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THE CONSTITUTIONALITY OF OPTING OUT OF ADOLESCENT SEX: HPV VACCINE-MANDATE LEGISLATION RAISES CONSTITUTIONAL QUESTIONS

Ariel Pizzitola *

I. HOW THE INTRODUCTION OF THE HUMAN PAPILLOMAVIRUS VACCINE CHANGED THE SCOPE OF VACCINE-MANDATE LEGISLATION

The human papillomavirus (HPV)\(^1\) is considered to be the most widespread sexually transmitted disease in the United States.\(^2\) In 2003, HPV caused one hundred percent of the cases of cervical cancer in the United States.\(^3\) Moreover, it is projected that eighty percent of women will contract the disease by the age of fifty.\(^4\) The infection manifests itself in a number of

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* J.D. Candidate, Catholic University of America Columbus School of Law, May 2009; B.A., Boston University, May 2006. The author thanks Professor Michael Noone for his expert feedback throughout the writing process. The completion of this article would not have been possible without the editors and staff of The Journal for Contemporary Health Law and Policy. The author also wishes to thank her parents for their unwavering support.

1. See generally CTRS. FOR DISEASE CONTROL & PREVENTION, DEP’T OF HEALTH & HUMAN SERVS., CDC FACT SHEET: GENITAL HPV INFECTION 1-2 (2004), http://www.cdc.gov/STD/HPV/hpv.pdf. HPV is the term used to describe a group of viruses that represents more than one hundred different strains. According to the CDC, more than 30 of these viruses are sexually transmitted, and they can infect the genital area of men and women including the skin of the penis, vulva (area outside the vagina), or anus, and the linings of the vagina, cervix, or rectum. Most people who become infected with HPV will not have any symptoms and will clear the infection on their own. Id. at 1.


3. Id. at 416.

4. Id. at 411 (citing Press Release, Ctrs. for Disease Control & Prevention, CDC’s Advisory Committee Recommends Human Papillomavirus Virus Vaccination (June 29, 2006), available at http://www.cdc.gov/od/oc/media/pressrel/r060629.htm). See also Ctrs. for Disease Control & Prevention, Dep’t of Health & Human Servs., HPV Vaccine -
ways: some infections cause genital warts, others display no symptoms, and ninety percent disappear within a couple of years. However, certain strains of HPV are known to cause cervical cancer in women as well as other cancers in men.

The medical community firmly established a link between HPV and cervical cancer during the late twentieth century and, during this time, the pharmaceutical companies Merck and GlaxoSmithKline began to develop preventative vaccines. In December 2005, Merck tendered its application for Gardasil, the first HPV vaccine, to the Food and Drug Administration (FDA) for fast-track approval. The FDA licensed Gardasil the following


5. Id.


Cervical cancer is the cancer of the cervix (the lower part of the uterus that connects to the vagina). Cervical cancer is caused by certain high-risk types of HPV. When a female becomes infected with certain types of HPV and the virus doesn’t go away on its own, abnormal cells can develop in the lining of the cervix. If not discovered early and treated, these abnormal cells can become cervical precancers and then cancer.

Id.

7. Bristol, supra note 2, at 411.

8. Id. at 419. In her article, Bristol explains that the relationship between sex and cervical cancer was first suspected during the nineteenth century in Italy, when physicians noticed that, unlike nuns, both prostitutes and married women contracted the disease. Id. In the early twentieth century, American physician George Papanicoloau detected abnormal cervical cells through vaginal smears; today, the “pap” smear is a widely used and effective cervical cancer screening procedure. Id.

9. See generally RAPID PUB. HEALTH POL’Y RESPONSE PROJECT, SCH. OF PUB. HEALTH & HEALTH SERVS. OF THE GEO. WASH. UNIV., HPV VACCINATION: SHOULD IT BE RECOMMENDED OR REQUIRED? 1 (Jan. 2007) [hereinafter GWU]. The vaccine is administered in three doses. Id. Dose two is administered two months after dose one, and dose three is administered four months after dose two. Id. Studies indicate that the vaccine is effective for at least five years. Id.

10. Bristol, supra note 2, at 419.
June.¹¹ Gardasil targets the four most serious strains of HPV: 16 and 18, which cause cervical cancer, and 6 and 11, which cause genital warts.¹² Cervarix, the British company GlaxoSmithKline's HPV vaccine, is currently up for consideration at the FDA.¹³ Cervarix protects against HPV strains 16 and 18, the most prevalent causes of cervical cancer tumors.¹⁴

Notably, at least forty-one states have introduced legislation providing for public education regarding the HPV vaccine, and at least seventeen states succeeded in enacting related statutes, including: Colorado, Indiana, Iowa, Maine, Maryland, Minnesota, Nevada, New Mexico, New York, North Carolina, North Dakota, Rhode Island, South Dakota, Texas, Utah, Virginia, and Washington.¹⁵ Only Virginia and the District of Columbia have been successful in taking the additional step of implementing vaccine-mandate legislation.¹⁶

The objections voiced by the vaccine's critics are numerous. For example, the vaccine's critics point to the fact that HPV is not "in the air;" it is spread only through sexual intercourse or other forms of sexual activity.¹⁷

¹¹ Id. at 411.


The rationale behind vaccinating against more broadly communicable diseases, like the measles, is far more obvious, especially when admission to the public school systems is concerned. A child infected with an airborne disease is more likely to transmit the virus to a fellow student in class; the same is not true of a child infected with HPV. These critics argue that, because an imminent danger to third parties is not present, HPV vaccine-mandate legislation is overly paternalistic.

Some critics suggested that vaccinating young girls against a sexually transmitted disease would encourage promiscuous conduct, despite parental opt-out provisions in HPV vaccine-mandate legislation. Such provisions usually allow a parent to opt out on medical, philosophical, or religious grounds. Many parents who are against the vaccine claim that their children will remain abstinent until marriage, but the Center for Disease Control (CDC) reports that forty-three percent of American girls are sexually experienced by the age of seventeen. This percentage increases to seventy percent by the time they reach age nineteen.

18. See generally Mayo Clinic, Measles; Causes (2007), http://www.mayoclinic.com (type “measles” into the search box; follow “measles” hyperlink under “Search results”; follow “causes” hyperlink under “Article Sections”). The Mayo Clinic reports that the measles is a virus “so contagious that if one person has it, 90 percent of that person’s close contacts who aren’t immunized will become infected.” Id.

19. Bristol, supra note 2, at 416. According to Cynthia Dailard, history, as supported by a large body of evidence, suggests that the most effective way to achieve universal vaccination is by requiring children to be inoculated prior to attending school. Yet the link between HPV and sexual activity—and the notion that HPV is different from other infectious diseases targeted by vaccine school entry requirements—tests the prevailing justification for such efforts.


22. Bristol, supra note 2, at 418.

23. Id.

While vaccine-mandate legislation generally has contained opt-out provisions, the opt-out provisions contained in HPV vaccine-mandate legislation have been especially liberal. For example, the Virginia legislature passed HPV vaccine-mandate legislation with a liberal opt-out provision that provides that parents need not submit their decision for exemption in writing.\textsuperscript{26} The Association of Immunization Managers (AIM)\textsuperscript{27} expressed concerns that "controversial immunizations might be mandated with liberal opt-out provisions that could spill over into other vaccines vital for public safety."\textsuperscript{28} Opt-out provisions can be especially problematic because research indicates that there are higher incidences of vaccine-preventable diseases in children claiming exemptions,\textsuperscript{29} and naturally, that such children sometimes lead to disease outbreaks.\textsuperscript{30}

Additionally, liberal opt-out provisions clearly do not satisfy those who object to HPV vaccination programs on a general level.\textsuperscript{31} If they did, presumably more legislation regarding HPV vaccination programs would have already been passed. As stated above, only Virginia and the District of Columbia have passed such legislation. This comment explores the various

\begin{itemize}
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} VA. CODE ANN. § 32.1-46 (2007).
  \item \textsuperscript{27} The Association of Immunization Managers is a non-profit organization committed to enabling "immunization managers to effectively prevent and control vaccine-preventable diseases and improve immunization coverage in the United States and its territories." The Association of Immunization Managers, About Us, http://www.immunizationmanagers.org/about/index_about.phtml (last visited Mar. 27, 2008).
  \item \textsuperscript{28} See Bristol, supra note 2, at 412; see also Santosky v. Kramer, 455 U.S. 745, 753 (1982) (holding that the Fourteenth Amendment protects a parent’s fundamental liberty interest with respect to the “care, custody, and management” of one’s child).
  \item \textsuperscript{29} For example, there are more cases of the whooping cough in states that allow personal belief exemptions, as opposed to states that provide only for religious exemptions. See GWU, supra note 9, at 3.
  \item \textsuperscript{30} See Bristol, supra note 2, at 418.
  \item \textsuperscript{31} California Republican state Sen. George Runner explained, “I have certain values and issues which I deal with my daughter on. And it seems to send an inconsistent message about sexual activity.” Bristol, supra note 2, at 412.
\end{itemize}
constitutional objections that could be raised if HPV-vaccine mandate legislation was challenged in court. First, the comment identifies the constitutional grounds on which vaccine legislation has been challenged in the past. Specifically, the jurisprudence in this area has centered on the constitutionality of religious exemptions provided for in vaccine-mandate legislation. The comment then analyzes how similar attacks could be made on HPV vaccine-mandate legislation as it currently stands. Importantly, the comment discusses how a court might treat the liberal opt-out provisions included in HPV vaccine-mandate legislation. Lastly, the comment suggests language that would most likely be held constitutional in court, while noting relevant policy considerations at work.

II. JURISPRUDENCE REGARDING VACCINE-MANDATE LEGISLATION

A. A state may enact compulsory vaccination laws pursuant to its broad police power in the realm of public health.

In Jacobson v. Massachusetts, decided in 1905, the Supreme Court of the United States upheld a Massachusetts law that required all citizens to be vaccinated, explaining that the state legislature lawfully exercised its police power in enacting the statute.\(^{32}\) The Court explained that “although this court has refrained from any attempt to define the limits of that power, it has distinctly recognized the authority of a state to enact quarantine laws and health laws of every description.”\(^{33}\) The Court held that the broad police power of a state stemmed from the Tenth Amendment of the United States Constitution, which provides that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”\(^{34}\)

The rationale behind authorizing a mass immunization program rests in part on the principle of self-defense; when a community is threatened by the outbreak of disease, it may take appropriate measures to defend itself.\(^{35}\) Consequently, courts are typically deferential to the decisions of state legislatures to require the vaccination of its citizens. In Jacobson, the Supreme Court cited Viemeister v. White, a case decided by the Court of


\(^{33}\) Id. at 25.

\(^{34}\) U.S. CONST. amend. X.

\(^{35}\) Jacobson, 197 U.S. at 27.
Appeals of New York, which upheld a statute providing for the exclusion of unvaccinated children from attending public schools.\textsuperscript{36} Although the professional medical community did not unanimously conclude that the vaccine prevented smallpox, the Court of Appeals of New York concluded that the common belief indicated that the vaccine had "a decided tendency to prevent the spread of this fearful disease" and therefore the state legislature's action was valid.\textsuperscript{37}

Seventeen years later, the Supreme Court, in \textit{Zucht v. King}, upheld the ordinances of the City of San Antonio, Texas, which prohibited unvaccinated children from entering any public school or place of education.\textsuperscript{38} The plaintiff challenged the statute on equal protection and due process grounds.\textsuperscript{39} The Court dismissed her constitutional objections, holding that "these ordinances confer not arbitrary power, but only that broad discretion required for the protection of public health."\textsuperscript{40}

\textbf{B. Courts have widely upheld the constitutionality of opt-out provisions in vaccine-mandate legislation.}

In \textit{Jacobson}, the Supreme Court noted that the police power does have its limits, explaining that a local law, even if founded upon a state's police powers, is invalid if it conflicts with the powers of the federal government under the United States Constitution.\textsuperscript{41} Although mass immunization programs have been upheld as constitutional, complications arise when state legislatures write exemptions into these statutes. For example, vaccine-mandate legislation requiring the vaccination of children as a precondition to entering public school commonly includes provisions that allow parents to opt out on behalf of their children on the basis of an objection recognized in

\begin{itemize}
\item \textsuperscript{36} \textit{Id.} at 34–35.
\item \textsuperscript{37} \textit{Id.} at 34.
\item \textsuperscript{38} \textit{Zucht v. King}, 260 U.S. 174, 177 (1922); \textit{see also generally} \textit{Utah ex rel. Cox v. Bd. of Educ. of Salt Lake City}, 60 P. 1013 (Utah 1900) (holding that an order requiring minor children to be vaccinated against smallpox as a precondition to attending school was reasonable in light of a smallpox outbreak).
\item \textsuperscript{39} \textit{Id.} at 176.
\item \textsuperscript{40} \textit{Id.} at 177.
\item \textsuperscript{41} \textit{Jacobson}, 197 U.S. at 28.
\end{itemize}
the statute.\textsuperscript{42} Such objections can rest on medical, religious, or philosophical reasons.\textsuperscript{43} The constitutionality of these opt-out provisions has been challenged in both state and federal courts, with varying success.

Notably, state legislatures must be careful when drafting exemptions. If an exemption is held unconstitutional, some courts have "severed" it from the remaining valid portion of the statute.\textsuperscript{44} The effect of such a severance is to have vaccine-mandate legislation with no exemption whatsoever.\textsuperscript{45} In \textit{Boone v. Boozman}, the United States District Court for the Eastern District of Arkansas explained that the fact that the religious exemption was unconstitutional did "not dismantle the entire immunization statute."\textsuperscript{46} In \textit{Davis v. State}, the Supreme Court of Maryland similarly held that the unconstitutional exemption was severable, reasoning that, "when the dominant purpose of a statute may largely be carried out notwithstanding the invalid provision, courts will ordinarily sever the statute and enforce the valid portion."\textsuperscript{47}

1. \textit{Religious exemptions have generally been upheld so long as they do not infringe upon First Amendment rights.}

The case law with respect to religious exemptions is instructive with respect to how courts typically handle these types of opt-out provisions. Courts have widely upheld the general constitutionality of religious

\textsuperscript{42} Whether an action for parental neglect could be maintained against a parent who opted out on behalf of a child warrants consideration. Although the petition for neglect was dismissed, \textit{In re Maria R.}, is instructive. \textit{In re Maria R.}, 366 N.Y.S.2d 309 (N.Y. Fam. Ct. 1975). In that case, the Family Court of New York, New York County, held that because the R. family held bona fide religious beliefs prohibiting vaccination and immunization, the neglect petition could not stand. \textit{Id.}

\textsuperscript{43} \textit{See Part I supra.}

\textsuperscript{44} \textit{See, e.g., Boone v. Boozman, 217 F. Supp. 2d 938, 952 (E.D. Ark. 2002) (denying plaintiff's request that the court re-write the statutory exemption).}

\textsuperscript{45} \textit{Id. at 952. In other words, if a religious exemption written into vaccine-mandate legislation is held unconstitutional, a court could strike the exemption without striking down the legislation itself. Therefore, a compulsory law would remain without the flexibility of an exemption.}

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Davis v. State, 451 A.2d 107, 114 (Md. 1982).}
exemptions provided in vaccine-mandate legislation.\textsuperscript{48} However, a minority of courts has struck exemptions on various grounds. For example, the Supreme Court of Mississippi concluded in \textit{Brown v. Stone} that an exemption providing for a parent to opt out on behalf of his or her child based on religious beliefs violated the Equal Protection Clause of the United States Constitution.\textsuperscript{49} This clause provides that no citizen shall be denied the equal protection of the nation's laws.\textsuperscript{50} The court's holding rested on the statute's requirement that the majority of children receive the vaccine, yet permitted them to attend school with children who had not been vaccinated.\textsuperscript{51}

Other courts striking religious exemptions did so on the grounds that a state's police power with respect to vaccinating its citizens trumps the individual's rights under the Free Exercise Clause of the First Amendment.\textsuperscript{52} The Free Exercise Clause prohibits the state from infringing upon the individual's free exercise of his or her religion.\textsuperscript{53} In \textit{Jones v. City of Moultrie}, the Supreme Court of Georgia explained, "[a] person's right to religious freedom, which may be manifested by acts, ceases where it overlaps and transgresses the rights of others."\textsuperscript{54} The court noted that the Free Exercise Clause is not without its limits; the effect of an unlimited right would be to make "the professed doctrine of religious faith superior to the law of the land . . . ."\textsuperscript{55}

\textsuperscript{48} Cf. McCarthy v. Boozman, 212 F. Supp. 2d 945 (W.D. Ark. 2002) (holding that states may adopt mass immunization programs pursuant to their police powers and are not required to write opt-out provisions into the statutes).

\textsuperscript{49} Brown v. Stone, 378 So. 2d 218 (Miss. 1979).

\textsuperscript{50} U.S. CONST. amend. XIV, § 1.

\textsuperscript{51} Brown, 378 So. 2d at 223.

\textsuperscript{52} U.S. CONST. amend. I.

\textsuperscript{53} Id.

\textsuperscript{54} Jones v. City of Moultrie, 27 S.E.2d 39, 42 (Ga. 1943); see also Cude v. State, 377 S.W.2d 816 (Ark. 1964) (holding that constitutional right to religious freedom ends when it overlaps with the rights of others); Anderson v. State, 65 S.E.2d 848 (Ga. 1964) (holding that parent's refusal to immunize children transgressed the rights of others due to the dangers presented by disease).

\textsuperscript{55} Id.
The United States District Court for the District of New Hampshire held in *Avard v. Dupuis* that a religious exemption was unconstitutionally vague and in contravention of the Due Process Clause of the Fourteenth Amendment. The provision granted total discretion to local school boards to determine whether a child should be exempted from vaccination on a religious basis. The court explained that the statute "denies plaintiff a meaningful right to be heard by leaving him in the position of not knowing what material to present to the Board to make its decision." In dictum, the court also considered the possibility that this statute might have equal protection implications. Without standards to guide the local school boards in making their decisions, it was possible that similarly situated persons would be treated differently under the statute.

Equal protection considerations are also raised when religious objections apply only to members of certain religious faiths. In *Dalli v. Board of Education*, the Supreme Judicial Court of Massachusetts held that an exemption that applied only to parents who subscribed to the "tenets and practice of a recognized church or religious denomination" violated the Free Exercise Clause, because it excluded those who did not belong to an established religious faith. The court further held that this statute violated the Equal Protection Clause because those belonging to organized religious groups enjoyed "the benefit of an exemption which is denied to other persons whose objections to vaccination are also grounded in religious belief."

Some district courts have declined to include moral objections within the umbrella of objections that are traditionally considered religious. For example, the court in *Farina v. Board of Education* held that parents could not claim a religious exemption if their beliefs were founded upon "medical or purely moral considerations," "scientific and secular theories," or


57. *Id.* at 481.

58. *Id.* at 483.

59. *Id.* at 482.

60. *Id.*


62. *Id.* at 222.
"philosophical and personal beliefs." Similarly, in Hanzel v. Arter, the court declined to extend a religious exemption to parents who believed in "chiropractic ethics" on the grounds that philosophical beliefs should not receive the same deference as religious ones.

However, some courts have held that inquiries may not be made into the sincerity of the parents' religious beliefs. In Department of Health v. Curry, the court concluded that the department of health superseded its authority by requiring a parent to justify the exemption on religious grounds. The court explained that, in enacting such a statute and providing for a religious exemption, the state legislature had two competing objectives in mind: the goal to protect public health and welfare versus respecting the rights of parents to raise their children according to their own religion. According to the court, greater deference must be given to the parental objections when these two objectives are in conflict.

Notably, the Supreme Court has not yet ruled on the constitutional issues raised with respect to religious exemptions provided in vaccination statutes. However, in Wisconsin v. Yoder, the Supreme Court held that the state did not have the authority to compel Amish children to attend school beyond the eighth grade. Although a state's police power enables it to enact a compulsory school attendance law, the Court concluded that it was in violation of the Free Exercise Clause. The Court explained that "[t]he trial testimony showed that respondents believed, in accordance with the tenets of


64. Hanzel v. Arter, 625 F. Supp. 1259, 1265 (S.D. Ohio 1985); see also In Matter of Christine M., 595 N.Y.S.2d 606 (N.Y. Fam. Ct. 2002) (holding that the child was not exempt because father's beliefs were rooted in medical and scientific concerns).

65. Dept. of Health v. Curry, 722 So. 2d 874, 877 (Fla. Dist. Ct. App. 1998). But see Mason v. General Brown Cent. School Dist., 851 F.2d 47, 54 (2d Cir. 1988) (holding that the parents have the burden of showing that they were members of a recognized religious organization whose teachings were incompatible with immunization or that their opposition or that their opposition to immunization was a personal belief that is followed sincerely).

66. Id. at 877.

67. Id.


69. Id. at 207.
Old Order Amish communities generally, that their children’s attendance at high school, public or private, was contrary to the Amish religion and way of life. The deference shown in this case indicates that the Supreme Court might treat a religious objection to a vaccine mandate similarly.

In *Boone*, the United States District Court for the Eastern District of Arkansas considered whether a religious exemption violated the Establishment Clause of the First Amendment of the United States Constitution. This clause provides that no law shall be made respecting an establishment of religion. When a challenge is based on the Establishment Clause, a court must apply strict scrutiny if the statute discriminates among religious sects. Although the plaintiff claimed to be a religious person, she was denied an exemption on her daughter’s behalf because “she was not a member of any church.” The court in *Boone* noted that strict scrutiny was the appropriate standard of review because the religious exemption facially applied only to organized religious faiths. The court held that the religious exemption was an unconstitutional violation of the Establishment Clause.

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70. *Id.* at 209.

71. *Id.* at 207. In that case, the Supreme Court held that the individual’s right to exercise his or her religion in accordance with the First Amendment trumped the State’s police powers with respect to public education. *Id.* Although the Supreme Court’s deference to the Free Exercise Clause in *Wisconsin v. Yoder* is instructive, that case focused on public education. *Id.* Should the Court rule on the constitutionality of a religious exemption in vaccine-mandate legislation, the scales might be tipped the other way in favor of public health. A court could reasonably conclude that the state’s interest with respect to public health is stronger than its interest concerning public education. See, e.g., *In re Cochise County Juvenile Action No. 5666-J*, 650 P.2d 459, 465 (Ariz. 1982) (applying *Yoder* with respect to balancing the state’s interest in medical care for children against the interests of religious freedom).


73. *U.S. Const.* amend. 1.


75. *Id.* at 944.

76. *Id.* at 945–46. The Boone court explained that the standard by which a statute is evaluated under the Establishment Clause depends upon whether the statute in question facially discriminates among varying religious sects. *Id* at 945. If the statute is facially discriminatory, a court should apply strict scrutiny. *Id.* The court, however, applied the “less stringent, familiar three-pronged test announced in *Lemon v. Kurtzman*, because the
Moreover, the plaintiff in *Boone* argued further that the statute similarly violated her due process rights under the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment provides that a state cannot "deprive any person of life, liberty, or property, without due process of law." The court noted that the plaintiff correctly pointed out that the liberty protected by this clause presumably includes the right to refuse medical treatment. Yet, the court quoted the United States Supreme Court, which held that, "determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; whether [an individual’s] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." In *Boone*, the court concluded that the State’s interest in immunizing children outweighed the educational right of the plaintiff’s daughter; the court explained that “the right to an education is not provided explicit or implicit protection under the Constitution and is not a fundamental right or liberty.”

C. Courts have upheld the authority of state legislatures to require vaccination against hepatitis B, which is a sexually transmitted disease.

As stated above, most states require that children be vaccinated against hepatitis B before entering school. Like HPV, hepatitis B is not an

77. *Id.* at 950.

78. *Id.* at 955.

79. U.S. CONST. amend. XIV § 1.


81. *Id.* at 955–56; see also *Cruzan v. Director*, 497 U.S. 261, 279 (1990) (holding that a competent person has a liberty interest in refusing unwanted medical treatment under the Due Process Clause but whether or not that constitutional right has been violated is determined by balancing the liberty interest against the interests of the state).

82. *Id.* at 957.

83. According to Planned Parenthood, “hepatitis is an inflammation of the liver.” Although there are three types of hepatitis viruses that can be transmitted sexually, hepatitis B is the type most likely to be transmitted sexually. Approximately 78,000 Americans are infected with hepatitis B annually. The majority of persons infected with
airborne disease: “the disease is primarily transmitted through plasma; sharing of needles, sexual contact, blood transfusions, or mutual accident resulting in the mixing of blood.” In Boone, the plaintiff argued that her case was distinguishable from “this draconian vaccine jurisprudence” on the grounds that hepatitis B, unlike other diseases, presents no “clear and present danger.” The Boone court, however, disagreed. The court observed that the Supreme Court in Jacobson did not limit its holding to diseases presenting such a danger, and moreover, that the dangerousness of a disease should not solely be judged on whether or not it is airborne. The court pointed to the fact that hepatitis B is spread by bodily fluids, and is one of the leading causes of cancer, and at that point in time, infected 80,000 people each year, mostly young adults.

In 2001, the Supreme Court of Wyoming decided In re LePage, in which the plaintiff invoked the religious exemption provided for in Wyoming’s vaccine-mandate legislation, because she did not want her daughter to receive a hepatitis B vaccine. The plaintiff initially invoked the exemption


86. Id.

87. The National Vaccine Information Center states:
Although CDC officials have made statements that hepatitis B is easy to catch through sharing toothbrushes or razors, Eric Mast, M.D., Chief of the Surveillance Section, Hepatitis Branch of the CDC, stated in a 1997 public hearing that “although [the hepatitis B virus] is present in moderate concentrations in saliva, it’s not transmitted commonly by casual contact.”

National Vaccine Information Center, Hepatitis B, http://nvic.org/Diseases/hepbn/htm (last visited Mar. 16, 2008). An argument could be made that hepatitis B is more communicable than HPV because there is a chance it could be transmitted via casual contact; however, because this chance is rather small, this argument is not persuasive. See also Jeffrey S., 896 F. 2d at 509 (“Transmission through other bodily fluids, such as saliva, urine, or tears, is theoretically possible if there is some plasma in those fluids.”).

88. Id.

on the grounds that she did not believe that her daughter would “engage in behavior that involves exposure to blood or bodily fluids,” further stating that “the instituting of mandatory hepatitis B vaccines is the direct result of our children growing up in a declining moral culture.”\textsuperscript{90} The Department of Health denied her invocation on the grounds that her beliefs were not grounded in religion, but rather on philosophy and morality.\textsuperscript{91}

The Supreme Court of Wyoming reversed the Department of Health’s decision. The court referenced the language of the statute, which indicated that “waivers shall be authorized by the state or county health officer upon submission of written evidence of religious objection.”\textsuperscript{92} The court then concluded that “the choice of the word ‘shall’ intimates an absence of discretion by the Department of Health” and that the statutory language itself did not authorize an inquiry into the sincerity of the religious beliefs held by the parent.\textsuperscript{93}

III. HOW THE HPV VACCINE FITS INTO VACCINE-MANDATE JURISPRUDENCE

In light of the jurisprudence surrounding vaccine-mandate legislation, it is important to consider how the introduction of Gardasil fits into the legal equation because it might be challenged in court someday. What kinds of constitutional challenges could be made and how might they be decided? In drafting HPV vaccine-mandate legislation, state legislatures will need to keep these considerations in mind, especially with respect to the provisions allowing parents to opt out. As noted above, a court can strike an unconstitutional provision from an otherwise valid law, thereby leaving in its place a compulsory law providing for no objections whatsoever.\textsuperscript{94}

\textsuperscript{90} Id. at 1178.

\textsuperscript{91} Id. at 1179.

\textsuperscript{92} Id.

\textsuperscript{93} Id. at 1180.

\textsuperscript{94} See Davis v. State, 451 A.2d 107, 115 (Md. 1982) (holding that the religious exemption was unconstitutional and severable from an otherwise valid immunization program, then affirming petitioner’s conviction for allowing his minor child to be absent from school due to the fact post-severance the statute no longer contains an exemption).
A. The fact that there is authority to require vaccination against hepatitis B suggests that there is similar authority to require vaccination against HPV.

As the United States District Court of the Eastern District of Arkansas correctly noted, in *Jacobson*, the Supreme Court did not limit its holding to airborne diseases that present a clear and present danger. Moreover, courts have generally defined the police power of a state to be considerably broad. When the issue presented relates to public health, courts are typically deferential to the judgment of the state legislatures.

As noted in Part One, a majority of state legislatures have introduced legislation related to the HPV vaccine. In addition, Rick Perry, the Republican Governor of Texas, issued an executive order on February 2, 2007, mandating that all female children entering the sixth grade be vaccinated against HPV as a prerequisite for entering public school. Executive Order RP65 contained provisions for parents to opt out on the


96. See *Slaughter-House Cases*, 83 U.S. 36, 87 (1873) (explaining that the police “power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways”).

97. See *In re Application of Jacobs*, 98 N.Y. 98, 110 (1885) (explaining that “[g]enerally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts.”).

98. See supra Part I.

99. Because Gardasil prevents infection, its effectiveness is dependent upon the vaccination of females before they are exposed to the virus. Therefore, the CDC’s Advisory Committee recommends the vaccination of eleven- and twelve-year-old girls and approves the vaccination of females ages nine to twenty-six. See Gudeman, Rebecca Gudeman, “High Cost of HPV Vaccine Limits Use in Surprising Way: The Problem with Private Insurance,” *Youth Law News*, April–June 2007 (available at http://www.youthlaw.org/publications/yn/2007/april_june_2007). The vaccine’s objective is to immunize a girl before the onset of sexual activity. See GWU, supra note 9, at 2.

100. Texas Register, 32 Tex. Reg. 599 (Feb. 16, 2007).
basis of a "conscientious objection." Texas conservatives widely criticized the Governor's action, arguing that it would promote promiscuity. The state legislature enacted legislation to override this executive order, which Governor Perry chose not to veto.

Perhaps the actions taken by the Texas state government were prompted by the CDC's official endorsement of the HPV vaccine; it was recommended for eleven- and twelve-year-old girls on March 12, 2007. Although the CDC's recommendations are non-binding, they dictate immunization policies on a national level and a majority of states defer to the agency's judgment when determining which immunizations should be required as a prerequisite for admission to public schools.

Texas was not the only state that introduced legislation pertaining to the HPV vaccine. Several states have made progress in addressing the problem of HPV. Notably, Michigan was the first state to introduce HPV vaccine-mandate legislation. In November 2006, New Hampshire became the first state to provide the vaccine free of charge to all young girls. Only Virginia and the District of Columbia were successful in their efforts to mandate the vaccine for sixth-grade girls. Texas has the second highest rate of cervical cancer, the District of Columbia having the first.

Not only do state legislatures have the authority and power to vaccinate against HPV, forty-two states (as of 1999) require that children receive the

101. Id.


103. Id.

104. See Brody, supra note 17, at F7.

105. See Bristol, supra note 2, at 411-12.

106. Id. at 423.


108. See Bristol, supra note 2, at 423.

109. Id.
hepatitis B vaccine before entering public schools.\textsuperscript{110} Like the plaintiff in Boone, critics argue that the HPV vaccine should not be mandatory on the grounds that the virus is not contagious in the sense that there is potential for transmission in a classroom.\textsuperscript{111} Yet, hepatitis B similarly cannot be contracted in that setting.\textsuperscript{112} Hepatitis B is contracted via sexual conduct and intravenous drug use and yet vaccine requirements for this disease were never challenged to the same degree.\textsuperscript{113}

The moral objections raised with respect to HPV similarly apply to hepatitis B. With respect to hepatitis B, it could be argued that it promotes both promiscuity and drug use, and still, objections against this vaccine were not as pervasive as objections to the HPV vaccine. Those who object to HPV vaccine-mandate legislation on the grounds that it promotes promiscuity and is not an airborne disease will need to distinguish HPV from hepatitis B in order to formulate a persuasive argument. Supreme Court jurisprudence suggests that states have broad discretion in the realm of public health,\textsuperscript{114} and the fact that states have chosen to vaccinate against hepatitis B strongly indicates that there is authority to require vaccination against HPV as well.

B. The fact that the vaccine is intended for females—and not for males—will not support a viable equal protection claim.

Notably, the HPV vaccine-mandate legislation introduced thus far pertains only to young girls, and not to boys.\textsuperscript{115} Such legislation could be challenged


\textsuperscript{111} See Bristol, supra note 2, at 416.

\textsuperscript{112} Id.

\textsuperscript{113} Id.

\textsuperscript{114} See Jacobson v. Massachusetts, 197 U.S. 11, 26 (1900).

\textsuperscript{115} According to the CDC, it is not yet known whether the vaccine is effective in either boys or men, and studies are currently being done to determine whether they should receive the vaccine as well. CDC HPV Vaccine Questions and Answers, http://www.cdc.gov/std/hpv/STDFact-HPV-vaccine.htm#hpvvac1 (last visited Feb. 22, 2008). The CDC suggests that, “it is possible that vaccinating males will have health benefits for them by preventing genital warts and rare cancers, such as penile and anal cancer. It is also possible that vaccinating boys/men will have indirect health benefits for girls/women.” Id.
in court on equal protection grounds; for example, it is arguable that, by vaccinating girls and not boys, boys are denied the equal protection of the state’s laws. However, the Equal Protection Clause, like other constitutional rights, is not without its limits. In the City of Cleburne v. Cleburne Living Center, the United States Supreme Court held that a court should apply minimum scrutiny in analyzing a state legislature’s action when “individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement,” and in such cases, “the equal protection clause requires only a rational means to serve a legitimate end.”

If HPV vaccine-mandate legislation were challenged in court on equal protection grounds, a court would most likely conclude that the legislation is constitutional. Because HPV vaccine-mandate legislation discriminates based on sex, it is subject to review under the Equal Protection Clause. A party seeking to uphold the legislation’s classification then carries the burden of providing an “exceedingly persuasive justification” for the classification. Here, the individuals affected by the law in question are young girls. Their gender is relevant to the interests that the state has the authority to implement; the fact that they are female makes them susceptible to developing cervical cancer if they contracted the virus. Because 100% of the cases of cervical cancer are caused by HPV in the United States, a court most likely would not have difficulty concluding that this is an exceedingly persuasive justification for a legislature’s decision to vaccinate young girls—rather than boys—against HPV.

Still, it is important to note that HPV does cause some cancers in men. Whether or not this law would be in violation of the Equal Protection Clause

117. See Reed v. Reed, 404 U.S. 71, 75 (1971).
119. Although boys and men are obviously not susceptible to developing cervical cancer, they do more than simply carry the disease. According to Dr. Bernadine Healy, Genital warts are a common sign of HPV infection in men, and HPV—rarely but surely—can lead to carcinoma of the penis. There is also evidence that as many as 20 percent of head and neck cancers, particularly cancer of the mouth and tonsil, are linked to HPV 16. Bernadine Healy, M.D., Don’t Rush to Judgment, U.S. NEWS & WORLD REP., Feb. 26, 2007, available at http://health.usnews.com/usnews/health/articles/070218/26healy.htm. However, more is known about HPV in women because of pap smear technology. Id.
might change in the future if the vaccine were tested on males and proven to be effective in preventing the transmission of the disease. In that case, a court would have difficulties justifying the application of the law only to young girls and not to young boys. This consideration, however, is not relevant at the present time. Although Gardasil is licensed for girls and women only, studies are currently being performed to determine whether the vaccine would be similarly effective if administered to boys and men.  

C. A religious exemption provided for in HPV vaccine-mandate legislation will pass muster in court so long as it does not run afoul of the First Amendment.

As stated above, vaccine-mandate legislation has commonly included provisions that allow parents to opt out on behalf of their children provided they submit a medical or religious exemption. The majority of the case law has dealt with the constitutional issues implicated by the religious exemption. Virginia and the District of Columbia have provided for both medical and religious exemptions in their HPV vaccine-mandate legislation, which have been signed into law.  

The case law concerning the religious exemption tends to support the notion that while states do not have an obligation to provide for a religious exemption, if they do so, the exemption must not violate the Free Establishment, Free Exercise, or Equal Protection Clauses of the United States Constitution. Courts have held religious exemptions to be facially void when applied only to organized religious faiths; in these cases, the exemption has been held to violate the Equal Protection and Free Establishment Clauses.  

Moreover, courts have objected to the way in which a request for a religious exemption has been administratively evaluated. For example, some courts have held that the government may not inquire as to the sincerity of the parents' beliefs. Others have held that such inquiries may


122. See supra Part II(b)(1).


124. See, e.g., In re LePage, 18 P.3d 1177, 1180 (Wyo. 2001).
be made, and that religious exemptions do not apply to those whose beliefs are grounded in philosophy, science or morality. Because different jurisdictions have handled this question differently, and because it cannot be predicted with accuracy at this time how a parental request for a religious exemption would be handled, this question is an open one. As a preliminary consideration, if a court concluded that a religious exemption is inapplicable to those whose beliefs are founded in moral considerations, then that same court would probably also conclude that the exemption is inapplicable to a parent objecting to the HPV vaccine on the grounds that it promotes promiscuity.

The religious exemptions in the legislation passed in Virginia and District of Columbia appear facially valid, as far as potential Equal Protection and Free Establishment claims are concerned. While the District of Columbia asserts that a religious objection must be made in "good faith," the Commonwealth of Virginia requires that the parent(s) object on the grounds that the administration of the vaccine "conflicts with his religious tenets or practices, unless an emergency or epidemic of disease has been declared by the Board." Because this language does not tend to prefer certain religious faiths, it should pass constitutional muster in court.

D. The catchall waivers provided for in HPV vaccine-mandate legislation are susceptible to equal protection claims and may dilute the force of other vaccine-mandate legislation.

One interesting difference between HPV mandate-legislation and vaccine-mandate legislation before the introduction of HPV is that both Virginia and the District of Columbia have included catchall waivers that allow parents to opt out of the requirement on any basis whatsoever. Because such waivers are a new phenomenon, no court has had an opportunity to rule on the constitutional issues implicated by such an inclusion.

Virginia's HPV vaccine-mandate legislation passed with the inclusion of a very liberal provision for parents to opt out of the requirement. The


128. See supra Part I.

statute provides that a parent may opt out on religious grounds, or upon a showing that administering the vaccine would be detrimental to the child's health.\textsuperscript{130} Such provisions are typical of vaccine-mandate legislation in general.\textsuperscript{131} The statute provides further that

because the human papillomavirus is not communicable in a school setting, a parent or guardian, at the parent's or guardian's sole discretion, may elect for the parent's or guardian's child not to receive the human papillomavirus vaccine, after having reviewed the materials describing the link between the human papillomavirus and cervical cancer approved for use by the Board.\textsuperscript{132}

In Texas, Governor Perry's executive order contained a similarly broad opt-out provision.\textsuperscript{133} With respect to parents' rights, the order provided that the Department of State Health Services will, in order to protect the right of parents to be the final authority on their children's health care, modify the current process in order to allow parents to submit a request for a conscientious objection affidavit form via the Internet while maintaining privacy safeguards under current law.\textsuperscript{134}

Similar to Virginia, the District of Columbia passed legislation requiring that all females entering grade six be vaccinated against HPV.\textsuperscript{135} The District of Columbia similarly allowed for parents to opt out on the basis of a medical or religious objection.\textsuperscript{136} Also similar to Virginia, the District of Columbia further allows parents to opt out for any reason whatsoever:

The parent or legal guardian, in his or her discretion, has elected to opt out of the HPV vaccination program, for any reason, by signing a form prepared by the Department of Health that states the parent or legal guardian has been

\begin{itemize}
\item \textsuperscript{130} Id.
\item \textsuperscript{131} See Bristol, supra note 2, at 418.
\item \textsuperscript{132} S.B. 1230, 2007 Leg., Reg. Sess. (Va. 2007) (enacted).
\item \textsuperscript{133} 32 Tex. Reg. 599 (Feb. 16, 2007).
\item \textsuperscript{134} Id.
\item \textsuperscript{135} Human Papillomavirus Vaccinating and Reporting Act, D.C. CODE § 7-1602 (2007).
\item \textsuperscript{136} Id.
\end{itemize}
informed of the HPV vaccination requirement and has elected not to participate. ¹³⁷

A potential objection to a catchall waiver is that it is a violation of the Equal Protection Clause. As discussed above, one court held that a religious exemption violates this clause, because it requires the majority of children to receive the vaccination yet requires them to attend school with children who are unprotected. ¹³⁸ A court could potentially rule similarly on this issue. Notably, because HPV is not communicable in a classroom setting, the argument behind an equal protection claim on this basis is not as strong. ¹³⁹

Still, hepatitis B is not communicable in a classroom setting either, and yet no such catchall waiver has been applied with respect to the administration of the vaccine against this virus. ¹⁴⁰ This fact may encourage state legislatures to apply catchall waivers to hepatitis B, as well, and perhaps to other diseases in the interest of keeping vaccine-mandate legislation uniform. In other words, those fears expressed by some critics may prove to be true: the more liberal opt-out provisions of HPV vaccine-mandate legislation may in turn dilute the force of other vaccine-mandate legislation. ¹⁴¹

¹³⁷. *Id.*


¹³⁹. The concept of "herd immunity," however, fits neatly into this context. This idea comes into play "when enough people are protected against the disease to slow or halt person-person transmission, even to those who are not vaccinated because they slip through the crack of the medical system or are exempt for medical, religious or personal reasons." GWU, supra note 9, at 3. That is to say, even if vaccinated students are compelled to attend school with those who are not vaccinated, the transmission slows due to the fact that the majority has been vaccinated.

¹⁴⁰. However, even if no catchall waiver exists, that does not necessarily prohibit a court from treating a religious exemption as such. For example, in *In re LePage,* 18 P.3d 1177, the Supreme Court of Wyoming held that the plaintiff's religious objections were valid notwithstanding the fact that her initial application to the Department of Health was founded upon considerations of morality and philosophy. Therefore, if a court interprets the religious exemption quite liberally, its actual effect may resemble that of a catchall waiver.

¹⁴¹. *See supra* Part I.
E. The policy concerns underlying vaccine-mandate legislation are evolving: they are now being used as “color-blind health-delivery programs.”

As explained in Part II of this article, vaccine-mandate legislation was first introduced during a time when the public health was threatened by the outbreak of communicable diseases. This rationale was then extended to the point of requiring the vaccination of children as a prerequisite to entering the public school system. However, as the court in Boone poignantly noted, the Supreme Court’s holding in Jacobson was not limited to those diseases that present a “clear and present danger.”

There is some indication that the underlying rationale behind vaccine-mandate legislation is evolving, at least on a public policy basis. Mass immunization programs have been praised because they ensure that all children receive minimum health care, regardless of their socio-economic status. Experts have pointed out that, for some underprivileged children, mass immunization programs are the only form of health care they receive. Mandating the vaccine makes it more likely that it will be...

142. See supra Part II.

143. According to The George Washington University School of Public Health and Health Services, “studies show that state laws requiring immunization as a condition of enrollment in school increase the use of vaccines, reduce disease, lessen racial disparities in coverage and increase available funding.” GWU, supra note 9, at 2.

144. See Boone, supra note 88, at 954.

145. See Bristol, supra note 2, at 415. William Schaffner, chairman of preventive medicine at Vanderbilt University’s School of Medicine, observed that, “[f]or all the childhood diseases for which there are vaccines and mandates, disparities, for all intents and purposes, have been eliminated.” Id. He noted further that mandates are “the most color-blind health-delivery program that we have in the United States.” Id. Researches at The Miriam Hospital and Brown Medical School published a commentary in the July 2006 issue of The Lancet Infectious Disease in which they noted that “African American women are at twice the risk of dying from cervical cancer than Caucasian women.” African American Women Need to Receive the HPV Vaccine, June 16, 2006, http://www.eurekalert.org/pub_releases/2006-06/I-aaw060806.php. The authors of the commentary suggested that “developing a school-based vaccine delivery program would provide an effective strategy for reaching the broadest number of at-risk African American females.” Id.

146. See supra Part I. Cynthia Dailard noted that, “bearing in mind that school dropout rates begin to climb as early as age [thirteen], middle school might be appropriately viewed as the last public health gate that an entire age-group of individuals...
government funded. Without these programs, state legislatures would not be compelled to fund the administration of these vaccines, and children belonging to families without health insurance would not have access to vaccines deemed necessary to public health. Critics complain that the vaccine is very costly, but the American Journal of Obstetrics and Gynecology noted that the annual burden of cervical HPV-related disease ranges from $2.25 billion to $4.6 billion in the United States alone.

Experts advise that women receive annual pap smears as a means of screening for cervical cancer; when caught early enough, the disease is less likely to be deadly. A young girl without health insurance who only receives a base level of health care via immunization programs enforced by her local school probably is not screened for HPV and cervical cancer on an


147. According to Gudeman, "adolescents without private insurance usually can receive ACIP-recommended vaccines for free or at low cost through the federal Vaccines for Children program or a state-based vaccine program." See Gudeman, supra note 105. Gudeman further notes that privately insured girls may have a harder time than uninsured girls with respect to obtaining the vaccine. Id. Although most large health insurance companies have agreed to cover the HPV vaccine, many doctors and clinics still choose not to stock the newest and most expensive vaccines, such as HPV, because the cost of providing them puts the doctor at financial risk. Id.

148. Courtland Milloy, a columnist for The Washington Post, was highly critical of the D.C. Council's introduction of The HPV Reporting Act of 2007. While noting that white elected officials decided to vaccinate against a sexually transmitted disease in a predominantly black school system, he sarcastically stated, "if the girls' parents can't protect them—and, God knows, they can't protect themselves—then somebody's got to do it." He quipped further, "after all, your daughter is 11 and black, so the assumption is she'll be having sex in no time, but don't take offense." See Courtland Milloy, District's HPV Proposal Tinged With Ugly Assumptions, WASH. POST, Jan. 10, 2007, at B01.

149. Costing $360 to vaccinate just one child, the HPV vaccine is the most expensive of the vaccines recommended for children. See Gudeman, supra note 105. The majority of other recommended vaccines cost less than fifty dollars. Id.

150. See Brody, supra note 17, at F7.

151. Experts recommend annual pap smears even if a woman has been vaccinated against HPV. Although Gardasil protects against the four most serious strains of HPV, other strains could potentially be transmitted. See GWU, supra note 9, at 1.
If she is not vaccinated against HPV, contracts it, and then develops cervical cancer, the onset of the disease probably will not be detected during an annual gynecological visit; after all, it would be unlikely for her to have one in the first place. This young girl would be more likely to suffer from the onset of cervical cancer than would a young girl with access to better health care, because the young girl with access to health care would probably detect the disease earlier and therefore be more successful in fighting against it. Thus, mass immunization would be the most beneficial to those young girls who would not otherwise be able to detect HPV or the onset of cervical cancer.

IV. CONCLUSION

Under their constitutionally recognized police powers, the states have broad discretion with respect to issues affecting public health. This discretion has been used to mandate vaccination as a precondition to entry into the public school system. This action is easy to justify with respect to vaccinating against diseases that are communicable in a classroom setting. The question remains whether there is similar authority to vaccinate against a disease like HPV that can be contracted via intimate conduct only. Because courts have upheld legislation that provides for vaccination against hepatitis B, which is also a sexually transmitted disease, this authority seems to exist.

The crux of the issue is the constitutionality of the opt-out provisions that are provided for in vaccine-mandate legislation. Because the introduction of the HPV vaccine induced a heated public response, state legislatures included broad catchall provisions in order to garner the votes necessary to pass the laws. Unlike the religious exemptions provided for in previous

152. Moreover, most girls do not begin seeing a gynecologist regularly until the age of eighteen. Therefore, if a girl—insured or not—contracted HPV before the age of eighteen, the virus may go undetected for quite some time. According to the Kaiser Daily Women’s Health Policy Report,

[doctors disagree about when girls should begin seeing a gynecologist for an annual exam, which includes an exam of the genitals, cervix and uterus in addition to a pap test. Some doctors suggest that regular screenings should begin at age [fifteen] because girls are maturing earlier and becoming sexually active at a younger age. However, most doctors agree that girls should begin by having exams by the age of [eighteen] or as soon as they become sexually active.

vaccine-mandate legislation, these catchall provisions have not been tested in court and could be susceptible to equal protection claims.

As state legislatures navigate their way through potential HPV vaccine-mandate legislation, they should bear in mind the potential constitutional issues implicated by the introduction of not only the program itself, but also by its exemptions. An exemption held to be unconstitutional could be stricken from an otherwise valid law, thereby leaving the valid law in effect without the comfort of the opt-out provisions provided by the legislature.