Herd Immunity Requires a Herd Mentality: Eliminating Religious and Philosophical Vaccine Exemptions Nationwide

Gabrielle Muniz[*]

INTRODUCTION

The 2020 COVID-19 outbreak threw into sharp relief the United States' vulnerability to deadly epidemics.[1] Along with an increasing death toll that has surpassed U.S. service member deaths in the Vietnam War, COVID-19 also fundamentally changed the way every American has lived since 2020.[2] Shelter-at-home orders, closed businesses, millions unemployed, social distancing, and mask mandates are just a few of the life-altering changes caused by the ongoing pandemic.[3] COVID-19 is a deadly and debilitating disease, and it will continue to affect our lives until a successful vaccine can be given to the majority of the population.[4] While COVID-19 is not the only deadly disease to kill thousands of Americans, it is the most recent.[5] Despite the clear destructive power of viruses like

[*] J.D., New England Law | Boston (2021), Salutatorian. B.A., Biology, College of the Holy Cross (2018).

[1] *See* Editorial Bd., *America May Be Done with Coronavirus, but COVID-19 Is Not Done with America*, USA TODAY (June 18, 2020, 9:03 PM ET), https://perma.cc/G6PS-PTVN (explaining that the coronavirus has killed more Americans than the Vietnam War, and the number of deaths keeps increasing).

[2] *Id.*

[3] *See, e.g.*, *Reopening Massachusetts*, MASS.GOV, https://perma.cc/CN5Y-5K8U (last visited Jan. 2, 2022).

[4] *See* Caroline Chen, *How—And When—Can the Coronavirus Vaccine Become Reality?*, PROPUBLICA (June 17, 2020, 5:00 AM EDT), https://perma.cc/H7FS-RD3N (noting the phased appropriate to creating, testing, and releasing the vaccine).

[5] *See* Jacob Gershman, *A Guide to State Coronavirus Reopenings and Lockdowns*, WALL ST. J., https://perma.cc/4Q6M-4PG3 (last updated May 20, 2020, 1:47 PM ET).

COVID-19, vaccination rates in the United States have been decreasing, thus placing more people at risk of dying from entirely preventable diseases.[6] Not only are decreasing vaccination rates concerning for resurging diseases like measles, they also raise questions about the efficacy of the coronavirus vaccine: if enough Americans choose not to get the vaccine, then COVID-19 will continue to infect Americans.[7] COVID-19 exposed the inherent national challenges of viruses that charge over state lines and global borders, challenges implicit in the nature of viruses that were exposed by the rampant spread of COVID-19.[8] This Note argues that, in order to increase vaccination rates across the United States, the federal government is best suited to implement a national vaccination policy for public schools.[9]

All states require public school students to be vaccinated.[10] However, vaccination rates of children have been decreasing, a decline exacerbated by COVID-19 pandemic.[11] However, most states allow parents to opt out of vaccination by claiming either a medical, religious, or philosophical exemption.[12] In 2019, New York, joining just four other states, banned all non-medical exemptions and tightly regulated medical exemptions in an effort to increase vaccination rates and prevent outbreaks.[13] While extreme, this Note will argue that the federal government has the authority to mandate vaccination in public schools, including the COVID-19 vaccine, with only medical exceptions, thereby expanding New York's public school

---

[6] *See* Catharine Paules, Hilary Marston & Anthony Fauci, *Measles in 2019—Going Backward*, 380 NEW ENG. J. MED. 2185, 2186 (2019).

[7] Lauren S. Grossman, *To Put Covid-19 Behind Us, All Americans Should Be Vaccinated Against It*, STAT (May 12, 2020), https://perma.cc/6RMU-FX4U; *see* Morgan Krakow, *A Tourist Infected with Measles Visited Disneyland and Other Southern California Hot Spots in Mid-August*, WASH. POST (Aug. 24, 2019), https://perma.cc/4QHF-9WPL (demonstrating how a contagious virus can quickly spread through crowds of people when one person spread the measles virus to 147 people at Disney in 2015, and other subsequent measles outbreaks have been traced back to Disney); Warren Cornwall, *Just 50% of Americans Plan to Get a COVID-19 Vaccine. Here's How to Win Over the Rest*, SCIENCE (June 30, 2020), https://perma.cc/SJH8-PNH9 (explaining that some surveys predict only 50% of Americans will get the COVID-19 vaccine).

[8] *See* Center for Systems Science and Engineering (CSSE), *COVID-19 Dashboard*, JHU: JOHNS HOPKINS UNIVERSITY, https://perma.cc/ZU8G-EA2E (last updated Jan. 27, 2021).

[9] *See* Paules, Marston & Fauci, *supra* note 6.

[10] Leila Barraza, Cason Schmit & Aila Hoss, *The Latest in Vaccine Policies: Selected Issues in School Vaccinations, Healthcare Worker Vaccinations, and Pharmacist Vaccination Authority Laws*, 45 J.L. MED. & ETHICS 16, 16 (2017).

[11] *See Decline in Child Vaccination Coverage During the COVID-19 Pandemic — Michigan Care Improvement Registry, May 2016–May 2020*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION (May 18, 2020), https://perma.cc/ZU5Q-9K3F.

[12] Barraza et al., *supra* note 10.

[13] *See* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.1–66-1.10 (2019).

vaccination requirements nationally.[14] With the advent of COVID-19, and the resurgence of viruses like measles, this Note will argue that it is necessary to federally mandate vaccination in order to protect both lives and the economy.[15] Vaccines can give back the freedom, safety, and normalcy COVID-19 took away, but they can only do so if people vaccinate.[16]

First, this Note will provide a background on vaccinations: their history, how they work, global vaccination rates, and that vaccines, including the COVID-19 vaccine, are safe.[17] Second, this Note will discuss the different vaccine exemptions and state vaccination policies, focusing on New York's 2019 policy.[18] This Note will then briefly discuss the necessity of vaccination in an increasingly connected world using COVID-19 as an example.[19] To argue that the federal government should adopt New York's 2019 policy nationally, and include COVID-19 as a vaccine, this Note will first explain that mandating a national vaccination policy is constitutional and does not unconstitutionally infringe on religious freedom, freedom of choice, or state powers.[20] Finally, this Note will explore the federal government's power to implement a vaccination policy first through a national recommendation, and second, through the spending and taxing powers.[21]

I. Background

A. *Measles Resurgence*

Welcome to Disneyland, the Happiest Place on Earth.[22] Forty-five thousand people visit the California theme park every day.[23] But one day in 2015, one of those forty-five thousand people was infected with measles.[24] If the United States maintained vaccination rates necessary for herd immunity

---

[14] *Id.*; *see infra* Part III.

[15] *See infra* Part III.

[16] *See* Oxford Vaccine Grp., *Herd Immunity: How Does it Work?*, UNIV. OF OXFORD, MED. SCI. DIV. (Apr. 26, 2016), https://perma.cc/F8MN-JPWF; *see also* Barraza et al., *supra* note 10, at 16–19.

[17] *See infra* Part I.

[18] *Infra* Part I(F).

[19] *Infra* Part II.

[20] *Infra* Part III.

[21] *See infra* Part IV.

[22] *See* Katie M. Palmer, *Why Did Vaccinated People Get Measles at Disneyland? Blame the Unvaccinated*, WIRED (Jan. 26, 2015, 6:00 AM), https://perma.cc/6UUR-7U2H (describing Disneyland as "The Happiest Place on Earth").

[23] Krakow, *supra* note 7.

[24] Krakow, *supra* note 7.

(90–95%), then the disease would not have spread.[25] Instead, because one person in Disneyland had measles, and vaccination rates were not high enough, 125 people contracted measles in eight different states.[26] Of those infected, "45% were unvaccinated for measles, and 43% had unknown vaccination status . . . . Among the unvaccinated patients . . . a majority (67%) of vaccine-eligible patients intentionally were unvaccinated because of personal beliefs."[27]

Instead of decreasing, measles cases are increasing in the United States.[28] Between January 1, 2019, and April 26, 2019, there were 704 measles cases in twenty-two states—the most measles cases reported in a single year since 1994.[29] In that four-month time period, there were thirteen outbreaks of measles, and the median age of a person infected with measles was five years old.[30] One of the greatest medical innovations—vaccination—prevents thousands of illnesses and deaths.[31] But, many children are still not getting vaccinated.[32]

B. *History of Vaccination*

Janet Parker began to feel unwell on August 11, 1978.[33] Her body was covered in red bumps, and she soon became too weak to stand.[34] The red, pus-filled bumps were so numerous on her face that Ms. Parker essentially went blind, unable to see because the sores obscured her vision.[35] She had

---

[25] *See* Oxford Vaccine Grp., *supra* note 16.

[26] Barraza et al., *supra* note 10, at 16–17.

[27] Barraza et al., *supra* note 10, at 17.

[28] Manisha Patel et al., *Increase in Measles Cases—United States, January 1–April 26, 2019*, 68 MORBIDITY & MORTALITY WKLY. REP. 402, 402 (2019).

[29] *Id.*

[30] *Id.*

[31] *See generally* Susan Pryor, *Smallpox in the 18th Century*, COLONIAL WILLIAMSBURG DIGITAL LIBR., (1984), https://perma.cc/GN8J-4GJ9 (describing the relief provided by a smallpox vaccine).

[32] *See States with Religious and Philosophical Exemptions from School Immunization Requirements*, NCSL: NAT'L CONFERENCE OF STATE LEGISLATURES, (Nov. 22, 2021) https://perma.cc/HR8T-6QAN; s*ee also Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements*, NY.GOV (June 18, 2019), https://perma.cc/6M43-37ER; Paul A. Offit, *Are Kids Getting Too Many Vaccines?*, DAILY BEAST (Jan. 29, 2017, 12:01 AM ET), https://perma.cc/87YM-JTWU.

[33] Monica Rimmer, *How Smallpox Claimed Its Final Victim*, BBC NEWS (Aug. 10, 2018), https://perma.cc/CF9H-456K.

[34] *Id.*

[35] *Id.*

renal failure and pneumonia, and then stopped talking.[36] Finally, on September 11, 1978, Ms. Parker died.[37] She was the last victim of smallpox.[38]

Smallpox had been one of the most feared viruses in the world for thousands of years.[39] Smallpox "disfigured, crippled, or killed every tenth person"[40] and killed over three hundred million people in the twentieth century alone.[41] But now, in a triumph of vaccination, smallpox has been eradicated worldwide.[42] Edward Jenner is largely credited with developing the first rudimentary smallpox vaccine in 1796.[43]

After Louis Pasteur created the first rabies vaccine in 1885, many scientists quickly invented vaccines.[44] Developments in science fueled the creation of vaccines against diphtheria, tetanus, cholera, typhoid, tuberculosis, polio, measles, mumps, rubella, pertussis, hepatitis B, and many others.[45] Today, there are vaccines for twenty-six diseases, including the seasonal flu.[46] Vaccines are essential to prevent humans, and especially children, from suffering from many deadly, debilitating diseases.[47]

However, the increase in vaccination rates has always been accompanied by a fear of vaccines.[48] During an outbreak of smallpox in Boston in 1721, Reverend Mather began giving people an inoculation using a technique similar to the Chinese method (smearing pus from an infected person over a cut on a healthy person) and had a bomb thrown in his

---

[36] *Id.*

[37] *Id.*

[38] *Id.* (explaining that, soon after Ms. Parker's death, the WHO declared smallpox eradicated).

[39] *See* Pryor, *supra* note 31.

[40] Pryor, *supra* note 31.

[41] Rimmer, *supra* note 33.

[42] Rimmer, *supra* note 33.

[43] Rimmer, *supra* note 33. *Contra* Coll. Of Physicians of Phila., *Chinese Smallpox Inoculation*, HISTORY OF VACCINES, https://perma.cc/S7NG-BL9T (last visited Jan. 2, 2022) (explaining that smallpox vaccinations were practiced in China for thousands of years). *See generally* Coll. of Physicians of Phila., *All Timelines Overview*, HISTORY OF VACCINES, https://perma.cc/65GS-KP6K (last visited Jan. 2, 2022) [hereinafter *The History of Vaccines*].

[44] *The History of Vaccines*, *supra* note 43.

[45] WHO, UNICEF & WORLD BANK, STATE OF THE WORLD'S VACCINES AND IMMUNIZATIONS at 6, 8 (World Health Org., 3d ed. 2009), https://perma.cc/U8ZY-EXFE [hereinafter STATE OF THE WORLD'S VACCINES AND IMMUNIZATIONS]; *The History of Vaccines*, *supra* note 43.

[46] *List of Vaccines Used in the United States*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/QLM9-D8TP (last updated Apr. 13, 2018).

[47] *See* Rimmer, *supra* note 33.

[48] *See* Matthew Niederhuber, *The Fight Over Inoculation During the 1721 Boston Smallpox Epidemic*, HARV. UNIV. (Dec. 31, 2014), https://perma.cc/VZ27-7HF5.

window by someone who opposed vaccination.[49] Thankfully, the bomb did not detonate, and the Reverend's inoculations were largely successful—of those who got smallpox, people who had been inoculated had a mortality rate of 2%, while people who had not been inoculated had a mortality rate of 14.8%.[50]

C. *Modern Vaccination*

1. The Body's Immune Response

Vaccines teach the body to recognize harmful germs (either viruses or bacteria) and speed up the body's natural immune system.[51] Normally, when a body is infected by a germ, the body takes some time to recognize and respond to that germ.[52] In the meantime, that germ has been replicating and spreading throughout the body, making the infected person sick.[53] The body has two types of cells that recognize germs: B-lymphocytes and T-lymphocytes.[54] When a B-lymphocyte encounters a germ, it binds to the germ and then clones itself, so there are more B-lymphocytes to bind with more germs.[55] The B-lymphocytes make memory B-cells (cells that have receptors that bind to that particular germ) and plasma cells that produce antibodies (molecules made to bind to germs to incapacitate them and identify them for destruction).[56] Then, the body summons macrophages to destroy any marked germs.[57] T-lymphocytes function similarly to B-lymphocytes, except they mark and destroy cells that have been infected with germs.[58] In summary, the natural immune response can take time because B- and T-lymphocytes need time to clone themselves and find the virus that is already in the body.[59]

Vaccination aims to speed up the body's natural immune response by

---

[49] *See id.* (describing how the pus transferred smallpox to the inoculated person, who developed a minor form of smallpox, recovered, and then had smallpox immunity).

[50] *Id.*

[51] *Understanding How Vaccines Work*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/2LHJ-ZKPS (last updated Aug. 17, 2018).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Ali Roghanian & Rebecca Newman, *B Cells*, IMMUNOLOGY, https://perma.cc/UA9Z-X5EL (last updated Mar. 2021).

[56] *Id.*

[57] *Understanding How Vaccines Work*, *supra* note 51.

[58] Maurie Markman, *B-cells Vs. T-cells: What's the Difference?*, CANCER CENTER, https://perma.cc/6R65-JLZR (last updated Jan. 10, 2022).

[59] *See id.*

introducing weakened, dead, or only part of a germ to the body so the body responds by producing antibodies and T-lymphocytes, but the germ itself does not cause the person to get sick.[60] Because the body has an immune response to the vaccine, it also builds and stores memory cells.[61] So, if that person is infected with a disease the person was vaccinated for, the memory cells will recognize the germs faster, and the person's body will be able to fight the disease more quickly and effectively.[62]

Vaccines do have some side effects.[63] The body takes time to build immunity (by making B- and T-lymphocytes) to diseases after receiving a vaccine.[64] So, it is possible to get a vaccine and still get the disease a few weeks later before the body has built up an immune response.[65] However, the vaccine did not cause that disease.[66] Rather, the vaccine did not have enough time to build immunity before that person was exposed to the disease.[67] Sometimes people can get a mild fever after a vaccine as a result of the body's immune response.[68] Again, that does not mean the person is sick with the germ, it means that the body is working hard to produce antibodies and B-lymphocytes.[69] In summary, while vaccinations have rare side effects, they are beneficial to human health because they teach the body to recognize harmful germs and speed up the body's natural immune system.[70]

2. Global Vaccination Goals

The World Health Organization ("WHO") launched the Expanded Programme on Immunization (EPI) in 1974 with the goal of increasing vaccination rates among children.[71] By 1990, 80% of children globally were vaccinated for at least the six main EPI diseases.[72] "WHO has estimated that

---

[60] *Understanding How Vaccines Work*, *supra* note 51.

[61] *Understanding How Vaccines Work*, *supra* note 51.

[62] *See Understanding How Vaccines Work*, *supra* note 51.

[63] *Understanding How Vaccines Work*, *supra* note 51.

[64] *Understanding How Vaccines Work*, *supra* note 51.

[65] *Understanding How Vaccines Work*, *supra* note 51.

[66] *See Understanding How Vaccines Work*, *supra* note 51.

[67] *Understanding How Vaccines Work*, *supra* note 51.

[68] *Understanding How Vaccines Work*, *supra* note 51.

[69] *See Understanding How Vaccines Work*, *supra* note 51.

[70] *See Understanding How Vaccines Work*, *supra* note 51.

[71] *History of Vaccine Development*, WHO: WORLD HEALTH ORG., https://perma.cc/CW2X-3DHF (last visited Jan. 23, 2022). *See generally* STATE OF THE WORLD'S VACCINES AND IMMUNIZATIONS, *supra* note 45.

[72] *History of Vaccine Development*, *supra* note 71 (explaining that the six main EPI diseases are tuberculosis polio, diphtheria, pertussis, tetanus, and measles).

if all the vaccines now available against childhood diseases were widely adopted, and if countries could raise vaccine coverage to a global average of 90% . . . an additional two million deaths a year could be prevented among children under five years old."[73] Vaccination is not just an individual protection; when most people in an area are vaccinated, then germs cannot find hosts to replicate and spread, and diseases are effectively eliminated from vaccinated communities.[74] This concept is called herd immunity.[75] If vaccination rates decrease, then the disease can spread again.[76] Immunization can also have effects beyond just preventing sickness and death.[77] "A recent study by a Harvard School of Public Health team found that by keeping children healthy and in school, immunization helps extend life expectancy and the time spent on productive activity–thereby contributing to poverty reduction."[78] The goal of vaccination is to have the world vaccinated at a level that would eliminate preventable diseases on a global scale, save lives, reduce poverty, and use herd immunity to protect those for whom it is medically unsafe to get vaccines.[79]

D. *Vaccines Are Safe*

Vaccines undergo years of testing, safety regulations, and certifications before being made available to the public.[80] The National Regulatory Authority ("NRA") monitors vaccines and ensures their safety and the Food and Drug Administration ("FDA") licenses vaccines.[81] Vaccines undergo at least three rounds of clinical trials before they are licensed, and then are subject to constant post-licensure surveillance and monitoring.[82] The Centers

---

[73] STATE OF THE WORLD'S VACCINES AND IMMUNIZATIONS, *supra* note 45, at xix.

[74] *See* Oxford Vaccine Grp., *supra* note 16.

[75] *See* Oxford Vaccine Grp., *supra* note 16.

[76] Offit, *supra* note 32; *see, e.g.*, *Measles (Rubeola): Cases and Outbreaks*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/RBB5-XX9A (last updated Nov. 19, 2021) (explaining how measles has infected over 1,200 people in 31 states in 2019 due to low vaccination rates).

[77] *See generally* STATE OF THE WORLD'S VACCINES AND IMMUNIZATIONS, *supra* note 45.

[78] STATE OF THE WORLD'S VACCINES AND IMMUNIZATIONS, *supra* note 45, at xxix.

[79] *See Expectations Towards Safety of Vaccines*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/2UCG-HPR8 (last visited Jan. 2, 2022); STATE OF THE WORLD'S VACCINES AND IMMUNIZATIONS, *supra* note 45.

[80] *Expectations Towards Safety of Vaccines*, *supra* note 79.

[81] *Vaccine Safety Partners*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/M2JD-GJGR (last visited Jan. 2, 2022); *Expectations Towards Safety of Vaccines*, *supra* note 79.

[82] *Pre-Licensure Vaccine Safety*, WHO: WORLD HEALTH ORG., https://perma.cc/HFU6-37Y7 (last visited Jan. 2, 2022); *Post-Licensure Vaccine Safety*, WHO: WORLD HEALTH ORG.,

for Disease Control and Prevention ("CDC") also has an immunization safety office which tracks any reported side effects of vaccines to ensure that vaccines are safe and effective.[83] Every vaccine available to the public has been rigorously tested, monitored, and licensed.[84]

E. *The COVID-19 Vaccine*

Similarly, the COVID-19 vaccine underwent rounds of rigorous testing before it was released.[85] The FDA, the federal agency responsible for licensing vaccine producers, released guidance explaining the benchmarks and testing requirements the COVID-19 vaccine needed to pass to be released to the public.[86] The FDA's guidelines ensure that, even though the COVID-19 vaccine was being made quickly (hence the name Operation Warp Speed), the vaccine was still rigorously tested to ensure it is safe.[87] The FDA guidance covered chemical testing, manufacturing requirements, animal studies, clinical tests, and post-licensure vaccine safety, as well as providing detailed requirements for the ingredients, facilities, and testing of the vaccine both pre- and post-licensure.[88] Additionally, the "COVID-19 vaccines licensed in the United States must meet the statutory and regulatory requirements for vaccine development and approval, including for quality, development, manufacture, and control . . . ."[89] Luckily, researchers were not starting from scratch with the COVID-19 vaccine.[90] Because COVID-19 is part of a family of viruses that includes SARS and MERS, scientists have already been researching and developing vaccines for those types of viruses.[91] The scientists know that coronaviruses have an S protein spike projecting from the virus that binds with human cells.[92]

---

https://perma.cc/NF3B-3CCY (last visited Jan. 2, 2022).

[83] *Vaccine Safety*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/H96D-RRTG (last visited Jan. 2, 2022).

[84] *See generally id.*

[85] *Coronavirus (COVID-19) Update: FDA Takes Action to Help Facilitate Timely Development of Safe, Effective COVID-19 Vaccines*, FDA: FOOD & DRUG ADMIN. (June 30, 2020), https://perma.cc/9WNZ-NAZF.

[86] *Id.*

[87] *Id.*

[88] Development and Licensure of Vaccines to Prevent COVID-19: Guidance for Industry, Guidance No. FDA-2020-D-1137, CTR. FOR BIOLOGICS EVAL. & RESEARCH 2 (FDA June 2020), https://perma.cc/WN36-EJ47.

[89] *Id.* at 3.

[90] *COVID-19 Vaccines: Get the Facts*, MAYO CLINIC, https://perma.cc/B2N3-TPPJ (last updated Dec. 18, 2021).

[91] *Id.*

[92] *Id.*

Because the vaccine prevents the S protein from binding with human cells, the vaccine can be effective.[93] However, experts estimate that about 70% of people will need to develop immunity, either through the vaccine or through infection, to break the COVID-19 pandemic, and an even higher immunity rate is necessary to eliminate the virus.[94]

F. *States Currently Decide Vaccination Requirements*

Vaccination requirements are governed by the states because states protect the health, safety, welfare, and morals of their citizens.[95] All states require students attending public schools to be vaccinated unless the child has a valid exemption—and some states also have the same requirements for private schools.[96] In 2016, all 50 states allowed medical exemptions, 47 states allowed religious exemptions, and 18 states allowed philosophical exemptions.[97] By 2019, states that allowed religious and philosophical exemptions decreased: 45 states currently allow religious exemptions and 15 states currently allow philosophical exemptions.[98] California, Mississippi, Maine, West Virginia, and New York are the only states that have eliminated both religious and philosophical exemptions.[99]

Out of those five states, New York has arguably the strictest vaccine laws.[100] First, unlike other states, New York's vaccine laws were immediately implemented.[101] Second, unlike California or Maine, New York has no exemption for students with special needs.[102] Also, New York made it harder to get a medical exemption:

> A signed, completed medical exemption form approved by the NYSDOH or NYC Department of Education from a physician licensed to practice medicine in New York State certifying that

---

[93] *Id.*

[94] Cornwall, *supra* note 7.

[95] See U.S. CONST. amend. XIV.

[96] Barraza et al., *supra* note 10, at 16 ("[O]ften these requirements extend to children attending daycare or private schools.").

[97] Barraza et al., *supra* note 10, at 16.

[98] *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 32.

[99] *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 32.

[100] *See* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.1–66-1.10 (2019); Sharon Otterman, *Get Vaccinated or Leave School: 26,000 N.Y. Children Face a Choice*, N.Y. TIMES (Sept. 3, 2019), https://perma.cc/T6AH-HJDW.

[101] *See* Otterman, *supra* note 100 (noting that Maine's new law did not go into effect immediately).

[102] Otterman, *supra* note 100.

> immunization may be detrimental to the child's health, containing sufficient information to identify a medical contraindication to a specific immunization and specifying the length of time the immunization is medically contraindicated. The medical exemption must be reissued annually. The principal or person in charge of the school may require additional information supporting the exemption.[103]

In New York, parents must apply every year to get a medical exemption, which must be approved by a state physician.[104] New York also reserves the right to deny any unvaccinated child with a medical exemption the right to go to school during an outbreak of a vaccine-preventable disease.[105] Unvaccinated children without medical exemptions are not allowed to attend public school in New York.[106] New York's strict vaccination laws also apply to private schools.[107] Thus, parents can choose to homeschool, move to another state, or vaccinate.[108]

New York's strict vaccine laws are in response to a large measles outbreak in 2018, where 654 people in New York City and 414 people in other parts of New York contracted measles—a high number considering that measles was declared eliminated from the United States in 2000.[109] Measles still exists in pockets around the world and can spread when infected travelers encounter a group of unvaccinated people.[110] Because New York had 26,000 unvaccinated children claiming religious exemptions, and those children were clustered mostly in Orthodox Jewish communities, exposure to measles quickly led to a severe outbreak.[111]

G. *Explaining the Exemptions: Medical, Religious, and Philosophical*

Parents can obtain medical exemptions if certain vaccines would not be

---

[103] N.Y. Comp. Codes R. & Regs. 10, § 66-1.3(c).

[104] N.Y. Comp. Codes R. & Regs. 10, § 66-1.3(c).

[105] N.Y. Comp. Codes R. & Regs. 10, § 66-1.10.

[106] Otterman, *supra* note 100.

[107] Otterman, *supra* note 100.

[108] Otterman, *supra* note 100.

[109] Otterman, *supra* note 100; *see Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements*, *supra* note 32 ("The United States is currently experiencing the worst outbreak of measles in more than 25 years . . . . As a result of non-medical vaccination exemptions, many communities across New York have unacceptably low rates of vaccination, and those unvaccinated children can often attend school where they may spread the disease to other unvaccinated students, some of whom cannot receive vaccines due to medical conditions.").

[110] *See Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements*, *supra* note 32.

[111] Otterman, *supra* note 100.

safe for their child.[112] For example, individuals cannot safely get a vaccine if they are allergic to one of its ingredients.[113] The medical exemptions vary with each disease, but, in general, age, impaired immune function, current illness, and allergies can provide grounds for medical exemptions.[114] The requirements to receive a medical exemption also vary by state; some states require medical exemptions to be renewed each year, and all require some sort of physician authorization.[115] In states that allow it, parents can get philosophical exemptions if they do not want their child to be vaccinated.[116] Some parents choose not to get their child vaccinated because they want their child to develop immunity naturally.[117] Many parents believe vaccines are not safe.[118] One study claims that about 25% of parents are concerned about vaccine safety, and 30% of parents think vaccines cause autism.[119] Parents can receive a religious exemption if they certify that their religion objects to vaccines.[120] But only a few religions, like Christian Scientists and some faith healing groups, actually object to vaccines.[121] Unlike medical exemptions, which require doctor approval, "in most states, . . . you can simply sign a form stating that you have religious reasons to opt out."[122] Because so few religions actually object to vaccines, some religious exemptions are more matters of personal interpretation.[123] One mother stated that "[t]he Bible . . . barred her as a Christian from 'desecrating the body,' which is what she says vaccines do."[124] But many Christians do get vaccines, and the Christian faith does not object to vaccines.[125] Similarly, not all Orthodox Jews object to vaccinations.[126]

---

[112] *See generally Who Should NOT Get Vaccinated with These Vaccines*?, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/M572-CCML (last updated Apr. 2, 2020).

[113] *See id.*

[114] *See id.*

[115] *What Are the Rules on Vaccine Exemptions?*, WEBMD, https://perma.cc/W2N7-JQPY (last updated Apr. 21, 2021).

[116] *Id.*

[117] *See generally id.*

[118] *See id.*

[119] Otterman, *supra* note 100.

[120] *What Are the Rules on Vaccine Exemptions?*, *supra* note 115.

[121] *What Are the Rules on Vaccine Exemptions?*, *supra* note 115.

[122] *What Are the Rules on Vaccine Exemptions?*, *supra* note 115.

[123] *What Are the Rules on Vaccine Exemptions?*, *supra* note 115.

[124] Otterman, *supra* note 100.

[125] *See* Vincent Iannelli, *Are There Religious Exemptions to Vaccines?*, VERYWELL FAMILY, https://perma.cc/AW8H-LFHK (last updated Dec. 9, 2020).

[126] Kimiko de Freytas-Tamura, *Despite Measles Warnings, Anti-Vaccine Rally Draws Hundreds of Ultra-Orthodox Jews*, N.Y. TIMES (May 14, 2019), https://perma.cc/NS6M-7BQ8 (showing that

II. A National Need for Increased Vaccination

Measles resurgences are becoming more common across the country.[127] The majority of people infected by measles outbreaks in 2019 were unvaccinated, and "underimmunized close-knit communities . . . accounted for 88% of all cases."[128] If the United States does not increase its vaccination rates, especially among children, then more people will get sick from completely preventable diseases.[129] And measles is not the only disease making a comeback:

> Poliovirus hasn't spread in our country because immunization rates are high. If immunization rates drop, however, polio will be back. Which is exactly what happened in an undervaccinated Amish community in Minnesota in 2005 when five children came down with polio. Or in an Amish community in Pennsylvania in 2001 when six children suffered meningitis caused by Hib. Or in states newly independent of the Soviet Union between 1990 and 1994 when 50,000 people, mostly children, were infected with diphtheria. Let your guard down, and these diseases will come back.[130]

States are not as equipped as the Federal Government to handle national outbreaks.[131] In 2019, twenty-two states had reported measles cases.[132] In 2015, one infected person in Disneyland spread the infection to eight different states.[133] COVID-19 spread to every continent in the world and every state in the United States in three months.[134] It has killed hundreds of thousands of people, left millions unemployed, and subjected Americans to the harshest quarantine measures in living memory.[135] The United States is facing an immediate and increasing health crisis and needs to quickly and

---

Orthodox Rabbi objected to the anti-vaccination movement).

127 *See* Patel et al., *supra* note 28, at 402.

128 Patel et al., *supra* note 28, at 402.

129 *See* Patel et al., *supra* note 28, at 403.

130 Offit, *supra* note 32; *see* Charles Payne, *Untraceable Coronavirus Clusters Emerge Outside Asia, Worrying Health Officials*, FOX BUSINESS (Feb. 22, 2020), https://perma.cc/Z6GN-XLA9 (illustrating how a contagious virus can spread globally, despite the extreme measures China took to contain it).

131 *See generally* Patel et al., *supra* note 28, at 403.

132 Patel et al., *supra* note 28, at 402.

133 Adeel Hassan, *Disneyland Visitor with Measles May Have Exposed Hundreds to Infection*, NY TIMES (Oct. 23, 2019), https://perma.cc/6LED-S9ZR; Krakow, *supra* note 7.

134 Associated Press, *How Did Coronavirus Infect People on Every Continent but Antarctica in Just Three Months?*, THE OREGONIAN (July 26, 2020, 6:23 AM), https://perma.cc/LY7Z-NTMC.

135 *See* Editorial Bd., *supra* note 1.

dramatically raise its vaccination rates nationally to prevent outbreaks.[136] New York's public school vaccine policy (immediately implemented, with no religious or philosophical exemptions, and with state-monitored, annual medical exemptions) is the most effective way to increase vaccination rates because it compels parents to comply.[137] The government has a duty to protect the most vulnerable population—people who cannot get vaccines for medical reasons—and the choices of a few parents should not endanger the health of the community.[138] The Federal Government needs to adopt New York's strict vaccination law to prevent more outbreaks.[139]

III. It Is Constitutional for the Federal Government to Adopt a National Vaccination Policy

A. *The New York Policy Would Be the Best to Implement Nationally*

The 2019 New York vaccination policy would be the most effective policy to achieve herd immunity for diseases with a current vaccine, like measles and COVID-19.[140] The federal government should require all students without a strictly regulated medical exemption to be vaccinated before going to public school.[141] The New York policy is better than other state policies for three reasons.[142] First, New York's vaccine laws were immediately implemented, requiring all students attending New York schools to be vaccinated before the 2019 school year.[143] An immediately implemented national vaccine policy would similarly achieve high vaccination rates quickly.[144] Second, New York has no exemption for special needs students, ensuring a greater vaccination rate.[145] Third, New York also made it harder to get a medical exemption, avoiding a situation like California where medical exemptions doubled when the state eliminated

---

136 *See generally* Patel et al., *supra* note 28; *Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements*, *supra* note 32.

137 *See* Otterman, *supra* note 100.

138 *See generally* Patel et al., *supra* note 28 (noting the unvaccinated are the primary source of outbreaks).

139 *See* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.1–66-1.10 (2019).

140 *See* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.1–66-1.10 (2019); *see also* Oxford Vaccine Grp., *supra* note 16.

141 *Contra* N.Y. Comp. Codes R. & Regs. 10, § 66-1.1(a) (applying the New York policy to private schools as well as public schools).

142 *See generally* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.1–66-1.10.

143 Otterman, *supra* note 100.

144 *See* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.1–66-1.10.

145 Otterman, *supra* note 100.

religious and philosophical exemptions.[146] To further ensure that only people with true medical conditions get the exemption, in New York, parents must annually complete a detailed application that is submitted to a state physician for approval.[147] New York also reserves the right to deny any unvaccinated child with a medical exemption the right to go to school during an outbreak of a vaccine preventable disease.[148] Unvaccinated children without medical exemptions are not allowed to attend school in New York.[149] Although New York's strict vaccination laws apply to private schools, this Note questions the legitimacy of the federal government's control over private schools that, unlike public schools, do not receive federal funding.[150] Thus, under the federally-mandated vaccination plan this Note advocates for, parents can choose: to homeschool, to send their children to private school, or to vaccinate.[151] People who truly cannot get vaccinated for medical reasons will be protected by herd immunity; and, most importantly, the public will be protected from the spread of diseases.[152]

B. *Medical Exemptions Should Be the Only Exemption*

Medical exemptions are only for people who cannot safely be vaccinated, and are not a choice, unlike religious and philosophical exemptions.[153] Very few children actually require medical exemptions.[154] But some parents use medical exemptions as a way to circumvent stricter vaccine laws.[155] When California banned non-medical exemptions, medical exemptions increased by 250% because "some doctors began writing medical exemptions for parents who had personal objections to vaccines."[156]

---

[146] Otterman, *supra* note 100 (explaining that when California banned all non-medical exemptions, their medical exemptions went from .2% to 1% of the population, dulling the law's effect).

[147] N.Y. Comp. Codes R. & Regs. 10, § 66-1.3(c).

[148] N.Y. COMP. CODES R. & REGS. 10, § 66-1.10.

[149] Otterman, *supra* note 100.

[150] Grace Chen, *An Overview of the Funding of Public Schools*, PUB. SCH. REV., https://perma.cc/3325-4P84 (last updated Mar. 31, 2021) (explaining that about 8% of a public school's budget is federal funds); Otterman, *supra* note 100.

[151] *See generally* Otterman, *supra* note 100.

[152] *What Are the Rules on Vaccine Exemptions?*, *supra* note 115.

[153] *But see* Otterman, *supra* note 100 (explaining that when California banned all non-medical exemptions, their medical exemptions went from .2% to 1% of the population, dulling the law's effect).

[154] *What Are the Rules on Vaccine Exemptions?*, *supra* note 115.

[155] *See What Are the Rules on Vaccine Exemptions?*, *supra* note 115; *see also* Otterman, *supra* note 100.

[156] *What Are the Rules on Vaccine Exemptions?*, *supra* note 115; *see* Otterman, *supra* note 100.

Thus, medical exemptions should be narrow and regulated like the New York policy, allowing only the few children who cannot receive vaccines to get the exemption.[157] In order to protect people who have valid medical exemptions, the exemptions need to be narrow and vaccination rates need to be high.[158] If too many unvaccinated people are in one area, then herd immunity is not effective, and the disease can spread to those who cannot safely get the vaccine.[159] Furthermore, vaccines are never 100% effective, meaning that sometimes a few people who get vaccinated can still get a mild version of the disease.[160] Therefore, a higher vaccination rate means that there is less virus spreading, and infection is less likely, whether a person is vaccinated or not.[161]

Parents who claim philosophical exemptions raise several objections to vaccines.[162] They claim vaccines are not safe, they want their children to develop natural immunity, and they worry vaccines cause autism.[163] All of these concerns are unfounded.[164] First, while vaccines have rare side effects like every other medicine, vaccines are rigorously tested, licensed, and monitored to ensure their safety.[165] Second, while vaccines are effective in helping a body build immunity, developing natural immunity exposes the unvaccinated child and the community to dangerous disease.[166] Third, vaccines *do not* cause autism.[167] Although the 1998 Wakefield studies claimed that vaccines caused autism, such studies were retracted and disproved by

---

157 *See* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.3(c) (2019) at 11 (mandating that parents must apply for a medical exemption every year, and that the exemption must be approved by a specific doctor trained by the state thereby eliminating the choice of parents who find the one doctor to sign off on their medical exemption).

158 *See* Oxford Vaccine Grp., *supra* note 16 (underlining that immunizing 90-95% of the population is necessary to prevent the spread of measles).

159 *See* Oxford Vaccine Grp., *supra* note 16.

160 *Vaccines and Immunization: Myths and Misconceptions*, WHO: WORLD HEALTH ORG. (Oct. 19, 2020), https://perma.cc/285B-ZAGG.

161 *See* Shelly McNeil, *Overview of Vaccine Efficacy and Vaccine Effectiveness* (Canadian Center for Vaccinology PowerPoint 2006), https://perma.cc/W64X-QM7X.

162 *See Understanding How Vaccines Work*, *supra* note 51; *see also Vaccines and Autism*, CHILDREN'S HOSPITAL OF PHILA., https://perma.cc/TQU5-DXAM (last visited Jan. 3, 2022).

163 *Understanding How Vaccines Work*, *supra* note 51; *Vaccines and Autism*, *supra* note 162; *see Overview, History, and How the Safety Process Works*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/C6W3-EQ3B (last visited Jan. 3, 2022).

164 *See Vaccine Safety*, *supra* note 83; *see also Understanding How Vaccines Work*, *supra* note 51; *Vaccines and Autism*, *supra* note 162.

165 *Vaccine Safety*, *supra* note 83.

166 *Understanding How Vaccines Work, supra* note 51.

167 *Vaccines and Autism*, *supra* note 162.

dozens of other studies.[168] In short, philosophical exemptions are mainly based on misinformation about the safety and effectiveness of vaccines and should not be a valid basis for exemption nationwide.[169]

Finally, many parents argue that mandatory vaccination infringes on their religious freedom and fundamental right to parent their child how they choose.[170] But, to a certain extent, the federal government has always limited personal rights in order to protect the public.[171] The government may limit First Amendment rights to prevent the public from panicking.[172] The FDA regulates the safety of the food we eat.[173] The Clean Air Act regulates how much emission cars can emit.[174] The draft requires people to sign up for military service to protect the country.[175] Vaccine-preventable diseases are a grave and increasing health threat to the public.[176] The federal government, like it already does in many ways, should limit personal choices that harm other people.[177]

C. *How to Counter Anti-Vax Beliefs*

People have always protested against vaccines.[178] Before the first true vaccines were ever invented, people protested against a Boston experiment that was largely successful.[179] In this experiment, those inoculated against smallpox had a mortality rate of 2% while people who had not been inoculated had a mortality rate of 14.8%—but many people still protested

---

[168] *Vaccines and Autism*, *supra* note 162.

[169] *See What Are the Rules on Vaccine Exemptions?*, *supra* note 115. *See generally Vaccines and Autism*, *supra* note 162.

[170] *See generally* Troxel v. Granville, 530 U.S. 57, 63 (2000) ("[P]arents should be the ones to choose whether to expose their children to certain people or ideas.").

[171] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[172] *Id.* (explaining that one cannot yell "fire" in a crowded theatre).

[173] *What We Do*, FDA: FOOD & DRUG ADMIN., https://perma.cc/WP3B-787E (last updated Mar. 28, 2018).

[174] *See* 42 U.S.C. § 7412 (1967) (explaining the criteria for a major source polluter and how that polluter is regulated).

[175] *See generally* Selective Draft Law Cases, 245 U.S. 366 (1918) (showing how the U.S. Supreme Court upheld the draft as constitutional).

[176] *See* Offit, *supra* note 32; *see also* Payne, *supra* note 130.

[177] *See* 42 U.S.C. § 7412 (explaining how there are limits on how much air pollution someone can put into the atmosphere); *Selective Draft Law Cases*, 245 U.S. at 366 (showing that the government can compel its citizens to do something); *What We Do*, *supra* note 173 (illustrating how there are safety limitations on what food and drugs can be sold).

[178] *See generally The Fight Over Inoculation During the 1721 Boston Smallpox Epidemic*, *supra* note 48.

[179] *See The Fight Over Inoculation During the 1721 Boston Smallpox Epidemic*, *supra* note 48.

the inoculations.[180] People fear science that they do not understand.[181] Psychologists have conducted research to discover the best way to change parent's minds about vaccination.[182] One study concluded that parents should be educated about the benefits, low safety risks, and the community necessity of vaccination.[183] By "convincing parents that the probability of disease contraction is high if they do not vaccinate their children and that the consequences of getting these illnesses are severe," the study concluded parents would be more likely to vaccinate.[184]

However, if dozens of peer-reviewed scientific studies cannot convince parents that vaccines do not cause autism, it may be difficult to eliminate parents' persistent fear.[185] If that is the case, and the federal government adopted the New York Law, parents would not be entirely bereft of options—parents could choose not to vaccinate and to homeschool their children instead.[186]

D. *Mandating Vaccination Is Not a Freedom of Religion Violation*

Religious exemptions are a greater danger to the public than philosophical exemptions because unvaccinated people with strongly held religious beliefs tend to live in tightly knit communities, making it easy for a disease to spread.[187] Religious groups are also a target for the anti-vaccination movement.[188] "[T]he anti-vaccination movement can exploit fear and anxiety within relatively insular communities, especially religious ones, to undercut scientifically sound warnings from health experts."[189] While it is important to educate parents about the safety of vaccines, it is equally important to quickly increase vaccination rates to prevent outbreaks and protect the vulnerable population that cannot get vaccinated for medical reasons.[190] Therefore, the federal government should adopt New York's

---

[180] *The Fight Over Inoculation During the 1721 Boston Smallpox Epidemic*, *supra* note 48.

[181] *See The Fight Over Inoculation During the 1721 Boston Smallpox Epidemic*, *supra* note 48.

[182] Zachery Horne et al., *Countering Antivaccination Attitudes*, 112 PROCEEDINGS NAT'L ACAD. SCI. 10321, 10321 (2015), https://perma.cc/UP9Z-3UT2.

[183] *See id.*

[184] *Id.*

[185] *Vaccines and Autism*, *supra* note 162; *see* Otterman, *supra* note 100 (demonstrating that parents will believe that vaccines cause autism if they have a child who received vaccines and developed autism).

[186] Otterman, *supra* note 100.

[187] *See generally* Patel et al., *supra* note 28 (noting close-knit communities are often underimmunized).

[188] Freytas-Tamura, *supra* note 126.

[189] Freytas-Tamura, *supra* note 126.

[190] *See Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from*

vaccine policies and require all students attending public school to be vaccinated unless they have a verified medical exemption.[191]

Religious freedom is an essential right protected by the First Amendment.[192] But, that right is not absolute.[193] In *Reynolds v. United States*, the Supreme Court held that freedom of belief was absolute, but not freedom of practice.[194] Thus, the defendant could believe in polygamy, but could not practice polygamy in violation of U.S. law.[195] The right of parents to practice their religion should be weighed against the state's interest in protecting children.[196] Regarding vaccination, the government's interest in protecting the community against national outbreaks of deadly diseases outweighs parents' religious views.[197] Personal religious views must not be allowed to endanger the community.[198]

Furthermore, a religiously neutral and generally applicable law does not need to be justified by a compelling government interest to be constitutional, even if that law has the incidental effect of burdening a particular religious practice.[199] Courts in the Second, Third, and Fourth Circuits, in addition to courts in New York, California, and Arkansas, have upheld the constitutionality of vaccine mandates that do not have religious exceptions.[200] They have held that vaccine mandates are neutral, and only incidentally affect religion, *even if states had religious exemptions, then repealed them*.[201] Deciding that removing a religious exemption was neutral and did not target religious beliefs, a New York trial court looked at the purpose of

---

School Vaccination Requirements, *supra* note 32.

[191] *See generally* N.Y. Comp Codes R. & Regs. 10, § 66-1.3 (2019).

[192] U.S. CONST. amend. I.

[193] *See* Reynolds v. United States, 98 U.S. 145, 145 (1878).

[194] *Id.* at 166 ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

[195] *Id.*

[196] *See* Wisconsin v. Jonas Yoder, 406 U.S. 205, 214–15 (1972).

[197] *See id.*

[198] *See id.* at 233-34.

[199] Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 877–80 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. . . . [Religious objections have not] 'relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.'") (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940).

[200] *See* F.F. v. State, 108 N.Y.S.3d 761, 770–72 (N.Y. Sup. Ct. 2019).

[201] *See id.* at 772–74 ("A neutral law, the Supreme Court has explained, is one that does not 'target[ ] religious beliefs as such' or have as its 'object . . . to infringe upon or restrict practices because of their religious motivation.'") (quoting Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 464 (2006)).

the entire vaccination statute, not just the repeal of the exemption—because the purpose of the mandatory vaccination requirement was to "protect[] the public health from vaccine-preventable diseases" after "a serious outbreak of measles . . . concentrated in areas of low vaccination rates," the trial court decided that the repeal was neutral and did not violate the First Amendment.[202] Decisions like this demonstrate that it is constitutional, and does not violate the free exercise of religion, not only to have vaccine mandates without religious exemptions, but also to repeal existing religious exemptions.[203]

E. *The Federal Government, Not the States, Needs to Mandate Vaccination*

It is undisputed that states have the power to mandate vaccination; the Constitution grants states police powers over the health, safety, welfare, and morals of their citizens.[204] Thus, the U.S. Supreme Court has upheld a state's power to mandate vaccination under its police powers.[205] In *Jacobson v. Massachusetts*, a Massachusetts citizen challenged the state's mandatory smallpox vaccine.[206] Smallpox was one of the most feared illnesses in the world in the early 18th century.[207] It was so contagious and deadly that it killed over 300 million people in the 20th century alone.[208] But, one Massachusetts resident claimed vaccines made him ill, and he did not want to vaccinate his son.[209] He said the state's mandatory vaccination policy invaded his liberty.[210] The Court upheld Massachusetts's mandatory vaccination policy saying, "the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[211] The Court ultimately decided that because the state vaccination statute had a substantial relation to protecting people's health, it was constitutional.[212] Most importantly, the Court recognized that people's liberty is not absolute:

> [T]he liberty secured by the Constitution of the United States to

---

[202] *Id*. at 774.

[203] *See generally id.*

[204] *See* U.S. CONST. amend. X; Berman v. Parker, 348 U.S. 26, 28 (1954).

[205] *See* Jacobson v. Massachusetts, 197 U.S. 11, 35 (1905).

[206] *Id.* at 12.

[207] Pryor, *supra* note 31.

[208] *Smallpox*, NAT'L GEOGRAPHIC, https://perma.cc/54RT-9KJV (last visited Jan. 3, 2022).

[209] *Jacobson*, 197 U.S. at 36.

[210] *Id.* at 26.

[211] *Id.* at 25.

[212] *Id.* at 31.

> every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned. . . . The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law."[213]

Historian Michael Willrich discussed *Jacobson* in his book, *Pox*.[214] He said that

> constitutional restraints on police power [are] few. Laws must apply equally to all under like circumstances . . . government interferences with individual rights must be 'reasonable'—they must have a clear relation to some legitimate legislative purpose. Beyond those outer limits . . . most courts stayed out of the way of [state] police power.[215]

In extraordinary times, the state government can act to regulate individual liberty in order to protect collective health.[216]

Jacobson creates, and Willrich explains, a reasonableness test for the constitutionality of mandatory vaccine policies.[217] In other words, a mandatory vaccine policy is constitutional as long as the health concerns

---

[213] *Id.* at 26–27 (citations omitted).

[214] MICHAEL WILLRICH, POX: AN AMERICAN HISTORY 302 (2012).

[215] *Id.*

[216] *See, e.g.*, *Jacobson*, 197 U.S. at 29–30; Brown v. Smith, 235 Cal. Rptr. 3d 218, 224–27 (Cal. Ct. App. 2018) (upholding *Jacobson* and holding: (1) immunization is rationally related to police powers; (2) mandating vaccination did not violate freedom of religion, equal protection, or the right to attend school); WILLRICH, *supra* note 214, at 302.

[217] *See Jacobson*, 197 U.S. at 25; WILLRICH, *supra* note 214, at 302.

requiring vaccination have a clear relation to a legitimate government power.[218] We live in a global society where it is easy to travel from one state to another, or from one country to another.[219] At the time of this writing, COVID-19 is a global pandemic infecting millions.[220] COVID-19 is just the latest example of the danger associated with disease outbreaks in our globally-connected society, and it will not be the last.[221] The first part of the *Jacobson* test, the strong health concerns, is clearly met.[222] State governments meet the second part of the test, a clear relation to legitimate government power, because courts have affirmed they have the legitimate police powers to mandate vaccination.[223] This Note takes the analysis one step further, arguing that the increasingly global nature of society necessitates that the federal government implement a national vaccination policy in public schools.[224]

Jacobson was decided before the Court established its substantive due process analysis, and the Supreme Court has not decided a mandatory vaccination case since.[225] Now, there are three levels of scrutiny to determine the constitutionality of statutes that infringe on fundamental rights.[226] First, if the right infringed on is a fundamental liberty interest, then a court applies strict scrutiny, meaning that the government has to show a compelling state interest and that their action is narrowly tailored to meet state goals.[227] Second, if the right is a non-fundamental liberty interest, then a court applies

---

[218] *Jacobson*, 197 U.S. at 39; *see* WILLRICH, *supra* note 214, at 302.

[219] *See generally* Barraza et al., *supra* note 10 (noting that, once one person traveling from overseas brought measles back to the United States and visited Disneyland, 125 people in eight states got measles).

[220] Emily Landon, *COVID-19: What We Know So Far About the 2019 Novel Coronavirus*, UCHI. MED., (May 8, 2020), https://perma.cc/DU6E-FRQS.

[221] *See* Barraza et al., *supra* note 10, at 16–19.

[222] *See Jacobson*, 197 U.S. at 25, 27. S*ee generally* WILLRICH, *supra* note 214.

[223] *Jacobson*, 197 U.S. at 24–25, 35; s*ee* U.S. CONST. amend. X.

[224] *See generally* Jacobson, 197 U.S. at 14, 24–25 (outlining that people give up some liberties to live in an organized society, and that a liberty intrusion reasonably related to a legitimate government interest is constitutional); Helen Branswell, *Understanding Pandemics: What They Mean, Don't Mean, and What Comes Next with the Coronavirus*, STAT (Feb. 12, 2020), https://perma.cc/Z2DP-4DW8 (explaining how pandemics start and how quickly an outbreak can turn into a pandemic).

[225] Mary Holland, *Compulsory Vaccination, the Constitution, and the Hepatitis B Mandate for Infants and Young Children*, 12 YALE J. HEALTH POL'Y L. & ETHICS 39, 48 (2012); *see* Biden v. Missouri, 142 S. Ct. 647, 655 (2022) (staying an injunction on a federal vaccine mandate for facilities receiving Medicare and Medicaid funding, thereby allowing the mandate until the case is decided on the merits).

[226] *See* Holland, *supra* note 225, at 48–49.

[227] *See* Holland, *supra* note 225, at 48–49.

the rational basis test, meaning that the government restriction cannot be arbitrary.[228] Third, under intermediate scrutiny, the law/policy must further an important government interest by means that are substantially related to the interest.[229] At least one law review article has argued that the Supreme Court would view mandatory vaccination under intermediate scrutiny.[230] While the Supreme Court has not decided a mandatory vaccination case since *Jacobson*, a 2015 decision in the Second Circuit affirmed that a mandatory vaccination policy does not violate substantive due process rights.[231]

IV. The Federal Government Should Mandate National Vaccination

A. *Option One: A National Recommendation from the Executive*

To mandate national vaccination, the federal government must have the legitimate power to do so.[232] Because the states already have the police power to mandate vaccination, the first option for increasing that policy across all states would be through a non-binding national recommendation.[233] A presidential guideline requesting all states to follow New York's strict vaccine policies in public schools could motivate state governments to use their police powers to put that recommendation into law.[234] While this option is most in accord with the current division of police powers between the states and the federal government, there is a significant downside to this choice.[235] Namely, the recommendation would be non-binding on states.[236] As we saw with the reopening guidelines, many states disregarded presidential guidelines and opened up early, triggering a

---

[228] *See* Holland, *supra* note 225, at 48–49.

[229] *See* Holland, *supra* note 225, at 48–49; City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985).

[230] *See, e.g.*, Holland, *supra* note 225, at 48–49 (explaining that the Supreme Court suggested it would apply intermediate scrutiny in a case about a patient's liberty interest in the right to refuse care).

[231] Phillips v. City of New York, 775 F.3d 538, 542 (2015).

[232] *See Jacobson*, 197 U.S. at 25; WILLRICH, *supra* note 214.

[233] *See Jacobson*, 197 U.S. at 28.

[234] *See, e.g.*, *Coronavirus: Trump Unveils Plan to Reopen States in Phases*, BBC (Apr. 17, 2020), https://perma.cc/MU7U-VFEC (demonstrating the type of Presidential guideline that could be implemented).

[235] *See* Derek Hawkins, Marisa Iati & Jacqueline Dupree, *Coronavirus Updates: Seven-Day Average Case Total in the U.S. Sets Record for 27th Straight Day*, WASH. POST (July 5, 2020), https://perma.cc/N9U2-68DA; Jasmine C. Lee et al., *See Reopening Plans and Mask Mandates for All 50 States*, N.Y. TIMES, https://perma.cc/5V8J-R536 (last updated July 1, 2021) (demonstrating state's varied mask mandates and reopening plans despite the presidential guidelines).

[236] *See Coronavirus: Trump Unveils Plan to Reopen States in Phases*, *supra* note 234.

second wave of COVID-19 cases.[237] Additionally, in today's polarizing political climate, it would likely be challenging for the President and state legislatures to all agree on something.[238] The goal of increasing vaccination rates across all states would likely be thwarted by a non-binding recommendation.[239] This Note recognizes the recent Supreme Court order staying an injunction on the President's vaccine mandate for facilities receiving Medicare and Medicaid funding.[240] While not a decision on the merits of the mandate, and while, unlike with public schools, the Secretary of Health and Human Services is statutorily authorized to promulgate health and safety regulations, the order indicates that the Supreme Court is not foreclosed to Executive Branch vaccine mandates.[241]

B. *Option Two: Spending Clause*

This Note argues that the federal government has the power, under the Spending Clause, to withhold a small percentage of federal funds for education unless states eliminate religious and philosophical exemptions.[242] Congress has the power to spend for the general welfare and to condition the receipt of federal funds.[243] This power "is not limited to the direct grants of legislative power found in the Constitution," meaning that the federal government could use the Spending Power to control legislative fields the Constitution does not explicitly grant them.[244] In *South Dakota v. Dole*, South Dakota challenged a congressional act, the National Minimum Wage Drinking Age Act, which withheld a percentage of highway funds from states until they changed their drinking age to 21.[245] South Dakota argued that the Twenty-first Amendment gave states the right to set a minimum drinking age.[246] The Court upheld the constitutionality of the Act deciding that the "relatively mild encouragement to the States" of withholding 5% of state highway funds was a valid use of the Spending Clause.[247] Furthermore,

---

[237] *See* Hawkins, *supra* note 235; Lee et al., *supra* note 235.

[238] *See, e.g.*, Hawkins, *supra* note 235; Lee et al., *supra* note 235.

[239] *See, e.g.*, Hawkins, *supra* note 235; Lee et al., *supra* note 235.

[240] Biden v. Missouri, 142 S. Ct. 647 (2022).

[241] *See id.*

[242] *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) (holding that an Act withholding federal highway funding on the condition that states make their drinking age 21 is constitutional).

[243] U.S. CONST. art. I, § 8, cl. 1; *Dole*, 483 U.S. at 206.

[244] United States v. Butler, 297 U.S. 1, 66 (1936).

[245] *See* 483 U.S. at 205–06.

[246] *Id*. at 205–06 ("South Dakota asserts that the setting of a minimum drinking age is clearly within the 'core powers' reserved to the states under § 2 of the Amendment.").

[247] *Id*. at 211–12.

the Court decided that, although the Twenty-first Amendment barred Congress from enacting a national drinking age directly, Congress could do so through withholding federal funds without infringing on state rights.[248]

Dole established a five-part test for judging the constitutionality of Spending Clause actions.[249] First, the spending must promote the general welfare.[250] Courts generally defer to the judgment of Congress in deciding if there is a public purpose for the spending.[251] Second, Congress must unambiguously condition the receipt of federal funds so States can knowingly decide whether to acquiesce to the condition.[252] Third, the condition must be related to the "federal interest in the particular national projects or programs."[253] Fourth, the conditional grant of federal funds must not be barred by another constitutional provision.[254] Finally, the condition cannot be coercive.[255]

While it may appear to be a broad provision, the Spending Power is not unlimited.[256] In *NFIB v. Sebelius*, the Court held as unconstitutional a Medicaid expansion plan requiring states to provide healthcare coverage to new categories of people or lose their Medicaid funding entirely.[257] As one law professor argues, the Court's interpretation of the *Dole* factors in that case also potentially limits the Spending Clause.[258] The second factor, for example—whether the terms of the condition are clear for states—Justice Roberts in *NFIB v. Sebelius* interpreted as "whether the States could have known at the time they agreed to participate in the *original* Medicaid plan that those funds might later be at risk unless additional conditions—to be disclosed at some unknown point in the future—were met."[259] Also, the Justice Roberts read the third factor—the program's relatedness to a federal interest—as allowing only a modification of Medicaid, and not an expansion.[260]

This Note argues that withholding federal education funding unless

---

[248] *Id*. at 209–10.

[249] *Id*. at 207–08; *see* Lynn A. Baker, *The Spending Power After* NFIB v. Sebelius, 37 HARV. J.L. & PUB. POL'Y 71, 74–75 (2014).

[250] *Dole*, 483 U.S. at 207.

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.* at 208.

[255] *Id.* at 211.

[256] *See generally* Baker, *supra* note 249, at 71–72.

[257] 567 U.S. 519, 579–80 (2012).

[258] Baker, *supra* note 249, at 75–76.

[259] Baker, *supra* note 249, at 76.

[260] Baker, *supra* note 249, at 77.

states eliminate their religious and philosophical vaccine exemptions meets all five *Dole* factors and is Constitutional.[261] First, education spending promotes the general welfare and school vaccination increases classroom learning and decreases poverty.[262] Second, so long as Congress made the conditions unambiguous, then such a law would pass the *Dole* standard.[263] However, this argument is weakened by Justice Roberts' interpretation in *NFIB v. Sebelius* of the second factor; if the Court interpreted the second provision as whether States could have known at the time they agreed to receive federal education funding that additional conditions might later attach to those conditions, then it would be challenging in this context to meet that factor.[264] Third, such conditional funding is related to a federal interest because vaccinations allow children to stay healthy and stay in school.[265] Arguably, unlike *NFIB*, eliminating religious and philosophical exemption is only a modification of vaccination laws, not an expansion, because some states have already eliminated the exemptions.[266] Fourth, vaccine mandates are constitutional when promulgated by the states.[267]

Finally, if Congress withheld a small percent, say 5% like *Dole*, of federal education funds, then the condition to remove vaccine exemptions would likely be constitutional because, unlike eliminating all of a state's Medicaid budget, a 5% reduction would not be coercive.[268] Also, conditioning the receipt of federal funds on adopting a vaccine policy would not infringe on state powers under the 10th Amendment because, like *Dole* and the Twenty-first Amendment, Congress could not directly legislate a national vaccine policy but could condition spending without infringing on state rights.[269] With this all being said, the constitutionality of Congressional action to encourage national vaccination in public schools would find support under the Spending Clause.[270]

---

[261] *See* South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

[262] *See State of the World's Vaccines and Immunizations*, *supra* note 45. ("A recent study by a Harvard School of Public Health team found that by keeping children healthy and in school, immunization helps extend life expectancy and the time spent on productive activity–thereby contributing to poverty reduction.").

[263] *See Dole*, 483 U.S. at 207.

[264] *See* Baker, *supra* note 249, at 76.

[265] *See* Dole, 483 U.S. at 207; *State of the World's Vaccines and Immunizations*, *supra* note 45.

[266] *See* Baker, *supra* note 249, at 77; *see also States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 32.

[267] *See generally* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[268] *See Dole*, 483 U.S. at 211; NFIB v. Sebelius, 567 U.S. 519, 579-580 (2012); Chen, *supra* note 150 (explaining that federal funding is about 8% of a public school's budget).

[269] *See Dole*, 483 U.S. at 209–10.

[270] *See* United States v. Butler, 297 U.S. 1, 66 (1936).

C. *Option Three: Congressional Tax Powers*

Even if vaccines were not considered a unique form of commerce that the federal government could regulate under the Commerce Clause, the federal government could enact a tax for the general welfare on people who choose not to get vaccinated.[271] Like *NFIB*'s individual mandate on people who do not get health insurance, a tax on people who choose not to get vaccines would both raise revenue for the government (necessary for a federal act to be constitutional under the taxing power) and would encourage national vaccination.[272] The downside to using the taxing power rather than the Commerce Clause is that people could choose to pay the tax rather than get vaccinated.[273] The purpose of strict laws like those in New York is to prevent choice and thereby prevent outbreaks.[274] To ensure herd immunity, vaccination rates need to be high to eliminate diseases, and for vaccination rates to be high, the government must require people to vaccinate.[275]

CONCLUSION

This Note was written acknowledging that the federal government has never before instituted a national vaccination policy in public schools. However, the purpose of this Note is to explore solutions, start debates, and begin thinking about potential solutions to increase vaccination rates. COVID-19 has thrown into sharp relief the inherent national spread of viruses. Where before COVID-19 virus outbreaks were mostly clustered in under-immunized communities, COVID-19 exposed what would happen in the United States when unimmunized people confront a highly contagious virus, thereby showing us what could happen if vaccine rates continue to decline. But the purpose of this Note is also to inspire hope. Widespread vaccine use has allowed the United States to triumph over viruses in the

---

[271] *See* U.S. CONST. art. I, § 8 (stating that the Constitution gives Congress the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States").

[272] *See* NFIB v. Sebelius, 567 U.S. 519 (2012).

[273] *See id*. at 546–547 (explaining the individual mandate).

[274] *See Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements*, *supra* note 32 ("The United States is currently experiencing the worst outbreak of measles in more than 25 years. . . . As a result of non-medical vaccination exemptions, many communities across New York have unacceptably low rates of vaccination, and those unvaccinated children can often attend school where they may spread the disease to other unvaccinated students, some of whom cannot receive vaccines due to medical conditions."). *See generally* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.1–66-1.10 (2019).

[275] *See* Otterman, *supra* note 100.

past, and it can do so again. Vaccines promote freedom because they allow Americans to return to a life of normalcy. We live in an increasingly global society, so the federal government must ensure that the rights, health, and safety of all its citizens are protected. In an era of mobility and fake news, more people are traveling across state lines and spreading diseases and misinformation, while less people are vaccinating. Because of this, only the federal government can protect the United States from deadly diseases by mandating vaccination in public schools unless a child has a valid medical exemption.