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Private Schools' Role and Rights in Setting Vaccination Policy: A Constitutional and Statutory Puzzle

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PRIVATE SCHOOLS' ROLE AND RIGHTS IN SETTING
VACCINATION POLICY: A CONSTITUTIONAL AND
STATUTORY PUZZLE

HILLEL Y. LEVIN*

ABSTRACT

Measles and other vaccine-preventable childhood diseases are making a comeback, as a growing number of parents are electing not to vaccinate their children. May private schools refuse admission to these students? This deceptively simple question raises complex issues of First Amendment law and statutory interpretation, and it also has implications for other current hot-button issues in constitutional law, including whether private schools may discriminate against LGBTQ students. This Article is the first to address the issue of private schools' rights to exclude unvaccinated children. It finds that the answer is "it depends." It also offers a model law that states should adopt to explicitly allow private schools to adopt policies to exclude unvaccinated children.

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INTRODUCTION

In 2019, there were more than 1200 cases of measles reported in the United States, which is more than the total number of cases in the previous four years combined.¹ The last time the total number of cases of measles topped the millennium mark in an entire year was 1992.² Although the numbers this year are especially striking, this development reflects a broader trend line of the rising incidence of vaccine-preventable childhood illnesses.³ In the wake of every major outbreak of these diseases, public health advocates, policy-makers, and academics inevitably call for tighter vaccination laws and other means of increasing vaccination rates.⁴ Sometimes laws change, but more often, they do not.⁵

Meanwhile, many private schools—which tend to have higher nonvaccination rates than public schools⁶ and have been loci of outbreaks and drivers of regional epidemics⁷—have begun to

1. *Measles Cases and Outbreaks*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/measles/cases-outbreaks.html> [<https://perma.cc/BXA2-2V3Q>].

2. Julia Ries, *Disneyland the Site of Another Measles Exposure*, HEALTHLINE (Oct. 23, 2019), <https://www.healthline.com/health-news/measles-cases-worst-since-1994-how-bad-will-it-get> [<https://perma.cc/B7ZF-HV54>].

3. *Reported Cases and Deaths from Vaccine Preventable Diseases, United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 2019), <https://www.cdc.gov/vaccines/pubs/pinkbook/downloads/appendices/E/reported-cases.pdf> [<https://perma.cc/AVF4-UKHV>].

4. See *Following Measles Outbreaks, More States Are Considering Removing Personal Exemptions to Vaccinations*, KAISER HEALTH NEWS (Mar. 1, 2019), <https://khn.org/morning-breakout/following-measles-outbreaks-more-states-are-considering-removing-personal-exemptions-to-vaccinations/> [<https://perma.cc/MUU6-DEWC>]; Patti Neighmond, *States Move to Restrict Parents' Refusal to Vaccinate Their Kids*, NPR (Feb. 28, 2019, 3:06 PM), <https://www.npr.org/sections/health-shots/2019/02/28/698606894/states-move-to-restrict-parents-refusal-to-vaccinate-their-kids> [<https://perma.cc/97BY-NZAZ>].

5. See Saad B. Omer et al., *Legislative Challenges to School Immunization Mandates, 2009-2012*, 311 JAMA 620, 620-21 (2014).

6. Jana Shaw et al., *United States Private Schools Have Higher Rates of Exemptions to School Immunization Requirements than Public Schools*, 165 J. PEDIATRICS 129, 131-32 (2014).

7. See Kimiko de Freytas-Tamura, *Bastion of Anti-Vaccine Fervor: Progressive Waldorf Schools*, N.Y. TIMES (June 13, 2019), <https://www.nytimes.com/2019/06/13/nyregion/measles-outbreak-new-york.html> [<https://perma.cc/NW8N-RVXK>]; Laurel Wamsley, *Chickenpox Outbreak Hits N.C. Private School with Low Vaccination Rates*, NPR (Nov. 20, 2018, 4:00 PM), <https://www.npr.org/2018/11/20/669644191/chickenpox-outbreak-hits-n-c-private-school-with-low-vaccination-rates> [<https://perma.cc/59HU-UU5J>].

consider refusing admission to students who are not vaccinated.⁸ The problem is that some state laws appear to prohibit them from doing so.⁹ The law here is frustratingly unclear, and the legal questions involve complex issues of both statutory and constitutional interpretation. This Article is the first to address this issue. In so doing, it exposes deep questions of First Amendment law that extend well beyond the context of vaccination.

On the statutory side, do vaccination mandates and exemptions apply to private schools at all? Here, the answer is “sometimes,” for it depends on states’ statutory schemes, the courts in each state, and even the type of private school.¹⁰ On the constitutional side, the issues are even more complex, as they implicate three foundational values: *individuals’* rights to be free from the burden and costs of others’ religious practices; *other individuals’* freedoms of religion and conscience; and *institutions’* religious autonomy and associational rights. When it comes to the issue of private schools’ vaccination policies, these values and interests are on a collision course.

In untangling this mess of statutes and undertheorized constitutional values, this Article finds that the law is, well, a mess. In some states, all private schools *might* have a statutory right to reject vaccination exemptions; in other states, only religious schools have

8. See *NM v. Hebrew Acad. Long Beach*, 155 F. Supp. 3d 247, 249-52 (E.D.N.Y. 2016) (school required parent to undergo sincerity inquiry and rejected claim for exemption; parent sued); *Bowden v. Iona Grammar Sch.*, 726 N.Y.S.2d 685, 686 (App. Div. 2001) (school excluded child after rejecting claim for nonmedical exemption); *Immunization Policy*, DIOCESE ORLANDO, <https://www.orlandodiocese.org/ministries-offices/schools/schools-parent-information/schools-immunization-policy> [<https://perma.cc/F9LL-LWBA>]; Dave Schechter, *Measles Outbreak Has Atlanta Rabbis Concerned*, ATLANTA JEWISH TIMES (Nov. 28, 2018, 11:03 AM), <https://atlantajewishtimes.timesofisrael.com/measles-outbreak-has-atlanta-rabbis-concerned> [<https://perma.cc/DRX2-7XFC>]; Jack Shea, *Cleveland Heights Private School Mandates Vaccinations for Students*, FOX 8 CLEV. (Nov. 27, 2018, 4:36 PM), <https://fox8.com/2018/11/27/cleveland-heights-private-schools-mandates-vaccinations-for-students> [<https://perma.cc/T8T3-C3ML>]; *Temple Israel Vaccination Policy*, TEMPLE ISR., <https://images.shulcloud.com/1267/uploads/docs/vaccination-policy-8-16.pdf> [<https://perma.cc/6XNB-SSQ2>]; see also, e.g., *Flynn v. Estevez*, 221 So. 3d 1241, 1243 (Fla. Dist. Ct. App. 2017); *Rubinstein v. Temple Isr. Early Learning Ctr.*, No. 335101, 2018 WL 1020509, at *1 (Mich. Ct. App. Feb. 22, 2018); *K.M. ex rel. A.M. v. Pixie Nursery Sch.*, No. 17344, 2018 WL 1428062, at *1-2 (N.Y.S. Educ. Dep’t Mar. 13, 2018); *Jacoba Urist, How Schools Are Dealing with Anti-Vaccine Parents*, ATLANTIC (Feb. 5, 2015), <https://www.theatlantic.com/education/archive/2015/02/schools-may-solve-the-anti-vaccine-parenting-deadlock/38520> [<https://perma.cc/25LG-8378>].

9. See *infra* Part II.B.

10. See *infra* Part II.B.

statutory permission to do so; and in yet other states, no private schools are granted such a right.¹¹ Meanwhile, some religious private schools have the *constitutional* right to reject exemptions, some nonreligious private schools *might* have a similar right, and some private schools *probably* do not.¹² This state of affairs is troubling for three reasons. First, it leaves a great deal of uncertainty for private schools. Second, there are deep constitutional problems with a regime that allows religious private schools to reject vaccination exemptions but that denies that right to similarly situated nonreligious private schools. And finally, it leaves children unnecessarily vulnerable to dangerous, debilitating, and life-threatening illnesses.

With this Article, I hope to make four important and different kinds of contributions. First, the Article describes the law as it currently stands. For at least some private schools, I offer clear answers, and for others, I can at least clarify the issues and the legal landscape. Second, I offer practical solutions to this problem by recommending that states clarify their statutes to allow private schools to exclude students who are unvaccinated for nonmedical reasons, and I offer clear statutory language to do so. I also suggest ways in which the judicial and administrative branches can help. Third, I explore the complex and heretofore undertheorized relationship between the First Amendment's religious autonomy and associational freedom doctrines, particularly as they relate to private schools. Finally, I show that the issues raised by the seemingly narrow question of private schools' vaccination policies have far-reaching implications for some contemporary and hot-button social and constitutional questions.

The Article proceeds as follows. Part I offers a brief introduction to vaccines and vaccination law. It also describes the dangers associated with nonvaccination and the necessity of high vaccination compliance rates. Part II then introduces the particular context of private schools and considers how states' statutes mandating vaccination apply to them. It also assesses whether private schools may and should conduct sincerity inquiries to determine whether individual claimants for vaccination exemptions are entitled to

11. See *infra* Part II.B.

12. See *infra* Part III.

them. Part III addresses the complex constitutional questions involved when private schools choose to exclude nonvaccinated children from admission. It finds some clarity, some lack of clarity, and some troubling practical and constitutional implications. Part IV then explores these implications and offers concrete solutions.

Finally, the Article concludes by exposing and briefly addressing the much broader questions implicated by the religious and associational freedoms analyses. When may private schools discriminate and on what basis? Against whom? What other state statutes may they ignore? On what constitutional grounds? These questions have particular salience today, in a parallel context: do religious organizations have a constitutional right to exclude or discriminate against people on the basis of sexual orientation or sexual identity despite states' laws guaranteeing LGBTQ equality?

I. VACCINATION MANDATES AND EXEMPTIONS: WHAT AND WHY?

Vaccines have been among the most successful public health interventions in history.¹³ Mandatory vaccinations in the United States provide protection from diseases that once threatened to wipe out communities.¹⁴ These diseases are now eradicated, preventable, or manageable.¹⁵ Among children born between 1994 and 2013, routine childhood vaccination will have prevented roughly 322 million cases of disease and 732,000 deaths, with an estimated net cost savings of \$1.38 trillion.¹⁶

Nevertheless, the choice of a relatively small but growing minority of parents to opt out of vaccination protocols puts the lives and health of their children and, crucially, others in the community as

13. See generally Pauline W. Chen, *Putting Us All at Risk for Measles*, N.Y. TIMES (June 26, 2014), <https://well.blogs.nytimes.com/2014/06/26/putting-us-all-at-risk-for-measles/> [<https://perma.cc/UNZ7-TYAB>] (noting a major resurgence in measles in 2014 due to parents who chose not to vaccinate their children).

14. See *Ten Great Public Health Achievements—United States, 2001-2010*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 26, 2011), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6019a5.htm> [<https://perma.cc/U8PG-7VKU>].

15. *Id.*

16. Holly A. Hill et al., *National, State, and Selected Local Area Vaccination Coverage Among Children Aged 19-35 Months—United States, 2014*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 28, 2015), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6433a1.htm> [<https://perma.cc/83CU-Q4JS>].

well, at risk. This Part briefly explains the importance of vaccination, the dangers of nonvaccination, and reviews the statutory landscape.

A. A Short Primer on Vaccination and Community Immunity

Vaccines work by introducing a benign pathogen into the body that primes the immune system to fight off a related, dangerous version of the pathogen.¹⁷ This process is safe. Complications from mandatory vaccines are mild, and severe complications are exceedingly rare and almost nonexistent.¹⁸ More than two dozen vaccines against major diseases are available, and more are being developed.¹⁹

Critically, vaccines' efficacies go beyond their ability to immunize the individuals who receive them. Once enough people in a community are immunized through vaccination, the entire community benefits from what is known as "community immunity," or what is more commonly (but less preferably) referred to as "herd immunity."²⁰ Community immunity occurs when so many people in

17. *Understanding How Vaccines Work*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 2018), <https://www.cdc.gov/vaccines/hcp/conversations/downloads/vacsafe-understand-color-office.pdf> [<https://perma.cc/73KK-RLQN>].

18. *Id.*; see also *Vaccine Information Statements: DTaP (Diphtheria, Tetanus, Pertussis)*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 24, 2018), <https://www.cdc.gov/vaccines/hcp/vis/vis-statements/dtap.html> [<https://perma.cc/89UE-V7S9>]; *Vaccine Information Statements: Rotavirus*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 23, 2018), <https://www.cdc.gov/vaccines/hcp/vis/vis-statements/rotavirus.html> [<https://perma.cc/9BGT-Y573>]. Although some people continue to express concerns that vaccines may cause autism spectrum disorders, these claims have been debunked by all available scientific evidence. See Neighmond, *supra* note 4; see also Frank DeStefano et al., *Increasing Exposure to Antibody-Stimulating Proteins and Polysaccharides in Vaccines Is Not Associated with Risk of Autism*, 163 J. PEDIATRICS 561, 563 (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).

19. MARK NAVIN, *VALUES AND VACCINE REFUSAL: HARD QUESTIONS IN ETHICS, EPISTEMOLOGY, AND HEALTH CARE* 4 (2016).

20. *Id.* at 5 ("If a sufficiently large percentage of the population develops individual immunity, then that population will possess 'herd immunity.'"); see also Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 600 (2016) (describing community immunity as a critical portion of the population becoming vaccinated and thus creating little opportunity for an outbreak); Allan J. Jacobs, *Do Belief Exemptions to Compulsory Vaccination Programs Violate the Fourteenth Amendment?*, 42 U. MEM. L. REV. 73, 79 (2011) (explaining that community immunity is achieved "when the fraction of the people who are immune to a disease is so great as to interrupt transmission of

a group are immunized that the disease cannot reach any non-immunized individuals that remain because the vectors of disease transmission are effectively closed.²¹

The development and maintenance of community immunity is critical because every society will have some who cannot, or will not, be immunized. Some are too young to be vaccinated.²² Others cannot be vaccinated for medical reasons.²³ Yet others receive vaccines but may not successfully develop complete immunity,²⁴ and others' immunity may have waned since having been vaccinated.²⁵ Still others are undervaccinated due to lack of access to healthcare or for other socioeconomic reasons.²⁶ Finally, and most problematically, some parents *choose* not to have their children vaccinated, either because of erroneous beliefs about the safety and efficacy of vaccines, or for religious, philosophical, or other deeply felt personal

that disease by removing most potential targets of infection from the chain of transmission”).

21. Chemerinsky & Goodwin, *supra* note 20, at 600; *see also* NAVIN, *supra* note 19, at 5.

22. For example, children cannot receive certain vaccines before reaching a certain age. *Who Should NOT Get Vaccinated with These Vaccines?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/vpd/should-not-vacc.html> [<https://perma.cc/UHJ2-4V7E>]; *see also Recommended and Minimum Ages and Intervals Between Doses of Routinely Recommended Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/pubs/pinkbook/downloads/appendices/a/age-interval-table.pdf> [<https://perma.cc/JE6M-NUP3>]. Some people can never be immunized against some diseases. NAVIN, *supra* note 19, at 5; *see also Who Should NOT Get Vaccinated with These Vaccines?*, *supra*. Others can be vaccinated, but they will not be effectively immunized. NAVIN, *supra* note 19, at 5.

23. *Who Should NOT Get Vaccinated with These Vaccines?*, *supra* note 22.

24. NAVIN, *supra* note 19, at 5 (noting the importance of community 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 20, 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. *Id.*

25. Joseph A. Lewnard, *Vaccine Waning and Mumps Re-emergence in the United States*, SCI. TRANSLATIONAL MED., Mar. 21, 2018, at 1, 5; *Measles Prevention: Recommendations of the Immunization Practices Advisory Committee (ACIP)*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 29, 1989), <https://www.cdc.gov/mmwr/preview/mmwrhtml/00041753.htm> [<https://perma.cc/FT9X-AJHA>]; *Pertussis Frequently Asked Questions*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 1, 2019), <https://www.cdc.gov/pertussis/about/faqs.html> [<https://perma.cc/DYS4-AQYP>].

26. NAVIN, *supra* note 19, at 10.

reasons.²⁷ Consequently, society depends on community immunity to avoid the spread of serious diseases.

Community immunity is only achieved once a large proportion of a community is vaccinated. The vaccination rates necessary for conferring community immunity differ by disease, with some requiring as much as 95 percent of the population within a community to be vaccinated in order to be successful.²⁸ This situation presents classic collective action and related free-rider problems: parents can enjoy the benefits of community immunity without internalizing the costs associated with having their own children immunized. Consequently, some may avoid the costs—financial, time, mild pain, and anxieties—of vaccination by choosing not to vaccinate their children, and instead rely on others' willingness to vaccinate and thereby confer community immunity.²⁹ But if enough people opt out, then community immunity is threatened.

Recent high-profile outbreaks of vaccine-preventable illnesses have occurred exclusively in communities with vaccination rates below the levels necessary to maintain community immunity.³⁰ Measles has been the most prevalent vaccine-preventable illness to experience a comeback due to characteristics that make it especially contagious and therefore necessitate high vaccination-compliance

27. *Id.* at 11 (“Many parents [who refuse to vaccinate] identify worries about health considerations, but a smaller number of parents refuse vaccines for religious or philosophical reasons.”).

28. *Id.* at 5; Chemerinsky & Goodwin, *supra* note 20, at 600 (citing PAULA. OFFIT, DEADLY CHOICES: HOW THE ANTI-VACCINE MOVEMENT THREATENS US ALL 145 (rev. foreword 2015 ed. 2011)) (stating that highly contagious infections such as measles and pertussis require an immunization rate of about 95 percent).

29. NAVIN, *supra* note 19, 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 20, at 79-80 (asserting that community immunity allows some number of free riders to benefit from the vaccination of others).

30. *See* Wamsley, *supra* note 7.

rates.³¹ However, other vaccine-preventable illnesses have also resurged due to low immunization rates.³²

B. Mandatory Vaccination Laws in the United States and the Threat to Community Immunity

States began to impose vaccination mandates in the nineteenth century in order to reduce the likelihood and magnitude of disease outbreaks.³³ By prohibiting or limiting opt-outs from vaccination, these requirements also help to eliminate the free-rider problem and, thereby, to generate and maintain community immunity.

All fifty states require children to be vaccinated against a range of diseases in order to attend public school.³⁴ Nearly all states have similar requirements for private schooling, while some also apply to daycare centers and homeschooled children.³⁵ However, state laws also include provisions that allow for nonvaccination in some cases. First, all states allow children to remain unvaccinated if vaccination is contraindicated for medical reasons.³⁶ Typically, this exemption

31. Aimee Cunningham, *How Holes in Herd Immunity Led to a 25-Year High in U.S. Measles Cases*, SCIENCE NEWS (Apr. 29, 2019, 4:04 PM), <https://www.sciencenews.org/article/holes-herd-immunity-led-25-year-high-us-measles-cases> [https://perma.cc/AU2Q-D5RE]; *Measles Outbreak*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 2019), <https://www.cdc.gov/measles/downloads/fs-measles-outbreak-508.pdf> [https://perma.cc/2DHD-DMV8].

32. See James D. Cherry, *Epidemic Pertussis in 2012—The Resurgence of a Vaccine-Preventable Disease*, 367 NEW ENG. J. MED. 785, 785 (2012); Eric Toner, *Resurgence of Vaccine-Preventable Childhood Diseases*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH, CTR. FOR HEALTH SECURITY (July 3, 2014), http://www.centerforhealthsecurity.org/cbn/articles/2014/cbnreport_07022014.html [https://perma.cc/2QS3-RV4Y].

33. NAVIN, *supra* note 19, at 7 (stating that in the nineteenth century, some states made vaccines mandatory for children, especially for children who wished to attend school); Chemerinsky & Goodwin, *supra* note 20, at 598-99 (noting that all fifty states and the District of Columbia have vaccination laws for public school children).

34. Chemerinsky & Goodwin, *supra* note 20, at 598-99; Jacobs, *supra* note 20, 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 20, at 599; see *School Vaccination Requirements and Exemptions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/imz-managers/schoolvaxview/requirements/index.html> [https://perma.cc/B4SJ-D86H] (listing the mandatory vaccines for every state in the United States).

35. Chemerinsky & Goodwin, *supra* note 20, at 598-99.

36. *Id.* at 597-98.

applies to those who are immunocompromised or too sick to withstand vaccination.³⁷ 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 makes no sense to mandate it. Because these children cannot be vaccinated, they depend entirely on community immunity.

More controversially, the overwhelming majority of states also allow for nonvaccination for other reasons.³⁸ Only five—Mississippi, West Virginia, California, Maine, and New York—reject all non-medical exemptions.³⁹ Of the other forty-five states, most only accommodate those who object to vaccination for religious reasons.⁴⁰ The remaining states provide religious accommodations as well as accommodations for those with moral, philosophical, or other conscientious objections to vaccination.⁴¹

Thus, the vast majority of states have opted to exempt those with some nonmedical objections from vaccination requirements, and nonvaccination persists. In pockets around the country, community immunity has been threatened due to nonvaccination, with wide geographic disparities in the proportion of vaccinated children.⁴² For example,

[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.⁴³

In addition, some states with high rates of vaccination overall may nevertheless have clusters of significantly undervaccinated populations within bounded geographical areas of the state, or even

37. *See id.*

38. *See States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [<https://perma.cc/CLJ3-Y22F>].

39. *Id.*

40. *Id.*

41. *Id.*

42. Jacobs, *supra* note 20, at 81.

43. *Id.* (footnotes omitted).

within individual schools.⁴⁴ Thus, even when a state has high vaccination rates overall, there are often microcommunities that are vulnerable to contagion.

Although there has been an absence of continuous transmission of measles in the United States, regular outbreaks still occur, almost exclusively in communities or schools where substantial proportions of the population opt not to vaccinate.⁴⁵

Among the highest-profile recent outbreaks was a measles epidemic that spread in California's Disneyland amusement park, caused 111 cases in seven states, and was exported to Mexico and Canada.⁴⁶ While the media attention and public dialogue resulting from the Disneyland outbreak were intense, the outbreak was hardly unusual. More recently, there was a major measles outbreak in ultra-Orthodox Jewish communities in New York and New Jersey.⁴⁷ Indeed, New York experienced its most severe outbreak of measles in decades, centered almost exclusively in ultra-Orthodox Jewish communities in which parents send their children to religious private schools.⁴⁸

Measles is not alone. Noncompliance with vaccination protocols by a minority of parents has led to outbreaks of a variety of other

44. Liza Gross, *Parents Who Shun Vaccines Tend to Cluster, Boosting Children's Risk*, NPR (Jan. 20, 2015, 3:45 PM), <https://www.npr.org/sections/health-shots/2015/01/20/378630798/parents-who-shun-vaccines-tend-to-cluster-boosting-childrens-risk> [<https://perma.cc/M59Y-Q2RW>].

45. See, e.g., Karen Kaplan, *Vaccine Refusal Helped Fuel Disneyland Measles Outbreak, Study Says*, L.A. TIMES (Mar. 16, 2015), <http://www.latimes.com/science/sciencenow/la-sci-sn-disneyland-measles-under-vaccination-20150316-story.html> [<https://perma.cc/4ZAG-96UE>]; see also Katie M. Palmer, *Why Did Vaccinated People Get Measles at Disneyland? Blame the Unvaccinated*, WIRED (Jan. 21, 2015), <https://www.wired.com/2015/01/vaccinated-people-get-measles-disneyland-blame-unvaccinated/> [<https://perma.cc/84ZQ-DUEA>].

46. Nakia S. Clemmons et al., *Measles—United States, January 4–April 2, 2015*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 17, 2015), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6414a1.htm> [<https://perma.cc/R9AE-ZL4X>].

47. Debra Goldschmidt, *More than 760 Measles Cases in US, Most in New York*, CNN (May 6, 2019), <https://www.cnn.com/2019/05/06/health/measles-update-us-cases-764-cdc/index.html> [<https://perma.cc/4YPJ-AL85>]; Sharon Otterman, *New York Confronts Its Worst Measles Outbreak in Decades*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/nyregion/measles-outbreak-jews-nyc.html> [<https://perma.cc/4WAA-PWUU>]; Tyler Pager, *'Monkey, Rat and Pig DNA': How Misinformation Is Driving the Measles Outbreak Among Ultra-Orthodox Jews*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/nyregion/jews-measles-vaccination.html> [<https://perma.cc/4QXJ-WYZ4>].

48. Pager, *supra* note 47.

serious diseases that should have long been eradicated through vaccination, including pertussis, mumps, and polio.⁴⁹

Public health advocates have responded to these outbreaks by pushing for changes to the law, with a particular focus on eliminating nonmedical exemptions.⁵⁰ For reasons I have explored elsewhere, with few exceptions, these efforts have been fruitless.⁵¹ In the meantime, public health officials, doctors, parents, caregivers, and educators are doing what they can to prevent and contain outbreaks.

II. PRIVATE SCHOOLS: THE PROBLEM AND THE LAW

Some private schools support parents' choice not to vaccinate.⁵² Some parents choose to send their children to particular private schools that share their values, including values that lead parents

49. The decline of community immunity has led to recent disease outbreaks, killing hundreds and hospitalizing thousands more. See Chemerinsky & Goodwin, *supra* note 20, at 601. The United States "has experienced outbreaks of pertussis, measles, and polio in recent years." Jacobs, *supra* note 20, at 80 (footnotes omitted). According to one commentator, "The rise of exemptions to compulsory vaccination laws threatens to undermine the public health achievements made possible by widespread immunizations." Chemerinsky & Goodwin, *supra* note 20, 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 Saad B. Omer et al., *Geographic Clustering of Nonmedical Exemptions to School Immunization Requirements and Associations with Geographic Clustering of Pertussis*, 168 AM. J. EPIDEMIOLOGY 1389, 1394-95 (2008); Alexandra Sifferlin, *4 Diseases Making a Comeback Thanks to Anti-Vaxxers*, TIME (Mar. 17, 2014), <https://time.com/27308/4-diseases-making-a-comeback-thanks-to-anti-vaxxers/> [<https://perma.cc/3ZJ5-5B4D>] (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 (Jan. 22, 2015), <https://www.bbc.com/news/blogs-echochambers-30942928> [<https://perma.cc/V2UG-DXGF>] (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).

50. See, e.g., *AMA Policy Advocates to Eliminate Non-Medical Vaccine Exemptions*, AM. MED. ASS'N (June 13, 2019), <https://www.ama-assn.org/press-center/press-releases/ama-policy-advocates-eliminate-non-medical-vaccine-exemptions> [<https://perma.cc/UK8Y-WXSH>]; Alyson Sulaski Wyckoff, *Eliminate Nonmedical Immunization Exemptions for School Entry, Says AAP*, AM. ACAD. OF PEDIATRICS (Aug. 29, 2016), <https://www.aappublications.org/news/2016/08/29/VaccineExemptions082916> [<https://perma.cc/N98N-PP2A>].

51. See Hillel Y. Levin, *Why Some Religious Accommodations for Mandatory Vaccinations Violate the Establishment Clause*, 68 HASTINGS L.J. 1193, 1234-37 (2017).

52. See de Freitas-Tamura, *supra* note 7.

not to vaccinate.⁵³ These private schools have dramatically higher rates of nonvaccination and undervaccination than do public schools, making them especially vulnerable to disease outbreaks.⁵⁴

Many other private schools, however, strongly prefer that parents comply with state vaccination mandates.⁵⁵ Their reasons for doing so may vary—concern over the health of their students, fear of liability, protection of their public image, religious or other values-based beliefs—but they all face the same question: Does the law permit them to limit the number of students who are not vaccinated for nonmedical reasons, or to exclude them altogether?

This Part considers the particular context of private schools, the legal landscape in which they operate, and the options that state statutes give them to prevent and minimize the risk of outbreaks of vaccine-preventable illnesses. It then assesses the possibility that schools may engage in sincerity inquiries to limit (even if not altogether eliminate) the number of unvaccinated students who attend their schools.

A. *The Private School Context*

Any space in which unvaccinated children regularly come into contact with one another is potentially vulnerable to disease transmission. Private schools may be especially vulnerable. Private schools often seek to foster community among their students and stakeholders. Whether organized around a religious identity, a particular educational vision, or a set of values, these schools tend to be smaller and more mission driven than their public school counterparts.⁵⁶ Further, small class sizes and extracurricular bonding experiences among students, faculty, and parents help to create this sense of community.⁵⁷

These features may also create an environment in which even a small number (in absolute terms) of unvaccinated children can lead

53. *See id.*

54. Shaw et al., *supra* note 6, at 130, 132.

55. *See, e.g.,* Shea, *supra* note 8; Urist, *supra* note 8.

56. *See, e.g.,* *School Mission Statements*, MISSION STATEMENTS, https://www.missionstatements.com/school_mission_statements.html [<https://perma.cc/ELY4-52LX>].

57. *See* *Why Choose a Private School?*, INLY INSIGHTS (Mar. 29, 2019), <https://inlyinsights.org/2019/03/29/why-choose-a-private-school/> [<https://perma.cc/K2BN-7KKF>].

to a localized outbreak of a deadly disease. Indeed, the recent and ongoing severe measles outbreak in New York has nearly exclusively affected communities in which parents send their children to private schools, and it is likely that these private schools have been sites of contagion.⁵⁸ Moreover, private schools in many places have higher rates of vaccination exemptions than public schools, suggesting that they are particularly vulnerable to outbreaks.⁵⁹ Finally, many private schools operate programs for children who are too young to be vaccinated, and who are consequently at particular risk.⁶⁰

Professional and lay leaders in private schools have recognized the potential dangers of nonvaccination and have begun to explore ways to protect their school communities, including by clarifying their vaccination policies and adopting new policies to limit or eliminate the availability of nonmedical exemptions. Some private schools have gone so far as to require all children to be vaccinated as a condition of attendance, unless they have a medical exemption, while others have taken somewhat less drastic measures.⁶¹ These decisions have led to lawsuits in some cases, with inconsistent outcomes, leaving private schools uncertain as to how to proceed.⁶²

B. The Statutory Landscape for Private Schools

Do state vaccination laws—both the mandates themselves and the exemptions that states offer—apply to private schools? Further, if they do apply to private schools, do those laws allow private schools to selectively accept or reject those claiming nonmedical exemptions?

Every state has its own statutory scheme compelling vaccination prior to school attendance. These schemes differ in some important respects, but they generally share several features. First, they all

58. See *Health Department Closes Two Williamsburg Schools for Violating Commissioner's Order During Measles Outbreak*, NYC HEALTH DEP'T. (June 13, 2019), <https://www1.nyc.gov/site/doh/about/press/pr2019/two-williamsburg-schools-closed-for-measles-violations.page> [<https://perma.cc/W9L4-QKNX>] (noting that 74 percent of measles cases have occurred within a small distance from private schools run by the Orthodox Jewish community).

59. Shaw et al., *supra* note 6, at 130, 132.

60. *Id.* at 132.

61. See, e.g., *supra* note 8.

62. See, e.g., *supra* note 8.

require students to be vaccinated in order to attend school.⁶³ Second, all clearly apply these mandates to both public and private schools.⁶⁴ Third, forty-five states offer nonmedical exemptions from vaccination mandates for those with objections rooted in religious or philosophical beliefs.⁶⁵ Among these states, New Jersey provides that *religious* private schools may choose whether or not they will allow nonmedical exemptions, but it offers no comparable choice to nonreligious private schools.⁶⁶

The remaining forty-four states are a bit more complicated. In several, the statutes provide (or the courts have interpreted or assumed) that private schools must accept exemptions on the same terms as do public schools. New York's previous statutory exemption scheme (which has recently been amended to eliminate the religious exemption) offers an illustrative example.⁶⁷ It dictates that all children must be vaccinated in order to attend school: "No principal, teacher, owner or person in charge of a school shall permit any child to be admitted to such school, or to attend such school [unless the child has been properly vaccinated]."⁶⁸ The statute defines "school" to include private schools: "The term 'school' means and includes

63. See *supra* note 34 and accompanying text.

64. *State Vaccination Requirements*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/imz-managers/laws/state-reqs.html> [<https://perma.cc/952N-FN47>] ("State laws establish vaccination requirements for school children. These laws often apply not only to children attending public schools but also to those attending private schools and day care facilities.").

65. A small majority of states limit nonmedical exemptions to those whose religious beliefs prohibit them from vaccinating their children. NAT'L CONF. ST. LEGISLATURES, *supra* note 38. The remainder of the states allow for religious or philosophical exemptions. *Id.* I have argued elsewhere that the states that limit their exemptions to those with religious objections run afoul of the Constitution's Establishment Clause. See Levin, *supra* note 51, at 1204-06. That is, states may *either* allow no exemptions, as in Maine, West Virginia, Mississippi, California, and New York, *or* both religious and philosophical exemptions. See *id.*

66. "Religious affiliated schools or child care centers shall have the authority to withhold or grant a religious exemption from the required immunization for pupils entering or attending their institutions without challenge by any secular health authority." N.J. ADMIN. CODE § 8:57-4.4(b) (2019). It follows from this special exemption for religious private schools that nonreligious private schools must accept children with bona fide religious exemptions. See *id.*

67. See N.Y. PUB. HEALTH LAW § 2164(9) (McKinney 2015). I have chosen to offer New York's prior scheme as an example because it is one of the few states in which the availability of a religious exemption in the statute has been explicitly interpreted by the state court to apply to private schools. See *Bowden v. Iona Grammar Sch.*, 726 N.Y.S.2d 685, 686 (App. Div. 2001).

68. N.Y. PUB. HEALTH LAW § 2164(7)(a) (McKinney 2019).

any public, private or parochial child caring center, day nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school.”⁶⁹

As all states' statutes do, it offers an exemption for children who cannot be vaccinated for medical reasons: “If any physician licensed to practice medicine in this state certifies that such immunization may be detrimental to a child's health, the requirements of this section shall be inapplicable until such immunization is found no longer to be detrimental to the child's health.”⁷⁰ Crucially, the statute then exempts children whose parents object to vaccination on nonmedical grounds, in this case, for religious reasons: “This section shall not apply to children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required, *and no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school.*”⁷¹

There are some open questions about the application of this statute. For example, is a synagogue or church playgroup that provides care and education for children during weekly services a “child caring center” or “day nursery” that must verify compliance for attendance, or is it more like a weekly babysitting service or playgroup? However, as is the case with several other states, it seems clear that children in New York attending private schools are subject to the same mandates *and* the same exemptions as are those attending public school. The phrase that, “no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school” is best read to mean that *any* school may not require a certificate of immunization if the student has a legitimate religious exemption.⁷² Indeed, New York's courts interpreted it to mean just that.⁷³ Other states' courts have adopted similar interpretations or assumptions.⁷⁴

69. *Id.* § 2164(1)(a).

70. *Id.* § 2164(8).

71. *Id.* § 2164(9) (emphasis added).

72. *See id.*

73. *See Bowden v. Iona Grammar Sch.*, 726 N.Y.S.2d 685, 686-87 (App. Div. 2001).

74. Florida courts have assumed that their state's vaccination laws and exemptions also apply to private schools. *See Flynn v Estevez*, 221 So. 3d 1241, 1243, 1249 n.18 (Fla. Dist. Ct. App. 2017) (assuming that, but for church autonomy doctrine, a private school would be bound to accept a religious exemption); *see also Rubinstein v. Temple Isr. Early Learning Ctr.*, No.

However, some other states' laws are less clear as to whether private schools may reject nonmedical exemptions altogether. Here, Georgia's statute is illustrative. Like New York, it imposes vaccination requirements for students attending both public and private schools, and it offers a medical exemption.⁷⁵ And, like New York, it also offers a nonmedical exemption for those with religious objections: "This Code section shall not apply to a child whose parent or legal guardian objects to immunization of the child on the grounds that the immunization conflicts with the religious beliefs of the parent or guardian."⁷⁶

Unlike New York, though, Georgia's statute contains no language that would prohibit private schools from adopting its own rules, separate and apart from state law, that would impose an obligation to vaccinate and reject religious exemptions.⁷⁷ Thus, a good case can be made that in states with statutes more similar to Georgia's than to New York's, private schools are free to reject nonmedical exemptions.⁷⁸ However, even in some states where the statutory scheme more closely resembles Georgia's than New York's, the courts have intimated that the statutes require private schools to accept exemption claims on the same basis as do public schools.⁷⁹ And, in most states, the courts have not yet confronted the question.

All told, then, the statutory landscape for private schools is as follows:

- In the five states that reject all nonmedical exemptions, statutes do not distinguish between public and private schools.⁸⁰ Thus, all schools must impose vaccination requirements, and none may offer nonmedical exemptions.

335101, 2018 WL 1020509, at *1-2 (Mich. Ct. App. Feb. 22, 2018) (assuming the same in Michigan).

75. GA. CODE ANN. §§ 20-2-771(a)(2),(a)(4), (d) (2019); *see also* N.Y. PUB. HEALTH LAW §§ 2164(1)(a), (7).

76. GA. CODE ANN. § 20-2-771 (e); *see* N.Y. PUB. HEALTH LAW § 2164(9).

77. *Compare* GA. CODE ANN. § 20-2-771(a)(4), *with* N.Y. PUB. HEALTH § 2164(1)(a).

78. *See infra* Part IV.B.

79. *See supra* note 8.

80. *See* CAL. HEALTH & SAFETY CODE § 120325 (Deering 2016); MISS. CODE ANN. § 41-23-37 (1983); W. VA. CODE § 16-3-4 (2015).

- In New Jersey, religious private schools may choose to reject all nonmedical exemptions if they so choose, but nonreligious private schools do not have this option.⁸¹
- In the remaining forty-four states, some statutory schemes require private schools to accept nonmedical exemptions on the same terms as must public schools, while others *seem* to allow private schools to adopt their own policies, although no courts have explicitly adopted this interpretation.⁸²

In at least some states, then, private schools that wish to exclude nonvaccinated students do not have the statutory authority to do so. Do they have other options for reducing the risk of vaccine-preventable illnesses?

C. *The Possibility (and Limits) of Engaging in Sincerity Inquiries*

The forty-five states that allow for nonmedical exemptions offer only limited bases for claiming them. Most of these allow them solely on the basis of religious belief, while others also allow them on the basis of what are typically called philosophical, personal belief, or conscientious objections.⁸³ It follows, then, that *other* bases for nonvaccination that often motivate people to reject vaccinations—inconvenience,⁸⁴ conspiracy theories,⁸⁵ or misguided fears about purported dangers of vaccines⁸⁶—are not acceptable bases for nonvaccination in any state. Consequently, like claims for religious exemptions in other contexts, the claimant for a nonmedical

81. See *supra* note 66 and accompanying text.

82. See NAT'L CONF. ST. LEGISLATURES, *supra* note 38.

83. *Id.*

84. Michael Favin et al., *Why Children Are Not Vaccinated: A Review of the Grey Literature*, 4 INT'L HEALTH 229, 232 (2012), <https://www.sciencedirect.com/science/article/pii/S1876341312000496> [<https://perma.cc/F58Q-6JBX>].

85. Michael Davidson, *Vaccination as a Cause of Autism—Myths and Controversies*, 19 DIALOGUES IN CLINICAL NEUROSCIENCE 403, 403-06 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5789217/> [<https://perma.cc/55CN-2UQY>]; Robert M. Wolfe & Lisa K. Sharp, *Anti-Vaccinationists Past and Present*, 325 BMJ 430, 431-32 (2002), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1123944/> [<https://perma.cc/P53V-6MJ8>].

86. Sarah E. Williams, *What Are the Factors that Contribute to Vaccine-Hesitancy and What Can We Do About It?*, 10 HUM. VACCINES & IMMUNOTHERAPEUTICS 2584, 2584 (2014), <https://www.tandfonline.com/doi/full/10.4161/hv.28596> [<https://perma.cc/JT94-B969>].

exemption must be sincerely motivated by religious or (in some states) philosophical beliefs.⁸⁷

This begs a question: How, if at all, may school officials distinguish between those with “legitimate” bases for nonvaccination from those with “illegitimate” bases for nonvaccination? May private schools in those states that statutorily require schools to accept nonmedical exemptions conduct sincerity inquiries of those claiming nonmedical exemptions to determine whether the claim is legitimate? May they use these inquiries as a means of limiting, even if not eliminating, the number of students who are unvaccinated in their schools? The following Sections address these questions.

1. *What Is a Sincerity Inquiry?*

“Courts and government officials adjudicate religious sincerity in a wide variety of contexts: fraud; immigration; employment discrimination; prisoner religious accommodations; conscientious objection from service in the armed forces; and statutory accommodations from general laws.”⁸⁸ However, the prevailing wisdom among scholars and some judges is that such inquiries are difficult, problematic, dangerous, and possibly unconstitutional.⁸⁹

The claims that religious sincerity inquiries are impossible or may be unconstitutional are mistaken. People who lie about their religious or philosophical commitments in order to receive special accommodations are not entitled to those accommodations, and courts and other decision makers often must have a means of assessing credibility to separate the legitimate claims from the pretextual.⁹⁰ Government officials, judges, juries, and others must routinely make judgments about honesty, credibility, and sincerity; and judging *religious* sincerity is, for the most part, a similar endeavor.⁹¹ That is, it is neither impossible nor unconstitutional. That said, it *is* true that, for reasons unique to the context of

87. Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1187 (2017).

88. *Id.* at 1188 (footnotes omitted).

89. *Id.* at 1188-90.

90. *See generally id.*

91. *Id.* at 1228-29.

religious claims, sincerity inquiries are especially difficult and fraught.

Sincerity inquiries are perhaps best known from the context of conscientious objection to compulsory military service, and that context offers a useful lens for understanding how sincerity inquiries work—and why they are hard.⁹² From its earliest days as a nation, the United States has recognized a statutory exemption from conscription for those whose religious beliefs prohibit them from serving in the military.⁹³ The contours of this right have changed—indeed, expanded—over time to include people with certain nonreligious beliefs that parallel religious beliefs.⁹⁴ Yet the right is still limited. Just as in the case of vaccination mandates, one must have a sincere religious (or quasi-religious or conscientious) objection to military service in order to be eligible for the exemption.⁹⁵ This requires a sorting mechanism—the sincerity inquiry—to determine whether a given exemption claim is legitimate.

During and around the period of the Vietnam War, the Selective Service System routinely assessed the sincerity of those who applied for conscientious objector status. Adjudicators would probe claimants as to the nature and source of their beliefs, search for inconsistencies, and scrutinize their demeanors for evidence of dishonesty.⁹⁶ And, in many cases, the adjudicators would reject the claims, and imprisonment or conscription would follow.⁹⁷ What other choice did

92. See *Welsh v. United States*, 398 U.S. 333, 340 (1970) (interpreting the term “religious” in the conscientious objector statute to include beliefs that are sincerely held, and which occupy in the life of the objector a place parallel to that filled by a higher being); *Witmer v. United States*, 348 U.S. 375, 384 (1955) (upholding the rejection of a Jehovah’s Witness’s conscientious objector claim for lack of sincerity).

93. Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367, 374 (1993).

94. See *Welsh*, 398 U.S. at 339-40 (holding that a conscientious objector need not base his deeply held and sincere beliefs against participating in the war in a recognized religion to qualify under the conscientious objector exemption; rather, “[w]hat is necessary ... for a registrant’s conscientious objection to all war to be ‘religious’ within the meaning of [the statute] is that this opposition to war stem from the registrant’s moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.”).

95. *Id.*

96. See *supra* note 94.

97. James B. White, *Processing Conscientious Objector Claims: A Constitutional Inquiry*, 56 CALIF. L. REV. 652, 658-59 (1968).

the adjudicators have? If such inquiries were impossible or unconstitutional, then anyone who preferred not to be drafted could claim conscientious objector status.

Over time, however, as a result of both social changes and doctrinal developments, sincerity inquiries of this sort have become more difficult, with many commentators and judges preferring to avoid them altogether. First, throughout contemporary American society, religious beliefs and practices have become less communal and shared, and more personal and idiosyncratic.⁹⁸ This is borne out by public polling, which reveals a decline in institutionalized religious affiliation and the growth of individualized spiritual beliefs and practices.⁹⁹ Such idiosyncratic beliefs are entitled to the same constitutional protections as religious beliefs associated with organized religions.¹⁰⁰ But the absence of any religious reference point—a text, a church, a corpus of commonly held beliefs, a religious leader—makes a sincerity inquiry difficult, simply as a practical matter. How does one test the sincerity of a person's claimed idiosyncratic beliefs?

Second, the courts have made it clear that sincerity inquiries must be narrow, going only to the question of whether a claimant for a religious exemption honestly believes that her religious beliefs prohibit her from engaging in certain behavior.¹⁰¹ In doing so, decision makers may not infer *insincerity* of a religious belief from its *implausibility*.¹⁰² This limitation strips adjudicators of one crucial tool they would use in other contexts requiring a judgment as to a witness's honesty, and thus makes the endeavor more difficult.

For example, the testimony of a witness to a car accident who claims that she saw the accident while walking on water can reasonably be dismissed, discounted, or doubted as the product of a lie or a delusion. But someone seeking a religious accommodation who states that his belief arises from being visited by an angel who walked across water to reach him cannot be dismissed as lying or

98. See Courtney Miller, "Spiritual But Not Religious": Rethinking the Legal Definition of Religion, 102 VA. L. REV. 833, 834-35 (2016).

99. *U.S. Public Becoming Less Religious*, PEW RES. CTR., (Nov. 3, 2015), <https://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious> [<https://perma.cc/BAN9-7HZC>].

100. *Welsh*, 398 U.S. at 339-40.

101. See Chapman, *supra* note 87, at 1225-26.

102. See *United States v. Ballard*, 322 U.S. 78, 88 (1944); Chapman, *supra* note 87, at 1225-26.

delusional. Indeed, even if he *is* delusional, the only question is whether he believes his delusion to be true. In such a case, it is difficult to see how to engage in a meaningful sincerity inquiry. For these reasons, although sincerity inquiries are sometimes unavoidable,¹⁰³ they are not easy.

2. *Should Private Schools Engage in Sincerity Inquiries?*

Engaging in sincerity inquiries may seem like an attractive option for private schools seeking to reduce the number of students who are not vaccinated. Many who claim religious or philosophical exemptions will privately state that their objections to vaccination are not truly rooted in religion or philosophy at all, but rather in their (mistaken) scientific beliefs about the safety and efficacy of vaccinations.¹⁰⁴ Further, there are vanishingly few organized, hierarchical, or institutionalized religious groups that oppose vaccination on religious grounds, and those that exist have scant representation in this country.¹⁰⁵ This has led many commentators to argue that virtually all religious exemption claims are insincere and should be rejected outright or at least heavily scrutinized.¹⁰⁶

Consequently, a private school might reasonably consider requiring parents to explain their reasons for not vaccinating prior to granting an exemption. Those parents who either assert that their reasons are rooted in (mistaken) scientific beliefs or whom the conductor of the inquiry believes to be lying can then be denied the exemption, while those of parents who credibly claim religious or

103. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 755 n.7 (1984).

104. See Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1570-71; 1584-85 (2014); *Parents Claim Religion to Avoid Vaccines for Kids*, ASSOCIATED PRESS (Oct. 17, 2007, 4:24 PM), http://www.nbcnews.com/id/21347434/ns/health-childrens_health/t/parents-claim-religion-avoid-vaccines-kids/ [<https://perma.cc/V5HY-LZA2>].

105. John D. Grabenstein, *What the World's Religions Teach, Applied to Vaccines and Immune Globulins*, 31 VACCINE 2011, 2012 (2013), <http://childrenshealthcare.org/wp-content/uploads/2012/01/Vaccine-Grabenstein-article.pdf> [<https://perma.cc/3D4R-FVFJ>]; *Immunizations and Religion*, VAND. U. MED. CTR. (Aug. 27, 2013), <https://www.vumc.org/health-wellness/news-resource-articles/immunizations-and-religion> [<https://perma.cc/ZAZ7-LCGP>].

106. Levin, *supra* note 51, at 1207; Reiss, *supra* note 104, at 1584-85.

(where applicable) conscientious objections would be accepted. Although this would not effectively exclude all of those who are non-vaccinated for nonmedical reasons from a given school, it might reduce their number and thereby lower the risk of contagion by eliminating some vectors of disease transmission.

This approach is not a panacea, however. First, some states categorically prohibit sincerity inquiries for vaccination exemptions.¹⁰⁷ These states require schools to accept at face value anyone's verbal or written claim that the exemption is rooted in religious or philosophical beliefs.¹⁰⁸ In these states, sincerity inquiries are simply not an option.

Second, even where sincerity inquiries are theoretically permitted, there are several reasons to proceed with caution. As a practical matter, for the reasons previously discussed, such inquiries are difficult to conduct. One imagines that savvy parents would quickly learn to couch their objections in religious or philosophical terms when questioned by school administrators. Indeed, the evidence suggests that parents who prefer not to vaccinate are adept at modifying their claimed reasons when state laws change to foreclose previously available justifications for their choices.¹⁰⁹ Once they do so, how could a school administrator deny the claim? As the cases demonstrate, denying such claims invites expensive legal challenges and exposes the school to potential liability.¹¹⁰ Thus, sincerity inquiries may be ineffective and too risky and expensive for private schools to engage in.

There are also potential philosophical and constitutional reasons to decline to engage in such inquiries. Although many non-vaccinators may privately state that their reasons are not rooted in religious or philosophical objections, scholars have argued that their

107. Anne L. Knight, *Religious Exemptions to North Carolina's Childhood Immunization Requirements*, U.N.C. SCH. GOV. L. BULL. 15-16 (Fall 2004), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/article2_5.pdf [<https://perma.cc/7XHJ-T433>].

108. *Id.*

109. See, e.g., Paul L. Delamater et al., *Elimination of Nonmedical Immunization Exemptions in California and School-Entry Vaccine Status*, PEDIATRICS, June 2019, at 1, 5-8.

110. *Case Law on Religious Exemptions to Vaccination Requirements*, NETWORK FOR PUB. HEALTH L. (Feb. 28, 2019, 9:20 AM), https://www.networkforphl.org/resources_collection/2019/02/28/1115/case_law_on_religious_exemptions_to_vaccination_requirements [<https://perma.cc/MA9V-LMDR>].

objections are nevertheless legitimate.¹¹¹ For example, Navin and others argue that many parents' objections are rooted in an "ethics of purity" that encompasses both physical and spiritual purity, and that informs their life choices well beyond the vaccination context.¹¹² These ethics of purity are similar in kind to—and may draw on—religious, spiritual, and transcendental beliefs. Indeed, many of the choices that people make as a result of holding these kinds of beliefs are similar in kind to the religiously motivated choices made by those with traditional deistic beliefs. Both groups may engage in particularistic behaviors related to diet, child-rearing, schooling, communal association, lifestyle, and personal identity. Thus, even if objections to vaccination are not religious in the deistic or familiar sense, they share important characteristics of classical religious beliefs and perhaps should be understood or treated by the law as religious.¹¹³

Whatever one thinks of this argument as a theoretical matter, it finds support in Supreme Court precedent. In the Vietnam era conscientious objector case, *Welsh v. United States*, the Court held that a statute that only exempted religious objectors from forced conscription also applied to "those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."¹¹⁴ In fact, the Court affirmed that anyone whose objection occupied the same place in his life as did those whose objections were rooted in traditional beliefs was entitled to the religious exemption.¹¹⁵ Although courts have been reticent to further develop this approach to religious accommodation, any private school that denies a nonmedical vaccination exemption to parents whose beliefs are credibly rooted in an "ethic of purity" must be aware that it potentially exposes itself to a costly lawsuit with little assurance of success.

111. See NAVIN, *supra* note 19, at 97-98; Levin, *supra* note 106, at 1207-08.

112. NAVIN, *supra* note 19, at 97-99, 104-06, 110-12, 121-22; Mark Navin, *Prioritizing Religion in Vaccine Exemption Policies* (Apr. 17, 2015) (unpublished manuscript), <https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/philosophy/documents/conferences/2015%20Religious%20Exemptions/Navin.pdf> [<https://perma.cc/SV76-9W97>].

113. Levin, *supra* note 51, at 1207 (footnotes omitted).

114. 398 U.S. 333, 344 (1970).

115. *Id.* at 339.

All of this is to say that private schools in some states may choose to engage in sincerity inquiries, but doing so is hardly a panacea.

III. BEYOND STATUTES: CONSTITUTIONAL DIMENSIONS OF PRIVATE SCHOOLS' VACCINATION POLICIES

If some states' statutes require private schools to accept nonmedical exemptions, and if constitutional barriers prohibit or limit the utility of sincerity inquiries, do private schools have other means to protect their students from vaccine-preventable illnesses?

This Part explores three possible constitutional arguments that private schools may assert to support their exclusion of students who are not vaccinated for nonmedical reasons: (1) that religious exemptions to vaccination mandates themselves violate the Establishment Clause; (2) that constitutional religious autonomy doctrines give religious private schools an independent right to reject vaccination exemptions; and (3) that the freedom of association rooted in the First Amendment's free speech doctrine provides a similar right to exclude for some or all private schools.

A. Challenging the Constitutionality of (Some) Vaccination Exemptions

As described previously, the majority of states that allow non-medical exemptions only permit them for religious reasons, and not for philosophical or other "personal belief" exemptions. As I have argued in depth elsewhere, this presents serious constitutional problems.¹¹⁶

The Establishment Clause restricts the degree to which the government may accommodate *only* religious interests when those accommodations would impose costs and burdens on third parties.¹¹⁷ The risks that nonvaccination impose on third parties—those who must rely on community immunity—constitute such a burden.¹¹⁸ Consequently, when state legislatures allow for only *religious*

116. See Levin, *supra* note 51, at 1193-241 (arguing that state laws offering only religious exemptions that impose burdens on third parties are unconstitutional if they do not offer comparable nonreligious exceptions).

117. *Id.* at 1214.

118. *Id.* at 1198-200, 1209.

exemptions to vaccination mandates, and not parallel nontheistic *conscience*-based exemptions, they violate the Establishment Clause.¹¹⁹

In theory, a private school located in a state that, (1) offers only religious exemptions, and (2) statutorily requires private schools to accept religious exemptions, could make use of this constitutional argument. After all, if the statutory exemption itself is unconstitutional, then parties cannot hold a private school liable for rejecting such exemptions. To reject vaccinations on this basis, a private school would first issue a policy excluding students with religious exemptions, and then, when a party challenges that policy in court, deploy this anti-Establishment-based constitutional argument as a defense.

But this approach is not without its own limitations and risks. Most obviously, a school adopting this approach assumes the normal costs and risks associated with litigation. Further, although I am quite fond of this argument—having developed it myself—I do not have the hubris necessary to assert with confidence that a court will adopt it. (It certainly would not be the first time that a court rejected an academic's argument.)

Most troublingly, even if a court *did* recognize the constitutional problem raised when states only offer religious exemptions, it is possible that its remedy would be to *expand* the exemption to include those who claim philosophical objections to vaccination rather than to strike down the religious exemption as unconstitutional. Indeed, there would be precedent for doing so. Consider again the statute that allowed for conscientious objection at the time of the Vietnam War. It explicitly offered the exemption only to those whose objections were rooted in “religious training and belief.”¹²⁰ The statute defined this term as “belief in a relation to a Supreme Being involving duties superior to those arising from any human relation,” and not including “essentially political, sociological, or philosophical views or a merely personal code.”¹²¹

119. *See id.* at 1214-17 (analyzing how the Supreme Court has used the “no third party harms” principle to strike down religious accommodations that burden nonreligious third parties).

120. *Welsh*, 398 U.S. at 336.

121. *Id.* at 336 (quoting Universal Military Training and Service Act, 50 U.S.C. § 456(j) (1958)).

In grappling with the potential constitutional flaw in this statute, the Supreme Court, in the *Seeger* and *Welsh* cases, adopted a broad interpretation (if it can really be called an interpretation at all) of “religious training and belief.” Specifically, it held that this phrase must be read to include any “sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption.”¹²² In other words, the Court held that at least *some* objections to war that are rooted in ethical or philosophical concerns—rather than in those that would traditionally be considered “religious”—would entitle their possessors to conscientious objector status.¹²³ This is the same constitutional flaw that is present in state statutes that limit vaccination exemptions to those rooted in religious belief. Consequently, if faced with a similarly problematic statute in the vaccination context, it is possible that a court would make the same interpretive leap in order to save the statutory exemption from unconstitutionality.

And, although courts have not dealt with this precise question in the vaccination context, some state courts have considered a similar issue and adopted an expansionist interpretation.¹²⁴ Some state vaccination statutes have said that only those who are members of “recognized religions” are entitled to an exemption.¹²⁵ Such a provision is *blatantly* unconstitutional, for it privileges some kinds

122. *United States v. Seeger*, 380 U.S. 163, 165, 176 (1965) (“[T]he test of belief ‘in a relation to a Supreme Being’ is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.”); see *Welsh*, 398 U.S. at 339 (citing *Seeger*, 380 U.S. at 176).

123. See *Seeger*, 380 U.S. at 165-66, 176.

124. See *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002); *McCarthy v. Boozman*, 212 F. Supp. 2d 945 (W.D. Ark. 2002); *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81 (E.D.N.Y. 1987); *Dalli v. Bd. of Educ.*, 267 N.E.2d 219 (Mass. 1971).

125. For example, Iowa’s child immunization statute requires an affidavit “stating that the immunization conflicts with the tenets and practices of a *recognized religious denomination* of which the applicant is an adherent or member” for nonmedical exemptions. IOWA CODE § 139A.8(2) (emphasis added). Proposed changes would eliminate the requirement of a “recognized” religious denomination. See S. 239, 88th Leg. (Iowa 2019). The Iowa Administrative Code defines a valid certificate of immunization exemption for religious reasons as requiring an attestation “that immunization conflicts with a genuine and sincere religious belief and that the belief *is in fact religious and not based merely on philosophical, scientific, moral, personal, or medical opposition to immunizations.*” IOWA ADMIN. CODE r. 641-7.3(2)(139A) (2018) (emphasis added).

of religious beliefs over others, thereby violating the Establishment Clause.¹²⁶ However, rather than striking down such statutes as unconstitutional, most courts have instead effectively adopted the *Seeger/Welsh* approach and simply expanded the exemption to apply to anyone opposed to vaccination for religious reasons, regardless of their affiliation with “recognized religions.”¹²⁷

I have explained elsewhere why I believe that this would be the wrong way to resolve a challenge to a state with an unconstitutional religious-only exemption, with the correct remedy (for both doctrinal and prudential reasons) being to strike down the exemption.¹²⁸ However, I am not entirely confident that every court confronting this issue would see it my way. Any private school considering using this as a basis to reject exemptions altogether would need to consider the risk that, in defending its policy to reject religious exemptions, a court may perversely *expand* the state’s exemption scheme.

Finally, even at its best—that is, even if a court agreed that the exemption is unconstitutional as written and that the proper remedy is to strike it down—this approach is still limited in its utility for private schools. After all, it is possible, even if unlikely in the current political climate, that a state legislature would respond to such a ruling by reenacting a broader exemption scheme that applies to both religious and philosophical objectors, thus fixing the constitutional flaw.¹²⁹ While that might reflect a healthy dialogue

126. See Levin, *supra* note 51, at 1204-05.

127. See *Boone*, 217 F. Supp. 2d at 946 (finding the provision of a statute which limited religious exemptions to practices of a “recognized church or religious denomination” was unconstitutional); *McCarthy*, 212 F. Supp. 2d at 948-50 (striking down as unconstitutional a statute that only provided exemptions for “members or adherents of a church or religious denomination recognized by the State”); *Sherr*, 672 F. Supp. at 91 (finding unconstitutional the provision of a statute which limited religious exemptions to “bona fide members of a recognized religious organization”); *Dalli*, 267 N.E.2d at 222-23 (finding a statute unconstitutional because it limited religious exemptions to adherents and members “of a recognized church or religious denomination”).

128. Levin, *supra* note 51, at 1228-29 (arguing that, when a court finds a statute unconstitutional under the Establishment Clause, the appropriate remedy is to strike down the religious accommodation, rather than expanding it to include nonreligious philosophical beliefs).

129. *States Move to Eliminate Non-Medical Exemptions for Vaccinations*, ASS’N ST. & TERRITORIAL HEALTH OFFICIALS (Feb. 21, 2019, 12:44 PM), <https://www.astho.org/State-PublicHealth/States-Move-to-Eliminate-Non-Medical-Exemptions-for-Vaccinations/02-21-19/> [<https://perma.cc/E2LS-XV2D>]. *But see* Molly Harbarger, *Hundreds Pack Oregon Hearing to*

between courts and legislatures, and while statutes that are constitutional are preferable to those that are unconstitutional, it would only serve to return the private school to its original position; only this time, it would be required to accept religious *or* philosophical objections.

In any event, this entire approach would only help private schools in those states that limit their vaccination exemptions to those claiming religious exemptions. In states that also allow for philosophical or similar nonreligious exemptions, there is no question that such exemptions are constitutionally permissible.

B. Religious Freedom: Church Autonomy

Religious private schools have a second argument rooted in the Religion Clauses that would support their right to reject vaccination exemptions: church autonomy. State and federal courts have unanimously recognized that the freedoms guaranteed by the Religion Clauses create a sphere of autonomy for religious organizations.¹³⁰ Broadly speaking, this means that some state laws simply cannot apply to religious organizations.¹³¹ The clearest statement of this right comes from the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.¹³² There, the Court recognized the ministerial exception to state antidiscrimination law, a particular subspecies of the broader category of church autonomy.¹³³ But church autonomy extends beyond the ministerial exception.

Oppose Bill to End Vaccine Exemptions, OREGONIAN (Feb. 28, 2019), <https://www.oregonlive.com/education/2019/03/hundreds-pack-oregon-hearing-to-oppose-vaccination-bill.html> [<https://perma.cc/93D5-FTKV>].

130. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199-200 (2012) (Alito, J., concurring) (“To safeguard this crucial autonomy [of religious groups], we have long recognized that the *Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs*. The Constitution guarantees religious bodies ‘independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’” (emphasis added) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952))).

131. See *id.* at 186-87 (analyzing Supreme Court precedent striking down state laws that infringe on religious organizations' sovereignty).

132. See *id.* at 188-89.

133. Chapman, *supra* note 87, at 1197.

In this Section, I first review the *Hosanna-Tabor* decision to explain how the ministerial exception represents an exception to the much more limited religious freedoms typically guaranteed by the First Amendment's Free Exercise Clause. I then dig more deeply into the broader but underdeveloped church autonomy doctrine and demonstrate that the courts have tried to demarcate a sphere of "internal" church matters in which state law does not apply, as distinguished from "external" matters, to which state law does apply. Finally, I show that constitutionally protected church autonomy allows at least some, and possibly all, religious private schools to exclude from admission any students who are not vaccinated for nonmedical reasons.

1. *Hosanna-Tabor: The Ministerial Exception*

In general, the First Amendment's Free Exercise Clause does not allow religious individuals or groups to ignore state law due to their religious beliefs.¹³⁴ Under *Employment Division v. Smith*, any law that is generally applicable and neutral toward religion is presumptively valid, even when it imposes a burden on religious practice.¹³⁵ Thus, for example, a law that requires people to pay taxes is valid even if that law conflicts with an individual's sincere religious belief that the form of taxation is prohibited by God.¹³⁶ *Smith* interprets the Free Exercise Clause to protect only the freedom of religious belief and worship, rather than religious practice, from incursion by the state.¹³⁷

Although *Smith's* rule is not especially generous to religious adherents, courts, agencies, and legislatures have provided *some* broader protections to religious practices and organizations. First, as the Supreme Court has made clear, laws that are not generally applicable or neutral toward religion—that is, laws that *target*

134. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879-80 (1990) ("[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 ... conduct that his religion prescribes.'" (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment))).

135. *Id.*

136. *Lee*, 455 U.S. at 261.

137. *See Smith*, 494 U.S. at 878-79.

religious practices—are presumptively invalid.¹³⁸ In other words, it is unconstitutional for a state actor to discriminate against religious practices, explicitly or implicitly; and it *may* even be unconstitutional to offer some nonreligious exemptions to an otherwise neutral and generally applicable law without also offering parallel religious exemptions.¹³⁹

Second, *Smith* suggests that laws that burden what the Courts call hybrid rights—where *both* freedom of religion *and* another constitutionally protected interest, such as parental rights or speech rights, are implicated—are subject to strict scrutiny.¹⁴⁰ Candidly, courts have not embraced this caveat to *Smith*'s general rule,¹⁴¹ and it does not appear that the Supreme Court has much interest in breathing life into this concept.¹⁴² It is also not clear that the idea itself makes any sense. As though through some alchemy, two weakly protected constitutional values—say, religious freedom and parental freedom—earn more constitutional protection when

138. See *id.* at 879; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

139. James M. Oleske, Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. REV. 295, 299, 306-14, 322-34 (2013) (discussing the selective-exemption rule—“the idea ... that although the Free Exercise Clause does not require religious exemptions to be made from uniform legal obligations, religious exemptions will occasionally be required when the government makes available other exemptions to a law (citing the Supreme Court’s opinion in *Church of Lukumi Babalu Aye*, 508 U.S. at 559)).

140. *Smith*, 494 U.S. at 881-82.

141. See Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175, 1189-96 (2015) for a review of courts’ decisions regarding the hybrid approach: the 2nd, 3rd, and 6th Circuits view the “hybrid” language from *Smith* as dicta, and have declined to follow it as precedential law. *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 244 (3d Cir. 2008); *Knight v. Connecticut Dept. of Pub. Health*, 275 F.3d 156, 160 (2d Cir. 2001); *Kissinger v. Bd. of Trs. of the Ohio State Univ.*, 5 F.3d 177 (6th Cir. 1993). The 1st Circuit and District of Columbia Circuits have taken the view that a hybrid rights free exercise claim can only be successful if the other constitutional claim involved could be successful alone. *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15 (1st Cir. 2004). The 9th and 10th Circuits have considered such claims, and have determined that a free exercise hybrid claim does not require the use of the compelling interest test whenever a companion constitutional claim is also raised—rather, the companion claim must at least have a “probability or likelihood, but not a certitude, of success on the merits.” *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1296-1297 (10th Cir. 2004); *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 705 (9th Cir. 1999), *vacated en banc on ripeness grounds*, 220 F.3d 1134 (9th Cir. 2000).

142. See *Church of Lukumi Babalu Aye*, 508 U.S. at 559, 567 (Souter, J., concurring) (describing *Smith*'s hybrid approach “as ultimately untenable”).

combined than either would alone.¹⁴³ Nevertheless, there is at least the *possibility* that courts will expand religious freedom over time by engaging the hybrid-rights approach that *Smith* offers.

Finally, some states have imposed higher constitutional and statutory safeguards for religious practices.¹⁴⁴ Likewise, under the Religious Freedom Restoration Act¹⁴⁵ and the Religious Land Use and Institutionalized Persons Act,¹⁴⁶ as well as in numerous other statutes and regulations,¹⁴⁷ the federal government has also imposed strict scrutiny on certain laws that burden religious practice, even when they are neutral and generally applicable.¹⁴⁸

Now let us consider how the *Smith* approach, with its refinements, exceptions, and expansions, would apply to a church that wishes to defy a state's general antidiscrimination law by hiring only men as ministers. Under *Smith*, the church would seem to be out of luck, even where it is sincerely motivated by religious belief. Laws that prohibit discrimination on the basis of sex are neutral and generally applicable, and so this law ought to be presumptively valid. Further, even if strict scrutiny were to apply, either because the state protects religious practice to a greater degree than does *Smith* or because hybrid rights are implicated, the courts have often held that antidiscrimination laws pass strict scrutiny.¹⁴⁹ Consequently, under the standard doctrinal approach to religious free exercise, the state's prohibition on sex discrimination would trump the church's religious doctrines.

143. See Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1908 n.21 (2001).

144. Gary S. Gildin, *Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. PA. J. CONST. L. 81, 82-83 (2001); Hillel Y. Levin, *Rethinking Religious Minorities' Political Power*, 48 U.C. DAVIS L. REV. 1617, 1646 (2015).

145. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488, 1488 (codified as amended at 42 U.S.C. § 2000bb (1994)) (later ruled unconstitutional by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

146. Religious Land Use and Institutionalized Persons Act of 2002, Pub. L. No. 106-274, §§ 2-3, 114 Stat. 803, 803-804 (codified as amended at 42 U.S.C. §§ 2000cc to 2000cc-1 (2012)).

147. Levin, *supra* note 144, at 1648-50.

148. See *id.*

149. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2420-21 (1996).

In the wake of *Smith*, variations on this case bubbled up through the lower courts.¹⁵⁰ Despite *Smith*, these courts (along with a long line of earlier decisions) unanimously held that antidiscrimination laws cannot limit a religious organization's decision concerning whom to hire as a minister.¹⁵¹ They arrived at this conclusion in different ways, but they agreed on a central point: there is a ministerial exception to antidiscrimination law.¹⁵²

The Supreme Court in *Hosanna-Tabor* affirmed this exception and took a relatively expansive view of its reach. In *Hosanna-Tabor*, a disabled teacher at a religious school and the EEOC sued the school for retaliatory dismissal after the teacher threatened to take legal action to protect her rights under the Americans with Disabilities Act.¹⁵³ The Court unanimously sustained the ministerial exception, holding that the Establishment Clause and the Free Exercise Clause "bar the government from interfering with the decision of a religious group to fire one of its ministers."¹⁵⁴ That is, even if she *was* fired due to her disability, or in retaliation for taking legal action, the church was free to do so.

The Court's conception of the ministerial exception was notably broad in one particular sense. Some lower courts had held that the ministerial exception to antidiscrimination law only applied when a church's reasons for refusing to hire or firing a minister were

150. See *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225-27 (6th Cir. 2007); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303-07 (3d Cir. 2006); *Werft v. Desert Sw. Ann. Conference of the United Methodist Church*, 377 F.3d 1099, 1100-04 (9th Cir. 2004); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655-57 (10th Cir. 2002); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800-01 (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301-04 (11th Cir. 2000); *Combs v. Cent. Tex. Annual Conference*, 173 F.3d 343, 345-50 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C. Cir. 1996).

151. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) ("The Courts of Appeals, in contrast, have had extensive experience with this issue. Since the passage of Title VII of the Civil Rights Act of 1964 ... and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers." (citation omitted)).

152. *Hosanna-Tabor*, 565 U.S. at 188.

153. *Id.* at 179-80.

154. *Id.* at 181.

rooted in religious belief and doctrine.¹⁵⁵ The Supreme Court rejected this approach, holding instead that the state may *never* interfere with a church's decisions concerning ministerial employment, regardless of the church's reasons.¹⁵⁶

To be sure, the *Hosanna-Tabor* decision leaves some important questions unanswered. For one, the Court did not offer a definitive test for determining *who* within a religious organization counts as a minister, but only implied that a kind of "totality of the circumstances" test applies.¹⁵⁷ Likewise, it did not offer guidance as to what *other* decisions a church might make that would be insulated from interference by the state.¹⁵⁸ These issues have been extensively litigated in the lower courts, with different courts taking divergent views.¹⁵⁹

However—and this is the important part—it is clear from *Hosanna-Tabor* that there is a sphere of religious organizational governance into which secular law may not intrude, and this sphere of autonomy extends beyond the ministerial exception.

2. *Beyond the Ministerial Exception: Church Autonomy Under the First Amendment and Schools' Vaccination Policies*

In *Hosanna-Tabor*, the Court approvingly cited and embraced a series of older cases that implicated related, but not identical, issues of religious organizations' special rights. For example, the Court cited *Watson v. Jones*, which involved a dispute between antislavery and proslavery factions of a church over who controlled the church's property.¹⁶⁰ There, the Court declined to decide the case on its merits, holding instead that, "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them."¹⁶¹ This and the other cases cited by the

155. *Roman Catholic Diocese of Raleigh*, 213 F.3d at 801.

156. *See Hosanna-Tabor*, 565 U.S. at 196.

157. *See id.*

158. *Id.*

159. *See Volokh*, *supra* note 149.

160. *Hosanna-Tabor*, 565 U.S. at 186 (citing *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872)).

161. *Id.* at 185-86 (alteration in original) (internal quotations omitted) (quoting *Watson*, 80

Court, together with a wealth of state and lower federal court opinions, indicate that there is a broader category of freedoms guaranteed to religious organizations, of which the ministerial exception is but one constituent part.

As the Court noted in *Hosanna-Tabor*, quoting an earlier decision, the cases suggest “a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”¹⁶² Although the reach and contours of this broader church autonomy concept are unclear, the previous quote from *Hosanna-Tabor* reflects a pattern in its application in the lower courts: “internal” church matters—disposition of church property, management and governance, questions of religious doctrine, resolving intrachurch disputes—are not subject to state oversight and authority. On the other hand, “external” matters—those that bring the church into conflict with the broader society—are subject to *Smith’s* general rule.¹⁶³

Some of the contemporary church-state conflicts that prove most vexing for courts involve disputes that lie in the vague, liminal, and gray spaces at the intersection of (or border between) “internal” and “external.” For example, if a church rents out its facilities for weddings in a state in which antidiscrimination law extends to sexual orientation discrimination, may it decline to rent to a same-sex couple on religious grounds?¹⁶⁴

However, some kinds of cases are *not* difficult because they are clearly either “internal” or “external” matters. “External” issues, over which neutral and generally applicable state law trumps religious doctrines, include things such as taxation and zoning laws, as well as those laws that pertain to individuals’ behavior (other than prayer) *outside* of the walls of the church.¹⁶⁵ Meanwhile, the three most well-known and most often litigated expressions of the church

U.S. at 727).

162. *Id.* at 186 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).

163. *See id.* at 190.

164. *See, e.g., Egan v. Hamline Methodist Church*, 679 N.W.2d 350 (Minn. Ct. App. 2004).

165. *See Douglas Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1406 (1981).

autonomy doctrine—the clearly “internal” matters—are the ministerial exception (and variations on it),¹⁶⁶ disputes involving church property,¹⁶⁷ and a grab bag of other cases that implicate disputes over religious doctrine.¹⁶⁸

A fourth area of church autonomy, which is apparently rarely litigated because the law is perfectly clear, involves the selection of church membership. These decisions lie in the very heartland of “internal” church matters. For example, suppose that an Orthodox Jewish synagogue admitted only Jewish members. Suppose further that, pursuant to Orthodox religious law, the synagogue only considered those with Jewish mothers, or those who converted to Judaism under the supervision of Orthodox rabbinic authorities, to be Jewish. Plainly, notwithstanding state and federal antidiscrimination laws that typically prohibit discrimination on the basis of religion,¹⁶⁹ these choices are not subject to state interference.¹⁷⁰ Put simply, a church gets to decide who is eligible to be a member of the church.¹⁷¹

This has critical implications for the potential right of religious private schools to exclude unvaccinated students. When a religiously affiliated school determines its student admissions criteria, it is no different from a synagogue determining its membership criteria. Indeed, recall that *Hosanna-Tabor* involved a teacher in a religious school, and not, say, a preacher in a church.¹⁷² Thus, for example, a Catholic school may decline to accept students who are

166. See *Hosanna-Tabor*, 565 U.S. at 188; see also *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 180 (5th Cir. 2012) (holding that the ministerial exception applied to church pianist because “he played a role in furthering the mission of the church and conveying its message to its congregants”).

167. See *Kedroff*, 344 U.S. at 95, 120-21; *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 722-23 (1872).

168. See, e.g., *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (“[T]he [First] Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.”) (citing *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-25 (1976)).

169. E.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of U.S.C. titles 5, 28, 42, 52).

170. See 77 C.J.S. *Religious Societies* § 127 (2019).

171. See *id.*

172. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 178 (2012).

not Catholic or who do not meet its standards of Catholic behavior and belief—*whatever* those standards are.

The upshot for religious private schools' vaccination policies should by now be clear: a religious private school may reject vaccination exemptions as a matter of policy *at least* if its reasons for doing so are sincerely rooted in religious doctrines or values. That is, a school might sincerely assert that it is compelled by religious tenets to require that all students be vaccinated, and that those who are not vaccinated for nonmedical reasons would be denied admission because they are acting contrary to the school's religious mission and identity. Such a decision would be constitutionally protected and would thereby trump a state statute that purported to require private schools to accept vaccination exemptions on the same terms required of public schools. The only court in the country to extensively address this issue adopted an analysis that closely tracks this one.¹⁷³

It is hardly farfetched to posit that some religious schools may indeed be sincerely and legitimately motivated to adopt such policies for religious reasons. For example, some Catholic,¹⁷⁴ Jewish,¹⁷⁵ and Muslim¹⁷⁶ religious authorities have asserted that their adherents are obligated to vaccinate their children or that there is religious value in doing so. They have rooted this assessment in religious obligations or values to take care of one's physical health,¹⁷⁷ or in a religion's communitarian principle that requires the strong to protect the weak or vulnerable.¹⁷⁸

While a state court might be empowered to judge a religious private school decision maker's *sincerity* in adopting this kind of interpretation and application of religious doctrine and values,¹⁷⁹ it

173. See *Flynn v. Estevez*, 221 So. 3d 1241, 1243 (Fla. Dist. Ct. App. 2017) (affirming a religious school's right to deny admission to a nonvaccinated student on religious grounds despite student's religious objection to vaccines).

174. See Grabenstein, *supra* note 105, at 2017-18; see also *FAQ on the Use of Vaccines*, NAT'L CATHOLIC BIOETHICS CTR., <https://www.ncbcenter.org/resources/frequently-asked-questions/use-vaccines/> [<https://perma.cc/C8Z3-BZ8N>].

175. See Grabenstein, *supra* note 105, at 2014; see also *Resolution on Mandatory Immunization Laws*, UNION FOR REFORM JUDAISM, <https://urj.org/what-we-believe/resolutions/resolution-mandatory-immunization-laws> [<https://perma.cc/HN3S-J9TN>].

176. See Grabenstein, *supra* note 105, at 2016.

177. See, e.g., *id.* at 2014.

178. See *id.* at 2019.

179. See Chapman, *supra* note 87, at 1203.

may certainly not question whether the interpretation or application is a *correct* understanding of religious sources.¹⁸⁰ To the extent that a court might conduct a sincerity inquiry, indicia of sincerity could include a statement explaining the religious reasons for adopting the school's policy; evidence that the decision was made by the school's religious decision makers rather than by its academic administrators (if those responsibilities are not vested in the same individual); a showing that the principle being cited as a religious value expresses itself elsewhere in school policy or is taught to students as part of their religious education; or, if the school is part of a larger religious denomination, confirmation that the denomination's religious authorities or texts support the policymaker's decision.¹⁸¹

The church autonomy doctrine may in fact go even further and allow schools even more leeway. Justice Thomas's concurrence in *Hosanna-Tabor* would have adopted the expansive view that the ministerial exception applies *no matter* the synagogue's reasoning for discriminating against a candidate for a ministerial position, whether rooted in religion or not.¹⁸² This is a quasi-judicial approach to the ministerial doctrine that would assert that secular courts simply have no place in adjudicating matters of ministerial employment.¹⁸³ It is possible that the same principle applies to religious institutions' membership decisions and to religious school admissions criteria.¹⁸⁴ If so, it would mean that such decisions cannot be subject to state interference even if they are *not* rooted in religious doctrine and values.¹⁸⁵ Under this approach, a religious private school could adopt a policy excluding unvaccinated children

180. See *supra* Part II.C.2 for discussion on sincerity.

181. I do not mean to suggest that *any* of these is necessary to demonstrate religious sincerity. As I noted above, religious beliefs may be idiosyncratic and still be sincerely held. See *supra* Part II.C.2. But to the extent that courts *might* seek evidence that corroborates or supports a finding of sincerity, these might be the sorts of indicia that it would find sufficient.

182. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196-97 (2012) (Thomas, J., concurring).

183. See *id.*

184. See *Flynn v. Estevez*, 221 So. 3d 1241, 1246-47 (Fla. Dist. Ct. App. 2017) (noting that Florida courts have interpreted the ministerial exception as an “‘internal affairs’ doctrine” that acts “as a jurisdictional bar ... upon a determination that it requires secular adjudication of a religious matter”).

185. *Hosanna-Tabor*, 565 U.S. at 196-97 (Thomas, J., concurring).

from admission even without having to assert or demonstrate a sincere religious reason for doing so.

In short, if a school's admissions criteria are rooted in its religious doctrines and values, then the state is *certainly* prohibited from challenging those criteria; and, depending on whether the application of the religious autonomy doctrine to church membership and school admissions decisions is as robust as it is in the ministerial context, then the state *might be* prohibited from challenging admissions criteria. That is, a sincere religious motivation for insisting on vaccination is certainly *sufficient* to bestow constitutional protection on its decision to reject vaccination exemptions; and it may not even be *necessary*.

*C. Associational Freedom: Nonreligious Organizations'
Conditional Freedom to Choose Their Members*

The First Amendment's Religion Clauses are not the only source of a private organization's right to exclude on grounds that would otherwise be unlawful. So-called expressive organizations, though not religious, share a similar right, grounded in the First Amendment's Free Speech Clause.¹⁸⁶ In *NAACP v. Alabama*, the Supreme Court held that the Free Speech Clause includes a right to associate because, in many cases, people can only engage in effective speech if they join with others who share their views.¹⁸⁷ This right to associate, in turn, necessitates a right not to associate—that is, to refuse to allow some people to join a group. As the Court has explained, “Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, [f]reedom of association ... plainly presupposes a freedom not to associate.”¹⁸⁸ In other words, religious groups' right to exclude, grounded in the Religion Clauses is paralleled by (some) secular organizations' right to exclude, grounded in the Free Speech Clause.

Consider: just as the Catholic Church may refuse membership to non-Catholics (and, indeed, to determine who is and is not a

186. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

187. 357 U.S. 449, 460 (1958).

188. *Dale*, 530 U.S. at 648 (second alteration in original) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

Catholic for the purposes of that organization),¹⁸⁹ so too must the Ku Klux Klan be free to exclude African Americans and others from membership and the Boy Scouts of America to exclude gay scoutmasters.¹⁹⁰

That said, the contours and reach of the associational freedom to exclude are unclear. Who may exclude? And whom may they exclude? Further, few courts have addressed whether private schools enjoy this right and, if so, what it would allow. This Section explores these questions and considers how associational rights might apply to the vaccination context.

The Supreme Court most clearly confronted the associational freedom to exclude in *Boy Scouts of America v. Dale*.¹⁹¹ There, the Court held that a state public accommodations law that prohibited discrimination on the basis of sexual orientation could not constitutionally be invoked to force the Boy Scouts to accept an openly gay assistant scoutmaster.¹⁹² As an expressive association founded “to instill values in young people,”¹⁹³ the Boy Scouts could not be forced to include someone who “would significantly affect [its] ability to advocate public or private viewpoints.”¹⁹⁴ Because the Scouts asserted that the values it promoted included an antigay message, it would not have to accept anyone whose inclusion would significantly interfere with or undermine that message.¹⁹⁵

In determining whether the inclusion of a particular person would affect the organization in this way, the Court sent mixed signals. On the one hand, it noted that “an expressive association can[not] erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.”¹⁹⁶ On the other hand, the Court also asserted that it must “give deference to an association’s view of what would impair its expression.”¹⁹⁷ These two statements are in some tension with one another: Should a court scrutinize an association’s claim or not?

189. See 77 C.J.S. *Religious Societies* § 127 (2019).

190. *Dale*, 530 U.S. at 648.

191. See *id.* at 644.

192. *Id.*

193. *Id.* at 649.

194. *Id.* at 650.

195. See *id.* at 650, 653.

196. *Id.* at 653.

197. *Id.*

The Court did not offer an explicit rule or means of mediating between these competing principles. Instead, it seems to have implicitly taken the view that, if there is some objective logic that supports the association's assertion, then that assertion must be credited.¹⁹⁸ And on the facts of *Dale*, the Court agreed with the Scouts's claim.¹⁹⁹ According to the Court, the presence of an assistant scoutmaster who is "open and honest about" being gay, and who is "a gay rights activist," would "force the [Boy Scouts] to send a message ... that [it] accepts homosexual conduct as a legitimate form of behavior."²⁰⁰ The Court concluded that sending this message would interfere with and undermine the Boy Scouts's own antigay messages.²⁰¹

Finally, the Court considered whether the state's interest in prohibiting discrimination outweighed the association's interest in exclusion.²⁰² The Court concluded that it did not.²⁰³

Putting all of this together then, the associational right to exclude applies when the following conditions are met: (1) the organization is an expressive one; (2) it wishes to transmit a particular message; (3) it will not be able to effectively transmit this message if it is forced to include certain people; and (4) its interest in exclusion is not outweighed by the public's interest in inclusion.

How do these elements apply to private schools in the context of vaccination policies? The first two conditions are relatively easy to assess. First, it would be difficult to argue that a private school cannot be an expressive organization. A school is nothing if not an organization organized to transmit a message. Furthermore, private schools are often—perhaps always—founded around a mission to inculcate certain values among their students. One private school's mission is to "create a community of engaged global leaders dedicated to the values of respect, responsibility, citizenship, and justice."²⁰⁴ Another is committed to "developing critical thinkers and ethical problem solvers, in an inclusive community, rich in opportunities

198. *See id.* at 651-52.

199. *See id.*

200. *See id.* at 653.

201. *Id.*

202. *See id.* at 658-59.

203. *See id.* at 659.

204. *Mission and Vision*, MIDTOWN INT'L SCH., <https://www.midtowninternational.school.com/mission-vision-promise.html> [<https://perma.cc/V3CB-78VZ>].

for student success.”²⁰⁵ Other mission statements speak of interpersonal ethics, empathy, care for the environment, individualism, science, and more.²⁰⁶ (Frankly, I have not found a single private school that, based on mission and value statements, should *not* qualify as an expressive association.) This reasoning finds strong support in Supreme Court opinions that accept that private *universities* can qualify as expressive associations,²⁰⁷ and at least two lower courts have assumed the same about private primary schools.²⁰⁸

The second condition—that the organization wishes to transmit a particular message (in this case, concerning the necessity of vaccination)—is similarly easy to assess and is likely met in some cases. As the Court in *Dale* made clear, the expressive organization may determine for itself what its messages are, and they may not be second-guessed by a court.²⁰⁹ At the same time, though, the Court sought and found evidence to corroborate the Boy Scouts’s claim that its messages included an antigay viewpoint.²¹⁰ Private schools that espouse communitarian values, personal health and well-being, or the importance of science and medicine may have little trouble connecting these values to a mandatory vaccination policy. However, they would be wise to make this connection explicit and express these values and the vaccination policy in a clear and consistent manner.²¹¹

Thus, for example, a private school that espouses the communitarian value that each person in a community is responsible for the welfare of every other person could reasonably assert that vaccination is a natural expression of this value. After all, the phenomenon of vaccine-enabled community immunity allows the strong (in this case, those who can be vaccinated) to protect the vulnerable (those who cannot be immunized)—a clear example of communitarian

205. *Our Mission & Vision*, WOODWARD ACAD., <https://www.woodward.edu/about/whoweare/mission> [<https://perma.cc/9G5P-EFPZ>].

206. See, e.g., *School Mission Statements*, *supra* note 56.

207. See *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 55, 68-70 (2006).

208. See, e.g., *Circle Sch. v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004).

209. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 651 (2000).

210. *Id.* at 651-52.

211. See *id.* at 676 (Stevens, J., dissenting) (“At a minimum, a group seeking to prevail over an antidiscrimination law must adhere to a clear and unequivocal view.”).

values.²¹² But the school would do well to go further. It should make this connection clear by *teaching* the relationship between vaccination and its values, and it would also do well to demonstrate other ways in which these values are taught.

Likewise, a school that roots its mandatory vaccination policy in a value of physical health must make that connection clear, and, for the sake of demonstrating a sincere and consistent commitment to this value, it should be able to show how else the school expresses it. For example, does the school have a robust physical education program? Does it employ a school nurse? Does instruction in personal health feature in its curriculum? Do its teachers explain how vaccinations work and how many lives vaccines have saved? If so, a private school could reasonably claim that mandatory vaccination is part of the core message it wishes to send to its students and community.

The third condition is likely more difficult to meet. Would the mere presence of a child who is unvaccinated for nonmedical reasons substantially interfere with or inhibit the school's ability to send its message? A strong case can be made that it would not, at least in many cases. There would be no reason for anyone in the school community to know that a particular child is unvaccinated for nonmedical reasons. This is legally protected personal health information.²¹³ If no one is aware that a child is unvaccinated, then how could his presence undermine the school's message about the importance and necessity of vaccination? The school could still send its provaccination message, even if particular parents choose to ignore it.

This argument finds support in the Supreme Court's opinions in *Roberts v. United States Jaycees*²¹⁴ and *Rumsfeld v. Forum for Academic & Institutional Rights*.²¹⁵ In *Roberts*, the Court held that an organization whose mission was to "pursue 'such educational and charitable purposes as will promote and foster the growth and

212. See David Isaacs, *An Ethical Framework for Public Health Immunisation Programs*, 23 NSW PUB. HEALTH BULL. 111, 114 (2012).

213. See generally Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (2012); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-90, 110 Stat. 1936.

214. 468 U.S. 609, 627-28 (1984).

215. 547 U.S. 47, 64 (2006).

development of young men's civic organizations" must allow women as members.²¹⁶ The Court reasoned that there was no reason to conclude "that admission of women ... will impede the organization's ability to ... disseminate its preferred views."²¹⁷ Similarly, in *Rumsfeld*, the Court upheld a law that required law schools to allow military recruiters access to campus hiring opportunities on a level playing field with other employers.²¹⁸ The law schools argued that the military's antigay policies²¹⁹ conflicted with the schools' expressive value of gay equality.²²⁰ The Court rejected this argument, reasoning that the law schools could continue to express their disagreement with the military's policy in whatever manner they wished, and the mere presence of military recruiters on campus did not undermine this message.²²¹ The Court seemed to distinguish *Dale* on the grounds that the inclusion of an openly gay assistant scoutmaster—a leadership position within the scouting hierarchy—would express a message that directly conflicted with the Scouts's own antigay message.²²²

However, there are two potential bases for challenging this analysis and arguing that, in some cases, the presence of non-vaccinated students *would* undermine a school's provaccination message. First, some parents who choose not to vaccinate their children do so openly, engaging in antivaccination advocacy. These parents would be similar to the assistant scoutmaster in *Dale*, whose presence as an openly gay man and a gay rights activist on his college campus would have (according to the Court) conflicted

216. *Roberts*, 468 U.S. at 612.

217. *Id.* at 627.

218. *See* 547 U.S. at 70.

219. *Id.* at 52 (citing 10 U.S.C. § 654 (2000)). At the time, the policy was "Don't Ask, Don't Tell." *See* DEP'T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL," 1 (2010). This statute has since been repealed. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, §§ 1-2, 124 Stat. 3515, 3515-17.

220. *Rumsfeld*, 547 U.S. at 68.

221. *Id.* at 69-70. Note that the Court in *Rumsfeld* also found it significant that the universities were not being compelled to accept the military recruiters as *members* of their communities but rather as outsiders who were allowed on campus for a limited purpose. *Id.* at 69. This could distinguish *Rumsfeld* from the context of private school admissions policies. However, *Roberts*, did require the inclusion of women as members, *Roberts*, 468 U.S. at 628, and so it is not altogether clear that this factor is dispositive.

222. *Rumsfeld*, 547 U.S. at 69-70.

with, undermined, and degraded the Scouts's antigay message. A private school would have a strong argument that parents who choose to speak openly or publicly about their choices not to vaccinate could not enroll their children in the school because their antivaccination advocacy would conflict with, undermine, and degrade the school's own message. After all, an observer might hear the school preach the importance and necessity of vaccination, only to dismiss it as empty words upon discovering that children in the school were not, in fact, vaccinated.

Second, and more broadly, although nonvaccinated students are not *individually* identified, private schools in most or all states are required to report their vaccination rates and the reasons—medical or nonmedical—for nonvaccination to public health departments.²²³ This information is then made public.²²⁴ Publicly available information that students are unvaccinated for nonmedical reasons in a school that preaches the importance of vaccination could similarly undermine a school's provaccination message. Therefore, schools might meet the third element necessary to assert their associational right to exclude.²²⁵

Finally, the fourth element that schools would have to meet in order to claim an associational right to exclude nonvaccinators—the balancing of the public's interest against the association's private interests—should easily fall in favor of private schools' interest in requiring vaccination of all students. The Supreme Court and state and lower courts have consistently held that *state* vaccination mandates, with or without exemptions, are presumptively valid, and would even pass strict scrutiny, because of the importance of public health.²²⁶ Surely a private school has a similarly strong, or even stronger, argument given the nature of a private

223. See *School VaxView for Health Care Professionals/Providers*, CTRES. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/imz-managers/coverage/schoolvaxview/groups/hcp.html> [<https://perma.cc/R77C-RVD3>].

224. See *VaxView*, CTRES. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/vaxview/> [<https://perma.cc/UE69-6CUE>].

225. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

226. Mary Holland, *Compulsory Vaccination, the Constitution, and the Hepatitis B Mandate for Infants and Young Children*, 12 *YALE J. HEALTH POL'Y L. & ETHICS* 39, 48-54 (2012).

school community,²²⁷ its interest in the health of its students,²²⁸ and its commitment to avoiding disease outbreaks.²²⁹ It would be difficult to take seriously an argument that these interests are outweighed by a generalized public interest in parental rights, freedom of conscience, and general libertarian values, particularly given that no one has a *right* to attend a private school in the first place.²³⁰

The upshot of all of this is that at least some private schools—those whose messages and values compel them to require vaccination—*might* have an associational right rooted in the Free Speech Clause to do so.

D. Putting It All Together

In short, the picture is this:

- In five states, nonmedical exemptions are prohibited for public and private schools.²³¹ Here, private schools *must* refuse admission to students who are nonvaccinated for nonmedical reasons.²³²
- In New Jersey, religious schools have a statutory right to exclude unvaccinated students, but other private schools do not.²³³
- In some states, private schools may have a statutory right to exclude students who are nonvaccinated, but the statutes and courts have not been clear on this question.²³⁴ Meanwhile, in

227. See, e.g., *Benefits of Private Schools*, OUR KIDS, <https://www.ourkids.net/school/benefits-of-private-schools.php> [<https://perma.cc/L2QX-EAKA>].

228. See, e.g., *Private Schools: General Information*, OR. DEP'T EDUC., <https://www.oregon.gov/ode/schools-and-districts/grants/ESEA/pages/private-schools-gen-info.aspx> [<https://perma.cc/429Q-ZGJ8>].

229. See generally Sarah H. Fay, *Immunizations and Communicable Diseases: What Independent Schools Need to Know*, SCHWARTZ HANNUM PC (June 2019), <http://www.shpclaw.com/immunizations-and-communicable-diseases-what-independent-schools-need-to-know> [<https://perma.cc/PL8F-RZFE>].

230. See Nina Walton, *The Price of Admission: Who Gets into Private School, and How Much Do They Pay?*, 29 ECON. EDUC. REV. 738, 739 (2010).

231. See *supra* note 65 and accompanying text; see also NAT'L CONFERENCE ST. LEGISLATURES, *supra* note 38.

232. See *supra* note 65 and accompanying text; see also NAT'L CONFERENCE ST. LEGISLATURES, *supra* note 38.

233. See *supra* note 66 and accompanying text.

234. See *supra* notes 75-79 and accompanying text.

other states, the statutes and courts have stated or assumed that there is no such statutory right.²³⁵

- Schools in some states may conduct sincerity inquiries that may result in the exclusion of some nonvaccinated students, but the utility of such inquiries may be limited.²³⁶
- Religious private schools that are motivated by sincere religious beliefs and values have a constitutional right rooted in the Religion Clauses to exclude students who are nonvaccinated for nonmedical reasons.²³⁷ Religious private schools that are motivated purely by secular concerns *might* enjoy this right at well.²³⁸
- Private schools for whom mandatory vaccination serves an expressive function that is aligned with their values and missions *might* have a constitutional right rooted in the Free Speech Clause to adopt an exclusionary policy.²³⁹
- States that allow religious exemptions, but not parallel philosophical exemptions, *likely* violate the Establishment Clause.²⁴⁰ If courts were to agree with this analysis, then private schools in these states could adopt whatever policies they wish.

IV. TROUBLING IMPLICATIONS AND POSSIBLE SOLUTIONS

My analysis provides clarity for some private schools, and for others, it offers a framework for assessing their legal options and risks in deciding whether to adopt policies that exclude nonvaccinated students from admission. But this is not sufficient because the status quo raises practical and philosophical problems. This Section briefly exposes these problems and then offers a legislative solution, as well as partial judicial and administrative solutions.

235. *See supra* Part II.B.

236. *See supra* Part II.C.

237. *See supra* Part III.A-B.

238. *See supra* Part III.B.2.

239. *See supra* Part III.C.

240. *See supra* note 65.

A. The Problems with the Current State of Affairs

As a practical matter, the lack of clarity is troubling. Of course, lack of clarity is a problem faced by litigants and potential litigants in all areas of the law.²⁴¹ Indeed, it is why (some) lawyers are paid so well—if the law were clear, lawyers would be largely unnecessary.²⁴² But lack of clarity is more troubling when it affects those who are relatively resource poor than when it affects those who are resource rich.²⁴³ Wealth allows for the greater assumption of risk associated with lack of clarity, whereas those without wealth often cannot afford to assume the cost and risk they face when they take steps that may be challenged in the courts.²⁴⁴ To be sure, many private schools can hardly be described as *poor*. After all, they are attended and supported by people of relative means.²⁴⁵ But their resources are usually devoted to their primary missions of educating their students, and they often do not enjoy the resources necessary to support the cost and risk taking associated with potential litigation.²⁴⁶ If nothing else, it would be *fairer* to them to offer clarity—one way or another—as to what their rights are.

Second, as a philosophical matter, the differences in treatment between religious and nonreligious private schools is problematic. Recall that religious schools get to set any *religious* conditions for admission that they choose, and, depending on the application of the church autonomy doctrine, possibly even *nonreligious* conditions.²⁴⁷

241. See Ryan Mize, *From Plausibility to Clarity: An Analysis of the Implications of Ashcroft v. Iqbal and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1262 (2010) (noting that many legal doctrines are plagued by lack of clarity). See generally Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1 (2011).

242. See Himani Singh, *Language of Law—Ambiguities and Interpretation*, 2 AM. INT'L J. RES. HUMAN. ARTS SOC. SCI. 122, 122, 125-26 (2013) (noting that “law is a profession of words” and it is lawyers’ jobs to parse through the ambiguous nature and lack of clarity in legal language).

243. See generally Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAULL. REV. 649, 652 (2010) (studying the effects of differing levels of wealth on litigants).

244. *Id.* at 669 (arguing that the current legal system disfavors those with resource constraints because resource-poor litigants who bring suit “may find that wealthier defendants can exploit their resource advantage ... to prevail or resolve the dispute on favorable terms”).

245. Richard J. Murnane et al., *Who Goes to Private School?*, 18 EDUC. NEXT 59, 66 (2018).

246. BRUCE D. BAKER, *PRIVATE SCHOOLING IN THE U.S.: EXPENDITURES, SUPPLY, AND POLICY IMPLICATIONS* 32-33 (2009).

247. See *supra* Part III.B.2.

In contrast, nonreligious schools, if they have any associational right to exclude at all, may only exclude those whose presence would directly undermine their ability to spread their values.²⁴⁸ Similarly, recall that once religious autonomy applies, religious institutions are entirely free from state oversight in that particular area; whereas expressive associational freedom allows for an interest balancing test that may favor the state's interests over the association's interest in maintaining fidelity to its expressive goals.²⁴⁹ But why should this be? Why should a religious school that asserts a religious motivation for rejecting nonvaccinated students, or perhaps a nonreligious reason altogether, be treated differently from a nonreligious institution that asserts parallel philosophical reasons for doing so?

Third, the idea that a private school (religious or not) could *not* exclude students on the basis of nonvaccination undermines the fundamental meaning of what it means to *be* a private school. Except in rare circumstances, private schools may choose their own students. Of course, there are reasonable critiques of the idea of private education.²⁵⁰ It may be troubling that people of means can opt out of the standard educational model that those without such means are offered.²⁵¹ It may perpetuate class and racial divides,²⁵² and it may make public schools worse off by removing the most engaged stakeholders from the public school ecosystem.²⁵³ But the reality is that we *do* allow private schools to exist, and we *do* allow them to select their student bodies on the basis of all kinds of criteria: wealth, academic ability, family fit, personality, connections, values, and more. Why would we deny them the ability to select their student body on the basis of vaccination status and an

248. *See supra* Part III.C.

249. *See supra* Part III.B.

250. *E.g.*, Yossi Dahan, *Privatization, School Choice and Educational Equality*, 5 LAW & ETHICS HUM. RTS. 307, 308 (2011) (“[C]onsiderations of fairness, as well as utility, solidarity, and democracy supply strong reasons for rejecting various arguments that support the existence of private schools.”).

251. *Id.* at 310.

252. *See id.* at 319-20; *see also* Daniel Kiel, *No Caste Here? Toward a Structural Critique of American Education*, 119 PENN ST. L. REV. 611, 622 (2015).

253. *See* Dahan, *supra* note 250, at 310; Diane Ravitch, *Charter Schools Damage Public Education*, WASH. POST (June 22, 2018, 1:37 PM), https://www.washingtonpost.com/opinions/charter-schools-are-leading-to-an-unhealthy-divide-in-american-education/2018/06/22/73430df8-7016-11e8-afd5-778aca903bbe_story.html [<https://perma.cc/5ZDX-RBJY>].

interest in protecting their school community from the spread of deadly disease? This would be an odd and unreasonable place to draw the line.

Finally, the stakes for children here are high. There is no reason that a developed country should be experiencing a spike in dangerous vaccine-preventable diseases.²⁵⁴ There are vigorous debates and proposals concerning how to reverse this trend on national and statewide bases,²⁵⁵ and that is a good thing. But in the meanwhile, children are needlessly suffering. Why would we ever prevent microcommunities such as private schools from adopting policies to protect the students that they can from these unnecessary illnesses? To be clear, my argument is not that private schools *must* adopt exclusionary policies; if they are made to do so, it should be because all schools, public and private (and perhaps even home-based), are mandated to do so. But schools should at least have the *option* to do so.

For these reasons, the law should provide clarity. And not just clarity; it should pick a side by clearly affirming the right of all private schools to reject students who are not vaccinated for nonmedical reasons.

B. Legislative, Administrative, and Judicial Solutions

The ideal resolution would be for state legislatures to change their statutes to state explicitly that private schools may choose to reject students who are not vaccinated for nonmedical reasons. Using language drawn from a comprehensive model statute concerning state vaccination laws that I and coauthors have offered, a new subsection should be added to state vaccination laws, stating:

Nothing shall be construed as to require private schools, private childcare facilities or private camps to accept nonmedical exemptions for any or all vaccinations required by the [Department of Health]. Private schools, private childcare facilities, and

254. See *What Would Happen if We Stopped Vaccinations?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/vac-gen/whatifstop.htm> [<https://perma.cc/HBZ4-HYPG>]; *Diseases You Almost Forgot About (Thanks to Vaccines)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/parents/diseases/diseases-forgot.html> [<https://perma.cc/SQJ9-L9PA>].

255. See *supra* note 4 and accompanying text.

private camps may elect whether or not to accept nonmedical exemptions as outlined [in] this section. Private schools, private childcare facilities, and private camps must clearly state if nonmedical exemptions will not be accepted in the school or facility's admissions agreements or contracts to be signed by a parent or legal guardian of the child, emancipated student or student aged 18 years or older.²⁵⁶

That said, unless and until states amend their statutes, there are two other approaches that would improve the status quo, albeit imperfectly.

As explained earlier, some state statutes are written in a way that could be interpreted to mean that private schools are not required to accept nonmedical vaccination exemptions. For example, Georgia's statute imposes vaccination mandates, and then exempts those with religious exemptions, stating that "[t]his Code section shall not apply to a child whose parent or legal guardian objects to immunization of the child on the grounds that the immunization conflicts with the religious beliefs of the parent or guardian."²⁵⁷

A strong case can be made that the plain meaning of this provision simply frees private schools to set exemption policies as they please. The "Code section" referred to is the broader statutory section that imposes the vaccination mandate in the first place.²⁵⁸ In the event that a student has a bona fide religious exemption, then the code section mandating vaccination falls away, as though it had never existed. If there had never been a statutory vaccination mandate in the first place, private schools would be able to insist on their own vaccination requirements, just as they may impose many other conditions for admission and attendance. Therefore, they remain free to adopt exclusionary policies for those whose religious exemptions would entitle them to attend public school. That is, the exemption is not an affirmative requirement that private schools accept such exemptions.

256. Hillel Y. Levin et al., *Stopping the Resurgence of Vaccine-Preventable Childhood Diseases: Policy, Politics, and Law*, 2020 U. ILL. L. REV. 233, 266. Of course, states should adapt this language to align with their already existing statutory language.

257. GA. CODE ANN. § 20-2-771(e) (2013).

258. *See id.*

Courts in states with statutes such as Georgia's have tended to (mistakenly) interpret or assume them to require private schools to accept nonmedical exemptions on the same footing as must public schools.²⁵⁹ But if courts are presented with an appropriate case, they should reject that interpretation and instead adopt the one I have offered. First, it is the more natural reading of the statute. Second, even if the statute is ambiguous, courts generally adopt an interpretation that avoids raising constitutional problems and, all the more, a reading that allows them to avoid striking down a statutory provision as unconstitutional.²⁶⁰ By adopting the reading I have offered, courts could avoid grappling with the constitutional arguments outlined above—and thus avoid a reading that requires the court to strike down the provision as unconstitutional when applied to private schools.²⁶¹

Unfortunately, relying on judicial interpretation is less than ideal, because it is limited in both application and utility. First, courts can only adopt this interpretation in those states with statutes similar to Georgia's, and not in those states with statutes that more clearly seem to require private schools to accept non-medical exemptions. Second, our judicial system requires, of course, that a dispute over the statute's meaning arise in order for the courts to intervene at all.²⁶² This means that a private school would have to adopt an exclusionary policy and subject itself to a costly lawsuit with an uncertain outcome. It may be reticent to do so—particularly given that some courts have not adopted this interpretation—and thereby be dissuaded from taking steps to prevent illness from spreading among its students. It would be preferable to provide ex ante assurances, something the courts are not empowered to do.

There is a third solution that would at least provide ex ante assurance to private schools, though it would still be limited in

259. *See supra* Part II.B.

260. *Gomez v. U.S.*, 490 U.S. 858, 864 (1989) (“It is ... settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.”).

261. It would be unconstitutional for privileging religious children, parents, and guardians, over the many more nonreligious.

262. VALERIE C. BRANNON, CONG. RESEARCH SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 2 (2018) (noting that statutory interpretation by courts does not begin until a dispute over the statute arises).

application to states with statutes such as Georgia's. States typically delegate authority to their health departments to implement their vaccination mandates.²⁶³ In carrying out their responsibilities, state health departments should, where possible, issue interpretive rules that affirm the right of private schools to adopt exclusionary policies for students who are not vaccinated for nonmedical reasons. It is not the ideal solution, but until states amend their statutes, it will help, and persuading a health department to do this may be easier to achieve than persuading a state legislature.

CONCLUSION: BEYOND VACCINATION POLICY

This Article focuses on the problem of antivaccination and the degree to which private schools can be a part of the solution. But the analysis raises much broader questions about the degree to which states may regulate private schools—and the degree to which private schools have constitutional freedoms that trump state regulation.

If the First Amendment's Speech and Religion Clauses allow some private schools to be free from state interference in developing their vaccination policies, what other state laws governing private schools might be trumped by their constitutional rights? Some states' regulations of private schools are relatively expansive, while others are minimal.²⁶⁴ States impose requirements concerning a range of activities, including licensing, curriculum, testing, teacher certification, reporting, antidiscrimination, and more.²⁶⁵ What if schools' religious or philosophical values conflict with such regulations?

This question raises complex questions of constitutional law and theory that warrant further attention. Not everyone will like the answers. For example, religious or nonreligious private schools likely have a constitutional right, in at least some cases, to exclude

263. Richard J. Pan & Dorit Rubinstein Reiss, *Vaccine Medical Exemptions Are a Delegated Public Health Authority*, PEDIATRICS, Nov. 2018, at 1-2, <https://pediatrics.aappublications.org/content/pediatrics/142/5/e20182009.full.pdf> [<https://perma.cc/7NJF-Q5XL>]; Kevin M. Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/vaccines/imz-managers/guides-pubs/downloads/vacc_mandates_chptr13.pdf [<https://perma.cc/B8HR-J5TA>].

264. U.S. DEP'T OF EDUC., STATE REGULATION OF PRIVATE SCHOOLS 326-31 (2009), <https://www2.ed.gov/admins/comm/choice/regprivschl/regprivschl.pdf> [<https://perma.cc/HK2E-C2GN>].

265. *Id.*

LGBTQ students or teachers, which may displease many who oppose such discrimination.²⁶⁶

But this is what it means to live and work within a constitutional order that allows and encourages a degree of religious and associational autonomy. Perhaps some of the same people who are displeased by schools' rights to discriminate in one context will appreciate that these same rights may also be used in the context of vaccination policies to protect some vulnerable students.

266. See discussion of church autonomy and expressive association rights *supra* Part III.C.