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# By the Pricking of My Thumbs, State Restriction This Way Comes: Immunizing Vaccination Laws from Constitutional Review

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# By the Pricking of My Thumbs, State Restriction This Way Comes: Immunizing Vaccination Laws from Constitutional Review

## INTRODUCTION

In December 2014, Disneyland in California was far from the happiest place on earth: an outbreak of measles began,<sup>1</sup> lasting until April 17, 2015, and infecting at least 147 people.<sup>2</sup> The outbreak was blamed on an insufficient number of vaccinated children, and it also infected many children, some of whom were infants too young to be fully vaccinated against the measles.<sup>3</sup> From January 1, 2015 to September 18, 2015,<sup>4</sup> the total number of reported measles cases in the United States was 189, covering 24 states and the District of Columbia.<sup>5</sup>

Outbreaks<sup>6</sup> such as the Disneyland incident represent an alarming trend in recent years. In 2014, the United States had a record number of measles outbreaks, with 27 states reporting a total of 668 cases.<sup>7</sup> This number shattered the record since the declaration of the elimination of

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1. Amy Taxin, *9 Measles Cases Linked to Disney Theme Parks in California*, ASSOCIATED PRESS (Jan. 7, 2015, 3:19 AM), <http://www.seattletimes.com/life/travel/9-measles-cases-linked-to-disney-theme-parks-in-california/> [<http://perma.cc/G7QQ-6VMP>].

2. Alicia Chang, *Large Measles Outbreak Traced to Disneyland is Declared Over*, ASSOCIATED PRESS (Apr. 17, 2015, 3:00 PM), <http://news.yahoo.com/large-measles-outbreak-traced-disneyland-declared-over-162831457.html> [<https://perma.cc/VE2M-B4RM>].

3. *Id.*; Karen Kaplan, *Vaccine Refusal Helped Fuel Disneyland Measles Outbreak, Study Says*, L.A. TIMES (Mar. 16, 2015, 5:30 PM), <http://www.latimes.com/science/sciencenow/la-sci-sn-disneyland-measles-under-vaccination-20150316-story.html> [<https://perma.cc/WM4R-SY84>].

4. *See Measles Cases and Outbreaks*, CTR. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/measles/cases-outbreaks.html> [<https://perma.cc/SDB8-4CP6>] (last updated July 20, 2016).

5. *Measles*, NAT'L FOUND. FOR INFECTIOUS DISEASES, <http://www.nfid.org/idinfo/measles> (last visited Sept. 2, 2016).

6. The Center for Disease Control and Prevention (“CDC”) defines an “outbreak” as three or more cases that are connected by time or geographic location. Ctr. For Disease Control and Prevention, *Measles—United States, 2011*, 61 MORBIDITY AND MORTALITY WEEKLY REP., Apr. 20, 2012, at 253, <http://www.cdc.gov/mmwr/PDF/wk/mm6115.pdf> [<https://perma.cc/YXB7-LX6C>].

7. *See Measles Cases and Outbreaks*, *supra* note 4.

measles in 2000.<sup>8</sup> In 2013, the U.S. experienced 11 outbreaks of measles, with one large outbreak affecting unvaccinated Amish communities in Ohio.<sup>9</sup> The total number of cases in 2013 was at least 175.<sup>10</sup> In 2011, 17 outbreaks and 22 measles cases were reported, at the time marking the highest number of measles cases in a given year since 1996.<sup>11</sup> The Center for Disease Control and Prevention (“CDC”) reports that most victims are unvaccinated and that the disease spreads through unvaccinated groups.<sup>12</sup> Thus, high vaccination rates are vital to prevent the spread of diseases.<sup>13</sup>

To ensure high vaccination rates, all 50 states have mandatory vaccination laws requiring their citizens to be vaccinated.<sup>14</sup> Three types of exemptions from mandatory state vaccination laws exist: medical, philosophical, and religious exemptions.<sup>15</sup> Although medical exemptions are not controversial, philosophical and religious exemptions are, not only because of the possible threat the exemptions could create by lowering vaccination rates,<sup>16</sup> but also because unlike medical exemptions, they are based on parental beliefs rather than the child’s medical condition. The Supreme Court has never heard a case involving exemptions to state vaccination laws and has heard only two cases involving vaccination laws in general: *Jacobson v. Massachusetts*<sup>17</sup> and *Zucht v. King*.<sup>18</sup> Together

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8. *Id.*

9. *Id.*; *Measles Still Threatens Health Security*, CTR. FOR DISEASE CONTROL AND PREVENTION (Dec. 5, 2013, 12:00 PM), <http://www.cdc.gov/media/releases/2013/p1205-meales-threat.html> [<https://perma.cc/7K4H-LM3Q>].

10. *Measles Cases and Outbreaks*, *supra* note 4; *Measles Still Threatens Health Security*, *supra* note 9.

11. *Measles—United States, 2011*, *supra* note 6; Mike Stobbe, *CDC: 2011 Was Worst Measles Year in U.S. in 15 Years*, ASSOCIATED PRESS (Apr. 19, 2012, 4:06 PM), <http://usatoday30.usatoday.com/news/health/story/2012-04-19/Measles-worst-year-CDC/54411802/1> [<https://perma.cc/42DF-LMJG>].

12. *Measles Cases and Outbreaks*, *supra* note 4. In 2013, 11 outbreaks of measles occurred. Three of these outbreaks included more than 20 cases, and one included 58 cases. *Id.*

13. Kevin M. Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, in *LAW IN PUBLIC HEALTH PRACTICE* 262, 264 (Richard A. Goodman et al. eds., 2d ed. 2007).

14. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT’L CONF. OF ST. LEG., <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [<https://perma.cc/5HZZ-B3B2>] (last updated Jan. 21, 2016).

15. *Id.*

16. Malone & Hinman, *supra* note 13, at 265.

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

18. 260 U.S. 174 (1922).

these cases held that states have the police power to mandate vaccinations and make them a prerequisite for attending school.<sup>19</sup> Since *Zucht* in 1922,<sup>20</sup> however, the Supreme Court has developed a line of jurisprudence that recognizes parental rights as constitutionally protected.<sup>21</sup> These parental rights holdings conflict with the previous holdings of the Court's vaccination cases in *Jacobson* and *Zucht* because state laws forcing parents to vaccinate their children over parental objections could violate the parents' constitutional rights.

This Comment argues that states should not allow philosophical exemptions and should either retain or create religious exemptions that meet certain requirements under the Free Exercise Clause, the Due Process Clause, and the Establishment Clause. California and Louisiana differ in their approaches to vaccination laws. As a result of the California legislature's controversial response to the Disneyland measles outbreak by banning philosophical and religious exemptions,<sup>22</sup> California is now among the few states with the strictest vaccination requirements.<sup>23</sup> In contrast, Louisiana is among the states with the laxest vaccination laws, which allow for both exemptions.<sup>24</sup> Under the proposed solution, California should modify its law to allow religious exemptions, and Louisiana should ban philosophical exemptions.

Part I of this Comment details the Supreme Court's jurisprudence regarding parental rights. It explains how the protection that these cases afford to parental rights under the Due Process Clause and the Free Exercise Clause could provide a framework different from *Jacobson* and *Zucht* through which to view state vaccination laws. It also gives a brief history of the invention of vaccinations and explains the necessity of maintaining high vaccination rates, in addition to discussing the three types of exemptions. Part II analyzes the scarce Supreme Court jurisprudence on state vaccination laws. It also explains the controversy surrounding California Senate Bill 277, which California's legislature enacted in response to the Disneyland measles outbreak, and compares California law to Louisiana law. Part III

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19. *Id.* at 176; *Jacobson*, 197 U.S. at 36–37.

20. *Zucht*, 260 U.S. at 176.

21. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

22. Adam Nagourney, *California Mandates Vaccines for Schoolchildren*, N.Y. TIMES (June 30, 2015), <http://www.nytimes.com/2015/07/01/us/california-mandates-vaccines-for-schoolchildren.html> [<https://perma.cc/Z9XU-GYCT>].

23. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 14.

24. *Id.*

details the different approaches lower courts have taken when analyzing exemptions, with an eye toward the solution of banning philosophical exemptions while allowing religious exemptions. Part IV proposes the solution of banning philosophical exemptions and allowing religious exemptions as a policy matter and suggests a change in the wording of state vaccination legislation to meet Free Exercise, Due Process, and Establishment Clause requirements.

#### I. ALL OUR YESTERDAYS: PARENTAL RIGHTS V. VACCINATION LAWS

The state has an interest in vaccinating its citizens to safeguard them from diseases; these disease control efforts, however, might conflict with the freedom of parents to raise their children as they wish. Whether the issue is considered a parental rights or a states' rights issue controls the answer to the questions surrounding exemptions to state vaccination laws. The Supreme Court has heard cases regarding parental authority that are wholly separate from cases involving vaccination laws. The cases the Court has heard regarding vaccinations held that the state has the power to mandate vaccination laws.<sup>25</sup> Parental rights cases, however, have generally held that parental authority is protected under the Due Process Clause and sometimes the Free Exercise Clause from the states' attempts to interfere with parental decisions regarding how children are raised.<sup>26</sup> An analysis of exemptions to state vaccination laws under parental rights case law changes the discussion from one of states' rights to enact laws to protect the public from disease to one of parents' rights to raise their children as they deem fit.<sup>27</sup>

##### A. Constitutional Protection of Parental Rights

On several occasions, the Supreme Court has recognized the importance of parental rights. The protections afforded to parental rights fall into two categories: Due Process protections and Free Exercise protections.<sup>28</sup> The Court has upheld parental rights in these cases, even over the state's interest in educating its citizens and claims of visitation

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25. *Zucht*, 260 U.S. at 176; *Jacobson v. Massachusetts*, 197 U.S. 11, 36–37 (1905).

26. *Troxel*, 530 U.S. at 66; *Yoder*, 406 U.S. at 232; *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 399.

27. *Troxel*, 530 U.S. at 66; *Yoder*, 406 U.S. at 232; *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 399.

28. *Troxel*, 530 U.S. at 66; *Yoder*, 406 U.S. at 232; *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 399.

rights. Moreover, when parental decisions are based on religion, the Court takes particular note of the rights parents possess to raise their children in the religion they wish, even if the decision conflicts with a state law.<sup>29</sup>

### 1. Due Process Protections

The Due Process Clause of the Fourteenth Amendment provides that citizens will not be denied fundamental rights without due process of law.<sup>30</sup> Although the Due Process Clause does not explicitly acknowledge parental rights, the Supreme Court has recognized that parental rights are protected under the Due Process Clause of the Fourteenth Amendment.<sup>31</sup> In *Meyer v. Nebraska*, the Supreme Court struck down a law that limited parents' rights to educate their children in speaking a foreign language under the Due Process Clause.<sup>32</sup> Despite the absence of parental rights in the Constitution, the Court recognized the right "to marry, establish a home and bring up children" as protected under the Due Process Clause.<sup>33</sup>

Similarly, in *Pierce v. Society of Sisters*, the Court held that a law requiring children to attend public schools violated the Due Process Clause because it interfered with parents' rights to raise their children as they wished.<sup>34</sup> The Court reasoned, "[t]he child is not the mere creature of the State,"<sup>35</sup> thereby recognizing that states generally cannot interfere with parents' decisions to raise their children as they wish.

In the more recent case of *Troxel v. Granville*, the Court overturned a law that allowed the courts to override parental decisions as to what their children's best interests were with regard to the visitation rights of nonparents—in this case, grandparents.<sup>36</sup> In its holding, the Court recognized its extensive jurisprudence upholding parental rights, stating, "[i]n light of this extensive precedent, it cannot now be doubted that the

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29. See, e.g., *Yoder*, 406 U.S. at 232 (refusing to dictate parents' educational decisions when the education interfered with the children's religious upbringing, and noting that to decide otherwise would be the Court deciding the children's religious future).

30. U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.").

31. *Troxel*, 530 U.S. at 66; *Yoder*, 406 U.S. at 232; *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 399.

32. *Meyer*, 262 U.S. at 396–97, 399, 403.

33. *Id.* at 399.

34. *Pierce*, 268 U.S. at 530, 534–35.

35. *Id.* at 535.

36. *Troxel*, 530 U.S. at 67.

Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”<sup>37</sup> Thus, under *Troxel*, parents possess the exclusive right not only to raise their children as they wish, but also to make decisions for their children’s well-being.

Consequently, the Supreme Court has firmly established parental rights as protected by the Due Process Clause. Furthermore, these holdings show that the Supreme Court will uphold parental rights even under claims that the parent’s decision is not in the child’s best interest.

## 2. Free Exercise Clause Protections

In addition to recognizing parental rights under the Due Process Clause, the Court has also defended parental rights under the Free Exercise Clause, which prohibits the government from barring the free exercise of religion.<sup>38</sup> In *Wisconsin v. Yoder*, two Amish families challenged a law mandating school attendance until the age of 16 on the grounds that it violated the principles of the Amish religion.<sup>39</sup> The families argued that school attendance at this time in the children’s lives significantly interfered with Amish religious training because the two occurred at the same time.<sup>40</sup> The Court declared the application of the law to the Amish families unconstitutional and explained that giving the state this much power under *parens patriae*<sup>41</sup> would be tantamount to deciding the child’s “religious future.”<sup>42</sup> The Court rejected the claim that the state should rescue Amish children from their parents’ religious beliefs, stating that the case implicated the “fundamental interest of parents . . . to guide the religious future and education of their children,” and that parents’ rights to raise their children as they wish were “now established beyond debate.”<sup>43</sup> Thus, under *Yoder*, parents possess the fundamental right to educate and raise their children in the religion of the parents’ choosing.

The Court also indirectly addressed parental rights in a case that on its face seemed to have no relation to the issue. In *Employment Division of*

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37. *Id.* at 66.

38. U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion].”).

39. *Wisconsin v. Yoder*, 406 U.S. 205, 207–09 (1972).

40. *Id.* at 222.

41. *Id.* at 232. The term *parens patriae* is literally translated as “parent of his or her country” and refers to the state’s ability to protect citizens who cannot protect themselves. *Parens Patriae*, BLACK’S LAW DICTIONARY (10th ed. 2014).

42. *Yoder*, 406 U.S. at 232.

43. *Id.*

*Oregon v. Smith*, the defendants had ingested peyote, which Oregon's criminal law considered a "controlled substance," as part of a Native American religious sacrament.<sup>44</sup> The Court rejected the defendants' argument that their religious beliefs should decriminalize their conduct under the relevant statute, stating, "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."<sup>45</sup> The primary effect of *Smith* is that laws burdening religion are permissible and not subject to the compelling interest test<sup>46</sup> as long as they are generally applicable and not targeted at that religion.<sup>47</sup>

Although the case did not involve parental rights, in dicta, the Court turned to the protection of parental rights under the Free Exercise Clause.<sup>48</sup> It noted that the compelling interest test still applied to laws restricting the free exercise of religion when the religious activity was connected to other constitutional rights, such as freedom of speech and the right to raise children under *Pierce* and *Yoder*.<sup>49</sup> Thus, the Court explicitly recognized that parental rights connected with freedom of religion receive extensive protection under the Constitution.

The Court refused to mandate that states create sweeping religious exemptions to their laws as a whole and included vaccination laws in its listing of generally applicable state laws.<sup>50</sup> It observed, however, that the states themselves are free to create nondiscriminatory religious exemptions to their laws.<sup>51</sup> It also noted that religious exemptions can be "desirable," although these exemptions are not constitutionally required, nor immune from judicial review.<sup>52</sup> Although exemptions to state vaccination laws might not be constitutionally mandated, the Court

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44. *Emp't Div. of Or. v. Smith*, 494 U.S. 872, 874 (1990).

45. *Id.* at 878–79.

46. The compelling interest test comes from *Sherbert v. Verner* and first requires the court to determine whether "any burden" exists on the individual's free exercise of religion as a result of the law. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). If a burden exists, the law burdening the free exercise of religion can be justified only if the state shows a "compelling interest"—that is, a serious interest—justifying the law and that the state has no other avenue to further its interest. *Id.* at 406–07.

47. *Emp't Div. of Or.*, 494 U.S. at 885.

48. *Id.* at 881.

49. *Id.*

50. *Id.* at 888–90.

51. *Id.*

52. *Id.*



recognized the importance of religious exemptions with regard to all state laws, and specifically vaccination laws.

### *B. Vaccination History, Laws, and Exemptions*

Vaccinations play an important role in maintaining public health, but state-mandated vaccinations have the potential to conflict with parents' religious beliefs and concerns over safety and health. Three types of exemptions exist that allow parents to opt out of vaccinating their children in accordance with these beliefs and concerns. Because vaccinations are vital to maintaining disease eradication, the state has a high interest in ensuring that its citizens are vaccinated.

#### *1. History of Vaccinations and Herd Immunity*

The state's interest in maintaining high vaccination rates to keep citizens healthy traces back to 1796, when Edward Jenner invented the smallpox vaccine.<sup>53</sup> Vaccines were a medical breakthrough, and their use quickly spread throughout Europe and the United States.<sup>54</sup> In 1809, Massachusetts became the first state to mandate vaccinations, and in 1855, became the first state to mandate childhood vaccinations as a prerequisite for attending school.<sup>55</sup> The CDC now counts vaccinations as one of the top ten public health achievements of the 20th century.<sup>56</sup>

One of the primary medical reasons responsible for this achievement is that vaccinations rely on what is known as "herd immunity" to sustain disease eradication.<sup>57</sup> Herd immunity is the phenomenon that occurs once a high percentage of the population is vaccinated.<sup>58</sup> Vaccinated persons serve as a "barrier" to the few who are not vaccinated and prevent the spread of diseases that are transmitted individually.<sup>59</sup> Although 100% of the population is not required to be vaccinated, once a high enough percentage

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53. Malone & Hinman, *supra* note 13, at 262.

54. Donald H. Henderson, *Edward Jenner's Vaccine*, 112 PUB. HEALTH REPS. 116, 117 (1997).

55. Malone & Hinman, *supra* note 13, at 271.

56. Ctr. For Disease Control and Prevention, *Ten Great Public Health Achievements—United States, 1900–1999*, 48 MORBIDITY AND MORTALITY WEEKLY REP., Apr. 2, 1999, at 241, <http://www.cdc.gov/mmwr/PDF/wk/mm4812.pdf> [<https://perma.cc/DD53-VKWY>].

57. Malone & Hinman, *supra* note 13, at 264.

58. *Id.*

59. *Id.*

is vaccinated, herd immunity confers the benefits of disease protection to the entire population.<sup>60</sup>

Because those who are unvaccinated profit from vaccinations while avoiding the perceived risks of vaccinations, the practice of being unvaccinated is incentivized.<sup>61</sup> This attitude threatens the existence of herd immunity; once the percentage of vaccinated persons drops sufficiently, herd immunity is destroyed.<sup>62</sup> The potential for outbreaks increases with high concentrations of unvaccinated persons.<sup>63</sup> Unvaccinated persons can endanger infants too young to be vaccinated, the elderly, and those with compromised immune systems, such as cancer patients, by exposing them to diseases preventable by vaccines.<sup>64</sup>

One study confirmed that geographically concentrated groups with high rates of unvaccinated children pose a risk of transmitting diseases to the vaccinated population, specifically, to those for whom vaccinations were not effective for some reason.<sup>65</sup> Additionally, unvaccinated children have a risk of contracting measles 35 times higher than do vaccinated children.<sup>66</sup> Despite this data, California has reported a particularly high rate of “exemptors”—that is, parents who opt out of vaccinating their children—who were generally clustered in the same geographic regions,

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60. *Id.* (explaining that the percentage that is required to be vaccinated varies depending on the disease; for measles, the required percentage exceeds 90%).

61. *Id.* at 263–65. *See infra* Part I.B.2.b. for a discussion of the belief that vaccines cause autism and for an explanation of why it is one of the main objections parents have to vaccines and one of the perceived risks parents believe they avoid by not vaccinating their children.

62. Malone & Hinman, *supra* note 13, at 265. A recent study using data from 2013 found that the percentage of vaccinated children has dipped below the optimal rate of 90% for the MMR vaccine—that is, the mumps, measles, and rubella vaccine—with 17 states reporting that fewer than 90% of children from the ages of 19 months to 39 months had not received the MMR vaccine. *Measles Vaccination Rates for Preschoolers Below 90 Percent in 17 States*, TRUST FOR AMERICA’S HEALTH (Feb. 4, 2015), <http://healthyamericans.org/newsroom/releases/?releaseid=323> [<https://perma.cc/W5P6-4VZQ>].

63. Malone & Hinman, *supra* note 13, at 269–70.

64. Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353, 420–21 (2004).

65. Daniel A. Salmon et al., *Health Consequences of Religious and Philosophical Exemptions from Immunization Laws*, 281 J. AM. MED. ASS’N 47, 51 (1999).

66. *Id.*

with 16% of schools reporting higher than average percentages of unvaccinated kindergarteners.<sup>67</sup>

Exemptors do not pose a serious threat to the rest of the vaccinated population, but only if exemption rates remain low and vaccination rates remain high.<sup>68</sup> Thus, the policy interest of the state in maintaining a healthy community through herd immunity could be jeopardized if too many parents claim exemptions to vaccination laws. All 50 states have mandatory vaccination laws for children as a requirement for school attendance,<sup>69</sup> but exemptions to these vaccination laws have been blamed for lowering rates of vaccinations.<sup>70</sup>

## 2. *Objections to Vaccines: Three Types of Exemptions*

Three types of exemptions from vaccination requirements are recognized: medical, philosophical—also called personal—and religious exemptions.<sup>71</sup> States vary with regard to the level of proof required to grant exemptions, and one study found that the laxer a state is in requiring proof of reasons for objections, whether religious or philosophical, the higher the number of unvaccinated children in that state.<sup>72</sup> States that required a form signed by a parent or guardian, a letter from a parent, or a notarized signature—in that order of complexity—had lower rates of exemptions, whereas states with lower standards of proof had higher rates of exemptions.<sup>73</sup> In other words, the higher the rate of complexity in the process of applying for exemptions, the lower the rate of actual exemptions, and the lower the rate of complexity, the higher the rate of exemptions. California, Mississippi, and West Virginia have the strictest vaccination laws in the U.S. because they

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67. *Id.* at 49.

68. *Id.* at 51.

69. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 14.

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

71. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 14.

72. Rota et al., *supra* note 70, at 647.

73. *Id.* at 646–47. The study also explained that for the second level of complexity, the letter requirement, the study also included states that required parents to obtain a form from a local health department. *Id.* at 646. The third and highest level of complexity included states that required both a letter and a form obtained from a local health department. *Id.* Some of those states also required a letter from a religious official or a signature of a state official. *Id.*

recognize neither philosophical nor religious exemptions.<sup>74</sup> In contrast, Louisiana is among the states with the laxest requirements because it grants medical, philosophical, and religious exemptions.<sup>75</sup>

*a. Medical Exemptions*

Medical exemptions are consistent with the state's policy interest of keeping its citizens healthy. All 50 states recognize medical exemptions,<sup>76</sup> and they are not controversial. Children who suffer from cancer, whose immune systems have been compromised, or who are allergic to vaccines receive these exemptions upon certification from their doctors.<sup>77</sup> Forcing children who would be harmed by vaccinations to receive them would violate the state's policy interest of ensuring that its citizens are healthy, and thus these exemptions are fully justified.

*b. Philosophical Exemptions*

In contrast to medical exemptions, which require a preexisting medical condition for the child to qualify, philosophical exemptions<sup>78</sup> are often based on "'personal,' 'moral,' or 'other' beliefs," or, more simply, the parents' beliefs.<sup>79</sup> These laws typically require that the beliefs be sincerely held or exercised in good faith,<sup>80</sup> although states rarely, if ever, enforce these requirements.<sup>81</sup>

A prime example of a philosophical objection to vaccinations is the widely held belief that vaccinations cause autism. In 1998, Dr. Andrew

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74. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 14.

75. *Id.*

76. *Id.*

77. See LA. REV. STAT. ANN. § 17:170 (2016); Daniel A. Salmon & Andrew W. Siegel, *Religious and Philosophical Exemptions from Vaccination Requirements and Lessons Learned from Conscientious Objectors from Conscripton*, 116 PUB. HEALTH REP. 289, 290 (2001).

78. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 14 (noting that as a result of recent legislation from California and Vermont banning philosophical exemptions, the number of states that allow philosophical exemptions is 18).

79. James G. Hodge & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 874 (2001).

80. *Id.* at 873.

81. Alan R. Hinman et al., *Childhood Immunization: Laws that Work*, 30 J.L. MED. & ETHICS 122, 125 (2002) (noting that 32 of 48 states that have religious or philosophical exemptions have not denied even one application).

Wakefield and 11 other doctors published a medical study claiming a link between autism and the measles, mumps, and rubella vaccine, also known as the MMR vaccine.<sup>82</sup> In response, alarmed parents refused to vaccinate their children for fear of triggering autism.<sup>83</sup> Consequently, vaccination rates in the U.S. have decreased significantly.<sup>84</sup> Despite the retraction of the article<sup>85</sup> and the denial from the scientific community of any link between autism and vaccinations,<sup>86</sup> parents continue to object to vaccinating their children on this ground.<sup>87</sup>

### *c. Religious Exemptions*

Similar to the requirements for philosophical exemptions, religious exemptions<sup>88</sup> require that parents hold certain beliefs. In contrast to philosophical exemptions, however, the reason for objecting must be

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82. A. J. Wakefield et al., *Ileal-Lymphoid-Nodular Hyperplasia, Non-Specific Colitis, and Pervasive Developmental Disorder in Children*, 351 LANCET 637, 639–40 (1998).

83. Lenisa Chang, *The MMR-Autism Controversy: Did Autism Concerns Affect Vaccine Take Up?* (November 8, 2012) (unpublished abstract), <https://appam.com/fex.com/appam/2012/webprogram/Paper3943.html> [<https://perma.cc/Z2P7-Z8U5>] (finding that vaccination rates decreased by 2% from 1999 to 2000 following publication of Wakefield's article and continued to decline in subsequent years).

84. *Id.*

85. Simon H. Murch, et al., *Retraction—Ileal-Lymphoid-Nodular Hyperplasia, Non-Specific Colitis, and Pervasive Developmental Disorder in Children*, 375 LANCET 445, 445 (2010).

86. INST. OF MED. OF THE NAT'L ACADEMIES, *ADVERSE EFFECTS OF VACCINES: EVIDENCE AND CAUSALITY* 145, 545 (Kathleen Stratton et al., eds., 2011) (finding that the evidence favored a rejection of a link between vaccines and autism).

87. Gary L. Freed et al., *Parental Vaccine Safety Concerns in 2009*, 125 PEDIATRICS 654, 657 (2010), <http://pediatrics.aappublications.org/content/early/2010/03/01/peds.2009-1962.full.pdf+html> [<https://perma.cc/S53F-AKZL>] (finding that over one in five parents believe there is a link between vaccinations and autism). Another study conducted in 2013 found that 33% of parents with minor children continue to believe that vaccinations cause autism. Of the 50% of parents who were aware of the study linking vaccinations to autism, only 50% were also aware that the study has been discredited and retracted. *Survey: One Third of American Parents Mistakenly Link Vaccines to Autism*, NAT'L CONSUMERS LEAGUE (Apr. 2, 2014), [http://www.nclnet.org/survey\\_one\\_third\\_of\\_american\\_parents\\_mistakenly\\_link\\_vaccines\\_to\\_autism](http://www.nclnet.org/survey_one_third_of_american_parents_mistakenly_link_vaccines_to_autism) [<https://perma.cc/Ry8U-TALL>].

88. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 14 (noting that on July 1, 2016, California joined Mississippi and West Virginia as the only states not to recognize religious exemptions).

based on religious rather than secular grounds.<sup>89</sup> The majority view<sup>90</sup> is that parents who possess a “sincerely held religious belief” against vaccinations must be granted religious exemptions under vaccination laws that allow them.<sup>91</sup> Religious groups who receive these exemptions, such as the Amish, Christian Scientists, and Mennonites, have experienced major outbreaks of diseases that those vaccines were designed to target.<sup>92</sup> Religious groups that opt out of vaccinations pose a lesser threat to the rest of the population, however, because they are few in number and geographically concentrated.<sup>93</sup>

## II. ITS HOUR UPON THE STAGE: VACCINATION CASES AND CONTROVERSIES

Despite the important issues that vaccination laws and exemptions raise, the Supreme Court has heard only two vaccination cases that implicate mandatory state vaccination laws, *Jacobson v. Massachusetts* and *Zucht v. King*.<sup>94</sup> The more recent case, *Zucht*, is from 1922.<sup>95</sup> Additionally, the cases do not address either philosophical or religious exemptions. Thus, this dated precedent fails to include any consideration of exemptions or of the constitutional rights that the Court has since afforded to parents. Although the Court’s previous precedent affirmed states’ police power to mandate vaccination laws,<sup>96</sup> the Court could decide differently today.

### A. Supreme Court Vaccination Cases

In *Jacobson v. Massachusetts*, the Supreme Court confirmed that states possess the police power to set their own laws governing vaccinations of their citizens.<sup>97</sup> *Jacobson* had objected to being vaccinated against smallpox

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89. See *Mason v. General Brown Ctr. Sch. Dist.*, 851 F.2d 47, 50–51 (2d Cir. 1988).

90. Calandrillo, *supra* note 64, at 415.

91. See, e.g., *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 99 (E.D.N.Y. 1987).

92. Donald G. McNeil, Jr., *Worship Optional: Joining a Church To Avoid Vaccines*, N.Y. TIMES (Jan. 14, 2003), <http://www.nytimes.com/2003/01/14/science/worship-optional-joining-a-church-to-avoid-vaccines.html?pagewanted=1> [<https://perma.cc/EAR4-UV7K>].

93. *Id.*

94. *Zucht v. King*, 260 U.S. 174 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

95. *Zucht*, 260 U.S. 174.

96. *Id.* at 176; *Jacobson*, 197 U.S. at 38.

97. *Jacobson*, 197 U.S. at 38.

because he claimed that the vaccine presented a risk of death, that as a child he had experienced an adverse reaction to a vaccine, and that he had observed a similar reaction in his own son.<sup>98</sup> He argued that the state law mandating vaccinations was “unreasonable, arbitrary and oppressive” and that forced vaccinations were tantamount to personal assaults.<sup>99</sup> In rejecting his claims and upholding Massachusetts’s mandatory vaccination law, the Court stated that it was “unwilling” to hold that “one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the State.”<sup>100</sup> Therefore, the Court has recognized that in the context of vaccinations, the state has the police power to override a minority viewpoint.

The Supreme Court expanded this reasoning 17 years later in *Zucht v. King*.<sup>101</sup> In San Antonio, Texas, a couple refused to vaccinate their child in accordance with state ordinances on the grounds that the compulsory vaccination requirement deprived the child of her liberty without due process of law.<sup>102</sup> The Court held that mandating vaccinations for all children as a condition of attending school was constitutional and fell within the state’s police power.<sup>103</sup> Thus, the Supreme Court affirmed states’ rights to impose their own requirements regarding vaccinations.

### *B. State Laws*

Since the Supreme Court has held that states have the power to impose requirements regarding vaccinations,<sup>104</sup> the states have taken seriously the right to create their own exemptions. The states possess a wide array of vaccination laws: some allow medical, philosophical, and religious exemptions; some allow only medical exemptions; and others recognize only medical and religious exemptions.<sup>105</sup> As a result of recent legislation,

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98. *Id.* at 36. Jacobson’s objections are similar to those claimed under current philosophical exemptions, particularly those claims that link vaccines to autism, because they express concerns over the safety of vaccines. The Court, however, did not label his claims as such or refer to medical, philosophical, or religious exemptions at all.

99. *Id.* at 26.

100. *Id.* at 38.

101. *Zucht*, 260 U.S. at 176.

102. *Id.* at 175.

103. *Id.* at 176.

104. *Id.*; *Jacobson*, 197 U.S. at 38.

105. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 14.

California is now among only three states that have the strictest vaccination laws in the nation.<sup>106</sup>

### *1. History and Content of California SB277*

In response to the measles outbreak at Disneyland in 2014, the California legislature passed Senate Bill 277, which does not allow parents to opt out of vaccinating their children for philosophical or religious reasons unless they choose to homeschool.<sup>107</sup> The bill radically alters California's existing law because the state previously allowed both philosophical and religious exemptions.<sup>108</sup> Governor Jerry Brown signed the bill, CA SB277, into law on June 30, 2015,<sup>109</sup> and the law took effect on July 1, 2016.<sup>110</sup> Opposition arose quickly, with groups suing to stop the law's enforcement almost immediately after the law took effect.<sup>111</sup> A central objection to state-mandated vaccinations is that the government is exercising extensive control over parents' rights to choose what they believe is best for their children.<sup>112</sup>

### *2. Louisiana Vaccination Laws*

Were they to move to Louisiana, California parents would face none of these concerns for three reasons. First, Louisiana Revised Statutes section 17:170(E) allows medical, religious, and personal exemptions from vaccinations.<sup>113</sup> Second, Louisiana Children's Code article 101 specifically provides that parents can make their own choices regarding their children's medical health.<sup>114</sup> This provision has apparently not been controversial enough to generate a discussion of the scope of the article:

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106. *Id.*

107. Nagourney, *supra* note 22.

108. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 14.

109. Nagourney, *supra* note 22.

110. 2015 Cal. Stat. 1438 (codified in scattered sections of CAL. HEALTH & SAFETY CODE D. 105, Pt. 2, Ch. 1).

111. *Lawsuit Challenges California's New Vaccine Requirements*, CBS L.A. (Jul. 5, 2016, 6:32 PM), <http://losangeles.cbslocal.com/2016/07/05/lawsuit-challenges-californias-new-vaccine-requirements/> [<https://perma.cc/U3WY-A92W>].

112. Sharon Bernstein, *Bid to Repeal California School Vaccination Law May Falter*, REUTERS, (Sept. 30, 2015, 7:55 PM), <http://www.reuters.com/article/2015/09/30/us-usa-california-vaccines-idUSKCN0RU32N20150930> [<https://perma.cc/LT7Z-B2HY>] (noting that concerns have ranged from parents' fears that vaccinations cause autism to objections over the lack of a religious exemption).

113. LA. REV. STAT. ANN. § 17:170(E) (2016).

114. LA. CHILD. CODE ART. 101 (2016).



no Louisiana cases applying the provision exist as of the writing of this Comment. Third, Louisiana has enacted the Preservation of Religious Freedom Act.<sup>115</sup> It declares religion a “fundamental right of the highest order in this state.”<sup>116</sup> California does not possess an equivalent of Louisiana’s religious freedom act.<sup>117</sup> Louisiana’s Preservation of Religious Freedom Act might mean that Louisiana could not eliminate its religious exemption to its vaccination laws without violating the Act. On the other hand, because California does not have a state religious freedom act, it might not suffer any adverse legal consequences by eliminating its religious exemption.

### III. SOUND AND FURY: PHILOSOPHICAL AND RELIGIOUS OBJECTIONS TO VACCINATION LAWS

The two main controversies surrounding vaccination laws and exemptions involve philosophical objections and religious objections.<sup>118</sup> Parents who object to vaccination laws on philosophical grounds alone, however, might lose their case. A potentially more successful argument is that state-mandated vaccination laws infringe on parental rights regarding the raising of children under the more recent Supreme Court precedent interpreting the Due Process Clause. Parents might also argue that they should be recognized as conscientious objectors—that is, those who are opposed to a duty required by law—an argument typically used in the context of conscription into the military.<sup>119</sup> A constitutional analysis reveals that states are not required to have philosophical exemptions under either the Due Process Clause or the conscientious objector doctrine of the First Amendment. Similarly, jurisprudence shows that religious exemptions to state vaccination laws are constitutional.<sup>120</sup> As with philosophical exemptions, religious exemptions are not required under the Due Process Clause and the Free Exercise Clause. Because states are not forbidden to have philosophical or religious exemptions but instead are free to create exemptions as they wish, a policy analysis is needed to

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115. LA. REV. STAT. ANN. § 13:5231 (2016).

116. LA. REV. STAT. ANN. § 13:5232 (2016); *Sherbert v. Verner*, 374 U.S. 398 (1963).

117. *State Religious Freedom Restoration Acts*, NAT’L CONF. OF ST. LEG., <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/UPT3-6G2E>] (last updated Oct. 15, 2015).

118. See Lea Ann Fracasso, *Developing Immunity: The Challenges in Mandating Vaccinations in the Wake of a Biological Terrorist Attack*, 13 DEPAUL J. HEALTH CARE L. 1, 4 (2010).

119. *Conscientious Objector*, BLACK’S LAW DICTIONARY (10th ed. 2014).

120. See *infra* Part III.B.1 for a full discussion of the constitutionality of religious exemptions.

resolve the question of whether states should have philosophical and religious exemptions.

### *A. Philosophical Objections*

Philosophical exemptions can be based on almost any reason the parent has for objecting to vaccinations and can therefore vary widely.<sup>121</sup> One philosophical objection to vaccinations is the widespread belief among parents that vaccinations cause autism.<sup>122</sup> This objection is now based on discredited science,<sup>123</sup> which could pose a serious roadblock for parents who wish to opt out of vaccinating their children for this reason. Additionally, under *Jacobson* and *Zucht*, the states clearly possess the police power to enforce their vaccination requirements.<sup>124</sup> Parents would need to rely on constitutional arguments to convince states to create or retain a philosophical exemption.

#### *1. Parental Due Process Rights Do Not Require Philosophical Exemptions*

Parents opposing vaccinations for philosophical reasons could make a compelling argument that under the more recent line of Supreme Court parental rights cases, parents must be allowed to refuse vaccinations based on philosophical reasons. Certainly, the trifecta of *Meyer*, *Pierce*, and *Troxel* all plainly state the Court's holdings that parents are allowed to make their own decisions regarding the raising of their children and that the Due Process Clause protects parental rights.<sup>125</sup> Parents might also rely on the Court's language that raising a family is "of similar order and magnitude as the fundamental rights specifically protected."<sup>126</sup> The Supreme Court's decision in *Parham v. J.R.*<sup>127</sup> also could be used to support this argument. In *Parham*, the Court upheld a law allowing parents

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121. Hodge & Gostin, *supra* note 79, at 874.

122. See, e.g., Freed et al., *supra* note 87 (finding that over one in five parents believes there is a link between vaccinations and autism).

123. Murch, et al., *supra* note 85; ADVERSE EFFECTS OF VACCINES, *supra* note 86 (finding that the evidence favored a rejection of a link between vaccines and autism).

124. *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905); *Zucht v. King*, 260 U.S. 174, 176 (1922).

125. *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

126. *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965).

127. 442 U.S. 584 (1979).

to commit their children to hospitals for treatment of mental illnesses, reasoning that parents possess the knowledge necessary to make decisions for their young children.<sup>128</sup> The Court thereby recognized that parents have the right to make decisions for their children's medical treatment.<sup>129</sup>

As one court noted, however, philosophical beliefs are traditionally not afforded the same high level of protection that religious beliefs receive.<sup>130</sup> Religious claims are afforded more protection under the Constitution than personal or philosophical claims, even when these groups have identical underlying values.<sup>131</sup> Furthermore, although more recent than *Jacobson* and *Zucht*, the decisions of *Meyer*, *Pierce*, and *Troxel* support parental rights but do not address vaccinations.<sup>132</sup> *Jacobson* and *Zucht* are more controlling because they specifically address the issue of vaccinations and recognize state police power to set vaccination laws.<sup>133</sup> Additionally, the case law could be interpreted as having already addressed an argument in favor of constitutionally required philosophical exemptions. In *Jacobson*, the father's belief that vaccines had adverse results<sup>134</sup> should be viewed as akin to, if not identical to, current objections that vaccines cause autism. In addressing the father's concern, the Court stated that a minority view could not take precedence over the majority and endanger public health.<sup>135</sup> The *Parham* Court added that states possess control over parental decisions when the child's health, mental or physical, is endangered.<sup>136</sup> If states can intervene in the realm of parental authority when parents endanger their own children, states should be able to intervene by banning philosophical exemptions when parental decisions endanger both their own children and other children. In the case of vaccinations, when parents opt out of vaccinating their children, thereby lowering vaccination rates and undermining herd immunity, they increase the risk for all children to contract a preventable disease.<sup>137</sup> Nevertheless, other arguments exist in favor of philosophical exemptions.

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128. *Id.* at 590–91, 602.

129. *Id.*

130. *Hanzel v. Arter*, 625 F. Supp. 1259, 1264 (S.D. Ohio 1985).

131. *Id.*

132. *Troxel*, 530 U.S. at 66; *Pierce*, 268 U.S. at 535; *Meyer*, 262 U.S. at 399.

133. *Zucht v. King*, 260 U.S. 174, 176 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905).

134. *Jacobson*, 197 U.S. at 36–37.

135. *Id.* at 37–38.

136. *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

137. *See Malone & Hinman, supra* note 13, at 265.

## 2. *Parents Opposed to Vaccinations Could Be Conscientious Objectors*

Although the parental due process argument seems likely to fail, a potential second argument in favor of philosophical exemptions analogizes these parents to conscientious objectors. In *United States v. Seeger*, the Supreme Court held that although the pacifist belief in question was not based on an “orthodox belief in God,” the belief was “sincere, honest, and made in good faith.”<sup>138</sup> Therefore, the Court extended the religious exemption to mandatory military service to a group of young men who objected to serving in the military.<sup>139</sup> The Court stated that “any person opposed to war on the basis of a sincere belief, which in his life fills the same place as a belief in God fills in the life of an orthodox religionist” should receive an exemption.<sup>140</sup>

Parents who object to vaccinations on the grounds that vaccinations cause autism could argue that their beliefs regarding the alleged link between vaccines and autism are sincere and made in good faith, and therefore, the *Seeger* definition of religion should apply to them. Although these beliefs might be found to be sincere and made in good faith, they do not fill “the same place as a belief in God.”<sup>141</sup> The *Seeger* Court based its holding on the fact that the beliefs qualified as religious exemptions,<sup>142</sup> and objections that rely on the correlations between vaccines and autism or other adverse side effects are not based on beliefs akin to religion. The objections are judgments regarding the effects of vaccinations, but not religious judgments. The Court’s statement that beliefs of conscientious objectors cannot allow them to avoid a “colliding duty fixed by a democratic government”<sup>143</sup> bears out that this argument should not succeed. In this situation, the conscientious opposition would be objections to vaccinations on philosophical grounds, and the colliding duty would be vaccination laws that aim to maintain high vaccination rates for the public good.

### *B. Religious Exemptions*

Although states are concerned with the public good of maintaining high vaccination rates, they must also consider the public good of allowing citizens to exercise religion freely. If religious exemptions are constitutionally

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138. *United States v. Seeger*, 380 U.S. 163, 166–67 (1965).

139. *Id.* at 164–65, 187–88.

140. *Id.* at 192–193 (Douglas, J., concurring).

141. *Id.*

142. *Id.* at 166–67, 187–88 (majority opinion).

143. *Gillette v. United States*, 401 U.S. 437, 461 (1971).

permissible, the inquiry then turns to whether religious exemptions are constitutionally required.

### *1. The Constitutionality of Religious Exemptions*

Regardless of whether religious exemptions are constitutionally required, the *Smith* Court noted that religious exemptions are permissible.<sup>144</sup> The holdings in *Jacobson* and *Zucht* also support the conclusion that states are permitted to enact religious exemptions to vaccination laws.<sup>145</sup> If a state can create mandatory vaccination laws under its police power,<sup>146</sup> it should also be able to create religious exemptions. Religious exemptions should be analyzed under the Free Exercise Clause, the Due Process Clause, and the Establishment Clause to provide a complete analysis of the questions surrounding religious exemptions and the state's police power to enact them.

#### *a. Religious Exemptions Do Not Violate the Free Exercise Clause*

The police power granted to the states does not extend so far as to allow states to create any kind of religious exemptions they wish. Courts have repeatedly struck down religious exemptions only for "bona fide members of a recognized religion"<sup>147</sup> or a "recognized church or denomination"<sup>148</sup> because this language violates the Free Exercise Clause by infringing upon the rights of adherents to nontraditional religions.<sup>149</sup> One court held that the refusal to recognize nontraditional religious beliefs under the state's religious exemption violated the Free Exercise Clause.<sup>150</sup> Another court granted religious exemptions to Jewish parents based on their personal religious beliefs even though Judaism does not contain any objections to vaccinations.<sup>151</sup> These decisions suggest that if a religious exemption does not favor some religions over others and specifically does not burden the beliefs of nontraditional religions, the exemption would not violate the Free Exercise Clause.

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144. *Emp't. Div. of Or. v. Smith*, 494 U.S. 872, 890 (1990).

145. *Zucht v. King*, 260 U.S. 174, 176 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905).

146. *Zucht*, 260 U.S. at 176; *Jacobson*, 197 U.S. at 38.

147. *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 84, 90–91 (E.D.N.Y. 1987).

148. *Boone v. Boozman*, 217 F. Supp. 2d 938, 942, 951 (E.D. Ark. 2002).

149. *Id.*; *Sherr*, 672 F. Supp. at 84, 90–91.

150. *Lewis v. Sobol*, 710 F. Supp. 506, 512–13, 517 (S.D.N.Y. 1989).

151. *See Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 655–56 (E.D.N.Y. 1994).

Additionally, although some courts have upheld vaccination laws that did not allow religious exemptions,<sup>152</sup> no court has held a religious exemption unconstitutional under the Free Exercise Clause. One court declined to reach the issue of whether the state's interest might be pressing enough to intrude on decisions not to vaccinate.<sup>153</sup> Another court declined to reach the First Amendment issues and simply relied upon "traditional child custody analysis"<sup>154</sup> in holding that the mother's objection was based on religious beliefs<sup>155</sup>—the court did not even question the constitutionality of the religious exemption. Based on these decisions, states are permitted to enact religious exemptions that do not infringe upon religious minorities' rights under the Free Exercise Clause.

*b. Religious Exemptions Do Not Violate the Due Process Clause*

Similar to the jurisprudence generally in favor of allowing religious exemptions under the Free Exercise Clause, courts have readily accepted the existence of religious exemptions under the Due Process Clause as long as the exemption is not so narrowly tailored to exclude nontraditional beliefs.<sup>156</sup> Many other courts have heard cases that involve religious exemptions, and regardless of whether the courts found that the belief was in fact religious, they have either refused to comment on or have not addressed the exemption's constitutionality, thus leaving the exemption intact.<sup>157</sup> The *Smith* Court went so far as to refer to religious exemptions as "desirable."<sup>158</sup> States are thus permitted to create religious exemptions under the Due Process Clause.

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152. *See* Phillips v. City of New York, 775 F.3d 538, 543 (2d Cir. 2015); Workman v. Mingo County Bd. of Educ., No. 09-2352, 2011 U.S. App. LEXIS 5920, at \*10–12 (4th Cir. Mar. 22, 2011); McCarthy v. Boozman, 212 F. Supp. 2d 945, 949–50 (W.D. Ark. 2002); Davis v. State, 451 A.2d 107, 112 n.8 (Md. 1982); Wright v. De Witt Sch. Dist. No.1 of Ark. Cty, 385 S.W.2d 644, 648 (Ark. 1965).

153. Hanzel v. Arter, 625 F. Supp. 1259, 1262 (S.D. Ohio 1985).

154. Grzyb v. Grzyb, 79 Va. Cir. 93, 93 (Va. Cir. Ct. 2009).

155. *Id.* at 97.

156. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 164–65, 187–88 (1965); Boone v. Boozman, 217 F. Supp. 2d 938, 942, 951 (E.D. Ark. 2002); Lewis v. Sobol, 710 F. Supp. 506, 512–13, 517 (S.D.N.Y. 1989); Sherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81, 84, 90–91 (E.D.N.Y. 1987).

157. *See, e.g.*, Check v. New York City Dept. of Educ., No. 13-cv-791, 2013 U.S. Dist. LEXIS 71124, at \*10 (E.D.N.Y. May 20, 2013); Lewis, 710 F. Supp. at 516–17; Hanzel, 625 F. Supp. at 1266; Diana H. v. Rubin, 171 P.3d 200, 205–06 (Ariz. Ct. App. 2007); Grzyb, 79 Va. Cir. at 101–02.

158. Emp't Div. of Or. v. Smith, 494 U.S. 872, 890 (1990).

*c. Religious Exemptions Do Not Violate the Equal Protection Clause*

In contrast to the jurisprudence generally in favor of allowing religious exemptions under the Free Exercise and Due Process Clauses, one case supports striking down religious exemptions to state vaccination laws on Equal Protection grounds.<sup>159</sup> In *Brown v. Stone*, the Mississippi Supreme Court held that the religious exemption to its vaccination laws was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.<sup>160</sup> The court reasoned that the statute requiring mandatory vaccinations for children “serves an overriding and compelling public interest.”<sup>161</sup> The court reasoned that allowing religious exemptions for children with religious parents, who could claim an exemption based upon religion, violated the Fourteenth Amendment rights of children without religious parents.<sup>162</sup>

*Brown* is unique, however, and does not have support—Mississippi is the only state to adopt such a radical precedent.<sup>163</sup> Without considering the rights of parents to raise their children in the religion they wish, the *Brown* court held that the statute mandating vaccinations was “complete in itself” without providing religious exemptions and that the protection of schoolchildren was a compelling state interest.<sup>164</sup> The court failed to weigh those competing interests and recognize that the statute’s narrow exemption for religious beliefs furthered parents’ rights, particularly religious rights, to raise their children in the religion they wish. This approach contradicts that of many courts that have not even questioned the constitutionality of a religious exemption under the Equal Protection Clause.<sup>165</sup> Consequently, *Brown* should not be followed, and courts should rely on the Free Exercise and Due Process Clauses precedents.

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159. *Brown v. Stone*, 378 So. 2d 218, 223–24 (Miss. 1979). The text of the Equal Protection Clause reads, “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST., amend. XIV, § 1.

160. *Brown*, 378 So. 2d at 223–24.

161. *Id.* at 222.

162. *Id.* at 223–24.

163. Allan J. Jacobs, *Do Belief Exemptions to Compulsory Vaccination Programs Violate the Fourteenth Amendment?*, 42 U. MEM. L. REV. 73, 90–91 (2011).

164. *Brown*, 378 So. 2d at 223–24.

165. See *Phillips v. City of New York*, 775 F.3d 538, 543–44 (2d Cir. 2015); *Hanzel v. Arter*, 625 F. Supp. 1259, 1265–66 (S.D. Ohio 1985).

*d. Religious Exemptions Do Not Violate the Establishment Clause*

Assuming that courts would rely on the precedents of the Free Exercise and Due Process Clauses in allowing religious exemptions, states must also consider how to define “religion” in exemptions under the Establishment Clause, which provides that Congress cannot make a law regarding the “establishment of religion.”<sup>166</sup> One fiercely contested issue is determining what beliefs are considered religions such that adherents are eligible to receive exemptions to vaccinations. One court held that requiring the religion to be a nationally recognized and established church did not violate the Establishment Clause of the Constitution.<sup>167</sup> The majority view,<sup>168</sup> however, is that such requirements violate the Establishment Clause and that anyone who possesses a “sincerely held religious belief” opposed to vaccinations, regardless of whether the religion is conventional, must be allowed to opt out under the state’s exemption.<sup>169</sup>

In furtherance of this view, one commentator argues that the *Lemon v. Kurtzman* test allows religious exemptions to vaccinations.<sup>170</sup> *Lemon* sets forth a three-part test to determine whether a law violates the Establishment Clause.<sup>171</sup> First, the purpose of the law must be secular.<sup>172</sup> Second, the law’s main effect must neither promote nor hinder religion.<sup>173</sup> Finally, the law must not have “an excessive government entanglement with religion.”<sup>174</sup> This commentator argues that religious exemptions are allowed under the Establishment Clause if two requirements are met: first, the exemption must be neutral toward religions; and second, the relief that religious freedom receives from the law must justify the subsequent burdens upon those who do not benefit from the law.<sup>175</sup>

In addition to the *Lemon* test, the Supreme Court has articulated other Establishment Clause tests. Another comes from *Agostini v. Felton*, in

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166. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion.”).

167. *Kleid v. Bd. of Educ.*, 406 F. Supp. 902, 904 (W.D. Ky. 1976).

168. Calandrillo, *supra* note 64, at 415.

169. *See, e.g.*, *Sherr v. Northport-East Northport Union Free School District*, 672 F. Supp. 81, 99 (E.D.N.Y. 1987).

170. Timothy J. Aspinwall, *Religious Exemptions to Childhood Immunization Statutes: Reaching for a More Optimal Balance Between Religious Freedom and Public Health*, 29 LOY. U. CHI. L.J. 109, 126–28 (1997).

171. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

172. *Id.* at 612.

173. *Id.*

174. *Id.* at 613.

175. Aspinwall, *supra* note 170, at 127.



which the Court stated three criteria for a law to avoid violating the Establishment Clause:<sup>176</sup> the law must not promote “indoctrination” by the government; the law must not specifically name religions; and the law must not be overly intertwined with religion.<sup>177</sup> Under *Cutter v. Wilkinson*,<sup>178</sup> the law must be analyzed under the effects the exemption might have on nonreligious citizens, the discrimination among religions, and the chance of an exemption trumping other significant concerns.<sup>179</sup> Provided that a religious exemption does not violate these tests, it is constitutionally permissible.

## 2. Religious Exemptions Are Not Constitutionally Required

Because states are constitutionally permitted to establish religious exemptions to their vaccination laws, the next inquiry is whether states are constitutionally required to have religious exemptions. Similar to the analysis of whether states are constitutionally permitted to have religious exemptions, this inquiry also turns on the Free Exercise and Due Process Clauses.

### a. The Free Exercise Clause Does Not Require Religious Exemptions

Although the *Smith* Court noted that states may create religious exemptions to their laws and that the exemptions might even be “desirable,” it added that these exemptions are not constitutionally required and suggested the decision should be left to the discretion of state legislatures.<sup>180</sup> Dicta from another Supreme Court case, *Prince v. Massachusetts*, suggests that religious exemptions might not be required under the Free Exercise Clause.<sup>181</sup> The Court rejected the argument that a parent or guardian was free to violate child labor laws on religious grounds under the Free Exercise Clause by enlisting the child to distribute religious pamphlets.<sup>182</sup> The case did not involve vaccination laws, but in dicta the Court specifically highlighted religious objections to vaccinations, stating,

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176. 521 U.S. 203, 234 (1997).

177. *Id.*

178. 544 U.S. 709, 720–24 (2005).

179. Angela C. Carmella, *Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. VA. L. REV. 403, 431 (2007).

180. *Emp’t Div. of Or. v. Smith*, 494 U.S. 872, 890 (1990).

181. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (citing *People v. Pierson*, 176 N.Y. 201 (N.Y. 1903)).

182. *Id.* at 159, 164, 167–68, 171.

“[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”<sup>183</sup> The Court did not clarify whether it meant that parents cannot claim religious exemptions when state law provides no exemptions, or rather that religious exemptions are unconstitutional as a matter of law.<sup>184</sup> The Court did add, however, that although parents are free to become “martyrs,” they cannot make the same decision for their young children.<sup>185</sup>

Lower courts have employed similar reasoning, with one court stating that parents’ freedom to exercise religion was “subject to a reasonable regulation for the benefit of society as a whole.”<sup>186</sup> Other courts have also upheld vaccination laws that did not allow religious exemptions as constitutional, reasoning that the lack of a religious exemption does not violate the Free Exercise Clause.<sup>187</sup> As recently as 2015, another court held that mandatory vaccinations as a prerequisite for school attendance were constitutional under the Free Exercise Clause.<sup>188</sup> Because courts have ruled both that the presence of a religious exemption is constitutional and that the absence of a religious exemption is constitutional, religious exemptions are not constitutionally required under the Free Exercise Clause.<sup>189</sup> The inquiry then turns to the Due Process Clause.

#### *b. The Due Process Clause Does Not Require Religious Exemptions*

Some courts have rejected arguments that parents’ freedom to educate and raise their children under the Due Process Clause includes the decision to opt out of vaccinations. One court addressed this argument and held that because *Meyer*, *Pierce*, and *Yoder* were related to children’s education and not to parents’ refusals to vaccinate their children, the state could force

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183. *Id.* at 166–67 (citing *Pierson*, 176 N.Y. 201).

184. *Id.*

185. *Id.* at 170.

186. *Wright v. De Witt Sch. Dist.*, 384 S.W.2d 644, 648 (Ark. 1965).

187. *See, e.g., Workman v. Mingo County Bd. of Educ.*, No. 09-2352, 2011 U.S. App. LEXIS 5920, at \*10–12 (4th Cir. Mar. 22, 2011); *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 949–50 (W.D. Ark. 2002); *Davis v. State*, 451 A.2d 107, 112 n.8 (Md. 1982).

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

189. This analysis could change under state religious freedom acts. If a state, such as Louisiana, has enacted a religious freedom act, then it might be required under state law to have a religious exemption. *See States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 14.

parents to vaccinate their children.<sup>190</sup> Other courts have reached similar conclusions.<sup>191</sup> Notwithstanding one anomalous decision under *Smith* and *Yoder* that the state must defer to the parents' wishes regarding how to raise their children,<sup>192</sup> the most reasonable conclusion is that states are not constitutionally required under the Due Process Clause to have religious exemptions to their vaccination laws.

### C. Policy Considerations for Philosophical and Religious Exemptions

Constitutional considerations are not likely to be determinative in state decisions to have philosophical or religious exemptions. An analysis of the cases from the Supreme Court reveals that the Constitution requires neither philosophical nor religious exemptions. Consequently, state decisions regarding philosophical and religious exemptions must rely heavily upon policy concerns, including the interest in deferring to parental decisions balanced against the state's interest in safeguarding public health. One serious policy issue is that philosophical and religious exemptions combined have the potential to destroy herd immunity. The discredited<sup>193</sup> philosophical view that vaccinations cause autism has led to decreased vaccination rates,<sup>194</sup> which threatens herd immunity because it lowers the number of vaccinated persons who serve as a barrier against disease transmission.<sup>195</sup> Additionally, states with lax requirements for proof to obtain philosophical exemptions have higher rates of unvaccinated children.<sup>196</sup> The reason for these increased rates is that states often fail to enforce the requirement that the beliefs be sincerely held or exercised in good faith,<sup>197</sup> which results in the purpose behind the creation of philosophical exemptions being unfulfilled. Based on these facts, states should not allow philosophical exemptions.

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190. *Boone v. Boozman*, 217 F. Supp. 2d 938, 955 (E.D. Ark. 2002).

191. *Caviezel v. Great Neck Pub. Sch.*, No. 11-3431-cv, 2012 U.S. App. LEXIS 21190, at \*6-7 (2d Cir. Oct. 12, 2012); *Workman*, 2011 U.S. App. LEXIS 5920, at \*15-17.

192. *Diana H. v. Rubin*, 171 P.3d 200, 205-06 (Ariz. Ct. App. 2007).

193. *Wakefield, et al.*, *supra* note 82, at 639-40.

194. *Chang*, *supra* note 83 (finding that vaccination rates decreased by 2% from 1999 to 2000 following publication of Wakefield's article and continued to decline in subsequent years).

195. *Malone & Hinman*, *supra* note 13, at 264-65.

196. *Rota et al.*, *supra* note 70, at 647.

197. *Hinman et al.*, *supra* note 81, at 125 (noting that 32 of 48 states that have religious or philosophical exemptions have not denied even one application); *Hodge & Gostin*, *supra* note 79, at 874.

As philosophical exemptions can be abused, religious exemptions can also be easily exploited. Parents often claim religious exemptions when they are unable to obtain medical or philosophical exemptions.<sup>198</sup> States often grant religious exemptions without substantiating that the belief is sincerely held and based upon religion, and they consequently grant exemptions to nearly all parents who apply.<sup>199</sup> Additionally, groups whose objections are not actually based on religion form for the express purpose of claiming religious exemptions.<sup>200</sup> One report revealed that by mailing a letter and making a donation to the “Congregation of Universal Wisdom,” founded by chiropractors who believe that Western medicine is pagan and satanic, parents can easily obtain a religious exemption.<sup>201</sup>

Serious policy considerations, however, are in favor of granting religious exemptions. First, religious groups such as the Amish, who do possess sincerely held religious beliefs against vaccinations, do not pose a public health risk. They are geographically concentrated with a small number of adherents<sup>202</sup> and primarily expose only themselves to diseases preventable by vaccines.<sup>203</sup> Because these groups came to the United States to practice their religion freely,<sup>204</sup> religious exemptions would accommodate their right to practice their religion. Consequently, good policy favors allowing religious exemptions.

Second, the lack of a religious exemption interferes with all parents’ religious freedom and could lead to decisions that undermine parental rights and autonomy. State intrusion in the raising of children can lead to dangerous interference because the court, not the parents, would determine the best interests of the child. A case exemplifying this danger is *Painter v. Bannister*, wherein the court denied a father custody of his child for no reason other than the court’s bias<sup>205</sup> in favor of the child’s grandparents.<sup>206</sup> The grandparents were educated and religious, whereas the child’s father held no religious beliefs and had liberal political views.<sup>207</sup> The problem with

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198. McNeil, Jr., *supra* note 92.

199. Hinman et al., *supra* note 81, at 125 (noting that 32 of 48 states that have religious or philosophical exemptions have not denied even one application); Hodge & Gostin, *supra* note 79, at 874; McNeil, Jr., *supra* note 92.

200. McNeil, Jr., *supra* note 92.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. See MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 40 (2005).

206. *Painter v. Bannister*, 140 N.W. 2d 152, 153–55 (Iowa 1966).

207. *Id.*

allowing courts to use this “best interests of the child” standard is that it “necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best.”<sup>208</sup> Legislatures mandating vaccinations without religious exemptions is a similar egregious intrusion because the legislatures would interfere with parents’ rights to raise their children in their chosen religion under the Free Exercise Clause.

Finally, the Supreme Court recognized in *Yoder* that the right of parents to raise their children in their religion is paramount under the Free Exercise Clause.<sup>209</sup> Additionally, the dissent in *Prince v. Massachusetts* stated that the right of religious liberty was “too sacred” to be limited without proving that the state’s interest was seriously jeopardized.<sup>210</sup> Religious groups who oppose vaccinations do not pose a serious threat to the public at large.<sup>211</sup> Further, religious exemptions have been granted to parents with a religious objection to vaccinations even when the parents’ religion does not formally forbid vaccinations.<sup>212</sup> Therefore, forcing vaccinations upon their children would be a grave intrusion into their religious rights. Consequently, as a policy matter, states should allow religious exemptions to their vaccination laws.

#### IV. A TALE TOLD BY A COMPROMISE: THE CASE FOR BANNING PHILOSOPHICAL EXEMPTIONS AND ALLOWING RELIGIOUS EXEMPTIONS

States face a difficult choice in deciding whether to allow both religious and philosophical exemptions, whether to ban both, or whether to allow only one or the other. On the one hand, private parental decisions regarding how to raise children deserve to be honored. On the other hand, the public interest in protection from diseases is also at stake. The issue of exemptions to state vaccination laws thus presents states with a careful balancing act because neither private nor public concerns should be allowed to trample the other.

To solve the problem of exemptions to mandatory vaccination laws, states should ban philosophical exemptions and allow religious exemptions. California should retain CA SB277’s ban on philosophical exemptions but

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208. GUGGENHEIM, *supra* note 205.

209. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

210. *Prince v. Massachusetts*, 321 U.S. 158, 176 (1944) (Jackson, J., dissenting).

211. McNeil, Jr., *supra* note 92.

212. *See Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 655–56 (E.D.N.Y. 1994).

should alter its law to allow religious exemptions, whereas Louisiana should retain its religious exemptions but ban philosophical exemptions.<sup>213</sup>

Louisiana and California should ensure that religious exemptions are not abused by requiring those who object to vaccinations to present proof of their religious beliefs. One study found that requiring a high level of proof in the form of notarized signatures reduced the number of exemptions,<sup>214</sup> and this requirement would help to ensure that the parents claiming the exemption do in fact object on religious grounds. The law should not attempt to differentiate among religions because such an endeavor would lead to Free Exercise problems by burdening the beliefs of adherents to nontraditional religions. The standard set forth in *Seeger*—that of a “sincere belief, which in his life fills the same place as a belief in God fills in the life of an orthodox religionist”<sup>215</sup>—should be used to avoid granting exemptions to groups that claim to be religious but are simply trying to avoid vaccinations on philosophical grounds. Louisiana and California should adopt language similar to the following: “Exemptions will be granted upon the showing of a sincerely held religious belief in the form of a notarized letter.” This language would exclude philosophical exemptions while avoiding First Amendment problems of favoring one religion over another. Furthermore, the notarized letter serves a gate-keeping function to ensure that those citizens receiving the exemption object on religious rather than philosophical grounds. Thus, the risk of religious exemptions being abused by those who wish to claim philosophical exemptions under the guise of religion would be significantly reduced, if not eliminated, because philosophical exemptions would not be tolerated in any form.

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213. Louisiana might have an even higher interest in religious exemptions than does California because of its Preservation of Religious Freedom Act, whereas California does not possess an equivalent act. An interesting side note is that Mississippi has a religious freedom act but does not allow philosophical or religious exemptions. LA. REV. STAT. ANN. § 13:5231 (2016); *State Religious Freedom Restoration Acts*, *supra* note 118; *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 14.

214. Rota et al., *supra* note 70, at 646–47.

215. *United States v. Seeger*, 380 U.S. 163, 192 (1965) (Douglas, J., concurring). See *supra* note 190 for a discussion of how state religious freedom acts might affect whether they should have religious exemptions to vaccination laws.

### A. Philosophical Exemptions Should Be Banned

Philosophical exemptions should not be tolerated for two reasons. First, parents can claim any reason they wish to receive an exemption.<sup>216</sup> This standard is far too broad because it opens the door to illegitimate objections that have no basis in science, such as refusing vaccinations because the parents dislike the pharmaceutical industry. Second, the increase in unvaccinated children because of the mistaken belief that vaccinations cause autism<sup>217</sup> must be halted to protect the population under herd immunity.

Several legal reasons in addition to policy considerations<sup>218</sup> exist for banning philosophical exemptions. First, the Supreme Court has already addressed a parent's worries over adverse effects of vaccines in *Jacobson*<sup>219</sup> and declared that a minority view could not threaten public health.<sup>220</sup> Second, claims that parents are conscientious objectors should be rejected because parents must comply with the "colliding duty" of the government in maintaining high vaccination rates.<sup>221</sup> Because states possess the power to intervene when parents' decisions endanger their own children,<sup>222</sup> states should intervene for the good of other children and the population in general.

### B. Religious Exemptions Should Be Allowed

States should allow religious exemptions because of policy considerations.<sup>223</sup> States should follow the language of the *Prince* dissent<sup>224</sup> that called the freedom to practice religion a "sacred right" with which the government should not interfere. States should also follow the

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216. Hodge & Gostin, *supra* note 79, at 874.

217. Chang, *supra* note 83 (finding that vaccination rates decreased by 2% from 1999 to 2000 following publication of Wakefield's article and continued to decline in subsequent years). A recent study using data from 2013 found that the percentage of vaccinated children has dipped below the optimal rate of 90% for the MMR vaccine—that is, the mumps, measles, and rubella vaccine—with 17 states reporting that fewer than 90% of children from the ages of 19 months to 39 months had not received the MMR vaccine. *Measles Vaccination Rates for Preschoolers Below 90 Percent in 17 States*, *supra* note 62.

218. See *supra* Part III.C. for a full discussion of the policy arguments against philosophical exemptions.

219. *Jacobson v. Massachusetts*, 197 U.S. 11, 36–37 (1905).

220. *Id.* at 37–38.

221. *Gillette v. United States*, 401 U.S. 437, 461 (1971).

222. *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

223. See *supra* III.C. for a full discussion of the policy reasons in favor of allowing religious exemptions.

224. *Prince v. Massachusetts*, 321 U.S. 158, 176 (1944) (Jackson, J., dissenting).

language in *Yoder* recognizing parents' rights to raise their children in the religion they wish.<sup>225</sup> In addition to these abstract considerations, religious groups claiming religious exemptions to vaccinations are geographically concentrated and small in number,<sup>226</sup> therefore, their lack of vaccinations is not likely to affect herd immunity. Although religious exemptions would lead to a small percentage of the population being unvaccinated, a ban on philosophical exemptions would ensure that vaccination rates do not dip dangerously low.<sup>227</sup> States should recognize religious exemptions even for parents who are not part of a small, geographically concentrated religious group because their beliefs are also religious in nature and deserve recognition. Granting religious exemptions to these parents could threaten herd immunity. Because most groups claiming religious exemptions are small and geographically concentrated,<sup>228</sup> however, this possibility is not likely, and courts should not deny parents their religious rights based on this remote prospect. Further, if states consider these children or those from a small, geographically concentrated religious group who are unvaccinated to be serious threats to public health, they have a solution readily available. Delaware's religious exemption states that if an outbreak of a vaccine-preventable disease occurs, or if in the opinion of the Division of Public Health unvaccinated children have had or are at risk of exposure to a vaccine-preventable disease, those unvaccinated children will be temporarily barred from attending public school until the Division of Public Health approves otherwise.<sup>229</sup> Concerned states should adopt similar provisions.

Turning to possible legal challenges to the proposed language—"exemptions will be granted upon the showing of a sincerely held religious belief in the form of a notarized letter"—under the Free Exercise Clause, this language would survive a challenge of discrimination because it favors religions equally. Courts have recognized religious exemptions even when the parents' formal religion does not forbid vaccinations and when the

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225. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

226. McNeil, Jr., *supra* note 92.

227. Although the data regarding how many parents claim religious exemptions versus philosophical exemptions is combined, which therefore makes determining an exact number of parents claiming either exemption impossible, this claim is reasonable because the report also notes that these groups are small and geographically concentrated. Thus, concluding that most parents who claim an exemption are claiming philosophical exemptions is reasonable. By banning philosophical exemptions, the overall vaccination rate would likely rise. *See* McNeil, Jr., *supra* note 92.

228. *Id.*

229. DEL. CODE ANN. tit. 14, § 131(a)(6)–(7) (West 2016).



parents hold nontraditional religious beliefs.<sup>230</sup> The proposed language continues this precedent. Louisiana's current religious exemption to vaccinations would not face such a challenge because its requirement is "a written dissent from the student or his parent or guardian."<sup>231</sup> Clearly, the language does not discriminate among religions; it should simply be modified to disallow philosophical exemptions and to require a notarized letter.<sup>232</sup>

Addressing possible Establishment Clause challenges to the proposed solution, the new language would not violate the Establishment Clause under any Supreme Court test. Under one commentator's argument, this language would survive a challenge because it is neutral in its reference to religions and because allowing groups to practice their religion as they wish justifies the burden of slightly lowered vaccination rates.<sup>233</sup> Religious groups who opt out of vaccinations pose risks to themselves,<sup>234</sup> and banning philosophical exemptions would ensure that overall vaccination rates remain high. Under the *Agostini* test,<sup>235</sup> the proposed solution does not indoctrinate its citizens; it poses no problem of identifying the recipients by a named religion; and the exemption does not create

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230. *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 655–56 (E.D.N.Y. 1994); *Lewis v. Sobol*, 710 F. Supp. 506, 512–13, 517 (S.D.N.Y. 1989).

231. LA. REV. STAT. ANN. § 17:170 (2016).

232. Because of Louisiana's Preservation of Religious Freedom Act, Louisiana has a different test under the Free Exercise Clause; the Act explicitly rejected the *Smith* test in favor of the *Sherbert v. Verner* test. LA. REV. STAT. ANN. § 13:5232 (2016). The test provides that the state "may not substantially burden" the exercise of religion even if the law is "facially neutral" or generally applicable." LA. REV. STAT. ANN. § 13:5233 (2016). The only reason the state can impose such a burden is if the application is both "[i]n furtherance of a compelling government interest" and "[t]he least restrictive means of furthering that compelling that government interest." *Id.* Disallowing religious exemptions would qualify as a substantial burden on parents who object to vaccinations for religious reasons. Mandating vaccinations over religious objections is unlikely to qualify as a compelling government interest in the vaccination context, despite the importance of herd immunity. Imposing mandatory vaccinations would not be the least restrictive means of furthering the state's interest in herd immunity. Instead, the least restrictive means would be banning philosophical exemptions so that combined, philosophical and religious exemptions do not threaten herd immunity, because by themselves, religious exemptions do not pose a threat. McNeil, Jr., *supra* note 92.

233. Aspinwall, *supra* note 170, at 126–28.

234. McNeil, Jr., *supra* note 92.

235. The test requires that the law does not promote "indoctrination" by the government, that it does not specifically name religions, and that it is not overly intertwined with religion. *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

excessive governmental entanglement. Finally, under the *Cutter* test,<sup>236</sup> the solution would not burden nonreligious citizens because religious groups threaten only themselves by refusing to vaccinate their children.<sup>237</sup> No possibility of sectarian discrimination exists, and the exemption would not trump the other significant concern of maintaining herd immunity because religious groups are small in number and geographically concentrated.<sup>238</sup> States should grant religious exemptions even to parents who are not part of a small, geographically concentrated religious group because their beliefs are equally worthy of recognition. States concerned with the implications for herd immunity as a result of granting these exemptions can adopt a provision similar to Delaware's limiting unvaccinated children from attending school temporarily during a disease outbreak or if these children are at risk of exposure to the disease.<sup>239</sup> Finally, eliminating philosophical exemptions while simultaneously tightening the requirements for religious exemptions would ensure that overall vaccination rates remain high.

#### CONCLUSION

Because of the importance of maintaining high vaccination rates, states have the police power to enact their own vaccination laws.<sup>240</sup> Allowing both philosophical and religious exemptions can create the risk of disease outbreaks, which in turn can affect the rest of the population.<sup>241</sup> States that are lax in enforcing requirements for philosophical and religious exemptions have the highest number of unvaccinated children.<sup>242</sup> As CA SB277 demonstrates, however, banning religious exemptions infringes upon the religious rights of groups who oppose vaccinations on religious grounds.<sup>243</sup> Parents who object on philosophical grounds, such as the discredited link between autism and vaccinations,<sup>244</sup> pose the highest threat by raising the

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236. The test requires that the law be analyzed under the effects the exemption might have on nonreligious citizens, the discrimination among religions, and the chance of an exemption trumping other significant concerns. *Cutter v. Wilkinson*, 544 U.S. 709, 720–24; Carmella, *supra* note 179, at 431. *See also supra* Part III.B.1.d.

237. McNeil, Jr., *supra* note 92.

238. *Id.*

239. DEL. CODE ANN., tit. 14, § 131(a)(6)–(7) (West 2016).

240. *Zucht v. King*, 260 U.S. 174 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

241. Salmon et al., *supra* note 65, at 51.

242. Rota et al., *supra* note 70, at 647.

243. McNeil, Jr., *supra* note 92.

244. Wakefield, et al., *supra* note 82, at 639–40.

number of unvaccinated children unchecked.<sup>245</sup> Religious groups by themselves do not pose a threat to herd immunity,<sup>246</sup> and even those parents who object on religious grounds but are not part of a geographically concentrated group deserve recognition under religious exemptions. Consequently, states should ban philosophical exemptions and allow religious exemptions.

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245. Chang, *supra* note 83 (finding that vaccination rates decreased by 2% from 1999 to 2000 following publication of Wakefield’s article and continued to decline in subsequent years).

246. McNeil, Jr., *supra* note 92.

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