 11. "As stated in Vaccine Rule 7, there is no discovery as a matter of right in a vaccine proceeding." *Id.*

Vaccination laws have never physically forced vaccination on unwilling subjects,[14] but vaccination has been required to avoid a penalty or to gain a valuable service such as public education. As a practical reality, vaccination is compulsory for the vast majority of Americans because their parents lack options.[15] Today, vaccination requirements are expanding beyond school vaccination laws, particularly in the employment context, which forces unwilling employees to get vaccinated or lose their source of income. This Article refers to vaccination laws as "mandates" or "compulsory vaccination" to reflect the economic reality that most people lack the resources to avoid vaccination when it is a condition of education or employment.

There is currently a concern that COVID-19 vaccination could be mandated, even for basic services such as travel. The existing lower court vaccination jurisprudence could be relied upon to require vaccination or other medical procedures on unwilling individuals to obtain basic public services. The Supreme Court recently indicated that lower courts' deference to health mandates in reliance on *Jacobson* is not the law, even during a pandemic.[16] The import of the Court's recent COVID-19 rulings in relation to vaccination mandates is not yet clear but may indicate that *Jacobson*-style deference is never appropriate considering separation-of-powers values. Considering that lower courts have been extending *Jacobson* to a standard of deference during the COVID-19 crisis, it is important to understand *Jacobson* and in particular to review critically lower court vaccination jurisprudence.

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14. In the only reported case in which a government vaccinator forced his way into a man's house and physically force-vaccinated him, the man sued and won. The year was 1894, and the award was $1500, which would be around $45,000 in 2021. Hodge & Gostin, *supra* note 11, at 845. *See also* Mary Holland, *Compulsory Vaccination, the Constitution, and the Hepatitis B Mandate for Infants and Young Children*, 12 YALE J. HEALTH POL'Y L. & ETHICS 39, 43 (2012); Alina Bradford, *Smallpox: The World's First Eradicated Disease*, LIVESCIENCE (Apr. 23, 2019), https://www.livescience.com/65304-smallpox.html [https://perma.cc/TLF7-UEMB] (claiming a 30% death rate from smallpox).

15. As an economic reality, American parents are forced to vaccinate their children. The Nevada Supreme Court recognized this social fact in 1994:

> [Mother] never had any real choice as to whether her son was to receive the vaccine . . . . Not only was she, let us say, "strongly encouraged" to make the decision . . . , she was faced with the Hobson's choice of either having the vaccine administered or not having the privilege of sending her son to private or public school. Choosing not to have her son attend school, of course, would have subjected her to criminal penalties. . . .

Allison v. Merck & Co., Inc., 878 P.2d 948, 954-55, n.9 (Nev. 1994) (citations omitted). Some states such as California and New York require more school vaccinations than other states, and many states other than California and New York allow religious or other exemptions. *See infra* Parts III and IV. All recognize medical exemptions, but they can be very hard to obtain. State laws may govern private schools and day cares as well, or their policies may involve vaccination requirements similar to those required of public schools. *See, e.g.*, *State Vaccination Requirements*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/vaccines/imz-managers/laws/state-reqs.html [https://perma.cc/FN9W-JU7P]).

16. *See infra* § V.

Historically, religious and other exemptions to vaccination mandates allowed people to avoid vaccination easily without penalty. These exemptions have been eliminated in recent years to address a rising problem of vaccination avoidance caused by increasingly elaborate vaccination mandates and growing concerns about children's injuries and death following vaccination. States such as California and New York repealed exemptions in response to vaccination avoidance, which triggered numerous constitutional lawsuits.[17] To date, the vaccination law challenges have been unsuccessful, but the imbalance of power between the judiciary and legislature that has given rise to ongoing litigation has not been resolved. The stream of challenges to vaccination laws will not cease until a proper separation-of-powers balance is struck in vaccination jurisprudence. The Court's recent COVID-19 rulings indicate that a shift in the balance of power toward more judicial oversight of health mandates that infringe constitutional rights is appropriate.

This Article identifies the various constitutional interests impacted by vaccination mandates and synthesizes the Court's medical liberty jurisprudence over the past century in order to identify the proper balancing test that should be used to review challenges to medically invasive state action including compulsory vaccination. To this end, the Supreme Court's seminal vaccination case, *Jacobson v. Massachusetts*, is scrutinized in conjunction with other landmark Supreme Court liberty cases to show that the current state of lower court vaccination jurisprudence is indefensible and unsustainable. The Article concludes that the lower courts, legislatures, and even the Supreme Court have acted in concert to shift unprecedented authority to the political branches to control vaccination policy while allowing vaccine manufacturers to externalize all costs of their very lucrative products. It is time for the Supreme Court to revisit *Jacobson*'s balance-of-power reasoning and set a meaningful and appropriate judicial standard of review for all cases in which state action requires unwanted medical treatment.

This Article proceeds in five parts. Part I reviews the historical vaccination law precedent. Part II reviews the vaccination policy created by the NCVIA. Part III reviews the Supreme Court's liberty jurisprudence with an emphasis on the cases involving medical liberty and argues that strict scrutiny is the proper standard of review for all state action that mandates unwanted medical treatment. Part IV reviews the lower courts' vaccination decisions post-2000 and argues that they collectively produced a standard of unprecedented deference to state laws that force unwanted medical procedures. Part V discusses the very recent Supreme Court and federal court decisions concerning COVID-19 mandates and how they may alter the longstanding lower

17. *See infra* § IV.

court vaccination jurisprudence that relies on *Jacobson*. Part VI offers suggestions for applying strict scrutiny.

I. HISTORICAL VACCINATION LAW JURISPRUDENCE

"The allocation of power among Congress, the President, and the courts [was created] in such fashion as to preserve the equilibrium the Constitution sought to establish—so that 'a gradual concentration of the several powers in the same department can effectively be resisted.'"[18]

The interests implicated in compulsory vaccination are multiple and complex like most medical decisions, rendering careful judicial review necessary to protect medical liberty adequately. And yet, in just over a century the power over vaccination policy has shifted from a balance of power between the legislative and judiciary branches to unfettered discretion in the legislatures with no meaningful judicial oversight.

Vaccination has always caused injuries—including serious injuries and death—to a small percentage of people, as the Supreme Court acknowledged in *Jacobson v. Massachusetts*.[19] On the other hand, smallpox was a very deadly airborne disease that swept through entire communities quickly, killing between 20-60% of those who contracted the virus and up to 98% of babies in some cities in the late 1800s.[20] At the time the Court heard *Jacobson*, the smallpox vaccine had been widely used and was believed to have saved millions of lives around the world.[21] After reviewing the medical facts and the Liberty Clause carefully and balancing the state's interests against Mr. Jacobson's interests, the Court upheld the vaccination law as a proper exercise of the police power.[22] Mr. Jacobson had chosen to remain in public during a devastating plague while violating the vaccination law and was not refunded the fine for noncompliance.[23]

State and lower federal courts issued a number of opinions in challenges to vaccination laws around the turn of the twentieth century, predating *Jacobson*. The cases arose in response to state laws requiring vaccination of school children to control smallpox. Despite the gravity of the social health risks created by the smallpox pandemic and medical evidence in support of vaccination, several state supreme court cases predating *Jacobson* engaged a careful balancing of

18. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (citation omitted).

19. 197 U.S. 11, 23-24 (1905).

20. *See, e.g.*, Stefan Riedel, *Edward Jenner and the History of Smallpox and Vaccination*, 18 BAYLOR UNIV. MED. CTR. PROCEEDINGS 21, 21 (2005).

21. *See Jacobson*, 197 U.S. at 31 n.1 (1905).

22. *Id*. at 38-39.

23. *Id*. at 39.

individual liberty versus the state action chosen to control smallpox before ruling.[24]

Two vaccination challenges were reviewed by the United States Supreme Court prior to the declared COVID-19 pandemic in March 2020, *Jacobson v. Massachusetts* in 1905 and *Zucht v. King* in 1922. The Supreme Court's analysis in *Jacobson* was very similar to the state supreme court decisions predating *Jacobson*. However, in the decades following *Jacobson*, lower courts' review of vaccination laws showed much more deference to the legislative branch, departing significantly from the careful balancing precedent of both the prior state supreme court decisions and *Jacobson*. This Part reviews the early vaccination law jurisprudence.

A. State Supreme Court Opinions Predating Jacobson v. Massachusetts

Prior to *Jacobson v. Massachusetts*, some state supreme courts had addressed the issue of whether schools could require children to be vaccinated as a condition of attending school.[25] In 1890, the California Supreme Court rejected a writ of mandamus to compel a school principal to admit James Abeel, who was denied admission to school for not complying with California's 1889 vaccination act, which required smallpox vaccination to attend school.[26] The court found that the state's police power allowed the state to "enact such laws as it may deem necessary, not repugnant to the constitution, to secure and maintain the health and prosperity of the state, by subjecting both persons and property to such reasonable restraints and burdens as will effectuate such objects."[27]

Although rational basis review and strict scrutiny had not yet been articulated as distinct constitutional standards of review,[28] the California Supreme Court engaged an inquiry and level of review that revealed a balancing test with aspects of both strict scrutiny and rational basis review.[29] The court found that the vaccination law related to a "highly contagious and much-dreaded disease," and that vaccination

24. *See infra* § I (A).

25. *See, e.g.,* State ex rel. Cox v. Bd. of Educ. of Salt Lake City, 60 P. 1013, 1017 (Utah 1900) (listing court decisions upholding vaccination as a condition for attending public school).

26. Abeel v. Clark, 24 P. 383, 383 (Cal. 1890).

27. *Id*. at 384.

28. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (first articulating different levels of judicial scrutiny that became rational basis and strict scrutiny, the latter of which applies to state action that is suspect in some way, such as legislation that restricts "political processes," or disadvantages "discrete and insular minorities"). *See also* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against Suspending Judicial Review*, 133 HARV. L. REV. 179, 193-94 (2020).

29. *See infra* Part III (discussing the various constitutional review standards and terminology that developed post-*Jacobson*).

was the "most effective method known of preventing the spread of [smallpox]."[30] Accordingly, the legislature was "justified in deeming it a necessary and salutary burden to impose" vaccination as a condition of school attendance.[31]

The court recognized the legislative power to make public health policy, but independently reviewed the medical facts and made clear that the judiciary's duty was to intercede "where [legislative] action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful."[32] The court upheld the Act which required the cost of the vaccine to be paid from public funds where the parents lack the funds and also required an exception for children whose physicians certify that they "cannot be vaccinated" for health reasons.[33]

The Supreme Court of Pennsylvania reviewed a smallpox vaccination mandate to attend school in 1894. In *Duffield v. Williamsport School District*, the court upheld the school board's decision to exclude pupils who were not vaccinated.[34] The court found that "smallpox now exists in Williamsport" and had been "epidemic" in nearby cities.[35] The court explained that the board took action in exigent circumstances and had the "right to close the schools temporarily during the prevalence of any serious disease of an infectious or contagious character."[36]

Reviewing the medical facts, the court found that although "medical men [may] differ" about the benefits of the smallpox vaccine, a "decided majority of the medical profession believe in its efficacy."[37] The court further found the school board to be acting in "utmost good faith."[38] The urgency of the smallpox crisis and the board's conclusion that vaccination was "necessary to preserve the public health" motivated the court not to disturb the school's health policy.[39] The court pointed out that the school board did not "claim that they can compel the plaintiff to vaccinate his son," but claimed "only the right to exclude from the schools those who do not comply" with the vaccination mandate, which was essentially a lesser-included power within the school board's discretion to close the schools altogether.[40]

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30. *Abeel*, 24 P. at 384.

31. *Id.*

32. *Id.* (citing THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 155 (1871)).

33. *Id.* at 383.

34. *See* Duffield v. Sch. Dist. of Williamsport, 29 A. 742, 742 (Pa. 1894).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 743.

39. *Id.* at 742-43.

40. *Id.* at 742.

Three years later, the Supreme Court of Illinois ordered school directors to admit unvaccinated children who had been denied school admission when their father "absolutely refus[ed] to permit his children to be vaccinated."[41] The court felt that the requirement of a vaccination certification as a condition of school attendance was an *ultra vires* act of the board of health, because the authority delegated to the board primarily was to certify doctors and to "detect quacks," as opposed to engaging "general supervisory power over the health and lives of citizens of the state."[42] The court's opinion was structural and the court clarified that it need not determine whether the legislature had the power to mandate vaccination for school children.[43] Still the court opined that the state's police power to regulate health was limited to *necessity*, and "can be justified upon no other ground than as a necessary means of preserving the public health" and that "[w]ithout the necessity, . . . the power does not exist."[44]

The Court's reference to "necessity" is important. Necessity is an historical common law defense to crimes and intentional torts.[45] The defense is proven where the defendant's unlawful conduct was necessary and reasonable in exigent circumstances to avert a crisis.[46] The Illinois Supreme Court quoted that "[t]he defense of necessity is available when a person is faced with a choice of two evils and must then decide whether to commit a crime or an alternative act that constitutes a greater evil."[47] Further, "the defense requires a showing that the defendant act[ed] to prevent an imminent harm which no available options could similarly prevent."[48] The Supreme Court in *Jacobson v. Massachusetts* made an analogy to another common law defense to crimes and torts to explain its vaccination law decision: self-defense.[49]

The Illinois court felt that such a necessity could arise only where it is proven that the excluded school children were actually exposed to or infected by smallpox as opposed to merely a "remote fear that the disease of smallpox might appear in the neighborhood."[50] Even then, a child could not be permanently excluded from school, but only temporarily excluded while there was a real threat of contagion and

41. Potts v. Breen, 47 N.E. 81, 82, 85 (Ill. 1897).

42. *Id*. at 83.

43. *Id*. at 82.

44. *Id*. at 84.

45. *See, e.g.,* Vorchheimer v. Philadelphian Owner Ass'n, 903 F.3d 100, 108 (3d Cir. 2018) (discussing the common law defense of necessity in criminal and tort law).

46. *Id*. at 208.

47. United States v. Dorrell, 758 F.2d 427, 430 (9th Cir. 1985) (quoting United States v. Contento-Pachon, 723 F.2d 691, 695 (9th Cir. 1984)).

48. *Id*. at 430-31 (quoting United States v. Nolan, 700 F.2d 479, 484 (9th Cir. 1983) (internal quotation marks omitted)).

49. *See infra* Part I(B)(ii).

50. Potts v. Breen, 47 N.E. 81, 84 (Ill. 1897).

"emergency."[51] There were many school districts in Illinois at this time that showed no signs of smallpox contagion, and requiring vaccination as a condition to attend school for a "disease which had never appeared, and where there was no apparent danger that it would ever appear in the vicinity" was considered to be legislative overreaching.[52] The court explained:

> It is a matter of common knowledge that the number of those who seriously object to vaccination is by no means small, and they cannot, except when necessary for the public health and in conformity to law, be deprived of their right to protect themselves and those under their control from an invasion of their liberties by a practically compulsory inoculation of their bodies with a virus of any description, however meritorious it might be.[53]

In 1900, the Supreme Court of Utah issued a detailed opinion in *Cox v. Board of Education of Salt Lake City* concerning whether a child could be excluded from school for rejecting the smallpox vaccine.[54] In this case, a majority of the court found that the board of health had the authority to exclude from schools any persons who were suffering from any contagious or infectious disease, including teachers. The student was not suffering from a contagious disease, but the court nonetheless decided that she could be excluded from school for not being vaccinated as long as the smallpox risk was exigent.

The *Cox* court initially clarified that there was an "emergency" because smallpox had spread rapidly and the deadly disease "had become epidemic" in Utah after one case was reported in Sterling, Sanpete County.[55] The court also found as a medical fact that the disease developed 10 days to 2 weeks *after* a person was infected, which justified the government's decision to exclude unvaccinated persons who did not appear to be ill but could still innocently spread the disease before showing symptoms.[56]

The court explained that the board of health with delegated police power had a "duty" to preserve the health of the people, and that if "an emergency exists, the remedy is left to them."[57] The court pointed out that the board was not demanding that Miss Cox be vaccinated, but rather, sought to eliminate her from school temporarily during a health crisis: "[T]he board did not attempt to compel the respondent's

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51. *Id.*

52. *Id.*

53. *Id.*

54. State ex rel. Cox v. Bd. of Educ. of Salt Lake City, 60 P. 1013, 1015 (Utah 1900).

55. *Id.*

56. *Id.* The court said, "there are no means by which [smallpox contagion] can be detected," which bolstered the state's justification for prophylactic measures to control the spread of smallpox. *Id.*

57. *Id.* at 1016.

daughter to be vaccinated. It simply gave the option to be vaccinated or remain out of school until the danger from smallpox had passed."[58]

The Utah Supreme Court emphasized the important role of the judiciary as a check on legislative police power that was "not, however, without limitation, and it cannot be invoked so as to invade the fundamental rights of a citizen."[59] The court recognized that the balance of power required judicial oversight and that while it is within the province of the legislature to decide when a public health emergency exists, "as to what are the subjects which come within it is evidently a judicial question."[60]

The Utah Supreme Court confined its decision to the facts of the case and justified its decision by the exigent circumstances and the fact that the child was not facing forced vaccination but only temporary exclusion from school until the crisis subsided:

> The order made had no effect beyond the existence of the emergency. The order did not require the child to be vaccinated. She could only be excluded from school, upon her refusal to be vaccinated, until danger from an epidemic had passed. Compulsory vaccination, in any other sense than that the child should be excluded from school if she refused to be vaccinated, was not intended by the board; nor was compulsory vaccination authorized by statute. But the board had power to prevent one person from infecting another with smallpox.[61]

Justice Baskin dissented. He felt that the board's power to exclude a child from school should be limited to situations in which there was evidence that a child was actually infected or exposed to smallpox.[62] Since there was no evidence that Miss Cox was afflicted with any disease or even exposed, Justice Baskin felt that there was insufficient justification for excluding her from school.[63] He also pointed out that vaccination is not an exact science and is not always effective, and that vaccinated children may still carry the disease and give it to others.[64] Accordingly, he did not believe that the state's chosen means were sufficiently tied to its objective to justify the infringement of Miss Cox's desire to attend school, saying, "the danger sought to be avoided was not remedied."[65] He concluded, "[t]he danger which existed on account of the prevalence in the city of smallpox might have justified the closing of the schools, but was no justification for such discrimination

58. *Id*.
59. *Id*.
60. *Id.*
61. *Id*. at 1017.
62. *Id*. at 1018-21.
63. *Id*. at 1019.
64. *Id*. at 1020.
65. *Id.*

[against an unvaccinated student who showed no signs of contagion]."[66]

The Supreme Court of Minnesota heard a challenge to a vaccination law in 1902 in *Freeman v. Zimmerman*.[67] The vaccination mandate had been determined to be valid at trial based on the jury's conclusion that there was a current threat of smallpox that justified the vaccination requirement.[68] The issue on appeal was whether authority to enforce the vaccination mandate was properly delegated to the local authorities.[69]

The court first noted the split of authority regarding the level of public health risk that must be proven to justify unwanted vaccination. That is, some courts required a showing that there was an epidemic of smallpox or imminent danger to justify vaccination while others upheld vaccination mandates preventively.[70] The court found that:

> [W]hatever may be the correct rule to apply to controversies of this kind, if the power may be exercised under any circumstances, where legislative authority has been granted, it should be where, as in the case at bar, there is an epidemic of smallpox and imminent danger of its spreading.[71]

The court found a proper delegation of authority and upheld the vaccination requirement and concluded:

> We may adopt for present purposes the rule that the power to enforce vaccination, as a condition to the right of admission to the public schools, may be exercised by local authorities in cases of emergency only, and not then unless expressly or by fair implication conferred upon them by the legislature . . . ."[72]

The following year, New York's highest court rendered a largely structural opinion that revolved around equal protection. In *Viemeister v. White*,[73] the court first clarified that public education is a privilege as opposed to a right and found that since the vaccination law applied to all pupils equally, it did not violate due process or equal protection. The court found that health policy was within the

66. *Id*. (Baskin, J., dissenting). Justice Baskin also questioned whether the delegation and redelegation of the legislative function was appropriate. *Id*.

67. *See* Freeman v. Zimmerman, 90 N.W. 783 (Minn. 1902).

68. The jury was asked to determine whether: (1) there was an epidemic of smallpox in the area or a current threat to the area; (2) whether vaccination prevented or materially prevented smallpox; and (3) whether the vaccination requirement to attend public school was reasonable. The jury answered all questions in the affirmative. *Id*. at 354.

69. *Id*. at 784-86.

70. *Id*. at 784. The court also noted the fact that some courts allow health officers to act without clearly delegated legislative authority "in cases of emergency amounting to an overruling necessity." *Id*. (internal quotations omitted).

71. *Id*.

72. *Id*. at 785.

73. *See* Viemeister v. White, 88 A.D. 44 (1903).

legislature's province in the balance of power and "so long as this regulation does not operate to deprive any member of this State of 'any of the rights or privileges secured to any citizen thereof . . .' there is no ground on which the statute may be declared null and void."[74] In concurrence, Justice Hirschberg noted that some states require a current epidemic to threaten the community while other states do not require "any specific menace of disease" to exclude unvaccinated children as long as it is "reasonable," and cited *Abeel v. Clark* and *Duffield v. Williamsport School District* as examples of the latter.[75] As noted above, however, *Abeel* and *Duffield* specifically discussed the urgency of the smallpox threat as part of the decisions to uphold the vaccination laws at issue.

As a whole, the state supreme court opinions predating *Jacobson v. Massachusetts* engaged similar analyses in terms of requiring evidence of a public necessity and urgency to justify compulsory vaccination. They often referred to the lack of available alternatives to quell the smallpox death toll.[76] The courts generally acknowledged the separation-of-powers issue and recognized that health policy was a legislative function while also recognizing the judiciary's duty to review medically invasive state action to protect liberty.

B. Jacobson v. Massachusetts

1. The Massachusetts Statute and Jacobson's Conviction

In 1905, a Massachusetts law that mandated smallpox vaccination at large came before the Supreme Court. The Court has generally undertaken a careful review of a statute's language when the law is challenged on constitutional grounds. In *Jacobson v. Massachusetts*, the Court republished the challenged statute in its opinion:

> The Revised Laws of that Commonwealth, c. 75, § 137, provide that 'the board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars.' An exception is made in favor of 'children who present a certificate, signed by a registered physician that they are unfit subjects for vaccination.' § 139.[77]

74. *Id*. at 46 (internal citation omitted).

75. *Id*. at 51.

76. *See, e.g.*, State ex rel. Adams v. Burdge, 70 N.W. 347, 351 (Wis. 1897); Lawbaugh v. Bd. of Educ., 52 N.E. 850, 850 (Ill. 1899); Rhea v. Bd. of Educ., 171 N.W. 103, 106 (N.D. 1919).

77. Jacobson v. Massachusetts, 197 U.S. 11, 12 (1905).

The Court also quoted the local law:

> [T]he Board of Health of the city of Cambridge, Massachusetts, on the twenty-seventh day of February, 1902, adopted the following regulation: 'Whereas, smallpox has been prevalent to some extent in the city of Cambridge and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease, that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered, that all the inhabitants of the city who have not been successfully vaccinated since March 1, 1897, be vaccinated or revaccinated.'[78]

Mr. Jacobson feared vaccination. As a child, he had suffered "great and extreme suffering for a long period by disease produced by vaccination," his son had experienced a bad reaction, and Mr. Jacobson witnessed bad reactions in others as well.[79] He refused to get vaccinated but was seen around town.[80] He was prosecuted for violating the smallpox vaccination law and raised due process and equal protection challenges defensively, but his offers of medical evidence and arguments were rejected.[81] The Massachusetts Supreme Judicial Court sustained the trial court's guilty judgment. Mr. Jacobson was ordered to pay the $5.00 statutory penalty or go to jail until he paid it.[82] He appealed to the Supreme Court in hopes of obtaining relief from the $5.00 penalty (which in 2021 would equal about $165.00).[83] The United States Supreme Court affirmed.

2. The Supreme Court's Constitutional Analysis

Mr. Jacobson argued a variety of personal experiences and fear of the risks posed by smallpox vaccination in support of his constitutional challenges, including his and his son's adverse reactions to prior vaccination.[84] Court found that the state's authority to enact the law rested with its police power to safeguard public health, carefully reviewed the medical evidence, and rejected all of Mr. Jacobson's challenges.[85] The Court used some language that sounds like modern-day

78. *Id*. at 12-13. The board subsequently adopted another regulation empowering a named physician to enforce the vaccine. The Court did not explain what this meant.

79. *Id*. at 36, 39. Jacobson apparently did not obtain a doctor's certification that he was not a proper subject for vaccination. *Id*. at 39.

80. *Id*. at 39. This is an important point, because had Mr. Jacobson chosen to self-isolate, the Court presumably would not have mentioned his refusal to vaccinate while interacting with others in public and possibly exposing them to smallpox as a result of his lack of vaccination.

81. *Id*. at 23-24.

82. *Id*. at 14.

83. *See, e.g.*, CPI INFLATION CALCULATOR, https://www.officialdata.org/us/inflation/1905?amount=5 [https://perma.cc/BTH8-7KH3].

84. *Jacobson*, 197 U.S. at 36.

85. *Id*. at 24-25, 31 n.1.

rational basis review: "the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[86] The Court also seemed to defer to Massachusetts's utilitarian "social compact."[87]

The Court used other language consistent with strict scrutiny, finding that the vaccination law was "necessary in order to protect the public health and secure the public safety."[88] The Court's decision rested on a detailed independent review of the medical facts and suggested that a very close nexus was required between an exigent public health risk and the unwanted medical procedure the state chose to address it.[89]

The Court took care to explain the urgency of the pandemic and the necessity of vaccination as the lesser of two evils. "Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the Board of Health, that was *necessary* for the public health or public safety."[90] The Court justified the invasive state action by analogy to justification to commit crimes in emergency situations: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[91] Self-defense, like necessity, is a "lesser evils" common law defense to crimes and torts that excuses unlawful conduct only to avert a greater public evil. To establish the defense, the defendant must prove: "(1) a reasonable belief that the use of force was necessary to defend himself or another against the immediate use of unlawful force and (2) the use of no more force than was reasonably necessary in the circumstances."[92]

The Court detailed the medical evidence showing that vaccination was necessary and the only option available at the time.[93] Smallpox spread rapidly and ultimately killed around 300,000,000 people in the twentieth century alone.[94] Many military and civilian studies around

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86. *Id.* at 25.

87. Language in the Massachusetts law established its choice of social policy. It provided that all people in Massachusetts are governed for the "common good," and that the government was instituted for the "protection, safety, prosperity and happiness of the people, and not for the profit, honor or private interests of any one man, family or class of men." *Id.* at 27 (internal quotations omitted).

88. *Id.* at 28.

89. *Cf.* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J. concurring) (the *Jacobson* Court "essentially applied rational basis review").

90. *Jacobson*, 197 U.S. at 27 (emphasis added).

91. *Id.*

92. *See* United States v. Biggs, 441 F.3d 1069, 1071 (9th Cir. 2006) (citing United States v. Keiser, 57 F.3d 847, 851 (9th Cir. 1995)).

93. *Jacobson*, 197 U.S. at 23-24, 31 n.1.

94. Donald A. Henderson, *The Eradication of Smallpox—An Overview of the Past, Present, and Future*, 29 VACCINE 7, 7-9 (2011).

the world indicated that the smallpox vaccine was efficacious.[95] In one study mentioned by the Court, it was found that statistics concerning the inhabitants of Chemnitz showed that less than 2% of those vaccinated contracted smallpox, as opposed to over 46% of those not vaccinated, and the mortality rate was *68 times greater* among the unvaccinated.[96] In addition, in an 1867 British Parliament investigation in which 552 doctors were asked about the utility of vaccination, only two doctors spoke against it.[97]

Despite recognizing the state's police power to control public health and safety, the Court checked the legislative power carefully by reviewing in detail the wealth of medical evidence that had been produced over many decades by exposing healthy people to cowpox or smallpox for the purpose of building immunity to smallpox. Mr. Jacobson's arguments rested on "alleged injurious or dangerous effects of vaccination" which the Court viewed as aberrational[98] and found that the risks of the smallpox vaccine were "too small to be seriously weighed as against the benefits."[99]

The Court also addressed the limits of the state's police power:

> [N]o rule prescribed by a State, nor any regulation adopted by a local governmental agency . . . shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures.[100]

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95. *See Jacobson*, 197 U.S. at 31, n.1 (the Court lists international evidence that the smallpox vaccine was effective and nearly universally recommended among medical experts).

96. *Id*. at 32, 31 n.1.

97. *Id*.

98. *Id*. at 23.

> "[F]or nearly a century most of the members of the medical profession . . . have recognized the possibility of injury to an individual from carelessness in the performance of [smallpox vaccination], or even in a conceivable case without carelessness, [but] they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive. . . ."

Id. at 23-24. Although some medical experts had opined that the smallpox vaccine may not be safe or effective, the Court found that the "facts of common knowledge" were to the contrary, and that the Court will accept medical "common knowledge" in passing upon the constitutionality of a statute. *Id*. at 23. The Court found that "high medical authority," statistics, and international use of the smallpox vaccine demonstrated that the smallpox vaccine was necessary to "suppress the evils of a smallpox epidemic that imperiled an entire population." *Id*. at 30-31.

99. *Id*. at 24.

100. *Id*. at 25 (citing Gibbons v. Ogden, 22 U.S. 1 (1924); Sinnot v. Davenport, 63 U.S. 227 (1859); Missouri, Kansas & Texas Ry. Co. v. Haber, 169 U. S. 613, 626 (1898)).

The Court discussed the separation of power and the judiciary's role to protect individual liberty when a public health law:

> [W]ent beyond the necessity of the case and under the guise of exerting a police power invaded . . . rights secured by the Constitution[] . . . . 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 . . . .[101]

The Court then balanced the state's interest in controlling the spread of smallpox with the individual liberty interest in avoiding vaccination without penalty:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. . . . Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, . . . regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; . . . . Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will.[102]

The facts in *Jacobson* sufficiently showed that the liberty infringement was necessary and reasonable based on the smallpox epidemic and available medical facts, and the Court's analogy to self-defense indicates that the urgent need to avert a greater public evil than vaccination was important to the Court's conclusion. The Court explicitly limited its holding to the Massachusetts case at hand.[103]

The *Jacobson* Court also found that there is no "absolute rule" that an adult "must be vaccinated" if it can be shown with "reasonable certainty" that he is not a "fit subject of vaccination."[104] A medical exemption is required where a person shows that vaccination would likely cause injury or death, because in such a case, compulsory vaccination would be "cruel and inhuman in the last degree."[105] But Mr. Jacobson's scant evidence failed to show that he was not in "perfect health" and

101. *Id*. at 28-29.

102. *Id*. at 26-27.

103. *Id*. at 39 ("We now decide only that the statute covers the present case . . . .").

104. *Id*.

105. *Id*.

not a "fit subject of vaccination" while he chose to remain at large and undermine the efficacy of the mandate.[106] The penalty imposed seems quite fair.

C. Zucht v. King

In 1922, school child Rosalyn Zucht sought a writ for an order to be admitted to a public school without proof of smallpox vaccination in part because there was no current outbreak of smallpox in the area.[107] The writ was denied.

The Court found in favor of the government in an extremely short opinion. The student argued that the board of health lacked authority to set vaccination policy because there existed no "rule by which that board is to be guided" or "safeguards against partiality and oppression."[108] The Court ruled that states may delegate vaccination policy to a municipality and the municipality may in turn vest discretion in the board of health.[109] The substantive issues required a writ of certiorari and were not properly before the Court.[110] *Jacobson v. Massachusetts* had settled the issue of whether mandatory smallpox vaccination was within the state's police power, and the Court therefore found no "substantial" constitutional issue.[111]

D. The Aftermath

After *Jacobson* and *Zucht*, lower courts began to rely on *Jacobson* for the broad proposition that states may require smallpox vaccination preventively, in the absence of an actual disease threat. The efficacy of the smallpox vaccine and states' need to control the disease had been settled, and deference to the legislative branch on this issue was considered appropriate. But lower courts began to engage broad language indicating that vaccination policy was uniquely a legislative function, departing from *Jacobson*'s separation-of-powers analysis.[112]

By 1948, the New Jersey Supreme Court upheld a school vaccination mandate and stated that "the desirability or efficacy of compulsory

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106. *Id*. at 36-39. The equal protection challenge was based on the fact that the legislature made an exception for children, but not adults. The Court answered that adults are not in the same class as children, so there was not unequal protection of the law among those similarly situated. *Id*. at 30.

107. Zucht v. King, 260 U.S. 174, 175 (1922). The Court did not mention smallpox in the opinion, but there is no evidence that any other vaccine was involved in the case.

108. *Id*.

109. *Id*. at 176 (citing Laurel Hill Cemetery v. San Francisco, 216 U.S. 358 (1910); Lieberman v. Van de Carr, 199 U.S. 552 (1905)).

110. *Id*. at 177.

111. *Id*. at 176.

112. For more detail on lower courts' post-*Jacobson* vaccination rulings see Holland, *supra* note 14, at 52-54.

vaccination . . . is strictly a legislative and not a judicial question."[113] In 1951, an Arkansas court similarly abdicated its role in the balance of power and found that that it was purely a legislative function to judge the safety and efficacy of vaccination.[114] By the 1960s, vaccination laws were considered "presumptively valid" despite expansion of mandatory vaccinations, and challenges to compulsory vaccination laws began to focus on exemptions.[115]

By deferring vaccination policy to the legislative branch, the lower court decisions in the decades following *Jacobson* and *Zucht* shifted power from the judicial to the legislative branch and all but eliminated the judicial check on the legislatures relative to vaccination challenges. *Jacobson's* balanced analysis, including investigation into the medical evidence, was not followed in favor of broad deference. In recent years, the judiciary has continued to defer to the legislative branch relative to vaccination policy[116] and by doing so has created an unjustified imbalance of power that will continue to animate litigation until a proper balance of power is restored.

II. THE NATIONAL CHILDHOOD VACCINE INJURY ACT OF 1986

"[T]he VICP is not just a specialized court. It is . . . a 'replacement regime' . . . the go-to weapon in serious tort reformers' collective arsenals."[117]

School vaccination mandates proliferated rapidly after 1964 when the Advisory Committee on Immunization Practices (ACIP) was formed as part of the Centers for Disease Control and Prevention (CDC).[118] Originally, the ACIP recommended a few doses of 7 vaccines.[119] Today, at least 69 doses of 16 vaccines are recommended for children.[120] As more vaccinations became mandatory for school attendance, more children had allergic reactions, suffered neurological disor-

113. Sadlock v. Bd. of Educ. of Carlstadt, 58 A.2d 218, 220 (N.J. 1948).

114. Seubold v. Fort Smith Special Sch. Dist., 237 S.W.2d 884, 887 (Ark. 1951).

115. *See* Holland, *supra* note 14, at 52-53.

116. *See infra* Part IV.

117. Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP,* 163 U. PENN. L. REV. 1631, 1640-41 (2015).

118. *See* Jean Claire Smith, *The Structure, Role, and Procedures of the U.S. Advisory Committee on Immunization Practices (ACIP),* 28 VACCINE A68-A75 (Apr. 19, 2010), https://doi.org/10.1016/j.vaccine.2010.02.037 [https://perma.cc/WKG2-4RFF]. *See also* Holland, *supra* note 14, at 54-55.

119. *See* Smith, *supra* note 118, at A75; Holland, *supra* note 14, at 53.

120. Depending on the state and its vaccination table, more than 70 doses may be required. *See Immunization Schedules,* CENTER FOR DISEASE CONTROL PREVENTION, https://www.cdc.gov/vaccines/schedules/index.html [https://perma.cc/M8HB-6LBJ].

ders, or even died, which led to numerous lawsuits against vaccine manufacturers.[121] By the 1980s, vaccine manufacturers claimed that vaccine-injury lawsuits threatened to bankrupt the industry.

The United States Congress responded by enacting in 1986 the Vaccine Injury Compensation Program (VICP) as part of the National Childhood Vaccine Injury Act (NCVIA or "Vaccine Act").[122] The Vaccine Act "created a no-fault compensation program to stabilize a vaccine market adversely affected by an increase in vaccine-related tort litigation and to facilitate compensation to claimants."[123] The Department of Justice had implored President Reagan to veto the Act but he signed it with "mixed feelings" and "serious reservations" about the compensation program aspect of the bill.[124] The reservations were prescient; the available empirical evidence suggests that the system subjects vaccine-injured children and their families to antagonistic litigation and fails to compensate most victims.[125]

The VICP was intended to operate similar to worker's compensation: injured persons give up regular civil procedure, discovery, a jury trial, and specialized damages calculations in exchange for certain sums to be paid quickly and administratively.[126] To this end, the NCVIA includes a Vaccine Injury Table[127] and a process whereby

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121. For a more detailed history of the evolution of American vaccine policy and law, *see* Holland, *supra* note 14, at 42-44.

122. *See* Bruesewitz v. Wyeth LLC, 562 U.S. 223, 249-50 (2011) (Sotomayor, J., dissenting).

123. *Id*. at 224.

124. Robert Pear, *Reagan Signs Bill on Drug Exports and Payment for Vaccine Injuries,* N.Y. TIMES (Nov. 15, 1986), https://www.nytimes.com/1986/11/15/us/reagan-signs-bill-on-drug-exports-and-payment-for-vaccine-injuries.html [https://perma.cc/TG8N-L322]. In accordance with the NCVIA, a person injured by a vaccine or his or her guardian may file a petition for compensation in the United States Court of Federal Claims (known among lawyers as the "Vaccine Court") naming the Secretary of Health and Human Services as the respondent. A special master then makes an informal adjudication, which is reviewed by the Vaccine Court along with any objections, and then a final judgment is entered in accordance with a rigid statutory timeline. *Bruesewitz*, 562 U.S. at 227. As long as the claimant brings an action for a listed injury on time, the claimant is prima facie entitled to compensation and the burden of proof of causation rests with the Secretary. *Id*. at 228. There is no right to discovery or jury trial and no formal rules of evidence or procedure. The outcomes of proceedings are considered confidential. *See* Office of Special Masters, *Guidelines for Practice Under the National Vaccine Injury Compensation Program* (2020), https://www.uscfc.uscourts.gov/sites/default/files/Guidelines-4.24.2020.pdf [https://perma.cc/DN9G-QZDL] (noting "[t]here is no discovery as a matter of right in a vaccine proceeding."). Special masters oversee the proceedings and decide questions of fact and law with limited review for abuse of discretion and factual errors. LOUISE KUO HABAKUS & MARY HOLLAND, VACCINE EPIDEMIC 44 (2011). Claimants may be denied access to medical studies such as the thimerosal studies in the aggregate Omnibus Autism Proceeding with 5000 claimants. *Id*. at 44-45.

125. Engstrom, *supra* note 117, at 1636.

126. *See id*. at 1640-42 (referring to the exchange as a "replacement regime") (internal quotations omitted). There have been many proposals for specialized courts, such as for injuries arising from nuclear accidents and motor vehicle accidents. *Id*. at 1641.

127. The Vaccine Injury Table lists dozens of categories of "illness, disability, injury or condition covered" by the NCVIA, including brain damage, seizures, and death. *Vaccine*

special masters adjudicate claims in an abbreviated fashion through the "Vaccine Court."[128] All vaccine injury costs are externalized and paid for by the public by means of a vaccine excise tax. This sort of administrative remedy substituted for common law tort trials creates constitutional problems *per se*, including Article III concerns about assigning power to bodies that do not comply with judicial requirements and the loss of the Seventh Amendment right to trial by jury for common law claims.[129] These issues, in conjunction with the more general separation-of-powers problem in vaccination policy, render the need for vaccination policy reform all the more pressing.

The NCVIA eliminates vaccine manufacturer liability for unavoidable injuries and vaccine side effects by its terms. After the NCVIA was passed, the number of vaccinations required of children to attend public school increased dramatically, and vaccine injuries exacerbated. Some plaintiffs attempted to circumvent the NCVIA by bringing claims for avoidable vaccine injuries. But in 2011 the Supreme Court interpreted the NCVIA expansively to block such claims and increased vaccine manufacturer immunity significantly. In *Bruesewitz v. Wyeth*, the Court held that the immunity provided by the NCVIA includes all design defects (even avoidable ones) such that all civil lawsuits for injuries caused by unreasonably dangerous vaccines are preempted by the NCVIA.[130] Congress has not responded to *Bruesewitz* by amending the NCVIA so the *Bruesewitz* decision stands.

The NCVIA in combination with *Bruesewitz* materially altered the balance of power and eroded judicial protection of medical liberty relative to vaccination. Constitutional issues "loom large" for such federal programs that displace traditional tort remedies.[131] At the same time,

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Injury Table, HEALTH RES. & SERVS. ADMIN., https://www.hrsa.gov/sites/default/files/vaccinecompensation/vaccineinjurytable.pdf [https://perma.cc/QKV9-PFNF].

128. For more detail on how the NCVIA is administered see Engstrom, *supra* note 117. *See also* Holland, *supra* note 14, at 54-59.

129. E. Donald Elliott, Sanjay A. Narayan & Moneen S. Nasmith, *Administrative 'Health Courts' for Medical Injury Claims: The Federal Constitutional Issues*, 33 J. HEALTH POL. POL'Y & L. 761, 777-91 (2008).

130. A majority of the Court ruled that the Vaccine Act covered all unavoidable adverse side effects of vaccine and that the Act preempted all cases arising from vaccine design defects—even where there is evidence that the vaccine manufacturer could have made a safer vaccine less likely to injure and kill people, that is, the injury was avoidable. Bruesewitz v. Wyeth LLC, 562 U.S. 223-25 (2011). The Court has been criticized harshly for the expansion of immunity, and Justice Sotomayor wrote a powerful dissent arguing that the majority misconstrued the intent of the Vaccine Act: "given the lack of robust competition in the vaccine market, [vaccine manufacturers] will often have little or no incentive to improve the designs of vaccines that are already generating significant profit margins." *Id.* at 273-74 (Sotomayor, J., dissenting).

131. *See* Engstrom, *supra* note 117, at 1636 (constitutional issues "loom large" for specialized health courts, including whether abrogating victims' common law remedies is accompanied with sufficient tangible benefits to justify the loss of regular judicial remedies). *See also, e.g.,* Amy Widman, *Why Health Courts Are Unconstitutional,* 27 PACE L. REV. 55, 81 (2006).

pronounced judicial deference in vaccination cases renders vaccination policy grossly aberrational and a significant departure from medical malpractice, products liability, and medical liberty jurisprudence. Judicial "absenteeism" conflicts with a fundamental judicial duty: to protect individual rights.[132] It is not yet clear whether states will attempt to extend school vaccination policies to require COVID-19 vaccination or enact laws of general applicability requiring adult COVID-19 vaccination.

The many issues surrounding vaccination policy led to a rise in vaccination avoidance by means of religious or other exemptions. Some attributed the measles outbreak in Disneyland, California in 2013 to a loss of "herd immunity," the theory upon which mass vaccination relies. California and New York responded by amending their vaccination laws to eliminate religious and other exemptions, triggering a new wave of constitutional challenges in the early 2000s.[133] The lower courts consistently cited *Jacobson* as establishing a rule of deference and did not engage normal judicial scrutiny or engaged it superficially. Part III discusses Supreme Court medical liberty cases to reveal that the Court strongly protects individual liberty against forced medical procedures and that lower court vaccination jurisprudence is an outlier. Part IV discusses the lower court vaccination opinions of the last twenty years to demonstrate that the judiciary has been essentially absent and should reassume their role in the balance of power to protect medical liberty adequately.

III. SUPREME COURT JURISPRUDENCE

"[The] freedom from unwanted medical attention is unquestionably among those principles 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[134]

The Supreme Court's liberty jurisprudence has been notoriously inconsistent. The Court has engaged various interpretive methods and created levels of judicial review depending on the importance of the liberty interest asserted but then engaged such methods irregularly or simply disregarded them in subsequent liberty cases. This has led to unabashed criticism of the Court's liberty jurisprudence. The Court has been called a "naked power organ"[135] that makes decisions "willy-

132. *See* Wiley & Vladek, *supra* note 28, at 194 ("[T]he most important argument against the suspension model is . . . the unique checking role of an independent judiciary and the costs of its absence.").

133. *See infra* Part IV (C).

134. Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 305 (1990) (Breyer, J., dissenting). The "sanctity, and individual privacy, of the human body is obviously fundamental to liberty. 'Every violation of a person's bodily integrity is an invasion of his or her liberty.' " *Id.* at 342 (Stevens, J., dissenting).

135. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1,12 (1959).

nilly"[136] depending on the "idiosyncrasies of a merely personal judgment."[137] Accusations of "judicial activism" abound as well as claims of lost judicial "legitimacy."[138]

This Part surveys the Court's liberty jurisprudence to seek answers concerning how the Court should handle constitutional challenges to compulsory vaccination laws based on its relevant Liberty Clause jurisprudence and, in particular, its medical autonomy opinions. The cases, taken together, evidence the Court's solid historical commitment to protecting individuals from forced medical procedures at the hands of the state, whether referring to them as "fundamental" or not. The nature of the liberty right infringed with a forced medical procedure renders it appropriate for the state to bear heavy burdens to justify such physically invasive state action and prove the necessity and safety of the unwanted medical procedure through medical evidence. This Part also briefly addresses cases concerning additional constitutional interests infringed by vaccination mandates, namely childrearing liberty and religious freedom. Under the theory of hybrid rights, heightened scrutiny is appropriate due to the overlapping infringement of constitutional rights.[139]

Liberty and other constitutional challenges to state laws involve balancing the individual's interests against the state's interests. The level of scrutiny rises along with the importance of the liberty interest asserted, with fundamental rights infringement warranting the most exacting judicial review standard: strict scrutiny. But the Court has not been consistent in recognizing liberty interests or announcing a standard of review. The Court sometimes analyzes liberty interests without defining them as fundamental or not and often analyzes liberty interests in terms that do not fit neatly into the Court's articulated standards of rational basis review, intermediate scrutiny, or strict scrutiny.

The standard of review is critical to determine a court's duty to review state legislative action. Where an infringed liberty interest is not deemed fundamental and does not operate to the detriment of a "suspect class"[140] under an equal protection analysis, a challenged law is subject to rational basis review and courts routinely defer to the

136. Richard A. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1278 (2006) (referring to Justice Scalia's use of the term in the case Vieth v. Jubelirer, 541 U.S. 267, 295 (2004)).

137. Adamson v. California, 332 U.S. 46, 68 (1947) (Frankfurter, J., concurring).

138. *See, e.g.,* Deana Pollard Sacks, *Elements of Liberty*, 61 S.M.U. L. REV. 1557, 1559 (2008).

139. *See* Emp. Div., Dep't. of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

140. Heller v. Doe by Doe, 509 U.S. 312, 335 n.1 (1993) (Souter, J., dissenting).

legislature and uphold the law on any conceivable basis as long as it is rationally related to a state's reasonable objective.[141]

When a law disadvantages a suspect class or infringes a fundamental right, strict scrutiny is the standard of review. Laws reviewed under this standard are usually struck down because fundamental constitutional rights and minority groups must be protected absent the most compelling of state objectives and proof that the state has chosen the least intrusive means necessary to meet its objective. Under strict scrutiny, the government has the burden of proving: 1) a compelling state interest; 2) the law is narrowly tailored; and 3) no less restrictive means are available to meet the state's goal.[142] The number of state laws that have been struck down based on strict scrutiny has led to the adage, "strict in theory, but fatal in fact" in reference to the number of laws struck down when strict scrutiny is the standard.[143]

An intermediate scrutiny standard requires a showing that the law seeks to further an important state interest by means that are substantially related to that interest and has been applied in equal protection challenges to laws that target quasi-suspect classes, such as women or children born to unmarried parents.[144] It has been called "rational basis with bite" or "heightened scrutiny" and involves less deference than rational basis review but less scrutiny than strict scrutiny.[145] In addition, some courts have engaged intermediate scrutiny to laws that infringe minors' liberty interests even though strict scrutiny would be the test applied to the same challenges if brought by adults.[146]

Despite the inconsistency in liberty analysis, certain ideas about what subjects a law to heightened scrutiny recur in the Court's opinions. The "nature" of the right, the legislative facts (including medical and social facts), and "history and tradition" are the cornerstones of fundamental rights analysis.[147] A "pattern of enacted [state] laws,"

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141. *See, e.g., id.* at 320; FCC v. Beach Commc'n.'s, Inc., 508 U.S. 307, 314-15 (1993); Romer v. Evans, 517 U.S. 620, 631 (1996).

142. *See, e.g.,* ACLU v. Mukasey, 534 F.3d 181, 190 (3d Cir. 2008).

143. *See, e.g.,* Wittmer v. Peteres, 87 F.3d. 916, 918 (7th Cir. 1996) (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 202-24 (1995)). *See also, e.g.,* Adam Winkler*, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (finding that laws survive strict scrutiny 30% of the time).

144. The intermediate standard was articulated by the Court in Craig v. Boren, 429 U.S. 190 (1976). *See also, e.g.,* Matthews v. Lucas, 427 U.S. 495 (1976); Trimble v. Gordon, 430 U.S. 762 (1977); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

145. *See, e.g.,* Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L. J. 779 (1987).

146. The dual standard recognizes that the government may infringe minors' rights more than adults' rights based on its *parens patriae* power to protect minors. *See, e.g.*, Schleifer v. City of Charlottesville, 159 F.3d 843, 846-47 (4th Cir. 1998) (citations omitted) (explaining Supreme Court precedent limited children's constitutional rights relative to adults' constitutional rights and applying intermediate scrutiny).

147. *See* Sacks, *supra* note 138, at 1576-89.

foreign and domestic, is also a factor.[148] Laws forcing medical procedures on civilians without their consent have generally motivated the Court to engage some form of heightened scrutiny if not strict scrutiny.[149]

The liberty interests implicated in medical decisionmaking have been referred to as "privacy" interests as in *Griswold v. Connecticut*[150] and *Roe v. Wade*,[151] or "bodily integrity" interests as in *Winston v. Lee*[152] and *Cruzan v. Director, Missouri Department of Health*,[153] although the Court has used these terms interchangeably at times. This Article refers to all cases challenging coerced medical procedures (or prohibition of desired medical procedures) as medical liberty cases because they have in common challenges to state action regulating medical procedures without consent but are a subset of both privacy and bodily integrity jurisprudence.

Jacobson v. Massachusetts foreshadowed the Court's careful review of medical liberty challenges to state laws because the Court engaged a fact-intensive analysis before reaching its conclusion. Importantly, in *Jacobson*, the penalty for noncompliance was not to coerce a medical procedure but to uphold a monetary penalty. Compulsory vaccination of children presents a complicated mix of the child's right of medical liberty, the parents' right to control children's upbringing (including medical decisions), religious and moral views of the parent and child, the state's *parens patriae* power to protect children, and the state's police power to protect society at large.

Various constitutional rights have been asserted to challenge vaccination laws other than medical liberty, including: 1) the parents' childrearing liberty; 2) religious freedom of both the parent and the child (assuming the child is sufficiently mature to form religious values); and 3) philosophical and moral autonomy of both the parent and child (assuming the child is sufficiently mature to form philosophical values). When religious freedom is raised in conjunction with another constitutional right, such "hybrid-rights" cases warrant heighted judicial review to adequately protect constitutional liberty.[154] The hybrid-

148. *See id.* at 1582-83, 1587-90 (internal quotation marks omitted).

149. Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 305 (1990) (Brennan, J., dissenting) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

150. 381 U.S. 479, 483 (1965).

151. 410 U.S. 113, 120 (1973).

152. 470 U.S. 753, 754 (1985).

153. 497 U.S. 261, 269 (1990).

154. *See* Emp. Div., Dep't. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 881-82 (1990) (explaining that in Free Exercise Challenges in which a law of generally applicability was ruled unconstitutional, the Free Exercise challenge was accompanied by another constitutional claim such as the parents' childrearing right, which presents a "hybrid situation" and warrants closer judicial scrutiny of the challenged law). *See also, e.g.*, Krafchow v. Town of Woodstock, 62 F. Supp. 2d 698, 712 (N.D.N.Y. 1999) (the implication of the Court's

rights policy should warrant heightened scrutiny any time a law infringes multiple constitutional rights, such as vaccination mandates.

A. Medical Liberty

The Supreme Court stated more than a century ago in *Union Pacific Railway Company v. Botsford*:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley: 'The right to one's person may be said to be a right of complete immunity; to be let alone.'[155]

Then in 1927 the Court heard *Buck v. Bell* and upheld a state law forcing sterilization on a very young "feeble minded" woman who was "the daughter of a feeble minded mother . . . and the mother of an illegitimate feeble minded child."[156] The Court found that the welfare of society may be promoted by sterilizing mental "defectives" who would become a "menace" if allowed to continue to procreate and concluded, "Three generations of imbeciles [are] enough."[157] The Court specifically relied on *Jacobson v. Massachusetts*: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."[158]

Buck v. Bell is considered one of the worst cases in Supreme Court history[159] but has never been overruled *per se*. However, the liberty right to avoid unwanted sterilization was deemed fundamental by the Court and subject to strict scrutiny in 1942 in *Skinner v. Oklahoma*. The Court explained, "Marriage and procreation are fundamental to the very existence and survival of the race" and forced sterilization would deprive an individual of a "basic liberty" forever.[160] The Court has strictly protected medical liberty that involves reproductive choices.

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distinction in Smith is that in "hybrid" cases, courts should apply a more exacting standard of review).

155. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 250-51 (1891) (citing THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OF THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (1879)) (internal quotations omitted) (denying defendant's motion for an order for the plaintiff to submit to a "surgical examination" in the presence of her own surgeon and attorneys in railway injury case).

156. Buck v. Bell, 274 U.S. 200, 205 (1927).

157. *Id*. at 205-07.

158. *Id*. at 207.

159. Long after Carrie Buck was sterilized along with nearly 20,000 other "forced eugenic sterilizations" that took place by 1935, it was discovered that she was a woman of average intelligence and that her pregnancy was the result of intrafamilial rape. *See* Stephen Jay Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENT 331, 332 (1985).

160. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

Repeatedly the Court has stated the high value placed on medical autonomy and yet not all laws depriving individuals of medical autonomy have been reviewed under a strict scrutiny standard. In 1990, a century after *Botsford*, the Court would requote verbatim Judge Cooley's statement in another reproductive case, *Planned Parenthood v. Casey*, adding, "[P]ersonal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of the government."[161] *Casey* represented a retreat from the strict scrutiny standard of review in the most famous Supreme Court reproductive rights case, *Roe v. Wade*, but did not alter *Roe v. Wade*'s analysis of when the state's interest in the life of an unborn fetus becomes sufficiently compelling to justify abortion regulation.

In *Roe v. Wade* the Court engaged extensive medical factfinding as part of its strict scrutiny of an abortion law. At the outset, the Court noted the important personal values involved with the medical choice to terminate a pregnancy, including moral beliefs: "One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion."[162] This quote helps to define what individual liberty means in terms of personal autonomy and supports the idea of a philosophy-based secular liberty interest to reject unwanted medical treatment. [163]

The *Roe v. Wade* Court's compelling interest analysis in this regard sheds light on the distinction between a state's obvious interest and a state's *compelling* interest. The Court explained that a state's interest in protecting a human fetus's life is always present but does not become compelling until the point of viability. The Court detailed the state's interest in preserving the health and life of both a pregnant woman and her fetus, ultimately striking a balance between a woman's medical liberty and the state's interest in protecting both the pregnant woman and her unborn child depending on the stage of pregnancy.

As to the pregnant woman, the Court decided that, "the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester," because the medical facts showed that "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth."[164] To the contrary, "[w]ith respect

161. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 927 (1992) (Blackmun, J., concurring in part and dissenting in part) (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

162. Roe v. Wade, 410 U.S. 113, 116 (1973).

163. *See infra*, Part III (D).

164. *Id*. at 163.

to the State's important and legitimate interest in potential life, the 'compelling' point is at viability," because that is the point at which the fetus "has the capability of meaningful life outside the mother's womb."[165] Although the Court has retreated from the strict scrutiny analysis in *Roe v. Wade* in favor of an "undue burden" test for pre-viability restrictions on abortions in *Casey*, the Court reaffirmed the compelling state interest in the life of a human fetus at the point of viability.[166]

In *Griswold v. Connecticut*, another reproductive rights case predating *Roe v. Wade*, the Court provided heightened scrutiny to protect "penumbras" or "zones of privacy" emanating from enumerated rights that give "life and substance" to such important individual rights.[167] Whether to use contraceptives was found to be one such penumbral right considering its profound impact on the decision whether to beget a child, which was deemed a fundamental right in *Skinner*.[168] Accordingly, a law prohibiting contraceptive use among married persons was declared unconstitutional absent the state's ability to prove that it was "necessary, and not merely rationally related to, the accomplishment of a permissible state policy."[169] The "penumbras" approach was quickly abandoned in favor of finding privacy rights implicit in the Liberty Clause as in *Roe v. Wade* and many cases subsequent to *Griswold*.[170]

In the 1990s the Court provided enormous insight into the medical autonomy aspect of the Liberty Clause in *Cruzan*[171] and *Washington v. Glucksberg*.[172] Both cases discussed whether liberty includes the right to make life or death decisions about oneself, and what procedures or processes the states may require before allowing a person to exercise her "right to die."[173] Neither opinion identified the right as fundamental; neither opinion stated the standard of review.

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165. *Id*.

166. *See* Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833, 837 (1992).

167. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

168. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

169. *Id*. at 497 (Goldberg, J., concurring) (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).

170. The penumbral approach has been criticized as allowing the Court to "find" rights based on the Members' personal preferences. *See, e.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70-71 (2020) (Gorsuch, J., concurring) ("Even if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise."). But even the current approach based on liberty interests found to be implicit in the Liberty Clause has the same problem with subjectivity, as shown by the caustic criticism of the Court's liberty jurisprudence.

171. *See* Cruzan v. Director, Miss. Dep't of Health, 497 U.S. 261 (1990).

172. *See* Washington v. Glucksberg, 521 U.S. 702 (1997).

173. *See id.* at 709 (1997) (referring to the Ninth Circuit's language that there is a "constitutionally-recognized right to die") (internal quotations and citations omitted).

In *Cruzan v. Director, Missouri Department of Health*, a traffic collision caused a young woman to be in a permanent vegetative state and her parents requested cessation of life support.[174] The issue presented was whether an individual "has a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment from her under these circumstances."[175] The Court first noted that *Jacobson v. Massachusetts* implicitly recognized a constitutionally protected liberty interest to refuse unwanted medical treatment as shown by the *Jacobson* Court balancing "an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interests in preventing disease."[176]

Once a liberty interest is implicated, the Court must then decide whether the challenged law violates the individual right by "balancing his liberty interests against the relevant state interests."[177] The Court assumed that liberty includes the "right to refuse lifesaving hydration and nutrition" but upheld the law requiring proof of the dying person's medical choice by clear and convincing evidence to adequately protect her right in light of her incapacity and the circumstances necessitating "substituted judgment" that could be erroneous or abusive.[178] In so holding the Court recognized Missouri's interest to protect and preserve human life and also to assure that the incapacitated terminally ill person would actually choose to die by means of the heightened evidentiary standard. The Court found that the many state laws that criminalize both homicide and assisted suicide demonstrated a national consensus to preserve life as a foundational value of any civilized society.[179]

In 1997 a Washington law that prohibited assisted suicide was challenged as violating the Liberty Clause. In *Washington v. Glucksberg*[180] the Court began its analysis, "as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."[181] The many state laws prohibiting assisted suicide showed a longstanding

174. 497 U.S. at 266-67.

175. *Id*. at 269.

176. *Id*. at 278 (citing Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905)).

177. *Id*. at 279 (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).

178. *Id*. at 279, 284 (internal quotation marks omitted). The parents' request was granted in the trial court based on evidence that their daughter told a friend that she would want to die in such circumstances. The evidence that the daughter would choose to be taken off life support was not sufficiently clear and convincing according to the Missouri Supreme Court, which reversed the trial court. *Id*. at 268-69.

179. The Court said, "As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." *Id*. at 280.

180. Washington v. Glucksberg, 521 U.S. 702, 702 (1997).

181. *Id*. at 710.

and "deeply rooted"[182] commitment to the "protection and preservation of all human life."[183] The Court upheld the law and rejected the argument that a right to assisted suicide was implicit in the Liberty Clause.

The Court distinguished *Cruzan*, which involved rejecting unwanted medical treatment as opposed to demanding life-terminating medical treatment. The right to reject medical treatment is deeply entrenched in legal history, "[g]iven the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment."[184] The *Cruzan* decision was:

> [E]ntirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct."[185]

The Court pointed out the multiple state interests supporting the law against assisted suicide: the preservation of human life, protection of vulnerable groups such as the elderly and disabled persons, and the concern about involuntary euthanasia exemplified by statistics from the Netherlands showing thousands of cases of death by euthanasia without the patient's "explicit consent."[186] Since no fundamental right exists to commit suicide, rational basis review rendered the law constitutional. The state's many interests to protect human life were "unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection."[187]

The Court has also upheld the right of prisoners to reject unwanted antipsychotic medication,[188] noting that forced medical intervention was a "substantial" interference with liberty and created a risk of

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182. *Id*. at 703.

183. *Id*. at 710.

184. *Id*. at 725.

185. *Id*. at 725.

186. *Id*. at 734.

187. *Id*. at 735. The Court also rejected an equal protection challenge to a New York law prohibiting aiding or abetting a suicide because it treated terminally ill persons on life support differently than terminally ill persons not able to reject medical treatment and die. The Court explained that the law against assisted suicide neither infringed a fundamental right nor involved a suspect classification, entitling the law to a "strong presumption of validity." Vacco v. Quill, 521 U.S. 793, 793 (1997).

188. Washington v. Harper, 494 U.S. 210, 221-22 (1990) (holding that prisoners possess a significant liberty interest in avoiding unwanted antipsychotic medication). The dissenters, Justices Stevens, Marshall, and Brennan, felt that the Court "undervalued" the liberty interest and that the "right to refuse such medication is a fundamental liberty interest deserving the highest order of protection." *Id*. at 237, 241 (Stevens, J., dissenting).

"serious, even fatal, side effects."[189] Despite not articulating a standard of review, the Court in *Cruzan, Glucksberg,* and *Harper* clearly engaged a form of heightened scrutiny.[190]

Other Supreme Court cases shed light on how the risks involved in a medical procedure weigh into the balance of interests. The Court decided in *Rochin v. California* that force-pumping a suspect's stomach to obtain evidence of morphine possession was unconstitutional because it was essentially a coerced confession, "too close to the rack and the screw to permit of constitutional differentiation."[191] The Court relied on the idea that force-pumping a person's stomach without consent violated "those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[192]

Thirty-three years later the Court held that a state may not forcibly remove a bullet from a criminal suspect's shoulder against his will due to the medical risks involved with "extensive probing and retracting of muscle tissue," the risk of infection, and other "uncertainty about the medical risks.[193] The government wanted the forensic evidence the bullet would provide, but the Court felt that the government could make out its case without the bullet, and that the level of risk involved with the surgical procedure rendered it unconstitutional in the absence of consent.[194] On the other hand, the Court has held that forced blood extraction to prove drunkenness is constitutional under a Fourth Amendment analysis, due in part to the extremely low risk involved with blood extraction and the state's significant need to enforce laws that address the extraordinary social danger of drunk driving.[195]

The Court has analyzed the degree of medical risk involved in state action that infringes medical autonomy in numerous cases, as it did in *Jacobson v. Massachusett*s.[196] Taken together, the medical liberty cases indicate that the greater the privacy, degree of bodily invasion, and level of medical risks (or uncertainty of the risks), the less likely a

189. *Id*. at 229.

190. *See* Holland, *supra* note 14, at 61.

191. Rochin v. California, 342 U.S. 165, 172 (1952).

192. *Id*. at 169. (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

193. *See* Winston v. Lee, 470 U.S. 753, 764 (1985) (the risks of surgical removal of a bullet were referred to as uncertain, which partly motivated the court to deny the government's request to order the surgery over the criminal suspect's objection, the Court noting that there were witnesses available to prove the crime which lessened the state's need for the evidence).

194. *Id*.

195. *See* Schmerber v. California, 384 U.S. 757, 769-71 (1966). The Court found no liberty violation by framing the liberty interest involved as one of self-incrimination, and blood is more akin to "real or physical evidence." *Id.* at 764.

196. For example, in *Winston v. Lee* and *Roe v. Wade,* the Court considered the degree of medical risks to the criminal suspect and pregnant woman, respectively, as part of its Liberty Clause analysis of state regulation concerning medical autonomy. *See generally* Winston v. Lee, 470 U.S. 753 (1985); Roe v. Wade, 410 U.S. 113 (1973).

state law forcing a medical procedure on an unwilling person is constitutional. On the other hand, if the medical procedure is necessary to obtain evidence in a criminal prosecution and involves very little or no health risks, it may be allowed over objection.

A person's right to control her own body is deeply rooted in the common law, history and tradition, and the American concept of ordered liberty, particularly as it relates to rejecting medical treatment as the *Cruzan* Court made quite clear.[197] The right of self-determination over one's own body and how it is touched is considered so valuable that even a harmless but unwanted kiss is grounds for civil liability under the common law and today.[198] Medical liberty should always be considered a fundamental right because the state should always carry the burden of proving why it is necessary to force a medical decision on an individual and why less intrusive measures are unavailable. This is particularly true where the unwanted medical procedure involves risks that are serious or even uncertain.[199]

Children's liberty interests are not necessarily "coextensive" with adults' rights and may be subject to less exacting judicial scrutiny because the state's *parens patraie* power authorizes the state to protect minors.[200] That is, "the State is entitled to adjust its legal system to account for children's vulnerability."[201] Consistent with consent in tort law, a child's right of medical autonomy grows as she does, developing into a full liberty right at the age of majority.[202] Other courts have decided that children's and adults' liberty rights should garner equal constitutional protection.[203] Equal protection of children's and adults'

197. As far back as 1891 the Supreme Court has recognized that Americans "right to one's person may be said to be a right of complete immunity; to be let alone." Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891) (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OF THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (1879)).

198. *See, e.g.,* Vaughn v. Virginia, 2019 WL 6354340 at *11 (W.D. Va. 2019); RESTATEMENT (SECOND) OF TORTS, § 18 cmt. d, illus. 2 (1965) ("A kisses B while asleep but does not waken or harm her. A is subject to liability to B."). *See also* Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 269 (1990) ("At common law, even the touching of one person by another without consent and without legal justification was a battery.").

199. *See Winston*, 470 U.S. at 761-64.

200. *See, e.g.*, Schleifer v. City of Charlottesville, 159 F.3d 843, 846-47 (4th Cir. 1998) (citations omitted) (explaining Supreme Court precedent limited children's constitutional rights relative to adults' constitutional rights).

201. Bellotti v. Baird, 443 U.S. 622, 635 (1979). In regard to a curfew law, the Fourth Circuit has applied less than strict scrutiny to the infringement of children's liberty interests although adults' liberty infringement would be analyzed under strict scrutiny. *See Schleifer,* 159 F.3d at 847 (stating that intermediate scrutiny applied to curfew laws but finding that the law survived intermediate and strict scrutiny).

202. *See also, e.g.*, Ginsberg v. New York, 390 U.S. 629, 639 (1968) (children's First Amendment rights are not coextensive with adults and do not include the right to obtain pornography). *See Bellotti*, 443 U.S. at 645 (minors' right to abortion is not coextensive with adults' reproductive rights, but law requiring parental consent for abortion was held unconstitutional nonetheless).

203. For example, the Supreme Judicial Court of Massachusetts stated: "We reject the rationale used by some courts to justify a lower standard of review, that the rights of minors

medical liberty is the better rule based on the potential for lasting or permanent injury caused by state action that carries medical risks.

All people's medical liberty interests should be considered fundamental consistent with the policies expressed in *Skinner, Roe v. Wade, Cruzan,* and *Winston v. Lee, inter alia.* Where the parent and child together assert liberty interests opposing an unwanted medical procedure that involves significant or unknown medical risks, the state should be required to defend the medical procedure under a strict scrutiny standard of review based on the policy expressed in hybrid-rights doctrine.

B. Childrearing Liberty

A number of interests other than medical liberty are involved with compulsory vaccination. These interests often converge to create hybrid-rights cases, such as when the parents' childrearing choices arise from religious beliefs. The Court has explained that the government has a *parens patriae* interest in protecting children, but at the same time, the state shares control over children with the parents: The child is not the "mere creature of the State" and "those who nurture him and direct his destiny" have a constitutional right to control the child's upbringing.[204]

The Court has repeatedly discussed the right of the state's and parents' control over minors' health care decisions when the parents and the minor child are at odds. In *Parham v. J.R.*, the Court explained:

> Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. . . . Parents can and must make those judgments. . . . [O]ur precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply.[205]

Thus, although the Court has recognized a substantive due process right for parents to control their children's upbringing,[206] including medical and educational prerogatives, the parents' interest is superseded by the best interests of the minor in life-or-death situations or

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are not coextensive with or are weaker than those afforded adults. Minors possess fully formed constitutional rights." Commonwealth v. Weston W., 913 N.E.2d 832, 841-42 (Mass. 2009) (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976)).

204. Pierce v. Soc'y. of Sisters, 268 U.S. 510, 535 (1925).

205. Parham v. J.R., 442 U.S. 584, 603-04 (1979).

206. In the seminal case, the Court struck down a law prohibiting children from learning a second language until they were at least 12 years of age, finding in part that children rarely become fluent in a second language when it is not introduced at a younger age. *See* Meyer v. Nebraska, 262 U.S. 390, 390 (1923).

an "apparent emergency."[207] Court orders for minors to undergo blood transfusions against the religious beliefs of the child and/or parents are upheld because "[f]ree exercise of religion, bodily autonomy and parental rights yield before the compelling interest the state has in protecting children from serious health problems."[208]

The deference given to parents' right to control a child's upbringing varies depending on the child's level of maturity as well as the importance of the state's interest and urgency of the state action. The maturity-based method of balancing minors' rights relative to parents' rights can be seen in the Court's jurisprudence concerning contraceptive and abortion rights of minors.[209] Common law engages similar analysis relative to a child's power to consent to physical contact, which broadens as she matures and fully vests at the age of majority.

The right to avoid vaccination should center on the child's medical liberty interest, whether the right is exercised as part of the parent's childrearing liberty combined with the doctrine of substituted consent or directly by the more mature child herself. Medical liberty rights as a whole have garnered great judicial protection if not strict scrutiny and are generally more protected than childrearing liberty. When a child and her parents jointly object to vaccination based on hybrid liberty interests, a stronger case for strict scrutiny is presented. Accordingly, the parents' childrearing liberty should be considered in challenges to compulsory vaccination laws along with all other constitutional rights infringed by the laws.

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207. Niebla v. Cty. of San Diego, No. 90-56302, 1992 WL 140250, at *4 (9th Cir. June 23, 1992) (citing Jehovah's Witnesses v. King Cty. Hosp., Unit No. 1, 278 F. Supp. 488, 504-05 (W.D. Wash. 1967), aff'd 390 U.S. 598 (1968) ("It is well established that a government agency acting pursuant to its parens patriae power may seek a court order authorizing a forced blood transfusion in an apparent emergency.")) *Id.*

208. *Id*. (citing 278 F. Supp. 488, 504-05). *See also, e.g.*, *In re* McCauley, 565 N.E.2d 411 (Mass. 1991) (state could compel lifesaving blood transfusion for minor notwithstanding parents' religious objections based on the state's interest in preserving the life of minors); Staelens v. Yake, 432 F. Supp. 834 (N.D. Ill. 1997) (judge acted within his authority in removing child from parents and appointing a guardian to consent to child's blood transfusion); Niebla v. Cty. of San Diego, No. 90-56302, 1992 WL 140250, at *4 (9th Cir. June 23, 1992) (court may order blood transfusion over minor's and parents' objections). *See also, e.g.*, Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311 (1994).

209. The Supreme Court has analyzed children's medical liberty interests primarily in the context of minors' access to and abortions and contraceptives. *See* Belotti v. Baird, 443 U.S. 622 (1979) (states may not require parental consent to an abortion; some limits to minors' right of abortion are constitutionally permissible, but restrictions cannot unduly burden the minor's right to abortion); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (states "may not impose a blanket provision . . . requiring the consent of a parent . . . as a condition for an abortion of an unmarried minor during the first 12 weeks of her pregnancy"); Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977) ("the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults"; state law invalidated that prohibited the sale or distribution of contraceptives to minors under age 16). *See also, e.g.*, Planned Parenthood of The Great Northwest. v. State of Alaska, 375 P.3d 1122 (2016) (statute burdening minors' right of abortion subject to strict scrutiny).

C. Religious Freedom

Religious objections to vaccination have always been raised. Early arguments included that disease proliferation is God's will and should not be disturbed.[210] Contemporary religious objections to vaccination more often arise from objection to the use of aborted human fetal tissue or animal tissue in vaccine research and development, often with no "ethical" vaccine alternative.[211]

Compulsory vaccination laws historically contained religious exemptions and the majority of states continue to recognize religious exemptions.[212] Between 1979 and 2015, West Virginia and Mississippi were the only states that did not recognize religious exemptions (and Arkansas, between 2002 and 2004).[213] In the past few years, California

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210. *See* Hodge & Gostin, *supra* note 11, at 847; SHELDON WATTS, EPIDEMICS AND HISTORY 116-17 (1997).

211. *See Aborted Fetal Cell Line Products for USA & Canada—and Ethical Alternatives*, CHILD. GOD FOR LIFE (June 2021), https://cogforlife.org/wp-content/uploads/vaccineListOrigFormat.pdf [https://perma.cc/FMF9-WE5B].

212. *See States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. ST. LEGISLATURES (Apr. 30, 2021), https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx [https://perma.cc/44HL-M4WB]. Interestingly, the Catholic Church has not rejected vaccination on account of the use of aborted fetal tissue in vaccine manufacturing. *See Abortion Opponents Protest COVID-19's Use of Fetal Cells,* SCIENCE MAG. (June 5, 2020), https://www.sciencemag.org/news/2020/06/abortion-opponents-protest-covid-19-vaccines-use-fetal-cells [https://perma.cc/ZT9D-FPLB]. Catholic religious leaders have not condemned the use of vaccines due to their presumed medical benefits (including research showing that vaccines avert spontaneous abortions). *See* Liz Neporent, *What Aborted Fetuses Have to Do With Vaccines,* ABC NEWS (Feb. 17, 2015, 3:32 PM), https://abcnews.go.com/Health/aborted-fetuses-vaccines/story?id=29005539 [https://perma.cc/BJ9V-9NNA]; *Is It True That There Are Vaccines Produced Using Aborted Fetuses?*, GEO. UNIV. KENNEDY INST. OF ETHICS: BIOETHICS RES. LIBR. (2017), https://bioethics.georgetown.edu/2017/01/is-it-true-that-there-are-vaccines-produced-using-aborted-foetuses/ (listing the identifying information for each aborted fetus used in vaccines and which part of the fetus's body was used, i.e., skin, heart, muscle, lung). For an explanation of what the identifying data means, see Matthew D. Staver, *Compulsory Vaccinations Threaten Religious Freedom*, LIBERTY COUNS. (2001) https://lc.org/memo_vaccination.pd0 [https://perma.cc/VX2E-HF4X]f (citations omitted). But doctors within the Catholic church have stressed the moral obligation to use "ethical" vaccines not produced by aborted fetuses whenever possible, and if not possible, to use the vaccines produced from abortions "temporarily" and to speak out about the need for a moral alternative. *See* Kathleen Berchelmann, *The Catholic Answer to Vaccines*, MY CATHOLIC DR. (Aug. 3, 2021), https://mycatholicdoctor.com/our-services/vaccines/ [https://perma.cc/2JRE-YNBE] (relying on official church decisions). Vaccines with no ethical alternatives in 2020 are chicken pox, Hepatitis-A, and Rubella.

213. *See* James Colgrove & Abigail Lowin, *The Tale of Two States: Mississippi, West Virginia, And Exemptions To Compulsory School Vaccination Laws,* HEALTH AFF.: CHILD.'S VACCINATION IN THE UNITED STATES (2016), https://www.nvic.org/Vaccine-Laws/state-vaccine-requirements.aspx [https://perma.cc/T3UC-2F6P]. Maine voters upheld a new law eliminating religious and philosophical exemptions to its vaccine law in early 2020 by 71.5% of the vote (effective September 1, 2021), amidst controversy concerning the amount of money the vaccine manufacturers paid in support of eliminating exemptions and assuring more sales of their products. *See* Patty Wight, *Vaccine Exemptions Defeated In Maine, A New Law Dividing Parents Is Upheld*, NPR (Mar. 3, 2020, 5:00 AM), https://www.npr.org/sections/health-shots/2020/03/03/811284575/vaccine-requirements-are-on-the-ballot-in-maine-after-a-new-law-divided-parents [https://perma.cc/Q9W6-FP3B. Interested companies such as

and New York eliminated some vaccination exemptions, triggering numerous constitutional challenges based on freedom of religion.[214] As explained in Part IV, *infra*, the challenges have not been successful. Numerous courts have held that it is not a violation of the Free Exercise Clause to require school children to be vaccinated over religious objection under a variety of constitutional analyses,[215] and a California court rejected a religious challenge despite using a strict scrutiny analysis.[216]

Religious beliefs typically do not exempt a person from complying with laws of general applicability. For example, in *Prince v. Massachusetts*, a Jehovah's Witness brought a child downtown to preach and obtain donations in violation of a child labor law, and the Court found in a 5-4 decision that the law was valid, to protect the child as well as society at large.[217] The Court explained, "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."[218] This quote is relied on to justify vaccination mandates, but this broad statement does not support vaccination mandates without meaningful judicial review.

Merck and Pfizer contributed about $600,000 to the campaign to uphold the law, while parents opposed to mandatory vaccination received a tiny fraction of that in contributions. *Id*. *See also* Brown v. Stone, 378 So. 2d 218, 223 (Miss. 1979); Hodge & Gostin, *supra* note 11, at 858-61.

214. California and New York eliminated their religious exemptions in 2015 and 2019, respectively. *See, e.g.*, Love v. State Dep't. of Educ., 240 Cal. Rptr. 3d 861 (3d Cal. Ct. App. 2018); Bobby Allyn, *New York Ends Religious Exemptions For Required Vaccines*, NPR (June 13, 2019, 5:26 PM), https://www.npr.org/2019/06/13/732501865/new-york-advances-bill-ending-religious-exemptions-for-vaccines-amid-health-cris#:~:text=New%20York%20Ends%20Religious%20Exemptions%20to%20Vaccines%20Gov.,other%20nonmedical%20exemptions%20for%20schoolchildren [https://perma.cc/7LY7-9FNQ].

215. *See, e.g.*, Sherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81, 92, 99 (E.D.N.Y. 1987) (upholding the "sincere and meaningful" religious belief aspect of the religious exemption, but invalidating the exemption under the Establishment Clause for allowing religious exemptions only for "bona fide members of a recognized religious organization"); Wright v. DeWitt Sch. Dist., 385 S.W. 2d 644, 648 (Ark. 1965); In re Whitmore, 47 N.Y.S.2d 143, 145 (1944); *Love*, 240 Cal. Rptr. 3d at 980.

216. *See infra* Part IV. Other courts have also found that religious exemptions violate the Equal Protection Clause, because the exemptions extend preferential treatment to certain religious groups while denying it to other religious groups or nonreligious persons. For example, the Supreme Court of Mississippi decided that a religious exemption to a vaccine law discriminated against children whose parents do not have "bona fide" and "recognized" religious beliefs to justify exemption from being vaccinated. Brown v. Stone, 378 So. 2d 218, 219, 223 (Miss. 1979). The statute stated that a religious exemption must be certified by "an officer of a church of a recognized denomination" and that the certification must show that the parents are "bona fide members of a recognized denomination whose religious teachings require reliance on prayer or spiritual means of healing." *Id*. at 219. The court's language was a mix of constitutional standards, saying that the state had a "compelling state interest in the protection of school children" and that the law was a "reasonable and constitutional exercise of the police power." *Id*. at 223.

217. Prince v. Massachusetts, 321 U.S. 158, 161-62, 171 (1944).

218. *Id*. at 166-67.

But the balance between the parents' and state's interests may tip in favor of parents where the law challenged is insufficiently supported by the state's child-protective legislation. Thus, in *Wisconsin v. Yoder*,[219] the Court agreed with Amish parents that the state's interest in compulsory education through the tenth grade was insufficient to overcome the parents' religious-based decision to withdraw their children after completion of the eighth grade. The state could not show sufficient value in the additional two years of high school to overcome the parents' religious educational convictions, which included continued vocational training within the Amish community after completion of the eighth grade.[220] *Wisconsin v. Yoder* involved a combination of religious and childrearing liberties.

In 1990 the Court revised the standard for free exercise challenges to laws of general applicability and retreated from the standard of strict scrutiny previously expressed in *Sherbert v. Verner*.[221] In *Employment Division v. Smith*,[222] a bare majority of the Court upheld a criminal law that prohibited the use of peyote against a free exercise challenge by Native Americans who used peyote for sacramental religious purposes. The Court rejected the strict scrutiny standard for religious freedom challenges to laws of general applicability and distinguished *Sherbert* as an unemployment benefits case.[223] The right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[224]

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219. Wisconsin v. Yoder, 406 U.S. 205, 205 (1972).

220. The state provided no evidence to support its argument that the additional two years was necessary to prepare the children to be productive citizens as opposed to a burden on society and the Amish vocational training program was a successful part of the Amish's overall law-abiding and productive way of life. *Id*. at 235-36.

221. Sherbert v. Verner, 374 U.S. 398, 398 (1963) (holding that strict scrutiny is the standard of review where laws infringe freedom of religion). However, between 1963 and 1990, the Court nonetheless upheld all laws of general applicability under the Sherbert test other than denials of unemployment benefits for persons fired for exercising their religion as in Sherbert and the compulsory education law in Wisconsin v. Yoder. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1743 (5th ed. 2017).

222. Emp. Div., Dep't. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884 (1990).

223. "Even if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." *Id*. at 884.

224. *Id*. at 879 (citing United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., concurring) (internal quotation marks omitted)). Congress reacted to Smith by enacting the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000 (bb) (2021), which attempted to restore Sherbert's compelling interest test. In Boerne v. Flores, 521 U.S. 507, 507-08 (1997), the Court declared the RFRA unconstitutional as applied to state and local governments. *See also, e.g.,* Tanzin v. Tanvir, 592 U.S. 1, 1-2 (2020) (recognizing that *Smith* was superseded by the RFRA and finding that federal officials are personally liable pursuant to the RFRA just as they are under 42 U.S.C. § 1983).

The *Smith* Court noted that the only decisions in which neutral laws of general applicability were struck down involved not a free-standing free exercise claim, but a free exercise claim in conjunction with another constitutional right, citing *Wisconsin v. Yoder*. *Smith* was distinguishable: "The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right."[225] This was the original recognition by the Court that state laws infringing hybrid rights may garner heightened constitutional scrutiny.

After *Smith*, it could be argued that free exercise challenges to compulsory vaccination laws do not warrant heightened review because the vaccination laws are generally applicable and *Smith*-type deference is appropriate relative to free exercise claims. But the hybrid-rights statement indicates that heightened review is appropriate when multiple constitutional interests are infringed by a law, which in the vaccination context mitigates in favor of heightened review. The constitutional interests additional to medical liberty bolster the argument that the standard of review in challenges to vaccination mandates should be strict scrutiny, although the history and tradition of the right to reject unwanted medical treatment should render the right fundamental *per se*.

D. Philosophical Exemptions & Liberty

Numerous states historically recognized vaccination exemptions based on personal philosophy. A few states recently eliminated both philosophical and religious exemptions, and only 15 states currently recognize philosophical exemptions to compulsory vaccination laws.[226] While these exemptions are grounded in state law and do not arise from a liberty right the Court has recognized,[227] the concept of deeply held secular philosophical liberty should be protected similar to religious freedom and exemptions for either should be treated similarly to avoid Establishment Clause issues.[228] Philosophical and moral convictions also bear on the right of medical autonomy as noted in *Roe v. Wade* as well as childrearing liberty. Accordingly, although the Court has not recognized a liberty interest right generally to live one's life

225. 494 U.S. 872, 882 (1972).

226. *See States with Religious and Philosophical Exemptions*, *supra* note 212; *State Vaccination Exemptions*, NAT'L. VACCINE INFO. CTR. (June 2019), https://www.nvic.org/CMSTemplates/NVIC/pdf/state-vaccine-exemptions_blue.pdf [https://perma.cc/2KE7-C6ZW].

227. Self-identity and the right to express it by living one's life consistent with one's personal beliefs is arguably embodied by the Due Process Clause as well as by First Amendment values. *See, e.g.*, Tiffany Pham, *Stepping Out of the Closet: Creating More Inclusive Sexual Education Instruction for Texas Public Schools*, 17 TEX. TECH. ADMIN. L. J. 347, 355 (2016) (discussing the First Amendment's protection of self-identity).

228. *See, e.g.*, Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

consistent with one's secular philosophy, philosophical opposition to vaccination should be considered in the balance of interests if the parents or child plead and prove a strong philosophical or moral objection to vaccination.

This history of vaccination is filled with philosophical objections to vaccination. A longstanding objection is that vaccination creates health risks and therefore violates a basic rule of medical ethics, *primum non nocere*, Latin for "first do no harm."[229] For some doctors, vaccination represents a choice to harm and even kill a few people for the benefit of many others, and violates the Hippocratic Oath: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel. . . ."[230] Mandatory vaccination laws cause injury and death to a few for the benefit of society as a whole and the utilitarian justification of human sacrifice is morally repugnant to some people.[231] As one lawyer put it, "A government that requires individuals —particularly children to be vaccinated, knowing that some will die and others will be permanently disabled as a result, risks losing all moral authority."[232]

Historically, some people expressed concern that there could be lasting danger or unanticipated human DNA changes caused by injecting humans with material derived from animals. Today, some people object to the use of monkey tissue, rat tissue, or other animal ingredients based purely on personal philosophy grounded in unknown future consequences for mankind, although these objections sometimes arise from religious beliefs.[233] Others object to using aborted fetal tissue in the manufacture of vaccines.[234] Recognizing and protecting philosophical freedom to live one's life consistent with one's moral convictions

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229. *See, e.g.*, Daniel K. Sokol, *"First Do No Harm" Revisited*, BMJ (Oct. 25, 2013) https://www.bmj.com/content/347/bmj.f6426; Vasudevan Mukunth, *ICMR's Rush to Produce 'Indian Vaccine' for COVID-19 Suggests Politic is Driving Science*, THE WIRE (July 3, 2020), https://science.thewire.in/health/icmr-balram-bhargava-covaxin-clinical-trials-bharat-biotech-politics/ [https://perma.cc/2KE7-C6ZW].

230. Roe v. Wade, 410 U.S. 113, 131 (1973).

231. HABAKUS & HOLLAND, *supra* note 124, at 27. *See also* Susan Scutti, *How Countries Around the World Try to Encourage Vaccination,* CNN HEALTH (Jan. 2, 2018, 3:32 PM), https://www.cnn.com/2017/06/06/health/vaccine-uptake-incentives/index.html [https://perma.cc/2KE7-C6ZW].

232. HABAKUS & HOLLAND, *supra* 124, at 27 (quoting James Turner).

233. *See, e.g.*, Tyler Page, *'Monkey, Rat and Pig DNA': How Misinformation Is Driving the Measles Outbreak Among Ultra-Orthodox Jews,*' N.Y. TIMES (April 9, 2019), https://www.nytimes.com/2019/04/09/nyregion/jews-measles-vaccination.html [https://perma.cc/6XP2-X3RW].

234. One person opposed to using aborted human tissue expressed it this way: the "manufacture of vaccines using such ethically-tainted human cell lines demonstrates profound disrespect for the dignity of the human person." Meredith Wadman, *Abortion Opponents Protest COVID-19 Vaccines' Use of Fetal Cells*, SCIENCE MAG. (June 5, 2020), https://www.sciencemag.org/news/2020/06/abortion-opponents-protest-covid-19-vaccines-use-fetal-cells [https://perma.cc/7B2P-WGYG].

adds another dimension to the liberty infringement involved with compulsory vaccination and further supports strict scrutiny as the proper standard of review under the doctrine of hybrid rights.

IV. CONTEMPORARY LOWER COURT JURISPRUDENCE

"Acquiescence by one branch to a redistribution of national powers may not prevent—indeed it may increase—the danger that the new arrangement will jeopardize some of the purposes that underlie the constitutional structure."[235]

Subsequent to the passage of the NCVIA, legislatures increased dramatically the number of vaccinations required of school children.[236] Fear concerning the relationship between increased vaccination mandates and various vaccine injuries or possible injuries motivated some parents to avoid vaccinating their children.[237] Some states responded by eliminating vaccination exemptions, particularly in the twenty-first century. All 50 states continue to recognize medical exemptions, following the exception to vaccination articulated in *Jacobson v. Massachusetts*, but medical exemptions can be nearly impossible to obtain, even with a physician's recommendation, and school districts have been known to override professional medical advice.[238] A statement by

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235. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 495 (1987). "This type of thinking is often associated with the 'functionalist' position on separation of powers, which embraces judicial enforcement of separation of powers to maintain a balance of power among the branches." Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution, and the Problem of Executive "Underenforcement,"* 164 U. PA. L. REV. 1677, 1687 (2016) (citing Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 232 (1991)). *See also, e.g.*, Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 707-15 (2006) (Congress may transfer too much power to the judicial branch by transferring power to the judiciary to supervise agencies).

236. *See* Holland, *supra* note 14, at 41 n.1.

237. *See, e.g.*, Jeanne M. Santoli et al., *Barriers to Immunization and Missed Opportunities,* 27 PEDIATRIC ANNALS 366, 367 (1998). For example, after California's SR 277 passed, parents sought exemptions from mandatory vaccinations for their children through the one remaining exemption: medical. Some parents were obtaining "questionable vaccine exemptions" from doctors to "skirt" the vaccine law. Some exemptions were based on things such as "a family history of allergies" or "autoimmune disorders," which public health officials said are not valid vaccine contraindications. Other doctors referred to doctors who granted "unwarranted" medical exemptions as "unscrupulous physicians [who] monetize their license and abuse the authority delegated to them from the state." Melissa Jenco, *Study: Some California Families Obtaining Questionable Vaccine Exemptions Following State Law Change,* AAP NEWS (Oct. 29, 2018), https://www.aappublications.org/news/2018/10/29/exemptions102918. After SB 277 was passed, vaccination rates of kindergartners rose from 93% to 95%, but exemptions also rose from .2% to .7%, an increase of 250%. *See id.* (citing S. Mohanty, et al., *Experiences With Medical Exemptions After a Change in Vaccine Exemption Policy in California*, PEDIATRICS (Oct. 29, 2018https://pubmed.ncbi.nlm.nih.gov/30373910/ [https://perma.cc/7FUR-4ZR3].

238. Sujata S. Gibson, *CHD Appeals to U.S. Supreme Court to Stop New York From Excluding Kids with Medical Exemptions for Vaccines from Online Education*, THE DEFENDER (Jan. 26, 2021), https://childrenshealthdefense.org/defender/chd-appeal-supreme-court-stop-

a medical doctor or doctor of osteopathy is required to prove that a child suffers from an immune disorder, cancer, or another health issue that makes vaccination too risky for the child. Other health care professionals, such as chiropractors, may not issue a vaccine exemption certification.[239]

In theory, vaccination avoidance threatens herd immunity. The rate of immunity required to achieve herd immunity varies by disease but generally requires a very high percentage of persons to be immune within a society, whether by natural immunity or vaccination.[240] When states responded to vaccination avoidance by repealing exemptions, multiple lawsuits were filed in the early 2000s challenging the new laws on constitutional and other grounds.[241]

In 2018, Justice Grimes of the California Court of Appeal stated: "[M]any federal and state cases, beginning with . . . *Jacobson v. Massachusetts*, have upheld, against various constitutional challenges, laws requiring immunization against various diseases. This is another such case, with a variation on the theme but with the same result."[242] This is a true statement. All contemporary vaccination law challengers have lost. But *why* they have lost warrants examination.

Lawsuits challenging vaccination laws continue to be filed,[243] indicating that the lower courts have not addressed the legal challenges to the public's satisfaction and manifesting an imbalance of power. This Part reviews the vaccination case law of the past two decades and concludes that lower courts engaged a fundamentally different level of review than that used in *Jacobson v. Massachusetts* and have deferred enormously to legislatures. The contemporary cases operated as yet another shift in the balance of power from the judiciary to the legislative branch and, in conjunction with the original shift in *Jacobson*'s aftermath and the enactment of the NCVIA, legislative and administrative vaccination policy today is almost entirely unchecked by the judiciary. The result is virtually no protection of medical liberty relative to compulsory vaccination, which is inconsistent with both *Jacobson* and the Court's other medical liberty jurisprudence. The lower

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new-york-excluding-kids-medical-exemptions-vaccines-online-education/ [https://perma.cc/Q5RG-X2FH].

239. *Frequently Asked Questions About Vaccine Exemption Information*, NAT'L VACCINE SAFETY CTR., https://www.nvic.org/faqs/vaccine-exemptions.aspx [https://perma.cc/T7CW-82XD].

240. *See, e.g.*, Holland, *supra* note 14, at 43 n.14 (for polio, herd immunity is believed to be reached at 80% but for measles it is over 90%).

241. *See infra* § IV(B)-(C).

242. Brown v. Smith, 235 Cal.Rptr.3d 218, 221 (2018).

243. *See, e.g.*, Garner v. President of the U.S., No. 2:20-CV-02470-WBS-JDP, 2021 WL 4052589 (E.D. Cal. Jan. 22, 2021) (seeking declaratory and injunctive relief from compulsory vaccinations).

courts' aberrational treatment in vaccination cases warrants a critical and comprehensive review, particularly in light of COVID-19 vaccine mandates.

A. Seminal Contemporary Lower Court Cases

Two federal courts reviewed vaccine law challenges in 2002 and 2011. These cases have been relied upon by other lower courts as precedent to a large degree, rendering their analysis and credibility important to understanding how the contemporary lower court precedent developed and whether it should be followed.

In *Boone v. Boozman*,[244] a vaccine law was challenged on religious freedom grounds, the mother's interest in childrearing liberty, and the child's medical liberty interest. The Arkansas federal court struck down the religious exemption as violating the Establishment Clause and dismissed the liberty challenges with little analysis.

The religious exemption required that the "immunization conflicts with the religious tenets and practices of a recognized church or religious denomination of which [the vaccine opposer is] an adherent or member."[245] The mother testified that an angel told her to be careful about what she does to her children and that she interpreted that to mean she should not give her daughter the hepatitis B vaccine.[246] The mother believed that the vaccine was the work of the devil because it could encourage her daughter to "engage in unprotected sex and intravenous drug use."[247] The court found her beliefs to be "rooted in religion and sincere."[248] The school originally granted the religious exemption but later revoked it, ultimately finding that the mother's religious beliefs were not among those "recognized" under the law.[249]

The court engaged the *Lemon v. Kurtzman*[250] test and found that the law violated the Establishment Clause by preferring recognized churches over smaller religious groups in violation of the neutrality requirement for laws benefitting religion. The court thereby avoided a heightened hybrid-rights standard of review relative to the free exercise claim:[251] "This Court has already determined that the statutory

244. Boone v. Boozman, 217 F. Supp. 2d 938, 938 (E.D. Ark. 2002).

245. *Id*. at 941.

246. *Id*. at 944-45.

247. *Id*. at 945.

248. *Id*.

249. *Id*. at 943.

250. Lemon v. Kurtzman, 403 U.S. 602, 602 (1971).

251. *See generally* Emp. Div., Dep't. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 872 (1990) (recognizing that heightened scrutiny may be appropriate under a hybrid-rights analysis). For a discussion concerning the hybrid-rights doctrine and its critics, see Axson-Flynn v. Johnson, 356 F. 3d 1277, 1295-97 (10th Cir. 2004).

religious exemption . . . is unconstitutional, and severed it . . . Plaintiff cannot now rely on an invalidated statutory exemption to determine the standard of review . . . ."[252]

The court relied on *Prince v. Massachusetts* to find that the Free Exercise Clause did not operate to exempt a person from complying with a health law of general applicability.[253] The court concluded, "the State may enact reasonable regulations to protect the public health and the public safety, and it cannot be questioned that compulsory immunization is a permissible exercise of the State's police power," citing *Jacobson* and *Zucht*.[254]

The mother's and child's substantive due process challenges were analyzed briefly. The mother argued that hepatitis B does not present a "clear and present danger" unlike the smallpox epidemic at issue in *Jacobson*.[255] Although smallpox spreads quickly through casual contact with droplets from an infected person's cough or sneeze,[256] hepatitis B is spread primarily through sex and shared needles, and cannot be spread through "food or water, sharing eating utensils, breastfeeding, hugging, kissing, hand holding, coughing, or sneezing."[257] The *Boone* court admitted that there was no evidence that Boone's daughter was at risk for contracting hepatitis B, no evidence that hepatitis B was present in the area, and no declaration of a public health emergency, and further found that even if the daughter contracted hepatitis B, her chances of recovery were 90%.[258] The court also made a finding that hepatitis B can live on surfaces and doorknobs for up to a month, and can lead to serious problems, such as sclerosis and liver cancer.[259]

The mother's liberty right was framed by the court as whether the mother had the right to reject medical treatment on behalf of her child. The court relied on *Cruzan*,[260] in which the Supreme Court assumed a "right to die" as part of medical autonomy grounded in the Liberty

252. Boone v. Boozman, 217 F. Supp. 2d 938, 952-53 (E.D. Ark. 2002).

253. *Id*. at 954 (citing Prince v. Massachusetts, 321 U.S. 158 (1944)).

254. *Id*. (citing Zucht v. King, 260 U.S. 174, 176 (1922); Jacobson v, Massachusetts, 197 U.S. 11, 24-25 (1905)). *See also, e.g.*, Brown v. Stone, 378 So. 2d 218, 223 (Miss. 1979) (the state's overriding interest in mandatory vaccination is a reasonable exercise of its police powers even if it conflicts with parents' religious beliefs).

255. *Boone*, 217 F. Supp. 2d at 944.

256. *See Transmission: How Does Smallpox Spread?*, CTR.'S FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/smallpox/transmission/index.html [https://perma.cc/95LK-SRQP].

257. *See Hepatitis B: Questions and Answers for the Public*, CTR.'S FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/hepatitis/hbv/bfaq.htm#:~:text=The%20hepatitis%20B%20virus%20is,Sex%20with%20an%20infected%20partner [https://perma.cc/PQ7M-6MHR].

258. *Boone* v. Boozman, 217 F. Supp. 2d 938, 943 (E.D. Ark. 2002).

259. *Id*. at 954.

260. *See generally* Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261 (1990).

Clause.[261] Since *Cruzan* did not actually decide what level of scrutiny applies to the right to refuse medical procedures, the *Boone* court found no fundamental right to avoid unwanted vaccinations based on history and tradition:

> The question presented in this case is not, as plaintiff suggests, simply whether a parent has a fundamental right to decide whether her child should undergo a medical procedure such as immunization. Carefully formulated, the question presented by the facts of this case is whether the special protection of the Due Process Clause includes a parent's right to refuse to have her child immunized before attending public or private school where immunization is a precondition to attending school. The Nation's history, legal traditions, and practices answer with a resounding "no."[262]

The court also juxtaposed the Supreme Court's decision in *Glucksberg v. Washington*, finding that there is no constitutional right to assisted suicide and relied on *Jacobson v. Massachusetts* for the proposition that state action pursuant to the police power is subject to deferential judicial review, upholding the law under the relaxed standard.[263]

In *Workman v. Mingo County Board of Education*,[264] the Fourth Circuit found in 2011 that a parent does not have a constitutional right to send her child to school without being vaccinated, and also found that the lack of a religious exemption did not violate the Equal Protection Clause. The child's medical liberty interest was not before the court.

Jennifer Workman had two children, and the elder child began having health problems upon being vaccinated, so Ms. Workman did not vaccinate her younger child.[265] The statute exempted children who presented a doctor's certificate that immunization was "impossible or improper or other sufficient reason."[266] Ms. Workman presented a certificate for her younger child based on the elder child's adverse reaction

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261. *Id.* at 277.

262. *Boone*, 217 F. Supp. 2d at 956 (internal citations omitted). It has been argued that the Supreme Court reaffirmed *Jacobson* in *Cruzan* because the *Cruzan* Court noted that the right to refuse medical treatment is not absolute, referring to *Jacobson*. *Cruzan*, 497 U.S. at 278. But the *Cruzan* Court qualified its note on *Jacobson* and made clear that *Jacobson* was an *exception* to the usual rule of medical autonomy due to the high death rate of smallpox and the "paramount necessity" involved in *Jacobson*. *Id.* at 312 n.12 (Brennan, J., dissenting). Realistically, the *Cruzan* Court's statements reaffirm the careful balancing test used in *Jacobson*, including the state's burden of proving *necessity* to justify a medical invasion. The *Boone* court found that a parent's decision not to immunize a child is not protected by the right to control a child's upbringing because the cases in which such a right has been found all relate to educational instruction. *Boone,* 217 F.Supp.2d at 955. This seems clearly at odds with the authority cited in Part III (B). The *Boone* court also found that the Supreme Court has "frowned upon extending strict scrutiny to compulsory immunization laws, albeit in dictum." *Id.* at 953 (citing Emp. Div. v. Smith, 494 U.S. 872, 888-89 (1990)).

263. *Boone,* 217 F.Supp.2d at 956.

264. Workman v. Mingo Cty. Bd. of Educ., 419 Fed. App'x. 348, 353-55 (4th Cir. 2011).

265. *Id*. at 351.

266. *Id*. at 351.

to vaccination, and her unvaccinated younger child began attending a public pre-kindergarten school.[267] Later, a school nurse challenged the doctor's certification, and in response the exemption was revoked.[268] The child was ultimately homeschooled as a result and her mother filed a lawsuit.

In regard to the free exercise claim, the court applied strict scrutiny over the government's objection and upheld the law.[269] The mother argued that *Jacobson* was limited to its facts during the urgent and deadly smallpox epidemic and was distinguishable because there was no such urgent, deadly epidemic in the instant case.[270] The court relied on *Boone's* analysis that *Jacobson's* holding was not limited to diseases presenting a "clear and present danger" and that the state has a compelling interest to prevent the spread of communicable diseases whether or not they present a current risk.[271]

The *Workman* court did not review the other two prongs of strict scrutiny, i.e., whether the government's chosen means to address the state's interest was narrowly tailored and whether there were less restrictive means available. The court found that *Jacobson* in conjunction with *Prince v. Massachusetts* supported the compulsory vaccination law regardless of religious infringement.[272] The court cited cases that similarly concluded that vaccination laws are constitutional with little or no analysis.[273]

Regarding the parent's challenge based on childrearing liberty,[274] the court found that a parent lacks a fundamental right to "refuse to have her child immunized" before attending school, relying on *Boone* and citing *Washington v. Glucksberg (*as the *Boone* court did).[275]

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267. *Id.*

268. *Id. See e.g.*, Barbara Loe Fisher, *The Disappearing Medical Exemption to Vaccination*, NATIONAL VACCINE INFORMATION CENTER (Sept. 17, 2019, 8:09 PM), https://www.nvic.org/nvic-vaccine-news/september-2019/the-disappearing-medical-exemption-to-vaccination.aspx#_ednref34 [https://perma.cc/68YK-6PYZ] (referring to the CDC vaccine recommendation tables and related financial incentives).

269. The government argued for rational basis review based on the Supreme Court abandoning the strict scrutiny test for laws burdening religion in *Emp. Div. v. Smith*, but the mother argued that the law involved the "hybrid-rights" exception, because both religious freedom and her right of childrearing discretion were impinged by the vaccine law. *Workman*, 419 F. App'x. at 352-53.

270. *Id.* at 353-54.

271. *Id.* at 353.

272. *Id.* at 353.

273. The court cited McCarthy v. Boozman, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002), which simply stated that a "challenge to the constitutionality of mandatory immunization warrants no extensive discussion." In Cude v. State, 377 S.W.2d 816, 819 (Ark. 1964), the court discussed smallpox only, which had been settled in *Jacobson*.

274. Workman's other claims were summarily disposed of due to pleading or evidentiary problems. Workman v. Mingo Cty. Bd. of Educ., 419 Fed. App'x. 348, 352, 354 (4th Cir. 2011).

275. *Id.* at 355 (quoting Boone v. Boozman, 217 F. Supp. 2d 938, 956 (E.D. Ark. 2002)).

Finding no fundamental right as framed, the court chose rational basis as the standard of review. The court did not analyze whether the child in fact established a medical risk that warranted a medical exemption.

B. Recent New York Cases

In December 2013, New York City went beyond other states' vaccination requirements and began requiring annual flu vaccines for babies and children 6 months old to 59 months old who attended "childcare or school-based programs."[276] This enormous expansion of vaccinations required for children triggered numerous challenges to the law.

In *Phillips v. City of New York*,[277] the Second Circuit entertained substantive due process, free exercise, and equal protection challenges to another vaccination law. The court's substantive due process analysis was strikingly brief and concluded in a single paragraph that *Jacobson* and *Zucht* "foreclosed" the parents' liberty-based objections because *Jacobson* "rejected the claim that the individual liberty guaranteed by the Constitution overcame the State's judgment that the mandatory vaccination was in the interest of the population as a whole."[278] The court did not investigate, analyze, or even mention any medical facts in support of plaintiff's claim that "a growing body of . . . evidence demonstrates that vaccines cause more harm to society than good," and simply concluded, "that is a determination for the legislature, not the individual objectors," as *Jacobson* had "made clear."[279]

The court did not consider the medical facts indicating that flu vaccines are notoriously ineffective compared with the smallpox vaccine. The CDC reports that flu vaccines have been about 40% effective on average over the past 15 years.[280] The independent watchdog group Cochrane Collaboration made very different conclusions. In 2012, the Cochrane Collaboration found that the flu vaccines have virtually no health benefits and that "reliable evidence on influenza vaccines is thin but there is evidence of widespread manipulation of conclusions

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276. Garcia v. New York City Dep't. of Health and Mental Hygiene, 106 N.E.3d 1187,1189 (N.Y. 2018).

277. *See* Phillips v. City of New York, N.Y., 775 F.3d 538 (2d Cir. 2015).

278. *Id*. at 542. (discussing *Jacobson*).

279. *Id*. To the contrary, *Jacobson* reviewed the medical evidence and balanced the interests as opposed to deferring to the legislature. *See supra* Part I (B)(ii).

280. The CDC estimates the efficacy of flu vaccinations between 2004 and 2020 as between 10% and 60%, with an average of 40.25%. *See CDC Seasonal Flu Vaccine Effectiveness Studies*, CTR.'S FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/flu/vaccines-work/effectiveness-studies.htm [https://perma.cc/94RL-HDEQ]. *See also, e.g.*, Vittorio Demicheli, et al., *Vaccines for Preventing Influenza in Healthy Adults (Review),* COCHRANE LIBR. 1, 2 (Feb. 1, 2018), https://www.cochranelibrary.com/cdsr/doi/10.1002/14651858.CD001269.pub6/full [https://perma.cc/322G-FDJH] ("71 people would need to be vaccinated to avoid one influenza case").

and spurious notoriety of the studies."[281] In 2020, Cochrane produced another flu vaccine report in which it found that flu vaccines "probably have a small protective effect" and that the vaccines "risk a number of adverse events."[282] In addition, flu vaccine injury claims outnumber all other vaccine injury claims combined.[283]

The court could have taken judicial notice of these medical facts because they are contained in CDC and other government websites, but the court did not address the medical or legislative facts.[284] Instead, the court simply concluded, "Plaintiffs' substantive due process challenge to the mandatory vaccination regime is therefore no more compelling that Jacobson's was more than a century ago."[285] Phillips appealed but the Supreme Court denied certiorari.[286]

Neither Second Circuit opinion engaged the *Jacobson* Court's detailed analysis by balancing the interests involved by reference to the medical facts. Some parents then turned to alternative structural arguments to challenge the 2013 New York vaccination amendments, including preemption and separation-of-powers arguments. Despite some early success in the trial court and appellate courts, the parents ultimately lost those challenges also.[287]

C. Recent California Cases

On January 5, 2015, the California Department of Public Health received notice of a suspected case of measles. By February 11, about 125 cases were reported. Of the cases, 110 were California residents, 35% had visited Disneyland, and 45% had not been vaccinated for measles.[288] The measles outbreak raised concerns that the number of

281. *See* Vera Sharav, *Cochrane Collaboration: Flu Vaccines of No Benefit, Alliance for Human Research Protection* (Oct. 10, 2012) (on file with author).

282. Demicheli, et al., *supra* note 281, at 2.

283. *See Data and Statistics, VICP Adjudication Categories, by Alleged Vaccine for Petitions Filed Since the Inclusion of Influenza as an Eligible Vaccine for Filings 01/01/2006 through 12/31/2019*, HEALTH RESOURCES & SERV.'S ADMIN. (Oct. 1, 2021), https://www.hrsa.gov/sites/default/files/hrsa/vaccine-compensation/data/vicp-stats-04-01-2022.pdf [https://perma.cc/5XVD-PDL9].

284. *See id.*

285. Phillips v. City of New York, 775 F.3d 538, 542 (2d Cir. 2015). The court also cited an unpublished 2012 Second Circuit opinion that predated the New York flu vaccine mandate and held without analysis that the challenge to the law was "defeated by Jacobson. . ." *See* Caviezel v. Great Neck Pub. Sch.'s, 500 Fed. App'x. 16, 19 (2d Cir. 2012).

286. *See* Phillips v. City of New York, N.Y., 775 F.3d 538 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 104 (2015).

287. *See, e.g.*, Garcia v. New York City Dep't. of Health and Mental Hygiene, 106 N.E.3d 1187 (N.Y. 2018); V.D. v. State, 403 F. Supp. 3d 76 (E.D.N.Y. 2019).

288. *Morbidity and Mortality Weekly Report, Measles Outbreak – California, December 2014-February* 2015, CTR.'S FOR DISEASE CONTROL AND PREVENTION (Feb. 20, 2015), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6406a5.htm [https://perma.cc/ZZ6X-P23G].

unvaccinated children in California caused a previously eradicated disease to reappear due to a loss of herd immunity.

Although measles was deemed eradicated by the CDC in 2000,[289] measles spread from California throughout the United States after the 2015 Disneyland outbreak. At the time, California law allowed vaccination exemptions for personal beliefs and religion as well as medical reasons.[290] Between 2000 and 2012, the number of personal belief exemptions to California's school vaccination laws had risen by 337%, and in certain areas, exemption rates were as high as 21%, rendering the vaccination rates significantly below the level believed necessary to achieve herd immunity for measles.[291]

Measles is extremely contagious, and in the absence of vaccination a person exposed to measles has a 90% chance of becoming infected.[292] The virus spreads though contact with droplets caused by coughing or sneezing and can live for up to two hours in airspace.[293] Before a measles vaccine became available in the United States in 1963, 3 to 4 million people were infected with measles annually, with around 48,000 hospitalizations and 400-500 deaths.[294] The disease remains a problem in other countries, and international travel creates risks to Americans. The highly contagious nature of measles renders it the disease most likely to reemerge after eradication.[295]

The publicized concern that herd immunity could be lost due to the increasing number of vaccination exemptions animated California promptly to raise the rate of vaccination by eliminating the exemptions.[296] The California Legislature specifically referred to the Disneyland outbreak to pass California Senate Bill 277 in 2015, effective January 1, 2016.[297]

The stated legislative intent was to achieve "total immunization" for ten childhood diseases: Diphtheria, hepatitis B, Haemophilus

289. *Id*. "Eradicated" does not necessarily mean that there are no cases, but that the disease is no longer considered a public threat.

290. *See* S.B. 277, § 1 (Cal. 2015).

291. *See, e.g.*, Love v. State Dep'.t of Educ., 240 Cal. Rptr. 3d 861, 866 (3d Cal. Ct. App. 2018). The vaccination rate to acquire herd immunity varies among experts and among diseases.

292. *Id*.

293. *Id*.

294. *Year in Review: Measles Linked to Disneyland*, CTR.'S FOR DISEASE CONTROL AND PREVENTION (Dec. 2, 2015), https://blogs.cdc.gov/publichealthmatters/2015/12/year-in-review-measles-linked-to-disneyland/ [https://perma.cc/W6PC-XQZG].

295. Measles is extremely contagious and easily transmissible. *See Measles,* CTR.'S FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/measles/contagious-infographic.html [https://perma.cc/5FZ6-7EG8]. It is therefore likely to reemerge in an unvaccinated population if an outbreak occurs. *See Understanding Emerging and Re-emerging Infectious Diseases*, NCBI, https://www.ncbi.nlm.nih.gov/books/NBK20370/ [https://perma.cc/C5ZH-6ENJ].

296. *See* Love v. State Dep'.t of Educ., 240 Cal. Rptr. 3d 861, 868 (3d Cal. Ct. App. 2018).

297. *Id*.

influenzae type b,[298] Measles, Mumps, Pertussis (whooping cough), Poliomyelitis, Rubella, Tetanus, and Varicella (chickenpox).[299] The California Assembly Committee on Health report contained findings that all ten diseases posed "very real health risks to children" and that the legislature considered the risks of each of the ten diseases as well as costs to the state in deciding to eliminate exemptions.[300] The new law eliminated all exemptions but three: a medical exemption, an exemption for home-based private school children, and an exemption for students who qualified for an individualized education program (IEP).[301]

In *Whitlow v. California*, parents challenged the new vaccination provisions based on due process, free exercise, equal protection, and the right of education under the California Constitution. As in other vaccination challenges in recent history, the court summarily disposed of the due process claims with virtually no analysis, relying on *Jacobson, Zucht,* and *Workman*, *inter alia*.[302] The parents' childrearing liberty and the children's medical liberty were analyzed together. As in other contemporary cases, the court did not balance the interests consistent with *Jacobson v. Massachusetts* but simply concluded: "Unquestionably, imposing a mandatory vaccine requirement on school children as a condition of enrollment does not violate substantive due process," and "all of Plaintiffs' arguments are foreclosed by *Zucht*."[303]

The court engaged a more detailed review of the state's compelling interest relative to the right of education under the California Constitution, which the government conceded required a strict scrutiny analysis.[304] The parents argued that the state lacked a compelling interest when there was no urgent public safety threat as to any of the diseases for which vaccination was required, distinguishing the smallpox pandemic at issue in *Jacobson*.[305] The court disagreed, stating that the state's interest in protecting the public health "does not depend on or need to correlate with the existence of a public health emergency" and that the interest is compelling "whether it is being used to prevent outbreaks or eradicate diseases."[306]

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298. This bacterial infection, also known as hib, is not the same as seasonal flus, which are normally viral.

299. *See* S.B. 277, § 2(a) (Cal. 2015) (listing the diseases for which "total immunization" was sought); Whitlow v. California, 203 F. Supp. 3d 1079, 1082 (S.D. Cal. 2016) (listing the diseases, quoting S.B. 277).

300. *See Love*, 240 Cal. Rptr. 3d at 868.

301. Whitlow v. California, 203 F. Supp. 3d 1079, 1082-83 (S.D. Cal. 2016). Foster children were "categorically exempt" according to the *Love* plaintiffs. *Love*, 240 Cal. Rptr. 3d at 873.

302. *Love*, 240 Cal Rprt. 3d at 867-68 (citing the cases).

303. *Whitlow,* 203 F. Supp. 3d at 1089.

304. *Id*.

305. *Id*. at 1090 (arguing that there was no epidemic when S.B. 277 was passed, distinguishing *Jacobson*).

306. *Id*.

The parents also argued that removing the personal belief exemption (PBE) was not narrowly tailored, since the prior law with the PBE served the same purpose and was a less restrictive means of achieving public health.[307] The court responded that the purpose of the new law was not the same as the old law, and that the newly articulated "objective of total immunization is not served by a law that allows for PBEs, whether the PBE rate is 2% or 25%."[308] Removing the PBE was an "aggressive" step toward total immunization, but the court found that California acted within the scope of its police power in choosing this action to meet its compelling interest in achieving total immunity.[309] The court noted that all 50 states require vaccination as a condition of school attendance, and found that no religious or conscientious exemption is constitutionally required.[310] Although California requires many more vaccinations than other states, the court did not analyze the medical facts concerning any particular vaccine and analyzed them all collectively.

In 2018, a California appellate court handed down *Brown v. Smith*, which similarly rejected all of the plaintiffs' challenges to Senate Bill 277 based on free exercise of religion, the right to attend school, equal protection, and vagueness (due process).[311] The plaintiffs did not raise the children's medical liberty right or the parents' right of childrearing liberty.

The court took judicial notice of vaccine data published by the Centers for Disease Control, the World Health Organization, the American Academy of Pediatrics, and the United States Department of Health and Human Services over plaintiff's objection that the research was hearsay and "government propaganda."[312] The court stated that it is proper to take judicial notice of the "safety and effectiveness of vaccines" that "are not reasonably subject to dispute and are easily verified" and "widely accepted as established by experts and specialists."[313]

The court's decision not to take judicial notice of contradictory medical evidence concerning the safety and efficacy of various vaccines was critical because the plaintiffs failed to file such evidence, leaving a one-sided court record of medical facts.[314] The plaintiffs argued that vaccines caused indiscriminate death and injury to some children and were found to be unavoidably unsafe products by the Supreme Court

307. *Id*. at 1091.

308. *Id*.

309. *Id*.

310. *Id*.

311. Brown v. Smith, 235 Cal. Rptr. 3d 218 (2d Cal. Ct. App. 2018).

312. *Id*. at 223.

313. *Id*. at 223-34. The court rejected plaintiffs' argument that, since the Supreme Court found in 2011 that all vaccine design defects were preempted by the NCVIA, this proves that all vaccines are unavoidably unsafe. *Id*. at 224.

314. *Id*. at 223.

in *Bruesewitz v. Wyeth*. The court simply replied, "Plaintiffs are, of course, quite wrong."[315] The court embraced deference to the legislature overtly, citing *Jacobson* and *Zucht* as having settled the issue that "it is within the police power of a State to provide for compulsory vaccination" and that "[w]hen we have determined that the act is within the police power of the state, nothing further need be said."[316] As in *Whitlow v. California*, there was no analysis of any particular vaccine's efficacy or the public risk posed by the disease balanced against the risks of vaccination.

The court summarily found that free exercise of religion does not exempt a person from complying with health laws of general applicability, relying primarily on *Prince v. Massachusetts* and *Phillips v. City of New York*:[317] "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."[318] The court did not balance the degree of public risk against the degree of liberty infringement.

The court reviewed the claimed violation of California's fundamental right of education under a standard of strict scrutiny.[319] The court found that preventing the spread of communicable diseases is always a compelling interest, regardless of any current health threat or a lack thereof, citing *Workman* and *Whitlow*.[320] The court noted that herd immunity "wanes as large numbers of children do not receive some or all of the required vaccinations, resulting in the reemergence of vaccine preventable diseases in the U.S.," in apparent recognition that there was no significant current risk of mass infection from measles or any other disease.[321]

The plaintiffs argued that Senate Bill 277 was not narrowly tailored to meet the state's goal and that less restrictive alternatives were available to meet the state's goal, such as quarantine in the event of an outbreak.[322] The court's response to these arguments was to cite California's 1890 smallpox case, *Abeel v. Clark*, stating, "[w]hile vaccination may not be the best and safest preventive possible, experience and observation . . . dating from the year 1796 . . . have proved it to be the best method known to medical science to lessen the liability to

315. *Id*. at 223-24 (internal quotations omitted).

316. *Id*. at 223-25 (internal quotations and citations omitted).

317. *Id*. at 224-26.

318. *Id*. at 224 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944)).

319. *Id.* at 226 (the court assumed strict scrutiny would apply and found that SB 277 met the standard).

320. *Id*. at 225-26.

321. *Id*. at 221 (the court referred to herd immunity as "community immunity.")

322. *Id*. at 226.

infection with the disease." [323] The court concluded that vaccination is the "gold standard for preventing the spread of contagious diseases."[324]

A few months later, a California Court of Appeal handed down *Love v. State Dep't. of Educ.*,[325] which considered a medical liberty challenge to the vaccination law. Plaintiffs did not introduce medical evidence to support their theory that compulsory vaccination is a liberty violation due to the level of medical risks. The court criticized the plaintiffs for this failure and also for failing to provide available authority that was directly contrary to their position in the case.[326]

The court relied heavily on *Brown v. Smith*. The *Love* court found that the vaccination law met strict scrutiny[327] while at the same time openly deferring to the legislature. The court stated:

> [I]t was for the legislature to determine whether the scholars of the public schools should be subjected to [vaccination], and we think it was justified in deeming it a necessary and salutary burden to impose upon that general class. . . . 'What is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is invested with a large discretion, which cannot be controlled by the courts, except, perhaps, when its action is clearly evasive, and where, under pretense of lawful authority, it has assumed to exercise one that is unlawful.'[328]

The court also stated that the plaintiffs failed to identify the appropriate elements for a substantive due process challenge[329] and therefore essentially abandoned the claim, citing a 1924 California case: "Contentions supported neither by argument nor by citation of authority are deemed to be without foundation, and to have been abandoned."[330]

The plaintiffs argued that Senate Bill 277 was not narrowly tailored because it eliminated vaccination exemptions for school children but did not apply to homeschooled children,[331] categorically exempted

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323. *Id*. at 220 (citing to Abeel v. Clark, 24 P. 383, 384 (Cal. 1890)).

324. *Id*. at 220, 226.

325. *See* Love v. State Dep'.t of Educ., 240 Cal. Rptr. 3d 861 (3d Cal. Ct. App. 2018).

326. The plaintiffs did not fully brief the court on the bodily integrity cases, and the court chastised the plaintiffs for not citing the seminal vaccine cases, stating that their opening brief "violates counsel's duty to the court" to provide legal authority directly contrary to their claim. *Id.* at 988-90.

327. *Id*. at 866-67 (finding a compelling interest without review of the medical facts or social urgency, and finding that the law met rational basis review and strict scrutiny because "Plaintiffs' substantive due process claim fails under either level of scrutiny.").

328. *Id*. at 868 (citations omitted).

329. *Id*. at 867-68.

330. *Id*. at 869 (quoting Estate of Randall, 230 P. 445, 446 (Cal. 1924)). The Court stated that the plaintiffs did "not provide any synthesis they believe is lacking, nor do they provide legal citations" to the landmark cases. *Id*. (internal quotations omitted).

331. *Id*. at 870.

foster children, and did not address California's huge tourism trade which brings in millions of people from around the world annually from countries with no vaccination requirements.[332] The plaintiffs argued that these large exceptions to the vaccination law rendered it insufficiently tailored to meet to the state's purported goal of "total immunization."[333] They also argued that there are less restrictive alternatives such as quarantine in the event of an actual disease outbreak.[334] In response, the court reframed the state's purpose as achieving total immunization *of school children* and reiterated the conclusion that vaccination is the "gold standard."[335]

As a whole, the contemporary lower court decisions do not follow the balancing paradigm of *Jacobson v. Massachusetts* but instead show unprecedented deference to states laws infringing on medical liberty. The courts routinely cite *Jacobson* for the proposition that health regulation is normally a legislative function, but routinely ignore *Jacobson*'s medical factfinding and numerous statements that a vaccination mandate is permissible in "an emergency" relative to "imminent danger" when an epidemic "imperiled an entire population."[336] Today, the lower courts' vaccination jurisprudence departs enormously from both the reasoning in *Jacobson* and the Court's medical jurisprudence over the past century. The Supreme Court's recent pronouncements concerning its role to protect individual rights in the face of oppressive COVID-19 state action renders all of these lower court decisions of questionable continuing validity. Based on the level of infringement to medical liberty, childrearing liberty, and religious and other personal reasons to reject vaccination, the Supreme Court should grant review of a liberty challenge to a vaccination law, and clarify that the standard of review should be strict scrutiny.

V. THE COVID-19 CASES

"[J]udicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised."[337]

As argued in Part I, *Jacobson* was a case decided during an emergency pandemic, and the Court nonetheless engaged a separation-of-powers analysis and recognized its role to protect individual liberty from legislative overreaching before upholding the law. After The

332. *Id*.

333. *Id*.

334. *Id*.

335. *Id*. at 870-71.

336. *See* Holland, *supra* note 14, at 46 nn. 35-39. *See also supra* Part I.

337. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 74 (2020) (Kavanaugh, J., concurring).

World Health Organization announced the COVID-19 pandemic on March 11, 2020, the political branches quickly issued mandates restricting civil liberties for the stated purpose of reducing the spread of the virus. Many health policy laws arising from COVID-19 were challenged on constitutional grounds, and lower courts grappled with the precedential value of *Jacobson* in part because the tiers of scrutiny for liberty challenges to state action had been created by the Supreme Court over the century post-*Jacobson*. Some courts began to interpret *Jacobson* as controlling authority that the judiciary should defer to other branches on health policy issues during the COVID-19 pandemic, even when the fundamental right to abortion was infringed.[338] Other courts engaged the tiers of scrutiny approach, or merged the tiers into *Jacobson*'s analytical framework, in recognition that liberty norms created over the 116-year period since *Jacobson* should be considered.[339]

Scholars balked at the idea of "suspending" judicial review during the COVID-19 crisis based on *Jacobson*: the "suspension principle is inextricably linked with the idea that a crisis is of finite—and limited—duration."[340] Principles of "proportionality and balancing" animating modern constitutional jurisprudence incorporate exigent circumstances into the constitutional inquiry.[341] Perhaps most importantly, the judiciary plays a crucial role in the separation of powers "as perhaps the only institution that is in any structural position to push back against potential overreaching by the local, state, or federal political branches."[342] Indeed, meaningful judicial review is necessary to "reduce the risk that the emergency will be used as a pretext to undermine constitutional rights. . . ."[343]

In late 2020 the Supreme Court indicated that *Jacobson* should not be interpreted to require judicial deference to health regulations even during a pandemic. In challenges to COVID-19 restrictions, numerous lower courts embraced the concept that *Jacobson* stands for deference to the political branches during a public health emergency.[344] This is

338. *See* In re Abbott, 956 F.3d 696 (5th Cir. 2020) (*Jacobson* required the judiciary to defer to state health policy during an epidemic), *vacated*, Planned Parenthood v. Abbott, 141 S. Ct. 1261 (2021).

339. *See* Delaney v. Baker, 511 F. Supp. 3d 55, 74-75 (D. Mass. 2021).

340. Wiley & Vladek, *supra* note 28, at 182.

341. *See, e.g.,* County of Butler v. Wolf, 486 F. Supp. 3d 883, 899 (W.D.Pa. 2020) ("The principles of proportionality and balancing driving most modern constitutional standards permit greater incursions into civil liberties in times of greater communal need.").

342. *Id*. at 899 (internal quotations omitted).

343. Ilya Somin, *The Case for "Regular" Judicial Review of Coronavirus Emergency Policies,* VOLOKH CONSPIRACY (Apr. 15, 2020, 4:16 PM), https://reason.com/volokh/2020/04/15/the-case-for-normal-judicial-review-of-coronavirus-emergency-policies/ [https://perma.cc/77QK-E7ZF].

344. *See, e.g.*, Hopkins Hawley LLC v. Cuomo, 518 F. Supp. 3d 705, 710 (S.D.N.Y. 2021). The court asked whether Roman Catholic Diocese of Brooklyn v. Cuomo and Agudath Israel of Am. v. Cuomo "abrogated *Jacobson*'s relevance in *all* Constitutional cases arising from the

consistent with decades of lower court abdication of their judicial role even in non-emergency situations relative to vaccination policy, relying on *Jacobson*.[345] However, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court found that Governor Cuomo's executive order discriminated against religion in a non-neutral manner, by "singl[ing] out houses of worship for especially harsh treatment."[346] Accordingly, the standard of review was strict scrutiny in accordance with *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, not *Jacobson*'s deferential standard.[347]

Justice Gorsuch concurred, pointing out that *Jacobson* does not stand for the proposition that the Court should abdicate its role as protector of individual rights even during a pandemic.[348]

> Jacobson hardly supports cutting the Constitution loose during a pandemic. . . . Why have some mistaken this Court's modest decision in Jacobson for a towering authority that overshadows the Constitution during a pandemic? . . . [The Court] may not shelter in place when the Constitution is under attack. Things never go well when we do.[349]

Justice Gorsuch further addressed the risk of overreaching when judicial review is lacking: "Government is not free to disregard the First Amendment in times of crisis . . . . At the flick of a pen, they have asserted the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples."[350] Although the *Cuomo* opinion specifically addressed the textual right of free exercise,

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pandemic?" and discussed Chief Justice Roberts's concurring comments about *Jacobson* in South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020). The court also listed lower court opinions that found *Jacobson* to be "displaced" or "abrogated" subsequent to Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020). *Hopkins*, 518 F. Supp. 3d at 712.

345. *See infra* Part IV.

346. *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 66-67 (applying strict scrutiny to Executive Order despite pandemic because religious organizations were singled out for "especially harsh treatment"). The COVID-19 vaccine and medical devices have not been authorized or approved by the FDA because of the current state of "emergency," which is authorized by the Public Readiness and Emergency Preparedness Act, enacted March 27, 2020. Emergencies allow for expedited FDA approval of vaccines among many other departures from normal processes.

347. *Id.* at 67 (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993)).

348. *Id.* at 70 (Gorsuch, J., concurring).

349. *Id.* at 70 (Gorsuch, J., concurring). This case concerned the Free Exercise Clause, and strict scrutiny was applied because the majority (in a 5-4 *per curiam* opinion) found that places of worship were treated without neutrality by the Executive Order at issue. Still, Justice Gorsuch's position seems to support the thesis in this Article that *Jacobson* has been taken out of context and used to expand other branches' authority, which has resulted in trampling individual constitutional rights.

350. *Id.* at 69 (2020) (Gorsuch, J., concurring).

other federal judges have interpreted *Cuomo* to mean that *Jacobson* has been "displaced" or "abrogated."[351]

Then on January 25, 2021, the Court vacated a Fifth Circuit opinion that harshly reversed the trial court's temporary restraining order in a substantive-due-process challenge to Texas's COVID-19 emergency-based abortion ban. In *In re Abbott*,[352] the Fifth Circuit chastised the lower court, stating that it:

> [C]learly abused its discretion by failing to apply (or even acknowledge) the framework governing emergency exercises of state authority during a public health crisis, established over 100 years ago in Jacobson v Commonwealth of Massachusetts. This extraordinary error allowed the district court to create a blanket exception for a common medical procedure—abortion—that falls squarely within Texas's generally-applicable emergency measure issued in response to the COVID-19 pandemic. This was a patently erroneous result. In addition, the court usurped the power of the governing state authority when it passed judgment on the wisdom and efficacy of that emergency measure, something squarely foreclosed by *Jacobson*.[353]

The recent Supreme Court decisions clarify that *Jacobson* is not the standard in emergency situations and suggest that *Jacobson* "hardly supports cutting the Constitution loose during a pandemic."[354] The Court's very recent opinions may indicate that the Court will resurrect traditional judicial scrutiny even in a pandemic notwithstanding *Jacobson*. Lower federal courts have interpreted these decisions to view *Jacobson* as "displaced" or "abrogated," certainly in regard to fundamental rights challenges to health mandates, with or without a pandemic.[355] The Supreme Court has not reviewed the medical facts

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351. *See* Hopkins Hawley LLC v. Cuomo, 518 F. Supp. 3d 705, 712 (S.D.N.Y. 2021) (describing various courts' rejection of *Jacobson* subsequent to *Cuomo*).

352. In re Abbott, 954 F. 3d 772 (5th Cir. 2020), *vacated*, Planned Parenthood v. Abbott, 141 S. Ct. 1261 (2021).

353. In re Abbott, 954 F. 3d 772, 783 (5th Cir. 2020) (citation omitted).

354. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring).

355. *See Hopkins Hawley LLC*, 518 F. Supp. 3d at 712 (describing various courts' rejection of *Jacobson* subsequent to *Cuomo*). In 2020, federal courts had begun to question how *Jacobson* should be used in modern religious and substantive-due-process challenges to health policy state action, and some began to interpret *Jacobson*'s statement of deference to lawmaking bodies as long as it is not a "plain, palpable invasion of rights secured by fundamental law" to mean that the tiers of scrutiny should be used to determine whether an invasion occurred. Jacobson v. Massachusetts, 197 U.S. 11, 31. This ultimately renders *Jacobson* meaningless, as the focus is redirected to tiers of scrutiny analysis post-*Jacobson*. *See, e.g.*, Delaney v. Baker, 511 F. Supp. 3d 55, 75 (D. Mass. 2021) (using tiers of scrutiny to determine whether a right was invaded renders "Jacobson and its articulated deference irrelevant"). Other very recent opinions have been effectively rendered void since the Supreme Court's vacation of the Fifth Circuit's opinion in *In re Abbott* on January 25, 2021. *See, e.g.*, Big Tyme Investments, LLC v. Edwards, 985 F.3d 456 (5th Cir. 2021) (relying on its own recent opinion in *In re Abbot* just days before the Supreme Court vacated *In re Abbott*).

355. *See, e.g.*, Schleifer v. City of Charlottesville, 159 F.3d 843, 846-47 (4th Cir. 1998) (citations omitted). Note also that Chief Justice Roberts had cited *Jacobson* in South Bay

concerning the COVID-19 vaccines. The Court's 2022 decisions concerning federal vaccine mandates analyzed issues of delegation and statutory construction but did not involve an analysis of whether the mandates violate the Liberty Clause, or review of the medical facts.[356]

VI. STRICT SCRUTINY FOR CHALLENGES TO VACCINATION LAWS

Heightened constitutional review of compulsory vaccination laws is needed to protect constitutional rights adequately and to reign in the extraordinary loss of individual liberty relative to vaccination over the course of the past century. There is danger in the lower courts' vaccination precedent because unchecked police power over public health policy is inconsistent with the separation of powers that is so basic to the structure of the Constitution and necessary to protect individual liberties. The judiciary is the proper branch to check legislative overreaching, and strict scrutiny is the proper standard of review when medical procedures are compelled.

Despite some courts' broad assumption that the states always have a compelling interest to control diseases—even those that have not posed an actual risk for decades—this assumption is inconsistent with other medical liberty jurisprudence. The same omnipresent compelling interest could be said of the state's interest to preserve fetal human life or to prove violent crimes, and yet these interests have been trumped by other liberty interests repeatedly as discussed in Part III. The state's interest in preserving public health relative to a particular illness or disease may or may not be compelling, depending on the level of public health risk posed.

The Supreme Court's balancing test in *Jacobson v. Massachusetts* fairly weighed the medical facts for and against vaccination as well as Mr. Jacobson's conduct and the penalty for vaccination noncompliance. As explained in Part II, the *Jacobson* Court took care to detail the urgent public threat and death toll caused by smallpox, a disease that

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United Pentecostal Church v. Newsom for the proposition that in relation to "restrictions on particular social activities . . . [o]ur Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect." *Hopkins Hawley LLC,* 518 F. Supp. 3d at 710 (quoting South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2021) (Roberts, J., concurring).

[356] *See* Nat'l Fed'n of Indep. Businesses v. Dep't of Labor, Occupational Safety and Health Admin., et al., 142 S. Ct. 661 (2022) and Biden v. Missouri, 142 S. Ct. 647 (2022). Justice Thomas pointed out in his dissent in Biden v. Missouri that the medical facts concerning the efficacy or importance of the COVID-19 vaccines were not considered by the Court: "These cases are not about the efficacy or importance of COVID-19 vaccines. They are only about whether CMS has the statutory authority to force healthcare workers, by coercing their employers, to undergo a medical procedure they do not want and cannot reverse." *Id.* at 658 (Thomas, J., dissenting). A Liberty Clause challenge to the COVID-19 vaccines should trigger an analysis of the medical facts concerning the safety and efficacy of the vaccines as well as whether they are necessary and whether less restrictive alternatives are available.

was killing many millions of people around the world and spread very quickly through casual contact. The state's interest was clearly compelling *based on the medical facts*. As the Court would explain nearly fifty years later:

> In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims on a judgment not ad hoc and episodic but duly mindful of reconciling the needs of both continuity and of change in a progressive society.[357]

Challengers to vaccination laws deserve such a scientific evaluation of state action that compels a medical procedure without truly voluntary and fully informed consent.

The efficacy of a vaccine available to combat the disease normally would be analyzed in the second and third prongs of strict scrutiny. However, where the chosen vaccine is known to cause serious injury or death consistently even as to a small percentage of persons vaccinated, a competing state interest may arise to protect the public *from the vaccine*. Accordingly, courts should consider not only the state's interest in avoiding each disease for which vaccination is available, but also the state's interest in avoiding the risks involved with each available vaccine, as the Court did relative to smallpox in *Jacobson v. Massachusetts*.

A complete review of all available medical and social facts should be viewed objectively to determine at what point the state's interest to prevent a disease or illness becomes truly compelling as opposed to merely legitimate or obvious as in the case of nonviable human life. Challenges should center on medical evidence, including peer-reviewed publications and expert testimony so that a court can make fully informed findings of medical fact as it has in many medical liberty cases, including *Jacobson*. The state's interest in forcing a potentially risky unwanted medical procedure on a person should never be presumed to be compelling. In addition, even where a compelling state interest is proven, medical facts should be considered to determine whether vaccination is truly necessary or whether alternative, less intrusive measures are available to address the state's interest. This is especially true considering the Supreme Court's longstanding commitment to medical autonomy.

For example, New York City may have overstepped its legislative legitimacy by mandating flu vaccination to obtain necessities such as access to childcare and school despite the extremely low efficacy rate of flu vaccines[358] and the relatively low public health risk of the annual

357. Rochin v. California, 342 U.S. 165, 172 (1952).

358. *See supra* note 280 and accompanying text.

flu, certainly as compared to smallpox.[359] Considering these facts, the state's interest is far lower than the state's interest in *Jacobson* and is far less compelling.[360] In addition, where a low-risk illness such as the seasonal flu is sought to be prevented by means that cause a high percentage of vaccine injuries, the competing state interest in protecting the public *from the vaccine* should weigh into the constitutional analysis. Considering that the flu vaccine causes more vaccine injuries than all other vaccines combined,[361] the balance tips against finding the state's interest compelling and/or the medical mandates unjustified.

Medical and social facts are also relevant to whether flu vaccination is really necessary and narrowly tailored to meet the state's interest or whether less restrictive alternatives are available. In relation to the seasonal flu, there are many ways to lessen transmission without vaccination, and these alternatives may be as effective or even more effective and do not pose the risks created by flu vaccination.[362] Less intrusive alternatives that should be considered as part of a balancing test include: 1) public education concerning how viruses spread and how to enhance personal health and immunity;[363] 2) requiring personal protective equipment such as face coverings during flu epidemics or when a person is sick or suffering from congestion causing coughing or sneezing; 3) temporary stay-at-home orders from employers and the

359. Since 2010, the CDC estimate that between 12,000 and 61,000 Americans die each year from the flu, although the CDC statistics have been criticized as "substantially overestimating flu deaths, in order to encourage vaccination and good hygiene[.]" Jeremy Samuel Faust, *Comparing COVID-19 Deaths to Flu Deaths Is like Comparing Apples to Oranges*, SCIENTIFIC AM. (Apr. 28, 2020), https://blogs.scientificamerican.com/observations/comparing-covid-19-deaths-to-flu-deaths-is-like-comparing-apples-to-oranges/ [https://perma.cc/5X79-67X3]. By comparison, between 35,000 and 50,000 Americans die each year from automobile accidents. *Traffic Safety Facts: 2018 Fatal Motor Vehicle Crashes: Overview*, U.S. DEP'T. OF TRANSP. (Oct. 2019), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812826 [https://perma.cc/CZZ6-CKLL].

360. To the contrary, the COVID-19 pandemic is considered "unquestionably a compelling interest[.]" *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67.

361. *See Data and Statistics*, *supra* note 284.

362. One problem is that ill persons routinely fail to self-quarantine and airlines and other high-density service operations fail to exclude them despite obvious signs of contagion such as wet coughing. Both the individual and airline may be responsible for infecting others, but proof of causation and social norms allowing ill people to be at large render liability unlikely. Over a century of precedent supports negligent and intentional transmission of diseases. *See*, *e.g.*, Deana Pollard Sacks, *Sex Torts*, 91 MINN. L. REV. 769 (2007).

363. Personal hygiene including frequent hand washing, avoiding alcohol and not smoking, eating fruits and vegetables, having a disciplined sleep routine, exercising regularly, and maintaining a healthy weight are all related to the immune system's ability to fight infection. *See, e.g.*, *How to Boost Your Immune System,* HARVARD HEALTH PUB. (Apr. 6, 2020), https://www.health.harvard.edu/staying-healthy/how-to-boost-your-immune-system [https://perma.cc/EBE5-RUAS]. Government monies spent providing education to facilities to create a healthier population seems much more efficient than a vaccine with a very low efficacy rate. In addition, vaccination may cause people to feel safe and enter the public domain when they otherwise may stay home for safety, and this mindset creates additional risks.

government for people showing signs of illness during a truly urgent and deadly epidemic; and 4) laws requiring airlines and other providers of mass transit to eliminate risky passengers by taking temperatures preboarding or refusing to board visibly or audibly sick passengers (runny nose, wet coughing, wet sneezing, and so forth).[364] These suggested alternatives used in conjunction could produce a norm cascade[365] far more powerful than low-efficacy vaccination in terms of lessening influenza transmission.

If the government seeks to force any medical procedure on unwilling individuals it is only fair that the state—with its superior power and access to information—meet the stringent burdens of proof under a standard of strict scrutiny. When courts confer unlimited authority for legislatures to mandate vaccination, basic constitutional structure created to assure that no branch of government is too powerful is violated. Strict scrutiny is the proper standard of review for any medical mandate so that the state's interest, the risks of the medical procedure, the necessity of the procedure, and the possibility of less intrusive or less risky options can be fully reviewed. This is the only way to uphold the history and tradition of protecting individuals' right for their bodies to be "let alone" absent informed and voluntary consent.[366]

CONCLUSION

The United States Supreme Court historically has protected medical autonomy as among the most important liberty interests protected by the Liberty Clause. The right to make decisions concerning one's own body is as fundamental as any individual right.

Vaccination jurisprudence exists in stark contrast to medical liberty jurisprudence generally. Although *Jacobson v. Massachusetts*'s opinion is well reasoned and created a proper balance of power, lower courts relied on *Jacobson* to defer to legislatures increasingly over time. Over the course of a century the lower courts have shifted vaccination policy to the legislative branch almost entirely and have avoided meaningful judicial review in the many constitutional challenges to state vaccination laws. In addition to this judicial-abdication problem, the NCVIA immunizes vaccine manufacturers from all strict liability and negligence claims for vaccine products, and further tilts

364. The businesses subject to such laws should include any place where the public gathers and disease transmission is particularly risky, including gyms, restaurants, bars, and other crowded area that are amenable to such measures upon entrance.

365. *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); *see* Sacks, *supra* note 363, at 812-19 (explaining how norm cascades were creating relative to drunk driving norms and applying the concept to liability for disease transmission).

366. *See, e.g.,* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 250-51 (1891) ("The right to one's person may be said to be a right of complete immunity; to be let alone.") (citing THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OF THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (1879) (internal quotations omitted)).

the balance against judicial protection of individual rights. The imbalance is manifested by ongoing litigation that will continue until a proper separation-of-powers balance is restored.

After the COVID-19 pandemic was announced, the political branches began to enact severe restrictions. Numerous lower courts began to apply *Jacobson* on individual liberties consistent with lower courts' vaccination jurisprudence, deferring to state action responsive to the COVID-19 pandemic. In late 2020, the Supreme Court indicated that *Jacobson* is not authority to defer to public health policies that infringe constitutional rights, even in a pandemic. The Court suggested that traditional tiers of scrutiny should apply anytime state action infringes constitutional rights.

Liberty jurisprudence includes a variety of standards of review, and the Court does not always articulate a standard when balancing the interests involved in a case. The most protective standard is strict scrutiny, which requires the state to prove the necessity and lack of alternative options to justify a law that infringes fundamental rights. Consistent with the Court's history of medical liberty jurisprudence, state action forcing medical treatment that risks serious or uncertain injury should be subject to strict scrutiny so that the state must justify its law. A strict standard of review should be adopted now for all medically invasive state action, particularly in light of recent COVID-19 controversies.

Vaccination is a medically invasive procedure, and vaccination mandates should be carefully scrutinized when challenged on constitutional grounds. Children's medical liberty interests should be protected equally with adults because injury to the body can be permanent, rendering children's medical liberty interest of the highest order. The lower courts' failure to review vaccination laws carefully upon challenge and instead to defer to vaccination mandates has created inadequate protection of medical liberty. The Court should adopt strict scrutiny as the standard of review in all challenges to state action requiring unwanted medical treatment to obtain education or other important government services. All vaccination and other medical mandates should therefore be subject to strict scrutiny.