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Religion and the First Amendment
Professor Carmella
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Mandatory Vaccination: First Amendment Considerations

Almost every state requires parents to vaccinate their children as a prerequisite for public school attendance, but there are religious exemptions available to objecting parents. In recent months, however, a number of state legislatures have introduced bills that would tighten vaccination requirements and make it more difficult for parents to obtain religious exemptions. Several of these bills propose the elimination of religious exemptions altogether, while other bills would require parents seeking a religious exemption to submit notarized applications each year, detailing their religious beliefs. This paper will discuss the constitutional arguments in favor of religious exemptions to mandatory vaccination requirements. As the following analysis will indicate, there is most likely no constitutional or statutory right to a religious exemption from mandatory vaccination, leaving objecting parents with few options. Free exercise and even hybrid constitutional claims will most likely be unsuccessful. Parents may, however, have recourse under state Religious Freedom and Restoration Acts, which may allow them to obtain narrow faith-based exemptions from the mandatory statutes.

I. Background

Forty-eight states allow parents to opt out of vaccination mandates on religious grounds.¹ Multiple state legislatures are, however, currently considering bills which would make it harder for parents to obtain a religious exemption or would eliminate the exemption altogether. These bills run the gamut from requiring parents to submit additional paperwork each year,

¹ *Bill Making It Harder to Opt Out of Vaccine Clears House*. May 7, 2015. <http://www.courant.com/politics/hc-vaccine-bill-0508-20150507-story.html>

to eliminating the religious exemption altogether. In Connecticut, for example, the current vaccination law allows parents to opt out of vaccinations for their children by signing a single form.² A newly introduced bill would require that parents seeking an exemption would have to submit a newly signed and notarized form each year.³ A similar bill pending in New Jersey would require parents to submit a notarized letter explaining the “nature of the person’s religious tenet or practice that is implicated by the vaccine and how...the vaccine would violate...that tenet or practice” as well as a certification that such beliefs are sincerely and consistently held by the person.⁴

A much stricter bill is pending in New York, which would eliminate religious exemptions altogether.⁵ Proponents of the bill wish to remove religious exemptions entirely because they believe that parents claiming such exemptions have bought into the anti-vaccination movement and do not actually hold sincere religious beliefs.⁶ In California, on July 30, 2015, in the wake of a large measles outbreak, Governor Jerry Brown signed into law a bill that eliminates both personal and religious belief exemptions for vaccines.⁷ With this law, California now has one of the strictest vaccination laws in the United States and joins only two other states – Mississippi and West Virginia – in forbidding any religious and personal belief exemptions.⁸

II. The Futility of the Free Exercise Argument

A. Current Case Law

² *Id.*

³ *Id.*

⁴ http://www.nj.com/politics/index.ssf/2015/05/restrictions_on_religious_vaccine_exemptions_passe.html; see also 2014 New Jersey Senate Bill No. 1147, New Jersey Two Hundred Sixteenth Legislature - First Annual Session.

⁵ *Bill Would End Religious Exemptions for Vaccines*. July 30, 2015.

<http://www.capitalnewyork.com/article/albany/2015/07/8572964/bill-would-end-religious-exemption-vaccines>

⁶ *Id.*

⁷ *Jerry Brown Signs California Vaccine Bill*. June 30, 2015. <http://www.sacbee.com/news/politics-government/capitol-alert/article25834726.html>

⁸ *Id.*

Although the United States Supreme Court has never explicitly addressed whether the Constitution mandates the presence of a religious exemption in a mandatory vaccination statute, its case law on vaccinations in general indicates that there is no right to a religious exemption. Subsequently, lower courts have interpreted Supreme Court case law as holding that the Constitution does not require the presence of a religious exemption in mandatory vaccination statutes.

The Court first addressed the issue of mandatory vaccination in *Jacobson v. Massachusetts*.⁹ In *Jacobson*, the Court upheld a Massachusetts law, which required all local residents to be vaccinated for smallpox. The Court stated that the statute was a proper exercise of the police power and therefore did not violate any constitutional guaranties with regard to personal or religious liberties.¹⁰ According to the *Jacobson* Court, the statute had a real or substantial relation to the protection of public health and safety, rendering it well within the sphere of the Massachusetts Legislature's power to establish reasonable regulations to protect the public.¹¹

In its subsequent decision in *Zucht v. King*, the Court again considered the constitutionality of mandatory vaccination in the context of a city ordinance that required a certificate of vaccination as a prerequisite to attendance at a public school or other place of education.¹² The Court again relied on the police power in upholding the ordinance, finding that it was a valid exercise of that power. The Court depended heavily on *Jacobson* in its holding: "Long before this suit was instituted, *Jacobson v. Massachusetts* had settled that it is within the police power of a state to provide for compulsory vaccination. That case and others had also settled that a state may,

⁹ 197 U.S. 11 (1905).

¹⁰ *Id.* at 39.

¹¹ *Id.* at 31.

¹² 260 U.S. 174 (1922).

consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative.”¹³

The United States Supreme Court has not again addressed the vaccination issue, or more particularly, the issue of whether the First Amendment mandates the presence of a religious exemption clause. Other lower courts have, however, interpreted *Jacobsen* and *Zucht* as disposing of the religious exemption issue entirely.

The Supreme Court of New Jersey relied on language from *Jacobsen* and *Zucht* in upholding a mandatory vaccination statute which did not permit exemptions for religious reasons, but allowed an exception only where the vaccine was medically contraindicated.¹⁴ In 1939, the New Jersey Legislature passed a mandatory vaccination statute requiring smallpox and diphtheria vaccinations as a prerequisite to public school attendance.¹⁵ In *Sadlock v. Bd. Of Ed. of Boro. Of Carlstadt in Bergen Cnty.*, the plaintiffs argued that New Jersey’s compulsory vaccination statute was unconstitutional because it violated the guaranty of religious liberty contained in both the Federal and New Jersey Constitutions.¹⁶ Specifically, the plaintiffs claimed that the statute denied them the constitutional right to attend the free public schools on account of their religious principles forbidding vaccination.¹⁷ The New Jersey Supreme Court upheld the constitutionality of the mandatory vaccination statute, relying on the discussion of the state’s police power in the U.S. Supreme Court decisions *Jacobson* and *Zucht*. The Court found that the “constitutional guaranty of religious freedom was not intended to prohibit legislation with respect

¹³ *Zucht*, 260 U.S. at 176.

¹⁴ *Sadlock v. Bd. of Ed. of Borough of Carlstadt in Bergen Cnty.*, 137 N.J.L. 85, 87 (N.J. Sup. Ct. 1948).

¹⁵ *Bd. of Ed. of Mountain Lakes v. Maas*, 56 N.J. Super. 245, 261 (App. Div. 1959).

¹⁶ *Sadlock*, 137 N.J.L. at 86.

¹⁷ *Id.* at 87.

to the general public welfare.”¹⁸ The New Jersey legislature had enacted the statute for the protection of the public welfare, and as such, the statute was a valid exercise of the police power.¹⁹

In 1952, the New Jersey Legislature amended its mandatory immunization statute to include a discretionary exemption for children whose parents submitted written statements objecting to the vaccinations on religious grounds.²⁰ In *Bd. Of Ed. of Mountain Lakes v. Maas*, the defendant sought a religious exemption from the diphtheria vaccination requirement on the grounds that the vaccination conflicted with her Christian Scientist beliefs.²¹ The School Board denied the request for an exemption, in accordance with its policy that such exemptions were purely discretionary.²² The defendant contended that the compulsory vaccination regulation adopted by the Board violated her rights of due process and religious freedom.²³

Reviewing the plain language of the statute, the Court first stated that the Board of Education’s policy regarding the denial of exemptions was entirely within the ambit of delegated legislative authority.²⁴ The Court then rejected the defendant’s due process and religious freedom claims, relying on *Sadlock*.²⁵ The Court specified that it was well-settled that a state through its Boards of Education has broad discretion to regulate the public health and a discretionary “regulation is not violative of the equal protection clause merely because it is not all-embracing.”²⁶ The defendant’s religious beliefs did not render her free from the vaccination requirement, because “the right to practice religion freely does not include liberty to expose the community or the child

¹⁸ *Id.* at 91.

¹⁹ *Id.*

²⁰ *Maas*, 56 N.J. Super at 260-261.

²¹ *Id.* at 254.

²² *Id.*

²³ *Id.* at 264.

²⁴ *Id.* at 262.

²⁵ *Id.* at 266.

²⁶ *Id.* (citing *Zucht*, 260 U.S. at 177).

to communicable disease....”²⁷ Additionally, the State has the power to impose a wide range of limitations on parental freedom and authority, including matters of religious conviction and conscience.²⁸

Relying on the interpretation of *Jacobsen* developed by *Sadlock* and *Maas*, the New Jersey Supreme Court ultimately opined in *Kolbeck v. Kramer*²⁹ that the police power was so broad that it would be permissible for the Legislature to enact a mandatory vaccination statute without any religious exemptions (as it had done in 1939), thereby essentially defeating all First Amendment and Equal Protection claims. The Court stated that “[i]t is beyond dispute that the State, through the Board of Education, could make the [vaccination] requirements mandatory as to all pupils without exemptions based on religious beliefs or principles and such would be valid by constitutional standards as a reasonable exercise of the police power.”³⁰

New Jersey’s interpretation of *Jacobsen* and *Zucht* is not an anomaly. Rather, other state courts and district courts have reached the same conclusion as New Jersey courts regarding the constitutionality of mandatory vaccination under the Free Exercise Clause.³¹ Additionally, when dealing with First Amendment challenges to mandatory vaccination statutes, multiple courts have explicitly stated that there is no constitutional requirement to a religious exemption from compulsory vaccination statutes. For example, in *Phillips v. City of New York*, the Eastern District of New York held that there is no constitutional exemption from mandatory inoculation laws under the Free Exercise Clause, and while a state has the power to create religious exemptions from the

²⁷ *Id.* at 269 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

²⁸ *Id.* at 264.

²⁹ 84 N.J. Super. 569, 571 (Ch. Div. 1964) *modified*, 46 N.J. 46 (1965).

³⁰ *Id.* at 571.

³¹ See *Marsh v. Earle*, 24 F. Supp. 385, 386-387 (M.D. Pa. 1938) (upholding a Pennsylvania statute requiring the exclusion of unvaccinated children from state schools); and *Commonwealth v. Gillen*, 65 Pa. Super 31 (Sup. Ct. Pa. 1916) (“[I]ndividual objection to the requirements of the law must give way to the necessity for protection of the public health.”).

law, they are not required to do so by the First Amendment.³² In another case, *Caviezel v. Great Neck Public Schools*, the Eastern District of New York held again that “the free exercise clause of the First Amendment does not provide a right for religious objectors to be exempt from New York’s compulsory inoculation law.”³³ The Western District of Arkansas found in *McCarthy v. Boozman* that [i]t is also well settled that a state is not required to provide a religious exemption from its immunization program” and thus the plaintiff parent may not receive an exemption for his child from compulsory immunization requirement when unconstitutional exemption provision is severed from statute.³⁴ Finally, in *Davis v. State*, the Maryland Supreme Court held that the state does not provide a religious exemption from its immunization program.³⁵

Thus, in general, the current state of the vaccine law throughout the United States is that there is no constitutional right to a religious exemption from a mandatory vaccination statute. Although the Supreme Court has not addressed the issue, multiple state and lower federal courts have interpreted Supreme Court precedent to mean that the First Amendment does not guarantee a religious exemption and that where a state statute has in fact provided an exemption on religious grounds, that state has gone above and beyond the dictates of the First Amendment.

B. The Federal Free Exercise Clause and *Smith*

The United States Supreme Court decision in *Employment Div. v. Smith* drove a further nail into the coffin of the religious exemption argument.³⁶ In *Smith*, the Supreme Court held that generally applicable, facially neutral statutes are constitutional under the Free Exercise Clause,

³² 2014 WL 2547584, *2 (E.D. N.Y. 2014).

³³ 739 F. Supp. 2d 273, 285 (E.D. N.Y. 2010).

³⁴ 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002).

³⁵ 294 Md. 370, 379 (Md. 1982).

³⁶ 494 U.S. 872 (1990).

even where they burden religion. Given that the statute at issue in *Smith*, which prohibited peyote use, applied evenly across the board, the Court declined to apply strict scrutiny analysis but instead applied a test that resembled the rational basis test, finding that the Free Exercise Clause permits but does not compel exemptions.³⁷

Under *Smith*'s reasoning, a neutral, generally applicable statute that requires all students wishing to attend public schools to obtain certain vaccinations cannot be challenged on Free Exercise grounds. *Smith*'s broad rational basis approach does not require the presence of an exemption based on religious beliefs, or any exemption, for that matter. Thus, it is clear that under *Smith*, the currently pending legislation that tightens religious exemptions or removes them altogether will not succumb to a Free Exercise challenge. Parents wishing to object on religious grounds will need to find another avenue.

C. Hybrid Claims Under *Smith*

Parents asserting hybrid claims to mandatory vaccination statutes will also most likely be unsuccessful. Justice Scalia's opinion in the *Smith* decision introduced the idea of "hybrid claims," that is, claims which involve both a Free Exercise challenge to a neutral, generally applicable law, in conjunction with another constitutional protection.³⁸ While a Free Exercise challenge of itself would be insufficient to invalidate a generally applicable, neutral statute, the Free Exercise challenge combined with the assertion of another constitutional right would bar the application of a neutral law to religious actions.³⁹ After *Smith*, parents asserting the right to a religious exemption have no recourse under the Free Exercise Clause by itself. If parents are able to combine their Free Exercise challenge with the assertion of another constitutional right,

³⁷ *Smith*, 494 U.S. at 902.

³⁸ *Id.* at 881.

³⁹ *Id.*

however, the analysis changes from rational basis to strict scrutiny. Yet, even under strict scrutiny, such claims will most likely fail.

The strongest hybrid claim for parents who wish to obtain a religious exemption from mandatory vaccination combines a Free Exercise challenge with a challenge based on parental rights and autonomy. After *Smith*, rational basis will apply to the Free Exercise Challenge if the law is neutral and generally applicable. The parental rights challenge, meanwhile, will merit the strict scrutiny standard.⁴⁰

In several pre-*Smith* cases, the Supreme Court dealt with parental autonomy challenges to statutes passed under states' general police power. In *Meyer v. Nebraska*, the Court found invalid a state law which prohibited foreign language instruction.⁴¹ The Court reproved the Nebraska legislature for attempting to "interfere with the power of parents to control the education of their own."⁴² The Court also emphasized that "[t]he Fourteenth Amendment guarantees the right of the individual...to establish a home and bring up children, to worship God according to his own conscience."⁴³ Two years later, in *Pierce v. Soc'y of Sisters*, the Court again upheld a challenge to an education statute on parental autonomy grounds, supporting its earlier recognition in *Meyer* of the parents' right to control the education and religious upbringing of their children.⁴⁴ In *Pierce*, parents challenged an Oregon statute that required their children to attend public schools.⁴⁵ The Court invalidated the statute, finding that children were not "the mere creature of the state," and

⁴⁰ See *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

⁴¹ 262 U.S. 390 (1923).

⁴² *Id.* at 402.

⁴³ *Id.* at 403.

⁴⁴ 268 U.S. 510 (1925)

⁴⁵ *Id.*

as such, “those who nurture [them]...have the right and the high duty to recognize and prepare [them] for additional obligations.”⁴⁶

On the other hand, however, the Supreme Court later upheld a Massachusetts labor law in *Prince v. Massachusetts*, despite a mother’s claim that it interfered with her parental autonomy.⁴⁷ In *Prince*, the Supreme Court dealt with a First Amendment challenge to a child labor law, which prohibited children under a certain age from distributing printed materials in public places. When a mother engaged her children in passing out religious tracts in the street, according to the dictates of the Jehovah’s Witness religion, she was convicted under the statute and subsequently challenged it on parental autonomy grounds. The Court recognized that the case dealt with a conflict between the fundamental interest of parents to raise their children free from interference, and the state’s interest in ensuring their welfare. The Court upheld the statute, however, reasoning that the authority of the government “is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion.”⁴⁸ According to the Court, the state could use its police power to limit “parental freedom and authority in things affecting the child’s welfare; and...this includes, to some extent, matters of conscience and religious conviction.”⁴⁹ Interestingly enough, in referencing the general police power of the state, the Court also referred to vaccination requirements and stated that a parent cannot claim an exemption from compulsory vaccination on religious grounds.⁵⁰ Thus, under *Prince*, even the fundamental interest in parental autonomy was insufficient to trump a generally applicable, neutral statute that burdened the religious practices of an individual.

⁴⁶ *Id.* at 535.

⁴⁷ 321 U.S. 158 (1944).

⁴⁸ *Prince*, 321 U.S. at 166-67 (1944).

⁴⁹ *Id.* at 167.

⁵⁰ *Id.* at 166.

In *Wisconsin v. Yoder*, the Court did mandate a religious exemption to a state statute requiring school attendance.⁵¹ In *Yoder*, Amish parents were fined for failing to send their children to a public school.⁵² The parents had withheld their children from enrolling because they believed that high school attendance was contrary to the Amish religion, which required separation from worldly influence.⁵³ Specifically, the Amish religion required members of the community to make a living from farming, and deemphasized all material success and competitive spirit.⁵⁴ The parents argued that the public schools' emphasis on intellectual accomplishments, self-distinction, and worldly success would inhibit their ability to exercise their religion by forcing them to integrate with contemporary society.⁵⁵ The Court addressed the state's compelling interest in education but found that it was insufficient to overcome the free exercise of religion. Applying strict scrutiny analysis to the statute, the Court stated that parents have the fundamental right to "guide the religious future and education of their children."⁵⁶ Thus, where education was at stake, rather than vaccination, the Court was willing to carve out a narrow exception. The Court was careful to make clear, however, that its holding was heavily fact-sensitive and created a narrow exception only for the Amish, who could demonstrate three centuries of sincere religious beliefs and the important role it played in their communities.⁵⁷

Several subsequent Supreme Court cases affirmed the importance of family and parental autonomy. In *Cleveland Board of Ed. v. LaFleur*, the Court found invalid a school board regulation

⁵¹ 406 U.S. 205 (1972).

⁵² *Id.* at 207.

⁵³ *Id.* at 209.

⁵⁴ *Id.* at 210.

⁵⁵ *Id.* at 211.

⁵⁶ *Id.* at 232.

⁵⁷ *Id.* at 235-236.

which required pregnant teachers to cease teaching at arbitrary dates due to their pregnancy.⁵⁸ The Court recognized that “[f]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the 14th Amendment.”⁵⁹ Again, in *Washington v. Glucksburg*, the Court recognized that the rights “to direct the education and upbringing of one’s children” are protected by the Due Process Clause.⁶⁰

A Free Exercise challenge, combined with a parental autonomy argument, will most likely fail. Although parents were successful in bringing autonomy challenges in *Meyer*, *Pierce*, and *Yoder*, these three cases focused primarily on parental autonomy in the education context, and the safety and welfare of the child remained a secondary issue. On the other hand, in *Prince*, the parental autonomy argument failed when directly juxtaposed with the state’s compelling interest in protecting its children. A Free Exercise challenge to a mandatory vaccination statute, combined with an argument that a parent has the right to choose whether to vaccinate his or her child according to the dictates of religion or otherwise, is most similar to the argument made in *Prince*. According to *Prince*, the state has a compelling interest in ensuring the health and safety of its citizens, and particularly its children, and therefore a statute requiring mandatory vaccination is valid, despite burdens on religious exercise or parental autonomy.

D. Possible Claims Under State RFRAs

In the wake of the *Smith* decision, Congress passed the federal Religious Freedom and Restoration Act (“RFRA”), which provided a framework of scrutiny for Free Exercise claims in an attempt to reconcile Free Exercise cases. The text of RFRA requires that the state and federal governments cannot substantially burden a person’s exercise of religion, even if the burden results

⁵⁸ 414 U.S. 632, 634 (1974).

⁵⁹ *Id.* at 640.

⁶⁰ 521 U.S. 702, 720 (1997).

from a rule of general applicability, unless the government can demonstrate that the burden: a) is in furtherance of a compelling governmental interest; and b) is the least restrictive means of furthering that interest.⁶¹ Although RFRA originally applied to both federal and state law, the Supreme Court found that RFRA was unconstitutional with regard to the states because Congress lacked the power to pass the Act under the Fourteenth Amendment.⁶² In response, many states enacted their own state RFRA's to hold state governments to the compelling interest test.⁶³

Twenty-two states have enacted their own version of the federal RFRA.⁶⁴ Of these states, six states have enacted a standard RFRA which requires the government to show that a substantial burden on religious exercise was in furtherance of a compelling governmental interest and the statute is the least restrictive means of furthering that compelling interest.⁶⁵ Several states have deleted the word "substantial" from the test, thereby easing the burden on the plaintiff, who need only show a "burden" on his or her free exercise.⁶⁶ Other states have added to the government's burden by requiring proof by clear and convincing evidence.⁶⁷ Despite the variations among the state RFRA's, however, it is likely that plaintiffs bringing challenges to mandatory vaccination on religious grounds will be unsuccessful, regardless of the applicable state RFRA.

As noted above, *Smith*-esque hybrid claims merit strict scrutiny. If challenges to mandatory vaccination statutes are unlikely to be successful when posed as a hybrid claim, it is unclear whether they will survive under a state RFRA's heightened scrutiny, regardless of the

⁶¹ 42 U.S.C. § 2000bb-1(a)(b).

⁶² *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁶³ Leslie C. Griffin, *Law and Religion, Cases and Materials* 182 (3rd ed. 2013).

⁶⁴ Leslie C. Griffin, *Development of State RFRA Statutes*, RFRAPERILS.COM, <http://rfraperils.com/states/> (last visited February 1, 2016).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

particular RFRA's language. After the plaintiff would establish a "substantial burden" on his or her free exercise, the burden would shift to the state government, and it is unclear whether the claim would fail. The state would need to show that the vaccination statute was in furtherance of a compelling governmental interest, and that it was the least restrictive means of furthering that compelling governmental interest.

Case law extending back to *Jacobsen*, *Zucht*, and *Prince* establishes clearly that the government has an important interest in protecting the health, safety, and welfare of its people, and in particular, its children. This important interest would most likely trump any substantial burden that the plaintiff could show on his or her free exercise. For example, in *Prince*, the state's important interest in protecting children through child labor laws was sufficient to prohibit a mother from allowing her children to distribute religious tracts, despite the burden on the free exercise of her religion.⁶⁸ Thus, even if the religious objector should show that vaccines contradicted a tenet of his or her religion, the state's interest in protecting the health and safety of the child would be paramount.

On the second prong, however, the result is less clear. The government would need to demonstrate that a mandatory vaccination statute imposes the least restrictive means of furthering the compelling governmental interest. When the subject statute is so restrictive that it does not contain any religious exceptions, the government has a heavy burden of showing that the introduction of religious exceptions would contravene the government's purpose.

For example, in *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court dealt with a claim under RFRA regarding the a religious group's sacramental use of *hoasca*, a tea

⁶⁸ *Prince*, 321 U.S. at 166-67.

brewed from plants containing the hallucinogen DMT.⁶⁹ United States Customs inspectors seized a shipment of *hoasca* and threatened prosecution because the hallucinogen DMT appeared on Schedule 1 of the Controlled Substances Act.⁷⁰ In a suit brought under RFRA, the government conceded that the prosecution would burden the religious group's free exercise, but it argued that this burden did not violate the second prong of RFRA because the Controlled Substances act was the least restrictive means of advancing three compelling government interests: protecting the health and safety of the religious group, preventing the spread of *hoasca* use from the church to recreational users, and complying with the United Nations Convention on Psychotropic Substances.⁷¹ The Court held that although these interests were indeed compelling, they did not by themselves preclude any consideration of individualized exceptions. In particular, RFRA required a focused inquiry (not a categorical approach) that required the government to show that the compelling interest test was satisfied by applying the challenged law to "the particular claimant whose sincere exercise of religion is being substantially burdened."⁷² The Court acknowledged that recognized exemptions existed for the Amish in the education context, for strict Sunday observers in the employment context, and most fatally to the government's claim, for peyote use under the Controlled Substances Act.⁷³ The Court found that the government's interest in the health and safety of its citizens would not be thwarted by the presence of a narrow individual exception; thus, the government could not demonstrate that it had used the least restrictive means of furthering its interests.⁷⁴

⁶⁹ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 418 (2006).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 431.

⁷³ *Id.* at 431, 435.

⁷⁴ *Id.* at 439.

Thus, based on the government's failure to second prong of RFRA in *Gonzalez*, it is unclear whether the government could defeat a RFRA claim with regard to vaccination. The government would need to show that its interest in the safety and welfare of children was so compelling that a mandatory vaccination statute devoid of religious exemptions was indeed the least restrictive alternative. This would be a heavy burden to bear.

The herd immunity theory is a further concern for the government with regard to establishing the second prong of RFRA. The term "herd immunity" refers to the idea that when a particular threshold proportion of individuals in a population is immune from a disease, a decline in the incidence of infection should result.⁷⁵ This phenomenon occurs because enough members of the population are immune from the disease, such that no sustained chains of transmission can be established.⁷⁶ In theory, this protects the entire population, even those who are unvaccinated.⁷⁷ Although the theory's validity is disputed, it indicates the existence of the argument that one hundred percent vaccination of a population is unnecessary. As a result of the herd immunity theory, religious objectors can potentially argue that mandatory vaccination is certainly not the least restrictive means of ensuring the public health and safety. On the contrary, according to this argument, vaccination of an entire population is unnecessary and thus the burden imposed on free exercise by disallowing vaccination exceptions is entirely impermissible.

A similar result would most likely follow if a plaintiff were to bring a claim under the federal RFRA. Although the federal RFRA does not apply to the state vaccination statutes, it applies to any federal vaccination statutes. In early 2015, Florida Congresswoman Frederica

⁷⁵ Paul Fine, Ken Eames, and David L. Heyman, *Herd Immunity: A Rough Guide*, OXFORD JOURNALS, (January 4, 2011), <http://cid.oxfordjournals.org/content/52/7/911.short>.

⁷⁶ Marcel Salathe, *Why a few unvaccinated children are an even bigger threat than you think*, (February 3, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/02/03/why-a-few-unvaccinated-children-are-an-even-bigger-threat-than-you-think/>.

⁷⁷ *Id.*

S. Wilson introduced a bill, House Resolution 2232, that would require all states to mandate vaccination for all students enrolled in public schools.⁷⁸ The bill, the first of its kind at the federal level, provides for no exemptions based on religious or philosophical objections.⁷⁹ Plaintiffs bringing claims under the federal RFRA would face similar challenges to those bringing claims under state RFRA. It seems likely that the government would be able to overcome its burden of showing a compelling governmental interest in protecting the health, safety, and welfare of its children. However, given the issues encountered in *Gonzalez*, it is unlikely that the government could show that mandatory vaccination is the least restrictive means of furthering its interest.

III. Navigating Establishment Clause Concerns

A possible solution to the burden that mandatory vaccination places on the free exercise of religion is to create a faith-based exemption under the Establishment Clause, or, where both religious and philosophical exemptions exist in a statute, to remove only the philosophical exemption. These two solutions raise additional issues, however, by bringing to the foreground problems of denominational favoritism and issues with where to draw the line between “recognized religions” and personal religious beliefs. If states can successfully navigate such issues, then a faith-based exemption may very well be possible.

A. Legislative exemptions

A faith-based exemption might be constitutional under the Establishment Clause. The Establishment Clause forbids the government from using state mechanisms to advance a religion. There is, however, “ample room for accommodation of religion under the Establishment Clause.”⁸⁰

⁷⁸ *New Federal Vaccine Mandate Proposed: All Shots Required, No Parental Exemptions*, HEALTH IMPACT NEWS, (May 13, 2015), <http://healthimpactnews.com/2015/new-federal-vaccine-mandate-proposed-all-shots-required-no-parental-exemptions/>.

⁷⁹ *Id.*

⁸⁰ *Amos v. Presiding Bishop*, 483 U.S. 327, 338 (1987).

In *Presiding Bishop v. Amos*, the Supreme Court considered an Establishment Clause challenge to Section 702 of the Civil Rights Act of 1964, which exempted a religious organization from the Act's ban on religious discrimination.⁸¹ The Court determined that Section 702's faith-based exemption merely removed a burden from the religious organization's free exercise, and did not create an affirmative privilege for religion. As such, the exemption was entirely permissible under the Establishment Clause.⁸²

In its subsequent decision, *Cutter v. Wilkinson*, the Court relied on *Amos* in holding that the Religious Land Use and Institutionalized Persons Act ("RLUIPA") did not violate the Establishment Clause.⁸³ RLUIPA is a federal law designed to protect religious institutions and assemblies from zoning and historic landmark laws and uses of the institutions' buildings that substantially interfere with the institutions' free exercise of religion.⁸⁴ Additionally, RLUIPA provides that governments shall not impose substantial burdens on the religious exercise of institutionalized persons.⁸⁵ Acknowledging that imprisonment imposed a burden on the free exercise of institutionalized persons by making them "dependent on the government's permission and accommodation for exercise of their religion," the Court found that RLUIPA permissibly alleviated these government-created burdens.⁸⁶ Thus, *Cutter* again demonstrates that a law which removes a burden from free exercise, as opposed to one that creates an affirmative privilege on the basis of religion, is not an impermissible establishment.

⁸¹ *Id.* at 330.

⁸² *Id.* at 338.

⁸³ *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

⁸⁴ *What is RLUIPA?* <http://aclj.org/us-constitution/aclj-memorandum-an-overview-of-the-religious-land-use-and-institutionalized-persons-act-rluiipa-2004>.

⁸⁵ *Id.*

⁸⁶ *Cutter*, 544 U.S. at 721.

Amos and *Cutter* provide support for the idea that a legislative exemption may be permissible under the Establishment Clause. Mandatory vaccination laws burden the exercise of religion by forcing parents to immunize their children, in contravention of their religious beliefs. A faith-based exemption would seek to alleviate this burden by allowing parents an opportunity to remove themselves from compliance with the statute. Such an exemption would not create a privilege for parents with religious beliefs, but would merely remove the burden that mandatory vaccination would impose on the exercise of their faith.

B. An Individual-Based Exemption - Distinguishing Between Religions

Although the Court in *Cutter* declined to find an Establishment Clause violation, it did note the possible danger of an individual accommodation that impermissibly distinguishes between bona fide faiths.⁸⁷ Such an accommodation can either convey privileged status upon a particular faith,⁸⁸ to the exclusion of other faiths, or can single out a faith for disadvantageous treatment. Both types of treatment are impermissible under the Establishment Clause. Thus, states administering religious exemptions must be careful that they do not impermissibly distinguish between faiths or condition the receipt of an exemption on membership in a particular religion. For example, in *Kiryas Joel v. Grumet*, the Supreme Court invalidated a state law that created a separate school district to exclusively serve a community of the Satmar Hasidim Jewish faith.⁸⁹ The Court held that the law violated the Establishment Clause because it “singled out a particular religious sect for special treatment.”⁹⁰

⁸⁷ *Id.* at 723.

⁸⁸ *See, e.g., Kiryas Joel, supra*, 512 U.S. at 690.

⁸⁹ 512 U.S. 689, 690 (1994).

⁹⁰ *Id.* at 706.

The New Jersey case *Kolbeck v. Kramer* illustrates well the Establishment Clause issues that arise when a state does not administer its religious exemption program in a neutral manner.⁹¹ In *Kolbeck*, a New Jersey university required membership in an organized religion in order to qualify for a religious exemption.⁹² When a student applied for a religious exemption from the public university's mandatory vaccination policy, the university declined to grant the exemption, on the grounds that the student was not a member of an established religion.⁹³ The Court reversed the university's decision, finding that the university did not have the right to judge whether a prospective student's religious beliefs were "sufficient" to qualify for the religious vaccination exemption.⁹⁴ Where the student had indicated religious beliefs against vaccination and had proceeded according to the proper channels in seeking the exemption, he was entitled to the exemption, regardless of the fact that he was not a member of an organized religion.⁹⁵

Thus, states administering individual religious exemptions must be careful that they do not single out a faith or groups of faith by either favoring or disadvantaging such faiths. Rather, the states must grant exemptions in a neutral manner as to not run afoul of *Cutter*.

C. Group Exemptions

As discussed below, individual-based exemptions that do not define a particular religion or religious beliefs pose problems because they force administrators or the courts to determine whether an individual's belief is indeed religious, as opposed to moral or philosophical. A potential solution to this problem is to define narrow exceptions to mandatory vaccination based on recognized religions which adhere to anti-vaccination beliefs. Group exceptions such as these

⁹¹ 84 N.J. Super 569 (1964)

⁹² *Id.* at 570.

⁹³ *Id.*

⁹⁴ *Id.* at 576.

⁹⁵ *Id.*

will be sufficiently narrow as to render administration possible and at the same time providing religious accommodation, in accordance with the Establishment Clause.

a. Categorization Issues in *Seeger* and *Welsh*

Individual based exemptions present a further difficulty, that is, the issue of deciding which anti-vaccination beliefs are religious, as opposed to moral or philosophical. This interpretive quandary is not new to the courts; indeed, the Supreme Court faced this very issue in *United States v. Seeger* and *Welsh v. United States*.⁹⁶ *Seeger* dealt with a statute that provided a conscientious objection exemption to the military draft. The statute's language required that objectors derive their views on war from a "belief in relation to a Supreme Being," as opposed to a political, sociological, philosophical or moral view.⁹⁷ The plaintiff denied a belief in any particular supreme being, but sought the exemption on the grounds that he ascribed to a more metaphysical religious belief and faith.⁹⁸ The Court grappled with the question of how to categorize an objector's belief as religious, as opposed to philosophical or moral. In an attempt to avoid requiring a belief in a particular supreme being or a specified religion, the Court ultimately invented a nebulous and relatively unhelpful test. This test required that objectors derive their views on war from a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those" who had routinely qualified for the exemption.⁹⁹

Five years later, the Court faced the same interpretive question in *Welsh v. United States*. In *Welsh*, the Court granted the conscientious objector exemption to the plaintiff, who also denied a belief in a supreme being, instead characterizing his beliefs as non-theistic convictions.¹⁰⁰ The

⁹⁶ *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970).

⁹⁷ *Seeger*, 380 U.S. at 165.

⁹⁸ *Id.* at 187.

⁹⁹ *Id.* at 166.

¹⁰⁰ *Welsh*, 398 U.S. at 343.

Court expanded on the already broad *Seeger* test, this time finding that the statute exempted from military service anyone whose conscience, “spurred on by deeply held moral, ethical, or religious beliefs, would give them no rest or peace” if they participated in the war.¹⁰¹

b. Possible Solution: Group Exemptions Based on Membership in a Particular Religious Group

Despite the Court’s attempt in *Seeger* and *Welsh* to provide a categorization framework without naming a specific religion or requiring belief in particular religious tenets, the reality remains that it is often difficult to define religion or distinguish between religious beliefs, as opposed to merely philosophical or moral objections. This difficulty is particularly important in the vaccination context, because many vaccination statutes require administrators to distinguish between religious and philosophical objections.

To avoid the issues encountered by the Court in *Seeger* and *Welsh*, it may be necessary to include in mandatory vaccination statutes narrow legislative exemptions for particular religious groups. Recognized religious already enjoy narrow religious exemptions to state statutes.¹⁰² For example, multiple states have provided such religious exemptions in their child neglect statutes. Arizona, Connecticut, and Washington specifically provide an exception for Christian Science treatment.¹⁰³ Connecticut’s child neglect statute reads as follows: “[T]he treatment of any child by a Christian Science practitioner in lieu of treatment by a licensed practitioner of the healing arts shall not of itself constitute maltreatment.”¹⁰⁴

¹⁰¹ *Id.* at 344.

¹⁰² *See Yoder*, 406 U.S. at 205.

¹⁰³ *Definitions of Child Abuse and Neglect*, CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/pubPDFs/define.pdf#page=4&view=Exceptions>.

¹⁰⁴ Conn. Stat. Ann. § 17a-104.

States wishing to avoid *Seeger* and *Welsh* interpretation issues can use the religious exemptions in child neglect statutes as a guide. By defining exemptions narrowly, based on the tenets of recognized religions who have well-known objections to vaccination, administrators will have clear guidance as to which parents qualify for the exemptions on religious grounds.

It is entirely possible, however, that the religious group exemption does not need to be limited to a particular sect by name. Instead, a slightly broader exemption may be possible without running afoul of the Establishment Clause, as evidenced by the child neglect statutes in thirty-one other states. These thirty-one states have created an exception in their civil child abuse reporting laws for parents who choose not to provide medical care for their children based on religious beliefs.¹⁰⁵ For example, New Jersey's child neglect statute provides that "no child who in good faith is under treatment by spiritual means alone through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall for this reason alone be considered to be abused or neglected."¹⁰⁶ Thus, a parent must show that he or she is a practitioner of a recognized religion which ascribes to spiritual healing.

Indiana's child neglect statute contains even broader language than that of New Jersey. The Indiana statute provides that "[i]f a parent...fails to provide specific medical treatment for a child because of the legitimate and genuine practice of the religious beliefs of the parent...a rebuttable presumption arises that the child is not a child in need of services because of the failure."

¹⁰⁵ *Definitions of Child Abuse and Neglect*, CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/pubPDFs/define.pdf#page=4&view=Exceptions>.

¹⁰⁶ N.J.Stat.Ann § 9:6-8.21 (2015).

¹⁰⁷ In contrast with New Jersey, Indiana does not require the parent to belong to a recognized religion, but only requires that the religious beliefs be legitimate and sincerely held.

A legislative exemption mirrored after the neglect statutes would be permissible under *Amos* because it would allow bona fide faiths to define and carry out their religious missions by alleviating significant government interference. As discussed previously, an individual-based exemption which distinguishes between faiths or seeks to provide special treatment to one faith over another is unconstitutional. The difference here, however, from the unconstitutional singling out of a faith for special treatment, is that a group-based legislative exemption would instead be removing a burden on the free exercise of a narrow group of religions with known objections to vaccination.

The language of Indiana's exception most closely comports with the requirements of the Establishment Clause. By specifically referring to practitioners of Christian Science, it creates a narrowly tailored exemption for a defined and accepted group. Although New Jersey's statute is also relatively narrow, it still requires administrators to judge whether an objector's beliefs are religious, as opposed to being grounded on something else. In contrast, Indiana's language is sufficiently narrow as to avoid the murky interpretation problems encountered by the court in *Seeger* and *Welsh*. Thus, states wishing to provide a narrow religious exemption could condition receipt of the exemption upon participation in the Christian Science faith, without running afoul of the Establishment Clause.

IV. Conclusion

¹⁰⁷ Ind. Code Ann. § 31-34-1-14 (West 2015).

It is likely that claims under the Free Exercise Clause seeking to establish an entitlement to a religious exemption from mandatory vaccination laws will fail, given the trajectory of case law leading up to *Smith*. Although the Supreme Court of the United States has not explicitly ruled on the constitutionality of religious exemptions, multiple federal and lower state courts have repeatedly found that there is no constitutional right to an exemption under the Free Exercise Clause. Even when combined with a hybrid parental autonomy claim post-*Smith*, it is unlikely that these claims will be successful.

On the other hand, however, parents objecting under state RFRAs may be more successful. Although it is well-established that the government has a compelling interest in protecting the health, safety, and welfare of its people, the government would have to demonstrate that a mandatory vaccination statute with no exemptions is the least restrictive means of achieving its compelling interest. Given the presence of narrowly tailored religious exceptions in various contexts, the government would most likely be hard-pressed to establish the least restrictive alternative prong of RFRA. Moreover, the herd immunity theory, which states that vaccination of a sufficient portion of the population is sufficient to protect the entire population, further undermines the government's argument that religious exceptions are unwarranted.

A legislative exemption might indeed be constitutional under the Establishment Clause as well. As long as the exemption merely removes a burden from the exercise of religion, rather than creating an affirmative benefit for religion, does not impermissibly distinguish among faiths, and is administered in a neutral manner, such an exemption would be within the dictates of the Establishment Clause. In order to avoid interpretation issues with regard to what beliefs constitute religious beliefs, as opposed to philosophical, sociological, or moral beliefs, states should draft narrowly tailored exceptions that limit the exceptions to recognized, defined religious groups who

ascribe to anti-vaccination principles. State child neglect statutes, for example, provide exceptions for Christian Science believers who do not seek medical care for their children. An exception to a mandatory vaccination statute that is limited to members of the Christian Science faith is certainly permissible under the Establishment Clause.