

# Mandatory Immunization: A Legal Brief

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## I. Introduction

The basic social applicability of immunization dates back to the second century A.D.<sup>1</sup> The modern development of vaccination as a social practice belongs to Edward Jenner who developed the smallpox vaccine.<sup>2</sup> Smallpox was a terror in early America that was finally quelled by the implementation of social vaccination programs.<sup>3</sup> The Center for Disease Control (CDC) has touted vaccination practices as one of the top ten public health achievements of the twentieth century.<sup>4</sup> Vaccination programs have also played a large part in the reduction of cases and spread of infectious diseases such as: measles, mumps, rubella, diphtheria, and polio.<sup>5</sup> In light of vaccination effectiveness, every state in America has a law requiring at least basic vaccinations for children entering school.<sup>6</sup> The primary focus of mandatory immunization has been on immunizing school-aged

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<sup>1</sup> James G. Hodge and Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspective*, 90 KY. L.J. 831 (2002).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*; A. Henderson and Bernard Moss, *Smallpox and Vaccinia*, in *Vaccines 74, 75* (Stanley Plotkin and Walter A Orenstein, 3 ed. 1999); Walter Orenstein, *The Role of Measles Elimination in Development of a National Immunization Program*, 25(12) *Pediatr. Infect. Dis. J.* 1093, 1093-1101 (2006); World Health Organization, *Immunization Coverage* (February 2014) available at <http://www.who.int/mediacentre/factsheets/fs378/en/>.

<sup>4</sup> Center for Disease Control and Prevention, *Impact of Vaccines Universally Recommended for Children, 1900-1998*, 281 *JAMA* 1482, 1483 (1999).

<sup>5</sup> Centers for Disease Control and Prevention, *Ten Great Health Achievements, 1900-1998: Impact of Vaccines Universally Recommended for Children*, 48 *Morbid. and Mortal. Wkly. Rep.* 241, 243-248 (1999); A. Henderson and Bernard Moss, *Smallpox and Vaccinia*, in *Vaccines 74, 75* (Stanley Plotkin and Walter A Orenstein, 3 ed. 1999); Walter Orenstein, *The Role of Measles Elimination in Development of a National Immunization Program*, 25(12) *Pediatr. Infect. Dis. J.* 1093, 1093-1101 (2006); World Health Organization, *Immunization Coverage* (February 2014) available at <http://www.who.int/mediacentre/factsheets/fs378/en/>.

<sup>6</sup> National Conference of State Legislatures, *States With Religious and Philosophical Exemptions from School Immunization Requirements* (Dec. 2012), available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

children as the most efficient way to reduce the spread of infectious diseases.<sup>7</sup> Thusly, this brief will primarily discuss mandatory immunization laws, and challenges to those laws in the context of immunization of school-aged children.

There are two primary challenges to mandatory vaccination laws: 1) legal challenges to their constitutional validity,<sup>8</sup> and 2) legislative challenges.<sup>9</sup> The legislative challenges are inexorably tied to the legal challenges, and both will be discussed at length. The basic issue with mandatory immunization laws is a tug-of-war between the alleged public health benefit backed by scientific data,<sup>10</sup> and infringement on individual and parental autonomy. Public health researchers suggest that school vaccinations have significantly reduced the occurrence of infectious diseases.<sup>11</sup> In exchange for giving up individual and parental freedom, parents and children are given exemptions from vaccination requirements in most states for medical, religious, or philosophical reasons. However, some states still do not recognize certain exemptions and public health authorities argue that mandatory immunization is a necessity.<sup>12</sup>

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<sup>7</sup> National Conference of State Legislatures, *States With Religious and Philosophical Exemptions from School Immunization Requirements* (Dec. 2012), available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>; A. Henderson and Bernard Moss, *Smallpox and Vaccinia*, in *Vaccines* 74, 75 (Stanley Plotkin and Walter A Orenstein, 3 ed. 1999); Walter Orenstein, *The Role of Measles Elimination in Development of a National Immunization Program*, 25(12) *Pediatr. Infect. Dis. J.* 1093, 1093-1101 (2006); World Health Organization, *Immunization Coverage* (February 2014) available at <http://www.who.int/mediacentre/factsheets/fs378/en/>.

<sup>8</sup> *Id.*

<sup>9</sup> American Medical Association, *Research Letter: Legislative Challenges to School Immunization Mandates, 2009-2012*, *JAMA* Vol. 113 No. 6, (Feb. 2014).

<sup>10</sup> A. Henderson and Bernard Moss, *Smallpox and Vaccinia*, in *Vaccines* 74, 75 (Stanley Plotkin and Walter A Orenstein, 3 ed. 1999); Walter Orenstein, *The Role of Measles Elimination in Development of a National Immunization Program*, 25(12) *Pediatr. Infect. Dis. J.* 1093, 1093-1101 (2006); World Health Organization, *Immunization Coverage* (February 2014) available at <http://www.who.int/mediacentre/factsheets/fs378/en/>.

<sup>11</sup> *Id.*

<sup>12</sup> James G. Hodge and Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspective*, 90 *KY. L.J.* 831 (2002); Walter Orenstein, *The Role of Measles Elimination in Development of a National Immunization Program*, 25(12) *Pediatr. Infect. Dis. J.* 1093, 1093-1101 (2006); National Conference of State Legislatures, *States With Religious and Philosophical Exemptions from*

## II. Establishing Authority For Mandatory Immunization Laws

### A. State Police Powers: *Jacobson v. Massachusetts*

*Jacobson v. Massachusetts* set the stage for entrusting primary immunization authority to the states through police powers.<sup>13</sup> Police powers refer to the broad power of a state to govern in the interest of the public's health and safety.<sup>14</sup> By the time *Jacobson* rolled around in 1905, several states had already required mandatory smallpox vaccinations.<sup>15</sup> Jacobson objected to a Massachusetts law that gave municipal boards of health the authority to require the vaccination of residents over the age of 21 against smallpox.<sup>16</sup> Jacobson refused to receive the vaccine and was immediately arrested.<sup>17</sup> The case was appealed to the United States Supreme Court where Jacobson argued that a compulsory vaccination requirement was "unreasonable, arbitrary, and oppressive."<sup>18</sup> Jacobson's argument was primarily based on his constitutional interests in bodily integrity.<sup>19</sup> The court rejected Jacobson's argument holding the law had "a real and substantial relation to the protection of the public health and safety."<sup>20</sup> The court addressed and dismissed Jacobson's bodily integrity argument because the security of a

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*School Immunization Requirements* (Dec. 2012), available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>; Miss. Code Ann. Sec. 41-23-37; W. Va. Code Sec. 16-3-4, see National Conference of State Legislatures, *States With Religious and Philosophical Exemptions from School Immunization Requirements* (Dec. 2012), available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

<sup>13</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

<sup>14</sup> Under the 10<sup>th</sup> Amendment of the United States Constitution the powers not specifically reserved for the federal government shall be reserved for the states.

<sup>15</sup> Illinois (1897), Wisconsin (1897), and Utah (1900), see *Lawbaugh v. Board of Educ.*, 52 N.E. 850 (Ill. 1899); *Adams v. Burdge*, 70 N.W. 347 (Wis. 1897); *Cox v. Board of Educ.*, 60 P. 1013 (Utah 1900).

<sup>16</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 26

<sup>19</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

<sup>20</sup> *Id.* at 31

person's bodily integrity is not an absolute right and is not "at all times and in all circumstances wholly free from restraint."<sup>21</sup>

As long as a state law has a real and substantial relation to the protection of the public health and safety it will likely pass constitutional muster.<sup>22</sup> However, a state must still act reasonably and out of public necessity.<sup>23</sup> *Jacobson* firmly established mandatory vaccination as a state issue to be resolved by state legislatures under their police powers.<sup>24</sup> As a result, all 50 states have some form of a mandatory immunization law.<sup>25</sup> The rise of laws in all 50 states has led to a continual stream of legal and legislative challenges.

### **III. State Mandatory Immunization Laws**

#### **A. School Vaccination Requirements**

Following *Jacobson*, states expanded their police power by instituting mandatory immunization laws that have been supported by courts at all levels.<sup>26</sup> In spite of the alleged success of immunization programs by health officials,<sup>27</sup> opposition still exists. The root of the problem is states are essentially requesting that parents give up their closely held right to parent their child the way they want. This can mean anything from the child's parent having a closely held religious objection, to a parent merely objecting

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<sup>21</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> National Conference of State Legislatures, *States With Religious and Philosophical Exemptions from School Immunization Requirements* (Dec. 2012), available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

<sup>26</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Adams v. Milwaukee*, 228 U.S. 572, 581-82 (1913); *Zucht v. King*, 260 U.S. 174, 176 (1922); *Brown v. Stone*, 378 So. 2d 218 (Miss. 1979).

<sup>27</sup> Kimberly Insel, *Treating Children Whose Parents Refuse to Have Them Vaccinated*, American Medical Association Journal of Ethics Vol. 14 No. 1:17-22 (Jan. 2012); Centers for Disease Control and Prevention, *Ten Great Health Achievements, 1900-1998: Impact of Vaccines Universally Recommended for Children*, 48 Morbid. and Mortal. Wkly. Rep. 241, 243-248 (1999).

because they personally believe vaccinations cause more harm than good. One of the primary arguments from opponents is the herd immunity theory. Herd immunity theory suggests that the choice not to immunize may be optimal for certain individuals if a herd-based immunity exists.<sup>28</sup>

Under this theory, when the majority of people in a group get vaccinated a group immunity would develop benefitting those who choose not to be vaccinated.<sup>29</sup> From a Public health official's perspective, the argument is that the risk of an outbreak is too high to justify herd immunity and a more likely result is a "tragedy of the commons" where too few people immunize putting everyone at risk.<sup>30</sup> Public health officials argue that vaccinations are statistically proven to work in reducing cases and the spread of infectious disease.<sup>31</sup> However, from a parent's perspective it is logical to think that if most children are vaccinated it is likely that their child has a low risk of infection and they are making a parental choice to put their child at risk.

Going forward there have been two primary sources of challenges to mandatory immunization laws: 1) legal challenges to constitutional validity of state laws, and 2) legislative challenges.

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<sup>28</sup> Herd Immunity theory refers when a population becomes resistant to a specific disease if a large population is vaccinated. This explains why some individuals can remain unvaccinated and the group can still remain protected against disease. National Institute of Allergy and Infectious Disease, *Community Immunity ("Herd" Immunity)*, available at <http://www.niaid.nih.gov/topics/pages/communityimmunity.aspx>.

<sup>29</sup> *Id.*

<sup>30</sup> G. Hardin, *The Tragedy of the Commons*, 162 *Sci.* 1243-1248 (1968).

<sup>31</sup> A. Henderson and Bernard Moss, *Smallpox and Vaccinia*, in *Vaccines* 74, 75 (Stanley Plotkin and Walter A Orenstein, 3 ed. 1999); Centers for Disease Control and Prevention, *Ten Great Health Achievements, 1900-1998: Impact of Vaccines Universally Recommended for Children*, 48 *Morbid. and Mortal. Wkly. Rep.* 241, 243-248 (1999); Walter Orenstein, *The Role of Measles Elimination in Development of a National Immunization Program*, 25(12) *Pediatr. Infect. Dis. J.* 1093, 1093-1101 (2006); World Health Organization, *Immunization Coverage* (February 2014) available at <http://www.who.int/mediacentre/factsheets/fs378/en/>; Kimberly Insel, *Treating Children Whose Parents Refuse to Have Them Vaccinated*, *American Medical Association Journal of Ethics* Vol. 14 No. 1:17-22 (Jan. 2012).

## B. Establishing Precedent

Precedent for broad state control over immunization goes back as far as 1830 where in *Hazen v. Strong* the Vermont Supreme Court positioned itself on the side of legislators, school board officials, and public health experts who supported the need for vaccination programs.<sup>32</sup> Since *Hazen*, numerous courts have given states broad discretion in enacting laws requiring children to be immunized prior to entering school.<sup>33</sup> Currently, the CDC has a scheduled list of immunizations to be used as a guide.<sup>34</sup> The schedule recommends vaccination for several diseases prior to children entering school.<sup>35</sup>

While *Jacobson* was a landmark case, school mandated immunization has had a long legal history leading to a broad spectrum of constitutional challenges.<sup>36</sup> In *Zucht v. King*, the United States Supreme Court held states may delegate to a municipality the power to require vaccination, and municipality boards of health may be given broad discretion to apply and enforce the regulation.<sup>37</sup> Broad authority is a common theme among courts that have seen the issue of mandatory immunization as directly under state's police powers.<sup>38</sup> With significant Supreme Court precedent on their side, all states

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<sup>32</sup> *Hazen v. Strong*, 2 Vt. 427 (1830).

<sup>33</sup> *Duffield v. School Dist. Of City of Williamsport*, 29 A. 742 (1894); *Viemester v. White*, 84 N.Y.S. 712 (1904); *Seubold v. Fort Smith Special Sch. Dist.*, 237 S.W. 2d 884 (1951); for a complete list see: James G. Hodge and Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspective*, 90 KY. L.J. 831 (2002), table 1.

<sup>34</sup> Center for Disease Control and Prevention Mandates for Colleges and Universities, Immunization Action Coalition (June 29, 2010), available at <http://www.immunize.org/laws/hepbcollege.asp>.

<sup>35</sup> *Id.*

<sup>36</sup> *Challenges ranging from equal protection to search and seizure: Viemester v. White*, 84 N.Y.S. 712 (1903); *McSween v. Board of Sch. Trustees*, 129 S.W. 206 (Tex. Civ. App. 1910); *Wright v. DeWitt Sch. Dist.*, 385 S.W. 2d 644, 648 (Ark. 1965); *Dalli v. Board of Education*, 267 N.E. 2d 219 (Mass. 1971); *Brown v. Stone*, 378 So. 2d 218 (Miss. 1979).

<sup>37</sup> *Zucht v. King*, 260 U.S. 174, 176 (1922).

<sup>38</sup> *Id.*; *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

have school mandated immunization laws.<sup>39</sup> The issue persists because states have carved out several exemptions as a legislative response to opposition.

### **C. Exemptions And Legal Challenges**

With the persistent challenges from those opposed to vaccinations, every state at least provides a medical exemption for children whose immune system is compromised, who are allergic to certain vaccines, are ill at the time of vaccination, or have other medical conditions putting the child at risk.<sup>40</sup> Generally, states require parents to present some kind of proof that their child is medically unfit to be vaccinated.<sup>41</sup> In addition to medical exemptions, 19 states allow for philosophical or moral exemptions.<sup>42</sup> In these states, children are exempt from being vaccinated based on their parent's philosophical or moral objection. The primary legal challenge has been deciding how much of a risk to public health it would be to let children be exempt from vaccination based on the religious or philosophical objection of their parent. When dealing with philosophical and religious exemptions, courts are often put in the uncomfortable position of attempting to draw a line between what is a valid religious belief and what is a mere philosophical objection.

Almost every state has some form of religious exemption,<sup>43</sup> but those states that oppose religious and philosophical exemptions have a powerful public health message.<sup>44</sup>

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<sup>39</sup> National Conference of State Legislatures, *States With Religious and Philosophical Exemptions from School Immunization Requirements* (Dec. 2012), available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; James G. Hodge and Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspective*, 90 KY. L.J. 831 (2002), see table 2.

<sup>42</sup> *Id.*

<sup>43</sup> National Conference of State Legislatures, *States With Religious and Philosophical Exemptions from School Immunization Requirements* (Dec. 2012), available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

The states that have blocked religious and philosophical exemptions exemplify the struggle between the scientific data suggesting vaccinations are effective, and the opposition claiming they are harmful. Several states have been concerned with the potential harm that even one unvaccinated child could cause to other innocent children and have responded by only allowing medical and religious exemptions.<sup>45</sup> Additionally, many states have worded their laws to ensure that individuals claiming exemption must do so with “sincere” or “closely held” religious beliefs.<sup>46</sup> Some states require only a statement of objection, while others require a more specific statement regarding their child’s religious membership.<sup>47</sup>

Due to the struggle states have been faced with in drawing a line between a valid religious objection and a mere philosophical object, the vast majority of litigation has been based on either the Establishment Clause or the Free Exercise Clause of the First Amendment. The Establishment Clause states that Congress shall make no law respecting an established religion, and the Free Exercise Clause states that Congress shall make no law prohibiting the free exercise of an established religion.<sup>48</sup>

In the Free Exercise Clause context, the Supreme Court has held that the right of free exercise does not relieve an individual of the obligation to comply with a “valid and

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<sup>44</sup> *Brown v. Stone*, 378 So. 2d 218 (Miss. 1979); States without philosophical exemptions are as follows: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wyoming. *Full state statutes available at* National Conference of State Legislatures, *States With Religious and Philosophical Exemptions from School Immunization Requirements* (Dec. 2012), available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> 1<sup>st</sup> Amendment of the United States Constitution incorporated by all states under the 14<sup>th</sup> Amendment.



neutral law of general applicability.”<sup>49</sup> In *Prince v. Massachusetts*, the Supreme Court also held that a mother could be prosecuted under child labor laws for using her children to distribute religious literature.<sup>50</sup> The Supreme Court in *Prince* was concerned with whether children actually hold the beliefs of their parents and how much harm is the belief in question causing the child.<sup>51</sup> As applied to immunization, several state Supreme Courts have upheld mandatory vaccination laws that did not exempt persons with religious beliefs based on the reasoning that the risk of an unvaccinated child causing an outbreak compared to the value of a parent’s religious objection was too high.<sup>52</sup>

At both the national and state Supreme Court levels, precedent has leaned towards broad discretion. Broad discretion essentially means states are not constitutionally obligated to allow for philosophical or religious exemptions.<sup>53</sup> However, creating or even failing to create a religious exemption places states in a First Amendment “Religion Clause” catch-22.<sup>54</sup> States that provide religious exemptions could arguably be viewed as favoring certain religions to the exclusion of others. While states without religious exemptions could face challenges under the Free Exercise Clause because the state is allegedly infringing on an individual’s right to practice their religion freely. The tension is somewhat released by the fact that legislatures have the constitutional authority to create religious exemptions without violating the Establishment Clause, and most states

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<sup>49</sup> *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982); *Employment Division v. Smith*, 494 U.S. 872 (1990).

<sup>50</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>51</sup> *Id.*

<sup>52</sup> *Wright v. DeWitt Sch. Dist.*, 385 S.W.2d 644, 648 (Ark. 1965); *Brown v. Stone*, 378 So. 2d 218 (Miss. 1979).

<sup>53</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Zucht v. King*, 260 U.S. 174, 176 (1922); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>54</sup> Joseph Heller, *Catch-22* (1961).

have done so.<sup>55</sup> On the opposite end of the spectrum, Mississippi has gone so far as to use the Equal Protection Clause to justify not having a religious exemption.<sup>56</sup> The decision has been left up to the states, and courts are reluctant to look at anything other than legislative intent.<sup>57</sup>

Where a state has limited the scope of their religious exemption requiring a closely held belief, the challenges have been based on the Establishment Clause. In the context of the Establishment Clause, courts have tended to give broad discretion to states to resolve religious exemption issues legislatively.<sup>58</sup> As a result, all but two states have religious exemptions and 19 have philosophical exemptions.<sup>59</sup> Mississippi and West Virginia remain as outliers by not allowing a religious exemption at all.<sup>60</sup>

In *Brown v. Stone*, the Mississippi Supreme Court addressed the issue of whether a child could be exempt from state vaccination laws based on religious beliefs.<sup>61</sup> The court addressed directly the religious exemption, but also addressed whether it was worth

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<sup>55</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Zucht v. King*, 260 U.S. 174, 176 (1922); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>56</sup> *Brown v. Stone*, 378 So. 2d 218 (Miss. 1979).

<sup>57</sup> The court in *Brown v. Stone* looked very strongly at the Mississippi legislature's intent when passing the bill. The overwhelming intent was for improving the public health and safety of Mississippians based on sound scientific data that vaccinations reduce instances of infectious disease. Further, the Mississippi Constitution under Sec. 2 prohibits judges from making policy or directly contradicting the intent of the state legislature as an encroachment on powers directly reserved for the state legislature. See Mississippi Constitution Art. I Sec. 2 Distribution of Powers.

<sup>58</sup> *Kleid v. Board of Educ.*, 406 F. Supp. 902 (W.D. Ken. 1976); *Hanzel v. Arter*, 625 F. Supp. 1259 (S.D. Ohio 1985); *Shear v. Northmost-East Northmost Union Free Sch. Dist.*, 672 F. Supp. 81 (E.D.N.Y. 1987) (One of few cases to hold that a state law requiring that an individual belong to a bona fide religious organization violated the Establishment Clause); *Mason v. General Brown Cent. Sch.*, Dist. 851 F.2d 47 (2d Cir. 1988).

<sup>59</sup> National Conference of State Legislatures, *States With Religious and Philosophical Exemptions from School Immunization Requirements* (Dec. 2012), available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

<sup>60</sup> Miss. Code Ann. Sec. 41-23-37; W. Va. Code Sec. 16-3-4 available at National Conference of State Legislatures, *States With Religious and Philosophical Exemptions from School Immunization Requirements* (Dec. 2012), available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

<sup>61</sup> *Brown v. Stone*, 378 So. 2d 218, 220 (Miss. 1979).

the risk to have any exemption other than a medical exemption.<sup>62</sup> *Brown* is a perfect encapsulation of the issues involved in creating a religious or philosophical exemption.

The Mississippi Supreme Court held that the price of allowing a religious exemption was too high due to the risk of outbreak, and the state had a valid public health interest in denying both religious and philosophical exemptions.<sup>63</sup> The court at one point even took judicial notice of the fact that vaccinations have been proven safe and efficient at protecting school-aged children from infectious diseases.<sup>64</sup> The court also addressed the line some states walk by requiring that a religion be closely held in order to avoid a religious exemption that functions as a philosophical exemption. The court cited *Wisconsin v. Yoder* where the United States Supreme Court held that “it must appear either that the state does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.”<sup>65</sup> In *Yoder*, there was not an overriding interest in education to require that Amish children attend school, but in the context of vaccinations the United States Supreme Court has consistently seen public health as an overriding interest.<sup>66</sup>

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<sup>62</sup> *Brown v. Stone*, 378 So. 2d 218, 221 (Miss. 1979).

<sup>63</sup> *Id.* at 223

<sup>64</sup> *Id.* at 221

<sup>65</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972); *Board of Education of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

<sup>66</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Zucht v. King*, 260 U.S. 174, 176 (1922); The Mississippi Supreme Court used *Yoder* as a juxtaposition of a related claim that lacked enough public interest to overcome religious objection. Immunization is a completely separate issue from compulsory attendance and presents a much greater risk to the public. See *Brown v. Stone*, 378 So. 2d 218, 221 (Miss. 1979).

The Mississippi Supreme Court directly addressed a religious exemption and dismissed it as insufficient to overcome the public health interest.<sup>67</sup> The court reasoned that the relationship a parent's child has with other children at school also carries a responsibility to protect the child and failing to vaccinate is analogous to not protecting them.<sup>68</sup> The court also held that to allow a religious exception would violate the 14<sup>th</sup> amendment,<sup>69</sup> which prohibits a state from making any law denying to any person within its jurisdiction the equal protection of the laws.<sup>70</sup>

The court rejected a religious exception because of the strong evidence based on scientific data that vaccinations are directly correlated with drops in instances of infectious disease in school-aged children.<sup>71</sup> The court reasoned that an exemption would require a large percentage of school children to be vaccinated while at the same time exposing them to disease, even if a small percentage of children go unvaccinated.<sup>72</sup> While the court did not directly address a philosophical exemption, the analysis would likely be the same. The court focused on the legislative intent and public health above all, and if the court struck down a religious exemption a philosophical exemption would not fare any better.<sup>73</sup>

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<sup>67</sup> *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> 14th Amendment United States Constitution

<sup>71</sup> *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979); Centers for Disease Control and Prevention, *Ten Great Health Achievements, 1900-1998: Impact of Vaccines Universally Recommended for Children*, 48 *Morbid. and Mortal. Wkly. Rep.* 241, 243-248 (1999); A. Henderson and Bernard Moss, *Smallpox and Vaccinia*, in *Vaccines* 74, 75 (Stanley Plotkin and Walter A Orenstein, 3 ed. 1999); Walter Orenstein, *The Role of Measles Elimination in Development of a National Immunization Program*, 25(12) *Pediatr. Infect. Dis. J.* 1093, 1093-1101 (2006); World Health Organization, *Immunization Coverage* (February 2014) available at <http://www.who.int/mediacentre/factsheets/fs378/en/>.

<sup>72</sup> *Id.*

<sup>73</sup> Religion is typically one of the most legally supported ideals under our Constitution. When a state chooses to forgo religious beliefs there has to be a substantial justification. In the context of vaccination, the same respect is not given to an individual's moral or philosophical beliefs. Only 19 states have

The Equal Protection Clause has had additional challenges based on the prohibition of intentional discrimination against individuals of a suspect class.<sup>74</sup> In *Dalli v. Board of Education*, a Massachusetts state court held that a religious exemption requiring that an individual must actually subscribe to a recognized religion violates equal protection by extending preferred treatment to certain groups while denying it to others with unrecognized religious objections.<sup>75</sup> The decisions reached in *Brown* and *Dalli* show the breadth of opposition and motivation compelling legislatures to adopt religious and philosophical exemptions. Deciding what is and is not a legitimate religious belief makes many state Supreme Courts uncomfortable, and the scientific data showing the effectiveness of vaccines is very strong.<sup>76</sup> It is clear that courts at all levels have consistently differed to state legislatures when deciding immunization policy.<sup>77</sup> Thusly, the future of mandatory immunization laws rests in the hands of state legislators.

#### **D. Legislative Data**

The American Medical Association (AMA) recently observed the legislative challenges and proposed changes to school immunization mandates from 2009-2012.<sup>78</sup>

The study placed a specific emphasis on whether states were looking to expand

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philosophical exemptions, and all but two states have religious exemptions. See National Conference of State Legislatures, *States With Religious and Philosophical Exemptions from School Immunization Requirements* (Dec. 2012), available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

<sup>74</sup> See 14<sup>th</sup> Amendment Sec. 1

<sup>75</sup> *Dalli v. Bd. Of Educ.*, 267 N.E.2d 219 (Mass. 1971); *Adams v. Milwaukee*, 228 U.S. 572 (1913), outside 1<sup>st</sup> Amendment context.

<sup>76</sup> Centers for Disease Control and Prevention, *Ten Great Health Achievements, 1900-1998: Impact of Vaccines Universally Recommended for Children*, 48 Morbid. and Mortal. Wkly. Rep. 241, 243-248 (1999); American Medical Association, *Research Letter: Legislative Challenges to School Immunization Mandates, 2009-2012*, JAMA Vol. 113 No. 6, (Feb. 2014).

<sup>77</sup> The cases are too numerous to list here and have been referenced, see James G. Hodge and Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspective*, 90 KY. L.J. 831 (2002), table 1.

<sup>78</sup> American Medical Association, *Research Letter: Legislative Challenges to School Immunization Mandates, 2009-2012*, JAMA Vol. 113 No. 6, (Feb. 2014).

exemptions or retract exemptions based on personal beliefs.<sup>79</sup> Bills were classified into two groups: 1) bills that expanded exemptions either by introducing a new exemption or made an existing exemption easier to attain, and 2) bills that restricted exemptions by adding administrative requirements to an existing exemption.<sup>80</sup>

The results showed that 18 states introduced at least one exemption related bill.<sup>81</sup> There were a total of 36 bills introduced regarding immunization from 2009-2012, including 30 in 12 states that did not previously have a personal belief exemption.<sup>82</sup> Of 20 states with a current personal belief exemption,<sup>83</sup> 5 saw bills introduced to restrict exemptions and 1 saw a bill to expand exemptions.<sup>84</sup> Among the 30 states without a personal belief exemption, none introduced a bill to restrict exemptions and 13 introduced bills to expand exemptions.<sup>85</sup> While it might seem that state legislatures are trending towards expanding exemptions, the study concluded that every single legislative effort to expand exemptions failed and the majority of the bills introduced to restrict exemptions passed.<sup>86</sup>

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<sup>79</sup> American Medical Association, *Research Letter: Legislative Challenges to School Immunization Mandates, 2009-2012*, JAMA Vol. 113 No. 6, (Feb. 2014).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Only 19 states have philosophical exemptions. The difference between the study and the NCSL reporting is that Missouri has a philosophical exemption but it only extends to pre-schools, daycares, and nurseries. See National Conference of State Legislatures, *States With Religious and Philosophical Exemptions from School Immunization Requirements* (Dec. 2012), available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> American Medical Association, *Research Letter: Legislative Challenges to School Immunization Mandates, 2009-2012*, JAMA Vol. 113 No. 6, (Feb. 2014).

In summary, all states have medical exemptions, all but two states have religious exemptions, and 19 states have philosophical exemptions.<sup>87</sup> With the majority of states having at least two exemptions, the question of whether a philosophical exemption is worth the risk to the general public has been answered by state legislatures across the country by rejecting all bills expanding exemptions.<sup>88</sup> Further, States such as Mississippi and West Virginia have gone so far as to only allow medical exemptions.<sup>89</sup>

The legislative data available on mandatory immunization shows trending opposition resulting in legislative challenges.<sup>90</sup> With state courts deferring to state legislatures, the mandatory immunization issue has made state legislatures the preferred battleground. The future of mandatory immunization is up to each state's legislature to find the most reliable scientific data to base their decisions upon. States will also have to decide what is best for their residents and act with the public's health interest in mind to avoid further litigation.

#### **IV. Conclusion**

Immunization has been historically viewed as a valued public health endeavor, and vaccination laws have been upheld by courts at all levels across the country.<sup>91</sup> School mandated immunization has prevailed over numerous challenges in every state

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<sup>87</sup> National Conference of State Legislatures, *States With Religious and Philosophical Exemptions from School Immunization Requirements* (Dec. 2012), available at <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

<sup>88</sup> American Medical Association, *Research Letter: Legislative Challenges to School Immunization Mandates, 2009-2012*, JAMA Vol. 113 No. 6, (Feb. 2014).

<sup>89</sup> National Conference of State Legislatures With Religious and Philosophical Exemptions from School Immunization Requirements (Dec. 2012), available at <http://www.ncsl.org/Default.aspx?TabId=14376>.

<sup>90</sup> *Id.*

<sup>91</sup> James G. Hodge and Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspective*, 90 KY. L.J. 831 (2002), see table 1.

legislature<sup>92</sup> and the United States Supreme Court.<sup>93</sup> The primary weight behind mandatory immunization is the legal notion of police powers,<sup>94</sup> and the strong scientific data directly pointing to a correlation between vaccination and lowered incidence of disease.<sup>95</sup>

Opposition to immunization laws cannot be ignored, and has caused exemptions to rise as an outlet for dissenters. The oppositionist movement is still strong and continues to cause an upward trend in state legislative challenges.<sup>96</sup> The data suggests states have not budged on exemptions,<sup>97</sup> but opponents to immunization argue they are just waiting for the other shoe to drop. The opposition has its own scientific data, some accurate and some not, suggesting immunization leads to more harm than good.<sup>98</sup> There is also a legitimate parental argument that if the majority of children are vaccinated, one child not being vaccinated is not a sufficient risk to ignore their religious or philosophical objections.

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<sup>92</sup> American Medical Association, *Research Letter: Legislative Challenges to School Immunization Mandates, 2009-2012*, JAMA Vol. 113 No. 6, (Feb. 2014); James G. Hodge and Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspective*, 90 KY. L.J. 831 (2002), see table 1.

<sup>93</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Zucht v. King*, 260 U.S. 174, 176 (1922).

<sup>94</sup> *Id.*

<sup>95</sup> Centers for Disease Control and Prevention, *Ten Great Health Achievements, 1900-1998: Impact of Vaccines Universally Recommended for Children*, 48 Morbid. and Mortal. Wkly. Rep. 241, 243-248 (1999); A. Henderson and Bernard Moss, *Smallpox and Vaccinia*, in *Vaccines* 74, 75 (Stanley Plotkin and Walter A Orenstein, 3 ed. 1999); Walter Orenstein, *The Role of Measles Elimination in Development of a National Immunization Program*, 25(12) *Pediatr. Infect. Dis. J.* 1093, 1093-1101 (2006); World Health Organization, *Immunization Coverage* (February 2014) available at <http://www.who.int/mediacentre/factsheets/fs378/en/>.

<sup>96</sup> American Medical Association, *Research Letter: Legislative Challenges to School Immunization Mandates, 2009-2012*, JAMA Vol. 113 No. 6, (Feb. 2014).

<sup>97</sup> *Id.*

<sup>98</sup> Center for Disease Control and Prevention, *Impact of Vaccines Universally Recommended for Children, 1900-1998*, 281 JAMA 1482, 1483 (1999); Centers for Disease Control and Prevention, *Vaccine Safety: Concerns About Autism*, available at <http://www.cdc.gov/vaccinesafety/concerns/autism/>. (Dispelling rumor that vaccinations cause autism); also see James G. Hodge and Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspective*, 90 KY. L.J. 831, at pg. 72 (2002).



The opposition to mandatory immunization is strong, and one legal health policy analyst suggests that: “trade-offs will be inevitable.”<sup>99</sup> State legislatures will have to decide on a state-by-state basis what is best for the safety of their residents based on the most accurate scientific data available. The mandatory immunization issue will likely never be fully resolved, but school vaccination programs have been crucial to the reduction of diseases that once plagued school-aged children.<sup>100</sup> The real challenge to mandatory immunization is for states to decide what is best for their resident’s health at the risk of offending an objector’s religious or philosophical objection.

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<sup>99</sup> James G. Hodge and Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspective*, 90 KY. L.J. 831, at pg. 72 (2002).

<sup>100</sup> Centers for Disease Control and Prevention, *Ten Great Health Achievements, 1900-1998: Impact of Vaccines Universally Recommended for Children*, 48 Morbid. and Mortal. Wkly. Rep. 241, 243-248 (1999); A. Henderson and Bernard Moss, *Smallpox and Vaccinia*, in *Vaccines* 74, 75 (Stanley Plotkin and Walter A Orenstein, 3 ed. 1999); Walter Orenstein, *The Role of Measles Elimination in Development of a National Immunization Program*, 25(12) *Pediatr. Infect. Dis. J.* 1093, 1093-1101 (2006); World Health Organization, *Immunization Coverage* (February 2014) available at <http://www.who.int/mediacentre/factsheets/fs378/en/>.