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## A Shot in the Arm: What a Modern Approach to Jacobson v. Massachusetts Means for Mandatory Vaccinations During a Public Health Emergency

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A Shot in the Arm: *What a Modern Approach to Jacobson v. Massachusetts Means for Mandatory Vaccinations During a Public Health Emergency*

A SHOT IN THE ARM: WHAT A MODERN  
APPROACH TO *JACOBSON V.*  
*MASSACHUSETTS* MEANS FOR MANDATORY  
VACCINATIONS DURING A PUBLIC HEALTH  
EMERGENCY

BEN HOROWITZ\*

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## INTRODUCTION

On April 2, 2009, five-year-old Edgar Hernandez came home from school with a fever, a sore throat, and a headache so bad his eyes hurt.<sup>1</sup> It was improbable that a boy from the small village of La Gloria, in the state of Veracruz, Mexico, would ever achieve notoriety;<sup>2</sup> however, within one month, Edgar would be known throughout the world as “patient zero.”<sup>3</sup>

By May, every region in the United States was affected by the H1N1 influenza virus, and the number of cases reached 1,000.<sup>4</sup> Just one month later, the number of U.S. cases grew to 18,000.<sup>5</sup> “The virus is not stoppable,” warned World Health Organization director Margaret Chan.<sup>6</sup> In mid-September, more than five months after “patient zero,” the FDA announced the approval of H1N1 vaccines.<sup>7</sup> Within the first three months of the vaccination program, “61 million Americans—about a quarter of the U.S. population—were vaccinated . . . .”<sup>8</sup>

Before the H1N1 outbreak, during a resurgence in health-related legislation,<sup>9</sup> many states enacted regulations authorizing legislatures and boards of health to impose vaccination mandates;<sup>10</sup> however, these powers were largely unutilized in response to the H1N1 outbreak, due in large part

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1. *I Feel Great, Says Five-year-old Mexican Boy Living near ‘Ground Zero’ Pig Farm who May Hold the Key to Swine Flu Outbreak*, MAIL ONLINE (Apr. 30, 2009, 10:28 AM), <http://www.dailymail.co.uk/news/worldnews/article-1174270/I-feel-great-says-year-old-Mexican-boy-living-near-ground-zero-pig-farm-hold-key-swine-flu-outbreak.html> [hereinafter *I Feel Great*]; Olga R. Rodriguez, *Patient Zero? Mom of First Confirmed Case Talks*, MSNBC.COM (Apr. 28, 2009, 9:11 PM), [http://www.msnbc.msn.com/id/30461857/ns/health-infectious\\_diseases](http://www.msnbc.msn.com/id/30461857/ns/health-infectious_diseases).

2. *I Feel Great*, *supra* note 1.

3. *Earliest Case of Swine Flu Tucked Away in Mexico, Officials Say*, CNN.COM (Apr. 28, 2009), [http://articles.cnn.com/2009-04-28/health/swine.flu\\_1\\_swine-flu-common-flu-flu-outbreak?\\_s=PM:HEALTH](http://articles.cnn.com/2009-04-28/health/swine.flu_1_swine-flu-common-flu-flu-outbreak?_s=PM:HEALTH).

4. *H1N1: Meeting the Challenge*, FLU.GOV, <http://flu.gov/timeline> (click “May” on timeline) (last visited July 7, 2011).

5. *Id.* (click “June” on timeline).

6. Caleb Hellerman, *Swine Flu ‘Not Stoppable,’ World Health Organization Says*, CNN.COM (June 11, 2009), [http://articles.cnn.com/2009-06-11/health/swine.flu.who\\_1\\_swine-flu-first-flu-pandemic-h1n1?\\_s=PM:HEALTH](http://articles.cnn.com/2009-06-11/health/swine.flu.who_1_swine-flu-first-flu-pandemic-h1n1?_s=PM:HEALTH).

7. *H1N1: Meeting the Challenge*, *supra* note 4 (click “September” on timeline).

8. CLARE STROUD ET AL., *THE 2009 H1N1 INFLUENZA VACCINATION CAMPAIGN: SUMMARY OF A WORKSHOP SERIES*, 1 (2010), available at <http://www.nap.edu/catalog/12992.html>.

9. See Lorena Matei, Note, *Quarantine Revision and the Model State Emergency Health Powers Act: “Laws for the Common Good,”* 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 433, 434 (2002) (describing the renewed focus on health law in the aftermath of September 11, 2001).

10. *The Model State Emergency Health Powers Act: State Legislative Activity*, CTR. FOR LAW & THE PUB.’S HEALTH AT GEORGETOWN & JOHNS HOPKINS UNIVS. (July 15, 2006), <http://www.publichealthlaw.net/MSEHPA/MSEHPA%20Leg%20Activity.pdf> [hereinafter *Legislative Surveillance Table*].

to the limited availability of the vaccine.<sup>11</sup> In New York, the State Board of Health enacted an emergency regulation requiring all healthcare personnel to receive the seasonal influenza and H1N1 vaccinations.<sup>12</sup> Employees and many unions challenged the law; however, the merits were never addressed.<sup>13</sup> Rather, the state suspended the program and withdrew the regulation purportedly due to inadequacy of the vaccine supply.<sup>14</sup>

While the H1N1 outbreak brought vaccination law to the forefront of the country's conscience, the doctrine's roots are ancient.<sup>15</sup> Over a century ago, the Supreme Court first considered<sup>16</sup> a broad vaccination mandate in *Jacobson v. Massachusetts*.<sup>17</sup> The Court upheld the Massachusetts regulation, and, in so doing, provided the foundation for expanded government powers in the realm of public health.<sup>18</sup> In the years since this

11. See *H1N1: Meeting the Challenge*, *supra* note 4 (click "December" on timeline) (noting that prior to December 2009, vaccine supply was not sufficient for states to extend their vaccination efforts to the general public).

12. 10 NYCRR Subpart 66-3: Health Care Personnel—Influenza Vaccination Requirements, Amending Title 10 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (Aug. 13, 2009), available at [http://biotech.law.lsu.edu/blaw/H1N1-2009/2009-08-13\\_health\\_care\\_personnel\\_influenza\\_vaccination\\_requirements.pdf](http://biotech.law.lsu.edu/blaw/H1N1-2009/2009-08-13_health_care_personnel_influenza_vaccination_requirements.pdf).

13. Anemona Hartocollis & Sewell Chan, *Albany Judge Blocks Vaccination Rule*, N.Y. TIMES, Oct. 17, 2009, at A17.

14. See Press Release, Governor David A. Paterson Announces Suspension of Flu Shot Mandate for Health Care Employees Due to Shortage of Vaccine (Oct. 22, 2009), available at [http://www.governor.ny.gov/archive/paterson/press/press\\_1022094.html](http://www.governor.ny.gov/archive/paterson/press/press_1022094.html) (citing vaccination shortage as the grounds for the suspension of the mandatory vaccination program); see also Letter from Richard F. Daines, Commissioner of Health, N.Y. State Dep't of Health, Suspension of Flu Vaccine Mandate for Health Care Workers (Oct. 23, 2009), available at [http://www.health.state.ny.us/diseases/communicable/influenza/seasonal/providers/2009-10-23\\_suspension\\_of\\_mandatory\\_influenza\\_immunization.htm](http://www.health.state.ny.us/diseases/communicable/influenza/seasonal/providers/2009-10-23_suspension_of_mandatory_influenza_immunization.htm) (recommending that the vaccination mandate be suspended because supplies of the vaccination were insufficient and not readily available). But see Jacob Goldstein, *New York Ends Flu Shot Mandate for Health Care Workers*, WALL ST. J. HEALTH BLOG (Oct. 23, 2009, 8:35 AM), <http://blogs.wsj.com/health/2009/10/23/new-york-ends-flu-shot-mandate-for-health-care-workers/> (noting that the statement of the Governor conspicuously excluded mention of the temporary restraining order a New York judge had granted challengers of the program just one week earlier).

15. KATHLEEN S. SWENDIMAN, CONG. RESEARCH SERV., RS 21414, MANDATORY VACCINATIONS: PRECEDENT AND CURRENT LAWS 1 (2011) (describing Massachusetts' first mandatory vaccination law passed in 1809).

16. See LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 66 (2000) (explaining that in early American jurisprudence, the Court treated public health regulations as unreviewable under the separation of powers doctrine).

17. 197 U.S. 11 (1905).

18. See *People v. Adams*, 597 N.E.2d 574, 581 (Ill. 1992) (relying on *Jacobson* in providing that "states enjoy broad discretion in devising means to protect and promote public health"); see also GOSTIN, *supra* note 16, at 67 ("The legacy of *Jacobson* surely is its defense of social welfare philosophy and unstinting support of police power regulation."). Gostin contends that courts rely on *Jacobson* in four distinct ways: (1) to allow regulation of individuals and businesses for public health and safety; (2) to limit liberty when promoting the common good; (3) to authorize broad grants of power from legislatures to public health agencies; and (4) to provide for deference to legislatures and agencies in the exercise of their powers. Lawrence O. Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576, 578-79 (Apr.

opinion, courts have consistently relied upon *Jacobson* to authorize state legislatures to mandate vaccinations in the interest of public health.<sup>19</sup>

This Comment argues that, in light of post-*Jacobson* jurisprudence, freedom from vaccination is a fundamental right requiring strict scrutiny review by the courts, but that a properly crafted vaccination mandate can survive such scrutiny. Part I of this Comment outlines the Court's holding in *Jacobson*, identifies the origins of fundamental rights and strict scrutiny review, and traces the development of the right to refuse medical treatment. It also describes the Model State Emergency Health Powers Act<sup>20</sup> and the codification of its provisions by states. Part II then explains why the right to refuse vaccination is a fundamental right requiring strict scrutiny review and considers whether typical components of vaccination statutes would be upheld in the event of a constitutional challenge. Part III considers the effect that an alternative interpretation of *Jacobson* would have on vaccination mandates absent a public health emergency.<sup>21</sup> Finally, this Comment concludes by asserting that, with the proper statutory mechanisms, states can mandate vaccinations in a public health emergency and survive a constitutional challenge.

## I. BACKGROUND

### A. *Protection of Public Health in Jacobson v. Massachusetts*

Immunization became the subject of much debate at the start of the twentieth century<sup>22</sup> when a smallpox outbreak in the Northeast spread rapidly, killing hundreds and infecting thousands.<sup>23</sup> One hundred cases were reported in Massachusetts alone in 1900.<sup>24</sup> In 1901, there were 773 cases and 97 deaths; in 1902, the infected population multiplied to include 2,314 individuals, 284 of whom died.<sup>25</sup> Relying on a Massachusetts statute

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2005).

19. See *Zucht v. King*, 260 U.S. 174, 176 (1922) (providing that it is “settled that it is within the police power of a state to provide for compulsory vaccination”); *Boone v. Boozman*, 217 F. Supp. 2d 938, 958 (E.D. Ark. 2002) (upholding Arkansas’ mandatory student immunization requirement as constitutional).

20. The Model State Emergency Health Powers Act, CTR. FOR LAW & THE PUB.’S HEALTH AT JOHNS HOPKINS & GEORGETOWN UNIVS. (2001), available at <http://www.publichealthlaw.net/MSEHPA/MSEHPA.pdf> [hereinafter MSEHPA].

21. See discussion *infra* Part III (describing courts’ reliance on *Jacobson*’s deferential standard of review in upholding vaccination mandates in other contexts).

22. As author Dr. Paul Offit points out, controversy over vaccination mandates was widespread throughout the nineteenth century in England but did not materialize in the United States until the turn of the century. PAUL A. OFFIT, DEADLY CHOICES: HOW THE ANTI-VACCINE MOVEMENT THREATENS US ALL 108–09, 125–27 (2011).

23. Wendy E. Parmet et al., *Individual Rights Versus the Public’s Health—100 Years After Jacobson v. Massachusetts*, 352 NEW ENG. J. MED. 652, 653 (Feb. 2005).

24. *Id.*

25. *Id.*

that granted city boards of health the authority to require vaccination when “necessary for the public health or safety,”<sup>26</sup> the city of Cambridge issued an order requiring the adult population to be vaccinated for smallpox.<sup>27</sup> The statutory penalty for refusing a vaccination was a five dollar fine.<sup>28</sup> Reverend Henning Jacobson refused the vaccination, citing concerns over the vaccination’s safety and claiming that he and his son had previously experienced adverse reactions to vaccinations.<sup>29</sup> After his refusal, Jacobson was tried and ordered to pay the fine or else be committed.<sup>30</sup> Jacobson refused to pay the fine and appealed the decision.<sup>31</sup> After an unsuccessful appeal to the Supreme Judicial Court of Massachusetts, the Supreme Court of the United States agreed to hear his case.<sup>32</sup>

Jacobson proffered several justifications for why the vaccination regulation was unconstitutional;<sup>33</sup> however, the Court focused on his claim that compelled vaccination was “inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the state.”<sup>34</sup> Justice Harlan, writing for the 7–2 majority, first noted that promulgating such regulations and vesting the power to enforce orders in municipalities or boards of health is well within the states’ police powers.<sup>35</sup> In assessing Jacobson’s claim that the mandate violated his liberty interest, the Court held that protection of the public welfare warrants such infringement in this case.<sup>36</sup> “[A]ll rights are subject

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

27. Wendy Mariner, *Jacobson v. Massachusetts: It’s Not Your Great-Great-Grandfather’s Public Health Law*, 95 AM. J. PUB. HEALTH 581, 582 (Apr. 2005).

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

29. *Id.* at 36; Mariner, *supra* note 27, at 582. There has been some confusion regarding the basis for Jacobson’s refusal of the vaccination. While the brief filed by Jacobson was riddled with religious rhetoric, the Court only addressed the health concern advanced by Jacobson. *Jacobson*, 197 U.S. at 36; *see also* Sheldon Gelman, *The Biological Alteration Cases*, 36 WM. & MARY L. REV. 1203, 1207 n.22 (1995) (clarifying that *Jacobson* is frequently miscited as a case of religious refusal of vaccination and that the Court referred to religion only in dicta).

30. *Jacobson*, 197 U.S. at 14.

31. *See* Parmet et al., *supra* note 23, at 652 (explaining that both the trial courts and the Supreme Judicial Court of Massachusetts upheld his conviction).

32. *Commonwealth v. Pear*, 66 N.E. 719, 722 (Mass. 1903), *aff’d sub nom. Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

33. The Court summarily rejected several of Jacobson’s arguments, including that the vaccine was ineffective and dangerous and that the regulation was “opposed to the spirit of the Constitution.” *Jacobson*, 197 U.S. at 14, 22, 23.

34. *Id.* at 24.

35. *See id.* at 25 (reiterating that police powers include the power to legislate for the public health and that “[i]t is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health”). This principle has survived and is the norm in public health law. While there exists a federal statute that authorizes the Executive to prevent the spread of disease, state and local governments retain primary responsibility for protecting the public health. *See* SWENDIMAN, *supra* note 15 (attributing this authority to the state’s police powers).

36. *Jacobson*, 197 U.S. at 26.

to such reasonable conditions . . . essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will."<sup>37</sup> Justice Harlan then stressed the necessity of protecting the common good,<sup>38</sup> emphasizing that the common good at stake in *Jacobson* was considerable and that the regulation was levied as a means to "meet and suppress the evils of a smallpox epidemic that imperiled an entire population."<sup>39</sup>

Another hallmark of *Jacobson* is the Supreme Court's continued express deference to state legislatures when reviewing their public health legislation.<sup>40</sup> In *Jacobson*, the Court considered only whether the regulation was reasonable under the circumstances, and was extremely deferential in its review.<sup>41</sup> It even went so far as to say that it would be "usurp[ing] the functions of another branch of government if it adjudged . . . [that the vaccination mandate] was not justified by the necessities of the case."<sup>42</sup> The only limit the Court provided was that it would interfere to protect a citizen if a grant or exercise of power by the legislature was arbitrary, unreasonable, or far beyond what was reasonably required to ensure the public's safety.<sup>43</sup>

The Court in *Jacobson* acknowledged that choosing the appropriate method to protect the welfare of the community is within the purview of the legislature.<sup>44</sup> Accordingly, it deferred to the Massachusetts legislature's findings regarding the safety of the smallpox vaccine, noting that the possibility that such findings may eventually be proven wrong was not conclusive.<sup>45</sup> While the Court dismissed Jacobson's argument that he should be exempt from the vaccination mandate for health reasons,<sup>46</sup> it did say, in dicta, that some individuals should be exempt for health reasons.<sup>47</sup>

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37. *Id.* at 26–27 (quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1890)).

38. *Id.* at 27.

39. *Id.* at 30–31. Justice Harlan added that a community has the right to protect itself against an epidemic of disease that threatens the safety of its members because of the principles of self-defense and of necessity. *Id.* at 27.

40. B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 296 (2007) (emphasizing that *Jacobson* is "striking and important" because of its deference to the legislature's discretion when protecting the public welfare).

41. *Jacobson*, 197 U.S. at 28.

42. *Id.*

43. *Id.* The Court provided *Railroad Co. v. Husen*, 95 U.S. 465, 471 (1877) as an example of such a case. *Jacobson*, 197 U.S. at 28. The state laws in *Husen* were enacted under the guise of public welfare, but were not reasonably necessary and were thus unconstitutional. 95 U.S. at 472–73.

44. *Jacobson*, 197 U.S. at 27.

45. *Id.* at 35.

46. *See id.* at 36 (reasoning that the defendant had not offered any proof that he was not fit for vaccination by implying that he was medically unfit when he was a child).

47. *See id.* (clarifying that if someone was subjected to vaccination despite being reasonably certain that it would seriously impair his health or cause his death, then the Court

Nonetheless, the Court continued its deferential approach and suggested that even if a mandatory vaccination statute failed to provide a medically contraindicated exemption,<sup>48</sup> it would be read into the statute.<sup>49</sup>

Not long after the Court ruled in *Jacobson*, the tenets of the opinion were challenged in *Zucht v. King*.<sup>50</sup> In San Antonio, Texas, student Rosalyn Zucht disobeyed a state ordinance requiring student vaccinations before enrollment in public school.<sup>51</sup> After she was barred from attending school, she brought suit to challenge the state law.<sup>52</sup> In reaffirming the holding of *Jacobson*, the Court did not squarely address Zucht's argument that the mandatory vaccination policy denied her liberty without due process of law; instead, it relied on the broad deference granted to the state in *Jacobson*, and upheld the ordinance.<sup>53</sup> Further, the Court stressed that a municipality may vest broad discretion in officials to apply and enforce health law,<sup>54</sup> so long as this grant of power is not arbitrary.<sup>55</sup> The Court's endorsement of *Jacobson* quelled challenges of vaccination mandates in the years following the opinion,<sup>56</sup> but historic developments in constitutional jurisprudence remained on the horizon.<sup>57</sup>

### B. *Strict Scrutiny and the Fundamental Right*

The deferential approach taken by the Supreme Court in *Jacobson* was the standard practice for decades;<sup>58</sup> however, review of government action underwent comprehensive change in the middle of the twentieth century.<sup>59</sup>

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would intervene).

48. Vaccination is "medically contraindicated" when, "in the judgment of a health care professional, the vaccine would be positively detrimental to an individual's health beyond minor anticipated adverse effects." Matt Lasher, Note, *Improving Indiana's Mandatory Immunization Programs*, 7 IND. HEALTH L. REV. 117, 135 (2010) (citation omitted).

49. See *Jacobson*, 197 U.S. at 39 (applying a "sensible construction" of the statute in presuming that the legislature did not intend to mandate vaccination of those that were medically contraindicated, and noting that this would be the Court's interpretation unless otherwise directed by the Supreme Judicial Court of Massachusetts).

50. 260 U.S. 174 (1922).

51. *Id.* at 175.

52. *Id.*

53. *Id.* at 176. *Zucht* is widely considered a reaffirmation of *Jacobson* because Justice Brandeis denied jurisdiction on the grounds that the constitutional question presented was not substantial in character; in so holding, the Court cited *Jacobson* as settling the matter. *Id.*

54. *Id.*

55. *Id.* at 177.

56. See Note, *Toward a Twenty-First-Century Jacobson v. Massachusetts*, 121 HARV. L. REV. 1820, 1824–25 (2008) (describing the weakening of the anti-vaccination movement following *Zucht* in light of the Court's rejection of the constitutional claims).

57. See discussion *infra* Part I.B (discussing the development of the strict scrutiny and fundamental rights doctrines).

58. See discussion *infra* Part I.B (identifying the foundation of heightened scrutiny as occurring more than a quarter century after *Jacobson*).

59. See generally Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 355–56 (2006) (providing a comprehensive

It was then that the Court adopted a more exacting standard of review, which it deemed appropriate whenever the government employed a suspect classification or burdened a fundamental right.<sup>60</sup> This transformation of constitutional jurisprudence<sup>61</sup> started with the Court's passing mention of a less deferential approach,<sup>62</sup> and, four decades later, became a comprehensive bifurcated test.<sup>63</sup>

While the Court did not expressly mention the phrase "strict scrutiny" as a means of reviewing constitutional issues until *Skinner v. Oklahoma*<sup>64</sup> in 1942, scholars have widely accepted that the Supreme Court implied this form of review three years earlier in *United States v. Carolene Products Co.*<sup>65</sup> While *Carolene Products* unremarkably dealt with the interstate shipment of milk,<sup>66</sup> it "retains its fascination solely because of Footnote 4—the most celebrated footnote in constitutional law."<sup>67</sup> The footnote provided that a "more searching judicial inquiry" was appropriate where there is "prejudice against discrete and insular minorities."<sup>68</sup> In addition to heightened scrutiny for such minorities, Justice Stone's footnote also introduced the possibility of heightened scrutiny for rights guaranteed by the Bill of Rights.<sup>69</sup>

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history of strict scrutiny review and tracing its development in the Warren Court).

60. *Id.* at 355.

61. *See id.* at 357 ("[S]trict scrutiny rapidly blossomed into one of the late-twentieth century's most fundamental constitutional doctrines.").

62. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that "[t]here may be narrower scope for . . . the presumption of constitutionality," but explaining that it was unnecessary to determine which rights call for a more exacting judicial scrutiny).

63. *See Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (enumerating the strict scrutiny test in the context of government interference with a fundamental right). Both the beginning and the closing stages of strict scrutiny development are the subject of some debate. Compare G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 301–02 (1996) (arguing that strict scrutiny actually found its origins "several years earlier [than *Carolene Products*] and was centered on speech cases"), with Siegel, *supra* note 59, at 357 (identifying the end of the "birthing process" fifteen years before *Zablocki* was decided).

64. 316 U.S. 535, 541 (1942).

65. 304 U.S. 144, 152 n.4 (1938); *see* Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1088 (1982) (recognizing that *Carolene Products* is considered the "primary source of 'strict scrutiny' judicial review" and is credited by some scholars for commencing a new era in constitutional law).

66. *Carolene Prods.*, 304 U.S. at 145–46.

67. Powell, *supra* note 65, at 1087.

68. *Carolene Prods.*, 304 U.S. at 152 n.4; *see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798 (2006) (explaining that footnote four was dicta, and that the holding of the case effectively overturned the doctrine of economic due process by applying rational basis review to economic legislation).

69. *See id.* (articulating that the presumption of constitutionality may be narrowed "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments"); *see also* Powell, *supra* note 65, at 1087–88 (explaining that the footnote was both restrained and provocative, because it noted that heightened scrutiny for certain rights was unnecessary to consider, but suggested that it should be employed in other specific circumstances).

Only a few years later, in *Skinner*, the Supreme Court predicted the future direction of strict scrutiny and of its application.<sup>70</sup> At issue in *Skinner* was an Oklahoma act that required sterilization for certain habitual criminals.<sup>71</sup> The Court declared the law unconstitutional and made its first mention of the phrase “strict scrutiny.”<sup>72</sup> While the Court expressly used the equal protection violation as the basis for striking down the legislation,<sup>73</sup> it also expressed the importance of the liberty interest being infringed upon: “[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are *fundamental* to the very existence and survival of the race.”<sup>74</sup>

Two years later, in *Korematsu v. United States*,<sup>75</sup> the Court expounded upon the idea of strict scrutiny, holding that “the most rigid scrutiny” is appropriate for classifications based on race and national origin.<sup>76</sup> The Court in *Korematsu* was faced with determining the constitutionality of an Executive Order that compelled Japanese Americans to relocate to internment centers during World War II.<sup>77</sup> The Court upheld the order and determined that government interests in a time of war are paramount,<sup>78</sup> noting that “[p]ressing public necessity may sometimes justify the existence of such restrictions.”<sup>79</sup>

In the immediate aftermath of *Korematsu*, the Court restricted its use of heightened scrutiny to cases involving the Equal Protection Clause.<sup>80</sup> In the years following, however, the Court expanded the application of strict

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70. See *Shapiro v. Thompson*, 394 U.S. 618, 660 (1969) (Harlan, J., dissenting) (describing *Skinner* as foreshadowing the use of the compelling state interest test); *Skinner v. Oklahoma*, 316 U.S. 535, 535 (1942).

71. *Skinner*, 316 U.S. at 536.

72. *Id.* at 541. While *Skinner* helped form the basis of what would become strict scrutiny, the Court did not really apply the test with the non-deferential approach that is currently employed. See *id.* (explaining that while “the instant legislation runs afoul of the equal protection clause,” the Oklahoma legislature is nonetheless afforded great deference); see also ERWIN CHEMERINKSY, *CONSTITUTIONAL LAW* 723 (3d ed. 2009) (“[T]he Court found that the right to procreate was a fundamental right and *essentially* used strict scrutiny under the Equal Protection Clause to analyze the government’s discrimination.”) (emphasis added); Siegel, *supra* note 59, at 359 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 146 n.38 (1980)) (describing the Court’s inquiry as “minimal scrutiny with bite”).

73. *Skinner*, 316 U.S. at 538.

74. *Id.* at 541 (emphasis added).

75. 323 U.S. 214 (1944).

76. *Id.* at 216.

77. *Id.*

78. See *id.* at 219 (describing the increased burden that citizens are expected to bear in times of war).

79. *Id.* at 216.

80. See Siegel, *supra* note 59, at 355–56 (describing the Court’s “hiatus” from applying strict scrutiny following *Skinner* and *Korematsu*); Winkler, *supra* note 68, at 801 (noting that after a period of dormancy, strict scrutiny was not applied to other areas of law until the late 1950’s).

scrutiny review to include government violations of fundamental rights.<sup>81</sup>

A fundamental right is one that the Court deems so important that the government cannot infringe upon it without meeting the heightened scrutiny standard.<sup>82</sup> A right is considered fundamental if it is “deeply rooted in [the] Nation’s history and tradition.”<sup>83</sup> The Supreme Court has enumerated certain fundamental rights, such as the rights to travel, to vote, and to free speech; with regard to these rights, the Court applies some form of heightened scrutiny to government encroachment.<sup>84</sup>

The development of strict scrutiny and its application to fundamental rights soon became formulaic, requiring a compelling government interest and means narrowly tailored to further those interests.<sup>85</sup> For example, in *Zablocki v. Redhail*,<sup>86</sup> the Court explained that, if a requirement imposed by a State “significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests<sup>87</sup> and is closely tailored to effectuate only those interests.”<sup>88</sup>

The purpose of the bifurcated approach is to determine whether the asserted government interest is important enough to justify the abridgment of “core constitutional rights.”<sup>89</sup> Though there is no succinct way to

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81. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1274–75 (2007) (describing the development and application of strict scrutiny after *Korematsu*).

82. *Moore v. City of E. Cleveland*, 431 U.S. 494, 537 (1977) (Stewart, J., dissenting); see also *Moore*, 431 U.S. at 546 (White, J., dissenting) (interpreting *Roe v. Wade*, 410 U.S. 113, 152 (1973) and *Paul v. Davis*, 424 U.S. 693, 713 (1976), as determining that where personal interests deemed implicit in the concept of ordered liberty are at stake, heightened protection is appropriate).

83. *Moore*, 431 U.S. at 503 (plurality opinion).

84. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 630–31 (1969) (applying strict scrutiny after establishing the right to interstate travel as a fundamental right); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667, 670 (1966) (stating that the right to vote is a fundamental right protected by the Constitution, which “must be closely scrutinized and carefully confined”); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (striking down a law that regulated speech because of the lack of a compelling interest, further providing that regulations of certain freedoms must be precise).

85. Winkler, *supra* note 68, at 800.

86. 434 U.S. 374 (1978).

87. While the majority opinion uses the phrase “sufficiently important state interests,” it is widely recognized that to overcome strict scrutiny the government interest must be “compelling,” which is the term used in Justice Powell’s concurrence. *Id.* at 396 (Powell, J., concurring).

88. *Id.* at 388 (majority opinion). Note that the majority opinion found the fundamental right of marriage to be protected under the Equal Protection Clause, while Justice Stewart’s concurrence used a substantive due process approach. *Id.* at 391–92 (Stewart, J., concurring). According to Professor Erwin Chemerinsky, this distinction is not practically significant. CHEMERINKSY, *supra* note 72, at 944. Chemerinsky asserts that little depends on whether the Court uses the Due Process Clause or the Equal Protection Clause as the basis for protecting a fundamental right. *Id.* “Under either provision, the Court must decide whether a claimed liberty is sufficiently important to be regarded as fundamental . . . . Also, once a right is deemed fundamental, under due process or equal protection, strict scrutiny is generally used.” *Id.*

89. *Republican Party of Minn. v. White*, 416 F.3d 738, 750 (8th Cir. 2005) (en banc) (explaining strict scrutiny analysis as a test to determine whether both the means and the

determine whether a purported interest is sufficiently compelling,<sup>90</sup> it is somewhat self-evident that it needs to be “extremely important” or “of the highest order.”<sup>91</sup> The second prong of strict scrutiny helps elucidate whether an interest is sufficiently compelling,<sup>92</sup> also requiring that the regulation be “narrowly tailored to serve that interest.”<sup>93</sup> For a law to be narrowly tailored, it must avoid broad grants of discretion,<sup>94</sup> sweeping “too broadly” as to be “overinclusive,” leaving “significant influences bearing on the interest unregulated” so that it is “underinclusive,” and it must be the least restrictive means of achieving its goal.<sup>95</sup> So long as a government infringement on a fundamental right satisfies these requirements and serves a sufficiently compelling interest, it will survive judicial review.<sup>96</sup>

### C. *Individual Liberty and the Right to Refuse Medical Treatment*

Because the enhanced protection of fundamental rights and the expansion of liberty and privacy rights did not occur until the latter half of the twentieth century, the right to refuse medical treatment is relatively new.<sup>97</sup> In 1990, the Supreme Court first considered this right when it decided *Washington v. Harper*.<sup>98</sup> In *Harper*, the Court examined a prisoner’s challenge to the procedure provided to him before being administered psychiatric medication against his will.<sup>99</sup> While the Court found that the procedures provided were sufficient,<sup>100</sup> it inched closer to declaring that the right to decline medical treatment is a fundamental right: “[There is] a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the

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ends of a regulation are sufficient to justify encroachment on a fundamental right).

90. *See id.* at 749 (outlining various attempts at defining what constitutes a compelling interest and noting that they are imprecise).

91. *Id.* (citations omitted).

92. *See id.* at 750 (pointing to the “tightness of the fit between the regulation and the purported interest”—which is at the heart of the narrow tailoring analysis—as helping determine whether an interest is actually compelling).

93. *Id.* at 751.

94. *See Ward v. Rock Against Racism*, 491 U.S. 781, 793–94 (1989) (stating that facial challenges to overly broad regulations have been permitted when the regulations grant unchecked discretion to government officials to encroach on a fundamental right).

95. *White*, 416 F.3d at 751.

96. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003) (upholding a policy with a racial classification under strict scrutiny because it was narrowly tailored to serve a compelling interest, and noting that not all regulations subject to strict scrutiny are invalidated by it).

97. *See Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 270 (1990) (articulating that, until recently, “the number of right-to-refuse-treatment decisions was relatively few”).

98. 494 U.S. 210 (1990).

99. *Id.* at 210.

100. *Id.* at 222–23 (holding that the procedures met the less strict standard that is appropriate for evaluating infringements on the liberty of prisoners, as determined by *Turner v. Safley*, 482 U.S. 78 (1987)).

Fourteenth Amendment.”<sup>101</sup>

That same year, the Supreme Court directly addressed the right to refuse medical treatment in *Cruzan v. Missouri Department of Health*.<sup>102</sup> Nancy Cruzan, a victim of a car accident, was left in a vegetative state.<sup>103</sup> Doctors found no indication of cognitive function; Cruzan was kept alive by a feeding and hydration tube attached to her body.<sup>104</sup> Her parents sued the hospital, which had refused their request to remove the nutrition and hydration treatment.<sup>105</sup> A state trial court determined that Cruzan had a fundamental right to “refuse or direct the withdrawal of ‘death prolonging procedures.’”<sup>106</sup> The court found that a previous conversation between Cruzan and her friend was sufficiently clear to represent her wish to forego life-sustaining treatment.<sup>107</sup> The Supreme Court of Missouri reversed,<sup>108</sup> and her parents appealed.

The Supreme Court affirmed the decision of the Supreme Court of Missouri, primarily because Cruzan was not competent, effectively approving the state’s determination that Cruzan’s statement to her friend was not clear and convincing evidence of her wishes.<sup>109</sup> While the Court’s decision rested on the determination that she was not competent, rather than on constitutional grounds, Chief Justice Rehnquist’s plurality opinion did “assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”<sup>110</sup> This plurality opinion further supplied the basis for such an assumption by relying on common law principles of battery<sup>111</sup> and

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101. *Id.* at 221–22.

102. 497 U.S. 261 (1990).

103. *Id.* at 265–66.

104. *Id.*

105. *Id.* at 267–68.

106. *Id.* at 268.

107. *See id.* (explaining that this conversation was “somewhat serious” and that, in it, Cruzan expressed she would not wish to continue her life “unless she could live at least halfway normally”).

108. *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988) (en banc), *aff’d sub nom. Cruzan v. Mo. Dep’t. of Health*, 497 U.S. 261 (1990).

109. *See Cruzan*, 497 U.S. at 283–84 (plurality opinion) (ruling that errors made in interpreting a patient’s wishes that lead to keeping the patient alive are preferable to errors that result in removal of life sustaining treatment; therefore, states are permitted to impose a clear and convincing evidence standard despite the fact that this heightened standard may result in keeping patients alive who would prefer to be removed from life support); *see also* John A. Robertson, *Cruzan and the Constitutional Status of Nontreatment Decisions for Incompetent Patients*, 25 GA. L. REV. 1139, 1144–45 (1991) (“While recognizing constitutional limits on the state’s power to override a *competent person’s* refusal of medical treatment, the Court gave states wide discretion . . . in decisions concerning *incompetent patients.*”) (emphasis added).

110. *Cruzan*, 497 U.S. at 279 (plurality opinion).

111. *Id.* at 269 (“[N]o right is held more sacred, or is more carefully guarded . . . 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.”) (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

informed consent.<sup>112</sup> While Chief Justice Rehnquist stopped short of declaring the right to refuse medical treatment a fundamental right, other Justices were not so hesitant and expressly recognized this right.<sup>113</sup> Had Nancy Cruzan been competent, the Court presumably would have found a fundamental right,<sup>114</sup> and strict scrutiny would have been employed.<sup>115</sup>

The Court repeated its approach of assuming that a constitutional right to refuse medical treatment exists when it considered a challenge to Washington State's ban on physician-assisted suicide in *Washington v. Glucksberg*.<sup>116</sup> The Court distinguished the interest at issue in *Cruzan* based on the notion that refusal of medical treatment has traditionally been protected, whereas the right to commit suicide has not enjoyed similar legal protection.<sup>117</sup> Thus, the Court held that the right to assistance in committing suicide was not fundamental<sup>118</sup> and upheld the ban under rational basis review.<sup>119</sup> The Court did, however, reaffirm and reiterate the fundamental right that was assumed in *Cruzan*, noting that "the right to refuse unwanted medical treatment [is] so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment."<sup>120</sup> As Justice Souter reinforced in his concurring opinion, a substantial infringement on the right to refuse medical treatment would be met with strict scrutiny and sustained only if it was narrowly tailored to serve a compelling state interest.<sup>121</sup>

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112. *Id.* at 269–70 (explaining that the informed consent doctrine is "firmly entrenched in American tort law" and, as a result, patients generally have the right to refuse unwanted treatment).

113. *See id.* at 289 (O'Connor, J., concurring) (asserting that individuals have a right, protected by the Due Process Clause, to refuse medical treatment); *id.* at 305 (Scalia, J., concurring) ("[F]reedom 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.'" (citation omitted)).

114. *See* CHEMERINKSY, *supra* note 72, at 1048 (observing that five Justices expressly recognized the right to refuse treatment in *Cruzan*).

115. *See Cruzan*, 497 U.S. at 303 (Scalia, J., concurring) (stating that, were a fundamental right at issue, the Missouri action would be scrutinized under the strict scrutiny standard set forth in *Zablocki*).

116. 521 U.S. 702 (1997).

117. *Id.* at 725; *see also* Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL'Y 599, 661 (2000) (explaining that the fundamental right to refuse medical treatment is based on common law battery, while assisted suicide and euthanasia are not afforded the protections associated with bodily integrity and unwanted physical invasions).

118. *Glucksberg*, 521 U.S. at 728.

119. *Id.* at 735.

120. *Id.* at 721 n.17 (citing *Cruzan*, 497 U.S. at 278–79).

121. *See id.* at 772 n.12 (Souter, J., concurring) (reiterating the use of strict scrutiny in reviewing regulations that infringe upon a fundamental right).

D. *Public Health Emergencies and the Model State Emergency Health Powers Act*

In the aftermath of September 11, 2001, and in response to the accompanying fears of possible bioterrorism, the Centers for Law and the Public's Health at Johns Hopkins and Georgetown Universities drafted the Model State Emergency Health Powers Act (MSEHPA).<sup>122</sup> The MSEHPA, which quotes from Justice Harlan's opinion in *Jacobson*,<sup>123</sup> was aimed at granting powers to protect public health to state and local authorities for use in times of public health emergencies to ensure effective prevention and response.<sup>124</sup> Over the next several years, most states enacted portions of the MSEHPA's language.<sup>125</sup>

Central to the MSEHPA is its definition of a public health emergency:<sup>126</sup>

[A]n occurrence or imminent threat of an illness or health condition that . . . poses a high probability of any of the following harms: (i) a large number of deaths in the affected population; (ii) a large number of serious or long-term disabilities in the affected population; or (iii) widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.<sup>127</sup>

This definition is widely used and has been adopted by approximately half of the states.<sup>128</sup> The MSEHPA provision that state or local officials may vaccinate individuals to protect them against infectious diseases and to prevent potentially contagious diseases from spreading in the event of a public health emergency<sup>129</sup> is also employed by many states.<sup>130</sup> The MSEHPA does provide a basic opt-out procedure for those who "are unable or unwilling for reasons of health, religion, or conscience to undergo vaccination . . ." <sup>131</sup> People who are unable or unwilling to be vaccinated, however, are subject to quarantine or to isolation.<sup>132</sup>

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122. MSEHPA, *supra* note 20.

123. *Id.*

124. *Id.* § 103.

125. As of 2006, thirty-eight states and the District of Columbia had passed bills that incorporated some portions of the MSEHPA. *Legislative Surveillance Table, supra* note 10.

126. See George J. Annas, *Blinded by Bioterrorism: Public Health and Liberty in the 21st Century*, 13 HEALTH MATRIX 33, 49 (2003) (explaining that the definition of a public health emergency provides the conditions that must be present for a governor to properly declare an emergency exists).

127. MSEHPA, *supra* note 20, § 104(m).

128. *Legislative Surveillance Table, supra* note 10.

129. MSEHPA, *supra* note 20, § 603.

130. *Legislative Surveillance Table, supra* note 10.

131. MSEHPA, *supra* note 20, § 603(a)(3).

132. *Id.* The MSEHPA also provides appropriate procedures for ordering quarantine, including stipulations that it shall be implemented by the "least restrictive means necessary," that individuals must have the opportunity to challenge a quarantine order, and that a failure to obey an order results in a misdemeanor. *Id.* §§ 604, 605. Quarantine and isolation are often understood as synonymous; however, they are considered distinct

States' implementation of the MSEHPA has varied greatly, with some states enacting most of its essential provisions and others disregarding it completely.<sup>133</sup> The extremes are evident when examining individual states' emergency health and vaccination laws. Arizona, for example, offers a broad grant of power to state authorities in the event of a public health emergency.<sup>134</sup> The Arizona statute provides that, if a highly contagious and highly fatal disease spreads, the governor may "[m]andate treatment or vaccination of persons who are diagnosed with illness resulting from exposure or who are reasonably believed to have been exposed or who may reasonably be expected to be exposed."<sup>135</sup> The Florida public health emergency statute similarly includes a broad grant of power,<sup>136</sup> but also incorporates a specific provision dealing with actual enforcement of the mandatory vaccinations,<sup>137</sup> a provision that the MSEHPA does not include.<sup>138</sup> If quarantine is impracticable, the Florida statute authorizes state health officials to use "any means necessary to vaccinate or treat the individual."<sup>139</sup>

At the other end of the spectrum is Minnesota, which eschews mandatory vaccinations as a whole<sup>140</sup> and requires authorities to provide notice of the individual's right to refuse.<sup>141</sup> The Georgia emergency powers statute, which offers various procedural checks and safeguards along with its provision for expanded powers, is a more moderate

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concepts by many public health experts. *See* Jason Marisam, *Local Governance and Pandemics: Lessons from the 1918 Flu*, 85 U. DET. MERCY L. REV. 347, 359 n.85 (2008) (noting the distinction that the MSEHPA provides and that isolation and quarantine are commonly confused). The MSEHPA distinguishes the two by defining quarantine as the confinement and separation of those who are or may have been exposed to the disease but *do not show signs or symptoms*, MSEHPA, *supra* note 20, § 104(o) (emphasis added), while isolation is the confinement and separation of those who are infected or are reasonably believed to be infected with the disease, *id.* § 104(h). This Comment will consider them interchangeable, which is consistent with the approach of most state legislatures. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 36-781, 787(C)(2) (2002) (using both terms without providing definitions); GA. CODE ANN. § 38-3-51 (Supp. 2010) (using the word "quarantine" exclusively).

133. *See Legislative Surveillance Table, supra* note 10; *supra* text accompanying note 128 (referring to the number of states that have enacted various provisions of the MSEHPA).

134. ARIZ. REV. STAT. ANN. § 36-787.

135. *Id.* § 36-787(C).

136. FLA. STAT. ANN. § 381.00315 (West Supp. 2011).

137. *Id.*

138. *See supra* note 132 and accompanying text (outlining the MSEHPA's procedures for quarantine, but not identifying any procedures for compelling vaccination itself).

139. FLA. STAT. ANN. § 381.00315(1)(b)4.b. While Arizona does not include similar detail, the power to compel through force can be inferred; Arizona's statute provides that the governor may issue orders mandating vaccination, and that law enforcement officials "shall enforce [such] orders." ARIZ. REV. STAT. ANN. § 36-787(C)-(D).

140. *See* MINN. STAT. ANN. § 12.39 (West Supp. 2010-11) (providing that, even in a public health emergency, "individuals have a fundamental right to refuse medical treatment, testing, physical or mental examination [and] vaccination").

141. *Id.*

approach.<sup>142</sup> Georgia sets forth expedited procedures that allow its legislature to swiftly review a governor's emergency declaration,<sup>143</sup> and its courts to review vaccination and quarantine programs.<sup>144</sup>

The inconsistency among the states is attributable to varying legislative philosophies,<sup>145</sup> but is also a consequence of the uncertainty regarding how the Supreme Court would treat a challenge to a broad vaccine mandate in light of the emphasis on individual liberty in modern courts.<sup>146</sup> Some advocate federalizing vaccination law as a means to deal with such disparity;<sup>147</sup> however, an interpretation of *Jacobson* that is consistent with evolving jurisprudence would provide the necessary guidelines to ensure effective, constitutional vaccination mandates.

## II. NARROWING *JACOBSON* AND SURVIVING STRICT SCRUTINY

An examination of modern substantive due process jurisprudence demonstrates that the right to refuse vaccination is a fundamental right.<sup>148</sup> This right can be inferred from the Supreme Court's review of the right to refuse medical treatment, which is similarly engrained in the nation's history and traditions.<sup>149</sup> Because infringements upon fundamental rights require strict scrutiny analysis,<sup>150</sup> *Jacobson*'s broad authorization of vaccination mandates, which was based on a deferential standard of review,<sup>151</sup> must be abandoned.

Although a reviewing court must apply strict scrutiny to a vaccination

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142. GA. CODE ANN. § 38-3-51 (Supp. 2010).

143. See *id.* § 38-3-51(a) (imposing the requirement that the state legislature convene within two days of the declaration "for the purpose of concurring with or terminating the public health emergency").

144. See *id.* § 38-3-51(i)(2) (outlining the due process procedures for a challenge of a vaccination or quarantine order, which include providing expanded access to the courts, shifting the burden of proof to the government, and an expedited appellate process).

145. Compare ARIZ. REV. STAT. § 36-787 (2002) (granting the state broad authority to enforce mandatory vaccinations during a public health emergency), with MINN. STAT. ANN. § 12.39 (supporting an individual's fundamental right to refuse medical treatment).

146. See Annas, *supra* note 126, at 55 (stressing that jurisprudence has changed a great deal since *Jacobson*, particularly with a new emphasis on protecting constitutional rights, including the right to refuse any medical treatment).

147. See generally Sara Mahmoud-Davis, Note, *Balancing Public Health and Individual Choice: A Proposal for a Federal Emergency Vaccination Law*, 20 HEALTH MATRIX 219, 252 (2010) (proposing amending the Public Health Service Act to authorize federal authorities to mandate vaccinations in certain circumstances).

148. See discussion *infra* Part II.A.

149. Compare *Gray v. Romeo*, 697 F. Supp. 580, 584–85 (D.R.I. 1988) (asserting that the right to make medical decisions affecting one's body is deeply rooted in the country's history and tradition, and pointing to precedent dating back to the nineteenth century), with *infra* notes 162–163 and accompanying text (finding that the right to be free from forced vaccination has extensive historical roots associated with unwanted touching and with assault and battery).

150. See discussion *supra* Part I.B.

151. Hill, *supra* note 40, at 296.

mandate, situations and mechanisms exist that would allow vaccination mandates to survive such scrutiny.<sup>152</sup> A public health emergency, which involves a substantial threat to the entire population, is a sufficiently compelling government interest to satisfy the first prong of the strict scrutiny analysis.<sup>153</sup> While the end in such circumstances is compelling—preventing an epidemic—examining the current public health legislative landscape reveals that many statutes could not survive the narrow tailoring prong of strict scrutiny review.<sup>154</sup> For a vaccination mandate to be valid, it must eliminate broad grants of discretion and exclude most opt-out provisions to avoid underinclusiveness and overinclusiveness issues.<sup>155</sup> Because there are no less restrictive alternatives that are sufficiently effective,<sup>156</sup> a well-crafted vaccination statute with appropriate provisions and procedures for quelling a public health emergency would withstand a constitutional challenge.

#### A. *The Right to Refuse Vaccination as a Fundamental Right*

The determination that the right to refuse vaccination is fundamental rests on the right's roots in the nation's history and tradition.<sup>157</sup> Some courts interpret *Jacobson* as providing the historical foundation for permitting vaccination mandates.<sup>158</sup> However, the Court in *Jacobson* infringed upon an individual's liberty without the enhanced protections of current constitutional jurisprudence<sup>159</sup> and determined that the infringement was warranted under the circumstances.<sup>160</sup>

The inquiry into the history and tradition of mandatory vaccinations

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152. See *infra* note 175 (discrediting the assumption that the application of strict scrutiny review invariably leads to the invalidation of a law).

153. See discussion *infra* Part II.B.

154. See discussion *infra* Part II.C.

155. See discussion *infra* Parts II.C, II.E.

156. See discussion *infra* Part II.D.

157. See *Lawrence v. Texas*, 539 U.S. 558, 593 n.3 (2003) (Scalia, J., dissenting) (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997)) (explaining that the historical analysis is the starting point of substantive due process inquiry, and emphasizing that, in addition to being deeply rooted in history and tradition, an asserted fundamental right must also be implicit in the concept of ordered liberty).

158. See, e.g., *Boone v. Boozman*, 217 F. Supp. 2d 938, 956–57 (E.D. Ark. 2002) (listing *Jacobson* among other cases in determining that requiring school children to be vaccinated is deeply rooted in history and tradition).

159. See discussion *supra* Parts I.B, I.C (describing the emergence of the fundamental rights doctrine and the expanded protections provided for personal medical decisions).

160. See *Jacobson v. Massachusetts*, 197 U.S. 11, 26–27 (1905) (“Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will.”). *But see Lawrence*, 539 U.S. at 571 (expressing that history and tradition are the starting points for the substantive due process inquiry, but laws and traditions of the past half century may be the most relevant); *Michael H. v. Gerald D.*, 491 U.S. 110, 138, (1989) (Brennan, J., dissenting) (explaining that evolving Supreme Court jurisprudence must be considered when conducting the historical inquiry regarding fundamental rights because common law notions no longer adequately define liberty rights guaranteed by the Constitution).

parallels the analysis conducted by Chief Justice Rehnquist in *Cruzan*.<sup>161</sup> The circumstances surrounding mandatory vaccinations are similarly violative of the common law doctrines of battery and informed consent.<sup>162</sup> Not only was the unauthorized touching of a human being a potential assault or battery at common law, courts in the nineteenth century dealt specifically with forced vaccinations and implied that compelling one to be vaccinated without consent would be deemed an assault.<sup>163</sup>

Recognizing the difference between vaccinations and the treatments at issue in *Cruzan* and *Glucksberg* also leads to the conclusion that the right to refuse vaccination is a fundamental right.<sup>164</sup> This right is akin to the fundamental right to be free from unwanted medical treatment, as opposed to the right to physician-assisted suicide that the Court declined to deem fundamental in *Glucksberg*.<sup>165</sup> In fact, due to their forceful nature, compulsory vaccinations go beyond mere medical treatment.<sup>166</sup>

Significant legal consequences flow from the determination that the right to be free from mandatory vaccinations is a fundamental right—most notably that regulations significantly infringing upon this right will be analyzed under strict scrutiny.<sup>167</sup> However, the Court's deferential

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161. See *supra* text accompanying notes 111–112 (reviewing the history of the right to refuse medical treatment).

162. See *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 437 (Ariz. 2003) (en banc) (explaining that it is well established that a health care provider performing a medical procedure, such as an injection, without a patient's consent commits a common law battery, and further describing two theories of liability that courts recognize for unwanted medical treatment: a traditional intentional tort claim for battery and a negligence claim for lack of informed consent); see also 1 WILLIAM BLACKSTONE, COMMENTARIES \*129, \*134 (proffering that a person's uninterrupted enjoyment of his life, body, and health is among the principal rights of all mankind, and includes the guarantee of preserving one's health from practices that may prejudice or annoy it).

163. See *O'Brien v. Cunard*, 28 N.E. 266, 266 (Mass. 1891) (holding that no assault had taken place because the vaccination was absent force, and consent was properly inferred). Even without this specific historical background, deriving the right to refuse vaccination from the traditional doctrines of informed consent and battery is consistent with well-founded constitutional principles. See *Abigail Alliance for Better Access to Dev. Drugs v. von Eschenbach*, 495 F.3d 695, 716 (D.C. Cir. 2007) (Rogers, J., dissenting) (observing that nearly all of the Supreme Court's substantive due process case law draws inferences from a broader right to a narrower right, and pointing to personal autonomy and privacy rights as prime examples of this practice).

164. See discussion *supra* Part I.C (summarizing the Supreme Court's treatment of refusal of medical treatment).

165. See *Washington v. Glucksberg*, 521 U.S. 702, 724 (1997) (distinguishing physician-assisted suicide from the right to refuse medical treatment that was recognized in *Cruzan* on the grounds that suicide has not historically been protected or accepted, and explaining that "the two acts are widely and reasonably regarded as quite distinct").

166. See *Coshov v. City of Escondido*, 34 Cal. Rptr. 3d 19, 31–32 (Cal. Ct. App. 2005) (internal citation and quotations omitted) (distinguishing the fluoridating of public drinking water from forceful medical treatment that has been deemed fundamental because the first does not "involve the state's power to physically force artificial life-support directly into the body of an individual claiming the right to refuse such treatment").

167. See discussion *supra* Part I.B.

approach in *Jacobson* is counter to the concept of strict scrutiny.<sup>168</sup> Examining the language used by the Court, it is apparent that the Court's review actually resembled what is now known as rational basis review.<sup>169</sup> The Court stressed that the grant of authority was not “unreasonable or arbitrary.”<sup>170</sup> It also indicated that the means employed by the state had a “real or substantial relationship” to the end sought—protecting public health and safety.<sup>171</sup> This language is germane to rational basis review<sup>172</sup> and is not appropriate when reviewing a government action that infringes upon a fundamental right.<sup>173</sup> Accordingly, *Jacobson*'s broad grant of power cannot survive in light of modern constitutional jurisprudence; rather, a similar mandate would be met with strict scrutiny by a reviewing court,<sup>174</sup> and thus would have to be narrowly tailored to serve a compelling state interest.<sup>175</sup>

### B. *The Compelling Public Health Emergency*

Although much of the Court's analysis in *Jacobson* should be considered a relic, if an infectious disease spreads, some core principles remain. The government interest protected in *Jacobson* would no doubt be considered compelling by today's standards.<sup>176</sup> The Supreme Court stated that “[u]pon the principle of self-defense, of paramount necessity, a community has the

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168. See, e.g., *Quilter v. Voinovich*, 981 F. Supp. 1032, 1062 (N.D. Ohio 1997), *aff'd*, 523 U.S. 1043 (1998), (rejecting the request for strict scrutiny review and applying the deferential rational basis test).

169. Rational basis review requires rational or reasonable means to serve a legitimate end. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 432 (1985).

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

171. *Id.* at 31.

172. See Neelum J. Wadhvani, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 803, 806 (2006) (explaining that rational basis review “reflects the basic principle that government cannot act in an *arbitrary manner*” and that it requires a court to “examine whether the governmental action at issue bears a *‘fair and substantial relation’* to the realization of those purposes”) (emphasis added).

173. See discussion *supra* Part I.B.

174. See discussion *supra* Part I.B.

175. Before applying strict scrutiny as a means to determine whether states can successfully mandate vaccinations in certain circumstances, it is important to debunk the notion that strict scrutiny will inevitably render all regulations unconstitutional. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (internal citation omitted) (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”); see also *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003) (upholding a regulation under strict scrutiny, and emphasizing that meeting the requirements of strict scrutiny are not unrealistic and “context matters”). One study indicates that twenty-two percent of regulations infringing on a person's fundamental right of substantive due process survive strict scrutiny review. Winkler, *supra* note 68, at 864. The majority of such regulations are composed of bodily integrity issues. *Id.*

176. See *Workman v. Mingo Cnty. Bd. of Educ.*, No. 09-2352, 2011 WL 1042330, at \*3–4 (4th Cir. Mar. 22, 2011) (emphasizing that preventing the spread of communicable disease clearly constitutes a compelling state interest, and suggesting that even if strict scrutiny applied, the mandatory vaccination law would withstand such scrutiny).

right to protect itself against an epidemic of disease which threatens the safety of its members.”<sup>177</sup> It is this feature of *Jacobson* that should survive: that a real threat to the safety of the entire community<sup>178</sup> is a compelling state interest that satisfies the first prong of strict scrutiny analysis.<sup>179</sup>

In reviewing vaccination mandates, courts will look to states’ public health laws, which provide for expanded powers during public health emergencies.<sup>180</sup> Though many states have not adopted the same definition of “public health emergency” that is provided in the MSEHPA, most provide similar statutory language in their mechanism for declaring such an emergency.<sup>181</sup> When conditions warrant the declaration of a public health emergency, as defined by the MSEHPA or similar statutes, the strict scrutiny test’s requirement of a compelling state interest is satisfied.<sup>182</sup> The

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177. *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). Gostin, author of the MSEHPA, argues that *Jacobson* established a floor of constitutional protection. GOSTIN, *supra* note 16, at 68. He contends that public health powers are constitutionally permissible if they meet four proposed standards: public health necessity, reasonable means, proportionality, and harm avoidance. *Id.* This approach essentially reiterates the broad grant of power provided in *Jacobson*. *Id.* Gostin does little to define or restrict what constitutes “necessity,” meaning it would not necessarily be deemed a compelling interest. *Id.* Further, the principle of harm avoidance appears to provide for the medically-contraindicated exception that is implied in *Jacobson*. *Id.* at 69.

178. See *Jacobson*, 197 U.S. at 31 (expressing that the smallpox epidemic “imperiled an entire population”). This point is distinguishable from personal autonomy cases such as *Cruzan* and *Glucksberg*, which similarly involved government meddling in an individual’s choice, but did not involve endangerment to the population as a whole. See OFFIT, *supra* note 22, at 144–45 (describing the decision to refuse vaccination as a choice to put one’s neighbors at greater risk, and outlining the prevalence of disease in populations with low immunization rates); Elizabeth Weeks Leonard, *The Public’s Right to Health: When Patient Rights Threaten the Commons*, 86 WASH. U.L. REV. 1335, 1346 (2009) (acknowledging the divergence of doctrines when a personal liberty issue also affects the population as a whole or “the commons”).

179. Though the Court in *Jacobson* analyzed the Massachusetts regulation under a deferential standard of review, ensuring merely that it was not arbitrary and bore a reasonable relationship to protecting the public health, it nonetheless implied that the government interest was compelling. *Jacobson*, 197 U.S. at 30–32; cf. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare not Speak its Name*, 117 HARV. L. REV. 1893, 1917 (2004) (declaring that the Court in *Lawrence* conspicuously left out the phrase “fundamental right” and applied heightened scrutiny under the guise of rational basis review).

180. See Fazal R. Khan, *Ensuring Government Accountability During Public Health Emergencies*, 4 HARV. L. & POL’Y REV. 319, 320 (2010) (explaining that the declaration of a public health emergency expands executive powers and can trigger the release of funds, the mobilization of personnel and equipment, and the waiver of certain legal structures).

181. See, e.g., ARIZ. REV. STAT. ANN. § 36-787 (2002) (defining public health emergency as “an occurrence or imminent threat of an illness or health condition caused by bioterrorism, an epidemic or pandemic disease or a highly fatal infectious agent or biological toxin and that poses a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability”).

182. See Rosemary G. Reilly, *Combating the Tuberculosis Epidemic: The Legality of Coercive Treatment Measures*, 27 COLUM. J.L. & SOC. PROBS. 101, 139 (1993) (acknowledging the heightened government interest in protecting the public health from communicable diseases because of their tendency to be spread by casual contact); see also *People v. Adams*, 597 N.E.2d 574, 578, 584 (Ill. 1992) (upholding a statute mandating testing for human immunodeficiency virus within an at-risk population because it served a

MSEHPA also requires a high probability of substantial harm to the public.<sup>183</sup> Reflecting on the facts of *Jacobson*, it is apparent that the smallpox epidemic would have satisfied this requirement; in fact, the exponential spread of the disease had already caused a large number of deaths in the affected population, going well beyond the requirement of a high probability of substantial harm.<sup>184</sup>

A parallel can be drawn to the compelling interest that is inherent in national security threats.<sup>185</sup> Both concern the safety and welfare of the population, and it “is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.”<sup>186</sup> The comparison and overlap between protecting the national security and mandating vaccinations in public health emergencies is natural.<sup>187</sup> Both aim to protect the public welfare from mass casualties.<sup>188</sup> Indeed, the drafters of the MSEHPA cite the attacks of September 11, 2001, as an impetus for the model legislation.<sup>189</sup> Such a comparison bolsters the compelling nature of mandating vaccinations during a public health emergency. While border searches and other terrorist prevention methods are aimed at preventing potential attacks, a vaccination mandate requires that a public health emergency already be declared.<sup>190</sup> Thus, there is less attenuation between the government action and the compelling interest being protected.<sup>191</sup> It is telling that courts considering constitutional challenges in cases affecting

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compelling state interest). Statutes that restrict due process rights in emergencies have also been upheld in the mental health context. *See* *Logan v. Arafah*, 346 F. Supp. 1265, 1265 (D. Conn. 1972), *aff’d sub nom. Briggs v. Arafah*, 411 U.S. 911 (1973) (authorizing the suspension of due process rights for fifteen days without prior hearing or notice in the event of an emergency).

183. *See* *Annas*, *supra* note 126, at 49 (providing the three types of substantial harm that the MSEHPA considers).

184. *See supra* text accompanying note 25 (supplying data of population imperiled in *Jacobson*).

185. This parallel is particularly relevant for a court’s consideration of mandatory vaccinations during the occurrence or in the aftermath of a bioterrorist attack, which is contemplated by and included in the MSEHPA. MSEHPA, *supra* note 20, § 104(m).

186. *Haig v. Agee*, 453 U.S. 280, 307 (1981) (internal citation and quotations omitted).

187. *See, e.g., id.* at 300 n.48 (pointing to the federal statute which allows restriction of travel during hostilities or “where there is imminent danger to the *public health* or the physical safety”) (emphasis added).

188. MSEHPA, *supra* note 20, preamble (“[D]angers—including . . . infectious diseases and incidents of civilian mass casualties—pose serious and immediate threats to the population.”).

189. *Id.*

190. *Id.* at § 603(a).

191. *See* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 960–61 (1988) (noting that, despite a very specific compelling interest in national security, the necessary means of protecting it are not always clear, and, thus, actions taken may not be valid); *see also* *United States v. Ressay*, 221 F. Supp. 2d 1252, 1263 (W.D. Wash. 2002) (articulating that national security is an unusual compelling government interest because of its ongoing nature).

national security do not avoid strict scrutiny analysis in favor of a more lenient standard, but instead find that protecting the nation qualifies as a compelling government interest.<sup>192</sup> Similarly, protecting public welfare during a public health emergency can trump individual rights if a vaccination mandate satisfies the second prong of strict scrutiny—narrow tailoring.

### C. *Necessary Elements to Achieve Narrow Tailoring*

Although the very nature of protecting the public welfare during a public health emergency is a compelling interest,<sup>193</sup> many state statutes would run afoul of strict scrutiny's narrow tailoring requirement.<sup>194</sup> While there is no structured formula to achieve narrow tailoring,<sup>195</sup> there should be a "fit" between the law and the interests.<sup>196</sup> To ensure a sufficient fit between the regulation and the interest of protecting the public health in an emergency, the law should avoid broad grants of discretion.<sup>197</sup> Accordingly, including checks and balances for declaring a public health emergency is preferable.<sup>198</sup> The MSEHPA contains a general provision to this effect, but sets forth no set procedures for state officials to follow.<sup>199</sup> Further, it

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192. See *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944) (reviewing the Executive Order that called for the internment of Japanese-Americans, and determining that the order was immediately suspect and subject to the most rigid scrutiny, even though it bore a "definite and close relationship" to national defense in time of war); *United States v. Aref*, 533 F.3d 72, 82–83 (2d Cir. 2008) (upholding First Amendment restrictions because they were narrowly tailored to protect the compelling interest of national security); *Tabbaa v. Chertoff*, 509 F.3d 89, 102–05 (2d Cir. 2007) (holding that a government policy of searching certain Muslim-Americans at the border survived a strict scrutiny analysis because it was narrowly tailored to achieve the compelling governmental interest of preventing terrorism).

193. See discussion *supra* Part II.B.

194. See generally Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 113 (1999) (assessing the landscape of compulsory public health laws, including vaccination statutes, and determining that broad discretion is the norm with many states providing vague or incomplete standards).

195. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (explaining that, in the context of a claim of free speech infringement, courts should avoid imposing "judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems").

196. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2424 (1996).

197. See *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758–59 (1988) (emphasizing the importance of express standards and of avoiding broad grants of discretion to local officials regulating speech).

198. *E.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 793–94 (1989) (holding that a licensing scheme regulating free speech was facially valid because its grant of power to local officials contained guidelines and avoided unbridled discretion); see also *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (upholding a university's affirmative action program as narrowly tailored in part because of its combined elements of discretion and structure).

199. MSEHPA, *supra* note 20, § 401 ("Governor shall consult with the public health authority and *may* consult with any additional public health or other experts as needed.") (emphasis added). Arizona similarly supplies a lack of procedural guidelines, providing

provides a broad, imprecise exemption from any deliberation or approval when the situation calls for prompt and timely action.<sup>200</sup> The absence of appropriate precautionary procedures for declaring a public health emergency increases the likelihood of an improper declaration.<sup>201</sup> This could result in the expansion of health powers and the authorization of mass mandatory vaccinations absent a public health emergency, which would be unconstitutional.<sup>202</sup> Thus, state statutes should provide discernable standards and procedures for the declaration of a public health emergency.

Once again, drawing from the comparable realm of national security is instructive. The Foreign Intelligence Surveillance Act<sup>203</sup> (FISA) sets forth the procedures required for surveillance and collection of foreign intelligence information.<sup>204</sup> While the FISA requires federal officials to seek a warrant from the congressionally-created Foreign Intelligence Surveillance Court,<sup>205</sup> the FISA contains procedures that apply in the case of an emergency.<sup>206</sup> In an emergency, the FISA authorizes the Attorney General to employ electronic surveillance without a warrant, but limits the scope, the use of the information, and the length of authorization, and provides judicial veto power.<sup>207</sup> The procedures provided in Georgia's emergency powers legislation are similarly thorough, and are ideal.<sup>208</sup> The Georgia law provides the government with the ability to react without delay by allowing a governor to declare a state of emergency immediately.<sup>209</sup> However, this expanded power is limited by the requirement that the general assembly convene for the purpose of concurring with or terminating the public health emergency.<sup>210</sup> Further, the Georgia statute

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only that during a state of emergency the governor shall consult with the director of the department of health services. ARIZ. REV. STAT. ANN. § 36-787(B) (2002).

200. *See id.* (excusing the governor, under certain circumstances, from consulting any experts before declaring a public health emergency).

201. Presumably state officials would consult with the proper health authorities in determining whether the spread of a certain disease constitutes a high probability of substantial harm, but an explicit provision is necessary to ensure a proper declaration. *Id.* at preamble.

202. *See Gostin et al., supra* note 194, at 102 (asserting that procedural protections are necessary both to reduce public perception that public health agencies arbitrarily employ coercive measures and to avoid biased or inconsistent decisions that erroneously deprive individuals of their liberty).

203. 50 U.S.C. § 1805 (2006).

204. *Id.*

205. *Id.* § 1804.

206. *Id.* § 1805(e).

207. *Id.*

208. GA. CODE ANN. § 38-3-51 (2009).

209. *Id.* § 38-3-51(a).

210. *Id.* This provision is comparable to the FISA's requirement that the Attorney General must inform a FISC judge of the emergency surveillance, and apply for the appropriate warrant as soon as practicable. 50 U.S.C. § 1805(e)(1)(C)-(D).

provides continuing oversight during an emergency declaration coupled with a temporal limitation—two features that are also contained in the FISA’s emergency provision.<sup>211</sup> These procedures help to ensure the proper declaration of a public health emergency and to limit the broad discretion that is counter to the concept of narrow tailoring.

Laws that are significantly overinclusive and regulate more than is necessary to achieve the ends sought will fail a narrow-tailoring analysis.<sup>212</sup> In the event that a public health emergency is properly declared, a law will rarely be deemed overinclusive.<sup>213</sup> Because the definition of a public health emergency requires that it affect a large number of people within the population or pose a high probability of widespread exposure to infectious disease, the population (within each state) is considered to be within the scope of the government interest.<sup>214</sup> Accordingly, allowing for discretion in determining the population to be vaccinated is generally permissible.<sup>215</sup> The MSEHPA, however, may run afoul of this general rule by granting blanket authorization to mandate vaccinations in a public health emergency, without requiring a link to medical necessity.<sup>216</sup> The Maryland statute, which provides that mandatory vaccinations are permissible when “medically necessary and reasonable to treat, prevent, or reduce the spread of the disease or outbreak,”<sup>217</sup> is an improved approach.

An underinclusive law—one that does not capture all like threats—may also fail strict scrutiny, as it implies that the government “does not really believe the underlying ends are so compelling.”<sup>218</sup> Practical considerations

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211. Compare GA. CODE ANN. § 38-3-51(a) (“The General Assembly by concurrent resolution may terminate a state of emergency or disaster at any time.”), and *id.* (“No state of emergency or disaster may continue for longer than 30 days unless renewed by the Governor.”), with 50 U.S.C. § 1805(e)(3)(providing that a FISC judge may terminate the surveillance at any point by denying the application), and 50 U.S.C. § 1805(e)(3) (establishing that authorization of the surveillance automatically terminates after seven days).

212. *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 810 (E.D. Pa. 2007) *aff’d sub nom.* *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008) (internal citation omitted).

213. See *Tyson v. Heckler*, 727 F.2d 1029, 1031 (11th Cir. 1984) (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)) (suggesting that some overinclusiveness is permissible when enacting social welfare legislation).

214. See *Boone v. Boozman*, 217 F. Supp. 2d 938, 954 (E.D. Ark. 2002) (noting that the relevant government interest is protecting society against the spread of disease).

215. See, e.g., ARIZ. REV. STAT. ANN. § 36-787 (2002) (providing the authority to vaccinate those who have been exposed, are reasonably believed to be exposed, or who may reasonably be expected to be exposed).

216. The MSEHPA requires only that the vaccinations be necessary to address the public health emergency. MSEHPA, *supra* note 20, § 603. While this standard would only be misconstrued by a particularly sinister government, George Annas argues that such vague standards are particularly dangerous when coupled with the immunity provisions of the MSEHPA. Annas, *supra* note 126, at 59.

217. MD. CODE ANN., PUB. SAFETY § 14-3A-03 (West 2004).

218. See *Winkler*, *supra* note 68, at 803 (explaining that courts use “narrow tailoring to police against means that are overinclusive or underinclusive”).

suggest that the MSEHPA's opt-out provision<sup>219</sup> could create a situation of underinclusiveness. Allowing people to bypass mandatory vaccinations for philosophical reasons, and instead allowing those individuals to choose isolation or quarantine, could be counterproductive to preventing an epidemic. Particularly, if fears spread regarding the safety of a vaccine,<sup>220</sup> many may opt-out,<sup>221</sup> rendering quarantine ineffective.<sup>222</sup> With such a large unvaccinated population, disease eradication would not be achieved.<sup>223</sup> Florida's vaccination law confronts this problem head-on, providing that where there "is no practical method to quarantine . . . the State Health Officer may use any means necessary to vaccinate or treat the individual."<sup>224</sup> While this law is panned by some as draconian,<sup>225</sup> a state

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219. See *supra* text accompanying notes 131–132 (describing the MSEHPA's opt-out provision).

220. The spread of fears regarding the safety of a vaccine is particularly plausible with the twenty-four hour news cycle and the reach of the Internet. See Sonny Bunch, *H1N1 Vaccine Fears Fueled Over Airwaves*, WASH. TIMES (Oct. 16, 2009, 4:45 AM), <http://www.washingtontimes.com/news/2009/oct/16/h1n1-flu-vaccine-fears-fueled-over-airwaves> (describing the statements of several prominent media figures and their influence on the public). A 1998 study by Dr. Andrew Wakefield linked autism to childhood vaccines and fueled many anti-vaccination advocates. *Retracted Autism Study an 'Elaborate Fraud,' British Journal Finds*, CNN.COM (Jan. 5, 2011, 8:14 PM), <http://www.cnn.com/2011/HEALTH/01/05/autism.vaccines/index.html>. The study was retracted over twelve years later after the British Medical Journal found the study to be an "elaborate fraud" in which data was deliberately falsified. *Id.* British Medical Journal pointed to the harm the study continues to have on public health, "fueled by unbalanced media reporting and an ineffective response from government . . ." *Id.*

221. See *Retracted Autism Study an 'Elaborate Fraud,' British Journal Finds*, *supra* note 220 (detailing that, after the study's publication in Britain, the country's vaccination rates dropped sharply); see also EJ Gangarosa et al., *Impact of Anti-Vaccine Movements on Pertussis Control: The Untold Story*, 351 LANCET 356, 360 (Jan. 1998) (noting that perceived risks tend to deter individuals from being vaccinated).

222. The quarantine of a large portion of the population shares many of the characteristics that lead to the increased spread of communicable disease. See Josephine Gittler, *Controlling Resurgent Tuberculosis: Public Health Agencies, Public Policy, and Law*, 19 J. HEALTH POL. POL'Y & L. 107, 109–10 (1994). For example, tuberculosis has a higher risk of transmission between those in the same household or those that share a common space on an ongoing basis. *Id.* The risk of transmission is also heightened in crowded settings, and is typical in homeless shelters, schools, and hospitals. *Id.* In California in 2008, pertussis, also known as whooping cough, experienced its largest outbreak in sixty years. Miriam Falco, *10 Infants Dead in California Whooping Cough Outbreak*, CNN.COM (Oct. 20, 2010, 10:10 PM), <http://www.cnn.com/2010/HEALTH/10/20/california.whooping.cough/index.html>. All of the resulting deaths occurred in infants, who were too young to receive the vaccine. *Id.* Health care officials employed a "cocooning strategy" as a means of prevention—limiting those who were in contact with newborns to vaccinated individuals. *Id.*

223. See Gangarosa et al., *supra* note 221, at 360 (internal quotations omitted) (explaining that when vaccine uptake is lowered, what follows is a "tragedy of the commons"—a loss of confidence in [the] vaccine and a resurgence of disease"); *Retracted Autism Study an 'Elaborate Fraud,' British Journal Finds*, *supra* note 220 (describing a CDC report that more than ninety percent of those infected with measles during a 2008 spate had not been vaccinated or their vaccination status was unknown).

224. FLA. STAT. ANN. § 381.00315 (West 2010).

225. Annas, *supra* note 126, at 61 n.86.

must have the means to repel an epidemic, protecting its compelling interest.

*D. Less Restrictive, Less Effective Alternatives*

When conducting a strict scrutiny analysis, courts will consider whether there are less-restrictive means available to a government to achieve its compelling ends.<sup>226</sup> The alternative means to prevent the spread of infectious disease is to quarantine the unvaccinated members of the population who are either infected or at risk. Nearly every state that has a compulsory vaccination regulation grants its officials the authority to quarantine individuals during a public health emergency.<sup>227</sup> A comparison of the features of quarantine and vaccination suggests that it is debatable whether quarantine is the less-restrictive option.<sup>228</sup> Although quarantine does constitute a significant deprivation of an individual's liberty,<sup>229</sup> it does not rise to the same level of physical invasion as a vaccination. First, confinement does not violate common law principles of assault and battery as blatantly as forced medical treatment,<sup>230</sup> and second, freedom from bodily intrusion, unlike freedom from quarantine, is rooted in the nation's history and tradition.<sup>231</sup> However, in light of changing societal norms,<sup>232</sup>

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226. Most consider this part of the narrow tailoring prong, while others consider it essentially synonymous. *Compare* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (narrow tailoring requires consideration of "lawful alternative and less restrictive means"), *with* *Winkler*, *supra* note 68, at 800–01 (considering "least restrictive alternative" as merely an alternative phrasing of narrow tailoring).

227. *Legislative Surveillance Table*, *supra* note 10.

228. This is apparent when examining discrepancies in the treatment of quarantine and vaccination by courts and scholars alike. *Compare* *Greene v. Edwards*, 263 S.E.2d 661, 663 (W. Va. 1980) (per curiam) (holding that, because confinement of an individual infected with tuberculosis was a significant liberty infringement, he was entitled to significant due process protections, including requiring the government to provide clear and convincing evidence to meet its burden of proof), *and* *Gostin et al.*, *supra* note 194, at 122–23 (advocating that public health officials should be required to prove the existence of a health threat by clear and convincing evidence before quarantine or isolation), *with* GA. CODE ANN. § 38-3-51 (2009) (requiring the government to prove there is a substantial risk of exposing others to imminent danger by clear and convincing evidence for compelling vaccinations, but only by the preponderance of the evidence with respect to quarantine).

229. *See* *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (citations omitted) ("It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty.").

230. *Compare* *Korematsu v. United States*, 323 U.S. 214, 218–19 (1944) (equating quarantine to the imposition of a curfew), *and* Eleanor E. Mayer, Comment, *Prepare for the Worst: Protecting Civil Liberties in the Modern Age of Bioterrorism*, 11 U. PA. J. CONST. L. 1051, 1072 (2009) (arguing that quarantine is less coercive than mandating immunization), *with* *supra* notes 162–163 and accompanying text (describing the commonalities between forced medical treatment and the doctrines of assault and battery).

231. *See* Michelle A. Daubert, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights*, 54 BUFF. L. REV. 1299, 1303–04 (2007) (providing thorough history of quarantine in the United States, which dates back to colonial times); *Gostin et al.*, *supra* note 194, at 106–07 (detailing eighteenth

and increased vaccine safety efforts,<sup>233</sup> one could argue that the temporary discomfort associated with vaccination is less of an infringement than the long-term restriction and confinement often associated with quarantine.

Regardless of whether is less restrictive, it is not an adequate alternative. A less-restrictive course of action need not be taken when it is not as effective as the challenged government conduct.<sup>234</sup> The most effective means through which to control an infectious disease outbreak is mass vaccination.<sup>235</sup> For example, in California's recent whooping cough outbreak,<sup>236</sup> officials pointed to unvaccinated adults as a major cause.<sup>237</sup> Local officials issued recommendations that indicated immunization would be necessary to quell the epidemic.<sup>238</sup> Quarantine can be a useful tool on a small scale; however, once a public health emergency exists, it is no longer effective at stopping the spread of infectious disease.<sup>239</sup> Accordingly,

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century quarantine regulations that were generally applied to identified diseases that might be perceived as a threat).

232. See *supra* note 160 (discussing the import of recent societal trends in the context of a substantive due process analysis); cf. Bonnie Berkowitz, *How Tattooing Went Mainstream*, WASH. POST, Feb. 8, 2011, at E1 (following the recent growth in the popularity of tattoos in the United States and citing a 2006 study that stated that nearly forty percent of adults under forty had a tattoo).

233. See OFFIT, *supra* note 22, at 181 (touting the safety of vaccines and asserting that they are tested in larger numbers of people for longer periods of time than any other drug).

234. See *Ashcroft v. ACLU*, 542 U.S. 656, 665–66 (2004) (stating that a court conducting a strict scrutiny review should consider whether the challenged regulation is the least restrictive among *effective* alternatives) (emphasis added); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (striking down legislation because less restrictive alternatives would have been “at least as effective in achieving the legitimate purpose that the statute was enacted to serve”) (emphasis added).

235. See Andrew T. Kroger et al., *Recommendations of the Advisory Committee on Immunization Practices (ACIP)*, MORBIDITY AND MORTALITY WEEKLY REPORT (Dec. 1, 2006), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5515a1.htm> (noting that universal vaccination is critical to achieve a highly immune population, which is the best way to reduce preventable diseases).

236. See Falco, *supra* note 222 (describing California's 2008 encounter with whooping cough).

237. See Rong-Gong Lin II, *Unimmunized Adults, Teens a Key Factor in Spread of Whooping Cough, Officials Say*, L.A. TIMES (Sept. 23, 2010), <http://articles.latimes.com/2010/sep/23/local/la-me-whooping-cough-20100923> (reiterating a federal official's statement that the low rates of immunization in adults was to blame for the spread of the whooping cough); *Health Information: Pertussis (Whooping Cough)*, CAL. DEP'T OF PUB. HEALTH, <http://www.cdph.ca.gov/HealthInfo/discond/Pages/Pertussis.aspx> (last visited Feb. 20, 2011) (emphasizing that whooping cough continues to spread throughout California as a result of the low vaccination rates in adults).

238. See *Health Information: Pertussis (Whooping Cough)*, *supra* note 237 (declaring that vaccination is the “best defense” against whooping cough, and recommending that all Californians ensure that they are immunized).

239. See *supra* notes 221–223 (describing the effects of an unvaccinated population and the ineffectiveness of quarantine); see also *HHS Pandemic Influenza Plan: Community Disease Control and Prevention*, DEP'T OF HEALTH AND HUMAN SERVS. (Nov. 2005), available at <http://www.hhs.gov/pandemicflu/plan/pdf/HHSPandemicInfluenzaPlan.pdf> (noting that quarantine of close contacts may only be effective during the earliest stages of a pandemic and that the usefulness and feasibility of such measures are limited once infectious disease has started to spread); *Quarantine and Isolation FAQ*, CTR. FOR DISEASE

allowing the public to choose quarantine as an alternative is not constitutionally required.<sup>240</sup>

### E. Limiting Statutory Exemptions

Liberal exemption clauses in vaccination statutes can result in large unvaccinated populations and, like permitting quarantine, can result in ineffective efforts to quell an epidemic.<sup>241</sup> States have varied approaches in allowing medically-contraindicated, philosophical, and religious exemptions.<sup>242</sup> A medical contraindication is “a condition in a recipient that increases the risk for a serious adverse reaction” to a vaccination.<sup>243</sup> Accordingly, mandating immunization where there is a medical contraindication would create the very evil that vaccination was designed to prevent—harm to the health of members of the public.<sup>244</sup> Therefore, to ensure constitutional compliance, a vaccination mandate should include an exemption where it is medically-contraindicated.<sup>245</sup> The MSEHPA contains a provision preventing compulsory vaccination where it is “reasonably likely to lead to serious harm to the affected individual;”<sup>246</sup> however, this exemption is superfluous because of the MSEHPA’s liberal opt-out policy.<sup>247</sup>

The other extreme is exemplified by the Arizona statute, which fails to articulate any exemptions, even if compelling vaccination would

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CONTROL (Nov. 7, 2006), <http://www2.cdc.gov/phlp/docs/faq%20quarantine%20fl%20judges%20oct%2006.pdf> (explaining that imposing mass quarantine as part of a pandemic response is “ineffective at best”).

240. Even if a large-scale quarantine program during a public health emergency was effective, it would also have to overcome significant constitutional obstacles. Discussion *supra* Part II.C. If health officials were to abide by the MSEHPA’s definition of quarantine, *supra* note 132, they would have to identify those that were *likely* exposed to the disease despite showing no symptoms, MSEHPA, *supra* note 20, § 104(o) (emphasis added), which could lead to problems of excessive discretion, *supra* notes 197–198 and accompanying text. A mass quarantine effort under the MSEHPA’s program would also likely suffer from overbreadth, as some uninfected individuals would inevitably be included and thus be exposed to the disease. *Supra* note 197 and accompanying text.

241. See *infra* notes 250–267 and accompanying text.

242. See, e.g., *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT’L CONFERENCE OF STATE LEGISLATURES (March 2011), <http://www.ncsl.org/default.aspx?tabid=14376> (illustrating the various combinations of school vaccine exemptions allowed by different states).

243. Kroger et al., *supra* note 235.

244. See *id.* (explaining that vaccines should not be administered to an individual with a contraindication, and providing the example of giving an influenza vaccine to someone with an anaphylactic allergy to egg protein, which could cause serious illness in, or death of, the recipient).

245. See, e.g., *Boone v. Boozman*, 217 F. Supp. 2d 938, 956 n.41 (E.D. Ark. 2002) (noting that the plaintiff did not claim that the vaccination was medically contraindicated, and suggesting that the mandate would have been unconstitutional if she had).

246. MSEHPA, *supra* note 20, § 603(a)(2).

247. See *id.* § 603(a)(3) (allowing for choice of quarantine for those who choose to forego vaccination for health, religious, or philosophical reasons).

substantially harm the individual's health.<sup>248</sup> A more balanced approach exempts individuals from vaccinations where compulsion would endanger the person's life or health or is medically-contraindicated.<sup>249</sup> Statutes supplying such a conditional exemption should incorporate some procedure for determining the legitimacy of the medical condition.<sup>250</sup>

Allowing philosophical exemptions, as the MSEHPA does,<sup>251</sup> could lead to dire consequences.<sup>252</sup> Examining how philosophical exemptions have affected school immunization efforts is instructive. In 2006, a study revealed that whooping cough outbreaks were more than twice as likely in states offering philosophical exemptions.<sup>253</sup> If such exemptions are invoked by a large portion of the population, it could lead to wholesale ineffectiveness of the vaccination program and create underinclusiveness issues.<sup>254</sup> Therefore, eliminating philosophical opt-outs is not only constitutionally preferable, but is likely essential to the successful

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248. ARIZ. REV. STAT. ANN. § 36-787 (2002).

249. Because school immunization exemptions have been the subject of litigation, and survived constitutional challenges, they provide a useful template. All state immunization laws grant exemptions to children where vaccination is medically contraindicated. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 242; e.g., COLO. REV. STAT. § 25-4-903 (2010) ("A student shall be exempted from receiving the required immunizations . . . [if] one or more specified immunizations would endanger his or her life or health or is medically contraindicated due to other medical conditions."). Colorado does not have a provision that explicitly mandates vaccinations in the event of a public health emergency. *See id.* § 24-32-2104 (8)(e) (noting that the governor may order the procurement of vaccines and the quarantine of individuals, but making no mention of mandatory vaccination).

250. *See* COLO. REV. STAT. § 25-4-903(2)(a) (requiring certification from a licensed physician or advanced practice nurse).

251. *See* MSEHPA, *supra* note 20, § 603(a)(3) (providing that those who opt-out of vaccination requirements are subject to quarantine).

252. *See* discussion *supra* Part II.C.

253. Saad B. Omer et al., *Nonmedical Exemptions to School Immunization Requirements*, 296 J. AM. MED. ASS'N 1757, 1761 (2006); *see also* Liz Szabo, *Whooping Cough Returns in Kids as Parents Skip Vaccines*, USA TODAY (May 26, 2009, 10:01 AM), [http://www.usatoday.com/news/health/2009-05-26-whooping-cough\\_N.htm](http://www.usatoday.com/news/health/2009-05-26-whooping-cough_N.htm) (citing study indicating that unvaccinated children are twenty-three times more likely to develop whooping cough than those that receive vaccinations).

254. *See* discussion *supra* Part II.C. A minority of states offer a philosophical exemption in their school immunization statutes. *See States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 242 (listing the twenty states that allow philosophical exemptions on the basis of personal, moral or other beliefs); *see also* Devin W. Quackenbush, Note, *Religion's Hepatitis B Shot: The Arkansas General Assembly Established an Overly Broad Religious Exemption to Mandatory Immunization After the District Court Invalidated the Original Religious Exemption—McCarthy v. Ozark School District*, 42 CREIGHTON L. REV. 777, 778 (2009) (criticizing the Arkansas General Assembly for its addition of a philosophical exemption, and arguing that it is counter to the purpose of the regulation). Such exemptions are particularly disfavored in the event of a public health emergency because of the widespread exposure to disease already introduced to the population. *See supra* note 127 and accompanying text (defining public health emergencies as, *inter alia*, the occurrence or imminent threat of widespread exposure to an infectious or toxic agent).

eradication of infectious disease during a public health emergency.<sup>255</sup>

Religious exemptions are also not constitutionally required components of vaccination mandates. In the landmark decision of *Employment Division v. Smith*,<sup>256</sup> the Supreme Court held that neutral laws of general applicability do not violate the Free Exercise Clause merely because they proscribe or require conduct that is contrary to one's religious practices.<sup>257</sup> While there is support indicating that, under *Smith*, no further scrutiny is appropriate,<sup>258</sup> a closer examination of Justice Scalia's opinion in the case suggests otherwise. In *Smith*, the Court rejected the plaintiff's appeal for heightened scrutiny,<sup>259</sup> stressing the importance of the fact that only free exercise of religion was involved, rather than a hybrid issue implicating other constitutional rights.<sup>260</sup> Having determined that the right to refuse vaccination is a fundamental right protected by the Constitution,<sup>261</sup> the lack of a religious exemption would likely create such a hybrid situation.<sup>262</sup>

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255. Because individuals that opt-out for philosophical reasons tend to "cluster," it increases the risk of disease outbreaks within such communities. Omer, *supra* note 253, at 1762. In 2005, Indiana experienced a measles outbreak caused by a small cluster of unvaccinated individuals. Amy A. Parker et al., *Implications of a 2005 Measles Outbreak in Indiana*

for Sustained Elimination of Measles in the United States, 355 NEW ENG. J. MED. 447, 448, 452 (2006). A full-scale epidemic was averted because of the high vaccination levels in the community surrounding the unvaccinated population. *Id.* at 452.

256. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 418 (2006).

257. *Smith*, 494 U.S. at 878-79.

258. See *Boone v. Boozman*, 217 F. Supp. 2d 938, 953 (E.D. Ark. 2002) ("Because the immunization statute is a neutral law of general applicability, heightened scrutiny is not required even though compulsory immunization may burden plaintiff's right to free exercise."). However, if the vaccination mandate was established by federal law, as some have advocated, the Religious Freedom Restoration Act (RFRA) would supply a standard that is the equivalent of strict scrutiny. See *Mahmoud-Davis*, *supra* note 147; see also *Forde v. Baird*, 720 F. Supp. 2d 170, 175-76 (D. Conn. 2010) (citations omitted) (describing the standard of review prescribed by the RFRA, and noting that, although the Supreme Court held that Congress exceeded its authority in making RFRA applicable against state and local governments, it is nonetheless valid as applied to actions of the federal government).

259. See *Smith*, 494 U.S. at 895, 897 (referring to the standard sought as the "compelling interest test").

260. *Id.* at 895-97. Justice Scalia distinguished previous rulings which used heightened scrutiny in reviewing government infringement upon religious beliefs. *Id.* at 881-82. He did so on the grounds that those cases involved a free exercise claim that was considered in conjunction with another constitutional protection, such as freedom of speech or parental rights. *Id.* at 882.

261. See discussion *supra* Part II.A (concluding that the right to refuse vaccination is a fundamental right akin to the fundamental right to be free from unwanted medical treatment).

262. See *Miller v. Reed*, 176 F.3d 1202, 1207-08 (9th Cir. 1999) (explaining that, in order to have a hybrid-rights claim under *Smith*, a plaintiff must have a "colorable claim" of an infringement of a fundamental right in addition to a free exercise claim). *But see* *Caviezel v. Great Neck Pub. Schs.*, 739 F. Supp. 2d 273, 283-84 (E.D.N.Y. 2010) (describing dicta in *Smith* as naming "'compulsory vaccination laws' in a list of laws that the Court believe[s] should not be required to be justified by a 'compelling state interest,' even if [they] adversely affect[] the practice of religion"); *Hicks v. Halifax Cnty. Bd. of*

However, under this framework, additional scrutiny would not have a substantial effect because a compelling state interest and narrowly tailored means are already required.<sup>263</sup>

Statutes that attempt to allow a religious exemption may also run afoul of other constitutional considerations. States that choose to include a religious exemption face a dilemma<sup>264</sup>: either provide precise procedures for certifying legitimate religious exemptions and risk Establishment Clause<sup>265</sup> or Equal Protection violations,<sup>266</sup> or have relaxed procedures that may result in underinclusiveness.<sup>267</sup> For both constitutional and practical reasons,<sup>268</sup> such an exemption need not be included and should be avoided.

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Educ., 5:98-CV-981-BR(2), 1999 WL 1940002, at \*7 (E.D.N.C. Feb. 12, 1999) (declining to apply heightened scrutiny, and reasoning that the hybrid-rights category provided in *Smith* is narrow).

263. See discussion *supra* Part II.A (explaining that strict scrutiny is already the appropriate standard when reviewing a vaccination mandate). Even before *Smith* was decided, some courts held that a religious exemption was not constitutionally required in the context of mandatory vaccination laws. See *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987) (“The legislature’s creation of a statutory exception . . . goes beyond what the Supreme Court has declared the First Amendment to require . . .”).

264. See Alicia Novak, Comment, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1107 (2005) (explaining the two different ways states qualify religious exponents: (1) limiting the exemption to those who practice an organized, recognized, or established religion, and (2) evaluating whether the religious beliefs asserted are genuinely or sincerely held).

265. See *Quackenbush*, *supra* note 254, at 816–17 (outlining Arkansas’ religious exemption, which was subsequently abandoned because it violated the Establishment Clause). The Arkansas statute only made the exemption available to those who adhered or frequented a recognized religious denomination whose tenets and practices were contrary to immunization. *Id.* at 816 n.359. Thus, the statute was deemed unconstitutional in *McCarthy v. Boozman* because the provision inhibited the practice of non-recognized religions that objected to vaccination based on religious beliefs. 212 F. Supp. 2d 945, 949 (W.D. Ark. 2002). This case illustrates the difficulty in crafting a mechanism for certifying genuine religious beliefs without evoking additional constitutional concerns. *But see In re Christine M.*, 595 N.Y.S.2d 606, 614 (N.Y. Fam. Ct. 1992) (noting that, in order to avoid an Establishment Clause violation, the Court could merely require that an individual sincerely hold a religious belief against vaccination, as opposed to a belief founded upon medical or moral considerations or a religious belief not sincerely held).

266. There is also precedent suggesting religious exemptions may violate the Equal Protection Clause. See *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (declaring a religious exemption unconstitutional on the grounds that it would discriminate against the great majority of children whose parents have no such religious convictions).

267. *E.g.*, *Diana H. v. Rubin*, 171 P.3d 200, 205–06 (Ariz. Ct. App. 2007) (construing the legislature’s inclusion of a faith-based exemption in its immunization statute as indicating the state interest was not compelling); see Daniel A. Salmon, *Mandatory Immunization Laws and the Role of Medical, Religious and Philosophical Exemptions*, INST. FOR VACCINE SAFETY, 1 (Oct. 2003), <http://www.vaccinesafety.edu/exemptreview101503.pdf> (acknowledging that, as of 2000, only twenty-one states had ever denied a religious exemption claim in the context of school immunization mandates); see also Donald G. McNeil, *Worship Optional: Joining a Church to Avoid Vaccines*, N.Y. TIMES, Jan. 14, 2003, at F1 (addressing the ease with which one can affiliate with a religious group as a means to avoid vaccination).

268. Religious exponents, like philosophical exponents, tend to live in proximate areas, causing an increased risk of spreading infectious disease to the surrounding vaccinated

III. COLLATERAL CONSEQUENCES OF NARROWING *JACOBSON*

For nearly a century, courts have authorized mandatory vaccinations in the absence of a public health emergency by relying on *Jacobson's* deferential approach.<sup>269</sup> Thus, narrowing *Jacobson* and requiring the compelling interest of a public health emergency would have significant consequences for vaccination mandates in other contexts. The most notable reliance on *Jacobson's* authorization of mandatory vaccinations is in the realm of education.<sup>270</sup>

A significant public policy interest exists in continuing to authorize school vaccination requirements.<sup>271</sup> One approach courts may take in permitting such mandates is to rely on the Supreme Court's holding in *San Antonio Independent School District v. Rodriguez*.<sup>272</sup> In *Rodriguez*, when reviewing a state's disparate funding of public schools, the Court declined to extend the added protection of heightened scrutiny in the context of education.<sup>273</sup> Thus, relying on *Rodriguez*, courts could uphold vaccination mandates as a prerequisite for school attendance on the grounds that they implicate educational rights, rather than infringing upon liberty interests.<sup>274</sup>

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population. See *supra* note 255 (discussing the problem of "clustering"); see also Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277, 285 (2003) (pointing to studies that show that exemptor populations tend to be in geographical clusters, often near a school or church, increasing the risk of transmission and spreading the disease to surrounding areas).

269. See *Zucht v. King*, 260 U.S. 174, 176 (1922) (citing *Jacobson* as signifying that the state's police powers include the power to mandate vaccinations as a prerequisite to attending school); see also UNIV. OF CAL. PRESS & THE MILBANK MEM'L FUND, PUBLIC HEALTH LAW AND ETHICS: A READER, 206, 386 (Lawrence O. Gostin ed., 2002) (deeming *Jacobson* perhaps the most important Supreme Court opinion in the history of public health law because it stood firmly for the proposition that states could compel vaccination for the public good).

270. See *Boone v. Boozman*, 217 F. Supp. 2d 938, 953–54 (E.D. Ark. 2002) (crediting *Jacobson* and its affirmation in *Zucht* for establishing that a state may require public and private school children to be immunized); *Toward a Twenty-First-Century Jacobson v. Massachusetts*, *supra* note 56, at 1830 (noting that courts have universally mandated vaccines for school children since *Jacobson*).

271. See Sean Coletti, Note, *Taking Account of Partial Exemptors in Vaccination Law, Policy, and Practice*, 36 CONN. L. REV. 1341, 1348–49 (2004) (referring to the concept of herd immunity—the practice of maintaining a high level of vaccination within a community, such as a school—as being of paramount importance in disease prevention).

272. 411 U.S. 1 (1973).

273. See *id.* at 35 (holding that it is firmly established that the right to an education is not provided explicit or implicit protection under the Constitution and is not a fundamental right or liberty); *Boone*, 217 F. Supp. 2d at 957 (responding to plaintiff's argument that education rights outweigh state's interest in immunizing children by pointing to the lack of constitutional protection for the right to an education).

274. See *Boone*, 217 F. Supp. 2d at 955 (noting that there are no constitutional protections for exempting children from various mandatory school programs, and concluding that a parent's desire that her child not be immunized does not implicate heightened scrutiny because it may only limit where and how the child receives an education); see also OFFIT, *supra* note 22, at 139 (describing the distinction between compulsory vaccinations, where those who refuse would be forcibly vaccinated, and

A more likely approach that courts could use to uphold school vaccination mandates is one that many courts have already implied in dicta—simply deeming the government’s interest in having children vaccinated compelling.<sup>275</sup> Thus, provided that the statute was sufficiently narrowly tailored, it would survive heightened scrutiny.<sup>276</sup> In practice, states’ current school vaccination requirements provide little impetus for a substantial legal challenge. Only two states—Mississippi and West Virginia—limit exemptions to the medically contraindicated.<sup>277</sup> Because narrow religious exemptions raise Establishment Clause concerns,<sup>278</sup> most states have crafted their exemptions broadly and inclusively.<sup>279</sup> In fact, some states have never denied an application for an exemption.<sup>280</sup> Because they often operate more like guidelines than mandates, challenges to such regulations would likely be meritless.

Mandating vaccinations for government healthcare employees is another area where limiting *Jacobson*’s deference would impact a court’s analysis.<sup>281</sup> Despite its eventual rescission,<sup>282</sup> New York was the first state

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vaccination mandates that merely make it a prerequisite to obtaining certain social privileges, like a public education).

275. *E.g.*, *Workman v. Mingo County Sch.*, 667 F. Supp. 2d 679, 689 (S.D. W. Va. 2009), *aff’d*, No. 09-2352, 2011 WL 1042330 (4th Cir. Mar. 22, 2011) (quoting *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987)) (“[I]t [is] settled law . . . that claims of religious freedom must give way [to] the *compelling interest* of society in fighting . . . contagious diseases through mandatory inoculation programs.”) (emphasis added); *Diana H. v. Rubin*, 171 P.3d 200, 205 (Ariz. Ct. App. 2007) (acknowledging that the state’s interest in the health and welfare of its children is “of the highest order”); *Boone*, 217 F. Supp. 2d at 954 (responding to plaintiff’s argument that vaccination should only be mandated where there is “clear and present danger” by outlining the dangers of Hepatitis B and suggesting that, even if the plaintiff’s argument was valid, the court would likely find that it did present such a danger); *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) (asserting that “individual rights must be subordinated to the *compelling state interest* of protecting society against the spread of disease.”) (emphasis added); *Brown v. Stone*, 378 So. 2d 218, 222–23 (Miss. 1979) (upholding a school vaccination scheme because it served the “compelling public interest” of protecting children in the school community); *see also* *Gottlieb*, *supra* note 191, at 948 (pointing to several provisions in the Constitution that indicate that physical health and safety of citizens is a compelling state interest).

276. *See supra* Part II.C. (discussing the procedures that a mandatory vaccination statute must have to be sufficiently narrowly tailored to survive heightened scrutiny).

277. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 242.

278. *See supra* note 265 and accompanying text (outlining the problems associated with a restrictive religious exemption).

279. *See* *Silverman*, *supra* note 268, at 285 (asserting that, due to a combination of broadly written statutes and relaxed enforcement, virtually any applicant can receive an exemption).

280. *See* *Salmon*, *supra* note 267 (referring to a study that found thirteen states with religious exemptions, but no philosophical exemptions, which had never denied any exemption request).

281. *See* *Alexandra M. Stewart, Mandatory Vaccination of Health Care Workers*, 361 *NEW ENG. J. MED.* 2015, 2016–17 (2009) (suggesting that challenges to vaccination mandates for health care workers in courts will likely fail because of the principles outlined in *Jacobson*).

to mandate flu vaccinations for healthcare workers statewide;<sup>283</sup> however, as fears of a pandemic influenza virus increase, it likely will not be the last. Moreover, a growing anti-vaccination movement makes a challenge to such a mandate inevitable.<sup>284</sup> Though a court assessing a healthcare employee vaccination mandate could certainly view disease prevention in health care settings as a compelling interest,<sup>285</sup> strict scrutiny review would not be necessary to review such a mandate. Even schemes that threaten forfeiture of employment do not implicate fundamental rights.<sup>286</sup> Rather, they involve property interests, which are afforded some due process<sup>287</sup> but are still subject to a deferential standard of review.<sup>288</sup> Also, employment law considerations control mandates levied against a class of workers and often already provide enhanced protections.<sup>289</sup> Accordingly, the status quo would likely remain, even absent the tenets of *Jacobson*.

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282. See *supra* notes 12–14 and accompanying text (reiterating how New York eventually suspended an emergency regulation that had required healthcare personnel to receive the seasonal vaccinations).

283. Lisa Schnirring, *First Hospital to Mandate Flu Vaccination Reports on Challenges, Success*, CTR. FOR INFECTIOUS DISEASE RESEARCH AND POL'Y (Aug. 3, 2010), <http://www.cidrap.umn.edu/cidrap/content/influenza/general/news/aug0310mandatory-br.html>.

284. See OFFIT, *supra* note 22, at 149 (detailing the persistence of anti-vaccination groups and the aggressive approach the modern movement has taken despite various recent outbreaks of infectious disease attributed to unvaccinated populations).

285. See Alexandra Stewart & Sara Rosenbaum, *Vaccinating the Health-Care Workforce: State Law vs. Institutional Requirements*, 125 PUB. HEALTH REP. 615, 615 (2010) (asserting that health care workers' direct contact with patients presents the primary source of infectious disease outbreaks in health care facilities and that vaccination would drastically reduce morbidity rates); cf. Christine Nero Coughlin et al., *When Doctors Become "Patients": Advocating a Patient-Centered Approach for Health Care Workers in the Context of Mandatory Influenza Vaccinations and Informed Consent*, 45 WAKE FOREST L. REV. 1551, 1553 (2010) (citing Stewart, *supra* note 281, at 2015) (noting that, over the past fifteen years, only forty to fifty percent of health care workers have voluntarily chosen to be vaccinated against seasonal influenza).

286. In the private sector, hospitals have dealt with unvaccinated workers in a variety of ways, including requiring them to wear surgical masks and an identifying badge, offering leave of absences or reassignment to non-patient-care areas, and potential termination of employment. *Serv. Emps. Int'l Union, Local 121RN v. Los Robles Reg'l Med. Ctr.*, C 09-5065 JF (RS), 2009 WL 3872138, at \*1 (N.D. Cal. Nov. 17, 2009); Coughlin et al., *supra* note 285, at 1554–55 (citations omitted).

287. See *Perry v. Sinderman*, 408 U.S. 593, 599–601 (1972) (acknowledging that some property interests receive procedural due process protection but “are not limited by a few rigid, technical forms”).

288. See Paris Nourmohammadi & Brigid Ryan, *Shooting the Moon: Should states require the H1N1 vaccine for healthcare workers?*, 7 J. EMERGENCY MGMT. 11, 12 (2009) (asserting that the property interests at issue in a health care mandate receive the least constitutional protection from government infringement).

289. See *Virginia Mason Hosp. v. Washington State Nurses Ass'n*, 511 F.3d 908, 911 (9th Cir. 2007) (affirming an arbitrator's ruling preventing a private employer from unilaterally implementing a mandatory influenza immunization regime because of the enhanced protections provided by the collective bargaining agreement).

## CONCLUSION

There is fertile ground for a challenge of a vaccination mandate to reach the Supreme Court. As it stands now, during a full-scale infectious disease epidemic, an individual in Minnesota may refuse vaccination without providing any explanation.<sup>290</sup> On the other hand, before such an epidemic in Arizona, the governor could prematurely declare a state of emergency and immediately order law enforcement officials to compel vaccinations due to inadequate oversight.<sup>291</sup> With such disparity among the states, as well as the recent H1N1 outbreak, growing concerns over the spread of infectious disease, and an anti-vaccination movement strengthened by today's information age, it is only a matter of time before the Supreme Court is confronted with a challenge to a vaccination mandate.

Considering evolution in constitutional jurisprudence, the right to refuse vaccination must be regarded as a fundamental right demanding strict scrutiny.<sup>292</sup> A properly crafted statute, however, can survive such scrutiny when employed during a public health emergency.<sup>293</sup>

While the last two decades have seen significant progress in health law—particularly evolution in the realm of bodily integrity and refusal of medical treatment—courts continue to follow century-old doctrines that are incompatible with these developments.<sup>294</sup> By synthesizing the doctrines and narrowing *Jacobson* accordingly, the Supreme Court can provide clarity to lower courts,<sup>295</sup> create an intelligible standard for legislatures to follow, empower state governments so they are more equipped to deal with the spread of infectious disease, and require procedures to protect civil liberties and personal autonomy from abuses of power.

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290. MINN. STAT. ANN. § 12.39 (2005).

291. ARIZ. REV. STAT. ANN. § 36-787 (2002).

292. See discussion *supra* Part II.A.

293. See discussion *supra* Parts II.B, II.C.

294. See *Workman v. Mingo Cnty. Bd. of Educ.*, No. 09-2352, 2011 WL 1042330, at \*4 (4th Cir. Mar. 22, 2011) (citing *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam)) (noting that it would not narrow *Jacobson* because it is bound by Supreme Court precedent and must follow such opinions no matter how misguided they may be). See generally Hill, *supra* note 40, at 281–82 (analyzing the doctrines as distinct, referring to one as “public-health cases” and the other “autonomy cases”).

295. See *Boone v. Boozman*, 217 F. Supp. 2d 938, 956 (E.D. Ark. 2002) (responding to the argument that *Jacobson* and *Zucht* are “utterly archaic” by stating that it is its responsibility, “until the Supreme Court says otherwise, to give effect to immunization cases like *Jacobson* and *Zucht*”).