Articles

Why Some *Religious* Accommodations for Mandatory Vaccinations Violate the Establishment Clause

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All states require parents to inoculate their children against deadly diseases prior to enrolling them in public schools, but the vast majority of states also allow parents to opt out on religious grounds. This religious accommodation imposes potentially grave costs on the children of non-vaccinating parents and on those who cannot be immunized. The Establishment Clause prohibits religious accommodations that impose such costs on third parties in some cases, but not in all. This presents a difficult line-drawing problem. The Supreme Court has offered little guidance, and scholars are divided.

This Article addresses the problem of religious accommodations that impose third party harms in the context of states' mandatory vaccination programs and proposes one approach to the line-drawing problem. This approach is consistent with the cases, offers predictable results in many situations, and accounts for relative judicial and legislative competencies. It suggests that in most cases, laws that offer religious exceptions, exemptions, or accommodations that impose third party harms are only unconstitutional if the law offers no comparable nonreligious exceptions.

Under this approach, most states' religious accommodations in the vaccination context violate the Establishment Clause. The Article also considers the relevant political dynamics and important implications of this conclusion.

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INTRODUCTION

Children sometimes get severely ill or die because their parents, or the parents of other children, refuse to vaccinate against preventable diseases on religious grounds.[1] Nonetheless, forty-seven states permit parents with religious objections to expose their own or others' children to these serious risks.[2] Such religious accommodations are constitutionally problematic under the Establishment Clause[3] because they impose harms on non-consenting third parties.[4] However, the issue is not clear-cut because *some* religious accommodations do not violate the Establishment Clause, despite imposing harms on others.[5]

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1. *See, e.g.*, Pauline W. Chen, M.D., *Putting Us All at Risk for Measles*, N.Y. TIMES (June 26, 2014), http://well.blogs.nytimes.com/2014/06/26/putting-us-all-at-risk-for-measles/?_r=0 (noting a major resurgence in measles in 2014 due to parents who chose not to vaccinate their children); Matthew F. Daley & Jason M. Glanz, *Straight Talk about Vaccination*, SCI. AM. (Sept. 1, 2011), http://www.scientificamerican.com/article/straight-talk-about-vaccination/ (stating that "the failure to vaccinate children endangers both the health of children themselves as well as others who would not be exposed to preventable illness if the community as a whole were better protected"); *see also* MARK NAVIN, VALUES AND VACCINE REFUSAL: HARD QUESTIONS IN ETHICS, EPISTEMOLOGY, AND HEALTH CARE 5, 197 (2016) (discussing the recent outbreaks of measles and other diseases in pockets of the United States, due in part to the increasing numbers of parents who refuse to vaccinate their children).

2. There is significant debate concerning whether parents who claim to have religious objections should be believed. *See infra* Part I.C.4. However, for both philosophical and practical reasons this Article assumes that such objections are genuine.

3. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ").

4. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2781 n.37 (2014) (discussing the continued importance of limiting the burdens of a religious accommodation on nonbeneficiaries); Christopher C. Lund, *Religious Exemptions, Third Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375 (2016); *see also infra* PART II (discussing the constitutionality of religious accommodations that lead to third party harms).

5. *See infra* PART II.B. As leading law and religion scholar Kent Greenawalt has stated, "[a]mong the most vexing questions . . . is when a legal measure that might otherwise be justified as an accommodation to free exercise is instead a forbidden establishment of religion." Kent Greenawalt, *Establishment Clause Limits on Free Exercise Accommodations*, 110 W. VA. L. REV. 343, 343 (2007).

The Supreme Court has never articulated a standard for determining when religious accommodations that impose harm on third parties are unconstitutional. Legal scholars have struggled with this question, which has come to the fore in debates concerning the Affordable Care Act's contraceptive mandate[6] and in the context of same-sex marriage.[7]

This Article contributes to that discussion in two important ways. First, it proposes a basic (though incomplete) approach to the broad constitutional question of when religious accommodations that impose third party harms violate the Establishment Clause. Second, it applies this test to the accommodation of religious objectors in the context of mandatory vaccination programs and concludes that the majority of states' religious accommodation regimes violate the Establishment Clause. Specifically, those states that limit accommodations to religious objectors violate the Establishment Clause, whereas those states that offer both religious accommodations and philosophical accommodations do not.[8] This Article thus contributes to scholarly debates concerning Establishment Clause doctrine and offers a practical foundation for challenging religious accommodations in the vaccination context in order to protect vulnerable children from contracting preventable diseases.

Part I reviews the scientific and legal landscape concerning mandatory vaccination programs. Part II introduces the judicial and scholarly debates concerning the Establishment Clause implications of religious accommodations that impose third party harms. Part III introduces, develops, and assesses a novel approach to the constitutional question. Finally, Part IV applies this approach to the vaccination context by analyzing the constitutionality of competing states' statutory regimes and considering ancillary issues attendant to a judicial challenge.

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6. *See, e.g.*, Frederick Mark Gedicks & Rebeca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014); Micah Schwartzman & Nelson Tebbe, *Obamacare and Religion and Arguing off the Wall*, SLATE (Nov. 26, 2013, 2:32 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/obamacare_birth_control_mandate_lawsuit_how_a_radical_argument_went_mainstream.html; *see also* Brief for Constitutional Law Scholars as Amici Curiae Supporting Hobby Lobby and Conestoga et al., Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354, 13-356); Brief for Amici Curiae Church-State Scholars Frederick M. Gedicks et al., Supporting the Government, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354, 13-356).

7. Barber v. Bryant, 193 F. Supp. 3d 677, 721–22 (S.D. Miss. 2016); Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389 (2010) (suggesting an alternative "middle-ground" postion to the argument surrounding a state's recognition of same-sex marriage); Jennifer C. Pizer, *Navigating the Minefield: Hobby Lobby and Religious Accommodation in the Age of Civil Rights*, 9 HARV. L. & POL'Y REV. 1 (2015) (discussing the change in analysis of religious liberty claims post the Hobby Lobby decision).

8. In using the term "philosophical accommodations," I mean any non-medical, non-religious exception or exemption that a state offers; *see also infra* Part I.B (explaining that different state statutes use different terms to describe such accommodations).

I. THE MANDATORY VACCINATION LANDSCAPE: SCIENCE, SOCIOLOGY, LAW, AND LEGAL SCHOLARSHIP

Vaccination saves tens of thousands of lives and billions of dollars each year.[9] Vaccines may stand as the single most significant and successful public health intervention in history.[10] It has prevented countless serious diseases.[11] Many life-threatening or debilitating diseases like diphtheria, hepatitis B, measles, meningitis, mumps, polio, rubella, tuberculosis, and yellow fever are now preventable and controlled due to widespread immunization, while others have been, or may one day be, entirely eradicated.[12] State laws that mandate vaccination of children prior to attending school have contributed to this achievement.[13]

This Part briefly explains how and why vaccines work so well and the dangers posed by non-vaccinators.[14] In addition, it describes

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9. NAVIN, *supra* note 1, at 6.

10. *Id.* (quoting *History of Vaccine Safety*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Feb. 8, 2011).

11. *See Immunization Facts and Figures: Nov. 2015 Update*, UNICEF (2015), http://www.unicef.org/immunization/files/Immunization_Facts_and_Figures_Nov_2015_update.pdf; *Measles Vaccination Has Saved an Estimated 17.1 Million Lives Since 2000*, WORLD HEALTH ORG. (2015) http://www.who.int/mediacentre/news/releases/2015/measles-vaccination/en/ (estimating that vaccination for measles have saved approximately 17.1 million lives since 2000); Fangjun Zhou et al., *Economic Evaluation of the Routine Childhood Immunization Program in the United States, 2009*, 33 PEDIATRICS 1, 5 (2014), http://pediatrics.aappublications.org/content/pediatrics/early/2014/02/25/peds.2013-0698.full.pdf (finding that routine childhood immunization among members of the 2009 US birth cohort will prevent approximately 42,000 early deaths and 20 million cases of disease).

12. *Why Are Childhood Vaccines so Important?*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/vaccines/vac-gen/howvpd.htm (last updated May 19, 2014). This is a miracle of modern medicine. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *Achievements in Public Health, 1900–1999: Control of Infectious Diseases* 621 (July 30, 1999), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm4829a1.htm; CTRS. FOR DISEASE CONTROL & PREVENTION, *Ten Great Public Health Achievements—United States, 1900–1999* 241 (Apr. 2, 1999), https://www.cdc.gov/mmwr/preview/mmwrhtml/00056796.htm; CTRS. FOR DISEASE CONTROL & PREVENTION, *Achievements in Public Health, 1900–99 Impact of Vaccines Universally Recommended for Children—United States, 1990–1998* 243 (Apr. 2, 1999), https://www.cdc.gov/mmwr/preview/mmwrhtml/00056803.htm. Smallpox has been successfully eradicated thanks to vaccine programs. Polio may be eradicated within a generation.

13. *See State Law & Vaccine Requirements*, NAT'L VACCINE INFO. CTR., http://www.nvic.org/vaccine-laws/state-vaccine-requirements.aspx (last visited Aug. 5, 2017).

14. Opinions differ as to how to characterize those who elect not to vaccinate their children. Some use the term *anti-vaxxers* (Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 592 (2016)) or refer to people as *anti-vaccine* (NAVIN, *supra* note 1, at 2. Non-vaccinators sometimes refer to themselves as *advocates of vaccine safety*. Other terms in use include *vaccine denialist* and *vaccine refuser*). In addition, those who elect not vaccinate their children follow a range of practices. Some *never* vaccinate their children. Others vaccinate against some diseases but not others. And still others may eventually allow their children to receive all required vaccines, but refuse to do so according to the schedule mandated by state law. *Id.* I use the term "non-vaccinator" (and its variants) as a catch-all term to describe all those who refuse to vaccinate their children according to the schedule generally mandated by state law. To be clear, this does not include those whose children are (1) exempt from vaccination mandates for medical reasons, *see infra* Part.I.B., and (2) not vaccinated due to a lack of ready access to healthcare rather than to a

mandatory vaccination laws, including the different state approaches to exemptions and accommodations. Finally, it reviews the scholarly literature concerning the constitutional implications of mandatory vaccination laws.

A. The Science and Data on Vaccination and Non-Vaccination

Vaccines work by introducing a benign pathogen, which teaches a person's immune system how to fight off a related, non-benign version of the disease.[15] This process is safe. Complications from mandatory vaccines are mild, and severe complications are almost non-existent.[16]

The concept of conferring immunity through exposure is hardly a new one. It was already known in antiquity that those who had recovered from certain diseases would develop immunity to them.[17] Thus, societies began actively cultivating immunity by exposing people to mild forms of potentially dangerous diseases.[18] By the late eighteenth and early nineteenth centuries, vaccines were developed from cowpox sores that could immunize recipients against smallpox without exposing them to even mild forms of the disease.[19] Today, more than two dozen vaccines against major diseases are available, and more are being developed.[20]

The efficacy of vaccines goes beyond their ability to immunize individuals. Once enough people in a community are immunized, the entire community benefits from what is known as "herd immunity."[21]

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conscious choice to avoid vaccination.

15. *Understanding How Vaccines Work*, Ctrs. for Disease Control and Prevention (2013), http://www.cdc.gov/vaccines/hcp/patient-ed/conversations/downloads/vacsafe-understand-color-office.pdf.

16. *Id.;* s*ee also MMR (Measles, Mumps, & Rubella) VIS*, Ctrs. for Disease Control and Prevention (May 17, 2007), www.cdc.gov/vaccines/hcp/vis/vis-statements/dtap/html; *Rotavirus VIS*, Ctrs. for Disease Control and Prevention (Aug. 26, 2013), www.cdc.gov/vaccines/hcp/vis/vis-statements/rotavirus.html. Although some people continue to express concerns that vaccines may cause autism spectrum disorders, these claims have been debunked by all available scientific evidence. Navin, *supra* note 1, at 6–7 (citing, among other sources, Gillian Baird et al., *Measles Vaccination and Antibody Response in Autism Spectrum Disorders*, 10 Archives of Disease in Childhood 832–837; Robert L. Davis et al., *Measles-Mumps-Rubella and Other Measles-Containing Vaccines Do Not Increase the Risk for Inflammatory Bowel Disease: A Case-Control Study from the Vaccine Safety Datalink Project*, 155 Archives of Pediatrics & Adolescent Med. 354 (2001)); *see also* Frank DeStefano, M.D. et al., *Increasing Exposure to Antibody-Stimulating Proteins and Polysaccharides in Vaccines Is Not Associated with Risk of Autism*, 163 J. Pediatrics 561 (2013) (finding that increasing exposure to vaccines during the first two years of life was not related to the risk of developing an autism spectrum disorder).

17. Navin, *supra* note 1, at 3.

18. *Id.*

19. *Id.* at 4.

20. *Id.*

21. *Id.* at 5 (explaining that "[i]f a sufficiently large percentage of the population develops individual immunity, then that population will possess 'herd immunity'"); *see also* Allan J. Jacobs, *Do Belief Exemptions to Compulsory Vaccination Programs Violate the Fourteenth Amendment?*, 42 U. Mem. L. Rev. 73, 79 (2011) (explaining that "[h]erd immunity occurs when the fraction of the

Herd immunity occurs when so many people in a group are immunized that the disease cannot reach any non-immunized individuals that remain.[22] Herd immunity is critical because there are always some in any society who cannot, or will not, be immunized. Some people cannot be vaccinated for medical reasons.[23] Others choose not to be vaccinated, either because of erroneous beliefs about the safety and efficacy of vaccines, or for religious and other belief based reasons.[24] Consequently, society depends on herd immunity to avoid breakouts of serious diseases.

Herd immunity is only achieved once a large proportion within a community is vaccinated. The vaccination rates necessary for conferring herd immunity differ by disease, with some requiring as much as ninety-five percent of the population to be vaccinated in order to be successful.[25] This presents classic collective action and related free-rider problems. For example, individuals can enjoy the benefits of herd immunity without having their own children immunized. For this reason, some may seek to avoid the cost, inconvenience, mild pain, and fear of vaccination by choosing not to vaccinate themselves or their children, and instead rely on herd immunity.[26] But if enough people opt out, then herd immunity in the community is threatened.

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people who are immune to a disease is so great as to interrupt transmission of that disease by removing most potential targets of infection from the chain of transmission."); Chemerinsky & Goodwin, *supra* note 14, at 600 (describing herd immunity as a critical portion of the population becoming vaccinated and thus creating little opportunity for an outbreak).

22. NAVIN, *supra* note 1, at 5.

23. For example, children cannot receive certain vaccines before reaching a certain age. *Id.*; *see also Recommended and Minimum Ages and Intervals Between Doses of Routinely Recommended Vaccines* CTRS. FOR DISEASE CONTROL & PREVENTION (2016), https://www.cdc.gov/vaccines/pubs/pinkbook/downloads/appendices/a/age-interval-table.pdf. Some people can never be immunized against some diseases. NAVIN, *supra* note 1, at 5; *see also Who Should NOT Get Vaccinated with these Vaccines?*, CTRS. FOR DISEASE CONTROL &PREVENTION, http://www.cdc.gov/vaccines/vpd-vac/should-not-vacc.htm (last updated May 8, 2017). Others can be vaccinated, but will not be effectively immunized. NAVIN, *supra* note 1, at 5 (noting the importance of herd immunity for the members of the community who cannot be immunized effectively either because they are too immunocompromised or because their vaccines failed to develop individual immunity); Jacobs, *supra* note 21, at 82 (explaining that some people who receive a vaccine cannot develop immunity to the disease; for example, "at least 10% of children fail to develop immunity to pertussis vaccine after the recommended three injections."). Still others will not be vaccinated because of a lack of medical care. NAVIN, *supra* note 1, at 2.

24. NAVIN, *supra* note 1, at 11 (noting that "Many parents [who refuse to vaccine] identify worries about health considerations, but a smaller number of parents refuse vaccines for religious or philosophical reasons.").

25. NAVIN, *supra* note 1, at 5; Chemerinsky & Goodwin, *supra* note 14, at 600 (citing PAUL A. OFFIT, DEADLY CHOICES: HOW THE ANTI-VACCINE MOVEMENT THREATENS US ALL 145 (rev. foreword 2015 ed. 2011) (stating that highly contagious infections like measles and pertussis require an immunization rate of about ninety-five percent)).

26. NAVIN, *supra* note 1, at 11 (writing that some parents choose not to vaccinate their children because "they know that the high rates of vaccination in their communities mean that their child is unlikely to be exposed to the diseases she is not vaccinated against."); Jacobs, *supra* note 21, at 79–80 (asserting that herd immunity allows some number of free riders to benefit from the vaccination of

States began to impose vaccination mandates in the nineteenth century in order to reduce the likelihood and magnitude of disease outbreaks.[27] In addition, by prohibiting or limiting opt-outs, vaccination requirements help eliminate the free-rider problem, which helps generate and maintain herd immunity. Although vaccination mandates have been exceptionally successful, causes for serious concern remain. The vast majority of states have opted to exempt some objectors from vaccination requirements,[28] and as a consequence, non-vaccination persists.[29] As Allan Jacobs notes,

> [i]n 2009, the proportion of teens who received a recommended booster of diphtheria-pertussis-tetanus vaccine ranged from 93.7% in Massachusetts to 52.7% in Arkansas and South Carolina. Worse, in 2008, the number of young children receiving even one dose of measles-mumps-rubella vaccine ranged from 95.6% in Tennessee to only 85.9% in Montana.[30]

As a consequence, herd immunity has been threatened in pockets around the country, and there have been outbreaks of serious diseases that should have long since been eradicated through vaccination, such as pertussis, measles, and polio.[31] Hundreds of children have died because

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others). Jennifer S. Rota et al., *Processes for Obtaining Nonmedical Exemptions to State Immunization Laws*, 91 AM. J. PUB. HEALTH 645 (2001) (stating that some find it easier as a practical matter not to vaccinate, knowing that their children are likely protected by herd immunity).

27. NAVIN, *supra* note 1, at 7 (stating that in the nineteenth century, some states made vaccines mandatory for children, especially for children who wished to attend school). All fifty states and the District of Columbia have vaccination laws for public school children. Chemerinsky & Goodwin, *supra* note 14, at 599 (citing *State School Immunization Requirements and Vaccine Exemption Laws*, CTRS. FOR DISEASE CONTROL AND PREVENTION (2015), http://www.cdc.gov/phlp/docs/school-vaccinations.pdf).

28. *See infra* PART.I.B.

29. Jacobs, *supra* note 21, at 81.

30. *Id.* (citing *Estimated Vaccination Coverage, with Selected Vaccines Among Adolescents Aged 13–17 Years, by State and Selected Local Areas—National Immunization Survey: Teen, United States, 2009*, CTRS. FOR DISEASE CONTROL & PREVENTION (2009), http://www2a.cdc.gov/nip/coverage/nisteen/nis_iap.asp?fmt=v&rpt=tab01_iap&qtr=Q1/2009-Q4/2009; *Estimated Vaccination Coverage with Individual Vaccines and Selected Vaccination Series Among Children 19–35 Months of Age by State and Local Area US, National Immunization Survey, Q1/2008–Q4/2008*, CTRS. FOR DISEASE CONTROL & PREVENTION (2008), http://www2a.cdc.gov/nip/coverage/nis/nis_iap2.asp?fmt=v&rpt=tab02_antigen_iap&qtr=Q1/2008-Q4/2008).

31. The decline of herd immunity has led to recent disease outbreaks, killing hundreds and hospitalizing thousands more. The United States has experienced outbreaks of pertussis, measles, and polio in recent years. Jacobs, *supra* note 21, at 80. According to one commentator, "[t]he rise of exemptions to compulsory vaccination laws threatens to undermine the public health achievements made possible by widespread immunizations." Chemerinsky & Goodwin, *supra* note 14, at 601 (quoting Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353, 421 (2004); *see also* Alexandra Sifferlin, *4 Diseases Making a Comeback Thanks to Anti-Vaxxers*, TIME (Mar. 17, 2014), http://time.com/27308/4-diseases-making-a-comeback-thanks-to-anti-vaxxers/ (citing nineteen cases of measles confirmed in New York City despite the fact that it was considered to be wiped out in 2000, twenty-three cases of mumps at Ohio State University, and eighty cases of chicken pox in Indiana which were thought to start from an unvaccinated child); Anthony Zurcher, *Measles Outbreak at Disney Raises Vaccination Questions*, BBC NEWS: ECHO CHAMBERS (Jan. 22, 2015),

of a small minority who refuse to vaccinate and the state laws that accommodate them.[32]

B. States' Mandatory Vaccination Programs, Accommodations, and Exemptions

All fifty states require children to be vaccinated against a range of diseases in order to attend school.[33] Most states have similar requirements for private school and day care attendance.[34] However, state laws also include provisions that allow for non-vaccination in some cases.

All fifty states allow children to remain unvaccinated if vaccination is contraindicated for medical reasons.[35] Typically, this exemption applies to children who are immuno-compromised or too sick to withstand vaccination.[36] The justification for this exemption is self-evident and uncontroversial: vaccines are mandated in order to protect a child's health; if vaccinating the child would compromise her health, it does not make any sense to do so.[37] Because they cannot be vaccinated, children who are unvaccinated for medical reasons must therefore depend on herd immunity.[38]

More controversially, forty-seven states also allow for non-vaccination for nonmedical reasons.[39] Of these, the majority—twenty-nine states—only accommodate those who object to vaccination for religious reasons.[40] The remaining states provide religious

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http://www.bbc.com/news/
blogs-echochambers-30942928 (reporting that public health experts attribute the spread of the measles outbreak at Disneyland in 2014 to the lower numbers of Americans who have been opting to receive the immunization shots); Saad B. Omer et al., Letter to the Editor, *Vaccination Policies and Rates of Exemption from Immunization, 2005–2011*, 367 New Eng. J. Med. 1170 (2012) (compiling data from the Centers for Disease Control and Prevention for school years 2005–2206 through 2010–2011).

32. *See* Chemerinsky & Goodwin, *supra* note 14, at 599–601 (arguing that compulsory vaccination laws are essential to prevent death and avoid needless suffering).

33. *Id.* at 596; Jacobs, *supra* note 21, at 74. States' requirements vary in the details, but mandatory vaccination laws typically require children to receive vaccinations against mumps, measles, rubella, polio, tetanus, diphtheria, pertussis, *Haemophilus Influenzae* Type b (Hib), hepatitis A, hepatitis B, rotavirus, varicella, and pneumococcal disease in order to attend public schools. Chemerinsky & Goodwin, *supra* note 14, at 598; *see also Vaccination Requirements*, Ctrs. for Disease Control & Prevention (July 21, 2011), http://www2a.cdc.gov/nip/schoolsurv/schImmRqmtReport.asp (listing the mandatory vaccines for every state in the United States).

34. Chemerinsky & Goodwin, *supra* note 14, at 598–99.

35. *Id.* at 597–98.

36. Navin, *supra* note 1, at 5.

37. *See id.* at 197.

38. *See infra* Part I.A.

39. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, Nat'l Conf. of St. Legislatures (Aug. 23, 2016), http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx.

40. *Id.*

accommodations as well as accommodations for those with moral, philosophical, or other personal objections to vaccination.[41] For the sake of brevity and consistency, I refer to the latter as "philosophical accommodations." Only three states—Mississippi, West Virginia, and California—offer medical exemptions but no other accommodations.[42]

Finally, state laws may provide that in the event of a local outbreak (or threat of outbreak) of a vaccine-preventable disease, children who are unvaccinated (for medical or other reasons) may be temporarily excluded from school.[43]

C. A Review of the Literature on the Constitutional Implications of Mandatory Vaccination Programs and Religious Accommodations

This is the first Article to comprehensively consider the constitutionality of religious accommodations for mandatory vaccination programs under the Establishment Clause. However, scholars and courts have considered several other constitutional questions concerning such programs, some of which have implications for the Establishment Clause questions. This Part briefly reviews this literature.

1. Mandatory Vaccination Programs Are Constitutional

The most basic constitutional question is whether states have the power to enact mandatory vaccination laws at all. That is, do people have a basic right to refuse to be vaccinated or to have their children vaccinated?

Courts have clearly and unanimously held that states do possess the power to impose vaccination mandates on parents and children alike.[44] This power stems from states' authority to maintain public health and safety.[45] The Supreme Court has twice upheld vaccination mandates for adults and children, in *Jacobson v. Massachusetts*[46] and *Zucht v. King*.[47]

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41. *Id.*

42. *Id.*

43. *See, e.g.*, Ga. Code. Ann. tit. 20, § 20–2–771(f) (2013) (directing that "[d]uring an epidemic or a threatened epidemic of any disease preventable by an immunization required by the Department of Public Health, children who have not been immunized may be excluded from the school or facility until (1) they are immunized . . . or (2) the epidemic or threat no longer constitutes a significant public health danger.").

44. *See* Chemerinsky & Goodwin, *supra* note 14, at 604–08.

45. *Id.* at 604 (citing Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905) (explaining that given the prevalence of smallpox in the city of Cambridge, "it cannot be adjudged that the present regulation of the board of health was not necessary in order to protect the public health and secure the public safety.")).

46. *Jacobsen*, 197 U.S. 11.

47. Zucht v. King, 260 U.S. 174 (1922).

Lower federal courts and state courts have followed suit.[48] The power of states to mandate vaccination is by now beyond serious dispute.

Although parents have a Fourteenth Amendment right to control their children's' upbringing,[49] that right is not absolute.[50] It does not trump the state's authority to impose vaccination mandates.[51] Mandatory vaccination laws meet strict scrutiny, and therefore defeat any due process claim. There is a compelling government interest—protecting the health and safety of those vaccinated, as well as that of those who cannot be vaccinated for medical reasons—and vaccination is the least restrictive means of achieving this compelling interest.[52]

2. *The Free Exercise Clause Does Not Give People the Right to Decline to Vaccinate for Religious Reasons*

Opponents of vaccination requirements sometimes argue that they have a constitutional right to opt out of vaccination mandates on religious grounds under the Free Exercise Clause.[53] They are mistaken.

Current Supreme Court doctrine provides that facially neutral, generally applicable laws are presumptively valid and do not run afoul of the Free Exercise Clause.[54] Otherwise, the law must pass strict scrutiny. Vaccination mandates are facially neutral because they apply to everyone equally, and they have not been gerrymandered to target people because of their religious beliefs.[55] Even if that were not the case,

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48. *See, e.g.*, Phillips v. City of New York, 775 F.3d 538, 542 (2d Cir. 2015) (rejecting plaintiffs' challenge to New York's mandatory vaccination law due to *Jacobson*'s clear finding that states have the police power to provide for compulsory vaccination based on the judgment of the state legislature); Wright v. DeWitt Sch. Dist. No. 1, 385 S.W.2d 644, 647 (Ark. 1965) (affirming the principle from *Jacobson* that legislatures are the proper forum to determine whether compulsory vaccinations are needed to protect the public health and safety).

49. *See* Troxel v. Granville, 530 U.S. 57 (2000); Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972).

50. "Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (upholding child labor laws despite parental objection).

51. Chemerinsky & Goodwin, *supra* note 14, at 606–07 (citing Workman v. Mingo Cty. Bd. of Educ., 419 F. App'x 348 (4th Cir. 2011); McCarthy v. Boozman, 212 F. Supp. 2d 945 (W.D. Ark. 2002); Wright v. DeWitt Sch. Dist. No. 1, 385 S.W.2d 644 (Ark. 1965)).

52. Chemerinsky & Goodwin, *supra* note 14, at 614.

53. *Id.* at 606 (citing *Workman*, 419 F. App'x 348 (upholding the constitutionality of a West Virginia law requiring that all school children be vaccinated with no exemption for religious reasons)).

54. Chemerinsky & Goodwin, *supra* note 14, at 609 (citing Emp't Div. v. Smith, 494 U.S. 872 (1990)).

55. *Cf.* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (finding that a city ordinance prohibiting the slaughter of animals violated the Free Exercise Clause where the facts showed that the law was intentionally designed to target the activities of a particular religious minority; further stating that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny").

a state law without religious accommodations would still meet strict scrutiny.[56]

Finally, the federal Religious Freedom Restoration Act,[57] which was designed to reverse *Employment Division v. Smith* and reinstate strict scrutiny for laws that interfere with religious practices,[58] has no bearing on this issue because it only applies to federal laws, and not to state laws like those that impose vaccination mandates.[59] To be sure, several states impose strict scrutiny as a result of having enacted their own Religious Freedom Restoration Acts or due to state constitutional requirements.[60] Even in these states, though, vaccination mandates that offer no religious accommodations would pass muster because they meet strict scrutiny.[61]

3. *Religious Accommodations in Vaccination Laws Are Unconstitutional When They Privilege "Recognized" Religious Groups Over Those With Non-Mainstream Religious Beliefs*

A different constitutional issue arises when states offer selective religious accommodations to members of "recognized" religions, but not to those who have idiosyncratic, non-"recognized," or non-mainstream religious beliefs.[62] Such religious accommodations violate the Establishment Clause because they extend state recognition and protection to believers with some religious beliefs and deny recognition and protection to believers with others.[63] In other words, they violate the

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56. *See* Chemerinsky & Goodwin, *supra* note 14, at 614.

57. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb (1993) (holding unconstitutional as applied to the states by City of Boerne v. Flores, 521 U.S. 507 (1997).

58. *Id.* at § 2000bb(b) (giving one of the purposes of the law as to restore the compelling interest test in all cases where free exercise is substantially burdened).

59. *Id.* at § 2000bb; *see also City of Boerne*, 521 U.S. at 507.

60. *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAS*, 55 S.D. L. REV. 466, 473–79 (2010).

61. Chemerinsky & Goodwin, *supra* note 14, at 606–07 (citing Wright v. DeWitt Sch. Dist. No. 1, 385 S.W.2d 644 (Ark. 1965)).

62. *See, e.g.*, Brown v. Stone, 378 So. 2d 218, 220 (Miss. 1979) (striking down as unconstitutional a statute that provided exemptions for "bona fide members of a recognized religious organization"); *see also* McCarthy v. Boozman, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) (striking down as unconstitutional a statute that only provided exemptions for "members or adherents of a church or religious denomination recognized by the State"); Boone v. Boozman, 217 F. Supp. 2d 938, 946 (E.D. Ark. 2002) (finding unconstitutional the provision of a statute which limited religious exemptions to practices of a "recognized church or religious denomination"); Sherr v. Northport-E. Northport Union Free Sch. Dist., 672 F. Supp. 81, 91 (E.D.N.Y. 1987) (finding unconstitutional the provision of a statute which limited religious exemptions to "bona fide members of a recognized religious institution"); Dalli v. Bd. of Educ., 267 N.E.2d 219 (Mass. 1971) (finding a statute unconstitutional because it limited religious exemptions to adherents and members "of a recognized church or religious denomination").

63. *See Dalli*, 267 N.E.2d at 223; *see also* ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013) (explaining that selective religious accommodations that discriminate among religions are unconstitutional).

Establishment Clause because they allow the government to approve of specific religious beliefs and to disapprove of others.[64]

Courts and scholars have struggled to define "religion" for accommodation purposes without running afoul of the Establishment Clause.[65] As one district court judge noted, "[d]efining 'religion' for legal purposes is an inherently tricky proposition. . . . [because it] brings the government exceedingly close to the involvement with ecclesiastical matters against which the First Amendment carefully guards."[66] At a minimum, the Supreme Court has held that "[t]he 'establishment of religion' clause of the First Amendment means . . . [that the government cannot] set up a church . . . [,] pass laws which aid one religion, aid all religions, or prefer one religion over another."[67] Moreover, in granting accommodations, laws violate the Establishment Clause if they privilege adherents of mainstream religious groups over non-mainstream religious believers.[68] Likewise, the State cannot "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[69]

Indeed, nearly every court faced with this question has held that religious accommodations in the vaccination context that are limited to certain "recognized" religions are unconstitutional.[70]

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64. *See, e.g.*, Alicia Novak, Note, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1111–15 (2005) (arguing that most religious exemptions violate the Establishment Clause because they require the excessive entanglement of the government in religious affairs).

65. *Id.; see, e.g.*, Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982); *Toward A Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1080 (1978); *see also Sherr*, 672 F. Supp. at 92 (noting that scholars and "courts have struggled to formulate workable definitions [of 'religion']").

66. *Sherr*, 672 F. Supp. at 92.

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

68. Welsh v. U.S., 398 U.S. 333, 356–57 (1970); *see also* Frazee v. Ill. Dept. of Emp't Sec., 489 U.S. 829 (1989) (holding that denial of employment compensation on the basis that Christian's refusal to work on Sundays was not based on the tenets of established religious sect was in contravention of Free Exercise Clause); Ben-Levi v. Brown, 136 S. Ct. 930, 932 (2016) (Alito, J., dissenting) (stressing that courts cannot examine whether claimants properly understand their own religions); Holt v. Hobbs, 135 S. Ct. 853, 862 (2015) (holding that religious protections exist whether or not specific beliefs are compelled by or central to a system of religious belief); Thomas v. Rev. Bd., 450 U.S. 707 (1981) (holding that a religious accommodation could not be denied on the grounds that a sincere religious believer held idiosyncratic religious beliefs that were not shared by co-religionists). Some have even suggested that non-transcendental beliefs are entitled to accommodations granted on the basis of religious belief. *See* U.S. v. Seeger, 380 U.S. 163 (1965) (offering a comparable analysis in a similar case to Welsh); Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901 (2010) (exploring the relationship between religious beliefs and beliefs of conscience).

69. Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

70. *Id.*; *see also* McCarthy v. Ozark Sch. Dist., 359 F.3d 1029 (8th Cir. 2004); Davis v. State, 451 A.2d 107 (Md. 1982). *But see* Kleid v. Bd. of Ed., 406 F. Supp. 902, 904 (W.D. Ky. 1976) (holding that an exception for "members of a nationally recognized and established church or religious denomination" did not violate the Establishment Clause). Interestingly, these courts have split as to the appropriate remedy. *Compare* Berg v. Glen Cove Sch. Dist., 853 F. Supp. 651, 655 (1994), *and*

In the end, the only constitutional basis for assessing the eligibility for a religious accommodation is to determine whether the person who claims to hold the belief is sincere.[71] Consequently, many states have adopted broad, rather than selective, religious accommodations.[72]

4. Assessing the Sincerity of Non-Vaccinators' Religiousness

Religious accommodation schemes invite challenges of a different sort when they seek to limit the "abuse" of religious accommodations by those whose objections are not rooted in genuine or sincere religious beliefs.[73] Some commentators charge that most people who claim religious exemptions do not possess sincere *religious* objections to vaccination, but simply have wrong-headed pseudo-scientific beliefs that lead them to question and reject the scientific and medical literature on the safety and efficacy of vaccines.[74] These people apply for religious accommodations not because their beliefs are genuinely religious, but rather because these accommodations offer their only opportunity to lawfully avoid vaccinating their children. In other words, non-vaccinators lie about the nature and source of their anti-vaccination views in order to become eligible for states' religious accommodations.[75]

Sherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81, 88–89 (1987) (both holding that the religious accommodation must be broadened to include those who do not belong to recognized religious groups), *with e.g.*, Boone v. Boozman, 217 F. Supp. 2d 938, 952 (E.D. Ark. 2002) (holding that the appropriate remedy is simply to "'sever' the religious exemption from the rest of the statute"); *Ozark Sch. Dist.*, 359 F.3d at 1037 (using the "ripeness doctrine" to determine when it would be appropriate for courts to address the validity of an exemption statute); McCarthy v. Boozman, 212 F. Supp. 2d 945, 947 (W.D. Ark. 2002) (holding that an unconstitutional religious exemption provision was severable from the remainder of the statute); Brown v. Stone, 378 So. 2d 218, 223 (Miss. 1979) (striking down the statutes entirely).

71. *Sherr*, 672 F. Supp. at 81; U.S. v. Ballard, 322 U.S. 78, 87 (1944); *see also* JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM (1998).

72. *See, e.g.*, M. Craig Smith, *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 (2005) (showing that the Arkansas legislature expanded its accommodation regime due to a judicial declaration of unconstitutionality); Novak, *supra* note 64, at 1114–15 (2005) (suggesting that "[t]he most simple" religious accommodation regime that most readily passes constitutional muster is a simple "form submission . . . [because it] requires no further evaluation beyond the applicant's own word.").

73. *See* Novak, *supra* note 64, at 1115, 1121, 1124–27, 1129 (using the term "abuse" to describe those who take advantage of broad religious accommodation regimes); *see also* Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551 (2014) (discussing the positions of various religions on vaccination).

74. NAVIN, *supra* note 1, ch. 2–3 (discussing the flawed systems of reasoning driving vaccine refusers' decisions not to vaccinate); *see also* Dan M. Kahan, *Climate-Science Communication and the* Measurement Problem, 36 ADVANCES IN POL. PSYCHOL. 1, 2 (June 25, 2014) (examining the split in cultural identity reasoning and collective-knowledge reasoning that leads to controversy over topics like climate change notwithstanding a scientific consensus).

75. *See* Betsy Woodruff, *Exemption Abuse*, SLATE (Feb. 11, 2015, 5:13 PM), http://www.slate.com/articles/health_and_science/medical_examiner/2015/02/unvaccinated_kindergartener_rates_states_need_to_tighten_religious_and_philosophical.html; NAVIN, *supra* note 1, at 105, 207 (citing Reiss, *supra*

Proponents of this charge point to the paucity of organized religious theologies that reject vaccination, as well as to some non-vaccinators' self-assessments concerning their true motivations.[76] The practical upshot of these arguments is that states should reject most applicants for religious accommodations as insincere or eliminate religious accommodations altogether.[77] For example, Dorit Reiss argues against offering religious accommodations at all, because "the majority of those taking advantage of [such accommodations do so] for reasons other than religion."[78]

There are several related problems—philosophical, constitutional, and practical—with this approach. First, from a philosophical standpoint, Navin and others maintain that the objections of many parents who object to vaccination *are* properly characterized as religious objections.[79] Navin suggests that some non-vaccinators are motivated by an "ethics of purity" that encompasses both physical and spiritual purity and that informs their life choices well beyond the vaccination context.[80] The ethics of purity are similar in kind to (and may even draw on) religious, spiritual, and transcendental beliefs; and the actions motivated by these beliefs likewise parallel the kinds of choices made by religious believers regarding diet, child-rearing, lifestyle, and personal identity.[81] Regardless of whether such objections are religious in the familiar sense, they share critical core characteristics of classical religious beliefs and should fall within the same category.

Second, constitutional doctrine may imply that such beliefs are to be treated as religious. As noted *previously*, the state cannot limit religious accommodations to "recognized" religions without running afoul of the

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note 73 (discussing in great detail the evidence that substantial numbers of persons who claim religious exemptions to vaccines are lying and are not doing so for religious reasons)); Linda E. LeFever, Note, *Religious Exemptions from School Immunization: A Sincere Belief or a Legal Loophole?*, 110 PENN. ST. L. REV. 1047, 1048 n. 7 (2006) (citing Donald G. McNeil, Jr., *Worship Optional: Joining a Church to Evade Vaccine*, N.Y. TIMES (Jan. 14, 2003), http://www.nytimes.com/2003/01/14/science/worship-optional-joining-a-church-to-avoid-vaccines.html) (stating that some parents claim religious exemptions "regardless of whether their objection to vaccination is legitimately grounded in a religious belief.").

76. *See* LeFever, *supra* note 75, at 1048; Miriam Krule, *Why Is There a Religious Exemption for Vaccinations?*, SLATE (Feb. 5, 2015, 3:23 PM), http://www.slate.com/articles/health_and_science/medical_examiner/2015/02/religious_exemption_for_vaccines_christian_scientists_catholics_and_dutch.html; NAVIN, *supra* note 1, at 105, 207 (citing Reiss, *supra* note 73).

77. Reiss, *supra* note 73, at 1557.

78. *Id.*

79. MARK NAVIN, *Prioritizing Religion in Vaccine Exemption Policies*, Paper Prepared for Bowling Green Workshop in Applied Ethics and Pub. Pol'y: "The Scope of Religious Exemptions" (Apr. 17–18, 2015) (manuscript at 4–7), https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and sciences/philosophy/documents/conferences/2015%20Religious%20Exemptions/Navin.pdf. [hereinafter NAVIN, *Prioritizing Religion*]; NAVIN, *supra* note 1, ch. 3 & 6.

80. NAVIN, *Prioritizing Religion*, *supra* note 79, at 6.

81. NAVIN, *supra* note 1, ch. 3 & 6; Navin, *Prioritizing Religion*, *supra* note 79, at 6.

Establishment Clause.[82] Consequently, courts have adopted a broad and vague definition of what constitutes religion.[83] The necessarily broad *legal* definition of religion is arguably capacious enough to include many non-vaccinators who claim the religious accommodation, even if a more conventional, narrower conception is not.

Third, as a result of the broad and vague definition of religion in American Constitutional law, it is difficult as a practical matter to reject an accommodation for reasons of insincerity.[84] Even if non-vaccinators who claim the religious accommodation could be excluded from religious accommodation schemes in theory, doing so is unrealistic as a practical matter. States cannot easily distinguish sincere claims of religious objection from insincere invocations of religion.[85] After all, if religious beliefs can be personal and idiosyncratic, who can say that any particular person seeking a religious accommodation is lying or insincere, and on what basis?

Perhaps due to the difficulty and costs associated with seriously testing sincerity, states that offer religious accommodation typically do not attempt to do so; and although it is not unheard of,[86] there does not appear to be many rejections of requested accommodations on sincerity grounds. At the very least, a case-by-case approach to assessing sincerity would be cost prohibitive;[87] and rejecting an applicant on the grounds of insincerity would, in turn, invite a costly lawsuit with an uncertain outcome. As one public health expert put it, "[a] lot of states call their exemptions religious, but anyone who wants it, gets it."[88]

Thus, for philosophical, constitutional, and practical reasons, states accept religious accommodations claims as sincere. To be clear, this does not argue in favor of providing a religious accommodation at all. Rather,

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82. *See supra* notes 69–77 and accompanying text.

83. NAVIN, *Prioritizing Religion*, *supra* note 79, at 4–5 (showing the breadth and vagueness of courts' definitions of religion for the purpose of religious objections, such as the U.S. Supreme Court's use of the idea "that a religious objection emerges from convictions that are part of a person's 'ultimate concerns'" and Oregon's broader understanding of religion as "'any system of beliefs, practices, or ethical values'") (citing U.S. v. Seeger, 380 U.S. 163 (1965) and Douglas S. Diekema, *Personal Belief Exemptions From School Vaccination Requirements*, 35 ANNUAL REV. OF PUB. HEALTH 275, 285 (2014)).

84. NAVIN, *Prioritizing Religion*, *supra* note 79, at 5.

85. *Id.* (postulating that "[w]hether someone's objection is sincere is an attribute of their inner life that is generally opaque to the law.").

86. *See, e.g.*, John Marzulli, *Staten Island Father Sues Over Pre-K Vaccine Requirements*, N.Y. DAILY NEWS (Jan. 3, 2014, 12:00 PM), http://www.nydailynews.com/new-york/education/s-father-sues-pre-k-vaccine-requirements-article-1.1564952 (profiling father whose request for a religious exemption was rejected where the city concluded that the father, a Catholic, did not "hold genuine and sincere religious beliefs which are contrary to immunization").

87. NAVIN, *Prioritizing Religion*, *supra* note 79, at 5.

88. McNeil Jr., *supra* note 75 (quoting Daniel A. Salmon, an expert on vaccinations from Johns Hopkins University School of Public Health).

it is contingent: if a state chooses to offer religious accommodations, it must offer them broadly and inclusively.

5. *Do Religious Accommodations Violate the Fourteenth Amendment?*

Finally, at least one state court has held that religious accommodations (and belief accommodations more broadly) violate the Equal Protection Clause of the Fourteenth Amendment.[89] One scholar has argued that such accommodations violate the Fourteenth Amendment's Due Process Clause as well.[90]

The Mississippi Supreme Court struck down a religious accommodation to mandatory vaccination on Equal Protection grounds because it "require[d] the great body of school children to be vaccinated and at the same time expose[d] them to the hazard of associating in school with children exempted under the religious [accommodation] who had not been immunized as required by the statute."[91] As Allan Jacobs explains, under this theory, vaccination schemes that accommodate religious objectors run afoul of the Equal Protection Clause because they give non-vaccinators a free ride on the herd immunity generated by those who are not eligible for the accommodation and impose serious risks on people who cannot be vaccinated for medical reasons.[92] It appears that no other court has adopted this argument.

Jacobs proposes an alternative Fourteenth Amendment challenge to belief accommodations, this one rooted in Due Process rather than Equal Protection. Under his theory, because school attendance is itself compulsory, by creating an unnecessary risk of contracting a serious disease, religious and other belief accommodations "violate[] the right of children to enjoy the safest possible school environment."[93] That is, Due Process prohibits a state from "compel[ling] children to be exposed to unnecessary danger by requiring them to congregate in schools and expos[ing] them to an increased risk of infection."[94] This approach has yet to be tested or vindicated in the courts.

II. Religious Accommodations and Third Party Harms

Federal and state laws privilege religious individuals and groups in a variety of ways.[95] These privileges are embedded in federal and state

89. Brown v. Stone, 378 So. 2d 218, 223 (Miss. 1979).
90. Jacobs, *supra* note 21, at 74.
91. *Brown*, 378 So. 2d at 223.
92. Jacobs, *supra* note 21, at 79–80.
93. *Id.* at 102.
94. *Id.*
95. *See* Hillel Y. Levin, *Rethinking Religious Minorities' Political Power*, 48 U.C.D. L. Rev. 1617 (2015) (discussing the significant political power of religious minorities to shape and influence laws).

constitutions, statutes, and regulations.[96] Among the advantages enjoyed by religious practitioners are accommodations, exceptions, and exemptions from generally applicable laws that grant them dispensation from obligations and prohibitions that apply to others.[97] As a general matter, such dispensations are benign and constitutionally permissible, even if not constitutionally mandated. However, religious accommodations that impose harm on non-consenting third parties present serious constitutional questions under the Establishment Clause.

Religious accommodations that allow some parents to decline to vaccinate their children present this problem, for three reasons. First, they allow parents to expose their own children to the risk of contracting life-threatening illnesses. Second, they threaten herd immunity and thus subject those who cannot be vaccinated[98] to the risks of disease exposure.[99] Third, in an attempt to mitigate these risks, some laws that provide religious accommodations also exclude unvaccinated children from schools during or in anticipation of disease outbreaks.[100] This denies these children their right to education, a right enshrined in every state's constitution.[101]

Unfortunately, courts and scholars have not provided a systematic approach or test for determining whether a particular religious accommodation that imposes third party harms violates the Establishment Clause. This Part reviews the doctrine and scholarship concerning religious accommodations, the problem of third party harms, and the limits of extant approaches.

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96. *Id.*

97. *Id.*

98. Those who cannot be vaccinated include children who are immuno-compromised, those who have not reached the necessary age for vaccination, and those who have been vaccinated but for who immunity has not developed. *See supra* notes 25–27 and accompanying text.

99. *See supra* Part I.A (explaining that for a vaccine to effectively immunize a community or a school body from a particular disease, a critical percentage of the community must be immunized—a concept known as "herd immunity"—or those who were not vaccinated remain at risk for that disease).

100. *See* GA. CODE. ANN. tit. 20, § 20–2–771(f) (2013).

101. Robyn K. Bitner, Note, *Exiled from Education*, 101 VA. L. REV. 763, 779 (2015) (noting that every state constitution guarantees some form of free public education, and many of offer students a fundamental right to education). The Supreme Court's treatment of education suggests there may also be some federal right to educational opportunities. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (holding that since education is "the very foundation of good citizenship . . . the opportunity of an education . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms"); Plyler v. Doe, 457 U.S. 202, 221 (1982) (noting the importance of education in allowing individuals to participate freely in society and the grave harms inflicted on children excluded from public education).

A. Constitutionally Mandated and Constitutionally Permitted Religious Accommodations: A Primer

Before the Supreme Court's decision in *Employment Division v. Smith*, routine religious accommodations were held to be constitutionally mandated by the Free Exercise Clause[102] whenever a law interfered with a religious practice, unless the law met strict scrutiny.[103] Of course, if an accommodation is mandated by the Free Exercise Clause it cannot also violate the Establishment Clause. In *Employment Division v. Smith*, however, the Supreme Court held that most neutral and generally applicable laws that incidentally interfere with religious practices do not violate the Free Exercise Clause and are presumptively valid.[104] Today, then, religious accommodations are typically not required by the Constitution, and are instead a matter of legislative and administrative judgment and choice.

Even after *Smith*, the Free Exercise Clause continues to mandate some protections for religious groups. First, laws that explicitly or implicitly discriminate against religious practitioners are unconstitutional because they are not neutral and generally applicable.[105] For example, in *Church of Lukumi Babalu Aye v. City of Hialeah*, the Supreme Court struck down an arguably facially neutral ordinance against animal sacrifice because it was directed at, and only applied to, adherents of Santería.[106] Citizens were free to kill animals for reasons other than ceremonial sacrifice, and the record was rife with evidence of animus towards practitioners of Santería.[107] Likewise, in *Tenafly Eruv Association., Inc. v. Borough of Tenafly*, the Third Circuit held that because a town only enforced a facially neutral ordinance against a religious group, it violated the Free Exercise Clause.[108] Since the town

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102. U.S. Const. amend. I, cl. 2 (stating "Congress shall make no law . . . prohibiting the free exercise [of religion]").

103. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (requiring the state to provide a "compelling interest" to justify withholding unemployment benefits from Sherbert, a member of the Seventh-day Adventist Church, for refusing to accept otherwise suitable work that did not allow him to abstain from working on Saturday to observe the Sabbath); Levin, *supra* note 95, at 1620 n.9 (discussing the Court's application of strict scrutiny to laws that interfered with religious practice for several decades); Laura A. Colombell, Note, *Retracting First Amendment Jurisprudence Under the Free Exercise Clause: Culmination in* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah *and Resolution in the Religious Freedom Restoration Act*, 27 U. Rich. L. Rev. 1127, 1133–35 (1993) (discussing the use of the strict scrutiny standard in free exercise cases beginning with *Sherbert*).

104. Emp't Div. v. Smith, 494 U.S. 872, 885–90 (1990); *see also* Levin, *supra* note 95, at 1620 n.9 (discussing the holding of *Smith* and its progeny); Kenneth Marin, Employment Division v. Smith: *The Supreme Court Alters the State of Free Exercise Doctrine*, 40 Am. U. L. Rev. 1431 (1991) (discussing the immediate impact of *Smith*'s holding on neutral laws of general applicability).

105. *Smith*, 494 U.S. at 890.

106. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534–42 (1993).

107. *Id.*

108. Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002); *see also* Levin, *supra* note 95, at 1631–35 (discussing *Borough of Tenafly* in detail).

accommodated nonreligious groups by declining to enforce the ordinance against them, it had to accommodate the religious group as well.[109]

Scholars and courts contest the reach and application of the *Lukumi* principle.[110] At the very least, it provides that state actors may not decline to accommodate religious groups due to discriminatory animus.[111] At most, religious practitioners are entitled to any accommodations that are offered to nonreligious individuals and groups.[112]

Religious institutions are also constitutionally entitled to another kind of accommodation: they benefit from a "ministerial exception," which excuses them from anti-discrimination laws in matters concerning the employment of ministers.[113] In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, the Court held that the Free Exercise Clause prohibits the government from interfering with religious institutions' ability to hire their preferred ministers.[114] Although the Court left open the questions of who qualifies as a "minister" and how far the exception applies, the upshot is that religious institutions enjoy at least some kind of constitutionally-mandated exception from generally applicable non-discrimination laws.[115]

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109. *Tenafly Eruv Ass'n, Inc.*, 309 F.3d 144, at 167–68.

110. *See, e.g.*, Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 200–13 (2004) (arguing that *Lukumi* should be applied broadly as an exception to Smith); James M. Oleske, Jr., Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 301 (2013) (arguing for a much narrower construction of *Lukumi* and its progeny); Mark L. Rienzi, Smith, Stormans, *and the Future of Free Exercise: Applying the Free Exercise Clause to Targeted Laws of General Applicability*, 10 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 143 (2009); Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions From* Smith, 75 N.Y.U. L. REV. 1045 (2000); Brief for Constitutional Law Professors as Amici Curiae Supporting Appellees, Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009) (Nos. 12-35221, 12-35223), 2012 WL 5915342.

111. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2007); Rienzi, *supra* note 110, at 143 (arguing that "except for rare cases of clear religious discrimination or animus, virtually all laws challenged on federal free exercise grounds are found to be 'neutral and generally applicable'"); Oleske, Jr., *supra* note 110, at 340 (stating that "[i]n cases involving classifications that raise no special danger of animus, the Court applies deferential rational basis review.").

112. *See* Laycock, *supra* note 110, at 243–45 (advocating for tight limits on government discretion and exemptions wherever possible for religious practices); *see also* Oleske, Jr., *supra* note 110.

113. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694, 696 (2012).

114. *Id.* at 706.

115. *Id.* (declining to adopt a rigid formula for deciding when an employee is a minister and instead basing its decision that the employee at issue was a minister because the church gave the employee a distinct role from other church members, gave the employee the title of "Minister of Religion, Commissioned," and provided for period review of her "skills of ministry" and "ministerial responsibilities"); *see also* Herx v. Diocese of Ft. Wayne-South Bend Inc., 48 F. Supp. 3d 1168, 1177 (N.D. Ind. 2014) (finding that a language arts teacher at a Catholic junior high school was not a minister where she was considered by the principal to be a "lay teacher" and never had any religious training to be a teacher at the school); Conlon v. Intervarsity Christian Fellowship, 777 F.3d 829,

Still, because of *Smith*, the vast majority of laws may constitutionally apply to religious groups, even if they interfere with and limit religious practices.[116] However, both before and since *Smith*,[117] federal and state legislatures and agencies have exempted religious practitioners from many generally applicable laws that would otherwise restrict them.[118] Religious accommodations in the mandatory vaccination context are but one example. Thousands of other accommodations have been included in statutes and regulations governing taxation, medical services, child care, drug policy, land use, copyright, food preparation, discrimination, military service, immigration, environmental protection, employment, education, dress codes, social security, and more.[119] The Religious Freedom Restoration Act ("RFRA")[120] and the Religious Land Use and Institutionalized Persons Act ("RLUIPA")[121] generalize the principle of religious accommodation throughout federal law and in a variety of state law contexts.[122]

Many of these religious accommodations do not impose harms on others. For instance, few would argue that allowing a religious Jewish member of the military to wear a small yarmulke while stationed on a military base harms anyone.[123] Similarly, there are no apparent costs borne by third parties if religious believers alone are permitted to partake of hoasca tea.[124] However, some legislative and administrative

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834–35 (6th Cir. 2015) (finding that a spiritual director for evangelical campus mission was a minister despite having no title as a minister where the spiritual director's title reflected her religious training and where she served a religious function for her church).

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

117. Levin, *supra* note 95, at 1647–51 (discussing the phenomenon of legislative accommodations of religion, of which there are thousands that pre-existed *Smith*, including for the preparation of food in accordance with religious practices and exemptions in tax laws for religious groups and organizations) (citing James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445–46 (1992)).

118. To be sure, a strong case can be made that legislatures were always more accommodating of religious practices than the Constitution required—even under the putative strict scrutiny regime in place prior to *Smith.* Levin, *supra* note 95, at 1647–51. Nevertheless, as a doctrinal matter, it is fair to say that the Court in *Smith* reduced the constitutional protections afforded to religious practices under the Free Exercise Clause. *Id.* at 1671.

119. *See* Levin, *supra* note 95; Ryan, *supra* note 117.

120. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb (1993) (held unconstitutional as applied to the states by City of Boerne v. Flores, 521 U.S. 507 (1997).

121. Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (2000).

122. *See* Levin, *supra* note 95, at 1645 (discussing the sweeping impact of RFRA and RLUIPA); *see also* Gedicks & Van Tassell, *supra* note 6; Greenawalt, *Establishment Clause Limits*, *supra* note 5.

123. 10 U.S.C. § 774 (2012) (expressly overturning a Supreme Court decision that permitted the military to prohibit a Jewish member of the military from wearing a small yarmulke while stationed on a military base).

124. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006); Greenawalt, *Establishment Clause Limits, supra* note 5, at 344; Frederick M. Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 56 (2014).

religious accommodations *do* harm third parties, and these raise complex constitutional questions.

B. Some Religious Accommodations That Impose Third Party Harms Are Prohibited by the Establishment Clause: A Line-Drawing Problem

Legal scholars, led by Gedicks and Van Tassell,[125] as well as Schwartzman, Schragger, and Nelson,[126] have recently begun considering in earnest the constitutionality of religious accommodations that impose harms on third parties under the Establishment Clause. They have traced a line of Supreme Court cases that stand for the proposition that the Establishment Clause indeed prohibits at least some kinds of religious accommodations that impose third party harms.

To understand why accommodations that impose third party harms potentially violate the Establishment Clause, consider a simple hypothetical. A state legislature adopts a law prohibiting murder. However, in order to accommodate the unique needs of a local religious group, the law permits the group to kill one unsuspecting and non-consenting person each year in order to appease the group's deity. By doing so, the state hands power over a non-assenting citizen's life to a religious group, to do with as their religious beliefs dictate.[127] According to the great legal philosopher H.L.A. Hart, in being granted this right, the religious group is given sovereign authority by the state[128]—precisely what the Establishment Clause is meant to prevent. Thus, as Gediks and Van Tassell explain, "accommodations that require [third parties] to bear the costs of someone else's religious practices constitute a classic Establishment Clause violation. Like the prototypical established church, [such] accommodations grant a privilege to those who engage in the accommodated practice at the expense of [those] who do not."[129]

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125. The leading article here is Gedicks & Van Tassell, *supra* note 6.

126. *See, e.g.*, Nelson Tebbe, Religious Freedom in an Egalitarian Age, Chapter 3 (2017) (addressing the issue at length); Tebbe, Schwartzman, & Schragger, "How May Religious Accommodations Burden Others?," in *Law, Religion, and Health in the United States* (Cambridge University Press, 2017 forthcoming); Schwartzman & Tebbe, *supra* note 6; *see also* Brief for Constitutional Law Scholars, Burwell v. Hobby Lobby, *supra* note 6; Brief for Amici Curiae Church-State Scholars, Burwell v. Hobby Lobby, *supra* note 6.

127. Gedicks & Koppelman, *supra* note 124, at 61 (stating that if third party harms did not violate the Establishment Clause, "then it would be permissible for the state to exempt Aztecs from homicide laws.").

128. H.L.A. Hart famously opined that having a right is "being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct governed by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed." H.L.A. Hart, *Legal Rights*, *in* Essays on Bentham: Jurisprudence and Political Theory 162, 163 (1982).

129. Gedicks & Van Tassell, *supra* note 6, at 363; *see also* Tebbe, *supra* note 126, at 52–54 (further explaining the constitutional problem with such accommodations).

In *Estate of Thornton v. Caldor, Inc.*, the Supreme Court considered the constitutionality of a law that required employers to allow observing employees observers to take a day off in order to observe their Sabbath.[130] Applying the Establishment Clause, the Court struck down this religious accommodation because it imposed harms on nonreligious third parties: the "employers [who] had to carry the costs of workers taking their Sabbath off, [and] other workers who had to work on days they would have preferred to be home."[131] As the Court stated, the Establishment Clause "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."[132] The Supreme Court thus articulated a "no third party harms" principle: religious accommodations that impose costs and harms on third parties violate the Establishment Clause.[133]

In *Cutter v. Wilkinson*, the Court reaffirmed the "no third party harms" principle.[134] In upholding the constitutionality of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the Court stipulated that if a specific religious accommodation imposed a third party harm, then it would be prohibited.[135] In other words, the Court held

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130. Thornton v. Caldor, Inc. 472 U.S. 703 (1985).

131. Greenawalt, *Establishment Clause Limits*, *supra* note 5, at 354; *see also* Gedicks & Van Tasell, *supra* note 6, at 357–58 ("By giving employees an unqualified right not to work on their chosen Sabbath, the statute 'externalized' the cost of accommodating Sabbath observance from the Sabbath-observing employees onto employers and other employees who did not observe a Sabbath.").

132. *Thornton*, 472 U.S. at 710 (quoting Otten v. Baltimore & Ohio R.R. Co., 205 F.2d 58, 61 (2d Cir. 1953)).

133. Greenawalt, *Establishment Clause Limits*, *supra* note 5, at 353 (noting that whether "others have to bear the cost of the privilege" a religious accommodation grants "can make a crucial difference for whether the accommodation is constitutional"); Gedicks & Koppelman, *supra* note 124, at 54 ("The Establishment Clause generally prohibits the government from shifting the costs of accommodating a religion from those who practice it to those who do not."); Gedicks & Van Tassell, *supra* note 6, at 349 (stating that the Supreme Court "condemns permissive accommodations on Establishment Clause grounds when the accommodations impose significant burdens on third parties who do not believe or participate in the accommodated practice"); Kara Lowentheil, *Where Free Exercise Is A Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 DRAKE L. REV. 433 (2014) (proposing a principled way of evaluating the burdens of religious accommodations on third parties using existing doctrines); *see also* Oversight of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act: Hearing Before the Subcomm. On the Constitution and Civil Justice, of the H. Comm. on the Judiciary, 114th Cong. (2015) (testimony of Nelson Tebbe, Professor of Law, Brooklyn Law School), https://judiciary.house.gov/wp-content/uploads/2016/02/114-9_93282.pdf; Reply Brief for the Petitioners, Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 975500 at *2 (stating that "when a party seeks a religious exemption from a neutral law, the potential impact on third parties is at the very core of the analysis") (citing United States v. Lee, 455 U.S. 252 (1982)).

134. Cutter v. Wilkinson, 544 U.S. 709, 720 (2004) (stating that "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . ."); *see also* Brief for Amici Curiae Church-State Scholars, Burwell v. Hobby Lobby, *supra* note 6, at *5 (citing *Cutter* as authority that the Establishment Clause prohibits shifting costs for the accommodation of religious beliefs to third party);

135. *Cutter*, 544 U.S. at 720; RLUIPA, 42 U.S.C. § 2000cc (2000).

that RLUIPA is only constitutional where a requested accommodation does not impose third party harms; otherwise, it would violate the Establishment Clause.[136]

The Court again reaffirmed this principle in its recent decision in the high-profile *Hobby Lobby* case.[137] There, the Court interpreted RFRA to exempt the Hobby Lobby corporation from the so-called contraceptive mandate, which imposed an obligation on employers to provide free coverage for women's contraception for its employees as part of their health insurance plans.[138] Although the Court held in favor of the religious accommodation at issue, the majority noted that "[i]t is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'"[139] Justice Kennedy amplified this point in his concurrence, stating that religious accommodations may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."[140] Although these references to the "no third party harms" principle do not explicitly cite the Religion Clauses, there are no other constitutional sources that would support these statements.[141] Thus, as Tebbe has explained, the *Hobby Lobby* decision "reaffirmed the rule against third party harms in its decision—a majority of justices, and maybe *every* justice, signed on to that core idea."[142]

If this "no third party harms" principle was ironclad, then the issue of religious accommodations in the mandatory vaccination context would be open-and-shut: such accommodations would violate the

136. *Cutter*, 544 U.S. at 722 (relying on the Court's previous holding that a Connecticut law that awarded Sabbath observers with an absolute and unqualified right not to work on their designated Sabbath day was "invalid under the Establishment Clause because it 'unyielding[ly] weigh[ted]' the interests of Sabbatarians 'over all other interests'") (citing Estate of Thornton v. Caldor, 472 U.S. 703, 710 (1985)).

137. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014); Barber v. Bryant, 193 F. Supp. 3d. 677, 721–22 (S.D. Miss. 2016).

138. *Hobby Lobby*, 134 S. Ct. at 2759.

139. *Id.* at 2781 n. 37 (quoting *Cutter*, 544 U.S. at 720); *Bryant*, 193 F. Supp. 3d. at 721–22.

140. *Hobby Lobby*, 134 S. Ct. at 2787 (Kennedy, J., concurring).

141. To be sure, some have argued against the existence of this principle. Brief for Constitutional Law Scholars, Burwell v. Hobby Lobby, *supra* note 6; *see also* Kevin C. Walsh, *Did Justice Ginsburg Endorse the Establishment Clause Third-Party Burdens Argument in* Holt v. Hobbs*?*, MIRROR OF JUSTICE (Jan. 21, 2015), http://mirrorofjustice.blogs.com/mirrorofjustice/2015/01/did-justice-ginsburg-endorse-the-establishment-clause-third-party-burdens-argument-in-holt-v-hobbs-.html ("I agree with Rick and Marc in rejecting the existence of a general rule that the Establishment Clause prohibits RFRA- or RLUIPA-required accommodations that impose third-party burdens . . . ."). However, given the Court's statement in *Hobby Lobby* and its decision in *Estate of Thornton*, it is difficult to credit these views. It is certainly possible to disagree as to the scope and reach of the "no third-party-harms" principle. Indeed, as I discuss *infra*, the Court has offered no clear guidance, and scholars are hardly in agreement as to its scope and reach. But *that* the principle exists seems by now beyond doubt. *Bryant*, 193 F. Supp. 3d at 721–22.

142. TEBBE, *supra* note 126, at 51 (emphasis in original).

Establishment Clause because they obviously impose costs and harms on third parties, namely.[143] However, this principle is not ironclad. The Supreme Court has sometimes upheld religious accommodations even when they do impose third party costs and harms.

For example, the federal government exempts people whose religious beliefs forbid military service from mandatory military service.[144] This accommodation still exists in the law, and the Supreme Court has upheld it.[145] Yet it clearly exposes third parties to harm. If one person is excused from mandatory military service, another will be required to serve in his place.[146]

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143. The children of those parents who claim the religious accommodation and the children of other parents are both put at risk due to the erosion of herd immunity. *See supra* notes 33—39 and accompanying text.

144. Timothy G. Todd, *Religious and Conscientious Objection*, 21 STAN. L. REV. 1734, 1734 (1969) (citing the 1917 Draft Act, which exempted from combat service "member[s] of any well-recognized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form.").

145. *See* Military Selective Service Act, 50 U.S.C. § 3806(j) (2014); United States v. Seeger, 380 U.S. 163, 187 (1964) (upholding as constitutional an exemption from military training and service for conscientious objectors that required "belief in relation to a Supreme Being" and interpreting the exemption to include beliefs in "creative intelligence" and the "tremendous spiritual price man must pay for his willingness to destroy human life"); Welsh v. United States, 398 U.S. 333, 343 (1969) (finding that statements that the taking of a life is morally wrong along with beliefs held "with strength of more traditional religious convictions" established plaintiff's right to a conscientious objector exemption). *Cf.* JAMES W. TOLLEFSON, THE STRENGTH NOT TO FIGHT 6 (1993) (noting that 170,000 Vietnam draftees received conscientious objector deferments).

146. *See* BRIAN LEITER, WHY TOLERATE RELIGION? 99 (2012) ("[i]f those with claims of conscience against military duty are exempted from service, then the burden (and all the very serious risks) will fall upon those who either have no conscientious objection or cannot successfully establish their conscientious claim."). Some have claimed that this accommodation should be treated differently than others that impose third party harms. For example, Tebbe proposes that "accommodating [religious] objectors does not shift demonstrable harm to other draftees." TEBBE, *supra* note 126 at 58; *see also* Gedicks & Koppelman, *supra* note 124, at 57 (stating that, in the context of the religious pacifist exemption, "[a]though whoever was drafted in place of the objectors faced the consequence of going to war, the pre-existing probability of those persons' being drafted was not significantly increased by the exemption"); Gedicks & Van Tassell, *supra* note 6, at 367 n. 114 (stating that the authors disagree with other scholars who have asserted "that draft exemptions impose serious costs on third parties" because "[i]t seems unlikely that a decision to flee to Canada or go underground to evade the draft during the Vietnam War would have been affected by knowledge that religious pacifists were exempt.").

I find these arguments deeply unpersuasive. If a military requires 100 draftees, *someone* will have to fill the spot of the accommodated religious objector. Being conscripted into military service is its own harm for those who would not choose to volunteer, regardless of whether further harm ensues. Moreover, the facts that (1) it may be difficult to identify with confidence the particular unlucky individual who would not have been conscripted but for the accommodation of the religious objector, or (2) that the *overall* odds of conscription are not meaningfully changed by the choice to accommodate, ought to be irrelevant. The fact is that some person somewhere suffers a great deal of harm—not to mention the potential of death—because society has chosen to excuse another individual on religious grounds. If we are to distinguish this case from those in which the accommodation is prohibited, then we will need to find another basis for doing so.

Likewise, when the government gives favorable tax treatment to religious organizations,[147] that imposes costs on third parties.[148] When the government must raise revenue, reducing a religious entity's tax burden necessarily results in someone else paying more.[149] Although the Supreme Court has occasionally rejected some tax benefits granted to religious organizations,[150] in general these benefits have been upheld.[151]

Scholars point to other religious accommodations, which harm third parties, but nonetheless are constitutional. For example, all fifty states recognize a priest-penitent privilege against compelled testimony.[152] This accommodation relieves a religious person from complying with an otherwise-applicable law requiring those with material evidence to testify. Further, it works to burden "the opposing party's right to the admission of all potentially favorable evidence, and burdens the court's quest for the truth."[153] Yet courts routinely apply this privilege, and neither scholars nor judges have questioned its constitutionality.[154]

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147. *See, e.g.*, 26 U.S.C. § 501(c)(3) (exempting from the income tax organizations "operated exclusively for religious, charitable, scientific or [other] purposes"). For more on the history and ubiquity of religious exemptions in the tax code, *see* Christine R. Moore, *Religious Tax Exemption and the 'Charitable Scrutiny' Test*, 15 REGENT U. L. REV. 295, 296–99 (2003) (discussing the long history of religious tax exemptions in America and noting that "tax exemptions for religious institutions have been continuous from colonial times to the present"); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 588–89 (1983) (asserting that "[t]ax exemptions for certain institutions thought beneficial to the social order of the country as a whole, or to a particular community, are deeply rooted in our history" and discussing century-old cases upholding such exemptions).

148. *See* Greenawalt, *Establishment Clause Limits*, *supra* note 5, at 354 (noting that notwithstanding the disadvantages imposed on others by exemptions from sales taxes for religious organizations, such exemptions have not been ruled unconstitutional on this basis); Gedicks & Koppelman, *supra* note 124, at 56 (noting that the Court has not found property tax exemptions for churches unconstitutional because it is not a religion-specific accommodation and "the incremental increase in the pre-existing tax burden was spread among all owners of taxable property and did not fall on a limited, narrow, and discrete class").

149. *Id.*

150. *Bob Jones*, 461 U.S. at 574 (holding that the IRS has discretion under the Internal Revenue Code to deny tax-exempt status to a nonprofit private school that maintains a racially discriminatory admission standard which it attributes to its religious doctrine); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989) (invalidating under the Establishment Clause a state sales tax exemption for religious publications because of the increased tax burden on secular publications).

151. *See* Walz v. Tax Comm'n of the City of N.Y., 397 U.S. 664 (1970).

152. *See* Mockaitis v. Harcleroad, 104 F.3d 1522, 1532 (9th Cir. 1997) (finding that "[a]ll fifty states have enacted statutes granting some form of testimonial privilege to clergy-communicant communications.") (internal quotations omitted).

153. *See* Brief for Constitutional Law Scholars, Burwell v. Hobby Lobby, *supra* note 6.

154. *Id.* at *15 (citing *Mockaitis* as support for the assertion that "courts routinely exclude from evidence at trial the substance of communications between a member of the clergy and a parishioner" despite the burden on the opposing party's right to potentially favorable evidence and the court's quest for truth); *see Mockaitis*, 104 F.3d at 1532 ("Neither scholars nor courts question the legitimacy of the [testimonial privilege to clergy communications], and attorneys rarely litigate the issue.").

What remains, then, is a classic line-drawing problem: sometimes a law that imposes third party harms is unconstitutional, but sometimes it is constitutional.[155] How to tell the difference?[156]

C. THE LINE-DRAWING PROBLEM: SCHOLARS' PROPOSED SOLUTIONS

The scholars who have addressed the line-drawing problem generally call on courts to assess the magnitude of the third party harms.[157] If the harms are too great, by some proposed metric, then the religious accommodation is unconstitutional; if the harms are not too great, then the accommodation is constitutional. As Greenawalt puts it, "it is hard to understand the question of whether the burdens to be borne by others are too great as anything other than a matter of degree."[158]

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155. *See* Lund, *supra* note 4, at 1385 (asserting that more work is necessary on this question); Gedicks & Van Tassell, *supra* note 6, at 362 ("Although there is broad consensus that the Establishment Clause prohibits permissive accommodations that shift the costs of the accommodated religious practices onto third parties, there is uncertainty about how weighty the shifted costs must be before they trigger anti-establishment concerns.").

156. Scholars also debate a separate, though related, question: What is the proper baseline against which to measure whether a religious accommodation relieves a burden in the first place? *See* Nelson Tebbe, Micah Schwartzman, & Richard Schragger, *When Do Religious Accommodations Burden Others?*, THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY (forthcoming 2017); Greenawalt, *Establishment Clause Limits*, *supra* note 5, at 349 (finding that although "the Court has been right to insist that an accommodation must relieve some burden on the exercise of religion . . . this conclusion alone does not settle the question of baselines"); *see also* Gedicks & Van Tassell, *supra* note 6, at 371 ("Any argument about impermissible cost shifting must identify the proper status quo ante as the baseline measure of whether and to what extent costs have been shifted."); *see also* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 6 (1989) ("To determine whether government action has 'aided' or 'penalized' [religion in violation of the Establishment Clause,] one needs a baseline: 'aid' or 'penalty' as compared to what?").

This issue was hotly contested in the context of the *Hobby Lobby* litigation. *See e.g.*, Brief for Constitutional Law Scholars, Burwell v. Hobby Lobby, *supra* note 6; Brief for National Association of Evangelicals as Amicus Curiae Supporting Hobby Lobby and Conestoga et al., Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 325703; *see also* Gedicks & Koppelman, *supra* note 124, at 59–61; Gedicks & Van Tassell, *supra* note 6, at 371–72; Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *Hobby Lobby and the Establishment Clause, Part II: What Counts as a Burden on Employees?*, BALKINIZATION (Dec. 4, 2013, 6:04 PM), https://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html; Eugene Volokh, *3B. Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause?*, THE VOLOKH CONSPIRACY (Dec. 4, 2013, 5:11 PM), http://volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause/; Marc DeGirolami, *On the Claim that Exemptions from the Mandate Violate the Establishment Clause*, MIRROR OF JUSTICE (Dec. 5, 2013), http://mirrorofjustice.blogs.com/mirrorofjustice/2013/12/exemptions-from-the-mandate-do-not-violate-the-establishment-clause.html. This question, though quite important, is beyond the scope of this Article, which focuses on cases in which a concrete harm is clear.

157. Tebbe also proposes a distinction between religious accommodations that impose burdens on "the public" and those that impose burdens on private individuals, finding only the latter constitutionally problematic. Tebbe, *supra* note 126, at 50. I find this perplexing, because a burden borne by "the public" is actually a burden borne by the individual citizens who *make up* the public.

158. Greenawalt, *Establishment Clause Limits*, *supra* note 5, at 354.

Thus, "[while a] slight cost borne by private individuals will not violate the Establishment Clause, a heavy cost will amount to an advancement of religion at the expense of other interests."[159]

The Supreme Court has hinted toward this approach. As Gedicks and Van Tassell note, the Court suggested in *Caldor* that the Establishment Clause concern is triggered when the imposition on third parties is "'significant' and 'substantial.'"[160] Gedicks and Van Tassell canvas several cases and suggest that these terms mean that the imposition on third parties must be more than "marginally increased" due to the religious accommodation.[161] For instance, the "additional burden imposed by accommodating religious pacifists [by exempting them from the military draft] . . . is barely measurable; those accommodated are so few compared to the entire population subjected to the law that it is not reasonable to understand the exemption as a meaningful third party burden."[162]

Gedicks and Van Tassell go on to propose that, in determining whether the third party harm caused by a religious accommodation is "significant and substantial," the Court should consider materiality as the "organizing principle."[163] That is, if reasonable third parties would consider the religious accommodation "relevant to [their own] decisions . . . in some relevant way," then the Establishment Clause is violated.[164] If a reasonable third party would not consider the costs of the religious accommodation as material to his own decisions, then the accommodation does not violate the Establishment Clause.[165]

Tebbe, Schragger, and Schwartzman similarly call on courts to measure the magnitude of the harm to third parties, but they offer a slightly different test for resolving the line-drawing problem. Borrowing from jurisprudence developed in the related context of Title VII's religious accommodation provision, they suggest that if the harm to third parties caused by a religious accommodation is more than *de minimis*, then the accommodation is unconstitutional.[166] Although this proposed

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159. *Id.*

160. Gedicks & Van Tassell, *supra* note 6, at 363 n. 92 (quoting Estate of Thornton v. Caldor, 472 U.S. 703, 709 (1985) ("There is no exception when honoring the dictates of Sabbath observers would cause the employer *substantial* economic burdens or when the employer's compliance would require the imposition of *significant* burdens on other employees required to work in place of the Sabbath observers." (emphasis in original)).

161. *Id.* at 363–65.

162. *Id.* at 364; Gedicks & Koppelman, *supra* note 124, at 57 (stating that, in the context of the religious pacifist exemption, "[a]lthough whoever was drafted in place of the objectors faced the consequence of going to war, the pre-existing probability of those persons' being drafted was not significantly increased by the exemption.").

163. Gedicks & Van Tassell, *supra* note 6, at 366.

164. *Id.*

165. *Id.*

166. Nelson Tebbe et al., *How Much May Religious Accommodations Burden Others?*, *in* LAW,

de minimis standard may initially seem quite unforgiving to religious accommodations, they suggest that it actually allows for more accommodations than does the materiality standard suggested by Gedicks and Van Tassell, which "may prohibit religious accommodations in situations where the burden on religion is relatively severe, but the effect on third parties is relatively slight."[167]

Canvassing Supreme Court and lower court opinions in the Title VII context, Tebbe, Schragger, and Schwartzman suggest that the term *de minimis* operationalizes Title VII's requirement that a religious accommodation not impose an "undue" or "unreasonable" burden on the employer or third parties.[168] Under this standard, determining whether a third party burden is unconstitutional requires a "context-specific [inquiry that] . . . [will look at both] the fact and the magnitude of [the] alleged [hardship]."[169]

By contrast, Jonathan Nuechterlein offers what appears at first to be an altogether different approach to the line-drawing problem.[170] According to Nuechterlein, the problem with religious accommodations that impose third party harms is that they evince a legislative purpose to advance religious interests, which is prohibited by the Establishment Clause.[171] Consequently, the relevant inquiry to resolve the line-drawing problem lies in determining the legislature's purpose. If the purpose was to advance religious interests, then the accommodation is unconstitutional. But if the purpose was to accommodate religious interests "out of secular respect," then the accommodation is constitutional.[172] When assessing the legislative purpose behind any particular accommodation, Nuechterlein would require courts to assess the degree of the burden that the accommodation places on third parties. As he puts it, "[t]o manifest a legitimate purpose, an accommodation statute must take the secular consequences of accommodation into account. If those consequences are great, the legislature cannot, in constitutional good faith, make the accommodation."[173]

The primary difference between Nuechterlein's proposed approach and those of other scholars is that Nuechterlein sees the magnitude of the burden as a proxy for the legislature's purpose,[174] whereas others see the

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RELIGION, AND HEALTH IN THE UNITED STATES (Elizabeth Sepper et al. eds., forthcoming 2017).

167. *Id.* at 8 ("Even though the Supreme Court's de minimis interpretation of the undue hardship standard sounds compromising, it has in fact been applied in ways that are more balanced.").

168. *Id.*

169. *Id.* at 9.

170. Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127, 1142 (1990).

171. *Id.*

172. *Id.* at 1142–43.

173. *Id.* at 1143.

174. *Id.* ("Thus, when a legislature goes far out of its way to accommodate religion, ignoring all

magnitude of the burden as independently decisive on the constitutional question. As a practical matter, though, all three approaches require courts to assess the degree of the burden placed on third parties as a means of determining the constitutionality of a religious accommodation.

Each of these proposals finds support in at least some judicial doctrine and dicta. As Greenawalt notes, the Supreme Court's use of the terms "substantial" and "significant" implies that an assessment of the magnitude of the third party harm is in order. Gedicks and Van Tassell's proposed materiality test draws on familiar common law doctrine to give content to the terms "substantial" and "significant," while the *de minimis* test favored by Tebbe, Schragger, and Schwartzman draws on judicial opinions from the related Title VII context to the same end. Nuechterlein's focus on the legislature's purpose, on the other hand, is in line with a great deal of Establishment Clause jurisprudence, beginning with the familiar *Lemon* test.[175] At the very least, then, these approaches are tethered to judicial doctrine and dicta, and their familiarity suggests a degree of workability.

However, these approaches also share an important weakness: they call on judges to make assessments that they are not institutionally well-suited to make. Greenawalt and Nuechterlein offer little direction for assessing significance and substantiality. Although the proponents of the materiality and *de minimis* tests offer somewhat more, these tests are also highly subjective. The proposed materiality test for giving meaning to these terms requires courts to engage in the notoriously malleable (even if familiar) "reasonable person" inquiry.[176] The alternative *de minimis* test similarly invites courts to make highly context-specific judgments about the magnitude of the harm. Although its proponents assert that courts have done an admirable job of applying this inquiry sensibly, they offer little by way of substantive guidance. Claiming that courts have been "sensible" also begs the basic questions: sensible to whom, and according to what measure? Moreover, the *de minimis* test seems to call on courts to balance the harms of accommodation against the burden to the religious individual in the event of non-accommodation.[177] This would apparently invite courts to assess the burdensomeness of a state intrusion on a religious practice, a highly

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kinds of other concerns, one may infer that it acts not simply out of respect, but also to please God.").

175. *Id.* at 1131–32 (focusing on Step 1 of the *Lemon* test). Also, some have argued that the *Lemon* test is in decline or has been substantially reshaped in practice in more recent years. *See* Carl H. Esbeck, *The Lemon Test: Should It Be Retained, Reformulated or Rejected*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 513 (2014).

176. *See, e.g.*, Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1235–37 (2010).

177. After all, its proponents assert that their approach is preferable to the materiality test because it would permit "religious accommodations in situations where the burden on religion is relatively severe, but the effect on third parties is relatively slight." Tebbe et al., *supra* note 166, at 2.

problematic undertaking.[178] In the end, according to all of these approaches, what constitutes an intolerable third party harm may lie in the eye of the beholder.[179]

To appreciate these problems, consider the difficulty of applying these tests in the case of non-vaccination. On the one hand, non-vaccination increases the risk of contracting serious diseases. Some people may choose not to live in communities with low vaccination rates to avoid exposing themselves and their children to an increased risk of infection. This suggests the materiality test is met. On the other hand, because most people are vaccinated, the absolute risk of contracting these diseases remains quite low, and even those children who are not vaccinated against these diseases will probably not contract them. Given the relative rarity of infection, is it objectively reasonable to make decisions about where to live based on these religious accommodations, or is it an overreaction due to the cognitive biases that make it difficult for people to properly assess and respond to risks?[180] After all, the same people might readily subject themselves and their children to vastly greater risks without a second thought.[181]

The alternative *de minimis* test provides similarly scant guidance for how it might apply in the case of non-vaccination. Further, if judges must balance these risks against the burden that mandatory vaccination would place on religious objectors, it is difficult to know where to begin. That is, without engaging in intra-religious theological inquiries—which courts are forbidden to undertake—how can the burden that vaccination would impose on the religious faith of those who oppose it be quantified?

We can do better, at least in some kinds of cases. There is a potential line-drawing test that would provide greater direction and certainty in some cases—and would readily resolve the problem of religious accommodations in the context of mandatory vaccination.

III. ASSESSING THE CONSTITUTIONALITY OF RELIGIOUS ACCOMMODATIONS THAT IMPOSE THIRD PARTY HARMS: AN EQUALITY APPROACH

This Part proposes a test for assessing the constitutionality of religious accommodations that impose third party harms, what I call an Equality approach to the problem. Under this approach, religious

178. *See, e.g.*, Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1799 (2016).

179. Chris Lund has likewise suggested that more work is to be done on this question, but that any approach will entail some balancing of harms. Lund, *supra* note 4, at 1381–82.

180. *See, e.g.*, Amos Tversky and Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE, 1124–31 (1974).

181. For example, ninety-five percent of parents fail to practice car seat safety for newborns. Benjamin D. Hoffman, Adrienne R. Gallardo, & Kathleen F. Carlson, *Unsafe from the Start: Serious Misuse of Car Safety Seats at Newborn Discharge*, 171 J. PEDIATRICS 48–54 (2016).

accommodations that impose third party harms are presumptively constitutional only if the legislature also offers accommodations for those with nonreligious needs and objections.

I first lay out the Equality approach, demonstrate how it accounts for the cases, and describe its normative framework. I then consider additional benefits and some limits of the approach.

A. Understanding the Equality Approach: Background and Framework

The line-drawing problem posed by the Establishment Clause's "no third party harms principle" nearly mirrors another, more familiar line-drawing problem that arises in the Free Exercise Clause context. Whereas the Establishment Clause provides an upper limit on the ability of the legislature to accommodate religious beliefs and practices, the Free Exercise Clause sets a floor for when religious accommodations are constitutionally required. The Court has developed a useful test for analyzing Free Exercise claims that could be adapted for the Establishment Clause context.

1. The Lukumi Paradigm: When the Free Exercise Clause Requires Religious Accommodations

In *Employment Division v. Smith*, the Court held that the Free Exercise Clause does not typically require religious accommodations to neutral, generally-applicable laws.[182] Thus, Native Americans who smoked peyote for religious purposes were entitled to no religious accommodation from laws that prohibited and penalized the use of peyote for all purposes.[183] By the same token, laws that are not neutral or generally applicable, but that specifically target religious practices, are constitutionally problematic.

The Court elaborated on this principle in *Church of Lukumi Babalu Aye v. City of Hialeah*.[184] There, the Court considered a facially neutral local ordinance that prohibited animal sacrifice.[185] If this ban were truly neutral and generally applicable, then it would survive constitutional scrutiny. However, because the ordinance was directed at, and only applied to, adherents of Santería, the Court struck it down.[186] The ban did not prohibit people from killing animals for reasons other than

182. Emp't Div. v. Smith, 494 U.S. 872, 879 (1989) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).") (internal quotations omitted).

183. *Id.* at 890.

184. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

185. *Id.* at 526–28.

186. *Id.* at 531–35.

ceremonial sacrifice,[187] and the record was replete with evidence that the ordinance was targeted at, and motivated by, animus towards practitioners of Santería.[188] Thus, under *Lukumi*, if a law singles out a religious practice for condemnation, while permitting parallel nonreligious practices, then the statute violates the Free Exercise Clause.

To further understand the *Lukumi* test, consider the Third Circuit's opinion striking down the application of a facially neutral ordinance to a religious group in *Tenafly Eruv Association v. Borough of Tenafly*.[189] A local ordinance in Tenafly, New Jersey, prohibited the attachment of any objects to utility poles located in the public right of way.[190] Based on this facially neutral ordinance, Tenafly prohibited an Orthodox Jewish group from attaching small posts to utility poles that would have facilitated religious practice.[191] However, the Third Circuit struck down Tenafly's action because the Borough had regularly allowed nonreligious groups to attach materials to utility poles.[192] Because the Borough accommodated nonreligious groups but not similarly-situated religious groups, it violated the Free Exercise Clause.[193]

Lukumi and its progeny, amplifying *Smith*, thus created a line-drawing test to resolve the question of when religious accommodations are constitutionally mandatory.[194] When the government allows people to engage in particular practices for some nonreligious reasons, it must also allow those with parallel religious reasons to engage in the same practices.[195]

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187. *Id.* at 528.

188. *Id.* at 528, 534–35.

189. Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002). For extensive discussion of this case, see Levin, *supra* note 95, at 1631–35.

190. *Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 151 ("No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough.") (quoting TENAFLY, N.J., ORDINANCE 691, art. VIII(7) (1954)).

191. *Id.* at 152–54.

192. *Id.* at 155.

193. *Id.* at 165–74.

194. Note that the Free Exercise Clause also requires accommodations in some other cases. Most obviously, in *Hosanna-Tabor Lutheran Church and School v. Equal Employment Opportunity Commission*, the Court held that the Free Exercise Clause creates a ministerial exception that exempts religious organizations from generally-applicable non-discrimination laws when it comes to the employment of religious ministers. 565 U.S. 171, 173 (2012). Such additional Free Exercise protections are unrelated to the *Smith-Lukumi* line of cases and do not speak to the line-drawing problem discussed herein.

195. *See, e.g.*, *Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 165–74; Fraternal Order of Police Newark v. City of Newark, 170 F.3d 359 (3d Cir. 1999).

2. *The Equality Approach: When the Establishment Clause Prohibits Religious Accommodations*

As the first step in assessing whether a religious accommodation that imposes third party harms violates the Establishment Clause, courts should invert the *Lukumi* test and apply a similar equality framework. If a statute offers *only* religious accommodations that impose third party harms, then it presumptively violates the Establishment Clause. If it offers both religious accommodations *and* other kinds of accommodations, then it is presumptively constitutional.

No court has explicitly applied this test to determine whether a religious accommodation that imposes third party harms violates the Establishment Clause. However, this test accounts for all of the Supreme Court cases that address the issue. The Court has never struck down a religious accommodation on the grounds that it imposes third party harms where the statute also provided parallel nonreligious accommodations. Conversely, it has never upheld a religious accommodation that imposes third party harms without a parallel nonreligious accommodation.

Compare, for example, the religious accommodation struck down in *Estate of Thornton v. Caldor*[196] with the constitutionally permissible religious accommodation in the context of the military draft.[197] Both of these statutes imposed third party harms, but one failed the Equality test, whereas the other passed it. In *Caldor*, the Court struck down a Connecticut statute that gave each employee the right to take a day off from work on his or her Sabbath, because that imposed the cost of a religious observance on nonreligious employers and co-workers.[198] The statute gave no similar right to select a day off from work for nonreligious reasons. The holding strongly implies that if the statute had allowed all employees to select a day off from work, it would have been constitutional.

In contrast, the religious accommodation that exempts religious objectors from military service *is* paralleled by nonreligious accommodations and exemptions, and is therefore constitutional. Indeed, the Court extended the exemption to nonreligious conscientious objectors, apparently in order to save the religious accommodation from being struck down on Establishment Clause grounds.[199] In addition, some elected officials, as well as those who can demonstrate that military service will impose a hardship on their dependents are exempt from

196. Estate of Thornton v. Caldor, 472 U.S. 703 (1985) (For further discussion on this case, see *supra* note 130 and accompanying text).

197. As noted *supra*, this is among the most well-entrenched religious accommodations, and no one seriously doubts its constitutionality.

198. *Caldor*, 472 U.S. at 709–11.

199. TEBBE, *supra* note 126, at Chapter 3.

service. Students and some immigrants and dual nationals can receive deferments.[200]

The Equality test also accounts for the Court's decisions concerning tax exemptions for religious groups. As noted previously, favorable tax treatment means others must make up for the forgone revenue by paying higher taxes.[201] The Court has variously struck down and upheld these accommodations. On the one hand, in *Texas Monthly v. Bullock*, the Court struck down a state provision that exempted religious publications from otherwise applicable sales and use taxes.[202] On the other hand, in *Walz v. Tax Commission of the City of New York*, the Court upheld a property tax exemption for properties owned by religious nonprofit organizations.[203] The difference between these cases is clear under an Equality analysis. In *Bullock*, the favorable tax treatment was only available to purveyors of religious publications. In *Walz*, however, the favorable treatment was available to a host of non-profit organizations, religious or not.[204] The statute in *Bullock* failed the Equality test, whereas the statute in *Walz* passed it.

The importance of this difference was made explicit by the plurality in *Bullock*. Distinguishing *Bullock* from *Walz*, the opinion emphasizes that the tax benefits in *Walz* "flowed to a large number of nonreligious groups as well. Indeed, were those benefits confined to religious organizations . . . we would not have hesitated to strike them down . . . ."[205] Later in its opinion, the plurality held that, when a legislature "directs a subsidy *exclusively* to religious organizations [and thereby] . . . *burdens nonbeneficiaries* markedly," it violates the Establishment Clause.[206] In her concurring opinion, Justice O'Connor noted the complicated relationship between the Free Exercise value of accommodating religion and the competing Establishment Clause value that prohibits certain kinds of government support for religion. She suggested that the state could resolve the tension between the two clauses by adopting a tax exemption that applies to "the sale not only of religious literature distributed by a religious organization but also of philosophical literature distributed by nonreligious organizations."[207] This comment implicitly anticipates both *Lukumi* and the proposed Equality test. That is, per *Lukumi*, a state would run afoul of the Free Exercise

200. *Postponements, Deferments, Exemptions*, SELECTIVE SERV. SYS., https://www.sss.gov/About/Return-to-the-Draft/Postponements-Deferments-Exemptions (last visited Aug. 5, 2017).

201. *See supra* notes 148–152 and accompanying text.

202. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 25 (1989).

203. Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 667 (1970).

204. This is generally the case with tax provisions that benefit religious groups, which may explain why the Court generally upholds these statutes. *See, e.g.*, 28 U.S.C. § 501(c)(3).

205. *Bullock*, 489 U.S. at 11–12.

206. *Id.* at 15 (emphasis added).

207. *Id.* at 27 (O'Connor, J., concurring).

Clause if it offered a tax exemption for philosophical literature without *also* offering an exemption for religious literature that addresses similar ideas. Per the Equality test, the Establishment Clause does not allow the state to limit a tax exemption for "the sale of religious literature by religious organizations."[208]

Note that the Equality approach does not require absolute neutrality between religion and non-religion. It has no applicability when religious accommodations do not impose third party harms. If there are no third party harms, legislators and other government actors can grant preferential treatment to religious practitioners without offering parallel accommodations to nonreligious groups. *Lukumi* applies to protect religious practices in *every* context; the Equality test only applies where there are third party harms. For example, the military can allow religious practitioners to wear religious headwear[209] without simultaneously permitting nonreligious skullcap-lovers to do the same. Under *Lukumi*, however, it cannot do the reverse. This point reflects the Court's insistence that the religion clauses do permit a degree of religious exceptionalism in the granting of accommodations.[210]

3. *Appropriate Remedies Under the Equality Approach*

When a court applies the Equality approach and finds that a statute is unconstitutional, it should strike down the religious accommodation, rather than expand it to those who seek nonreligious philosophical accommodations. There are three reasons to apply this remedy. First, the suit would be a facial challenge to the religious accommodations regime, brought by a party who is in a position to suffer harm as a result (such as a person who cannot be vaccinated for medical reasons). The relief most calibrated to remedy that harm is to eliminate, rather than expand, the accommodation. Second, as discussed below, one of the reasons that courts should act in this case is to reverse the burden of legislative inertia and allow the legislature to reconsider the question of whether the exemption should exist. The most effective way to do that is to create a blank canvas for legislators to work from, instead of defaulting to an even broader exemption. Third, and most important, by providing religious accommodations and not philosophical ones, state legislatures tacitly reject the approach of sister states that have adopted broader philosophical accommodations. They could have explicitly allowed for a broader scheme, but chose not to. Courts would do violence to the statute's plain meaning and the legislature's apparent intent if it ignored this choice in favor of expanding the accommodation. By striking down

208. *Id.* at 28.

209. This imposes no third party harms, *see supra* note 124 and accompanying text.

210. Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 669 (1970).

statutes that only provide religious accommodations regime, the courts would give state legislatures a choice: reenact it with a parallel philosophical accommodation or provide no accommodations at all.

B. Normative Justifications for, and Promise and Limits of, the Equality Approach

Having laid out the Equality approach and shown how it accounts for the cases, it is worth considering why it makes normative sense, as well as its broader potential promise and important limits.

1. Normative Justifications for the Equality Approach

Why does it make sense that a religious accommodation that is matched by a parallel, nonreligious accommodation is absolved of Establishment Clause concerns? If the problem with religious accommodations that impose third party harms is that they impose costs on non-consenting third parties, then it should not make a difference if the government extends that permission to people with nonreligious reasons to impose such costs. The injured third party is a victim of government sanction of religious practice regardless of whether or not the government also sanctions similar nonreligious practices. Treating religious and nonreligious institutions alike does not eliminate Establishment Clause concerns in other contexts, after all. For example, the government could directly give unrestricted funds to a private, nonreligious school, but giving the same type of unrestricted funding to a religious school would still violate the Establishment Clause. So in the context of religious accommodations that impose third party harms, why does granting parallel nonreligious accommodations eliminate the Establishment Clause problem?

There are three complementary answers to this question. First, the interplay between the Free Exercise Clause and the Establishment Clause is unique in the context of accommodations. As discussed previously, under *Smith* and *Lukumi*, once the government offers a nonreligious accommodation, the Free Exercise Clause may *require* it to offer a parallel religious accommodation.[211] As already noted, the

211. Courts and scholars are split concerning the exact circumstances in which a non-religious accommodation necessarily triggers a government responsibility to offer a religious accommodation. *Compare* Blackhawk v. Pennsylvania, 381 F.3d 202, 211 (3d Cir. 2004) ("The categorical exemptions in 34 Pa. Cons. Stat. Ann. § 2965(a) for zoos and 'nationally recognized circuses' likewise trigger strict scrutiny because at least some of the exemptions available under this provision undermine the interests served by the fee provision to at least the same degree as would an [religious] exemption."), *with* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 701–02 (9th Cir. 1999) ("Underinclusiveness is not in and of itself a talisman of constitutional infirmity; rather, it is significant only insofar as it indicates something more sinister."), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000); *see also* Oleske, Jr., *supra* note 110, at 295 (2013) (comparing different approaches to the *Lukumi* line-drawing question). This issue is beyond the scope of this Article, but it is worth noting

Establishment Clause cannot prohibit that which the Free Exercise Clause requires. This is not the case with other Establishment Clause cases, where the Free Exercise Clause is not pertinent. For example, the Free Exercise Clause gives no support to a claim for government funding of a religious school. But in the context of accommodations, both religion clauses are in play. One way to respect both clauses is to adopt both *Lukumi* and the Equality approach.

A second normative argument in favor of the Equality approach is to view it simply as a useful proxy or heuristic for determining what constitutes a "significant" or "substantial" third party harm. As already discussed, one of the difficulties with current approaches is that they require judges to assess whether a harm is "significant" or "substantial" enough to violate the Establishment Clause, an assessment judges are not well-equipped to make.[212] The Equality approach offers a way for judges to reason through the issue in a manner that reflects courts' institutional competencies: by making apples-to-apples, comparisons.[213] If the law offers nonreligious accommodations that risk imposing a particular harm, it follows that the force behind the law has decided that this harm is not so serious that it must always be prevented. Thus, it does not violate the Establishment Clause when it accommodates religious practices that impose the same kind of risk of harm. The Equality approach thus serves as a shorthand tool for assessing the magnitude of the harm.

Third, if Jonathan Nuechterlein's interpretation of *Caldor* and the "no third party harms" principle is correct,[214] then the Equality approach makes intuitive sense. Recall that Nuechterlein proposes that a religious accommodation that imposes third party harms may violate the Establishment Clause because it is evidence of an impermissible legislative purpose to promote religion.[215] But if the legislature also grants nonreligious accommodations, then there is no reason to believe that it intends to promote religion.[216] Instead, its manifest purpose is to respect *any* people for whom the practice is especially important, whether for religious or other reasons.

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that even if the Free Exercise Clause does not necessarily *require* a religious accommodation in a case in which a specific non-religious accommodation has been granted, the values embedded in the Free Exercise Clause suggest a general tolerance for religious accommodations.

212. *See, e.g.*, Emp't. Div. v. Smith, 494 U.S. 872, 886–87 (1990) (discussing the difficulties associated with assigning to judges such tasks).

213. *See* Levin, *supra* note 95, at 1683 (discussing the relative competencies of judges in this context).

214. *See supra* note 170 (discussing Nuechterlein's approach).

215. *Id.*

216. *Id.*

2. *The Broader Promise of the Equality Approach*

The Equality approach accounts for the relevant cases, makes sense of both religion clauses in a theoretically coherent manner, and avoids forcing judges to make difficult substantive assessments of the potential for third party harm.

More broadly, the equality approach may offer greater potential for our contemporary moment and political system. A defining feature of our political system, and one that carries with it substantial dangers, is the prevalence of interest group politics. Political scientists have shown that small groups representing small fractions of the electorate enjoy outsize influence and can protect their interests at the expense of the majority's.[217] This is because insular groups may be cohesive, well-organized, and highly motivated to lobby for a particular issue.[218] In contrast, large majorities may be disbursed, disorganized, and not focused on the particular issue.[219] Consequently, religious groups (like other interest groups) command attention from politicians and maintain disproportionate political clout.[220]

Of course, religious groups do not always see their interests vindicated. Social majorities and competing interest groups can and do defeat minority religious groups, just as they defeat other minority groups.[221] As I argue elsewhere, the *Lukumi* test is one means of combating the problem of majoritarianism that victimizes small religious groups.[222] However, *Lukumi* only protects religious groups from the tyranny of the majority, or from competing interest groups that succeed in protecting their own interests at the expense of religious practices. It cannot protect others from the tyranny of religious groups.[223] Under *Lukumi*, religious groups get at least as much accommodation as others, and can externalize the costs of religious accommodation. But other

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217. *See* Levin, *supra* note 95, at 1661–69 (discussing public choice dynamics in the context of religious accommodationism); *see also* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW & PUBLIC CHOICE: A CRITICAL INTRODUCTION 23 (1991) (explaining how the "free rider" problem allows small interest groups to dominate the political discourse); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975).

218. *See* Levin, *supra* note 95, at 1662–23.

219. *Id.*; *see also* Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1051 (2011) ("Generally, public-choice theory posits that small groups are successful at obtaining legislation because they are more interested and more easily organized than the general public—each member of which bears only a small cost of the interest-group legislation.").

220. Levin, *supra* note 95 at 1642–57, 1661–69 (discussing and debunking the conventional/intuitive approach that small religious groups have relatively little power with evidence and theory to the contrary).

221. *Id.* at 1664–67 (addressing the conditions in which religious interest groups may be defeated in the political branches).

222. *Id.* at 1669–76.

223. *Id.* at 1651–56, 1682 (discussing the problem of over-accommodation of religious interests and a one-way ratchet).

groups are promised no accommodation and no protection from costs imposed by religious accommodation. Privileging religious groups in this way also facilitates their political isolation. There may be less of a need to build coalitions with other groups, because *Lukumi* can serve as a powerful weapon to wield in courts.

The Equality approach offers a way to change these dynamics by limiting the circumstances in which religious groups can advance their own, and only their own, agendas. Religious groups would not be able to act alone to protect their own religious interests in the political arena. Even if they win narrow religious accommodations, those accommodations would be struck down by courts if they impose third party harms and are not matched by comparable nonreligious accommodations. Working in tandem, then, *Lukumi* and the Equality approach could balance the scales by either guaranteeing accommodations that apply both to the traditionally religious and the nonreligious, or removing those harmful accommodations altogether. Religious and nonreligious interest groups would therefore be incentivized to work together politically to secure their own interests.[224]

One practical example of the power of such coalition building is the agreement between the Mormon Church and proponents of gay rights in Utah regarding the extension of anti-discrimination protections to gays and lesbians.[225] The Mormon hierarchy, perhaps recognizing that the tide of public opinion has turned in favor of gay rights,[226] agreed to support anti-discrimination legislation protecting gays and lesbians.[227] In return for this support, advocates of non-discrimination agreed to accommodations that would exempt objecting religious clerks from being required to facilitate same-sex weddings.[228] In other words, by recognizing the changing political dynamic and working together, both interest groups were able to achieve beneficial results that neither may have won alone. To the extent that the Equality approach encourages similar coalition-building among interest groups by requiring either broad accommodations or none at all, it would benefit all stakeholders.

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224. *See supra* text accompanying note 211. It is worth reiterating that religious groups still enjoy special treatment in the accommodations context in that they *can* be the sole beneficiaries of accommodations that do not impose third party harms. In this way, *Lukumi* and the Equality approach are not fully equivalent. *Lukumi* applies to protect religious practices in *every* context; whereas the Equality test only applies where there are third party harms.

225. Niraj Chokshi, *Gay Rights, Religious Rights and a Compromise in an Unlikely Place: Utah*, THE WASHINGTON POST (Apr. 12, 2015), https://www.washingtonpost.com/politics/gay-rights-religious-rights-and-a-compromise-in-an-unlikely-place-utah/2015/04/12/.

226. *See, e.g.*, *Changing Attitudes on Gay Marriage*, PEW RESEARCH CENTER (May 12, 2016), http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/; Lydia Wheeler, *Poll: Seven in 10 Support LGBT Nondiscrimination Laws*, THE HILL (July 1, 2015, 3:06 PM), http://thehill.com/regulation/246683-poll-7-in-10-americans-support-lgbt-nondiscrimination-laws.

227. Chokshi, *supra* note 225.

228. *Id.*

3. The Limits of the Equality Approach

The Equality approach to the problem of third party harms is not a panacea. It will not resolve all disputes concerning the constitutionality of religious accommodations that impose third party harms. There are two important questions that the Equality approach alone cannot answer.

First, what qualifies as a third party harm? Recall that the Establishment Clause problem—and therefore the Equality solution—is only present where a religious accommodation imposes legally cognizable harms on third parties.[229] Consequently, it is necessary to identify what constitutes a third party harm that triggers the Equality inquiry. This question has received considerable scholarly attention and remains contentious.[230] The Equality approach has little to say about this question. Although it can be a proxy to help quantify that magnitude of the harm,[231] it cannot tell us what constitutes a legally cognizable third party harm that triggers the Establishment Clause inquiry.

Second, the Equality approach requires courts to ask whether accommodations that impose third party harms are accompanied by similar nonreligious accommodations. However, it may be difficult to make this kind of apples-to-apples comparison. In this sense, the Equality approach suffers the same limitation as *Lukumi*: sometimes it is not self-evident whether a religious accommodation and a given nonreligious accommodation are similar enough to be compared to assess constitutionality. In the Free Exercise context, where *Lukumi* applies, this question is the subject of significant debate among scholars and judges.[232] How great does the secular exception have to be before there is an obligation to provide a parallel religious accommodation? And what does it mean for the religious and nonreligious accommodations to be parallel?

The Equality approach invites similar questions, and there is room for debate and further consideration of this question. For now, it is sufficient to note that the *Lukumi* inquiry has proven helpful in many cases even without a definitive answer to this question.[233] The same is

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229. *See supra* PART II.A, II.B.

230. For a thoughtful discussion of this question, see TEBBE, *supra* note 126, at 59–60.

231. *See supra* note 213 and accompanying text. For the most recent and most thoughtful discussion of this issue, see Tebbe, Schwartzman, & Schragger, *supra* note 156.

232. *See supra* notes 111–113 and accompanying text.

233. It is difficult to assess exactly how many or what percentage of requested religious accommodations are clearly resolved by *Lukumi* without raising this difficult question. Many or most instances in which the apples-to-apples comparison between a requested religious accommodation and a parallel non-religious accommodation is self-evident may never be the subject of lawsuits. That is, after *Lukumi*, policymakers are aware that the Free Exercise Clause requires them to extend religious exceptions if they are already creating similar non-religious exceptions, and they act accordingly. Therefore, the *difficult* cases—those that develop into lawsuits—may be those in which the

true for the Equality inquiry. It is easy to identify parallel secular accommodations to situations like religious exemptions from military service, religious tax exemptions, and religious "day of rest" provisions. As discussed in Part IV, the question of religious accommodations in the context of vaccination mandates is one such case.

The Equality approach has important limits. It will not resolve every challenge to religious accommodations that may impose third party harms, and scholars and judges will require additional or alternative modes of analysis in some cases. But a legal test need not resolve every possible question in order to be useful. The Equality approach resolves *some* questions, limits the universe of unresolved cases, and may provide some guidance even in those cases that it does not resolve. In the case of the mandatory vaccination regimes specifically, it is dispositive.

IV. APPLYING THE EQUALITY APPROACH TO RELIGIOUS ACCOMMODATIONS FOR MANDATORY VACCINATION PROGRAMS

Having laid out the proposed approach to religious accommodations that impose third party harms, we can now apply it in the context of mandatory vaccination programs. Because this analysis suggests that some religious accommodation schemes are unconstitutional, and therefore open to legal challenge, it is also worth considering the potential value and possible risks of a legal challenge.

A. THE UNCONSTITUTIONAL AND THE CONSTITUTIONAL

As noted previously, forty-seven states offer non-medical accommodations to vaccination statutes.[234] The majority only allow for religious accommodations, while eighteen allow for both religious and philosophical accommodations.[235] Applying the Equality approach, the states in the former category violate the Establishment Clause; whereas those in the latter do not.

The twenty-nine states that allow for only religious accommodations to otherwise-mandatory vaccination regimes: (1) impose a mandatory vaccination requirement that requires all parents to vaccinate their children;[236](2) only accommodate parents with religious objections; and (3) in doing so harm on third parties by increasing the risk they will contract deadly diseases, as well as be excluded from school in the event of a disease outbreak. More broadly, in the event of a disease outbreak, society as a whole bears the associated financial and social costs.

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comparison is not self-evident.

234. *See supra* PART. I.B.

235. *See supra* PART. I.B.

236. Except for those for whom the vaccination is itself physically dangerous, and thereby undermines the very goal of vaccination, see *supra* PART. I.B.

Therefore, under the Equality approach, these statutes would be unconstitutional.

However, the eighteen states that provide both religious and philosophical accommodations that relieve parents from vaccinating their children do not violate the Establishment Clause. In these states, the religious accommodations pass the Equality test because they are accompanied by parallel secular accommodations. The choice to grant both religious and secular accommodations may not be *wise,* but it is not unconstitutional.

B. THE NECESSITY OF JUDICIAL ACTION

Since non-vaccinators are a minority in this country, it might be reasonable to ask why courts should address the problem of religious-based opposition to vaccination at all.[237] Why not proceed through ordinary political and legislative channels, where those who oppose religious accommodations can defeat the small minority who approve of such accommodations without resort to the courts and Constitution?

This question may be framed in two ways. It could be a purely descriptive question: why do forty-seven states tolerate religious accommodations if they present these risks and are opposed by the majority of citizens? Why have they not followed California[238] and revoked these accommodations legislatively?

The question could also be posed as a normative challenge to the Equality approach. One leading Constitutional theory suggests that judicial enforcement of the Bill of Rights should primarily be used as a means for protecting minority groups from the political majorities that would otherwise dominate them.[239] In the context of vaccination, though, the judiciary and the Establishment Clause would work to protect majority interests, at the expense of vulnerable minorities. Is that a reasonable use of our judiciary? After all, political majorities are opposed to such accommodations, so legislatures should be able to eliminate these accommodations. Perhaps judges should take a minimalist approach to the Constitutional question. This would allow the political arena to resolve something that is fundamentally a policy concern about public health.

However posed, the same answer applies. The question is based on mistaken underlying assumptions concerning the relevant political dynamic. Although those who oppose religious accommodations far

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237. *See e.g.*, *Americans, Politics and Science Issues*, PEW RESEARCH CENTER (July 1, 2015), http://www.pewinternet.org/2015/07/01/americans-politics-and-science-issues/.

238. *See infra* notes 251–253 and accompanying text; Chemerinsky & Goodwin, *supra* note 14.

239. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Levin, *supra* note 95.

outnumber those who support them,[240] the latter enjoy far more political power on this particular issue and can effectively block attempts to change the law to eliminate the accommodations. This is consistent with the observed political dynamics concerning religious accommodations in general and with basic insights and predictions of political science.[241]

As discussed previously, small religious groups enjoy outsized political power and lobby effectively in the political sphere to secure religious accommodations.[242] Though small in numbers, groups like those who oppose mandatory vaccination or support religious accommodations to vaccination mandates are highly motivated and well-organized in pursuing their policy preferences.[243] The costs and risks associated with the accommodation, in contrast, are dispersed throughout society at large, and the risk to any particular individual is quite small. Moreover, it is much easier to block change and maintain the status quo than it is to pass new legislation. Because the majority of states only provide religious accommodations, and nearly all states provide some accommodations, even a majority that wishes to remove accommodations can be stymied by a minority that works to maintain them.[244] Those who prefer to eliminate accommodations are unlikely to focus their energies and lobbying power on an issue that presents are relatively small risk to them, their children, and their communities.[245] Under these conditions, it

240. *See supra* note 237.

241. Levin, *supra* note 95, at 1661–69; Zoë Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 WM. & MARY BILL RTS. J. 133 (2011); Zoë Robinson, *Lobbying in the Shadows: Religious Interest Groups in the Legislative Process*, 64 EMORY L. J. 1041, 1045 (2015); Hillel Y. Levin et al., *To Accommodate or Not to Accommodate: (When) Should the State Regulate Religion to Protect the Rights of Children and Third Parties?*, 73 WASH. & LEE L. REV. 915, 952 (2016) [hereinafter Levin, *To Accommodate or Not to Accommodate*].

242. Levin, *To Accommodate or Not to Accommodate* at 952. *See also supra* Part III.B.2.

243. *Id.*; *See* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1314 (2010) ("political minorities [have] extraordinary power to block legislative change").

244. Pete Levitas, *A Common Sense Guide to Effective Lobbying on Capitol Hill*, 21 ANTITRUST 21, 22 (2007) ("it is axiomatic that it is far easier for a member to block legislation than it is for a member to pass legislation"); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 134 (2013) ("Given the many "vetogates" in the legislative process, it takes considerably more votes to pass a law than to block one."); Manning, *supra* note 243, at 1317 ("Perhaps interest groups sometimes dominate a process that is geared to make it much easier to block rather than pass legislation."); Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 DRAKE L. REV. 989, 993 (2013) ("Aside from the requirements of bicameralism and presentment, within the Senate and House are a series of 'vetogates,' such as committee chairs, which make it easy to block legislation."); William N. Eskridge, *Vetogates,* Chevron*, Preemption*, 83 NOTRE DAME L. REV., 1441, 1443, 1444–47 (2008) (laying out a vetogates model and describing nine vetogates); Maxwell L. Stearns, *Direct (Anti-)Democracy*, 80 GEO. WASH. L. REV. 311 n.125 (2012) ("interest groups, including demographic minorities, can more easily block than pass within legislatures"); *see generally* WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 66–67 (3d ed. 2001) (defining and discussing vetogates).

245. Levin, *To Accommodate or Not to Accommodate*, *supra* note 241.

is exceedingly difficult to overcome the powerful force of legislative inertia and overturn the existing law.[246]

Given this political reality, a "focusing event" is often necessary to alter the baseline political dynamic and allow for reconsideration of religious accommodations.[247] In political science literature, focusing events are "sudden, rare events that affect a relatively large number of people and thereby attract media coverage and capture the attention of larger publics and policymakers."[248] By drawing such attention, a focusing event may galvanize the public to consider the dangers posed by non-vaccination, and could spur the majority to overcome the forces of legislative inertia and the objections of the minority in order to change the law.[249]

In the context of vaccine-preventable diseases, a major outbreak can serve as a focusing event and lead to change through normal political channels. In California, there was a highly-publicized measles outbreak at Disneyland in 2014.[250] As a result of the publicity and public outcry generated by this outbreak, California eliminated all religious and philosophical accommodations in 2015 over the organized opposition by a minority who wished to preserve the status quo.[251] This shows that under some conditions, legislatures can address this policy problem. But it is hardly sufficient.[252]

California's experience does not undermine the case for pursuing judicial review of religious accommodations. The Constitution does not typically stand in the way of rent-seeking or troubling laws produced by the realities of the political economy.[253] But where constitutional values are at stake, as in the case of religious accommodations that impose third

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246. Levin, *supra* note 95 at 1661–69; Levin, *To Accommodate or Not to Accommodate*, *supra* note 241.

247. For discussion of "focusing events," see Thomas A. Birkland, *Focusing Events, Mobilization, and Agenda Setting*, 18 J. PUB. POL'Y 53 (1998).

248. Timothy D. Lytton, Clergy *Sexual Abuse Litigation: The Policymaking Role of Tort Law*, 39 CONN. L. REV. 809, 854 (2007).

249. *Id.*

250. Chemerinsky & Goodwin, *supra* note 14 (discussing the recent events in California).

251. S.B. 277 (Cal. 2015).

252. It is worth noting that no other state has followed California's lead. However, in light of major disease outbreaks—that is, in light of such focusing events—some major medical associations have begun engaging in lobbying efforts. Press Release, American Medical Association, AMA Supports Tighter Limitations on Immunization Opt Outs (June 8, 2015), http://www.ama-assn.org/ama/pub/news/news/2015/2015-06-08-tighter-limitations-immunization-opt-outs.page; *Immunization Exemptions*, AM. ACAD. OF FAM. PHYSICIANS (2015) http://www.aafp.org/about/policies/all/immunizations-exemptions.html; *State Immunization Laws Should Eliminate Non-Medical Exemptions Say Internists*, AM. C. OF PHYSICIANS (July 29, 2015), https://www.acponline.org/acp-newsroom/state-immunization-laws-should-eliminate-non-medical-exemptions-say-internists.

253. *See e.g.*, Ry. Express Agency v. New York, 336 U.S. 106 (1949) (Jackson, J., concurring; expressing concern about these political dynamics and the laws they produce, but declining to find a constitutional violation).

party harms, we should not have to wait for more outbreaks around the country—more sick and dead children—to galvanize the public and the legislature. A child who cannot be vaccinated for medical reasons, or a child of a parent who claims the religious accommodation, should not be harmed by others' religious beliefs. This is precisely what the Establishment Clause was meant to protect against.

A successful judicial challenge is therefore appropriate, and can serve as its own sort of focusing event. Judicial action here would not remove the issue from the political sphere. Under extreme pressure from a galvanized pro-accommodation lobby, the legislature could provide both religious and philosophical accommodations, as discussed below. However, as already noted, such a ruling would change the political dynamic by reversing the burden of legislative inertia. In other words, it allows the political branches to assess the wisdom of such accommodations, but in a context in which the default option is *no accommodations.* This modification of the status quo changes the political dynamic because it would require the political minority which supports accommodations to affirmatively pass, rather than block, new legislation.

By invoking the Constitution and judicial power, then, a successful challenge to religious accommodations can be democracy-forcing rather than democracy-inhibiting. It allows legislatures and the public to make a choice: either the scourge of vaccine-preventable diseases is a serious enough concern to permit no accommodations at all; or the risks are small enough that society can tolerate a broad range of accommodations. The only choice that is *not* constitutionally valid is for the government to give religious groups a power to inflict harms on others for the sake of benefits no one else enjoys. In this way, the courts can push the public and the legislature to revisit the question of vaccination exceptions in a manner consistent with constitutional dictates.

C. The Acceptable Risk of a Constitutional Challenge

Those who view the argument presented herein primarily as a utilitarian means of achieving a desired end, namely of improving health and minimizing disease may now articulate a different concern. If a court ruling striking down religious accommodations could lead a state legislature to expand the accommodation, it could open the door to more accommodations, not fewer. A judicial decision could galvanize opponents of mandatory vaccinations to pass even broader exceptions. This prospect could deter some from pursuing a legal challenge in the first place. After all, the last thing vaccination advocates would want to do is make it even easier to secure an accommodation.

There is cause for concern. In 2002, two district courts in Arkansas struck down as unconstitutional the state's legislation granting religious

accommodations to only "recognized church or religious denomination of which the parent or guardian is an adherent or member."[254] Rather than allowing these rulings to stand and eliminating all accommodations, the Arkansas legislature enacted a law that offered broader accommodations.[255] The statute now provides that the state's mandatory vaccination requirements "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 the parent or guardian."[256] As one commentator laments, under this new statute, "virtually any person who requests such an exemption may qualify for it."[257] There are risks to bringing such a lawsuit.

These concerns are not compelling, however, for four reasons. First, I do not believe it is likely that a state legislature today will respond to a ruling striking down religious accommodations by expanding the accommodations, as the Arkansas legislature did fifteen years ago. Recently, the legislative movement has been toward *eliminating* or *limiting* accommodations, rather than *expanding* them. As noted previously, California's legislature recently succeeded in eliminating its religious and philosophical accommodations in the wake of a high profile disease outbreak.[258] Also in 2015, Vermont eliminated its philosophical accommodation in an effort to boost vaccination rates, leaving only the religious accommodation in place.[259] Several other states have introduced similar bills.[260] Further, as discussed previously, although the political dynamics surrounding mandatory vaccination make it difficult to repeal laws that provide for religious accommodations,[261] striking down the religious accommodation would reverse the burden of legislative inertia. It will be harder for an interest group to pass a new statute than it is to block legislation from the other side.[262] Thus, it is unlikely that state legislatures would respond to a ruling striking down religious accommodations by enacting broader accommodations.

Second, even if states do adopt broader accommodations, they could do so in a manner that improves vaccination rates. Some states require

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254. McCarthy v. Boozman, 212 F. Supp. 2d 945, 947 (W.D. Ark. 2002); *see also* Boone v. Boozman, 217 F. Supp. 2d. 938, 941 (E.D. Ark. 2002); *supra* Part I.C.3.; M. Craig Smith, *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 (2005) (discussing *McCarthy* and *Boone* and the legislature's reaction to them).

255. Smith, *supra* note 254.

256. ARK. CODE ANN. tit. 6 § 6-18-702(d)(4)(A) (2003). Smith, *supra* note 254.

257. Smith, *supra* note 254, at 251.

258. *See supra* 250–252 and accompanying text.

259. *See* Sarah Breitenbach, *States Make it Harder to Skip Vaccines*, VALLEY NEWS (May 29, 2016), http://www.vnews.com/To-combat-disease-states-make-it-harder-to-skip-vaccines-2486243.

260. *Id.*

261. *See supra* note 253; *see also* Part III.B.2.

262. *Id.*

parents seeking accommodations to be educated on the importance and safety of vaccination.[263] This has apparently been successful in reducing rates of non-vaccination, and some scholars have suggested that it is the most desirable and effective approach for balancing the public health interests at stake against parents' interests.[264]

There are two possible reasons that these education requirements may succeed in reducing non-vaccination rates. Some states make it so simple to receive an accommodation that it is easier to do so than to be vaccinated.[265] If states make it more difficult to receive the accommodation, some people may prefer to simply accept vaccination.[266] In this view, what matters most is not whether a state offers accommodations, but rather how easy or difficult it is to qualify for the accommodation.[267] It could also be that educating potential non-vaccinators about the safety and efficacy of vaccination helps assuage their concerns and convince some of them to vaccinate their children.[268] Either way, states could effectively improve vaccination rates even while enacting broader laws that allow for both religious and philosophical accommodations.

Such a change is unlikely to take place in the absence of a focusing event such as a judicial ruling, because advocates of non-vaccination have little incentive to make it more difficult to receive an accommodation. A judicial ruling striking down religious-only accommodations, then, presents an opportunity to get all sides to the table, so to speak, to hash out a new legislative compromise that best represents and protects the relevant interests.

Third, even if states followed the lead of the Arkansas legislature and responded to a ruling by adopting the broadest possible accommodations, it may not matter a great deal. According to the Centers for Disease Control, in states that offer only religious accommodations, more people claim a religious accommodation than in states that offer both religious and philosophical accommodations.[269] Those who see themselves as having philosophical, rather than religious, objections may be able to already claim to have religious objections in order to secure the accommodation if the statute only allows for religious

263. Nina R. Blank, Arthur L. Caplan, & Catherine Constable, *Exempting School Children From Immunizations: States With Fewer Barriers Had Highest Rates Of Nonmedical Exemptions*, 32 HEALTH AFF. 1282 (2013); Omer et al., *supra* note 31; Rota et al., *supra* note 26; *see also* Mich. Admin. Code r. 325.176 (2017); *see also* NAVIN, *supra* note 1, at 211 (suggesting this is what states *should* do); Rota, *supra* note 26.

264. *See* NAVIN, *supra* note 1, at 212.

265. *Id.* at 211–12.

266. *Id.*

267. *Id.*

268. *Id.*

269. *See* Smith, *supra* note 254, at 251. *But see* Omer et al., *supra* note 31.

accommodations.[270] This suggests, in turn, that a state would not necessarily experience a substantial rise in the numbers of people seeking accommodations, if it amended its laws to also allow for philosophical accommodations. Therefore, the risk of a legislature adopting an expansive accommodation in response to a judicial ruling striking down the religious-only accommodation is less real as a de facto matter than as a de jure matter.

These three arguments address concerns about the practical utility of a judicial ruling striking down accommodations. At worst, vaccination rates are unlikely to change a great deal; at best, they will be reduced significantly.

There is yet a fourth reason that I am also not especially concerned about the risk of a legislature expanding its accommodation regime: my interest is not strictly utilitarian. I am equally concerned with developing a normative, neutral principle for resolving the third party harms puzzle. I examine the vaccination context, in part as a means of exploring and illustrating one proposed approach; I do not adopt my proposed approach *because* it leads to a desirable outcome in the vaccination context. To be sure, I would applaud a move toward higher vaccination rates, and I would surely be pleased if my proposed approach contributed to that end. But contributing to that effort is not my motivating force in proposing this approach. Even if the effort backfired due to a legislative reaction, the contribution remains worthwhile. After all, the nature of neutral principles is that they sometimes apply in a manner contrary to the preferences of those who hold them.

CONCLUSION

How will constitutional law mediate the clashes between law and religion in an increasingly diverse and heterogeneous society? How will it balance individual and religious liberty against the costs they impose on others? The Equality approach to this problem offers an elegant and balanced, if incomplete, solution that asks judges to do what they are institutionally competent to do, while leaving space for political engagement by the public. It could also save some lives.

270. *Id.*

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