

Essay

COMPULSORY VACCINATION LAWS ARE CONSTITUTIONAL

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ABSTRACT—A measles epidemic in California, that then spread to other states, focused national attention on the many children who have been vaccinated against communicable diseases. This Essay focuses on the constitutional issues concerning compulsory vaccination laws and argues that every state should require compulsory vaccination of all children, unless there is a medical reason why the child should not be vaccinated. There should be no exception to the compulsory vaccination requirement on account of the parents' religion or conscience, or for any reason other than medical necessity. The government's interest in protecting children and preventing the spread of communicable disease justifies mandatory vaccinations for all children in the United States.

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NORTHWESTERN UNIVERSITY LAW REVIEW

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INTRODUCTION: THE CALIFORNIA EXPERIENCE

In December 2014, the first reported cases of measles arising in connection with Disneyland were reported. In the initial outbreak, forty-two people visiting or working at Disneyland were exposed to measles.¹ Measles is a highly communicable respiratory disease; the virus can linger on surfaces for up to two hours,² which can be disastrous for an amusement park, school, or even a neighborhood playground. The virus mostly spread among those who had not been vaccinated, either because they were too young or were not vaccinated by choice.³ By the end of January, the virus spread beyond the borders of California to infect children and even adults in Utah, Colorado, Washington, Oregon, and Mexico in a total of sixty-seven confirmed cases.⁴ Most of the January and December cases in California and beyond were linked to initial exposure at Disneyland.⁵ The outbreak ended in April 2015, when no new infections were reported after two incubation periods.⁶ Overall, approximately 147 people in the United

¹ Alicia Chang, *Disney Measles Outbreak that Sparked Vaccination Debate Ends*, KSL.COM (Apr. 17, 2015, 2:51 PM), <http://www.ksl.com/?nid=157&sid=34278095> [<http://perma.cc/M9LH-UZHT>].

² Lisa Aliferis, *Disneyland Measles Outbreak Hits 59 Cases and Counting*, NPR (Jan. 22, 2015, 12:24 PM), <http://www.npr.org/sections/health-shots/2015/01/22/379072061/disneyland-measles-outbreak-hits-59-cases-and-counting> [<http://perma.cc/JT3X-KEWY>].

³ Ralph Ellis et al., *Outbreak of 51 Measles Cases Linked to Disneyland*, CNN (Jan. 23, 2015, 3:04 PM), <http://www.cnn.com/2015/01/21/health/disneyland-measles/index.html> [<http://perma.cc/ML3B-ZC4G>].

⁴ Adam Nagourney & Abby Goodnough, *Measles Cases Linked to Disneyland Rise, and Debate Over Vaccinations Intensifies*, N.Y. TIMES (Jan. 21, 2015), <http://www.nytimes.com/2015/01/22/us/measles-cases-linked-to-disneyland-rise-and-debate-over-vaccinations-intensifies.html> [<http://perma.cc/T3AH-NZKW>].

⁵ Jonathan Corum et al., *Facts About the Measles Outbreak*, N.Y. TIMES (Feb. 6, 2015), http://www.nytimes.com/interactive/2015/02/02/us/measles-facts.html?_r=0 [<http://perma.cc/9SW8-QRRX>].

⁶ Chang, *supra* note 1.

States were infected.⁷ This outbreak was the worst in California in twenty-four years, but luckily there were no reported deaths.⁸

According to the California Department of Public Health, measles, mumps, and rubella (MMR) vaccinations “are more than 97% effective in preventing measles.”⁹ However, in the past few years, more and more parents have declined to vaccinate their children. In California, from 2007 to 2013 the rate of kindergarten parents refusing to vaccinate their children under a personal belief exemption doubled.¹⁰ One reason for this precipitous drop in vaccinations in the last few years is largely due to the medically unsupported theory that inoculation could lead to autism among children. Parents and even some scholars¹¹ point to a 1998 article published in *The Lancet* written by Dr. Andrew Wakefield and his colleagues.¹² The article inferred a cause and effect between autism and the MMR vaccine. The impact of his article was swift and profound. According to one article, “tens of thousands of parents around the world” were turned against the MMR vaccine.¹³

Yet, the study had many flaws. Dr. Wakefield’s study consisted only of twelve children who were selectively screened and chosen to participate. Moreover, the study was partially funded by attorneys hired by parents to sue vaccine manufacturers. Nevertheless, Dr. Wakefield’s research was quoted by newspapers throughout the world, raising alarm about the

⁷ *Id.*

⁸ *See id.*; Phil Willon & Melanie Mason, *California Gov. Jerry Brown Signs New Vaccination Law, One of Nation’s Toughest*, L.A. TIMES (June 30, 2015, 9:11 PM), <http://www.latimes.com/local/political/la-me-ln-governor-signs-tough-new-vaccination-law-20150630-story.html#page=1> [<http://perma.cc/U58T-SKZQ>].

⁹ Press Release, Cal. Dep’t of Pub. Health, *Measles Outbreak that Began in December Now Over* (Apr. 17, 2015), <https://www.cdph.ca.gov/Pages/NR15-029.aspx> [<https://perma.cc/UPD2-G53C>].

¹⁰ Aliferis, *supra* note 2.

¹¹ MARK NAVIN, VALUES AND VACCINE REFUSAL: HARD QUESTIONS IN ETHICS, EPISTEMOLOGY, AND HEALTHCARE 42 (2016) (stating that “[m]any vaccine denialists have rallied around Wakefield”); Fiona Godlee et al., *Wakefield’s Article Linking MMR Vaccine and Autism was Fraudulent: Clear Evidence of Falsification of Data Should Now Close the Door on this Damaging Vaccine Scare*, 342 *BMJ* 64 (2011); Laura Eggertson, *Lancet Retracts 12-Year-Old Article Linking Autism to MMR Vaccines*, 182 *CANADIAN MED. ASS’N J.* E199, E199 (2010) (stating that parents “seized upon the apparent link” between vaccines and autism); Philip J. Smith et al., *Parental Delay or Refusal of Vaccine Doses, Childhood Vaccination Coverage at 24 Months of Age, and the Health Belief Model*, 126 *PUB. HEALTH REP. (SUPPLEMENT 2: ASSESSMENT OF VACCINATION COVERAGE)* 135, 144 & tbl.5 (2011) (explaining that many parents who delay or refuse to vaccinate their children cite autism as a main reason).

¹² A.J. Wakefield et al., *Ileal-Lymphoid-Nodular Hyperplasia, Non-Specific Colitis, and Pervasive Developmental Disorder in Children*, 351 *LANCET* 637 (1998). The article was retracted in February 2010. Editors of the *Lancet*, *Retraction—Ileal-Lymphoid-Nodular Hyperplasia, Non-Specific Colitis, and Pervasive Developmental Disorder in Children*, 375 *LANCET* 445 (2010).

¹³ Eggertson, *supra* note 11, at E199; *see also* Smith et al., *supra* note 11.

efficacy and safety of vaccines.¹⁴ Even politicians “sow[ed] suspicion” about the safety of vaccination and urged parents to be cautious.¹⁵ Eventually, *The Lancet* retracted Wakefield’s study, criticizing fundamental aspects of the paper as “incorrect.”¹⁶ As well, subsequent research disproved Wakefield’s findings, including a recent study involving over 95,000 children with older autistic siblings, found that the relative risk of autism among vaccinated children with older autistic siblings was lower compared to unvaccinated children.¹⁷

Parents opposed to vaccinations (often referred to as anti-vaxxers) claim the dramatic rise in autism cases in the United States prove that vaccines are harmful and vindicate Wakefield’s early findings. In an effort to “protect” their children from vaccination, anti-vaxxers have used various legislative “opt-outs” or exemptions to spare their children from vaccination. As of June 2015, more than 80,000 California students claim personal belief exemptions annually.¹⁸

Despite the rising fears of vaccination, the benefits of measles vaccines are well documented. Within the first twenty years of licensed measles vaccination in the United States, an estimated fifty-two million cases and fifty-two hundred deaths were prevented.¹⁹ Additionally, due to the effectiveness of that vaccine, the United States declared measles to be eliminated from the country in 2000.²⁰ That was a significant victory for modern medicine. So what accounted for the most recent outbreak?

¹⁴ See, e.g., Philip J. Hiltz, *House Panel Asks for Study of a Vaccine*, N.Y. TIMES (Apr. 7, 2000), <http://www.nytimes.com/2000/04/07/us/house-panel-asks-for-study-of-a-vaccine.html> [<http://perma.cc/92LR-AKR9>]; see also Michael J. Smith et al., *Media Coverage of the Measles-Mumps-Rubella Vaccine and Autism Controversy and Its Relationship to MMR Immunization Rates in the United States*, 121 PEDIATRICS 836, 839 fig.1 (2008). For a summary of MMR vaccine coverage in British media markets, see Tammy Speers & Justin Lewis, *Journalists and Jabs: Media Coverage of the MMR Vaccine*, 1 COMM. & MED. 171, 173 tbl.1 (2004).

¹⁵ Scott Gottlieb, *Why Debate Over Vaccines and Autism Will Continue*, FORBES (Feb. 4, 2015, 4:34 AM), <http://www.forbes.com/sites/scottgottlieb/2015/02/04/why-debate-over-vaccines-and-autism-will-continue/> [<http://perma.cc/77MB-Y7RR>]; Carrie Dann, *Rand Paul: Vaccines Can Lead to ‘Mental Disorders,’* NBC NEWS (Feb. 2, 2015, 5:07 PM), <http://www.nbcnews.com/politics/elections/rand-paul-vaccines-can-lead-mental-disorders-n298821> [<http://perma.cc/X2RW-28LR>] (quoting Rand Paul as saying, “I have heard of many tragic cases of walking, talking normal children who wound up with profound mental disorders after vaccines”).

¹⁶ Editors of the *Lancet*, *supra* note 12, at 445.

¹⁷ Anjali Jain et al., *Autism Occurrence by MMR Vaccine Status Among US Children With Older Siblings With and Without Autism*, 313 JAMA 1534, 1536 (2015).

¹⁸ Willon & Mason, *supra* note 8.

¹⁹ Alan B. Bloch et al., *Health Impact of Measles Vaccination in the United States*, 76 PEDIATRICS 524, 530 (1985).

²⁰ See Corum, *supra* note 5.

Measles outbreaks in the United States, such as the one in Disneyland, have largely been attributed to those carrying the disease from other countries into the United States.²¹ Travelers abroad can become infected—especially in countries that lack “herd immunity”²² or high vaccination rates of the United States—and then spread the disease among the unvaccinated back home. Therefore, although the United States’ high vaccination rates and herd immunity serve as a global model, vaccines continue to be important because outbreaks still can (and do) occur among those not immunized as demonstrated in the Disneyland case.

As a result of the California outbreak, pressure was exerted on the legislature to change state law.²³ At the end of June 2015, Governor Brown signed into law SB 277.²⁴ This bill eliminated personal and religious belief vaccination exemptions for children enrolled in school or daycare. Under SB 277, a parent can continue to decline vaccinations for his or her child for religious or personal reasons, but only if the child is enrolled in a home-based private school or off-campus independent study program.²⁵ Moreover, unvaccinated children can utilize their exemptions obtained before 2016 until they enter either kindergarten or the seventh grade, depending on their age.²⁶ Additionally, parents may still obtain medical exemptions for their children and the law permits doctors to take family history or sibling health into account in deciding whether to issue a medical exemption.²⁷

The bill goes into effect on July 1, 2016, and will make California the third state in the nation to require compulsory vaccination law with no religious or personal belief exemptions.²⁸ In a prepared statement, Governor

²¹ See Mark Berman, *How the U.S. Went from Eliminating Measles to a Measles Outbreak at Disneyland*, WASH. POST: POST NATION (Jan. 23, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/01/23/how-the-u-s-went-from-eliminating-measles-to-a-measles-outbreak-at-disneyland> [https://perma.cc/LS39-DNAR].

²² Emily Willingham & Laura Helft, *What is Herd Immunity?*, PBS (Sep. 9, 2014), <http://www.pbs.org/wgbh/nova/body/herd-immunity.html> [http://perma.cc/G447-MKPW] (“The term ‘herd immunity’ refers to a means of protecting a whole community from disease by immunizing a critical mass of its populace. Vaccination protects more than just the vaccinated person. By breaking the chain of an infection’s transmission, vaccination can also protect people who haven’t been immunized. But to work, this protection requires that a certain percentage of people in a community be vaccinated.”).

²³ See Willon & Mason, *supra* note 8.

²⁴ S.B. 277, 2015–16 Leg., Reg. Sess. (Cal. 2015) (approved by Governor Jerry Brown on June 30, 2015).

²⁵ *Id.* § 2.

²⁶ *Id.*

²⁷ *Id.* § 5.

²⁸ The other two states are Mississippi and West Virginia. Sarah Kaplan, *The California Assembly Just Approved One of Nation’s Strictest Mandatory Vaccine Laws*, WASH. POST (June 26, 2015),

Brown remarked that “[t]he science is clear that vaccines dramatically protect children against a number of infectious and dangerous diseases. While it’s true that no medical intervention is without risk, the evidence shows that immunization powerfully benefits and protects the community.”²⁹ In May 2015, the Public Policy Institute of California found that 67% of California adults and 65% of public school parents supported not allowing children who have not had the MMR vaccine to attend public schools.³⁰

Despite overwhelming support, the legislation faced strong opposition from some of the public. Hundreds of California parents protested the bill by holding vigils at the Capitol.³¹ Moreover, throughout the year, legislative hearings on the bill attracted outspoken crowds of parents criticizing the legislation. Concerns ranged from the rights of parents to make decisions about their child’s health to the debunked link between vaccinations and autism. Many opponents believe vaccinations are dangerous and contend that parents should be able to make the choice of whether to expose their child to those alleged dangers (none of this is backed by any medical science). The California Coalition for Vaccine Choice, which is organized by those who oppose the bill, argues that “SB 277 eliminates a parent’s right to exempt their children from one, some, or all vaccines, a risk-laden medical procedure including death.”³² The Coalition’s founders and other opponents of the bill say they are currently exploring the possibilities of mounting a legal challenge against the bill.

We believe, though, that this bill does not go far enough. It exempts children from compulsory vaccination if they are home-schooled or educated in off-campus independent study programs. All children should be vaccinated, to protect them and to protect others from the spread of communicable diseases. Even children schooled at home will come into contact with other children and other people, whether at sports events, in parks, or at places like Disneyland. A better approach than the California

<https://www.washingtonpost.com/news/morning-mix/wp/2015/06/26/the-california-assembly-just-approved-one-of-nations-strictest-mandatory-vaccine-laws/> [<https://perma.cc/93SA-KDGL>].

²⁹ Letter from Jerry Brown, Governor of Cal., to the Members of the Cal. State Senate (June 30, 2015), https://www.gov.ca.gov/docs/SB_277_Signing_Message.pdf [<https://perma.cc/PG8M-53NN>].

³⁰ MARK BALDASSARE ET AL., PPIC STATEWIDE SURVEY: CALIFORNIANS AND THEIR GOVERNMENT 13 (2015), http://www.ppic.org/content/pubs/survey/S_515MBS.pdf [<http://perma.cc/23PD-PU4W>].

³¹ Jenna Chandler, *O.C. Parents Protest as Assembly Panel Approves Bill to Require Vaccinations*, ORANGE COUNTY REG. (June 9, 2015, 11:31 PM), <http://www.ocregister.com/articles/parents-665293-bill-sacramento.html> [<http://perma.cc/62U7-6666>].

³² CAL. COALITION FOR VACCINE CHOICE, <http://www.sb277.org> [<http://perma.cc/8MRV-S7E2>].

law would be to require every child to be vaccinated unless there is a medical reason not to do so.

In this Essay, we focus on the constitutional issues concerning compulsory vaccination laws. Our position is that every state should require compulsory vaccination of all children, unless there is a medical reason why the child should not be vaccinated. In other words, there should be no exception to the compulsory vaccination requirement on account of the parents' religion or conscience or for any reason other than medical necessity. Simply put, the government's interest in protecting children and preventing the spread of communicable disease justifies mandatory vaccinations for all children in the United States.

There is no doubt that compulsory vaccination is constitutional. In 1905, in *Jacobson v. Massachusetts*, the Supreme Court held that state compulsory vaccination laws are constitutional when they are "necessary for the public health or the public safety."³³ Since then, the Court has affirmed the constitutionality of state compulsory vaccination laws in cases like *Zucht v. King*, which upheld childhood vaccination requirements for entrance to public schools.³⁴ Indeed, compulsory vaccination laws have existed in the United States in some form since the nineteenth century.³⁵

In Part I of this Essay, we briefly describe the history of compulsory vaccination laws in the United States. Part II explains why such laws are desirable and why every state should require compulsory vaccination with only a medical exception. Finally, Part III looks at the possible constitutional objections based on free exercise of religion and the right of parents to control the upbringing of their children. We conclude that these arguments are not a basis for invalidating compulsory vaccination laws.

I. HISTORY OF COMPULSORY VACCINATION LAWS

In 1796, Dr. Edward Jenner of England became the first physician to develop a vaccination for smallpox by using a system of "deliberate inoculation."³⁶ Not long after, the United States' vaccination movement began in the early nineteenth century and centered on Dr. Benjamin Waterhouse, a physician from Harvard University who had knowledge of Dr. Jenner's work and created a vaccination based on it, and Thomas Jefferson, who strongly supported the widespread delivery of the smallpox

³³ 197 U.S. 11, 27 (1905); *see also infra* notes 98–108 and accompanying text.

³⁴ 260 U.S. 174, 177 (1922); *see also infra* notes 109–14 and accompanying text.

³⁵ James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 849 n.126 (2002).

³⁶ *Id.* at 838–40.

vaccination.³⁷ During this time, vaccination was a resource available only to wealthy Americans because poor communities generally lacked the resources and education to engage in vaccination programs.³⁸ In 1809, however, Massachusetts became the first state to enact a mandatory smallpox vaccination law and government support for compulsory vaccinations began to grow.³⁹

In the mid-nineteenth century, compulsory education laws were enacted in states across the United States. State and local governments grew concerned that the bringing together of school-age children in public schools created a risk of a smallpox outbreak.⁴⁰ In 1827, Boston was the first city to require vaccination records for children upon entering public school.⁴¹ In the years that followed, statewide compulsory vaccination laws for school-age children were enacted in many states, including Massachusetts in 1855, New York in 1862, Connecticut in 1872, Indiana in 1881, Illinois, Arkansas, Virginia, and Wisconsin in 1882, California in 1888, Iowa in 1889, and Pennsylvania in 1895.⁴² The main illness that spurred state compulsory vaccination laws was smallpox. By 1904, “eleven out of then forty-five U.S. states had compulsory vaccination laws.”⁴³

In the following years, the number of states with such laws and the number of required vaccinations grew significantly. By 1980, all fifty states had compulsory vaccination laws that covered children entering public schools for the first time.⁴⁴ By 2003, fifty states required diphtheria and tetanus toxoids and polio, measles, and rubella vaccines. Forty-seven states required the mumps vaccine. Forty-four states required the pertussis

³⁷ See *id.* at 842–43. Jefferson vaccinated his children and servants in 1800 and the following year supported the vaccination of hundreds of his family members, staff, and friends. *Id.*

³⁸ See *id.* at 843.

³⁹ See *id.* at 849 n.126; see also Kevin M. Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, in *LAW IN PUBLIC HEALTH PRACTICE* 338, 346 (Richard A. Goodman et al. eds., 2d ed. 2007).

⁴⁰ Alfred J. Sciarrino, *The Grapes of Wrath, Part II*, 8 J. MED. & L. 1, 17 (2004) (“As a court in Pennsylvania stated in 1916: ‘It is an accepted fact, that during the common school ages, children are specially susceptible to the infectious and contagious diseases mentioned in these acts, and that this hazard is greatly increased by their being brought together from our varied conditions of society. To avoid the spread of these diseases, it has been deemed necessary by the legislature to enforce rigid quarantine and preventive measures, even to the isolation of persons, and exclusion of pupils from infected districts.’” (quoting *Commonwealth v. Gillen*, 65 Pa. Super. 31, 38 (1916))); see also Hodge & Gostin, *supra* note 35, at 850.

⁴¹ Hodge & Gostin, *supra* note 35, at 851.

⁴² *Id.*

⁴³ Kristine M. Severyn, *Jacobson v. Massachusetts: Impact on Informed Consent and Vaccine Policy*, 5 J. PHARMACY & L. 249, 250 (1995).

⁴⁴ Malone & Hinman, *supra* note 39, at 345.

vaccine and the hepatitis B vaccine.⁴⁵ As of 2003, all U.S. states but four—Louisiana, Michigan, South Carolina, and West Virginia—had compulsory vaccination laws covering school-age children from kindergarten to twelfth grade.⁴⁶ These compulsory vaccination laws share two important features: (1) their proven effectiveness in preventing and even eradicating disease and (2) the exemptions to mandatory vaccination that they provide for certain individuals.

By the early 1970s, the Centers for Disease Control and Prevention (CDC) reported that states with compulsory vaccination laws for school-age children experienced a dramatic reduction in measles incidence rates—between 40%–51% lower than states that did not have such laws.⁴⁷ Later that same decade, an analysis conducted as part of the Childhood Immunization Initiative⁴⁸ reported that the incidence rates of measles in states that strictly enforced compulsory vaccination laws were less than one tenth of those in the rest of the country.⁴⁹ Most poignantly, measles outbreaks in Alaska and Los Angeles in 1976 and 1977 “led health officials to strictly enforce the existing requirements” for school-age children.⁵⁰ In Alaska, on the day of the announced crackdown, 8.3% of students, or 7418 students out of 89,109, were excluded from school for failing to meet vaccination requirements.⁵¹ In Los Angeles, approximately 4%, or 50,000 out of 1,400,000, of students were excluded.⁵² One month later, however, only fifty-one students in Alaska remained excluded from school, and in Los Angeles, it only took days for most students to return to school with their required vaccinations.⁵³

Still, within each state’s compulsory vaccination laws, legislators crafted exemptions for certain individuals for different purposes.⁵⁴ For example, all fifty states provide medical exemptions for individuals with contraindicating medical conditions that increase their risk of adverse effect

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 344.

⁴⁸ An initiative undertaken in 1977 with the goal of raising childhood vaccination levels to 90% by 1979. *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See id.*

⁵⁴ *See* CTRS. FOR DISEASE CONTROL & PREVENTION, STATE SCHOOL IMMUNIZATION REQUIREMENTS AND VACCINE EXEMPTION LAWS (2015) [hereinafter SCHOOL VACCINATIONS], <http://www.cdc.gov/phlp/docs/school-vaccinations.pdf> [<https://perma.cc/7WNB-ED7D>].

to a certain vaccine or even multiple vaccines.⁵⁵ Some states—like Connecticut, Montana, and West Virginia—expressly distinguish between whether an exemption is temporary or permanent,⁵⁶ while other states—like Georgia, Kansas, and New Mexico—require recertification⁵⁷ of medical exemptions at different intervals. Though each state’s medical exemption language differs, all states provide such an exemption.⁵⁸

The scope and scale of vaccination exemptions vary by state. In addition to medical exemptions, many states provide religious exemptions and some states provide philosophical exemptions. Five states—Delaware, Iowa, North Carolina, New Jersey, and West Virginia—expressly exclude philosophical exemptions.⁵⁹ For example, Delaware’s law requires an affidavit be signed by those requesting exemption which includes a statement distinguishing what constitutes a religious belief that qualifies for exemption saying, “This belief is not a political, sociological or philosophical view of a merely personal moral code.”⁶⁰ Iowa’s law distinguishes an exemptible religious belief from beliefs that are merely “philosophical, scientific, moral, personal, or medical[ly] oppos[ed] to immunizations.”⁶¹ As of July 2015, only three states—California, Mississippi, and West Virginia—did not have either a religious or philosophical exemption.⁶² Twenty-nine states and the District of Columbia provide only medical and religious exemptions, but not philosophical exemptions from their mandatory vaccination requirements.⁶³

Nonetheless, achieving high vaccination rates remains an important goal for all states. Compiling information in February and March of 2015, the CDC reported that all fifty states and the District of Columbia established vaccination laws for public school children.⁶⁴ Forty-six of those states—excluding only Indiana, Ohio, Michigan, and South Dakota—and the District of Columbia also established vaccination requirements for

⁵⁵ See Malone & Hinman, *supra* note 39, at 348.

⁵⁶ Twenty states distinguish between temporary or permanent according to the CDC’s graph. See SCHOOL VACCINATIONS, *supra* note 54, at 2.

⁵⁷ Nine states require recertification according to the CDC’s graph. See *id.* at 2.

⁵⁸ See Malone & Hinman, *supra* note 39, at 348.

⁵⁹ See SCHOOL VACCINATIONS, *supra* note 54, at 10 app. 2.

⁶⁰ *Id.* at 3 (quoting DEL. CODE ANN. tit. 14, § 131(a)(6) (2016)).

⁶¹ See *id.* (quoting IOWA ADMIN. CODE r. 641-7.3(2) (2016)).

⁶² IMMUNIZATION ACTION COAL., EXEMPTIONS PERMITTED TO SCHOOL AND CHILDCARE IMMUNIZATION REQUIREMENTS (2015), http://www.immunize.org/laws/exemptions_map_july-2015.pdf [<https://perma.cc/XQ4C-5VMP>] (map documenting exemptions).

⁶³ SCHOOL VACCINATIONS, *supra* note 54, at 10 app. 2.

⁶⁴ See *id.* at 7 app. 1 (detailing the statistics cited below).

private school.⁶⁵ All forty-seven of those requirements for private schools mirrored the requirements for public schools.⁶⁶ Additionally, all fifty states and the District of Columbia have vaccination requirements for day care facilities. Forty-four of those states—excluding only Mississippi, Missouri, Montana, Nebraska, Pennsylvania, and West Virginia—and the District of Columbia have requirements for day care facilities that mirror the requirements for public schools.⁶⁷

The 2015 CDC vaccination recommendations for children include a vaccination schedule for fourteen preventable diseases.⁶⁸ The CDC also recommends various vaccinations for preteens, teens, and adults. While states differ on how many of the CDC's vaccination recommendations they adopt into their mandatory vaccination requirements, the number of vaccinations that states require for children remains similar to those mentioned above. The majority of states require vaccinations against diphtheria, polio, measles, mumps, and rubella, varicella, hepatitis B, and pneumococcal viruses for children entering public or private school and day care facilities.⁶⁹ Furthermore, many states also require vaccinations for healthcare workers and patients.⁷⁰

II. COMPULSORY VACCINATION LAWS ARE ESSENTIAL

Many studies demonstrate the enormous value of vaccinations both in terms of preventing death and avoiding needless suffering.⁷¹ An article in the peer-reviewed journal *Pediatrics* concluded that routine childhood immunization will prevent approximately 42,000 early deaths and twenty

⁶⁵ In the four excluded states, the CDC notes the vaccination requirements as “unclear.” *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See *For Everyone: Easy-to-Read Schedules*, CTRS. FOR DISEASE CONTROL & PREVENTION (2015), <http://www.cdc.gov/vaccines/schedules/easy-to-read/index.html> [<http://perma.cc/UGG9-D82A>] (linking to charts documenting the recommended vaccinations and proper schedule for children 0–6 years old, teens and preteens, and adults).

⁶⁹ See *State Information*, IMMUNIZATION ACTION COALITION, <http://www.immunize.org/laws/> [<http://perma.cc/UQ8R-9GRG>] (linking to maps documenting state coverage of individual vaccinations).

⁷⁰ See *Public Health Law Program*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/phlp/publications/topic/vaccinationlaws.html> [<https://perma.cc/KV7Y-WJGZ>].

⁷¹ Vaccinations are now available for the following diseases: haemophilus influenzae type b (Hib), diphtheria, hepatitis A, hepatitis B, influenza, measles, mumps, pertussis (whooping cough), pneumococcal disease, polio, rubella (German measles), tetanus (lockjaw), rotavirus, and varicella (chickenpox). *Vaccines for Children - A Guide for Parents and Caregivers*, U.S. FOOD & DRUG ADMIN, <http://www.fda.gov/BiologicsBloodVaccines/ResourcesforYou/Consumers/ucm345587.htm> [<http://perma.cc/A2XM-M9H3>].

million cases of disease for those born in the year 2009.⁷² Such predictions are consistent with the CDC's reports and findings, which estimated that between 1994 and 2014, 732,000 deaths of U.S. children were prevented, as well as 322 million cases of childhood illnesses due to vaccination.⁷³ Moreover, the American Academy of Pediatrics states that “[m]ost childhood vaccines are 90% to 99% effective in preventing disease.”⁷⁴

Thus, robust evidence lends strong support to our argument that vaccinations are essential to save children's lives. But compulsory vaccinations also are crucial to protect those who cannot be vaccinated, such as infants, and those for whom vaccinations are medically inadvisable, such as those with compromised immune systems. Because there always will be a portion of the population for whom vaccinations will not work, achieving the highest vaccination rates possible for all others remains important. Herd immunity occurs when a “critical portion” of the population—the minimum percentage of vaccinated persons essential to provide herd immunity—is vaccinated against a contagious disease thus creating “little opportunity for an outbreak.”⁷⁵ As a result, members of the community will be protected even if they are not vaccinated or their vaccination does not work.⁷⁶ As Dr. Paul A. Offit explained: “Indeed, when enough people are vaccinated, these infections simply stop spreading.”⁷⁷ Dr. Offit warns that “[f]or highly contagious infections—such as measles or pertussis—the immunization rate needs to be about 95 percent. For somewhat less contagious infections—like mumps and rubella—herd immunity can be achieved with immunization around 85 percent.”⁷⁸ The effects of a decline in herd immunity can be swift. For example, a 2012 outbreak of whooping cough (pertussis) which affected 42,000 people—the largest outbreak since 1955—occurred in an instance where forty-nine

⁷² Fangjun Zhou et al., *Economic Evaluation of the Routine Childhood Immunization Program in the United States, 2009*, PEDIATRICS, Apr. 2014, at 1, 1.

⁷³ Bahar Gholipour, *Vaccination Has Saved 732,000 Children's Lives Since 1994*, LIVESCIENCE (Apr. 24, 2014, 2:23 PM), <http://www.livescience.com/45111-national-vaccination-effects.html> [<http://perma.cc/68XH-T7NH>].

⁷⁴ AM. ACAD. OF PEDIATRICS, VACCINE SAFETY: THE FACTS 1 (2008), http://www.aap.org/immunization/families/vaccinesafety_parenthandout.pdf [<http://perma.cc/MG2S-CN3Q>].

⁷⁵ See *Community Immunity (“Herd Immunity”)*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Apr. 16, 2015), <http://www.vaccines.gov/basics/protection/> [<http://perma.cc/VCF9-C3K6>].

⁷⁶ See *id.*

⁷⁷ PAUL A. OFFIT, DEADLY CHOICES: HOW THE ANTI-VACCINE MOVEMENT THREATENS US ALL 145 (rev. foreword 2015 ed. 2011).

⁷⁸ *Id.* at xxiii.

states had dropped below the immunity threshold of 92%–94% as of 2011.⁷⁹

As one commentator noted:

The decline of communal herd immunity is not a merely academic concern. Disease outbreaks have already occurred, killing hundreds and hospitalizing thousands more. “Hot spots” are cropping up in communities across the United States and the rest of the world as well. The rise of exemptions to compulsory vaccination laws threatens to undermine the public health achievements made possible by widespread immunizations.⁸⁰

Given the profound public health threat posed by refusing vaccinations, why are parents placing their children and others at risk? For some parents their anxieties are steeped in medical concerns, others claim to oppose vaccination on religious or philosophical grounds, and for another category of parents, poverty impacts their access to vaccination. It is important then to distinguish between parents who do not vaccinate and those who undervaccinate. For some it is not a choice, but a lack of access to health care. For those parents, frequently the highly mobile and poor, their children often receive some vaccinations, but not all, because of homelessness or frequent moves across cities and states for employment or affordable housing. These parents “undervaccinate,” and are not the population of parents that *refuse* to vaccinate. They, of course, are not the focus of this Essay. In those cases, the solution is to make sure that all have access to vaccinations and the health care system regardless of where they live or their socioeconomic status.

Still other parents may refuse vaccinations based on the fear of the side effects of vaccinations, including fear of autism and even death. Certainly, all drugs expose patients to risks of side effects and vaccinations are no exception, even if clearly on balance they are safe, effective, and the benefits justify the risks. To address potential harms resulting from vaccination, Congress passed the National Childhood Vaccine Injury Act in 1986,⁸¹ which created the National Vaccine Injury Compensation Program (VICP) in 1988.⁸² According to the Health Resources and Services

⁷⁹ Mark Fischetti, *Too Many Children Go Unvaccinated*, SCI. AM. (May 14, 2013), <http://www.scientificamerican.com/article/too-many-children-go-unvaccinated/> [<http://perma.cc/ZM5X-3LK7>].

⁸⁰ Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353, 421 (2004).

⁸¹ Pub. L. No. 99-660, 100 Stat. 3755 (1986) (codified as amended at 42 U.S.C. §§ 300aa-1 to -34 (2012)).

⁸² *National Vaccine Injury Compensation Program*, U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH RES. & SERVS. ADMIN., <http://www.hrsa.gov/vaccinecompensation/index.html> [<http://perma.cc/YUF5-CQ28>]; see also Katherine E. Strong, Note, *Proving Causation Under the*

Administration, “The VICP was established to ensure an adequate supply of vaccines, stabilize vaccine costs, and establish and maintain an accessible and efficient forum for individuals found to be injured by certain vaccines.”⁸³ The VICP replaced the conventional tort system with a no-fault alternative under which the U.S. Court of Federal Claims determines who is compensated.⁸⁴

Yet, the fear of autism remains deeply entrenched among those apprehensive about vaccination.⁸⁵ Dr. Wakefield’s reported link between vaccinations and a greater risk of autism⁸⁶ continues to influence some parents’ decisionmaking, despite *The Lancet*’s retraction and strong repudiation: “[I]t has become clear that several elements . . . are incorrect, contrary to the findings of an earlier investigation.”⁸⁷ The author of the study has since had his medical license revoked.⁸⁸ Many studies conducted in countries all over the world debunk Dr. Wakefield’s finding because none has found any link between vaccinations and autism or anything other than preventing the spread of communicable disease.⁸⁹ Professor Offit notes that in response to the Wakefield paper, six large epidemiological research studies conducted by academic and public health communities all found the vaccines, and specifically thimerosal in them (which Wakefield had pointed to as the causal agent), “didn’t cause autism.”⁹⁰

Yet, many parents, including celebrities,⁹¹ continue to warn the public that vaccinations either cause or expose children to serious risks of developing autism. As one commentator wrote, “Neither the judicial

Vaccine Injury Act: A New Approach for a New Day, 75 GEO. WASH. L. REV. 426, 433–44 (2007) (describing side effects for vaccines and the Act).

⁸³ U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 82.

⁸⁴ *Id.*

⁸⁵ For example, at the debate among Republican presidential candidates in September 2015, Ben Carson, Rand Paul, and Donald Trump were all hesitant to disavow a suggested link between vaccinations and autism. Michael E. Miller, *The GOP’s Dangerous ‘Debate’ on Vaccines and Autism*, WASH. POST (Sep. 17, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/17/the-gops-dangerous-debate-on-vaccines-and-autism/> [<https://perma.cc/QSW8-J5HR>].

⁸⁶ Wakefield et al., *supra* note 12.

⁸⁷ Editors of the *Lancet*, *supra* note 12; *see also* Simon H. Murch et al., Commentary, *Retraction of an Interpretation*, 363 LANCET 750 (2004).

⁸⁸ Alice Park, *Doctor Behind Vaccine-Autism Link Loses License*, TIME (May 24, 2010), <http://healthland.time.com/2010/05/24/doctor-behind-vaccine-autism-link-loses-license/> [<http://perma.cc/E4VB-3RXX>].

⁸⁹ *See, e.g.*, Brent Taylor et al., *Autism and Measles, Mumps, and Rubella Vaccine: No Epidemiological Evidence for a Causal Association*, 353 LANCET 2026 (1999).

⁹⁰ OFFIT, *supra* note 77, at 96.

⁹¹ *Jim Carrey Slams California School Vaccine Legislation: It’s ‘Poisoning More Children,’* HOLLYWOOD REP. (June 30, 2015, 10:56 PM), <http://www.hollywoodreporter.com/news/jim-carrey-slams-school-vaccine-806187> [<http://perma.cc/UR3L-PYQP>].

decisions, the ethics findings, nor *The Lancet's* retraction appear to have shaken the Wakefield faithful.⁹² And as Dr. Paul Offit explained, while “[i]t’s very easy to scare people; it’s very hard to unscare them.”⁹³

Nor has conclusive medical and scientific literature stopped politicians from making statements that have no basis. In 2015, Kentucky Senator Rand Paul, himself a doctor, said that he had delayed his own children’s vaccinations and claimed that there were “many tragic cases of walking, talking, normal children who wound up with profound mental disorders after vaccines.”⁹⁴ Senator Paul cited no medical or scientific literature to back up his claim. None exists. Did Senator Paul’s political ideology cause him to invent “science” and to lose sight of one of the basic tenets of libertarianism: the government can act to prevent people from harming others?

Dr. Paul Offit expressed it well: “We’ve reached a tipping point. Children are suffering and dying because some parents are more frightened by vaccines than by the diseases they prevent. It is time to put an end to this.”⁹⁵ Thus, we propose doing just that. We advocate that every state amend its law to require that every child be vaccinated and that there be no exemptions except where medically necessary.

We turn our attention to those parents who *refuse* vaccinations based on their religious beliefs against medicine⁹⁶ as well as those who aver medical concerns as their reason for avoiding vaccines. As discussed in Part III, there is no constitutional basis for exempting children from vaccinations based on the religious beliefs of their parents. We analyze why compulsory vaccination laws are constitutional.

III. COMPULSORY VACCINATION LAWS ARE CONSTITUTIONAL

In the discussion of the California bill to eliminate religious and conscience exemptions from the compulsory vaccination law, opponents repeatedly asserted that there is a constitutional right of parents to refuse to inoculate their children. The threatened litigation against the law, which

⁹² John Thomas, *Autism, Medicine, and the Poison of Enthusiasm and Superstition*, 7 J. HEALTH & BIOMEDICAL L. 449, 452 (2012).

⁹³ Shirley S. Wang, *Lancet Retracts Study Tying Vaccine to Autism*, WALL ST. J. (Feb. 3, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704022804575041212437364420> [<https://perma.cc/QU8U-6TVN>].

⁹⁴ Carrie Dann, *Rand Paul: Vaccines Can Lead to ‘Mental Disorders.’* NBC NEWS (Feb. 2, 2015, 5:07 PM), <http://www.nbcnews.com/politics/elections/rand-paul-vaccines-can-lead-mental-disorders-n298821> [<http://perma.cc/ZF75-UPKV>].

⁹⁵ OFFIT, *supra* note 77, at 191.

⁹⁶ For a discussion of religious beliefs against medicine and their consequences, see PAUL A. OFFIT, *BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE* (2015).

seems likely to occur, will be on constitutional grounds.⁹⁷ Rhetorically, of course, claiming that a bill is unconstitutional is a powerful argument. Also, there is no doubt that opponents of compulsory vaccination sincerely believe that parents have a constitutional right to refuse to vaccinate their children.

They are wrong. No such constitutional right exists. In fact, every court to consider challenges to compulsory vaccination laws has upheld the statutes. In this Part, we initially review those cases. We then explain why neither the claimed right of religious freedom nor the asserted right of parents to control the upbringing of their children justifies a constitutional exemption from compulsory vaccination requirements.

A. Courts Have Consistently Rejected Constitutional Challenges to Compulsory Vaccination Laws

The Supreme Court has twice considered constitutional challenges to state laws requiring compulsory vaccination and in both instances rejected the challenges and upheld the laws. Most famously, in *Jacobson v. Massachusetts*, the Court upheld a Massachusetts law that required compulsory smallpox vaccinations for adults.⁹⁸ This case took place during a time when smallpox was a very real and immediate threat to the population of Massachusetts.⁹⁹

The Court held that laws promoting public health or safety fall under a state's police power and are under the sole discretion of the state unless the law violates the Constitution.¹⁰⁰ Additionally, individual rights may need to yield to the state's police power in order to preserve the public health or safety. "There are manifold restraints to which every person is necessarily subjected for the common good."¹⁰¹

The Court then found that the Massachusetts legislature and the Board of Health had the discretion to enact compulsory vaccination when such vaccination is necessary for the public health or safety.¹⁰² The Court explained that smallpox was "prevalent and increasing" in Cambridge, Massachusetts, and, therefore, compulsory vaccination appeared a

⁹⁷ See *Could Proposed Mandatory Vaccine Laws Survive Legal Challenges?*, HEALTH IMPACT NEWS: VACCINE IMPACT (Dec. 5, 2015), <http://vaccineimpact.com/2015/could-proposed-mandatory-vaccine-laws-survive-legal-challenges/> [http://perma.cc/J2JS-HREN].

⁹⁸ 197 U.S. 11, 27 (1905).

⁹⁹ *Id.* at 29–31 (referring to smallpox as an "imminent danger" that "imperilled an entire population").

¹⁰⁰ *Id.* at 25.

¹⁰¹ *Id.* at 26.

¹⁰² See *id.* at 27.

necessity to protect the public health and safety.¹⁰³ Because the law was enacted to combat smallpox, the means prescribed by Massachusetts did have a “real [and] substantial relation to the protection of the public health and the public safety.”¹⁰⁴

The Court also held that skepticisms about the efficacy of vaccinations against diseases among the public or some physicians does not mean that a state legislature cannot enact a compulsory vaccination law.¹⁰⁵ The Court found that the common belief among physicians and the public was that vaccinations do prevent the spread of disease and this common belief was enough to justify the legislature’s actions.

The defendant argued that vaccinations could be harmful and that it would be impossible to tell in an individual case whether a vaccination would be beneficial at all.¹⁰⁶ The Court held that because the defendant could not prove that he was in the class of people who were medically unfit for receiving vaccinations, his argument was not persuasive.¹⁰⁷ The Court noted that this case did not concern an adult who would be harmed by a vaccine. According to the Court, this

[was] the case of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease.¹⁰⁸

In a less well known, but equally important decision, *Zucht v. King*, the Court held that a city can impose compulsory vaccination for all children in school, even if there is no immediate threat of an epidemic like there was in *Jacobson*.¹⁰⁹ In that case, San Antonio, Texas, ordinances required that “no child or any other person shall attend a public school or other place of education without having first presented a certificate of vaccination.”¹¹⁰ Under these ordinances, “public officials excluded Rosalyn Zucht from a public school because she did not have the required certificate

¹⁰³ *See id.* at 28.

¹⁰⁴ *Id.* at 31.

¹⁰⁵ *See id.* at 34–35.

¹⁰⁶ *See id.* at 36.

¹⁰⁷ *See id.* at 36–37.

¹⁰⁸ *Id.* at 39.

¹⁰⁹ 260 U.S. 174 (1922).

¹¹⁰ *Id.* at 175.

and refused to submit to vaccination.”¹¹¹ Public officials also excluded her from private school.

Rosalyn’s parents then brought a suit against the officials in state court. Rosalyn claimed

that there was then no occasion for requiring vaccination; that the ordinances deprive plaintiff of her liberty without due process of law by, in effect, making vaccination compulsory; and, also, that they are void because they leave to the Board of Health discretion to determine when and under what circumstances the requirement shall be enforced without providing any rule by which that board is to be guided in its action and without providing any safeguards against partiality and oppression.¹¹²

The Supreme Court rejected these arguments and held that “the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law.”¹¹³ The Court declared that “these ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health.”¹¹⁴ Therefore, the Court held that a state can constitutionally impose a compulsory vaccination requirement for school children.

These decisions should put an end to arguments that compulsory vaccination laws are unconstitutional. Not surprisingly, all subsequent challenges to such state statutes have been rejected by both federal and state courts.

For example, in *Workman v. Mingo County Board of Education*, the United States Court of Appeals for the Fourth Circuit held that a West Virginia law requiring all school children to be vaccinated, with no exemption for religious reasons, is constitutional.¹¹⁵ The court explained that compulsory vaccination laws are within the state’s police power, even though there may not be an immediate threat of disease. The court of appeals said that Supreme Court has settled that claims of religious freedom must yield to the compelling social interest of combating the spread of disease through mandatory immunization programs.

The court of appeals rejected the parents’ claim of a religious right to not vaccinate their children by citing to *Prince v. Massachusetts*,¹¹⁶ and its holding that “[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 176.

¹¹⁴ *Id.* at 177.

¹¹⁵ 419 F. App’x 348 (4th Cir. 2011).

¹¹⁶ 321 U.S. 158 (1944).

to ill health.¹¹⁷ The court said that *Jacobson*'s holding is not limited to diseases that present an immediate danger.¹¹⁸ The Fourth Circuit thus concluded that “the West Virginia statute requiring vaccinations as a condition of admission to school [did] not unconstitutionally infringe Workman’s right to free exercise.”¹¹⁹

Many other federal courts have come to similar conclusions. In *McCarthy v. Boozman*, a federal district court upheld the Arkansas compulsory vaccination law and declared: “The constitutional right to freely practice one’s religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children.”¹²⁰ In *Sherr v. Northport–East Northport Union Free School District*, a federal district court upheld the New York law and stated: “[I]t has been settled law for many years that claims of religious freedom must give way in the face of the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs.”¹²¹

State courts faced with the issue have come to the identical conclusion. In *Wright v. DeWitt School District*, the Arkansas Supreme Court held that it is within the state’s police power “to require that school children be vaccinated and that such requirement does not violate the constitutional rights of anyone, on religious grounds or otherwise.”¹²²

In fact, some courts have held that religious exemptions to compulsory vaccination laws are unconstitutional because they impermissibly favor religion.¹²³ In *Brown v. Stone*, the Mississippi Supreme Court held that a religious exemption in the Mississippi state compulsory vaccination law for school children was unconstitutional because it only allowed members of recognized denominations to obtain exemption.¹²⁴ The court concluded that because a state compulsory vaccination law could stand on its own without a religious exemption, the law was constitutionally valid without the exemption.

¹¹⁷ 419 F. App’x at 353 (quoting *Prince*, 321 U.S. at 166–67).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 353–54.

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

¹²¹ 672 F. Supp. 81, 88 (E.D.N.Y. 1987).

¹²² 385 S.W.2d 644, 646 (Ark. 1965); *see also* *Cude v. State*, 377 S.W.2d 816, 819 (Ark. 1964) (“According to the great weight of authority, it is within the police power of the State to require that school children be vaccinated against smallpox, and that such requirement does not violate the constitutional rights of anyone, on religious grounds or otherwise.”).

¹²³ For development of this argument, see Allan J. Jacobs, *Do Belief Exemptions to Compulsory Vaccination Programs Violate the Fourteenth Amendment?*, 42 U. MEM. L. REV. 73 (2011).

¹²⁴ 378 So. 2d 218, 223 (Miss. 1979).

The Mississippi Supreme Court found:

[T]he statute in question, requiring immunization against certain crippling and deadly diseases particularly dangerous to children before they may be admitted to school, serves an overriding and compelling public interest, and that such interest extends to the exclusion of a child until such immunization has been effected, not only as a protection of that child but as a protection of the large number of other children comprising the school community and with whom he will be daily in close contact in the school room.¹²⁵

Compulsory vaccinations are so important for protecting our children and the community against dangerous diseases that “[t]o the extent that it may conflict with the religious beliefs of a parent, however sincerely entertained, the interests of the school children must prevail.”¹²⁶

Further, the court concluded:

We have no difficulty here in deciding that the statute is “complete in itself” without the provision for religious exemption and that it serves a compelling state interest in the protection of school children. Therefore, we hold that the provision providing an exception from the operation of the statute because of religious belief is in violation of the Fourteenth Amendment to the United States Constitution and therefore is void.¹²⁷

Because the statute can stand on its own, the rest of it is constitutionally valid and can continue as law. Therefore, only the religious exemption was struck down.

Similarly, in *Davis v. State*, the Maryland Court of Appeals held that the state’s religious exemption clause in its compulsory vaccination statute violated the establishment clause of the First Amendment because it only allowed exemption for children whose parents were members of a recognized church or denomination.¹²⁸ Moreover, the court held that the religious exemption clause was severable from the rest of the statute because compulsory vaccination statutes do not need religious exemption clauses.¹²⁹

Thus, the cases from courts at all levels and from all jurisdictions are unanimous: state laws requiring compulsory vaccination are constitutional. The following Sections more carefully examine the constitutional objections to compulsory vaccination laws.

¹²⁵ *Id.* at 222–23.

¹²⁶ *Id.* at 223.

¹²⁷ *Id.*

¹²⁸ 451 A.2d 107, 113 (Md. 1982).

¹²⁹ *Id.* at 115.

B. *The Objection Based on Religious Freedom*

A frequent objection to compulsory vaccination laws is that they intrude on the right of parents to practice their religion. Parents who oppose medical care on religious grounds contend that their beliefs require a constitutional exemption from mandatory inoculation requirements. Under current First Amendment law this claim is groundless, without even needing to consider whether the state has a sufficient interest in requiring vaccinations.

In 1990, in *Employment Division v. Smith*, the Court held that the Free Exercise Clause cannot be used to challenge a neutral law of general applicability.¹³⁰ In other words, no matter how much a law burdens religious practices, it is constitutional under *Smith* so long as it does not single out religious behavior for punishment and was not motivated by a desire to interfere with religion.

Smith involved a challenge by Native Americans to an Oregon law prohibiting use of peyote, a hallucinogenic substance. Specifically, individuals challenged the state's determination that their religious use of peyote, which resulted in their dismissal from employment, was misconduct disqualifying them from receipt of unemployment compensation benefits.¹³¹

Justice Scalia, writing for the majority, rejected the claim that free exercise of religion required an exemption from an otherwise valid law. Justice Scalia said that “[w]e have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.”¹³² Justice Scalia thus declared “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).’”¹³³

The Court stressed that it should be the political process, and not the judicial, that provides for exemptions in laws to protect religious beliefs. Justice Scalia said that:

Precisely because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference,” and precisely because we value and

¹³⁰ 494 U.S. 872 (1990).

¹³¹ *Id.* at 874.

¹³² *Id.* at 878–79.

¹³³ *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.¹³⁴

The Court said that those seeking religious exemptions from laws should look to the democratic process for protection, not the courts.

There is no doubt that *Smith* changed the test for the free exercise clause. No longer is strict scrutiny used when the challenge is to a neutral law of general applicability. Such laws are upheld so long as they meet a deferential rational basis test. This applies to vaccination. State statutes requiring vaccinations of all children are neutral laws of general applicability. They are not motivated by a desire to interfere with religion and they apply to everyone. Therefore, there is no basis for a First Amendment challenge to compulsory vaccination laws.

In response to *Smith*, Congress adopted two statutes to restore religious freedom rights by statute. Neither provides a basis for challenging compulsory vaccination laws.

Congress adopted the Religious Freedom Restoration Act of 1993 to restore the law to what it was before *Smith*: strict scrutiny for claims that the government is significantly burdening religion, even when it is a challenge to a neutral law of general applicability.¹³⁵ The Act declares that its purpose is “to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and . . . to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”¹³⁶ The key provision of the Act states:

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except . . . [g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.¹³⁷

However, the Supreme Court quickly declared the Religious Freedom Restoration Act unconstitutional as applied to state and local governments. In *City of Boerne v. Flores*, a 6–3 decision, the Court held that the law was unconstitutional as exceeding the scope of Congress’s powers under

¹³⁴ *Id.* at 888 (citation omitted) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)).

¹³⁵ See Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 5 U.S.C. § 504, 42 U.S.C. §§ 1988, 2000bb to 2000bb-4 (2012)), *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹³⁶ § 2(b) (citations omitted).

¹³⁷ § 3(a)–(b).

Section Five of the Fourteenth Amendment. Justice Kennedy, writing for the majority, stated that Section Five empowers Congress to enact laws “to enforce” the amendment, but Congress is not “enforcing” when it creates new constitutional rights or expands the scope of rights.¹³⁸ The Court held that Congress under Section Five may act only to prevent or remedy the violation of rights recognized by the courts. Such laws must be narrowly tailored; they must be proportionate and congruent to prevent and remedy the constitutional violations.¹³⁹ The Religious Freedom Restoration Act was deemed to fail these requirements and was declared unconstitutional as applied to state and local governments. It therefore cannot be used to challenge state laws requiring vaccinations.

In 2000, in response to *City of Boerne v. Flores*, the Religious Land Use and Institutionalized Persons Act was adopted by Congress.¹⁴⁰ This law requires that the government meet strict scrutiny when it significantly burdens religion in two areas: land use decisions and institutionalized persons. Congress justified acting to regulate land use decisions under its commerce power and to regulate institutionalized persons under its spending power as a condition on federal funds. But state laws requiring vaccinations do not involve either of these areas, so this statute is inapplicable as a basis for challenges.

Thus, under current law, there is no basis for a religious challenge—either under the Constitution or federal laws—to state laws’ mandatory vaccinations for all children.

C. Compulsory Vaccination Laws Meet Strict Scrutiny

In addition to claims of free exercise of religion, parents also challenge mandatory inoculation requirements on the ground that it infringes their constitutional right as parents to control the upbringing of their children. The Court has recognized this as a fundamental right protected under the word “liberty” of the Due Process Clause.

In *Meyer v. Nebraska*, in 1923, the Supreme Court declared a state law unconstitutional that prohibited teaching in any language other than English in the public schools.¹⁴¹ The Court invalidated the law, not on First Amendment grounds, but by using substantive due process and finding that

¹³⁸ See *Flores*, 521 U.S. at 519. For a criticism of this aspect of *City of Boerne v. Flores*, see Erwin Chemerinsky, *The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601 (1998).

¹³⁹ *Flores*, 521 U.S. at 514, 520.

¹⁴⁰ Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2012)).

¹⁴¹ 262 U.S. 390, 403 (1923).

the statute violated the right of parents to make decisions for their children.¹⁴² Similarly, two years later, in *Pierce v. Society of Sisters*, the Supreme Court held unconstitutional a state law that required children to attend public schools.¹⁴³ The Court explained that:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹⁴⁴

Fifty years later, in *Wisconsin v. Yoder*, the Supreme Court held that Amish parents had a constitutional right, based on their right to control the upbringing of their children and based on free exercise of religion, to exempt their 14- and 15-year-old children from a compulsory school attendance law.¹⁴⁵ The Court said that:

[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children.¹⁴⁶

The Court gave great weight to the parents' claim that additional education would threaten their children's religious beliefs and to the uniquely insulated nature of the Amish culture. The Court accepted the argument that applying the mandatory schooling law to 14- and 15-year-old Amish children would interfere with free exercise of religion and with the ability of parents to make decisions concerning their children. The Court noted that there was no evidence of "any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare."¹⁴⁷ The Court thus concluded that "[u]nder the doctrine of *Meyer v. Nebraska*, . . . we think it entirely plain that the Act . . . interferes with the liberty of

¹⁴² In part, this is because the First Amendment had not yet been incorporated into the Fourteenth Amendment and applied to the states. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (finding that the First Amendment applies to the states through its incorporation into the Due Process Clause of the Fourteenth Amendment).

¹⁴³ 268 U.S. 510 (1925).

¹⁴⁴ *Id.* at 535.

¹⁴⁵ 406 U.S. 205, 207–08 (1972).

¹⁴⁶ *Id.* at 214.

¹⁴⁷ *Id.* at 230.

parents and guardians to direct the upbringing and education of children under their control.”¹⁴⁸

The Supreme Court most recently considered the right of parents to control the upbringing of their children in the context of a state law protecting grandparents’ rights. In *Troxel v. Granville* the Supreme Court declared unconstitutional Washington’s grandparent visitation law as violating the right of parents to control the upbringing of their children.¹⁴⁹ Justice O’Connor’s plurality opinion began by noting the fundamental nature of the right involved: “The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”¹⁵⁰ The plurality found that the Washington law, as applied in this case, was unconstitutional as infringing on this fundamental right.

There is thus a stronger claim that state laws requiring compulsory vaccination infringe the right of parents to control the upbringing of their children than there is an argument that such laws infringe free exercise of religion. However, and quite significantly, the Court also has recognized that the right to make parenting decisions is not absolute and can be interfered with by the state if necessary to protect a child. For example, in *Prince v. Massachusetts*, the Court upheld the application of child labor laws to a nine-year-old girl who was soliciting for the Jehovah’s Witnesses religion at the direction of her parents.¹⁵¹

In *Prince*, the Court acknowledged that there is a “private realm of family life which the state cannot enter.”¹⁵² But the Court also opined that:

[T]he family itself is not beyond regulation in the public interest Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways.¹⁵³

The Court observed that the need to protect children from being exploited and harmed justified upholding laws prohibiting child labor, even if the work was at the direction of the parents and even if it was undertaken for religious purposes.¹⁵⁴

¹⁴⁸ *Id.* at 232–33 (quoting *Pierce*, 268 U.S. at 534–35).

¹⁴⁹ 530 U.S. 57, 72–73 (2000).

¹⁵⁰ *Id.* at 65.

¹⁵¹ 321 U.S. 158 (1944).

¹⁵² *Id.* at 166.

¹⁵³ *Id.* (footnotes omitted).

¹⁵⁴ The free exercise aspect of this case is discussed in ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 12.3.2 (5th ed. 2015).

State laws that require compulsory vaccination of all children, except when there is a medical reason to not inoculate, meet strict scrutiny. The government has a compelling interest in protecting children from communicable diseases, which could kill or seriously injure them. In fact, courts across the country have consistently held that states can require medical care that potentially could save a child's life, even when the parents object on religious or other grounds.¹⁵⁵ As we emphasize in this Essay, the government also has a compelling interest in protecting others from the spread of communicable diseases. For example, infants and those who cannot be vaccinated for medical reasons need the rest of the population to be vaccinated in order to be protected from communicable diseases.¹⁵⁶

Strong and irrefutable medical and scientific evidence demonstrates that there is no less restrictive alternative except to require every person to be vaccinated. Only vaccinations can protect children from communicable diseases. Only by vaccinating every child who medically can be inoculated, can there be protection for those who cannot be vaccinated, whether by reason of being too young or it being medically inadvisable.

In other words, compulsory vaccination laws meet strict scrutiny. As demonstrated in this Essay, that is why every court to consider them has deemed compulsory vaccination to be constitutional.

CONCLUSION

Claims of personal freedom understandably and deservedly carry great weight in our society. But one of the most basic principles of liberty is that a person's freedom does not justify infringing injury on others. Those who fail to vaccinate their children are unnecessarily risking that their children will be exposed to communicable diseases that can have serious or even fatal consequences. Those not vaccinated also can spread communicable diseases to others in society who cannot be vaccinated.

¹⁵⁵ See, e.g., *Walker v. Superior Court*, 763 P.2d 852, 855 (Cal. 1988) (“[A] prosecution for involuntary manslaughter and felony child endangerment can be maintained against the mother of a child who died of meningitis after receiving treatment by prayer in lieu of medical attention.” (citations omitted)); *People v. Rippberger*, 283 Cal. Rptr. 111 (Cal. Ct. App. 1991) (noting the free exercise of religion does not mean that a parent can engage in conduct that is life-threatening to his or her child, and therefore a parent is liable if he or she utilizes prayer treatment instead of medical treatment and thus causes the child harm or death); *In re McCauley*, 565 N.E.2d 411 (Mass. 1991) (finding it is appropriate for a state to order medical treatment for a sick child over a parent's religious objections; although parents' rights over their children and religious rights are important, those rights must yield to the state's interest in keeping a child alive when that child is dangerously ill).

¹⁵⁶ See *supra* Part II.

Our conclusion is that laws that require vaccination need not—and should not—have exceptions for religion or for conscience. Compulsory vaccination laws are unquestionably constitutional without such exceptions. Indeed, we urge every state to revise its vaccination law to make sure that every child, and every person, is vaccinated unless there is a medical reason not to do so.

