

WHO SHOULD CALL THE SHOTS? PROPOSING FEDERAL OVERSIGHT OF MANDATORY CHILDHOOD
VACCINATIONS

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“In a democracy laws are not made to meet the predilections of individuals, nor to feed mistaken views which an individual might hold, when that view is detrimental to the people as a whole. Laws are made for the protection of all, and such laws are enforced even if the law is distasteful to some individual – yes, even if the law is hateful to some individual.”¹

I. INTRODUCTION

The United States was founded on the principle of personal freedom, famously “secur[ing] the blessings of liberty” for generations.² However, it is commonly accepted (albeit sometimes grudgingly) that this freedom is not absolute, as one’s exercise of personal freedom cannot infringe upon another citizen’s exercise of their own freedom. Federal and state governments are charged, not with determining whether citizens have freedoms, but rather with drawing boundaries and determining when one’s actions impede the rights of another. For example, America’s basic principles dictate that one should have the freedom to refuse to be vaccinated for any reason including, distrust in science or wish to avoid physical discomfort. At the same time, parents have the right to send their children to receive an education in a safe environment.

For over a century, state governments have attempted to toe the fine line between respecting a citizen’s decision to refuse a vaccine and protecting the public health. Despite consistent scientific advances in the area of vaccinations, the spread of infectious disease continues today and is likely to remain under the status quo. With that understanding, the federal government is in a much better position than state governments to safeguard public health due to its superior financial and scientific resources and expertise.

¹ *In re Whitmore*, 47 N.Y.S.2d 143, 145 (Dom. Rel. Ct. 1944).

² *See* U.S. Const. pmbl.

This Article argues that the current system of excessive vaccination exemptions, coupled with inconsistent governmental standards and enforcement, inhibits public health goals associated with compulsory immunization. Part II discusses the development of current vaccination laws, including the three commonly accepted exemptions to vaccines. Part III examines the negative impact these exemptions have on the public health. Finally, Part IV urges the federal government to take action by setting stricter standards and influencing states to implement this program by tying it to federal funding for education.

II. BACKGROUND: DEVELOPMENT OF CONTEMPORARY VACCINE REQUIREMENTS

There are many examples in which individual and societal interests conflict, including inhibiting personal autonomy in order to create a society free from infectious diseases. The government's attempt to balance these interests in relation to mandatory vaccination is currently comprised of various federal and state statutes on the issue. The public's legal response has been primarily focused on various constitutional challenges. Despite these unsuccessful challenges, anti-vaccine sentiment continues to increase across the United States.

A. Growth of Legislative Action Creating Mandatory Programs

In 1827, Massachusetts was the first state to require compulsory vaccination.³ While some states followed suit, modern vaccination laws did not gain traction until the 1960s, when a measles outbreak in schools increased the government's support of mass vaccination as a means to prevent – rather than treat – epidemics. During this time, President John F. Kennedy pushed for federal assistance, which resulted in Congress appropriating funds to the Centers for Disease Control and Prevention (CDC) to help state and local governments purchase and administer

³ See James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives - A State of the Art Assessment of Law and Policy*, 90 KY. L.J. 831, 851 (2002).

vaccines for all infectious diseases.⁴ In the aggregate, these vaccines are credited with significantly reducing mortality rates and saving billions in societal resources.⁵ Unsurprisingly, the CDC asserts that vaccinations are the greatest health achievement of the twentieth century.⁶

Today, every state requires that school-aged children be vaccinated in order to attend a public or private school.⁷ Since lawmaker's primary goal is to ensure that individuals are being vaccinated in order to protect the public health at large, the CDC asserts that most vaccinations should be received within two years of birth.⁸ Tying compulsory vaccination to school attendance is a way to ensure that children who may otherwise fall through the cracks are indeed vaccinated by the time they are school aged.

Overall, the development and implementation of today's vaccination statutes relies upon three different entities with different roles working together despite limited resources and negative public perception. First, state legislatures pass laws designating vaccination requirements. Second, state health departments refine the mandate and exemption process. Then third, local school districts and individual schools must carry out the mandates and respond to waiver requests. As such, there are different standards and levels of enforcement not only between states but also between enforcement agencies (from one school district to another).

⁴ *See id.*

⁵ *See* FE Andre et. al., *Vaccination Greatly Reduces Disease, Disability, Death and Inequity Worldwide*, 86 WHO BULLETIN 140, 141 (Feb. 2008) (noting that vaccines prevent an estimated 6 million deaths each year).

⁶ *See* CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., *Impact of Vaccines Universally Recommended for Children – United States, 1900 – 1998*, 281 JAMA 1482, 1483 (1999).

⁷ *See generally* *State Mandates on Immunization and Vaccine-Preventable Diseases*, IMMUNIZATION ACTION COAL. (Feb. 24, 2015), <http://www.immunize.org/laws/>.

⁸ *See generally*, Ctrs for Disease Control & Prevention, *Advisory Committee on Immunization Practices Recommended Immunization Schedules for Persons Aged 0 Through 18 Years — United States, 2015*, 64 MORBIDITY & MORTALITY WKLY. REP. 93-94 (2015).

Today, parents have forgotten the benefits that the measles vaccination provided for their generation – helping to “eliminate” the disease for over a decade – and have opted to exempt their children from all childhood vaccinations. Ultimately, such exemptions would not be an issue if they had no practical negative effects on society and were grounded in solid reasoning. However, as this Article argues, most exemptions are neither.

B. Anti-Vaccine Sentiment Continues to Intensify

Anti-vaccine sentiment originally focused on the belief that such technology was an “inappropriate meddling in the work of God.”⁹ Today, parents’ concerns over the use of vaccines encompass a wide variety of issues, but the most commonly reported concern is the perceived physical harms, especially the likelihood of autism. While it is commonly accepted that nothing is “100% safe,” the reality is that a majority of the side effects from vaccinations are minor and local, including pain or swelling at the injection site.¹⁰ Other, more serious side effects, such as severe allergic reactions, deafness, and seizures, are extremely rare.¹¹ Arguably, the position that a vaccine is not worth the risk (of a tender arm) is overlooking the substantial risk of no vaccination: the increased spread of deadly infectious diseases.

The media only worsens the situation by latching onto the claims of celebrities regarding the unsubstantiated link between vaccines and autism. This argument began in 1998, when A.J. Wakefield published an article in a well-respected British medical journal that linked the Measles, Mumps, and Rubella vaccine to autism. The study was later deemed an “elaborate

⁹ See Steve P. Calandrillo, *Vanishing Vaccination: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH J.L. REFORM 353, 388 (2004).

¹⁰ See *Possible Side-Effects From Vaccines*, VACCINES.GOV (Oct. 12, 2014), http://www.vaccines.gov/basics/safety/side_effects/index.html.

¹¹ *Frequently Asked Questions in Parents’ Guide to Childhood Immunizations*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 10, 2014), <http://www.cdc.gov/vaccines/pubs/parents-guide/parents-guide-part4.html>.

fraud” and was retracted twelve years later, and since that time, numerous studies have discredited Wakefield’s study, including articles published in the *Journal of American Medical Association* and *The Institute of Medicine of the National Academy of Sciences*.¹² However, parents are still “concern[ed]” that “[v]accines may cause learning disabilities, such as autism.”¹³

C. Current Legislative Exemptions

In response to parent’s concerns, state legislatures generally have adopted three exemptions to mandatory vaccination policies: (1) medical, (2) religious and (3) philosophical.¹⁴ Since the balance between public health and personal autonomy can be difficult to gauge (especially in an election year), these exemptions are generally easy to obtain.

a. Medical Exemption

As the name suggests, the medical exemption is given to individuals suffering from a serious medical diagnosis, including children who suffer from an immunodeficiency disorder, who may be allergic to either the vaccine or a component in the vaccine, and who are suffering from certain forms of cancer.

Unsurprisingly, every state allows for this exemption. In order to obtain this exemption, states generally require a physician’s signature.¹⁵ The rationale for this exemption is premised on the belief that those who would suffer incredibly because of their unique health situation should not be required to be vaccinated.

¹² Christine Parkins, *Protecting the Herd: A Public Health, Economics, and Legal Argument for Taxing Parents Who Opt-Out of Mandatory Childhood Vaccinations*, 21 S. CAL. INTERDISC. L.J. 437, 452-53 (2012).

¹³ Allison Kennedy et al., *Confidence About Vaccines in the United States: Understanding Parents’ Perceptions*, 30 HEALTH AFF. 1151, 1153 (2011).

¹⁴ For an interactive breakdown of each state’s exemptions as of 2012, see *Vaccine Exemptions*, VACCINESAFETY.EDU (July 25, 2012), <http://www.vaccinesafety.edu/cc-exem.htm>.

¹⁵ See, e.g., DEL. CODE ANN. tit. 14, § 131; KAN. STAT. ANN. § 72-5209; OHIO REV. CODE ANN. § 3313.671; WASH. REV. CODE § 28A.210.090.

b. Religious Exemption

While the Supreme Court has held that a state's interest in protecting public health supersedes one's right to religious freedom, almost every state grants an exemption to individuals who hold a religious belief that is contrary to inoculation.¹⁶ The states that allow for a religious exemption generally have one of two tests in order for a citizen to take advantage of the exemption. The minority approach is to require an individual to belong to an "organized" or "recognized" religion.¹⁷ Far more states take the alternative approach, which is to require an individual to simply show that they hold a "sincere" or "genuine" religious belief that is contrary to vaccinations.

For the majority of states that require only a genuine or sincere religious belief as a prerequisite to an exemption, there is division among those states as to whether a governmental agency can and should look into the sincerity of a parent's religious beliefs. Some states expressly prohibit a governmental agency from looking into the sincerity of a parent's religious beliefs and whether a parent's hostility toward immunization is rightfully grounded.¹⁸ Other states simply avoid the issue by granting exemptions without verification of a parent's beliefs or

¹⁶ The only two states who do not allow for a religious exemption are West Virginia and Mississippi. *See Vaccine Laws*, NAT'L VACCINE INFO. CTR., <http://www.nvic.org/Vaccine-Laws.aspx> (last visited Mar. 15, 2015).

¹⁷ *See, e.g.,* *Kleid v. Bd. of Ed. of Fulton, Ky. Indep. Sch. Dist.*, 406 F. Supp. 902, 904 (W.D. Ky. 1976) (requiring parents to be member of "nationally recognized and established church or religious denomination"); *see also* IOWA CODE ANN. § 139A.8.4.b (Supp. 2004) ("Immunization is not required for a person's enrollment . . . if . . . the applicant . . . submits an affidavit . . . stating that the immunization conflicts with the tenets and practices of a recognized religious denomination of which the applicant is an adherent or member."); UTAH CODE ANN. § 53A-11-302 (Supp. 2003) (requiring parent to be "bona fide member of a specified, recognized religious organization whose teachings are contrary to immunizations . . .").

¹⁸ *See, e.g.,* *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 655 (E.D.N.Y. 1994) ("[T]hen this Court must determine whether those beliefs are genuinely and sincerely held.").

objections.¹⁹ Ultimately, twenty-one of the forty-eight states that allow for a religious exemption have never denied a claim for this exemption.²⁰

Every state differs on its requirements for how to obtain the religious exemption. For example, in some states, a parent must provide a written statement explaining how immunization conflicts with their sincere religious beliefs.²¹ Other states simply require that a parent sign a prewritten form stating that the parent objects to vaccines on religious grounds.²²

c. Philosophical Exemption

For parents whose objections to inoculation are secular, seventeen states allow for a philosophical exemption.²³ This exemption is a catchall that allows parents to opt-out of vaccinating their children due to a moral, philosophical, or political reason. Even though this exemption is generally broader than a religious exemption, the technical distinction between the two is considered to be ambiguous.²⁴ As such, the procedures for obtaining an exemption based upon personal beliefs is similar to the procedures required by the state for a religious exemption

¹⁹ See Jennifer S. Rota et al., *Processes for Obtaining Nonmedical Exemptions to State Immunization Laws*, 91 AM. J. PUB. HEALTH 645, 645 (2001).

²⁰ See, Calandrillo, *supra* note 9, at 413.

²¹ See, e.g., KY. REV. STAT. ANN. § 214.036 (2005) (requiring parents to supply sworn written statement as to why immunization conflicts with religious grounds).

²² See, e.g., MD. CODE REGS. 10.06.04.05 (“Using the form provided by the Department of Health and Mental Hygiene, a student whose parent or guardian objects to immunization on the ground that the immunization conflicts with the parent’s or guardian’s bona fide religious beliefs and practices is exempt from the requirement to present a physician’s certificate of immunization in order that the student be admitted to school.”).

²³ *Vaccine Law*, *supra* note 16 (listing states who currently have philosophical exemption).

²⁴ See Rota et al., *supra* note 19, at 648 (“[T]he distinction between a religious exemptions . . . and the philosophical or personal conviction [exemption] may be negligible in actual practice.”); see also UNIV. OF PENN., CTR. FOR BIOETHICS, *Vaccination Requirements and Exemptions*, VACCINEETHICS.ORG, http://www.vaccineethics.org/issue_briefs/requirements.php (last visited Mar. 21, 2015).

During the national measles outbreak in 1989, many state legislatures removed this exemption.²⁵ In more recent years, increased concerns over vaccinations and decreased instances of epidemics have resulted in more support for this exemption. But this support is likely to wane due to recent outbreaks of measles and whopping cough in schools and amusement parks, making it the perfect time for a national change to these exemptions.²⁶

D. Constitutional Challenges to Compulsory Vaccinations Keep Missing the Mark

Unsurprisingly, parents who have been unable to obtain exemptions have filed lawsuits against state governments alleging various constitutional violations. However, courts have continually granted deference to compulsory inoculation statutes that require a certificate of vaccination as a precursor to admission to a local school.

In 1905, the Supreme Court of the United States heard a case in which a plaintiff brought suit claiming that a statute requiring all citizens of Cambridge, Massachusetts to receive the smallpox vaccination infringed upon individual liberty and autonomy.²⁷ Relying on social compact theory, the Supreme Court held that mandatory immunization is within the state's police powers so long as the measure was reasonable to ensure public health.

Further, in *Prince v. Massachusetts*,²⁸ the Supreme Court held that the First Amendment's Free Exercise Clause "does not include liberty to expose the community or the child to communicable disease or the later to ill health or death."²⁹ While most states do allow for a

²⁵ See Rota et al., *supra* note 19, at 646 (noting four states removed philosophical exemption from statutes between 1993 and 1998).

²⁶ See, e.g., Gabrielle Canon, *Is Your State Trying to Outlaw Vaccine Exemptions?*, MOTHER JONES (Mar. 2, 2015 7:00 AM), <http://www.motherjones.com/politics/2015/02/vaccine-map-exemption-bills> ("Legislators in 29 states have introduced bills that would make it harder for parents to opt out of vaccinating their kids.").

²⁷ *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905).

²⁸ 321 U.S. 158 (1944).

²⁹ *Id.* at 166.

religious exemption, states are not required to provide an exemption, and a lack of an exemption is not a violation of one's religious freedom.

Courts have also generally accepted that these vaccination statutes do not violate either the Equal Protection Clause or the Due Process Clause of the United States Constitution. In *Zucht v. King*,³⁰ The Supreme Court relied on precedent in coming to the conclusion that a local ordinance mandating vaccinations was within the state's general police power of protecting the public health.³¹ More recently, the Arizona Court of Appeals echoed this sentiment in *Maricopa County Health Department v. Harmon*.³² The *Harmon* court also went a step further and held that excluding an unvaccinated child from school did not violate the child's right to education under the state's constitution.³³

III. MAKING A POINT: THE NEGATIVE IMPACTS OF EXEMPTIONS

As mentioned above, an individual who would physically suffer more harm than good should not be required to obtain a vaccination. Therefore, a medical exemption is both practical and necessary and is not included in the criticism that follows. However, non-medical, belief-based exemptions are detrimental to individuals and society in a number of ways and need to be limited or eliminated when appropriate.

Most importantly, non-medical vaccine exemptions undermine public health goals. Mandatory immunization statutes are based upon the concept of "herd immunity," which proposes that if enough individuals (80%-90%) are vaccinated, a disease will not become an

³⁰ 260 U.S. 174 (1922).

³¹ *See id.* at 176-77.

³² 750 P.2d 1364 (Ariz. Ct. App. 1987).

³³ *See id.*; *see also* *Viemeister v. White*, 88 A.D. 44, 45 (N.Y. App. Div. 1903) (finding there is no right to education under New York State Constitution).

epidemic because too few people are capable of carrying it and passing it on to others.³⁴ In order to prevent infectious diseases, as close to 100% of the population as practically possible must be vaccinated.³⁵ Many individuals, including those who cannot receive vaccines because of a medical condition or age, rely on herd immunity to protect them from acquiring an infectious disease. Those who seek exemptions put these unvaccinated people at risk by becoming transmitters of the disease. This is especially true in practice, as individuals who obtain exemptions tend to be clustered in the same area.³⁶

Statistics confirm that every individual who receives a non-medical vaccination exemption directly inhibits that goal. For example, the number of cases of measles in 2008 was more than double the amount of cases during 2000-2007, during which time the number of exemptions has increased nationwide.³⁷ Similarly, the CDC reports that there were more provisional cases of pertussis reported in 2012 than in any previous year since 1955.³⁸ According to the CDC, the measles outbreak, which continues today, is “largely among school-aged children who were eligible for vaccination but whose parents chose not to have them vaccinated.”³⁹

³⁴ See Paul E. M. Fine, *Herd Immunity: History, Theory, Practice*, 15 EPIDEMIOLOGIC REVS. 265, 267-68 (1993); see also Allan J. Jacobs, *Do Belief Exemptions to Compulsory Vaccination Programs Violate the Fourteenth Amendment?*, 42 U. MEM. L. REV. 73, 79-84 (2011).

³⁵ See Perviz Asaria & Eithne MacMahon, *Measles in the United Kingdom: Can We Eradicate It by 2010?*, 333 BRIT. MED. J. 890, 890 (2006) (“Because measles is so highly infectious, vaccination of 90-95% of the population with a two dose schedule is required to . . . halt the endemic transmission of measles.”).

³⁶ See CTRS FOR DISEASE CONTROL & PREVENTION, *Vaccination Coverage Among Children in Kindergarten – United States, 2013-14 School Year*, 63 MORBIDITY & MORTALITY WKLY. REP. 913-920 (2014).

³⁷ See Emily Oshima Lee et. al., *The Effect of Childhood Vaccine Exemptions on Disease Outbreaks*, CTR. FOR AM. PROGRESS (Nov. 14, 2013), <https://www.americanprogress.org/issues/healthcare/report/2013/11/14/76471/the-effect-of-childhood-vaccine-exemptions-on-disease-outbreaks/>.

³⁸ See *id.*

³⁹ See *id.*

Further, statistics on the prominence of disease outbreaks among specific religious communities further bolsters the causal link between exemptions and epidemics. For example, members of Amish and Christian Science communities are generally given exemptions from mandatory vaccination statutes, and those groups have also experienced instances of vaccine-preventable diseases during nearly every major outbreak in the past twenty-five years.⁴⁰

Finally, immunization exemptions directly increase health-care costs because preventing a disease through the use of vaccines is more cost-effective than treating a disease.⁴¹ More specifically, it costs approximately sixteen times more to treat an illness than to vaccinate against it.⁴² Ultimately, vaccine exemptions result in thousands of Americans contracting preventable disease, which costs \$10 billion to treat and results in 30,000 deaths each year.⁴³

IV. SUGGESTIONS FOR CHANGE: WHY FEDERAL OVERSIGHT IS THE UPSHOT

In order to overcome the issues with the current vaccination system, the federal government should adopt and implement uniform vaccination laws rather than leaving such individualized power to the states. While the federal government does not have inherent constitutional jurisdiction over mandatory vaccinations, such jurisdiction could be overcome by tying vaccines to the federal funding received by every school nationwide. The federal government should limit the availability of exemptions under the model provided by the Affordable Care Act (ACA). Ultimately, this approach is consistent with current public perception and is a logical extension of the federal government's current responsibilities.

⁴⁰ See Calandrillo, *supra* note 9, at 415; see also CTRS. FOR DISEASE CONTROL & PREVENTION, *Current Trends in Rubella and Congenital Rubella Syndrome*, 40 MORBIDITY & MORTALITY WKLY. REP. 93-99 (Feb. 15, 1991).

⁴¹ See Calandrillo, *supra* note 9, at 380.

⁴² See *id.*

⁴³ Yvonne A. Malonado, *Current Controversies in Vaccination: Vaccine Safety*, 288 J. AM. MED. ASS'N 3155, 3155 (2002).

A. Overcoming Constitutional Barriers to Federal Oversight of Vaccines

The largest hurdle to a federal mandatory vaccination program is fitting such a program within the federal government's limited powers. According to the Tenth Amendment to the United States Constitution, any power not specifically enumerated to the federal government in the Constitution is reserved to the state governments.⁴⁴ Since the power to implement a mandatory vaccine program is not specifically granted to the federal government, this power is retained by the states.

Generally, the federal government has argued that its power to act over public health falls under the Commerce Clause, which states that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States”⁴⁵ The federal government has previously used this authority to pass the National Childhood Vaccine Injury Act (NCVIA). Under the NCVIA, the Department of Health and Human Services is responsible for overseeing everything from research and development to distribution and use of vaccines.⁴⁶ In addition, the NCVIA also establishes two important reporting systems. The first requires health care providers to supply parents with standardized pamphlets on each vaccine prior to administering the vaccine.⁴⁷ The second requires health care providers and manufactures to report certain adverse events from vaccines to the federal government.⁴⁸

⁴⁴ See, U.S. Const. amend. X (“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.”).

⁴⁵ See *id.* Art. 1, § 8.

⁴⁶ See 42 U.S.C. § 300aa-1. The NCVIA also establishes the National Childhood Vaccine Injury Compensation Program, which is a no-fault alternative to the traditional tort system. *Id.* § 300aa-10 *et. seq.*

⁴⁷ See *History of Vaccine Safety*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 4, 2014), http://www.cdc.gov/vaccinesafety/Vaccine_Monitoring/history.html (explaining vaccine adverse event reporting system and notification to patients).

⁴⁸ *Id.*

However, the idea that the Commerce Clause extends to a mandatory vaccination program for school admission is a more attenuated argument. Rather, the federal government would be more successful in creating a unified vaccine program by requiring states to adopt specific standards as a condition to federal funding for education. This situation is analogous to the federal government has previously done by tying federal transportation funding to alcohol distribution standards.

In 1984, Congress passed the National Minimum Drinking Age Act, which withheld 10% of federal highway funding from states that did not maintain a minimum legal drinking age of twenty-one.⁴⁹ South Dakota challenged the law but the Supreme Court upheld the law noting that Congress may “attach conditions on the receipt of federal funds.”⁵⁰ In coming to this decision, the Court established a five part test for determining whether such a condition on federal funding is constitutional or amounts to coercion. Ultimately, a condition of federal funding will be upheld so long as (1) promotes the general welfare, (2) is unambiguous, (3) relates “to the federal interest in particular national projects or programs,” (4) is not in and of itself unconstitutional, and, (5) is not coercive.⁵¹

Congress should use this precedent of deferential treatment toward congressional conditional spending to persuade states to adopt mandatory vaccination programs with more stringent exemption standards as a condition to federal funding for education.⁵² It is commonly accepted that the federal government has an interest in maintaining public health, and a mandatory vaccine program instituted at the federal level relates to the Healthy People 2020

⁴⁹ 23 U.S.C. § 158.

⁵⁰ *South. Dakota v. Dole*, 483 U.S. 203, 206 (1987).

⁵¹ *Id.* at 207-08.

⁵² *See id.* at 207 (“In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.”).

program, which is a federal initiative that seeks to improve the nation's health through various means, including increased vaccinations.⁵³ Congress may also seek to tie this vaccine program to specific projects carried out by the Department of Education at the elementary and secondary levels.⁵⁴

Given the state precedent on this matter, a federal statute can easily be drafted that is unambiguous. Further, such a program is not in and of itself unconstitutional because citizens have alternative options (e.g., homeschooling) and will not be forcibly immunized against their will. The Supreme Court has continually upheld the constitutionality of a mandatory vaccination program at the state level under a theory of deference to public health. The federal government could argue that it is also entitled to this protection when similarly acting to promote the public welfare through a mandatory childhood vaccine program created by the federal government and implemented by at the state level.

Finally, such a program is not coercive. While mandatory vaccination is a constraint on one's personal freedom (albeit to protect the health and safety of the community), the restriction is with the constitutional powers of the government and the availability of limited exemptions allows the state to exclude some children without risk of losing funding. Further, states are not required to enact the legislation just as they were not required to implement a minimal drinking age of twenty-one.

⁵³ See *Healthy People*, HEALTH.GOV, (Apr. 15, 2015), <http://health.gov/our-work/healthy-people/> (discussing objectives and benchmarks of Healthy People program); see also *Immunizations and Infectious Diseases*, HEALTHYPEOPLE.GOV, <http://www.healthypeople.gov/2020/topics-objectives/topic/immunization-and-infectious-diseases> (last visited April 15, 2015) (“Objectives new to Healthy People 2020 focus on technological advancements and ensuring that States, local public health departments, and nongovernmental organizations are strong partners in the Nation’s attempt to control the spread of infectious diseases.”).

⁵⁴ For a database of programs funded by Congress and implemented by the United States Department of Education, see *Programs*, DEPT. OF EDU., <http://www2.ed.gov/programs/landing.jhtml> (last visited Apr. 29, 2015).

B. Tying Mandatory Vaccination Laws to Federal Funding of Education

The primary responsibility for K-12 education lies with the individual states. However, the federal government provides annual funding to supplement subpar state funding.⁵⁵ Authority for this federal funding is found in the Elementary and Secondary Education Act (ESEA). The ESEA was enacted by Lyndon B. Johnson, in 1965, to grant federal funding and to establish a national curriculum to hold schools accountable for educational achievements.⁵⁶ Under ESEA, funding is allocated for a number of different elementary and secondary programs, including programs for low-income children, foreign languages, gifted students, and arts, as well as library and textbook materials.⁵⁷

Overall, the federal government contributes 10.8% of the total amount spend nationwide on education each year. While this percentage seems relatively low, in reality, it amounts to over \$100 billion annually.⁵⁸ This amount is also a necessary supplement to state budgets, which would not be able to make up the difference if such funding was pulled because of a failure to implement a mandatory vaccine program.

C. Determining Allowable Exemptions

⁵⁵ See Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U.L. REV. 577, 623 (2013); see also *Supplement/Supplant Requirement for Federal Funds*, OHIO DEPT. OF EDU. (May 10, 2004), <https://ccip.ode.state.oh.us/DocumentLibrary/ViewDocument.aspx?DocumentKey=1043>.

⁵⁶ See, Pasachoff, *supra* note 55, at 613 (“Like Medicaid, the ESEA was passed in 1965 as part of the War on Poverty, President Johnson’s Great Society legislation that transformed the role of the federal government in social welfare programs and beyond.”).

⁵⁷ *Elementary and Secondary Education Act*, LAWS.COM, <http://education.laws.com/elementary-and-secondary-education-act> (last visited Apr. 19, 2015).

⁵⁸ *The Federal Role in Education*, U.S. DEP’T. OF EDU. (Feb. 13, 2012), <http://www2.ed.gov/about/overview/fed/role.html> (explaining that in 2011-2012, over \$1.15 trillion was spent on education, and 10.8% of that amount came from federal government). For a general breakdown of the federal education budget see *The Federal Education Budget*, FED. EDU. BUDGET PROJECT (Apr. 30, 2014, 7:47 PM), <http://febp.newamerica.net/background-analysis/education-federal-budget>.

In establishing this program, the federal government must determine what, if any, exemptions will be granted. As previously discussed, an exemption for individuals with specific medical conditions is necessary and logical. Further, very few individuals meet the criteria to receive this exemption.⁵⁹ Therefore, such an exemption should continue under a federal program with the sole requirement being that a child's parent or guardian must provide written documentation from a licensed physician explaining why the child's medical condition makes him or her exempt from vaccines.

Conversely, philosophical exemptions are ill founded and only inhibit the public goal without any benefit to the community. As such, this exemption is seen more as one of convenience than of actual belief. A majority of states have recognized the detriment associated with this exemption and no longer allow parents to opt their children out of vaccinations simply because of a personal belief. Also, as previously mentioned, a number of states that do still allow for the exemption have proposed bills to eliminate it. It only makes sense that the federal government follow this majority approach and also not allow a philosophical exemption under a federal program.

The remaining recognized and relatively sensitive exemption is that based on religious beliefs. The United States Constitution protects an individual's right to openly and freely practice the religion of one's choosing, without fear.⁶⁰ The Constitution further provides that no

⁵⁹ See CTRS FOR DISEASE CONTROL & PREVENTION, *Vaccination Coverage Among Children in Kindergarten – United States, 2012-13 School Year*, 62 MORBIDITY & MORTALITY WKLY. REP. 607-12 (2013) (noting that in 2012-13 school year only 0.3% of children across country received medical exemption).

⁶⁰ See, U.S. CONST. AMEND. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”); see also *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (“Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities . . .”).

governmental agency may discriminate based on one's religion, including placing one religion above another.⁶¹ However, the Supreme Court has held on numerous occasions that the government may limit the free exercise of religion so long as the law applies to all religions equally and supports a compelling government interest.⁶² Thus, a uniform and narrowly tailored law mandating vaccines, despite one's religious beliefs would likely be constitutional because it promotes the compelling state interest of public health.

Since herd theory requires a significant percentage of the population to be vaccinated in order for that vaccination to be effective, it is in the best interest of the nation for the federal government to exclude a religious exemption from the mandatory vaccination program. However, given the social and political implications, the federal government should grant a limited religious exemption that mirrors the one provided for under the Affordable Care Act.⁶³ Specifically, the exemption should apply to those who meet three requirements: (1) the individual is a member of a religious group whose tenets and teachings establish that its members are conscientiously opposed to receiving medical treatment, (2) the individual must waive all Social Security and Medicare benefits, and (3) the religious organization must pay for the health care and disability costs of its members who contract an illness.⁶⁴ Requiring parents to have opted into the ACA's exemption makes sense because a parent who is against vaccines is also likely to be against medical treatment generally.

⁶¹ *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540, (1993).

⁶² *See generally* Reynolds v. United States, 98 U.S. 145 (1878); *see also* Sherbert, 374 U.S. 398.

⁶³ *See*, 26 U.S.C. 5000A (providing text of ACA).

⁶⁴ *C.f. id.* (exempting individuals who fall under 26 U.S.C §1402).

Parents who do not properly fit within this exemption and still do not vaccinate their children would be subject to a tax similar to the penalty under the ACA.⁶⁵ The goal of such a tax is to deter individuals from not vaccinating their children, since it is no longer more convenient than getting them vaccinated. In addition, the money generated from the penalty can be used to help further the implementation and enforcement of the mandatory program as well as education regarding vaccinations.

While at first this program may seem like unwanted federal intrusion into personal beliefs, twenty-nine states have recently proposed bills that would eliminate exemptions based on religious or moral beliefs as a way to combat the current measles and pertussis outbreaks.⁶⁶ These bills demonstrate that a number of state legislatures, and presumably their constituents, are open to making exemptions harder to receive. However, since these bills are simply proposals and they are not unanimous across the board, federal oversight is still necessary to achieve elimination or eradication of vaccine-preventable infectious diseases.

D. Why Federal Oversight Is Rational

The rationale for implementing a vaccine program with federal oversight includes historical, economical, and logical reasons. In 1813, Thomas Jefferson signed a law that required the federal government to “guarantee and distribute effective vaccines” in order to

⁶⁵ See generally *id.* (providing, among other things, parameters and flat dollar penalty for those who do have health insurance); see also *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012).

⁶⁶ See, Gabrielle Canon, *supra* note 26 (“Legislators in 29 states have introduced bills that would make it harder for parents to opt out of vaccinating their kids.”); see also Bob Kinzel, *Proposed Legislation Would Remove Philosophical Exemption for Vaccinations*, Vermont’s NPR (Feb. 3, 2015) <http://digital.vpr.net/post/proposed-legislation-would-remove-philosophical-exemption-vaccinations> (explaining how 2012 bill in Vermont to eliminate philosophical exemption failed but is currently being proposed for second time given recent outbreaks).

prevent epidemics.⁶⁷ While the federal government currently retains the right to quarantine individuals and require vaccination of immigrants and military, Congress has since rescinded control of immunizations of children, leaving authority to the states.⁶⁸ Due to the direct correlation between decreases in vaccinations and increases in infectious diseases, the federal government should return to its original position in mandating childhood vaccines.

Such federal oversight makes sense for a number of reasons. First, the current structure has led to an inconsistent patchwork of laws, standards, and procedures both among and within states. Further, most of these statutes are outdated and have failed to keep up with trends in scientific and technological advances, as well as judicial interpretations. In addition, some states are moving in the wrong direction as legislatures in the past two years have proposed bills to make exemptions even easier to obtain.⁶⁹ These states include Florida, Georgia, Iowa, Kansas, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, South Dakota, Virginia, and West Virginia.⁷⁰ In order to improve the nation's health, it is imperative that the federal government act to encourage states to implement uniform standards based on a delicate balance of the risk and cost of disease with a burden on individual autonomy.

Such standards are necessary to ensure clarity and coherence among public health officials at all levels and in all states. They also prevent parents from moving to another state –

⁶⁷ Cristina Valldejuli, *When Did Mandatory Vaccinations Become Common?*, TIME (Mar. 19, 2015), <http://time.com/3751083/mandatory-vaccination-history/>.

⁶⁸ See 42 U.S.C. § 264 (authorizing U.S. Secretary of Health and Human Services to take measures to prevent entry and spread of communicable diseases from foreign countries into United States and between states, including through limited vaccination and quarantine within U.S. borders).

⁶⁹ See Tasneem Raja & Chris Mooney, *How Many People Aren't Vaccinating Their Kids in Your State?*, MOTHER JONES (Feb. 12, 2014 7:00 AM), <http://www.motherjones.com/environment/2014/02/vaccine-exemptions-states-pertussis-map> (providing map of states that have heard bills aimed at making exemptions easier and harder).

⁷⁰ *Id.*

or often times the neighboring school district – to avoid a poorly implemented vaccine policy, due to false rumors about possible side effects of immunizations, including their link to autism. Just as disease knows no boundaries, our government’s public health initiatives must also look past state lines. Additionally, the federal government is in the best position to create such a mandate because of their superior financial and scientific resources and expertise.

V. CONCLUSION

As more and more parents continue to take advantage of ineffective, unenforced, and overbroad vaccine exemptions, the federal government must proactively take steps to protect the public’s health. The federal government should develop mandatory requirements with limited and narrow exceptions that would not be a financial burden on school districts and public health boards. It should persuade states to adopt and appropriately implement this policy by tying federal funding of education to its operation. And finally, it must also take steps to educate parents about the truths and myths regarding vaccines, including how opting their children out of a vaccine places the community at risk of contracting a vaccine-preventable disease.