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Determining Legal Custody in a Divorce Proceeding: When the Health of a Child Hinges on Their Parents' Religion

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DETERMINING LEGAL CUSTODY IN A DIVORCE PROCEEDING: WHEN THE HEALTH OF A CHILD HINGES ON THEIR PARENTS' RELIGION*

In the last two decades, married couples have become more racially and ethnically diverse than ever.[1] The United States Census Bureau has reported that from 2000 to 2012–2016, the percentage of interracial or interethnic married-couple households grew from 7.4 to 10.2 percent.[2] As a result, more couples who practice two different religions are getting married and having children who grow up in households with direct exposure to both religions. However, these couples are not immune to the divorce rate and as a result, every aspect of their lives may suddenly be subject to the scrutiny of the judicial system.

When two parents are involved in a divorce proceeding, the parties seldom anticipate a court to control medical procedures of their child. Even more surprising is when a court is able exercise this control by using the parents' religions as a justification. While courts are often reluctant to factor a parent's religion into the "best interests" standard for child custody determinations, certain narrow circumstances may warrant such an inquiry.

The central argument of this Article is that a court is permitted to inquire into the religions of two parents in a divorce proceeding to determine the best interests of a child when one parent's religion supports vaccinations and the other parent's religion opposes vaccinations. Such an inquiry not only withstands the First Amendment but finds further support from the state's police power and the state's role as *parens patriae*. Part I of this Article provides a background on compulsory vaccination requirements and the best interests standard that courts use during a divorce proceeding. Part II of this Article examines why a court's inquiry into the religion of parents to determine the best interests of a child is sound, discussing the relationship between a parent's fundamental right to raise their child as they see fit and the

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1. Brittany Rico et al., *Growth in Interracial and Interethnic Married-Couple Households*, U.S. Census Bureau (July 9, 2018), https://www.census.gov/library/stories/2018/07/interracial-marriages.html.

2. *Id.*

state's interest as *parens patriae*. Part III argues that courts should grant legal custody to the parent who supports vaccinations and analyzes the impact of such a choice, in addition to the impact of the alternative. Part IV concludes that awarding legal custody to the parent who supports vaccinations is the best possible outcome in order to maintain public health and safety.

I. BACKGROUND

A. Compulsory Vaccination Requirements

1. Vaccinations

Vaccinations are defined as the "medical process by which an agent similar to the disease or virus being prevented is deliberately introduced into a non-exposed individual, thereby causing the body to produce antibodies against the underlying illness."[3] Numerous public health studies conclude that comprehensive vaccination policies are "greatly responsible for the significant reduction, and sometimes complete eradication, of many childhood diseases," and others have said that "childhood vaccinations are the most effective public-health measure in American history."[4] Since the United States began to realize the benefits of vaccinations throughout the nineteenth century,[5] and full-scale immunization efforts spread throughout the twentieth century, "[n]ew and improved vaccines have been developed at an unprecedented rate in the last few decades, and the trend continues to the present day."[6]

Generally speaking, risk versus risk analysis indicates that receiving a vaccination is approximately one thousand times safer than not receiving a vaccination and risking exposure to the disease.[7] One thousand times safer is on the lower end of the spectrum; some studies indicate that it could be up to one hundred thousand times safer to receive a vaccine than it is to risk contracting a life-threatening disease.[8]

Today, all states have their own series of compulsory and recommended vaccines.[9] All states require evidence of vaccination against

3. Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353, 362 (2004).

4. Alicia Novak, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1121–22 (2005).

5. Calandrillo, *supra* note 3, at 365.

6. *Id.* at 368.

7. *Id.* at 391.

8. *Id.* at 393.

9. *Id.* at 383.

"diphtheria, measles, rubella[,] and polio (at minimum) . . ." for school entrance.[10] This movement began in the 1960s, when data showed that states with mandatory measles vaccination requirements had 40% to 51% lower rates of the disease than did states without such regulations.[11] These compulsory school vaccination requirements did not force children to get vaccinated.[12] Rather, the requirements merely prevented unvaccinated children from enrolling in public school.[13] However, under certain circumstances, parents can opt their children out from the vaccination requirement while their children are nonetheless permitted to enroll in public school.[14]

2. Herd Immunity

Compulsory school vaccination requirements "have been required for years and are associated with successful reduction of infectious disease and establishment of herd immunity, which occurs when a threshold of vaccinated individuals is reached so that others may not need to be vaccinated to maintain a population of healthy individuals."[15] When the majority of a population is properly immunized against a certain disease or diseases, the "herd immunity" serves as a "protective barrier against the spread of infection to others in the group who are not immunized . . ." due to exemptions or age.[16]

An important aspect of herd immunity is that it can occur even when less than one hundred percent of the population is vaccinated.[17] However, herd immunity's most significant downfall is that a sufficiently high proportion of the population must be immunized so that transmission of the disease can be interrupted.[18] Therefore, problems arise when individuals justify not receiving vaccinations by relying on the rest of the "herd" to keep them safe.

This scenario is a classic collective action problem: "increasing numbers of free-riders undermine society's ability to achieve a critical mass of people who are vaccinated."[19] When too many individuals rely on the rest of the herd to be immunized, their lives are not the

10. *Id.*
11. Calandrillo, *supra* note 3, at 382; *see* Kathryn M. Edwards, Editorial, *State Mandates and Childhood Immunization*, 284 JAMA 3171, 3172 (2000).
12. Hope Lu, *Giving Families Their Best Shot: A Law-Medicine Perspective on the Right to Religious Exemptions from Mandatory Vaccination*, 63 CASE W. RES. L. REV. 869, 875 (2013).
13. *Id.*
14. *See infra* Part I.A.5; Novak, *supra* note 4, at 1101.
15. Lu, *supra* note 12, at 874–75.
16. Calandrillo, *supra* note 3, at 420.
17. *Id.*
18. *Id.*
19. *Id.* at 361.

only ones endangered.[20] Risk of exposure increases, and diseases can spread to individuals with weakened immune systems, children who are too young to receive vaccinations,[21] and even individuals who have already been vaccinated.[22] The community protection provided by herd immunity becomes meaningless when too many individuals try to "free ride" off of the obliging population.[23] Herd immunity is a driving force behind compulsory vaccination requirements; requiring the entire population to receive vaccines ensures that herd immunity will be maintained, providing protection to all individuals in the community and thereby serving the wider public good.[24]

3. The Rise of the Anti-Vaccination Movement

Vaccines have become a victim of their success.[25] Because mass immunizations have eradicated debilitating illnesses, or have made them incredibly rare, today's generation no longer fears the diseases that vaccines are designed to prevent.[26] Since these diseases are no longer killing off large populations in the United States, the focus has shifted to the risks that immunizations present.[27] Instead of focusing on the health achievements provided by immunizations, attention is directed toward vaccine-related injuries due to "their rarity and ability to shock parents and catch viewers' attention."[28] Today, individuals are overreacting to high tragedy events with relatively low probability, while simultaneously underperceiving the risk of death from diseases that vaccines were intended to eradicate.[29] Of course, news stories about one child—out of millions—dying after receiving one vaccine are far more alarming to parents than news stories about diseases that have killed millions of individuals.[30]

The anti-vaccinationists' movement is further fueled by distrust of government[31] and perceived threats to freedom and individualism.[32] Public health authorities are often characterized as "abusive, untrust-

20. *Id.* at 419.
21. Novak, *supra* note 4, at 1122.
22. *Id.* at 1123.
23. Calandrillo, *supra* note 3, at 420.
24. *Id.*
25. *Id.* at 419.
26. *Id.*
27. *Id.* at 388–89.
28. *Id.* at 404.
29. *See* Yvonne A. Maldonado, *Current Controversies in Vaccination: Vaccine Safety*, 288 JAMA 3155, 3156 (2002).
30. Calandrillo, *supra* note 3, at 405.
31. *Id.* at 397.
32. *Id.* at 393.

worthy, and paternalistic[,]" while the resistance was "equated with fighting government oppression."[33] Individuals and groups opposing government interference in their personal lives argue that no one has the ability to control what they do with their body—or their child's body—and the state especially may not control their decisions.[34] Thus, compulsory vaccination requirements are inexcusable obtrusions on basic human autonomy and liberty.[35]

The Internet, providing hundreds of websites spreading misinformation about vaccines, exacerbates this opposition.[36] In 2003, Robert Wolfe published an account of the content contained on a dozen anti-vaccination websites, with a majority stating that vaccine immunity is temporary, that homeopathy is a viable alternative, and even that diseases have declined without the assistance of vaccinations.[37] The websites also included "[a]necdotal, emotionally charged stories of children who had allegedly been killed or harmed by vaccines . . ."[38] The use of personal stories and heartbreaking photographs encourage false consensus bias.[39] The number of anti-vaccinationists websites spouting such disinformation have undoubtedly increased since 2003, but the claims contained on the websites continue to be circulated without being peer-reviewed in published medical literature.[40]

4. The Constitutionality of Compulsory Vaccination Requirements

Although states are charged with creating their own laws mandating immunization, the United States Supreme Court has upheld the constitutionality of state vaccination laws on numerous occasions.[41] Beginning in 1905, in *Jacobson v. Massachusetts*, the Supreme Court held that municipalities are authorized to require immunizations without violating one's constitutional liberty rights.[42] In 1922, the Court extended its holding from *Jacobson* in *Zucht v. King* and upheld a local

33. James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 849 (2001–02).

34. Calandrillo, *supra* note 3, at 393.

35. *Id.*

36. *See generally* Robert M. Wolfe et al., *Content and Design Attributes of Antivaccination Web Sites*, 287 JAMA 3245 (2002).

37. *See id.* at 3247 (stating that homeopathy can help fight against diseases in the same way that vaccines can).

38. Calandrillo, *supra* note 3, at 403.

39. *See id.* False consensus bias is defined as the tendency to rely on personal experience rather than systematic, scientific evidence.

40. *See* Wolfe et al., *supra* note 36, at 3247.

41. Daniel A. Salmon & Andrew W. Siegel, *Religious and Philosophical Exemptions from Vaccination Requirements and Lessons Learned from Conscientious Objectors from Conscription*, 116 PUB. HEALTH REPS. 289, 290 (2001).

42. Jacobson v. Massachusetts, 197 U.S. 11, 25–30 (1905).

government mandate that required vaccination as a prerequisite for enrolling in school, holding that state officials had "broad discretion in matters affecting the application and enforcement of a health law."[43] Following the Supreme Court's reasoning in *Jacobson* and *Zucht*, several state courts have ruled that "antivaccinationists' arguments concerning the right to public education (absent government interference) do not prevent legislatures from imposing reasonable immunization laws on their citizens."[44]

Compulsory vaccination requirements are constitutional under the state's police power, whereby states have a compelling interest in preserving public health and safety.[45] The Institute of Medicine defines public health as "what we, as a society, do collectively to assure the conditions for people to be healthy."[46] As laws relating to the public health and welfare, state vaccination laws fall under the state's police power, making them completely state-based.[47] In creating state vaccination laws, a state is charged with balancing public health welfare with a parent's individual right to raise their child as they see fit.[48]

The Supreme Court has emphasized the state's police power to require vaccinations for the benefit of overall public safety, holding that "important individual liberty rights (to opt out from vaccines) do not override other people's rights (to communal health safety)."[49] In *Jacobson v. Massachusetts*, the Court ruled that "the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[50] Thus, the Court has made it clear that the state may in fact infringe upon individual rights when the health concerns of the larger community are at stake.[51]

Further, compulsory vaccination requirements do not violate the First Amendment. The religion clauses of the First Amendment state that "Congress shall make no law [1] respecting an establishment of

43. Zucht v. King, 260 U.S. 174, 176 (1922); *see* Novak, *supra* note 4, at 1105; Lu, *supra* note 12, at 876.

44. Calandrillo, *supra* note 3, at 394–95; *see* Maricopa Cty. Health Dep't v. Harmon, 750 P.2d 1364, 1369 (Ariz. Ct. App. 1987) (holding that the state health department did not violate unvaccinated children's rights when excluding them from school).

45. Novak, *supra* note 4, at 1121.

46. Lu, *supra* note 12, at 872.

47. *See* Salmon & Siegel, *supra* note 41, at 294.

48. *See* Calandrillo, *supra* note 3, at 356.

49. *Id.* at 358.

50. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

51. *See generally id.*

religion or [2] prohibiting the free exercise thereof."[52] The first clause, often referred to as the Establishment Clause, ensures that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[53] The second clause, often referred to as the Free Exercise Clause, provides the "right to religious beliefs, including assembling for worship services, proselytizing, and observing dietary restrictions . . ."[54] Thus, the Free Exercise Clause affords constitutional protection to beliefs, but not necessarily actions motivated by those beliefs.[55]

When determining whether a statute is constitutional, courts must conduct a balancing test and analyze whether the state has a compelling interest that is promoted by the statute's religious eligibility provisions and justifies substantially infringing on someone's First Amendment rights.[56] When looking at compulsory vaccination requirements, the Supreme Court has weighed the balance in favor of public health concerns when in conflict with religious beliefs.[57] In *Prince v. Massachusetts*, the Court held that the Free Exercise Clause does not give a parent the right to expose their child or the community to harm from disease.[58] States have followed the Supreme Court's holding. In *Wright v. DeWitt School District*, the Supreme Court of Arkansas held that a compulsory vaccination law with no religious exemption is constitutional because the right of free exercise is subject to reasonable regulation for the good of the community as a whole.[59] The Mississippi Supreme Court has also ruled in the interest of public health, holding that a state has an "'overriding and compelling public interest' to protect children from harm, even when such rights conflict[ ] with the religious rights of the parents seeking exemptions for their children."[60]

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52. U.S. CONST. amend. I. The Fourteenth Amendment has made the First Amendment applicable to the states. U.S. CONST. amend. XIV.

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

54. Joanne Ross Wilder, *Resolving Religious Disputes in Custody Cases: It's Really Not About Best Interests*, 22 J. AM. ACAD. MATRIM. L. 411, 412 (2009) [hereinafter Wilder, *It's Really Not About Best Interests*].

55. Joanne Ross Wilder, *Religion and Best Interests in Custody Cases*, 18 J. AM. ACAD. MATRIM. L. 211, 220 (2002) [hereinafter Wilder, *Religion and Best Interests*].

56. *See* Sherbert v. Verner, 374 U.S. 398, 399–400 (1963).

57. Salmon & Siegel, *supra* note 41, at 291.

58. 321 U.S. 158, 167–70 (1944).

59. 385 S.W.2d 644, 648 (Ark. 1965).

60. Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277, 283 (2003) (citing Brown v. Stone, 378 So. 2d 218, 222 (Miss. 1979)).

5. Exemptions to Compulsory Vaccination Requirements

While all fifty states have enacted compulsory vaccination statutes, almost all states have provided the opportunity for parents to claim some sort of exemption to those statutes.[61] There are three types of exemptions: medical exemptions, religious exemptions, and philosophical exemptions, sometimes called personal belief exemptions.

a. Three Types of Exemptions

All fifty states allow parents to claim medical exemptions.[62] Most often, parents claim a medical exemption for their child when the child is "immuno-compromised, suffer[s] from certain forms of cancer, or [is] allergic to vaccines[.]"[63] When verified by a physician as legitimately indicated, medical exemptions make the most sense.[64] Thus, when a child would suffer more harm than good as a result of vaccinations because of his compromised health situation, clearly he should not be vaccinated.[65]

Religious exemptions differ from medical exemptions in that they "do not present a medically necessary reason for abandoning vaccination."[66] Courts have held that a parent's reason for seeking the exemption must be based on religious grounds, rather than mere secular grounds.[67] However, courts have limited themselves on how far they are willing to inquire into someone's religious beliefs, looking at the sincerity of the person's belief, rather than the truth of that belief.[68] Courts have determined that "[a]n inquiry into the sincerity of a person's religious belief is constitutionally permissible, but subjecting the belief to scrutiny to determine the truth of the belief is not because people can sincerely believe religious principles that are not necessarily true."[69]

The last type of exemption is a philosophical exemption. It should be noted that very few states still have philosophical exemptions, as

61. *States With Religious and Philosophical Exemptions From School Immunization Requirements*, NAT'L CONF. ST. LEGS. (Apr. 30, 2021), https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx ("All 50 states have legislation requiring specified vaccines for students. Although exemptions vary from state to state, all school immunization laws grant exemptions to children for medical reasons.").

62. *See* Alan R. Hinman et al., *Childhood Immunization: Laws that Work*, 30 J.L. MED. & ETHICS 122, 124 (2002).

63. Calandrillo, *supra* note 3, at 413.

64. *Id.*

65. *See id.*

66. *Id.*

67. Mason v. Gen. Brown Cent. Sch. District, 851 F.2d 47, 53 (2d Cir. 1988).

68. Lu, *supra* note 12, at 877.

69. Wilder, *Religion and Best Interests*, *supra* note 55, at 224.

many states have removed the exemption entirely. However, for the states that still employ philosophical exemptions, parents may claim these exemptions for "moral, philosophical[,] or other personal beliefs."[70] These statutes usually require that the parents' beliefs be exercised in good faith or sincerely held, but these requirements are enforced infrequently.[71]

b. Negativity Surrounding Religious Exemptions

The recent rise of religious and philosophical exemptions has sparked concern, especially within the medical community. In fact, the American Medical Association has gone on record opposing both religious and philosophical exemptions.[72] The most popular organized religious sects objecting to mandatory vaccinations include the Amish, Mennonite, Jehovah's Witnesses, and Christian Scientists, among others.[73] Unfortunately, almost all major outbreaks occurring in the United States in the last twenty-five years have been tied to communities of those denominations.[74] Diseases that were believed to be completely eradicated have suddenly resurged, prompting skepticism into the true benefit of religious exemptions. Specifically, religious exemptions have been criticized in two major ways. First, the ease of obtaining religious exemptions in some states have made those exemptions prone to abuse. Second, the number of parents claiming religious exemptions for their children has had a significant impact on herd immunity.

Religious exemptions have been characterized as "anyone who wants it, gets it[.]"[75] This is because there is little oversight with regard to who is claiming these exemptions.[76] In some states, the only thing a parent has to do to receive a religious exemption is simply assert that vaccines are contrary to their religious beliefs.[77] Thus, someone with even the slightest desire to claim a religious exemption can do so with-

70. *See* Hodge & Gostin, *supra* note 33, at 869 tbl.2, 873.

71. *See id.* at 873.

72. *See* Donald G. McNeil, Jr., *Worship Optional: Joining a Church To Avoid Vaccines*, N.Y. TIMES (Jan. 14, 2003), https://www.nytimes.com/2003/01/14/science/worship-optional-joining-a-church-to-avoid-vaccines.html.

73. Lu, *supra* note 12, at 877.

74. Calandrillo, *supra* note 3, at 415.

75. *See* McNeil, *supra* note 72.

76. Novak, *supra* note 4, at 1124.

77. *See* Lu, *supra* note 12, at 870.

out much thought.[78] Conversely, some states demand more proof of sincerity for a parent claiming a religious exemption.[79]

Because exemptions are state-based,[80] the ease of obtaining religious exemptions vary from state to state. Numerous studies have linked the ease in obtaining exemptions to the number of parents claiming exemptions for their children. Predictably, the complexity of each state's exemption is directly correlated to the percentage of parents who choose to legally opt their children out of vaccinations.[81] In fact, one study found that of the nineteen states with "the highest level of complexity required to receive an exemption," none of those states had more than one percent of children exempted from compulsory vaccination laws.[82] The ease by which a parent may obtain a religious exemption for their child thus threatens to undermine compulsory vaccination laws' intent.[83]

More crucially, studies have proven a direct link between children who are exempted and children who are at risk of contracting these serious, life-threatening diseases that vaccinations were intended to eradicate.[84] A national seven-year study showed that school-aged children who claimed a religious or philosophical exemption were thirty-five times "more likely to contract measles" than children who were vaccinated.[85] The likelihood that exempted children could contract one of these serious, life-threatening diseases are even greater in hot spots,[86] where a community faces a cluster problem. Clustering—when those who apply for the exemptions live in clusters in relatively close proximity to one another—is a frequent issue with religious exemptors, as they cluster around a school or church.[87] For example,

78. Salmon & Siegel, *supra* note 41, at 293.

79. For example, in order to receive a medical exemption, Nebraska schools require parents to submit "an affidavit signed by a legally authorized representative stating that the immunization conflicts with the tenets and practices of a recognized religious denomination of which the student is a member." *See* Aleksandra Sandstrom, *Amid measles outbreak, New York closes religious exemption for vaccinations – but most states retain it*, PEW RES. (June 28, 2019), https://www.pewresearch.org/fact-tank/2019/06/28/nearly-all-states-allow-religious-exemptions-for-vaccinations/.

80. *See supra* Part I.A.4.

81. Calandrillo, *supra* note 3, at 434.

82. *Id.* at 434–35.

83. *Id.* at 418.

84. *See id.* at 435.

85. Daniel A. Salmon et al., *Health Consequences of Religious and Philosophical Exemptions From Immunization Laws: Individual and Societal Risk of Measles*, 282 JAMA 47, 47 (1999).

86. National immunization rates appear to be high overall. However, hot spots occur in local communities where "disease pockets" spring up, where significant percentages of populations remain unvaccinated. *See* Calandrillo, *supra* note 3, at 421–22.

87. Novak, *supra* note 4, at 1122–23.

clusters have been found in Vashon Island, Washington and Boulder, Colorado, both of which have encountered outbreaks of illnesses that could have been prevented by vaccinations.[88] Because these clusters contain large numbers of individuals claiming exemptions, herd immunity is compromised.[89]

With studies finding a link between the ease of obtaining a religious exemption and the number of exemptions claimed, as well as a link between exempted children and children who are at risk of contracting diseases that vaccinations were created to guard against, it is clear why so many critics believe that the rise of exemptions threatens to undermine the public health achievements made possible by compulsory vaccination laws.[90] However, because religious exemptions "reflect a political and judicial attempt to reconcile competing personal and public interests[,]" states will likely continue to offer religious exemptions.[91] Nevertheless, states maintain the authority to impinge on a parent's right to religious freedom and override a parent's religious practice when the welfare of innocent parties is at stake.[92]

B. The Best Interests of the Child

When two parents go through a divorce proceeding, some state courts are required to assign decision-making responsibilities to one or both parents.[93] In deciding whether to assign those decision-making responsibilities to one parent or both parents equally, the courts must consider "the ability of the parents to cooperate and make joint decisions."[94] If parents are able to agree and make decisions together for their child in an amicable fashion, joint custody will be awarded. Conversely, if two parents are unable to make joint decisions relating to their child's upbringing, one parent will be awarded sole legal cus-

88. *Id.*

89. *See supra* Part I.A.2.

90. *See* Calandrillo, *supra* note 3, at 421.

91. *Id.* at 412.

92. *See id.* at 432.

93. Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 414.

94. *Id.*

tody.[95] The court will determine which parent is awarded sole legal custody based on the best interests of the child.[96]

1. The "Best Interests" Standard

The majority of states have enacted statutes setting forth the proposition that custody decisions are made in accordance with the best interests of the child.[97] Further, each state legislature has set forth best interests criteria for determining which parent should make major decisions for the child.[98] While the best interests standard is the paramount concern when parents engage in a custody dispute,[99] the legal definition of "best interests" has perplexed scholars, attorneys, and even judges. This is because the court is most often attempting to determine whose rights—those of the children or the parents—should be of paramount consideration.[100]

While courts attempt to delineate the best interests of the child, the court is simultaneously treading lightly so as to not interfere in a parent's constitutional right to raise their child how they see fit.[101] While

95. Legal custody is distinct from physical custody. Legal custody grants a parent authority to make important, long-term decisions regarding their child. In contrast, physical custody refers to where the child lives after the parents are divorced. While the common scenario is for both parents to have joint legal and physical custody, it is possible that one parent may be awarded sole legal custody or sole physical custody. The result of sole legal custody is one parent having the final decision-making authority relating to the health, education, and welfare of his or her children. On the other hand, the result of sole physical custody is one parent exercising the majority of parenting time while the other parent is granted "visitation," which is a regularly scheduled time that is less than the custodial parent's parenting time.

96. *See, e.g.*, ALA. CODE § 30-3-1 (1975); ALASKA STAT. § 25.24.150(c) (2017); ARIZ. REV. STAT. ANN. § 25-403.01(B) (2013); ARK. CODE. ANN. § 9-13-101(a)(1)(A)(ii) (2019); COLO. REV. STAT. § 14-10-123(1.5)(b) (2019); CONN. GEN. STAT. § 46b-56(b) (2014); D.C. CODE § 16-914(a)(1)(A) (2021); GA. CODE ANN. § 19-9-3(a)(2) (2021); HAW. REV. STAT. § 571-46(a)(1) (2013); IDAHO CODE § 32-717(1) (2007); IOWA CODE § 598.41 (2019); KAN STAT. ANN. § 23-3203(a)(6) (2017); KY. REV. STAT. ANN. § 403.270(2) (West 2021); MASS. GEN. LAWS ch. 208 § 28 (2019); MINN. STAT. § 518.17 (2015); MISS. CODE ANN. § 93-5-24 (2003); MO. REV. STAT. § 452.375(2) (2018); NEB. REV. STAT. § 42-364(1)(b) (2018); N.M. STAT. ANN. § 40-4-9(A) (1977); N.Y. DOM. REL. LAW § 240(1)(a) (McKinney 2020); N.C. GEN. STAT. § 50-13.2(a) (2017); N.D. CENT. CODE § 14-09-06.2 (2019); OHIO REV. CODE. ANN. § 3109.04 (LexisNexis 2011); OKLA. STAT. tit. 43, § 109(A) (2009); OR. REV. STAT. § 107.105(1)(b) (2014); S.D. CODIFIED LAWS § 25-4-45 (1994); TENN. CODE. ANN. § 36-6-106 (2016); VT. STAT. ANN. tit. 15, § 665(b) (2018); VA. CODE ANN. § 20-124.2(B) (2018); WASH. REV. CODE 26.10.100 (2021); W. VA. CODE § 48-9-101 (2001); WIS. STAT. § 767.41(2) (2021); WYO. STAT. ANN. § 20-2-201 (2018).

97. *Id.*

98. Cynthia R. Mabry, *Blending Cultures and Religions: Effects that the Changing Makeup of Families in our Nation Have on Child Custody Determinations*, 26 J. AM. ACAD. MATRIM. L. 31, 31 (2013).

99. *See id.*

100. Erin Bajackson, *Best Interests of the Child – A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIM. L. 311, 311 (2013).

101. Mabry, *supra* note 98, at 31.

parents are presumed to act in the best interest of their children, "[t]he reality is that the best interests of the child [can be] subordinated to overarching public policy considerations[,]" resulting in the welfare of that individual child being sacrificed to a greater good.[102]

2. A Parent's Fundamental Right to Raise Their Child

The Supreme Court has recognized that parents have a constitutionally protected, fundamental right to raise their child as they see fit, including making decisions regarding the custody, control, and care of their child.[103] Included in this decision-making is the right to direct the religious upbringing of their children, protected by the parents' own freedom of religion.[104] That right is not forfeited just because parents are involved in a divorce proceeding.

While a state court has the ability to designate one parent as the custodial parent in a divorce proceeding, both parents retain the fundamental right to make their own decisions relating to their child, and unless a showing of harm to the child can be made, the court is in no position to substitute its judgment for the parents' judgment on the ground that a different choice might be better.[105] In fact, even when there is a primary custodial parent and a secondary custodial parent, both parents retain the right to expose the child to each parent's religion.[106] The difference in religious exposure between a primary and secondary custodial parent is that the primary custodial parent determines the child's religion and what faith the child will be raised in, while the secondary custodial parent may expose the children to his or her religion, but does not have a right to "enroll the child in classes or

102. Wilder, *Religion and Best Interests*, *supra* note 55, at 216.

103. *See id.* at 220; Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 413; *see* Troxel v. Granville, 530 U.S. 57, 66 (2000) ("In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); *see* Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'"); *see* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *see* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *see* Parham v. J.R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course[.]").

104. Wilder, *Religion and Best Interests*, *supra* note 55, at 220.

105. *Id.* at 221.

106. *See* Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 418.

programs in a religion different from that chosen for the child" by the primary custodial parent.[107] Regardless of their custodial status, both parents' right to control their child's religious training is subject to limitation upon a showing of substantial harm to the child.[108]

3. The State's Parens Patriae *Power*

The limitation on a parent's fundamental right to raise their child how they see fit arises out of the state's interest as *parens patriae*.[109] The Supreme Court has found that a state has a "compelling" interest in "safeguarding the physical and psychological well-being of a minor[.]"[110] In other words, "the state has a compelling interest in protecting children from harm."[111] Thus, if a parent's actions cause "actual or threatened harm to a child[,]" a compelling interest sufficient to permit state interference with that parent's rights has been established.[112] However, courts may not rely on the legislature's best interests standard absent a substantial harm to the child; such a standard is insufficient to find that a parent's fundamental rights have been subordinated to a compelling state interest.[113] In other words, without a finding of substantial harm to the child, a court's finding of best interests does not constitutionally support a custody decision that transgresses a parent's fundamental right of religion or right to raise their child how they see fit.[114]

4. Constitutionality of Denominational Preferences

The religion clauses of the First Amendment state that "Congress shall make no law [1] respecting an establishment of religion or [2] prohibiting the free exercise thereof."[115] The first clause, often referred to as the Establishment Clause, ensures that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[116] The second clause, often referred to as the Free Exercise Clause, provides the "right to religious beliefs, including assem-

107. *Id.* at 413.

108. Mabry, *supra* note 98, at 39.

109. Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 418–19.

110. *See* New York v. Ferber, 458 U.S. 747, 756–57 (1982) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

111. Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 419.

112. *See id.*

113. *See id.* at 421.

114. *See id.*

115. U.S. CONST. amend. I. The Fourteenth Amendment has made the First Amendment applicable to the states. U.S. CONST. amend. XIV.

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

bling for worship services, proselytizing, and observing dietary restrictions . . ."[117] Thus, the Free Exercise Clause affords constitutional protection to beliefs, but not necessarily actions motivated by those beliefs.[118] The Free Exercise Clause forbids governmental interference with a parent's decision to practice or not to practice religion, as well as the parent's choice of religion.[119] However, if the government in fact interferes with fundamental constitutional rights of the parent, that interference is subject to a strict scrutiny analysis.[120] The government's interference will only be justified with a showing of a compelling state interest.[121]

Under certain circumstances, courts may consider religion in divorce proceedings when custody is being determined.[122] Assuming that the parents are unable to agree or make decisions jointly, the government may intervene on the otherwise protected sphere of parental decision-making.[123] There are times when a custody determination requires the court to inquire into a parent's religious beliefs. In this case, a state court may consider: (1) "religion as one, but not the sole factor;" (2) "the impact that religion will have on the child's secular well-being;" or (3) "the child's ascertainable preferences and whether religion plays an important role in shaping the child's identity."[124]

When a court investigates into a parent's religion, the court should refrain from focusing on the official doctrines of the religion.[125] This limitation is derived from the Free Exercise Clause, whereby a law may not interfere with a person's religious beliefs, but, in certain circumstances, it may interfere with the practices of those religious beliefs.[126] Thus, in order for a court to honestly consider a parent's religion "for its secular worth" and survive strict scrutiny, the court must identify the secular values pertinent in the court's custody determination and require a factual showing that the religion does or does

117. Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 412.

118. Wilder, *Religion and Best Interests*, *supra* note 55, at 220.

119. *See* Mabry, *supra* note 98, at 39.

120. Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 418.

121. Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702, 1704 (1984) [hereinafter *Factoring Religion into the Best Interest Equation*].

122. *See* Mabry, *supra* note 98, at 40.

123. Wilder, *Religion and Best Interests*, *supra* note 55, at 221.

124. Mabry, *supra* note 98, at 40–41.

125. *See Factoring Religion into the Best Interest Equation*, *supra* note 121, at 1705.

126. *See generally* Bob Jones Univ. v. United States, 461 U.S. 574 (1983); United States v. Lee, 455 U.S. 252 (1982); *see* Harris v. Harris, 343 So. 2d 762 (Miss. 1977).

not embody those secular values.[127] Thus, religious practices may be considered by a court if it can be demonstrated that the practices impact the child's best interests.[128]

a. Preference Between Two Different Religions

The Establishment Clause generally prohibits courts from determining custody between religious parents solely on the grounds of religion.[129] Thus, a court's preference for one religion over another based on the doctrines they promote is a violation of the Establishment Clause.[130] However, an exception to this general rule exists: "[t]his preference is unconstitutional unless the religious practices involved threaten the child's health or safety."[131] Additionally, courts agree that in most cases, "the unconventionality or unpopularity of the [parent]'s religion may not be considered" in a custody determination.[132] Thus, even when a parent follows an unpopular or unconventional religion, traditional and nontraditional religions must be treated alike.[133]

b. Preference Between Religion and Non-Religion

Courts have held that preference for religion over no religion is equally as constitutionally impermissible as preferring one religion over a different religion.[134] The constitutionality of a court's preference for religion over no religion is determined under the tripartite test set forth in *Lemon v. Kurtzman*.[135] The test set forth in *Lemon* requires: (1) that the statute have a secular legislative purpose; (2) that its principal or primary effect neither advance nor inhibit religion; and (3) that the statute not foster an excessive government entanglement with religion.[136] A court's preference for religious over nonreligious parents violates every part of the *Lemon* test: it serves a religious purpose rather than a secular purpose, it has the principal effect of advancing religion, and it entangles the state with religion in

127. *Factoring Religion into the Best Interest Equation*, *supra* note 121, at 1716.
128. *See* Wilder, *Religion and Best Interests*, *supra* note 55, at 225.
129. *See Factoring Religion into the Best Interest Equation*, *supra* note 121, at 1704.
130. *See* Wilder, *Religion and Best Interests*, *supra* note 55, at 229.
131. *Factoring Religion into the Best Interest Equation*, *supra* note 121, at 1716.
132. *Id.* at 1704 n.13.
133. *See id.* at 1704, 1717 n.50.
134. *See, e.g.*, Welker v. Welker, 129 N.W.2d 134, 138 (Wis. 1964) (refusing to compare the merits of religious attitudes during a custody determination between a religious parent and an agnostic parent).
135. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
136. *Id.*

such a way to violate the Establishment Clause.[137] Moreover, freedom of religion is not only the freedom to practice organized religion; it is also the freedom to reject all religions.[138] A court's preference for a religious parent over a nonreligious parent not only punishes the nonreligious parent for exercising a constitutionally protected right, but it also places the court on the side of organized religion.[139]

c. Preference When Religion Threatens Health and Safety

It is clearly a constitutional violation for a court to prefer one religion over a different religion, or to prefer one religion over no religion.[140] However, there is an exception to this general rule: a court may exercise a preference when the religious practices of one parent threaten a child's health or safety.[141] To make a preference, a court must consider the respective religious practices of each parent. However, the court's examination of the parents' religious practices is limited to the direct impact that those practices have on the child.[142] Courts face an ongoing struggle with these examinations; namely, to what degree is the certainty and amount of harm to the child shown?[143]

Courts seem to agree that a showing of harm must be more than simply demonstrating that the child could be confused or upset by conflicting religious practices, or that the child might be bored when sitting in church for long periods of time.[144] A religious parent will not be denied custody "where the possibility of harm is speculative and not immediate."[145] Rather, the only way a court may justify an intrusion on the parent's right to expose their children to certain religious beliefs is if actual harm is demonstrated.[146] Hence, a state will have a compelling interest sufficient to permit interference with parental rights upon a finding that a parent's actions cause threatened or actual harm to the child.[147]

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137. *See Factoring Religion into the Best Interest Equation*, *supra* note 121, at 1727.

138. *See* Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 419–20.

139. *Id.* at 420.

140. *See supra* Part I.B.4.a–b.

141. *See Factoring Religion into the Best Interest Equation*, *supra* note 121, at 1716; *see* Wilder, *Religion and Best Interests*, *supra* note 55, at 220.

142. *See id.* at 1706 n.19.

143. *See id.* at 1705 n.18.

144. Wilder, *Religion and Best Interests*, *supra* note 55, at 222–23.

145. *Id.* at 225–26.

146. *See* Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 416.

147. *See id.* at 419.

II. Analysis

A. What Do Vaccinations Have to Do with the Best Interests Standard?

In order to ensure government neutrality in matters involving religion, the First Amendment requires courts to stay out of controversies involving religion and prohibits judges from inquiring into religion during custody proceedings.[148] Unless extenuating circumstances exist, the court may not include religion in its determination of a child's best interest.[149] Seeing that a person's right to the free exercise of religion is a fundamental constitutional right, governmental interference is subject to a strict scrutiny analysis, whereby the interference must be narrowly tailored to achieve a compelling governmental interest.[150]

Not only do parents have the fundamental right to the free exercise of religion, but they also have the fundamental right to the care and custody of their children.[151] These fundamental rights, when taken together, present a strong barrier against governmental interference. However, there are circumstances that may warrant a court interfering into this sphere of protected parental decision-making. One instance that may justify a court's interference is during a divorce proceeding. Specifically, the court may justifiably interfere when two parents are unable to agree on crucial decisions relating to their child.[152]

Imagine this scenario: a couple is going through a divorce proceeding. The wife identifies as a Christian Scientist and thus opposes vaccinations.[153] The husband does not identify with any religion and believes that their child should in fact be vaccinated. In this situation, the parents are clearly unable to make joint medical decisions relating to their child; the wife strongly opposes vaccinations and would likely seek a religious exemption when enrolling the child into school, whereas the husband believes that the child should be vaccinated. Here, in order to fully ascertain the best interests of the child, a court may inquire into the religious beliefs of the parents.

When two parents who practice two different religions are involved in a divorce proceeding, and the outcome of a custody judgment in-

148. *See Factoring Religion into the Best Interest Equation*, *supra* note 121, at 1725–26.

149. *See id.* at 1738.

150. *See* Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 418.

151. *See generally id.* at 413.

152. Wilder, *Religion and Best Interests*, *supra* note 55, at 221.

153. Antonia Blumberg, *Here's Where Major Religions Actually Stand On Vaccines*, Huff. Post (Mar. 31, 2017, 5:47 AM), https://www.huffpost.com/entry/heres-where-major-religions-actually-stand-on-vaccines_n_58dc3ef0e4b08194e3b71fc4.

volves the vaccination—or exemption from vaccinations—of a child, a court may consider the parents' religions if the religious practices threaten the child's health or safety. The court's consideration of the parents' religions is of course limited to the direct impact that the religious practices have on the child.[154] A court's "judgment[ ] of religious merit [is] only justified by the compelling interest in protecting children's health and safety."[155]

While there is no uniform standard for the amount of harm that needs to be shown, courts seem to agree that a showing of harm must be more than simply demonstrating that the child could be confused or upset by conflicting religious practices, or that the child might be bored when sitting in church for long periods of time.[156] The only way that a court may justify an intrusion on the parent's right to expose their children to certain religious beliefs is if actual harm is demonstrated.[157] Courts have found that the religious practices of a parent may endanger the health or safety of a child when the parent prohibits medical treatment—such as a blood transfusion—because of his or her religious beliefs.[158]

A court's interference is far from unlimited. Rather, "[i]nfringement is constitutionally permissible only upon a showing that the restriction is necessary to promote a compelling state interest, and that this interest is served in the least restrictive manner possible."[159] In making its determination, a court must balance individual liberty (*i.e.*, a parent's right to raise their child) with police power (*i.e.*, the state's interest as *parens patriae*).[160] Courts are charged with balancing the rights of individuals to choose whether or not to vaccinate their children with the individual and societal risks associated with claiming a religious exemption.[161]

Parents enjoy a constitutionally protected, fundamental right to raise their child as they see fit, including making decisions regarding the custody, control, and care of their child.[162] However, the limitation on a parent's fundamental right to raise their child as they see fit arises out of the state's interest as *parens patriae*.[163] As *parens patriae*,

154. *See Factoring Religion into the Best Interest Equation*, *supra* note 121, at 1706 n.19.
155. *Id.*
156. Wilder, *Religion and Best Interests*, *supra* note 55, at 222–23.
157. *See* Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 416.
158. Mabry, *supra* note 98, at 43.
159. Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 418.
160. Lu, *supra* note 12, at 872.
161. Salmon & Siegel, *supra* note 41, at 289.
162. *See generally supra* note 103 and accompanying text.
163. *See* Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 418–19.

the state has a compelling interest in "safeguarding the physical and psychological well-being of a minor."[164] Thus, parents may make all of their own choices regarding the custody, control, and care of their child without worrying about interference from the state. This remains true unless a parent's actions cause actual or threatened harm to their child. In that instance, the state's interest as *parens patriae* outweighs the parent's right to raise their child as they see fit.

While the state may not interfere simply because the two parents are involved in a divorce proceeding, a showing during said proceeding—that a parent's actions may cause or have caused actual or threatened harm to the child—warrants interference by courts. Otherwise stated, the court's finding of the child's best interests will constitutionally support a custody decision that transgresses a parent's fundamental right to raise their child how they see fit if a parent's decision results in actual or threatened harm to the child.[165]

In the scenario at hand, one parent identifies herself as a Christian Scientist and practices the teachings of Christian Science. Taken on its face, there are no problems. She is free to follow and practice her religion and she is allowed to pass the teachings of her religion along to her children. However, the religion of Christian Science starkly opposes immunization and opposes the medical process of vaccinating individuals, including children.[166] As a result, this parent refuses to vaccinate her children and intends to claim a religious exemption in order to enroll her child in public school. If the child does not receive his or her vaccines, the parent is not only exposing her child to numerous deadly diseases, but she is also exposing all other children and adults who may come into contact with her child.[167]

Her decision not to vaccinate her child creates a threatened risk to the child's health and safety; in a divorce proceeding, the court has been informed of this decision. At this point, the state's interest as *parens patriae* effectively creates a duty to interfere.[168] Under normal circumstances, a court may not substitute its judgment for the parent's judgment on the ground that a different choice might be better.[169] However, this is not a normal circumstance; the parent's decision could result in her child contracting a lethal disease. Thus, a court may assign legal custody to the other parent who does not oppose vaccina-

164. *See generally supra* note 110.

165. *See* Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 421.

166. Blumberg, *supra* note 153.

167. Calandrillo, *supra* note 3, at 420.

168. *See supra* Part I.A.3.

169. Wilder, *Religion and Best Interests*, *supra* note 55, at 221.

tions and wants his child to receive the proper vaccinations. Such an action is supported by the state's interest as *parens patriae* and outweighs the mother's right to raise her child how she sees fit.

Not only does this action not violate the mother's fundamental right to raise her child as she sees fit, but this action also does not violate her First Amendment rights under either the Establishment Clause or the Free Exercise Clause. The Establishment Clause ensures that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[170] The court's decision to award legal custody to the parent who does not identify with any religion is the exact outcome that the Establishment Clause intended for. Even if the father identified with a certain religion, there is still no violation of the Establishment Clause because preference for one religion over another is permissible when the practices of one of the religions followed by a parent threatens the health and safety of their child.[171] Next, the Free Exercise Clause provides the "right to religious beliefs, including assembling for worship services, proselytizing, and observing dietary restrictions . . ."[172] As a result, the Free Exercise Clause affords constitutional protection to beliefs, but not necessarily actions motivated by those beliefs.[173] In this scenario, the Free Exercise Clause protects the mother's right to follow and practice her religion, but it does not grant her the right to expose her child or community to harm from disease.[174] Maintaining the good of the public as a whole justifies such a limitation on the Free Exercise Clause. Therefore, a court's decision to award legal custody to the parent who does not identify with any particular religion does not violate the mother's First Amendment rights.

B. Considering the Religions of Both Parents Satisfies All Three Prongs of Lemon

A court's consideration of each parents' religion in custody determinations should be analyzed under the *Lemon* test.[175] In *Lemon*, the Supreme Court created a three-prong test, which the Court has subsequently used to determine the constitutionality of laws challenged

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

171. *See Factoring Religion into the Best Interest Equation*, *supra* note 121, at 1716; *see also* Wilder, *Religion and Best Interests*, *supra* note 55, at 220.

172. Wilder, *It's Really Not About Best Interests*, *supra* note 54, at 412.

173. *See* Wilder, *Religion and Best Interests*, *supra* note 55, at 220.

174. *See* Prince v. Massachusetts, 321 U.S. 158, 167–70 (1944).

175. *See generally Factoring Religion into the Best Interest Equation*, *supra* note 121, at 1708.

under the Establishment Clause.[176] While *Lemon* focused primarily on state statutes, judicial decisions may nevertheless be subject to the scrutiny of the tripartite test.[177] Thus, the test is used to determine whether governmental action offends the Establishment Clause and requires: "(1) that the action have a secular purpose, (2) that its principal or primary effect neither advances nor inhibits religion, and (3) that it does not foster an excessive entanglement with religion."[178] If a government action "fails" just one of the prongs, there will be a violation of the Establishment Clause.[179] When two parents who practice two different religions are involved in a divorce proceeding, and the outcome involves the vaccination—or exemption from vaccinations—of a child, a court's consideration of the parents' religion satisfies all three prongs of the *Lemon* test and passes constitutional muster.

1. Secular Purpose

The first prong of the *Lemon* test is secular purpose: "[t]he government is required to have a secular purpose for its message or action."[180] While the purpose may in fact be self-serving, it will be considered constitutional so long as it is secular.[181] Of course, the Court has found that certain actions have a preeminent purpose that is religious in nature, which could never "blind [the Court] to that fact."[182] At times, the majority of the Court has framed the finding of a secular purpose in such a way that a religious purpose and a secular purpose may not coexist without violating the Constitution.[183] Other times, the Court has "limited the purpose requirement to the express wording of the *Lemon* test—that the government have 'a' secular purpose."[184] Such a limitation demonstrates the Court's search for *any* secular purpose.

Following this relaxed attitude, the Court has done away with serious investigations into the purpose of an action and no longer requires that a secular purpose be preeminent.[185] Following the standard as set forth in *Lemon*, the simple requirement of having a secular purpose

176. Novak, *supra* note 4, at 1111.

177. *See generally* Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979); Zucco v. Garrett, 501 N.E.2d 875 (Ill. App. Ct. 1986).

178. *Zucco*, 501 N.E.2d at 880.

179. *See* Amy J. Alexander, *When Life Gives You the* Lemon *Test: An Overview of the* Lemon *Test and Its Application*, 3 PHOENIX L. REV. 641, 646 (2010).

180. *Id.* at 656.

181. *See* Stone v. Graham, 449 U.S. 39, 40 (1980).

182. *Id.* at 41.

183. *But see id.* at 44 (Rehnquist, J., dissenting).

184. Alexander, *supra* note 179, at 657.

185. *See* Lynch v. Donnelly, 465 U.S. 668, 681–82 (1984).

provides a much clearer approach for lower courts.[186] So long as there is a secular purpose, the action will satisfy the first prong. But if there is not a secular purpose, the action will fail this prong.[187] While the court may be required to conduct a more thorough investigation into the motives behind the governmental action, the requirement that the secular purpose be legitimate is reinforced when taking this approach.[188]

In this situation, when a court inquires into the parents' religion in making a custody determination, it is doing so for a secular purpose and thus satisfies the first prong of the *Lemon* test. The reason that the court must look into the religion of the parents is to understand the relationship between religion and vaccinations. The question that the court is presented with when analyzing this issue is whether or not a child will be vaccinated. Vaccinations and immunizations are undoubtedly secular purposes, as the court is assessing behavior and decisions that directly affect the health and safety of the child.[189]

Under the *Lemon* test, a secular purpose exists because the court is essentially just making the decision of whether or not the child will receive the vaccines necessary to enroll in school. It is true that standing alone, the "religiousness" of a party is not a reliable guide to his or her fitness as a parent.[190] However, in this situation, religion alone is not being weighed to determine the best interests of the child. The analysis of religion is merely used as a means to an end. The end—awarding legal custody to the parent who wants to vaccinate the child—serves a secular purpose by protecting the health and safety of that child, as well as all other individuals in that community. Therefore, the first prong of the *Lemon* test is satisfied.

2. *Principal or Primary Effect Must Not Advance or Inhibit Religion*

The second prong of the *Lemon* test is effect, which requires that the action not have the principal or primary effect of advancing or inhibiting religion.[191] Rather than focusing on the motivation behind the action, the effect prong focuses on the result of the government action.[192] This prong, morphing since *Lemon*, saw its most significant

186. *See id.* at 681.
187. *See* Alexander, *supra* note 179, at 658.
188. *See generally* McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 902 (2005).
189. *See* Zucco v. Garrett, 501 N.E.2d 875, 880 (Ill. App. Ct. 1986).
190. *See generally id.*
191. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
192. *See generally id.*

change in Justice O'Connor's concurrence in *Lynch v. Donnelly*.[193] In her concurrence, Justice O'Connor introduced the "endorsement test," where the Court would ask whether the government's message endorses a religion as determined by the reasonably informed observer, rather than asking what effect actually occurred.[194] Rather than looking at the actual effect, Justice O'Connor's version of the prong requires the Court to examine the hypothetical effect of a government action based on social context.[195] While this version provides a clearer standard for the Court, its application has proven unworkable.[196] This is due to the fact that analysis under the "endorsement test" requires a highly fact-based analysis, which in turn reduces its precedential value.[197]

The endorsement test has also altered the way that the Court looks at the preeminence of the effect. Under the original *Lemon* test, in order to hold that an action violated the Establishment Clause, the effect of advancing religion must have been "primary" or "principal."[198] Following this language, the Court frequently found that "incidental benefits conferred on religion were acceptable as long as they were not primary."[199] Under this approach, incidental benefits to religion will not invalidate a government's action.[200] However, the revised prong—incorporating Justice O'Connor's endorsement test—created a much stricter test. Under the endorsement version, if a hypothetical observer could confuse an incidental benefit to religion with endorsement of religion, the government's action could be held to violate the Establishment Clause.[201] Even if the purpose and primary effect of the action was secular, the action could still be considered unconstitutional if a hypothetical person views an incidental benefit as the government favoring a religion.[202] Justice O'Connor's

193. *See* Lynch v. Donnelly, 465 U.S. 668, 691–92 (1984) (O'Connor, J., concurring).

194. *Id.* at 691.

195. *See generally id.*

196. *See generally* Cty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 598–621 (1989) (evaluating context in detail to determine whether a creche and a menorah would lead a reasonable observer to believe the government was favoring religion).

197. Alexander, *supra* note 179, at 659.

198. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

199. Alexander, *supra* note 179, at 660.

200. *See Lynch*, 465 U.S. at 673 (mandating accommodation, not just tolerance of all religions); *see generally* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding state payment of chaplains praying at legislative sessions); *see also* Walz v. Tax Comm'n, 397 U.S. 664, 693 (1970) (upholding tax exemption for church property).

201. *See* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 768 (1995).

202. *See* Alexander, *supra* note 179, at 661.

endorsement test with respect to the second prong has effectively lowered the threshold for invalidating a government action or message.[203]

In this situation, when a court inquires into the parents' religion in making a custody determination, the principal or primary effect is not to advance religion and thus satisfies the second prong of the *Lemon* test. When preference is given to parents who are actively involved in organized religion, the effects are essentially to punish non-religious parents who do not believe in God or going to church by making it less likely that they will gain custody of their children; to encourage non-religious, anti-religious, or simply disinterested parents to engage in religious practices even if their beliefs are not sincere; and to increase the number of children raised in religious households.[204]

Under the original version of the *Lemon* test, there are no benefits conferred upon any specific religion when the court considers the religion of both parents and there are no benefits conferred when the court awards legal custody to the non-religious parent, rather than the religious parent. Even when this issue is analyzed under Justice O'Connor's endorsement test, it still satisfies the second prong of the *Lemon* test. Under Justice O'Connor's endorsement test, a hypothetical person would have to view the incidental benefit as the government favoring religion.[205] However, this is not possible under these circumstances. The court's decision to inquire into the religions of both parents and award legal custody to the non-religious parent simply cannot be viewed as the government favoring religion. In fact, the court's decision actually disfavors religion and makes a preference for non-religion over religion, which is precisely the type of outcome that the First Amendment intended. Therefore, the second prong of the *Lemon* test is satisfied.

3. Excessive Government Entanglement

The third prong of the *Lemon* test is entanglement, which prohibits the government from acting in a manner that would excessively entangle the government with religion.[206] In *Lemon*, the Court defined excessive entanglement as "'comprehensive, discriminating, and continuing state surveillance' or action potentially igniting controversy."[207] This definition of "excessive entanglement" has proven to

203. *See id.*

204. *See* Zucco v. Garrett, 501 N.E.2d 875, 881 (Ill. App. Ct. 1986).

205. *See Lynch*, 465 U.S. at 691–92 (O'Connor, J., concurring).

206. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

207. Alexander, *supra* note 179, at 662 (quoting *Lemon*, 403 U.S. at 619).

be "broad enough to allow courts to interpret the prong in a variety of ways."[208]

A prime example of how the entanglement prong could be construed differently by different Justices was in *Aguilar v. Felton*, where the Court used the entanglement prong to strike down a state remedial program.[209] The program involved public teachers going to parochial schools to teach and perform administrative duties.[210] Despite the fact that the subjects taught at the school were secular and the environment within the school would be secularized, the Court nevertheless found an excessive entanglement between government and religion.[211] In Chief Justice Burger's dissent, he expressed his fear that the majority was "obsessed" with the *Lemon* test and as a result, the Court's opinions were actually contrary to the country's interests.[212] In Justice O'Connor's dissent, she fervently disagreed with the majority's application of the entanglement prong, expressing that she "would not invalidate [a statute] merely because it requires some ongoing cooperation between church and state or some state supervision . . ."[213]

In this situation, when a court inquires into the parents' religion in making a custody determination, it is not creating an excessive entanglement between government and religion and thus satisfies the third prong of the *Lemon* test. The third prong is arguably the most controversial and the most difficult to ascertain how Justices would rule.[214] It is possible to argue that taking religion into consideration, even as a means to an end, is sufficient entanglement between government and religion. However, similar to Justice O'Connor's dissent in *Aguilar*, a court's inquiry into a parent's religion should not be held unconstitutional for merely acting as a means to an end, especially when public health is an interest closely related to that "end" (*i.e.*, whether or not a child will be vaccinated).

Following the Supreme Court's holding that the Free Exercise Clause does not grant a parent the right to expose their children or the community to harm from disease,[215] states have similarly held that

208. *See id.*

209. Aguilar v. Felton, 473 U.S. 402, 412–13 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

210. *See id.*

211. *Id.*

212. *Id.* at 419 (Burger, C.J., dissenting).

213. *Id.* at 430 (O'Connor, J., dissenting).

214. *See generally id.* at 419 (Burger, C.J., dissenting), 420–21 (Rehnquist, J., dissenting), 429–30 (O'Connor, J., dissenting).

215. *See* Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

states have an "overriding and compelling public interest" to protect children from harm, even when such rights conflict with the religious rights of parents.[216] In theory, this scenario should produce a similar result. While there may be some type of entanglement between government and religion, the entanglement certainly cannot be considered excessive. Additionally, public health and safety, as well as the health and safety of that specific child, outweigh the court's inquiry into the parents' religion. Therefore, the third prong of the *Lemon* test is satisfied.

III. Impact

With custody determinations lying in the hands of judges, the possibility that a court may award decision-making to the parent who opposes vaccinations—in this scenario, the mother—is a legitimate one. There are a number of reasons why a court may favor the wife over the husband in these situations. For instance, courts have justified considering a parent's religion when the religion is said to promote the child's "spiritual welfare," or to promote the child's temporal well-being.[217] In promoting the child's temporal well-being, many courts refer to the "supposed causal connection between a parent's religion and her morality, or more generally, between a parent's religion and a good home life for the child[,]" thereby linking religion to valid secular concerns (*i.e.*, the moral and ethical beliefs of parents and the effects these beliefs will have on the child).[218] Despite the fact that the Supreme Court has stated that a person without a traditional religious affiliation may have just as strong of a moral code as a person with such traditional beliefs,[219] trial courts can and will continue to award custody to religious parents.

There is no dispute that custody determinations are extremely fact determinative and that judges make their decisions on a case-by-case basis. But most often, the facts that determine the outcome are limited to the parents and the child in that specific case. The scope of the case is extremely limited, and societal factors are often excluded from the decision-making process. In the majority of cases, this is justified; the future is uncertain, and judges cannot predict the effect of one custody judgment on the rest of society. However, when vaccinations and potential exemptions are involved, the court must consider third parties and outside groups. While consideration of third parties who are un-

216. *See* Brown v. Stone, 378 So. 2d 218, 222 (Miss. 1979); Silverman, *supra* note 60, at 283.
217. *Factoring Religion into the Best Interest Equation*, *supra* note 121, at 1709.
218. *See id.* at 1709–10.
219. *See* Welsh v. United States, 398 U.S. 333, 340 (1970).

likely to experience a direct effect from such a decision seems burdensome and too far removed, serious problems may arise if every judge making this decision believes that it is "just this one time" and "just this one case."

Arguably one of the most important communal aspects of compulsory vaccination requirements is the establishment of herd immunity. When a significant percentage of individuals are vaccinated, it is possible that others may not need to be vaccinated.[220] Serving as a protective barrier, herd immunity makes it safe for a minority of individuals who may be unable to receive vaccinations, due to age- and health-related concerns.[221] While herd immunity can occur even when less than one hundred percent of the population is vaccinated, there is very little room for error. In fact, in order for the transmission of the disease to be interrupted, a significantly high proportion of the population must be immunized.[222] When individuals who do not receive vaccinations rely on the rest of the "herd" to keep them safe, problems arise, and not just for those individuals who opt out. "Rather, the safety of the entire community is jeopardized when overall immunization rates fall below a critical threshold."[223] The protective barrier created by herd immunity creates a lethal collective action problem, which exists when "individuals can gain more by not contributing to the public good[,] but instead 'free riding' on the contributions of others."[224]

When a judge believes that their decision is "just this one time" or "just this one case," he or she is contributing to, and exacerbating, the collective action problem. Operating under the assumption that "if everyone else is protected, then so is this child" undermines society's ability to achieve a critical mass of people who are vaccinated.[225]

If a court were to award legal custody to the religious parent, it would result in yet another unimmunized child. The problem arises when the reaction is "So what if there is another unimmunized child? It's only one person." because it is not just one person. In fact, the number of children in the United States under the age of two who are completely unvaccinated has been on a steady incline over the last

220. Calandrillo, *supra* note 3, at 420.

221. *See id.*

222. *See id.*

223. *Id.* at 419.

224. *See generally* Robb Willer, *Groups Reward Individual Sacrifice: The Status Solution to the Collective Action Problem*, 74 AM. SOCIOLOGICAL REV. 23 (2009).

225. Calandrillo, *supra* note 3, at 361.

decade.[226] In 2001, the proportion of children who received no vaccine doses by age 24 months was 0.3%.[227] In 2011, the proportion gradually increased to 0.9% and in 2015, the proportion increased to 1.3%.[228] Additionally, the Center for Disease Control has reported that of the 2.2% of kindergarteners nationwide claiming an exemption, 2.0% of those exemptions were non-medical (*i.e.*, religious or philosophical/personal belief exemptions).[229] While immunization rates remain high at national and state levels, county-level data has demonstrated alarmingly high exemption rates in some rural locations.[230] Some of these communities have seen vaccine coverage fall below 90–95%, making herd immunity meaningless.[231]

While courts may disregard society and third parties entirely when making routine custody determinations, excluding societal factors when a child's vaccination is at issue may produce a potentially fatal result. By awarding legal custody to the parent whose religion opposes vaccinations, a court is essentially promoting the use of exemptions and, thus, contributing to the downfall of herd immunity. Therefore, it is of the utmost importance for courts to take the negative externality costs into account when making a custody determination, since the determination is actually whether or not a child will be immunized.

IV. Conclusion

There is no question that the best interests standard is a dominant force in child custody determinations. While courts should be cognizant of the First Amendment and a parent's right to raise their child as they see fit, the narrow situation set forth in this Article should be at the forefront of a judge's mind. Not only does the judge's decision affect the immediate parties, but making the wrong decision could contribute to the collective action problem by decreasing herd immunity and exposing other children—and even adults—to potentially fa-

226. *See* Holly A. Hill et al., *Vaccination Coverage Among Children Aged 19–35 Months — United States, 2017*, 67 Morbidity & Mortality Wkly Rep. 1123, 1123 (2018), *available at* https://www.cdc.gov/mmwr/volumes/67/wr/mm6740a4.htm?s_cid=MM6740a4_e.

227. *Id.* at 1127.

228. *Id.* at 1123.

229. *See* Jenelle L. Mellerson et al., *Vaccination Coverage for Selected Vaccines and Exemption Rates Among Children in Kindergarten — United States, 2017–18 School Year*, 67 Morbidity & Mortality Wkly Rep. 1115, 1116 (2018), *available at* https://www.cdc.gov/mmwr/volumes/67/wr/mm6740a3.htm?s_cid=MM6740a3_e.

230. *See* Lena H. Sun, *Kids in these U.S. hot spots at higher risk because parents opt out of vaccinations*, Wash. Post (June 20, 2018, 1:37 PM), https://www.washingtonpost.com/news/to-your-health/wp/2018/06/12/kids-in-these-u-s-hotspots-at-higher-risk-because-parents-opt-out-of-vaccinations/?noredirect=ON.

231. *See id.*

tal diseases. As the anti-vaccination movement continues to gain force, courts must take societal factors into account when making a child custody determination between two parents with different religions, one that supports and one that opposes vaccinations. In such a case, awarding legal custody to the parent who supports vaccinations is the best possible outcome in order to maintain public health and safety.

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