COMPETING CONCERNS: CAN RELIGIOUS EXEMPTIONS TO MANDATORY CHILDHOOD VACCINATIONS AND PUBLIC HEALTH SUCCESSFULLY COEXIST?

Megan Gibson*

I. INTRODUCTION

Close your eyes and imagine you have taken your young family to one of the most popular travel attractions in the world: Disneyland.¹ The smiling faces on your children indicate the family had a wonderful trip, making enough memories to last a lifetime; however, shortly after returning home your wonderful vacation turned into your worst nightmare. You learned your youngest child, still too young to be vaccinated, contracted measles while on vacation.² Unfortunately, this nightmare was a reality for a number of families during a multistate measles outbreak linked to Disneyland.³ As of February 11, 2015, 125 measles cases have been reported as a part of this multistate outbreak beginning at Disneyland.⁴ While it is believed that the origin of the outbreak was a traveler who

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¹ B.A. in Biology 2008, University of Louisville; Ph.D. in Biology 2013, University of Louisville; J.D. Candidate 2016, Brandeis School of Law, University of Louisville.
³ The measles vaccination is given in two doses, the first at twelve to fifteen months of age and the second at four to six years of age. Measles (Rubeola), Ctrs. for Disease Control & Prevention, http://www.cdc.gov/measles/vaccination.html (last updated Aug. 10, 2015).
⁵ Id. Of the 125 reported cases, 110 were California patients. Id. “Among the 110 California patients, 49 (45%) were unvaccinated; five (5%) had 1 dose of measles-containing vaccine, seven (6%) had 2 doses, one (1%) had 3 doses, 47 (43%) had unknown or undocumented vaccination status, and one (1%) had immunoglobulin G seropositivity documented, which indicates prior vaccination or measles infection at an undetermined time. Twelve of the unvaccinated patients were infants too young to be vaccinated. Among the 37 remaining vaccine-eligible patients, 28 (67%) were intentionally unvaccinated because of personal beliefs, and one was on an alternative plan for vaccination. Among the 28 intentionally unvaccinated patients, 18 were children (aged <18 years), and 10 were adults. Patients range in age from 6 weeks to 70 years; the median age is 22 years. Among the 84 patients with known hospitalization status, 17 (20%) were hospitalized.” Id. (emphasis added).
contracted measles overseas prior to visiting Disneyland, the implications of this outbreak for the young and unvaccinated have been, and will continue to be, felt across the nation.

At the turn of the millennium, the Centers for Disease Control and Prevention (CDC) published a list of “Ten Great Public Health Achievements” from the years 1900 to 1999, and vaccinations were at the top of the list. The use of vaccinations to reduce life-threatening infectious disease has been among the greatest success stories in all of public health. Among the greatest successes of vaccines has been the complete eradication of smallpox and near-elimination of the poliovirus. Because of the success of worldwide vaccination efforts, the World Health Organization (WHO) declared smallpox eradicated in 1980. The Global Polio Eradication Initiative began in 1988, and since then, polio cases have decreased by ninety-nine percent; furthermore, as of 2014, polio remains endemic in only parts of three countries.

Today, the CDC recommends children aged newborn through six years old get vaccinated against: hepatitis B, rotavirus, diphtheria, tetanus, pertussis (whooping cough), Haemophilus influenzae type B, pneumococcus, polio, influenza, measles, mumps, rubella, varicella (chickenpox), and hepatitis A. Additionally, the protection from infection conferred by vaccines is not limited to those who personally receive the vaccination. “Herd immunity,” “indirect protection,” or “the herd effect” are all synonyms for a phenomenon that occurs when a critical portion of the population is vaccinated against infection. At this critical mass of

2 See Zipprich et al., supra note 3, at 153 (noting that measles importations “continue to occur in the United States” and can spread through “venues with large numbers of international visitors,” including tourist attractions and airports).
5 Id.
10 Id.
vaccination rates, protection from infection is conferred upon, and risk of
infection is reduced to, those remaining susceptible (non-vaccinated)
individuals.\textsuperscript{15} Herd immunity benefits and protects society as a whole, as
certain individuals are medically unable to receive vaccinations (e.g.
immune comprised individuals).\textsuperscript{16} These individuals, as well as any other
unvaccinated individuals, remain biologically susceptible to infection.\textsuperscript{17}
Fortunately, herd immunity affords some protection to these otherwise
susceptible individuals.\textsuperscript{18} Unfortunately, the critical mass of vaccination
rates to provide indirect protection to unvaccinated individuals is difficult to
precisely calculate and varies by disease causing organism.\textsuperscript{19} This
variability depends on the “basic reproduction number” of the infection, as
measured by the number of secondary infections an infected individual will
cause in a wholly susceptible population, and the “effectiveness [of the
vaccine] against transmission.”\textsuperscript{20} While critically important to unvaccinated
individuals, reliance upon herd immunity for protection is far from perfect.

A decrease in herd immunity, occurring when less than the critical mass
of the population is properly vaccinated, could cause a deadly increase in
vaccine-preventable diseases, such as measles or pertussis (whooping
cough).\textsuperscript{21} While the specifics vary from state-to-state, presently all fifty
states, as well as all U.S. Territories, require vaccinations prior to a
student’s enrollment in school.\textsuperscript{22} However, all fifty states allow at least
some type of exemption to the mandatory vaccination policy: medical
exemptions, religious exemptions, philosophical exemptions, or some
combination of the three.\textsuperscript{23} While there have been objections to mandatory
vaccination policies since their beginning over a century ago,\textsuperscript{24} there has
been a recent rise in nonmedical exemptions to vaccination, and the

\textsuperscript{15} Id.
\textsuperscript{16} Id. at 915 (noting the benefits that herd immunity provides to those with contraindications to
vaccines).
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 912–15.
\textsuperscript{19} Id. at 912–13.
\textsuperscript{20} Id.
\textsuperscript{21} Emily Oshima Lee et al., The Effect of Childhood Vaccine Exemptions on Disease Outbreaks,
CENTER FOR AMERICAN PROGRESS (Nov. 14, 2013), https://www.americanprogress.org/issues/
\textsuperscript{22} Childcare & School Vaccination Requirements 2007–2008, CTRS. FOR DISEASE CONTROL &
/content/articles/vaccination-exemptions (last updated July 31, 2014).
\textsuperscript{24} James G. Hodge & Lawrence O. Gostin, School Vaccination Requirements: Historical, Social,
increase in the rate of these exemptions is accelerating. The increased risk of disease, due to the decrease in herd immunity resulting from an increased exemption rate, is particularly concerning where “low vaccination and high exemption levels [] cluster within communities.” The year 2014 was a record breaking year for cases of measles, as increased numbers of unvaccinated individuals has led to rates of measles infection that have not been seen since 2000. The recent outbreak of measles tied to Disneyland indicates the possibility that 2015 may also be a record-breaking year for measles cases. Vaccinations provide both a personal benefit to the individual receiving the vaccine, and also a societal benefit through herd immunity, making vaccinations one of the most important facets of both individual and public health.

In what was a historic decision, Burwell v. Hobby Lobby, the Supreme Court recently expanded the scope of religious exemptions in the corporate sector. In Hobby Lobby, the Court held that the contraceptive mandate of the Affordable Care Act, as applied to closely held for-profit corporations with sincere religious beliefs against certain contraceptives, violates the Religious Freedom Restoration Act of 1993. While Hobby Lobby was about contraception, the implications of this decision for corporate health insurance coverage of vaccinations (and other controversial medical issues) is unsettled. The majority opinion states that “[o]ther coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them,” but the dissent takes a different approach. In the dissent, Justice Ginsburg discusses the possibility of the Hobby Lobby holding being applied broadly to other religious objections to medical issues, including coverage for vaccinations. Hobby Lobby leaves open the possibility that a closely held for-profit corporation with religious objections to vaccinations could refuse to pay for coverage of childhood (and other) vaccinations. This would further complicate issues of herd

27 Measles Cases and Outbreaks, supra note 5.
28 134 S.Ct. 2751 (2014) [hereinafter Hobby Lobby].
29 Id. at 2785.
30 See id. at 2805. (Ginsburg, J., dissenting).
31 Id. at 2783.
32 Id. at 2805 (Ginsburg, J., dissenting).
immunity, religious exemptions, and public health importance of vaccinations.

This note examines the legal issues surrounding states’ compulsory childhood vaccination policies and questions the current state of vaccination policy in light of public health concerns. This note argues that the elimination of all non-medical exemptions would not run afoul of constitutional concerns because of the compelling interest of public health with regard to communicable disease. Part II of this note examines the history and development of vaccinations and vaccination policy, and the history and development of legal challenges to vaccination policies and parental rights. Part III.A examines the extent of the states’ police powers to protect public health and welfare, through a comparison of vaccination law and quarantine law. Part III.B examines constitutional issues stemming from religious exemptions to compulsory vaccination, including the standard of scrutiny applied to vaccination exemptions. Part III.C examines the rights of minor children with regard to compulsory vaccination, and part III.D examines the implications of *Hobby Lobby* on matters of public health. Part IV proposes that non-medical exemptions to mandatory childhood vaccination policies would not violate individual First Amendment rights because of compelling interest of protection from communicable disease. Part V concludes.

II. HISTORY

A. The Science of Vaccination

Edward Jenner, whose work is often regarded as the foundation of immunology, is credited with the first attempt to counter infectious disease (smallpox) with the process of vaccination. Jenner noted that dairymaids were protected from smallpox infection after acquiring a cowpox infection. In 1796, Jenner took matter from an active cowpox lesion and used it to inoculate a young child who subsequently developed cowpox — vaccinating the child against a much more virulent smallpox infection. Jenner coined the term “vaccination,” which we still use today, from his work with cowpox, as the Latin word for cow is *vacca*, and the Latin name

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34 Id. at 24.
35 Id.
for cowpox is vaccinia; thus, Jenner called his newly discovered procedure "vaccination." 36

Historically, state and local governments have been responsible for the regulation and preservation of public health, and inclusive in this responsibility has been the authority, under the state’s police powers, to enact laws to safeguard public health. 37 Laws for protecting public health have included requiring quarantine and isolation of infected individuals and mandatory vaccination laws. 38 The first mandatory vaccination law was a law requiring vaccination for smallpox in Massachusetts enacted in 1809, 39 only thirteen years after Jenner’s historical experiment. In 1827, Boston, Massachusetts became the first city to mandate vaccination (for smallpox) for students in the public school system; many other cities and states soon followed. 40 Presently, all fifty states, the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands all have mandatory vaccination policies. 41 Furthermore, all fifty states, the District of Columbia, and U.S. Territories require incoming kindergarteners to have the following vaccines: diphtheria, tetanus, acellular pertussis (DTaP) vaccine; 42 measles, mumps, rubella (MMR) vaccine; 43 and the polio vaccine. 44

In 1921, prior to the development of a vaccination, more than 15,000 Americans died of diphtheria; however, because of successful vaccination efforts there has not been a single case of diphtheria in the United States

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36 Id.
38 Id.
39 Id.
40 Id. at 2.
41 Id. at 2. Vaccination requirements by vaccine can be found for each state and U.S. territory by visiting the Centers for Immunization Action Coalition’s website. See State Information: State Mandates on Immunization and Vaccine-Preventable Diseases, IMMUNIZATION ACTION COALITION, http://www.immunize.org/laws/ (last updated July 7, 2015).
since 2004. A rubella (which is often referred to as German measles) outbreak in 1964-1965, prior to the development of a vaccine, infected 12.5 million Americans. Included in that 12.5 million Americans, 20,000 individuals were born with congenital rubella syndrome, 11,000 individuals were left deaf, 3,500 were left blind, 2,100 children died, and there were more than 11,000 spontaneous abortions caused by rubella infection of the mother. Fortunately, due to vaccination, rubella was eradicated from the United States in 2004. A decrease in vaccination rates opens the proverbial door for the return or rise of these communicable diseases otherwise preventable by vaccination.

B. Legal Challenges to Vaccination and Parental Rights

The Supreme Court’s first ruling on mandatory vaccination law, Jacobson v. Commonwealth of Massachusetts, was in 1905. In Jacobson, the Court upheld a Massachusetts law giving local Boards of Health the ability to mandate vaccination of local adult citizens, stating that “[a]ccording to settled principles the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.” The petitioner argued “[a] compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best.” The Court held that the Constitution “does not import an absolute right in each person to be, at all times, and in all circumstances, wholly freed from restraint.” However, the Jacobson Court also recognized the possible limits to this power if not reasonable:

[P]ower of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable

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46 Id.
48 Id.
49 197 U.S. 11 (1905).
50 Id. at 25.
51 Id. at 26.
52 Id.
manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.\(^53\)

Through this ruling the Court created a strong presumption of Constitutionality for reasonable mandatory vaccination policies.

In 1922, the Supreme Court returned to the issue of mandatory vaccination laws in Zucht v. King, where the plaintiff argued a San Antonio, Texas city ordinance prohibiting the admission of any person to a public school or “other place of education” without verification of vaccination violated her right of due process.\(^54\) The Court, as in Jacobson, held that there was no issue of validity with the ordinance, and that Constitution delegates to local authorities matters regarding the regulation of public health through the exercise of police powers.\(^55\)

There is an intersection of a state’s police powers in order to protect its citizens and a citizen’s right of free practice of religion that exists.\(^56\) In Prince v. Massachusetts the Supreme Court ruled on such an intersection, specifically when involving children.\(^57\) In Prince, the Court upheld a ruling that a young child distributing religious pamphlets violated a Massachusetts child labor law.\(^58\) While the Court recognized free religious practice, including that of children, and free exercise of parents to give children religious training, the Court held that the state acting as parens patriae may restrict parental control in certain circumstances and that authority is “not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.”\(^59\) The Court goes on to state that a parent “cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds.\(^60\) 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.”\(^61\) Furthermore,

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\(^{53}\) Id. at 28. At the time, the Board of Health enacted the local regulation mandating vaccination smallpox was prevalent in the community and the incidence of infection was increasing. Id. at 22.

\(^{54}\) 260 U.S. 174, 175 (1922). The petitioning child was refused admission to both public and private school under the ordinance at issue. Id.

\(^{55}\) Id. at 176.


\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) Id. at 166.

\(^{60}\) Id.

\(^{61}\) Id. at 167.
the Court holds that a state’s authority to regulate the activity of children is greater than that of adults in order to protect them. The law at issue regarding religious exemptions was limited to “parents or guardians who can present the specified evidence that they are adherents or members in good standing of a ‘recognized’ church or religious denomination whose tenets conflict with the practice of vaccination or immunization.” The plaintiff in this case had a religious objection to vaccinating her child, but was “not an adherent or a member of a ‘recognized’ church or religious denomination.” The court ruled the exemption law unconstitutional because certain religious adherents were granted an exemption that was “denied to other persons whose objections to vaccination [were] also grounded in religious belief.” The United States Supreme Court has never directly taken up the issue or ruled on the issue of religious (or philosophical) exemptions to vaccinations. However, a number of state courts have ruled on the constitutionality of their mandatory vaccination policies; and further, legal scholars have also opined regarding the constitutionality of religious exemptions.

As these cases demonstrate, there has been opposition to mandatory vaccination policies since the genesis of such policies. Early rationales for objection to mandatory vaccination included objections based on effectiveness, transmission of other diseases, fear of harmful effects, and religious or philosophical beliefs. Other objectors viewed mandatory vaccination policies as a governmental interference with personal autonomy. Many of these are the same reasons to which modern opponents of vaccination cite. Presently, each of the states provides a varying degree of exemptions for childhood vaccination requirements for

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62 Id. at 168–69.
64 Id. at 222.
65 Id.
66 Id. at 223.
67 See infra Part III, Section A.
68 See infra Part III, Section B.
69 See Hodge & Gostin, supra note 24, at 844.
70 Id.
71 Id.
72 The History of Vaccines: History of Anti-vaccination Movements, THE COLL. OF PHYSICIANS OF PHILA., http://www.historyofvaccines.org/content/articles/history-anti-vaccination-movements (last updated Dec. 18, 2014) (“Although the time periods have changed, the emotions and deep-rooted beliefs—whether philosophical, political, or spiritual—that underlie vaccine opposition have remained relatively consistent since Edward Jenner introduced vaccination.”).
school entry. All fifty states provide exemptions for medical necessity. Examples of medical necessity include a child with a compromised immune system, a previous allergic or adverse reaction to a vaccine, or a known allergy to a vaccine component. Currently, forty-eight states provide for religious exemptions to vaccination, although the states vary in what qualifies as a religious exemption and procedures for seeking such an exemption. Finally, twenty states allow for exemptions for children whose parents have a philosophical or personal belief objection to vaccination. The following section will examine the complex legal issues associated with mandatory vaccination policies and religious exemptions to them.

III. ANALYSIS

Mandatory vaccination policies, particularly those for matriculation into a public school system, involve the intersection of a number of complex legal issues. Traditionally, there have been three major legal issues that must be balanced when assessing religious exemptions to these mandatory vaccination policies: 1) the right(s) of the government, specifically through police powers, to safeguard the public health of all individuals; 2) the constitutional right of all individuals to freely exercise their chosen religion; and, 3) the rights of minors with respect to compulsory vaccination. Now, following Hobby Lobby, the role of closely held corporations to object to particular facets of public health policy on religious grounds is uncertain; there now exists an additional consideration of the corporate sector and insurance for coverage for vaccinations.

A. Use of Police Powers for the Public Health and Welfare for All

In many ways, quarantining is merely the opposite side of the same coin as vaccination. Many of the legal issues associated with quarantine and vaccination are the same. Both quarantine and vaccination represent mechanisms for containing and minimizing the spread of communicable

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73 THE COLL. OF PHYSICIANS OF PHILA., supra note 23.
74 Id.
75 Id.
76 Id. “Mississippi and West Virginia are the only states to offer only medical exemptions to vaccination.” Id.
77 Id.
78 See, e.g., Hodge & Gostin, supra note 24.
79 Issues regarding potentially unlawful detention with quarantine do not exist for vaccination, and therefore will not be discussed herein.
disease. Quarantine is the process of separating and restricting the movement of individuals who have been exposed to a communicable disease in order to observe them for symptoms of the disease; similarly, isolation is the process of separating a sick individual with a communicable disease from individuals who are not yet ill. Although there are subtle differences between the meanings of the terms “quarantine” and “isolation,” they are often used interchangeably. Because of the similarities in legal issues surrounding quarantine (and isolation) and vaccination, quarantine and isolation are excellent illustrative examples for the ability of the states to utilize police powers for public health necessity.

Unlike mandatory vaccinations, which are governed by the states, the federal government derives a right to effectuate the quarantine and isolation of individuals under the Commerce Clause of the U.S. Constitution. Further, the Public Health Service Act provides the Surgeon General (with approval of the Health and Human Services Secretary) with the power to “make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.” Although these provide the federal government with the authority to quarantine under certain circumstances for certain diseases, the primary authority for, and practical application of, quarantine or isolation exists at the level of the state or local government.

The right of a state or local government to effectuate quarantine or isolation, like the right of the state to mandate vaccinations, is an exercise of the state’s police power to protect society as a whole from communicable diseases. While mandatory vaccination policies are present, and actively
used, in all fifty states, the use of quarantine has been rarely used throughout the course of our nation’s history. Although rarely used, quarantine and isolation may be viewed as examples of the ability of the states to utilize police powers for public health necessity, particularly in the case of emergencies.

In 1902, the Supreme Court addressed the constitutionality of the involuntary quarantine of individuals within the United States. In, *Compagnie Francaise De Navigation A Vapeur*, a French-owned vessel, the S.S. Britannia, which contained both cargo and passengers, including United States citizens, was not allowed to land and disembark at the port of New Orleans. At the time of the vessel’s attempt to land, all passengers had been declared free of communicable disease. The Louisiana Board of Health adopted a resolution preventing the entry of “healthy persons from a locality infested with a contagious or infectious disease,” which in turn prevented the vessel from being able to land and disembark at a number of Louisiana ports. The French owner of the vessel petitioned the Supreme Court of Louisiana for review of the constitutionality of the quarantine.

Ultimately, the United States Supreme Court held that the Louisiana law, which allowed the Board of Health to quarantine any part of the state experiencing an outbreak of a communicable disease, was “not repugnant to the Constitution of the United States, and was not in conflict with the acts of Congress or the treaties made by the United States.” The Court expressly held that the involuntary quarantine of an individual (or entire geographic location) for the public welfare is not at odds with the Constitution. Further, courts have continued to refer to the *Compagnie Francaise de Navigation a Vapeur* decision as the preeminent authority on the constitutionality of quarantine.

Cases challenging the mandatory quarantine are very few. In 1918, the Supreme Court of Washington held that the quarantine of a man with

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86 See CTRS. FOR DISEASE CONTROL & PREVENTION, supra note 42; CTRS. FOR DISEASE CONTROL & PREVENTION, supra note 43; CTRS. FOR DISEASE CONTROL & PREVENTION, supra note 44.
87 CTRS. FOR DISEASE CONTROL & PREVENTION, supra note 80, at 2.
89 Id. at 382.
90 Id. at 383.
91 Id. at 385.
92 Id. at 380–83.
93 Id. at 397.
94 Id. at 387–90.
syphilis was not unconstitutional, and deferred to the expertise of the medical professionals, health boards, and legislature to make determinations regarding public health.\textsuperscript{96} The largest pandemic of infectious disease in American history was the Spanish flu pandemic of 1918, during which numerous quarantines occurred, although it appears there were not any legal challenges to these quarantines.\textsuperscript{97} More recently, states’ use of involuntary quarantine has consisted of the involuntary hospitalization and isolation of infectious tuberculosis patients; however, courts in multiple states have upheld challenges to these quarantines.\textsuperscript{98}

The discussion of states’ abilities to involuntarily quarantine individuals resurfaced in 2014 amid concerns of a widespread Ebola outbreak in the United States.\textsuperscript{99} Perhaps most outspoken about the issue was nurse Kaci Hickox, who worked with Ebola patients in West Africa, and was quarantined by the states of New Jersey and Maine upon her return from West Africa.\textsuperscript{100} Ms. Hickox publically denounced the quarantine and hired an attorney to defend her civil rights.\textsuperscript{101} With the increasing concern about Ebola, many states began exercising their police powers by implementing involuntary quarantines of anyone “returning from having direct contact with Ebola patients in West Africa,” mandating that they “will have to be quarantined for 21 days,” the incubation period for Ebola, during which time symptoms would appear if a person were infected.\textsuperscript{102}

Not surprisingly, much of the law regarding states’ use of police powers for public health, including both quarantine and vaccine, is concentrated in time periods of necessity or emergency, as opposed to prophylactic vaccination or public health matters.\textsuperscript{103} In fact, following the terrorist attacks of September 11, 2001, concerns of bioterrorism prompted The Center for Law and the Public’s Health at Georgetown and Johns Hopkins Universities to draft the Model State Emergency Health Powers Act.

\textsuperscript{98} See id. at 104.
\textsuperscript{100} See id.
\textsuperscript{101} Id.
\textsuperscript{103} See, e.g., \textit{THE MODEL STATE EMERGENCY HEALTH POWERS ACT} at Preamble (THE CTR. FOR LAW AND THE PUBLIC’S HEALTH AT GEORGETOWN AND JOHNS HOPKINS UNIVS., 2001) [hereinafter MSEHPA].
(MSEHPA). The preamble to the MSEHPA quotes the seminal *Jacobson v. Massachusetts* decision, and states that the Act is designed to promote the common public good, while maintaining a balance with individual civil liberties during emergency health threats. The MSEHPA is drafted to be implemented in a “public health emergency” which the Act defines as:

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

The Act authorizes certain actions during a “public health emergency” including vaccination and quarantine.

With regard to vaccination, the MSEHPA allows state and local officials to vaccinate individuals against infectious diseases in order to prevent their spread through the community. The MSEHPA also has a provision that allows for individuals “who are unable or unwilling for reasons of health, religion, or conscience” to opt-out of vaccination. However, unvaccinated individuals, in order to prevent the spread of communicable disease, may be subject to isolation or quarantine. The opt-out provision of the MSEHPA signifies a shift from the rule of *Jacobson v. Commonwealth of Massachusetts*, where a balance between the need for the common good to minimize the spread of communicable disease is desired and attempted.

Interestingly, the states’ implementation of the MSEHPA, particularly with regard to the vaccination, varies greatly. Some states, such as Arizona, have taken the position that health officials may mandate

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104 See id. As of 2006, thirty-eight states had passed bills or resolutions that include provisions from the MSEHPA or that are substantially similar to those in the MSEHPA. *The Model State Emergency Health Powers Act (MSEHPA)*, CTRS. FOR LAW AND PUB.’S HEALTH, http://www.publichealthlaw.net/ModelLaws/MSEHPA.php (last updated Jan. 27, 2010).
105 MSEHPA at Preamble.
106 Id. § 104(m).
107 See id. §§ 603–605.
108 See id. § 603(a).
109 See id. § 603(a)(3).
110 Id.
vaccinations under certain emergent circumstances.\textsuperscript{112} Meanwhile, other states—Minnesota, for example—have taken the position that “[n]otwithstanding laws, rules, or orders made or promulgated in response to a national security emergency or peacetime emergency, individuals have a fundamental right to refuse medical treatment, testing, physical or mental examination, [and] vaccination . . . .”\textsuperscript{113} Some have opined that the differences in states’ implementation of mandatory vaccination policies in the face of a public health emergency is due to differing legislative philosophies.\textsuperscript{114}

It is clear that states derive the right to vaccinate from their police powers in order to protect society at large.\textsuperscript{115} However, the extent of a state’s right to mandate vaccination (or other health measures) at times when a public health crisis is absent remains unclear. As demonstrated by the promulgation of the MSEHPA, a delicate balancing of public health and individual civil liberties is required. This delicate balance is achieved in the MSEHPA through allowing exemptions to vaccination, including religious exemptions, but subjecting those individuals exempting to quarantine or isolation.\textsuperscript{116} While this balance works during a public health crisis by providing an acceptable alternative to mandatory vaccination, such a balance would certainly prove problematic for routine vaccination, as isolation indefinitely for failure to vaccinate would run afoul of other liberties. For prophylactic or routine vaccination such a balance cannot be attained.

\textit{B. Constitutional Concerns with Religious Exemptions}

Religious views regarding medical interventions are often personal in nature, meaning the effect of the religiously motivated medical decision affects only the individual making the decision (e.g. Jehovah’s Witness’ refusal of blood products).\textsuperscript{117} However, vaccinations are unique with respect to this aspect of medical decision-making—vaccinations are important for the health and wellbeing of the individual, for the health and

\textsuperscript{113} Minn. Stat. § 12.39 (2005).
\textsuperscript{114} Horowitz, \textit{supra} note 111, at 1730.
\textsuperscript{115} See \textit{supra} Part II, Section B; Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905).
\textsuperscript{116} MSEHPA § 603(a)(3).
wellbeing of society as a whole, and collectively for the protection of those medically unable to receive vaccinations.\textsuperscript{118}

In order to properly understand the application of free exercise of religion as it applies to vaccination policies, a brief overview of the recent history of the law regarding free exercise is required. In \textit{Employment Division Oregon Department of Human Resources. v. Smith}, the Supreme Court defined the free exercise of religion as “the right to believe and profess whatever religious doctrine one desires,”\textsuperscript{119} and held that “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”\textsuperscript{120} Congress, in response to \textit{Smith}, enacted the Religious Freedom Restoration Act (RFRA), which explicitly countered \textit{Smith}, stating “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.”\textsuperscript{121} The RFRA provides the exception that the government may substantially burden an individual’s free exercise of religious only upon showing a compelling governmental interest, and that the application is the least restrictive means of furthering said governmental interest.\textsuperscript{122} In other words, the RFRA requires that strict scrutiny analysis be applied for all laws, even those neutral toward religion.

In \textit{City of Boerne v. Flores}, the Supreme Court held that Congress, in enacting the RFRA, overstepped constitutional authority and held that the RFRA “is a considerable congressional intrusion into the states' traditional prerogatives and general authority to regulate for the health and welfare of their citizens;” and thus unconstitutional as applied to the states.\textsuperscript{123} Following the Court’s decision in \textit{City of Boerne}, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).\textsuperscript{124} Enacted through the Commerce and Spending Clause, the RLUIPA requires the same basic test as RFRA, but on limited categories of governmental actions.\textsuperscript{125} These categories include: 1) where the substantial burden is imposed as part of a program or activity that receives federal financial assistance;\textsuperscript{126} 2) the substantial burden affects commerce with foreign

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\begin{enumerate}
\item See supra Part I.
\item \textit{Id.} at 879 (internal quotation marks and citations omitted).
\item \textit{Id.} § 2000bb-1(b).
\item \textit{Burwell v. Hobby Lobby Stores, Inc.}, 134 S.Ct. 2751, 2761 (2014).
\item § 2000cc(a)(2)(A).
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nations, between states, or with Indian tribes; 127 or, 3) the substantial burden is imposed on the implementation of a land use regulation where the government has formal or informal procedures permitting governmental assessment of proposed land use. 128

Certain aspects of state vaccination policies may fall under the first prong of the RLUIPA categories, as the Vaccine for Children (VFC) program is federally funded. 129 The VFC program assists in providing vaccines to children whose parents or guardians would otherwise not be able to afford them. 130 As a part of this program, the Centers for Disease Control and Prevention purchases vaccines in bulk, at a discount, and distributes them at no charge to registered VFC providers, which include private physicians’ offices, state health departments, and health clinics. 131 This may require, because of the program’s federal funding, that any truly mandatory vaccination policy (not allowing for religious or philosophical exemptions) pass strict scrutiny analysis. 132

Additionally, it has been purported that the freedom from vaccination is a fundamental right, analogized to the fundamental right to be free from unwanted medical treatment, which would also require a strict scrutiny review by courts of mandatory vaccination policies. 133 However, it is likely, given the strong compelling interest a state has in the protection of its children from deadly communicable disease, that a well drafted and narrowly tailored vaccination policy could survive strict scrutiny review. 134 In fact, a number of courts have implied in dicta that mandatory vaccination policies would qualify as a compelling state interest. 135 One court went as far as to say “[i]t has long been settled that individual rights must be subordinate[] to the compelling state interest of protecting society against

123 § 2000cc(a)(2)(B).
124 § 2000cc(a)(2)(C).
126 Id.
127 Id.
129 Horowitz, surpa note 111, at 1718.
130 Id.; see also Workman v. Mingo Cty. Sch., 667 F. Supp. 2d 679, 689 (S.D. W. Va. 2009) (“Although most states have chosen to provide a religious exemption from compulsory immunization, a state need not do so.”); Diana H. v. Rubin, 171 P.3d 200, 205 (Ariz. Ct. App. 2007) (“[A]s a general proposition, a state has an interest of the highest order in the health and welfare of its children.”); Sherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81, 88 (E.D.N.Y. 1987) (“[I]t has been settled law for many years that claims of religious freedom must give way [to] the compelling interest of society in fighting . . . contagious diseases through mandatory inoculation programs.”).
the spread of disease.” Further, it can surely be inferred that compulsory vaccination serves a compelling government interest of protecting children who are either too young or medically unable to receive vaccines. Finally, as previously discussed, the Model State Emergency Health Powers Act proposes quarantine as an alternative for those wishing to be exempt from vaccination (for any reason) during a public health emergency; however, in non-emergent situations, indefinitely quarantining an unvaccinated individual is not a viable alternative to vaccination.

Compulsory vaccination policies for matriculation into the school system, and religious exemptions to them, create a unique intersection of the free exercise of religion and parental rights. The right of parents to raise their children as they please has long been recognized by the Court. The interplay of these two fundamental rights—free exercise and parental rights—could also create an opportunity for a hybrid rights claim. The theory of hybrid rights involves the application of strict scrutiny to cases where the Free Exercise Clause is at issue in conjunction with an additional constitutional protection, including the right to parent. However, the Supreme Court has not remarked on the theory of hybrid rights since Smith, and the Circuit Courts of Appeal have taken different approaches to the application of the theory. In addition to issues of free exercise of religion and parental rights, the compulsory vaccination of school children also leads to issues about the scope of the rights of the children themselves.

C. The Rights of the Minor Child

The Supreme Court in Parham v. J.R. established a presumption that a fit parent will make medical decisions, and generally, act in the best interest of their children. The Court reiterated this presumption more than twenty

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137 Troxel v. Granville, 530 U.S. 57, 66 (2000) (“[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).
138 See Emp’t Div. Or. Dep’t Human Res. v. Smith, 494 U.S. 872, 882 (Stating that the present case did not present a hybrid situation but implying that such ‘hybrid situations’ in which a free exercise claim was combined with a parental rights claim might merit a higher standard of review).
140 Smith, 494 U.S. 872.
142 442 U.S. 584, 600 (1979) (“[T]he interest is inextricably linked with the parents’ interest in and obligation for the welfare and health of the child, the private interest at stake is a combination of the child’s and parents’ concerns.”).
years later in Troxel v. Granville. There is no disputing that the vast majority of parents are objectively acting in the best interest of their children, and that an even larger, more overwhelming, majority of parents believe that they are acting in the best interest of their children. However, the question must be posed – is allowing a parent to exempt a child, for a non-medical reason, from a vaccination objectively in the best interest of the child? Further, is it in the best interest of society and the purposes served by compulsory vaccination policies? Finally, what are the rights of this hypothetical unvaccinated child?

The Supreme Court in Parham also held that “a child, in common with adults, has a substantial liberty interest” in medical decision-making; however, the Court presumes that the child’s interest and the parent’s interest are inseparable. However, it has been opined that that a parent’s professed religious beliefs are irrelevant to the child’s inherent need to be protected from deadly communicable disease, in the same way that “the religious beliefs of a child’s parents are irrelevant to her inherent need for protection from sexist treatment and instruction, as well as a need for an education that is in other ways beneficial rather than harmful.” Further, the Court in Prince held that a state may restrict parental control under certain circumstances, and that this authority is “not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.”

The United States Constitution does not know or recognize different classes of individuals; and the Fourteenth Amendment explicitly promises equal protection of the laws. However, the Fourteenth Amendment “must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or

143 530 U.S. 57, 68–69 (2000) ("[T]here will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearin of that parent’s children.").

144 Parham, 442 U.S. at 600–02.


147 U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

Dr. James G. Dwyer, Professor of Law at the William and Mary, Marshall-Wythe School of Law has argued that vaccination laws that provide for religious exemptions create classes of children, and “explicitly deny a particular subgroup of children—those whose parents have a particular set of religious beliefs—the benefit of compulsory immunization.”\footnote{Dwyer, supra note 145, at 1386.} This denial of immunization, argues Dwyer, discriminates (albeit unintentionally) against a group of children based on the religious beliefs of their parents; which creates two distinct classes of children: 1) those with parents without objecting religious beliefs who receive vaccinations, and 2) those with parents with objecting religious beliefs who do not receive vaccinations.\footnote{Id. at 1386.} Dwyer further argues that the unvaccinated children of religious objectors satisfy the criteria for designation as a suspect class or quasi-suspect class.\footnote{Id. at 1412 (“In sum, children of religious objectors satisfy all of the criteria for designation as a suspect or quasi-suspect class. Their defining characteristic is rarely if ever relevant to their need for and ability to benefit from child welfare and education regulations. They have a history, albeit not particularly long, of discrimination against them vis-a-vis other children in our society. They arguably have less representation in the political process than any other group in this country and they have no control over their disabling characteristic. The only significant element of suspect class analysis lacking in their case is hostility toward them on the part of the majority.”).} As such, Dwyer argues that heightened scrutiny should be applied to the “classifications among children based on the religious beliefs of their parents that appear in child welfare […] laws.”\footnote{Id. at 1422.} This heightened scrutiny would require the state to demonstrate a compelling reason for the classification of these children, and thus a compelling reason for the allowance of exemptions to mandatory vaccination policies. One possible compelling reason for such an exemption policy would be to protect the religious liberty of parents, which is arguably a legitimate rationale given the long history of the Court in granting parental rights; however, Dwyer argues that “courts have typically arrived at these parental free exercise rights decisions with little or no consideration of the implications for children.”\footnote{Id. at 1429.}

It is has been argued, in support of both religious and philosophical exemptions to vaccines, that there are inadequate remedies for children and
their families harmed from adverse reactions to vaccinations. However, in 1986 Congress passed the National Childhood Vaccine Injury Act (NCVIA) in order to coordinate vaccine-related activities between federal agencies involved in the vaccination process. The NCVIA also requires that the health care provider administering the vaccination provide the individual being vaccinated, or in the case of minors their parent or guardian, with a vaccine information statement prepared by the Centers for Disease Control and Prevention that includes information about the disease the vaccine prevents and possible risks associated with vaccination. Finally, the NCVIA requires health care providers to report any adverse reactions to vaccinations, including minor reactions or those that may not be directly related to the vaccination itself, and the NCVIA created the National Vaccine Injury Compensation Program.

The National Vaccine Injury Compensation Program (NVICP) is a “no-fault” system that is designed as an alternative to the traditional tort system. The program is funded by a small tax on each vaccination, and this program provides compensation to individuals who have been found, by the U.S. Court of Federal Claims, to be injured by a vaccination. Since its inception in 1989, there have been nearly 14,000 petitions to the NVICP, and of those nearly thirty percent were compensated for their injury. Compensation varies depending on the needs of the injury, but may include: reasonable value of past and projected future medical expenses, up to $250,000 for past and expected pain and suffering, lost

155 Kimberly J. Garde, Student Article, This Will Only Hurt For Ever: Compulsory Vaccine Laws, Injured Children, and No Redress, 3 PHOENIX L. REV. 509, 543–49 (2010).
156 CTRS. FOR DISEASE CONTROL & PREVENTION, supra note 8 (Agencies and departments that the NCVIA was established to coordinate include: Department of Health and Human Services, Centers for Disease Control and Prevention, Food and Drug Administration, National Institutes of Health, and the Health Resources and Services Administration).
157 Id.
158 Id.
160 Id. (There is a $0.75 excise tax on vaccines recommended by the CDC for children, which is imposed on each dose, or each disease the vaccine is designed to prevent. For example the MMR (measles-mumps-rubella) vaccine, is taxed at $2.25, because it prevents three diseases).
162 What You Need to Know About the National Vaccine Injury Compensation Program (VICP), U.S. DEPT. OF HEALTH & HUMAN SERV.: HEALTH RES. & SERV. ADMIN. 1, 9 (2011), http://www.hrsa.gov/vaccinecompensation/84521booklet.pdf. There is no cap on the amount of past and
earnings, and attorney’s fees. To promote use of the system, even when a petition is dismissed the VCIP will pay attorney’s fees, provided the claim was filed on a reasonable basis and in good faith. The NVICP provides children, and their parent(s) or guardian(s), with adequate resources for any injuries resulting from the administration of a mandatory vaccine.

D. Hobby Lobby – A Slippery Slope for Public Health

The Court in *Hobby Lobby* held that a closely-held for-profit corporate entity may hold religious beliefs, and on the basis of those religious beliefs, object to certain medical treatments. This ruling, as recognized by Justice Ginsburg in her dissent, creates a slippery slope for a corporate entity to refuse to cover other medical treatments for employees on the basis of religion. As of the date of this note, only one decision citing *Hobby Lobby* is related to vaccinations, but scholars have opined on the effect *Hobby Lobby* will have on the greater healthcare landscape, which could certainly implicate vaccinations.

In *George v. Kankakee Community College*, the plaintiff was a student enrolled in a paramedic-training program, and as a requirement of said program was required to receive certain vaccinations. The plaintiff refused vaccination on religious grounds, and as a result was unable to complete the required course. He then sued alleging, *inter alia*, that the vaccination requirement infringed upon his right to freely exercise his religion. In a Motion to Dismiss, the court stated that:

the Supreme Court concluded that a statute that authorized a municipal board of health to require and enforce vaccination for residents of the municipality did not ‘invade[] any right secured by the Federal

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163 Id.
164 Id. at 5.
165 See id. at 1, 3.
167 Id. at 2805 (Ginsburg, J., dissenting).
169 See Day et al., *A Primer on Hobby Lobby: For-Profit Corporate Entities’ Challenge to the HHS Mandate, Free Exercise Rights, RFRA’s Scope, and the Nondelegation Doctrine*, 42 PEPPE. L. REV. 55, 91 (2014) (“This Court's decision will undoubtedly affect the trajectory of the law governing exemptions from public accommodation laws for secular employers with deeply held religious beliefs, potentially resulting in a new wave of law that essentially condones and safeguards discrimination.”).
171 Id. at *2–3.
172 Id.
Constitution.’ […] this Court cannot conceive of, a reason that a hospital, even when behaving as a state actor, could not impose a similar requirement on its employees.  

The court also held, citing the *Hobby Lobby* decision, that the RFRA is not applicable in this case, as it is only applicable to the federal government. Finally, the court stated that the policy was “a generally applicable, neutral policy,” leading the court to dismiss the case. While not directly relevant to close-held private corporate entities, this case does provide some insight to how broadly (or narrowly) courts may interpret the *Hobby Lobby* decision. Here, the court appeared to only rely on the *Hobby Lobby* decision for a rationale to dismiss the federal statute claim.  

Prior to the *Hobby Lobby* decision, the Supreme Court of New Mexico held in *Elane Photography v. Willock* that requiring a photography business to not discriminate against same-sex couple did not infringe the owner’s First Amendment rights. However, following *Hobby Lobby*, scholars have opined that while “*Elane Photography* was unsuccessful at discriminating against a same-sex married couple based on religious freedom and free speech grounds, it will not be long before a similar claim will succeed.” This similar case could be a case where the corporate entity has a religious objection to vaccination, to blood products, or to any other type of medical treatment, or it could be a religious objection to photographing same-sex couples, as in *Elane Photography*. The holding of *Hobby Lobby* creates a slippery slope for the coexistence of religious freedom and public health.

**IV. Resolution**

Allowing religious exemptions to state mandated vaccination policies for matriculation into public school systems is inherently problematic from a public health standpoint; as such, the adoption of mandatory vaccination policies allowing only medical necessity exemptions would not

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173 *Id.* at *9 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905)).
174 *Id.* at *15–16.
175 *Id.* at *13, 17.
176 *See id.* at *15–16.
177 309 P.3d 53, 77 (N.M. 2013).
178 *Day et al., supra* note 169, at 107.
179 309 P.3d at 59–60.
180 While not the subject of this note, many of the same arguments could be made for philosophical or conscience-based objections to vaccination as well.
run afoul of First Amendment considerations.\textsuperscript{181} A state, through its police powers, has the right to compel actions on behalf of the interest of public safety; quarantine law provides an example of this.\textsuperscript{182} The Court has held that a state has a compelling interest in the protection of its citizens from communicable disease.\textsuperscript{183} Thus, allowing non-medical exemptions to childhood vaccination would satisfy a strict scrutiny analysis so long as it was narrowly tailored to the compelling government interest or accomplished the compelling interest in the least restrictive means.

Much of the case law regarding challenges to public health law and states’ police powers has centered on emergent situations, and courts have repeatedly held in favor of public health and safety.\textsuperscript{184} When the situation is not emergent, but rather prophylactic in nature, excluding religious exemptions and showing that preventing communicable disease is accomplished in the least restrictive means becomes more difficult. However, the Centers for Disease Control and Prevention does not haphazardly recommend vaccinations for children, rather they recommend vaccinations against organisms capable of causing dangerous or deadly complications if contracted.\textsuperscript{185} For example, the U.S. Department of Health and Human Services has stated that “measles is the most deadly of all childhood rash/fever illnesses” and that “[g]etting vaccinated is the best way to prevent measles.”\textsuperscript{186}

Further bolstering the argument that vaccination is the least restrictive means of protecting society from communicable disease the Model State Emergency Health Powers Act, drafted with striking a balance in public health and civil liberties specifically in mind, states that those refusing vaccination may be subject to quarantine.\textsuperscript{187} Subjecting an individual to quarantine temporarily during a public health crisis is permissible, but is not a viable alternative to prophylactic vaccination. It is not a reasonable alternative that unvaccinated children be isolated or quarantined from populated public places, for example Disneyland. As such, it is possible, and in the interest of public health preferable, that mandatory childhood vaccination policies provide for only medical-necessity exemptions.

\textsuperscript{181} See The Coll. of Physicians of Phila, supra note 23; see also Jacobson v. Massachusetts, 197 U.S. 11 (1905).
\textsuperscript{182} See Ctrs. for Disease Control & Prevention, supra note 80.
\textsuperscript{183} See Jacobson, 197 U.S. 11 (1905); Zucht v. King, 260 U.S. 174 (1922).
\textsuperscript{184} See supra Part II, Section A.
\textsuperscript{185} See, e.g., Protect Your Baby with Immunization, Ctrs. for Disease Control & Prevention, http://www.cdc.gov/features/infantimmunization/ (last updated May 1, 2015).
\textsuperscript{186} Measles, VACCINES.GOV (managed by the U.S. DEPT. OF HEALTH & HUMAN SERV.), http://www.vaccines.gov/diseases/measles (last visited Feb. 22, 2015).
\textsuperscript{187} See supra Part III, Section A.
Finally, policies allowing religious exemptions to vaccination create different classes of children based on the religious preference of their parents. As such, these classifications violate these children’s right to equal protection under the Fourteenth Amendment, by denying them equal access to potentially life saving vaccinations. A child’s personal need to be vaccinated against deadly communicable disease is not relevant to a parent’s religious belief. Further, an individual parent’s personal religious beliefs are not relevant to the societal interest of public health, which is the rationale for mandatory vaccination policies.

V. CONCLUSION

After more than two centuries of mandatory vaccination policies in the United States, there remains much debate about the balance between the needs of public health and civil liberties. When presented with the question courts upheld mandatory vaccination policies under the state’s police powers to safeguard public health. The interest of protecting society from vaccine-preventable disease, particularly society’s youngest and most vulnerable, is a compelling government interest. Further, children should not be subjected to the dangers of communicable disease because of the religious observances of their parents. To this end, states need to evaluate their vaccine mandates to ensure they are the least restrictive means of protecting public health and eliminate all non-medical exemptions. If non-medical exemption rates to vaccinations continue to rise, the effect of herd immunity will be further minimized or eliminated entirely; and outbreaks, like the one involving the hypothetical family vacation to Disneyland, will become increasingly prevalent.

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188 See supra Part III, Section C.
189 See supra Part II, Section B.