

**TAKING ONE FOR THE HERD: ELIMINATING NON-MEDICAL
EXEMPTIONS TO COMPULSORY VACCINATION LAWS TO
PROTECT IMMUNOCOMPROMISED CHILDREN**

I.	INTRODUCTION.....	750
II.	BACKGROUND.....	754
	A. <i>The Measles Virus, Recommended Vaccination Requirements, and the Anti-Vaccination Movement</i>	754
	B. <i>Herd Immunity</i>	757
	C. <i>Exemptions to Compulsory Vaccination Laws</i>	760
	1. Types of Compulsory Vaccination Exemptions.....	761
	2. Process for Obtaining Vaccination Exemptions.....	762
	3. Correlation Between Vaccination Laws and Vaccination Levels.....	763
	D. <i>State Compulsory Vaccination Laws Without Religious or Philosophical Exemptions</i>	763
	1. West Virginia Compulsory Vaccination Law.....	764
	2. Mississippi Compulsory Vaccination Law.....	765
	3. California Compulsory Vaccination Law and Amendments.....	767
	E. <i>Constitutionality of Compulsory Vaccination Laws</i>	768
	1. <i>Jacobson v. Massachusetts</i>	769
	2. <i>Zucht v. King</i>	770
	F. <i>Compulsory Education Laws Background</i>	771
	1. History of Compulsory Education Laws.....	772
	2. State Authority to Enact Compulsory Education Laws ..	773
	3. Supreme Court Decisions Regarding Compulsory Education.....	774
III.	ANALYSIS.....	775
	A. <i>States Should Eliminate Non-Medical Exemptions to Vaccination Laws for the Protection and Betterment of Society Similar to Compulsory Education Laws</i>	777
	1. States' Use of <i>Parens Patriae</i> Power in Education and Vaccination.....	778
	2. States Invoke Their <i>Parens Patriae</i> Power for the Betterment of Society and Should for Vaccinations.....	779
	B. <i>States Should Infringe Upon Parental Rights Where There Are Important Interests of Children</i>	780
	1. The Betterment of Society is an Important Interest Allowing the Infringement Upon Parental Rights.....	781

a.	<i>A Child's Interest in Life Is Greater Than His or Her Interest in Education</i>	781
b.	<i>States Infringe on Privacy Rights for the Betterment of Society and Should for Vaccinations</i>	782
c.	<i>Anti-Vaccination Movement Proponents' View of Eliminating Non-Medical Exemptions</i>	782
2.	<i>States Infringe Upon Parental Rights for Education and Should for Vaccination</i>	784
a.	<i>The Current Exemptions to Compulsory Education Differ Greatly from Compulsory Vaccination Exemptions</i>	785
b.	<i>The Wisconsin v. Yoder Exemption to Compulsory Education Differs Greatly from Compulsory Vaccination Exemptions</i>	786
c.	<i>Vaccinations Will Not Fall Out of Vogue Once They Again Become Commonplace</i>	787
C.	<i>States Should Have an Affirmative Duty to Protect the Welfare of Their Citizens Through Effective Vaccination Laws</i>	788
1.	<i>States Should Have a General Affirmative Duty to Eliminate Non-Medical Exemptions</i>	788
2.	<i>States Should Have an Affirmative Duty to Eliminate Non-Medical Exemptions in the School Context</i>	789
IV.	CONCLUSION	790

I. INTRODUCTION

Maggie Jacks was two years old when she was diagnosed with acute lymphoblastic leukemia.¹ She endured “multiple rounds of chemotherapy, lumbar punctures, and surgery to implant her [chemotherapy] port.”² Maggie had been admitted to the Phoenix Children’s Hospital six times since her diagnosis.³ Maggie’s family planned a vacation during the three-week break from her chemotherapy treatments.⁴ After finishing her last chemotherapy session, Maggie went to a Phoenix Children’s Hospital clinic for a routine lab blood

¹ Tim Jacks, *To the Parent of the Unvaccinated Child Who Exposed My Family to Measles*, MOTHER JONES (Feb. 2, 2015, 4:34 PM), <http://www.motherjones.com/environment/2015/02/open-letter-parent-unvaccinated-child-measles-exposure>; Christine Vara, *Family's Exposure to Measles Reveals Importance of Herd Immunity*, SHOT OF PREVENTION (Feb. 9, 2015), <http://shotofprevention.com/2015/02/09/familys-exposure-to-measles-reveals-importance-of-herd-immunity/>.

² Jacks, *supra* note 1.

³ *Id.*

⁴ *Id.*

draw.⁵ A few days later, Maggie's parents received a call; Maggie and her 10-month old brother were exposed to the measles virus at the clinic.⁶ Maggie, who had been fully vaccinated until she started her treatments, could not be further vaccinated until the conclusion of her chemotherapy treatments.⁷ The woman who exposed the Jacks' children to the measles was infected with the virus while visiting Disneyland.⁸ She contracted the virus from members of a family that chose not to vaccinate.⁹

Although Maggie had the first dose of the measles, mumps, and rubella ("MMR") vaccine, chemotherapy rendered her immune system unable to fight the virus.¹⁰ Two-year old Maggie, who just finished a round of chemotherapy, had to endure multiple, painful shots of measles antibodies to provide temporary protection from the disease.¹¹ Instead of taking a vacation for Maggie to "see snow" as she longed to do, her family was forced to keep her isolated and watch for measles symptoms during her break from chemotherapy.¹² Immunocompromised children, like Maggie, either cannot be vaccinated or have a medical condition that has rendered their immune system ineffective even with vaccinations.¹³

Since 2000, children like Maggie have been better protected because the United States eliminated measles¹⁴ through the use of highly effective

⁵ *Id.*; Vara, *supra* note 1.

⁶ Jacks, *supra* note 1; see Elizabeth Cohen & Debra Goldschmidt, *Arizona Measles Exposure Worries Parents of At-Risk Kids*, CNN (Feb. 2, 2015, 9:02 AM), <http://www.cnn.com/2015/01/30/health/arizona-measles-vaccination-debate/> (see both the article and the news video).

⁷ Jacks, *supra* note 1.

⁸ Cohen & Goldschmidt, *supra* note 6.

⁹ *Id.*

¹⁰ Sydney Lupkin, *Dad's Heartfelt Plea to Congress After 2-Year-Old With Leukemia Exposed to Measles*, ABC NEWS (Feb. 10, 2015, 2:25 PM), <http://abcnews.go.com/Health/dads-heartfelt-plea-congress-year-leukemia-exposed-measles/story?id=28866376>.

¹¹ Jacks, *supra* note 1.

¹² *Id.* For stories of other families who advocate for mandatory vaccinations because the safety of their families relies on herd immunity, see *Category Archives: Immunocompromised Children*, VOICES FOR VACCINES, <http://www.voicesforvaccines.org/category/immunocompromised-children/> (last visited Nov. 3, 2016).

¹³ See Jacks, *supra* note 1.

¹⁴ *Frequently Asked Questions about Measles in the U.S.*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/measles/about/faqs.html> (last visited Nov. 3, 2016). Though measles has been eliminated in the United States, people still contract measles because the measles virus is brought into the United States from countries where the disease still exists. *Id.* For instance, in 2010 there were 63 cases of measles reported in the United States, in 2011 there were 220 cases reported, and in 2012 there were 55 reported cases. *Measles Cases and Outbreaks*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/measles/cases-outbreaks.html> (last visited Nov. 3, 2016).

vaccinations and strong vaccination programs.¹⁵ However, in December 2014, a measles outbreak, which originated in Disneyland California, infected at least 142 individuals with the measles virus.¹⁶ “Pockets of unvaccinated children . . . [likely] fueled the recent measles outbreak.”¹⁷ As the anti-vaccination movement continues to grow, vaccination rates continue to decline, and society becomes more susceptible to outbreaks, such as the recent Disneyland outbreak.¹⁸

The anti-vaccination movement is likely one force behind the reemergence of measles.¹⁹ Vaccine fears and anxieties have led to what some scholars term “vaccinophobia.”²⁰ Vaccines require the injection of a substance into the body of healthy individuals, which is likely the cause of the fear.²¹ When a disease is eradicated by vaccinations it is no longer visible in the community and individuals begin to forget the importance of vaccinations because the effects of the disease are no longer vivid memories of vaccine recipients.²² For instance, although the smallpox vaccine was saving lives, it was causing discomfort at the site of inoculation.²³ As a result, the public began to resist the vaccination, especially in developed countries such as the United States where smallpox symptoms had been forgotten.²⁴ Although the elimination of routine smallpox vaccination in the United States proved that vaccination was successful at the eradication of the disease, it led to “scientific neglect,” which ended the studies of the poxvirus.²⁵

Americans’ fears of vaccinations emerged with the polio vaccine.²⁶ In the mid-1950s, Jonas Salk created the first inactivated poliovirus vaccine, which required injection.²⁷ As a result of public fears of the poliovirus, the vaccine was

¹⁵ *Frequently Asked Questions about Measles in the U.S.*, *supra* note 14.

¹⁶ Steven Reinberg, *Low Vaccination Rates and Disney Measles Outbreak*, WEBMD (Mar. 16, 2015), <http://www.webmd.com/children/vaccines/news/20150316/low-vaccination-rates-likely-behind-disney-measles-outbreak-study>. “As of February 11, 2015, the Centers for Disease Control and Prevention (“CDC”) only linked approximately 125 cases to the Disneyland measles outbreak.” *See Measles Cases and Outbreaks*, *supra* note 14.

¹⁷ Reinberg, *supra* note 16.

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ Laura A. Jana & June E. Osborn, *The History of Vaccine Challenges: Conquering Diseases, Plagued by Controversy*, in *VACCINOPHOBIA AND VACCINE CONTROVERSIES OF THE 21ST CENTURY* 1, 1 (Archana Chatterjee ed., 2013).

²¹ *See id.* at 3–4 (explaining that the fear of vaccines is a result of the idea of injecting healthy humans with something delivered by a syringe).

²² *See id.* at 4 (comparing vaccines to the “out of sight,” “out of mind” paradigm).

²³ *See id.* at 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See id.* at 4.

²⁷ *Id.*

met with public acceptance and demands for widespread accessibility.²⁸ A few years later, Albert Sabin created an orally administered live-attenuated vaccine.²⁹ This vaccination was easily administered; therefore, it became popular among Americans.³⁰ Later, it became evident that the vaccine created by Sabin could itself cause paralysis.³¹

Unease regarding vaccinations began to increase in the United States in the 1960s just as current, effective vaccines emerged.³² Improved tissue-culture technology permitted the creation of highly effective vaccinations for once fear-inducing childhood diseases such as measles and mumps.³³ The anti-vaccination movement or unease regarding vaccinations continues today and is discussed in Part II of this Note.

Every state has vaccination requirements that must be met before children are permitted to attend school.³⁴ Although these requirements are in place, states provide exemptions to these requirements.³⁵ Every state has a medical exemption for children who are unable to be vaccinated as a result of a medical condition.³⁶ Nearly every state has a religious exemption for individuals who have religious beliefs against vaccinations.³⁷ Some states also offer philosophical exemptions to individuals who have “personal, moral, or other beliefs” against vaccinations.³⁸ West Virginia, Mississippi, and most recently California, do not offer religious or philosophical exemptions to compulsory vaccination requirements.³⁹

This Note argues that states should eliminate religious and philosophical exemptions to compulsory vaccination laws, like West Virginia, Mississippi, and

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 5.

³² *Id.* at 6.

³³ *Id.*

³⁴ *See, e.g.*, ALA. CODE §§ 16-30-1 to -3 (2016); COLO. REV. STAT. § 25-4-902 (2016); MISS. CODE ANN. § 41-23-37 (2016); W. VA. CODE ANN. § 16-3-4 (LexisNexis 2016); *see also States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. OF ST. LEGISLATURES (Aug. 23, 2016), <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [hereinafter *Religious and Philosophical Exemptions*].

³⁵ *Religious and Philosophical Exemptions, supra* note 34.

³⁶ *Id.*

³⁷ *See, e.g.*, IDAHO CODE § 39-4802 (2016); ME. REV. STAT. ANN. tit. 20-A, § 6355 (2016); OHIO REV. CODE ANN. § 3313.671 (West 2016); *see also Religious and Philosophical Exemptions, supra* note 34.

³⁸ *See, e.g.*, COLO. REV. STAT. § 25-4-903 (2016); IDAHO CODE ANN. § 39-4802 (West 2016); ME. REV. STAT. ANN. tit. 20-A, § 6355 (2016); OHIO REV. CODE ANN. § 3313.671 (West 2016); *see also Religious and Philosophical Exemptions, supra* note 34.

³⁹ *See Religious and Philosophical Exemptions, supra* note 34.

California, to protect immunocompromised children. These non-medical exemptions should be eliminated using the same power that enables states to enact compulsory education laws.

Part II of this Note discusses the measles virus and why compulsory vaccinations are beneficial to society. Further, it discusses the history of state power to enact compulsory education statutes without exemptions, which infringe upon parental rights. Part III argues that compulsory vaccination exemptions should be eliminated to protect immunocompromised children, and states have the authority and should eliminate these exemptions using the same power used to enact compulsory education statutes without exemptions.⁴⁰ Part III explains this argument by analogizing compulsory education and compulsory vaccination laws, as well as various state powers in this context.

II. BACKGROUND

This section provides an overview of compulsory vaccinations and the measles virus, as well as an overview of compulsory education laws. The measles virus is highly contagious and outbreaks are preventable with proper vaccination schedules regulated by compulsory vaccination requirements.⁴¹ First, this section discusses the measles virus and the importance of vaccinations. Second, this section discusses the concept of herd immunity and how it shields immunocompromised children. Third, this section discusses state compulsory vaccination laws and exemptions. Fourth, this section analyzes the constitutionality of compulsory vaccination laws. Finally, this section explores the history of compulsory education laws and states' abilities to implement such laws for the betterment of society.

A. *The Measles Virus, Recommended Vaccination Requirements, and the Anti-Vaccination Movement*

The measles virus is dangerous and highly contagious.⁴² The symptoms of measles include high fever, cough, runny nose, and watery eyes.⁴³ However, the symptoms of measles do not generally appear until 14 days after the person is infected with the virus.⁴⁴ Thus, an infected individual can spread the virus

⁴⁰ Reinberg, *supra* note 16 (discussing immunocompromised children and their susceptibility to infectious diseases).

⁴¹ *About Measles: Transmission of Measles*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/measles/about/transmission.html> (last visited Nov. 3, 2016); *see also Frequently Asked Questions about Measles in the U.S.*, *supra* note 14.

⁴² *About Measles: Transmission of Measles*, *supra* note 41.

⁴³ *About Measles: Signs and Symptoms*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/measles/about/signs-symptoms.html> (last visited Nov. 3, 2016). "Measles" is the common name used to refer to the rubeola virus. *Id.*

⁴⁴ *Id.*

before the symptoms even appear.⁴⁵ The measles virus is transmitted through aerosolized respiratory droplets and direct contact.⁴⁶ Additionally, school-age children have the highest attack rates of vaccine-preventable diseases, and school-age children are likely a source of secondary infections of those outside the school environment.⁴⁷

Measles can lead to other complications, such as ear infections that can result in permanent hearing loss, as well as diarrhea.⁴⁸ The most common cause of death from measles in children is the subsequent contraction of pneumonia.⁴⁹ Approximately 1 in 20 children who contract the measles virus develop pneumonia.⁵⁰ In severe cases, children infected by measles develop encephalitis, or swelling of the brain.⁵¹ Encephalitis may lead to convulsions, which subsequently can cause deafness and intellectual disabilities.⁵² In rare cases, individuals who have measles can develop subacute sclerosing panencephalitis (“SSPE”).⁵³ SSPE, a deadly brain disorder caused by the measles virus,⁵⁴ develops 7 to 10 years after an individual has the measles.⁵⁵ Possible complications include behavior changes, dementia, seizures, and coma.⁵⁶ The measles virus can be especially devastating to immunocompromised individuals.⁵⁷

⁴⁵ See *About Measles: Transmission of Measles*, *supra* note 41.

⁴⁶ World Health Org., *Measles Vaccines: WHO Position Paper*, 35 W.K.L.Y. EPIDEMIOLOGICAL REC. 349, 349 (2009), <http://www.who.int/wer/2009/wer8435.pdf>.

⁴⁷ Melinda Wharton et al., *Childhood Immunization: Exemptions and Vaccine Safety*, 33 J.L. MED. & ETHICS (SPECIAL SUPPLEMENT) 34, 36 (2005).

⁴⁸ *About Measles: Complications of Measles*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/measles/about/complications.html> (last visited Nov. 3, 2016).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*; V.A. Young & G.F. Rall, *Making It to the Synapse: Measles Virus Spread in and Among Neurons*, in MEASLES: PATHOGENESIS AND CONTROL 3, 7 (Diane E. Griffin & Michael B.A. Oldstone eds., 2009).

⁵⁴ U.S. Nat'l Library of Med., *Subacute Sclerosing Panencephalitis*, MEDLINEPLUS, <https://www.nlm.nih.gov/medlineplus/ency/article/001419.htm> (last visited Nov. 3, 2016).

⁵⁵ *About Measles: Complications of Measles*, *supra* note 48. Other literature suggests that SSPE can occur between 1 to 15 years after the measles virus infection. Young & Rall, *supra* note 53, at 7.

⁵⁶ *Subacute Sclerosing Panencephalitis*, *supra* note 54.

⁵⁷ “In individuals with impaired cellular immunity (HIV infection, congenital immunodeficiency, leukemia, etc.), measles infection can lead to giant cell pneumonia, measles inclusion body encephalitis, and death.” D. Nanche, *Human Immunology of Measles Virus Infection*, in MEASLES: PATHOGENESIS AND CONTROL 151, 161 (Diane E. Griffin & Michael B.A. Oldstone eds., 2009).

The MMR vaccine prevents the contraction of the measles virus.⁵⁸ “One dose of MMR vaccine is about 93% effective at preventing measles if exposed to the virus,” and a second dose raises the efficacy to 97%.⁵⁹ The Centers for Disease Control and Prevention (“CDC”) recommends that children receive their first dose of the MMR vaccine between the age of 12 and 15 months and the second dose between the age of 4 and 6.⁶⁰ The anti-vaccination movement has caused parents to question these vaccination schedules and opt-out of vaccinating their children.⁶¹

Since the early 2000s, the media has fueled the anti-vaccination movement.⁶² Perhaps one of the most common arguments of “vaccine-safety activists” is that immunizations can lead to autism in children.⁶³ A 1998 article published in a British medical journal by A.J. Wakefield linked autism and colitis to the MMR vaccine.⁶⁴ Although this study was retracted,⁶⁵ vaccine-safety activists claim that vaccines can affect the nervous and immune systems of children and cause autism.⁶⁶ This argument emerged as parents and scientists searched for a cause of the rapid rise of autism diagnosis.⁶⁷ Today, concerns still

⁵⁸ *Measles Vaccination*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/measles/vaccination.html> (last visited Nov. 3, 2016). Prior to the MMR vaccination three to four million people contracted the measles virus in the United States each year. *Frequently Asked Questions about Measles in the U.S.*, *supra* note 14. Additionally, each year 400 to 500 people died, 48,000 people were hospitalized, and 4,000 people developed brain swelling from the measles virus. *Id.*

⁵⁹ *Measles Vaccination*, *supra* note 58.

⁶⁰ *Id.*; see *Table 1: Summary of WHO Position Papers – Recommendations for Routine Immunization*, WORLD HEALTH ORG., http://www.who.int/immunization/policy/Immunization_routine_table1.pdf (last updated Sept. 26, 2016).

⁶¹ See Jana & Osborn, *supra* note 20, at 1.

⁶² See generally ELENA CONIS, *VACCINE NATION: AMERICA’S CHANGING RELATIONSHIP WITH IMMUNIZATION* 204–26 (2014). Anti-vaxxer Robert F. Kennedy, Jr. publically referred to vaccinations as a “holocaust.” Steven Salzberg, *California’s Children Win, Anti-Vaxxers Lose*, FORBES: PHARMA & HEALTHCARE (June 28, 2015, 8:00 AM), <http://www.forbes.com/sites/stevensalzberg/2015/06/28/californias-children-win-anti-vaxxers-lose/>.

⁶³ CONIS, *supra* note 62, at 204.

⁶⁴ Andrew J. Wakefield et al., *Illegal-Lymphoid-Nodular Hyperplasia, Non-Specific Colitis, and Pervasive Developmental Disorder in Children*, 351 LANCET 637 (1998); see also Christine Parkins, *Protecting the Herd: A Public Health, Economics, and Legal Argument for Taxing Parents Who Opt-Out of Mandatory Childhood Vaccinations*, 21 S. CAL. INTERDISC. L.J. 437, 452 (2012).

⁶⁵ Editors of the Lancet, *Retraction—Illegal-Lymphoid-Nodular Hyperplasia, Non-Specific Colitis, and Pervasive Developmental Disorder in Children*, 375 LANCET 445 (2010); see also Parkins, *supra* note 64, at 452–53.

⁶⁶ CONIS, *supra* note 62, at 204.

⁶⁷ *Id.*

exist that thimerosal, a mercury compound found in some vaccines, is linked to the development of autism.⁶⁸ Although medical experts concluded that there is no link between vaccinations and autism, the anti-vaccination movement continues.⁶⁹ In 2010, a study of U.S. parents “showed that 30 percent of parents surveyed reported ‘concern’ that ‘[v]accines may cause learning disabilities, such as autism.’”⁷⁰ Contrarily, *Autism Speaks*, the world’s leading autism science and advocacy program, has urged all children to get vaccinated and stated “[t]he results of this research are clear: [v]accines do not cause autism.”⁷¹ Even in 2015, the vaccine and autism link became a controversial issue during a Republican presidential primary debate.⁷²

Furthermore, the movement is strengthened by the vocal endorsement of celebrities. Actors Jim Carrey and Jenny McCarthy have been prominent opponents of vaccinations.⁷³ McCarthy’s son was diagnosed with autism; subsequently, McCarthy, and her partner at the time, Carrey, became proponents of the discredited theory that linked vaccines and autism.⁷⁴

B. Herd Immunity

Herd immunity refers to “the principle that if a significant portion of the community . . . is vaccinated, those who cannot be vaccinated will be protected from illness by the community members who are vaccinated because the vaccine has eliminated ‘chains of contagion.’”⁷⁵ Thus, any person’s chance of becoming

⁶⁸ Charles J. Russo & Ralph D. Mawdsley, *Student Vaccinations: A Brief Pain That’s Worth the Gain?*, 241 EDUC. L. REP. 519, 520 (2009).

⁶⁹ CONIS, *supra* note 62, at 204; *see also* Clyde Haberman, *A Discredited Vaccine Study’s Continuing Impact on Public Health*, N.Y. TIMES (Feb. 1, 2015), http://www.nytimes.com/2015/02/02/us/a-discredited-vaccine-studys-continuing-impact-on-public-health.html?_r=0.

⁷⁰ Parkins, *supra* note 64, at 453 (alteration in original).

⁷¹ *Vaccines and Autism*, AUTISM SPEAKS, <https://www.autismspeaks.org/science/policy-statements/information-about-vaccines-and-autism> (last visited Nov. 3, 2016).

⁷² For a discussion on compulsory vaccination laws during a debate between Republican presidential candidates Ben Carson and Donald Trump, *see* Michael E. Miller, *The GOP’s Dangerous ‘Debate’ on Vaccines and Autism*, WASH. POST (Sept. 17, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/09/17/the-gops-dangerous-debate-on-vaccines-and-autism/>. Also, for further political discussion on the anti-vaccination movement and compulsory vaccination, *see* Laura Parker, *The Anti-Vaccine Generation: How Movement Against Shots Got Its Start*, NAT’L GEOGRAPHIC (Feb. 6, 2015), <http://news.nationalgeographic.com/news/2015/02/150206-measles-vaccine-disney-outbreak-polio-health-science-infocus/>.

⁷³ Justin Wm. Moyer, *Jim Carrey Denounces New Calif. Vaccine Law in Twitter Rant*, WASH. POST (July 1, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/07/01/jim-carrey-denounces-new-calif-vaccine-law-in-twitter-rant/>.

⁷⁴ *Id.*

⁷⁵ Parkins, *supra* note 64, at 440.

infected with a disease falls when others in the community are immune through prior vaccinations.⁷⁶ Many people cannot be vaccinated, including the elderly, very young children, and individuals who cannot be vaccinated due to a medical condition.⁷⁷ Through herd immunity, contagious diseases are contained providing protection for infants, the elderly, and immunocompromised individuals.⁷⁸ When parents fail to vaccinate their children, they cause two issues.⁷⁹ First, if the child becomes infected with a vaccine-preventable illness, the child runs the risk of exposing vulnerable members of the community to the disease.⁸⁰ Second, herd immunity is undermined by clusters of unvaccinated people, which creates the risk that disease will spread even by uninfected, unvaccinated children.⁸¹

Aside from religious and philosophical reasons for not vaccinating their children, parents have little incentive to vaccinate because they feel they can “free ride” on herd immunity.⁸² This is a dangerous notion. This undermines herd immunity and puts other community members, many of whom do not have the choice to vaccinate, at risk.⁸³

Herd immunity and vaccinations have been examined through a cost-benefit analysis.⁸⁴ When parents fail to vaccinate their children, they create negative externalities by threatening herd immunity.⁸⁵ If herd immunity is lost, the public is no longer protected from vaccine preventable diseases.⁸⁶ Thus, community members who are unable to be vaccinated, based upon a medical condition, bear the burden of this negative externality.⁸⁷ The cost borne by individuals includes healthcare costs, lost wages, and in severe cases, loss of life.⁸⁸

⁷⁶ *Id.* at 446.

⁷⁷ For examples of community members relying on herd immunity to protect them from vaccine-preventable diseases, see *id.* at 438.

⁷⁸ Ellen C. Tolsma, Note, *Protecting Our Herd: How a National Mandatory Vaccination Policy Protects Public Health by Ensuring Herd Immunity*, 18 J. GENDER RACE & JUST. 313, 334 (2015).

⁷⁹ Parkins, *supra* note 64, at 440.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 441.

⁸³ *Id.*; see also *Herd Immunity*, OXFORD VACCINE GROUP, <http://www.ovg.ox.ac.uk/herd-immunity> (last visited Nov. 3, 2016).

⁸⁴ See Parkins, *supra* note 64, at 445.

⁸⁵ *Id.*

⁸⁶ *Id.*; see *Herd Immunity*, *supra* note 83.

⁸⁷ Parkins, *supra* note 64, at 445.

⁸⁸ *Id.*

To achieve herd immunity for most diseases, vaccination rates of 85% to 95% are necessary.⁸⁹ Pockets of low vaccination rates compromise herd immunity within those communities.⁹⁰ Vaccination exemptions have allowed these pockets of low vaccination rates to develop.⁹¹ For instance, over the past 30 years, the use of personal exemptions in California has increased from 0.5% to 2% of children starting school.⁹²

As previously stated, the failure of herd immunity places vulnerable community members at risk.⁹³ Vulnerable community members are unable to be vaccinated; therefore, they rely on herd immunity for protection against vaccine-preventable diseases.⁹⁴ For instance, infants could potentially be exposed to life-threatening diseases before they are old enough to undergo vaccination.⁹⁵ Herd immunity is particularly important for children who are too young to be vaccinated and children who are unable to be vaccinated because they “tend to be ‘more susceptible to the complications of infectious diseases than the general population of children.’”⁹⁶ Herd immunity is also important for vaccinated individuals.⁹⁷ Vaccines are not always 100% effective at preventing diseases, and the effectiveness can diminish over time.⁹⁸ Thus, if herd immunity fails, vaccinated individuals are still at risk for vaccine-preventable diseases.⁹⁹

Although many people rely on herd immunity, this Note focuses on the protection of immunocompromised children and their dependence on herd immunity.¹⁰⁰ Immunocompromised children are children who are unable to be

⁸⁹ *Id.* at 446.

⁹⁰ *Id.*; see also W.J. Moss, *Measles Control and the Prospect of Eradication*, in MEASLES: PATHOGENESIS AND CONTROL, *supra* note 57, at 180 (Diane E. Griffin & Michael B.A. Oldstone eds., 2009) (explaining that “clustering of susceptible persons can lead to outbreaks”).

⁹¹ Parkins, *supra* note 64, at 446.

⁹² *Id.*; see also Katharine Mieszkowski, *Areas of Low Vaccination Rates Pose Risk to Students*, N.Y. TIMES (Sept. 11, 2010), http://www.nytimes.com/2010/09/12/us/12bcvaccines.html?_r=0.

⁹³ Parkins, *supra* note 64, at 446.

⁹⁴ *Id.* at 447.

⁹⁵ *Id.* at 447–48 (noting that “[o]f the sixty-four cases of measles that occurred in the U.S. between January 2008 and April 2008, thirteen of those cases were in children too young to be vaccinated”).

⁹⁶ *Id.* at 448.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ As a result of medical complications, immunocompromised children cannot be vaccinated. Josh Levs, *The Unvaccinated, by the Numbers*, CNN (Feb. 4, 2015, 8:05 PM), <http://www.cnn.com/2015/02/03/health/the-unvaccinated/>. These children must obtain medical exemptions in order to be able to attend school without first being vaccinated. *See id.* Compared to other exemptions, very few children seek and receive medical exemptions. *Id.* But, the reason immunocompromised children need exemptions is not based on a belief, but rather out of necessity. *See id.* In the 2013–2014 school year there were 1,000 medical exemptions obtained in California,

vaccinated due to a medical condition and are eligible to receive medical exemptions to compulsory vaccination laws.¹⁰¹ An individual that is immunocompromised is someone that, as a result of an impaired immune system, is more likely to contract an illness than the average person.¹⁰² Thus, herd immunity is especially important to protect immunocompromised children in schools because they are already at a higher risk of becoming sick.

C. Exemptions to Compulsory Vaccination Laws

School vaccination requirements have played an integral role in the prevention of vaccine-preventable diseases in the United States.¹⁰³ Vaccination requirements exist in every state and must be met before a child is able to begin public school.¹⁰⁴ All states offer medical exemptions that allow children with certain medical conditions to be exempt from the compulsory vaccination requirements.¹⁰⁵ Some states statutorily provide religious and philosophical exemptions, as well.¹⁰⁶ Currently, two states, West Virginia and Mississippi, provide only medical exemptions.¹⁰⁷ Additionally, as of January 2016, the only exemption California offers for its compulsory vaccination law is a medical exemption.¹⁰⁸ This section first explores the types of exemptions compulsory vaccination laws provide. Next, this section explores the various processes employed by states to obtain exemptions. Lastly, this section explains the link between compulsory vaccination laws and the incidence of vaccine-eradicable diseases.

less than 800 medical exemptions in Florida, and only 50 medical exemptions between West Virginia and Mississippi combined. *Id.*

¹⁰¹ *See id.*

¹⁰² *See Immunocompromised*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/immunocompromised> (last visited Nov. 3, 2016); *see also* Jacks, *supra* note 1.

¹⁰³ Wharton et al., *supra* note 47, at 34.

¹⁰⁴ *Religious and Philosophical Exemptions*, *supra* note 34; *see also Exemptions Permitted for State Immunization Requirements*, IMMUNIZATION ACTION COALITION, <http://www.immunize.org/laws/exemptions.asp> (last visited Nov. 3, 2016).

¹⁰⁵ *Religious and Philosophical Exemptions*, *supra* note 34.

¹⁰⁶ Alicia Novak, Comment, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1101 (2005).

¹⁰⁷ *Religious and Philosophical Exemptions*, *supra* note 34.

¹⁰⁸ *Id.*; *see* CAL. HEALTH & SAFETY CODE § 120325 (West 2016).

1. Types of Compulsory Vaccination Exemptions

Nearly every state grants religious exemptions for individuals who have religious beliefs contrary to vaccinations.¹⁰⁹ Originally, religious exemptions were provided so that followers of religions whose beliefs did not align with modern medical practices, such as vaccination, would have legal recourse to continue observing their beliefs.¹¹⁰ The Child Abuse Prevention and Treatment Act of 1974,¹¹¹ which was adopted by the United States Department of Health, Education, and Welfare, fueled medical exemptions on religious grounds, such as religious exemptions to compulsory vaccinations.¹¹² This Act conditioned federal funding on providing these religious exemptions.¹¹³ Although this mandate was subsequently repealed, many states still offer religious exemptions to compulsory vaccinations.¹¹⁴

States that statutorily provide religious exemptions to compulsory vaccination laws categorize the individuals they exempt in one of two ways.¹¹⁵ First, some states require that those seeking a religious exemption belong to an “‘organized,’ ‘recognized’ or ‘established’ religion[.]”¹¹⁶ These statutes have proven to be problematic in light of the Conscientious Objector cases,¹¹⁷ in which it was determined that beliefs that were arguably religious were considered religious for free exercise analysis.¹¹⁸ Second, some states scrutinize those seeking religious exemptions to compulsory vaccination laws “to determine if the applicant’s beliefs are ‘genuine and sincerely held.’”¹¹⁹ Other states only require a person seeking a religious exemption to submit a form or affidavit objecting to vaccinations on religious grounds.¹²⁰

Philosophical exemptions provide exemptions to compulsory vaccination laws for those with moral, personal, or other beliefs contrary to

¹⁰⁹ See, e.g., CONN. GEN. STAT. § 10-204a (2016); FLA. STAT. ANN. § 1003.22 (West 2016); IDAHO CODE ANN. § 39-4802 (West 2016); ME. REV. STAT. ANN. tit. 20-A, § 6355 (2016); OHIO REV. CODE ANN. § 3313.671 (LexisNexis 2016); 28 PA. CODE § 23.83 (2016).

¹¹⁰ Jennifer S. Rota et al., *Processes for Obtaining Nonmedical Exemptions to State Immunization Laws*, 91 AM. J. PUB. HEALTH 645, 645 (2001).

¹¹¹ 42 U.S.C. §§ 5101–19 (2016).

¹¹² Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277, 282 (2003).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 282.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at n.33.

¹¹⁹ *Id.* at 282–83.

¹²⁰ *Id.*

vaccinations.¹²¹ Currently, 20 states allow philosophical exemptions.¹²² Philosophical exemptions require a lower burden of proof to gain a waiver for vaccination requirements than the burden of proof required to obtain religious exemptions.¹²³ As a result of the lessened burden, many parents take advantage of philosophical exemptions in the jurisdictions in which they are offered.¹²⁴ In states that provide both philosophical and religious exemptions, there are far more philosophical exemptions granted than religious and medical exemptions combined.¹²⁵ Easy access to such exemptions undermines the purpose behind compulsory vaccination laws.¹²⁶

2. Process for Obtaining Vaccination Exemptions

States differ in the complexity of their processes required to obtain vaccination exemptions.¹²⁷ For instance, some states only require that parents submit a form in order for their child to be exempt from vaccination requirements.¹²⁸ Other states require the parent to obtain a form from the local health department, fill out the form, and have the form notarized.¹²⁹ Some states require the submission of the form obtained from the health department, along with a letter from a parent or guardian.¹³⁰ Also, some jurisdictions require a letter from a religious official or an official of the state for a child to be exempt from vaccination requirements.¹³¹ Studies have shown that fewer exemptions are claimed in states with more complex processes for obtaining exemptions.¹³²

Also, states differ in their processes for granting exemptions to vaccination laws.¹³³ In some states, school officials are delegated the authority to approve exemptions.¹³⁴ Other states delegate the authority to health department

¹²¹ *Religious and Philosophical Exemptions*, *supra* note 34.

¹²² *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-872 (2016); LA. STAT. ANN. § 17:170(A) (2016); OHIO REV. CODE ANN. § 3313.671 (LexisNexis 2016).

¹²³ Silverman, *supra* note 112, at 284.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 285.

¹²⁷ Rota et al., *supra* note 110, at 644–47.

¹²⁸ *Id.* at 646.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *See id.* at 647.

¹³³ *Id.* at 646–47 (finding “[a]n inverse relationship was observed between the complexity of requirements and the proportion of children claiming exemptions”).

¹³⁴ *Id.* at 646.

or state officials to grant exemptions.¹³⁵ A combination approach is taken by some jurisdictions in which school officials make the original determination and then the decision can be appealed to the health department.¹³⁶

3. Correlation Between Vaccination Laws and Vaccination Levels

Statistics show that compulsory school vaccination laws significantly increase immunization levels.¹³⁷ Additionally, there is a direct correlation between the existence of vaccination laws and a decrease in vaccine-eradicable diseases.¹³⁸ For instance, “[i]n the early 1970s, public health officials found that states with vaccine mandates had rates of measles that were 50% lower than states without mandates.”¹³⁹

Additionally, exemption availability affects the incidence of vaccine-eradicable diseases.¹⁴⁰ In states where exemptions are easier to obtain, there has been an increase in diseases that are preventable by vaccination.¹⁴¹ “In states with easily granted exemptions, pertussis incidence is 90 percent higher than in states without exemptions.”¹⁴² Other studies have shown that states that permit philosophical or personal belief exemptions have double the pertussis rates than states that only offer religious exemptions.¹⁴³

D. State Compulsory Vaccination Laws Without Religious or Philosophical Exemptions

State law governs school compulsory vaccination requirements; there is no legislation at the federal level pertaining to compulsory vaccinations.¹⁴⁴ All states have compulsory vaccination laws that require children to be vaccinated prior to admittance to school to ensure higher vaccination rates.¹⁴⁵ The penalty

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Parkins, *supra* note 64, at 458.

¹³⁸ *See id.*

¹³⁹ *Id.* (quoting Paul A. Offit, *Fatal Exemption*, WALL ST. J., Jan. 20, 2007, at A10).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Rota et al., *supra* note 110, at 645.

¹⁴⁵ *See, e.g.*, ALA. CODE §§ 16-30-1 to -5 (2016); COLO. REV. STAT. § 25-4-902 (2016); MISS. CODE ANN. § 41-23-37 (2016); W. VA. CODE ANN. § 16-3-4 (LexisNexis 2016); *see also Vaccines and Immunizations: State Vaccination Requirements*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/vaccines/imz-managers/laws/state-reqs.html> (last visited Nov. 3, 2016). For a map of state vaccination law exemptions, *see State Law and Vaccine Requirements*, NAT'L VACCINE INFO. CTR., <http://www.nvic.org/vaccine-laws/state-vaccine-requirements.aspx>

of exclusion from school for failure to comply with vaccination requirements is successful in ensuring that parents vaccinate their children.¹⁴⁶ State compulsory vaccination laws originated as a means to protect the public from the smallpox virus through the vaccination of the general public.¹⁴⁷ Today, young parents “may not view these diseases with the same concern and therefore may be inclined to question the need to vaccinate.”¹⁴⁸ As noted earlier, West Virginia, Mississippi, and California are the only states that do not provide non-medical exemptions to school compulsory vaccination laws. This section analyzes the compulsory vaccination laws of those states.

1. West Virginia Compulsory Vaccination Law

West Virginia Code Section 16-3-4,¹⁴⁹ “Compulsory immunization of school children,” provides the vaccination requirements for children entering public, private, and parochial schools in West Virginia.¹⁵⁰ A child entering school must be vaccinated against “chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough.”¹⁵¹ Schools may not admit children who have not been vaccinated against all of these diseases, unless they furnish a certificate from the commissioner that exempts them from the compulsory immunizations.¹⁵²

The Commissioner, as defined by West Virginia Code Section 16-1-2, is the Commissioner of the Bureau for Public Health and is the State Health Officer.¹⁵³ West Virginia only provides exemptions to its compulsory vaccination requirements for medical reasons.¹⁵⁴ “The commissioner is authorized to grant, renew, condition, deny, suspend or revoke exemptions to the compulsory immunization requirements of this section . . . upon sufficient medical evidence that immunization is contraindicated or there exists a specific precaution to a particular vaccine.”¹⁵⁵ When seeking a medical exemption, the

(last visited Nov. 3, 2016). The CDC has provided a database on their website that includes a search and listing of each state’s vaccination requirements and exemptions for easy access. *SchoolVaxView School Vaccination Requirements and Exemptions*, CTR. FOR DISEASE CONTROL AND PREVENTION, <http://www2a.cdc.gov/nip/schoolsurv/schImmRqmt.asp> (last visited Nov. 3, 2016).

¹⁴⁶ Rota et al., *supra* note 110, at 645.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 648.

¹⁴⁹ W. VA. CODE ANN. § 16-3-4 (LexisNexis 2016).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* § 16-3-4(b).

¹⁵² *Id.* § 16-3-4(c).

¹⁵³ *Id.* § 16-1-2(4).

¹⁵⁴ *Id.* § 16-3-4(h).

¹⁵⁵ *Id.*

request must be accompanied by a “certification of a licensed physician stating that the physical condition of the child is such that immunization is contraindicated or there exists a specific precaution to a particular vaccine.”¹⁵⁶

The commissioner is entitled to employ an immunization officer, who must be a licensed physician, to make determinations on compulsory vaccination exemptions.¹⁵⁷ Determinations of the immunization officer may be appealed to the State Health Officer.¹⁵⁸

During the 2015 legislative session, the compulsory vaccination statute was a hotly debated issue. House Bill 2556 sought to include an exemption to compulsory vaccinations based upon religious beliefs.¹⁵⁹ This bill never made it out of the House Health and Human Resources Committee.¹⁶⁰ The West Virginia legislature adopted Senate Bill 286 during the 2015 Legislative Session.¹⁶¹ Senate Bill 286 originally included a religious exemption provision; however, this provision was eliminated prior to the adoption of the bill.¹⁶² Thus, West Virginia still does not provide any non-medical exemptions to its compulsory vaccination law.

2. Mississippi Compulsory Vaccination Law

Mississippi Code Section 41-23-37¹⁶³ describes compulsory vaccination requirements for public and private schools.¹⁶⁴ The statute provides that the State Health Officer is tasked with promulgating a list of required vaccinations.¹⁶⁵ It is unlawful for any child to attend any school unless they have been vaccinated against all of the diseases specified by the State Health Officer.¹⁶⁶ Children can only obtain a certificate of exemption for medical reasons.¹⁶⁷ A physician must issue the certificate of exemption and then the certificate must be submitted to

¹⁵⁶ *Id.* § 16-3-4(h)(1).

¹⁵⁷ *Id.* §§ 16-3-4(h)(2)–(3).

¹⁵⁸ *Id.* § 16-3-4(h)(4).

¹⁵⁹ H. B. 2556, 82d Leg., 1st Reg. Sess. (W. Va. 2015).

¹⁶⁰ *Bill Status–2015 Regular Session House Bill 2556*, W. VA. LEGISLATURE, http://www.legis.state.wv.us/Bill_Status/bills_history.cfm?INPUT=2556&year=2015&sessiontype=RS (last visited Nov. 3, 2016).

¹⁶¹ S.B. 286, 82d Leg., 1st Reg. Sess. (W. Va. 2015).

¹⁶² *Bill Status–2015 Regular Session Senate Bill 286*, W. VA. LEGISLATURE, http://www.legis.state.wv.us/Bill_Status/bills_history.cfm?INPUT=286&year=2015&sessiontype=RS (last visited Nov. 3, 2016).

¹⁶³ MISS. CODE ANN. § 41-23-37 (2016).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

the local health officer.¹⁶⁸ The exemption will be accepted if the local health officer concludes that the exemption will not present an undue risk to the community.¹⁶⁹ It is the responsibility of each school to enforce the requirements of immunization.¹⁷⁰ If a school official fails to enforce these requirements, they shall be guilty of a misdemeanor and shall be fined, imprisoned, or both.¹⁷¹

Mississippi lists its annual vaccination requirements on the Mississippi State Department of Health website.¹⁷² In 2015, Mississippi required students to be immunized against measles, mumps, rubella, polio, chickenpox, hepatitis B, diphtheria, tetanus, and pertussis.¹⁷³ Again, unvaccinated students may only be admitted to Mississippi schools if they obtain a medical exemption.¹⁷⁴

Mississippi has not been insulated from the political debate behind compulsory vaccination requirements.¹⁷⁵ In the 2015 legislative session, Senate Bill 2800 was proposed to create an exemption for compulsory vaccination based on vaccinations being contrary to the beliefs of the parent.¹⁷⁶ This bill died in the Public Health and Welfare Committee.¹⁷⁷ Additionally, House Bill 130 proposed exemptions from vaccinations based upon “conscientious beliefs.”¹⁷⁸ This bill also died in committee.¹⁷⁹

Mississippi’s compulsory vaccination requirements have also been challenged through the court system.¹⁸⁰ In *Brown v. Stone*,¹⁸¹ a six-year old boy

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Required Immunizations*, MISS. ST. DEP’T OF HEALTH, http://www.msdh.state.ms.us/msdhsite/_static/41,0,71,303.html (last visited Nov. 3, 2016).

¹⁷³ *Mississippi School Immunization Requirements*, MISS. ST. DEP’T OF HEALTH, http://www.msdh.state.ms.us/msdhsite/_static/resources/2029.pdf (last visited Nov. 3, 2016).

¹⁷⁴ The Mississippi State Department of Health provides a copy of the Medical Exemption Request Form (Form 139) on its website. A physician licensed in the state of Mississippi must fill out the form. The form is then submitted to the District Health Officer in the district in which the child is seeking admittance. If the form is approved, the Health Office will mail a Certificate of Medical Exemption (Form 122) to the party who submitted the exemption request form. *Medical Exemptions from Vaccinations for School Attendance*, MISS. ST. DEP’T OF HEALTH, http://www.msdh.state.ms.us/msdhsite/_static/41,0,71,688.html (last visited Nov. 3, 2016).

¹⁷⁵ See H.B. 130, 2015 Leg., Reg. Sess. (Miss. 2015); see also S.B. 2800, 2015 Leg., Reg. Sess. (Miss. 2015).

¹⁷⁶ S.B. 2800, 2015 Leg., Reg. Sess. (Miss. 2015).

¹⁷⁷ *Senate Bill 2800*, MISS. LEG. 2015 REG. SESS., <http://billstatus.ls.state.ms.us/2015/pdf/history/SB/SB2800.xml> (last visited Nov. 3, 2016).

¹⁷⁸ H.B. 130, 2015 Leg., Reg. Sess. (Miss. 2015).

¹⁷⁹ *House Bill 130*, MISS. LEG. 2015 REG. SESS., <http://billstatus.ls.state.ms.us/2015/pdf/history/HB/HB0130.xml> (last visited Nov. 3, 2016).

¹⁸⁰ See *Brown v. Stone*, 378 So. 2d 218 (Miss. 1980).

¹⁸¹ *Id.*

was denied admission by a Mississippi school because he was not vaccinated against certain diseases as required by the Mississippi statute.¹⁸² The child was not immunized based upon the religious beliefs of his father.¹⁸³ At the time of this case, Mississippi provided exemptions based on religious beliefs to students whose parents were members of a recognized denomination that required reliance on spiritual healing.¹⁸⁴ The student's father obtained a certificate from a minister who stated that although his religious denomination did not "teach against the use of medicines [and] immunizations," a chiropractor who was a member of that particular church had strong convictions against any use of medications.¹⁸⁵ The father argued that the compulsory vaccination statute interfered with his First Amendment rights by inhibiting his free exercise of religion.¹⁸⁶ The court held that requiring children to be vaccinated against certain deadly diseases prior to school admittance "serves an overriding and compelling public interest."¹⁸⁷ Also, to the extent that the vaccination requirements interfere with a person's free exercise of religion, "the interests of the school children must prevail."¹⁸⁸ The court also held that the statute was a constitutional exercise of the state's police power.¹⁸⁹ Additionally, the court voided the portion of the statute that allowed an exemption based on religious beliefs because it concluded that this provision violated the Equal Protection Clause of the Fourteenth Amendment.¹⁹⁰

3. California Compulsory Vaccination Law and Amendments

California Senate Bill 277¹⁹¹ was signed into law by California's governor on June 30, 2015, repealing California Code Section 120365, which permitted philosophical exemptions from vaccination.¹⁹² Senate Bill 277 was introduced as a result of the measles outbreak that occurred in Disneyland in

¹⁸² *Id.* at 220.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 219.

¹⁸⁵ *Id.* at 219–20.

¹⁸⁶ *See id.* at 220.

¹⁸⁷ *Id.* at 222. The reasoning that the *Brown* court provides is discussed *infra* Section II.E. The court cites various cases that generally support the constitutionality of compulsory vaccination requirements.

¹⁸⁸ *Id.* at 223.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ S.B. 277, 2015–2016 Leg., 2015 Reg. Sess. (Cal. 2015).

¹⁹² CAL. HEALTH & SAFETY CODE § 120365 (West 2016), *repealed by* S.B. 277. California Senate Bill 277 affected California Health and Safety Code Sections 120325, 120335, 120365, 120370, and 120375. For further information regarding changes to these statutes, see S.B. 277.

December 2014.¹⁹³ California Code Section 120365 provided that students could attend schools without the required vaccinations, if vaccinations were contrary to their personal beliefs.¹⁹⁴ This exemption is no longer permitted. Students entering schools in California must be immunized against measles, mumps, rubella, and diphtheria, among other diseases.¹⁹⁵ A “governing authority” in each institution is tasked with declining admittance to any student that has failed to receive all required vaccinations.¹⁹⁶ Children who have a physical condition or medical circumstance that renders immunizations unsafe can obtain an exemption to the compulsory vaccination requirements.¹⁹⁷ A licensed physician must issue a written statement that must be submitted to the institution’s governing authority.¹⁹⁸

California Senate Bill 277 became effective on January 1, 2016, but any child that has not been vaccinated against all of the required diseases will be permitted to continue school until they advance to the next grade level.¹⁹⁹ On or after July 1, 2016, students will not be admitted to school for the first time, or be permitted to enter the seventh grade, if they have not obtained all of the required immunizations.²⁰⁰ The Bill stalled in the Senate Education Committee because legislators feared that the Bill would force too many children into homeschooling.²⁰¹ However, a provision was added to the bill that expanded the definition of homeschooling to include multiple families joining together to educate their children, which allowed the Bill to pass that committee.²⁰²

E. Constitutionality of Compulsory Vaccination Laws

Courts and scholars routinely conclude that compulsory vaccination laws are constitutional and withstand free exercise of religion and parental rights challenges.²⁰³ In response to arguments that parents have a constitutional right to refuse to vaccinate their children, constitutional law scholar Erwin Chemerinsky

¹⁹³ Jennifer Medina, *Bill Requiring Vaccination of Children Advances in California, but Hurdles Remain*, N.Y. TIMES, Apr. 23, 2015, at A13.

¹⁹⁴ CAL. HEALTH & SAFETY CODE § 120365 (West 2016), *repealed by* S.B. 277.

¹⁹⁵ *Id.* § 120335(b).

¹⁹⁶ *Id.* §§ 120335(a)–(b).

¹⁹⁷ *Id.* § 120370.

¹⁹⁸ *Id.*

¹⁹⁹ S.B. 277; CAL. HEALTH & SAFETY CODE § 120335(g)(1) (West 2016).

²⁰⁰ S.B. 277; CAL. HEALTH & SAFETY CODE § 120335(g)(3) (West 2016).

²⁰¹ Medina, *supra* note 193.

²⁰² *Id.*

²⁰³ See Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws are Constitutional*, 110 NW. U.L. REV. 589 (2016).

explicitly states “[n]o such constitutional right exists.”²⁰⁴ The Supreme Court of the United States has rendered two decisions regarding the constitutionality of compulsory vaccination laws.²⁰⁵

1. *Jacobson v. Massachusetts*

The Supreme Court first explored the constitutionality of compulsory vaccination laws in its 1905 decision in *Jacobson v. Massachusetts*.²⁰⁶ The case involved Massachusetts’s compulsory vaccination law that required all inhabitants to be vaccinated against smallpox.²⁰⁷ Jacobson failed to comply with the requirements and consequently faced a criminal complaint.²⁰⁸ The Board of Health of Cambridge deemed vaccination “necessary for the public health and safety.”²⁰⁹ The Supreme Court rejected Jacobson’s arguments that the vaccination requirement deprived him of his rights under the Preamble to the United States Constitution and was “opposed to the spirit of the Constitution.”²¹⁰ The Court held that Massachusetts had the authority to enact this statute based upon its police powers.²¹¹

Although the Supreme Court noted that it had never defined the parameters of state police powers, it recognized that it previously allowed states to enact quarantine laws.²¹² The Court reasoned that “the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”²¹³ Further, a state can safeguard the public health and safety as long as the means do not conflict with the United States Constitution or conflict with a right secured by the Constitution.²¹⁴

²⁰⁴ *Id.* at 604.

²⁰⁵ *Jacobson v. Massachusetts*, 197 U.S. 11, 12–13 (1905); *Zucht v. King*, 260 U.S. 174, 175, 177 (1922). For a scholarly discussion on the Supreme Court cases regarding compulsory vaccination laws, see Chemerinsky & Goodwin, *supra* note 203.

²⁰⁶ 197 U.S. 11 (1905).

²⁰⁷ *Id.* at 12–13.

²⁰⁸ *Id.* at 13.

²⁰⁹ *Id.* at 22.

²¹⁰ *Id.*

²¹¹ *Id.* at 24–25; *see also State Police Power*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining state police power as “[t]he power of a state to enforce laws for the health, welfare, morals, and safety of its citizens, if enacted so that the means are reasonably calculated to protect those legitimate state interests”).

²¹² *Jacobson*, 197 U.S. at 25.

²¹³ *Id.* (citing *Gibbons v. Ogden*, 22 U.S. 1 (1824)).

²¹⁴ *Id.*

The Court then explored whether any right given or secured by the Constitution conflicts with the vaccination statute.²¹⁵ Jacobson argued that the vaccination requirements invaded his liberty and were “unreasonable, arbitrary, and oppressive.”²¹⁶ For these reasons, he argued that such laws were hostile to every free man’s ability to care for his own body.²¹⁷ The Court responded to Jacobson’s arguments by stating that the liberty secured by the Constitution does not provide an absolute right for people to be completely freed from restraint.²¹⁸ Further, the Court explained that “[t]his court has more than once recognized it as a fundamental principle that ‘persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state’”²¹⁹

2. *Zucht v. King*

Furthermore, in *Zucht v. King*,²²⁰ the Supreme Court of the United States upheld a city ordinance that required all children entering public schools to present a vaccination certificate.²²¹ The plaintiff, a student who was denied admittance to school because she did not submit to the required vaccinations, claimed that the compulsory vaccination ordinance deprived her of “her liberty without [the] due process of law.”²²² The Court stated that it was well settled after its decision in *Jacobson* that states have, within their police power, the ability to provide for compulsory vaccination.²²³ Further, the Court asserted that in exercising police powers states may apply reasonable classifications and this regulation does not violate the Equal Protection Clause merely because of the classifications.²²⁴

After the Supreme Court’s decisions in these two cases, it is apparent that states have the ability to use their police powers to enact statutory vaccination requirements. These cases do not, however, explicitly place a duty on states to eliminate exemptions to compulsory vaccination laws to protect children and society. This state duty is discussed in Part IV of this Note.

²¹⁵ *Id.*

²¹⁶ *Id.* at 26.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* (quoting *R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)).

²²⁰ 260 U.S. 174 (1922).

²²¹ *Id.* at 175, 177.

²²² *Id.* at 175.

²²³ *Id.* at 176.

²²⁴ *Id.*

F. Compulsory Education Laws Background

Many similarities exist between compulsory vaccination and compulsory education laws. Parents have a fundamental right to direct and make decisions regarding the upbringing of their children.²²⁵ However, this right can be infringed upon by the state if there is a compelling interest in protecting children.²²⁶ The Supreme Court has asserted that a parent's right to parent must be balanced against the state's interest in protecting children.²²⁷ For instance, in *Prince v. Massachusetts*, Mrs. Prince, the custodian of a young girl, violated a Massachusetts statute prohibiting child labor.²²⁸ The Court stated that the family is not beyond regulation if such regulation is in the public interest.²²⁹ Further, states asserting their *parens patriae* power may restrict parents' control when acting to safeguard the wellbeing of children.²³⁰

Every state has a compulsory education statute.²³¹ Every statute requires that children, up to a certain age, be educated either in a public school, private school, homeschool, or other type of school prescribed by statute.²³² Courts consistently uphold objections to compulsory education laws.²³³ Though parents have a fundamental right to direct the upbringing of their children, states have deemed education so important that requiring children to be educated is permitted even though it infringes upon parents' fundamental rights. States have the power to enact compulsory education laws through the use of their police powers and through their role as *parens patriae*.²³⁴ As previously discussed, the

²²⁵ See generally *Troxel v. Granville*, 530 U.S. 57 (2000); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²²⁶ See *Prince v. Massachusetts*, 321 U.S. 158, 169–71 (1944).

²²⁷ See *id.* at 165.

²²⁸ *Id.* at 159–62. Mrs. Prince permitted the young girl to sell religious propaganda on a street corner in violation of a child labor law.

²²⁹ *Id.* at 166.

²³⁰ *Id.* (explaining, in dicta, that parents cannot avoid compulsory vaccination by claiming that such vaccination precludes their free exercise of religion or invades their right to parent).

²³¹ See, e.g., CAL. EDUC. CODE § 48200 (West 2016); MISS. CODE ANN. § 37-13-91 (2016); 24 PA. STAT. AND CONS. STAT. ANN. § 13-1327 (West 2016); W. VA. CODE ANN. § 18-8-1 (LexisNexis 2016); Daniel J. Rose, Note, *Compulsory Education and Parent Rights: A Judicial Framework of Analysis*, 30 B.C. L. REV. 861, 869 (1989).

²³² Rose, *supra* note 231, at 869.

²³³ Ralph D. Mawdsley, *Compulsory Attendance Laws Under Attack*, 30 EDUC. L. REP. 627, 627 (1986). The validity of compulsory education laws “has generally been recognized, for the natural rights of a parent to the custody and control of his child are subordinate to the police power of the state and may be restricted and regulated by municipal law providing minimum educational standards.” *Id.* at n.1 (citing *State v. Garber*, 419 P.2d 896, 900 (1966)).

²³⁴ Allan J. Jacobs, *Needles and Notebooks: The Limits of Requiring Immunization for School Attendance*, 33 HAMLIN L. REV. 171, 190 (2010). The doctrine of *parens patriae* refers to “the

Supreme Court in *Prince* reiterated the breadth of states' *parens patriae* power.²³⁵ In support of its decision in *Prince*, the Court recognized that "the state as *parens patriae* may restrict the parent's control by requiring school attendance"²³⁶

First, this section discusses the history behind compulsory education laws and their infringements on a parent's right to parent. Second, this section explains the state authority to enact compulsory education laws, in order to analogize between compulsory education and compulsory vaccination in Part III. Finally, this section discusses the constitutionality of compulsory education laws.

1. History of Compulsory Education Laws

Compulsory education has a long history. The Puritans of the Massachusetts Bay Colony passed what is considered the first compulsory education law in June 1642.²³⁷ Early compulsory education laws gave states two powers: (1) to establish minimum educational standards and (2) to require the establishment of schools and teachers; they did not compel attendance in schools.²³⁸

Not only did Massachusetts pass the first compulsory education law, Massachusetts also passed the first compulsory school attendance law.²³⁹ It was not until 1918 that all states in the United States adopted compulsory education statutes.²⁴⁰ These laws proved ineffective.²⁴¹

A transformation of many state compulsory school attendance statutes occurred between 1900 and 1930.²⁴² The statutes became effective, thus leading to higher school attendance levels, with the adoption of enforcement mechanisms.²⁴³ In 1920, most compulsory schooling statutes required students to attend school for a longer period and required the elimination of many

state in its capacity as provider of protection to those unable to care for themselves." *Parens Patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²³⁵ See *Prince*, 321 U.S. at 166; see also MICHAEL S. KATZ, A HISTORY OF COMPULSORY EDUCATION LAWS 25 (1976).

²³⁶ *Prince*, 321 U.S. at 166.

²³⁷ KATZ, *supra* note 235, at 11; see also Rose, *supra* note 231, at 867.

²³⁸ KATZ, *supra* note 235, at 12.

²³⁹ This law was ineffective as there were no mechanisms in place to enforce it. *Id.* at 17; see also Rose, *supra* note 231, at 867.

²⁴⁰ KATZ, *supra* note 235, at 17.

²⁴¹ *Id.* at 18–19.

²⁴² *Id.* at 21.

²⁴³ *Id.* The enforcement mechanisms included the hiring of Truant officers. *Id.*

exemptions to compulsory education statutes.²⁴⁴ The increase in public high schools led to the acceptance of children being sent to school rather than sent into the workforce.²⁴⁵

Although parents' willingness to send their children to school rather than into the workforce gained momentum, such statutes were challenged in the courts.²⁴⁶ Despite the conflict between state and parental control over education, the Supreme Court asserted that, "education is perhaps the most important function of state and local governments."²⁴⁷ The Court explained that "[c]ompulsory school attendance laws . . . demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities"²⁴⁸ Education is the foundation for good citizenship.²⁴⁹

2. State Authority to Enact Compulsory Education Laws

As previously stated, every state has a compulsory education statute.²⁵⁰ States have the ability to enact such statutes using their police powers and their *parens patriae* powers.²⁵¹ State authority to require children to attend school is primarily derived from the Tenth Amendment.²⁵² States have the power to regulate citizen's health, safety, and morals, which are termed the police powers

²⁴⁴ *Id.* at 22. The elimination of exemptions to compulsory education statutes by 1920 is particularly important with respect to this Note in the comparison between compulsory education statutes and compulsory vaccination statutes.

²⁴⁵ *See id.* at 23.

²⁴⁶ *See id.* at 24–25.

²⁴⁷ *Brown v. Bd. of Educ. of Topeka Kansas*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *See, e.g.*, CAL. EDUC. CODE § 48200 (West 2016); MISS. CODE ANN. § 37-13-91 (2016); 24 PA CONS. STAT. § 13-1327 (2016); W. VA. CODE ANN. § 18-8-1a (LexisNexis 2016); Rose, *supra* note 231, at 869.

²⁵¹ James C. Easterly, Comment, "*Parent v. State*": *The Challenge to Compulsory School Attendance Laws*, 11 *HAMLIN J. PUB. L. & POL'Y* 83, 89 (1990).

²⁵² Rose, *supra* note 231, at 870–71. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

of the state.²⁵³ Adopting requirements to compel children to attend schools falls within a state's police powers.²⁵⁴

Compulsory education statutes were enacted to promote literacy and good citizenship, as well as to protect young people from exploitation.²⁵⁵ Additionally, states enacted these statutes for the betterment of society. Thomas Jefferson recognized the importance of compulsory education requirements and explained that children must be educated in order to have upstanding citizens.

3. Supreme Court Decisions Regarding Compulsory Education

A series of three Supreme Court decisions described a state's power to require compulsory education with limited exceptions and the power and limits of parental rights to control the education of their children. First, in *Meyer v. Nebraska*,²⁵⁶ the Supreme Court stated that parents have a right to control the education of their children. The Court noted that education and the acquisition of knowledge should be diligently promoted because of their utmost importance.²⁵⁷ Furthermore, the Court concluded that parents have a duty to provide children with a suitable education and states can enforce this obligation using compulsory attendance laws.²⁵⁸

Next, in *Pierce v. Society of Sisters*,²⁵⁹ the Supreme Court struck down a compulsory education statute that required children to be educated in public schools.²⁶⁰ While this case challenged the regulation of education, the ability of states to regulate and mandate child attendance in schools was not questioned.²⁶¹ The Court held that the statute requiring education in public schools unreasonably interfered with the Fourteenth Amendment rights of parents and guardians to direct the education and upbringing of their children.²⁶²

Finally, in *Wisconsin v. Yoder*,²⁶³ the Court balanced the state's ability to enact compulsory education laws with a parent's right to direct the religious

²⁵³ See *Slaughter-House Cases*, 83 U.S. 36, 62 (1873) (discussing the police power of states and concluding that it includes regulating the social order and the life and health of citizens).

²⁵⁴ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²⁵⁵ Mawdsley, *supra* note 233, at 627.

²⁵⁶ 262 U.S. 390 (1923).

²⁵⁷ *Id.* at 400.

²⁵⁸ *Id.*

²⁵⁹ 268 U.S. 510 (1925).

²⁶⁰ *Id.* at 534–35. The statute required parents or guardians to enroll their children in public school in their district. *Id.* at 530.

²⁶¹ *Id.* at 534 (“No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school . . .”).

²⁶² *Id.* at 534–35.

²⁶³ 406 U.S. 205 (1972).

practices of their children. In *Yoder*, Amish parents were convicted of violating a compulsory education statute that required children to attend school until they reached the age of 16.²⁶⁴ The Court concluded that the First and Fourteenth Amendments to the United States Constitution prevent states from compelling Amish parents to force their children, who have graduated from the eighth grade, to attend school until they reach the age of 16.²⁶⁵

The *Yoder* Court balanced the state's interest in educating all children with the parental interest in directing the upbringing of their children.²⁶⁶ The Court asserted that states have the power to impose reasonable regulations on child education and duration.²⁶⁷ However, the Court recognized that its precedent emphasizes the importance of parental direction in the religious and educational upbringing of their children in their early and formative years.²⁶⁸

The Court explained that Thomas Jefferson emphasized "that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."²⁶⁹ Although these interests were recognized, the Court stated that requiring Amish children to attend additional years of formal high school would not likely further these interests in the Amish community.²⁷⁰ Justice Warren E. Burger then looked to the history or origins of requiring children to attend school until the age of 16.²⁷¹ Although the origin is unclear, the Court projected that, to some extent, such laws were enacted to prevent child labor and to foster conformance with the Fair Labor Standards Act.²⁷² Thus, both of these interests infringed upon parental rights.

III. ANALYSIS

This Note argues that states should eliminate religious and philosophical exemptions to compulsory vaccination laws, like West Virginia, Mississippi, and California, to protect immunocompromised children. These non-medical

²⁶⁴ *Id.* at 207. The parents that violated the statute in *Yoder* did not permit their children to attend school after the eighth grade because it was contrary to their religious beliefs and the children received vocational education at home. *Id.*

²⁶⁵ *Id.* at 205.

²⁶⁶ *Id.* at 213.

²⁶⁷ *Id.* at 213–14 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 221. Furthermore, Justice Warren E. Burger accepted the proposition that education prepares people to be self-sufficient members of society. *Id.*

²⁷⁰ *Id.* at 223–24.

²⁷¹ *Id.* at 227–28.

²⁷² *Id.* at 228.

exemptions should be eliminated using the same power that enables states to enact compulsory education laws.

Immunocompromised children are children who are unable to be vaccinated or unable to complete a vaccination schedule due to a disease that has negatively affected their immune system.²⁷³ Immunocompromised children have a right to be free from diseases that can be eradicated through vaccinations while attending school.²⁷⁴ The lack of concern for diseases that are no longer widespread requires states to implement stricter laws to protect the public against vaccine-preventable diseases. States infringe on parents' fundamental rights to direct the upbringing of their children by adopting compulsory education laws.²⁷⁵ Thus, states have the ability to protect the immunocompromised children and infringe upon a parent's right to parent by eliminating non-medical exemptions to compulsory vaccination laws.²⁷⁶

Challenges to compulsory vaccination statutes repeatedly fail.²⁷⁷ Not only are compulsory vaccination laws constitutional, immunocompromised children need protection from exposure to eradicable diseases in schools; thus, states should eliminate religious and philosophical exemptions to protect these children. States have the ability to eliminate these non-medical exemptions using the same powers used to enact compulsory education laws without exemptions. Not only do states have the ability to eliminate non-medical exemptions, states should eliminate non-medical exemptions to adequately protect immunocompromised children by invoking their police powers and *parens patriae* powers.

Compliance with compulsory education laws is one of the few areas where parents have an affirmative duty to act and this affirmative duty should be extended to compulsory vaccinations without non-medical exemptions. West Virginia, Mississippi, and California enacted laws without non-medical exemptions or eliminated non-medical exemptions to compulsory

²⁷³ Reinberg, *supra* note 16 (discussing immunocompromised children and their susceptibility to infectious diseases).

²⁷⁴ This Note is not suggesting that there is a fundamental right or protected right of children to be free from vaccine-eradicable diseases in schools. This "right" I am discussing that immunocompromised children have is more of a natural right, rather than a fundamental right.

²⁷⁵ See, e.g., *Yoder*, 406 U.S. 205 (permitting the infringement on a parent's right to parent by requiring children to attend school until the eighth grade).

²⁷⁶ When referring to compulsory vaccination laws without exemptions, this Note is referring to compulsory vaccination statutes without religious, philosophical, or personal belief exemptions. Each state does have and should continue to have a medical exemption to compulsory education statutes for children who are unable to be vaccinated based on a medical condition.

²⁷⁷ See *Zucht v. King*, 260 U.S. 174, 175, 177 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11, 12–13 (1905); *Brown v. Stone*, 378 So. 2d 218 (Miss. 1979) (rejecting a challenge to Mississippi's state compulsory vaccination law).

immunizations prior to admittance to school,²⁷⁸ and all states should follow this example.

Overall, this section analyzes and analogizes the power states have to enact compulsory education laws with compulsory vaccination laws to provide an explanation for why states should proactively eliminate non-medical exemptions to compulsory vaccination laws. First, this section argues that non-medical exemptions to compulsory vaccination laws should be eliminated, and this argument is presented by analogizing states' use of their *parens patriae* power in compulsory education versus compulsory vaccination for the betterment of society and for the protection of the wellbeing of children. Next, this section argues that non-medical exemptions to compulsory vaccination laws should be eliminated, and that parental rights can be infringed upon to do so when there are important state interests, similar to the power to enact compulsory education laws. Finally, this section argues that states should have an affirmative duty to protect their citizens through effective vaccination requirements and that this duty is even more important in the school context where immunocompromised children are forced to attend.

A. *States Should Eliminate Non-Medical Exemptions to Vaccination Laws for the Protection and Betterment of Society Similar to Compulsory Education Laws*

States can enact compulsory education laws for the good of society. Compulsory education or school attendance laws require parents to proactively act for the betterment of society by sending their children to school.²⁷⁹ Parents should have the same duty to proactively act and vaccinate their children for the betterment of society, as well.

The Supreme Court has already determined that compulsory vaccination laws are constitutional and states have the power to enact such laws through the use of their police powers.²⁸⁰ However, the Supreme Court has not decided whether non-medical exemptions to compulsory education laws are constitutional.²⁸¹ All states should eliminate their non-medical exemptions to

²⁷⁸ CAL. HEALTH & SAFETY CODE § 120338 (WEST 2016); MISS. CODE ANN. § 41-23-37 (2016); W. VA. CODE ANN. § 16-3-4 (LexisNexis 2016).

²⁷⁹ See, e.g., CAL. EDUC. CODE § 48200 (West 2016); MISS. CODE ANN. § 37-13-91 (2016); 24 PA CONS. STAT. § 13-1327 (2016); W. VA. CODE ANN. § 18-8-1a (LexisNexis 2016).

²⁸⁰ See *Jacobson*, 197 U.S. at 26; *Zucht*, 260 U.S. at 175, 177.

²⁸¹ This Note does not argue that non-medical exemptions to compulsory vaccinations statutes are unconstitutional because that topic is outside the scope of this Note. By mentioning the questions of whether non-medical exemptions are constitutional, this Note is merely suggesting that they might not be because the issue has not been decided. Furthermore, it is not necessary for non-medical exemptions to be deemed unconstitutional to support the premise of this Note because this Note suggests that, through the effective use of state police powers and state *parens patriae* powers, states should eliminate non-medical exemptions even if they are not unconstitutional.

compulsory vaccination laws. Compulsory vaccination laws clearly protect the health and safety of the community. The elimination of non-medical exemptions would further protect the health and safety of inhabitants of a community, whereas compulsory vaccination laws that provide non-medical exemptions fail to adequately protect society.

1. States' Use of *Parens Patriae* Power in Education and Vaccination

As discussed earlier in this Note, states have the power to enact compulsory school education or attendance laws through, not only their police powers, but also acting as *parens patriae*.²⁸² Acting as *parens patriae*, states have the ability to protect the wellbeing of children.²⁸³ Though education is very important, when analyzing the wellbeing of children, their health, life, and safety are even more important. Thus, states should eliminate non-medical exemptions to compulsory vaccination statutes while acting as *parens patriae*, since states enact compulsory education requirements without exemptions for the betterment of society.²⁸⁴

In *Prince*, the Court asserted that parental rights could be overstepped by the state when the state is acting to protect the wellbeing of children.²⁸⁵ In that case, the state's interest in prohibiting child labor was important enough for the state to act using its power as *parens patriae* to infringe upon the decision of the guardian to allow the child to sell religious materials on a street corner at night.²⁸⁶ While protecting children from selling materials on a street corner is important for the wellbeing of children,²⁸⁷ vaccinations are arguably even more important for the wellbeing of children. If the state can step into the familial relationship to prohibit children selling religious propaganda, then they should be able to interfere with the familial relationship by requiring vaccination.

²⁸² See *supra* notes 217–19 and accompanying text.

²⁸³ See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

²⁸⁴ It is true that there are some exemptions to compulsory education requirements, such as the exemption set forth in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where the Court held that Amish children did not have to attend school beyond the eighth grade. However, this religious exemption cannot be obtained until the child has already received a certificate certifying that the child has passed the eighth grade. This differs from exemptions to compulsory vaccination requirements, which would require the exemption be obtained prior to the child entering school. Thus, it can be inferred that, since education is so important that there are no exemptions until children have completed the eighth grade, the health of children through vaccinations is also important enough to require without the availability of exemptions.

²⁸⁵ *Prince*, 321 U.S. at 166.

²⁸⁶ See *supra* Part II.F for a full discussion of *Prince v. Massachusetts*.

²⁸⁷ See *Prince*, 321 U.S. at 161–62, 166.

Also, vaccination is only effective at eliminating diseases if all children obtain vaccinations and herd immunity is in place.²⁸⁸ Compulsory vaccination laws that provide non-medical exemptions do not reach this level. Thus, not only can states step into the familial relationship and require vaccinations for the well-being of children, states should not allow exemptions to these laws in order to further protect the wellbeing of immunocompromised children.

Merely because parents have a religious or philosophical belief contrary to vaccinations does not mean that they should be able to fail to vaccinate and put immunocompromised children at risk. Instead, states should eliminate these non-medical exemptions acting as *parens patriae* because such power is granted to states to protect the wellbeing of children. Compulsory vaccination statutes are directly linked to decreased appearance of vaccine-eradicable diseases.²⁸⁹ Therefore, states should eliminate all non-medical exemptions in order to protect society, primarily these immunocompromised children.

2. States Invoke Their *Parens Patriae* Power for the Betterment of Society and Should for Vaccinations

If states can enact and enforce compulsory education statutes for the good or betterment of society then this state power should extend to forcing immunization for the good of society. Prior to the measles vaccination, three to four million people contracted measles in the United States each year.²⁹⁰ Each year approximately 300 to 400 people died; 48,000 were hospitalized; and 4,000 developed brain swelling from measles.²⁹¹ Protection from this disease is arguably even more important than the education of children. It is well established that states can enact compulsory education laws for the betterment of society through their powers as *parens patriae*.²⁹² When a disease kills over 300 people each year and hospitalizes thousands more,²⁹³ it seems that taking measures to eliminate this disease would better society. Since states can compel education for the betterment of society while acting as *parens patriae*,²⁹⁴ then states acting as *parens patriae* should have even more power to protect children's

²⁸⁸ Parkins, *supra* note 64, at 440. For a discussion on the correlation between vaccination levels and a decrease in vaccine-eradicable diseases, see *supra* Part II.C.3.

²⁸⁹ See Parkins, *supra* note 64, at 458.

²⁹⁰ See *Frequently Asked Questions about Measles in the U.S.*, *supra* note 14.

²⁹¹ See *id.*

²⁹² See *Prince*, 321 U.S. at 166 (explaining, in dicta, that parents cannot avoid compulsory vaccination by claiming that such vaccination precludes their free exercise of religion or invades their right to parent); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school . . .").

²⁹³ *Frequently Asked Questions about Measles in the U.S.*, *supra* note 14.

²⁹⁴ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

health by eradicating diseases such as the measles. The only effective way to eradicate the measles is through effective vaccination schedules that do not provide non-medical exemptions.²⁹⁵

State authority to require education has already been well established; now, states should extend this power by requiring parents to vaccinate their children to protect other children from a disease that claimed the lives of 300 to 400 people each year and caused brain swelling with negative effects in over 4,000 others.²⁹⁶ Accordingly, not only do states have the ability to enact compulsory vaccination laws, in order to effectively protect children and better society, states should proactively eliminate any non-medical exemptions to vaccination laws.

B. States Should Infringe Upon Parental Rights Where There Are Important Interests of Children

It is well established that states can infringe upon parental rights where it is necessary to protect important interests of children.²⁹⁷ Historically, compulsory education has been seen as an important state interest allowing the infringement upon parental rights to compel education.²⁹⁸ Compulsory vaccination is directly analogous to compulsory education as an important interest of children; thus, states should infringe upon parental rights with regard to requiring vaccinations of all children, including those with religious or philosophical beliefs contrary to vaccination. In the education context, states and the Supreme Court have recognized that parental rights can be infringed upon for the betterment of society.²⁹⁹ This section argues that this power to infringe upon parental rights for the betterment of society should not only apply in education but also in the vaccination context.

²⁹⁵ See Parkins, *supra* note 64, at 445–46; see also Herd Immunity, *supra* note 83.

²⁹⁶ See *Frequently Asked Questions about Measles in the U.S.*, *supra* note 14.

²⁹⁷ *Prince*, 321 U.S. at 166 (“And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways.”).

²⁹⁸ *Id.*; *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925). See generally *Yoder*, 406 U.S. 205 (describing education as an important state interest).

²⁹⁹ *Brown v. Bd. of Educ. of Topeka Kansas*, 347 U.S. 483, 493 (1954) (explaining the importance of education for the betterment of society); *Prince*, 321 U.S. at 166; see also Mawdsley, *supra* note 233, at 627.

1. The Betterment of Society is an Important Interest Allowing the Infringement Upon Parental Rights

The enactment of compulsory education laws proved a huge infringement on parents' rights to direct the upbringing of their children.³⁰⁰ Such laws required parents to send their children to school for a designated period of time, and parents who failed to meet the requirements could be criminally punished.³⁰¹ These laws, which impacted parents greatly, did not provide exemptions but were seen as necessary for the betterment of society.³⁰² Thus, the same logic should follow, and even though compulsory vaccination laws without non-medical exemptions infringe upon parental rights, such laws are necessary for the betterment of society.

a. A Child's Interest in Life Is Greater than His or Her Interest in Education

The health and lives of immunocompromised children are arguably more important than the education of children; therefore, states, without question, should be able to infringe upon a parent's right to parent by requiring vaccinations. Again, states should use the same power to eliminate exemptions that they use to compel education. This is not to undercut the importance of education in the development of a good citizenry; however, if there are fewer healthy citizens we would not be able to better society through education.

When explaining the purpose behind compulsory education laws, Thomas Jefferson reiterated the notion that education is the foundation for a good citizenship.³⁰³ This is true. However, education is not the only foundation for a good citizenship. To have a good citizenship, we must have healthy citizens. As previously discussed, prior to the emergence of the measles vaccination, the disease stole many lives.³⁰⁴ With the eradication of measles in the United States in 2000,³⁰⁵ it appeared that United States citizens were safe from this deadly disease. Then, pockets of unvaccinated individuals caused a measles outbreak that, once again, stole the lives of many United States citizens.³⁰⁶ It seems that it cannot be argued, in this context, that education is more important than vaccination. Consequently, because states can and do infringe upon parental

³⁰⁰ See KATZ, *supra* note 235, at 22–25 (discussing the acceptance of sending children to school rather than into the workforce, which shows how this would have infringed upon parental rights to decide whether or not to send children to school or to work).

³⁰¹ See *id.* at 21–22.

³⁰² See *id.*

³⁰³ Mawdsley, *supra* note 233, at 627.

³⁰⁴ See *Frequently Asked Questions about Measles in the U.S.*, *supra* note 14.

³⁰⁵ *Id.*

³⁰⁶ Reinberg, *supra* note 16.

rights to require education, they should infringe upon parental rights to force the vaccination of children to have healthy citizens.

b. States Infringe on Privacy Rights for the Betterment of Society and Should for Vaccinations

Critics of compulsory vaccination requirements argue that families have privacy rights that cannot be infringed upon by the state by requiring immunization. However, the prevalence of compulsory education statutes show that parental rights and privacy rights can be infringed upon in order to require children to attend school. This should also extend to the vaccination context. The interests in protecting immunocompromised children outweigh the privacy rights of a family because the risks that immunocompromised children are forced to bear are much greater. This is not to say that families should not be afforded a right to privacy. However, when that right to privacy leads to a situation that is harmful to immunocompromised children, states should step in for the betterment of society. Additionally, when states already invade the privacy rights of families in other, less life threatening contexts, states should proactively invade the privacy of a family by requiring vaccinations to prevent the breakdown of herd immunity.

c. Anti-Vaccination Movement Proponents' View of Eliminating Non-Medical Exemptions

While most people would agree that the health and lives of children are more important than the privacy rights of the family, anti-vaccination movement proponents would disagree, or would at least argue that they have a choice about how to protect their children. As discussed earlier in this Note, the anti-vaccination movement has been fueled by a number of factors including parents' fears that there is a link between vaccinations and autism.³⁰⁷ Even after A.J. Wakefield's article regarding the link between vaccinations and autism was debunked, parents still fear that there is some link between vaccinations and other mental and behavioral disorders.³⁰⁸ Additionally, as debated in the 2015 Republican presidential debate, another argument of anti-vaccination movement proponents is that states should not infringe upon the privacy rights of the family by requiring vaccinations.³⁰⁹ However, when parents fail to take the steps necessary to protect their children, as well as other immunocompromised children that rely on herd immunity, then the state needs to do just that: step in and require vaccination to protect these children.

³⁰⁷ See Jana & Osborn, *supra* note 20, at 1–6.

³⁰⁸ CONIS, *supra* note 62, at 204.

³⁰⁹ See *supra* note 72 and accompanying text.

Today, after the link between vaccinations and behavioral disorders has been debunked, anti-vaccination movement activists' arguments against compulsory vaccination laws without non-medical exemptions are without merit. It is true that vaccinations can cause mild symptoms and allergic reactions in some children, but these minor symptoms are far less serious than children contracting the measles virus. This would be a different debate if there were any link between behavioral disorders and vaccination, but there is not.³¹⁰ If a vaccination would harm a child due to a current medical condition, states already provide medical exemptions for these children.³¹¹

States invade the privacy rights of the family by requiring children to attend school, so it only follows that states can invade the privacy rights of a family to protect the health and lives of children. Anti-vaccination movement proponents argue that they have the power to direct the upbringing of their children and that this power should not be invaded by the states. But, the Supreme Court has held that a parent's right to direct the upbringing of their children is limited and must be balanced against the state's power to protect children.³¹² States can infringe upon parental rights to protect the well-being of children.³¹³ Thus, the argument asserted by anti-vaccination proponents that they have a right to choose not to vaccinate based upon this right to direct the upbringing of their children is, again, without merit. Furthermore, the Supreme Court has explicitly stated that "the family" is not beyond the regulation of the state if there is an important public interest.³¹⁴ The protection of children, and even more importantly, immunocompromised children, is an important public interest.

In explaining the importance of education of children, Thomas Jefferson recognized that education is important to protect children from exploitation.³¹⁵ This interest provides another basis for the elimination of non-medical exemptions to compulsory vaccination laws. Anti-vaccination movement proponents exploit children by not providing them with the protection they deserve. Instead of taking measures to protect the lives of both healthy and immunocompromised children, anti-vaccination activists fight to protect their rights to make decisions, even though these rights harm others. Children are unable to protect themselves, and they need society to protect them from exploitation. The elimination of non-medical exemptions to compulsory vaccination laws is just one way states can protect these children.

³¹⁰ CONIS, *supra* note 62, at 204.

³¹¹ *Religious and Philosophical Exemptions*, *supra* note 34.

³¹² Prince v. Massachusetts, 321 U.S. 158, 165–66 (1944).

³¹³ *Id.* at 170.

³¹⁴ *Id.* at 166.

³¹⁵ See Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (discussing Thomas Jefferson's opinion regarding the importance of compulsory education laws); see also Mawdsley, *supra* note 233, at 627.

Finally, anti-vaccination movement advocates would argue that if vaccinations are not 100% effective, they should have the choice to either vaccinate or take advantage of exemptions. It is true that vaccinations are not always 100% effective and that the effectiveness of vaccinations can reduce over time.³¹⁶ Nonetheless, the concept of herd immunity is premised on the idea that everyone that can be vaccinated, should be vaccinated, to protect those who cannot be vaccinated.³¹⁷ Accordingly, even if vaccinations are not always 100% effective, as long as herd immunity is in place, everyone is more protected against the spread of vaccine-eradicable disease.³¹⁸ With easily obtainable non-medical exemptions available to parents who have views contrary to vaccination,³¹⁹ herd immunity will likely fail as it did with the recent Disneyland outbreak.

2. States Infringe Upon Parental Rights for Education and Should for Vaccination

Compulsory education statutes greatly infringe on parental rights. These statutes compel parents to ensure their children attend some form of school for approximately 13 years of their lives.³²⁰ Historically, this would have greatly impacted families that needed children to work to support the family—yet the statutes were consistently upheld.³²¹ Currently, it is not common for parents to argue that states should not require their children to attend school because parents realize that education is important. This same reasoning should follow in the compulsory vaccination context, and states should start this process by eliminating non-medical exemptions to vaccination laws. Eventually, required vaccination schedules will be commonplace, like compulsory education, and will protect the well-being of all children by eliminating the opportunity for parents to easily obtain an exemption.

This section discusses the differences in exemptions to compulsory education statutes and compulsory vaccination statutes. Also, it discusses how the *Wisconsin v. Yoder* exemption to compulsory education differs from

³¹⁶ Parkins, *supra* note 64, at 448; see *Frequently Asked Questions about Measles in the U.S.*, *supra* note 14; see also *Measles Vaccination*, *supra* note 58.

³¹⁷ Parkins, *supra* note 64, at 440.

³¹⁸ See *id.*

³¹⁹ See Rota et al., *supra* note 110, at 644–47. See *supra* Part II.C.2 for a discussion of the varying processes that states require to obtain exemptions to vaccination laws.

³²⁰ Thirteen years is merely an estimate because statutes vary on the age that children are required to start school (generally between five and six but sometimes even as old as eight) and the age at which children are no longer required to attend school (generally between 16 and 18). See, e.g., MISS. CODE ANN. § 37-13-91 (2016); 24 PA. CONS. STAT. § 13-1327 (2016); W. VA. CODE ANN. § 18-8-1a (LexisNexis 2016); Rose, *supra* note 231, at 869.

³²¹ See generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

vaccination exemptions and explains why the religious exemption provided in *Yoder* should not extend to the vaccination context because of these differences. Finally, this section addresses and refutes the argument that if vaccination schedules without exemptions become commonplace they will fall out of popularity like they recently have with the emergence of the anti-vaccination movement.

a. The Current Exemptions to Compulsory Education Differ Greatly from Compulsory Vaccination Exemptions

Most compulsory education statutes, unlike vaccination statutes, do not contain exemptions.³²² Every compulsory vaccination statute provides a medical exemption, which is permissible and should be continued.³²³ However, as extensively discussed, most states provide religious and philosophical or personal belief exemptions, which are problematic.³²⁴ Exemptions may exist in compulsory education statutes for instruction outside of public schools, such as a private school or homeschool education, but all children are required to obtain instruction until a certain age.³²⁵ In other words, the “exemptions” provided in compulsory education statutes are not really exemptions at all; they are merely alternative methods to obtain education. Religious exemptions may also exist in compulsory education statutes, but children must first reach a certain grade level.³²⁶ These exemptions do not provide a complete exemption from education; rather, for a certain religious sect, courts have found that requiring children to attend school beyond the eighth grade was unnecessary.³²⁷

Compulsory vaccination statute exemptions are different. Vaccination statutes require children to obtain the vaccinations before entering school.³²⁸ A religious exemption would allow these children to completely avoid vaccination. This is vastly different than a religious exemption to compulsory education and should not be upheld by a court. Thus, if states enact compulsory education

³²² See, e.g., CAL. EDUC. CODE § 48200 (West 2016); MISS. CODE ANN. § 37-13-91 (2016); 24 PA. CONS. STAT. § 13-1327 (2016); W. VA. CODE ANN. § 18-8-1a (LexisNexis 2016); Rose, *supra* note 231, at 869.

³²³ See *Religious and Philosophical Exemptions*, *supra* note 34.

³²⁴ See *id.* For a discussion of religious and philosophical exemptions and the states that provide these exemptions, see *supra* Part II.C.1.

³²⁵ See, e.g., CAL. EDUC. CODE § 48200 (West 2016); FLA. STAT. ANN. § 1003.21 (West 2016); MISS. CODE ANN. § 37-13-91 (2015); N.Y. EDUC. LAW § 3205 (McKinney 2016); 24 PA. CONS. STAT. § 13-1327 (West 2016); W. VA. CODE ANN. § 18-8-1a (LexisNexis 2016).

³²⁶ See generally *Yoder*, 406 U.S. 205 (permitting an exemption to Wisconsin’s compulsory education statute for Amish children only after the student completes the eighth grade).

³²⁷ See *id.*; see also *infra* Part III.B.2.b.

³²⁸ See, e.g., IDAHO CODE § 39-4801 (2016); KY. REV. STAT. ANN. § 214.034 (West 2016); ME. STAT. tit. 20-A, § 6355 (2016); OHIO REV. CODE ANN. § 3313.671 (West 2016); WIS. STAT. § 252.04 (2016).

statutes, without exemptions, for young children, then states should also enact compulsory vaccination statutes for young children without non-medical exemptions in order to protect the health and safety of children.

b. The Wisconsin v. Yoder Exemption to Compulsory Education Differs Greatly from Compulsory Vaccination Exemptions

The Supreme Court did provide an exemption to compulsory education laws in *Wisconsin v. Yoder*.³²⁹ However, this exemption differs greatly from exemptions to compulsory vaccination laws, and the two should not be analogized. In *Yoder*, as previously discussed, the Court found that states could not force Amish children to attend school beyond the eighth grade because of the parents' interest in directing the religious upbringing of their children, as well as the longstanding tradition of the Amish providing vocational training to their teenagers.³³⁰ Notice, there is no exemption available until after the Amish children complete the eighth grade.³³¹ This is not the case with vaccination exemptions.

Vaccination exemptions are sought and obtained by parents before or shortly after their child starts kindergarten.³³² This means that for education, parents cannot seek to obtain an exemption until their child reaches at least the eighth grade;³³³ however, in states providing religious exemptions, parents can seek an exemption before the child even starts kindergarten.³³⁴ If states can force children to attend school, even when there is a conflict with religion, then states should be able to use the same powers to force children to be vaccinated prior to entering schools to protect their health and safety, as well as that of others.

Furthermore, religious exemptions to vaccination requirements permit children who obtain those exemptions to avoid vaccination completely. This is very different than a religious exemption to education. With regards to education, children must reach a certain grade before they are even eligible to assert their right to obtain an exemption.³³⁵ Therefore, children are unable to avoid attending school completely, unlike the avoidance of vaccination. Although education is

³²⁹ 406 U.S. at 205.

³³⁰ *Id.* at 213–14.

³³¹ *See id.*

³³² *See* sources cited *supra* note 328.

³³³ *See Yoder*, 406 U.S. at 205 (only permitting an exemption to compulsory education after the student completes the eighth grade).

³³⁴ *See, e.g.*, CONN. GEN. STAT. § 10-204a (2016); FLA. STAT. ANN. § 1003.22 (West 2016); IDAHO CODE § 39-4802 (2016); ME. REV. STAT. tit. 20-A, § 6355 (2016); OHIO REV. CODE ANN. § 3313.671 (West 2016); 28 PA. CODE § 23.84 (2016).

³³⁵ *See Yoder*, 406 U.S. at 205 (explaining that students must complete the eighth grade before they can receive an exemption not to attend school based upon a contrary religious belief).

important, the health of children is just as, or even more, important than their education. It follows that states should proactively step in and require vaccination. Moreover, immunocompromised children, that are also required to attend school based on compulsory education statutes, should be able to attend school in a safe and healthy environment.

c. Vaccinations Will Not Fall Out of Vogue Once They Again Become Commonplace

Opponents to the idea of eliminating non-medical exemptions to compulsory vaccination laws will argue that if compulsory vaccination schedules without exemptions become commonplace, like compulsory education requirements, such laws will likely fall out of popularity as they have recently done. However, this would be impossible. Opponents would argue that if strict vaccination schedules are enacted, vaccine-eradicable diseases would be less prevalent, and we would see a drop in vaccination levels similar to the resistance to vaccinations in the smallpox era.³³⁶ As previously discussed, the resistance or decline in vaccinations during the smallpox era occurred as a result of individuals forgetting the severity of the symptoms of smallpox.³³⁷ This is also likely one reason for the most recent anti-vaccination movement. However, the elimination of non-medical exemptions would eliminate the possibility that vaccinations would fall out of popularity and would hinder the most recent anti-vaccination movement.

The elimination of exemptions to compulsory vaccination will not fuel a resistance or decline in vaccination levels. Rather, like compulsory education requirements, eventually everyone will generally accept the requirements.³³⁸ Unlike statutes that provide a philosophical or personal belief exemption to compulsory vaccination, the elimination of all non-medical exemptions will require children to be vaccinated before entering any public school; thus, making a resistance or decline in vaccination levels impossible.³³⁹ Allowing personal belief exemptions has fueled the recent anti-vaccination movement or resistance to childhood vaccinations.³⁴⁰ These non-medical exemptions give parents the opportunity not to vaccinate. If they are eliminated, parents who want to send

³³⁶ Jana & Osborne, *supra* note 20, at 3–4 (comparing vaccines to the “out of sight,” “out of mind” paradigm).

³³⁷ *See id.*

³³⁸ KATZ, *supra* note 235, at 24–25 (describing parents’ new willingness to send children to school rather than into the workforce).

³³⁹ It could be argued that a resistance or decline in vaccination levels could be possible by parents choosing to homeschool their children or send them to a private school, but this would be unlikely. Forced compliance with compulsory education requirements is not likely to make parents choose to homeschool children or pay for their education. In some circumstances this may occur, but it would likely be rare.

³⁴⁰ *See supra* Parts II.A, Part II.C.

their children to public school would be required to vaccinate, and a resistance or decline in vaccinations would be impossible.

Also, the resistance or decline in vaccination levels during the smallpox era was made possible by loose vaccination requirements. People who no longer remembered the devastating effects of the smallpox virus failed to vaccinate because it was no longer seen as important to them.³⁴¹ However, strict vaccination requirements for school admittance would not allow this to happen. If viruses, such as the measles virus, are eradicated, people may forget about the harmful effects that the virus caused, but if parents want their children to attend public, and most private schools, they will be required to vaccinate their children despite views contrary to vaccination. Furthermore, if non-medical exemptions are eliminated, parents will not be able to use the personal or philosophical belief exemption to opt out of vaccination, even if they forget the devastating effects of these diseases.

C. States Should Have an Affirmative Duty to Protect the Welfare of Their Citizens Through Effective Vaccination Laws

States have police powers that allow them to implement and enforce laws to protect and promote the health, morals, and safety of their citizens.³⁴² There is no question that states have the ability to enact compulsory vaccination laws using their police powers.³⁴³ Not only should states have the ability to enact such laws, they should have an affirmative duty to either enact these laws without non-medical exemptions or eliminate any current non-medical exemptions to these requirements. This section argues that states should have an affirmative duty to eliminate non-medical exemptions as a general matter, and an even greater duty to eliminate non-medical exemptions in the school context.

1. States Should Have a General Affirmative Duty to Eliminate Non-Medical Exemptions

There are no Supreme Court cases that suggest that states have an affirmative duty to eliminate non-medical exemptions to compulsory vaccination laws, but an affirmative duty on the states is plausible considering the purpose behind state police powers. Police powers are powers granted to and used by

³⁴¹ Jana & Osborne, *supra* note 20, at 3–4 (comparing vaccines to the “out of sight” “out of mind” paradigm).

³⁴² *State Police Power*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining state police power as “[t]he power of a state to enforce laws for the health, welfare, morals, and safety of its citizens, if enacted so that the means are reasonably calculated to protect those legitimate state interests”).

³⁴³ See *Zucht v. King*, 260 U.S. 174 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

states to protect the health and safety of their citizens.³⁴⁴ Police powers are discretionary in nature. Again, there is a direct correlation between compulsory vaccination laws and fewer cases of vaccine-eradicable diseases.³⁴⁵ When there are non-medical exemptions to compulsory vaccination requirements, they are not as effective at the elimination of vaccine-eradicable diseases.³⁴⁶ Therefore, if states want to utilize their police powers in a way that is more effective in protecting the health and safety of their citizens, they should eliminate all non-medical exemptions to current vaccination laws.

Allowing non-medical exemptions fails to maximize the effectiveness of vaccination requirements, which are implemented to protect the health of citizens. As the effectiveness of vaccination requirements dwindles, herd immunity fails.³⁴⁷ When herd immunity fails, outbreaks occur like the Disneyland outbreak in 2014.³⁴⁸ Not only are outbreaks dangerous for groups such as immunocompromised children and the elderly, they can also be dangerous for those who have been vaccinated. Since all states take the initiative to enact compulsory vaccination laws, they should recognize that by allowing exemptions they are hurting their citizenry by not affording them the best protection against disease. This is simply reckless in an age where so many diseases can be prevented through effective vaccination schedules.³⁴⁹ Therefore, states that grant non-medical exemptions fail to adequately use their police powers to protect the health and safety of their citizens. States should take the next step, and eliminate all non-medical exemptions to prevent future outbreaks that cause sweeping harm to citizens.

2. States Should Have an Affirmative Duty to Eliminate Non-Medical Exemptions in the School Context

States have an even greater duty to protect children because children are some of our most vulnerable citizens and are unable to protect themselves. Immunocompromised children are even more susceptible because they face a greater risk at contracting diseases. Therefore, states should have an even greater affirmative duty to protect these individuals. Again, one step that can be taken is to eliminate non-medical exemptions to compulsory vaccination requirements.

As discussed multiple times, states enact compulsory education laws that require children to attend school. Even immunocompromised children are

³⁴⁴ See *Slaughter-House Cases*, 83 U.S. 36, 62 (1872) (discussing the police power of states and concluding that it includes regulating the social order and the life and health of citizens); see also *State Police Power*, BLACK'S LAW DICTIONARY (10th ed. 2014).

³⁴⁵ See *Parkins*, *supra* note 64, at 458; see also *supra* Part II.C.3.

³⁴⁶ See *Parkins*, *supra* note 64, at 458; see also *supra* Part II.C.3.

³⁴⁷ *Parkins*, *supra* note 64, at 445.

³⁴⁸ See *Reinberg*, *supra* note 16.

³⁴⁹ See *Measles Vaccination*, *supra* note 58; see also discussion *supra* Part II.A.

required to attend school.³⁵⁰ Of course, these children can be exempt or excused from school at times when they are too sick to attend, but there are no exemptions to compulsory education requirements for immunocompromised children. Since these children are compelled to attend school by the state, the state should have an affirmative duty to provide a safe environment for immunocompromised children while they attend school. By allowing other students to obtain exemptions to compulsory vaccination requirements, states fail to satisfy this duty.

The power to eliminate non-medical exemptions to compulsory vaccination statutes is within the state's police powers. Easily accessible exemptions undermine herd immunity, leading to outbreaks in disease.³⁵¹ Immunocompromised children are at an even higher risk of becoming infected with vaccine-eradicateable diseases.³⁵² Forcing these immunocompromised children into schools, where children spread infections, viruses, and diseases at more rapid rates, while providing non-medical exemptions, fails to adequately protect the immunocompromised.

IV. CONCLUSION

States should eliminate religious and philosophical exemptions to compulsory vaccination laws, like West Virginia, Mississippi, and California, to protect immunocompromised children. These non-medical exemptions should be eliminated using the same power that enables states to enact compulsory education laws.

Compulsory education laws exist in every state requiring children to attend school. States have the power to force children to attend school through their *parens patriae* power. Historically, education has been seen as so important for the betterment of society that states allow parents' rights to be infringed upon by requiring their children attend school until a specific age. Arguably, the health and lives of children are even more important than education. One proven way to protect the health and lives of children is through the implementation of compulsory vaccination requirements. Vaccination requirements that provide non-medical exemptions fail to adequately protect society from eradicateable diseases. Therefore, states should, for the betterment of society, create a safe educational setting for immunocompromised children by eliminating non-medical exemptions to vaccination requirements.

³⁵⁰ Note that none of the compulsory education statutes contain an exemption for immunocompromised children. These children have to rely on other means to miss school because of their illness. *See, e.g.*, CAL. EDUC. CODE § 48200 (West 2016); MISS. CODE ANN. § 37-13-91 (2016); 24 PA. CONS. STAT. § 13-1326 (2016); W. VA. CODE ANN. § 18-8-1a (LexisNexis 2016).

³⁵¹ Tolsma, *supra* note 78, at 334.

³⁵² *See supra* note 100 and accompanying text.

States can infringe upon parental rights where there are important interests of children. In the school context, courts have consistently found that states can infringe upon parental rights for the betterment of society through compulsory school attendance laws. In turn, states should infringe upon parental rights for the betterment of society by eliminating non-medical exemptions to compulsory vaccination requirements to promote the health of their citizens.

Not only should states eliminate non-medical exemptions to compulsory vaccination laws, states have an affirmative duty to protect the health of their citizens. The state police powers give states the ability to enact laws that promote the health, safety, and morals of their citizens. If states enact compulsory vaccination laws with religious and philosophical exemptions, they fail to maximize the effectiveness of these vaccination laws. This is contrary to the whole purpose behind state police powers and enacting the vaccination laws in the first place. Furthermore, states require children to attend school, so states should have an affirmative duty to provide a safe and healthy environment for immunocompromised children who are also required to attend school.

Numerous families face the same challenges and worries that Maggie's family had to face. They are forced to endure the struggles of having a sick child and then face the worry of sending their child out into the world to be exposed to vaccine-eradicable diseases. Hopefully, if states eliminate non-medical exemptions to vaccination requirements, families, like Maggie's, will face fewer worries and struggles.

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