Contemporary dilemmas about vaccination and public health law have deeply rooted historical precedents. The story of Henning Jacobson is the story of a central challenge in public health: how to protect community health and safety while preserving individual civil liberties. In June 1894, the Commonwealth of Massachusetts enacted a law that allowed municipalities to order the compulsory vaccination of its residents during disease outbreaks.1 When the Boston smallpox epidemic that began in May 1901 spread to surrounding towns, the Cambridge Board of Health in February 1902 ordered its residents who had not received the smallpox vaccine since March 1897 to be vaccinated.2 Jacobson, the minister of the Swedish Evangelical Lutheran Church in Cambridge, had been vaccinated against smallpox as a child and had experienced a serious reaction to the vaccine. Jacobson refused to comply with the Board of Health’s vaccination order. Charged with violating the law, Jacobson pled not guilty in the municipal court, but was eventually convicted and fined $5. After the Massachusetts Supreme Court upheld the lower court’s decision, Jacobson appealed his case to the US Supreme Court.3 The Court’s decision in Jacobson v Massachusetts, which upheld the state’s right to order that its citizens be compulsorily vaccinated, became a foundational case in American law and, for the past century, the decision has defined the scope of public health law.4

The decision reaffirmed the state’s police powers in matters of health and allowed a generous latitude in the types of measures the state could impose when public health and safety were threatened. The court did, however, give deference to the idea of “bodily integrity” by not declaring that an individual who refused to obey a vaccination order or other public health measure could be forcibly vaccinated or made to comply with the measure.5 Individuals may be punished for refusing to comply, but the measure could not be forcibly imposed on them. The state’s new public health powers were immediately used in such contexts as the long-term quarantine of a healthy typhoid carrier, Mary Mallon; the immunization of children against diphtheria; and the forced segregation of patients with leprosy.6-8

Since the terrorist attacks of September 2001, the public health community has struggled to formulate a vaccination policy and a bioterror response that balances the competing values of individual autonomy and governmental authority to protect the public health. The implications of the proposed Model State Emergency Health Powers Act (MSEHPA),9 which was formulated in response to the September 11, 2001, attacks, are more consequential because of the legislation’s potential to further expand governmental police powers during public health emergencies. Rather than spelling out how public health and government officials should respond to a crisis, the legislation vests them with broad legal powers to pursue emergency measures. To date, 43 states have introduced bills or resolutions that include components of MSEHPA and 32 states have enacted emergency health powers legislation based in part on MSEHPA.10 The MSEHPA has been criticized for vesting enormous powers in the nation’s governors; for allowing governmental authorities to seize and control private property during a public health emergency and not be held liable in case of their damage or destruction; for allowing the arrest, imprisonment, and forcible examination, vaccination, or medication of individuals without their consent and not be held liable in case of any injury or death; and for being vague in what defines a public health emergency.11,12 The law’s authors make several assumptions that can be approached from a historical perspective: that existing public health laws are inadequate, obsolete, or inconsistent to address a bioterror emergency; that courts would not allow an amplification of existing laws to address the crisis; and that the nation’s governors, although already wielding extraordinary powers during a public health crisis, need additional powers. These issues have their roots in the development of American public health over the past century. The MSEHPA’s authors observe that the rights of liberty, due process, and property are fundamental but not absolute and allude to Justice John Harlan’s opinion in Jacobson v Massachusetts.13 The MSEHPA’s critics also point to Jacobson v Massachusetts and suggest that the law’s authors fail to appreciate public health’s historical and legal development and that what was appropriate at the start of the 20th century is no longer appropriate at the start of the 21st.11

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