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GROWING USE OF RELIGIOUS EXEMPTIONS FOR MANDATORY IMMUNIZATIONS: PROBLEMS CREATED BY THEIR USE AND SOLUTIONS FOR GREATER SOCIETAL PROTECTION

Annie E. Kouba*

I. INTRODUCTION

Illness and disease have long been a part of human existence. The suffering, disfigurement, and death caused by disease have even been exploited as an advantage in war through the practice of bioterrorism.¹ Outbreaks and pandemics of diseases and viruses have been one of the most consistent and significant challenges that civilization has had to face throughout history, and that trend continues today.

The United States has a long history of protecting religious freedoms. The Establishment Clause to the United States Constitution states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”² However, neither federal legislation nor any ruling by the United States

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1. The United States Centers for Disease Control and Prevention (CDC) defines bioterrorism as “the deliberate release of viruses, bacteria, or other germs (agents) used to cause illness or death in people, animals, or plants.” See generally Emergency Preparedness and Response: Bioterrorism Overview, Centers for Disease Control and Prevention, http://emergency.cdc.gov/bioterrorism/overview.asp (last updated Feb. 12, 2007). The practice of bioterrorism has been used for thousands of years, possibly since the advent of human war.

2. U.S. CONST. amend. I.
Supreme Court requires that states provide religious exemptions to mandatory vaccinations for children entering the public school system.\(^3\)

This Note will begin with the history and background of vaccinations and their role in shaping current medicine as well as the legislation and case law that is currently in place in the United States. It will then discuss the harm to the individual child and to society at-large that religious exemptions to vaccinations create, will suggest that religious exemptions to vaccinations are not protected under the Establishment Clause of the First Amendment, and will argue such exemptions can and should be abolished on a federal level. Additionally, this Note will take into consideration the recent ruling by the United States Supreme Court in *Hobby Lobby v. Burwell* and try to predict what, if any, impact that case has on religious exemptions to mandatory vaccinations for children in this country.

### A. Brief History of Diseases and Pandemics Before the Advent of Vaccinations

To understand why vaccinations are so vital to the health and safety of the United States' population today, it is important to look back at the history of disease and illness before the discovery and implementation of vaccinations. Disease has plagued humankind for thousands of years and medicine is now in a unique position to effectively fight back with vaccinations against some of history’s worst diseases.

#### 1. The Plague

The plague, also known as the Black Death, is one of the most well-known pandemics in human history. It is still uncertain where the plague originated, but it swept through Europe, the Near East, and North Africa in the 14th century and has been described as “probably the most devastating public health disaster in recorded history.”\(^4\) The plague killed...
more than twenty-five million Europeans during the fourteenth and fifteenth centuries, and the outbreak was so extensive and easy to transmit that it was even used as a weapon of biowarfare. The plague continues to be a concern for biowarfare even today: while a vaccine for bubonic plague was invented and available in the United States for military personnel and researchers, efforts are still ongoing to develop a vaccine against the far deadlier pneumonic plague.

2. Spanish Influenza

The Spanish Influenza of 1918 is a terrifying example of how quickly disease can spread and the devastating effects it can have on a population not protected by vaccinations. The Spanish Flu took more than fifty million lives worldwide in only eighteen months; this represented nearly half of all deaths in the United States that year. In other parts of the world, the effect was even more devastating: in Ghana, for example, five percent of the population died from the Spanish Influenza in only two months due to lack of qualified medical providers. To put these numbers into perspective, the Spanish Influenza “killed more people in a year than the Black Death of the Middle Ages killed in a century; it killed more people in twenty-four weeks than AIDS has killed in twenty-four years.” The historical Spanish Flu outbreak shows the potential destruction pandemics can have on any population that has too few medical resources, and serves as a reminder that it is not possible to fully predict when the next epidemic might take place.

As our scientists might attempt today, researchers reacted to Spanish Flu by attempting to create an effective vaccination to prevent more loss of lives. While some of the vaccines invented during this time period were not particularly effective, some of the vaccines could have

5. Id. The issue of vaccines being used as a defense against biowarfare and as a safeguard to national security is discussed infra Part II.D.
reduced the horrific numbers, particularly after researchers discovered that the disease was caused by a virus and not a bacterium. This period of time served as a forerunner to today's extremely effective vaccine against influenza. While the next pandemic is impossible to predict, care must be taken to ensure we have vaccine production capacity ready to meet a new threat.

3. Smallpox

The origin of smallpox is not known for certain, however, it is generally believed to have appeared around 10,000 B.C. The earliest physical evidence of smallpox can be found on the faces of mummies in ancient Egypt, including on the face of Pharaoh Ramses V. Smallpox has not only been a devastating disease to individuals, but hindered the development of Western civilization by contributing to the decline of the Roman empire.

Smallpox is so devastating due in large part to how easily it is spread; in the 18th century in Europe, 400,000 people died annually of smallpox and one-third of the survivors were left permanently blind. Smallpox was so deadly around this time period that European settlers (both inadvertently and then later, purposefully) spread smallpox to Native Americans, nearly eradicated multiple tribes and caused many deaths. Furthermore, smallpox was the disease that sparked research into vaccinations for dangerous illnesses. British troops attempted (both successfully and unsuccessfully) to use smallpox as a weapon during the Revolutionary War. There is significant evidence to suggest that the

11. Id.
12. Id.
13. Id.
British purposefully exposed citizens of Boston and possibly also Quebec to strains of smallpox; after they fled the infected cities, the British hoped that the civilians would carry smallpox to rebel troops.\textsuperscript{16} This plan was effective primarily because the British soldiers themselves were inoculated against the disease.\textsuperscript{17} Although the smallpox vaccine had not yet been invented, the British troops were already routinely inoculating their own troops by exposing soldiers to pustules of smallpox to induce a milder case of the illness (and running the risk of losing a few soldiers).\textsuperscript{18}

However, in 1796, Dr. Edward Jenner actually invented a vaccination for smallpox when he discovered that an inoculation of cowpox could prevent individuals from falling ill to smallpox.\textsuperscript{19} This discovery changed the way scientists look at disease. By the early 1800s, many European nations implemented mandatory vaccination programs which became even more popularized by the mid-1850s.\textsuperscript{20} By 1877, mortality rates from smallpox in Europe had dropped over eighty-eight percent; by 1977, the disease was deemed eradicated from the population on a global scale.\textsuperscript{21} Despite the United States Centers for Disease Control and Prevention calling vaccinations one of the “top ten public health achievements of the twentieth century,”\textsuperscript{22} and even with the advent of modern medicine, it seems that many in the United States have forgotten some of the horrors that diseases of the past inflicted. Smallpox, polio, measles and whooping cough seem like vestiges of a bygone age. With more parents and guardians choosing not to vaccinate their children, American society is facing a risk of reemergence of some of these diseases that will continue to grow if the current trend continues.\textsuperscript{23} This

\begin{itemize}
\item 16. \textit{Id.}
\item 17. \textit{Id.}
\item 18. \textit{Id.}
\item 20. \textit{Id.} at 840–42.
\item 21. \textit{Id.}
\item 22. \textit{Id.} at 833 (internal citations omitted).
risk may be even greater than some parents realize; not vaccinating children compromises herd immunity and puts the population at risk not just for naturally occurring epidemics, but can also threaten national security due to increased vulnerability for a bioterrorist attack.\textsuperscript{24}

\textbf{B. Timeline of Government Regulation of Vaccinations}

The United States government has had significant involvement in the use of vaccines by its citizens beginning shortly after Dr. Edward Jenner invented vaccinations. For instance, when smallpox rampaged through the newly formed country, the Commonwealth of Virginia was the first to pass strict regulations for inoculation. In fact, not only did this regulation require that citizens be inoculated, but also "included a penalty of $1,500 or six months imprisonment for anyone [who] willfully [defied the legislation].\textsuperscript{25}

At the turn of the century, the government endorsed and regulated vaccinations on an even greater scale. Massachusetts became the first state to endorse the use of vaccinations and encourage citizens to inoculate themselves against smallpox.\textsuperscript{26} In 1813, the United States National Vaccine Agency was created after Congress authorized and James Madison signed "An Act to Encourage Vaccination."\textsuperscript{27} One of the first results of the vaccine agency was that the U.S. Postal Service had to carry certain packages for free if they contained vaccines as part of an effort to make them widely available and further encourage their use. As the 19th century continued, the government began to regulate vaccinations more consistently. In 1855, Massachusetts passed the first U.S. law that mandated vaccination for children to attend public schools

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cases. From January 1 to September 29, there have been 594 confirmed measles cases reported to CDC's National Center for Immunization and Respiratory Diseases (NCIRD). This is the highest number of cases since measles elimination was documented in the U.S. in 2000. The majority of the people who got measles are unvaccinated.
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\textsuperscript{24.} See infra Part II.
\textsuperscript{26.} Id.
\textsuperscript{27.} Id.
and in 1894 New York City began to regulate antitoxin. In 1898, as the immediate need for smallpox vaccination had mostly subsided, there was more time to research safer vaccinations without adverse reactions and ensure that pharmaceutical suppliers were meeting adequate standards for the vaccines they sold. Finally, in 1902, Congress passed the first modern federal legislation to control the quality of drugs, titled “The Biologics Control Act,” which was “[a]n act to regulate the sale of viruses, serums, toxins, and analogous products.” Eventually, as more diseases emerged, and medicine became more sophisticated and capable of both preventing and treating diseases that were previously death sentences, more government action had to accompany citizens’ vaccination use.

C. History and Overview of Case law and Legislation in the United States Concerning Vaccinations

As evidenced by the previous section, vaccinations and immunizations have historically been mandated for the greater public good in the United States without violating any First Amendment rights. The Free Exercise Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion, or

28. Id.
29. Id.
30. Id.
31. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Basics, VACCINES.GOV, http://www.vaccines.gov/basics/ (last visited Feb. 10, 2015) (“A vaccination is the injection of a killed or weakened organism that produces immunity in the body against that organism . . . [.] An immunization is the process by which a person or animal becomes protected from a disease. Vaccines cause immunization, and there are also some diseases that cause immunization after an individual recovers from the disease.”) For the purposes of this Note, both vaccinations and immunizations will be referred to under the blanket term of “vaccinations.”
32. Jacobson v. Massachusetts, 197 U.S. 11, 26–27 (1905) (holding that in defense of the court deciding a man must submit to a smallpox vaccination despite his opposition to vaccinations “[e]ven liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.” (quoting Crowley v. Christensen, 137 U.S. 86, 89 (1890)).
prohibiting the free exercise thereof..." In Employment Division v. Smith, the Supreme Court found that laws of general applicability are Constitutional even if they incidentally suppress the free exercise of religion. This holding is directly relatable to the argument about vaccinations, as mandatory vaccination laws are laws of general applicability that do not "attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of children in those beliefs."

Further support for the Constitutionality of mandatory vaccination laws can be found in other case law. The landmark case in requiring vaccinations for the greater public safety is Jacobson v. Massachusetts, which was decided in 1905 by the United States Supreme Court. In Jacobson, the defendant did not want to undergo the mandatory vaccination for smallpox because he felt it was an unnecessary invasion of his freedom. The Court held that "[e]ven liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will." The Court went on to discuss the importance of the common good and the importance of the "protection, safety, prosperity and happiness of the people, and not ... [the] private interests of any one man." While this decision was not based on a religious exemption, but rather individual liberty, it still set the stage for later cases that addressed the question of whether vaccinations can be made mandatory by the state.

Eventually, all states enacted statutes that require children to be vaccinated to join the public school system, and the vast majority of states enacted statutes allowing religious exemptions to these vaccinations. Courts began to hear parents bringing claims of First

33. U.S. CONST. amend I (emphasis added).
35. Id. at 882.
37. Id. at 13.
38. Id.
39. Id. at 27.
40. Id. at 26–27.
Amendment rights violations because some state statutes only allowed exemptions for "bona fide members of a recognized religious organization." In *Sherr v. Northport-E. Northport Union Free School District*, the plaintiffs argued that their rights under the Establishment Clause had been violated since they were not part of a majority or recognized religion. In *Sherr*, the court held that the portion of the statute that required a person to be a practicing member of a "bona fide" religion to qualify for a religious exemption was "violative of both the establishment and free exercise clauses of the First Amendment to the United States Constitution." Since *Sherr* in 1987, all states that have religious exemptions to vaccinations do not attempt to assess the validity of the religion in question, although government officials may still assess the genuineness of the belief.

The U.S. Supreme Court case of *Employment Division, Department of Human Resources v. Smith* is vital to understanding religious exemption practices in the United States. In *Smith*, two drug rehabilitation counselors were fired from their jobs when they were discovered to have ingested peyote, which is a hallucinogenic drug. Many employers have a "no tolerance" standard surrounding drug use and termination for drug use did not entitle the employee to unemployment benefits under state law. The employees in *Smith*, however, were members of the Native American Church and had consumed the drug for sacramental purposes at a church ceremony. Since both respondents were fired from their jobs based on an action committed outside of the workplace and through a religious ceremony, they proceeded to file a claim that the denial of benefits violated their religious freedoms under the First Amendment. The United States Supreme Court held that the Free Exercise Clause allows a state to criminally punish any drug use, including religious drug use, as long as

42. 672 F. Supp. 81, 91 (E.D.N.Y. 1987).
43. *Id.* at 84.
44. *Id.* at 91.
45. See, e.g., Dalli v. Bd. of Educ. 267 N.E.2d 219, 222 (1971) (applying the *Seeger* test of whether the belief occupies the place in the heart of person seeking a religious exemption as someone clearly qualified (i.e. a recognized religious group)).
47. *Id.* at 874.
48. *Id.*
49. *Id.*
the state does not attempt to regulate religious beliefs in any way.\textsuperscript{50} The practical effect of the Smith decision is that states’ generally applicable statutes still apply in religious circumstances as long as the statute’s purpose was not to intrude unnecessarily upon religious freedom.\textsuperscript{51}

Partly as a response to the decision in Smith, the Religious Freedom Restoration Act (RFRA) was passed in 1993. RFRA is a civil rights act that is “an express limitation on the power of government to act when that action interferes with the rights of an individual.”\textsuperscript{52} RFRA also reiterated what has already been established in case law: that any burden on religious freedom must be due to a compelling state interest.\textsuperscript{53} Additionally, RFRA established that not only must there be a compelling state interest, but the government may only substantially burden an individual’s religious liberty if that application of law is the least restrictive means of furthering that compelling interest.\textsuperscript{54} As will be discussed in Part II.A, case law has shown multiple times that the health and safety of the greater population is a compelling state interest to bar religious exemptions to mandatory vaccinations; yet only two states actually apply that compelling interest by barring all religious exemptions. Furthermore, vaccinations are currently the only way to sufficiently protect vulnerable populations from many dangerous diseases, and while medical advances may change in the future, the current immunization scheme is the least restrictive alternative.\textsuperscript{55} Additionally, even if there are other alternatives such as quarantine, “a less-restrictive course of action need not be taken when it is not as effective as the challenged government conduct.”\textsuperscript{56}

\textsuperscript{50. Id. at 890.}
\textsuperscript{51. Smith at 878–79.}
\textsuperscript{54. The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (1993). See Ben Horowitz, Shot in the Arm: What a Modern Approach to Jacobson v. Massachusetts Means for Mandatory Vaccinations during a Public Health Emergency, 60 AM. U. L. REV. 1715, 1740 (2010) (stating that the only real alternative to preventing a pandemic is quarantine, which is not generally considered a less restrictive alternative, and, more importantly, it is not an adequate alternative).}
\textsuperscript{55. Id. at 1741. See also Ashcroft v. ACLU, 542 U.S. 656, 666 (2004).}
Multiple cases have assessed requirements for affiliation with mainstream religion as the only recognized religious exemptions from mandatory vaccinations, including *Dalli v. Board. of Education.*\(^{57}\) In *Dalli*, the court held that ""[n]o matter how misguided or even ridiculous such beliefs may appear to be to the court, or to the overwhelming majority of the people, unless they damage a compelling State interest the courts can examine only to determine whether they are sincerely held.""\(^{58}\) Additionally, some states do not assess even the sincerity of the belief and grant exemptions on a religious basis by default.\(^{59}\)

While it has been generally established that requiring religious exemptions only to members of an ""established"" or ""bona fide"" religion violates the First Amendment as incorporated by the Fourteenth Amendment of the U.S. Constitution, it is not unconstitutional to offer no religious exemptions to vaccinations at all. In *Workman v. Mingo County Schools*, a mother argued that West Virginia, by not offering any exemptions to its mandatory vaccination statute, violated her First Amendment rights.\(^{60}\) The District Court, however, held that while many states have chosen to provide a religious exemption from mandatory vaccinations, they are not required to do so, and not having an exemption does not violate the religious freedom of the parents or child.\(^{61}\) The court in *Workman* held that the mother's freedom of religion claim failed as ""[t]he right to practice religion freely does not include [parental] liberty to expose the community or the child to communicable disease....""\(^{62}\)


\(^{58}\) *Id.* at 222. The issue of a compelling state issue being the public health and safety of the state's children and citizens will be discussed in Part II.A of this Note.

\(^{59}\) See *Lepage v. Wyoming*, 18 P.3d 1177, 1180–81 (Wyo. 2001) (holding that due to the way the statute was phrased (using ""shall"" language instead of ""may"" language), all religious exemptions requested in writing would be granted by the state). Although this case was decided in 2001, Wyoming's religious exemption statute continues to contain ""shall"" language ensuring that all religious exemptions submitted in writing, regardless of sincerity of held belief shall be granted. Wyo. Stat. Ann. § 21–4–309(a) (2014).


\(^{61}\) *Id.* at 689.

\(^{62}\) *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944)).
Most recently, in *Phillips v. City of New York*, a court rejected both a federal and state challenge of New York’s mandatory vaccination statute. Plaintiffs brought seven claims against the City of New York, alleging that, despite being granted religious exemptions, their rights under the First, Ninth and Fourteenth Amendments were being violated because their children had to be excluded from school any time another student reported an instance of a “vaccine preventable disease.” The *Phillips* court addressed each of the plaintiffs’ complaints thoroughly and dismissed them. The court deconstructed the First Amendment argument immediately by referencing *Jacobson*, *Caviezel* and *Sherr*. The court concluded, based on precedent, that not only were the plaintiffs’ rights not violated by the school prohibiting their children from attending during high-risk outbreak periods, but that they also had no constitutional right to receive a religious exemption from vaccinations at all. Although this Note focuses on First Amendment issues, the court in *Phillips* also dismissed the plaintiffs substantive due process causes of action, their arguments surrounding the Equal Protection Clause, and general claims under the Ninth and Fourteenth Amendments.

Finally, although this Note will not attempt to delve too deeply into the murky waters of the United States Supreme Court’s recent decision in *Burwell v. Hobby Lobby Stores*, it would be remiss to exclude it totally from an analysis of the Free Exercise Clause, especially

64. *Id.*
65. *Id.* at 311. One child was actually granted an exemption, which was later revoked. *Id.* The plaintiffs also brought claims under various state and local laws outside the focus of this Note. *Id.*
67. *Id.* at 312–13 (stating that: *Jacobson* laid the foundation that religious objectors are not constitutionally exempt from mandatory vaccination programs; that *Caviezel v. Great Neck Pub. Sch.*, 739 F. Supp. 2d 273, 285 (E.D.N.Y. 2010), had very similar facts to *Jacobson* and as a result held that “the free exercise clause of the First Amendment does not provide a right for religious objectors to be exempt from New York’s compulsory inoculation law[.]”; and that *Sherr* established explicitly that there is no constitutional right to religious exemptions).
68. *Id.*
69. *Id.* at 313.
70. 134 S.Ct. 2751 (2014).
as it concerns medical decisions.\footnote{71. \textit{Hobby Lobby} is particularly salient in the context of vaccinations, as the dissent actually cites the decision in \textit{Phillips v. City of New York}.} The majority in \textit{Hobby Lobby} held that RFRA protected closely-held private corporations’ religious beliefs by stating that these corporations were not required to provide health insurance coverage for contraception if that violated the sincerely held religious beliefs of the owners of the corporations.\footnote{72. \textit{Hobby Lobby}, 134 S.Ct. at 2759.} The Court in \textit{Hobby Lobby} held that although the “compelling government interest” test applied in the case and was met, because there were conceivably other “less restrictive” alternatives for serving that interest, the mandate that corporations provide birth control through health insurance failed the test.\footnote{73. \textit{Id.}} In the majority opinion, the Court specifically stated that the ruling was intended to be narrow and does not necessarily apply to other medical needs such as blood transfusions or vaccinations.\footnote{74. \textit{Id.} at 2758, 2760.} However, the dissent seemed less than convinced by this assertion. The dissent mentioned multiple times that it felt that the decision in \textit{Hobby Lobby} will open the doors to a multitude of religious objections that could affect more than just contraception. For instance, the dissent worried that objections to blood transfusions, antidepressants, medications derived from pigs (including anesthesia, intravenous fluids, and pills coated with gelatin) and vaccinations would all now have a much greater chance of being granted, even if there is a compelling state interest, if there is a less restrictive alternative.\footnote{75. \textit{Id.} at 2805.}

If the federal government attempted to implement a mandatory vaccination statute, it would invoke the Religious Freedom Restoration Act and fall under the jurisdiction of \textit{Hobby Lobby}. While these standards are more rigorous than state law requirements, a federal mandatory vaccination law could still be found Constitutional for two primary reasons: (1) The compelling government interest test is easily passed due to the harms caused by low rates of vaccination,\footnote{76. Not only is there a compelling government interest in requiring mandatory vaccinations on a federal level, but that interest is also more effective at a federal level than at a state level, and less effective alternatives do not have to be considered if they are significantly less effective even if they are also less restrictive. See generally Ashcroft v. ACLU, 542 U.S. 656 (2004).} and (2)
There are no other less restrictive alternatives to effectively reach the public health goals of mandatory vaccinations.\(^77\)

II. PROBLEMS CREATED BY RELIGIOUS EXEMPTIONS FOR VACCINATIONS

A. Religious Exemptions to Vaccines for Children Create a National Health and Safety Risk

The advent of vaccinations has all but eradicated many of the most dangerous and deadly diseases and ailments from the United States and even the world.\(^78\) However, as many more parents choose not to vaccinate their children, the risk that those diseases, among new ones, will reemerge and cause a national epidemic increases. Why are so many parents choosing to opt out of vaccinating their children? The reasons vary and include everything from a genuine religious belief that vaccinations should not enter the body, to a fear that vaccines cause autism or other illness, and even the simple belief that “Western medicine” is “Satanism.”\(^79\) However, the most common way, and often the easiest, to receive an exemption to mandatory vaccination statutes is through a religious or philosophical exemption.\(^80\)

The primary problem with exemptions from mandatory vaccinations for children is not necessarily the individual harm to the

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\(^77\) See supra note 53.

\(^78\) See supra Part I.


\(^80\) Only religious exemptions are being discussed at length in this Note, though philosophical exemptions are just as problematic and possibly have even less basis in the Constitution. However, it could be argued that philosophical exemptions should be required in states that offer religious exemptions to not violate the Establishment Clause by providing preferential treatment to those parents that hold a religious belief. Additionally, usually the only other way to escape a mandatory vaccination is to enroll the child in a school that does not require it (private school or home-school) or to have a legitimate medical reason that the child cannot receive a vaccination.
child (which is also important as they do not themselves make the decision to remain unvaccinated), but rather the issues it causes in weakening "herd immunity."81 Herd immunity is "the principle that if a significant portion of the community—for most diseases, more than eighty percent—is vaccinated, those who are not vaccinated will be protected from illness by the community members who are vaccinated because the vaccine has eliminated 'chains of contagion.'"82 This principle is especially important for people that cannot receive vaccinations: those that have a medical reason to avoid vaccination, infants that are too young to be vaccinated, and the generally medically frail. When states grant too many religious exemptions, it becomes a major problem for herd immunity. For example, polio requires an 80 percent immunization rate in the community, but measles requires a staggering 95 percent immunization rate in school settings, which likely explains the recent outbreaks of measles in the U.S., since affected areas tend to have higher rates of those seeking religious exemption.83

Measles poses one of the most serious risks to unvaccinated children of weakened herd immunity. Americans tend to become very worried about diseases entering the United States and causing an epidemic (particularly Americans' reaction to illnesses like swine flu, SARS, and Ebola), but focus less on diseases like measles, which are far more likely to affect them and are still very dangerous.84 Before the measles vaccination program began, an estimated three to four million people in the United States were infected each year, of whom 400 to 500 died, 48,000 were hospitalized, and another 1,000 developed a chronic

82. Id. at 440 (quoting Donald S. Kenkel, Prevention, in 1B HANDBOOK OF HEALTH ECONOMICS 1677, 1694 (Anthony J. Culyer & Joseph P. Newhouse eds., 2000)).
84. See Gwynn Guilford, Forget Ebola. This is the viral epidemic that should really terrify Americans, QUARTZ (Oct. 1, 2014), http://qz.com/274230/forget-ebola-this-is-the-viral-epidemic-that-should-really-terrify-americans/.
disability due to encephalitis, or swelling of the brain.\textsuperscript{85} Like Ebola, measles is very common in some other countries; the virus is extremely contagious and can spread rapidly.\textsuperscript{86} In 2008, there were about 164,000 measles deaths, or eighteen deaths every hour worldwide.\textsuperscript{87} Measles was declared eliminated from the United States population completely in 2000.\textsuperscript{88} However, in recent years, measles cases have been on the rise again: in 2013 there were less than 200 cases of measles in the U.S., but in 2014 that number almost tripled to a very concerning 644 cases in twenty-seven states.\textsuperscript{89} This upward trend of measles outbreaks began in 2008 when the CDC attributed the outbreak to measles spreading in communities with large groups of unvaccinated people.\textsuperscript{90}

Unfortunately, measles is not the only disease making a comeback after eradication. Whooping cough and other dangerous diseases have been on the rise in recent years as well, with a 2012 outbreak of over 48,000 cases of whooping cough being due to the highest number of unvaccinated people since 1955.\textsuperscript{91} Many of the modern outbreaks in the United States have been found to be the result of more people choosing not to vaccinate their children for non-medical reasons.\textsuperscript{92} When children are not vaccinated many people are harmed: (1) the children themselves because their risk of contracting the disease is

\textsuperscript{85}\textsc{Centers for Disease Control, Measles—Q&A About Disease and Vaccine}, \url{http://www.cdc.gov/vaccines/vpd-vac/measles/faqs-dis-vac-risks.htm} (last updated Mar. 3, 2015).

\textsuperscript{86}\textsc{Centers for Disease Control, Measles Vaccination}, \url{http://www.cdc.gov/measles/vaccination.html} (last updated Feb. 4, 2015).

\textsuperscript{87} Id.

\textsuperscript{88}\textsc{Id.}

\textsuperscript{89}\textsc{Id.}

\textsuperscript{90}\textsc{Id.}

\textsuperscript{91}\textsc{Id.}

\textsuperscript{92}\textsc{Id.}
greatly increased; (2) the population's most vulnerable, because they may not be medically able to be vaccinated or may be too young; and (3) the population as a whole because of diminished herd immunity.

B. There Are Limited Options for Concerned Parents to Protect Their Children from Unvaccinated Children That Threaten Herd Immunity

Parents of children that have actually been vaccinated, are too young to be vaccinated, or have a health related reason not to vaccinate are left with little recourse against parents of children who are not vaccinated and threaten herd immunity. Unfortunately for those parents whose children are truly at risk, there is unlikely to be legal recourse for them in the courtroom as the harm is often too abstract. For instance, parents may be worried about the potential for children to become ill, but the practical implications of pursuing that in the court system is too broad and nearly impossible to show causality. What if the unvaccinated child is not in their classroom? What if the child is not in their grade level? What if the child is not at their school at all but is out in the community at playgrounds, shopping centers, or movie theaters?

Article III of the Constitution places “case or controversy” limitations on what cases federal courts can hear, and one of those limitations is standing. Standing requires an “injury in fact” that is “fairly traceable” to challenged action of the defendant and will “likely” be “redressed by a favorable decision.” However, there may be some argument to be made that parents could attempt to go through the American Civil Liberties Union (ACLU) or another similar organization and achieve standing in that capacity. The ACLU has achieved standing before in cases involving the Establishment Clause where the primary issue is whether there was “injury in fact” under Article III. In *ACLU Nebraska Foundation v. City of Plattsmouth*, the plaintiff alleged that he had standing because there was a religious monument in a public park that made him so uncomfortable that he avoided the park itself.

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94. *Id.* (internal citations omitted).
95. *Id.* at 1030–31.
96. *Id.* at 1031 ("Doe has also stated that he has curtailed his use of Memorial Park because of the presence of the monument, and there is no reason to disbelieve
where parents are concerned about the health and safety of their own children, they will likely have a difficult time showing standing. However, they may have an opportunity under *Plattsmouth* and similar cases if parents can show that there is injury in fact that is "‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’"\(^9\) For instance, for a parent to have standing, he or she would need to show actual, concrete injury to their child due to exposure to an unvaccinated child.

**C. Statutes Concerning Religious Exemptions Vary State by State and Some States Grant More Exemptions than Others**

One issue with the lack of a unified exemption scheme to mandatory vaccination statutes is that the requirements can vary dramatically from state to state. For instance, Ohio has one of the easiest standards to meet to become exempt from vaccinations in its legislation. The Ohio exemption portion of the statute reads: "[a] pupil who presents a written statement of the pupil’s parent or guardian in which the parent or guardian declines to have the pupil immunized for reasons of conscience, including religious convictions, is not required to be immunized."\(^9\) When the parent searches for what sort of statement to prepare, he or she will find that it is a simple form which asks for the child’s name, their religion and denomination, and the reason.\(^9\) In Wyoming, once the statement is prepared and submitted, *all* religious exemption requests must be granted.\(^1\) In New York, a written and signed statement is all that is required, but the school itself may accept or deny the request.\(^1\) In California, as a result of suffering through a

\(^{97}\) *Id.* at 1030.

\(^{98}\) OHIO REV. CODE ANN. § 3313.671(B)(4) (LexisNexis 2014).


\(^{100}\) WYO. STAT. ANN. § 21-4-309(a) (LexisNexis 2014).

\(^{101}\) See generally Immunization FAQ’s, NEW YORK STATEWIDE HEALTH SERVICES CENTER, (Oct. 9, 2014) http://www.schoolhealthservicesny.com/faq.cfm?subpage=41
measles outbreak due to high levels of unvaccinated children, an updated statute now requires that parents seeking a religious exemption provide verification that they consulted their child’s doctor about the risks and benefits of not receiving vaccinations. Despite this added provision, some in the legal community argue that the parental verification has had the opposite effect of what the California legislature hoped to achieve, as there is a box on the religious exemption form which allows parents to opt out of visiting the child’s doctor if doing so is against their religious beliefs. As a result, the genuineness or sincerity of the belief is not assessed in any way. Other states have taken steps to assess the sincerity of religious belief behind the requested exemption. For example, in Arkansas, parents must have their statement of religious belief notarized, undergo an educational component, sign an informed consent form, and acknowledge they understand that their children must stay home during any vaccine-preventable outbreak. And then, of course, Mississippi and West Virginia have no religious exemptions at all.

The fact that states have so many varying requirements for religious exemptions is not irrelevant. Not only does it show that federal oversight could make the process much simpler, but the CDC has also noticed a correlation between states that offer the most religious exemptions and outbreaks of measles.

("A religious exemption is a written and signed statement from the parent or guardian of such child, stating that the parent or guardian objects to their child’s immunization due to sincere and genuine religious beliefs which prohibit the immunization of their child. The principal or person in charge of the school may require supporting documents. The school decides whether to accept or reject the request for a religious exemption.").

105. Paul Gastanaduy et al., Morbidity and Mortality Weekly Report (MMWR), CENTERS FOR DISEASE CONTROL, (June 6, 2014), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6322a4.htm?s_cid=mm6322a4_w ("Measles cases have been reported from 18 states and New York City. Most cases were reported from Ohio (138), California (60), and New York City (26) . . . Most of the 288 measles cases reported this year have been in persons who were unvaccinated (200 [69%]) or
D. Lack of Vaccinations in the United States Creates an Increased National Security Risk

Bioterrorism has a long and varied history in the United States and around the world. After the terrorist attacks on the World Trade Centers and the Pentagon, national security became even more of a priority to the United States. Further, particularly after the terrorist attacks caused by the anthrax mailer, the United States began to focus on bioterrorism and expanded its research, prevention, and action plan for future potential bioterrorism attacks. As a result, Congress and the President took action to make citizens feel more prepared and perhaps less anxious about a bioterror attack on American soil. The response was a piece of legislation titled the Public Health Security and Bioterrorism Preparedness And Response Act of 2002 (BPRA).\(^{106}\) BPRA’s primary purpose is “[t]o improve the ability of the United States to prevent, prepare for, and respond to bioterrorism and other public health emergencies.”\(^{107}\) Other legislation to prepare for and act against incidences of bioterrorism include: the Pandemic and All-Hazards Preparedness Act of 2006;\(^{108}\) the U.S. Homeland Security Department’s BioWatch Initiative;\(^{109}\) and the Project BioShield Act of 2004.\(^{110}\) While these legislative efforts are long and detailed and employ multiple departments to achieve their goals, they all use vaccinations as one of the

who had an unknown vaccination status (58 [20%]); 30 (10%) were in persons who were vaccinated. Among the 195 U.S. residents who had measles and were unvaccinated, 165 (85%) declined vaccination because of religious, philosophical, or personal objections, 11 (6%) were missed opportunities for vaccination, and 10 (5%) were too young to receive vaccination.”).

107. Id.
resources that medical facilities plan to use and already implement as a way to prevent and contain a bioterrorist attack.

Herd immunity and its importance has already been discussed in this Note, and the principle certainly applies in a national security situation. While vaccinations are an important and effective form of preparation for a bioterror attack, they cannot be employed to their full ability if herd immunity is so lessened that individuals are actually at risk for contracting diseases that were “eradicated” years ago, such as measles or smallpox.

III. POTENTIAL SOLUTIONS TO THE PROBLEMS CAUSED BY GRANTING RELIGIOUS EXEMPTIONS TO VACCINATIONS FOR CHILDREN

While the problems discussed previously may seem grim, there are possible solutions for raising vaccination rates to where they should be for the safety of the community. First, this analysis will discuss the solution of increased federal oversight; second, it will discuss the abolishment of religious exemptions to mandatory vaccinations; and finally, it will discuss the idea of an educational media campaign to attempt to change modern public perception of vaccinations.

A. Increased Federal Oversight

The current landscape of vaccination requirements allows each state to create its own statute dictating the requirements for mandatory vaccinations for children. Additionally, each state can choose whether or not to allow religious and/or philosophical exemptions to those vaccinations. These requirements can vary wildly from state to state and can become confusing if someone lives in one state and then moves to

111. See supra Part II-A.
112. In the decade before the measles vaccination program began, an estimated 3 to 4 million people persons in the United States were infected each year, of whom 400-500 died, 48,000 were hospitalized, and another 1,000 developed chronic disability from measles encephalitis. This makes measles the most deadly childhood fever illness. Measles – Q&A about Disease & Vaccine, CENTERS FOR DISEASE CONTROL, MEASLES VACCINATION, http://www.cdc.gov/vaccines/vpd-vac/measles/faqs-dis-vac-risks.htm (last updated Mar. 3, 2015); CENTERS FOR DISEASE CONTROL, MEASLES VACCINATION, http://www.cdc.gov/vaccines/vpd-vac/measles/ (last updated Feb. 7, 2013).
another. Additionally, if a state has relatively lax requirements for a religious exemption (such as automatically granting the request by default), then people who do not want to vaccinate their children may flock to that area and create a larger population of people who are unvaccinated, resulting in even more dangerously decreased herd immunity. This system puts herd immunity and the safety of the American population in jeopardy by increasing the risk of once-eradicated diseases making a reprisal in groups of people with inadequate numbers of vaccinations.

After the terrorist attacks of 2001, states that grant exemptions to mandatory vaccinations (forty-eight of the fifty) enacted emergency procedures in place to require forced treatment and vaccination in the case of a terrorist attack of a significant epidemic. The problem with this system is that, like the vaccination and exemption laws in the first place, there is significant variation between states. For instance:

Wisconsin and Florida are examples of states with the most lenient emergency compulsory vaccination laws. These states allow individuals to refuse vaccinations for medical, religious and philosophical reasons but reserve state authority to isolate or quarantine such individuals. By contrast, public health emergency laws in Arizona and Hawaii impose mandatory vaccinations and make no reference to allowing exemptions, even conditional opt-outs.

Therefore, there are at least three stages at which states across the country could vary their standards: (1) the mandatory vaccination laws themselves; (2) the exemption laws (if they offer them, how they offer them, whether they allow religious or philosophical exemptions or both); and (3) the emergency standards that are in place for requiring treatment or vaccinations. Having this much diversity from state to state

113. Supra Part II.C.
115. Id.
only breeds confusion and puts the nation’s health, safety, and national security at risk.

The obvious solution to the states’ current autonomy in making public health decisions lies in increased federal oversight. There are several constitutional arguments that can be made authorizing Congress to create a statute that standardizes procedures surrounding all three areas of vaccination law. However, the most promising would probably be the employment of the Interstate Commerce Clause. The Interstate Commerce Clause is found in Article I § 8 of the Constitution and grants Congress the power to “regulate Commerce with foreign Nations and among the several states, and with the Indian Tribes.” The clause has been interpreted broadly, allowing Congress to regulate activity if it has a substantial effect on interstate commerce. Vaccinations and public health and safety likely constitute interstate commerce, or alternatively, if thousands or millions of Americans were to fall ill to an epidemic or bioterrorist attack, commerce would certainly be affected in a significant manner.

A federal statute would need to be drafted by Congress and approved by the President. To make the legislation truly effective, the law would need to cover all three stages of mandatory vaccinations. While there might be some public resistance to such a statute (particularly in light of the recent Hobby Lobby decision), most resistance could probably be quelled by writing the statute as an amendment to existing legislation for bioterrorism or pandemics mentioned in Part II. Such a statute could strengthen herd immunity and therefore limit and contain outbreaks of preventable diseases, strengthen

116. See supra Part I.C.
117. U.S. CONST. art. I, § 8, cl. 3.
118. Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that activity, “whatever its nature” may “be reached by Congress if it exerts a substantial economic effect on interstate commerce”).
119. Abigale Ottenburg, et. al., Vaccinating Health Care Workers Against Influenza: The Ethical and Legal Rationale for a Mandate, AM. J. PUBLIC HEALTH 212 (Feb. 2011), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3020194 (noting that, as demonstrated through efforts such as the Public Health Service Act, “the commerce clause grants significant power to the federal government to regulate, encourage, or potentially mandate the vaccination of health care workers against influenza and ensure fair processes to adjudicate complaints related to vaccination.”).
national security, and create a more stable environment to contain and eliminate an emergency pandemic in the United States.

B. Abolishment of Religious Exemptions to Mandatory Vaccinations

Throughout this Note, it has been reiterated that religious exemptions to vaccinations have often been exploited as legal loopholes and have caused major issues with the resurgence of once-eradicated illnesses such as measles. For instance, unvaccinated children are more than twenty-two times more likely than their peers to fall ill with measles. Additionally, it has been established that religious and philosophical exemptions to vaccinations are not protected as a right under the United States Constitution. In fact, not only are they not required, religious exemptions may even be in violation of the Establishment Clause:

In *Lemon v. Kurtzman*, the Supreme Court articulated a three-part test to ensure that statutes are sufficiently neutral and do not offend the Establishment Clause. The Lemon test requires 1) that the statute have a secular legislative purpose; 2) that its principal or primary effect does not advance or inhibit religion; and 3) that the statute does not impermissibly entangle government and religion. In addressing challenges to immunization laws, a number of courts have found the statutory language of the religious exemption to be in violation of the Establishment Clause. For example, a New York Court struck down New York’s religious exemption provisions for running afoul of the second and third prongs of the Lemon test because it allowed only members of a

120. LeFever, *supra* note 92, at 1048.
121. *Supra* Part I-C.
recognized religious organization to claim an exemption.\textsuperscript{122}

Many states have attempted to avoid violating the \textit{Lemon} test and the Establishment Clause by removing language that requires that religious exemptors be members of an organized religion, and instead have moved to a "sincerely held" religious belief standard.\textsuperscript{123} However, moving to this standard makes it even easier for many exemptors to receive a religious exemption, even if they do not actually hold religious beliefs that require them to forego vaccinations.\textsuperscript{124}

Eliminating religious and philosophical exemptions to vaccinations completely may be the answer to the multitude of problems they cause. Two states in this country (Mississippi and West Virginia) have already removed religious or philosophical exemptions to mandatory vaccinations, showing that this is a "legally justified, viable position."\textsuperscript{125} The drawbacks to this plan are that (1) it would be difficult to implement on a nationwide scale unless it was a federal law, and (2) it would likely be met with significant resistance from the public as an infringement on individual rights. However, there would still be options for parents that want to forego vaccinating their children; they could send their children to a private institution that does not require vaccinations or could homeschool their children. This would leave options for people that have a genuine religious belief but would be a significant deterrent for parents that are seeking religious exemptions without a sincere religious belief that forbids vaccinations. There is a strong legal argument that the state has a significant interest in preserving health and safety, and there is precedent for abolishing religious and philosophical exemptions to vaccines in two states and in the Free Exercise Clause.

\textsuperscript{122} Lefever, \textit{supra} note 92, at 1061–62. (footnotes and quotations marks omitted).

\textsuperscript{123} Id. at 1062.


\textsuperscript{125} Lefever, \textit{supra} note 92, at 1066.
C. Media Campaign

While the previous two solutions may be more effective, they could also be difficult to implement as they would require significant partisan agreement to be passed by Congress and signed by the President, and they may be unpopular with many Americans who are protective of individual rights. The third option, a media campaign, may not have the same effect as the first two, but would be easy to implement, would not be costly, and could at least educate the public on: (1) the need for vaccinations for personal health, (2) the health and safety of the nation as whole, and (3) the safety and efficacy of vaccinations.

Since the birth of vaccinations themselves, there have been those opposed to vaccinations.\(^\text{126}\) Today, the majority of the population views vaccinations favorably, or at least choose to have their children vaccinated to attend public schools. The main reasons that parents today want to shield their children from vaccinations are the misconception that vaccines are medically risky and can cause autism among other disorders (thanks in large part to celebrities such as Jenny McCarthy) or that vaccines are the government’s way of overreaching into individuals’ medical decisions.\(^\text{127}\) While there are some (very minor) medical risks to vaccinating, autism and many other major disorders have never been found to be results of vaccinations and the scientific community at large agrees on the safety and efficacy of vaccines.\(^\text{128}\)

A media campaign sponsored by the government could help clear the fog of misinformation surrounding vaccinations. A campaign that stressed the risks of not vaccinating, for instance, showed that vaccinations are “1,000 to 100,000 times safer than running the risk of contracting any of the above life-threatening diseases.”\(^\text{129}\) Additionally,

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\(^\text{126}\) Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out Of Vaccinating Their Children?*, 37 Mich. J.L. Reform 353, 388 (2004) (“The same year that Jenner published his groundbreaking work [resulting in the creation of the smallpox vaccine], the ‘Society of Antivaccinationists’ was founded upon the belief that vaccination was an ‘inappropriate meddling in the work of God.’”).


\(^\text{129}\) Id. at 393.
the campaign would need to stress that it is imperative for the sake of the individual, the community, and national security that parents vaccinate their children. The campaign would need to play in schools (so that unvaccinated children could request that their parents vaccinate them), on television and radio, and particularly, in social media to reach the greatest audience possible. The ads would need to have a message (1) stating firmly that vaccinations are not associated with autism or any other serious disorder, (2) reviewing the history of diseases in this country and the devastation they wreaked on children before vaccinations, and (3) reminding parents of their civic duty to vaccinate their children to keep the nation safe from acts of bioterrorism and pandemics. While this may not convince every mind, it certainly could be a good start in swaying the courts of public opinion.

IV. CONCLUSION

Not long ago, nations lost thousands and even millions of individuals every year to dangerous diseases. These diseases and illnesses are now largely preventable in the United States, where medical resources exist to combat smallpox, measles, diphtheria, and whooping cough, yet many parents still put their own children, and society as a whole at risk through choosing not to vaccinate their children.

The history of disease and illness before the age of vaccinations should be a sobering lesson. Vaccinations have changed the face of this country and the world, and have paved the way for many remarkable medical discoveries. This history should remind Americans of the risk of not vaccinating. The threat to national security and public health and safety is very real, and since religious exemptions to compulsory vaccinations are not protected by the Free Exercise Clause, and may even violate it, action must be taken to reverse the current trend in the United States. Whether it be through federal legislation to standardize exemptions and authorize uniform emergency vaccination procedures, through total abolition of religious exemptions to vaccinations, or through a coordinated media campaign to correct public misperception, some action should be taken to protect this nation from easily preventable diseases.