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## Immunization Law: Litigating Alternative Facts

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**Immunization Law:**  
*Litigating Alternative Facts*<sup>1</sup>

Dorit Rubinstein Reiss

From January 1, 2019, to March 21, 2019, 314 cases of measles have been confirmed in fifteen states.<sup>2</sup> By comparison, the entire year of 2018 saw 372 cases, and that, too, was relatively high. The rise in measles cases is directly connected to non-vaccination: The outbreaks are often started by unvaccinated individuals traveling from measles-endemic areas or returning from such areas. As a result, multiple states are considering tightening their school immunization mandates. This is unsurprising: school immunization mandates are highly effective at reducing outbreaks, and the stronger they are, the higher the state's immunization rate.<sup>3</sup>

California acted to strengthen its mandate in 2015, in response to a large measles outbreak centered on Disneyland. Legislators proposed SB277, a bill to remove California's personal-belief exemption from school immunization requirements. After a lengthy, fully deliberative process, the bill was signed into law by Governor Jerry Brown on June 30, 2015.

Naturally, opponents challenged the new law in the courts. So far, all courts—five trial courts (three federal, two state) and two California courts of appeal—have upheld SB277. This chapter uses these litigations to examine the legal framework surrounding school immunization mandates, including the best arguments against school immunization mandates. The chapter then confronts those arguments and explains why the extensive jurisprudence upholding school immunization mandates is correct. As stated by California's Second Appellate District, "compulsory immunization has long been recognized as the gold standard for preventing the spread of contagious diseases."<sup>4</sup> School mandates also fit well with our basic constitutional principles, and the arguments against them are unconvincing.

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1. Summarized and excerpted from Dorit Rubinstein Reiss, *Litigating Alternative Facts: School Vaccines Mandates in the Courts*, 21 U. PA. J. CONST. L. 207 (2018).

2. Centers for Disease Prevention and Control, *Measles Cases in 2019* (Mar. 21, 2019).

3. See Reiss, *supra* note 1, at 211 n.25-28.

4. *Brown v. Smith*, 24 Cal. App. 5th 1135, 1146 (2018).

School immunization mandates exist in all fifty states and the District of Columbia. All states offer medical exemptions from them, and most states offer nonmedical exemptions. A jurisprudence going back to the 19th century, however, makes it clear that nonmedical exemptions are not required, and that a school mandate can be valid even if it is accompanied only by medical exemptions. This jurisprudence is supported by three basic principles. First, since the early days of the republic, America has recognized that public health is a core state function. Second, the Supreme Court has long recognized that individual liberty can be limited to protect the public health—especially in the context of communicable, dangerous diseases. Third, school mandates specifically occupy a special place in our system because they sit at the intersection of two important justifications for state action: public health and children’s rights. School mandates thus draw on another source of state power: *parens patriae*, the state’s role in protecting the vulnerable. The value of protecting children—both the unvaccinated children left unprotected from disease by their parents’ choice, and other children in the school—strongly supports the legality of school immunization mandates. This combination makes them especially constitutionally robust.

This chapter groups arguments made by opponents of the law into three categories according to their strength: The strongest arguments, arguments that are plausible but incorrect under established jurisprudence, and implausible arguments. The chapter analyzes each group and concludes, at the end of the day, that they all are unconvincing.

The strongest arguments have some jurisprudential support and make plausible claims that mandates affect important countervailing rights. There are three such arguments: the claim that school immunization mandates interfere with a child’s right to education, the claim that school immunization mandates run afoul of the First Amendment’s protections of free exercise of religion, and the claim that school immunization mandates impose an unconstitutional condition.

The right to access education in California is based on a series of three cases in the 1970s that, in essence, found California’s system of public schools at the time to be unconstitutional, because it used a suspect category (wealth) in the context of a fundamental interest (education).<sup>5</sup> But using these cases to argue against imposing a health-and-safety regulation on schools misapplies them; in fact, health and

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5. *Serrano v. Priest (Serrano I)*, 487 P.2d 1241, 1255, 1258 (Cal. 1971); see also *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 948 (Cal. 1976) (en banc).

safety are a precondition to education. Further, between the children whose parents choose not to vaccinate, and the children who cannot be vaccinated for medical reasons and who depend on high rates in the school for their safety, the stronger claim is that of the children whose parents cannot protect, not that of the children whose parents choose not to protect. Finally, the right to education is not absolute but can be overcome by the need to protect the health and safety of other students.<sup>6</sup>

The Free Exercise Clause claim has been rejected by courts, most notably the U.S. Court of Appeals for the Second Circuit, which held that argument as foreclosed by Supreme Court jurisprudence on the First Amendment,<sup>7</sup> and California courts ruling on the constitutionality of SB277 have agreed with the Second Circuit's analysis. However, recent United States Supreme Court decisions upholding religious protections raise questions about this claim, and the special place of the First Amendment in our constitutional order supports giving Free Exercise claims careful treatment. Analysis of the recent Supreme Court decisions in *Burwell v. Hobby Lobby Stores, Inc.*<sup>8</sup> and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*<sup>9</sup> reveals the care that the Supreme Court took to narrowly base these decisions, including specific carveouts for vaccines. These cases do not, therefore, support a departure from the general framework used in past decades to reject First Amendment challenges to school immunization mandates.

Finally, a creative argument urged in one of the lawsuits against SB277 contends that school mandates set an unconstitutional condition by conditioning a number of important rights—such as a child's right to education, parents' right to make medical decisions for their child, and a child's right to privacy—on vaccinating. California's Third Appellate District rejected this argument as “strong on hyperbole and scant on authority,” because none of the rights raised are absolute and the jurisprudence supports school mandates.<sup>10</sup> Further, even the best interpretation of the unconstitutional-conditions doctrine, though confusing and unclear, does not support the unconstitutionality of school mandates.

The second category of arguments opposing school immunization mandates appear plausible on their face but in fact have been addressed

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6. *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016).

7. *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015).

8. 134 S. Ct. 2751, 2760–62 (2014).

9. 138 S. Ct. 1719 (2018).

10. <https://law.justia.com/cases/california/court-of-appeal/2018/c086030.html>.

conclusively and in depth by previous courts. These arguments include claims that school mandates violate parental rights and rights under the Fourteenth Amendment.

While the law recognizes parental rights, they have never been absolute. Parental rights were always subject to limits to protect a child's welfare. In the context of school mandates, parental rights are weaker than in other contexts because the parental choice of non-vaccination is contrary to the health and safety of both the parent's own child and other parents' children. Lower immunization rates increase the risk of outbreaks in a school environment, threatening the health of everyone, and especially of the children who cannot be vaccinated for medical reasons. Existing parental-rights jurisprudence does not support extending parental rights to include a right to make school less safe for other children. For related reasons, the Supreme Court has consistently rejected substantive due-process challenges to school mandates on the ground that the liberty protected by the Fourteenth Amendment can be limited to protect others.

Fourteenth Amendment equal-protection claims fail on two grounds. First, children unvaccinated by choice are meaningfully different from other children. Unvaccinated children are at higher risk of getting and transmitting a preventable disease. This meaningful difference between vaccinated and unvaccinated children legitimates different treatment. Further, children unvaccinated by parental choice are different from children unvaccinated because of medical exemptions. All comparisons fail under the Equal Protection Clause for the same reason: the children are not similarly situated. Second, vaccination status is not a protected classification. Thus, any legal distinctions based on vaccination status are scrutinized for a rational basis—and each of the distinctions made in SB277 has a rational basis. To give one example, distinguishing between children at different classes was adopted to allow for gradual implementation, preventing schools from being overwhelmed by having to address 200,000 exempt children at once and allowing most parents time to consider their option. Those are reasonable goals, and the points chosen correspond to important changes in a child's education, where most children already are in transition (entering the system, entering kindergarten, and entering seventh grade).

The last category includes two implausible arguments made by plaintiffs. While it is tempting to dismiss these far-fetched arguments out of hand, vaccination opponents likely will raise them again in cases and before legislators, so it remains important to address and provide answers to them.

The first argument—made by a group of unrepresented plaintiffs—was that SB277 violated the Racketeer and Corrupt Organization Act, a

RICO claim. The claim appeared to be that the act was the result of a conspiracy by legislators to harm children. The suit named many legislators, their spouses, the governor, and his wife as defendants. It failed for two reasons. First, legislators and the governor are immune from suits for damages for legislative activity. Second, the events alleged did not plausibly satisfy the elements of RICO.

The second implausible argument is that the Supreme Court in *Bruesewitz v. Wyeth*<sup>11</sup> declared vaccines “unavoidably unsafe,” and states cannot mandate unavoidably unsafe products. In fact, the Supreme Court in *Bruesewitz* rejected the “unavoidably unsafe” argument. In addition, the fact that vaccines have some risks does not automatically negate mandates—just as the risks of seatbelts do not automatically negate seatbelt mandates. Like seatbelts, vaccines risks are much smaller than the risks they protect against.

In short, the strong jurisprudence behind school mandates is as well-founded today as it was in 1905, when the Supreme Court first held a vaccination requirement constitutional.<sup>12</sup> School mandates make school and communities safer and do not impermissibly violate constitutional rights. There is every reason to continue to support them.

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11. 562 U.S. 223, 226 (2011).

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

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