
Timothy J. Aspinwall

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Religious Exemptions to Childhood Immunization Statutes: Reaching for a More Optimal Balance Between Religious Freedom and Public Health

Timothy J. Aspinwall

I. INTRODUCTION

State immunization laws expose a tension between society's commitment to both religious freedom and public health. While each of the fifty states requires children to undergo a standard set of immunizations prior to entering school, forty-eight states grant religious exemptions to this requirement. Though exemptions are not

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* B.A. 1983, University of Utah; J.D. 1986, Vanderbilt University; M.A. Religious Studies 1995, University of Chicago; Academic Fellow, 1996, MacLean Center for Clinical Medical Ethics, University of Chicago.

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necessarily incompatible with corresponding general requirements, the
tension between public health and religious freedom arises from the
fact that the respective advocates for each often advance competing
policy objectives. Advocates for religious freedom will generally
favor exemptions to vaccination requirements, and public health
advocates will more often focus on the need to maximize the
immunization rate. This division of policy objectives is driven
primarily by religious and public health interests that are motivated by
different values. Consequently, advocates for these competing
interests will frequently weigh the benefits and burdens of a given
policy very differently.

A common characteristic of religious values is that they are
developed around or inspired by a source of ultimate authority,

§ 23-07-17.1(1)-(3) (Supp. 1995); OHIO REV. CODE ANN. § 3313.671(A),
3313.671(A)(3) (Anderson 1994); OKLA. STAT. tit. 70, §§ 1210.191(a),
24, § 13-1303(a), 13-1303(a)(d) (West 1992); R.I. GEN. LAWS § 16-38-2 (1996); S.C.
CODE ANN. § 44-29-180(A), 44-29-180(D) (Law Co-op. Supp. 1996); S.D. CODIFIED
LAWS § 13-28-7-1, 13-28-7-1(2) (Michie Supp. 1997); TENN. CODE ANN. § 49-6-
5001(a), 49-6-5001(b)(2) (1996); TEX. HEALTH & SAFETY CODE ANN. § 161.004(a),
161.004(d)(1) (West Supp. 1997); UTAH CODE ANN. §§ 53A-11-301(1), 53A-11-
302(3)(c) (1997); VT. STAT. ANN. tit. 18, §§ 1121, 1122(a)(3) (1982); VA. CODE ANN. §
22.1-271.2(A), 22.1-271.2(C) (Michie 1993); WASH. REV. CODE ANN. §§
28A.210.080, 28A.210.090(2) (West Supp. 1996); WIS. STAT. ANN. § 252.04(2),
252.04(3) (West Supp. 1995); WYO. STAT. ANN. § 21-4-309(a) (Michie 1997). A couple
of states recently repealed their laws granting religious exemptions for required
immunizations prior to entering school. See ALASKA STAT. §§ 14.30, 125 (repealed
1996); HAW. REV. STAT. §§ 298-42(a), 298-44(2) (repealed 1996). West Virginia and
Mississippi are the two states that do not grant religious exemptions to the vaccination
requirement. See MISS. CODE ANN. § 41-23-37 (Supp. 1994); W. VA. CODE § 16-3-4
(1995); CENTER FOR DISEASE CONTROL AND PREVENTION, U.S. DEPARTMENT OF HEALTH &
HUMAN SERVICES, STATE IMMUNIZATION REQUIREMENTS 1 (1993-94) [hereinafter STATE
IMMUNIZATION REQUIREMENTS].

Diseases against which most states require vaccination for school children are
diphtheria, tetanus, pertussis, measles, mumps, rubella, and polio. See STATE
IMMUNIZATION REQUIREMENTS. Seventeen states also grant philosophical objections to
childhood vaccination requirements. This essay does not address the issues attendant to
philosophical exemptions.

2. See American Health Consultants, Religion and Medicine Clash Over Deadly
Measles Epidemic, 7 MED. ETHICS ADVISOR 41, 42 (1991) (discussing whether to
vaccinate children over parents' religious objection or permit parents to pursue other
strategies such as temporary isolation). The American Academy of Pediatrics ("AAP"),
not surprisingly, gives priority to children's health, and takes a position that criticizes
vaccination exemptions and advocates for their repeal: "The AAP asserts that every
child should have the opportunity to grow and develop free from preventable illness or
injury." Commission on Bioethics, Am. Academy of Pediatrics, Religious Objections
to Medical Care, 99 PEDIATRICS 279, 279 (1997). However, "[t]he AAP does not support
the stringent application of medical neglect laws when children do not receive
recommended immunizations." Id.
something to which all else refers. As a consequence, religious beliefs and priorities are often more responsive to religious teachings than to the social concerns and epidemiological data that motivate public health advocates. This is not to suggest that religious teachings do not share similar concerns with public health advocates—they often do. Rather, religious believers and public health advocates often begin with entirely different assumptions about what is ultimately good for humanity. In the case of vaccination policy, these diverging starting assumptions have led to sharp differences between public health advocates and religious believers.

The central task of this Essay is to identify a policy that better accommodates society’s interest in both religious freedom and public health. This Essay begins with a discussion of some specific tensions between public health and religious freedom. Next, the Essay sets forth a brief review of Supreme Court rulings on state intervention into the parent-child relationship, and the early precedent on vaccination jurisprudence. The discussion points out that improvements in public health during recent decades are significant to a reasonable discussion of vaccination policy. This Essay then addresses the question of whether the Free Exercise Clause of the First Amendment requires religious exemptions from generally applicable laws that burden religion. The discussion acknowledges the prevailing precedent that religious exemptions to vaccination requirements are not constitutionally mandated, but it demonstrates that legislative exemptions are a reasonable accommodation, if the public health is not seriously threatened by them. Discussion of precedent also shows that religious exemptions are permissible under the Establishment Clause. However, exemption eligibility must be defined so broadly in order to comply with free exercise standards that vaccination exemptions may compromise the public health by reducing population immunity.

Finally, this Essay suggests that a more optimal balance between

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3. See infra note 109 and accompanying text.
5. See infra Part II.
6. See infra Part III.
7. The U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.
8. See infra Part IV.A.
9. See infra Part IV.B.
10. See infra Part IV.
religious freedom and public health can be achieved by implementing programs that more efficiently administer voluntary childhood vaccinations, while maintaining religious exemptions.11

II. TENSIONS BETWEEN PUBLIC HEALTH AND RELIGIOUS FREEDOM

Public health advocates worry about religious exemptions to childhood vaccination requirements because exempt youth may become infected and spread disease within exempt and nonexempt communities.12 One example of this occurred in a 1994 multistate measles outbreak that began when a religiously exempt Christian

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11. See infra Part V.
12. The diseases targeted by vaccination requirements are characterized as follows:

Diphtheria is a toxin-mediated infection of the mucous membranes at sites including the anterior nasal area, tonsils and pharynx, larynx, and outer skin. Diphtheria can result in prostration, coma, or death. The fatality rate is approximately 20% in cases involving persons under the age of five or older than forty. See CENTER FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERV., EPIDEMIOLOGY AND PREVENTION OF VACCINE-PREVENTABLE DISEASES 35-38 (William Atkinson et al. eds., 2d ed. 1995) [hereinafter EPIDEMIOLOGY AND PREVENTION].

Tetanus is an acute disease characterized by increasing muscle rigidity and spasms of the jaw and neck muscles, becoming more generalized as the disease progresses. The fatality rate is approximately 30%. See id. at 47-49.

Pertussis, or whooping cough, is an acute toxin-mediated infectious disease that causes inflammation of the respiratory tract. The disease is characterized by attacks of rapid coughing, during which the patient may become oxygen deprived. Brain damage from oxygen deprivation can result. Pertussis can be fatal. See id. at 57-59.

Poliomyelitis is a viral infection most commonly affecting the spinal cord and cells of the central nervous system. Approximately 95% of cases are subclinical, while less than 1% are paralytic. The fatality rate for children infected with paralytic polio is 2-5%. See id. at 73-75.

Measles is an acute viral systemic infection. The disease is characterized by a fever of 102-105 degrees F., followed by a rash that begins at the hairline and moves downward and outward to the hands and feet. Pneumonia is the most common serious complication, occurring in approximately 6% of cases. The fatality rate is approximately 2/1000. See id. at 85-88.

Mumps is an acute viral infection that replicates in the nasopharynx and regional lymph nodes, and it can spread to the salivary glands, testes, ovaries, pancreas, and cerebral spinal fluid. The most common manifestations are swollen salivary glands and headaches with stiff neck. Testicular swelling occurs in 20-50% of postpubertal males, and ovarian inflammation occurs in approximately 5% of postpubertal females. Deafness occurs in 1/20,000 cases. The fatality rate is 1-3.4/10,000. See id. at 101-04.

Rubella is a virus that infects the nasopharynx and regional lymph nodes, and it spreads throughout the body. The disease is most commonly manifested in a rash that is fainter than the measles rash. Arthritis or arthralgia lasting up to one month also occurs in up to 70% of adult women. The most serious effect is Congenital Rubella Syndrome, which can cause deafness, eye defects, cardiac defects, and neurologic abnormalities for infants infected during gestation. See id. at 111-14.
Science high school student transported the disease from her Colorado vacation site to her home in Illinois and boarding school in Missouri. The disease then spread among persons both inside and outside of the Christian Science community. Additionally, instances of more localized outbreaks of vaccine-preventable disease demonstrate how disease can spread geographically and between exempt and nonexempt communities.

Public health advocates strongly support comprehensive childhood vaccination programs because these programs dramatically reduce disease rates and can ultimately eliminate a disease from a given population by reducing the number of vulnerable hosts. However, the ultimate success of these programs requires that the vaccination rate within a population and its subgroups be sufficiently high to provide effective population immunity. This rate varies between eighty and ninety-five percent, depending on the disease. Public health advocates fear that vaccination exemptions may make it more difficult to achieve population immunity.

Even though religiously exempt persons comprise a small portion of the population, they often form concentrated communities that are more vulnerable to disease, and often can transmit disease into the larger nonexempt population.


14. See, e.g., Benita M. Jackson et al., An Epidemiologic Investigation of a Rubella Outbreak Among the Amish of Northeastern Ohio, 108 PUB. HEALTH REP. 436 (1993); Center for Disease Control & Prevention, U.S. Dep't of Health & Human Serv., Isolation of Wild Poliovirus Type 3 Among Members of a Religious Community Objecting to Vaccination—Alberta, Canada 1993, 269 JAMA 3104 (1993); Desiree V. Rodgers et al., High Attack Rates and Case Fatality During a Measles Outbreak in Groups with Religious Exemption to Vaccination, 12 PEDIATRIC INFECTIOUS DISEASE J. 288 (1993); Peter A. Briss et al., Rubella Among the Amish: Resurgent Disease in a Highly Susceptible Community, 11 PEDIATRIC INFECTIOUS DISEASE J. 955 (1992).


16. See Anderson and May, supra note 15, at 642.

17. See id. at 641-42. The vaccination coverages necessary to block transmission within a population are as follows: for measles and pertussis, 92-95%; mumps, 90-92%; rubella, 85-87%; diphtheria and polio, 80-85%. See id. at 642.

18. See John Fox et al., Herd Immunity: Basic Concept and Relevance to Public Health Immunization Practices, 94 AM. J. EPIDEMIOLOGY 179, 185 (1971). See generally Paul Fine, Invited Commentary on "Herd Immunity: Basic Concept and Relevance to
vulnerable to the targeted diseases for two reasons. First, vaccinations are less than one hundred percent effective. The efficacy rate for most of the targeted diseases is approximately ninety-five to ninety-seven percent.\textsuperscript{19} Also, there are indications that some vaccinations may lose their efficacy over time, thus requiring vaccinees to obtain boosters to retain their immunity.\textsuperscript{20} However, the second and more significant reason for vulnerability within the larger population is that young children remain seriously undervaccinated.\textsuperscript{21} This poor vaccination rate puts children and the larger community at risk.\textsuperscript{22} Given that vaccinations can significantly reduce or eliminate serious disease risks, public health advocates may reasonably argue that exemption statutes should be repealed. A forceful claim for such a position is that protecting unvaccinated children and the general public from the continuing risks of contagious disease is sufficiently important to justify childhood vaccination requirements, religious interests notwithstanding.

Advocates for religious freedom have a different view. Although such advocates take positions as diverse and varied as religion itself, they often will disagree with a public health priority claim to mandate religiously objectionable vaccinations.\textsuperscript{23} Religious advocates


19. The efficacy rate for vaccinations is as follows: for tetanus and polio, 100%; diphtheria, 95%; measles, 93-98%; mumps and rubella, 90-97%; pertussis, 70-90%. \textit{See EPIDEMIOLOGY AND PREVENTION, supra} note 12, at 53, 79, 43, 97, 106, 118, and 63 respectively.

20. The duration of vaccination efficacy is as follows: polio, measles, mumps, and rubella remain effective for life; diphtheria and tetanus remain effective for approximately ten years; pertussis is approximately 50% effective at four to seven years, and is ineffective at twelve years. \textit{See EPIDEMIOLOGY AND PREVENTION, supra} note 12, at 79, 96, 106, 118, 42, and 52 respectively.

21. \textit{See} Center for Disease Control \& Prevention, U.S. Dep't of Health \& Human Serv., National, State, and Urban Area Vaccination Coverage Levels Among Children Aged 19-35 Months—United States, April 1994-March 1995, 45 MORBIDITY \& MORTALITY WKLY. REP. 145, 145 (1996). A recent survey shows that 75% of U.S. children ages nineteen to thirty-five months have been fully vaccinated. Although this is the highest rate ever achieved in the United States, it is still significantly lower than the goal of a 90% rate of vaccination by 2000 set by the Center for Disease Control. \textit{See id.} at 146.

22. The Center for Disease Control attributed the 1989-1991 resurgence of measles in the United States (an estimated 55,000 cases, 11,000 hospitalizations, and 130 deaths) primarily to a low vaccination rate among preschool children. \textit{See} Center for Disease Control \& Prevention, U.S. Dep't of Health \& Human Serv., \textit{Reported Vaccine-Preventable Diseases—United States, 1993, and the Childhood Immunization Initiative, 43 MORBIDITY \& MORTALITY WKLY. REP. 57, 58 (1994) [hereinafter Reported Vaccine—Preventable Diseases].

23. \textit{See} supra note 4 and accompanying text.
reasonably can claim that the state has no moral authority to force citizens to subordinate their religious beliefs to public health mandates when the state has not done all it can do to advance the public health through voluntary means. On this issue, religious advocates may point out that more effective voluntary vaccination programs for preschool children could improve the public health significantly. This point must be taken seriously, given the fact that unvaccinated children under the age of five form a significant portion of the victims of vaccine-preventable diseases. On this basis, religious advocates can make a strong argument that state policies that privilege public health over religious interests are discredited by the state’s failure to maximize voluntary childhood immunizations, if more efficient voluntary immunization programs would effectively suppress contagious disease.

Religious advocates also may argue that eliminating exemptions would permit the state to unfairly intrude upon parental rights to care for and protect their children from harm. A primary point here is that vaccinations may have serious adverse consequences. In defending

24. See supra note 22. The numbers of vaccine-preventable diseases in the United States during 1992 and 1993 were as follows:

<table>
<thead>
<tr>
<th>Disease</th>
<th>1992 Total Cases</th>
<th>1993 Total Cases</th>
<th>1992 Cases among Children &lt; 5 years old</th>
<th>1993 Cases among Children &lt; 5 years old</th>
</tr>
</thead>
<tbody>
<tr>
<td>Diphtheria</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Measles</td>
<td>2,231</td>
<td>281</td>
<td>1,116</td>
<td>104</td>
</tr>
<tr>
<td>Mumps</td>
<td>2,485</td>
<td>1,640</td>
<td>364</td>
<td>275</td>
</tr>
<tr>
<td>Pertussis</td>
<td>3,935</td>
<td>6,335</td>
<td>2,261</td>
<td>3,753</td>
</tr>
<tr>
<td>Poliomyelitis</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Rubella</td>
<td>157</td>
<td>195</td>
<td>24</td>
<td>36</td>
</tr>
<tr>
<td>Tetanus</td>
<td>44</td>
<td>43</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

See Report of Vaccine—Preventable Diseases, supra note 22, at 58.

25. The federal government is making efforts to increase the childhood vaccination rate; however, political realities prevent the enabling legislation from being as thorough as originally proposed. See infra notes 144-48 and accompanying text. Individual states are also making efforts to increase the rate of voluntary vaccination. For example, the Georgia Division of Public Health was able to increase the vaccination rate of children served at all of the public health clinics in the state from 35% in 1987 to 80% in 1993. See Center for Disease Control & Prevention, U.S. Dep’t of Health & Human Serv., Evaluation of Vaccination Strategies in Public Clinics—Georgia, 1985-1993, 44 MORBIDITY & MORTALITY Wkly. Rep. 323, 323 (1995).

26. In 1991 and again in 1993, the Institute of Medicine released reports on the adverse events associated with vaccinations. Evidence in the 1991 report indicates a causal relation in the following instances: between diphtheria/tetanus/pertussis (DTP) vaccination and anaphylaxis (6/100,000 for three doses), between DTP and protracted inconsolable crying (.1%-6%), and between RAE 27/3 rubella vaccination and acute arthritis (13%-15% among adult women). The evidence is consistent with a causal relation between DTP vaccination and acute encephalopathy (up to 10.5/1,000,000), between DTP and shock-like symptoms (between 3.5 and 291/100,000), and between
the choice not to vaccinate, the religious advocate may point out that the risk of the child becoming infected with a vaccine-preventable disease is very small and that the parent should have the right to choose between the risk of disease and the possibility of harm from vaccine. This argument has particular force because parents are permitted and even encouraged to engage in activities, such as driving children to school, that present a greater risk of harm than the targeted diseases.

Another important point that religious advocates may make is that there can be punitive consequences for parents who fail to comply with vaccination requirements. If there is no religious exemption, or if the court finds that the parents’ beliefs do not qualify for an exemption, then the state may hold parents criminally liable for causing their child’s truancy because vaccination is a precondition for school attendance. The religious advocate’s claim here would be that if the state requires vaccinations over parents’ religious objections, it should use enforcement mechanisms that do not require parents to choose

rubella vaccination and chronic arthritis (no reliable estimated frequency). See Christopher P. Howson & Harvey V. Fineberg, Adverse Events Following Pertussis and Rubella Vaccines, 267 JAMA 392, 395-96 (1992) (emphasis added).

Evidence in the 1993 Institute of Medicine report favors acceptance of a causal relation in the following instances: between diphtheria/tetanus toxoid (DT/Td/T) vaccination and Guillain-Barre syndrome (very rare), between DT/Td/T and brachial neuritis (.5-1.0/100,000 tetanus toxoid recipients), between measles vaccination and anaphylaxis (very rare), and between oral polio vaccine (OPV) and Guillain-Barré syndrome (very rare). This evidence establishes a causal relation in the following instances: between D/Td/T and anaphylaxis; between measles-mumps-rubella (MMR) vaccination and thrombocytopenia, anaphylaxis, and death (all very rare); and between oral polio vaccine (OPV) and paralysis and death (both very rare). See Kathleen R. Stratton et al., Adverse Events Associated with Childhood Vaccines Other than Pertussis and Rubella, 271 JAMA 1602, 1604-05 (1994) (emphasis added).

In response to the possibility of injury from required vaccinations, Congress established the National Vaccine Injury Compensation Program. See 42 U.S.C. § 300aa-13 (1991). The program permits persons to seek compensation from a government fund if they suffer specified illnesses within a specified time of vaccination. See id.

In the meantime, government advisory committees continue to recommend safer vaccinations. A government advisory panel has recommended that an injection of inactivated virus be used rather than the current oral vaccination with a live attenuated virus. See U.S. Panel Proposes a Change in Administering Polio Vaccine, N.Y. TIMES, June 21, 1996, at A8.

27. West Virginia immunization statutes provide for fines of ten to fifty dollars for each instance in which a parent refuses to have his/her child vaccinated. See W. VA. CODE § 16-3-4 (1997). For an example of a parent being fined for refusing to submit his child to state mandated vaccination requirements, see Cude v. State, 377 S.W.2d 816 (Ark. 1964).

between their religious convictions and avoiding criminal penalty.

As the next section shows, states have not always done very much to avoid imposing a choice between religious belief and secular law when the public health is involved.

III. EARLY SUPREME COURT VACCINATION JURISPRUDENCE

The earliest, most significant case in American vaccination jurisprudence is *Jacobson v. Massachusetts.* In *Jacobson*, the United States Supreme Court affirmed the criminal conviction of a Massachusetts man who refused to accept a legislatively mandated smallpox immunization. The appellant unsuccessfully claimed that the State violated his rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses when the state gave the local board of health power to require his vaccination, thereby denying him equal protection by exempting children and not adults. The Court held that the state has police power to establish regulations reasonably designed to protect the public health, and that it has the prerogative to determine the means best suited to this objective. Recognizing that public health mandates may legitimately burden a person’s individual liberties, the Court noted that liberty "does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good." This principle remains central to the state’s police power to enact compulsory vaccination laws in the interest of public health.

The Supreme Court next commented upon the vaccination issue in *Zucht v. King*, a case involving childhood immunization requirements. In *Zucht*, a San Antonio, Texas girl argued that her Fourteenth Amendment due process and equal protection guarantees were violated by city ordinances authorizing the board of health to prevent her school attendance unless she received required vaccinations. She claimed that the statute was unconstitutional because it failed to provide "any safeguards against partiality and oppression." The Court reaffirmed its ruling in *Jacobson* by dismissing her claim. The Court noted that *Jacobson* already had

29. 197 U.S. 11 (1904).
30. See id. at 14.
31. See id. at 25.
32. Id. at 26.
33. See supra text accompanying note 1.
34. 260 U.S. 174 (1922).
35. Id. at 175.
effectively answered all the constitutional questions presented by the Texas case.\(^{36}\)

Although \textit{Jacobson} and \textit{Zucht} involved due process and equal protection claims rather than First Amendment religious freedoms, they established the state’s general authority to require immunizations in the interest of public safety. The state’s authority set forth in \textit{Jacobson} was extended into the context of families and religious freedom by the Court’s 1944 ruling in \textit{Prince v. Massachusetts}.\(^{37}\) The particular issue in \textit{Prince} was whether a statute prohibiting childhood labor violates free exercise or equal protection guarantees when applied to proscribe a child’s distribution of religious pamphlets. The Court upheld the statute and sustained the conviction of a Jehovah’s Witness woman for permitting her nine-year-old niece, of whom she had legal custody, to sell religious pamphlets on the street in the evening. The Court decided the case on the basis of religious freedom, finding that, under the circumstances, equal protection guarantees are “another phrasing” of free exercise protection.\(^{38}\) The Court recognized both the child’s and the parent’s religious freedom in the context of a family, but it held that free exercise guarantees do not preclude regulation of family practices in order to protect a child’s well being.\(^{39}\) Taking note

\(^{36}\) See id. at 176.

\(^{37}\) 321 U.S. 158 (1944). The Court’s opinion in \textit{Prince} set forth a concise review of Supreme Court precedent on the issue of parents’ rights to teach and encourage their children to practice the parents’ chosen religion, as well as the right of schools and teachers to offer their services. See, e.g., W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (finding a state violation of First Amendment by forcing students to say the “Pledge of Allegiance” and by punishing parents for teaching their religious prohibitions against reciting the pledge); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding a violation of Fourteenth Amendment Due Process rights for requiring children to go to public rather than private school); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that Fourteenth Amendment Due Process rights are violated by laws that restrict the teaching of foreign languages). The \textit{Prince} opinion also set forth a Supreme Court precedent that permitted Congress to intervene in family relationships. See \textit{Prince}, 321 U.S. at 164-66 (citing Reynolds v. United States, 98 U.S. 145 (1878); Davis v. Beason, 133 U.S. 333 (1890), \textit{rev’d on other grounds}, Romer v. Evans, 116 S. Ct. 1620, 1628 (1996) (holding that the First Amendment does not prevent Congress from prohibiting polygamy and distinguishing between permissible regulation of conduct and impermissible regulation of opinion or belief)).


\(^{39}\) See \textit{Prince}, 321 U.S. at 166. “But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty . . . . Acting to guard the general interest in youth’s well being, the state as \textit{parens patriae} may restrict the parent’s
of what it called the "crippling effects of child employment," the Court stated that "[p]arents may be free to become martyrs themselves. But it does not follow [that] they are free . . . to make martyrs of their children . . . ." This phrase, used in conjunction with Jacobson, is the central precedent for the prevailing rule in vaccination cases that parents' religious freedom must give way to the state's interest in protecting the public health and individual children. However, factual distinctions give cause to question the utility of this precedent in the contemporary vaccination context.

Jacobson, perhaps the most frequently cited vaccination case, was decided during a time of dangerously high smallpox infection rates. Today, vaccine-preventable disease rates are much lower and vaccination rates are much higher. Thus, vaccination exemptions present a much smaller health risk for individuals and society. This fact makes it more reasonable to allow exemptions from generally applicable vaccination requirements.

IV. FIRST AMENDMENT ACCOMMODATIONS

A First Amendment accommodation occurs when the state removes a burden that is imposed upon religion by state action and thus permits religious freedom that would not be present without the accommodation. In the vaccination context, religious accommodation is manifested in exemptions from generally applicable vaccination requirements. The next section discusses whether free exercise requires religious exemptions to generally applicable laws. The issue of whether and when discretionary legislative

control . . . ." Id. (citations omitted).

40. Id. at 168.
41. Id. at 170.
43. See Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905).
44. See supra note 21.
45. Religious accommodations, as discussed in this Essay, include both accommodations that are constitutionally required under the Free Exercise Clause, and those that are discretionary, whereby the state may choose to grant legislative exemptions within the limits of the Establishment Clause. See Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 GEO. WASH. L. REV. 685, 686 (1992) [hereinafter McConnell, Accommodation].
accommodations impermissibly advance or cause government entanglement with religion is discussed under the section on establishment.\textsuperscript{46}

\section*{A. Free Exercise}

The Supreme Court currently holds that the First Amendment protects religion from state action directed at religion, but not from burdens that are incidental to neutral, generally applicable laws.\textsuperscript{47} This interpretation of free exercise protections became law with the Court’s majority opinion in \textit{Employment Division v. Smith}. In \textit{Smith}, the Court upheld the denial of unemployment benefits to two Native American men who had been dismissed from their jobs for religiously inspired peyote use during their period of employment.\textsuperscript{48} The two men in this case, arguing as respondents, claimed that the law excluding them from eligibility burdened their free exercise of religion, and that they should, therefore, be exempt from its application unless the state could show that the law was narrowly tailored to serve a compelling state interest.\textsuperscript{49} The respondents sought support for their position by citing the Court’s holdings in \textit{Wisconsin v. Yoder},\textsuperscript{50} and \textit{Sherbert v. Verner} that, until \textit{Smith}, had formed a centerpiece of free exercise jurisprudence.

In \textit{Sherbert}, the Court established the compelling interest test, which required the State to justify laws or policies that burden fundamental rights by showing that the state action serves a compelling state interest by the least intrusive means.\textsuperscript{52} The Court ruled that South Carolina violated a Seventh Day Adventist woman’s free exercise rights by conditioning her eligibility for unemployment insurance compensation upon her willingness to accept work on Saturdays, her Sabbath.\textsuperscript{53} The Court held that the denial of benefits constituted an indirect burden on the woman’s free exercise rights because she may have felt pressure to abandon her religious practices.\textsuperscript{54} Because the fundamental right of religious freedom was burdened by this denial of benefits, the Court

\begin{footnotes}
\item[46] See infra Part IV.B.
\item[48] See Smith, 494 U.S. at 890.
\item[49] See id. at 878, 882-83.
\item[50] 406 U.S. 205 (1972).
\item[51] 374 U.S. 398 (1963).
\item[52] See id. at 406-08.
\item[53] See id. at 403-04.
\item[54] See id. at 404.
\end{footnotes}
inquired whether the State had shown a compelling interest in the employment law.\textsuperscript{55} The State did not show that fraudulent unemployment claims constituted a public threat, that any had actually been filed, or that the rule in question was the least intrusive means of preventing unemployment fraud.\textsuperscript{56} Thus, the Court held that the restriction on unemployment eligibility was a violation of First Amendment free exercise guarantees.\textsuperscript{57}

In \textit{Yoder}, the issue before the Court was whether the Free Exercise Clause mandated an exemption from a law requiring formal schooling for children up to the age of sixteen in order to allow the Amish community to provide schooling only at home for their children after eighth grade. In this case, the Supreme Court affirmed a Wisconsin Supreme Court decision reversing the criminal convictions of certain members of the Old Order Amish.\textsuperscript{58} The Court found that the law directly burdened the Amish religious practices, and therefore it inquired whether there was a compelling state interest.\textsuperscript{59} The Court acknowledged the state’s interest in universal education, but it found that even this “paramount responsibility” must be balanced against the fundamental rights protected by the Free Exercise Clause.\textsuperscript{60} The Court ruled that home-schooling provided by the Amish community satisfied both the religious imperatives and the State’s interest in ensuring that children are properly educated.\textsuperscript{61}

A distinctive feature of both \textit{Sherbert} and \textit{Yoder} is that the states were required to justify either an indirect burden (denial of unemployment benefits in \textit{Sherbert}) or a direct burden (coerced educational requirements in \textit{Yoder}) by showing a compelling interest. Given that religiously-objectionable vaccination requirements impose both direct and indirect burdens (the threat of criminal prosecution for contributing to a child’s truancy and the denial of school entry) the \textit{Sherbert/Yoder} requirement of a compelling state interest would seem to be directly applicable. This does not mean that application of the compelling interest test would necessarily result in a free exercise right

\textsuperscript{55} See id.
\textsuperscript{56} See id. at 406-07. It was significant to the Court that South Carolina had employment protection laws in place for Sunday sabbatarians. The State’s willingness to accommodate Sunday worshipers discredited its claim that it would be unacceptable to compromise compelling state interests to similarly accommodate Saturday worshipers. See id. at 406.
\textsuperscript{57} See id. at 410.
\textsuperscript{58} See Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).
\textsuperscript{59} See id. at 221.
\textsuperscript{60} See id. at 213-14 (citing Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925)).
\textsuperscript{61} See id. at 234-35.
to vaccination exemptions. Rather, precedent suggests that vaccination exemptions would not be required, even if Sherbert and Yoder were read to provide free exercise protection against generally applicable laws.\textsuperscript{62} But under current law it is a moot question whether the compelling interest test, properly applied, would require religious exemptions from generally applicable vaccination requirements.

In Smith, the Court rejected the respondents' claim that Sherbert and Yoder are controlling in cases where a generally applicable law burdens religious freedom.\textsuperscript{63} The Court distinguished Smith from Sherbert (an unemployment case) by framing the issue at hand in terms of criminal rather than unemployment law.\textsuperscript{64} Specifically, the Court inquired whether the Free Exercise Clause permits the State of Oregon to include religiously inspired peyote use within the prohibitions of a criminal statute.\textsuperscript{65} The Court ruled that the prohibition was permissible as applied to ritual peyote use and that the State was not required to present a compelling state interest to justify the generally applicable law.\textsuperscript{66} Further, the Court distinguished between free exercise challenges to generally applicable laws involving only religious freedom, and cases where a right in addition to religious freedom is at stake. In making this distinction, the Court found that Yoder involved the right to educate one's own child in addition to religious freedom.\textsuperscript{67} Thus, outside the unemployment context and against generally applicable laws, Smith limited free exercise protection under the compelling interest test to cases in which a right in addition to religious freedom is at stake.\textsuperscript{68}

\textsuperscript{62. See supra note 42.} Notwithstanding these cases from the state courts citing Jacobson, at least one Supreme Court Justice has questioned whether a vaccination requirement would survive a free exercise challenge under the compelling interest test. See Justice Scalia's majority opinion in Employment Division v. Smith, 494 U.S. 872, 888-89 (1990).

\textsuperscript{63. See Smith, 494 U.S. at 883-85.}

\textsuperscript{64. See id. at 884.} The Court justifies this distinction with the assertion that exemptions for unemployment compensation are more amenable to individual assessment; however, the facts in Smith do relate primarily to unemployment compensation. See id. The Court's characterization of the issues in terms of criminal law does not make the case any less amenable to individual assessment than other unemployment cases. See Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1123-24 (1990) [hereinafter McConnell, Revisionism].

\textsuperscript{65. See Smith, 494 U.S. at 876.}

\textsuperscript{66. See id.}

\textsuperscript{67. See id. at 881.}

\textsuperscript{68. See id. at 881-82.}
Some commentators have criticized the Smith opinion for this characterization of precedent. The Court’s effort to limit the reach of Sherbert by asserting that Yoder treated free exercise and the right to direct the education of one’s children as independent constitutional claims seems contrived, particularly given the fact that the Yoder Court clearly states that parents have no constitutional right to direct their children’s education outside the First Amendment. Perhaps the most incredible case to which the Court cited is Minersville School District v. Gobitis, standing for the proposition that the Court has “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law . . . .” Not only is this assertion inaccurate, but the Court also failed to acknowledge that this case, which permitted the prosecution of school children for their religiously motivated refusal to recite the Pledge of Allegiance, was overruled three years later.

The Smith Court’s use of precedent and the lengths it went to isolate the Sherbert model of religious accommodation drew an unusually strong response from scholars, interest groups, and lawmakers. After a period of bipartisan negotiations, Congress responded by passing the Religious Freedom Restoration Act of 1993 ("RFRA"). The general purpose of this legislation was “to restore the compelling interest test as set forth in Sherbert and Yoder . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened.” Although RFRA was generally implemented by the courts, litigants and commentators frequently challenged its

69. See McConnell, Revisionism, supra note 64, at 1123.
70. See id. at 1121 (citing Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972)).
72. Smith, 494 U.S. at 878-79.
73. Yoder is a primary example of a case in which the Court found that a free exercise required an exemption from an otherwise valid generally applicable law. See McConnell, Revisionism, supra note 64, at 1120 (citing Yoder, 406 U.S. at 220 (1972)).
74. See id. at 1124 (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).
constitutionality. The Supreme Court ultimately weighed in, reaffirming its opinion in *Smith*, and striking down RFRA as exceeding Congress' enforcement powers under section 5 of the Fourteenth Amendment.

In *City of Boerne v. Flores*, the Archbishop of San Antonio filed suit in federal court seeking relief from the City of Boerne's refusal to grant a building permit, which he had requested in order for St. Peter Catholic Church to proceed with plans to enlarge the sanctuary. The Archbishop relied substantially upon RFRA to support his claim that the City had improperly denied his application for a building permit. The district court denied the Archbishop's claim for relief, finding RFRA to be an unconstitutional extension of Congress' Fourteenth Amendment enforcement powers. The Court of Appeals for the Fifth Circuit reversed the district court, finding RFRA to be constitutional. The Supreme Court reversed the Fifth Circuit, citing *Marbury v. Madison* in its ruling that Congress had exceeded its

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78. Some circuit courts have affirmed the constitutionality of RFRA outside of the prisoner's rights context. See EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996), rev'd, 117 S. Ct. 2157 (1997); see, e.g., *In re Young*, 82 F.3d 1407 (8th Cir. 1996) (implying the constitutionality of RFRA by applying it retroactively to find that the recovery of church contributions in a bankruptcy proceeding violates RFRA), vacated by mem., Christians v. Crystal Evangelical Free Church, 117 S. Ct. 2502 (1997); Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995) (implying the constitutionality of RFRA by applying the Act to enjoin the school district's enforcement of a weapons ban against students whose religious beliefs required them to carry ceremonial knives); Droz v. Commissioner, 48 F.3d 1120 (9th Cir. 1995), cert. denied, 116 S. Ct. 698 (1996) (implying the constitutionality of RFRA by finding that denial of the religious exemption from participation in Social Security System did not violate taxpayers' First Amendment rights).


79. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2162 (1997). The Court set forth the Fourteenth Amendment in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person within its jurisdiction the equal protection of the laws.

> . . . The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

*Id.* (quoting U.S. CONST. amend XIV, §§ 2, 5).


81. See id. at 2172.

82. See id. at 2160 (citing Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996)).
authority with RFRA by attempting to enact an interpretation of, rather than enforce constitutional guarantees.\(^8\)

Though at least eight of the current Supreme Court Justices agree that RFRA was constitutionally defective, a minority would rehear the case, ordering the parties to argue the free exercise issues presented in *Smith*.\(^8\) Although this minority points to a tension in free exercise jurisprudence between *Smith* and the free exercise analysis set forth in *Sherbert* and *Yoder*, the safest operating assumption is that religious exemptions from generally applicable laws will remain a matter of legislative discretion rather than constitutional mandate.

Given the near certainty that vaccination exemptions will not be constitutionally required, the remaining First Amendment inquiry is whether, and on what terms, the Establishment Clause permits religious exemptions to vaccination requirements.

### B. Establishment

Establishment Clause doctrine determines whether a religious exemption to a generally applicable law is constitutionally permissible and, if so, how inclusively exemption eligibility must be defined.\(^8\) Establishment permissibility and exemption eligibility are critical factors in examining the merits of vaccination exemptions. If religious exemptions are permissible based upon broadly defined eligibility, then a vaccination exemption may permit population immunity within subgroups to be significantly reduced, thereby compromising public health goals.

The main reference point for modern establishment doctrine is *Lemon v. Kurtzman*.\(^8\) In *Lemon*, the Court rejected a Rhode Island plan to supplement the salaries of classroom instructors teaching only nonreligious courses in private schools, including sectarian institutions.\(^8\) The Court found that the inquiries necessary to ensure that public funds were not used for religious purposes would entangle state power with religious authority.\(^8\) The *Lemon* Court put forth a

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8. *See id.* at 2172 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).
8. *See id.* at 607-09.
8. *See id.* at 619.
three-part test to determine whether a state action violates the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" Though a lively debate persists about whether and to what extent the Lemon test should remain in force, the Court continues to cite the case as authority. As the following discussion shows, the Court tends to interpret Lemon in ways that give states more latitude to enact religious exemptions than a strict reading of the opinion might suggest.

Perhaps the clearest example of this tendency is Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, in which the Court upheld an exemption provided exclusively for religious organizations. In the context of a complaint brought by a maintenance worker whom the church fired for not being a member, the Amos Court considered whether a Title VII exemption for religious organizations from the prohibition against religiously motivated employment discrimination violates the Establishment Clause. The Court held that the exemption did not violate the establishment principles in Lemon. Specifically, the Court held that the exemption satisfied the first principle in Lemon (that of serving a secular purpose) by removing the burden of a government regulation from religious employment decisions.

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89. Id. at 612-13 (citations omitted).
92. See infra notes 93-98 and accompanying text.
95. See Amos, 483 U.S. at 339. Amos is distinctive because in it the Court for the first time upheld the constitutionality of a statutory exemption directed exclusively at religious organizations. Prior to Amos, exemptions that passed Establishment Clause muster were directed at a more generalizable body of beneficiaries. See, e.g., Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding property tax exemption for property used exclusively for religious, educational, or charitable purposes). The Amos Court noted that the statute was neutral as between religions. See Amos, 483 U.S. at 339. Had the statute not been facially neutral, it would have been impermissible under establishment principles. See id. For Supreme Court authority on this point, see Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994).
96. See Amos, 483 U.S. at 335-36.
statute satisfied the second *Lemon* requirement (that of neither advancing nor inhibiting religion) in that the exemption merely allows religion to more effectively advance its own causes.\(^9\) The Court observed that exempting religious organizations from government regulation prevents church-state entanglement (the third *Lemon* requirement).\(^9\) Though *Amos* is significant because it upholds an exemption permitted exclusively for religion, it should not be read to indicate unrestrained Establishment Clause permissiveness.

One of the more significant cases since *Amos* in setting some establishment parameters is *Texas Monthly, Inc. v. Bullock*.\(^9\) In *Texas Monthly*, the Court held that a sales and use tax exemption exclusively for religious periodicals violated the Establishment Clause because it favored religious over secular interests and unjustifiably burdened nonbeneficiaries.\(^10\) The Court noted that the secular purpose requirement in *Lemon* forbids the state from using its power and prestige to advance or inhibit religion in general, or one religion over another.\(^10\) The Court, however, was clear in saying that exemptions benefiting only religious organizations may be permissible if the exemption does not impose an unjustifiable burden upon nonbeneficiaries.\(^10\) In thus clarifying, the Court distinguished between *Texas Monthly* and *Amos* on the basis that in *Amos* the exemption prevented substantial intrusions into religious freedom.\(^10\) The *Texas Monthly* court found no such intrusion in the requirement that religious periodicals pay taxes.\(^10\)

Taken together, *Amos* and *Texas Monthly* can be used as precedent to support the claim that religious exemptions to vaccination requirements are permissible under establishment analysis if the exemption is facially neutral among religions, and if the burdens removed from religious freedom are sufficient to justify the burdens imposed upon nonbeneficiaries.\(^10\) The facial neutrality requirement, that an exemption not favor one religion over another, is borne out in lower court decisions holding that vaccination exemptions offered only to members of an organized religion are invalid under the

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\(^9\) See *id.* at 336-37.
\(^9\) See *id.* at 339.
\(^10\) See *id.* at 14-15, 18 n.8.
\(^10\) See *id.* at 8-9.
\(^10\) See *id.* at 18 n.8.
\(^10\) See *id.*
\(^10\) See *id.* at 18.
\(^10\) See *id.* at 18 n.8.
Establishment Clause.\textsuperscript{106} Although case law clearly demonstrates the facial neutrality requirement, there is no precedent on the precise question of whether vaccination exemptions provide a sufficient benefit to religious interests to justify the burden of reduced population immunity. However, the burdens that vaccination exemptions remove from religious practice are significant, and they almost certainly would satisfy the standard set forth in \textit{Amos} and \textit{Texas Monthly}.

Given the requirement that religious exemptions must extend equally to all religions, exemption eligibility will be determined largely by how one defines religion. Two formative cases in the definition of religion are \textit{Welsh v. United States}\textsuperscript{107} and \textit{United States v. Seeger}.\textsuperscript{108} The relevant issue in these cases is whether the statutory exemption for conscientious objector status impermissibly favors one religion over another, or religion over nonreligion, if it allows exemption for persons with a "belief in a relation to a Supreme Being" and denies exemption for those whose objections are "political, sociological, or philosophical."\textsuperscript{109}

Justice Harlan addressed this point extensively in his concurring opinion in \textit{Welsh}.\textsuperscript{110} His opinion states that the government is free to choose whether or not to offer exemptions, but if it chooses to create an exemption, the Establishment Clause constrains the government from distinguishing between theistic and nontheistic religious beliefs, or between religious and secular beliefs.\textsuperscript{111} In \textit{Welsh}, the Court ruled that those who object to combat service on the basis of moral or ethical beliefs that are "held with the strength of traditional religious convictions" are not made ineligible for exemption by the statutory language excluding those whose objections are essentially "political, 


\textsuperscript{108} 380 U.S. 163 (1965).

\textsuperscript{109} \textit{Id.} at 165-66 (quoting the Universal Military Training and Service Act, 50 U.S.C. § 456(j) (1958)).

\textsuperscript{110} \textit{See Welsh}, 398 U.S. at 345.

sociological, or philosophical." In Seeger, the Court held that religious belief as belief in a "Supreme Being" includes convictions that have a theocentric as well as anthropocentric basis. Though the Court does not itself define religion, it does establish very inclusive boundaries by quoting passages from the writings of theologians including Paul Tillich. The point to be drawn from Seeger and Welsh is that in order for an exemption statute to be permissible under the Establishment Clause, the exemption must define religion broadly enough to include nontheistic religions as well as those moral and ethical beliefs that are maintained with strength similar to that of traditional religion. These broad parameters for exemption eligibility exacerbate the tension between religious freedom and public health. As exemption eligibility increases, so will the number of successful applicants, thereby reducing the level of protection against disease within a population.

112. See Welsh, 398 U.S. at 339-42.  
114. See id. at 180-87. Paul Tillich is quoted for writing:  
I have written of the God above the God of theism . . . . In such a state (of self-affirmation) the God of both religious and theological language disappears. But something remains, namely, the seriousness of that doubt in which meaning within meaninglessness is affirmed. The source of this affirmation of meaning within meaninglessness, of certitude within doubt, is not the God of traditional theism but the "God above God," the power of being, which works through those who have no name for it, not even the name God.  
_Id. at 180 (quoting PAUL TILLICH, II SYSTEMATIC THEOLOGY 12 (1957)).  
And if that word (God) has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, of what you take seriously without any reservation. Perhaps, in order to do so, you must forget everything traditional that you have learned about God . . . .  
_Id. at 187 (quoting PAUL TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948)).  
Separately, Franklin Gamwell, Professor, University of Chicago Divinity School, seeks to define religion by identifying "what all religious convictions have in common." Franklin I. Gamwell, Religion and Reason in American Politics, 2 J.L & RELIGION 325, 326 (1984). He identifies this as "the affirmation of a comprehensive or all-inclusive purpose or ideal for human life. 'Comprehensive' or 'all-inclusive' here means a purpose to which all others are properly subservient . . . ." _Id._  
115. The Court has not defined the strength with which traditional religious convictions are maintained. Personal convictions about traditional religious subjects range from the absolute to the very tentative, suggesting that a person could be very unsure about his or her ethical or moral position and still qualify for a religious exemption—a suggestion that would probably not be very convincing to the Court. In United States v. Ballard, 322 U.S. 78, 88 (1944), the Court reversed the decision to submit the question of the sincerity of religious belief to the trier of fact. This is one step removed from, and perhaps less intrusive, than an inquiry into the strength with which religious beliefs are held. Even so, some question the wisdom of a judicial inquiry into the sincerity of religious proclamation. See, e.g., John T. Noonan, Jr., How Sincere Do You Have to Be to Be Religious?, 1988 U. ILL. L. REV. 713 (1988).
Broad parameters also make it difficult for the courts to reasonably distinguish between religion and nonreligion. This is demonstrated by two federal court cases that encountered difficulty in interpreting New York’s vaccination exemption statute. In *Mason v. General Brown Central School District*, the Second Circuit ruled upon an exemption claim made by two parents on their son’s behalf, pursuant to the New York exemption statute. The appellate court interpreted the statute to permit exemption on the basis of sincere religious belief without regard to church affiliation, but it denied relief to the petitioners on the basis that their objections were philosophical and not religious. The parents’ petition claimed that vaccinations are prohibited by their belief in a “natural existence.” Though the court did not question the sincerity with which the parents maintained their beliefs, it ruled that the petitioners’ beliefs reflected a secular lifestyle choice that did not qualify for religious exemption. Given the

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117. The New York statute in 1985 provided: “No principal, teacher, owner or person in charge of a school shall permit any child to be admitted to such school, or to attend such school in excess of fourteen days, without the certificate . . . of the child’s immunization against poliomyelitis, mumps, measles, diphtheria, [and] rubella . . . .” *N.Y. PUB. HEALTH LAW § 2164(7) (McKinney 1985).* It goes on to say:

> This section shall not apply to children whose parent, parents, or guardian are bona fide members of a recognized religious organization whose teachings are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school.

*Id.* § 2164(9).

118. 851 F.2d 47 (2d Cir. 1988).

119. The *Mason* court noted:

> that the clause in section 2164(9) requiring that parents who seek an exemption be “bona fide members of a recognized religious organization” has been held unconstitutional, *see* Scherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81 (E.D.N.Y. 1987), and that the state has determined it will not appeal . . . . As a result, pursuant to New York’s separability statute, [citation omitted] the ‘recognized religious organization’ clause is automatically excised from subsection 9, leaving a general exemption for any person whose opposition to immunization stems from a sincere religious belief.

*Mason*, 851 F.2d at 54 (quoting *Scherr*, 672 F. Supp. at 92 (E.D.N.Y. 1987)).

120. *See id.* at 49.

121. *See id.* at 52-53. Though the court affirmed its belief in the petitioners’ sincerity, it gave some attention to the fact that the petitioners’ affiliation with the Universal Life Church, which has no rights of membership, offers ecclesiastical titles through the mail for a specified fee. *See id.* at 53. One must question whether the petitioners’ cause was prejudiced by this affiliation, regardless of personal beliefs.
court's focus on the secular nature of the petitioners' beliefs, one might question whether the court would have granted the exemption if the petitioners had made reference to a transcendent reality.

Lewis v. Sobol, read in conjunction with Mason, suggests that courts may look for some references to a transcendent reality when deciding whether particular beliefs are religious, notwithstanding Seeger and Welsh, which explicitly include philosophical beliefs for exemption eligibility.\textsuperscript{122} In Lewis v. Sobol,\textsuperscript{123} the United States District Court for the Southern District of New York considered whether the petitioners' belief in a "natural order" and awareness of the "spirituality of the land" qualified as religion for purposes of a vaccination exemption.\textsuperscript{124} The court found that the petitioners' lifestyle and opposition to vaccinations were informed by "ultimate concerns" and therefore qualified for religious exemption.\textsuperscript{125} Given the broad definition of religion in Seeger, which includes both spiritual and philosophical ultimate concerns, it is not clear that a meaningful distinction can be made between the beliefs held by Lewis (a general spirituality) and those held by the Masons (philosophical). Either may be taken by the holder as a source of comprehensive and ultimate authority. The Lewis court's distinction between spiritually and biologically-based beliefs is unconvincing. Biological claims can be just as authoritative for the claimant as spiritual beliefs, even if the biology is demonstrably mistaken.\textsuperscript{126} And it would surely risk entanglement with religion for the state to move beyond assessing sincerity of belief into the area of assessing the relative authority that petitioners grant to their respective beliefs.\textsuperscript{127}

These cases demonstrate how difficult it is to develop a definition of religion that establishes meaningful parameters for exemption eligibility. A clear reading of Welsh and Seeger shows that religious exemption statutes must be written and interpreted broadly enough to include all persons whose objections are based upon a belief in, what is for the believer, a source of ultimate authority. This type of broad

\textsuperscript{123} 710 F. Supp. 506 (S.D.N.Y. 1989).
\textsuperscript{124} See id. at 507-08.
\textsuperscript{125} See id. at 515.
\textsuperscript{126} For example, "creationist science," whether or not factually accurate, is often essential to an adherent's perception of the world and the nature of authority in his life. See James Gustafson, Intersections: Science, Theology, and Ethics 1-2 (1996).
\textsuperscript{127} See supra notes 88-92 and accompanying text; See also Lemon v. Kurtzman, 403 U.S. 602, 622 (holding that political division along religious lines was one of the principal dangers that the First Amendment was intended to guard against).
exemption eligibility creates obvious tensions between religious freedom and public health. Present legislation, of which the New York statute is typical, has not resolved the tension. This suggests that policy and/or administrative changes will be necessary to reach a more optimal balance between public health and religious freedom.

V. BALANCING INTERESTS IN RELIGIOUS FREEDOM AND PUBLIC HEALTH

The central interests in religious freedom and public health in the vaccination context are, respectively, the freedom to practice religion without interference or penalty, and that no person should suffer illness unnecessarily. The task of this section is to identify a method and examine practical alternatives by which these interests can be more optimally balanced.

Theoretically, one can approach an optimal balance between competing interests by advancing each to a point where any additional benefit to one will cause a greater burden for the other. A significant difficulty in applying this theory to religious freedom and public health is that it often will involve a comparison of incommensurables. Religious and public health interests have very different guiding principles and refer to different standards to measure marginal benefit. Although each particular religion focuses on some ultimate authority to receive or develop guiding principles, public health policy refers to physical health and contingent political authority. Although it is true that religion may influence public policy, it is not contained within public policy. Stated differently, government may take into account the positions advanced by religious advocates, but public policy cannot adopt all of the policies advanced by religious and secular interests on a particular point. This leads to a tension between interest groups that cannot be resolved without a common moral understanding.

One response to this tension between religious and secular interests is an accommodationist approach as modeled in Sherbert and Yoder.129

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128. See R.H. Coase, The Problem of Social Costs, 3 J.L. & Econ. 1, 2 (1960). The optimal outcome is the efficient outcome, which is possible in a world of free trade. It is the point at which people have maximized their respective benefits in free trade with other persons. Whether economic theory has developed methods by which one can accomplish a balancing of incommensurable interests is beyond the scope of this Essay.

129. See Wisconsin v. Yoder, 406 U.S. 205, 235-36 (1972) (holding that the First and Fourteenth Amendments do not allow a state to force Amish parents to cause their children to attend high school through age sixteen, once they have already graduated from eighth grade); Sherbert v. Verner, 374 U.S. 398, 408-09 (1963) (holding that South Carolina could not constitutionally deny unemployment benefits to a woman who...
Though a Court majority now holds that the *Sherbert/Yoder* compelling interest test no longer extends to First Amendment challenges to generally applicable laws, the cases do provide a helpful method of analysis. Under a principle of accommodation, the state remains attentive to the impact of generally applicable laws such as vaccination requirements, and it makes conscious efforts to avoid imposing burdens on religious freedom.\(^{130}\) This arrangement gives religious believers maximum freedom to optimize their own interests on their own terms, permitting state interference only when necessary to advance or protect a very important state interest. Although in many cases a policy of accommodation may prevent conflict by giving conditional deference to religion, it does not resolve the problem of balancing incommensurables. Accommodation raises the question, but it does not determine whether a given secular interest is sufficiently important to justify burdening religious interests that may be at stake.

The fact that both religion and public health acknowledge different sources of authority makes it difficult to determine precisely how much weight to give a secular interest as compared to a religious claim.\(^{131}\) But, a conscientious effort to balance the interests at stake gives advocates from all perspectives on a particular issue a fair opportunity to advance their objectives in terms that best express their values. The approach suggested here is necessarily a democratic process, where policy decisions are made publicly, and no position enjoys an inherent advantage.\(^{132}\) A commitment to a democratic balancing process implies a willingness to respect the resulting decision, even if contrary to one's own point of view.\(^{133}\) This commitment is acceptable because the balancing process permits choice between competing interests

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1. "The most difficult aspect of the free exercise balance is assessment of the weight that should be given to enforcement of the government’s policy, as applied to the religious objector." McConnell, *Accommodation*, *supra* note 45, at 689.

2. With this understanding, an optimal balance is one in which religious freedom is given as much respect as other fundamental rights. This does not mean that religion should always win, but that it should be considered along with other very important rights. *See Stephen L. Carter, The Culture of Disbelief* 14-16, 145 (1993). Professor Carter develops the point by suggesting that society, more than the courts, should "balance the depth of our moral commitment to the policy in question against the value of religious autonomy." *Id.* at 145.

while respecting the legitimacy of both. To the extent that religious and secular interests are committed to deciding by a public balancing of interests, the commitment to the process becomes the common moral language. It is a language of mutual respect that advocates for either position are willing to listen to and accommodate the other if reason and respect suggest that they should.\(^{134}\) In this sense, there can be a common morality of interaction that goes beyond mere procedure. By respecting one's own position and the positions of others, religious and secular interests may be able to balance the otherwise incommensurable interests at stake.

The strongest objection to a democratic balancing of interests is that it has obvious majoritarian implications. The concerns of a small minority religion, regardless of the openness of the balancing process, may be consistently subordinated to more widely held claims. The strongest response to this is that the alternatives to democracy tend either toward anarchy or tyranny.\(^{135}\) But this fact provides no absolute assurance of fairness; it simply points out that an accommodationist democracy is the best of an imperfect set of alternatives. However, a balancing process based upon mutual respect suggests that a majority may, or perhaps should, defer to a minority on a point of great importance to that minority, even if the minority position is slightly offensive to the majority, and even though the Free Exercise Clause does not require accommodation. The choice of forty-eight states to provide religious exemptions to vaccination requirements reflects this sort of choice by the majority to defer to a minority. This is a laudable effort by the states to optimize the balance between religious freedom and public health. However, accommodation alone will not generate a more optimal balance if either public health or religious interests are unnecessarily compromised.

The remaining part of this section is directed toward an assessment of alternatives to optimize the balance between religious freedom and public health in the context of immunization policy, taking into account the concerns of the parties most affected: individual children, parents, and the general public. The guiding principle here is that neither religious freedom nor public health gets absolute priority. There are occasions when religious freedom must yield to the exigencies of organized society, and there are times when organized society's commitment to religious freedom requires accommodation of minority

\(^{134}\) See David Tracy, Plurality and Ambiguity 19 (1987).

religions. With this understanding, an optimal balance is one in which religious freedom is taken as seriously and given as much respect as other important interests and fundamental rights.\textsuperscript{136}

The first, and perhaps most likely, legislative alternative is to maintain the status quo that exists in the majority of states: a general requirement that all children receive a standard series of vaccinations before entering school, from which persons with religious objections can apply for exemption. As suggested above, this alternative causes problems for both religious freedom and public health. Public health may be poorly served if exempt children become infected and spread disease among exempt and otherwise underimmunized persons.\textsuperscript{137} Conversely, religious freedom may be poorly served if parents whose beliefs fail to qualify them for exemption can be subject to criminal prosecution.\textsuperscript{138} The most obvious way to relieve the burden on one interest results in increasing the burden on the other interest. That is, broadening exemption eligibility to include all sincere objections minimizes the possibility that a religious objection will be incorrectly denied, but it increases the burden on public health. Conversely, repeal of religious exemptions might advance the public health, but not without increasing the burden on religious freedom. As a result, neither of these solutions improves the suboptimal status quo—they merely reallocate the burdens.

A second alternative is to repeal religious exemptions and all punitive measures for parental noncompliance with vaccination requirements. Under this alternative, the public health authorities would vaccinate school children, with or without parental consent.\textsuperscript{139} This alternative has two benefits. First, it protects the public health by eliminating the pockets of disease vulnerability that exist among exempt populations. Second, it reduces the burden on parents who otherwise would be penalized for refusing consent for their child’s vaccination. Because their consent becomes unnecessary, parents would not be forced to choose between their religious beliefs and legal interests.

However, even if parental consent is not required, significant burdens remain. First, parents who anticipate a religiously

\begin{flushleft}
136. See CARTER, supra note 132.
137. See supra notes 15-22 and accompanying text.
138. See supra notes 27-28 and accompanying text.
139. This would require appointment of a public guardian for the limited purpose of consenting to a vaccination. For an example of this approach, see Mannis v. State, 398 S.W.2d 206 (Ark. 1966) (appointment of temporary guardian for purposes of vaccinating children and enrolling them in school).
\end{flushleft}
objectionable vaccination might keep their child from attending school where the vaccinations most likely would be imposed. In such a case, parents could be criminally prosecuted for causing their child's truancy, thereby suffering an indirect burden on their religious practice. However, a very direct burden on religious freedom is eliminated in that parents would not be prosecuted as a direct consequence of refusing to consent. Second, and the more onerous burden, is the fact that some religions may consider vaccination to be so offensive that a vaccinated child is no longer acceptable to the parents and thus may be abandoned. Such cases are unusual; while the beliefs that precipitate such a response may be extreme, the burden imposed is also extreme. These burdens must be taken seriously in any effort to reach an optimal balance, but in the absence of a better alternative, they do not preclude a policy of vaccinating children without parental consent.

A third alternative is to permit exemption for children who engage in home-schooling or attend private schools that explicitly permit unvaccinated children. This policy would give religious parents an option to maintain their religious integrity without imposing a significant burden on them. There are two significant problems with this alternative. First, it would create underimmunized subpopulations by giving parents an incentive to put their children into schools with a high proportion of unimmunized students. Children in home-schooling also would be at risk to the extent that they associate with unimmunized persons, most likely in worship or other religious gatherings. A provision permitting the public health authorities to vaccinate in the event of an epidemic would be of limited utility because the disease already has spread by the time symptoms appear. Another significant problem is that it is divisive and stigmatizing to give parents a clear incentive to segregate. When parents are forced to choose between consenting to a religiously prohibited vaccination and segregating their child, those who can afford to segregate are likely to do so. Segregationist incentives fail to optimize the public well-being, either socially or epidemiologically.

140. See supra notes 27-28.
141. See Cude v. State, 377 S.W.2d 816, 817 (Ark. 1964) (including testimony by the father that he will not accept his children if they are vaccinated).
142. The burden on religious freedom is similar to the burden of a religiously objectionable curriculum; parents who object to the conditions at public schools may choose to send their children elsewhere.
143. Post-exposure vaccinations can protect against some diseases. For example, a measles vaccination may prevent or modify the course of the disease if given within six days of exposure. See Epidemiology and Prevention, supra note 12, at 99.
Although each of these alternatives to the status quo offer to protect one interest and mitigate the burdens on the other, neither is entirely successful. Both impose burdens upon either religious freedom or public health that are unacceptable if they can be reasonably avoided. A more optimal solution would enhance both sets of interests while imposing minimal burdens.

A legislative and executive policy that vigorously promotes voluntary vaccinations is an alternative that offers to enhance both religious freedom and public health without burdening either. This is perhaps the most obvious way to reduce the tension between religious freedom and public health because it improves one without imposing on the other. However, this solution has proven difficult to implement. This can be seen in the development of federal legislation providing free distribution of pediatric vaccines to qualifying primary care providers who may charge a fee only to cover the cost of administering the vaccine. Children qualify for these low-cost vaccines if they are on Medicaid, have no insurance coverage for vaccinations, or if they are American Indian.

There are a number of problems with the program that may explain its incomplete success. First, although a participating provider may not refuse to vaccinate a child who is unable to pay the cost of administration, not all financially needy parents necessarily will know this; and, even if they do know it, the prospect of asking for a fee waiver may be a deterrent itself. Another possible hindrance to the program's success is that physicians may be discouraged from participating because of the requirements that they determine whether the child qualifies for the vaccination program by inquiring with the child's parent or guardian, and that they keep records of each child's qualifying status. If qualifying children are discouraged by administrative fees, and if physicians are disenchanted with administrative requirements, many children may be pushed back to the often inconvenient and overcrowded public clinics. For these and other reasons, the initiative that was intended to have increased the vaccination rate among two-year-old children to ninety percent by the year 1996 remains unfinished.

144. See 42 U.S.C. § 1396s(a), (c), (d) (1996).
145. See id. § 1396s(b)(2)(A).
146. See id. § 1396s(c)(2)(C)(ii).
148. See 42 U.S.C. § 1396s(a), (c), (d).
Given the incomplete success of this ambitious plan, a practical question remains as to whether voluntary vaccination programs can be reasonably expected to meet the established public health goals. The successes of earlier vaccination programs, such as the campaign against polio, shows that an adequately mobilized public can achieve remarkable results.\textsuperscript{149} Such prior success suggests that a more efficient voluntary vaccination program could significantly improve the population immunity.

In light of this assessment, how should religious freedom and public health be balanced? A public health advocate might suggest that it would be most prudent to repeal vaccination exemptions, at least until the goal of vaccinating ninety percent of the nation’s two-year-olds has been met. Although such a proposal shows admirable impulses, it permits political and administrative ineptitude to displace important religious interests.\textsuperscript{150} It is one thing to suggest that religious interests should defer to public health interests when all reasonable efforts have been made to advance the public health. It is quite another to claim that religious freedom should be subordinated to administrative and political shortcomings. A fairer policy would be to permit the exemptions to remain while public health advocates unify around the cause of voluntary vaccination. If, despite such efforts, an appreciable risk of disease remains, then the state may have a morally defensible claim to vaccinate over religious objection.

VI. CONCLUSION

A more optimal balance between public health and religious freedom can be approached through aggressive campaigns to promote voluntary vaccination while continuing to permit religious exemptions. Such a policy respects both religious freedom and public health. Public health interests are clearly advanced by increasing voluntary immunization rates. A small number of unvaccinated children in a highly immunized society should not be at significant risk, nor should they present a significant health threat to others. Religious freedom is enhanced by continuing to permit exemptions, and removing punitive sanctions for persons whose objections are judged, correctly or not, to be nonreligious. In this way, something close to an optimal balance can be reached. The Free Exercise and Establishment Clauses clearly


\textsuperscript{150} See supra notes 19-25 and accompanying text.
permit this balance. Whether politics can produce such a solution is uncertain. However, the combined energies of religious and public health advocates may be sufficient to initiate some positive change.

But even with the most effective vaccination campaign, some children will become ill with the targeted diseases. This will be the case until the diseases are eradicated. Until such time, questions will remain. How many cases of disease is too many? How many sick children does it take to justify an imposition on religious freedom? To these questions neither religious nor public health interests speaking alone can provide the answer. The optimum is found in a balanced respect for each.