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### Who Calls the Shots?: Parents Versus the Parens Patriae Power of the States to Mandate Vaccines for Children in New York

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**WHO CALLS THE SHOTS?: PARENTS VERSUS  
THE *PARENS PATRIAE* POWER OF THE STATES  
TO MANDATE VACCINES FOR CHILDREN IN  
NEW YORK**

**Emily R. Jones\***

ABSTRACT

*Vaccines are one of the top ten public health interventions of the twentieth century, lengthening lifespans and drastically reducing the burden of infectious disease in many nations. Childhood immunizations in particular have significantly impacted rates of infant and child mortality and morbidity, and nearly eliminated the presence of diseases like measles in the United States. Unfortunately, parents are increasingly seeking “religious” exemptions for mandatory childhood immunizations, which threatens to lead to a resurgence in these diseases, impacting children and schools.*

*This Note discusses New York’s repeal of the religious exemption from its public health code in 2019. Passed in response to one of the largest measles outbreaks in decades, this measure reignited tension between those seeking personal and religious liberty, and those seeking safe and healthy school environments. This Note examines this law throughout its history and in relation to similar measures seen in other states and concludes that public health law has the authority to challenge personal liberty when health and safety are at stake.*

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\* Legislation Editor, *Georgia State University Law Review*; J.D. Candidate, 2021, Georgia State University College of Law. First to my Dad. Sincerest thank you to Mom, Bill, Kasha, and Rachel, constantly my biggest supporters and cheerleaders. Anne, Ja’Net, and Laura, for the last four years. Thank you to the *Georgia State University Law Review* and Professor Brooke Silverthorn for your guidance and help through this process. I would also like to thank Erin Jones, a mentor, friend, and persistent advocate for this bill. And of course, Tyler—for your constant support while I tried to do it all.

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## INTRODUCTION

In June 2019, New York Governor Andrew Cuomo signed legislation undoing almost fifty years of precedent set by state law—legislation that eliminated religious exemptions from the state’s mandatory vaccination law.<sup>1</sup> Schoolchildren in the state only had a few months to comply with the new law that mandates vaccines for all children entering school, except those with a documented medical exemption.<sup>2</sup> After a large outbreak of measles threatened the United States’ measles elimination status, the New York legislature acted swiftly to ensure future generations of schoolchildren would not be at risk for this and other highly contagious diseases.<sup>3</sup> Public health advocates applauded this event, while parents across the state protested and sued to prevent the law from going into effect before the 2019 school year.<sup>4</sup>

Vaccines are touted as one of the top ten most effective public health interventions of the twentieth century.<sup>5</sup> Infectious diseases with high mortality rates that used to affect children across the

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1. Assemb. B. A2371A, 2019 Leg., Reg. Sess. (N.Y. 2019); *see also* Nick Paumgarten, *The Message of Measles*, NEW YORKER (Aug. 26, 2019), <https://www.newyorker.com/magazine/2019/09/02/the-message-of-measles> [<https://perma.cc/7ZLV-8P3X>].

2. Sharon Otterman, *Get Vaccinated or Leave School: 26,000 New York Children Face a Choice*, N.Y. TIMES, <https://www.nytimes.com/2019/09/03/nyregion/measles-vaccine-exemptions-ny.html> [<https://perma.cc/RPJ9-Z998>] (Sept. 6, 2019).

3. Measles Elimination of *Measles (Rubeola)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/measles/elimination.html> [<https://perma.cc/4WFF-EDUS>] (Oct. 4, 2019). According to the Centers for Disease Control and Prevention (CDC), the United States could lose its measles elimination status if an outbreak lasts for a full year; however, the 2019 New York outbreak ended before the one-year cutoff, and the status was preserved. *Id.* “The World Health Organization (WHO) defines measles elimination as ‘the absence of endemic measles virus transmission in a defined geographical area (e.g., region or country) for at least [twelve] months in the presence of a surveillance system that has been verified to be performing well.’” *Id.* (quoting *Weekly Epidemiological Record*, 9 WORLD HEALTH ORGANIZATION [WHO] 88, 91 (Mar. 1, 2013), <https://www.who.int/wer/2013/wer8809.pdf> [<https://perma.cc/UT47-CL5Q>]); *see also* *The Clock Is Ticking for New York Vaccinations*, L.A. TIMES (Sept. 1, 2019), <https://www.latimes.com/world-nation/story/2019-09-01/new-york-student-vaccinations-deadline> (“Legislators did away with the exemption in June amid the nation’s worst measles outbreak since 1992.”).

4. Otterman, *supra* note 2.

5. Ctrs. for Disease Control & Prevention, *Impact of Vaccines Universally Recommended for Children—United States, 1900–1998*, 48 MORBIDITY & MORTALITY WKLY. REP. 241, 247 (1999) [hereinafter *Impact of Vaccines*].

country, such as polio, diphtheria, and measles, have been virtually eliminated in countries where vaccines are readily accessible.<sup>6</sup> However, as disease rates declined, a new trend emerged that threatened to undo years of progress.<sup>7</sup> Vaccine hesitancy and vaccine refusal from those who believe that vaccines cause unnecessary injury or illness to their children have spread in communities as quickly as the diseases that vaccines have eliminated.<sup>8</sup> Social networks have fueled the fire in these groups, and many rely on values they claim stem from religion to ensure their children remain unvaccinated.<sup>9</sup>

In 2019, New York State saw the worst outbreak of measles since 1992, reporting over 1,000 cases by August of that year.<sup>10</sup> This outbreak began in a close-knit religious community in Rockland County and, due to the infectious nature of the measles virus, spread rapidly through the community's population, many of whom were unvaccinated.<sup>11</sup> In 2015, a similar outbreak in California prompted the state's legislature to pass a law removing language providing for philosophical and religious exemptions.<sup>12</sup>

This Note explores the state of the New York law, considering the nationwide legal battles that mandatory vaccine laws have faced for

6. *Id.* at 244 (“[S]mallpox has been eradicated, poliomyelitis caused by wild-type viruses has been eliminated, and measles and *Haemophilus influenzae* type b (Hib) invasive disease among children aged [less than five] years have been reduced to record low numbers of cases.”).

7. See Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*, 63 BUFF. L. REV. 881, 884 (2015) (“[P]arents have been seeking exemptions from vaccination requirements at increasing rates, which has, in turn, contributed to unprecedented increases in exemptions rates.”).

8. *Id.* at 935–36. “Vaccine rejectors” and “vaccine hesitant” parents react differently to vaccines and, thus, while typically lumped together to form the anti-vaccination movement, need to be handled differently by medical professionals. *Id.*

9. Anna Kata, *A Postmodern Pandora’s Box: Anti-Vaccination Misinformation on the Internet*, 28 VACCINE 1709, 1709 (2010); James Lobo, *Vindicating the Vaccine: Injecting Strength into Mandatory School Vaccination Requirements to Safeguard the Public Health*, 57 B.C. L. REV. 261, 278 (2016).

10. Paumgarten, *supra* note 1.

11. *Id.* Of the 1,000 cases reported by August 2019, New York State reported 392 cases—this did not include 654 cases in New York City—of which 296 were in Rockland County, almost all of them in Orthodox enclaves with low rates of vaccination. *Id.*

12. Mark Fadel, *360 Years of Measles: Limiting Liberty Now for a Healthier Future*, 39 J. LEGAL MED. 1, 8 (2019). Mark Fadel comments that it is unfortunate the change in the law had to result from a reactive approach and not a proactive approach that might have been able to prevent many of the cases involved in the Disneyland outbreak. *Id.* at 9.

the last century. Part I provides background on vaccines and the accompanying laws and specific legal controversies. Part II analyzes specific legal hurdles that the New York law will have to endure, including its probability of succeeding. Part III suggests the outcome of the legal challenges and recommend that other states looking to increase childhood vaccination rates should follow New York's lead.

## I. BACKGROUND

The emergence of the measles vaccine and corresponding mandatory vaccination laws set the stage for the 2019 New York statute. Subsequent lawsuits have challenged these laws on the grounds of violation of the Free Exercise Clause of the U.S. Constitution, parental rights, and interference with a child's right to education.<sup>13</sup>

### A. *Emergence of Vaccines*

At the turn of the twentieth century, health and disease looked significantly different in the United States than they do today.<sup>14</sup> The leading causes of death were pneumonia, tuberculosis, and diarrhea.<sup>15</sup> One hundred years later, the new millennium saw a shift in the leading causes of death from infectious conditions to chronic ones.<sup>16</sup>

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13. See cases cited *infra* note 100 and accompanying text.

14. Ctrs. for Disease Control & Prevention, *Achievements in Public Health, 1900–1999: Control of Infectious Diseases*, 48 MORBIDITY & MORTALITY WKLY. REP. 621, 623 (1999) [hereinafter *Achievements in Public Health*].

15. *Id.* at 622. The CDC attributed the achievements of infectious disease control in the twentieth century to scientific and technologic developments:

Public health action to control infectious diseases in the [twentieth] century is based on the [nineteenth] century discovery of microorganisms as the cause of many serious diseases (e.g., cholera and TB). Disease control resulted from improvements in sanitation and hygiene, the discovery of antibiotics, and the implementation of universal childhood vaccination programs. Scientific and technologic advances played a major role in each of these areas and are the foundation for today's disease surveillance and control systems. Scientific findings also have contributed to a new understanding of the evolving relation between humans and microbes.

*Id.* (footnote omitted).

16. *Id.* at 621–22 (“In 1900 the three leading causes of death were pneumonia, tuberculosis (TB), and diarrhea which (together with diphtheria) caused one third of all deaths. . . . In 1997, heart disease and cancers accounted for 54.7% of all deaths, with 4.5% attributable to pneumonia, influenza, and HIV

The Centers for Disease Control and Prevention (CDC) published findings on the ten interventions that contributed to the vast reduction in morbidity and mortality from infectious conditions,<sup>17</sup> some of which—despite their successes—are now facing ardent opposition.<sup>18</sup>

Although vaccination is more recent, the practice of using a bit of a disease to protect against future sickness is not new.<sup>19</sup> Dating back to ancient outbreaks of smallpox is the practice of variolation, in which a piece of an infected scab was inserted into the nose of a healthy person, conferring future immunity to the disease on that person.<sup>20</sup> Vaccinations as we know them also emerged in an attempt to protect against smallpox.<sup>21</sup> Dr. Edward Jenner, commonly known as the Father of Vaccination, is credited as the first to control smallpox outbreaks through a systematic approach to inoculation against the disease.<sup>22</sup> This discovery ultimately led to the eradication of a disease that had killed millions of people for generations.<sup>23</sup>

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infection.”).

17. *See id.* at 623. The ten achievements were vaccination, motor-vehicle safety, safer workplaces, control of infectious diseases, decline in deaths from coronary heart disease and stroke, safer and healthier foods, healthier mothers and babies, family planning, fluoridation of drinking water, and recognition of tobacco use as a health hazard. *Id.*

18. *See, e.g.,* Marisa Iati, *California’s Governor Signed a Pro-Vaccine Bill into Law This Week. Then the Protests Got Weird*, WASH. POST (Sept. 14, 2019, 4:05 PM), <https://www.washingtonpost.com/health/2019/09/14/californias-governor-signed-pro-vaccine-bill-into-law-this-week-then-protests-got-weird/> [<https://perma.cc/U7RW-7N5P>] (detailing the heated protests that occurred in the California capitol after the newest bill was signed into law, including blocking the entrance to the capitol and throwing items at legislators).

19. James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 836 (2001).

20. *Smallpox a Great and Terrible Scourge*, NAT’L INST. OF HEALTH, [https://www.nlm.nih.gov/exhibition/smallpox/sp\\_variolation.html](https://www.nlm.nih.gov/exhibition/smallpox/sp_variolation.html) [<https://perma.cc/X4ZJ-R2Z8>] (July 30, 2013). Variolation is the process of taking a scab from an infected person and blowing it “into the nose of an individual who then contracted a mild form of the disease.” *Id.* This practice was developed in Asia, spread to the other continents by 1700, and was used as a regular practice to prevent smallpox. *Id.*

21. Hodge & Gostin, *supra* note 19, at 836, 841.

22. *Id.* at 836–39. The lore of the discovery is that Dr. Jenner heard milkmaids in the English countryside claim that they were able to survive exposure to smallpox after coming down with cowpox. *Id.* at 839. Dr. Jenner is said to have exposed a young boy to cowpox and then subsequently to smallpox after his recovery. *Id.* at 839–40. When the boy did not become ill with smallpox, Dr. Jenner considered it a success. *Id.* at 840; *see also* Stefan Riedel, *Edward Jenner and the History of Smallpox and Vaccination*, 18 BAYLOR U. MED. CTR. PROC. 21, 25 (2005) (“[Dr.] Jenner’s work represented the first scientific attempt to control an infectious disease by the deliberate use of vaccination.”).

23. *See* Hodge & Gostin, *supra* note 19, at 839; *see also* *Achievements in Public Health*, *supra* note 14, at 624 (“In 1977, after a decade-long campaign involving [thirty-three] nations, smallpox was

Rather than retroactively treating disease, this initiative to prevent outbreaks led to the discovery of the vaccines that the population receives today.<sup>24</sup>

Large-scale vaccination campaigns create herd immunity, where individuals are protected by the high vaccination rates of the population around them.<sup>25</sup> Immunity from a vaccine protects both the individual and the people in the population who may be unable to receive the vaccine.<sup>26</sup> Widespread public use of vaccinations to achieve herd immunity and protect children and adults from vaccine-preventable diseases emerged in the 1800s.<sup>27</sup> European countries began to order compulsory vaccinations for various groups at that time, with the first school vaccination requirements dating back to 1818.<sup>28</sup> History in the United States paralleled the trends in Europe; Massachusetts passed the country's first mandatory vaccination law in 1809.<sup>29</sup>

### *B. Legal History of Childhood Immunization Laws in the United States*

In 1904, compulsory vaccination laws withstood the first challenge in a case that still holds precedent today.<sup>30</sup> In *Jacobson v.*

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eradicated worldwide—approximately a decade after it had been eliminated from the United States and the rest of the Western Hemisphere. Polio and dracunculiasis may be eradicated by 2000.”); Colette Flight, *Smallpox: Eradicating the Scourge*, BBC, [https://www.bbc.co.uk/history/british/empire\\_seapower/smallpox\\_01.shtml](https://www.bbc.co.uk/history/british/empire_seapower/smallpox_01.shtml) [https://perma.cc/5G3R-FP3F] (Feb. 17, 2011) (estimating that 300 million people died from smallpox in the twentieth century alone).

24. See Hodge & Gostin, *supra* note 19, at 841; *Impact of Vaccines*, *supra* note 5, at 244; see also *Achievements in Public Health*, *supra* note 14, at 624 (“Strategic vaccination campaigns have virtually eliminated diseases that previously were common in the United States, including diphtheria, tetanus, poliomyelitis, smallpox, measles, mumps, rubella, and *Haemophilus influenzae* type b meningitis.”).

25. Rhea Boyd, *It Takes a Herd*, AM. ACAD. OF PEDIATRICS: AAP VOICES BLOG (Apr. 18, 2016), <https://www.aap.org/en-us/aap-voices/Pages/It-Takes-a-Herd.aspx> [https://perma.cc/N8RZ-P8VB].

26. *Id.*

27. See Hodge & Gostin, *supra* note 19, at 841. “Compulsory vaccination was instituted in Bavaria in 1807, Denmark in 1810, Russia in 1812, and Sweden in 1816.” *Id.* In 1840, England and Wales began providing free vaccines to the public and then mandated vaccines in 1853. *Id.*

28. See *id.*; see also C.W. DIXON, *SMALLPOX* 278 (1962).

29. See Hodge & Gostin, *supra* note 19, at 849 & n.126. The first laws required citizens to submit to smallpox vaccinations. *Id.* at 849–50.

30. See *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905); see also Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH.



*Massachusetts*, a man challenged the authority of the state to require smallpox vaccinations.<sup>31</sup> The Supreme Court ruled that the state law did not violate the Fourteenth Amendment and further that the government had the authority to compel vaccinations to prevent the spread of life-threatening contagious diseases.<sup>32</sup> Although this case did not involve children's vaccinations, it set the precedent for public health law across the board and confirmed that states' "police power" encompassed the power to mandate vaccinations.<sup>33</sup>

Fifteen years later, a second case solidified the government's authority "to exclude children from school for failure to present a certificate of vaccination prior to attendance."<sup>34</sup> In *Zucht v. King*, a San Antonio couple refused to vaccinate their child, claiming that mandatory vaccination violated the child's liberty without due process of the law.<sup>35</sup> The Court held that mandating vaccinations as a condition of attending school fell within the state's police power, thus affirming the state's right to impose their own requirements for immunization.<sup>36</sup> These two precedent cases caused many states to pass mandatory immunization laws, although they were not widely enforced until 1977.<sup>37</sup> Neither case addressed religious or

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J.L. REFORM 353, 384 (2004); Reiss & Weithorn, *supra* note 7, at 894; Megan Joy Rials, *By the Pricking of My Thumbs, State Restriction This Way Comes: Immunizing Vaccination Laws from Constitutional Review*, 77 LA. L. REV. 209, 210–11 (2016) (noting that the primary case for childhood vaccination laws is *Zucht v. King*, 260 U.S. 174 (1922), as opposed to *Jacobson*, which ruled on the rights of an individual adult to receive vaccinations).

31. 197 U.S. at 11. Jacobson objected to the smallpox vaccination 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." Rials, *supra* note 30, at 222 (citing *Jacobson*, 197 U.S. at 36). The Court overruled this objection, finding Massachusetts had a compelling state interest in protecting the health of its citizens over the demur of one. *Id.*

32. See *Jacobson*, 197 U.S. at 11; Reiss & Weithorn, *supra* note 7, at 894.

33. Reiss & Weithorn, *supra* note 7, at 894; Rials, *supra* note 30, at 221–22.

34. Linda E. LeFever, *Religious Exemptions from School Immunization: A Sincere Belief or a Legal Loophole?*, 110 PA. ST. L. REV. 1047, 1051 (2006). See generally *Zucht*, 260 U.S. 174.

35. 260 U.S. at 175.

36. Rials, *supra* note 30, at 222. Mandatory immunization laws have existed in many states since the 1920s but were not widely enforced until after 1977. LeFever, *supra* note 34. This was in response to the Childhood Immunization Initiative launched that year. *Id.*; see also Alan R. Hinman et al., *Childhood Immunization: Laws That Work*, 30 J.L. MED. & ETHICS 122, 125 (2002).

37. LeFever, *supra* note 34; Hinman et al., *supra* note 36.

philosophical exemptions, or many of the other common issues that have arisen from more recent vaccine legislation.<sup>38</sup>

Today, all fifty states, the District of Columbia, and Puerto Rico have mandatory childhood immunization laws.<sup>39</sup> Although these laws vary from state to state, they all cover children from kindergarten through twelfth grade, require vaccinations against twelve potentially serious diseases, and allow for medical exemptions.<sup>40</sup> From there, the laws vary significantly in their incorporation of other types of exemptions—specifically, religious and personal belief or philosophical exemptions.<sup>41</sup> As of 2019, forty-five states permitted a religious exemption.<sup>42</sup>

### C. Vaccine Hesitancy and Statutory Exemptions

Hesitation around the use of vaccines is not new.<sup>43</sup> Since Dr. Jenner's discovery, people have objected to the use of vaccines for

38. Rials, *supra* note 30, at 219–21. This Note primarily explores the religious exemption, but it is difficult to have the conversation without acknowledging the interplay with the philosophical and personal belief exemptions.

39. Hinman et al., *supra* note 36 (explaining that, in some areas, it is much easier to obtain an exemption than to receive immunization).

40. LeFever, *supra* note 34, at 1052; Aleksandra Sandstrom, *Amid Measles Outbreak, New York Closes Religious Exemption for Vaccination—but Most States Retain It*, PEW RSCH. CTR.: FACTTANK (June 28, 2019), <https://www.pewresearch.org/fact-tank/2019/06/28/nearly-all-states-allow-religious-exemptions-for-vaccinations/> [<https://perma.cc/4PMK-9VJ8>].

41. Sandstrom, *supra* note 40.

42. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. OF STATE LEGISLATURES (June 26, 2020) [hereinafter *Exemptions from School Immunization Requirements*], <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [<https://perma.cc/5KZA-T3CH>] (listing each state statute and whether it permits a religious or philosophical exemption). The states providing philosophical exemptions were Arizona (school enrollees), Arkansas, Colorado, Idaho, Louisiana, Maine, Michigan, Minnesota, Missouri (childcare enrollees only), New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Washington, and Wisconsin. *Id.* "Religious exemption" indicates that there is a provision in the statute that allows parents to exempt their children from vaccination if it contradicts their sincere religious beliefs. *Id.* "Philosophical exemption" indicates that the statutory language does not restrict the exemption to purely religious or spiritual beliefs. *Id.* For example, Maine allows restrictions based on "moral, philosophical or other personal beliefs," and Minnesota allows objections based on "conscientiously held beliefs of the parent or guardian." *Id.*; see also Sandstrom, *supra* note 40 (showing a map with a state-by-state breakdown by type of exemption, more current than the National Conference of State Legislatures' article, as the states changed rapidly in 2019).

43. Hodge & Gostin, *supra* note 19, at 844. "Although vaccination was generally accepted by the population of colonial America, minority opposition arose in many quarters." *Id.* Concerns included scientific objections about effectiveness, worries about transmission of other diseases, and unwarranted governmental interference with human autonomy. *Id.* At that time, the financial burden of vaccines was

personal, financial, scientific, and many other reasons.<sup>44</sup> The more recent surge in antivaccination sentiment is commonly attributed to a 1998 study that claims there is a link between the Measles Mumps and Rubella (MMR) vaccine and autism.<sup>45</sup> Though the study was discredited and revoked and though no other studies have found a link between the vaccine and autism, the damage to public trust has been substantial.<sup>46</sup> Although the majority of the public remains vaccinated, these small antivaccination groups are very vocal with social media and the internet amplifying their message.<sup>47</sup> Additionally, these groups tend to cluster in communities known as “hot spots,” creating the requisite conditions for diseases to spread rapidly.<sup>48</sup>

#### D. Types of Nonmedical Exemptions

Philosophical exemptions (sometimes called personal belief exemptions) are the legal vehicle for parents wishing to avoid

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still high and caused opposition as well. *Id.* at 845.

44. *Id.* at 846–47. Professors Dorit Rubinstein Reiss and Lois A. Weithorn list several reasons for objecting to vaccinations, including vaccine safety, civil rights, alternative medicine, and mistrust and conspiracy theories. Reiss & Weithorn, *supra* note 7, at 937–52.

45. LeFever, *supra* note 34, at 1054–55.

46. *Id.* at 1055 (“As a result of the autism scare, Britain’s immunization rates have dropped from over ninety-two percent in 1995 to seventy-nine percent at the start of 2004, with the number of actual reported cases more than tripling.”). In the United States, while immunization rates remain relatively stable, certain communities have seen their vaccination rates plummet. Calandrillo, *supra* note 30, at 421–22. In California, one in twenty-five schools had exemption rates greater than 5%. *Id.* at 422. In King County, Washington, 24% of two-year-olds were not fully immunized. *Id.* Low rates in communities around Boulder, Colorado; Missouri; and Massachusetts, as well as within the Amish, Mennonite, and Christian Science Communities, are also at risk of outbreaks. *Id.* The clustering of these communities can lead to outbreaks. *Id.*

47. Kata, *supra* note 9 (“With the prominence of the Internet in today’s world, the attitudes, beliefs, and experiences of that local culture can quickly become global.”).

48. Ashley Welch, *Kids in U.S. “Hotspots” Most Vulnerable to Vaccine-Preventable Diseases, Research Finds*, CBS NEWS (June 14, 2018, 12:10 PM), <https://www.cbsnews.com/news/vaccine-preventable-disease-kids-us-hotspots/> [<https://perma.cc/2P47-EVW2>]. Hot spots are areas of the country “where more than 5 percent of kindergarten-age children are unvaccinated.” *Id.* These typically include major metropolitan areas such as Seattle, Portland, Houston, and Pittsburgh. *Id.*; see also 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, 113 (1997) (“Even though religiously exempt persons comprise a small portion of the population, they often form concentrated communities that are more vulnerable to disease, and often can transmit disease into the larger nonexempt population.”).

vaccinations for nonmedical and secular reasons.<sup>49</sup> Religious exemptions, on the other hand, allow parents to receive exemptions from these laws based on the belief that “parents who possess a ‘sincerely held religious belief’ against vaccinations must be granted religious exemptions under vaccination laws that allow them.”<sup>50</sup>

There is not a lot of uniformity on the language or execution of these exemptions.<sup>51</sup> Some states require that beliefs are “sincerely held” or “genuine and sincere,” but there is no agreement about how to enforce these requirements.<sup>52</sup> Additionally, the complexity of obtaining these exemptions varies from state to state.<sup>53</sup> Some states, such as Washington and Georgia, merely require a notarized form stating that the parent has a religious objection to vaccinations.<sup>54</sup>

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49. Rials, *supra* note 30, at 219. It should be noted that all states allow medical exemptions when a child becomes sick or injured from a vaccine. *Id.* This is “consistent with the state’s policy interest of keeping its citizens healthy.” *Id.* Medical exemptions are not controversial. *Id.*; *see also* Joshua T.B. Williams et al., *Religious Vaccine Exemptions in Kindergartners: 2011-2018*, PEDIATRICS, Dec. 2019, at 1, 6. An article published in December 2019 found that religious exemptions were associated with personal belief exemption availability and may be subject to a “replacement effect.” Williams et al., *supra*, at 3; *see also* Lobo, *supra* note 9 (“Recent trends indicate that parents are using philosophical exemptions with growing frequency.”).

50. Rials, *supra* note 30, at 221 (“Religious groups who have received these exemptions, such as the Amish, Christian Scientists, and Mennonites, have experienced major outbreaks of diseases that those vaccines were designed to target.”).

51. Donald G. McNeil, Jr., *Worship Optional: Joining a Church to Avoid Vaccines*, N.Y. TIMES (Jan. 14, 2003), <https://www.nytimes.com/2003/01/14/science/worship-optional-joining-a-church-to-avoid-vaccines.html> [<https://perma.cc/8RBR-ZNSQ>].

52. Lobo, *supra* note 9, at 284. The New York court struck down part of the state’s law that required the person seeking an exemption to be a member of a “bona fide religion.” *Id.* It upheld the language requiring that the religious beliefs must be “genuine and sincere,” although some people have expressed concern about how that would be enforced. *Id.*; *see also* N.Y. PUB. HEALTH LAW § 2164(9) (McKinney 2018) (“This section shall not apply to children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school.”) (repealed 2019). The law was amended in 2019 and removed this language. PUB. HEALTH § 2164.

53. Calandrillo, *supra* note 30, at 434–35 (“A study by J.S. Rota et al. found that of the [nineteen] states with the highest level of complexity required to receive an exemption, *none* had more than 1% of students exempted from compulsory vaccination laws. By contrast, five of the fifteen states with the simplest exemption process witnessed opt-out rates of greater than 1%.”); *see also* Jennifer S. Rota et al., *Processes for Obtaining Nonmedical Exemptions to State Immunization Laws*, 91 AM. J. PUB. HEALTH 645, 645 (2001).

54. *See Certificate of Exemption—Personal/Religious*, WASH. STATE DEP’T OF HEALTH (Oct. 2019), [http://www.doh.wa.gov/Portals/1/Documents/Pubs/348-106\\_CertificateofExemption.pdf](http://www.doh.wa.gov/Portals/1/Documents/Pubs/348-106_CertificateofExemption.pdf) [<https://perma.cc/6YBZ-YA84>]. The form simply asks the parent to provide the name of the religious organization; it does not require a statement of why or how their beliefs conflict with vaccination. *Id.* The form does not need to be renewed at any point. *Id.*; *see also, e.g.*, GA. COMP. R. & REGS. 511-2-2-07 (2019); O.C.G.A. § 20-2-771 (2016); O.C.G.A. §§ 31-2A-6, -12-3 (2019); O.C.G.A.

Other states, such as New York before 2019, require a more thorough evaluation of these beliefs through an extensive form with a notarized signature and the ability to request more documentation if the school requires it.<sup>55</sup> In states without personal belief exemptions, parents may misuse the religious exemptions to further their opposition.<sup>56</sup> A 2001 study found a direct correlation between the strict nature of the law and vaccination rates.<sup>57</sup> In 2015, California removed the religious and personal belief exemptions from their law, which led to an increase in medical exemptions.<sup>58</sup>

In 1966, New York passed legislation that mandated vaccines for school attendance and included the nation's first religious exemption.<sup>59</sup> In June 2019, Governor Andrew Cuomo signed legislation removing the religious exemption language, making New York only the fifth state to require vaccinations for all children except those with medical exemptions.<sup>60</sup> In between these two dates,

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§ 49-5-12 (2013 & Supp. 2020).

55. McNeil, *supra* note 51; *see also* Lobo, *supra* note 9, at 280 (detailing New York's requirements for vaccine exemptions, which include a written submission with explanation of why the parent requests the exemption, a description of the religious principles that guide the objection to immunization, and notarization of the form); Williams et al., *supra* note 49, at 4 (finding that states with both philosophical and religious exemptions are less likely to have kindergartners with religious exemptions than states with only religious exemptions).

56. Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1573 (2014) (citing cases where courts found parents seeking religious exemptions had expressed fear about vaccine injury, effectiveness, and other non-religious reasons); *see also* Williams et al., *supra* note 49, at 4 (examining exemption rates from 2011–2018); Lobo, *supra* note 9. States that recognize both religious and personal belief exemptions were “significantly less likely to have kindergartners with religious exemptions than were states with religious exemptions only.” Williams et al., *supra* note 49, at 4. Additionally, after California banned both types of exemptions, medical exemptions rose, suggesting a replacement effect using medical exemptions as well. *Id.*

57. Lobo, *supra* note 9, at 277 (citing Rota et al., *supra* note 53, at 647). This study found that a simple process for obtaining an immunization (such as a form that simply required you to check a box) was associated with lower rates of immunizations in schoolchildren. *Id.* On the other hand, states that required more steps to obtain exemptions from the required immunizations had higher rates of immunization. *Id.*

58. Alexei Koseff, *California Limits Vaccine Medical Exemptions As Protests Disrupt Legislature*, S.F. CHRON. (Sept. 9, 2019, 8:11 PM), <https://www.sfchronicle.com/politics/article/California-limits-vaccine-medical-exemptions-as-14426441.php> [<https://perma.cc/5BRG-NCJZ>] (recognizing that “[t]he number of medical exemptions has quadrupled” since the 2015 law removing religious and personal belief exemptions was passed).

59. Paumgarten, *supra* note 1. The proposal attracted dissenters, especially Christian Scientists, so the legislature added the exemption to mollify the population. *Id.*

60. Assemb. B. A2371A, 2019 Leg., Reg. Sess. (N.Y. 2019); *see also* Paumgarten, *supra* note 1.

the law faced a variety of legal challenges and changes reflecting the nation's discontent with the vaccine laws.<sup>61</sup>

### *E. The Legal Standard for Constitutional Challenges*

The U.S. Constitution guarantees each U.S. citizen certain freedoms.<sup>62</sup> Specifically, the First Amendment states that “Congress shall make no law respecting an establishment of religion or prohibiting the Free Exercise thereof . . . .”<sup>63</sup> However, the Supreme Court has consistently held that an individual's rights under the federal Constitution are not absolute.<sup>64</sup> Typically, if a law is

New York became the fifth state after California, Maine, Mississippi, and West Virginia to require immunizations for all children except those who have a medical exemption. Sandstrom, *supra* note 40.

61. See, e.g., Sherr v. Northport-E. Northport Union Free Sch. Dist., 672 F. Supp. 81, 90 (E.D.N.Y. 1987); Caviezel v. Great Neck Pub. Schs., 701 F. Supp. 2d 414, 416 (E.D.N.Y. 2010). See generally Berg v. Glen Cove City Sch. Dist., 853 F. Supp. 651 (E.D.N.Y. 1994); Turner v. Liverpool Cent. Sch., 186 F. Supp. 2d 187 (N.D.N.Y. 2002).

62. U.S. CONST. amend. I.

63. *Id.*; see also Barry Nobel, *Religious Healing in the Courts: The Liberties and Liabilities of Patients, Parents, and Healers*, 16 U. PUGET SOUND L. REV. 599, 611 (1993) (“Religious liberty holds an esteemed position among American values. The first words of the First Amendment to the United States Constitution set forth the federal policy regarding religion: ‘Congress shall make no law respecting the establishment of religion, or prohibiting the Free Exercise thereof.’” (quoting U.S. CONST. amend. I)).

64. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (“But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation.” (citation omitted)); see also Jacobson v. Massachusetts, 197 U.S. 11, 26, 38 (1905). In *Jacobson*, the Court observed:

[T]he liberty secured by the Constitution of the United States . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint . . . .

. . . .

[Nor is it] an element in the liberty . . . 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.

*Jacobson*, 197 U.S. at 26, 38; see also Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878–79, 882–83 (1990) (“We 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. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. . . . Respondents argue that even though [an] exemption . . . need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)[, *abrogated by Holt v. Hobbs*, 574 U.S. 352 (2015)].”), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020). Under the *Sherbert* test, the governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. *Smith*, 494 U.S. at 883.

considered neutral and of general applicability, a person must comply with it even if she claims the law violates her Free Exercise Clause rights.<sup>65</sup> When a right is so fundamental, courts use a heightened form of analysis called “strict scrutiny.”<sup>66</sup> Courts use a strict scrutiny analysis when the interest restricted by the state rises to the level of a fundamental right.<sup>67</sup> The State possesses the burden of proving that its regulation seeks to achieve a “compelling state interest” and that the State is pursuing this interest in the most narrowly tailored way.<sup>68</sup>

Under strict scrutiny, the State must show that a law is necessary to further a compelling state interest.<sup>69</sup> The Court in *Jacobson* applied this level of scrutiny in determining that the State of Massachusetts had a compelling interest in protecting the public’s health.<sup>70</sup> However, since *Jacobson*, the Court has evolved in “the process of scrutinizing the factual basis of legislative findings, including those grounded in science.”<sup>71</sup> Today, if an interest rises to the level of a fundamental right, strict scrutiny requires the State to demonstrate that its regulation is narrowly tailored and advances a compelling state interest.<sup>72</sup> In this evolution of judicial jurisprudence, claims related to First Amendment rights are more likely to require strict scrutiny, under which a court is more likely to strike down a state regulation.<sup>73</sup> State laws not subject to strict scrutiny must be neutral, generally applicable, and not overly burdensome to a

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65. *Smith*, 494 U.S. at 879; *see also* Reiss & Weithorn, *supra* note 7, at 894–95 (“The Court emphasized that ‘persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state.’” (quoting *Jacobson*, 197 U.S. at 26)).

66. *LeFever*, *supra* note 34, at 1064 (“Whether a court reviews the regulation under the strict scrutiny, intermediate scrutiny, or rational basis standard is based on whether the discrimination is against a ‘suspect’ or ‘quasi-suspect’ class and whether the violated right is one that is fundamental.”); *see also* ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 794–98 (3d ed. 2009).

67. *See* Reiss & Weithorn, *supra* note 7, at 896.

68. *Id.* at 896–97.

69. Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 297 (2015); *see also* Hodge & Gostin, *supra* note 19, at 856–67 (“Utilizing state police powers in support of [compulsory] vaccination . . . is constitutionally permissible only if the powers are exercised in conformity with the principles of: (1) public health necessity . . . ; (2) reasonable means . . . ; (3) proportionality . . . ; and (4) harm avoidance . . . .” (emphasis omitted) (footnotes omitted)).

70. Reiss & Weithorn, *supra* note 7, at 896. It is unclear what level of scrutiny would apply today under similar circumstances. *Id.*

71. *Id.*

72. *Id.* at 896–97.

73. *Id.*

particular religion.<sup>74</sup> If the state laws substantially burden a religion, then such laws must be justified by a compelling state interest.<sup>75</sup>

### 1. *Hostility Towards Religion*

The predominant precedent for compulsory vaccination laws rests on the decision in *Jacobson*, in which the Supreme Court analyzed a Massachusetts law requiring mandatory smallpox vaccinations during an outbreak under strict scrutiny.<sup>76</sup> The Court held that certain external factors—in this case, the compelling interest of the State to maintain the public’s health—limit one’s First Amendment free exercise right.<sup>77</sup> Since *Jacobson*, courts across the country have repeatedly found that protecting the public’s health serves enough of a compelling state interest to uphold mandatory vaccination laws.<sup>78</sup> The Court has subsequently held that the Free Exercise Clause does not protect a “valid and neutral law of general applicability.”<sup>79</sup>

Although a “neutral law of general applicability” may not violate an individual’s First Amendment rights, a law that prohibits conduct *because* it is motivated by religious reasons is not neutral.<sup>80</sup> Courts analyze the historical background of the event, the events leading up to the enactment of the policy, and legislative history, including any

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74. *Id.* at 897; *see also* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 692–96 (2014).

75. *Reiss & Weithorn*, *supra* note 7, at 897; *see also* *Burwell*, 573 U.S. at 694–96; *Hodge & Gostin*, *supra* note 19, at 857 (“Thus, while *Jacobson* stands firmly for the proposition that police powers authorize states to compel vaccination for the public good, government power must be exercised reasonably to avoid constitutional scrutiny.”).

76. *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905).

77. *Id.* at 19, 29–30; *see also* *In re Smith*, 146 N.Y. 68, 77 (1895) (“In its unquestioned power to preserve and protect the public health, it is for the legislature of each State to determine whether vaccination is effective in preventing the spread of smallpox or not and deciding in the affirmative to require doubting individuals to yield for the welfare of the community.”).

78. *F.F. v. State (F.F. D)*, 65 Misc. 3d 616, 628 (N.Y. Sup. Ct. Aug. 23, 2019); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (“If . . . [it] is to withstand appellant’s constitutional challenge, it must be either because her disqualification . . . represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant’s religion may be justified by a ‘compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.’” (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963))), *abrogated by* *Holt v. Hobbs*, 574 U.S. 352 (2015).

79. *F.F. I*, 65 Misc. 3d at 628; *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982).

80. *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 532 (1993); *F.F. I*, 65 Misc. 3d at 630.



comments made by lawmakers during the process.<sup>81</sup> Lawmaking bodies must ensure that both the language of the law as well as their own legislative documentation show that the law is neutral and does not have an anti-religious motivation.<sup>82</sup>

## 2. *Hybrid Rights and Parens Patriae*

Though not directly enumerated in the U.S. Constitution, the Supreme Court has held that parents have a fundamental right to raise their children as they see fit.<sup>83</sup> Because parental rights are “fundamental,” courts subject laws that restrict a parent’s rights to the same level of scrutiny as religious rights—strict scrutiny.<sup>84</sup> However, like other fundamental rights, parents’ rights are not without limitation.<sup>85</sup> The doctrine of *parens patriae*, which literally means “parent of his or her country,” gives the state the ability to limit parental freedom in matters affecting the child’s health, safety, and welfare.<sup>86</sup> Because courts agree that states have a compelling interest in protecting the public’s health, as well as the health of

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81. *F.F. I*, 65 Misc. 3d at 630 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018)).

82. *Id.*

83. Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 611 (2016). The Court has recognized the constitutional right of parents to control the upbringing of their children as “a fundamental right protected under the word ‘liberty’ of the Due Process Clause.” *Id.*

84. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). The state’s interest in education is not free from a balancing process when it affects fundamental rights and interests such as the right of parents to raise their children in the religion they choose. *Id.*

85. Chemerinsky & Goodwin, *supra* note 83, at 613.

86. William James Ritchey, *Compulsory Vaccinations: Balancing the Equitable Reality of Police Power with Provider Assistance Through an Improved Informed Consent Process*, 32 J. ENV’T L. & LITIG. 119, 132 (2016). The doctrine of *parens patriae* has been described as follows:

[N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well-being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The 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.

Natalia A. Escobar, *Leaving the Herd: Rethinking New York’s Approach to Compulsory Vaccination*, 80 BROOK. L. REV. 255, 264 (2014) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944)).

children more proactively, compulsory vaccination laws fall under this umbrella.<sup>87</sup>

Freedom of exercise and parental rights often go hand in hand.<sup>88</sup> As the Court in *Prince v. Massachusetts* acknowledged, it is imperative that the “custody, care and nurture of the child reside first in the parents” and that states may only intervene in matters of school attendance, child labor, and health.<sup>89</sup> If a violation of a law causes no harm to the well-being of the child, courts typically find in favor of the parents and their liberty to raise their children freely.<sup>90</sup> The state will intervene if there is a need to protect the child from a clear and present danger.<sup>91</sup> These cases are analyzed with the same balancing tests of other constitutional rights—assessing whether the law is a neutral law of general applicability and whether there is a compelling state interest.<sup>92</sup> If a state law implicates parents’ rights to pass on their beliefs to their children, or if the state has no compelling interest, courts will find in favor of the parents.<sup>93</sup> However, parents’ rights to raise their children under the tenets of a specific faith do not allow them to withhold their children from a compulsory activity (such as receiving a vaccination) just because their religion conflicts with the law.<sup>94</sup>

## II. ANALYSIS

In the course of New York’s history, vaccination laws have faced both Free Exercise and Establishment Clause challenges.<sup>95</sup> In 1987,

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87. Ritchey, *supra* note 86; *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App’x 348, 354 (4th Cir. 2011).

88. *See Yoder*, 406 U.S. at 207–08.

89. 321 U.S. at 166–67.

90. Chemerinsky & Goodwin, *supra* note 83, at 612; *see also Yoder*, 406 U.S. at 207–08.

91. *Prince*, 321 U.S. at 166–68 (holding that the “state’s authority over children’s activities is broader than over like actions of adults”); *see also Chemerinsky & Goodwin, supra* note 83, at 612.

92. Chemerinsky & Goodwin, *supra* note 83, at 612. *See generally Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Yoder*, 406 U.S. 205; *Meyer v. Nebraska*, 262 U.S. 390 (1923).

93. William J. Haun, *A Standard for Salvation: Evaluating “Hybrid-Rights” Free-Exercise Claims*, 61 CATH. U. L. REV. 265, 289–90 (2011).

94. *Id.* at 289.

95. *See, e.g., Caviezel v. Great Neck Pub. Schs.*, 701 F. Supp. 2d 414, 429 (E.D.N.Y. 2010) (holding a parent’s concerns about vaccine injury were not taught to her by her religious doctrine, though they

New York's state law allowed for religious exemptions only for those "bona fide members of a recognized religious organization."<sup>96</sup> The U.S. District Court for the Eastern District of New York found that this language violated both the Establishment Clause and the Free Exercise Clause, striking down the application of this part of the law.<sup>97</sup> However, the court maintained that although religious beliefs may stem from teachings of religions less commonly recognized, the beliefs must actually stem from the religion and not from secular sources.<sup>98</sup>

Lawsuits challenging the 2019 law were filed almost immediately.<sup>99</sup> Over thirty parents filed suit in New York state court under the doctrine of "hybrid-rights," claiming that the law violated both their ability to raise their children as desired and their free exercise rights.<sup>100</sup> As in *Prince*, this notion of "hybrid-rights" creates a stronger case for parents seeking to overcome challenges to two constitutional rights.<sup>101</sup> In fact, hybrid-rights cases may be the only

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were genuine and sincere beliefs and were secular in nature); *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 653 (E.D.N.Y. 1994) (holding religious beliefs were sincere and genuine based on a long history of observing these practices in all medical instances); *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 89 (E.D.N.Y. 1987) (holding New York's religious exemption requiring individuals to be members of a state-recognized religion violated the Establishment Clause by failing the second prong of the *Lemon* test); see also Kayla Hardesty, *Vacci [Nation]: New York As a Stepping Stone to a Healthier Country*, 30 J. C.R. & ECON. DEV. 273, 283 (2017).

96. *Sherr*, 672 F. Supp. at 89.

97. *Id.* at 90; see also Hodge & Gostin, *supra* note 19, at 861 ("[B]ecause these laws provide preferential treatment to particular religious doctrines, [individuals] argue that the provisions violate the Establishment Clause.").

98. Hodge & Gostin, *supra* note 19, at 861; see also *Phillips v. City of New York*, 775 F.3d 538, 541 (2d Cir. 2015). The plaintiff in *Phillips v. City of New York* testified both that her daughter's health was dictated strictly by the "word of God" and that she believed that vaccination could hurt, kill, or put her daughter into anaphylactic shock. 775 F.3d at 541.

99. Chad Arnold, *Vaccinations: Lawsuit Filed Seeking to Repeal New York's Religious Exemption Ban*, LOHUD, <https://www.lohud.com/story/news/politics/elections/2019/07/11/dozens-file-lawsuit-repeal-new-yorks-vaccination-mandate/1703016001/> [perma.cc/VPL6-XMNT] (July 11, 2019, 1:47 PM) ("Dozens of plaintiffs have filed a class action lawsuit in state [s]upreme [c]ourt . . ."). However, Governor Andrew Cuomo felt secure that with the outcome of the cases in California—the state after which New York modeled its legislation—the state courts in New York would uphold the constitutionality of the bill. *Id.*

100. *F.F. I.*, 65 Misc. 3d 616, 630 (N.Y. Sup. Ct. Aug. 23, 2019); *V.D. v. New York*, 403 F. Supp. 3d 76, 81–82 (E.D.N.Y. 2019).

101. *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944). In *Prince*, "two claimed liberties [were] at stake": one was the parents' right to raise their child in a specific faith, and the other was the child's freedom to observe those religious practices. *Id.*

example of cases against a law of neutral general applicability that have successfully prevailed in a free exercise case.<sup>102</sup> In the case of the New York law, the crossover of parental rights under the Fourteenth Amendment and the free exercise claim is complicated by the fact that these religious rights are those of the parent and not the child.<sup>103</sup> In cases involving parental rights, courts have made it clear that these state laws must fundamentally impose a restriction on the parents that makes it “nearly impossible to guide the religious future of their children,” setting an extremely high standard.<sup>104</sup> Analyzing cases through this lens, courts will still rule in favor of the health and safety of the children.<sup>105</sup> If the State has a compelling interest—such as protecting the public’s health—the courts will find in favor of the State.<sup>106</sup>

#### A. *Free Exercise*

The New York law does not violate the Free Exercise Clause of either the New York State or U.S. Constitutions.<sup>107</sup> Although new to

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102. *Cath. Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 523 (N.Y. 2006). In *Serio*, the New York Court of Appeals observed:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the rights of parents . . . to direct the education of their children.

*Id.* (quoting *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 881 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No.103-141, 107 Stat. 1488, *as recognized in* *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020)).

103. Haun, *supra* note 93, at 286.

104. *Id.* at 289; *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972).

105. Haun, *supra* note 93, at 289.

106. *Id.*

107. *F.F. v. State (F.F. II)*, 65 Misc. 3d 467, 487 (N.Y. Sup. Ct. Dec. 3, 2019) (issuing declaratory judgment that the law does not violate plaintiffs’ free exercise rights under the New York State or U.S. Constitutions); *F.F. I*, 65 Misc. 3d 616, 634 (N.Y. Sup. Ct. Aug. 23, 2019) (denying plaintiffs’ request for a preliminary injunction on the grounds that the law violated their free exercise rights); Dave Robinson, *Judge Upholds New York Vaccination Law for Students in Amish Lawsuit*, DEMOCRAT & CHRON., <https://www.democratandchronicle.com/story/news/politics/albany/2019/11/05/judge-upholds-new-york-vaccination-law-students-amish-lawsuit/4166243002/> [<https://perma.cc/4XB6-VBTW>] (Nov. 5, 2019, 3:07 PM) (noting that New York Supreme Court Justice Doyle joined several other judges in holding the state has the power to compel vaccinations); *see also* N.Y. CONST. art. I, § 3. The New York State Constitution provides:

The Free Exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind;

parents in New York, mandatory vaccination laws are over a century old.<sup>108</sup> Both federal and state courts have upheld these laws, even in states that do not provide anything but medical exemptions.<sup>109</sup>

In *F.F. v. State I (F.F. I)*, the plaintiffs in a class action state lawsuit represented a group of parents on behalf of their children who had previously received religious exemptions under New York's public health law requiring vaccines for school attendance.<sup>110</sup> They requested a preliminary injunction, claiming that the law violated their free exercise rights because the legislature acted with religious animus when enacting the new law.<sup>111</sup> Citing quotes from legislators that demeaned the religious exemption, the plaintiffs sought to invalidate the law by proving it was not neutral but targeted religion by repealing the statute.<sup>112</sup> On the other side, the State defended its actions by citing numerous statistics about pockets of unvaccinated individuals that would be especially prone to outbreaks, as well as the state's measles outbreak that was the epicenter of the country's largest outbreak since 1994.<sup>113</sup>

A New York state judge blocked the injunction, citing legislative memoranda and an official government statement to find that the overall motive of the legislators was not religious animus but public

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and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

N.Y. CONST. art. I, § 3.

108. Stephanie Awanyai, *In Defense of California's Mandatory Child Vaccination Law: California Courts Should Not Depart from Established Precedent*, 50 LOY. L.A. L. REV. 391, 420 (2017).

109. *Id.*

110. 65 Misc. 3d at 620–21.

111. *Id.* at 620–21, 626.

112. *Id.* at 621. Quotes included a reference from a legislator calling the religious exemption “garbage,” saying “[w]e’ve chosen science over rhetoric,” and views that the religious exemption had become a personal belief exemption. *Id.* (alteration in original); see also Dan M. Clark, *State Judge Blasts NY Legislature for Curbing Religious Exemptions to Vaccine Requirements*, LAW.COM: N.Y.L.J. (Oct. 10, 2019, 5:19 PM), <https://www.law.com/newyorklawjournal/2019/10/10/state-judge-blasts-ny-legislature-for-law-curbing-religious-exemptions-to-vaccine-requirements/>.

113. *F.F. I*, 65 Misc. 3d at 622–23; Memorandum from the N.Y. State Assemb. in Support of Legislation A02371 (June 7, 2020), [https://assembly.state.ny.us/leg/?default\\_fld=&bn=A2371&term=&Memo=Y](https://assembly.state.ny.us/leg/?default_fld=&bn=A2371&term=&Memo=Y) [https://perma.cc/S6FS-JYWC].

health concerns.<sup>114</sup> The judge acknowledged that a few legislative comments might, in isolation, have shown animus towards unvaccinated individuals, but the legislature and the administration consistently used the legislation to target this and other future outbreaks, not an attempt to pass judgment on religion.<sup>115</sup> The order in *F.F. I* cited legislative and administrative documents that specifically detailed the “protection of the public health from vaccine-preventable diseases.”<sup>116</sup> Coming off “the heels of the most serious outbreak of measles in New York in [twenty-five] years,” the legislative intent did not show evidence of animus that would warrant strict scrutiny because the objective of the law (the public’s health) was expressly stated in all documentation and because the government acknowledged the respect for the religious beliefs but ultimately decided public health concerns must prevail.<sup>117</sup> Additionally, the judge noted that the statute did not single out any specific religious beliefs and concluded that the legislative intent, as a whole, did not indicate that the government was acting in a discriminatory fashion; thus, the law was constitutional.<sup>118</sup>

Opponents claimed the law was unconstitutional because it repealed an existing religious freedom, thereby specifically targeting those with religious beliefs.<sup>119</sup> Courts have found that religious

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114. *F.F. I*, 65 Misc. 3d at 635; *see also id.* at 632 (“Skepticism over the genuineness of some claimed religious exemptions does not necessarily equate to hostility toward legitimate religious beliefs. And other legislators’ comments may merely express the view that the public health of all children, and the public generally, supersedes even bona fide religious interests.”).

115. *Id.* at 631; Clark, *supra* note 112. The lawyer for the opposing parents said that “public comments from a handful of lawmakers who supported the bill showed criticism, and sometimes hostility, towards religious groups.” Clark, *supra* note 112.

116. *F.F. I*, 65 Misc. 3d at 630 (considering legislative memoranda in support of the bill and the governor’s approval statement of the bill).

117. *Id.* at 630–31.

118. *Id.* at 631–32.

119. *Id.* at 628. The court disagreed, however:

The fact that the legislature first allowed for a religious exemption and later repealed that exemption does not . . . turn the law into one that targets religious beliefs.

. . . .

Nor does the fact that the legislature retained the medical exemption, while at the same time repealing the religious exemption, suggest religious animus. The ultimate purpose of the legislation is the protection of public health. The elimination of the medical exemption would be contrary to the ultimate purpose of the statute.

*Id.* at 628, 631 (citations omitted).

exemptions are, in fact, not required and that states like New York go further than what is mandated by the U.S. Constitution by allowing them.<sup>120</sup> Free exercise rights do not “include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”<sup>121</sup>

In the case of New York, a large outbreak in 2019 threatened the lives of several hundred people, as well as the health of the country as a whole.<sup>122</sup> A New York court previously ruled that laws are not made to “meet the predilections of individuals” or “feed [the] mistaken views which an individual might hold.”<sup>123</sup> Therefore, courts in New York found that even if this analysis rises to the level of strict scrutiny (which it does not) it still fails.<sup>124</sup> Courts in New York, California, and other states rely on the precedent set in *Jacobson* to hold that compulsory vaccination laws do not violate the Free Exercise Clause.<sup>125</sup> In fact, one of the courts noted that “statutes of this nature . . . are constitutional within the police power and thus constitutional generally[, which] is too well established to require discussion.”<sup>126</sup>

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120. Hodge & Gostin, *supra* note 19, at 860; *see also* Phillips v. City of New York, 775 F.3d 538, 543 (2d Cir. 2015) (finding that New York could constitutionally require all children be vaccinated to attend school and providing religious exemptions goes beyond what the federal Constitution requires).

121. Hodge & Gostin, *supra* note 19, at 859 (quoting Wright v. DeWitt Sch. Dist., 385 S.W.2d 644, 648 (Ark. 1965)).

122. Measles Cases and Outbreaks of *Measles (Rubeola)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/measles/cases-outbreaks.html> [<https://perma.cc/NG43-785R>] (Aug. 19, 2020). The CDC reported that 1,282 cases of measles had been identified in the United States in 2019. *Id.*

123. Hodge & Gostin, *supra* note 19, at 860 (quoting *In re Whitmore*, 47 N.Y.S.2d 143, 145 (N.Y. Dom. Rel. Ct. 1944)).

124. *F.F. I*, 65 Misc. 3d at 632–33; *see also* Brown v. Smith, 235 Cal. Rptr. 3d 218, 225–26 (Cal. Ct. App. 2018).

125. *See, e.g., F.F. I*, 65 Misc. 3d at 626; *Brown*, 235 Cal. Rptr. 3d at 224; Awanyai, *supra* note 108 (“While the mandatory child vaccination law may be new to California, in actuality, it is not a new concept.”).

126. *Stoltzfus v. Cuomo*, No. 20190311, 2019 WL 7593710, at \*2 (N.Y. Sup. Ct. Nov. 4, 2019) (quoting *McCartney v. Austin*, 31 A.D.2d. 370, 371 (N.Y. App. Div. 1969)).

### B. Parental Rights

The New York law also does not violate parental rights, even under the hybrid-rights theory.<sup>127</sup> The fundamental right of parents to raise their children as they see fit, guaranteed by the Fourteenth Amendment, is not absolute when addressing a child's welfare.<sup>128</sup> Compulsory vaccination is an excellent example of the state's special relationship with children, balancing the welfare of the child, the parents' autonomy to make decisions in the upbringing of their children, and the protection of the public.<sup>129</sup>

Compulsory vaccination laws are at the intersection of *parens patriae* and police powers, distinguishing them from most other personal healthcare decisions.<sup>130</sup> Because herd immunity is crucial to the success of large-scale vaccination campaigns, the decision not to require vaccinations encompasses more than just the health of the child.<sup>131</sup> Additionally, courts hold that these laws do not need to be reactionary—a state may proactively pass a mandatory vaccination law without infringing on a person's constitutional rights, even without an active outbreak.<sup>132</sup> In this sense, a parent's choice to not vaccinate a child enrolled in school affects the health and wellness of

127. Assemb. B. A2371A, 2019 Leg., Reg. Sess. (N.Y. 2019).

128. Reiss & Weithorn, *supra* note 7, at 908 (“While the law grants substantial deference to parental choice, that choice is not unlimited.”).

129. *Id.* at 908–09; *see also* Otterman, *supra* note 2. Many parents concerned with the law's passage did not oppose vaccinations so much as they opposed being told how to make decisions about their child's health. Otterman, *supra* note 2. Some parents sought vaccinations on a delayed schedule, which is no longer a viable option under this law. *Id.*

130. Reiss & Weithorn, *supra* note 7, at 912.

131. LeFever, *supra* note 34, at 1056; *see also* Glossary of Vaccines and Immunization, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/terms/glossary.html#commimmunity> [<https://perma.cc/3BZ6-F9CA>] (July 30, 2020). The CDC defines “community immunity” as:

A situation in which a sufficient proportion of a population is immune to an infectious disease (through vaccination and/or prior illness) to make its spread from person to person unlikely. Even individuals not vaccinated (such as newborns and those with chronic illnesses) are offered some protection because the disease has little opportunity to spread within the community. Also known as herd immunity.

Glossary of Vaccines and Immunization, *supra*; *see also* Otterman, *supra* note 2 (“The problem was that unvaccinated children tended to be clustered in communities, driving down vaccination rates in certain schools and neighborhoods to under 95 percent and creating potential tinder boxes for outbreaks, Dr. Hotez said.”).

132. *F.F. I*, 65 Misc. 3d 616, 633 (N.Y. Sup. Ct. Aug. 23, 2019) (citing *Zucht v. King*, 260 U.S. 174, 176 (1922)); *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002); *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 89–91 (E.D.N.Y. 1987).



other children.<sup>133</sup> To say that one parent can make a choice that affects another child's health and wellness is a weak argument for the protection of parental rights.<sup>134</sup>

Protecting children's health through herd immunity is "unquestionably a compelling state interest."<sup>135</sup> As a result, mandatory vaccination laws constitute a compelling state interest, whether classified as a parental right or free exercise issue, and whether evaluated under a strict scrutiny test or a general balancing test.<sup>136</sup> The same is true when looking at state constitutional rights, such as the right to education.<sup>137</sup>

### C. Right to Education

The last related issue is whether New York's law violates a child's right to receive education in the state.<sup>138</sup> One unique feature of the New York law is that it applies more broadly than comparable laws in California or Maine by expanding the requirement to all schools and not providing exemptions for anyone, even disabled children.<sup>139</sup> The only alternative route for these families to pursue is homeschooling, which is not accessible to every family based on circumstances.<sup>140</sup> California's law does not contain a provision barring students who qualify for an individualized education program (IEP) from accessing services required by the IEP.<sup>141</sup> By contrast, the

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133. Dorit Rubinstein Reiss, *Litigating Alternative Facts: School Vaccine Mandates in the Courts*, 21 U. PA. J. CONST. L. 207, 251 (2018).

134. *Id.*

135. *F.F. I*, 65 Misc. 3d at 633 (citing *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 353 (4th Cir. 2011)).

136. *Id.* at 629.

137. *See id.* at 626 n.2; *Cath. Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 516 (N.Y. 2006).

138. Assemb. B. A2371A, 2019 Leg., Reg. Sess. (N.Y. 2019).

139. Otterman, *supra* note 2. The New York law went into effect immediately, allowing parents no extra time to comply with the law. *Id.* Parents sought injunctions to block the law from going into effect before the school year started to buy themselves more time to make decisions. *Id.*

140. Reiss, *supra* note 134, at 252; Otterman, *supra* note 2. One parent shut down her business to try to figure out how to homeschool her children. Otterman, *supra* note 2. One of her children had already been told she could not attend an Upper East Side Manhattan public school without receiving her vaccinations. *Id.*

141. *V.D. v. New York*, 403 F. Supp. 3d 76, 81 (E.D.N.Y. 2019); CAL. HEALTH & SAFETY CODE § 120335(h) (West 2016).

New York law applies to students with an IEP unless they have a valid medical exemption.<sup>142</sup>

These services are authorized by a federal law known as the Individuals with Disabilities Education Act (IDEA).<sup>143</sup> This law guarantees access to special services required for a child's education and makes available certain programs for homeschooled children as well.<sup>144</sup> One of the main purposes of the IDEA is to ensure that children with disabilities receive access to "free [and] appropriate public education."<sup>145</sup> The Act establishes certain safeguards for children so that a change in policy or procedure does not disrupt their education.<sup>146</sup> In New York, unvaccinated children without a medical exemption who received summer services under the IDEA were excluded from receiving services immediately following the vaccine law's implementation.<sup>147</sup> Parents were forced to alter their work schedules, and children's integral services were delayed or paused.<sup>148</sup> The parents sued in federal court alleging that the IDEA preempted

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142. N.Y. STATE DEP'T OF HEALTH, FREQUENTLY ASKED QUESTIONS ABOUT LEGISLATION REMOVING NON-MEDICAL EXEMPTIONS FROM SCHOOL VACCINATION REQUIREMENTS 4 (June 18, 2019), [https://www.health.ny.gov/publications/2170/docs/nonmedical\\_vaccine\\_exemption\\_faq.pdf](https://www.health.ny.gov/publications/2170/docs/nonmedical_vaccine_exemption_faq.pdf) [<https://perma.cc/EEL4-MDZA>].

143. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482, *amended by* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647. The purpose of the Act is to protect children and parents of children with disabilities and ensure they receive access to proper services, as well as to ensure that educators have access to the proper tools needed to provide adequate educational services. *About IDEA*, IDEA, <https://sites.ed.gov/idea/about-idea/#IDEA-Purpose> [<https://perma.cc/6BYM-RMF8>].

144. *Disabilities, COAL. FOR RESPONSIBLE HOME EDUC.*, <https://responsiblehomeschooling.org/policy-issues/current-policy/disabilities/> [<https://perma.cc/BUL3-53WW>]. Homeschooling programs vary by state. *Id.* Some states may allow IEPs to be used in the home, and others may also allow federal and state funds for services for homeschooled students. *Id.*

145. § 1400(d)(1)(A).

146. *V.D.*, 403 F. Supp. 3d at 84.

147. *Id.* at 82.

148. *See id.*; *see also* Ginia Bellafante, *How Far Would You Go to Avoid Vaccinating Your Child?*, N.Y. TIMES, <https://www.nytimes.com/2019/09/13/nyregion/vaccination-homeschooling-new-york-city.html> [<https://perma.cc/R23H-2ZLN>] (Sept. 15, 2019). After the passage of the California law, the number of homeschooled kindergartners jumped from 1,500 to 5,000 children. Bellafante, *supra*. In New York, a homeschooling consulting business saw its largest growth in demand after the 2019 mandatory vaccination law was signed. *Id.* "Parents were willing to upend their lives, quit jobs, learn the new ways of long division, hire tutors, sit down and conjugate French verbs all for the purpose of avoiding a series of injections that would protect their children and the children of other families." *Id.*

the repeal of the religious exemption and that the repeal violated the Act's procedural safeguards.<sup>149</sup>

The parents alleged conflict preemption in their complaint, claiming that the state law prohibiting their children from participating in special services created a “physical impossibility” of complying with both laws.<sup>150</sup> Children who were unvaccinated because of a religious exemption were no longer allowed to receive their special services, potentially causing delays in developmental milestones.<sup>151</sup> The U.S. District Court for the Eastern District of New York held that the two laws were not in conflict because the parents made an affirmative decision to violate the requirements of a neutral state law, which was not an impossibility.<sup>152</sup> Relying on precedent establishing the law as neutral, the court noted that parents of disabled children may opt out of traditional schools for a variety of reasons.<sup>153</sup> The court also noted that the legislature was free to consider the needs of all disabled children in the state when passing laws and that protecting all children (including those with disabilities) from vaccine-preventable diseases was well within the legislature's scope.<sup>154</sup>

Finally, the right to education is guaranteed by the New York State Constitution.<sup>155</sup> Adjudicating the same issue pertaining to the similar California mandatory vaccination law, the California Court of Appeals held that the right of education is “no more sacred than any of the other fundamental rights that have readily given way to a

149. *V.D.*, 403 F. Supp. 3d at 82.

150. *Id.* at 86 (quoting *In re Methyl Tertiary Butyl Ether (MBTE) Prods. Liab. Litig.*, 725 F.3d 65, 97 (2d Cir. 2013)).

151. *Id.* at 89.

152. *Id.* at 88. The court explained:

Here, it is entirely possible to comply with both the compulsory immunization provisions of § 2164 and the IDEA. Plaintiffs do not allege that their children are unable to receive vaccinations as a result of their disabilities; indeed, if they did, they would likely qualify for medical exemptions under § 2164(8). Instead, plaintiffs have made the affirmative choice not to vaccinate their children for non-medical reasons, thus opting out of public, private, and parochial schools in New York State.

*Id.*

153. *Id.* at 91–94.

154. *Id.* at 90.

155. N.Y. CONST. art. XI, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”).

State's interest in protecting the health and safety of its citizens . . . ."<sup>156</sup> The New York law, despite its material difference with regards to homeschooled children, would likely be found not to infringe on the state constitutional right to education.

### III. PROPOSAL

"There is no doubt that compulsory vaccination is constitutional."<sup>157</sup> As measles cases re-emerge in the United States, state legislatures should consider using their legislative power to control the outbreak by passing laws limiting or removing religious exemptions from compulsory vaccine laws.<sup>158</sup> Religious exemptions were not always a component of state vaccination laws, and in states that never allowed an exemption, vaccination rates remain high.<sup>159</sup> Protecting the existing laws and passing more laws in states with high exemption rates should be the priority for state lawmakers and courts across the nation. These laws are constitutional as approached from several angles.<sup>160</sup> State courts respect state legislative

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156. *Brown v. Smith*, 235 Cal. Rptr. 3d 218, 226 (Cal. Ct. App. 2018) ("The right of education, fundamental as it may be, is no more sacred than any of the other fundamental rights that have readily given way to a State's interest in protecting the health and safety of its citizens, and particularly, school children,' and 'removal of the [personal beliefs exemption] is necessary or narrowly drawn to serve the compelling objective of SB 277.'" (alteration in original) (quoting *Whitlow v. Cal. Dep't of Educ.*, 203 F. Supp. 3d 1079, 1091 (S.D. Cal. 2016))).

157. See Chemerinsky & Goodwin, *supra* note 83, at 595.

158. *Id.* ("Our position is that every state should require compulsory vaccination of all children, unless there is a medical reason why the child should not be vaccinated. In other words, there should be no exception to the compulsory vaccination requirement on account of the parents' religion or conscience or for any reason other than medical necessity.").

159. *A Case Against Vaccine Religious Exemptions*, EARTH INST. COLUM. UNIV.: ST. OF THE PLANET (Apr. 10, 2019) [hereinafter *Case Against Religious Exemptions*], <https://blogs.ei.columbia.edu/2019/04/10/case-against-vaccine-religious-exemptions/> [https://perma.cc/59GZ-VCKS]; see also James Colgrove & Abigail Lowin, *A Tale of Two States: Mississippi, West Virginia, and Exemptions to Compulsory School Vaccination Laws*, 35 HEALTH AFFS. 348, 348 (2016), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2015.1172> [https://perma.cc/BC92-LZ3Y]. The Mississippi Supreme Court ruled in 1979 that the mandatory vaccine law did not infringe on First Amendment rights. Colgrove & Lowin, *supra*, at 350. Despite several recent efforts from advocates, Mississippi's legislature has never allowed a religious exemption to be passed. *Id.* at 351. West Virginia is another state that has never allowed a religious exemption. *Id.*

160. See *supra* Part II.

enactments that compel vaccination without offering religious exemptions.<sup>161</sup>

A. *The State Has the Power Under Parens Patriae to Compel Vaccinations*

An individual's freedom under the U.S. Constitution is not absolute.<sup>162</sup> The state has the power to overrule a parent's right to religious liberty and parental autonomy if the welfare of the child is in question.<sup>163</sup> Before New York passed the 2019 law, four states had already used this power to compel vaccinations without exemptions.<sup>164</sup> Additionally, states limit autonomy through their police power when they pass child labor laws, quarantine laws, and compulsory education laws.<sup>165</sup>

These laws all offer a good analogy of the states' appropriate use of police power. In *Prince*, the Supreme Court held that the state could intervene on parental rights when protecting the well-being of the children.<sup>166</sup> It is arguable that vaccinations are even more important for a child's well-being than labor laws because some of these infectious conditions are a matter of life or death.<sup>167</sup> States use their police power to intervene for the betterment of the child by enacting these protective laws, and mandating vaccinations would be an easy extension of the same powers.

Additionally, states should use their police power to intervene for the betterment of society. Because herd immunity is vital to protect individuals that are too young or too sick for vaccinations, the protection provided by the general public is vital to the success of

161. Fadel, *supra* note 12, at 11.

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

163. *Id.* at 38.

164. Assemb. B. A2371A, 2019 Leg., Reg. Sess. (N.Y. 2019); *Exemptions from School Immunization Requirements*, *supra* note 42 (listing each state statute and whether it permits religious and philosophical exemptions).

165. Marie Killmond, *Why Is Vaccination Different? A Comparative Analysis of Religious Exemptions*, 117 COLUM. L. REV. 913, 928–29 (2017). *See generally* *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

166. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *see also Yoder*, 406 U.S. at 220.

167. Kylie Barnhart, *Taking One for the Herd: Eliminating Non-Medical Exemptions to Compulsory Vaccination Laws to Protect Immunocompromised Children*, 119 W. VA. L. REV. 749, 778 (2016).

proactive vaccination campaigns.<sup>168</sup> Eradication and elimination of disease comes from proactive vaccination campaigns.<sup>169</sup> These necessary steps to protect a state's citizenry, which are constitutional, should be taken by states to proactively prevent infection and work towards achieving elimination status.

Tight-knit religious communities demonstrate why low vaccination rates can be dangerous.<sup>170</sup> The Orthodox Jewish community in Rockland County, New York, was hit the hardest with the 2019 measles outbreak because the county had low rates of vaccination and fell below the guidelines for achieving herd immunity.<sup>171</sup> Similar outbreaks have occurred in the Amish and Mennonite communities.<sup>172</sup> In addition to low vaccination rates, people in these communities typically remain insulated from the outside world, tend to go to school together, and attend religious functions together.<sup>173</sup> The two measles outbreaks in New York ultimately totaled about 1,000 cases, with about 300 cases in Rockland County alone.<sup>174</sup> Additionally, New York spent \$6 million in both implementing reactive countermeasures and education campaigns, and administering over 5,000 doses of the MMR vaccine to try to contain the outbreak.<sup>175</sup> Outbreaks like these are not only dangerous but put a significant strain on state resources.<sup>176</sup> Proactively vaccinating individuals before an outbreak occurs is both safer and more cost-effective for states.

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168. *Id.* at 790.

169. Christine Parkins, *Protecting the Herd: A Public Health, Economics, and Legal Argument for Taxing Parents Who Opt-Out of Mandatory Childhood Vaccinations*, 21 S. CAL. INTERDISC. L.J. 437, 445–46 (2012).

170. *See* Paumgarten, *supra* note 1.

171. *Id.*

172. Sarah Jane Tribble, *Measles Outbreak in Ohio Leads Amish to Reconsider Vaccines*, NPR (June 24, 2014, 3:31 AM), <https://www.npr.org/sections/health-shots/2014/06/24/323702892/measles-outbreak-in-ohio-leads-amish-to-reconsider-vaccines> [<https://perma.cc/E778-KBCB>].

173. *Id.* The outbreak within the Amish community delayed weddings and closed churches in an attempt to keep the contagious disease at bay. *Id.*

174. Jacqueline Howard, *New York City Measles Outbreak Has Ended, Health Officials Say*, CNN, <https://www.cnn.com/2019/09/03/health/new-york-city-measles-outbreak-over-bn/index.html> [<https://perma.cc/3DYU-SP92>] (Sept. 3, 2019, 1:59 PM).

175. *Id.*

176. *Id.*

### B. Conflict with Compulsory Education Laws

Education laws in state constitutions and at the federal level exist to facilitate education for children.<sup>177</sup> Although not included in the federal Constitution, many state constitutions—including the New York State Constitution—include a provision guaranteeing children access to education.<sup>178</sup> Other federal laws such as the IDEA protect access for children and families with specific needs.<sup>179</sup> Together with a robust body of law requiring children to attend school through a certain age, the interaction of these laws creates an adequate environment for ensuring that children receive what the state has deemed an appropriate education for existence in this society.<sup>180</sup>

Although the Supreme Court allowed a religious exemption for Amish children in *Wisconsin v. Yoder*, the Court still required the children to attend some level of schooling that was approved by the state.<sup>181</sup> The primary distinction between the religious exemption applied in *Yoder* and the religious exemption applied to vaccine laws is that no religious exemption allows students to forego an education entirely.<sup>182</sup> If a child receives a religious exemption from vaccination, the child receives no vaccines.<sup>183</sup> Though vaccines are available and accessible for those that seek them later in life, the primary purpose of childhood vaccinations is to protect children who may suffer much more severe, long-term consequences from the diseases.<sup>184</sup>

Finally, it is well-settled that religious exemptions are misused in states where a philosophical exemption does not exist.<sup>185</sup> There is no true replacement available for medical exemptions, as a physician

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177. See *supra* Section II.C.

178. See, e.g., N.Y. CONST. art. XI, § 1.

179. See, e.g., Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482, amended by Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

180. See Barnhart, *supra* note 168, at 784.

181. 406 U.S. 205, 214 (1972).

182. See Barnhart, *supra* note 167, at 786–87.

183. *Id.*

184. Complications of Measles of *Measles (Rubeola)*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/measles/symptoms/complications.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fmeasles%2Fabout%2Fcomplications.html](https://www.cdc.gov/measles/symptoms/complications.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fmeasles%2Fabout%2Fcomplications.html) [https://perma.cc/K9LP-PZHG] (June 13, 2019). Complications include brain swelling (encephalitis), pneumonia, and hospitalization. *Id.*

185. Williams et al., *supra* note 49.

must sign off on a form.<sup>186</sup> By removing all forms of nonmedical exemptions and removing the politically heated religious exemption from the conversation, fewer exemption options would be available to parents. Moreover, because the difficulty of obtaining an exemption correlates with the number of parents seeking an exemption in a state, removing the religious and philosophical exemption options promotes an increase in vaccination rates by removing options that can be easily manipulated.<sup>187</sup>

In California, which was the third state to ban all nonmedical exemptions, medical exemptions rose almost immediately after the exemptions were removed from the law.<sup>188</sup> Although not extremely common, some physicians remain skeptical about the effectiveness of vaccines.<sup>189</sup> A few physicians in California have a “soft theory” that they use to provide medical exemptions—a family history of allergy and autoimmune disease.<sup>190</sup> This theory is inconsistent with guidelines from the CDC’s Advisory Committee on Immunization Practices, and the American Academy of Pediatrics has also expressed concern about the practice.<sup>191</sup> Problems occur when schools and policymakers fail to adequately communicate with physicians about the change.<sup>192</sup> One policy suggestion to counteract this practice is to have a verification system in place for medical exemptions.<sup>193</sup> California responded with California Senate Bill 276 in 2019, which gives compliance authority to the public health

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186. Joanna Pearlstein, *California’s Vaccination Rate Slips As Medical Exemptions Rise*, WIRED (June 7, 2019, 7:00 AM), <https://www.wired.com/story/californias-vaccination-rate-slips-as-medical-exemptions-rise/> [https://perma.cc/H58Z-D48P]. Five years ago (before the implementation of the current law), only 0.2% of California students received a medical exemption, but the rates have climbed from 0.7% to 0.9% in the last two years. *Id.*; see also Rials, *supra* note 30, at 221.

187. See Will Huntsberry, *One Doctor Is Responsible for a Third of All Medical Vaccine Exemptions in San Diego*, VOICE OF SAN DIEGO (Mar. 18, 2019), <https://www.voiceofsandiego.org/topics/news/one-doctor-is-responsible-for-a-third-of-all-medical-vaccine-exemptions-in-san-diego/> [https://perma.cc/G3LM-77MY].

188. *Id.*; see also Salini Mohanty et al., *Experiences with Medical Exemptions After a Change in Vaccine Exemption Policy in California*, PEDIATRICS, Nov. 2018, at 2, 2.

189. Huntsberry, *supra* note 187.

190. *Id.*

191. *Id.*

192. Mohanty et al., *supra* note 188, at 7.

193. *Id.*



agencies.<sup>194</sup> The original bill left medical exemptions up to individual medical providers, but now a health department employee can flag problematic medical exemptions and potentially revoke them if the employee feels the exemptions are inappropriate.<sup>195</sup> Moving forward, states need to ensure that they close all potential loopholes that parents may use to pursue a vaccine exemption.

### C. Challenges

State power is, of course, not absolute.<sup>196</sup> Although religious exemptions are not required by the U.S. Constitution and have been upheld as constitutional by the Supreme Court, state lawmakers must rely heavily on policy concerns when making decisions about mandatory vaccination laws.<sup>197</sup> From a public health perspective, religious exemptions threaten herd immunity, which protects the public's health.<sup>198</sup> From an autonomy perspective, mandatory vaccination laws threaten the integrity of individuals' ability to make decisions for themselves and for their children.<sup>199</sup> Lawmakers are in a more precarious position than courts when it comes to balancing these policy positions. As an elected lawmaking body, the state legislature faces significant political barriers to passing these laws, including a renewed focus on religious liberty.<sup>200</sup>

Opponents of vaccines can capitalize on the political fallout of passing a law that interferes with religion or autonomy.<sup>201</sup> In

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194. S.B. 276, 2019 Leg., Reg. Sess. (Cal. 2019); Katherine Drabiak, *California Law to Restrict Medical Vaccine Exemptions Raises Questions Over Control*, U.S. NEWS (Sept. 24, 2019), <https://www.usnews.com/news/best-states/articles/2019-09-24/california-law-to-restrict-medical-vaccine-exemptions-raises-questions-over-control> [https://perma.cc/25DE-XZ7E].

195. Cal. S.B. 276; Drabiak, *supra* note 194.

196. See Reiss & Weithorn, *supra* note 7, at 953.

197. See Rials, *supra* note 30, at 234.

198. *Id.*

199. See Killmond, *supra* note 165, at 946–48.

200. *Id.* at 915.

201. See Antonia Noori Farzan, 'Yeah, I Pushed You': Anti-Vaxxer Cited for Assaulting Lawmaker While Live-Streaming on Facebook, WASH. POST (Aug. 22, 2019, 6:59 AM), <https://www.washingtonpost.com/nation/2019/08/22/yeah-i-pushed-you-anti-vaxxer-cited-assaulting-lawmaker-while-live-streaming-facebook/> [https://perma.cc/SF96-V8TZ]; Melody Gutierrez, *Anti-Vaccine Activist Assaults California Vaccine Law Author, Police Say*, L.A. TIMES (Aug. 21, 2019, 2:21 PM), <https://www.latimes.com/california/story/2019-08-21/richard-pan-confronted-anti-vaccine-activist> [https://perma.cc/AV2F-64FD]; Jon Campbell et al., *Will New York Parents Opposed to*

California, protests at the state capitol led to the public heckling and physical assault of the bill sponsor.<sup>202</sup> A group of constituents also threatened to recall the sponsor.<sup>203</sup> Protests at the New York state capitol continued during and after the legislative session, with some parents threatening “civil disobedience” by sending their unvaccinated children to school despite the law.<sup>204</sup> These political demonstrations can create uncertainty for elected officials, especially when they are looking towards the next election cycle. However, bowing to this type of public pressure should not deter lawmakers from pursuing the appropriate policies.

Legislators will need to rely heavily on the judicial precedent set in vaccine cases.<sup>205</sup> Thus far in the country’s history, no court at the state or federal level—even the Supreme Court—has held that a mandatory vaccination law was unconstitutional.<sup>206</sup> However, restrictions on religious exemptions themselves have been found to violate the Establishment Clause.<sup>207</sup> Removing religious exemptions entirely allows both state lawmakers and courts to avoid a potentially contentious legal issue around limiting or controlling religious beliefs.

New York and Maryland both attempted to control religious exemptions more closely in the past.<sup>208</sup> In both cases, the states tried to use “recognized religious organizations” to narrow the scope of those who were eligible to seek a religious exemption under the law.<sup>209</sup> Subsequently, both states’ laws were struck down as

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*Vaccinations Send Kids to School? They Rallied in Albany Amid Uncertainty*, LOHUD, <https://www.lohud.com/story/news/2019/09/09/new-york-parents-opposed-vaccinations-send-kids-school/2263308001/> [<https://perma.cc/64NA-ATLR>] (Sept. 10, 2019, 9:43 AM).

202. Farzan, *supra* note 201. Senator Richard Pan, the primary sponsor for both of California’s major pieces of legislation, was followed and pushed by an anti-vaccination advocate while walking around the streets of Sacramento. *Id.* The assailant livestreamed the incident on his Facebook page. *Id.*

203. Gutierrez, *supra* note 201. Activists previously filed a petition to recall Senator Pan, claiming he was committing treason by authoring the bills. *Id.*

204. Campbell et al., *supra* note 201.

205. *See supra* Section I.B.

206. *See supra* Part II.

207. *See supra* Part II; Killmond, *supra* note 165, at 932.

208. *See* Kevin M. Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, in *LAW IN PUBLIC HEALTH PRACTICE* 262, 277 & n.i (Richard A. Goodman et al. eds., 2d ed. 2007).

209. *Id.*

violations of the Establishment Clause.<sup>210</sup> The states failed to remain neutral when they restricted the exemption and discriminated against those who did not belong to an officially-recognized denomination.<sup>211</sup> States can avoid the stumbling block related to religious exemptions by not allowing them in the first place.

### CONCLUSION

New York's legislature enacted a law repealing religious exemptions on the heels of the biggest outbreak in the state's recent history.<sup>212</sup> After a fifty-year history balancing the needs of religious freedom and those of public health, the New York legislature took a swift step in the direction of public health by enacting Assembly Bill A2371A in 2019.<sup>213</sup> Judges at the state and federal level relied on case law that spanned a century and set the precedent for the five states that currently do not allow religious exemptions.<sup>214</sup> New York's law is materially different in one aspect, but it has still been upheld. As measles outbreaks pop up in under-vaccinated populations around the country, population-wide vaccination remains one of the strongest protections against these highly infectious diseases.<sup>215</sup> States can protect their vulnerable populations by enforcing compulsory vaccination laws and knowing that the neutral laws modeled in New York and other states provide persuasive—and compelling—authority from constitutional challenges.

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210. *Id.*

211. *Id.*

212. *F.F. I*, 65 Misc. 3d 616, 622 (N.Y. Sup. Ct. Aug. 23, 2019). The court in *F.F. I* provided a recap of the spread of measles cases in the state:

Dr. Blog describes the extent of the recent measles outbreak in New York, the first in [twenty-five] years since the disease was thought to have been eliminated in the United States. She notes that there were 379 confirmed cases in New York outside of New York City—283 in Rockland County, [fifty-five] in Orange County, [eighteen] in Westchester County, [fourteen] in Sullivan County, seven in Monroe County, one in Suffolk County, and one in Greene County. Most of the Rockland County cases were school-aged students.

*Id.* at 623.

213. Assemb. B. A2371A, 2019 Leg., Reg. Sess. (N.Y. 2019).

214. *See F.F. I*, 65 Misc. 3d at 626–35.

215. Reiss & Weithorn, *supra* note 7, at 883–84 (“Vaccines are literally lifesavers.”).