Introduction

Debate over the HPV vaccine has been a prominent and heated battle within states since 2006. A prominent part of the debates has been geared around school vaccination requirements. In 2007, 24 states including Washington DC proposed legislation to mandate the HPV vaccine for school attendance. In October of 2009, 12 states proposed legislation or resolutions dealing with the HPV vaccine.

The development of the HPV vaccination raises questions about whether the mandate of the vaccine for school age girls is constitutional when the contraction of the disease is behavioral in nature.

America is a country that was founded on the ideas of individual freedom and responsibility. The basic foundation of this idea is that nobody should be directly beholden to another person's irresponsible personal actions. Sadly, over the last two hundred years, this idea has been slowly losing ground to various decisions in courts and legislatures. It has instead come to be what the government considers to be in the best interest of public health, and personal responsibility is only an afterthought.

The latest is the attempt by state legislatures to mandate the HPV vaccine for all school aged girls, which is a virus that only affects people who engage in a specific type of lifestyle.

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2 *Id.*

3 *Id.* Virginia is the only state that has been successful in making it mandatory. The District of Columbia’s bill was also passed. (B. 17-0030).

4 *Id.*
Mandating a vaccine for a sexually transmitted disease could create new legal precedent. Hepatitis B brought about the materialization of a new trend of mandatory vaccines, but the issue still remains of whether behavioral drug vaccines meet the constitutional requirements of mandatory vaccines laid out by the Supreme Court.

Government mandates of vaccines for behavioral based diseases increases the importance of religious exemptions. A case history of available exemptions reveals that issues have arisen regarding the use of religious exemptions. Such statutory provisions have not always been upheld, however, and have often been found to violate the First Amendment’s Establishment Clause. Most state immunization statutes are unclear about whether partial exemptions are permitted, while at least one specifically prohibits partial exemption.

There are other and better solutions. If mandated the HPV vaccine would become the most expensive mandatory vaccine to date. Instead a better solution would be to establish a parental opt in provision as part of the state’s immunization statute. As part of that, or as another possible solution, would be programs that provide funding for the education and administration of the vaccine.

This article will first discuss the constitutionality of mandatory vaccination. Section II, will describe the Hepatitis B vaccine and whether it is a frontrunner for a mandatory HPV vaccine. Third, this article will outline how religious exemptions have not been upheld and how some states may not allow partial exemptions even though some parents may rely on them.

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8 *Id.* See DEL. CODE ANN §131(a)(6)(2007).
Finally, this article presents a better solution in state or federal programs in the form of a parental opt in provision as well as a funding initiative.

I. Constitutionality of Mandatory Vaccination

Mandatory vaccinations have been widely accepted for contagious diseases since the early 19th century. The main focus of these cases was on highly contagious diseases such as smallpox. In *Jacobson v. Massachusetts* the Supreme Court ruled that a state could require the mandatory vaccination of the inhabitants of a city or town for the public health and safety of its people.10

In the year prior to *Jacobson* New York ruled on the matter of mandatory vaccinations in the case of *In the Matter of Viemeister*.11 In that case a young school age boy was not allowed to attend school because he had not received a vaccination, nor did he intend to become vaccinated.12 The main concern was smallpox, even though at the time there did not appear to be an outbreak.13 At the time Public Health Law provided that

> No child or person not vaccinated shall be admitted or received into any of the public schools of the State, and the trustees or other officers having the charge, management or control of such schools shall cause this provision of law to be enforced. They may adopt a resolution excluding such children and persons not vaccinated from such school until vaccinated.14

At the time of the case it was also reported that the board of education had a regulation, “[n]o pupil shall be allowed to attend any school, nor shall any teacher be employed in the same, unless such pupils or teacher has been vaccinated.”15 This case found that while a student has the right to attend a public school that right may have restrictions and limitations placed upon it,

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10 *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905)
11 *In the Matter of Viemeister*, 179 N.Y. 235 (Ct. of Apps. 1904)
12 *Id.* at 237
13 *Id.*
14 *Id.*
15 *Id.*
one being in the interest of public health. The court went on to give examples of what that might entail, such things as a child having “leprosy, smallpox, scarlet fever or any other disease which is both dangerous and contagious.” Smallpox is a highly contagious disease and mandatory vaccination can be required to protect the public health and safety.

The Supreme Court paved the way for mandatory vaccinations in 1905 with *Jacobson v. Massachusetts*. While this case dealt with mandatory vaccinations it did not deal with the issue of mandatory school vaccinations. Once again the vaccination at issue was for the smallpox. Massachusetts had required the residents of a city or town to be vaccinated when it was deemed to be necessary for public health or public safety. The court found, as it had earlier, that persons and property are subjected to all kinds of restraint and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledge general principles ever can be made, so far as natural persons are concerned.

The states are able to enforce the mandatory vaccinations through their police power. However, there are limitations on how far the states are able to extend their police power, and when that line has been crossed the court may have to intervene. The Court felt this was an important and necessary point to make and articulated it twice in the opinion. The state may have taken its police power to far if it is arbitrary, done so in an unreasonable manner, and is beyond what is reasonably necessary for the public health and safety.

The criteria that *Jacobson* established for states enforcing compulsory vaccines can be set

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16 *Id.* at 239  
17 *Id.*  
18 *Jacobson*, 197 U.S. at 27. This decision was made by the Board of Health.  
20 *Id.* at 24-25.  
21 *Id.* at 28, 38.  
22 *Id.*
out with four basic criteria. First, there must be a public health necessity.\textsuperscript{23} This means that police powers are based on the public health necessity and are conducted accordingly. They are not to be operated in an arbitrary and/or unreasonable manner and may not extend too far beyond what is reasonably necessary.\textsuperscript{24} Secondly, there must be a reasonable relationship between public health intervention and the achievement of a legitimate public interest.\textsuperscript{25} Third, there must be proportionality\textsuperscript{26} between the police powers or methods used for the goal of public health and personal rights.\textsuperscript{27} Methods used must have a real and substantial relationship and must not be arbitrary and oppressive.\textsuperscript{28} Finally, the regulations must be proportional to the risk.\textsuperscript{29} A person can be required to submit to a vaccination for the common good of the community; however, they cannot require someone to submit when it would pose a health risk to that individual.\textsuperscript{30} When a state oversteps its police power the Court may step in to protect individuals’ rights.

Mandatory vaccination was upheld for school attendance in \textit{Zucht v. King}.\textsuperscript{31} San Antonio, Texas, required any person attending a public school or place of public education to present a certificate for proof of vaccination. Zucht was excluded from a public school because she did not have the certificate and refused to be vaccinated.\textsuperscript{32} The Court looked to the ruling in \textit{Jacobson} and deemed that it extended to schools. It is within a state’s police power to provide compulsory vaccinations.\textsuperscript{33}

Another issue with mandatory vaccination is due process. As \textit{Jacobson} clearly pointed

\textsuperscript{23} Id. at 27.
\textsuperscript{24} Dowling, \textit{supra} note 9, at 68. And Carrie A. Roll, \textit{The Human Papillomavirus Vaccine: Should It Be Mandatory or Voluntary?}, 10 J. Health Care L & Pol’y 421, 429 (2007).
\textsuperscript{25} Id.
\textsuperscript{26} Carrie A. Roll, \textit{The Human Papillomavirus Vaccine: Should It Be Mandatory or Voluntary?}, 10 J. Health Care L & Pol’y 421, 430 (2007).
\textsuperscript{27} Jacobson, 197 U.S. at 28, 38.
\textsuperscript{28} Dowling, \textit{supra} note 9, at 68., and Roll, \textit{supra} note 26, at 430.
\textsuperscript{29} Dowling, \textit{supra} note 9, at 68., and Roll, \textit{supra} note 26, at 430. Roll refers to it as harm avoidance.
\textsuperscript{30} Dowling, \textit{supra} note 9, at 68., and Roll, \textit{supra} note 26, at 430.
\textsuperscript{31} Zucht v. King, 260 U.S. 174 (1922).
\textsuperscript{32} Id. at 175.
\textsuperscript{33} Id. at 176.
out there is a limit to compulsory vaccinations. There are important questions to ask in
determining whether a state policy violates due process. Three such questions to ask about
mandatory state policies are, whether the policy intrudes upon a constitutionally protected right,
if so, whether there is a compelling state interest to justify, and is the policy at issue necessary in
order to carry out the state interest?34 A mandatory HPV vaccine, is behavioral based and
therefore fails each of the three categories, violating due process. The constitutionally protected
right it intrudes upon is a parent’s right to monitor/regulate their child’s sexual behavior.35 A
state always has a compelling state interest to ensure public health, but HPV is not spread
through casual contact. A mandatory vaccine is not necessary when it is not the only, or most
effective, means of preventing the spread or contraction of HPV.36

The cases for mandatory vaccinations and the use of a state’s police power were formed
around highly contagious diseases, diseases that are spread through casual contact. Smallpox was
the vaccine at issue in most of the paramount Supreme Court cases. HPV and smallpox are
extremely different in how they are contracted and in the immediacy of sickness and even death.
Smallpox is highly contagious and can be spread through mass amounts of people by just being
in proximity of or in casual contact with a contaminated person. HPV on the other hand is
contracted through sexual behavior. The mandatory vaccination cases did not deal with
behavioral decisions because vaccines are not the only solution for behavioral diseases.

II. New Trend-Behavioral Drug Vaccinations

The Court in Jacobson focused on the public health necessity not on the danger to an

34 Lindsey Heinz, “Please Don’t Shot My Daughter!” Is There Legal Support for State-compelled HPV Vaccination
Laws? Why Ethical, Moral, and Religious Opposition to These Laws May be Jumping the Gun, 56 KAN. L. REV.
913, 928 (2008).
35 Id. at 929
36 Id.
individual but to the community.37 A new trend towards behavioral vaccinations is on the rise, having started with mandating the Hepatitis B vaccine and now the efforts with HPV. Currently Virginia is the only state with a mandatory HPV school vaccination.38 Hepatitis B has been designated as a disease for which mandatory school vaccination can be required.

The Hepatitis B vaccination can help prevent one from contracting the disease.39 Starting in 1991 the vaccine was given to children. The Center for Disease Control (CDC) suggested that newborns receive the vaccine before leaving the hospital. It has sense become common practice.40 The CDC suggests that adults at risk who have not been vaccinated should do so.41 Many of the factors that put a person at risk are behavioral decisions. Therefore, there is no need to require a mandatory vaccination for a disease that is primarily contracted through behavioral means. Instead it should be an option for those adults who partake in those types of activities, have those conditions, or work in fields where they may be at risk.

The issue of mandatory Hepatitis B vaccination for school attendance was considered in *Boone v. Boozman*.42 State code required a Hepatitis B vaccination for school attendance.43 Unlike *Jacobson* where smallpox was a major and eminent threat for the community, there was

38 VA. CODE ANN. §32.1-49 (2009). Subsection (D)(3) states “Because the human papillomavirus is not communicable in a school setting…”
40 Rebecca Skov, *Examining Mandatory Vaccination for All School-Aged Children*, 62 FOOD DRUG L.J. 805, 824 (2007). The decision to vaccination newborns was also related to the decision that not enough adults in the high risk groups were being vaccinated.
41 *Hepatitis B Vaccine: What you Need to Know*, supra note 39. Those groups are: “sex partners of people infected with HBV, men who have sex with men, people who inject street drugs, people with more than one sex partner, people with chronic liver or kidney disease, people with jobs that expose them to human blood, household contacts of people infected with HBV, residents and staff in institutions for the developmentally disabled, kidney dialysis patients, people who travel to countries where Hepatitis B is common, people with HIV infection.”
42 Bonne v. Boozman, 217 F. Supp. 2d 939 (E.D. Ark. W.D 2002). The same part of the Arkansas Code was looked at in Brock v. Boozman, 2002 U.S. Dist. LEXIS 15479. Once again the court found that the required vaccination was within the state’s police power and constitutionally permissible.
43 *Id.* at 942. AR CODE §6-18-702(a) deemed Hepatitis B as one of the diseases from which school children must be vaccinated, and a child should not be admitted to the school without proof of vaccination.
no evidence that Boone or the students were at a significant risk of contracting Hepatitis B.\textsuperscript{44} The court addressed the lack of a pressing concern by finding that in \textit{Jacobson} the Supreme Court did not limit the holding to “diseases presenting a clear and present danger.”\textsuperscript{45} An important point in the Court’s rationalization was that while Hepatitis B is not airborne, it could still be considered dangerous because it is spread by bodily fluids and the virus itself is hearty and could survive for up to a month on surfaces such as a door knob.\textsuperscript{46} Based on that finding the court upheld the state’s police power in a mandatory Hepatitis B school vaccination. The court’s decision and rationale came down too,

[b]ecause the groups at highest risk for Hepatitis B are unlikely to self-identify and pursue the vaccine, immunizing those individuals as children is the recommended strategy to stem the spread of Hepatitis B. Immunization of school children against Hepatitis B has a real and substantial relation to the protection of the public health and the public safety. The Court therefore finds that requiring schoolchildren to be immunized against Hepatitis B is a reasonable exercise of the State’s police power and is constitutionally permissible even though it affects plaintiff’s religious practice.\textsuperscript{47}

Mandating the HPV vaccine would take it even a step beyond the mandatory Hepatitis B vaccine. With the Hepatitis B vaccine it was important that the disease could be contracted through touching a surface that the virus could live on for up to a month.\textsuperscript{48} That possibility made it possible for Hepatitis B to be contracted in a school setting. However, HPV does not have that possibility. HPV is a sexual disease; it is not airborne or somehow contagious in a normal school

\textsuperscript{44} \textit{Id.} at 943. “No evidence exists to show that Ashley Boone is at significant risk for contracting Hepatitis B, and Ashley Boone is of the age where, even if she were to contract Hepatitis B, she would have a 90% likelihood of full recovery. There is no evidence that even a single case of Hepatitis B is present in the schools of Cabot, Arkansas, and there is no declaration of public health emergency in Arkansas with regard to Hepatitis B.

\textsuperscript{45} \textit{Id.} at 954. The court also points out that, “[e]ven if such a distinction could be made, the Court cannot say that Hepatitis B presents no such clear and present danger.”

\textsuperscript{46} \textit{Id.} While not airborne like smallpox that is not the only factor to determine whether a disease is to be considered dangerous.

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Id.}
setting.\textsuperscript{49} Instead of protecting school children from a disease they might come in contact with while in a normal school setting and environment this vaccine protects them from sexual behavioral decisions.

HPV vaccine is an immunization specifically mandating behavioral decisions. HPV is a consequence of a decision to partake in sexual behavior. A mandatory HPV vaccine can be seen as a regulation on behavior.\textsuperscript{50} HPV is obtained through a volitional act, the vaccine protects the individual and not the community. Therefore, the vaccination is not justified by the same necessities outlaid in \textit{Jacobson}.\textsuperscript{51} A public health necessity is focused on the protection of the community and not the individual.\textsuperscript{52}

In order for a vaccination to be mandatory for school attendance it must pass Jacobson’s reasonable relationship test.\textsuperscript{53} A school environment places children at a higher risk because of the close proximity with other students. In such a setting students are at a great risk of contracting and spreading diseases.\textsuperscript{54} Therefore, some vaccines can be mandatory for school attendance to avoid the spread of diseases.\textsuperscript{55} The HPV vaccine does not protect students from transmitting or contracting HPV in a school environment. Also, not all students, or even adults, are at an equal risk for contracting HPV. Only those who engage in that behavior are at a high risk.\textsuperscript{56} The HPV vaccine is not necessary to protect the community against HPV because there are other means, abstaining from certain behavior or receiving medical tests, to reduce or prevent

\begin{thebibliography}{9}
\bibitem{49} Wood, \textit{supra} note 1, at 33.
\bibitem{51} Kochuba, \textit{supra} note 37, at 769
\bibitem{52} \textit{Id.}
\bibitem{54} \textit{Id.}
\bibitem{55} \textit{Id.}
\bibitem{56} \textit{Id.}
\end{thebibliography}
Another argument is that the HPV vaccine is not necessary to protect woman from cervical cancer. HPV is not immediately life threatening, and the majority of cases can be prevented by proper medical care. The progression to cervical cancer can be prevented and detected through pap tests and necessary treatment.

When behavioral decisions are mandated by vaccinations another consideration is privacy. A mandatory HPV vaccine regulates how an individual protects themselves from a sexually transmitted disease. The vaccine is aimed at these private and personal behavioral decisions. What other private behavioral decisions could be next? Food? One’s diet is a private behavioral decision but it can also affect the public health.

III. Religious Exemptions

A religious exemption case has never been heard by the United State’s Supreme Court. Many believe the outcome would be the unconstitutionality of religious exemptions. Instead, to date, the issue has been left up to individual states and their police power.

A Supreme Court case that dealt with the issue of religion and parental rights was Prince v. Massachusetts. That case dealt with to what extent should religious freedom extend, and which is more important religious freedom or public interest. The court ruled on the side of public interest. “But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty.” And neither rights of religion nor rights of parenthood are beyond

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57 Heinz, supra note 34, at 927
58 Javitt, Berkowitz, & Gostin, supra note 53, at 389
59 Heinz, supra note 34, at 927
60 Harrell, supra note 50, at 134
61 Id. at 135
62 Id. at 136
63 Prince v. Massachusetts, 321 U.S. 158 (1943)
64 The Prince Court took this from Reynolds v. US, 98 U.S. 145; and Davis v. Beason, 133 U.S. 333.
limitation.”65 The court is able to limit parental rights if they deem it is best for the welfare of the child.66

This he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.67 The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare; and that this includes, to some extent, matters of conscience and religious conviction.68

Among the states there tends to be two types of religious exemptions. First is an organized religion or that the person at least has a sincere religious belief.69 And secondly, the person opposes vaccination on religious grounds.70 It is often argued and cases have shown that such exemptions may violate the First Amendment’s Establishment Clause.71 The Establishment Clause forbids the federal government from passing laws which favor religion.72

In Lemon v. Kurtzman73 the Supreme Court laid out a three part test to determine whether something violates the Establishment Clause. In developing the test the Court looked to prior case law.74 “Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statutes must not foster an ‘excessive government

65 Prince, 321 U.S. at 166
66 Id. at 167
67 The Prince Court took this from People v. Pierson, 176 N.Y. 201
68 Prince, 321 U.S. at 166-67
69 Heinz, supra note 34, at 935
70 Id.
74 Id. at 612.
entanglement with religion." 75 An exemption that is for organized religion would violate the second and third prongs of the Lemon test. 76 It can also be argued that an exemption requiring a sincerely held religious belief may also be in violation of the Lemon test. 77 Both of those types of religions exemptions could be seen to be favoring religious people.

On the other hand, one could argue that the Free Exercise Clause of the First Amendment protects a person who is opposed to vaccinations on religious grounds. 78 This tension with the religions exemptions within the First Amendment’s Establishment Clause and Free Exercise Clause has so far been dealt with by allowing each legislature to create religious exemptions without violating the Establishment Clause. 79

One of the main cases dealing with a state’s religious exemption statute is Boone v. Boozman. 80 The Arkansas immunization statute 81 provided a limited religious exemption. “The provisions of this section shall not apply if the parents or legal guardian of that child object thereto on the grounds that immunization conflicts with the religious tenets and practices of a recognized church or religious denomination of which the parent or guardian is an adherent or member.” 82 The Department of Health screens the applications for religious exemptions. They determine whether the recognized religion requirement is met and if so, whether the recognized

75 Id. at 612-13.
76 Heinz, supra note 34, at 937.
77 Id.
78 Hodge and Gostin, supra note 72, at 860.
79 Id.
81 See Brock v. Boozman, 2002 U.S. Dist. LEXIS 15479 (E.D. Ark. W.D.) for another case dealing with Arkansas’s religious exemption provision in the immunization statute. She objected on religious grounds for her child to receive the Hepatitis B vaccine. She was a member of St. Mary’s Catholic Church. The Department of Health denied her application for religious exemption because her’s was held to a personal religious belief on which they did not grant exemptions, and because there was nothing to indicate that the immunization conflicted with the her church’s doctrine. In determining the court looked to the recent Boone decision in which the statutory religious exemption had been severed. They also held that it was not a violation of the Free Exercise Clause because it was within the state’s police power and constitutionally permissible to require.
82 Boone, 217 F. Supp. 2d at 942.
religion’s tenets and practices are in conflict with immunizations.\textsuperscript{83} Boone was not a member of any organized or recognized church but claimed her religion was based on a personal relationship with God.\textsuperscript{84} In order to determine if the state’s religious exemption violated the Establishment Clause the court applied the Lemon test.

Under the secular legislative purpose prong the court found that the statute singled out and gave preferential treatment to “recognized churches.”\textsuperscript{85} The protections provided under the First Amendment are not to be restricted to those who are under the practices or tenets of a particular organization.\textsuperscript{86} Also, the statute had no room for personal religious beliefs.\textsuperscript{87}

Under the statutory exemption and the Department of Health’s corresponding review, it is not sufficient that an objection to immunization flows from an individual’s interpretation of her church’s tenets or her sincere, personal religious beliefs. The effect is to discriminate against a nondenominational, nonsectarian individual with a sincerely held individual religious belief, or churches and religious denominations that do not have explicit policies on immunization but may leave such matters to individual religious conscience.\textsuperscript{88}

Under the second prong, primary effect, the court found that an equal benefit is not bestowed upon individuals who oppose immunization for religious reasons but are not members of a recognized church or denomination.\textsuperscript{89} However, the court also found that this case is not the best fit for the primary effect prong of the \textit{Lemon} test and would be better situated under \textit{Larson}.\textsuperscript{90} Next, was the entanglement prong. There was found to be excessive government entanglement.\textsuperscript{91}

The court considered the fact that the Department of Health was required to determine what a

\textsuperscript{83} \textit{Id.} at 943. 
\textsuperscript{84} \textit{Id.} at 944. 
\textsuperscript{85} \textit{Id.} at 947. 
\textsuperscript{86} \textit{Id.} 
\textsuperscript{87} \textit{Id.} 
\textsuperscript{88} \textit{Id.} 
\textsuperscript{89} \textit{Id.} at 949. 
\textsuperscript{90} \textit{Id.}, See Larson v. Valente, 456 U.S. 228 (1982). 
\textsuperscript{91} \textit{Id.} at 950.
recognized church was. The Department would evaluate whether the statement of immunization for the church or denomination was sufficient- which could mean was it specific enough or explained in enough detail as to why they did not approve of or allow immunizations. The court believed that in actual practice this method could lead to and allow for the possibility of personal bias by the official’s within the Department for what constitutes a religion.

Next the Boone court looked to the Free Exercise Clause. The outcome under that was similar. “Where the State elects to accommodate religion on a particular issue like immunization, it is simply not constitutionally permissible for it to indulge the free exercise rights of some individuals and inhibit the free exercise of others on an arbitrary basis.”

In holding that the religious exemption violated the First Amendment the court decided to sever the religious exemption portion of the statute. The rest of the immunization statute was left in force. The result was that the immunization statute for the state did not have a religious exemption provision.

Before Boone there had been previous cases that dealt with religious exemptions of the same type, applying only to members of an organized church or denomination. The issue in those was also whether the statutory religious exemptions passed the Lemon test of a secular legislative purpose, primary effect does not advance nor inhibit religion, and entanglement of the government and religion.

In the Matter of Sherr v. Northport-East Northport Union Free Sch. Dist. the New York
statute required immunization of school children in order for attendance. This claim dealt with the possible religious exclusion of two families, both claimed immunization of their son violated their religious beliefs. 99 The immunization statute did have a religious exemption for people who were members of a recognized religious organization. 100 The religious exemption part of the statute failed the \textit{Lemon} test. 101 The court held that the exemption violated the Establishment Clause and Free Exercise Clause of the First Amendment. 102 The primary effect of the statute instead inhibited the religious practice of people opposed to vaccination on religious grounds but who were not members of a state recognized religious organization. 103

The United State’s Constitution mandates that, if New York wishes to allow a religiously-based exclusion from its otherwise compulsory program of immunization of school children, it may not limit this exception from the program to members of specific religious groups, but must offer the exemption to all persons who sincerely hold religious beliefs that prohibit the inoculation of their children by the state. 104

Even though the religious exemption portion of the statute was held to violate the First Amendment one family was still exempted from the required immunization based on their religious beliefs. 105 One family was found to be sincerely opposed to vaccination but it was held that they do not sincerely hold the religious beliefs they claimed as a basis for the religious exemption. 106 The other family was found to sincerely hold the religious beliefs that they used as a basis for their exemption and the court held they were exempt from immunization. 107 In essence the court modified the religious exemption in order to make it comply with the First

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99 \textit{Id.} at 84.  
100 \textit{Id.} at 88.  
101 \textit{Id.}  
102 \textit{Id.} at 91.  
103 \textit{Id.} at 98  
104 \textit{Id.} at 99.  
105 \textit{Id.}  
106 \textit{Id.}  
107 \textit{Id.}
Massachusetts’ religious exemption provision was also severed from its immunization statute in *Dalli v. Bd. of Edu.* Immunization was a requirement for entry into public schools and the plaintiff opposed vaccination of her child, but she did not meet the requirements of the religious exemption. She claimed that her opposition to the vaccination was based upon her personal belief in the Bible. The statutory religious exemption required the people to be “members of ‘a recognized church or religious denomination’ whose tenets conflict with the practice of vaccination.” In order to obtain an exemption the “signature of a recognized official of a church or denomination” was required. The court found that it was a clear violation of the First and Fourteenth Amendments because it gave preferential treatment to members of recognized churches or religious denominations.

In *Brown v. Stone* the Mississippi immunization statute provided for a religious exemption, part of which stated

> a certificate of religious exemption may be offered on behalf of a child by an officer of a church of a recognized denomination. This certificate shall certify that parents or guardians of the child are bona fide members of a recognized denomination whose religious teachings require reliance on prayer or spiritual means of healing.

The father was denied a religious exemption on behalf of his son. He was a member of the

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108 See *In the Matter of Christine M.*, 595 N.Y.S.2d 606, 614 (N.Y. Fam. Ct. 1992). That case looked to the court’s reasoning in *In the Matter of Sherr*: “[A] parent need not be a member of an organized religious group opposed to inoculation in order to claim a religious exemption. In order to invoke the exemption a parent must however (1) hold a religious belief against vaccination, as opposed to a belief founded upon medical or purely moral consideration; and (2) sincerely hold such belief.”
110 *Id.* at 754.
111 *Id.*
112 *Id.*
113 *Id.* at 755.
114 *Id.* at 759.
116 *Id.* at 219.
Church of Christ which does not teach against the use of immunizations or medicines. The court found the statute to be in violation of the Fourteenth Amendment and that the state’s immunization statute was complete without the religious exemption. The reasoning was that the exemption would discriminate against the children whose parents did not hold any religious belief.

When it comes to religious exemptions often times it is for a specific vaccine and not immunization in general. However, many state immunization statutes are not clear in whether a partial exemption is allowed. Delaware is the only statute which specifically states whether partial exemptions are allowed. The Delaware immunization code does not allow for partial exemptions; “[p]rovision for exemption from the immunization program for an enrollee whose parents or legal guardian, because of individual religious belief, reject the concept of immunization. Such a request for exemption shall be supported by the affidavit herein set forth.” Several states claim that they allow for partial exemptions even though their statutes’ do not specifically state so. According to Coletti those states include: South Dakota, Oregon, Missouri, Alaska, Iowa, Massachusetts, Kansas, Montana, Nebraska, New Hampshire, New York, Pennsylvania, Rhode Island, Tennessee and Wyoming. The Minnesota immunization

117 Id. at 220.
118 Id. at 223.
119 Id.
120 Coletti, supra note 7, at 1371. Two examples he explored where Connecticut and South Dakota. Both of the statutory language is similar with neither clearly addressing the issue of partial exemptions. (See CONN. GEN. STAT. §10-204(a)(3) (2006). “[P]resents a statement from the parents or guardian of such child that such immunization would be contrary to the religious beliefs of such child.” S.D. CODIFIED LAWS §13-28-7.1(2) (2007). “A written statement signed by one parent or guardian that the child is an adherent to a religious doctrine whose teachings are opposed to such immunization.”) Even with similar immunizations statutes the two states have arrived at different conclusions. In Connecticut the Department of Public Health states that that partial exemption is not allowed, only religious objections to all vaccinations in general are permissible. While in South Dakota they are able to state on the exemption form a specific vaccination.
121 Id. at 1370.
123 Coletti, supra note 7, at 1371.
statute also seems to allow for partial exemptions based upon religious beliefs.\textsuperscript{124}

IV. Solution

A common argument in favor of a mandatory HPV vaccine is that it is necessary to make it affordable to the people at the highest risk. Gardasil is the approved HPV vaccine and it costs $360 for the full immunization, not including administrative costs.\textsuperscript{125} The vaccine must be injected in three doses over six months, with each dose at a market price of $120.\textsuperscript{126} If mandated the HPV vaccine would become the most expensive vaccine required.\textsuperscript{127}

If a vaccine becomes mandatory the private insurance companies are more likely to cover the cost of the vaccine.\textsuperscript{128} There are also public options available for those within the target group who do not have insurance or have inadequate coverage.\textsuperscript{129} However, the price of immunization has seen a dramatic increase with the increasing number of required vaccines.\textsuperscript{130} Adding HPV, which would be the most expensive mandatory vaccine to date, could have large negative consequences upon private physicians and private insurance coverage, and state health departments.\textsuperscript{131} One public option is the Federal Vaccines for Children Program, which provides immunization for children on Medicaid and some others. In 2000 that program had grown to

\textsuperscript{124} MINN. STAT. §121A.15(3)(d) (2009). “If a notarized statement signed by the minor child's parent or guardian or by the emancipated person is submitted to the administrator or other person having general control and supervision of the school or child care facility stating that the person has not been immunized as prescribed in subdivision 1 because of the conscientiously held beliefs of the parent or guardian of the minor child or of the emancipated person, the immunizations specified in the statement shall not be required. This statement must also be forwarded to the commissioner of the Department of Health.”

\textsuperscript{125} Dowling, supra note 9, at 73.

\textsuperscript{126} Id.

\textsuperscript{127} Id.

\textsuperscript{128} Id., See also, Felicia B. Eshragh, Same Debate, Different Result: Parental Opt-Outs Of A Mandated HPV Vaccine, 2 ST. LOUIS L.J. 205, 214 (2008).


\textsuperscript{130} Gail Javitt, Deena Berkowitz, and Lawrence O. Gostin, supra note 53, at 392.

\textsuperscript{131} Id.
$2.5 billion, from its previous $500 million.\textsuperscript{132} Adding a mandatory HPV vaccine on top of the already expanding costs could lead private insurance companies and federal and state options to reduce or abandon the practice.\textsuperscript{133}

Woman in lower economic groups are five times more likely to develop cervical cancer or abnormal cell growth than women in higher economic groups because they are less likely to have a Pap test or proper follow up care.\textsuperscript{134} Many in this category probably also, do not have health insurance or adequate coverage to cover the cost of a vaccination such as HPV. Many argue that the only hope for them being able to afford the vaccine is if it is made mandatory and subsequently covered by a state or federal program. However, as Javitt, Berkotiwz, and Gostin point out the addition of the HPV vaccine may cause such programs to abandon the practice/funding or to at least cut back.\textsuperscript{135}

Instead of making it mandatory an ideal solution would for a state to create a parental opt in provision. Instead of parents having to try to opt out a better path would be to have parents choose to opt in. For example, take the provision in the Virginia Code allowing for an opt out for the HPV vaccine.

Because the human papillomavirus is not communicable in a school setting, a parent or guardian, at the parent’s or guardian’s sole discretion, may elect for the parent’s or guardian’s child not to receive the human papillomavirus vaccine, after having reviewed the materials describing the link between the human papillomavirus and cervical cancer approved for such use by the Board.\textsuperscript{136}

A better option would be to implement a parental opt in provision. Playing off of Virginia’s opt out provision an opt in provision could be created. “Because the human papillomavirus is not

\textsuperscript{132} Id.
\textsuperscript{133} Id. Some states that once provided free vaccination to children have already abandoned that practice due to the increasing costs.
\textsuperscript{134} Skov, supra note 40, at 806.
\textsuperscript{135} Javitt, Berkotiwz, and Gostin, supra note 53, at 392.
\textsuperscript{136} VA. CODE ANN. §32.1-49(D)(3) (2009).
communicable in a school setting, a parent or guardian, at the parent’s or guardian’s sole
discretion, may elect for the parent’s or guardian’s child “to receive the human papillomavirus
vaccine. Each parent or guardian and student shall be provided with educational materials
describing the risks associated with HPV and the link with cervical cancer.

Along with that, or as another possible solution, a proper response would be to enact state
and/or federal programs with the sole purpose of providing or funding the vaccine for those who
cannot otherwise afford it and wish to be vaccinated. Another important part of the program
would be to educate parents and students about the HPV vaccine. Some states have already or
are in the process of developing such programs. New Hampshire decided not to make the
HPV vaccine mandatory but to allow parents to decide whether their daughters were to receive
the vaccine. For girls ages eleven through eighteen the HPV vaccine was offered free of
charge. Arizona proposed legislation that would start a fund that would provide the vaccine
for girls age twenty-one through twenty-six, raise money for education on HPV, and it would
require the insurance companies to cover the HPV vaccine for their female customers. South
Dakota signed an initiative that gave the Department of Health $9.2 million to provide the
vaccine for girls age eleven to eighteen. North Dakota’s provides funding for the distribution
of materials to educate on HPV and also funding for the HPV vaccine.

Other states have signed into or proposed legislation that would establish a campaign to
provide information on the HPV vaccine. Washington state signed into law a provision that

\[\text{References} \]

137 Id.
138 Many argue that without the HPV vaccine being mandatory no one, especially the parents, would be aware of the
vaccine and even know to request it.
139 Julie E. Gendel, Playing Games with Girls’ Health: Why It Is Too Soon to Mandate the HPV Vaccine for Pre-
140 Eshragh, supra note 129, at 214.
141 Id.
142 Gendel, supra note 139, at 272.
143 Nat’l Conference of State Legislatures, HPV Vaccine, supra note 1.
144 Id.
provides parents of sixth grade girls with information about the vaccine and where they can receive one.\footnote{\textit{Id.} The Washington law does not require the vaccine. \textit{See} Wash. Chapter No. 276 (2007).
}\footnote{\textit{Id.}} Utah started a campaign to establish the awareness on the “cause, prevention, and risk of cervical cancer.”\footnote{\textit{Id.}}

An ideal solution for a state, possibly also with the help of federal programs, would be to implement a program providing funding for the education of students and parents on HPV and the vaccine and also providing funding for the HPV vaccine itself for those who choose to receive it.

Conclusion

Based on the requirements for a mandatory vaccine laid out in \textit{Jacobson} the HPV vaccine does not pass constitutional muster. On top of that the HPV vaccine should not be required for school attendance. Vaccines necessary for school attendance are based upon the fact that they are highly contagious within the school environment, but with HPV there is no possibility for casual contraction. Instead HPV is spread through behavioral decisions. Being a behavioral vaccine there are other more effective ways of prevention.

With the constitutionality of religious exemptions in question it is more difficult for parents to exempt their children out of vaccines such as HPV. Also, some states do not allow for partial exemptions. Either a parent has to object to immunization in general or none at all. While parents may not be opposed to the more traditional vaccines, and even want their child to receive them, they have limited options when a state’s statute does not allow for partial exemptions.

Economic disparity is a popular argument for not only making the HPV vaccine mandatory but could also be used for any vaccine in general. Instead, a better option is for the state to create a parental opt in provision. Another possible solution is for a state, maybe along
with federal support, to have a program which funds the education of students and parents on the HPV vaccine and also provides support for those wishing to receive the vaccine.