

2017

SB-277 Calls the Shots: How California Can Mend the Divide between Proponents and Opponents of Mandatory Vaccination Laws

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Jennifer Yeung, *SB-277 Calls the Shots: How California Can Mend the Divide between Proponents and Opponents of Mandatory Vaccination Laws*, 55 Duq. L. Rev. 435 (2017).

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Jennifer Yeung

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I. INTRODUCTION

Since the world’s eradication of smallpox in 1979,¹ vaccination has been touted as one of the greatest tools in the public health arsenal.² In fact, its near elimination of diphtheria, rubella, and measles are such outstanding feats³ that in 2011, the Centers for Disease Control and Prevention (CDC) declared vaccination as one of

1. Scott Barrett, *The Smallpox Eradication Game*, 130 PUB. CHOICE 179, 179 (2006); accord Natalia A. Escobar, Note, *Leaving the Herd*, 80 BROOK. L. REV. 255, 261 (2014).

2. INST. OF MED., ADVERSE EFFECT OF VACCINES: EVIDENCE AND CAUSALITY 1, 4 (2011), <http://www.nationalacademies.org/hmd/Reports/2011/Adverse-Effects-of-Vaccines-Evidence-and-Causality.aspx>.

3. *Vaccines and Immunizations—What Would Happen If We Stopped Vaccinations?*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 19, 2014), <http://www.cdc.gov/vaccines/vac-gen/whatifstop.htm>.

the twentieth century's top ten public health achievements.⁴ Without vaccinations, rates of infection would soar, claiming thousands of lives and costing millions of dollars each year.⁵ This explains why governments are so interested in regulating the practice—so they can better control the spread of disease.⁶

When it comes to children, one of society's most vulnerable groups, all fifty states presently require proof of immunization as a prerequisite for admission to school.⁷ Legislation is left to each state's government, as no federal laws compel the practice.⁸ However, federal funding supports most of the costs therein.⁹

Between parents' interest in making autonomous decisions regarding their children's health and states' interest in protecting public welfare, few areas within the public health arena are as highly contentious as compulsory vaccination.¹⁰ In fact, debates between those who fervently oppose it and those who staunchly defend it have become so emotional and polarized in recent times¹¹

4. See Ctrs. for Disease Control & Prevention, *Ten Great Public Health Achievements—Worldwide, 2001–2010*, 60 MORBIDITY & MORTALITY WKLY. REP. 805, 814–15 (2011).

5. Michael Poreda, Comment, *Reforming New Jersey's Vaccination Policy: The Case for the Conscientious Exemption Bill*, 41 SETON HALL L. REV. 765, 775 (2011).

6. Kimberly J. Garde, *This Will Only Hurt For . . . Ever: Compulsory Vaccine Laws, Injured Children, and No Redress*, 3 PHOENIX L. REV. 509, 519 (2010).

7. Poreda, *supra* note 5, at 771; Ctrs. for Disease Control & Prevention, *Public Health Law: State School Immunization Requirements and Vaccine Exemption Laws* (Mar. 27, 2015), <http://www.cdc.gov/phlp/docs/school-vaccinations.pdf> (summarizing state vaccination laws as of March 2015); *State Mandates on Immunization and Vaccine-Preventable Diseases*, IMMUNIZATION ACTION COALITION (Sept. 26, 2017), <http://www.immunize.org/laws/>.

8. Escobar, *supra* note 1, at 268.

9. Poreda, *supra* note 5, at 777.

10. See JAMES K. COLGROVE, *STATE OF IMMUNITY: THE POLITICS OF VACCINATION IN TWENTIETH-CENTURY AMERICA* 2 (2006) (stating that “[o]ne of the most fundamental and enduring tensions in the enterprise of public health is the balance between the rights of the individual and the claims of the collective, and nowhere is this dynamic more salient than in policies and practices surrounding immunization”).

11. Escobar, *supra* note 1, at 265.

that a middle ground seems nearly impossible.¹² For a prime example, look no further than the heated discussions surrounding California's Senate Bill 277 (SB-277).¹³

Taking into consideration both sides' interests, this comment will attempt to: (1) narrow the divide between SB-277's proponents and opponents, and (2) strengthen the bill's constitutionality by suggesting amendments where it may be susceptible to constitutional attack. Together, Sections II and III will set the stage for which to analyze SB-277. Section II includes an overview of the evolution of vaccination jurisprudence, while Section III highlights some of vaccination's advantages and disadvantages. Section IV contains an analysis of SB-277 and delves into aspects of the bill that the California Legislature should consider amending.

II. THE EVOLUTION OF VACCINATION JURISPRUDENCE IN THE CONTEXT OF SCHOOLS AND CHILDREN

A. *The Pivotal Role of Increasingly Serious Outbreaks of Smallpox*

In the 1830s, two events were responsible for bringing vaccination jurisprudence into existence¹⁴: the first was the passing of laws mandating public school attendance, which brought large groups of children together; the second was increasingly serious outbreaks of smallpox as a result of these children not having been vaccinated.¹⁵ Massachusetts was the first state to enact a mandatory vaccine program, and by the mid-nineteenth century, other states followed suit.¹⁶ Collectively, efforts by all participating states yielded such success that in 1949, the United States deemed smallpox officially

12. Compare Jimmy Kimmel Live, *Jimmy Kimmel's Update on the Anti-Vaccination Discussion*, YOUTUBE (Mar. 3, 2015), <https://youtu.be/i2mdwmpLYLY> (taking a pro-vaccine end-of-conversation stance), with TheHealthRanger, *VAXXED: The ABC News Interview That Big Pharma Didn't Want You to See*, YOUTUBE (Mar. 27, 2016), <https://www.youtube.com/watch?v=tvcdh7KlgPI> (revisiting the causal link between the Measles-Mumps-Rubella (MMR) vaccine and autism and taking a more open-the-conversation stance). Note that *Vaxxed* is a documentary that was pulled from the 2016 Tribeca Film Festival's official list by Robert De Niro, one of the festival's founders, amid criticism and backlash. Robert De Niro later went on the Today Show regretting his decision and stating, "There's something to that movie . . . I wanna know the truth . . . The thing is, to shut it down—there's no reason to. If you're a scientist, let's see. Let's hear. Everybody doesn't seem to want to hear much about it." Robert De Niro's interview can be accessed here: <https://www.youtube.com/watch?v=FJ7iPn39i08&t=223s>.

13. S.B. 277, 2015–2016 Reg. Sess. (Cal. 2015).

14. See Escobar, *supra* note 1, at 262.

15. *Id.*

16. Poreda, *supra* note 5, at 770.

eradicated.¹⁷ Fourteen years later, with the advent of the measles vaccine, the federal government went down a warpath to make it the nation's second vaccine-eliminated disease.¹⁸ For those states not yet convinced to jump on board, studies revealing a forty to fifty percent reduction in infection rates where compulsory vaccination programs were in place provided just the right impetus.¹⁹ By 1981, every state had enacted mandates, not just for smallpox and measles, but for a plethora of other diseases as well, including diphtheria, polio, pertussis, mumps, and rubella.²⁰

Today, no state is without some kind of mandatory vaccination program.²¹ Parents wishing to exclude their children from such programs may do so only if an exemption—medical or non-medical—applies.²² As of July 2016, all fifty states and the District of Columbia allow for medical exemptions; forty-seven states and the District of Columbia allow for non-medical, religious-based, exemptions; and seventeen states and the District of Columbia allow for non-medical, personal belief-based, exemptions.²³ To minimize threats to public health, many states' statutes include quarantine clauses prohibiting school attendance of unvaccinated children during the event of an outbreak or the imminent risk of one.²⁴

17. *Id.* at 771.

18. *Id.* at 770.

19. *Id.* at 771. *But see* John B. McKinlay & Sonja M. McKinlay, *The Questionable Contribution of Medical Measures to the Decline of Mortality in the United States in the Twentieth Century*, 55 MILBANK MEMORIAL FUND Q.: HEALTH & SOC'Y 405, 425 (1977) (questioning the true efficacy of medical intervention techniques like vaccinations and estimating that, at most, such techniques could have only accounted for 3.5 percent of the total decline in mortality since 1900). *See also* U.S. DEP'T OF HEALTH, EDUC., & WELFARE, VITAL STATISTICS OF THE UNITED STATES: VOLUME II—MORTALITY PART A, at 1–18 to 1–19 (1963), https://www.cdc.gov/nchs/data/vsus/mort63_2a.pdf (reporting that by the time the measles vaccine was available to the American public in 1963, the number of people dying from the disease—only 364 that year—was already at an all-time low); Roman Bystryanik & Suzanne Humphries, *Vaccines: A Peek Underneath the Hood*, INT'L MED. COUNCIL ON VACCINATION (Nov. 12, 2013), <http://www.vaccinationcouncil.org/2013/11/12/vaccines-a-peek-beneath-the-hood-by-roman-bystryanik-and-suzanne-humphries-md/> (suggesting that the decline in mortality could have been due, not to vaccinations, but to improved hygiene, sanitation, nutrition, labor laws, electricity, chlorination, refrigeration, and pasteurization instead).

20. Poreda, *supra* note 5, at 771.

21. *See supra* note 7 and accompanying text.

22. *See* Poreda, *supra* note 5, at 781.

23. *See State Vaccination Exemptions for Children Entering Public Schools*, PROCON.ORG (July 8, 2016), <http://vaccines.procon.org/view.resource.php?resourceID=003597>.

24. Poreda, *supra* note 5, at 786 n.151. For example, ARIZ. REV. STAT. ANN. § 15–873(C) (2015) provides that “[p]upils who lack documentary proof of immunization shall not attend school during outbreak periods of communicable immunization-preventable diseases,” while LA. STAT. ANN. § 17:170(F) (2015) provides that “[i]n the event of an outbreak of a vaccine-preventable disease[,]” administrators are “empowered . . . to exclude from attendance unimmunized students.”

While these rules sound reasonable enough, opponents argue they still rob parents of the right to make autonomous health care decisions for their children.²⁵ Vaccinations are the only medical procedures mandated for healthy individuals—individuals who pose no threat to society,²⁶ the sheer number of required vaccines continues to increase,²⁷ and not all vaccines are safe for everyone.²⁸ Proponents, on the other hand, argue that mandatory vaccinations are necessary to protect society from disease outbreaks.²⁹ With both sides unwavering in their convictions, the balance between individual autonomy and general societal welfare has become so strained that the question of whether it can even be restored is not unreasonable.

B. SB-277

SB-277, sponsored by Democratic Senators Richard Pan and Ben Allen following the infamous measles outbreak at Disneyland at the end of 2014 and into the beginning of 2015,³⁰ is an amendment to California's Health and Safety Code.³¹ Its elimination of all non-medical exemptions for school-mandated vaccinations is arguably what made it the most contentious bill to come out of the California Legislature in 2015. In what the media termed as one of Sacramento's "largest grassroots movements," hundreds of people spilled into the hallways of the State Capitol and thousands more descended on its grounds in opposition to the bill, but their efforts were for naught.³² The California Legislature was steadfast in its

25. See COLGROVE, *supra* note 10. See also Mahesh Vidula, *Individual Rights vs. Public Health: The Vaccination Debate*, ANGLES (Feb. 5, 2016), http://web.mit.edu/angles/2010_Mahesh_Vidula.html (citing parents' desire to be the decision makers for their children. One Chicago mother asked, "[w]hat right does the government have over my children? . . . I have the right to choose what's best for them").

26. See Escobar, *supra* note 1, at 264–65.

27. See Garde, *supra* note 6, at 524–26; Michael E. Horwin, Comments, *Ensuring Safe, Effective and Necessary Vaccines for Children*, 37 CAL. W. L. REV. 321, 325–26 (2001).

28. See INST. OF MED., *supra* note 2, at 4; see also Sofia Morfopoulou et al., *Deep Sequencing Reveals Persistence of Cell-Associated Mumps Vaccine Virus in Chronic Encephalitis*, 133 ACTA NEUROPATHOLOGICA 139, 139 (2017).

29. See Poreda, *supra* note 5, at 774.

30. *California Lawmakers Pass Vaccine Bill Amid Emotional Debate*, CNSNEWS.COM (June 9, 2015, 11:10 PM), <http://www.cnsnews.com/news/article/california-lawmakers-pass-vaccine-bill-amid-emotional-debate>; see also Jennifer Zipprich et al., *Measles Outbreak—California, December 2014–February 2015*, 64 MORBIDITY & MORTALITY WKLY. REP. 153, 153–54 (2015).

31. S.B. 277, 2015–2016 Reg. Sess. (Cal. 2015).

32. Shannon Kroner & Tim Donnelly, *Let Voters Decide About Vaccination Law*, L.A. DAILY NEWS (Aug. 5, 2015), <http://www.dailynews.com/2015/08/03/let-californians-decide-about-vaccinations-shannon-kroner-and-tim-donnelly/>; see also CNSNEWS.COM, *supra* note

resolve to pass SB-277 and did so just after five short hours of debate.³³ On June 30, 2015, three weeks later, California Governor Jerry Brown and the Secretary of State, Alex Padilla, signed and filed the same.³⁴

In pertinent part, SB-277, which went into effect on July 1, 2016, states that a student or pupil of “any private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center” shall not be admitted unless he or she has been fully immunized against: (1) diphtheria, (2) Haemophilus influenzae type b (Hib), (3) measles, (4) mumps, (5) pertussis (whooping cough), (6) poliomyelitis (polio), (7) rubella, (8) tetanus, (9) hepatitis B, (10) varicella (chickenpox), and (11) any other disease deemed appropriate by the Department of Health.³⁵ Exemptions for diseases (1) through (10) are permitted for medical reasons only,³⁶ and authorities may temporarily exclude any student with good cause to believe that he or she has been exposed to a disease for which there is no proof of immunization.³⁷

To date, there have been a number of attempts to stop the enforcement of SB-277.³⁸ And in every case, the defendants, including the State of California, its departments and agencies, and various individuals in their official capacities, have looked to courts to apply the holdings in *Jacobson v. Massachusetts*³⁹ and its progeny.⁴⁰ A United States Supreme Court case from 1905, *Jacobson* is semi-important not just because it was the first to address mandatory vaccination laws, but also because courts have not deviated from its basic tenets in well over one hundred years.⁴¹ Interestingly

30 (reporting that one individual went so far as to shout at lawmakers, which resulted in her removal from the hearing).

33. CNSNEWS.COM, *supra* note 30.

34. S.B. 277, 2015–2016 Reg. Sess. (Cal. 2015).

35. *Id.* § 2(a)–(b).

36. *See id.* § 1(c). Note that SB-277’s introduction states that it will allow exemptions for future immunization requirements to be based on medical reasons or personal beliefs.

37. *Id.* § 5(b).

38. *See, e.g.*, Whitlow v. Cal., Dep’t of Educ., 203 F. Supp. 3d 1079 (S.D. Cal. 2016); Complaint for Declaratory, Injunctive, or Other Relief, Torrey-Love v. Cal., Dep’t of Educ., No. 5:16-cv-02410 (C.D. Cal. Nov. 21, 2016).

39. 197 U.S. 11 (1905).

40. *See State Defendants’ Consolidated Opposition to Plaintiffs’ Motion for Preliminary Injunction at 9–10*, Whitlow v. Cal., Dep’t of Educ., 203 F. Supp. 3d 1079 (S.D. Cal. 2016) (No. 16cv1715 DMS (MED)) (citing *Zucht v. King*, 260 U.S. 174 (1922) and *Prince v. Massachusetts*, 321 U.S. 158 (1944)); Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss Plaintiffs’ Complaint at 8–9, Torrey-Love v. Cal., Dep’t of Educ., No. 5:16-v-02410 (C.D. Cal. Dec. 1, 2016) (citing the same).

41. Wendy E. Parmet, Richard A. Goodman & Amy Farber, *Individual Rights Versus the Public’s Health—100 Years After Jacobson v. Massachusetts*, 7 NEW ENG. J. MED. 652, 652 (2005).

enough, there exists a wholly separate, equally authoritative, and largely ignored line of cases in *Jacobson's* shadow that, if applied, could yield very different results.⁴²

The next two subsections summarize, chronologically, the holdings of both lines of cases. The cases in subsection C, which attest to *Jacobson's* indisputable influence on the evolution of vaccination jurisprudence, stand in contrast to those in subsection D, which illustrate the development of privacy and bodily integrity rights in adjacent areas of law. Viewed side by side, the question becomes whether SB-277 improperly infringes on well-established fundamental rights.

C. *Cases Courts Have Come to Rely on in Upholding Mandatory Vaccination Laws*

1. *Jacobson v. Massachusetts and Zucht v. King*

Decided in 1905, the issue before the United States Supreme Court was the constitutional validity of a Massachusetts vaccination statute.⁴³ In an attempt to neutralize a smallpox outbreak, the City of Cambridge's board of health adopted a regulation requiring those who had not been vaccinated against smallpox as of March 1, 1897, to be vaccinated or revaccinated.⁴⁴ Henning Jacobson refused to comply, so the Commonwealth charged him and ordered him to pay a five-dollar fine.⁴⁵ Jacobson argued the Commonwealth had invaded his liberty by imposing an "unreasonable, arbitrary, and oppressive" compulsory vaccination law in contravention of his inherent right to care for his own body and health.⁴⁶ The Court disagreed and stated that Massachusetts had the authority to enforce the statute via its state police power—a power permitting reasonable regulation for the protection of public health and safety.⁴⁷ Explaining further, the Court stated that Massachusetts was free to employ whatever modes and manners it saw fit to achieve this goal, as long as none would infringe upon any individual's constitutional rights.⁴⁸ The liberty of which Jacobson spoke was not an absolute right, as there would always be circumstances where the common

42. See discussion *infra* Section II.D.

43. *Jacobson*, 197 U.S. at 12.

44. *Id.* at 12–13.

45. *Id.* at 13.

46. *Id.* at 26.

47. *Id.* at 25.

48. *Id.*

good would take precedence.⁴⁹ Thus, to guard the public from additional smallpox outbreaks, Massachusetts's restraint on Jacobson's liberty was necessary.⁵⁰

*Zucht v. King*⁵¹ came seventeen years later. At issue there was a San Antonio ordinance prohibiting any person from attending school "without having first presented a certificate of vaccination."⁵² Rosalyn Zucht, who sought admission to both public and private school, not only lacked the required certificate, but also refused to be vaccinated.⁵³ In her charge against public officials for her exclusion from school, she alleged the following: (1) there was no occasion for requiring the vaccination; (2) the ordinance, by its compulsory nature, deprived her of her liberty without due process of law; and (3) the ordinance gave unfettered discretion to the officials in determining the conditions for enforcement.⁵⁴ The Court ruled in favor of the public officials, reiterating *Jacobson's* holding that the state had police power to enforce compulsory vaccinations.⁵⁵ Then, in postscript fashion, the Court added: (1) a state has the power to determine the conditions under which health regulations should become operative; and (2) a state can vest in its authorities "broad discretion in matters affecting the application and enforcement of . . . health law[s]."⁵⁶ The Court held that San Antonio's ordinance was required for the protection of public health. Thus, Zucht's exclusion could not be deemed "arbitrary."⁵⁷

2. *Prince v. Massachusetts, Matter of Christine M., Phillips v. City of New York, and the Doctrine of Parens Patriae*

The doctrine of *parens patriae*, which allows a state to provide "protection to those unable to care for themselves,"⁵⁸ did not appear in vaccination jurisprudence until *Prince v. Massachusetts*⁵⁹ in

49. *Id.* at 26.

50. *Id.* at 28. See also Christopher Richins, *Jacobson Revisited: An Argument for Strict Judicial Scrutiny of Compulsory Vaccination*, 32 J. LEGAL MED. 409, 414 (2011) (stating that much of the evidence Jacobson attempted to introduce discussed the potential risks of vaccination, not the specific risks he would face personally, which might have been the death knell for his case).

51. 260 U.S. 174 (1922).

52. *Id.* at 175.

53. *Id.*

54. *Id.*

55. *Id.* at 176.

56. *Id.*

57. *Id.* at 177.

58. *Parens patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014).

59. 321 U.S. 158 (1944).

1944. Although the case involved child labor laws, subsequent vaccination cases relied on *Prince's* holding as a means of vesting in states an additional layer of authority to protect children's health and safety—even to the point of restricting parents' control by requiring school attendance and regulating mandatory vaccination laws.⁶⁰ By the end of the twentieth century, *Jacobson*—along with *Zucht* and *Prince*—had implicitly become the controlling legal standard in upholding mandatory vaccination laws. Two cases from 1992 and 2015—*Matter of Christine M.*⁶¹ and *Phillips v. City of New York*,⁶² respectively—make this clear.

In *Matter of Christine M.*,⁶³ where a father refused to have his daughter immunized during a measles outbreak for personal and religious reasons, the family court of Kings County, New York, citing *Jacobson*, *Zucht*, and *Prince*, concluded that government interference with the right of parents to nurture and manage their children was grounded in both the state's general police power⁶⁴ and in the doctrine of *parens patriae*.⁶⁵

Then, in *Phillips*, where a group of parents challenged New York's requirement that all children be vaccinated before attending public school, the United States Court of Appeals for the Second Circuit rejected the plaintiffs' allegations that the state's mandate violated their substantive due process and Free Exercise Clause rights.⁶⁶ To their substantive due process claim, the court stated that what the plaintiffs were asserting was no more compelling than it was over a century ago in *Jacobson*.⁶⁷ And to their Free Exercise Clause claim, the court stated that their right to practice religion did not include the liberty to expose the public to communicable diseases.⁶⁸

Under *Jacobson's* precedent, SB-277's constitutionality is solid. Courts have found,⁶⁹ and will likely continue to find, it difficult to conclude otherwise.⁷⁰ Under the precedents set forth by the next

60. *Id.* at 166; see also Escobar, *supra* note 1, at 264.

61. 595 N.Y.S.2d 606 (N.Y. Fam. Ct. 1992).

62. 775 F.3d 538 (2d Cir. 2015).

63. *Matter of Christine M.*, 595 N.Y.S.2d 606.

64. *Id.* at 611.

65. *Id.*

66. *Phillips*, 775 F.3d at 540 (explaining that the plaintiffs additionally alleged violations of the Equal Protection Clause, the Ninth Amendment, as well as state and municipal laws but the Second Circuit determined these to be meritless or waived).

67. *Id.* at 542.

68. *Id.* at 543 (citing *Prince v. Massachusetts*, 321 U.S. at 166–167).

69. *Whitlow v. Cal., Dep't of Educ.*, 203 F. Supp. 3d 1079, 1092 (S.D. Cal. 2016).

70. See Dorit Rubinstein Reiss, *Attacking SB277 with Another Lawsuit—Torrey-Love v. State of California*, SKEPTICAL RAPTOR (Dec. 1, 2016), <http://www.skepticalraptor.com/skepticalraptorblog.php/attacking-sb277-another-lawsuit-torrey-love-v-state-california/>; *SB277*

line of cases, however, SB-277's constitutionality may sound entirely differently.

D. Cases Courts Have Overlooked in Upholding Mandatory Vaccination Laws

In *Jacobson's* shadow is a line of cases dating back from 1891 that involve common law principles of battery, assault, and informed consent, as well as fundamental privacy and bodily integrity rights.⁷¹ Despite their authority, these cases' holdings have oddly wielded little influence over vaccination jurisprudence.⁷²

1. Cases on Battery, Assault, and Informed Consent

In the 1891 case *O'Brien v. Cunard Steam-Ship Co.*,⁷³ the question before the Supreme Judicial Court of Massachusetts was whether Cunard's onboard surgeon committed an assault on Mary O'Brien by giving her a vaccination en route to Boston.⁷⁴ The court held that if O'Brien's behavior—by way of her overt acts and manifestation of feelings—indicated consent, then the surgeon was justified in his act.⁷⁵ O'Brien understood she was going to be vaccinated, never expressed any desire not to be, and allowed herself to be vaccinated without objection.⁷⁶ Thus, the surgeon's act was lawful.⁷⁷

In 1914, in *Schloendorff v. Society of New York Hospital*,⁷⁸ the question was whether an operation on an unconscious Mary Schloendorff constituted an assault when she had expressly desired an examination only.⁷⁹ While the Court of Appeals of New York ultimately affirmed the trial judge's ruling in favor of the defendant hospital because the surgeons who performed the operation were not the hospital's agents, it stated that “[e]very human being . . . has a right to determine what [should] be done with his own body.”⁸⁰

Litigation, A VOICE FOR CHOICE, <http://avoiceforchoice.org/sb277-litigation/> (last visited Jan. 24, 2017).

71. This is merely a road map for the cases that will follow.

72. *Id.*

73. 28 N.E. 266 (Mass. 1891).

74. *Id.* at 266.

75. *Id.*

76. *Id.*

77. *Id.*

78. 105 N.E. 92 (N.Y. 1914).

79. *See id.* at 93. While Schloendorff was a patient at the hospital, the house physician, Dr. Bartlett, discovered a lump. *Id.* The character of the lump could not be determined without an examination. *Id.* Schloendorff consented to an exam, but said there could be no operation. *Id.*

80. *Id.*

Thus, a surgeon who performs an operation on a patient without the patient's consent is liable.⁸¹

In the 2003 case *Duncan v. Scottsdale Medical Imaging, Ltd.*,⁸² a patient required a magnetic resonance imaging examination and specifically told the nurse she could only accept Demerol or morphine for sedation. The patient received fentanyl, which led to serious complications, so she sued for lack of informed consent and battery.⁸³ Although the Supreme Court of Arizona ultimately remanded the case,⁸⁴ it stated that a health care provider commits a battery whenever a medical procedure is performed without a patient's consent.⁸⁵

2. *Cases on Privacy and Bodily Integrity Rights Decided by the United States Supreme Court*

In the 1891 case *Union Pacific Railroad Co. v. Botsford*,⁸⁶ the defendant railroad company filed a motion to order a passenger—who allegedly suffered head injuries after an upper berth fell on her—to submit to a surgical examination if she desired the defendant's presence at trial.⁸⁷ The United States Supreme Court held that no right is “more sacred, or . . . 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 . . .”⁸⁸ Moreover, without lawful authority, it was a trespass to “compel any one . . . to lay bare [his or her] body” or to submit it to a stranger's touch.⁸⁹

Then, in *Meyer v. Nebraska*⁹⁰ and *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,⁹¹ decided in 1923 and 1925, respectively, the Court held that parents have the right to control their children's upbringing as part of their privacy rights within their right to liberty.⁹² The Court expanded this right of privacy in

81. *Id.*

82. 70 P.3d 435 (Ariz. 2003).

83. *Id.* at 437–38.

84. *See id.* at 442–43. The Supreme Court of Arizona ultimately remanded the case because Arizona's medical malpractice statute abolishing the right to bring an action in battery violated the anti-abrogation clause of the state's constitution. *Id.*

85. *Id.* at 438.

86. 141 U.S. 250 (1891).

87. *Id.* at 250.

88. *Id.* at 251.

89. *Id.* at 252.

90. 262 U.S. 390 (1923).

91. 268 U.S. 510 (1925).

92. *Pierce*, 268 U.S. at 534 (establishing the right of parents to decide which schools their children should receive education from); *Meyer*, 262 U.S. at 399–400 (establishing the right of teachers to teach and the right of parents to engage teachers in teaching their children).

1973, in *Roe v. Wade*,⁹³ to include the right of pregnant women to choose abortion,⁹⁴ and expanded it again in 1990, in *Washington v. Harper*,⁹⁵ to include the right of inmates to refuse certain medication.⁹⁶ In *Cruzan by Cruzan v. Director, Missouri Department of Health*,⁹⁷ decided that same year, the Court inched closer to declaring the right to decline medical treatment as fundamental,⁹⁸ but it was not until *Washington v. Gluck*,⁹⁹ seven years later, that the Court finally said outright: “[T]he right to refuse unwanted medical treatment [is] so rooted in our [nation’s] history, tradition, and practice” that it should “require special protection under the Fourteenth Amendment.”¹⁰⁰

3. *Cases on Privacy and Bodily Integrity Rights Decided by the Supreme Court of California*

California’s state courts may also have a say in SB-277’s constitutionality. Thus, their stance on privacy and bodily integrity rights is an important one to understand. Two cases from 2004 and 2005—*In re Qawi*¹⁰¹ and *Coshov v. City of Escondido*¹⁰²—are revealing.

In *In re Qawi*,¹⁰³ where a prisoner challenged his involuntary antipsychotic medication, the Supreme Court of California stated that: (1) the right of a competent adult to refuse medical treatment is grounded in both state constitutional and common law; and (2) this right of privacy guarantees “the freedom to . . . reject, or refuse to consent to, intrusions of . . . bodily integrity.”¹⁰⁴ In *Coshov*, where city residents sued the City of Escondido, California and the Department of Health Services for violating their constitutional rights by allegedly exposing residents to health risks via plans to fluoridate the city’s drinking water, the California Court of Appeals for the Fourth District stated: “There is no dispute [that] the right

93. 410 U.S. 113 (1973).

94. *Id.* at 153.

95. 494 U.S. 210 (1990).

96. *See id.* at 241 (stating that “a competent individual’s right to refuse . . . medication is a fundamental liberty interest deserving the highest order of protection”).

97. 497 U.S. 261 (1990).

98. *Id.* at 269 (stating that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . .”).

99. 521 U.S. 702 (1997).

100. *Id.* at 721 n.17 (1997) (citing *Cruzan by Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278–79 (1990)).

101. 81 P.3d 224 (Cal. 2004).

102. 34 Cal. Rptr. 3d 19 (Cal. Ct. App. 2005).

103. 81 P.3d at 224.

104. *Id.* at 230–31.

to bodily integrity is a *fundamental* right”—a right which “limits the traditional police powers of the state.”¹⁰⁵

III. VACCINATION'S ADVANTAGES AND DISADVANTAGES

A. *The Well-Known Advantages*

The upsides to vaccination are widely known and have been tirelessly expounded on by the CDC, Advisory Committee on Immunization Practices (ACIP), American Academy of Pediatrics, and American Academy of Family Physicians, as well as mainstream media. From the significant reduction rates in infection and mortality to the total and near eradication of certain infectious diseases,¹⁰⁶ there is no doubt that the practice is a major public health achievement.¹⁰⁷ To drive the point home, Table 1 lays out some compelling “before and after” statistics compiled by the CDC:

Location	Disease	Reported Cases Before Mass Inoculation	Reported Cases After Mass Inoculation
United States	Tetanus	486 in 1950	26 in 2013
United States	Mumps	152,209 in 1968	584 in 2013
United States	Rubella	46,975 in 1966	9 in 2013
United States	Paralytic Polio	33,300 in 1950	1 in 2013

Table 1. Reported Cases of Various Diseases from Vaccine Preventable Diseases.¹⁰⁸ The last two columns to the right compare the number of reported cases for specific diseases before and after mass inoculation.

105. *Coshov*, 34 Cal. Rptr. 3d at 30 (emphasis added). In its ultimate ruling for the defendants, the court distinguished fluoridating water as rationally related to the state's interest in protecting dental health from other invasive and highly personalized medical treatments like smallpox vaccinations. *Id.*

106. *See supra* notes 1–5 and accompanying text.

107. *See supra* note 4 and accompanying text.

108. CTRS. FOR DISEASE CONTROL & PREVENTION, EPIDEMIOLOGY AND PREVENTION OF VACCINE-PREVENTABLE DISEASES app. E, at E-1 to E-4 (Jennifer Hamborsky, Andrew Kroger & Charles Wolfe eds., 13th ed. 2015).

Additionally, there is the benefit of herd immunity, the phenomenon heralded by the pro-vaccine camp as immunization's biggest advantage, which refers to whole-community protection against infectious diseases when enough of the population is vaccinated.¹⁰⁹ Typically, when eighty to ninety-five percent of a community is immunized,¹¹⁰ the risk of disease will decrease, resulting in protection for all.¹¹¹ However, when too many people opt out, everyone becomes vulnerable.¹¹² The biggest threat to herd immunity occurs once the cumulative percentage of those willing to be immunized falls below the eighty to ninety-five percent threshold.¹¹³ Because some people cannot be vaccinated due to medical contraindications, the argument is that it is imperative to keep vaccination rates high enough in those who can be vaccinated.¹¹⁴

The counterargument to herd immunity is twofold. First, unvaccinated individuals may still be at risk for contracting the vaccine's targeted disease via germ shedding by vaccinated individuals.¹¹⁵ Second, immunity from vaccination inevitably wears off over time.¹¹⁶ Therefore, at some point, all vaccinated persons will once again become susceptible to contracting, carrying, and passing along the communicable disease for which they were previously immune.¹¹⁷

B. *The Lesser-Known Disadvantages*

To start, it is important to note that many anti-vacciners do not oppose the practice of vaccination in its entirety. Rather, their concerns are with particular aspects of the practice.¹¹⁸ In the interest of concision, this comment will only explore a few concerns—

109. Poreda, *supra* note 5, at 775.

110. *Id.* See also Jason L. Schwartz, Commentary, *Unintended Consequences: The Primacy of Public Trust in Vaccination*, 107 MICH. L. REV. 100, 102 (2009).

111. Escobar, *supra* note 1, at 258.

112. Garde, *supra* note 6, at 521.

113. See Escobar, *supra* note 1, at 258.

114. Schwartz, *supra* note 110, at 102.

115. Garde, *supra* note 6, at 521–22; see also BARBARA LOE FISHER, NAT'L VACCINE INFO CTR., THE EMERGING RISKS OF LIVE VIRUS & VIRUS VECTORED VACCINES: VACCINE STRAIN VIRUS INFECTION, SHEDDING & TRANSMISSION 12–13 (Nov. 2014), <http://www.nvic.org/Vaccines-and-Diseases.aspx> (explaining that individuals who receive live virus vaccines like the MMR, chickenpox, influenza nasal spray, rotavirus, and shingles vaccines can continue to shed and transmit vaccine strain live attenuated viruses for days, weeks, or even months depending on the vaccine as well as the health and other host factors of the vaccinated person).

116. Garde, *supra* note 6, at 522.

117. *Id.*

118. Poreda, *supra* note 5, at 805.

whether vaccines are safe, whether too many are administered too early on, and whether they are all equally important.

1. *Safety Concerns: Life-Threatening Side Effects, Complications, and Toxic Constituents*

Consider the tragic story of Sean Leary.¹¹⁹ On March 7, 1984, Sean Leary—a healthy two month and three week old baby—received his first dose of a combination vaccine for diphtheria, whooping cough, and tetanus (DPT).¹²⁰ On May 9, he received a second dose; and on August 22, he received a third.¹²¹ Beginning almost immediately after his third, Sean began exhibiting signs of discomfort, fussiness, restlessness, and general withdrawal.¹²²

Sean's mother, Mrs. Leary, noted he had vomited after only having taken half his bottle and showed no interest in eating for the rest of the day.¹²³ Sean was awake, but not active, and did not want to play or interact.¹²⁴ At approximately 7:00 p.m. on the night of August 23, Mrs. Leary laid Sean in his crib where he dozed off and on.¹²⁵ Beginning at midnight, he cried out every fifteen minutes or so until 2:00 a.m., when he retched violently.¹²⁶ Sean settled down by 4:00 a.m., but by then his breathing was faster than normal.¹²⁷ As soon as the doctor's office opened on the morning of August 24, Mrs. Leary took Sean in, but by the time they arrived, it was apparent something was horribly wrong.¹²⁸ At the doctor's office, Sean's skin exhibited a yellow-looking tinge, his eyes suddenly rolled back in his head, and his rapid breathing stopped.¹²⁹ Though he was rushed to the emergency room, Sean was pronounced dead at 1:44 p.m.¹³⁰

Although uncommon, Sean Leary's case illustrates the point that vaccines can cause injury—even death—in some situations.¹³¹ Thus, despite proponents' claim that vaccines are safe and effective,

119. *See* Leary v. Sec'y of Dep't of Health & Human Servs., No. 90-1456V, 1994 WL 43395 (Fed. Cl. Jan. 31, 1994).

120. *Id.* at *1.

121. *Id.*

122. *Id.* at *2.

123. *Id.* at *1-2.

124. *Id.* at *2.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See* Garde, *supra* note 6, at 512. *See also* Poreda, *supra* note 5, at 793-94; *Vaccines & Immunizations: Possible Side-Effects from Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 2, 2016), <https://www.cdc.gov/vaccines/vac-gen/side-effects.htm>.

the reality is that they are far from being “*perfectly safe [or] perfectly effective.*”¹³² Table 2 below lists other adverse effects of vaccines, as detailed by a 2011 report entitled, *Adverse Effects of Vaccines: Evidence and Causality*, by the Health and Medicine Division of The National Academies of Sciences, Engineering, and Medicine¹³³:

Name of Vaccine	Proven Adverse Effect(s)
Varicella zoster live vaccine	Meningitis or encephalitis (inflammation of the brain)
Mumps, measles, and rubella combination (MMR) vaccine	Measles inclusion body encephalitis and febrile seizures
MMR, varicella zoster, influenza, hepatitis B, meningococcal, and tetanus-containing vaccines	Anaphylaxis

Table 2. Summary of Adverse Effects of Vaccines According to the Institute of Medicine.¹³⁴ The table lists adverse effects of various vaccines for which there is convincing evidence to support a causal relationship.

An additional safety concern is the constituents that make up vaccines. Mercury and aluminum are the most widely discussed.¹³⁵ Regarding mercury, a 2014 article entitled “Methodological Issues and Evidence of Malfeasance in Research Purporting to Show Thimerosal in Vaccines Is Safe,” which was published in the journal *BioMed Research International*, provides evidence linking mercury to death, poisoning, allergic reactions, malformations, autoimmune reactions, developmental delays, and neurodevelopmental disorders like tics, language delay, attention deficit disorder, and autism in infants and children.¹³⁶ Regarding aluminum, various studies

132. Escobar, *supra* note 1, at 265 (emphasis added).

133. INST. OF MED., *supra* note 2, at 2–3. The Health and Medicine Division, formerly known as the Institute of Medicine, is a division of the National Academies of Sciences, Engineering, and Medicine. The Academies are private, nonprofit institutions that provide independent and objective analysis and advice for the purpose of informing the nation’s public policy decisions. More information can be found at: <http://www.nationalacademies.org/hmd/About-HMD.aspx>.

134. INST. OF MED., *supra* note 2, at 2–3.

135. See Horwin, *supra* note 27, at 333.

136. Brian Hooker et al., *Methodological Issues and Evidence of Malfeasance in Research Purporting to Show Thimerosal in Vaccines Is Safe*, 2014 BIOMED RES. INT’L 1, 1 (2014). See also A Shot of Truth, *CDC’s Vaccine Safety Research Is Exposed as Flawed and Falsified in*

have demonstrated that the element interferes with a variety of cellular and metabolic processes in the nervous system and in other tissues.¹³⁷ Even in diluted amounts,¹³⁸ aluminum has the potential to stimulate autoimmune syndromes,¹³⁹ chronic kidney failure,¹⁴⁰ and neurological dysfunction.¹⁴¹

2. *The Concern: "Too Many, Too Early On"*

Considering the potential side effects and complications of vaccines then, many opponents have expressed genuine concern that in today's world, giving children so many vaccines so early on might have negative consequences.¹⁴² To illustrate, compare the CDC's immunization schedules at various points in history.¹⁴³ Back in 1983, the CDC's immunization schedule recommended only nineteen doses of vaccines for both males and females.¹⁴⁴ By 2009, the number had jumped to 139 and 142 for males and females, respectively.¹⁴⁵ Although the number of recommended doses in the CDC's latest 2016 schedule is not vastly different from its 2009 schedule, it is startling that a person born in the 1960s only received vaccinations for polio, chickenpox, and DPT; while a person born today will

Peer-Reviewed Scientific Journal, HEALTH IMPACT NEWS (June 12, 2014), http://www.bizjournals.com/prnewswire/press_releases/2014/06/13/MN48236. This press release discusses BioMed Research International's article and points out the contradictions between the 165 studies demonstrating thimerosal's dangers and the 6 CDC coauthored and sponsored papers declaring thimerosal "safe." In it, Brian Hooker, the article's lead author, states: "This type of cherry-picking of data by the CDC . . . to support flawed and dangerous vaccination policies should not be tolerated." *Id.*

137. Horwin, *supra* note 27, at 333 & n.87.

138. *Id.* at 333. See also Paul Thomas, *A Sad Day for Medical Freedom: California Joins West Virginia and Mississippi in Removing Religious and Personal Vaccine Exemptions*, DR. THOMAS'S BLOG (July 2, 2015), <http://paulthomasmd.com/2015/07/02/a-sad-day-for-medical-freedom-california-joins-west-virginia-and-mississippi-in-removing-religious-and-personal-vaccine-exemptions/>. In his blog, Dr. Paul Thomas, M.D., a board-certified pediatrician in Portland, Oregon, points out that the hepatitis B vaccine contains 250 micrograms of aluminum, which far exceeds what the Food and Drug Administration (FDA) deems safe. Under the FDA's own guidelines, a newborn weighing 10.4 pounds should not get more than 25 micrograms. *Id.* Alarming, the hepatitis B vaccine is one of the very first administered to newborns.

139. 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, 71 & n.233 (2012).

140. Committee on Nutrition, *Aluminum Toxicity in Infants and Children*, 78 PEDIATRICS 1150, 1150 (1986).

141. *Id.*

142. Poreda, *supra* note 5, at 773; see also Horwin, *supra* note 27, at 327–28.

143. See *infra* notes 144–46.

144. Garde, *supra* note 6, at 526.

145. *Id.*

receive additional vaccinations for hepatitis B, rotavirus, Hib, pneumococcal conjugate, seasonal influenza, hepatitis A, human papillomavirus, and meningococcal.¹⁴⁶

Proponents dismiss the “too many too early” concern by arguing that the delay of vaccination provides no benefit,¹⁴⁷ all childhood vaccines are important,¹⁴⁸ and any concerns are scientifically unfounded.¹⁴⁹ While the first two arguments are debatable, the third is not. Science has never had a monopoly on facts—the scientific community makes enormous mistakes on a regular basis.¹⁵⁰ In other words, just because something has not been scientifically proven yet does not preclude its truth. To illustrate this point, consider the classic example of cigarette smoking.¹⁵¹

As far back as 1917, doctors attested to the safety of cigarette smoking.¹⁵² In the article, “Are Tobacco and Cigarettes Injurious?,” author and doctor P.C. Remondino wrote that he had “never observed any injuries blamable to the use of tobacco [or cigarettes].”¹⁵³ Corroborating this line of thought some sixteen years later, the *Journal of the American Medical Association (JAMA)* published its first cigarette advertisement stating it had done so only “after care-

146. See *Recommended Immunization Schedules for Persons Aged 0 Through 18 Years, United States, 2015*, CTRS. FOR DISEASE CONTROL & PREVENTION fig.1, <http://www.cdc.gov/vaccines/schedules/downloads/child/0-18yrs-child-combined-schedule.pdf> (last visited Jan. 21, 2016). In the current schedule, the CDC recommends: three doses of hepatitis B; up to three doses of Rotavirus; five doses of Diphtheria, tetanus, and acellular pertussis (DTaP); one dose of tetanus, diphtheria, and acellular (Tdap); four doses of haemophilus influenzae type b (Hib); four doses of Pneumococcal conjugate; four doses of inactivated poliovirus; annual doses of influenza; two doses of measles, mumps, and rubella (MMR); two doses of varicella; two doses of hepatitis A; three doses of Human papillomavirus; and two doses of meningococcal. *Id.* But see Ctrs. for Disease Control & Prevention, *Achievements in Public Health, 1900–1999: Control of Infectious Diseases*, 48 MORBIDITY & MORTALITY WKLY. REP. 621 (1999), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm4829a1.htm> (stating that improved sanitation, hygiene, sewage disposal, water treatment, food safety, and public education about hygienic practices beginning in the 1900s have already significantly decreased the incidence of diseases. What is odd is that the number of required vaccines for children keeps increasing when society’s standards of living have never been higher).

147. Aaron E. Carroll, *Not up for Debate: The Science Behind Vaccination*, N.Y. TIMES (Sept. 17, 2015), http://www.nytimes.com/2015/09/18/upshot/not-up-for-debate-the-science-behind-vaccination.html?smid=fb-nytimes&smtyp=cur&_r=0.

148. *Id.*

149. Poreda, *supra* note 5, at 773.

150. Mike Adams, *Infographic: Vaccine Industry Science Lies Are Nothing More Than Recycled Big Tobacco Science Lies*, NATURAL NEWS (Mar. 3, 2015), http://www.naturalnews.com/048847_Big_Tobacco_science_lies_vaccine_propaganda.html.

151. See P.C. Remondino, *Are Tobacco and Cigarettes Injurious?*, 33 MEDICO-LEGAL J. 9, 13 (1917).

152. See *id.*

153. *Id.*

ful consideration of the extent to which cigarettes were used by physicians in practice.”¹⁵⁴ By 1941, not only had smoking gained near universal acceptance and appeal,¹⁵⁵ but it also had the full support of the American Medical Association.¹⁵⁶ There was virtually no scientific evidence to the contrary¹⁵⁷ until 1950, when the *JAMA* published its first major study linking smoking to lung cancer.¹⁵⁸ To apply pro-vacciners’ reasoning is akin to saying that cigarette smoking was not dangerous before 1950 because science had not yet discovered it to be so.¹⁵⁹

3. *Not All Vaccines Are Equally Important*

Not all vaccines are equally important. Unlike measles or whooping cough, which can spread rapidly through schools and pose serious corollary health problems, some diseases, like hepatitis B, are less severe,¹⁶⁰ which raises the question of whether vaccines for such diseases are essential.¹⁶¹

Hepatitis B, caused by the hepatitis B virus (HBV), is a liver infection that can be passed to uninfected persons via blood, semen, or some other bodily fluid.¹⁶² Sexual contact and the sharing of drug paraphernalia with those infected are the most common ways to

154. Mike Adams, *Doctors, American Medical Association Hawked Cigarettes as Healthy for Consumers*, NATURAL NEWS (July 25, 2007), <http://www.naturalnews.com/021949.html>.

155. See Allan M. Brandt, *THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA 2* (2007); see also graphicsfx, *More Doctors Smoke Camels Than Any Other Cigarette*, YOUTUBE (Nov. 11, 2006), <https://youtu.be/gCMzjJjuxQI>.

156. See Mike Adams, *Big Tobacco Ad from 1953 Sums Up the Scientific Fraud of the Entire Vaccine Industry Today*, NATURAL NEWS (Mar. 3, 2015), http://www.naturalnews.com/048846_science_lies_Big_Tobacco_vaccine_industry.html.

157. See Adams, *supra* note 154 (stating that a 1930 study in Cologne, Germany, was the only research at the time to make a statistical correlation between cancer and smoking, but the tobacco industry dismissed it as anecdotal).

158. Morton L. Levin, Hyman Goldstein & Paul Gerhardt, *Cancer and Tobacco Smoking: A Preliminary Report*, 143 *JAMA* 336, 336 (1950). See also Adams, *supra* note 154.

159. See Michael Schuller, *A Toxic History Lesson*, CNN (June 3, 2010, 6:53 PM), <http://www.cnn.com/2010/HEALTH/06/03/ddt.toxic.america/index.html> (naming lead and dichlorodiphenyltrichloroethane (DDT) as other things that were assuredly safe before science discovered they were not). See also Sanjay Gupta & Elizabeth Cohen, *Formaldehyde Among Substances Added to Cancer List*, CNN (June 13, 2011), <http://thechart.blogs.cnn.com/2011/06/13/formaldehyde-among-those-added-to-cancer-list/> (reporting the official addition of formaldehyde to the National Toxicology Program’s “list of substances known to cause cancer” and adding that the “move [came] after years of delays prompted by critics, including the chemical industry, who [claimed] the studies used to establish the link to cancer [were] not based on science”).

160. Poreda, *supra* note 5, at 806.

161. See *id.* at 773–74.

162. *Viral Hepatitis*, CTNS. FOR DISEASE CONTROL & PREVENTION (May 31, 2015), <http://www.cdc.gov/hepatitis/hbv/index.htm>.

contract the disease,¹⁶³ but newborns are also at risk if their mothers have the HBV.¹⁶⁴ This is precisely why medical professionals routinely test pregnant women and implement protective safeguards for the babies whose mothers test positive.¹⁶⁵ In light of the fact that the individuals who are most vulnerable are those who share intravenous needles, engage in promiscuous unprotected sex, or work in the health care sector, then¹⁶⁶ it is a mystery why the HBV vaccine is one of the first vaccines that the CDC recommends to *every single* newborn within the first twelve hours of birth—even before hospital discharge.¹⁶⁷

IV. WHAT THIS MEANS FOR SB-277

A. *Open to Constitutional Attack?*

Time and again,¹⁶⁸ courts have looked to *Jacobson* to uphold mandatory vaccination laws.¹⁶⁹ Its impact has been far reaching to say

163. See Thomas, *supra* note 138.

164. Holland, *supra* note 139, at 67. See also *Viral Hepatitis: Perinatal Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 19. 2017), <https://www.cdc.gov/hepatitis/hbv/perinatalexmtn.htm>.

165. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 164.

166. Horwin, *supra* note 27, at 334.

167. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 108, at 161. See generally Holland, *supra* note 139, at 68–76 & nn.237 & 268. Holland’s article reports that in 1982, the ACIP only recommended the HBV vaccine to those at substantial risk—approximately five percent of the American population. By 2005, however, the ACIP was recommending the vaccine to *all* infants. To get to the bottom of this, the Association of American Physicians and Surgeons (Association) filed a Freedom of Information Act request, seeking all of the CDC’s safety data on the vaccine. Still awaiting an answer in 2011, and armed with evidence linking HBV vaccines to autism, the Association issued a statement that the ACIP’s failure to respond was “damning”—at-birth HBV vaccine recommendations had been made “without conducting proper safety studies in babies beforehand.” Additionally, considering that revenues in the United States from HBV vaccines totaled \$468.1 million in 2003, some scholars have concluded that the ACIP’s dramatic change in tune could have only been financially motivated. There was no medical rationale for introducing the vaccine to infants and young children. Vaccinating this group to avoid disease later on in adulthood, especially when immunity tended to wear out, did not make medical sense.

168. Lawrence O. Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576, 577 & 578 tbl.1 (2005) (counting 69 times that *Jacobson* was cited). See also *Whitlow v. Cal., Dep’t of Educ.*, 203 F. Supp. 3d 1079 (S.D. Cal. 2016).

169. See, e.g., *supra* notes 61–62 and accompanying text. See also *Whitlow*, 203 F. Supp. 3d at 1083.

the least.¹⁷⁰ As long as states pay respect to the floor of constitutional protections established by the *Jacobson* Court,¹⁷¹ even coercive vaccine mandates¹⁷² have generally passed constitutional muster.¹⁷³ Add to this the doctrine of *parens patriae*, which entered the vaccination jurisprudence scene in 1944,¹⁷⁴ and one might even argue that a state's power nowadays to enforce vaccination laws is absolute. Accordingly, proponents of vaccines should feel confident that courts would uphold SB-277 in the same fashion then, right? Not so fast. While it is true that the United States District Court for the Southern District of California has already denied a motion for a preliminary injunction enjoining the state of California from enforcing SB-277,¹⁷⁵ the bill may still be susceptible to attack.

1. *Disallowing Non-Medical Exemptions Disregards Established Fundamental Liberty Interests and Relying on Jacobson Requires Adherence to Outdated Legal Principles*

The first ground on which SB-277 could be susceptible to constitutional attack is if courts continue to rely on *Jacobson*¹⁷⁶ despite the bill's disregard for established fundamental liberty interests.¹⁷⁷ Government action that allegedly infringes upon a fundamental liberty interest demands strict scrutiny review,¹⁷⁸ but this is not what the *Jacobson* Court employed.¹⁷⁹ By deeming the board of health's authority not "unreasonable or arbitrary,"¹⁸⁰ the Court, in actuality, employed a primitive version of rational basis review.¹⁸¹

Understandably, the Supreme Court could not have applied strict scrutiny review back in 1905—neither the current standards of review nor any of the privacy and bodily integrity rights at stake here

170. Richins, *supra* note 50, at 416.

171. Gostin, *supra* note 168, at 576 (stating that the floor of constitutional protections consist of four standards: necessity, reasonable means, proportionality, and harm avoidance).

172. Poreda, *supra* note 5, at 795.

173. See Gostin, *supra* note 168, at 576.

174. See *supra* notes 58–59.

175. See *Whitlow v. Cal., Dep't of Educ.*, 203 F. Supp. 3d 1079 (S.D. Cal. 2016).

176. Gostin, *supra* note 168, at 578 tbl.1.

177. See S.B. 277, 2015–2016 Reg. Sess. (Cal. 2015) (infringing on privacy and bodily integrity rights by mandating vaccines notwithstanding objections based on personal beliefs).

178. See *Zablocki v. Redhail*, 434 U.S. 374, 381 (1978); *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 548 (1977); *Poe v. Ullman* 367 U.S. 497, 543 (1961); Richins, *supra* note 50, at 420.

179. See *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

180. *Id.*

181. Ben Horowitz, *A Shot in the Arm: What a Modern Approach to Jacobson v. Massachusetts Means for Mandatory Vaccinations During a Public Health Emergency*, 60 AM. U. L. REV. 1715, 1733; see also Richins, *supra* note 50, at 422.

existed then.¹⁸² Today though, courts are in much different positions. Where fundamental rights are at issue, courts must apply the heightened standard of analysis.¹⁸³ Foregoing it in favor of *Jacobson*'s age-old irrelevant one is inappropriate¹⁸⁴—maybe even erroneous. As some scholars have aptly stated, the century-old doctrines of *Jacobson* are so incompatible with modern judicial developments¹⁸⁵ that a large part of the Court's analysis should be considered a “relic of a bygone era” when civil liberties were not so important.¹⁸⁶

2. *SB-277's HBV Vaccine Mandate Fails Strict Scrutiny Review and Implicates Equal Protection Issues*

The second ground on which SB-277 is susceptible to constitutional attack has to do with its mandate for the HBV vaccine.¹⁸⁷ Because fundamental liberty rights demanding strict scrutiny review are at stake,¹⁸⁸ California must come up with a narrowly tailored “compelling interest and least restrictive means” argument¹⁸⁹ to justify the vaccine's inclusion. For the following reasons, California may find it difficult to do so.

First, to assert a compelling state interest, California would have to show that preventing school-aged children from contracting the HBV infection is a necessity¹⁹⁰—a necessity so “overbalancing” and “weighty” on the constitutional scale¹⁹¹ that it would justify limiting fundamental privacy and bodily integrity rights. Studies indicate

182. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (demonstrating that it took thirty-three years after *Jacobson* for the United States Supreme Court to even hint at a heightened standard of judicial review: “[P]rejudice against discrete and insular minorities may be a special condition, . . . which may call for a correspondingly more searching judicial inquiry”). See also *supra* Sections II.D.2–3 (outlining the evolution of privacy and bodily integrity rights).

183. Today, strict scrutiny analysis is well established. *Planned Parenthood of Southeastern Pennsylvania v. Casey* sets forth the test like so: “[L]imitations on the right of privacy are permissible only if . . . the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest.” 505 U.S. 833, 929 (1992).

184. Horowitz, *supra* note 181, at 1733.

185. *Id.* at 1749.

186. *Id.* at 1733. See also Note, *Towards a Twenty-First-Century Jacobson v. Massachusetts*, 121 HARV. L. REV. 1820, 1835 (2008).

187. S.B. 277, 2015–2016 Reg. Sess. (Cal. 2015).

188. Horowitz, *supra* note 181, at 1749.

189. See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

190. Holland, *supra* note 139, at 81.

191. *Braunfeld v. Brown*, 366 U.S. 599, 613–14 (1961) (Brennan, J., concurring and dissenting) (describing “compelling state interest” as an interest so “overbalancing” and “weighty [on] the constitutional scale” that it justifies government limitation on established fundamental freedoms. In this case, free exercise of religion was the right at issue).

the opposite is true though. The incidence of HBV infection among children is extremely low,¹⁹² which means two things: (1) children are not the ones most at risk;¹⁹³ and (2) the HBV vaccine is of little benefit to them.¹⁹⁴ So, while California could point to the vaccine's approval by the Food and Drug Administration (FDA) and ACIP as demonstrative of its reasonableness,¹⁹⁵ a reasonable state interest is barely a compelling one.¹⁹⁶

Second, supposing California could even pass the first hurdle, it would then have to prove that the HBV vaccine mandate is the least restrictive means of achieving its ultimate goal—prevention of the entire population, not just children, from contracting the disease.¹⁹⁷ Because immunity from the HBV vaccine inevitably wears off by adulthood,¹⁹⁸ mandating the vaccine for children alone¹⁹⁹ can hardly be argued as the least restrictive means.

That being said, imposing the HBV vaccine solely on this age group may also give rise to equal protection issues.²⁰⁰ As the group who has the least risk for contracting the disease, children are the ones who must bear the risks that are associated with vaccination.²⁰¹ A child petitioner might very well make a case for discrimination, seeing as how the adult population, which is demonstrably at far greater risk, is exempted.²⁰²

192. Holland, *supra* note 139, at 81. *See also supra* Section III.B.3 and accompanying notes.

193. *See* Holland, *supra* note 139, at 81.

194. *See supra* Section III.B.3 and accompanying notes.

195. *See* Holland, *supra* note 139, at 81.

196. *See id.* at 81, 84.

197. S.B. 277, 2015–2016 Reg. Sess. § 1(a) (Cal. 2015); Ctrs. for Disease Control & Prevention, *The Adult Hepatitis Vaccine Project—California, 2007–2008*, 59 MORBIDITY & MORTALITY WKLY. REP. 514 (2010).

198. *See* Thomas, *supra* note 138 (reporting that only twenty-four percent of people who received the HBV vaccine as infants still had immunity as teenagers).

199. *See* Holland, *supra* note 139, at 84; *supra* Section III.B.3. California does not mandate the HBV vaccine for adults—even those at high risk. For example, in the context of industrial safety, California merely provides that employers must make the HBV vaccine available to employees who, through their occupation, get exposed to blood borne pathogens. If an employee declines the HBV vaccine, he or she only has to sign a statement of acknowledgment. *See* CAL. CODE REGS. tit. 8, §§ 5160, 5193(f)(2)(D) & app. A (1993).

200. Holland, *supra* note 139, at 84.

201. *Id.* at 81.

202. *Id.* at 84.

B. *Suggestions for Amendments*

1. *Allow for Non-Medical Exemptions with Safeguards to Protect Against Abuse and Make the HBV Vaccine Optional*

Non-medical exemptions help balance public health and personal liberty interests.²⁰³ They allow parents who sincerely disagree with one or more aspects of an immunization program to opt out of compliance.²⁰⁴ Although the bill's supporters argue that the exclusion of all non-medical exemptions prevents abuse by those likely to invoke exemptions for non-valid and non-sincere reasons,²⁰⁵ there is a better way.

Studies show an inverse relationship between the complexity of requirements and the proportion of parents claiming exemptions for their children.²⁰⁶ Thus, states with the most complex procedures for obtaining exemptions exhibit the lowest opt-out rates.²⁰⁷ The non-medical exemption framework ("Framework") proposed by the Johns Hopkins group²⁰⁸ in Arkansas in the aftermath of *Boone v. Boozman*²⁰⁹ would carry over well if applied to SB-277.

The Framework requires parents wishing to invoke non-medical exemptions to prove that their beliefs are sincere and well informed,²¹⁰ and the best way to do this is to make exemptions difficult to obtain.²¹¹ In a nutshell, the hurdles proposed by the Framework include having to meet with a doctor or public health official for individual counseling, annually renewing the exemption, and composing a statement stating: (1) the reason for requesting the exemption; (2) the parent's belief that the vaccination is inappropriate for the child; (3) the duration the parent has held the belief; (4) the parent's understanding that the child may be removed from school in the event of an outbreak; and (5) the parent's confirmation that

203. Poreda, *supra* note 5, at 780.

204. *See id.* at 780–81.

205. *See* Melissa Jenco, *FAAP Helps Change California Vaccine Law*, AAP NEWS (June 30, 2015), <http://aapnews.aapublications.org/content/early/2015/06/30/aapnews.20150630-1>. *See also* Poreda, *supra* note 5, at 792.

206. Jennifer S. Rota et al., *Processes for Obtaining Nonmedical Exemptions to State Immunization Laws*, 91 AM. J. PUB. HEALTH 645, 647 (2001).

207. *Id.* at 647 fig.1; Poreda, *supra* note 5, at 791.

208. Poreda, *supra* note 5, at 798 & n.235.

209. *Boone v. Boozman*, 217 F. Supp. 2d 938 (2002). *See* Poreda, *supra* note 5, at 798 & n.230.

210. Poreda, *supra* note 5, at 807.

211. *Id.* at 799.

he or she has received counseling concerning the vaccine's risks and benefits.²¹² Obviously, the inconvenience is deliberate.²¹³

If California adopts the Framework, it can better balance parents' interests with its own. Face to face counseling will assure that parents are not making uninformed decisions to opt out while the annual renewal process will assure that parents who do opt out re-evaluate their decision in subsequent years.²¹⁴ California will have the added bonus of affording itself the opportunity to educate parents and dispel so-called misperceptions about vaccines.²¹⁵ And on the flip side, doctors and public health officials will be able to learn more about parents' concerns and the bases for these concerns.

Regarding the HBV vaccine, the solution is simpler. Because it is not likely to survive a strict scrutiny analysis, California should make it optional or exclude it altogether from SB-277's mandatory list.

V. CONCLUSION

As a sponsor of SB-277, Senator Richard Pan expressed hope that the bill would cause parents to receive information about vaccines, engage in meaningful conversations with health care professionals, rethink their concerns about vaccines, and become more open to listening to actual science and facts whilst turning away from the "misinformation that's been peddled [about] by too many people."²¹⁶ What Senator Pan has turned a blind eye to, though, is the fact that SB-277's current exclusion of all non-medical exemptions adheres to an outdated legal standard that fails to take into account established fundamental personal liberty interests. Furthermore, SB-277's inclusion of non-essential vaccines like the HBV vaccine is not narrowly tailored enough—the specific mandate will likely not survive strict scrutiny analysis.

Add to this the sentiment shared by many people that SB-277 was rushed through California's Legislature by lawmakers who used the Disneyland measles outbreak as an excuse to increase government control.²¹⁷ For this group, the question is not whether to

212. *Id.* at 800.

213. *Id.*

214. *Id.*

215. *Id.* at 793.

216. Jenco, *supra* note 205.

217. Kroner & Donnelly, *supra* note 32 (reporting that "[i]t wasn't 'responsible Californians' who voted to deny parents' rights to make informed decisions about their child[ren's] health; it was 24 California senators who used the Disneyland measles outbreak as an excuse to increase government control" and also: "[T]here were 125 confirmed cases Of

vaccinate, but whether parents should have the right to make informed medical decisions about their children's health.²¹⁸

California can certainly enact SB-277 but its makers should be mindful about aspects of the bill that could falter under constitutional attack. Even though courts have relied on *Jacobson* up until this point to uphold mandatory vaccination laws, they may face increasingly difficult problems in continuing to do so, especially in light of the judiciary's growing recognition of fundamental privacy and bodily integrity rights. SB-277 has a much better chance at withstanding constitutional attack if it allows for non-medical exemptions and makes the HBV vaccine optional. Procedural obstacles will safeguard against abuse, and the bill, as a whole, will stand a better chance of surviving a heightened standard of review.

those 125 cases, 110 patients were California residents and only 49 were totally unvaccinated. This means that more than 50 percent of those who actually got the measles were, in fact, vaccinated").

218. *Id.*

