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NOTE

THOU SHALT VACCINATE THY CHILDREN: NEW YORK'S ATTEMPT TO CURB ABUSE OF RELIGIOUS EXEMPTIONS

I. THE GLOBAL HISTORY OF VACCINES

“Thanks to a vaccine, one of the most terrible diseases in history—smallpox—no longer exists outside the laboratory.”¹ Vaccination practices go as far back as the late 1700s when Edward Jenner² published his work on the development of a smallpox vaccine.³ Before the first vaccine was developed, a practice known as variolation⁴ was used to combat diseases, which is said to date as far back as the 1100s.⁵

Legally mandated vaccinations for schoolchildren are by no means a novel concept in American history.⁶ In 1885, Massachusetts became the first state in the country to require students to be vaccinated.⁷ More than eighty years later, New York joined Massachusetts when it statutorily prescribed vaccinations for schoolchildren in section 2164 of the New York Public Health Law (“Section 2164”) in 1966.⁸ However, since Section 2164’s inception, there have also been exceptions to this

1. *Why Are Childhood Vaccines So Important?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/vac-gen/howvpd.htm> (May 16, 2018).

2. *See Edward Jenner 1749-1823*, SCI. MUSEUM GRP., <https://collection.sciencemuseumgroup.org.uk/people/cp37470/edward-jenner> (last visited Nov. 7, 2020). Edward Jenner was a doctor in the U.K. who was famous for introducing the smallpox vaccine. *See id.*

3. *See id.*; *Vaccine Timeline*, IMMUNIZATION ACTION COAL., <https://www.immunize.org/timeline> (Apr. 6, 2020).

4. *See Smallpox: A Great and Terrible Scourge*, U.S. NAT’L LIBR. OF MED., https://www.nlm.nih.gov/exhibition/smallpox/sp_variolation.html (July 30, 2013) (defining “variolation” as “the deliberate infection with smallpox,” and explaining that “[u]pon recovery, the individual was immune to smallpox,” and “[b]etween 1% to 2% of those variolated died as compared to 30% who died when they contracted the disease naturally”).

5. *See Vaccine Timeline*, *supra* note 3.

6. *See* Ginia Bellafante, *Why Are There Religious Exemptions for Vaccines?*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/nyregion/measles-vaccines-religious-exemptions.html>.

7. *Id.*

8. N.Y. PUB. HEALTH LAW § 2164 (McKinney 2019).

requirement.⁹ One such exemption, which could be found in Section 2164 until June 2019 and remains in effect in an overwhelming majority of states, provides that children may be exempted from this mandate if their parents claim that vaccines violate their religious beliefs.¹⁰ Another exemption is available where a doctor licensed to practice medicine in the State of New York certifies that certain immunizations will likely harm the child's health.¹¹ In such a scenario, the child would not be required to have such immunizations administered until it is medically determined that the particular vaccines would no longer harm the child.¹²

Serious consequences can and typically do result from vaccination levels dropping below a certain threshold.¹³ For example, the Journal of Infectious Diseases states that an immunization percentage range of approximately ninety-two to ninety-four percent is needed to establish what is referred to as *community immunity* or *herd-immunity* for measles.¹⁴ Herd-immunity is the scientific principle that, when enough people are vaccinated against a certain disease, the germs cannot travel as easily from person to person and, as a result, the entire community is less likely to contract the disease.¹⁵ This is even true for those in the community who are not or cannot be vaccinated for that disease.¹⁶

All fifty states condition school attendance on certain required vaccinations in one way or another,¹⁷ and allow for medical exceptions.¹⁸ Forty-five states also allow for religious and/or philosophical belief exemptions.¹⁹ The only states that *do not* allow for religious or philosophical belief exemptions are California, Mississippi, West Virginia, Maine, and, most recently, New York.²⁰ It is suspected that

9. See *id.* § 2164(8), (9) (repealed 2019).

10. See *id.* § 2164(9) (repealed 2019); *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. ST. LEGISLATURES (June 26, 2020), <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> (stating that forty-five states and Washington, D.C. still allow for religious belief exemptions).

11. See PUB. HEALTH § 2164(8) (providing that "[i]f any physician licensed to practice medicine in [New York] certifies that such immunization may be detrimental to a child's health, the requirements of [Section 2164] shall be inapplicable until such immunization is found no longer to be detrimental to the child's health").

12. *Id.*

13. See *Vaccines Protect Your Community*, VACCINES.GOV, <https://www.vaccines.gov/basics/work/protection> (last visited Nov. 7, 2020).

14. See Walter A. Orenstein et al., *Building an Immunity Fence Against Measles*, 196 J. INFECTIOUS DISEASES 1433, 1434 (2007); see also *Vaccines Protect Your Community*, *supra* note 13.

15. *Vaccines Protect Your Community*, *supra* note 13.

16. *Id.*

17. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 10.

18. *Id.*

19. *Id.*

20. *Id.*

New York modeled their amendment to Section 2164 after similar legislation passed in California in 2015,²¹ which repealed exemptions based upon personal beliefs.²² Vaccination rates among California kindergartners had dropped to 90.4% during the 2014-2015 school year, nearly four percent below the threshold needed to establish herd-immunity for many preventable diseases.²³ California's repeal came after a measles outbreak in Disneyland in late 2014,²⁴ and New York's came after the worst nationwide outbreak in more than a quarter-century during the 2018-2019 school year.²⁵

After this outbreak, the likes of which New York City had not seen in decades,²⁶ New York State joined the short list of states that would no longer allow their constituents to exempt their children from their mandatory immunization programs for any non-medical reasons.²⁷ Governor Andrew Cuomo signed a bill to this effect into law on June 13, 2019.²⁸ As a result, parents can no longer use their religious beliefs as a basis to refuse to vaccinate their children.²⁹ However, some argue that this undermines parents' constitutional freedom of religion—a right recognized since the inception of the Bill of Rights.³⁰

This Note will address whether overarching health concerns overwhelm perceived burdens on parents' First Amendment freedoms so

21. Amanda Ottaway, *NY Brushes Off Bias Claims in New Anti-Vaccine Suit*, COURTHOUSE NEWS SERV. (July 26, 2019), <https://www.courthousenews.com/ny-brushes-off-bias-claims-in-new-anti-vaccine-suit>.

22. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 10.

23. Karen Kaplan, *Here's What Happened After California Got Rid of Personal Belief Exemptions for Childhood Vaccines*, L.A. TIMES (Oct. 29, 2018, 12:05 AM), <https://www.latimes.com/science/sciencenow/la-sci-sn-vaccine-medical-exemptions-20181029-story.html>; Laura Helft & Emily Willingham, *What is Herd Immunity?*, PBS: NOVA (Sept. 5, 2014), <https://www.pbs.org/wgbh/nova/article/herd-immunity>.

24. Liz Szabo, *California Measles Outbreak Linked to Disneyland*, USA TODAY (Jan. 8, 2015, 11:45 AM), <https://www.usatoday.com/story/news/nation/2015/01/07/measles-outbreak-disneyland/21402755>.

25. See Daily News Editorial Board, Opinion, *A Shot of Truth: Ending the Religious Exemption for Vaccines Is Constitutional*, N.Y. DAILY NEWS (Aug. 15, 2019, 4:05 AM), <https://www.nydailynews.com/opinion/ny-edit-vaccines-court-20190815-n5bbqjuptjc7ndragv2plqetuu-story.html>; Sharon Otterman, *New York Confronts its Worst Measles Outbreak in Decades*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/nyregion/measles-outbreak-jews-nyc.html>.

26. Lena H. Sun, *New York City Declares End to Largest Measles Outbreak in Nearly 30 Years*, WASH. POST (Sept. 3, 2019, 1:01 PM), <https://www.washingtonpost.com/health/2019/09/03/new-york-city-declares-end-largest-measles-outbreak-nearly-years>.

27. See David Klepper, *New York Ends Religious Exemption to Vaccine Mandates*, ASSOCIATED PRESS (June 14, 2019), <https://www.apnews.com/cdab615894c24163a7947d67c6874f2f>.

28. See *id.*

29. See *id.*

30. See *id.*; U.S. CONST. amend. I.

as to make religious exemptions a luxury, as opposed to a constitutional mandate.³¹ In *Wisconsin v. Yoder*,³² the Supreme Court held that states have a responsibility to educate their citizens and the power to impose “reasonable regulations” to ensure that their children receive a basic education.³³ Measles outbreaks in schools tend to make it very difficult, if not impossible, for schools to ensure that children receive a basic education.³⁴ Students infected with the disease cannot attend school and, in particularly severe cases, entire schools have been shut down as a result of measles outbreaks.³⁵ Thus, Section 2164, as amended, is no more than a reasonable regulation enacted to protect the health and safety of constituent children and society at large; this, in turn, furthers the state’s interest in ensuring that constituent children receive a basic education.³⁶

One problem with Section 2164 is that it is rigid and overly restrictive,³⁷ making it very difficult for the legislature to adjust the list of mandatory immunizations as needed.³⁸ Further, New York’s mandatory vaccination statute requires significantly more vaccinations than most other states.³⁹ On the other hand, Maine and Mississippi seem to have dealt with their religious exemption repeal in a more practical way⁴⁰ than did California, West Virginia, and New York.⁴¹ Maine’s and

31. See *infra* Part III.

32. 406 U.S. 205 (1972).

33. *Id.* at 213.

34. Phyllis W. Jordan & Raegen Miller, *The Toll that Measles Outbreaks Take on Schools*, FUTUREED (Apr. 24, 2019), <https://www.future-ed.org/the-toll-that-measles-outbreaks-take-on-schools>.

35. *Id.*; Nolan Hicks, *Health Department Closes Queens Yeshiva Amid Measles Outbreak*, N.Y. POST (May 13, 2019, 6:36 PM), <https://nypost.com/2019/05/13/health-department-closes-queens-yeshiva-amid-measles-outbreak>.

36. See Bobby Allyn, *New York Ends Religious Exemptions for Required Vaccines*, NPR (June 13, 2019, 5:26 PM), <https://www.npr.org/2019/06/13/732501865/new-york-advances-bill-ending-religious-exemptions-for-vaccines-amid-health-cris>.

37. N.Y. PUB. HEALTH LAW § 2164 (McKinney 2019).

38. *Id.* § 2164(2) (providing a list of required immunizations). *But see* ME. STAT. tit. 22, § 1066(1), (3) (2019) (establishing committees comprised of medical professionals in order to determine which immunizations ought to be required for schoolchildren on at least an annual basis); MISS. CODE ANN. § 41-23-37 (West 2020) (providing that “the state health officer shall specify such immunization practices as may be considered best for the control of vaccine preventable diseases”).

39. See, e.g., OHIO REV. CODE ANN. § 3313.671(B)(4) (LexisNexis 2020) (providing that a student who presents a written statement from his or her parent or guardian objecting to immunizations on religious or philosophical grounds is not required to be immunized).

40. See tit. 22, § 1066(1), (3) (providing for a committee comprised of medical professionals to establish a list of vaccines that ought to be required for children in schools); § 41-23-37 (establishing that “the state health officer” will establish a list of vaccines that ought to be required for children in schools).

41. See CAL. HEALTH & SAFETY CODE §§ 120335, 120338 (West 2020); PUB. HEALTH § 2164; W. VA. CODE § 16-3-4 (2020).

Mississippi's mandatory immunization programs establish governmental entities and require those entities to establish a list of vaccines that serve as conditions precedent to children attending schools in their states, to be updated on at least an annual basis.⁴² Furthermore, Maine requires its committee to convene at least four times per year.⁴³ New York ought to follow in Maine's and Mississippi's footsteps, as theirs is a much more adaptable and prudent way to deal with this crisis, particularly in light of the coronavirus pandemic.⁴⁴ Regarding the recent release of the coronavirus vaccine, it appears Maine and Mississippi will have no issue adding it to their lists of required vaccinations for schoolchildren, while California, West Virginia, and New York will likely need to amend their respective mandatory immunization statutes in order to add the new vaccine.⁴⁵

This Note continues by discussing how religious exemptions have been abused, as well as the practical and societal hurdles that have hindered, and continue to hinder, progress in this area.⁴⁶ Part II additionally examines the positions various religions in the United States *actually* take with regard to vaccinations.⁴⁷ Part III discusses constitutional issues with regard to repealing religious exemptions to mandatory vaccination laws, and which level of scrutiny the Supreme Court will likely apply to a court challenge to a mandatory immunization program that does not provide for religious exemptions.⁴⁸ Additionally, Part III considers post-repeal results in Mississippi, West Virginia, California, and Maine.⁴⁹ Part III also explains that, beyond constitutional challenges (namely, those involving the Free Exercise Clause), some issues presented in this Note arise out of poor statute drafting by some state legislatures in drafting their mandatory immunization programs.⁵⁰ Part IV argues that New York ought to do more to educate its constituents on the benefits of vaccines,⁵¹ which will, in turn, quell the fears of those with misconceptions.⁵² Finally, Part IV proposes that this issue should be resolved by amending the language of Section 2164(6)⁵³ in a way that both protects the New York legislature's repeal from

42. See tit. 22, § 1066(1); § 41-23-37.

43. See tit. 22, § 1066(3)(D).

44. See tit. 22, § 1066; MISS. CODE ANN. § 41-23-37 (West 2020). *But see* PUB. HEALTH § 2164.

45. See *infra* Part III.F.2–3, IV.

46. See *infra* Part II.

47. See *infra* Part II.A.

48. See *infra* Part III.A–B, D–E.

49. See *infra* Part III.F.

50. See *infra* Part III.C.

51. See *infra* Part IV.

52. See *infra* Part IV.A.

53. See *infra* Part IV.B.

constitutional challenges and allows mandatory vaccination lists to adapt to the changing medical needs of society.⁵⁴

II. RELIGIOUS BELIEF EXEMPTIONS ARE RARELY ABOUT RELIGION

Mandatory vaccines have been a polarizing societal issue in recent history.⁵⁵ However, as a society, we generally have not come to the table to resolve differences amicably, or even reasonably or intelligently.⁵⁶ Rather than engaging in meaningful, results-producing debate, some anti-vaccination parents (so-called “anti-vaxxers”) have taken to social media, using children as pawns to make their flawed arguments sound more sympathetic.⁵⁷ Some have gone as far as analogizing the alleged plight of their children to racial segregation of schools⁵⁸ or, worse yet, the Holocaust.⁵⁹

Aggrieved parents who advocate in favor of mandatory vaccinations because they have lost children to disease, instead of receiving public sympathy, have received numerous hateful comments online.⁶⁰ Again, this neither helps state legislatures reach the right result regarding mandatory vaccination law nor contributes to meaningful discussion in society; on the contrary, it facilitates hate and impedes progress.⁶¹ The individuals advancing these hateful and

54. See *infra* Part IV.B.

55. Emily Baumgaertner, *Why the Measles Outbreak Has Roots in Today's Political Polarization*, L.A. TIMES (May 9, 2019, 6:00 AM), <https://www.latimes.com/science/scienceNOW/la-sci-measles-outbreak-political-polarization-trump-20190509-story.html>.

56. See Ellie Hall, *Unvaccinated Children Are Now Barred from Going to School in New York—and Their Anti-Vax Parents Are Really Mad*, BUZZFEED NEWS (Sept. 20, 2019, 6:28 PM), <https://www.buzzfeednews.com/article/elliehall/vaccination-school-law-new-york-anti-vaxx-parents>.

57. Trae Murray (@traemurray), TWITTER (Sept. 18, 2019, 7:48 PM), <https://twitter.com/traemurray/status/1174470262030364672> (showing a picture of a young, unvaccinated boy who was apparently removed from his school because his parents refused to vaccinate him, in the picture the child is visibly distraught and is holding up a sign that reads, “We will miss you Zachary!” which appears to be signed by his classmates).

58. @Melissa232220, TWITTER (June 13, 2019, 8:41 AM), <https://twitter.com/Melissa232220/status/1139150813715226624>. This tweet contains an old picture, which appears to be from the pre-*Brown v. Board of Education* era, that depicts a young, white boy holding a sign that reads, “WE WON’T GO TO SCHOOL WITH NEGROES,” but the individual who posted this photo edited the picture, crossing out the word “NEGROES” and replacing it with “unvaccinated.” *Id.* This photo is captioned, “[r]emember when society ignorantly thought black people carried diseases they didn’t have? I thought we learned from this.” *Id.*

59. Yaron Steinbuch, *Anti-Vaxxers Slammed for Using Star of David to Promote Cause*, N.Y. POST (Apr. 8, 2019, 1:01 PM), <https://nypost.com/2019/04/08/anti-vaxxers-slammed-for-using-star-of-david-to-promote-cause>.

60. Elizabeth Cohen & John Bonifield, *Her Son Died. And then Anti-Vaxers Attacked Her*, CNN: HEALTH, <https://www.cnn.com/2019/03/19/health/anti-vax-harassment-eprise/index.html> (Mar. 21, 2019, 2:47 PM).

61. See Claire Felter, *Measles and the Threat of the Anti-Vaccination Movement*, COUNCIL ON

counter-productive criticisms claim to be fighting for freedom—specifically, the freedom of religion—that the government is depriving them of.⁶² However, most religions, at least as they are practiced in the United States, do not object to the use of vaccinations on a doctrinal level.⁶³ This means very little from a legal perspective, though, as American courts are not permitted to inquire into religious dogma—religious exemption claims must merely be predicated on sincerely-held religious beliefs.⁶⁴ This Part briefly discusses the limitations that constitutional law presents to the religion clauses of the First Amendment and breaks down the positions taken by several popular religions in the United States with regard to vaccinations.⁶⁵

A. *The “Clash” Between Vaccinations and Religion: Where Major Religions Really Stand on Vaccination*

Due to long-standing and deep-rooted constitutional principles, the concept of religious exemptions is inherently individualistic.⁶⁶ Our Constitution forbids American courts from interpreting bibles or other religious materials.⁶⁷ Therefore, neither courts nor the states can determine whether to approve a purported religious belief exemption based on the merits of a parent's claim.⁶⁸ Courts may only analyze claims of religious belief exemptions to determine whether such a claim is based on a sincerely held religious belief.⁶⁹

FOREIGN RELS. (Mar. 12, 2019), <https://www.cfr.org/in-brief/measles-and-threat-anti-vaccination-movement>.

62. See generally Matthew Walther, *Vaccine Exemptions Are a Necessary Part of Religious Toleration*, THE WK. (June 18, 2019), <https://theweek.com/articles/847598/vaccine-exemptions-are-necessary-part-religious-toleration>.

63. See Antonia Blumberg, *Here's Where Major Religions Actually Stand on Vaccines*, HUFFPOST (Mar. 31, 2017, 5:47 AM), https://www.huffpost.com/entry/heres-where-major-religions-actually-stand-on-vaccines_n_58dc3ef0e4b08194e3b71fc4.

64. See *infra* Part II.A.

65. See *infra* Part II.A.

66. See Eugene Volokh, *Religious Exemptions—a Guide for the Confused*, WASH. POST (Mar. 24, 2014, 7:32 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/24/religious-exemptions-a-guide-for-the-confused>.

67. See *id.*; Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981).

68. Volokh, *supra* note 66.

69. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 1728 (Rachel E. Barkow et al. eds., 5th ed. 2017) (stating that “[t]he Supreme Court has indicated that the judiciary can determine only whether [purported religious beliefs] are sincerely held views, not whether they are true or false”); see also U.S. v. Ballard, 322 U.S. 78, 87 (1944) (holding that “[t]he religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.”).

Very few major religions in the United States have expressed explicit and doctrinal objections to the practice of vaccination.⁷⁰ The only two major religions practiced in the United States that have expressed disapproval of vaccinations are Christian Scientists and the Dutch Reformed Church.⁷¹ Not only have very few religions openly rejected the practice of vaccinations, but many have affirmatively supported this practice because the risks associated with refusing to immunize outweigh all, or substantially all, objections on religious grounds.⁷² Below is a breakdown of the stances taken by major religions in America with respect to vaccinations.⁷³

1. Catholicism

The Catholic Church largely supports vaccination.⁷⁴ The one caveat is that some vaccines—including the measles vaccine—are derived from aborted human fetuses, a practice that the Catholic Church proscribes.⁷⁵ However, the Catholic Church, though historically opposed to

70. See Blumberg, *supra* note 63; Rene F. Najera, *Very Few Religions Expressly Prohibit Vaccination, yet Confusion Remains*, THE HIST. VACCINES (Nov. 9, 2018), <https://www.historyofvaccines.org/content/blog/religion-vaccination-confusion>.

71. See Blumberg, *supra* note 63; Najera, *supra* note 70.

72. See Blumberg, *supra* note 63; Najera, *supra* note 70.

73. See *infra* Part II.A.1–4.

74. Marshall Connolly, *What Is the Catholic Church's Position on Vaccines?*, CATH. ONLINE (July 24, 2018), <https://www.catholic.org/news/health/story.php?id=77999> (stating that “the Church understands that it is not the parents’ fault for being put in a position to choose between” two less-than-ideal alternatives). *But see* Elizabeth Bruenig, *Religious Leaders Should Step Up on Vaccinations*, WASH. POST (Apr. 8, 2019, 9:25 PM), <https://www.washingtonpost.com/opinions/2019/04/09/religious-leaders-should-step-up-vaccinations>. Some Catholic parents, such as the Kunkel family discussed in this *Washington Post* article, are opposed to vaccinations that are derived from the tissues of aborted human fetuses. *Id.* It is worth mentioning, however, that the Catholic Church has emphatically rejected this view. See *supra* note 77 and accompanying text; *FAQ: On the Use of Vaccines*, NAT’L CATH. BIOETHICS CTR. (May 11, 2020), <https://www.ncbcenter.org/resources/frequently-asked-questions/use-vaccines>; *Moral Reflections on Vaccines Prepared from Cells Derived from Aborted Human Foetuses*, IMMUNIZATION ACTION COAL., <https://www.immunize.org/talking-about-vaccines/vaticandocument.htm> (last visited Nov. 7, 2020). *But see* Gordana Pelčić et al., *Religious Exception for Vaccination or Religious Excuses for Avoiding Vaccination*, 57 CROATIAN MED. J. 516, 517 (2016) (stating that the Catholic Church recommends avoiding such vaccines, but that “in the case where no alternative vaccine is available, the use of the existing vaccine is morally acceptable in order to avoid serious risks for children and for the whole population”).

75. Blumberg, *supra* note 63; Connolly, *supra* note 74 (citing *Moral Reflections on Vaccines Prepared from Cells Derived from Aborted Human Foetuses*, *supra* note 74); *Vaccine Ingredients—Fetal Tissues*, CHILD.’S HOSP. PHILA., <https://www.chop.edu/centers-programs/vaccine-education-center/vaccine-ingredients/fetal-tissues> (last visited Nov. 7, 2020); CNA Daily News, *What Does the Catholic Church Teach About Vaccines*, CATH. WORLD REP. (May 6, 2019), <https://www.catholicworldreport.com/2019/05/06/what-does-the-catholic-church-teach-about-vaccines> (“One reason that some [Catholics] decline the measles vaccine in particular has to do with the fact that it was developed from cell lines descending from aborted fetal tissue.”). The commandment on which Catholics lean in support of their position on abortion is the Sixth Commandment, which reads, “You shall not kill.” *Exodus* 20:13.

abortion,⁷⁶ has said that its followers are free to use vaccines that are derived from the cells of aborted fetuses so long as reasonable alternatives are not available.⁷⁷ The Catholic Church has taken the position that, even though certain vaccinations (rubella and measles vaccines, in particular) are derived from sources that the Catholic Church does not condone, their administration is necessary to keep children safe.⁷⁸ The Church does not condemn or otherwise sanction its followers from administering such vaccinations to their children when alternatives not derived from aborted fetuses are unavailable.⁷⁹

2. Judaism

The Orthodox Jewish communities in New York were hit particularly hard by the recent measles epidemic.⁸⁰ This is due, at least in part, to the fact that some Orthodox Jews feel compelled to refuse some or all vaccinations on account of their religious beliefs, which leads to vaccination rates dropping below the herd-immunity threshold in those communities.⁸¹ However, Dr. Aaron Glatt, a rabbi and Chairman of the Department of Medicine at South Nassau Communities Hospital, disagrees with this interpretation of the teachings of the Jewish faith.⁸² Rabbi Yitzchak Breitowitz further claims that two halachic principles not only make vaccines acceptable under the teachings of the Jewish faith but mandatory.⁸³ Under the Jewish faith, guarding one's health is considered a *mitzvah*,⁸⁴ meaning that Jews are commanded by the Torah to protect their own health.⁸⁵ According to Rabbi Breitowitz, this

76. *Respect for Unborn Human Life: The Church's Constant Teaching*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/respect-for-unborn-human-life.cfm> (last visited Nov. 7, 2020); see also CNA Daily News, *supra* note 75.

77. *FAQ: On the Use of Vaccines*, *supra* note 74; *Moral Reflections on Vaccines Prepared from Cells Derived from Aborted Human Foetuses*, *supra* note 74; see also Pelčić et al., *supra* note 74, at 517.

78. *Moral Reflections on Vaccines Prepared from Cells Derived from Aborted Human Foetuses*, *supra* note 74.

79. *Id.*; *FAQ: On the Use of Vaccines*, *supra* note 74.

80. Michelle Andrews, *Why Measles Hits so Hard Within N.Y. Orthodox Jewish Community*, KAISER HEALTH NEWS (Mar. 11, 2019), <https://khn.org/news/why-measles-hits-so-hard-within-n-y-orthodox-jewish-community>.

81. *See id.*

82. *Id.*

83. Yitzchak Breitowitz, *Vaccinations and Halacha*, OHR SOMAYACH (Aug. 24, 2013), <https://ohr.edu/5503>.

84. MJL, *Mitzvah: A Commandment*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/mitzvot-a-mitzvah-is-a-commandment> (last visited Nov. 7, 2020). A *mitzvah*, while commonly used as a term to describe good deeds, literally translates to "commandment." *Id.* Thus, *mitzvot* (the plural of *mitzvah*) are not merely principles that Jews should observe—*mitzvot* must be observed by those who practice the Jewish religion. *Id.*

85. *See* Breitowitz, *supra* note 83.

mitzvah obligates the administration of vaccines.⁸⁶ Rabbi Breitowitz claims there is another *mitzvah*, similar to the former, which requires vaccinations in the Jewish religion.⁸⁷ Pursuant to this second *mitzvah*, Jews are “required not to expose others to danger”⁸⁸ and must “take positive steps to rescue others from peril.”⁸⁹ Rabbi Breitowitz views this *mitzvah* as including a duty “not to expose ourselves, our children or others to hazards, risks or dangers. Since failure to vaccinate endangers both my children and the children of others, both obligations would lead to the same result—a duty to minimize danger.”⁹⁰ Another Jewish leader, Rabbi Elliot Kaplowitz, has said:

The overwhelming consensus in the medical community is that immunization is a necessary and simple step to prevent the spread of disease. Certainly if one takes the approach that there is a positive commandment to proactively safeguard one’s health, it seems to me that immunization is a necessary measure. In the context of this debate one also hears the argument that it is selfish to not immunize because of the potential threat this poses to others. An analogy may be built to discussions in the Talmud of one who places a hazardous item in the public thoroughfare. Such a person is negligent for any damages caused.⁹¹

Based on the opinions of several leaders of the Jewish religion, it appears that the Jewish faith emphatically endorses, if not makes mandatory, immunizations.⁹² The opinions of these leaders make it all the more troubling that many parents in Orthodox Jewish communities are refusing to administer mandatory vaccinations to their children, endangering not just their children, but society at large.⁹³

3. Islam

There are also members of the Muslim faith who oppose vaccines.⁹⁴ Dr. Aisha Hamdan, who objects to vaccines on account of her Muslim

86. *Id.*

87. *Id.*

88. Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1574 (2014).

89. *Id.*

90. Breitowitz, *supra* note 83.

91. Elliot Kaplowitz, Comment to *Regarding Immunizations for Children Who Will Be Attending Day (Jewish or Parochial) Schools: What Is the Jewish View on Whether This Is Obligatory or Optional? What Jewish Values or Ethics Are Involved in This Question?*, JEWISH VALUES ONLINE, <http://www.jewishvaluesonline.org/566> (last visited Nov. 7, 2020).

92. *See id.*; Breitowitz, *supra* note 83.

93. *See* Andrews, *supra* note 80; *Why Are Childhood Vaccines so Important?*, *supra* note 1.

94. *See, e.g.*, Aisha Hamdan, *Immunizations—Harmful to Your Child or Not?*, MISSION ISLAM, <http://www.missionislam.com/health/immunizationhurtornot.htm> (last visited Nov. 7, 2020).

faith, claims that there is little to no proof that vaccines actually work, and that society is unaware of just how dangerous vaccines are.⁹⁵ Further, Dr. Hamdan believes that to administer immunizations to oneself or to his or her children is disrespectful to Allah because Allah “created us in the finest form,”⁹⁶ and that “our body and our health are gifts from Allah, and that we will be held accountable on the Day of Judgment of them.”⁹⁷

However, other Islamic officials disagree and have determined that vaccines are not only acceptable but necessary under the teachings of the Islamic faith.⁹⁸ Vaccines are necessary, according to many American Islamic scholars and officials, when the risk of disease is high and the potential benefits of the immunization outweigh the risks associated with such immunization.⁹⁹ Similar to the Catholic Church’s willingness to tolerate the administration of vaccines derived from cells of aborted fetuses, the Islamic Church has expressed a willingness to tolerate vaccines that contain pork gelatin,¹⁰⁰ even though the teachings of the Muslim faith proscribe consumption of pork.¹⁰¹

4. Other Religions

The Christian Scientists have typically expressed opposition to vaccines,¹⁰² though their official website states that “[c]oncern for public health and safety is something that all responsible people share—including Christian Scientists.”¹⁰³ Regardless, even though many Christian Scientists generally reject vaccines, such objections cannot be

95. *Id.* Dr. Hamdan, in her article, states that “studies in the medical literature have documented vaccine failure” and that “[v]accines are much more dangerous than we are even aware of” because doctors allegedly conceal data on the dangers of vaccines. *Id.*

96. *Id.*

97. *Id.* Dr. Hamdan claims that vaccines are inconsistent with the teachings of the Muslim faith because to administer vaccines is to assume “that the body is not ‘perfect’ enough to withstand infectious diseases,” which, in effect, conveys that “Allah did not complete his job or carry it out well enough.” *Id.*

98. See *Immunizations and Religion*, VAND. UNIV. MED. CTR., <https://www.vumc.org/health-wellness/news-resource-articles/immunizations-and-religion> (last visited Nov. 7, 2020).

99. *Id.*

100. See Letter from Dr. Hussein A. Gezairy, Reg’l Dir., Reg’l Off. of the World Health Org. for the E. Mediterranean, to Dr. Zaffron et al. (July 17, 2001), <http://www.immunize.org/concerns/porcine.pdf>.

101. See *Why Do Muslims Abstain from Pork?*, WHYISLAM.ORG (Aug. 9, 2011), <https://www.whyyislam.org/faqs/restrictions-in-islam/why-do-muslims-abstain-from-pork>.

102. See Blumberg, *supra* note 63 (stating that “only two religious groups—Christian Scientists and the Dutch Reformed Church—have demonstrated a precedent of widely rejecting vaccinations”).

103. *A Christian Science Perspective on Vaccination and Public Health*, CHRISTIAN SCI., <https://www.christianscience.com/press-room/a-christian-scientist-s-perspective-on-vaccination-and-public-health> (last visited Nov. 7, 2020).

explicitly found in their teachings.¹⁰⁴ In fact, it appears that Christian Scientists are beginning to at least slightly change their view on vaccines.¹⁰⁵ The founder of Christian Science, Mary Baker Eddy, said that even though she personally does not support the administration of vaccines, followers of this faith should obey mandatory vaccination laws and then attempt to recompense through prayer.¹⁰⁶

The Dutch Reformed Church, a denomination of Christianity, objects to vaccinations because the religion, at an institutional level, believes that vaccines interfere with its adherents' relationship with God.¹⁰⁷ Followers of the Dutch Reformed Church have generally been problematic in the spread of preventable disease.¹⁰⁸ However, like the Christian Scientists, objections to vaccinations are not explicitly contained in the teachings of their faith.¹⁰⁹ In fact, "the North American split from that church, the Reformed Church in America, doesn't seem to have these strict objections" to vaccines.¹¹⁰

III. THE FREE EXERCISE AND ESTABLISHMENT CLAUSES PITTED UP AGAINST ONE ANOTHER

The Constitution does not require religious exemptions for mandatory vaccinations.¹¹¹ Courts across the country have taken the

104. See Blumberg, *supra* note 63.

105. See *A Christian Science Perspective on Vaccination and Public Health*, *supra* note 103. Christian Science's official website predictably states that "[m]ost of [their] church members normally rely on prayer for healing" and the religion has "appreciated vaccination exemptions and sought to use them conscientiously and responsibly." *Id.* However, the church acknowledges that "[their] practice isn't a dogmatic thing" and that "[c]hurch members are free to make their own choices on all life-decisions, in obedience to the law, including whether or not to vaccinate their children." *Id.*

106. Reiss, *supra* note 88, at 1583.

107. Blumberg, *supra* note 63.

108. See Mark Sumner, *Anti-Vaxxers Protest for the 'Right' to Endanger Their Children and Spread Disease*, DAILY KOS (Feb. 9, 2019, 12:23 PM), <https://www.dailykos.com/stories/2019/2/9/1833482/-Anti-vaxxers-protest-for-the-right-to-endanger-their-children-and-spread-disease> (stating that "the Dutch Reformed Church . . . is the big reason that the largest measles outbreak in recent history, with over 1,200 cases, hit the Netherlands in 2013").

109. Blumberg, *supra* note 63.

110. Sumner, *supra* note 108.

111. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (conducting a First Amendment analysis and providing that laws need not even meet strict scrutiny where they are "neutral and of general applicability"); *Emp. Div. v. Smith*, 494 U.S. 872, 878-79 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)) (holding no First Amendment violation can be found "if prohibiting the exercise of religion . . . is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision" and that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'""); *Workman v. Mingo*

view that state legislatures may choose not to allow their constituents to claim religious or philosophical belief exemptions, even when applying strict scrutiny.¹¹² This is due to, at least in large part, the indisputable fact that protecting the health and safety of children is a legitimate, and likely a compelling, state interest.¹¹³

The First Amendment of the United States Constitution reads, in pertinent part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹¹⁴ This constitutional provision is commonly broken down into two separate, but somewhat intertwined, clauses: (1) the Establishment Clause; and (2) the Free Exercise Clause.¹¹⁵ The relationship between these two clauses is interesting, and there is often tension between them¹¹⁶: “If the government goes too far in protecting one, it risks violating the other.”¹¹⁷ That is to say, a government seeking to protect the free exercise of religion runs the risk of going too far and “establishing” a religion, which the Federal Constitution forbids.¹¹⁸ It is a basic constitutional principle that the United States Constitution applies only to the federal

Cnty. Bd. of Educ., 419 F. App'x 348, 352-53 (4th Cir. 2011) (passing on the question of which level of scrutiny should apply in cases challenging mandatory immunization programs on Constitutional grounds because Supreme Court precedent lead the Fourth Circuit “to conclude that West Virginia’s vaccination laws,” which do not allow for religious exemptions, “withstand [strict] scrutiny”); *Brown v. Smith*, 235 Cal. Rptr. 3d 218, 225 (Ct. App. 2018) (rejecting plaintiff’s First Amendment challenge and holding that California’s mandatory immunization program, sans religious belief exemptions, withstands even strict scrutiny); *D.J. v. Mercer Cnty. Bd. of Educ.*, No. 13-0237, 2013 WL 6152363, at *4 (W. Va. Nov. 22, 2013) (applying strict scrutiny to West Virginia’s mandatory immunization program, which does not provide for a religious belief exemption, because “education is a fundamental right” under West Virginia’s state constitution; rejecting plaintiff’s First Amendment challenge thereto; and holding that “there is a compelling state interest for the rules requiring proof of [the statutorily required] vaccinations to attend public school in [the State of West Virginia]”); *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (holding that *to provide for* a religious belief exemption in mandatory immunization programs violated Equal Protection, as believers in faiths that do not proscribe vaccines are treated differently from believers in faiths that do not).

112. See *supra* note 111.

113. See, e.g., *Love v. State Dep’t of Educ.*, 240 Cal. Rptr. 3d 861, 868 (Ct. App. 2018) (“It is well established that laws mandating vaccination of school-aged children promote a compelling governmental interest of ensuring health and safety by preventing the spread of contagious diseases.”).

114. U.S. CONST. amend. I.

115. *First Amendment and Religion*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion> (last visited Nov. 7, 2020).

116. See *Locke v. Davey*, 540 U.S. 712, 718 (2004) (recognizing that “[t]hese two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension”).

117. Oscar Michelen, *Eliminating Religious Exemption to Vaccination Should Withstand First Amendment Challenge*, COURTROOM STRATEGY (Apr. 14, 2019), <https://courtroomstrategy.com/2019/04/eliminating-religious-exemption-to-vaccination-should-withstand-first-amendment-challenge>.

118. See U.S. CONST. amend. I.

government.¹¹⁹ The First Amendment, however, has been incorporated against the states.¹²⁰

Anti-vaxxers tend to lean on the Free Exercise Clause to argue that to require them to vaccinate their children is to offend their religious values, which substantially burdens their ability to freely exercise their religion.¹²¹ On the other hand, those in favor of repealing the religious exemption argue that states have a compelling interest in protecting the health and safety of their constituents¹²² and that to allow for religious exemptions for adherents who oppose vaccines¹²³ constitutes a governmental establishment of religion, which is emphatically and unequivocally proscribed by the United States Constitution.¹²⁴

A. Anti-Vaxxers' Free Exercise Argument

The argument put forth by anti-vaxxers is predictable and based on a flawed premise.¹²⁵ As stated above, those who oppose New York's repeal of the religious exemption argue that to compel them to vaccinate their children is to substantially burden their free exercise rights under the First Amendment of the United States Constitution.¹²⁶

The Free Exercise Clause "embraces two concepts—freedom to believe and freedom to act."¹²⁷ In *Braunfeld v. Brown*,¹²⁸ the Supreme Court of the United States made clear that "[t]he freedom to hold religious beliefs and opinions is absolute."¹²⁹ Thus, the government (state or federal) "may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose

119. *Incorporation Doctrine*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/incorporationDoctrine> (last visited Nov. 7, 2020).

120. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) (incorporating the Establishment Clause to the states); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (incorporating the Free Exercise Clause to the states); see also *Incorporation Doctrine*, *supra* note 119.

121. See Shaun P. McFall, *Vaccination & Religious Exemptions*, FREEDOM F. INST. (Aug. 18, 2008), <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-religion/free-exercise-clause-overview/vaccination-religious-exemptions>.

122. See *id.*

123. There are very few religions that doctrinally oppose vaccines. See *supra* Part II.A.1-4.

124. McFall, *supra* note 121.

125. Christian Nolan, *Who Calls the Shots?: Parents and School Districts Clash over Vaccinations*, N.Y. STATE BAR ASS'N J., Apr. 2019, at 25, 27 (citing *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015)) (stating that "the parents [in *Phillips*] had argued that [Section 2164] violated their substantive due process rights, the Free Exercise Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Ninth Amendment"); see also *supra* note 111 (explaining, by use of case law, why this argument is flawed).

126. Nolan, *supra* note 125, at 27; McFall, *supra* note 121.

127. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

128. 366 U.S. 599 (1961).

129. *Id.* at 603.

special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.”¹³⁰ However, the Supreme Court has made equally clear that “religiously motivated conduct”¹³¹ does not enjoy the same constitutional protections.¹³² The Supreme Court “ha[s] never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”¹³³

The Supreme Court set forth the current free exercise test in *Employment Division v. Smith*.¹³⁴ In *Smith*, respondents Alfred Smith and Galen Black were denied unemployment compensation after they were fired for using “religiously inspired peyote.”¹³⁵ In rejecting respondents’ Free Exercise Clause argument, the Court held that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”¹³⁶ Further, the Court held that “neutral, generally applicable law[s]”¹³⁷ violate the First Amendment only when the challenger presents a “hybrid situation,”¹³⁸ meaning that the challenge presented does not implicate free exercise concerns alone, but rather “the Free Exercise Clause in conjunction with other constitutional protections.”¹³⁹

After taking into consideration both the *Smith* decision and the language of Section 2164, application of relevant law is simple.¹⁴⁰ The constitutional validity of state-mandated vaccinations is beyond any and all dispute.¹⁴¹ Section 2164 is a viewpoint-neutral, generally applicable

130. *Emp. Div. v. Smith*, 494 U.S. 872, 877 (1990) (emphasis added) (internal citations omitted).

131. *Emp. Div. v. Smith*, 485 U.S. 660, 670-71 n.13 (1988) (emphasis added).

132. *Cantwell*, 310 U.S. at 303-04 (holding that “[t]he [freedom to believe] is absolute but, in the nature of things, the [freedom to act] cannot be”).

133. *Smith*, 494 U.S. at 878-79.

134. *Id.* at 876-82.

135. *Id.* at 874.

136. *See supra* note 111 and accompanying text.

137. *Smith*, 494 U.S. at 881.

138. *Id.* at 881-82.

139. *Id.*

140. N.Y. PUB. HEALTH LAW § 2164 (McKinney 2019).

141. *See Zucht v. King*, 260 U.S. 174, 175-76 (1922) (holding that a San Antonio ordinance providing that a “certificate of vaccination” is a condition precedent to a child’s admission to school “is within the police power of a State” and that “a State may . . . delegate to a municipality authority to determine under what conditions health regulations shall become operative”); *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905) (holding that Massachusetts’s mandatory immunization statute “cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor . . . can anyone confidently assert that the means prescribed by [Massachusetts] to that end has no real or substantial relation to the protection of the public health and the public safety.”).

law.¹⁴² This statute does not distinguish among religions, but simply disallows parents, regardless of their faith or spiritual affiliation, to refuse to vaccinate their children based on religious objections.¹⁴³ Further, the Supreme Court has held that, at least with respect to the Equal Protection Clause doctrine, education is not a fundamental right.¹⁴⁴

“Pro-vaxxers” will run into trouble, however, because the Supreme Court has acknowledged the fundamental nature of parents’ rights to control the upbringing of their children.¹⁴⁵ As such, it is possible that the Supreme Court will find that a parent challenging Section 2164 satisfies the “hybrid situation” requirement for an as-applied constitutional challenge and, thus, will apply strict scrutiny to Section 2164.¹⁴⁶

B. *Pro-Vaxxers’ Establishment Clause Argument*

The Establishment Clause of the First Amendment ensures: “Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”¹⁴⁷ A major argument against religious exemptions is that to grant exemptions only to parents whose faith proscribes vaccination, but not to others, constitutes an “establishment” of the religions that oppose vaccines, as it favors some religions over others.¹⁴⁸ Further, the determination of whether to grant exemptions would require government “entanglement” in religion.¹⁴⁹ This argument is further discussed and analyzed below.¹⁵⁰

142. PUB. HEALTH § 2164 (neither stating nor implying that the provisions contained in the statute apply differently to persons who are differently situated).

143. *Id.* § 2164(9) (repealed 2019).

144. *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (holding that education is not a fundamental right).

145. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (acknowledging “the fundamental right of parents to make decisions concerning the care, custody, and control of their children”).

146. *See Emp. Div. v. Smith*, 494 U.S. 872, 881-82 (1990) (providing an illustrative list of “constitutional protections” that might give rise to a “hybrid situation”).

147. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

148. *See McFall*, *supra* note 121 (stating that “[a]ccording to [the Establishment Clause] argument, granting religious exemptions only to members of a recognized religious organization, or to those who demonstrate a sincere and genuine religious aversion to vaccination, fails the second two prongs of the Supreme Court’s famous *Lemon* test and thus offends the First Amendment. Both of these exemption requirements advance one religion at the disadvantage of another, thus violating strict neutrality, while at the same time demanding a high level of government intrusion and investigation into the beliefs of the faithful, thus creating an unconstitutional entanglement of government and religion.” (internal citations omitted)).

149. *Id.*

150. *See infra* Part III.D–F.

C. Poor Statute Drafting Is a Large Part of the Problem

Another issue here is the rigid way in which some state legislatures have drafted their mandatory immunization programs.¹⁵¹ Some states, such as New York, have merely provided a list of vaccinations that students must have administered.¹⁵² If New York children fail to have all vaccines administered that appear on Section 2164's unchanging list, they will not be permitted to attend New York schools.¹⁵³ On the other hand, some state legislatures, like those in Maine and Mississippi, have elected to draft malleable, adaptable statutes that require state officials to create regularly-updated lists of vaccinations that they deem to be necessary to public health and safety.¹⁵⁴ New York State's Constitution vests "[t]he legislative power," which includes the power to *delegate* such power in a manner similar to Maine's and Mississippi's mandatory vaccination programs, with the Senate and Assembly of New York, and New York's legislature ought to exercise such authority.¹⁵⁵

D. How the Supreme Court Has Handled Mandatory Vaccination Statutes in the Past

The Supreme Court upheld the constitutionality of mandatory vaccination statutes more than a century ago in *Jacobson v. Massachusetts*.¹⁵⁶ In *Jacobson*, the Supreme Court affirmed the defendant's conviction for refusing to accept a statutorily required smallpox vaccination, thereby rejecting his constitutional challenge.¹⁵⁷ The Court proceeded to hold that Massachusetts's mandatory vaccination statute was properly enacted pursuant to the general police power of the states,¹⁵⁸ which, at the very least, encompasses "such reasonable regulations established directly by legislative enactment as

151. See CAL. HEALTH & SAFETY CODE §§ 120335, 120338 (West 2020); N.Y. PUB. HEALTH LAW § 2164 (McKinney 2019); W. VA. CODE § 16-3-4 (2020).

152. See, e.g., PUB. HEALTH § 2164(2).

153. See *id.* § 2164(7).

154. See ME. STAT. tit. 22, § 1066(1), (3) (2019); MISS. CODE ANN. § 41-23-37 (2020).

155. N.Y. CONST. art. III, § 1; see also *Boreali v. Axelrod*, 517 N.E.2d 1350, 1354 (N.Y. 1987) (holding that the legislature can delegate any authority "which the legislature may rightfully exercise itself").

156. 197 U.S. 11, 35 (1905) (quoting *Viemeister v. White*, 72 N.E. 97 (N.Y. 1904)) (holding that Massachusetts's mandatory vaccination statute "is a health law, enacted in a reasonable and proper exercise of the police power"); see also *Zucht v. King*, 260 U.S. 174, 176 (1922) (holding that *Jacobson* "had settled that it is within the police power of a State to provide for compulsory vaccination").

157. *Jacobson*, 197 U.S. at 37-38.

158. *Id.* at 24-25 (holding that "[t]he authority of the State to enact this statute is to be referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution").

will protect the public health and the public safety.”¹⁵⁹ Typically, legislation passed pursuant to this police power receives great deference from the courts,¹⁶⁰ with one key exception being that such legislation must not “contravene the Constitution of the United States.”¹⁶¹

It cannot be denied that a state’s choice to provide for certain vaccinations as conditions precedent to a child’s ability to attend schools in the state falls squarely within the state’s police power.¹⁶² This police power, at the *least*, encompasses issues implicating health and safety.¹⁶³ It is hard to conceive of legislation that implicates public health and safety more than mandatory immunization programs for schoolchildren.¹⁶⁴ Regardless, anti-vaxxers argue that New York’s mandatory vaccination law, sans nonmedical exemptions, substantially burdens their ability to exercise their religion, and no deference should be given to the New York State legislature as a result.¹⁶⁵

E. Which Level of Scrutiny the Court Will Apply and Why it Does Not Matter

The level of scrutiny a court applies is typically of great importance.¹⁶⁶ This is not necessarily true when courts hear cases in

159. *Id.* at 25.

160. *See, e.g.,* *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)) (holding that “the structure and limitations of federalism . . . allow the States ‘great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons’”); *Medtronic, Inc.*, 518 U.S. at 475 (acknowledging that “[t]hroughout our history the several States have exercised their police powers to protect the health and safety of their citizens”); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (giving “deference” to the “historic police powers of the States” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

161. *Jacobson*, 197 U.S. at 25 (“[No] regulation . . . shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures.”).

162. *See supra* note 156 and accompanying text.

163. *See supra* note 156 and accompanying text.

164. *Herd Immunity*, HIST. VACCINES, <https://www.historyofvaccines.org/index.php/content/herd-immunity-0> (last visited Nov. 7, 2020); *Why Are Childhood Vaccines So Important?*, *supra* note 1; *Why Childhood Immunizations Are Important*, STAN. CHILD’S HEALTH, <https://www.stanfordchildrens.org/en/topic/default?id=why-childhood-immunizations-are-important-1-4510> (last visited Nov. 7, 2020).

165. *See supra* Part III.A.

166. *See Intermediate Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Nov. 7, 2020) (defining intermediate scrutiny); *Rational Basis Test*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis (last visited Nov. 7, 2020) (defining rational basis review); *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Nov. 7, 2020) (defining strict scrutiny).

which the challenged law survives even the most exacting scrutiny.¹⁶⁷ In 1963, the Supreme Court in *Sherbert v. Verner*¹⁶⁸ held that the “no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.”¹⁶⁹ The Court repudiated this method of analysis twenty-seven years later in *Employment Division v. Smith*.¹⁷⁰ Congress subsequently passed the Religious Freedom Restoration Act of 1993¹⁷¹ (“RFRA”) in an effort to negate the *Smith* test.¹⁷² The Supreme Court, however, held that the RFRA was constitutionally invalid as applied to state and local governments.¹⁷³ Although the Court has never expressly ruled on the constitutional validity of the RFRA as applied to the federal government, it did so implicitly in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*,¹⁷⁴ in which the Court held in favor of religion and applied the RFRA against the federal government.¹⁷⁵

The Supreme Court held in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*¹⁷⁶ that its precedent “establish[es] the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest.”¹⁷⁷ This is true “even if the law has the incidental effect of burdening a particular religious practice.”¹⁷⁸ On the other hand, a court will apply strict scrutiny to a law that is not “neutral and of general applicability,” thereby requiring the government to show that the law is “justified by a compelling governmental interest” and “narrowly tailored to advance that

167. See, e.g., *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 353 (4th Cir. 2011) (holding that the court need not decide which level of scrutiny should apply “because, even assuming for the sake of argument that strict scrutiny applies, prior decisions from the Supreme Court guide us to conclude that West Virginia’s vaccination laws withstand such scrutiny”); see also *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (“The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”).

168. 374 U.S. 398 (1963).

169. *Id.* at 406 (internal quotation omitted) (citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

170. 494 U.S. 872, 879 (1994); see *supra* note 111 and accompanying text.

171. 42 U.S.C. § 2000bb-1.

172. *Id.* § 2000bb-1(b) (requiring strict scrutiny for all Free Exercise Clause claims). But see *Smith*, 494 U.S. 872 at 888 (holding that “we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order”).

173. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that the “RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance”).

174. 546 U.S. 418 (2006).

175. See *id.* at 439.

176. 508 U.S. 520 (1993).

177. *Id.* at 531.

178. *Id.*

interest.”¹⁷⁹ The Court also suggests that principles of neutrality and general applicability are causally related,¹⁸⁰ meaning that when a law fails to satisfy one requirement, the other, too, is likely not satisfied.¹⁸¹

1. Supreme Court Jurisprudence Suggests that the Court Would Apply Strict Scrutiny Here, Though There Is Room to Argue for a Lesser Level of Scrutiny

Laws that discriminate based on race or religion have historically been subjected to strict scrutiny review.¹⁸² Most courts have avoided the question of whether the Constitution requires strict scrutiny in the context of religious exemption repeals, but there is certainly precedent to argue that strict scrutiny need not be applied.¹⁸³ As discussed above, Supreme Court precedent clearly establishes that laws that are both neutral and generally applicable are not subject to strict scrutiny.¹⁸⁴ The argument in favor of the application of strict scrutiny in constitutional challenges to mandatory immunization programs, similar to Section 2164, is that to deny religious belief exemptions is to discriminate against those religions with apparent objections to the practice of vaccination.¹⁸⁵ However, the New York State legislature draws no such discriminatory distinction between religions that proscribe and prescribe vaccination in its amendment to Section 2164.¹⁸⁶ As of June 13, 2019, no parent may refuse to immunize their children on the basis of religious beliefs, regardless of their religious affiliation.¹⁸⁷ In fact, Section 2164, as amended, makes no use of the word “religion” at all.¹⁸⁸ Section 2164 is neutral and applies generally to all parents in the State of New York.¹⁸⁹ Therefore, it is not without merit to argue that the Supreme Court should apply a lesser level of scrutiny because Section 2164 does not differentiate among religions.¹⁹⁰

179. *Id.* at 531-32.

180. *Id.* at 531.

181. *Id.*

182. *See, e.g.,* *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024-25 (2017) (applying strict scrutiny to and invalidating a law that discriminated on the basis of religion).

183. *See supra* Part III.E.

184. *See supra* note 177 and accompanying text.

185. Walther, *supra* note 62. Mr. Walther asserts that New York’s amendment to Section 2164 is “legislation of the very worst kind—passed in a fit of self-aggrandizing indignation and meant to affect a single group of people who are all but named.” *Id.* The “single group of people” Mr. Walther refers to is “the minority of Orthodox Jews in New York.” *Id.*

186. *See* N.Y. PUB. HEALTH LAW § 2164 (McKinney 2019).

187. *See id.* § 2164(9) (repealed 2019).

188. *See id.* § 2164.

189. *See id.*

190. *See id.*; *see also supra* Part III.E (explaining that strict scrutiny need not be applied when the law in question is both neutral and generally applicable).

2. First Amendment Jurisprudence Strongly Suggests that New York's Amendment Would Survive Strict Scrutiny

It did not take long for parents to challenge the New York State Legislature's decision to repeal the religious exemption.¹⁹¹ In fact, it barely took a full month.¹⁹² In *V.D. v. New York*,¹⁹³ "six parents of children with disabilities" filed a lawsuit in federal court on July 25, 2019, against Governor Andrew Cuomo, New York Attorney General Letitia James, Commissioner of the New York State Department of Education MaryEllen Elia, and Executive Deputy Commissioner Elizabeth Berlin.¹⁹⁴ Plaintiffs sought a preliminary injunction which would "immediate[ly] restor[e] . . . the religious exemption."¹⁹⁵ In the alternative, plaintiffs sought a stay-put order, which would require the State of New York to "maintain the most recent agreed-upon educational placement for students with disabilities during the course of this litigation."¹⁹⁶

On August 19, 2019, Judge Allyne Ross of the Eastern District of New York found that plaintiffs failed to meet their burden of proving entitlement to a preliminary injunction or a stay-put order.¹⁹⁷ Judge Ross reasoned that New York's amendment to Section 2164 was a proper exercise of New York's general police power¹⁹⁸ and that states are entitled to considerable discretion when regulating areas that concern the health and safety of their citizens.¹⁹⁹

Judge Ross's decision was not legally controversial, as courts have long recognized the states' interest in protecting the health and safety of their constituents.²⁰⁰ This is particularly true when it comes to children.²⁰¹ Even though the religious exemption repeal *arguably*

191. Dan M. Clark, *Legal Challenge Filed Against NY Law Ending Religious Exemptions for Vaccines*, N.Y.L.J. (July 10, 2019, 5:07 PM), <https://www.law.com/newyorklawjournal/2019/07/10/legal-challenge-filed-against-ny-law-ending-religious-exemptions-for-vaccines>.

192. *Id.*

193. 403 F. Supp. 3d 76 (E.D.N.Y. 2019).

194. *Id.* at 79.

195. *Id.* at 80.

196. *Id.*

197. *Id.* at 86.

198. *See id.* at 87.

199. *See V.D. v. New York*, 403 F. Supp. 3d 76, 86 (E.D.N.Y. 2019).

200. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). In *Medtronic*, the Court recognized that "[t]hroughout our history the several States have exercised their police powers to protect the health and safety of their citizens," and that "[s]tates traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Id.*; *see also* *Homere v. Inc. Vill. of Hempstead*, 322 F. Supp. 3d 353, 367 (E.D.N.Y. 2018) ("It has long been held that issues involving public welfare and safety fall squarely within a state's plenary police powers and therefore implicate important state interests.").

201. *See, e.g., N.J. v. Madison Cnty. Dep't of Hum. Res.*, 980 So. 2d 997, 1001 (Ala. Civ. App. 2007) ("[T]he State of Alabama has a legitimate interest in the welfare of children."); *State v.*

interferes with the free exercise of religion of *some* citizens in *some* circumstances,²⁰² repealing the religious exemption serves a compelling state interest in protecting the health and safety of all other schoolchildren in the state system.²⁰³ Therefore, even if courts apply strict scrutiny in lawsuits challenging the constitutionality of New York's mandatory immunization statute, those challenges should fail because there is strong support for the argument that the statute is narrowly tailored to serve this compelling interest.²⁰⁴

The Supreme Court articulated, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,²⁰⁵ that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."²⁰⁶ Section 2164 is narrowly tailored because any less restrictive means of furthering New York's interest in providing for the health and safety of its constituents—like if New York were to cater to anti-vaxxers who claim their religion proscribes vaccines—would implicate separation of church and state issues, as New York would then be treating followers of certain faiths differently than others.²⁰⁷

Since the Supreme Court decided *Employment Division v. Smith*, it has only found a violation of the Free Exercise Clause on two occasions, and the facts of those cases are not remotely analogous to the situations presented in this Note.²⁰⁸ First, the Court struck down a Florida law that made the ritual sacrifice of animals illegal in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.²⁰⁹ In invalidating the law, the Court found that the statute was not "neutral" or "general[ly] applicabl[e]."²¹⁰ Justice Kennedy, writing for a unanimous Court, held that "suppression

Wilson, 987 P.2d 1060, 1067 (Kan. 1999) (holding that "[t]he State [of Kansas] has a compelling interest in the well-being of its children").

202. See *supra* Part II.A.

203. See *Why Childhood Immunizations Are Important*, *supra* note 164 (stating that "[v]accinations not only protect your child from deadly diseases, such as polio, tetanus, and diphtheria, but they also keep other children safe by eliminating or greatly decreasing dangerous diseases that used to spread from child to child").

204. See *id.*; see also *infra* note 207 and accompanying text.

205. 485 U.S. 439 (1988).

206. *Id.* at 448.

207. See, e.g., *Grumet v. Bd. of Educ.*, 618 N.E.2d 94, 99-100 (N.Y. 1993) (holding that in statutorily establishing a separate public school district in and for the Satmarer Hasidic Village of Kiryas Joel, Orange County constituted a "symbolic union of church and State" and thus violated the second prong of the *Lemon* test because "[t]he residents of the Village of Kiryas Joel are of the Satmarer Hasidic religious sect," and "only Hasidic children will attend the public schools in the . . . school district").

208. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993).

209. *Lukumi*, 508 U.S. at 527, 547.

210. *Id.* at 546 (holding that the law at issue "burden[s] religious practice" and is not "neutral or . . . of general application" and thus "must undergo the most rigorous of scrutiny").

of the central element of the Santeria worship service was the object of the ordinances.”²¹¹ However, this case is distinguishable from the facts and issues presented in this Note because, in the context of repealing religious exemptions, the goal is not to suppress any one religion, but merely to prevent the widespread outbreak of preventable diseases.²¹²

More recently, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,²¹³ the Supreme Court found a violation of both the Free Exercise and Establishment Clauses.²¹⁴ *Hosanna-Tabor* involved a narcoleptic teacher who was fired from her job because of her medical condition.²¹⁵ The plaintiff filed a complaint with the EEOC, which brought suit on her behalf against her former employer, Hosanna-Tabor Evangelical Lutheran Church and School.²¹⁶ The issue in the case centered around a First Amendment “ministerial exception,” which holds religious institutions to a lower standard with regard to employment matters.²¹⁷

The Missouri Synod, the Lutheran denomination of which the Hosanna-Tabor Church and School was a member, employs what it referred to as “called” teachers and “lay” teachers.²¹⁸ Called instructors “are regarded as having been called to their vocation by God through a congregation.”²¹⁹ To be eligible to become a called instructor, “a teacher must satisfy certain academic requirements” which may be fulfilled “by completing a ‘colloquy’ program at a Lutheran college or university.”²²⁰ When a teacher is labeled a called teacher, she “receives the formal title ‘Minister of Religion, Commissioned.’”²²¹ On the other hand, “[l]ay’ or ‘contract’ teachers . . . are not required to be trained by the Synod or even to be Lutheran.”²²² The teacher in *Hosanna-Tabor* was originally

211. *Id.* at 534.

212. Klepper, *supra* note 27 (stating that Governor Andrew Cuomo signed the bill to revoke the religious exemption in Section 2164 because he believed “public health and the need to protect those who cannot get vaccinated . . . for medical reasons . . . outweighs the concerns about religious freedom”).

213. 565 U.S. 171 (2012).

214. *See id.* at 176-77, 196 (framing the issue as “whether the Establishment and Free Exercise Clauses of the First Amendment bar such an action when the employer is a religious group and the employee is one of the group’s ministers,” and ultimately holding that “[w]hen a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.”).

215. *Id.* at 178-79.

216. *Id.* at 179-80.

217. *Id.* at 180-81, 188-89.

218. *Id.* at 177 (stating that the school “classifies teachers into two categories: ‘called’ and ‘lay’”).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

hired as a lay teacher, but later “completed her colloquy,” and “Hosanna-Tabor asked her to become a called teacher.”²²³ Therefore, the disposition of this case turned on whether the plaintiff was a “minister,” in which case the ministerial exception would bar her suit.²²⁴

The district court held for Hosanna-Tabor on the ministerial exception issue, finding that the exception barred the plaintiff’s lawsuit because “Hosanna-Tabor treated [the plaintiff] like a minister and held her out to the world as such long before this litigation began.”²²⁵ The Sixth Circuit vacated and remanded the case because, while it acknowledged “the existence of a ministerial exception,” it nonetheless found that the teacher “did not qualify as a ‘minister’ under the exception” because “her duties as a called teacher were identical to her duties as a lay teacher.”²²⁶ The unanimous Supreme Court agreed with the arguments set forth by Hosanna-Tabor and the district court and reversed the Sixth Circuit’s decision.²²⁷ Chief Justice Roberts, writing for the Court, found that a ministerial exception does exist and that it bars the teacher’s lawsuit.²²⁸ Specifically, the Court held that “it would violate the Free Exercise Clause, as well as the Establishment Clause, to hold a religious institution liable under an anti-discrimination law for the choices it makes as to who will be its ministers.”²²⁹

F. Constitutional Challenges to Religious Belief Exemption Repeals in Other States

Below is a brief discussion of how courts in Mississippi, West Virginia, California, and Maine have analyzed the constitutional issues behind state legislatures repealing and/or failing to provide for religious exemptions to mandatory immunization programs.²³⁰

223. *Id.* at 178.

224. *Id.* at 190-91.

225. *Id.* at 180-81.

226. *Id.*

227. *Id.* at 192 (holding that “in light of . . . the formal title given [to the plaintiff] by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—[the court] conclude[s] that [the plaintiff] was a minister covered by the ministerial exception”).

228. *See id.* at 190, 192.

229. CHEMERINSKY, *supra* note 69 at 1747-48; *see also Hosanna-Tabor*, 565 U.S. at 182-83, 196. In *Hosanna-Tabor*, the Court held that this case was outside the purview of the Court’s discretion because “the First Amendment . . . str[i]kes the balance” for the Court “[w]hen a minister who has been fired sues her church alleging that her termination was discriminatory.” *Id.* at 196. In the Court’s view, “[t]he church must be free to choose those who will guide it on its way.” *Id.* The underlying principle supporting the court’s decision in this case appears to be separation of church and state. *See id.* at 182-83.

230. *See* Part III.F.1-4.

1. Mississippi

The Mississippi Supreme Court took an extraordinary position with regard to religious exemptions to Mississippi's mandatory vaccination statute.²³¹ The Mississippi Supreme Court's decision in *Brown v. Stone*²³² has been credited as the reason why Mississippi has the best vaccination rate in the country, even though it has "the worst overall health in the nation."²³³ In *Brown*, a six-year-old boy was denied admission to the first grade because his father refused to vaccinate him, citing religious objections to the use of vaccines.²³⁴ The boy's father sued, seeking an injunction compelling the district to grant admission to his son.²³⁵ The Chancery Court of Chickasaw County dismissed his complaint, and the Mississippi Supreme Court affirmed.²³⁶

The statute at issue in *Brown* was not a mandatory immunization program that *failed to* provide a religious exemption, but a program that *did* provide one.²³⁷ The court went above and beyond, not only declaring it constitutional for a state to repeal its religious exemption, but also holding that the Mississippi state legislature's *allowance* of religious belief exemptions is inconsistent with the United States Constitution.²³⁸ The Mississippi Supreme Court held that "the provision providing an exception from the operation of the statute because of religious belief is in violation of the Fourteenth Amendment to the United States Constitution and therefore is void."²³⁹ The court reasoned, in this anomalous case, that to allow parents with certain religious beliefs to be exempted from vaccinating their children discriminates against those parents and children who follow religions that do not oppose vaccinations, thus violating the Equal Protection Clause of the Fourteenth Amendment.²⁴⁰

231. *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (holding that "the provision providing an exception from the operation of the [Mississippi mandatory vaccination] statute because of religious belief is in violation of the Fourteenth Amendment to the United States Constitution and therefore is void").

232. 378 So. 2d 218 (Miss. 1979).

233. Paul Offit, *The Unhealthiest State in America Has the Best Vaccination Rate*, DAILY BEAST (Dec. 15, 2017, 5:17 AM), <https://www.thedailybeast.com/the-unhealthiest-state-in-america-has-the-best-vaccination-rate>.

234. *Brown*, 378 So. 2d at 220.

235. *Id.* at 218.

236. *Id.* at 219-20, 224.

237. *Id.* at 219-20. Here, the court cited *Jacobson* and *Zucht* and acknowledged that "mandatory immunization against dangerous diseases, without exemptions based on religious beliefs or convictions, has been held constitutionally valid as a reasonable exercise of police power." *Id.* at 220; *see also* *Zucht v. King*, 260 U.S. 174, 176 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905).

238. *See supra* note 231.

239. *Brown*, 378 So. 2d at 223.

240. *Id.* (holding that allowing for religious belief exemptions "would discriminate against the

2. West Virginia

In *Workman v. Mingo County Board of Education*,²⁴¹ a mother sued West Virginia state and county officials alleging constitutional violations because defendants “refus[ed] to admit her daughter to public school without the immunizations required by state law.”²⁴² Plaintiff was a “mother of two school-aged children” in West Virginia at the time she filed suit.²⁴³ Plaintiff attempted to have one of her children exempted from West Virginia’s mandatory vaccination statute due to a medical condition that *the other child* had.²⁴⁴ This request was, of course, denied by the school.²⁴⁵ After several attempts by the plaintiff to “take advantage of an exception,” the school ultimately sent her a letter, stating that her child “will no longer be attending” the Mingo County preschool.²⁴⁶ The child did not return to school for a year, and once the child aged out of the Head Start program that accepted the exemption, Plaintiff resorted to home-schooling.²⁴⁷ The United States District Court for the Southern District of West Virginia granted summary judgment in favor of the West Virginia officials.²⁴⁸ The Fourth Circuit, in affirming the decision of the district court, passed on the question of which level of scrutiny should apply because the Fourth Circuit took the position that West Virginia’s mandatory vaccination statute withstands even strict scrutiny.²⁴⁹

Similarly, in *D.J. v. Mercer County Board of Education*,²⁵⁰ a parent of a young child sued the Mercer County Board of Education, Mercer County Schools, and Superintendent Deborah S. Akers after the parent was told that her child would no longer be able to attend school because “he had not received the new vaccinations required by” West Virginia law.²⁵¹ The lower court ruled in favor of the school.²⁵² One issue on appeal was whether strict scrutiny should be applied.²⁵³ Unlike the Fourth Circuit in *Workman*, the Supreme Court of Appeals of West

great majority of children whose parents have no such religious convictions”).

241. 419 F. App’x 348 (4th Cir. 2011).

242. *Id.* at 350-51.

243. *Id.* at 351.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 351-52.

249. *Id.* at 351, 353 (holding that “we do not need to decide this issue here because, even assuming for the sake of argument that strict scrutiny applies, prior decisions from the Supreme Court guide us to conclude that West Virginia’s vaccination laws withstand such scrutiny”).

250. No. 13-0237, 2013 WL 6152363, at *1 (W. Va. Nov. 22, 2013).

251. *Id.*

252. *Id.*

253. *Id.* at *4.

Virginia answered that question in the affirmative.²⁵⁴ The court applied strict scrutiny but upheld the statute, finding that it was narrowly tailored to serve a compelling state interest.²⁵⁵

3. California

A California state appellate court reviewed the constitutionality of California's mandatory immunization statute in *Brown v. Smith*.²⁵⁶ The plaintiffs at bar were parents who preemptively filed suit to challenge the state's mandatory immunization statutes, claiming "philosophic, conscientious, and religious objections" to vaccines.²⁵⁷ When considering the level of scrutiny to apply, like the Fourth Circuit in *Workman*,²⁵⁸ the California appellate court did not feel obligated to address the issue.²⁵⁹ Instead, the court found that, even when applying strict scrutiny, the statute did not violate the religious freedoms guaranteed by the Constitution.²⁶⁰

The court, in rejecting plaintiffs' constitutional claims, acknowledged that "the elimination of communicable diseases through vaccination became one of the greatest achievements of public health in the 20th century."²⁶¹ Further, the court relied on the Supreme Court's decision in *Jacobson v. Massachusetts*, which held that "it is within the police power of a State to provide for compulsory vaccination."²⁶² The California Supreme Court gave even more deference to the California legislature in *French v. Davidson*²⁶³ when it held that "[w]hen we have determined that the [California mandatory vaccination statute] is within the police power of the state, nothing further need be said"²⁶⁴ and "[t]he rest is to be left to the discretion of the lawmaking power."²⁶⁵

254. *Id.* (holding that "[d]ue to the fact that education is a fundamental right in this state, an interference with that right is subject to strict scrutiny, requiring the State to demonstrate that the action is narrowly tailored to promote a compelling interest").

255. *Id.* ("[T]here is a compelling state interest for the rules requiring proof of these vaccinations to attend public school in this state.").

256. 235 Cal. Rptr. 3d 218, 220, 224 (Ct. App. 2018).

257. *Id.* at 220, 222.

258. *See supra* note 249 and accompanying text.

259. *Smith*, 235 Cal. Rptr. 3d at 225 (holding that "[e]ven if we were to assume that laws requiring vaccination substantially burden the free exercise of religion and therefore merit strict scrutiny, plaintiffs' claim fails" because "the state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest").

260. *See id.* (holding that each of the plaintiffs' arguments are devoid of merit).

261. *Id.* at 224 (internal quotations omitted) (citing *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011)).

262. *Id.* (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905)).

263. 77 P. 663 (Cal. 1904).

264. *Id.* at 664.

265. *Id.*

4. Maine

The Maine Senate voted to end religious exemptions in 2019, which ended religious belief and most other nonmedical exemptions to the state's mandatory immunization statute.²⁶⁶ Though challenges to this law do not seem to have gained traction in Maine courts, Maine residents have taken an interesting approach in objecting to this amendment.²⁶⁷ Even more interesting is the fact that Maine's legislature listened to the objections of its constituents and is doing something about them.²⁶⁸ Maine's Constitution provides that Maine electors can propose legislation to the legislature and, if their petition bears the signature of at least ten percent of the constituency, the state legislature may initiate a referendum vote.²⁶⁹ This is exactly what the Maine constituency is doing.²⁷⁰ The petition for invalidation of Maine's amended mandatory vaccination law obtained more than 93,000 signatures—30,000 more than the required ten percent.²⁷¹ Once the requisite number of signatures is obtained, the Secretary of State has thirty days to validate the signatures.²⁷² On March 3, 2020, Maine voters took to the ballot box and “voted to uphold a state law that eliminated philosophical and religious exemptions for mandated childhood vaccines.”²⁷³

266. Steve Mistler, *In Reversal, Maine Senate Drops Religious Exemptions from Vaccination Bill*, ME. PUB. (May 15, 2019), <https://www.mainepublic.org/post/reversal-maine-senate-drops-religious-exemptions-vaccination-bill>.

267. See, e.g., Jon Kamp, *Vaccine Law Targeted in Potential Maine Ballot Question*, WALL ST. J. (Sept. 19, 2019, 3:19 PM), <https://www.wsj.com/articles/vaccine-law-targeted-in-potential-maine-ballot-question-11568920751>; Michael Shepherd, *Challenge to Maine Vaccine Law Likely to Make March Ballot as Other People's Veto Bids Fall Short*, BANGOR DAILY NEWS (Sept. 18, 2019), <https://bangordailynews.com/2019/09/18/politics/opponents-of-maine-vaccine-law-say-their-peoples-veto-effort-will-make-the-ballot>.

268. See Kamp, *supra* note 267; Shephard, *supra* note 267.

269. ME. CONST. art. IV, pt. III, § 18 (providing the procedural requirements for Maine constituents to propose legislation).

270. See Kamp, *supra* note 267; Shephard, *supra* note 267.

271. See Kamp, *supra* note 267.

272. *Id.*

273. Kelly Mena, *Maine Voters Uphold Law Barring Religious Opt-Outs on Immunizations*, CNN (Mar. 4, 2020), <https://www.cnn.com/2020/03/04/politics/maine-ballot-measure-immunization/index.html>.

IV. HOW PUBLICLY AVAILABLE INFORMATION AND STATUTORY MALLEABILITY WILL PROTECT SECTION 2164 FROM PUBLIC SCRUTINY AND SHIELD IT FROM COURT CHALLENGES

It seems not just possible, but plausible that the Supreme Court will rule that religious exemptions to mandatory vaccinations are not constitutionally required.²⁷⁴ Therefore, it is uncontroversial to say that Section 2164, as written, would survive a constitutional challenge.²⁷⁵ However, a major flaw in New York's mandatory vaccination statute is its rigidity.²⁷⁶ Without the ability to adapt to changing times, mandatory vaccination laws are at the mercy of feet-dragging legislative bodies, particularly in light of the current Coronavirus pandemic.²⁷⁷ The New York State Legislature ought to amend its mandatory vaccination statute so as to imitate those of Mississippi and Maine.²⁷⁸

Legislatures around the country also face an issue of inadequate and inaccurate information, leading to a belief that vaccinating children will in some way be detrimental to their health.²⁷⁹ This view, however, runs contrary to the overwhelming majority of scientific research that indisputably shows that the health risks associated with vaccination are negligible at best.²⁸⁰ New York ought to dedicate resources to educating its constituent parents on the topic of vaccinations.²⁸¹

There are two solutions to the issues created by religious exemptions discussed above—one practical and one legal.²⁸² Both must be implemented concurrently in order to ensure that Section 2164 passes

274. See *supra* Pars III.D–E.

275. See *supra* Part III.D–E; N.Y. PUB. HEALTH LAW § 2164 (McKinney 2019).

276. See PUB. HEALTH § 2164(2) (providing a list of statutorily required immunizations).

277. See *How a Bill Becomes a Law*, N.Y. ST. SENATE, <https://www.nysenate.gov/how-bill-becomes-law-1> (last visited Nov. 7, 2020) (setting forth the burdensome procedure for enacting and amending legislation in New York).

278. See *supra* note 38.

279. See *Misconceptions About Vaccines*, HIST. VACCINES, <https://www.historyofvaccines.org/index.php/content/articles/misconceptions-about-vaccines> (Jan. 25, 2018).

280. See *generally Vaccines Are Safe*, IVACCINATE, <https://ivaccinate.org/about-vaccines/vaccines-are-safe> (last visited Nov. 7, 2020) (providing empirical data regarding the safety of vaccines).

281. See *Vaccine Hesitant Parents*, AM. ACAD. PEDIATRICS, <https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/immunizations/Pages/vaccine-hesitant-parents.aspx> (last visited Nov. 7, 2020) (providing pediatricians with guidelines regarding how to engage parents who are hesitant to vaccinate their children).

282. See *infra* Part IV.A–B.

constitutional muster while putting concerned parents' minds at ease with regard to vaccinating their children.²⁸³

Most claims for religious exemptions are, in reality, misguided fears that vaccines will adversely affect the health of children, disguised as claims that a parent's religion precludes them from vaccinating their children.²⁸⁴ The underlying premise behind the views of anti-vaxxers is that vaccinations are somehow unsafe.²⁸⁵ In the overwhelming majority of cases, however, these fears are unsupported by scientific evidence; instead, they are at least partially attributable to hysterical and hyperbolic information published on social media and other unreliable platforms.²⁸⁶ Flawed empirical studies also contribute to parents' beliefs that vaccinating their children will harm them.²⁸⁷ Below is a discussion of two of the more common misconceptions about vaccines.²⁸⁸

A. *New York Must Increase Public Awareness Regarding the Safety of Vaccinations*

One of the most common misconceptions about vaccines "is that a child's immune system can be 'overloaded' if the child receives multiple vaccines at once."²⁸⁹ No scientific evidence supports this position,²⁹⁰ on the contrary, evidence shows that children are at no greater risk when vaccines are administered together.²⁹¹

283. See *supra* Part II.A.1–4; see also *supra* Part III (explaining how the New York legislature can ensure Section 2164 will withstand constitutional scrutiny); *Why Are Childhood Vaccines so Important?*, *supra* note 1 (explaining the importance of administering immunizations to children); *Vaccine Hesitant Parents*, *supra* note 281 (providing effective ways for pediatricians to adequately inform parents who believe vaccinations will harm their children in some way).

284. See *supra* Part II.A.1–4.

285. See *Misconceptions About Vaccines*, *supra* note 279.

286. See, e.g., Alexander Nekrassov (@StirringTrouble), TWITTER (Dec. 4, 2019, 7:04 PM), <https://twitter.com/StirringTrouble/status/1202378213726523394> (stating, *inter alia*, that "[d]octors are selling their soul to the devil to plug vaccines that are dangerous to children"); Think Free (@thinkfree55), TWITTER (Dec. 24, 2019, 8:16 AM), <https://twitter.com/thinkfree55/status/1209462835698438150> (stating that "[g]overnments know that vaccines are dangerous and ineffective. They know that vaccines can kill and maim children.").

287. *Misconceptions About Vaccines*, *supra* note 279 (debunking the flawed bases for prominent anti-vaxx theories).

288. See *infra* Part IV.A.

289. *Misconceptions About Vaccines*, *supra* note 279.

290. See *id.* (stating that "there is no scientific evidence to support this approach"); Sherri DeVito, *Vaccinations and Public Health: For the Greater Good*, 18 ANNALS HEALTH L. ADVANCE DIRECTIVE 117, 120 (2009) (stating that "no scientific evidence indicates combined vaccines overload a child's immune system").

291. See *Misconceptions About Vaccines*, *supra* note 279 (stating that "studies have repeatedly demonstrated that the recommended vaccines are no more likely to cause adverse effects when given in combination than when they are administered separately").

Another common misconception about vaccinations is that they can somehow cause autism.²⁹² This flawed belief is allegedly traceable to a 1998 study that seemed to suggest that “the MMR (measles-mumps-rubella) vaccine, or infection with the naturally occurring measles virus itself, might cause autism.”²⁹³ This 1998 study is “critically flawed” in two respects.²⁹⁴ First, “determination of whether MMR causes autism is best made by studying the incidence of autism in *both* vaccinated and unvaccinated children,”²⁹⁵ which was not done in this 1998 study.²⁹⁶ At the time this study was conducted, “[a]bout 90% of children in England received MMR” vaccines,²⁹⁷ and such vaccines are regularly administered at an age when many autistic children are first diagnosed.²⁹⁸ Therefore, this study in no way proves a causal relationship between the vaccine and autism because the children who allegedly developed autism as a result of these vaccines likely would have developed autism anyway.²⁹⁹ Second, “[a]lthough the authors [of the study] claim that autism is a consequence of intestinal inflammation, intestinal symptoms were observed *after*, not before, symptoms of autism.”³⁰⁰ Despite claims by the media, “strong evidence has been shown that vaccines do not cause autism.”³⁰¹ In fact, there is “evidence that autism develops in utero, well before a baby is born or receives vaccinations.”³⁰²

B. New York Should Follow Maine's Lead and Amend Section 2164 to Establish a Committee of Medical Professionals to Determine Those Vaccines on Which School Attendance Should Be Conditioned

Maine's mandatory immunization statute,³⁰³ which establishes a committee of medical and health care professionals to determine the vaccinations on which to condition school attendance, adequately

292. See *Is There a Connection Between Vaccines and Autism?*, KIDSHEALTH, <https://kidshealth.org/en/parents/autism-studies.html> (last visited Nov. 7, 2020); *Vaccines and Autism*, CHILD.'S HOSP. OF PHILA., <https://www.chop.edu/centers-programs/vaccine-education-center/vaccines-and-other-conditions/vaccines-autism> (last visited Nov. 7, 2020).

293. *Is There a Connection Between Vaccines and Autism?*, *supra* note 292.

294. *Vaccines and Autism*, *supra* note 292 (describing the two central flaws in the 1998 study).

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. See *id.*

300. *Id.*

301. *Autism*, NAT'L ALL. ON MENTAL ILLNESS, <https://www.nami.org/Learn-More/Mental-Health-Conditions/Related-Conditions/Autism> (last visited Nov. 7, 2020).

302. *Vaccine Myths Debunked*, PUBLICHEALTH, <https://www.publichealth.org/public-awareness/understanding-vaccines/vaccine-myths-debunked> (last visited Nov. 7, 2020).

303. ME. STAT. tit. 22, § 1066 (2019).

provides for the safe and efficient administration of vaccinations to children in a way that Section 2164 and similar statutes do not.³⁰⁴ Specifically, Maine's statute provides that "[t]he Universal Childhood Immunization Program is established to provide all children from birth until [nineteen] years of age in the State with access to a uniform set of vaccines as determined and periodically updated by the Maine Vaccine Board."³⁰⁵ The "Maine Vaccine Board" consists of nine members, eight of whom are appointed by the Governor of Maine.³⁰⁶ Of those eight appointed members, three must be health insurance carriers, three must be "providers in the State," meaning that they are "a person licensed by this State to provide health care services to individuals or a partnership or corporation made up of those persons," one must be "[a] representative of employers that self-insure for health coverage," and finally, one must be "[a] representative of the pharmaceutical manufacturing industry."³⁰⁷ Pursuant to this statute, "the board shall [annually] determine the list of vaccines to be made available by the program."³⁰⁸ Further, in comprising this list, the board is to consider, among other things, "[c]linical and cost-benefit analyses."³⁰⁹ The benefits of such a comprehensive and adaptable statutory scheme are obvious: as new medical research is conducted, the Maine Vaccine Board can adjust the list of statutorily required vaccines as necessary to protect the health and safety of schoolchildren.³¹⁰ While Section 2164 can change the statutorily prescribed list via amendment, Maine's statute is far more efficient, as the mandatory vaccination list may be adjusted by the Maine Vaccine Board on an annual basis without the need for intervention by the Maine legislature.³¹¹

Comparatively, the process of amending a statute is much less efficient than that of forming a committee vested with the authority to amend the required vaccination list on an annual basis.³¹² This is particularly problematic in the context of the polarizing topic of vaccinations.³¹³ It may take only a few anti-vaxxer legislators from New York to prevent newly developed and necessary vaccinations from making it onto the Section 2164 list; therefore, schoolchildren, and New

304. See N.Y. PUB. HEALTH LAW § 2164 (McKinney 2019); tit. 22, § 1066(1), (3).

305. See tit. 22, § 1066(1).

306. *Id.* § 1066(3)(A), (3)(A)(3).

307. *Id.* § 1066(2)(J), (3)(A)(3)(a)–(d).

308. ME. STAT. § 1066(3)(E) (2019).

309. *Id.* § 1066(3)(E)(3).

310. See *id.* § 1066(1), (3).

311. See *id.* § 1066(3)(E); *supra* notes 276–77.

312. See *How a Bill Becomes a Law*, *supra* note 277.

313. See Vanessa Milne et al., *Seven Ways to Talk to Anti-Vaxxers (that Might Actually Change Their Minds)*, HEALTHYDEBATE (Aug. 31, 2017), <https://healthydebate.ca/2017/08/topic/vaccine-safety-hesitancy>.

York State constituents as a whole, would benefit greatly from a more malleable mandatory vaccination statute.³¹⁴

V. CONCLUSION

We have seen in the recent past that the repercussions for allowing immunization rates to drop below the herd-immunity threshold are untenable.³¹⁵ Prominent and educated public officials and medical professionals must work together to educate people and to debunk misconceptions and widespread rumors about the alleged dangers of vaccines.³¹⁶ Without such public awareness, these tragic misconceptions will continue to spread to and pollute the minds of others.³¹⁷ Further, in order to prevent another breakout of a preventable disease, i.e., further outbreaks of coronavirus, more states ought to follow the lead of Maine and Mississippi.³¹⁸ It seems inevitable that when a coronavirus vaccine is developed, states like Maine and Mississippi will experience little to no issues adding that vaccine to their mandatory immunization program, while states like New York will likely experience delay.³¹⁹ States planning to repeal their religious and/or philosophical belief exemptions should model their statutes after those in Maine and Mississippi, which provide a comprehensive and adaptable way of controlling the spread of preventable diseases amongst the most vulnerable demographic of the population—children.³²⁰ This will ensure that the very few children who have legitimate medical reasons for neglecting to receive vaccinations

314. See *How a Bill Becomes a Law*, *supra* note 277 (providing that for a bill to pass, it must obtain majority approval from both the Senate and the Assembly); *Senators, Committees, and Other Legislative Groups*, N.Y. ST. SENATE, <https://www.nysenate.gov/senators-committees> (last visited Nov. 7, 2020) (stating that the New York State Senate is comprised of sixty-three members).

315. *Herd Immunity*, *supra* note 164 (finding that “[w]hen only a small percentage of the population is vaccinated, the risk of a disease outbreak is greater than if many are vaccinated. The unvaccinated members of the population are not indirectly protected, and each community member has a higher risk of becoming infected.”).

316. *Vaccine Myths Debunked*, *supra* note 302 (stating that “U.S. public health officials and physicians have been combating misconceptions about vaccine safety for over twenty years” with “mixed success”).

317. Signe Dean, *This Ultimate Infographic Breaks Down 100 of the Most Common Misconceptions*, SCI. ALERT (Sept. 1, 2017), <https://www.sciencealert.com/this-ultimate-infographic-breaks-down-100-of-the-most-common-myths> (stating that “[m]isconceptions have a way of wriggling into our brains and spreading through word-of-mouth, and social media has put that process on steroids”).

318. ME. STAT. tit. 22, § 1066 (2019); MISS. CODE ANN. § 41-23-37 (2020).

319. See tit. 22, § 1066(1), (3); § 41-23-37; see also N.Y. PUB. HEALTH LAW § 2164 (2019).

320. See tit. 22, § 1066(1), (3); § 41-23-37; see also *Are Children's Immune Systems Stronger than Adults?*, ACTIVE HEALTH, LTD., <https://activehlth.com/childrens-immune-systems> (last visited Nov. 7, 2020) (“Research shows that young people do not have immune systems as efficient as adults.”).

will not jeopardize herd-immunity, and, as a result, our society will be much better protected from the spread of preventable diseases.³²¹

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321. *Herd Immunity*, *supra* note 164 (“When a large percentage of the population is vaccinated, the spread of disease is limited.”).

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