Calling the Shots: Authorizing Child Welfare Departments to Vaccinate Foster Care Children Despite Parental Objections

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“A parent cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”

“To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under Prince if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”

I. INTRODUCTION

Vaccination is recognized as an indispensable public health tool responsible for eradicating, controlling, and preventing the spread of infectious diseases. Early vaccination efforts in the United States began in Massachusetts with the work of Dr. Benjamin Waterhouse. Waterhouse successfully inoculated his family members—most notably his children—and garnered the attention of men

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3. See Lyndsey B. Davis, Note, Who’s Calling the Shots? Individual v. State: A Look Inside the Exemption Laws and the Threats of Forgoing Vaccinations, 21 SUFFOLK J. TRIAL & APP. ADVOC. 371, 391 (2016) (considering vaccines monumental tool in public health). Vaccination is responsible for the significant decrease—if not total eradication—of many diseases, including smallpox, mumps, measles, rubella, and polio. See James G. Hodge, Jr. & Lawrence O. Gostin, School Vaccination Requirements: Historical, Social, and Legal Perspectives, 90 KY. L.J. 831, 833 (2002) (listing numerous diseases controlled through vaccination). Vaccines are deliberate injections of a weakened form of a virus or bacteria into a person’s system. See Eugene McCarthy, The Regulatory Production of Vaccine Hesitancy, 86 BROOK. L. REV. 81, 85 (2020) (defining vaccines). In response to such injections, the body produces antibodies that immunize the individual and protect them when they are exposed to the disease. See id. at 85 (explaining how vaccines protect against disease).
like Thomas Jefferson, who encouraged and directed early vaccination programs.\(^5\) By the mid to late 1800s, various states followed Massachusetts’s lead and enacted vaccination legislation to combat smallpox and protect the health of local communities.\(^6\)

Since its inception, vaccination has prompted discussion and debate in the United States.\(^7\) Despite continued opposition, the Supreme Court has sanctioned states’ authority to regulate vaccination.\(^8\) In the seminal case of *Jacobson v. Massachusetts*, the Court affirmed Massachusetts’s smallpox vaccine mandate and held that compulsory vaccination is a reasonable exercise of a state’s police power and does not unreasonably infringe on individual liberties.\(^9\) The Court reasoned that police powers authorize a state to enact regulations concerning the health, safety, and morality of its citizens.\(^10\) *Jacobson* remains the leading authority on vaccination law.\(^11\) Several years later, in *Zucht v. King*, the Supreme Court explicitly held that it is within a state’s authority to impose vaccine mandates for children.\(^12\) In the following decades, courts have continued to uphold the legality of mandatory vaccination.\(^13\)

Most vaccine legislation targets children, not adults.\(^14\) All fifty states and the District of Columbia have compulsory child vaccination laws that require

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7. See Hodge & Gostin, *supra* note 3, at 844-49 (observing political and social struggles surrounding vaccination); Calandrillo, *supra* note 5, at 388-89 (describing antivaccination movement in United States).


9. See *Jacobson*, 197 U.S. at 24-25, 31 (determining reasonable public health and safety regulations within state’s police power to regulate). In *Jacobson*, the Supreme Court reiterated the fundamental principle that “possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country as essential to the safety, health, peace, good order, and morals of the community.” *Id.* at 26 (quoting Crowley v. Christensen, 137 U.S. 86, 89 (1890)).

10. See R.R. Co. v. Husen, 95 U.S. 465, 471 (1877) (considering legislation promotive of public health and safety within scope of state’s police power). Pursuant to its police powers, a state can enact sanitary, inspection, and quarantine laws; pass legislation to stop crime; and prevent people or animals suffering from infectious diseases from entering its borders. See *id.* at 471-72.


12. See *Zucht*, 260 U.S. at 176 (confirming state’s authority to mandate vaccination settled law). The state may delegate to a municipality the authority to determine under what conditions health regulations should become operative. *See id.* (vesting municipality officials with broad discretion to apply and enforce health law).


children be immunized against certain diseases prior to attending public school.\textsuperscript{15} Child vaccination legislation balances the state’s interests in protecting public health and the welfare of children with parents’ fundamental liberty interests in their child.\textsuperscript{16}

Parents possess fundamental rights protected by the Due Process Clause of the Fourteenth Amendment to make decisions concerning the care, custody, and control of their children.\textsuperscript{17} The Fourteenth Amendment implicitly authorizes parents to make decisions with respect to their child’s education, religious and moral upbringing, and medical care.\textsuperscript{18} It is a cardinal rule that the custody and control of children reside with parents first and foremost, and states generally should not infringe nor hinder parents’ rights.\textsuperscript{19} Although courts and legislatures defer to a parent’s decision-making authority, parental rights are not absolute.\textsuperscript{20} States may enact regulations pursuant to their parents patriae and police powers that restrict or burden a parent’s liberty interest in their child.\textsuperscript{21} Police powers and parens patriae powers work in tandem to justify state regulation and intervention when a parent jeopardizes the health and safety of their child and threatens

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\item\textsuperscript{16} See Jones, supra note 4, at 659 (observing various interests considered in child vaccine laws); see also Reiss & Weithorn, supra note 14, at 893 (explaining balance of constitutional liberties and state authority different for laws targeting children). Mandatory vaccination programs serve a compelling interest in protecting society from the spread of disease. See Workman v. Mingo Cnty. Bd. of Educ., 419 F. App’x’s 348, 356 (4th Cir. 2011) (observing mandatory child vaccination constitutional and consistently recognized by Supreme Court).
\item\textsuperscript{17} See Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (concluding right to raise children within liberty guaranteed by Fourteenth Amendment); Troxel v. Granville, 530 U.S. 57, 65 (2000) (acknowledging fundamental liberty protects parents’ decisions concerning child).
\item\textsuperscript{18} See Meyer, 262 U.S. at 400 (recognizing parents’ right to determine child’s education); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (acknowledging parents’ right to determine child’s education and religious upbringing); Wallis ex rel. Wallis v. Spencer, 202 F.3d 1126, 1141 (9th Cir. 2000) (recognizing parents’ right to make important medical decisions for children).
\item\textsuperscript{19} See Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (observing judicial and governmental deference given to parents). Justice Rutledge opined that “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” Id. at 166.
\item\textsuperscript{20} See Pierce v. Soc’y of Sisters, 268 U.S. 510, 535 (1925) (noting governmental deference to parental rights); Prince, 321 U.S. at 166-67 (recognizing parental rights subject to limitations).
\item\textsuperscript{21} See supra text accompanying note 12 (describing state’s authority to enact legislation promoting public health); Prince, 321 U.S. at 166-67 (reaffirming state’s parens patriae power to enact legislation protecting society’s youth).
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public welfare. Child vaccination laws and the foster care system are two examples of state legislation that impinge on parental rights.

Child vaccination laws limit a parent’s decision-making autonomy by requiring children to be vaccinated in order to attend school. Despite the constitutionality and widespread acceptance of compulsory vaccination to control the spread of disease, many parents oppose vaccines and refuse to immunize their children. Parents object to vaccines for various reasons—they are incompatible with their religious beliefs, represent unwarranted governmental intrusion, and impede on parental decisional autonomy. State vaccine laws include exemptions that allow a parent to exempt their school-aged child from complying with the mandate. States vary by the types of exemptions recognized and the process and conditions imposed to use an exemption. Absent an exemption, failure to comply can result in the school prohibiting the child’s attendance, and the parent

See Yoder, 406 U.S. at 233-34 (recognizing limited parental power when decisions negatively impact child and society); Reiss & Weithorn, supra note 14, at 912 (justifying regulation of children through police power and parens patriae concerns).

See, e.g., MASS. GEN. LAWS ch. 76, § 15 (2022) (requiring vaccination for school entry); MASS. GEN. LAWS ch. 119, § 1 (2022) (detailing public policy of foster care system in Massachusetts).

See NCSL, supra note 15 (noting all fifty states require vaccination for school attendance); Zucht v. King, 260 U.S. 174, 176-77 (1922) (ordering child’s immunization against smallpox despite father’s objections).

See Phillips v. City of New York, 775 F.3d 538, 540 (2d Cir. 2015) (dismissing challenge against vaccination statute and affirming its constitutionality). The judiciary recognizes that it is within the police power of the State to require that school children be vaccinated... and that such requirement does not violate the constitutional rights of anyone, on religious grounds or otherwise. In fact, this principle is so firmly settled that no extensive discussion is required.

Cude v. State, 377 S.W.2d 816, 819 (Ark. 1964); see Hodge & Gostin, supra note 3, at 875-76 (describing continued resistance to vaccination laws).


See Reiss & Weithorn, supra note 14, at 916-18 (discussing exemption variability among states).
may face civil fines or criminal penalties for their child’s truancy. Still, most parents—willingly or not—immunize their children.

The foster care system substantially limits the rights of parents who have abused or neglected their children by removing them from their parent. A state agency, usually referred to as the “department,” is responsible for receiving, caring for, maintaining, and placing children in need of care and protection. The department is authorized to intervene in the constitutionally protected parent-child relationship if a judge determines that the parent is not providing the child with reasonable care and protection. If the judge makes a preliminary finding that a child is suffering from abuse or neglect, or will suffer from abuse or neglect if the state takes no action, then they are authorized to temporarily transfer the child to the custody of the child welfare department until the court hears the case on the merits. The department’s foremost goal is to reunify the parent and child, and the parent’s fundamental interest in their child remains intact. Both the parents and department have vested interests in the child, which often conflict

29. See Zucht, 260 U.S. at 176-77 (concluding denial of school entry to unvaccinated student constitutional); Cude, 377 S.W.2d at 817 (noting father fined three times for violating school attendance laws). In some cases, even if a child is properly exempted, they may still be denied access to school during an outbreak. See Phillips, 775 F.3d at 549 (affirming constitutionality of temporary exclusion of exempted child during vaccine-preventable chickenpox outbreak).


31. See Zach Strasburger, Medical Decision Making for Youth in the Foster Care System, 49 J. MARSHALL L. REV. 1103, 1104 n.1 (2016) (explaining foster care system). The foster care system provides temporary out-of-home care when the state removes a child from their parents pursuant to a dependency proceeding. See id. at 1104 n.1.

32. See, e.g., MASS. GEN. LAWS ch. 119, § 1 (2022) (authorizing department to oversee child welfare system in Massachusetts).

33. See Care & Prot. of Lillian, 837 N.E.2d 269, 272-73 (Mass. 2005) (describing care and protection proceedings). The court is first made aware of the child’s circumstances through a petition for care and protection filed on behalf of the child that alleges that the child’s circumstances fall within the four enumerated concerns that warrant state intervention. See infra note 125 and accompanying text (listing reasons for bringing petition for care and protection).

34. See, e.g., ch. 119, §§ 24-26 (granting judge authority to issue order removing child from parent’s custody). Once the petition is filed, the court either notifies the parent of the petition’s allegations and upcoming temporary custody hearing or issues an emergency order that immediately removes the child from the parent’s custody until the temporary custody hearing occurs. See Lillian, 837 N.E.2d at 276-77 (requiring hearing occur within seventy-two hours of child’s removal). At the temporary custody hearing, the judge determines the status of the child’s custody until a hearing on the merits takes place. See Care & Prot. of Robert, 556 N.E.2d 993, 995 (Mass. 1990) (highlighting child’s welfare of paramount concern). In addition to the department, the child may be transferred to a licensed childcare agency or an individual considered qualified by the court to care for the child. See ch. 119, § 24.

over the issue of immunization. Due to statutory variation among states, there is a lack of uniformity as to whether the department can immunize a foster care child over their parent’s objections.

This Note examines the competing interests that arise between parent and state over the issue of immunizing foster care children and how courts address this problem. Section II.A discusses the history and early jurisprudence of vaccination, its success as a public health tool, and modern child vaccination laws. Section II.B then examines a parent’s fundamental right to the care and custody of their child and the extent to which a state’s police and parents patriae powers justify limiting parental rights. Section II.C considers two types of policy considerations that impact parental rights: child vaccination as a limit on parental autonomy and the foster care system as a more substantial threat to parental integrity. Next, Section II.D addresses the competing interests that emerge between parent and state over the issue of child vaccination, specifically with respect to children temporarily placed in foster care.

This Note examines how courts resolve parents’ objections to their child’s immunization and analyzes the disparate results among states due to ambiguous legislation and overreliance on judicial discretion to parse child welfare laws. The Note balances the rights of unfit parents against the child’s best interests and considers whether parents should retain decision-making authority over immunization. These issues are considered in light of the COVID-19 pandemic and public policy goals to protect the public’s health. In addition, this Note argues that the rights of an unfit parent must cede to the child’s—and society’s—best

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38. See infra Section II.D (examining overreliance on judiciary to resolve ambiguous legislation).

39. See infra Section II.A (tracing development of vaccine).

40. See infra Section II.B (discussing scope of parental rights and extent of states’ authority to subvert individual liberties).

41. See infra Section II.C (considering limiting effects of vaccine and child welfare laws on parental rights).

42. See infra Section II.D (balancing parental rights against states’ interest in protecting children and public policy favoring vaccination).

43. See infra Section III.A (presenting correlation between unclear legislation and subsequent reliance on judiciary to resolve statutory ambiguities).

44. See infra Section III.B (concluding vaccination outside scope of medical decisions warranting parental consent).

45. See infra Section III.B.4 (opining COVID-19 pandemic reinforces importance of vaccines to protect public health).
interests in being free from disease. This Note proposes that states adopt a bright-line rule vesting child welfare departments with exclusive authority to immunize foster care children, despite parental objections, according to the best interests standard and refers to Massachusetts’s law as an example of legislative clarity that other states may look to for guidance. The Note argues that the health and safety of children should be the primary consideration when immunizing foster care children. The Note concludes by asserting that parents who fail to act in accordance with their child’s best interests act inconsistently with their fundamental liberties and should not be allowed to assert these rights when disputing the state’s decision to vaccinate the child.

II. HISTORY

A. Vaccination Law in the United States

1. History of Vaccination

Vaccination in the United States has a rich and controversial history that continues to inspire debate and discussion today. Early vaccination efforts began at the turn of the nineteenth century and centered around the research of Dr. Benjamin Waterhouse of Harvard University. Dr. Waterhouse relied on the findings of Dr. Edward Jenner, creator of the smallpox vaccine, to conduct his own inoculation experiments that he successfully administered to members of his household. Waterhouse’s achievement attracted the attention and support of men like Thomas Jefferson, who contributed to the success of the early vaccine
movement.53 In 1809, Massachusetts passed the country’s first mandatory vaccination law, and in 1827 Boston became the first city to require all children entering public school to provide proof of immunization.54 By the mid to late 1800s, many other states followed Massachusetts’s lead and enacted their own vaccination laws.55 The quick and successful adoption of vaccine legislation was largely the result of fortuitous timing—the enactment of school attendance laws coincided with a rise in smallpox cases and increase in number of public schools.56 State legislatures effectively addressed this public health concern by conditioning school entry on vaccination.57

2. Early Vaccination Jurisprudence

Despite the efficacy of vaccines in curtailing the spread of smallpox, many individuals viewed vaccine mandates as a threat to their autonomy and opposed the early success of the vaccination movement.58 In Jacobson, the Supreme Court upheld the constitutionality of Massachusetts’s compulsory smallpox mandate.59 The Court reasoned that pursuant to its police powers, a state can enact legislation or impose regulations to protect the public’s health and safety.60 The Court determined that mandating vaccination during a smallpox outbreak to limit the spread of disease was a reasonable and proper exercise of legislative prerogative to protect the public’s health and did not deprive individuals of their liberties.61 Jacobson remains the cornerstone of early vaccination jurisprudence and

53. See supra note 5 and accompanying text (detailing Jefferson’s involvement in early vaccine programs).
54. See Jones, supra note 4, at 643 (observing vaccination law in United States paralleled trends in Europe).
55. See supra note 6 (describing beginning of early vaccination movement in United States).
56. See Kevin M. Malone & Alan R. Hinman, Vaccination Mandates: The Public Health Imperative and Individual Rights, LAW IN PUBLIC HEALTH PRACTICE 262, 271 (Goodman et al. eds., 2007) (discussing impact of school attendance laws on early vaccine success). Massachusetts was the first state to enact compulsory attendance laws in 1852, and by 1918 all states had enacted similar laws requiring children attend school. See Adriana Lleras-Muney, Were Compulsory Attendance and Child Labor Laws Effective? An Analysis from 1915 to 1939, 45 J.L. & ECON. 401, 403 (2002) (describing content of state attendance laws, including age, period, penalties, and exemptions).
57. See Hodge & Gostin, supra note 3, at 850-51 (explaining school vaccination part of larger plan to promote comprehensive public vaccination).
58. See id. at 844 (describing early resistance to vaccination in America).
59. See Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905) (observing law reasonably related to protecting public health). In Jacobson, Jacobson refused to comply with a vaccine mandate requiring immunization against smallpox, claiming it derogated his Fourteenth Amendment rights. See id. at 23, 26 (claiming mandate “hostile to inherent right of every freeman”). Although Jacobson’s argument failed, the Court noted that if his refusal was tied to medical concerns—namely that immunization would cause serious health consequences—he would be exempt. See id. at 39 (planting seed for modern medical exemption).
60. See id. at 35 (quoting Viemeister v. White, 72 N.E. 97, 99 (N.Y. 1904)) (establishing state-mandated vaccination programs within scope of state’s police power). The Court also noted that it was appropriate for the state to vest local authorities with the power to enact reasonable measures to ensure the health and safety of local communities. See id. at 25.
61. See id. at 28-29 (considering restraints reasonable to ensure health and safety of society). The Court determined that mandatory vaccinations were constitutional if they addressed a public health necessity and were reasonable and proportional. See id. at 38.
set legal precedent for the constitutionality of vaccine mandates as a reasonable exercise of a state’s authority to protect and safeguard public health.62

Over a decade later, in Zucht, the Supreme Court reaffirmed its decision in Jacobson and held that states are authorized to mandate child vaccination as a valid prerequisite for school entry.63 By 1963, twenty states conditioned entry to public school on proof of immunization against specific diseases, and by 1980, all fifty states adopted similar legislation.64

3. The Continued Success of Vaccination

Vaccination is a safe and effective means of controlling and preventing the spread of infectious diseases.65 The CDC declared vaccinations one of the greatest public health achievements of the twentieth century.66 Through herd immunity, vaccination has eradicated numerous infectious diseases, reduced mortality rates, increased life expectancy, and saved countless lives.67

In recent decades, researchers have developed vaccines at an unprecedented rate.68 Most recently, vaccines have been indispensable in helping to combat COVID-19.69 On March 11, 2020, the World Health Organization (WHO) declared the COVID-19 outbreak as a global pandemic, and two days later, the United States announced a nationwide emergency.70 Schools, restaurants, and bars closed as cities went into lockdown, and states implemented social

62. See Jones, supra note 4, at 644 (stating Jacobson set legal precedent for public health law).
64. See Reiss & Weithorn, supra note 14, at 892 (outlining timeline of vaccination adoption across country).
65. See supra note 3 and accompanying text (considering vaccination essential public health tool).
66. See Davis, supra note 3, at 376-77.

67. See James Lobo, Note, Vindicating the Vaccine: Injecting Strength into Mandatory School Vaccination Requirements to Safeguard the Public Health, 57 B.C. L. REV. 261, 268-69 (2016) (discussing societal benefits of vaccination). Herd immunity occurs when a sufficient proportion of a population is immune to an infectious disease, either through vaccination or prior illness, such that the risk of spread decreases. See Zidoves, supra note 36, at 182 (explaining herd immunity protects those unable to vaccinate due to age or medical reasons); see also McCarthy, supra note 3, at 87 (noting herd immunity achieved when 80%-90% of population vaccinated).
distancing measures and mask mandates pursuant to CDC recommendations. The first human vaccine trials began in spring 2020, and on December 11, 2020, the U.S. Food and Drug Administration (FDA) issued Emergency Use Authorization (EUA) of the Pfizer-BioNTech COVID-19 vaccine for individuals sixteen years and older. The following May, the FDA authorized the use of the Pfizer-BioNTech COVID-19 vaccine in adolescents aged twelve to fifteen, and by November, the COVID-19 vaccine was available to children aged five to eleven years. By June 2022, all people aged six months and older were eligible for the COVID-19 vaccine in the United States.

In an effort to encourage vaccination and a return to normalcy, some private and governmental employers implemented vaccine policies for their employees, and cities required proof of vaccination to enter certain indoor spaces. These policies have been met with resistance and criticism, and opposition to the COVID-19 vaccine persists. It remains unclear whether similar vaccine policies will extend to children, but in the interim the controversy surrounding vaccination is unlikely to dissipate.

71. See Timeline, supra note 70 (describing spread of COVID-19 throughout United States and implementation of policies to curb spread).
72. See Timeline, supra note 70 (discussing development of vaccine program for COVID-19). On December 18, 2020, the FDA issued EUA for the Moderna COVID-19 vaccine, followed by the Johnson & Johnson vaccine on February 27, 2021. See id.
73. See id.
74. See id. (noting children aged six months to five years last group to receive vaccine approval).
76. See Buckley, supra note 75 (describing public backlash to Heineken’s pro-vaccine advertisement); Silva, supra note 68 (noting 25% of eligible Americans refuse COVID-19 vaccine).
4. Modern Vaccination Law

Children are the subject of most mandatory vaccination programs today. All fifty states have compulsory school vaccination laws that condition school entry on a child receiving and presenting proof of immunization against certain diseases. If a parent fails to show proof of their child’s immunization record, then the school can bar the child’s entry unless the parent uses an available exemption to excuse the child from the mandated requirements.

An exemption removes the liability a parent would otherwise face for failure to vaccinate their child according to the state’s vaccination schedule. There are three types of vaccine exemptions—medical, religious, and personal belief. A medical exemption is used when a child has a specific, underlying medical condition that places them at undue risk from routine vaccinations. Religious exemptions are used when a parent’s religious beliefs are fundamentally incompatible with their child obtaining immunization. A personal belief exemption—also known as a philosophical or moral exemption—is used when a parent objects to vaccination because of personal, moral, or other beliefs. Not all states have religious or personal belief exemptions, reflecting the lack of uniformity with respect to vaccination legislation in the United States. Nonmedical exemptions are particularly problematic because states have different standards as

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78. See supra note 14 (observing states possess greater authority over children than adults).
81. See LeFever, supra note 26, at 1047 (explaining nonmedical exemptions allow parents to legally sidestep mandatory school immunization requirements).
82. See Lobo, supra note 67, at 275 (describing three types of exemptions).
83. See Nancy Berlinger, Parental Resistance to Childhood Immunizations: Clinical, Ethical, and Policy Considerations, 8 AM. MED. ASS’N J. ETHICS 681, 681 (2006) (stating all fifty states and District of Columbia have medical exemptions); see also Reiss & Weithorn, supra note 14, at 915 (listing common bases for medical exemption).
84. See Reiss & Weithorn, supra note 14, at 916-17 (defining religious exemption). Some states require affiliation with a recognized religious organization or delineation of the opposition to qualify for the exemption. See id. As of February 2023, forty-four states and the District of Columbia have a religious exemption. See State Vaccination Exemptions, supra note 27 (charting states where religious exemption allowed).
85. See Berlinger, supra note 83, at 682-83 (noting objections include fear, resistance to perceived government intrusion, and preference for alternative medicine).
86. See State Vaccination Exemptions, supra note 27 (observing absence of federal vaccination law). Fifteen states have personal belief exemptions: Arizona, Arkansas, Colorado, Idaho, Louisiana, Michigan, Minnesota, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, and Wisconsin. See NCSL, supra note 15 (detailing personal belief exemptions by state). Maine, New York, Connecticut, West Virginia, California, and Mississippi are the only states to have removed both religious and personal belief exemptions. See id.
to what beliefs qualify for the exemption and how the state verifies those beliefs.\textsuperscript{87} The screening mechanisms in place are not always effective in separating individuals whose religious values genuinely conflict with vaccination from those that use the religious exemption as a loophole to evade vaccination when a personal belief exemption is unavailable.\textsuperscript{88} States’ lack of verification and regulation of exemptions threatens herd immunity and the continued success of vaccination as a public health tool.\textsuperscript{89}

B. Parental Rights

1. Parental Rights as a Fundamental Liberty

It is deeply rooted in our nation’s history and ingrained in the framework of American society that a parent is responsible for the care and upbringing of their child.\textsuperscript{90} The origin of parental rights stems from a long history of judicial and governmental recognition that the sanctity of the family sphere should be protected from undue government intrusion.\textsuperscript{91} It is well-established that the Due Process Clause of the Fourteenth Amendment protects a parent’s fundamental right to make decisions concerning the care, custody, and control of their child.\textsuperscript{92} Parents are imbued with authority to determine their child’s education, religious and moral upbringing, and medical care in conformity with their own values and

\textsuperscript{87} See Reiss & Weithorn, supra note 14, at 916-18 (discussing exemption variability among states and difficulty differentiating religious and secular justifications for vaccine opposition).

\textsuperscript{88} See Davis, supra note 3, at 392-93 (explaining lackadaisical approach to qualifying exemptions); Lobo, supra note 67, at 273-74 (criticizing use of religious exemption for nonreligious motive).

\textsuperscript{89} See McCarthy, supra note 3, at 88 (explaining vaccine refusal reduces herd immunity). In response to recent disease outbreaks, several states removed nonmedical exemptions to curb the spread of disease and encourage compliance with vaccine mandates. See id. at 88-89 (noting California, Michigan, West Virginia, Washington, and Maine removed personal belief and religious exemptions); Jones, supra note 4, at 639 (stating New York removed religious exemption in response to measles outbreak).


\textsuperscript{91} See Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (explaining historical significance of family institution requires strong constitutional protection); Newmark v. Williams, 588 A.2d 1108, 1115 (Del. 1991) (holding, “[t]he primacy of the familial unit is a bedrock principle of law”). Legislatures and courts give due deference to the family sphere such that decisions made within the scope of the family unit—pertaining to one’s marriage, family, and children—are valued and respected. See M.L.B. v. S.L.J., 519 U.S. 102, 116-17 (1996) (observing parental rights and choices about child’s upbringing protected from unwarranted state involvement); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (recognizing freedom of choice in family matters protected by Fourteenth Amendment).

beliefs. In light of these constitutional protections, courts and legislatures give great deference to parental rights.

2. Limiting Parental Rights: State Police Power and Parens Patriae

Despite judicial and legislative deference to parental decision making, this fundamental liberty interest is not absolute. Parental rights may be limited by laws and regulations in matters reasonably related to the state’s compelling interests. Under its police and parens patriae powers, a state is justified in imposing laws reasonably related to public health and child welfare respectively, even if parental rights are limited as a result.

Under its police powers, a state is constitutionally authorized to enact legislation promotive of domestic order and to ensure the health, safety, and welfare of its citizens. It is thus a fundamental principle that individual liberties may be subjected to restraints and restrictions deemed necessary by the state to ensure and protect the common good of society. As noted earlier, the Supreme Court’s decision in *Jacobson* was premised on the conclusion that vaccination is within a state’s power to regulate because it is part of the state’s larger objective of

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93. *See supra* note 18 (describing types of decisions where parents retain authority); *see also* Custody of a Minor, 379 N.E.2d 1053, 1062 (Mass. 1978) (recognizing parental right to raise child according to dictates of their own consciences).

94. *See supra* note 19 and accompanying text (describing deference given to parents).


96. *See Prince*, 321 U.S. at 167 (recognizing subjugating citizens to certain limitations not violative of due process rights); *Meyer*, 262 U.S. at 399-400 (barring state from arbitrarily infringing on parental right); *Newmark*, 588 A.2d at 1110 (requiring compelling reason for state intervention into parent-child relationship). For example, the state has an interest in ensuring that its citizens are educated and may impose reasonable regulations that pertain to a child’s basic education. *See Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) (concluding regulating child’s education part of state’s interest in universal education).


98. *See R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877) (extending state’s police power authority to enact legislation related to public health and safety). A state’s police power is rooted in the Tenth Amendment, which reserves the powers of the states to regulate that which does not fall under the purview of the federal government. *See U.S. Const.* amend. X. Because the Constitution does not expressly authorize the federal government to regulate matters related to the health, safety, and welfare of its citizens, it is presumed that this authority is vested in the state. *See Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, 203 (1824) (listing inspection, quarantine, and health laws subject to state regulation).

99. *See Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 150 (1854) (explaining citizens subjected to manifold restraints to ensure common good); *Crowley v. Christensen*, 137 U.S. 86, 89 (1890) (noting possession and enjoyment of rights subject to reasonable restrictions). This notion is rooted in a community-oriented philosophy whereby citizens’ liberties must be balanced against the public welfare and at times subjugated because “to hold otherwise would be to place the individual above the law.” *See Sadlock v. Bd. of Educ.*., 58 A.2d 218, 222 (N.J. 1948) (stating fundamental liberties not absolute and considered against public welfare).
keeping society safe from disease.\footnote{See Jacobson v. Massachusetts, 197 U.S. 11, 27-28 (1905) (observing smallpox outbreak warrantted regulation by Board of Health to limit disease spread).} Nevertheless, a state’s police powers alone are insufficient to justify legislation targeting children: The principle of parens patriae provides the additional justification needed to counterbalance a parent’s decisional autonomy with respect to their child.\footnote{See Prince v. Massachusetts, 321 U.S. 158, 166-68 (1944) (explaining state’s parens patriae interests justify greater authority to control activities of children than adults); Reiss & Weithorn, supra note 14, at 912 (noting robust alliance of police power and parens patriae concerns justify regulating children).}

Pursuant to the doctrine of parens patriae, a state has an independent interest in protecting the health, safety, and welfare of children so that they may develop into mature citizens.\footnote{See Prince, 321 U.S. at 166-68 (summarizing parens patriae doctrine). As parens patriae, or “father of the country,” the state functions as a substitute parent concerned with protecting and safeguarding society’s youth. See Newmark v. Williams, 588 A.2d 1108, 1116 (Del. 1991) (explaining parens patriae duty to protect youngest and most helpless citizens); Jones, supra note 4, at 652-53 (noting Latin translation of parens patriae).} It may enact legislation pursuant to this objective because the health and safety of children is a compelling state interest that justifies infringement on parental rights.\footnote{See Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972) (requiring compelling state interest for legislation threatening parental interests and free exercise claims); Jessica A. Graf, Note, Can Courts and Welfare Agencies Save the Family? An Examination of Permanency Planning, Family Preservation, and the Reasonable Efforts Requirement, 30 Suffolk U. L. Rev. 81, 92 (1996) (noting state must possess compelling interest to overcome parental rights).} Working in tandem, a state’s police powers and its role as parens patriae justify limiting—and at times supersed—a parent’s decision-making autonomy if the parent’s actions jeopardize the health and safety of the child.\footnote{See Yoder, 406 U.S. at 230, 233-34 (recognizing state involvement authorized to protect safety of child or public). The state may also interfere when the parent’s actions threaten the public’s welfare or have the potential for significant social burdens. See id.} The interplay of state and parental interests in children is most evident in child vaccination laws and the foster care system.\footnote{See Zidoves, supra note 36, at 174-76 (balancing state and parent interests in child vaccination); Strasser, supra note 31, at 1126-27 (explaining parens patriae doctrine to justify foster care system and state involvement in parent-child relationship).}

\section*{C. Parental Rights in Conflict}

\subsection*{1. Child Vaccination}

Child vaccination is judicially sanctioned and accepted as within a state’s authority to regulate.\footnote{See Zucht v. King, 260 U.S. 174, 176-77 (1922) (upholding state authority to mandate child vaccination); see also Sadlock v. Bd. of Educ., 58 A.2d 218, 222 (N.J. 1948) (affirming compulsory child vaccination for school attendance).} Despite the widespread acceptance of vaccination as a key tool to ensure public health, many parents oppose child vaccination and refuse to immunize their children.\footnote{See supra note 26 and accompanying text (discussing parental objections to vaccination); Hodge & Gostin, supra note 3, at 878 (crediting vaccines for reduction and eradication of childhood diseases).} Parents may oppose vaccines because they conflict with their religious beliefs; intrude on parental autonomy; contain questionable
ingredients; or will adversely affect or harm their child. Many parents remain skeptical due to the dissemination of misinformation surrounding vaccination and its dangers—most notably, a 1998 study that linked vaccination to autism. Although this study was eventually debunked and holds no credibility in the scientific and medical communities, it instilled a sense of mistrust in vaccination that persists today. Myths surrounding the dangers of the COVID-19 vaccine reflect society’s continued distrust in vaccination.

All fifty states have laws requiring children’s immunization against certain diseases to attend public school. A parent who fails to comply by not vaccinating their child may face criminal charges or incur civil fines. In addition, schools may also deny entry until the child is immunized. Nevertheless, a parent that refuses to immunize their child for nonmedical reasons can use an available exemption to avoid the consequences of not complying with the law.

2. The Foster Care System

Courts have treated the exercise of parental prerogative with deference, but a parent’s interest in their child is not absolute and may be overruled if the child’s welfare is at issue. There is a presumption that a “fit” parent acts in their child’s best interests, so only a showing of clear and convincing evidence of parental unfitness necessitates state involvement. To be considered unfit, a parent must exhibit grievous shortcomings that place their child at risk of abuse,
neglect, or some other harmful activity that threatens the child’s welfare. 118 The Supreme Court has held that state intervention into the parent-child relationship is warranted when the parent is unfit such that their actions place the health, safety, and well-being of their child at risk. 119

Pursuant to parens patriae powers and in accordance with federal legislation, every state has child welfare laws that protect children from the harmful and destructive behavior of their parents or guardians. 120 These laws embody what is commonly referred to as the foster care or child welfare system, whose foremost objective is to support and assist families to prevent or eliminate the need for a child to be removed from their home due to abuse or neglect. 121 In the event that the child is removed from the home, then the objective shifts to implementing plans to encourage the parent’s reunification with their child. 122 The department is imbued with the authority to effectuate child welfare legislation and ensure that an abused or neglected child is provided with a good parental substitute when their parent is unable to provide sufficient care and protection. 123

3. Foster Care in Massachusetts

In Massachusetts, an individual or the Department of Children and Families (DCF) may file a petition with the juvenile court alleging that a child is in need of care and protection due to parental unfitness. 124 A petition for care and protection must allege that the child is: without necessary physical or educational care; growing up in conditions damaging to their character development; without

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118. See Laurent, 22 N.E.3d at 978-79 (considering parent’s character, temperament, conduct, and ability to provide in determining unfitness). The assessment of parental fitness should consider on child’s age, needs, and requirements. See id. at 979.


121. See Adoption Assistance and Child Welfare Act § 471(a)(15) (requiring “reasonable efforts” to keep family unit intact and prolong foster care placement). In 1997, Congress amended the reasonable efforts requirement and provided specific exceptions where reasonable efforts to preserve the family were not required. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, § 101 (removing reasonable effort requirement when parent subjected child to aggravated circumstances defined by state law).

122. See Adoption Assistance and Child Welfare Act § 471(a)(15) (facilitating child’s return home); Adoption and Safe Families Act § 101 (eliminating reasonable efforts to reunite family when child subjected to aggravated circumstances).

123. See, e.g., ch. 119, § 1 detailing child welfare policy and appointing department to oversee care and protection proceedings).

124. See ch. 119, § 24 (describing care and protection proceedings in Massachusetts). DCF may also learn of allegations of abuse or neglect from receipt of a 51A report. See id. § 51B (detailing investigative responsibilities of department after 51A report received).
proper attention; or under the care of a parent or guardian that is unwilling and unable to provide care, discipline, and attention to the child. The petitioner may also request an ex parte emergency hearing if they have reason to believe the child is in immediate danger. If the petitioner presents specific, articulable evidence from which the judge may find reasonable cause to believe that the child is suffering from abuse or neglect or will suffer from abuse and neglect, then the judge may issue an emergency order that temporarily transfers custody of the child to an individual, DCF, or a licensed child care agency. A severe threat to the child’s welfare is sufficient to temporarily hinder a parent’s constitutionally protected right to the custody of their child.

At the hearing, the judge hears from both the parent and DCF regarding the petitioner’s allegations. The judge balances the child’s interest in being free from abuse or neglect against the parent’s fundamental rights to their child, and issues a temporary custody order until the case is heard on the merits. Irrespective of whether the child remains with their parent or is transferred to the custody of DCF, a plan is implemented to ensure that the child receives proper care and the parent is provided with services to alleviate the need for the child’s placement. At trial, the judge evaluates the parent’s fitness and compliance

125 See ch. 119, § 24 (delineating situations warranting filing of care and protection petition). A petition is sufficient if it alleges specific facts based on personal knowledge, information, or belief that fall within the enumerated list. See Care & Prot. of Lillian, 837 N.E.2d 269, 274 (Mass. 2005) (indicating petitioner’s purpose to notify parties of child’s alleged needs for care and protection). After the petition is filed, a precept is issued to bring the child before the court, the department is notified, and the parents receive a summons and notice to appear for a temporary custody hearing. See ch. 119, § 25 (summarizing process for temporary custody hearing).

126 See Care and Prot. of Walt, 84 N.E.3d 803, 811 (Mass. 2017) (explaining only petitioner, not parents, present at initial emergency hearing).

127 See MASS. GEN. LAWS ch. 119, § 24 (2022) (permitting immediate removal of child from parent’s custody for seventy-two hours). When issuing an emergency order transferring custody to the department, the judge must first determine that it is contrary to the child’s best interests to remain at home and the department made reasonable efforts to prevent or eliminate the need for removal from the home. See ch. 119, § 29C (requiring judge to make written certification and determination of department’s reasonable efforts).

128 See Ram v. Rubin, 118 F.3d 1306, 1310-11 (9th Cir. 1997) (permitting exception to due process notice and hearing when child in imminent danger). When an emergency order is issued, parents are provided notice of the allegations of abuse or neglect, and a temporary custody hearing occurs within seventy-two hours of the order’s issuance. See Walt, 84 N.E.3d at 815 (requiring judge to revisit reasonable efforts determination from ex parte hearing at seventy-two-hour hearing).

129 See Care & Prot. of Robert, 556 N.E.2d 993, 994 (Mass. 1990) (granting parent opportunity to defend against child’s removal). A parent’s right to the custody of their child is constitutionally protected and the temporary custody hearing provides the parent with the opportunity to be heard and evaluated as to their fitness. See Stanley v. Illinois, 405 U.S. 645, 658 (1972) (entitling parent to fitness hearing before depriving custody of child).

130 See Robert, 556 N.E.2d at 998 (reasoning child’s freedom from abuse or neglect takes precedence over parental rights). The child may remain with the department pursuant to the emergency order, or if the court determines that it would not be in the child’s best interests to return home, then the child may be placed with some suitable person, with a licensed agency that provides foster care, or in the custody of the department. See ch. 119, §§ 24-25.

with the plan in determining the child’s custody. The court only permanently
severs a parent’s rights if it determines that the parent remains unfit to care for
the child and termination is in the child’s best interests.

D. Vaccinating Foster Care Children

1. Losing Custody

When the court issues a temporary order, custody of the child transfers from
the parent to the state’s child welfare department. The department physically
removes the child from the parent and assumes custodial responsibility to make
decisions previously within the purview of the parent. The department’s au-
thority includes the right and responsibility to make decisions regarding the
child’s welfare, such as medical care. Nevertheless, the parent still has a funda-
mental liberty interest in their child and retains some authority to make deci-
dions. The result is often an unclear and disproportionate sharing of custody
between the parent and department, which can be particularly problematic.

2. Medical Decision-Making and Immunization

Each state has their own set of child welfare laws that delineate decision-mak-
ing authority for foster care children. Thus, the extent to which a parent retains
control and decisional autonomy over their child’s medical care and treatment

132. See ch. 119, § 26 (adjudicating merits of care and protection petition). The hearing on the merits re-
quires careful judicial consideration, and the judge must enter specific facts and findings that parental unfitness
has been persuasively shown. See Custody of a Minor, 389 N.E.2d 68, 73 (Mass. 1979) (holding mother incapable
of providing food, shelter, proper care, and supervision to child); Adoption of Carlos, 596 N.E.2d 1383, 1388

to terminate parent’s relationship with child); Adoption of Gwendolyn, 558 N.E.2d 10, 12-13 (Mass. App. Ct.
1990) (noting termination ends all legal relation between parent and child). The parent-child relationship may
be terminated at the trial on the merits or a later date pursuant to a petition by the department. See MASS. GEN.
LAWS ch. 119, § 26 (2022); MASS. GEN. LAWS ch. 210, § 3 (2022).

134. See, e.g., ch. 119, §§ 24-25 (committing child to custody of DCF). The child may also be placed in
the custody of a childcare agency or individual considered suitable to care for the child. See ch. 119, § 25 (describing
possible custodians).

135. See, e.g., 42 PA. CONS. STAT. § 6351(a)(2) (2022) (transferring temporary legal custody to authorized
agency).

136. See ch. 119, § 21 (defining custodial power to determine child’s abode, medical care, education, and
visitation); ARK. CODE ANN. § 9-27-355(b)(1) (2022) (including medical and educational decisions within cus-
todian’s responsibility).

evaporate when custody temporarily lost); see also § 6357 (clarifying department’s authority limited by parents’
remaining rights and duties); HAW. REV. STAT. § 587A-15(c)(2) (2022) (retaining parental right to consent to
major medical or psychological care or treatment).

138. See Strassburger, supra note 31, at 1104-05 (observing lack of clear rules delineating medical decision-
making authority for foster children causes significant confusion).

139. See supra notes 121-121 and accompanying text (discussing influence of federal legislation on adoption
of state child welfare laws).
after the parent loses temporary custody varies across the United States.140 In some states, the department is independently authorized to consent to certain medical treatments for the child.141 For example, the department is independently authorized to order medical screenings for the child.142 The purpose of the screening is to examine the child for signs of abuse or neglect, illness, and immunization status.143 The department’s authority to permit a medical screening does not extend to consent for medical treatments, such as vaccination, that may be recommended after the screening.144

Constitutional protections ensure parents retain some authority over medical decisions for their child.145 Depending on the medical treatment at issue, the department must obtain either parental consent or a court order.146 How the medical treatment is categorized—routine, nonroutine, major, emergency, or preventative—largely indicates who is authorized to consent.147 In theory, a treatment falls into one of the respective categories, and the authorized decision-maker of that category consents to the treatment.148 In reality, categories are often poorly

140. See Strassburger, supra note 31, at 1105 (stating localized nature of legislation results in bewildering array of policies and practices). Decision-making authority may be delegated to the department, caseworker, foster parent, or lawyer. See id. at 1104-05.

141. See, e.g., 110 MASS. CODE REGS. § 11.01 (2022) (granting DCF authority over routine medical care); 55 PA. CODE § 3130.91(2)(i) (2022) (authorizing agency to consent to routine treatment); § 587A-15(b)(5) (including ordinary medical, psychiatric, and psychological needs within department’s authority); see also Strassburger, supra note 31, at 1112 (noting state agency most frequent medical decision-maker in twenty-two states).

142. See, e.g., FLA. STAT. § 39.407(1) (2022) (allowing medical screenings without court authorization or parental consent); N.J. STAT. ANN. § 9:6-8.30(c) (West 2021) (requiring division immediately arrange medical screening for child); TEX. FAM. CODE ANN. § 32.005 (West 2022) (warranting medical examination without consent when child abused or neglected).

143. See, e.g., § 39.407(1) (explaining child examined for injury, illness, and immunization); § 9:6-8.30(c) (stating medical screening reports help determine abuse or neglect).


145. See N.J. Div. of Child Prot. & Permanency v. J.B., 212 A.3d 444, 451 (N.J. Super. Ct. App. Div. 2019) (recognizing parents’ interest continues despite foster care placement). In most states, the parent’s decision-making authority is limited to extraordinary circumstances, such as major medical decisions, or waived through a blanket consent form. See Strassburger, supra note 31, at 1112 (pointing out someone other than parent most common decision-maker in thirty-seven states).

146. See § 39.407(2) (requiring parent’s consent first to authorize medical treatment). Failure to obtain parental consent does not mean the department is without recourse—they can obtain a court order instead. See id.

147. See 110 MASS. CODE REGS. § 11.01 (2022) (outlining decision-maker by type of medical care provided). Routine or ordinary medical treatments typically do not require parental consent, whereas nonroutine or major medical decisions usually necessitate parental consent or court order. See Strassburger, supra note 31, at 1127-28. Emergency treatment often requires no consent. See, e.g., §§ 11.01, 11.03 (eliminating consent requirement for emergency medical care); 55 PA. CODE § 3130.91(3) (2022) (removing need for consent if delay in obtaining would increase risk to child’s health).

148. See § 11.01 (outlining authorized decision-maker based on type of medical treatment). Unlike most states, Massachusetts’s regulations are clear and succinct: they delineate three categories of medical treatments and indicate the respective decision-maker of each. See id. (requiring department consent for routine treatment, parent for extraordinary, and no consent for emergency). The regulations define each category and provide an exhaustive list of the types of treatments that qualify as routine, extraordinary, and emergency. See id. § 11.04 (defining routine medical care); § 11.03 (defining emergency medical care); §§ 11.11-11.17 (listing extraordinary treatments).
defined, circumstantial, and involve multiple avenues of consent. Many state codes and regulations are ambiguous in how immunization is categorized and who can consent. \footnote{See e.g., Fla. Stat. § 39.407(2) (2022) (describing process for child to obtain medical treatment). In Florida, when a child needs medical treatment—including immunization—consent is first obtained from a parent or court order, but if the parent is unavailable and a court order cannot be obtained, then the department may consent. See \textit{id}. If a parent is available and refuses to consent, then a court order is required, unless the situation is an emergency or the treatment is related to suspected abuse, abandonment, or neglect of the child. See \textit{id}. (providing exceptions where court can sidestep parental consent).} This is problematic, given the frequency that parents object to their child receiving immunizations while in foster care. \footnote{Compare Tex. Fam. Code Ann. § 266.004(b) (2022) (allowing court to authorize department to determine child’s medical care), with \textit{id}. § 32.101(c) (limiting authority granted to department when parent objects). Some states, like Texas, have conflicting provisions on who possesses ultimate authority to determine a foster child’s vaccination status. See § 266.004, § 32.101. Other states have more unequivocal legislation in place. See Haw. Rev. Stat. § 587A-15(b) (2022) (determining department’s authority supersedes parent’s rights and duties).} It is not unusual for children who enter foster care for medical neglect to be behind on vaccinations because of their parent’s inability or unwillingness to provide the child with proper medical care. \footnote{See infra notes 152, 157 (illustrating parents’ objections to vaccination).} The department will then independently authorize or obtain consent from either the parent or the court to

3. \textit{Parental Objections to Vaccinations}

Parents often object to department efforts to immunize their child while in foster care. \footnote{See \textit{In re Stratton}, 571 S.E.2d 234, 235 (N.C. Ct. App. 2002) (determining whether immunizing children violated parent’s constitutional rights and religious beliefs); N.J. Div. of Child Prot. & Permanency v. J.B., 212 A.3d 444, 453 (N.J. Super. Ct. App. Div. 2019) (considering mother’s religious-based objection to child’s immunization); Macklin v. Ark. Dep’t of Hum. Servs., 624 S.W.3d 869, 874 (Ark. 2021) (evaluating whether department had authority to vaccinate over parent’s religious and philosophical objections).} When a child enters foster care, the department performs a medical screening to assess the child’s immunization status. \footnote{See supra notes 142-145 and accompanying text (discussing use of medical screenings to ascertain child’s health, well-being, and immunization status).} If the child is not up to date on their immunizations, or has yet to receive any, then the examining physician usually recommends that the child receive age-appropriate vaccinations. \footnote{See In Int. of A.W., 187 A.3d. 247, 249 (Pa. Super. Ct. 2018) (heeding doctor’s recommendation to immunize children). The pediatrician or examining physician’s recommendation is in accordance with the CDC’s vaccination schedule. See N.J. \textit{Div. of Child Prot.}, 212 A.3d at 448 (evaluating pediatrician’s recommendation to vaccinate children).} The department will then independently authorize or obtain consent from either the parent or the court to
immunize the child pursuant to the recommendation.\textsuperscript{156} If a parent objects, then they may file a grievance with the court.\textsuperscript{157}

When adjudicating cases brought by a parent to enjoin the department from vaccinating their child, the judge first examines the applicable law to determine whether the department or court properly authorized the child’s immunization.\textsuperscript{158} Determining who possesses authority to vaccinate the child is not an easy task—many states have extensive regulations that rarely provide a clear-cut answer.\textsuperscript{159} Even if the department is independently authorized or properly obtained a court order to vaccinate the child, a parent can still assert their parental rights and object through an exemption.\textsuperscript{160} The existence of an exemption alone does not guarantee a parent’s success.\textsuperscript{161} In addition, the judge must balance the various interests at play, including the child’s best interests, the parent’s fundamental liberties, and public policy favoring immunization.\textsuperscript{162} The case law on this issue is often irregular and arbitrary due to the statutory ambiguity and inconsistency in determining who can authorize a foster child’s vaccination.\textsuperscript{163}

\textsuperscript{156} See 110 MASS. CODE REGS. § 11.01 (2022) (granting DCF independent authority to immunize foster child); 55 PA. CODE § 3130.91(2)(i) (2022) (authorizing agency to consent to immunization); FLA. STAT. § 39.407(2)(a) (2022) (requiring department to obtain parental consent or court order to immunize child). The department’s decision to immunize foster care children is based on the child’s best interests and reflects public policy favoring vaccination. See N.J. Div. of Child Prot., 212 A.3d at 454 (concluding vaccination in child’s best interests).


\textsuperscript{158} See In the Int. of T.C., 290 So. 3d at 588 (determining department failed to meet conditions prior to obtaining court consent for immunization); Macklin v. Ark. Dep’t of Hum. Servs., 624 S.W.3d 869, 874-75 (Ark. 2021) (Wood, J., dissenting) (interpreting statute according to its plain meaning first step of statutory construction); In re Eliannah T.-T., 165 A.3d 1236, 1242 (Conn. 2017) (interpreting words by plain meaning).

\textsuperscript{159} See § 39.407(2) (detailing circuitous steps to obtain child’s vaccination); see also Womack, 549 S.W.3d at 767-68 (concluding specific statute trumped general statute and illustrating difficulties arising from contradictory regulations). Compare TEX. FAM. CODE ANN. § 266.004 (2022) (authorizing department to consent for child’s medical care), with id. § 32.101 (2021) (limiting department’s authority when parental objections known).


\textsuperscript{162} See Zihlones, supra note 36, at 174-75 (observing conflicting interests at play).

\textsuperscript{163} Compare Macklin, 624 S.W.3d at 874 (concluding parental rights override state’s interest in health and safety of children), with N.J. Div. of Child Prot., 212 A.3d at 454 (prioritizing best interests of child over parent’s objection), and In re Stratton, 571 S.E.2d 234, 236 (N.C. Ct. App. 2002) (emphasizing public policy encouraging vaccination of children).
4. The Impact of the COVID-19 Pandemic

Vaccine hesitancy and mistrust among parents has increased amid the COVID-19 pandemic.\textsuperscript{164} Parents’ opposition to the COVID-19 vaccine soon extended to all vaccines, including those regularly administered as part of early child wellness exams.\textsuperscript{165} As a result, vaccination rates among children have markedly declined, causing the largest sustained drop in childhood immunization in decades.\textsuperscript{166} There is little doubt that the growing antivaccination sentiment among parents will pervade the foster care system, making it imperative to resolve the ambiguity surrounding vaccination of foster care children.\textsuperscript{167}

III. ANALYSIS

A. The Need to Resolve Legislative Ambiguity

1. Lack of Uniformity and Clarity

Despite extensive legislation on the topic, few states have a bright-line rule that provides a definitive answer on who is authorized to vaccinate a child in foster care.\textsuperscript{168} By drafting regulations in a vague manner, state legislatures avoid taking a definitive stance on vaccination.\textsuperscript{169} As a result, child welfare codes and regulations on vaccination are complex and cumbersome, which causes unnecessary and time-consuming litigation to determine who has authority to vaccinate a foster care child and whether a parent’s objection is sufficient to stop the child from becoming vaccinated.\textsuperscript{170}

\textsuperscript{164} See infra notes 165-166 and accompanying text (examining impact of vaccine opposition on child vaccination rates).


\textsuperscript{166} See COVID-19 Pandemic Fuels Largest Continued Backslide in Vaccinations in Three Decades, supra note 165 (explaining COVID-19 factor in historic backsliding in immunization rates); Timeline, supra note 70 (reporting largest global increase in unvaccinated children in last twenty years).


\textsuperscript{168} See supra notes 148-149 and accompanying text (discussing statutory ambiguity across states on issue of immunization). But see 110 MASS. CODE REGS. §§ 11.00-11.17 (providing definitive answer on department’s authority to immunize). Massachusetts’s regulations are most akin to a bright-line rule and provide a clear, straightforward approach in delegating medical decision-making authority with respect to foster care children. See supra note 148 (describing §§ 11.00-11.17).

\textsuperscript{169} See Zidones, supra note 36, at 174-75 (observing high risk of controversy and public backlash on issues involving competing interests). Vaccination legislation requires consideration of state and federal powers, parental rights, and protection of public health. See id. (observing fundamental rights at risk of infringement).

\textsuperscript{170} See supra notes 149-150 and accompanying text (discussing ambiguity surrounding immunization of foster care children); see also Zidones, supra note 36, at 167, 171 (observing most litigation in state courts involves parent’s objection to child vaccination).
2. Overreliance on Judicial Discretion

Because the codes and regulations are often unclear, adjudicating whether a foster child should be immunized is largely left to judicial discretion.\(^{171}\) In adjudicating whether a parent’s objection should prevail, the judge first looks to the legislation in place and gives effect to its plain meaning.\(^{172}\) When this evaluation proves difficult, judges are left to resolve textual ambiguities at their own discretion.\(^{173}\) In addition, a judge considers the parent’s use of an exemption, the child’s interests, and public policy.\(^{174}\) Judicial discretion is an integral aspect of adjudicating a case; nevertheless, judges should have clear legislative guidance in making decisions to maintain consistency in the law.\(^{175}\) Inconsistent and unpredictable holdings reflect the multitude of ways that statutes can be interpreted and the inherent dangers of too much judicial discretion.\(^{176}\)

B. Adopting the Best Interests Standard

1. Minimizing Parental Rights of Unfit Parents

There is an apparent need for a uniform, bright-line standard to govern the immunization of foster care children.\(^{177}\) Child welfare departments and courts treat unfit parents, whose children have been found in need of care and protection, differently from fit parents.\(^{178}\) Nevertheless, unfit parents retain some

\(^{171}\) See Strasser, supra note 31, at 1120. Lack of uniformity in the law means the burden of delineating the scope of parental consent is shifted away from the legislature to the judiciary. See Macklin v. Ark. Dep’t of Hum. Servs., 624 S.W.3d 869, 870 (Ark. 2021) (observing need for statutory interpretation, clarification, or development of law).

\(^{172}\) See Macklin, 624 S.W.3d at 875 (Wood, J., dissenting) (explaining first step of statutory construction involves interpreting statute according to plain meaning); In re Eianah T.-T., 165 A.3d 1236, 1242 (Conn. 2017) (giving words their ordinary meaning unless defined within).

\(^{173}\) See Eianah, 165 A.3d at 1243-44 (inquiring into extratextual evidence, legislative history and intent, and public policy to resolve ambiguity).

\(^{174}\) See supra notes 160-162 and accompanying text (discussing judicial consideration of exemptions and fundamental rights). The outcome of a case is determined by the judge’s interpretation of the statute, the parent’s use of an exemption, and the value placed on the child’s interests, the parent’s rights, and public policy. See Strasser, supra note 31, at 1120. Decisions may be influenced by additional factors, such as the parent’s legal representation, race, ethnicity, socioeconomic class, and education level. See id. (cautioning inherent risk of judge’s personal beliefs subliminally affecting decision).

\(^{175}\) See Macklin, 624 S.W.3d at 874-75 (Wood, J., dissenting) (admonishing majority’s failure to apply statute’s plain meaning). It is not for the judiciary to rewrite legislation that they do not agree with. See id. at 874 (Wood, J., dissenting); see also Matter of Athena Y. (Ashleigh Z.), 161 N.Y.S.3d 335, 337 (N.Y. App. Div. 2021) (cautioning judicial intrusion on other branches of government).

\(^{176}\) See Macklin, 624 S.W.3d at 874 (Wood, J., dissenting) (criticizing majority decision for improperly interpreting statute and expanding it to include immunizations); Compare N.J. Div. of Child Prot. & Permanency v. J.B., 212 A.3d 444, 453 (N.J. Super. Ct. App. Div. 2019) (noting mother’s use of exemption intended for school attendance inapplicable to care and protection proceeding), with Macklin, 624 S.W.3d at 873-74 (concluding parent’s interest overrides state’s interest in child’s health and accepting use of school-immunization waiver).

\(^{177}\) See Strasser, supra note 31, at 1112-13, 1118 (discussing discrepancies across states).

\(^{178}\) See Zidones, supra note 36, at 176 (acknowledging difference in treatment between fit and unfit parents). Child welfare laws recognize that parental rights are subject to infringement when a parent fails to provide
decision-making authority over their children in most states.179 States should not allow unfit parents to assert parental rights through nonmedical exemptions to object to their child’s immunization.180 Tradition and precedent favor parental rights, but they are not absolute and are rooted in the presumption that a parent acts in their child’s best interests.181 When a parent fails to provide for their child’s basic necessities—shelter, clothing, food, medical care, and formal education—they have acted in a manner inconsistent with their constitutionally protected parental relationship.182 Failure to act in accordance with the parental presumption warrants state intervention and diminution of parental rights until the parent affirmatively shows their actions align with the child’s best interests.183

2. Removing Nonmedical Exemptions

A parent who is unable to fulfill their parental responsibilities should be limited in their exercise of parental privileges—through use of nonmedical exemptions—to dictate their child’s immunization status while in foster care.184 Nonmedical exemptions are specifically tailored to accord deference to a parent when the parent’s religious or secular views conflict with immunization, rather than the child’s.185 As such, nonmedical exemptions prioritize the parent’s personal interests over the child’s best interests and unequivocally disregard the child’s

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179. See Santosky v. Kramer, 455 U.S. 745, 753 (1982) (stating fundamental liberty interest does not evaporate when parent loses custody of child). Blanket consent forms commonly limit or restrict a parent’s authority to make medical decisions for their child. See Strasser, supra note 31, at 1112 (observing decisions limited to those involving extraordinary care or psychotropic medications). As a policy matter, it is important that parents remain involved in decisions as a means of encouraging reunification, but there are drawbacks to leaving the decision-making authority with abusive or neglectful parents who may not have their child’s best interests in mind. See id. at 1121-23 (noting addiction, cognitive impairment, and lack of education interfere with parent’s decision-making abilities). In addition, parents may be difficult to reach or fail to respond to permission requests authorizing medical treatment, which can cause unnecessary delays or prevent the child from receiving medical attention. See id. at 1124 (explaining dangers of vested authority in unavailable parents).

180. See In re Stratton, 571 S.E.2d 234, 238 (N.C. Ct. App. 2002) (refusing to recognize parents’ religious objection to child’s immunization); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (refusing to accept freedom from compulsory vaccination on religious grounds).


182. See In re Stratton, 571 S.E.2d at 237 (determining unfitness, neglect, and abandonment inconsistent with parents’ protected status); see also text accompanying note 1255 (detailing conditions warranting state intervention).

183. See Care and Prot. of Walt, 84 N.E.3d 803, 816-17 (Mass. 2017) (explaining situations necessitating state intervention); see also Graf, supra note 103 (stating parental unfitness triggers state’s power of intervention through parens patriae doctrine).

184. See In re Stratton, 571 S.E.2d at 237-38 (determining parent’s protected status diminished by finding of abuse or neglect). Even though the child may only be in the department’s custody temporarily, eliminating the option of an exemption is reasonable, given the parent’s unfitness. See id. at 238 (concluding temporary custody foreclosed parents’ use of exemption).

185. See text accompanying notes 84-85 (defining religious and personal belief exemptions).
health and safety.\textsuperscript{186} Removing nonmedical exemptions is justified by the parent’s unfitness and is not an infringement of rights.\textsuperscript{187} Once a parent is deemed unfit at the care and protection proceedings, the prevailing standard to determine whether a child should be vaccinated must be the best interests standard.\textsuperscript{188} It is in a child’s best interests to be healthy and remain free from disease, and vaccination is the key to preventing disease and related health issues.\textsuperscript{189}

3. Vaccination Is Not a Major Medical Decision

Vaccination is a routine medical treatment that should not require parental consent.\textsuperscript{190} Vaccines do not have the same characteristics as major medical decisions that justify parental involvement: They are not highly invasive, risky, or likely to cause adverse consequences.\textsuperscript{191} There is overwhelming evidence that vaccines are safe, effective, and carry minimal risk.\textsuperscript{192} Vaccination is widely endorsed by the medical community and a regular component of early child wellness visits.\textsuperscript{193} Any potential side effect or risk is substantially outweighed by the fatal consequences an unvaccinated child may face if infected.\textsuperscript{194} Given the undisputed benefits of vaccination and minimal associated harm, a parent’s consent should not be required for their child to be vaccinated in foster care.\textsuperscript{195}

\textsuperscript{186} See Lobo, supra note 67, at 268-69 (explaining impact of vaccine refusal on herd immunity and child’s health); see also supra text accompanying notes 87-89 (highlighting problems with nonmedical exemptions).

\textsuperscript{187} See Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (noting parents’ religious liberties do not override child’s health and safety); Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972) (denying unlimited free exercise claim when actions threaten child’s health or impose social burdens); Phillips v. City of New York, 775 F.3d 538, 540 (2d Cir. 2015) (concluding no constitutional right to receive religious exemption from vaccination); see also supra note 89 (demonstrating removal of religious and personal belief exemptions).


\textsuperscript{190} See, e.g., 110 MASS. CODE REGS. § 11.04(1)(k) (2022) (considering immunization against communicable diseases routine medical care); 55 P.A. CODE § 3130.91(1)(i) (2022) (stating examples of routine treatment include baby visits, immunizations, and treatment for ordinary illnesses).

\textsuperscript{191} See Reiss & Weithorn, supra note 14, at 888 (discussing minimal risks associated with vaccines); Strasser, supra note 31, at 1127 (explaining risks associated with major medical decisions involving psychotropic medication or surgery warrant parent consent). In determining whether a treatment qualifies as nonroutine, factors to consider include possible side effects, invasiveness, prognosis with and without treatment, and the complexity and novelty of the treatment. See, e.g., § 11.17 (noting risk of serious complications or harm largely determines whether parental consent required).

\textsuperscript{192} See Malone & Himman, supra note 56, at 263 (observing minimal risks associated with vaccination).

\textsuperscript{193} See supra note 66 and accompanying text (stating CDC’s stance on vaccination); supra note 79 (noting CDC schedule recommends immunization against fourteen diseases within first two years of life).

\textsuperscript{194} See Reiss & Weithorn, supra note 14, at 888 (discussing likelihood of adverse reaction very small compared to life-saving benefits); LoFever, supra note 26, at 1049 (noting fatality rate of children infected by disease prior to inception of vaccine usage).

\textsuperscript{195} See McCarthy, supra note 3, at 86 (describing low-risk and high-reward profile of vaccines major driver in successful vaccination); supra text accompanying note 67 (discussing benefits of vaccination).
4. Protecting Public Health Amid COVID-19

In light of the COVID-19 pandemic, it is essential that courts defer to public policy favoring vaccination.196 The recent spike in unvaccinated newborns indicates that parental hesitancy towards the COVID-19 vaccine has extended to other well-recognized and common childhood vaccines.197 Parents that refuse to comply with child vaccination mandates threaten the success of herd immunity.198 Achieving herd immunity is crucial to controlling the spread of any disease, including COVID-19, and exemptions are contrary to this goal.199 Parental rights and the use of nonmedical exemptions must cede to ensure the health and safety of children and the public.200

C. Adopting a Bright-Line Rule According to the Best Interests Standard

States should adopt a bright-line rule that vests each state’s child welfare department with exclusive authority to immunize children in its custody without the need for parental consent.201 Vaccination should be determined according to the best interests of the child, and absent a medical reason, vaccination is in a child’s best interest.202 Vesting the department with the authority to vaccinate foster care children is a reasonable exercise of a state’s police and parents patriae powers.203 In addition, nonmedical exemptions should not be available for parents to exempt their child from being vaccinated at the department’s request.204 Removing nonmedical exemptions does not infringe on a parent’s constitutional


197. See supra notes 165166 and accompanying text (discussing impact of COVID-19 on vaccination rates among children).

198. See McCarthy, supra note 3, at 88 (discussing impact of vaccine refusal on herd immunity); supra note 67 and accompanying text (explaining herd immunity needed to control spread of disease and maintain public health); see also Malone & Hinman, supra note 56, at 264 (observing parents rely on herd immunity to protect their unvaccinated child).

199. See Lobo, supra note 67, at 270 (opining improper use of exemptions, when used in aggregate, reduces herd immunity).

200. See supra note 99 and accompanying text (requiring individual rights to cede to common good of society).

201. See, e.g., 110 MASS. CODE REGS. § 11.01 (2022) (providing “[i]f the treatment is routine, the Department may consent”); id. § 11.04 (including diseases dangerous to public health and immunization within definition of routine medical care).


203. See supra notes 101-101 and accompanying text (explaining police and parents patriae powers justify laws protecting children’s health and welfare).

204. See Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972) (reasoning parent’s religious justifications insufficient when actions threaten child’s health or society’s welfare); Phillips v. City of New York, 775 F.3d 538, 543 (2d Cir. 2015) (observing religious exemption not constitutionally required); Stratton, 571 S.E.2d at 237-38 (refusing to recognize exemption for unfit parents).
rights, as it is judicially recognized that regulations intended to ensure the child’s welfare and the public’s health may subvert individual liberties. A bright-line rule would prove indispensable to the administration of vaccines for foster care children. Authorizing the department to approve vaccination without parental consent would eliminate reliance on judicial discretion to determine the scope of the department’s decision-making authority. Further, removing nonmedical exemptions would minimize the need for judicial intervention and litigation. Most importantly, a bright-line rule would keep children free from disease and protect public health by ensuring the continued success of herd immunity.

IV. CONCLUSION

The need to address the problems surrounding immunization of foster care children is more critical than ever in light of the COVID-19 pandemic. As Congress has not yet acted to create federal uniformity, states should adopt a bright-line rule—without nonmedical exemptions—vesting child welfare departments with exclusive authority to immunize foster care children according to the child’s best interests. States can look to Massachusetts as an example of legislative clarity and model their laws similarly. Parents that fail to act in accordance with their child’s best interests should not retain the ability to assert parental privileges to object to their child’s immunization. By refusing or objecting to vaccination, a parent not only jeopardizes their child’s health, but also threatens the public’s welfare. Pursuant to their police and parens patriae powers, states are not only authorized, but justified, in enacting such a bright-line rule to protect the health of foster care children and ensure the continued success of vaccination as a public health tool.

205. See Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (refusing to recognize parental liberties potentially exposing community or child to disease); N.J. Div. of Child Prot., 212 A.3d. at 454 (concluding parental rights must yield to safety and well-being of child); Sadlock v. Bd. of Educ., 58 A.2d 218, 222 (N.J. 1948) (reaffirming people must at times yield their individual rights, both personal and religious).
206. See supra notes 147148 and accompanying text (summarizing Massachusetts regulations for medical authorizations for foster care children).
207. See supra Sections III.A-B.
208. See supra Section III.A.2.
209. See supra Section III.B.2.
210. See supra Sections III.B.3-4.