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## I. INTRODUCTION

In the absence of evidence to the contrary, it would seem that the womb essentially marks the physical boundary in terms of a woman’s choices, the consequences of which have the potential to significantly affect her future. Consider a woman who finds herself pregnant. Perhaps she is in graduate school and the prospect of having a child would interrupt her plans to complete her education and her intended career path. Accordingly, she

chooses to abort the baby, and the decision has constitutional approbation, as decided by the United States Supreme Court.<sup>1</sup> Now, however, imagine that the same woman has carried her child to term, perhaps readjusting her plans to include a career path that is more amenable to a working mother.

Because she will eventually be enrolling her child in school, she makes sure she complies with compulsory vaccination mandates, even though she is aware of the risks, because her child cannot be medically exempted from vaccinations and she does not hold religious beliefs contrary to the practice. Further, imagine that her child is injured during a routine round of vaccinations, and the result is that she now cannot procure or cannot afford the type of care that her child requires. Her career plans have been altered, perhaps indefinitely. Yet, her situation has never been contemplated in the framework of the right to privacy that guarantees her right to terminate the pregnancy. With implications that may be as far reaching as those visited upon a woman forced to have a child, perhaps it is time to recognize the mother's "right to choose" extending beyond the womb.

In 1973, the Supreme Court of the United States first declared that a state could not interfere with a woman's right to choose to terminate her pregnancy.<sup>2</sup> In this landmark decision, the Court recognized that while the state did have a compelling interest in "potential life," that interest could only be said to coincide with the "point of viability," such that a prohibition on abortion before viability was unconstitutional.<sup>3</sup> The Court overcame the lack of an explicitly stated "right of privacy" by considering constitutional provisions that contemplated "zones of privacy" in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, as well as in the "penumbras of the Bill of Rights."<sup>4</sup> Justification for this newfound privacy right was articulated by asserting, "[m]aternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent."<sup>5</sup> Having determined that a woman's right to an abortion was a matter of privacy made the right to abortion one of a fundamental denomination, such that any state interference with that right had to be "narrowly drawn to express only the legitimate state interests at stake."<sup>6</sup>

Aside from the issue of abortion, the Supreme Court has found that the fundamental right of privacy exists in cases involving the formation of marital/familial relationships,<sup>7</sup> an individual's right to privacy concerning her

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1. Roe v. Wade, 410 U.S. 113 (1973).

2. *Id.*

3. *Id.* at 163.

4. *Id.* at 152.

5. *Id.* at 153.

6. *Roe*, 410 U.S. at 155.

7. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that anti-miscegenation laws intrude upon individual privacy); see also *Moore v. East Cleveland*, 431 U.S. 494, 499

sexual orientation,<sup>8</sup> a right to privacy in the matter of birth control materials,<sup>9</sup> and, of particular importance to the topic at hand, a parent's right to decide how his or her children should be raised.<sup>10</sup>

By recognizing that parents "have the right, coupled with the high duty"<sup>11</sup> to prepare their children for the future, the Supreme Court has conveyed the message that the choices parents make about how their children are raised are theirs to make and the consequences of those choices are theirs to bear. Considering that it would be unjust to require that parents bear the consequences of decisions affecting their children that they had little or no discretion in making, there is a strong basis for great deference to parental discretion in these matters.<sup>12</sup> Accordingly, the right to choose not to vaccinate one's children, when the practice poses a risk of injury and/or death, should be deemed fundamental under a right to privacy analysis. Part II of this Comment will discuss the current state of vaccination law, existing exemptions, and the attendant concerns of some parents. Part III of this Comment will explore how a blanket substitution of philosophical exemptions for religious exemptions will cure Equal Protection Clause problems. Part IV will lay out the argument that vaccination exemption rights should be deemed fundamental under the Due Process Clause, abortion jurisprudence, and the Supreme Court's holdings in family autonomy cases.

## II. THE CURRENT STATE OF VACCINATION PRACTICES

### A. AVAILABLE EXEMPTIONS AND THEIR CRITERIA

There are three types of vaccine exemptions: medical, religious, and philosophical.<sup>13</sup> In all fifty states, a medical exemption from compulsory

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(1977) (holding that a state may not interfere with the right of related persons to form a household in a way that contravenes existing zoning ordinances).

8. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (finding that a right to privacy between consenting adults prohibits state interference in such interactions).

9. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (holding that the state cannot interfere in the sexual relationships of consenting adults by way of birth control regulation).

10. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (holding that parents have the right to determine educational instruction of their children); see also *Troxel v. Granville*, 538 U.S. 57, 65 (2000) (holding that parents have a right to privacy in determining care and custody issues where they have proven to be fit custodians).

11. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925).

12. See *id.*

13. See, e.g., UTAH CODE ANN. § 53A-11-303(3)(a) (LexisNexis 2009) (an example of a medical exemption from vaccination regulations); ILL. ADMIN. CODE tit. 77, § 695.30

vaccination is available.<sup>14</sup> It is worth noting, however, that the criteria for medical exemptions can vary from state to state; some states simply require a certification from the child's physician "stating that due to the physical condition of the student one or more specified immunizations would endanger the student's life or health,"<sup>15</sup> while another state, for instance, allows that the licensed physician's certification "may be accepted by the local health officer when, in his opinion, such exemption will not cause undue risk to the community."<sup>16</sup> The magnitude of difference between these approaches is significant; the former approach provides a great degree of protection for a child whose doctor has determined that the benefits of vaccines are contraindicated for that particular child due to some physiological/biological factor,<sup>17</sup> while the latter approach subjugates a child to the determination of the local health officer without defining what constitutes "undue risk," the basis for which an exemption will be denied, even though a child's physician believes vaccinations are contraindicated in that particular instance.<sup>18</sup> Furthermore, parents in Mississippi cannot circumvent the requisite local health official approval (of medical exemption from compulsory vaccination) by sending their children to private schools since the law applies to both public and private schools.<sup>19</sup> (The only option available to parents whose child has been deemed medically unfit for vaccinations by the child's physician, yet who have failed to attain approbation of the local health official, is to educate their child at home,<sup>20</sup> an option that may not be possible for all families so situated.) In both Mississippi and West Virginia, the only available exemption from vaccination is the medical exemption.<sup>21</sup>

Exemption from compulsory vaccination for religious reasons is an option available in all states, with the exceptions of Mississippi, West Virginia,<sup>22</sup> and California (where the option of a philosophical exemption renders a religious one moot).<sup>23</sup> Not all religious exemptions are created equal, though. In some states, legislatures have opted for an adherence to a more

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(2011) (an example of a religious exemption); ARIZ. REV. STAT. ANN. § 15-873 (2009) (an example of a philosophical exemption).

14. *Vaccine Laws*, NAT'L VACCINE INFO. CENTER (NVIC), <http://www.nvic.org/vaccine-laws.aspx> (last visited Sept. 26, 2011).

15. See, e.g., UTAH CODE ANN. § 53A-11-302(3)(a) (LexisNexis 2009).

16. MISS. CODE ANN. § 41-23-37 (2009).

17. UTAH CODE ANN. § 53A-11-302(3)(a) (LexisNexis 2009).

18. MISS. CODE ANN. § 41-23-37 (2009).

19. *Id.*

20. *Id.*

21. *State Vaccination Exemptions*, NAT'L VACCINE INFO. CENTER, <http://www.nvic.org/CMSTemplates/NVIC/images/state-exemptions2.pdf> (last visited Oct. 3, 2011).

22. MISS. CODE ANN. § 41-23-37 (2009); W. VA. CODE § 16-3-4 (2007).

23. CAL. CODE REGS. tit.17, § 6051 (2006).

stringent standard, requiring that the parent belong to a specific church that teaches against vaccination in order to qualify.<sup>24</sup> Yet other states (the majority of them that allow for religious exemptions) have allowed for a more liberal application, requiring only that the parent state that he or she objects to vaccinations based upon personally held religious beliefs, satisfied by sending a letter to the local school authority.<sup>25</sup>

While the wording varies in the different states' statutes that excuse compulsory vaccination on a philosophical basis, the requirements for this exemption are rather uniform in that all that is required is a letter or affidavit from the parent stating that he or she asserts objections to vaccinations based upon "the conscientiously held beliefs,"<sup>26</sup> "philosophical or personal"<sup>27</sup> reasons, or other similar wording. There may be a heightened requirement to qualify for a philosophical exemption, however, as illustrated by Arizona's requirement that philosophical exemption-seekers must attest to the fact that they have "received information about immunizations provided by the department of health services and understand[] the risks and benefits of immunizations and the potential risks of nonimmunization and that due to personal beliefs, the parent or guardian does not consent to the immunization of the pupil."<sup>28</sup> Such provision is akin to what one commentator refers to as "informed refusal."<sup>29</sup>

## B. REASONS FOR ASSERTION EXEMPTION RIGHTS OUTSIDE OF MEDICAL NECESSITY

### 1. *Reasons Relating to Religion*

The provision for religious objection exemptions<sup>30</sup> reflects two things: there are religious organizations that teach against vaccinations, as is the case with Jehovah's Witnesses;<sup>31</sup> additionally, some religious exemptions provide for the recognition of religious opposition to the practice of vac-

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24. See, e.g., KAN. STAT. ANN. § 72-5209(b)(2) (2002).

25. See, e.g., ILL. ADMIN. CODE tit. 77, § 695.30 (2011).

26. MINN. STAT. ANN. § 121A.15(3)(d) (West 2008 & Supp. 2011).

27. WASH. REV. CODE ANN. § 28A.210.090(3) (West 2011).

28. ARIZ. REV. STAT. ANN. § 15-873 (2009).

29. Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277, 294 (2003) (proposing that exemption status be predicated upon consultation, documentation, and meaningful discussion about the risks of choosing not to vaccinate one's child).

30. See, e.g., KAN. STAT. ANN. § 72-5209(b)(2) (2002).

31. See *Jehovah's Witnesses, Past Opposition to Vaccinations*, RELIGIUSTOLERANCE.ORG, <http://www.religioustolerance.org/witness6.htm> (last visited Oct. 8, 2011) (discussing how Jehovah's Witnesses formerly condemned the practice, but have since retracted an outright prohibition, leaving it up to the individual to decide).

ination,<sup>32</sup> even when those religious beliefs are not founded on the teachings of a particular church.<sup>33</sup> Furthermore, there exists a rationale for asserted religious opposition to specific vaccinations when, as some vaccine-choice proponents argue, the particular vaccine has been attenuated in aborted fetal tissue.<sup>34</sup> This is not disputed by pro-vaccine advocates—the use of aborted fetal tissue is simply justified by pointing out that the fetal tissue used for attenuation derived from only two aborted babies, *named only* for the cell strains as “WI-38” and “MRC-5” that have been used for “more than 35 years” for vaccine production.<sup>35</sup> Because the practice of abortion is considered to be “intrinsically evil” by certain religious organizations, affiliated bioethics advocates have insisted that a believer “under direct teaching of the Magisterium of the Catholic Church has the absolute right to refuse any medical products derived from aborted fetal tissue, including vaccinations . . . .”<sup>36</sup>

## 2. *Reasons Relating to Safety*

The potential for adverse reactions is not merely a battle cry promulgated by the vaccine choice crowd; rather, there is a formalized governmental program “under which compensation may be paid for a vaccine-related injury or death.”<sup>37</sup> The program was established with two objectives: to promote “optimal prevention of human infectious diseases through immunization and to achieve optimal prevention against adverse reactions to vaccines.”<sup>38</sup> The program was henceforth called the “National Vaccine Injury Compensation Program (NVICP),”<sup>39</sup> and it provided compensation through the federal court system (presided over by special masters),<sup>40</sup> with damages funded by federally collected taxes on vaccines,<sup>41</sup> and with a \$1000 limit on any cause of action claimed against a vaccine manufacturer.<sup>42</sup> Since 1989 to date, the program has paid out over two billion dollars in awards (including

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32. See, e.g., 77 ILL. ADMIN. CODE tit 77, § 695.30 (2011).

33. See, e.g., *Dalli v. Bd. of Educ.*, 267 N.E.2d 219, 220 (Mass. 1971).

34. E.g., VACCINATION INFO. & CHOICE NETWORK, <http://www.nccn.net/~wwwithin/abortedtissue.htm> (naming “rabies, mumps, rubella, chickenpox, hepatitis a, smallpox (some), ipv” as being “attenuated in diploid cells”).

35. *Human Fetal Links with Some Vaccines*, NAT’L NETWORK FOR IMMUNIZATION INFO., <http://www.immunizationinfo.org/issues/vaccine-components/human-fetal-links-some-vaccines> (last visited Oct. 8, 2011).

36. CHILD. OF GOD FOR LIFE, <http://www.cogforlife.org/vaxexempt.htm> (last visited Oct. 8, 2011).

37. Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3758.

38. 42 U.S.C. § 300aa-1 (Supp. IV 1987).

39. 42 U.S.C. § 300aa-10 (Supp. IV 1987).

40. 42 U.S.C. § 300aa-12 (Supp. IV 1987).

41. I.R.C. § 9510 (LexisNexis 2011).

42. 42 U.S.C. § 300aa-11(a)(2) (Supp. IV 1987).

attorney's fees) to individuals, or their families, for vaccine-related injuries and/or deaths.<sup>43</sup>

Particularly illustrative of parental leering towards vaccines, the MMR (Measles, Mumps, Rubella) vaccine has been a source of concern among some parents because of theories that the vaccine has a causal link to autism.<sup>44</sup> Critics assert that such hand-wringing is baselessly propagated by reliance upon faulty science.<sup>45</sup> Even the U.S. Department of Health and Human Services (HHS), responsible for administering the NVICP states, "HHS has never concluded in any case that autism was caused by vaccination."<sup>46</sup> This assertion was strongly underscored when the HHS dismissed more than five thousand claims for vaccine-caused autism.<sup>47</sup> Yet, there is a single vaccine-related autism claim that HHS concluded to be compensable,<sup>48</sup> which, as one recent article points out, "[t]he Poling concession left unclear just how Hannah Poling [the one compensated autism claim] might differ from the other five thousand claims of vaccine-induced autism . . . ."<sup>49</sup> The authors of the article further point out that while only one autism-based claim has been compensated, several other compensated individuals had concurrent autistic or autistic-like symptoms in addition to a root injury (in many instances encephalopathy) for which they were remunerated.<sup>50</sup> Furthermore, the Institute of Medicine, in a report released on April 23, 2001, concluded that while there was no causal link between the MMR vaccine and autism, "the committee notes that its conclusion does not exclude the possibility that MMR vaccine could contribute to ASD [autistic spectrum disorders] in a small number of children . . . ."<sup>51</sup>

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43. *Statistics Reports*, U.S. DEPARTMENT OF HEALTH & HUM. SERVICES HEALTH RESOURCES & SERVICES ADMIN. (HRSA), <http://www.hrsa.gov/nvicp/statisticsreports.html#2> (last visited Oct. 8, 2011) [hereinafter HRSA, *Statistics Reports*].

44. Nancy Shute, *Parents' Vaccine Safety Fears Mean Big Trouble for Children's Health*, U.S. NEWS & WORLD REP. HEALTH (Mar. 1, 2010), <http://health.usnews.com/health-news/blogs/on-parenting/2010/03/01/parents-vaccine-safety-fears-mean-big-trouble-for-childrens-health>.

45. *See id.*

46. HRSA, *Statistics Reports*, *supra* note 43.

47. *Id.*

48. *Id.*

49. Mary Holland, Louis Conte, Robert Krakow & Lisa Colin, *Unanswered Questions from the Vaccine Injury Compensation Program: A Review of Compensated Cases of Vaccine-Induced Brain Injury*, 28 PACE ENVTL. L. REV. 480, 501 (2011) (reviewing multiple cases of compensated vaccine injury victims and discovering eighty-three cases involving concurrent diagnoses of autism, or at least autistic-like disorders).

50. *Id.*

51. INSTITUTE OF MEDICINE, IMMUNIZATION SAFETY REVIEW: MEASLES-MUMPS-RUBELLA VACCINE AND AUTISM 6 (Kathleen Stratton et al. eds., 2001), available at [http://books.nap.edu/openbook.php?record\\_id=10101&page=6](http://books.nap.edu/openbook.php?record_id=10101&page=6).



The uncertainty of the MMR-autism link, however, is certainly not dispositive of other vaccine-related, compensable injuries.<sup>52</sup> Anaphylaxis, anaphylactic shock, encephalopathy, and encephalitis are among the most common injuries listed; however, provisions for “any acute complication or sequela (including death)”<sup>53</sup> appear on the vaccine injury table.<sup>54</sup> “The Table lists and explains injuries/conditions that are presumed to be caused by vaccines.”<sup>55</sup> A reaction’s absence from the table is not preclusive to filing a claim; rather, the petitioner must prove his/her case, and is not afforded the convenience of presumed causation.<sup>56</sup>

Beyond the faceless statistics published by the Health Resources and Services Administration (HRSA) are the personal stories. In one account of an adverse reaction to a diphtheria, pertussis, and tetanus (DTP) shot, a mother describes how her active and alert two-month-old transitioned over the next thirty-three hours into a listless and unresponsive baby before dying.<sup>57</sup> Particularly heart-wrenching in this mother’s story is that she relied upon her doctor’s advice that her son was having a normal reaction to the vaccine, when there were serious warning signs that—as she admits—would have prompted her to seek medical attention were it not for her physician’s dismissive attitude.<sup>58</sup> Stories such as this fuel vaccine-apprehensive parents’ concerns, and rightly so.

### 3. *Failures in the Compensation Program*

As a society, we embrace risk of all sorts from the routinely benign, driving a car for instance, to the routinely hazardous, which may include washing the windows on skyscrapers. The tool bolstering our ability to accept risks is insurance, which essentially “transfers, or shifts, risk from one person or entity to another.”<sup>59</sup> As one author notes, “[r]isk aversion helps explain why someone pays an insurance premium today against the mere possibility of suffering a loss in the future. A premium is a *small*, certain loss that protects against having to bear the financial costs of a much larger

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52. HRSA, *Statistics Reports*, *supra* note 43.

53. *Vaccine Injury Table*, U.S. DEPARTMENT OF HEALTH & HUM. SERVICES HEALTH RESOURCES & SERVICES ADMIN., <http://www.hrsa.gov/vaccinecompensation/vaccinetable.html> (last visited Oct. 8, 2011) [hereinafter HRSA, *Vaccine Injury Table*].

54. *Id.*

55. *Id.*

56. *Id.*

57. HARRIS L. COULTER & BARBARA LOE FISHER, *A SHOT IN THE DARK* 15-17 (1991).

58. *Id.* at 18.

59. TOM BAKER, *INSURANCE AND POLICY: CASES, MATERIALS, AND PROBLEMS* 2 (2d ed. 2008).

loss in the future.”<sup>60</sup> In terms of vaccination policy, one could postulate that the existence of the NVICP and its compensation policy is the “insurance” that allows for parents to engage the risk of vaccinating their children. Whether or not the premium is “small”<sup>61</sup> is a question for a separate discussion; pertinent to this Comment is an evaluation of what is given in return for *that premium*: compliance with vaccination policy.

When the NVICP was established, it was constructed to be favorable to both vaccine manufacturers—by funding awards from collected vaccine taxes thereby absolving them of most vaccine liability<sup>62</sup>—and the individuals who had been injured by vaccines, and their families, by way of presumption of causation.<sup>63</sup> In spite of the intent behind the legislation, some vaccine-choice advocates have come to view the adjudication process available through the program with bitter eyes.<sup>64</sup> Furthermore, some critics have accused the administration of the Department of Health and Human Services (HHS) of arbitrarily redefining compensable injuries like encephalopathy such that “petitioners . . . will never again see an injury to a child that falls within the definition’s narrow confines.”<sup>65</sup> Barbara Loe Fisher, mother of a vaccine-injured son, and co-founder of the National Vaccine Information Center (NVIC) (a vaccine-choice advocacy organization), reflects disdainfully upon how the NVICP in practice has diverged from the program as proposed at the time of its inception:

We maintain that the spirit and intent of the law, as Congress and the public envisioned it, has not been fulfilled. In our view, the principal reason for this failure of implementation is because the Department of Health and Human Service, which was on record as opposing the passage of this legislation (as was the Department of Justice), was given too much discretionary authority in the law to change the rules for compensation after the law was passed. Through the wielding of this discretionary authority, both federal agencies have worked together to weaken the ability of vaccine injured claimants to obtain compensation.

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60. *Id.* (emphasis added).

61. *Id.*

62. I.R.C. § 9510 (LexisNexis 2011).

63. Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3758.

64. *Compensating Vaccine Injuries: Are Reforms Needed? Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Res.*, 106th Cong. 12 (1999) (statement of Rep. Dan Burton, Chairman, H. Comm. on Gov’t Reform).

65. Barbara Loe Fisher, *Compensating Vaccine Injuries: Are Reforms Needed?*, NAT’L VACCINE INFO. CENTER (Sept. 28, 1999), <http://www.nvic.org/injury-compensation/congresstestimony.aspx> (providing prepared testimony for a hearing by the House Subcommittee on Criminal Justice, Drug Policy, and Human Resources).

The net result has been the creation of an uneven playing field that has often turned what was supposed to be a fairer, expedited, less traumatic, less expensive, no-fault alternative to a lawsuit against vaccine manufacturers and administering physicians into a highly adversarial, lengthy, traumatic and unfair imitation of a lawsuit conducted in front of a Special Master instead of a judge and jury.<sup>66</sup>

This assertion is bolstered by elected officials, such as Representative Dan Burton (Indiana) who in 2002 stated, “[w]hile approximately 1,700 families have received compensation under this program, many families have seen their cases tied up for years in a system that has become too contentious.”<sup>67</sup> Furthermore, Fisher laments that the HHS has manipulated standards in order to make compensation for vaccine-injured families illusory:

[O]ver time, the Secretary has primarily used her discretionary authority through the regulatory process to *remove* compensable events from the Table sanctioned by Congress, and to redefine permanent injuries in the Aids to Interpretation long recognized by the medical community as being associated with vaccine reactions. In the words of one attorney for vaccine injured children, the Secretary’s arbitrary redefinition of the medically recognized definition of “encephalopathy” “*is so restrictive that it is believed by petitioners’ counsels across this country that they will never again see an injury to a child that falls within the definition’s narrow confines.*”<sup>68</sup>

Given that “children today are required by law to receive thirty-three doses of ten different viral and bacterial vaccines before entering kindergarten,”<sup>69</sup> the potential for an adverse reaction is not negligible, and parents who harbor doubts about the integrity of the compensation program may be inclined to base their vaccination-related decision, at least in part, on those alleged shortcomings. Considered along with the assertion that “[t]he FDA and CDC have admitted that reported adverse events represent as few as 1-

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66. *Id.*

67. *The Continuing Oversight of the National Vaccine Injury Compensation Program: Hearing Before the Comm. on Gov’t. Reform, 107th Cong. 2 (2002)* (statement of Dan Burton, Chairman, H. Comm. on Gov’t. Reform).

68. Fisher, *Compensating Vaccine Injuries: Are Reforms Needed?*, *supra* note 65.

69. Barbara Loe Fisher, *Vaccines: Finding a Balance Between Public Safety and Personal Choice*, FED. NEWS SERVICE, INC., Aug. 3, 1999.

10% of the events actually occurring,”<sup>70</sup> fears that drive parents to avoid vaccinating their children *may* be validly attributable to deficiencies in the NVICP.

4. *Questions About the Efficacy of Vaccines: Are Vaccines the Real Reason for the Decline in Childhood Diseases?*

Considering the evidence that at least some children will be injured by vaccines,<sup>71</sup> parents inclined to reject vaccinations for their children may be further influenced by arguments that the near eradication of childhood diseases cannot be attributed to vaccinations.<sup>72</sup> For instance, Polio vaccination practices were credited with the elimination of the disease in the United States; however, critics question why Polio was also eradicated in Europe where no “mass vaccination” campaign was employed.<sup>73</sup> Furthermore, after the Polio vaccine was introduced, Dr. Salk (credited with creating the Polio vaccine) pointed out that the majority of the cases that subsequently developed were attributable to the Sabin [Polio] vaccine.<sup>74</sup>

Additionally, the number of people infected with measles in 1958 was 800,000; the number of people had fallen by 300,000 in 1962, the year before the “vaccine was introduced.”<sup>75</sup> Contrasting the percentage of measles-related deaths in 1900 (13.3 deaths per 100,000 population)<sup>76</sup> against the death rate in 1955 (.03 deaths per 100,000), one critic states, “[t]hose numbers alone are dramatic evidence that measles was disappearing before the vaccine was introduced.”<sup>77</sup> Yet another critic points out that some diseases virtually disappeared, “without any vaccines at all, such as typhoid fever, scarlet fever, scurvy and tuberculosis.”<sup>78</sup> If parents entertain doubts that vaccines are really as effective as proponents claim, the attendant risks may, for some, outweigh the purported benefits.

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70. Alan G. Phillips, *The Moral and Ethical Imperative for Vaccine Philosophical Exemptions*, VACCINERIGHTS.COM, 1, <http://www.vaccinerights.com/pdf/PhilosophicalExemption.pdf> (last updated Aug. 12, 2011).

71. HRSA, *Statistics Reports*, *supra* note 43.

72. ROBERT S. MENDELSON, HOW TO RAISE A HEALTHY CHILD—IN SPITE OF YOUR DOCTOR 210 (1984).

73. *Id.*

74. *Id.* at 210-11.

75. *Id.* at 216.

76. *Id.*

77. ROBERT S. MENDELSON, HOW TO RAISE A HEALTHY CHILD—IN SPITE OF YOUR DOCTOR 210, 216 (1984).

78. Phillips, *supra* note 70.

C. CIRCUMVENTING THE SYSTEM WHEN EXEMPTIONS ARE LIMITED/NARROW

When medical exemptions are not applicable, and philosophical exemptions are unavailable, some parents have resorted to invoking religious beliefs that they do not hold.<sup>79</sup> Yet other parents in states that allow a religious exemption only for members of a particular faith have claimed to subscribe to a “church,” the sole purpose of its establishment being to provide parents an avenue to successfully claim a religious exemption.<sup>80</sup> Limiting exemptions to those medically necessary or based upon religious beliefs may encourage dishonesty and a general degradation of religious beliefs.

III. SOLUTIONS: JETTISONING THE RELIGIOUS EXEMPTION AND ITS DEFECTS IN FAVOR OF THE NON-DISCRIMINATORY PHILOSOPHICAL EXEMPTION

One argument promulgated by opponents to vaccine choice is that statutory provisions establish a de facto violation of the Establishment Clause.<sup>81</sup> One author, reviewing court decisions that analyzed religious-based vaccination exemptions stated, “[t]hese courts have ruled that permitting individuals that belong to religious groups that forbid vaccinations to opt out of the vaccination requirement while requiring all other individuals . . . to be vaccinated . . . is an example of the state providing privileges to particular religious groups.”<sup>82</sup> Furthermore, the author noted that the disparate approach of allowing the benefits of religious exemptions (whether under a narrowly written religious exemption or a broadly drafted one) to only certain religions or generally those citing religion, results in violations of the Equal Protection Clause.<sup>83</sup> While states are generally free to accommodate religion,<sup>84</sup> it is worth noting that inherent in this author’s argument is the admission that being granted an opportunity to avoid vaccinations is indeed a benefit. Given the concerns of some parents,<sup>85</sup> that obscure admis-

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79. Steve Leblanc, *Parents Use Religion to Avoid Vaccines*, USA TODAY, Oct. 18, 2007, [http://usatoday30.usatoday.com/news/nation/2007-10-17-19819928\\_x.htm](http://usatoday30.usatoday.com/news/nation/2007-10-17-19819928_x.htm) (last visited Jan. 26, 2013).

80. Donald G. McNeil Jr., *Worship Optional: Joining a Church to Avoid Vaccines*, N.Y. TIMES, Jan. 14, 2003, <http://www.nytimes.com/2003/01/14/science/worship-optional-joining-a-church-to-avoid-vaccines.html>.

81. Alicia Novak, Comment, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. LAW. 1101, 1113 (2005).

82. *Id.*

83. *Id.* at 1115.

84. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 714 (1994) (“[R]eligious needs can be accommodated through laws that are neutral with regard to religion.”).

85. See *infra* Part III.B-D; *supra* Part II.B.

sion (and the argument within which it is buried) bears weight and is illustrated in two cases that came out of two federal district courts: one from the Western District of Arkansas and the other from the Eastern District of Arkansas.<sup>86</sup> In the first of the two cases, *McCarthy v. Boozman*, the court stated:

*Section 6-18-702(d)(2) also violates the Equal Protection Clause of the Fourteenth Amendment. Members or adherents of a recognized church or denomination enjoy the benefit of an exemption that is denied to other persons whose objections to immunization are also grounded in sincere religious belief. This preferred treatment of one group and discrimination against the other can only result in a denial of equal protection of the law. Accordingly, we hold that the religious exemption provision is unconstitutional and invalid.*<sup>87</sup>

Ironically, McCarthy's request for summary judgment was granted, in that the court declared the religious exemption was to be entirely stricken from the Arkansas Code; however, the court conceded, "[o]ur holding does not afford relief of any real value to the Plaintiff."<sup>88</sup> When, less than a month later, a second religious exemption-related case was decided in an Arkansas federal court, the court dismissed the parent's claim that compulsory vaccination mandates violated her Free Exercise rights by stating, "[s]ubsection (a) of the immunization statute does not target religious beliefs or seek to infringe upon or restrict certain practices because of their religious motivation."<sup>89</sup> Essentially, these two decisions meant that parents in Arkansas were left without the option of invoking a religious exemption from vaccinating their children because the exemption statute failed "to pass muster under all three prongs of the test in *Lemon v. Kurtzman*."<sup>90</sup> Interestingly, after these "anti-

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86. See *McCarthy v. Boozman*, 212 F. Supp. 2d 945 (W.D. Ark. 2002); *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002).

87. *McCarthy*, 212 F. Supp. 2d at 949 (emphasis added).

88. *Id.* at 950.

89. *Boone*, 217 F. Supp. 2d at 953 (citing *Church of Lukimi Babalu Aye v. City of Hialeah*, 506 U.S. 520 (1992)).

90. M. Craig Smith, Note, *A Bad Reaction: A Look at the Arkansas General Assembly's Response to McCarthy v. Boozman and Boone v. Boozman*, 58 ARK. L. REV. 251, 256 (2005) ("To pass muster under the Establishment Clause, it must be found that the exemp-

choice” decisions were handed down, the Arkansas legislature redrafted their vaccine exemption statute, which now asserts that the compulsory vaccination requirement “shall not apply if the parents or legal guardian of that child object thereto on the grounds that immunization conflicts with the religious or philosophical beliefs of that parent or guardian.”<sup>91</sup>

One opponent criticized that “the Arkansas Legislature seemed to completely abdicate the spirit of its former exemption,”<sup>92</sup> and instead proposed that the statute would “pass constitutional muster by providing an exemption based upon one’s good faith religious objections, ‘genuinely and sincerely held,’ while still excluding those whose objections . . . were more rooted in personal and philosophical, rather than religious beliefs.”<sup>93</sup> Even if an exemption were drafted according to the suggestion, it could be challenged as violative of the Establishment Clause because exempting out of compulsory vaccinations is viewed as a benefit,<sup>94</sup> and “governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.”<sup>95</sup> Consider, for instance, that groups like the Atheist and Agnostic Pro-Life League<sup>96</sup> exist. Surely a group with a number of members who support the complete abolition of abortion without exception may be equally as inclined as a pro-life Catholic<sup>97</sup> to shun vaccines that have been cultured in aborted fetal tissue.<sup>98</sup> The denial of the benefit of rejecting a vaccine for the aforementioned reasons certainly presents fertile soil for an Equal Protection Clause claim. One critic argues that the better approach is that which was taken by the Mississippi legislature. Abolishing the religious exemption altogether, he argues, would “benefit and better protect . . . citizens.”<sup>99</sup> The assertion, however, fails to address how a lack of available exemptions better protects citizens for whom the very real risks of vaccination<sup>100</sup> pose incredibly harsh choices.

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tion serves a secular purpose, that its primary effect neither advances nor inhibits religion, and that the government is not excessively entangled with religion.”).

91. ARK. CODE ANN. § 6-18-702(d)(4)(A).

92. Smith, *supra* note 90, at 278.

93. *Id.* at 278-79.

94. See Novak, *supra* note 81.

95. City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J., concurring).

96. ATHEIST AND AGNOSTIC PRO-LIFE LEAGUE HOMEPAGE, <http://www.godlessprolifers.org/home.html> (last visited Nov. 9, 2011).

97. See CHILD. OF GOD FOR LIFE, *supra* note 36.

98. *Human Fetal Links with Some Vaccines*, *supra* note 33.

99. Smith, *supra* note 90, at 279-80 (explaining how the Mississippi legislature “simply allowed the religious exemption to be severed and never reenacted a new one” after its religious exemption was struck down in *Brown v. Stone*).

100. See HRSA, *Statistics Reports*, *supra* note 43.

While the Arkansas rewrite of the exemption statute<sup>101</sup> effectively eliminates any Establishment Clause, Equal Protection, or Free Exercise claims, the same effect could have been achieved by striking any reference to religious beliefs, and simply replacing it with a provision for philosophical beliefs. Some assert that allowing philosophical exemptions will lead to higher rates of non-vaccination,<sup>102</sup> yet one commentator posits that states that allow philosophical exemptions could enjoy higher vaccination rates by permitting parents to selectively exempt from certain vaccines unlike religious exemptions that are characteristically applied on a take-it-or-leave-it basis.<sup>103</sup>

#### IV. WHY BOTHER? IS THERE A CONSTITUTIONAL BASIS FOR RECOGNIZING EXEMPTION RIGHTS?

##### A. THE DUE PROCESS ARGUMENT

All tiers of government are prohibited from depriving persons of life, liberty, or property under constitutional amendments. The Fifth Amendment defines the scope of the federal government's power to intrude upon personal rights, stating, "[n]o person shall . . . be deprived of life, liberty, or property without due process of law."<sup>104</sup> The Fourteenth Amendment similarly limits the power of the states: "[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ."<sup>105</sup> Some vaccine-choice advocates have argued that because the risk of death or injury (which may be characterized as a deprivation of life, whether complete or partial) accompanies the practice of vaccination,<sup>106</sup> the current vaccination programs "fail to meet the due process requirements necessary to protect life"<sup>107</sup> as analyzed under existing case law.<sup>108</sup> The existing case, to which the author, James Turner, referred, is the oft-quoted case *Jacobson v. Massachusetts*, a United States Supreme Court case that opponents to vaccine choice have cited as the basis for compulsory vaccinations.<sup>109</sup> Mr.

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101. ARK. CODE ANN. § 6-18-702(d)(4)(A).

102. Smith, *supra* note 90, at 277-78.

103. Sean Colletti, Comment, *Taking Account of Partial Exemptions in Vaccination Law, Policy and Practice*, 36 CONN. L. REV. 1341, 1344 (2004).

104. U.S. CONST. amend. V.

105. U.S. CONST. amend. XIV, § 1.

106. See *supra* Part II.B.2.

107. JAMES TURNER, *Due Process and the American Constitution*, in *VACCINE EPIDEMIC* 27, 32 (Louise Kuo Habakus & Mary Holland eds., 2011).

108. *Id.*

109. See, e.g., James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 857 (2002) (discuss-



Turner, among others, asserts that this dispositive approach to interpreting *Jacobson* is flawed. Turner states that “the Supreme Court emphasized that it was upholding the Massachusetts statute under the ‘necessities of the case,’ namely, that an epidemic was prevalent and increasing.”<sup>110</sup> In the absence of a health emergency, Turner suggests that compulsory vaccination policies “might be exercised in particular circumstances and in reference to a particular person in such an arbitrary, unreasonable manner, or might go so far as what was reasonably required for the safety of the public . . . .”<sup>111</sup> In *Jacobson*, the petitioner had refused a smallpox vaccination [during an epidemic] and was subsequently fined a five-dollar penalty.<sup>112</sup> Given that the Cambridge ordinance required either vaccination compliance *or* the payment of a fine assessed for non-compliance, perhaps the Court’s holding is not nearly as absolute—in terms of denying personal choices that relate to vaccinations—as the compulsory vaccine crowd suggests.<sup>113</sup>

Even supposing that *Jacobson* stands for the absolute power of the states to impose compulsory vaccination mandates, the case was decided in 1905. “Since *Jacobson*, the Supreme Court has decided several cases about medical intervention, bodily integrity, and sexual autonomy, further articulating what constitutes valid individual liberty interests and the level of scrutiny a court must apply to laws restricting them.”<sup>114</sup> Considering that the Supreme Court has afforded a great level of deference to the individual in choices that relate to autonomy, the “Court would view a challenge under the Fourteenth Amendment to a compulsory vaccination mandate today” quite differently than it did at the time *Jacobson* was decided.<sup>115</sup>

#### B. FUNDAMENTAL RIGHTS INVOLVING FAMILY INCEPTION AND BEYOND

The Supreme Court has, with a great degree of faithfulness, upheld individual liberties substantiated in issues involving privacy.<sup>116</sup> Drawing on historical traditions, the Supreme Court has held that the right to marry is fundamental, and, absent a compelling reason, a state could not interfere with that right.<sup>117</sup> Furthermore, in *Skinner v. Oklahoma*, the Supreme Court

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ing how compelled vaccination policies outweigh the minimal risk of death or injury to individuals).

110. TURNER, *supra* note 107, at 35.

111. *Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905)).

112. *Jacobson v. Massachusetts*, 197 U.S. 11, 13-14 (1905).

113. See Ross, *supra* note 29, at 280-81.

114. Mary Holland, *Compulsory Vaccination, the Constitution, and the Hepatitis B Mandate for Infants and Young Children*, 12 YALE J. HEALTH POL’Y L. & ETHICS 39, 59 (2012).

115. *Id.*

116. See, e.g., *Lawrence v. Texas*, 539 U.S. 588 (2003).

117. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

addressed the right to reproduce and declared that “[m]arriage and procreation are fundamental [rights],”<sup>118</sup> and that “[in] our view . . . strict scrutiny [applies].”<sup>119</sup>

Notably, the Court has taken a strong pro-family autonomy stance when states have interfered with a parent’s right to determine the upbringing of her child.<sup>120</sup> The Court, recognizing that parents, not the State, were in a superior position to make decisions about how children are raised, stated:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to *standardize* its children . . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, *coupled with the high duty*, to recognize and prepare him for additional obligations.<sup>121</sup>

In fact, in 2007, the Supreme Court—after finding no intent by Congress to preclude—cited the reasoning in *Pierce v. Society of Sisters* as justification for its holding that parents could pursue a cause of action resulting from violations of the Individual’s With Disabilities Education Act (IDEA) as pertaining to their child.<sup>122</sup> This holding reflects the Court’s recognition for the degree to which a parent’s interests are intertwined with those of her child; the injuries a child suffers are simultaneously suffered by the parent. In *Winkleman v. Parma City School District*, both the child and his parents had separate causes of action for the IDEA violations, and the parents were not merely suing in the stead of their child.<sup>123</sup>

Furthermore, the Court has further defined the type of control that a parent has regarding choices that relate to her children.<sup>124</sup> In *Troxel v. Granville*, a mother (Granville) asserted her authority to limit visitations between her children and their deceased father’s parents.<sup>125</sup> At that time, Washington state law allowed that “[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings.”<sup>126</sup> Accordingly, the paternal grandparents of the children (the Troxels) filed a petition seeking expanded visitation rights.<sup>127</sup> Initially, the

118. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

119. *Id.*

120. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

121. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (emphasis added).

122. *Winkleman v. Parma City Sch. Dist.*, 550 U.S. 516, 529 (2007).

123. *Id.* at 529-30.

124. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000).

125. *Id.* at 60-61.

126. *Id.* at 61 (citing WASH. REV. CODE § 26.10.160(3)).

127. *Id.*

grandparents prevailed in the state's lower court upon a finding that they had standing to petition the court for visitation and because "[t]he Petitioners are part of a large, central, loving family . . . and the Petitioners can provide opportunities for the children in the areas of cousins and music."<sup>128</sup> The Washington Court of Appeals decided that the Troxels lacked standing under the statute, but the Washington Supreme Court disagreed, finding that the statute unconstitutionally infringed upon Granville's fundamental parenting rights.<sup>129</sup> When the case reached the U.S. Supreme Court, Justice O'Connor wrote that the Washington statute allowed for the court to "disregard and overturn *any* decision by a fit custodial parent," when a "judge disagree[s] with the parent's estimation of the child's best interests."<sup>130</sup> The Court found that the statute had extended the state's power too broadly, and that:

[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.<sup>131</sup>

Imagining that the Court had found that the Washington statute was a valid exercise in the state's ability to interfere with Granville's fundamental rights conjures up a tenuous—but very real—vision of Ira Levin's state computer-controlled society in *This Perfect Day*.<sup>132</sup>

A review of these holdings demonstrates that the Court will not infringe upon the fundamental parental right to the care, custody, and control of their children, absent a compelling state interest, because, "[t]he law[] . . . has recognized that natural bonds of affection lead parents to act in the best interests of their children."<sup>133</sup> One critic argues that a parent's ability to assert exemptions for his unvaccinated children unethically intrudes upon

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128. *Id.* at 61-62 (citing *In re Custody of Smith*, 969 P.2d 21, 23 (Wash. 1998)).

129. *Troxel v. Granville*, 530 U.S. 57, 62-63 (2000).

130. *Id.* at 67.

131. *Id.* at 68-69 (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993)).

132. IRA LEVIN, *THIS PERFECT DAY* (1970). Levin's futuristic dystopian novel explored the idea of a "perfect" society in which all people were forbidden from making any life choices—including decisions about whether to have children and how to raise them—without first gaining the consent of "UniComp"—the omniscient state-run computer system. *Id.*

133. *Troxel*, 530 U.S. at 68 (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

the child's rights to make health-related decisions for herself.<sup>134</sup> Recently, California Governor Jerry Brown signed legislation that would allow children as young as twelve to obtain the human papillomavirus (HPV) vaccine without parental consent.<sup>135</sup> Ironically, on the same day, Governor Brown signed a bill that would make it illegal for teens under the age of eighteen to use tanning beds.<sup>136</sup> The incongruence in the two measures is stunning; essentially, the State of California will permit young women to obtain—without parental consent, let alone knowledge—a vaccine, which has generated a host of safety concerns,<sup>137</sup> yet the same young woman could not legally use a tanning bed in the State of California.<sup>138</sup> A parent of a young woman who had used a tanning bed may detect physical clues as to what her child has been doing and perhaps have a discussion about the safety of such practices. On the other hand, the parent of a girl who has—unbeknownst to the parent—received the HPV vaccine, and subsequently experienced an adverse reaction, may be ill-equipped to seek appropriate medical attention.

The Supreme Court has indicated a presumption in favor of the parents of children making important decisions in the interest of the child. The Court has held that “[t]he law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”<sup>139</sup> This judicial recognition of a parent’s superior rights to make decisions for her children reflects the basic presumption of family structures; there would be little need for family organization if children were capable of making decisions in their best interest (let alone understanding what their best interest is). Accordingly, the Court has consistently upheld the interests of a child’s *fit* parent in making decisions relating to how the child is to be raised.<sup>140</sup>

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134. See Novak, *supra* note 81, at 1119 (“Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child’s rights to permit such an imposition without canvassing his views . . .”).

135. *Brown Signs California Bill Letting 12-Year-Olds Get HPV Vaccine Without Parents’ Consent*, FOXNEWS.COM (Oct. 10, 2011), <http://www.foxnews.com/politics/2011/10/10/brown-signs-california-bill-letting-12-year-olds-get-hpv-vaccine-without/>.

136. *Id.*

137. *Should Parents Worry About HPV Vaccine?*, CNN HEALTH (Jul. 7, 2008), [http://articles.cnn.com/2008-07-07/health/cervical.cancer.vaccine\\_1\\_hpv-vaccine-gardasil-cervical-cancer?\\_s=PM:HEALTH](http://articles.cnn.com/2008-07-07/health/cervical.cancer.vaccine_1_hpv-vaccine-gardasil-cervical-cancer?_s=PM:HEALTH).

138. See *Brown Signs California Bill Letting 12-Year-Olds Get HPV Vaccine Without Parents’ Consent*, *supra* note 135.

139. *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

140. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Amish parents relying upon their religious beliefs may choose to terminate their children’s formal education

C. ABORTION RIGHTS, “ANATOMICAL LANDMARKS,” AND EQUAL PROTECTION CLAUSE IMPLICATIONS.

Prior to 1821, no state had enacted an anti-abortion statute, nor did any state criminally prosecute abortion under common law.<sup>141</sup> Rather, abortion laws rapidly emerged in the late 1800s<sup>142</sup> and were bolstered in the early 1900s by society’s drive to legislate morality.<sup>143</sup> However, the emergence of a modest national birth control policy, which was effectuated when President John F. Kennedy “add[ed] birth control studies to the agenda of the federally funded National Institutes of Health,”<sup>144</sup> seemed to spark an interest in a spectrum of birth control measures that could keep pace with women’s growing interest in realizing roles beyond that of housewife and mother.<sup>145</sup> Federal legislation establishing the rights of women to file sexual discrimination lawsuits, the decision of the Supreme Court in *Griswold v. Connecticut*,<sup>146</sup> the movement by many states to allow abortion on demand (provided that procedural guidelines were followed),<sup>147</sup> and the inception of the National Organization for Women (NOW) were at work in the forefront of national issues that led up to the grandfather of all abortion cases: *Roe v. Wade*.<sup>148</sup>

The *Roe* Court constructed a “trimester” analysis which was designed to balance the state’s interest in protecting potential life against the interest of the mother to be free from compelled pregnancy and impending motherhood.<sup>149</sup> The timing of *Roe* was ripe for victory for abortion-rights advocates because the Court had to consider its solidly grounded fundamental family and procreation privacy rights jurisprudence,<sup>150</sup> as well as the emerg-

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after the eighth grade in favor of an immersive education conferred through community participation).

141. IRVING J. SLOAN, *THE LAW GOVERNING ABORTION, CONTRACEPTION & STERILIZATION I* (1988).

142. *Id.* at 6.

143. See, e.g., N.E.H. HULL & PETER CHARLES HOFFER, *ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY* 49 (2001).

144. *Id.* at 90.

145. See generally *id.* at 90-96.

146. In *Griswold*, the Court held that the state could not intrude upon the privacy of the marital relationship by punishing medical personnel for providing information about and access to birth control. The case was not decided upon explicit wording in the United States Constitution; rather Justice Douglas wrote that certain “zones of privacy” were found in the penumbras of the First, Third, Fourth, Fifth and Ninth Amendments. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

147. SLOAN, *supra* note 141, at 11-12.

148. See HULL & HOFFER, *supra* note 143, at 90-96; see also *Roe v. Wade*, 410 U.S. 113 (1973).

149. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

150. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that laws that provide fundamental rights of privacy in regards to married couples but deny those rights to

ing law and societal attitudes in the field of women's liberation.<sup>151</sup> While the petitioners in *Roe* argued that the privacy found in the penumbras analysis from *Griswold* applied,<sup>152</sup> the Court instead decided the issue by finding that a woman had a liberty interest in the decision whether or not to bear a child, and declared the right to abortion to be fundamental.<sup>153</sup> The Court reasoned:

Maternity, or additional offspring may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.<sup>154</sup>

Furthermore, Justice Stewart suggested that a woman's right to an abortion should be more rigorously protected than certain other fundamental rights:

Certainly the interest of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school . . . .<sup>155</sup>

The decision rendered states powerless to regulate abortion at all in the first trimester, but states could regulate the safety of abortions during the second trimester, and could ban abortion at the time that the unborn child

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unmarried couples violate the Equal Protection Clause); *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that an unwed father—like an unwed mother—has a fundamental liberty interest in the custody of his children such that statutes that deny unwed fathers custody of their children violate the Equal Protection Clause); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding that marital privacy regarding birth control falls within the “zones of privacy” found in the penumbras); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating that “[m]arriage and procreation are fundamental to the very existence and survival of the race,” and that forced sterilization upon convicts creates an Equal Protection Clause violation); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (finding that parents, and not the state, have the right to decide how to educate their children).

151. See HULL & HOFFER, *supra* note 143.

152. *Griswold*, 381 U.S. at 484.

153. *Roe*, 410 U.S. at 153-55.

154. *Id.* at 153.

155. *Id.* at 170 (Stewart, J., concurring) (quoting *Abele v. Markle*, 351 F. Supp. 224, 227 (D. Conn. 1972)).

had become viable.<sup>156</sup> Largely, though, women were free to obtain abortions without state interference because the Supreme Court weighed the potential burdens to the mother more heavily than the interests of the states.

Nearly twenty years later, when the Court was urged to overturn the central holding of *Roe*, the Court declined, citing reliance: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>157</sup> While the decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* did not affirm the Court’s “trimester” analysis from *Roe*—allowing states to regulate the safety of abortions as pertaining to maternal health—the Court firmly held that states may not place any “undue burden” on women seeking abortions.<sup>158</sup>

These concerns are shared by parents who are left with a vaccine-damaged child.<sup>159</sup> In fact, states without a philosophical exemption from compulsory vaccinations are potentially placing an “undue burden” on parents who may be left holding the bag when their child is damaged by a vaccine. For instance, consider just one of the NVICP listed vaccine-induced injuries: encephalopathy.<sup>160</sup> The NVICP defines encephalopathy as a condition “that is sufficiently severe so as to require hospitalization,” and may manifest in “[a] significant change in mental status . . . specifically a confusional state or a delirium, or a psychosis.”<sup>161</sup> Other symptoms might include “increased intracranial pressure,” and “decreased or absent response to environment,” among other factors.<sup>162</sup> The effects of encephalopathy may be short-lived with no lingering complication, but for less fortunate families, the long-term effects of encephalopathy may include, “personality changes, severe brain damage . . . [or] death.”<sup>163</sup>

In *Roe*, the Court cited “psychological harm” as one of the factors that may face a woman compelled to bear a child.<sup>164</sup> While compelled parenthood may produce psychological harm, it is difficult for people to comprehend the suffering of parents who lose a child in death. One expert describes such suffering:

Bereaved parents feel oppressive feelings of failure in their  
roles as parents; their inability to prevent their child’s death

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156. *Id.* at 164.

157. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

158. *Id.* at 877-78.

159. *See supra* Part II.B.

160. *See* HRSA, *Vaccine Injury Table*, *supra* note 53.

161. *Id.*

162. *Id.*

163. Charles Patrick Davis, *Encephalopathy*, MEDICINET.COM, <http://www.medicinenet.com/encephalopathy/page4.htm> (last visited Oct. 8, 2011).

164. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

leads to overwhelming feelings of helplessness and of being violated. Their sense of self diminishes, and they feel disillusioned, empty and insecure. Parents, looking through their pain, are disoriented and confused to see that somehow the world continues on even though nothing makes sense any more. Their instincts to provide for and protect the child continue after the death, but they are unable to act on these instincts; stormy nights often find bereaved parents awake, wondering if their child is in a safe, dry place.<sup>165</sup>

Parents whose child suffers a vaccine-induced death not only suffer the loss of their child, but must also likely live with “oppressive feelings of failure in their roles as parents,”<sup>166</sup> when the death is linked to a vaccine to which they willingly—or grudgingly—consented. Why then, are the concerns facing an unwillingly pregnant woman given greater weight than the concerns of parents who have chosen to bear children? Perhaps it is because life is riddled with uncertainty, and accepting the potential for devastation is simply a cost inherent in becoming a parent? Even so, should the parents of wanted children not be given the same freedom to make choices that may diminish that potential?

Suppose instead of death, a family suffers a vaccine injury that renders their child brain-damaged. If the parents can show that their child’s reaction falls within what some have characterized as ever-narrowing definitions of vaccine injury,<sup>167</sup> they may receive some compensation. The average award (based solely upon successful petitioners and total outlays)<sup>168</sup> works out to \$786,000. That amount may seem generous; however, the uncertainty of the true costs to the family may render the award less stunning, as “[t]he financial consequences of child brain damage range from the cost of medical care to lost wages that will not be felt for years, or decades, in the future.”<sup>169</sup> In addition to any award recovered from NVICP, brain-damaged children may qualify<sup>170</sup> for federal assistance via special education pro-

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165. Donna Lamb, *Surviving the Death of a Child*, HAND OF THE PENINSULA, 1, <http://www.handsupport.org/newsletters/spring08.pdf> (last visited Jan. 26, 2013).

166. *Id.*

167. See Fisher, *Compensating Vaccine Injuries: Are Reforms Needed?*, *supra* note 65.

168. See HRSA, *Statistics Reports*, *supra* note 43.

169. LEVY PHILLIPS & KONIGSBERG, LLP, <http://www.lpklaw.com/child-brain-damage.php> (last visited Jan. 5, 2012).

170. Individuals With Disabilities Education Act, 20 U.S.C. § 1401(3)(A) (2006 & Supp. IV 2010) (“The term ‘child with a disability’ means a child—(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this



grams administered by their local school district: “The Secretary shall make grants to States, outlying areas, and freely associated States, and provide funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities . . . .”<sup>171</sup> What these forms of compensation do not account for is that even with financial assistance, “[m]ental and physical health may be taxed by [the] childcare”<sup>172</sup> required of children who may suffer brain damage from an adverse reaction to a vaccine. One article points out:

Parents of children with disabilities had a greater number of stressors and a higher number of days during which they had at least one stressor. They reported having at least one stressor on 50 percent of the study days compared with 40 percent among the other parents. Parents of children with disabilities also reported experiencing a greater number of physical health problems.<sup>173</sup>

The article further points out that there are resources designed to assist such families: “[r]espice is critical for family wellness,” yet “it is not an easy support for many families to access.”<sup>174</sup> Absent adequate access to such help, families may be left to completely shoulder the sort of psychological burden which the Supreme Court held would have violated a woman’s liberty interests if she were denied the right to an abortion.<sup>175</sup>

Yet, the Court has drawn restrictive lines termed “anatomical landmarks” in terms of a woman’s right to abort her unborn child.<sup>176</sup> At issue in *Gonzales v. Carhart* was the Partial-Birth Abortion Ban Act of 2003.<sup>177</sup> The Act criminalized partial-birth abortions when performed as such:

(1) the term “partial-birth abortion” means an abortion in which the person performing the abortion—

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the

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chapter as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities . . . .”).

171. Individuals With Disabilities Education Act, 20 U.S.C. § 1411(a)(1) (2006).

172. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

173. Rick Nauert, *Parental Stress with Special-Needs Children*, PSYCH CENT., <http://psychcentral.com/news/2009/02/19/parental-stress-with-special-needs-children/4219.html> (last visited Jan. 26, 2013).

174. *Id.*

175. *Roe*, 410 U.S. at 153.

176. *See Gonzalez v. Carhart*, 550 U.S. 124, 148 (2007).

177. *Id.*

case of a breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(B) performs the overt act, other than the completion of delivery, that kills the partially delivered living fetus . . . .<sup>178</sup>

The Court held that this law was constitutional, rejecting arguments that the proscribed procedure would leave only the *potentially* more risky method available to women, cited to congressional findings, and held that the banned procedure “will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.”<sup>179</sup> The Court explained, “[t]he Act expresses respect for the dignity of human life.”<sup>180</sup> The Court found additional justification in finding the law constitutional by considering the reputation-damaging effect the practice has upon the medical community: “Partial-birth abortion . . . confuses medical, legal, and ethical duties of physician’s to preserve and promote life . . . .”<sup>181</sup> The Court explained the government has a role “in protecting the integrity and ethics of the medical profession.”<sup>182</sup>

The holding from *Gonzales* indicates that the state’s interest in the preservation of the “dignity of human life,”<sup>183</sup> surpasses a woman’s interest in obtaining a partial-birth abortion because to allow a child to be nearly fully delivered before extinguishing its life pushes the ethical boundaries beyond our comfort. Similarly, then, the same concern should extend to parents of children who seek to protect the integrity of their child’s life by choosing not to introduce vaccinations into the child’s vulnerable body. Furthermore, the “integrity and ethics of the medical profession”<sup>184</sup> may rightly be questioned when there appears to have been some bed-swapping between two of the largest medicine-related bureaucracies, the Center for Disease Control and Prevention (CDC)<sup>185</sup> (which determines vaccine poli-

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178. 18 U.S.C. § 1531 (2006).

179. *Gonzales*, 550 U.S. at 157 (quoting Pub. L. No. 108-105, 117 Stat. 102).

180. *Id.*

181. *Id.* at 157 (first ellipsis in original) (quoting Pub. L. No. 108-105, 117 Stat. 1202, 1205).

182. *Id.* (quoting *Washington v. Glucksburg*, 521 U.S. 702, 731 (1997)).

183. *Id.*

184. *Gonzales*, 550 U.S. at 157.

185. *Dr. Julie Gerberding Named President of Merck Vaccines*, MERCK (Sep. 9, 2011, 1:34 PM), <http://www.merck.com/includes/print-friendly.html> (on file with author) (announcing the appointment of former CDC Director, Dr. Julie Gerberding, to the position of president of Merck Vaccines).

cy) and the Federal Drug Administration (FDA)<sup>186</sup> (which approves vaccines), and the pharmaceutical companies that manufacture the nation's vaccine supplies. Suggestions that the relationship may be tainted might be tenuous, but in the mind of the parent of a vaccine-damaged child, the "integrity and ethics of the medical profession"<sup>187</sup> will likely come into question. Furthermore, the CDC does not require that physicians obtain "informed consent" from the parent of a child who is to receive a vaccination; rather, the agency merely mandates a "Vaccine Information Statement" (VIS).<sup>188</sup> The purpose of providing the VIS to the parent is to "inform vaccine recipients—or their parents or legal representatives—about the benefits and risks of a vaccine."<sup>189</sup> Presumably, in the interest of conservation, the CDC does not require that the parent/patient be given a personal copy of the VIS: "The patient may be offered a permanent (e.g. laminated) copy of the VIS to read during their visit (instead of their own copy) . . ."<sup>190</sup> Given the potential for life-altering consequences affiliated with certain vaccines, why is information about vaccine safety—not to mention the lack of informed consent—so callously administered? Some critics argue that nothing less than informed consent is ethical:

The First Principle of the Nuremberg Code is "The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision."<sup>191</sup>

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186. Ed Silverman, *Glaxo Hires Former FDA Chief Counsel Dan Troy*, PHARMALOT (July 22, 2008, 4:19 PM), <http://www.pharmalot.com/2008/07/glaxo-hires-former-fda-chieneral-counsel-dan-troy/> (on file with author) (announcing the appointment of former FDA chief counsel, Dan Troy, as senior vice president and general counsel).

187. *Gonzales*, 550 U.S. at 157.

188. *Fact Sheet for Vaccine Information Statements*, U.S. DEPARTMENT OF HEALTH & HUM. SERVICES CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vaccines/pubs/vis/vis-facts.htm> (last visited Jan. 6, 2012).

189. *Id.*

190. *Id.*

191. Barbara Loe Fisher, *The Moral Right to Conscientious, Philosophical and Personal Belief Exemption to Vaccination*, NAT'L VACCINE INFO. CENTER (May 2, 1997), <http://www.nvic.org/informed-consent.aspx> (making accessible Barbara Loe Fisher's statement to the National Vaccine Advisory Committee on May 2, 1997).

Such issues call the ethics of the industry into question, particularly for families who have personally weathered the repercussions of vaccine injury.

The disparity between the treatment of the two groups of parents—women who choose to have an abortion and parents who have children—simply doesn't reflect the reasoning that the Supreme Court has promulgated as justification for upholding abortion rights:

*Roe*, however, may be seen . . . as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection . . . a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims.<sup>192</sup>

How much more implicated can “the interests of a woman[/parent] in giving of her physical and emotional self”<sup>193</sup> be than when a parent is left to raise a child injured by a vaccine? Just as the Court in *Roe* gave superior consideration—over state interests—to the interests of a woman compelled to give birth, that same level of consideration should be given to parents who might face the stressful task of raising vaccine-damaged children. The Court has recognized that compelled motherhood can have extreme impacts upon a woman's life.<sup>194</sup> The establishment of the NVICP is Congress's less articulate acknowledgment that national vaccine policy can have an extreme impact upon a family.<sup>195</sup>

#### D. A NEW HYBRID: ABORTION RIGHTS PLUS FAMILY AUTONOMY RIGHTS EQUALS THE RIGHT TO PHILOSOPHICAL EXEMPTIONS

When the United States Supreme Court took a sharp turn away from existing religious freedom jurisprudence in *Employment Division v. Smith*,<sup>196</sup> the Court maneuvered a preservation of the seminal case, *Wisconsin v. Yoder*,<sup>197</sup> by declaring that *Yoder* involved a hybrid of two fundamental rights.<sup>198</sup> Similarly, rights to privacy and family autonomy rights, both

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192. *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992).

193. *Roe v. Wade*, 410 U.S. 113, 170 (1973) (citing *Abele v. Markle*, 351 F. Supp. 224, 227 (D. Conn. 1972)).

194. *Id.* at 153.

195. Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3743.

196. *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

197. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

198. *Smith*, 494 U.S. 872, 882 (holding that the regulation in *Yoder* implicated Amish parents' religious freedom and right to raise their children as they deemed proper).

deemed fundamental, could support an analogous hybrid approach (to vaccination exemption rights) as formulated by the Court in *Smith*. A merger of language pulled from the reasoning supporting the decisions in both abortion rights and family autonomy rights cases clearly indicates that parents are entitled to claim philosophical exemptions from state-mandated vaccination laws.

Considering that a state may not place an “undue burden”<sup>199</sup> on a woman’s right to make a decision in which “psychological harm may be imminent,”<sup>200</sup> the state should likewise not force the undue burden of compulsory vaccination upon parents when psychological harm may be imminent should that child experience an adverse reaction.

Because the Supreme Court has declared that “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children,”<sup>201</sup> states should not interfere with a parent’s “right, coupled with the high duty, to recognize”<sup>202</sup> what choices best suit their children, be it private education or an exemption from vaccinations. Obviously, the *Pierce* court recognized that state standardization of children meant that some children/families would lose something in the process. Such is the case for families who suffer vaccine injuries.

Certainly fundamental abortion rights and family autonomy rights are opposite sides of the same coin. Both issues involve matters of privacy and choosing what is best for the individual or family involved. The Supreme Court has recognized this concept. In *Roe*, both Justice Douglas and Justice Stewart recognized the interconnection between the issues. Writing for the majority, Justice Douglas stated that “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.”<sup>203</sup> In his concurrence, Justice Stewart wrote that “[s]everal decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”<sup>204</sup> Writing a concurring opinion in *Casey*, Justice Blackmun said, “[t]hese cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny

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199. *Planned Parenthood v. Casey*, 505 U.S. 833, 877-78 (1992).

200. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

201. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

202. *Id.*

203. *Roe*, 410 U.S. at 152-53 (citations omitted).

204. *Id.* at 169 (Stewart, J., concurring).

should be largely beyond the reach of government.”<sup>205</sup> Accordingly, the Supreme Court has laid the foundation for a finding that a parent’s right to not vaccinate her children should be designated fundamental.

## V. CONCLUSION

While states do have a legitimate interest in enforcing compulsory vaccination requirements, a failure to allow for broadly construed philosophical exemptions unconstitutionally interferes with a parent’s fundamental rights to make decisions that bear the potential to devastatingly impact a family. A more narrowly tailored approach would be to make vaccinations compulsory during an outbreak of a particular disease, just as Massachusetts did in 1902,<sup>206</sup> bearing in mind that “[t]here is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government . . . to interfere with the exercise of that will.”<sup>207</sup> Perhaps instead, as is the case in many states’ exemption statutes, sequestration of unvaccinated individuals during outbreaks<sup>208</sup> would suffice. Additionally, the practice of requiring “informed refusal”<sup>209</sup> would provide the type of procedural safeguards that would ensure that parents are validly asserting an exemption (as opposed to acting negligently), and have been made aware of the risks of non-vaccination. As one commentator notes, “[s]tates with a philosophical exemption claim to allow parents to use it for individual vaccines if they so choose,”<sup>210</sup> and “[a] partial exemption system will help to keep parents from making the drastic decision to exempt their children from all of the vaccines.”<sup>211</sup> This potentially translates into higher levels of vaccination compliance.

How will the Supreme Court decide if the argument that a parent’s right to exempt her child from vaccination is fundamental? It is hard to say, but as one author points out, “[t]hese personal autonomy cases contrast starkly with *Jacobson*’s legacy. . . . [T]hey are relevant to how the Supreme Court would view a challenge . . . to a compulsory vaccination mandate

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205. *Planned Parenthood v. Casey*, 505 U.S. 833, 927 (1992) (Blackmun, J., concurring).

206. *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (“The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body.”).

207. *Id.* at 28.

208. See, e.g., ARIZ. REV. STAT. ANN. § 15-873 (2009) (“Pupils who lack documentary proof of immunization shall not attend school during outbreak periods of communicable immunization-preventable diseases . . .”).

209. See Silverman, *supra* note 29.

210. Colleti, *supra* note 103, at 1370.

211. *Id.* at 1380.

today.”<sup>212</sup> A Supreme Court decision that favors parental control of this very private decision would comport with the Court’s existing jurisprudence and would effectively eliminate the current existing Equal Protection Clause concerns.<sup>213</sup>

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212. Holland, *supra* note 114, at 59.

213. See Novak, *supra* note 81, at 1115.

\* To my husband, Bill: your support and patience has often been my motivational sustenance. I cannot thank you enough. To my sons, Bailey and Ethan: I am so proud that both of you are not only incredibly unique, but also have the good sense to embrace your individuality. To my parents and siblings: while it's true that we cannot pick our family, had I the choice, I'd take the whole crazy lot of you all over again. Soli Deo gloria - and - ave atque vale!