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My Body, My Temple: The Constitutional Requirement for Religious Exemptions to a COVID-19 Vaccination Mandate

Ben Davisson*

I. Introduction

While the COVID-19 crisis has caused many to fear the threat that the virus poses to the health and safety of themselves and their loved ones, for others, and particularly for those with certain religious beliefs, the cure is worse than the disease. Long ago, in 1905, the Supreme Court held in *Jacobson v. Massachusetts*¹ that a state may constitutionally require its residents to comply with mandatory vaccination laws. However, much has happened in the way of constitutional law in the 115 years since that case was decided. Beginning in the 1930s and 40s, the Court embarked upon an excursion into delimiting the boundaries of the Free Exercise and Establishment clauses of the First Amendment. And since the passage of the Religious Freedom Restoration Act² in 1993 up through recent landmark free exercise cases such as *Burwell v. Hobby Lobby*³ and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,⁴ both Congress and the Court have displayed a trend toward granting broad religious rights under the Free Exercise Clause. Thus, at least where religious liberties are at stake, *Jacobson* may no longer have the teeth that it was once thought to have. A state that attempts to enact mandatory vaccination laws in response to the COVID-19 crisis must take into account these developments in religious freedom law and offer alternatives for those members of its constituency who cannot in good conscience submit themselves to injecting a substance into their bodies in violation of their deepest and most personal religious beliefs and convictions.

After a brief discussion of the COVID-19 crisis, the vaccine, and the controversy that surrounds it, this analysis will explore the outer limits of

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¹ 197 U.S. 11 (1905).

² 42 U.S.C. § 2000bb *et. seq.* (2018).

³ 573 U.S. 682 (2014).

⁴ 138 S. Ct. 1719 (2018).

the *Jacobson* holding as it might pertain to a mandatory vaccination law before ultimately concluding that the First Amendment requires greater accommodation of religious rights than *Jacobson* would otherwise suggest. This analysis will then set forth two alternate theories — lack of general applicability and hybrid rights — that require laws denying religious exemptions to undergo heightened scrutiny. It will then conclude that, under strict scrutiny review, a mandatory vaccination law that denies religious exemptions would violate the First Amendment.

II. Background

In the early days of 2020, the World Health Organization (WHO) announced a mysterious group of pneumonia-like cases in Wuhan, China, postulating that they likely arose from an entirely new coronavirus.⁵ In a couple short months, this small cluster of cases mushroomed into what is now known as the COVID-19 pandemic.⁶ In an effort to stave off the potentially devastating effects of the virus, business shut down, schools sent their students home, and people all across the globe began to lock themselves inside their homes. Many thought that this crisis would last for a few months at the most. It didn't.

Six months later, things hardly look “normal.” Office buildings still remain empty, parents are mining the recesses of their memories to remember how long division works so that they can teach it to their grade-schoolers who are spending yet another semester at home, people on the sidewalks dive into bushes at the sight of a passerby in order to avoid entering his six-foot bubble, and surgical-style facemasks are now a bona fide fashion staple. While some might revel in showing off their expensive designer masks to their friends, and others may enjoy their workplace's new no-pants-required dress policy, there is a common understanding that this mode of living is not sustainable. Enter the COVID-19 vaccine.

Scientists are hard at work on developing an effective vaccine against the virus. Ordinarily, this is lengthy process, which can take ten to fifteen

⁵ *A Timeline of COVID-19 Developments in 2020*, AM. J. MANAGED CARE (July 3, 2020), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020>.

⁶ *Id.*

years.⁷ At a mere four years, the mumps vaccine is the current record holder for fastest time to develop a vaccine and bring it to market.⁸ The U.S. government, however, is looking to roll out a COVID-19 vaccine as early as January 2021 — less than a year since the virus was first declared a global health emergency!⁹ Potential safety concerns associated with such expedited development aside, this news is certain to bring hope to the high-risk segment of the population as well as those who are otherwise apprehensive about contracting the virus.

This would all be fine and great if those who wished to avail themselves of the vaccine's protection could take the vaccine while others who, for whatever reason, might wish to forego the treatment could choose to do so. However, due to concerns over the delay that mass opt-outs could cause to achieving herd immunity,¹⁰ some officials are pushing for mandatory immunization.¹¹ While principles of American federalism might make nationwide vaccine mandates tricky to accomplish — indeed, White House Coronavirus Task Force director Dr. Anthony Fauci has assured that the COVID-19 vaccine will not be mandated by the federal government¹² — officials in some state and local governments, such as Virginia's health commissioner, have expressed an intent to mandate the vaccine.¹³

Such mandatory vaccination laws might create friction with a large segment of the American population, as a Gallup survey revealed that around thirty-

⁷ Amy McKeever, *Dozens of COVID-19 vaccines are in development. Here are the ones to follow*, NAT'L GEOGRAPHIC (Oct. 2, 2020),

<https://www.nationalgeographic.com/science/health-and-human-body/human-diseases/coronavirus-vaccine-tracker-how-they-work-latest-developments-cvd/>.

⁸ *Id.*

⁹ *Id.*; *A Timeline of COVID-19 Developments in 2020*, *supra* note 5.

¹⁰ "Herd immunity" refers to the phenomenon that occurs when a "threshold proportion" of the population achieves immunity to a disease, making person-to-person spread unlikely. *Herd immunity and COVID-19 (coronavirus): What you need to know*, MAYO CLINIC (June 6, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/herd-immunity-and-coronavirus/art-20486808>.

¹¹ A. Pawlowski, *Will the COVID-19 vaccine be mandatory?*, TODAY (Sept. 3, 2020), <https://www.today.com/health/will-covid-19-vaccine-be-mandatory-t190838>.

¹² Aayushi Pratap, *Fauci: Covid-19 Vaccines Unlikely To Be Mandatory*, FORBES (Aug. 18, 2020), <https://www.forbes.com/sites/aayushipratap/2020/08/18/fauci-covid-19-vaccines-unlikely-to-be-mandatory/#565545715a01>.

¹³ Pawlowski, *supra* note 11.

five percent of Americans would not take the vaccine, even if it were free.¹⁴ In addition to concerns over the safety and efficacy of vaccines, many people cite religious reasons for their reluctance to receive the shot.¹⁵ The Church of Christ, Scientist, is the most well-known religious opponent of mandatory vaccination laws, and through its lobbying efforts, has helped to pass religious vaccine exemption laws in most states.¹⁶ While not doctrinally mandated, prayer-based healing is central to the Christian Science faith and has motivated the church's efforts in lobbying for vaccine exemptions in the past.¹⁷ In fact, the religion's main text, titled *Science and Health*, focuses specifically on the connection between the miraculous healing acts of Jesus and a mind-over-matter approach to healing, and discourages reliance on pharmaceuticals and mainstream western medicine.¹⁸ Outside of Christian Science, vaccine refusal is not a core tenant of any major religion, although some religious devotees may still invoke their faith as a reason to forgo vaccination.¹⁹ For example, many Catholics have refused vaccinations that were created from cell lines from a voluntarily aborted fetus.²⁰ Some Orthodox Protestants, on the other hand, simply claim that vaccination interferes with divine providence.²¹ Additionally, certain Muslims might deny a vaccine if it contains gelatin derived from a non-halal²² animal, whereas a Buddhist might similarly

¹⁴ Shannon Mullen O'Keefe, *One in Three Americans Would Not Get COVID-19 Vaccine*, GALLUP (Aug. 7, 2020), <https://news.gallup.com/poll/317018/one-three-americans-not-covid-vaccine.aspx>.

¹⁵ Chephra McKee & Kristin Bohannon, *Exploring the Reasons Behind Parental Refusal of Vaccines*, 21(2) J. PEDIATRIC PHARMACOLOGY & THERAPEUTICS 104, 104 (2016).

¹⁶ Julia Belluz, *Religion and vaccine refusal are linked. We have to talk about it.*, VOX (June 19, 2019), <https://www.vox.com/2019/6/19/18681930/religion-vaccine-refusal>.

¹⁷ *A Christian Science perspective on vaccination and public health*, CHRISTIAN SCIENCE, <https://www.christianscience.com/press-room/a-christian-science-perspective-on-vaccination-and-public-health> (last visited Oct. 6, 2020).

¹⁸ Siobhan Hegarty, *Why Christian Scientists believe in 'prayerful healing' — and what they think of a COVID-19 vaccine*, ABC NEWS (AUSTRALIAN BROADCASTING CORPORATION) (Sept. 20, 2020) <https://www.abc.net.au/news/2020-09-21/christian-science-religion-prayer-vaccination-covid-medicine/12678764>.

¹⁹ See Belluz, *supra* note 16.

²⁰ Gordana Pelčić et al., *Religious exception for vaccination or religious excuses for avoiding vaccination*, 57(5) Croatian Med. J. 516 (2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5141457/>.

²¹ *Id.*

²² The term "halal" refers to meat that has been slaughtered in accordance with Islamic scripture and is therefore permissible for consumption. *Definition of Halal*, HALAL FOOD

reject a vaccine if its development has in any way resulted in the destruction of any life form.²³

Outside the community of religious devotees whose faiths either forbid or disfavor vaccinations, others might object to vaccination on philosophical grounds without pointing to any particular religious belief. Such philosophies tend to value that which is “natural,” as opposed to a synthetic pharmaceutical product. For example, some believe that natural immunity acquired through contracting and then fighting off illness is better than acquiring that immunity through vaccination.²⁴ Others, in a similar vein, believe that contracting certain illnesses helps to build the immune system.²⁵ And yet others would rather cultivate immunity through healthy diets and lifestyles, rather than by putting extra chemicals into their bodies.²⁶ Some philosophical objections, however, take on a more political tone: mandatory vaccination represents the state’s intrusion upon a person’s bodily integrity and is a symbol of government oppression.²⁷ These beliefs usually stem from a distrust of government, scientists, and pharmaceutical companies.²⁸

Religious and philosophical objections to vaccination abound, it is clear that many will not take the needle lying down. Those who dream of America as land of the vaccinated may therefore find that, should the populace be left to its own devices, the realization of that dream will remain elusive. Solution? Take the variable of personal choice out of the equation.

AUTHORITY, <https://www.halalfoodauthority.com/definition-of-halal> (last visited Oct. 6, 2020).

²³ Pelčić et al., *supra* note 20.

²⁴ McKee & Bohannon, *supra* note 15, at 107.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Douglas S. Diekema, *Personal Belief Exemptions From School Vaccination Requirements*, 35 ANN. REV. PUB. HEALTH 275, 279–80 (2014).

²⁸ *Id.* at 280.

III. Analysis

A. *Jacobson v. Massachusetts* and a State's Prerogative to Vaccinate

But surely if the right to life, liberty, and the pursuit of happiness means *anything*, it must provide Americans the security of knowing that the state cannot penetrate a person's skin and inject him with a foreign substance against his will. This is not what our founding fathers fought and died for!

Not so fast. It has been settled law for well over a century that a state may do just that. In the 1905 case *Jacobson v. Massachusetts*, a resident of Cambridge, Massachusetts was arrested and charged for refusing to comply with a smallpox vaccination mandate issued by the city's board of health.²⁹ Facing a five dollar fine,³⁰ the defendant challenged the law, claiming that it violated his personal liberty rights guaranteed by the Fourteenth Amendment of the Constitution.³¹ The Supreme Court, however, held that the authority to enact mandatory vaccination legislation is within a state's police power to protect the public health and safety.³² Concluding that in enacting the law, the state did not act in an arbitrary or unreasonable manner, or go beyond what was reasonably required for public safety, the Court upheld the validity of the statute and affirmed the defendant's conviction.³³

Thus, *Jacobson* remains the law of the land. But exactly how far does the Court's seemingly draconian holding extend? The penalty suffered in that case was a mere five dollar fine.³⁴ Even measured in today's dollars, such a fine would, for most people, be a small price to pay to maintain one's bodily autonomy, especially when a failure to do so would violate that person's

²⁹ 197 U.S. 11, 13 (1905).

³⁰ Adjusted for inflation, this amount would be roughly equivalent to \$150 in 2020. See *CPI Inflation Calculator*, Official Data Foundation, <https://www.in2013dollars.com/> (last visited Oct. 9, 2020); see also *CPI Inflation Calculator*, U.S. Bureau of Labor Statistics, https://www.bls.gov/data/inflation_calculator.htm (last visited Oct. 9, 2020).

³¹ *Jacobson*, 197 U.S. at 14; Section One of the Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

³² *Jacobson*, 197 U.S. at 35.

³³ *Id.* at 28.

³⁴ *Id.* at 21.

most deeply held beliefs. Furthermore, in the mandatory vaccination cases that have followed *Jacobson*, the states have generally declined to paint with such a broad brush so as to simply require all residents living within a particular jurisdiction to receive a vaccine. In *Zucht v. King*, for example, the Court relied on *Jacobson* in upholding a mandatory vaccination law, but that law only applied to children in schools and other places of education.³⁵ While *Zucht* was a civil suit by a parent, as next friend, seeking damages and a writ of mandamus to compel his daughter's admission to public school,³⁶ there have been other cases in the state courts where the state has turned up the heat on those resisting vaccines. For instance, in *Cude v. State* a parent was both subjected to a fine and deprived custody of his children for failing to send his children to school as required by Arkansas law.³⁷ Although it was the parent's religious objections to vaccinations that caused the school authorities to refuse to admit the children, the Arkansas Supreme Court nonetheless affirmed the lower court's order granting the State custody of the children.³⁸ Most states seem to draw the line at schoolchildren when deciding the extent of their vaccine mandates. Even California's Full Immunization Act, the purpose of which is to allow for the "full and ongoing immunization of all California children," requires vaccination only for children who will eventually enter an educational or care facility.³⁹ Thus, while *Jacobson*, on its face, seems to suggest the permissibility of Orwellian state control in administering mandatory vaccination laws, in practice, the true amount of compulsion effected by the states seems to fall somewhere short of this mark.

Where there's a will, there's a way. Even under a broad mandatory vaccination scheme, religious devotees who cannot possibly receive the vaccine in good conscience can likely find ways to slip through the cracks.

³⁵ 260 U.S. 174, 176–77 (1922).

³⁶ *Id.* at 175; *see also* *Sadlock v. Bd. of Educ.*, 58 A.2d 218, 219 (N.J. 1948) (similar suit to compel state to grant school admission to unvaccinated children).

³⁷ 377 S.W.2d 816, 817 (Ark. 1964).

³⁸ *Id.* at 816, 821; *see also* *State v. Drew*, 192 A. 629, 631 (N.H. 1937) (parent convicted and subjected to a criminal penalty under a similar statutory scheme)

³⁹ *Salasguevara v. Frye*, 37 Cal. App. 4th 330, 340–41 (1995) (holding that the vaccinations were "required by state law" for all children in the state ages two through seven for the purposes of granting physician immunity from malpractice liability for complications arising from the vaccine, but not addressing whether a parent who refused to vaccinate her child could be subject to criminal liability or some other penalty).

If the vaccination mandates of the past century are any indication of the states' approaches to the current pandemic, then it is likely that many states will only require children attending school to receive the vaccine.⁴⁰ If that is the case, parents may opt to homeschool their children to avoid subjecting them to vaccination, and there is a strong argument to be made that the Constitution requires states to provide this option.⁴¹ While the Supreme Court has not yet addressed whether parents have a constitutional right to homeschool their children, the court did find in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* that the Constitution guarantees parents the right to send their children to private religious schools, while observing that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right . . . to recognize and prepare him for additional obligations."⁴² In this same vein, the Court later held in *Wisconsin v. Yoder* that the state must permit Amish parents to provide informal vocational training for their children in lieu of sending them to public high schools when doing so would not result in the child's inability to be self-supporting or to otherwise participate in society.⁴³ Read together, these cases would seem to stand for the proposition that when sending their children to school would be in conflict with their religious beliefs, parents may choose to homeschool their children so long as their instruction adequately meets a state's reasonable standards set to prepare the child to be a functioning and productive member of society.⁴⁴

Unlike the viruses that we have been dealing with over the past century, however, COVID-19 is a different beast and states may find that limiting vaccination mandates to schoolchildren inadequately addresses the problem. While health policy experts assure that the vaccine police will not be busting down our doors, some experts envision inoculation being a requirement to participate in many activities such as travelling on an

⁴⁰ See *supra* notes 37–39 and accompanying text.

⁴¹ See Jon S. Lerner, *Protecting Home Schooling Through the Casey Undue Burden Standard*, 62 U. CHI. L. REV. 363, 391 (1995).

⁴² 268 U.S. 510, 535 (1925).

⁴³ 406 U.S. 205, 234 (1972).

⁴⁴ See *id.* at 236; Indeed, this point may now be moot as all fifty states allow parents to homeschool their children, subject to varying degrees of regulation. Tasha Swearingen, *Best States for Homeschooling*, HOMESCHOOL.COM (Jan. 21, 2019), <https://www.homeschool.com/blog/2019/01/best-states-for-homeschooling/>.

airplane, attending a sporting event, or even going to work.⁴⁵ What we have learned during this pandemic is that it is possible, if not exactly ideal, to live and work from our homes. Those with religious objections to vaccination could therefore avoid receiving the shot by simply continuing this lifestyle. While some might not have the luxury of a job that allows for remote work, it is likely many states will only target certain industries with the vaccine mandates.⁴⁶ Grocery and hospitality workers are two classes that may likely be targeted due to their close and frequent contact with co-workers and customers.⁴⁷ Workers in these industries who wish to avoid the vaccine could then seek other types of employment that do not require such close contact, such as construction, clerical, or warehouse work. Avoiding the vaccine at least seems theoretically possible.

B. The Implications of Health Exemptions on Free Exercise Rights

In America, a country founded on principles of pluralism and inclusivity, to force those with religious objections to completely alter their lifestyles so that they can live in line with their consciences would do violence to the spirit of our nation. Such laws would in effect render religious objectors as second-class citizens, unable to enjoy basic liberties that the rest of the society is free to indulge in. We can do better.

Although *Jacobson* stands as gatekeeper between religious objectors and the doorway to constitutionally-required religious exemptions, there may be a way around its holding. States begin to encounter constitutional problems when they exempt one class of persons from following an otherwise generally applicable law while refusing to grant religious devotees the same exemptions for engaging in their practices.⁴⁸ Therefore, the question to be asked first is whether *anybody* should be exempted from a mandatory vaccination law. Rather than tackling the topic of religious exemptions right out of the gate, let's begin with a much less controversial topic: health-based

⁴⁵ Jillian Kramer, *COVID-19 vaccines could become mandatory. Here's how it might work.*, NAT'L GEOGRAPHIC (Aug. 19, 2020), <https://www.nationalgeographic.com/science/2020/08/how-coronavirus-covid-vaccine-mandate-would-actually-work-cvd/#close>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See *Emp't Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 884 (1990), see also *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520, 538 (1993).

exemptions. Even the Centers for Disease Control and Prevention (CDC) recognizes that some people, because of their age, health conditions, or other factors, should not get certain vaccines.⁴⁹ For example, the CDC recognizes that certain people who have had seizures, Guillain-Barré Syndrome, or who have exhibited an allergic reaction to the DTaP vaccine in the past should not receive the vaccine.⁵⁰ Sensitive to this issue, all states of course allow those whose health would be adversely affected to be exempt from vaccination laws.⁵¹

This however provides the footing that religious objectors need in order to stake a claim against becoming subjected to mandatory vaccination laws. While it is true that a religious devotee is still a member of society and is therefore bound to follow its laws, the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith* held that this requirement only extends to laws of “general applicability.”⁵² On the other hand, when a law burdening a religious practice is not generally applicable, it must undergo “the most rigorous of scrutiny.”⁵³ In *Smith*, the Court refused to recognize a First Amendment right to ingest peyote for sacramental purposes when the drug was otherwise banned by Oregon law, save for when prescribed by a medical practitioner.⁵⁴

Turning our attention back to *Jacobson*, the vaccination statute at issue in that case applied across the board to all inhabitants of the city of Cambridge, with an exception for children determined by their physicians to be unfit for vaccination.⁵⁵ Keep in mind though, that despite the Court’s strict mandatory-vaccination-laws-are-constitutional-period holding, this case was not challenged on Free Exercise grounds, and it certainly was not

⁴⁹ *Who Should NOT Get Vaccinated with these Vaccines?*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/vaccines/vpd/should-not-vacc.html> (last visited Oct. 17, 2020).

⁵⁰ *Id.*

⁵¹ Kevin M. Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, in *LAW IN PUBLIC HEALTH PRACTICE* 262, 273 (Richard A. Goodman et al. eds., 2d ed. 2007).

⁵² 494 U.S. at 879.

⁵³ *Lukumi*, 508 U.S. at 547 (1993).

⁵⁴ 494 U.S. at 890.

⁵⁵ *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905).

subject to the general applicability test of *Smith*.⁵⁶ Thus, in the case of religious exemptions to a mandatory COVID-19 vaccination law, *Smith* — not *Jacobson* — provides the correct framework through which to analyze the constitutional requirements of such exemptions.⁵⁷

An astute observer will quickly point out that even if *Smith* does provide the controlling law, the result should be the same. Like in *Smith*, where the Court refused to grant a religious exemption to a state statute that criminalized peyote use in all cases except when prescribed by a doctor,⁵⁸ the statute in *Jacobson* required all Cambridge residents to receive a vaccination with an exception for children deemed unfit for vaccination by their doctors.⁵⁹ Under *Smith*, then, would such a vaccination scheme not be considered a law of general applicability? The problem is, while *Smith* certainly set forth the language requiring religious objectors to follow valid and neutral laws of general applicability, the Court merely assumed without analysis that the law at issue was generally applicable because there was no need to define the concept of general applicability.⁶⁰ The doctrine had yet to undergo further development.

The Court again addressed the generally applicability requirement three years later in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.⁶¹ There, members of the Church of Santeria, a religious group that engaged in the practice of animal sacrifice, challenged a group of city ordinances that, for the purpose of promoting public health and preventing animal cruelty, prohibited individuals from killing animals for any type of “ritual,” regardless of whether or not animal would then be consumed.⁶² However, the ordinances made an exception for the slaughtering of animals by licensed establishments when the animals are specifically raised for food purposes.⁶³ The order further prohibited all slaughter of animals for food

⁵⁶ See *id.* at 15.

⁵⁷ See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring).

⁵⁸ 494 U.S. at 890.

⁵⁹ *Jacobson*, 197 U.S. at 12.

⁶⁰ Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 859 (2001).

⁶¹ 508 U.S. 520 (1993).

⁶² *Id.* at 528–29, 543.

⁶³ *Id.* at 528.

outside of slaughterhouses, but made an exception for the slaughter of a small number of hogs and cattle per week for the processing for sale.⁶⁴ Furthermore, despite the city's concern for promoting public health and preventing animal cruelty, many other types of animal killings remained legal: fishing, hunting, rodent extermination, and euthanasia of stray animals.⁶⁵ The Court concluded that the city's ordinances were not generally applicable because they were underinclusive in achieving the purpose of preventing animal cruelty by continuing to allow many types of non-religious killings.⁶⁶ The Court further concluded that the city's ordinances also were underinclusive in regard to protecting against the public health threat posed by the disposal of animal carcasses in public and the consumption of uninspected meat because that threat is no greater in cases of ritual sacrifice than it is in cases of the non-proscribed killings.⁶⁷

In *Lukumi*, because the ordinances fell "well below the minimum standard necessary to protect First Amendment rights," the Court decided that it did not need to "define with precision" the standard to be used in evaluating whether a law is generally applicable.⁶⁸ However, scholars who have dissected *Lukumi* and the general applicability standard have proposed that a law is underinclusive, and therefore not generally applicable, if it fails to pursue a government interest uniformly against other conduct that causes a similar harm to the interest.⁶⁹ Therefore, in *Lukumi*, the ordinances would have failed the general applicability requirement if they provided *any* exemptions for non-religious conduct that threatens public health and animal welfare.⁷⁰ This understanding is consistent with the inviolable nature of our First Amendment rights, and is in the spirit of Justice Kennedy's command when he asserted in *Lukumi* that "categories of selection are of *paramount concern* when a law has the incidental effect of burdening religious practice."⁷¹

⁶⁴ *Id.*

⁶⁵ *Id.* at 543–44.

⁶⁶ *Lukumi*, 508 U.S. at 543.

⁶⁷ *Id.* at 544–45.

⁶⁸ *Id.* at 543.

⁶⁹ Duncan, *supra* note 59, at 868; see also Michael Stokes Paulsen, *A RFRA Runs Through it: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 264 (1995).

⁷⁰ See Duncan, *supra* note 59, at 869.

⁷¹ *Lukumi*, 508 U.S. at 542 (emphasis added). This principle was established by the Court in the context of the COVID-19 pandemic in *Roman Catholic Diocese of Brooklyn v. Cuomo*,

With the general applicability framework laid down, we can now turn our attention to how this will affect the requirement for a religious exemption to a mandatory COVID-19 vaccination law. If a state chooses to allow exemptions for those whose health would be adversely affected by the vaccine — as all states have done for other vaccines and should do for the COVID-19 vaccine as well⁷² — the exemptions would render the law not generally applicable under *Smith* and *Lukumi*. Remember that when a law grants exemptions, to remain generally applicable, those exemptions must not detract from the law’s ability to pursue its objectives.⁷³ While it might be argued that a medical exemption, by its very nature, would not detract from — and may even further — a vaccination law’s objective of promoting public health, the law’s objective should be viewed more narrowly than simply the promotion of health in general. Instead, the law’s actual goal is to prevent the spread of an airborne infectious disease, which has nothing to do with an individual’s allergic or otherwise negative reaction to the vaccine. And if an individual were unable to be vaccinated due to health reasons, that individual would be more prone to spreading the virus, thereby compromising the law’s effectiveness.

Now, compare this to a law such as the one at issue in *Smith*, in which the Court concluded that the law was one of general applicability.⁷⁴ Recall that in that case, the statute forbade the ingestion of peyote with a single exception for when the drug had been prescribed by a medical

141 S. Ct. 63, 67 (2020). In that case, the Court struck down a state executive order that limited capacity on places of worship without placing similar restrictions on comparable secular businesses which were deemed “essential,” including acupuncture clinics, liquor stores, bicycle repair shops, laundromats, and banks. *Id.* at 69 (Gorsuch, J., concurring). Observing that many of these “essential” businesses contributed to the spread of the virus just as much, if not more, than the churches seeking relief, the Court, citing *Lukumi*, concluded that the restrictions were not generally applicable and that they therefore must be subject to strict scrutiny. *Id.* at 67.

⁷² Malone & Hinman, *supra* note 51, at 273. Failing to provide a health exemption would be in violation of the Hippocratic Oath, every doctor’s fundamental promise to “follow that system of regimen which, according to [the doctor’s] ability and judgment, [the doctor] consider[s] for the benefit of [the] patients, and abstain from whatever is deleterious and mischievous.” Robert H. Shmerling, *First, do no harm*, HARV. MED. SCH. (Oct. 13, 2015), <https://www.health.harvard.edu/blog/first-do-no-harm-201510138421>.

⁷³ Duncan, *supra* note 59, at 869.

⁷⁴ 494 U.S. at 879.

practitioner.⁷⁵ It can be assumed that the reason for prohibiting peyote was to protect both individuals from harmful health effects associated with ingesting the substance, as well as society from the negative social effects associate with drug use.⁷⁶ However, when the drug has been prescribed by a doctor, it has been deemed not only safe for the patient, but even beneficial to that person's health, and the clinical setting for the drug's use neutralizes any negative effects that the patient's use might have on society.⁷⁷ Thus, unlike a health exemption to a COVID-19 vaccination mandate, which would continue to place the greater population (and even the individual claiming the exemption) at risk of infection, because the medical exemption to the peyote law failed to detract from the law's ability to achieve its intended goals, the law was generally applicable and the state was therefore not required to provide a religious exemption.

The secular-minded will certainly be uncomfortable with this conclusion — medical reasons for granting an exemption to a law *must* take precedence over religious reasons; a state *must* be able to grant an exemption to protect an individual's health and well-being (and maybe even that person's very survival) without having to grant the same exemption to religious objectors! However, courts have held just the opposite. Take, for example, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,⁷⁸ a Third Circuit case dealing with a police department policy prohibiting all officers from growing beards except for when a beard would be necessary for medical reasons.⁷⁹ In an opinion by then-Judge Alito, the court reasoned that the department's interest in conveying the image of a "monolithic, highly disciplined force" would be no less undermined when an officer displayed a beard for medical reasons than it would be when the beard is displayed for religious reasons.⁸⁰ The court struck down any notion that medical interests are sacrosanct while religious interests are something less when it observed that "the medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to

⁷⁵ *Id.* at 874.

⁷⁶ See Duncan, *supra* note 59, at 878.

⁷⁷ See *id.*

⁷⁸ 170 F.3d 359, 360 (3d Cir. 1999).

⁷⁹ Typically due to the skin condition known as pseudo folliculitis barbae. *Id.*

⁸⁰ *Id.* at 366 (internal quotation marks omitted).

overcome its general interest in uniformity but that religious motivations are not,” and it held that “when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government’s actions must survive heightened scrutiny.”⁸¹

C. The Hybrid Rights Avenue to Strict Scrutiny

Although a state’s health exemptions to a mandatory COVID-19 vaccination law would place any refusal to grant similar religious exemptions safely within the lush green fields of strict scrutiny analysis, there is more than one pathway to the promised land. Recall *Wisconsin v. Yoder*, mentioned earlier, where the Court held that Amish parents were entitled to keep their teenage children out of high school and instead provide informal vocational training despite a state law requiring all parents to send their children to public or private school until age sixteen.⁸² This law was generally applicable, yet in ordering the religious exemption the Court declared that “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”⁸³

So, then, did *Smith* overrule *Yoder*? No. In his opinion in *Smith*, Justice Scalia distinguished *Yoder* and other similar cases⁸⁴ where the Court granted religious exemptions to neutral, generally applicable laws by observing that these cases were “hybrid” situations where Free Exercise was not the only constitutional right at issue, but rather the state action encroached on other rights as well.⁸⁵ In fact, the Court in *Yoder* said so much when it declared

⁸¹ *Id.*

⁸² 406 U.S. 205, 234 (1972).

⁸³ *Id.* at 215.

⁸⁴ See *Cantwell v. Connecticut*, 310 U.S. 296, 304–07 (freedom of speech interest implicated when a licensing system for religious and charitable solicitations gave the administrator discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943) (freedom of press implicated when a flat tax on solicitation was applied to the dissemination of religious ideas); *Follet v. McCormick*, 321 U.S. 573, 577–78 (1944) (same); *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925) (right of parents to send their children to private religious schools involves their constitutional right to direct the education of their children).

⁸⁵ *Emp’t Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 881 (1990).

that “when the interests of parenthood are combined with a free exercise claim . . . , more than merely a reasonable relation to some purpose within the competency of the State is required to sustain the validity of the State’s requirement under the First Amendment.”⁸⁶ Thus, in these “hybrid” cases, state actions that burden religious exercise must pass strict scrutiny review.⁸⁷

So what constitutional right, other than Free Exercise, might be implicated by a mandatory COVID-19 vaccination law? In *Cruzan v. Director, Missouri Department of Health*, the Court found a constitutionally protected liberty interest in refusing unwanted medical treatment.⁸⁸ In that case, the Court had to grapple with the issue of whether to allow the removal of life-supporting feeding and hydration systems from a car accident victim who was in a persistent vegetative state when the victim’s family put forth evidence indicating that prior to the accident the victim had expressed to a friend that, if she ever became seriously sick or injured, she would not wish to continue her life unless she could live at least halfway normally.⁸⁹ Although the Court found a constitutional right to refuse medical treatment, even if such refusal would result in the death of the patient, the Court held that this right was not absolute, but that to overcome the State’s countervailing interest in preserving the life of the patient, the State could require clear and convincing proof that the patient would in fact wish to discontinue life-sustaining treatment.⁹⁰

Of course, the mere fact that an individual’s constitutional right to refuse treatment may be overcome by a sufficiently compelling state interest does not mean that it cannot form the basis of a hybrid rights claim to refuse a mandatory vaccination. If that were the case, there would be no need for the hybrid rights doctrine at all because a person wishing to avoid a

⁸⁶ 406 U.S. at 233 (internal quotation marks omitted).

⁸⁷ *Duncan*, *supra* note 59, at 858–59. Even amidst the COVID-19 pandemic, the Court has reassured that the hybrid rights doctrine remains alive and well. *See Danville Christian Acad. v. Beshear*, 141 S. Ct. 527, 528 (2020).

⁸⁸ 497 U.S. 261, 278 (1990). The Court even cited *Jacobson* when it found this constitutional right to refuse treatment. *Id.* The Court observed that in *Jacobson* there was in fact an individual liberty interest in declining an unwanted vaccine, but that such liberty interest failed to overcome the State’s interest in preventing disease. *Id.*

⁸⁹ *Id.* at 266–67.

⁹⁰ *Id.* at 282.

mandatory vaccine for religious reasons could simply bring his claim under the other, more inviolable, constitutional right. While one might argue that when two constitutional rights are not independently sufficient to trigger heightened scrutiny this deficiency is not cured simply by implicating them together in a single constitutional claim — zero plus zero, after all, does not add up to one — it can also be argued that two halves make a whole and that therefore, the more constitutional rights at issue the more compelling justification there is for heightened scrutiny.⁹¹ Regardless of the logic (or lack thereof) underlying this rule, the hybrid rights doctrine remains that law and a person with religious objections to a mandatory COVID-19 vaccination law can trigger strict scrutiny by asserting that his constitutional right to refuse medical treatment is also implicated by the mandate.⁹²

D. The Viability of a COVID-19 Vaccination Mandate Under Strict Scrutiny Analysis

While we have established two alternate avenues for requiring a vaccine mandate without religious exemptions to undergo strict scrutiny analysis, we are not out of the woods yet. Although it has been oftentimes observed that strict scrutiny is “strict in theory and fatal in fact,”⁹³ a state could nonetheless choose to withhold religious exemptions so long as doing so would be the least restrictive means of furthering a compelling governmental interest.⁹⁴

The first question to be answered, then, is whether a mandatory COVID-19 vaccination law would serve a compelling governmental interest. While the purpose of a mandatory vaccination law would be to achieve herd

⁹¹ Duncan, *supra* note 59, at 858.

⁹² See *id.*; Cf. Jacobson v. Massachusetts, 197 U.S. 11, 14 (1905) (defendant asserting right to exemption from vaccine mandate brought no Free Exercise basis for his refusal to comply with the law).

⁹³ Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotation marks omitted); see also, e.g., Bernal v. Fainter, 467 U.S. 216, 219 n.6 (1984).

⁹⁴ Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695 (2014); see also Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 (2018).

immunity to the virus,⁹⁵ there is still the question as to whether that interest is a compelling one. Although the Supreme Court has never assessed a mandatory vaccination law under the modern strict scrutiny analytical framework, the Court has suggested that the interests served by such a law would be sufficiently compelling to satisfy this element of the strict scrutiny analysis.⁹⁶ More broadly speaking, the Court has directly stated that combating the spread of COVID-19 qualifies as a compelling governmental interest.⁹⁷ This comes as no surprise, considering the fact that the Court has long recognized compelling interests when serious and widespread threats to public safety and welfare are at issue.⁹⁸

Things become more interesting when we ask whether a vaccination law without any religious exemptions can qualify as the least restrictive means of achieving the law's objectives. Keep in mind that the least restrictive means test really means what it says: a law burdening the free exercise of one's faith will fail under strict scrutiny analysis unless there is absolutely no other way to accomplish the law's objectives.⁹⁹ In *Burwell v. Hobby Lobby Stores, Inc.*, the Court assumed the task of determining whether a law that required employers to provide insurance coverage for abortifacient contraceptives, yet failed to exempt closely held corporations owned by persons whose religious beliefs would forbid them from providing such coverage, accomplished its goals by the least restrictive means possible.¹⁰⁰ The Court concluded that it did not.¹⁰¹ It reasoned that, due to the small percentage of the population that works for corporations whose owners object to funding the abortifacients, and the fact that these methods of contraceptives are only used in emergency situations, the cost of providing

⁹⁵ See Kristin Samuelson, *Should a COVID-19 vaccine be mandated?*, Nw. U. (Nov. 17, 2020), <https://news.northwestern.edu/stories/2020/11/should-a-covid-19-vaccine-be-mandated/>.

⁹⁶ See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

⁹⁷ *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020).

⁹⁸ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (threat of Japanese espionage during World War II found sufficiently compelling to justify executive order directing all persons of Japanese ancestry to be excluded from the designated "Military Area" of San Leandro, California); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (United States citizen's activities directed at undermining CIA's activities in foreign country sufficient to warrant revocation of his passport due to the compelling interest in national security).

⁹⁹ See *Burwell*, 573 U.S. at 728.

¹⁰⁰ *Id.* at 688–91.

¹⁰¹ *Id.* at 730.

these contraceptives would be so minor that, in these cases, there is no reason for why the government could not pay for the coverage itself.¹⁰² The Court further reasoned that, because the government already had a program in place that allowed other religious organizations and nonprofits to exempt themselves from contraceptive coverage while still ensuring their employees' access to these contraceptives, there was no reason for why this program could not be extended to corporations.¹⁰³

Bearing in mind that the purpose of a mandatory COVID-19 vaccination law would be to ensure herd immunity amongst the relevant population, the question then is whether, in denying religious exemptions to the law, the law's purpose is being served in the least restrictive means possible. Although experts are still uncertain as to the precise level of inoculation needed for the population to achieve herd immunity, they estimate this number to be around 70%.¹⁰⁴ While it is too soon to determine the percentage of the population that will need a medical exemption from the COVID-19 vaccine, if recent medical exemption rates among the nation's schoolchildren for other required vaccines are any indication, then this number may be estimated to be less than 1%.¹⁰⁵ This leaves room for an additional 29% of the population to forgo vaccination before it can be expected that herd immunity will be compromised. So, will 29% of the population seek to claim a religious exemption to the COVID-19 vaccine? Not likely. A study in the *American Journal of Pediatrics* reported that between 2011 and 2018, the number of children entering kindergarten claiming religious exemptions to vaccination never exceeded 2% in any

¹⁰² *Id.* at 728–29.

¹⁰³ *Id.* at 730–32.

¹⁰⁴ Len Strazewski, *Why hopes for fast track to coronavirus herd immunity don't add up*, AM. MED. ASS'N (Oct. 26, 2020), <https://www.ama-assn.org/delivering-care/public-health/why-hopes-fast-track-coronavirus-herd-immunity-don-t-add>; Saad B. Omer et al., *Herd Immunity and Implications for SARS-CoV-2 Control*, J. AM. MED. ASS'N (Oct. 19, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2772167>; *COVID-19 Vaccine Key to Reaching 'Herd Immunity'*, U. MO. HEALTH CARE, <https://www.muhealth.org/our-stories/covid-19-vaccine-key-reaching-herd-immunity> (last visited Nov. 20, 2020).

¹⁰⁵ Rane Seither et al., *Vaccination Coverage with Selected Vaccines and Exemption Rates Among Children in Kindergarten — United States, 2018–19 School Year*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 18, 2019), <https://www.cdc.gov/mmwr/volumes/68/wr/mm6841e1.htm> (0.3% of kindergartners claimed medical exemption to vaccination in 2018–19 school year).

given year.¹⁰⁶ The prediction that few will seek religious exemptions is bolstered by the fact that adherents to the Christian Science faith — the only major religion in the United States to formally oppose vaccination¹⁰⁷ — comprise less than 0.4% of the population.¹⁰⁸ In fact, in the 2018–2019 school year, the total number of schoolchildren claiming an exemption for *any* reason was a mere 2.5%.¹⁰⁹ No matter how you look at it, the number of persons who may be entitled to claim an exemption, religious or otherwise, falls far short of the 30% threshold where the goal of herd immunity becomes threatened.

Looking to *Burwell* for guidance, we can conclude that a vaccination law that denies religious exemptions would fail to serve the goal of herd immunity in the least restrictive means possible. Recall that in *Burwell*, the Court based its decision to require religious exemptions, which thereby called for the government to shoulder the cost of providing coverage for the contraceptives, largely on the fact that such a small portion of the total population both (a) worked for employers with religious objections to providing coverage for abortifacients, and (b) would even need to use these contraceptives during the course of their employment due to the abortifacients' emergency nature.¹¹⁰ Similarly, in the case of a COVID-19 vaccination law, if recent vaccine exemption trends are any indication, then the number of persons both entitled to and wishing to avail themselves of an exemption would be so small that such exemptions could not possibly pose any reasonable threat to herd immunity.¹¹¹ Under the reasoning in *Burwell*, then, providing accommodation to those individuals whose religious convictions forbid them from receiving a COVID-19 vaccine would serve a state's interest in herd immunity just as effectively as would a harsh exemption-free mandate.¹¹² Because such a mandate would fail to

¹⁰⁶ Joshua T.B. Williams et al., *Religious Vaccine Exemptions in Kindergartners: 2011–2018*, J. AM. ACAD. PEDIATRICS (Nov. 4, 2019), <https://pediatrics.aappublications.org/content/144/6/e20192710>.

¹⁰⁷ See *supra* text accompanying note 19.

¹⁰⁸ *Religious Landscape Study*, PEW RES. CENTER, <https://www.pewforum.org/religious-landscape-study/> (last visited Nov. 20, 2020).

¹⁰⁹ Seither et al., *supra* note 103.

¹¹⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728–29 (2014).

¹¹¹ See *supra* text accompanying notes 105–08.

¹¹² See *Burwell*, 573 U.S. at 732.

achieve herd immunity by the least restrictive means possible, it could not satisfy strict scrutiny, and would therefore violate our Constitution.

IV. Conclusion

While many might muse over ideals of self-sacrifice in service of the common good, it must be remembered that we live in a society governed by the rule of law as enshrined our Constitution, a constitution which guarantees certain fundamental liberties in the Bill of Rights. At the helm of this Bill of Rights is the First Amendment and its Free Exercise Clause, which guarantees each citizen the security of knowing that “Congress shall make no law . . . prohibiting the free exercise” of his religion.¹¹³ Although, as we have seen, there are limits to this right, this basic liberty forms the bedrock of our national identity and should not be lightly cast aside.

This basic principal of our Constitution holds just as true when a person’s faith precludes him from accepting a vaccination as it does for others who might seek to participate in Holy Communion or to be excused from work to pray the Salah.¹¹⁴ Although sweeping vaccination mandates were once thought to be beyond the reaches of the Constitution, in light of the development of Free Exercise jurisprudence over the past century, it is time to reconsider this broad power that we unquestioningly believed the states to hold, at least when religious interests are at stake. For better or worse, it is often crisis that fuels change. Perhaps, then, the COVID-19 crisis will provide the fertile soil for the Court to firmly establish that which is necessitated by its Free Exercise jurisprudence: a COVID-19 vaccination mandate that fails to accommodate religious objectors would unlawfully value the secular over the religious and would needlessly restrict the free exercise of one’s faith. Hence, it is unconstitutional.

¹¹³ U.S. CONST. amend. I.

¹¹⁴ The term “Salah” refers to the ritual prayers performed by Muslims five times per day. Elizabeth Podrebarac Sciupac, *U.S. Muslims are religiously observant, but open to multiple interpretations of Islam*, PEW RES. CENTER (Aug. 28, 2017), <https://www.pewresearch.org/fact-tank/2017/08/28/u-s-muslims-are-religiously-observant-but-open-to-multiple-interpretations-of-islam/#:~:text=A%20majority%20also%20say%20that,of%20the%20salah%20every%20day>