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Cover Page Footnote

Candidate for Juris Doctor, Notre Dame Law School, 2022; Artium Baccalaureus in Politics with Certificates in Latin American Studies and Spanish Language and Literature, Princeton University, 2016. First, thank you to my family for their support and guidance. Thank you to my readers—especially Momma, Britt, and JLEG. Thank you also to Professor Nicole Garnett for her advice regarding the constitutionality of my proposed amendments to VACA 2019. All errors are my own.

VACCINATION EVASION: LEGISLATING A SOLUTION THROUGH A REVISED VACCINATE ALL CHILDREN ACT OF 2019

*Sophia C. Aguilar**

INTRODUCTION

The first variolation believed to have occurred in the United States is said to have been performed in Boston in 1721.¹ Resistance to vaccination began just as early. For example, across the Atlantic in 1722, Anglican Reverend Edmund Massey preached “[a] sermon against the dangerous and sinful practice of inoculation” at St. Andrew Church, Holborn in London.² In this sermon he opined that, among its other problems, inoculation was a “diabolical operation.”³

Unfortunately, individuals like Massey represented only the beginning of vaccine skepticism in the West. Even while early proponents of inoculation and vaccination included prominent figures such as Louis Pasteur, and Presidents John Adams and Thomas Jefferson,⁴ the struggle to convince the population to protect itself against deadly diseases began nearly as soon as the vaccine was first conceived.

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¹ Ira M. Rutko, *Zabdiel Boylston and Smallpox Inoculations*, 136 *ARCH. SURG.* 1213 (2001). Variolation is defined by the Merriam-Webster Dictionary as “the deliberate inoculation of an uninfected person with the smallpox virus (as by contact with pustular matter) that was widely practiced before the era of vaccination as prophylaxis against the severe form of smallpox.” *Variolation*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/medical/variolation> (last visited May 8, 2021).

² Edmund Massey, Lecturer at St. Andrew at Holborn, *A Sermon Against the Dangerous and Sinful Practice of Inoculation* (July 8, 1722).

³ *Id.*; see also Alexander Muacevic et al., *The Anti-vaccination Movement: A Regression in Modern Medicine*, *CUREUS* (July 3, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6122668/>.

⁴ For example, in 1806, President Thomas Jefferson wrote to Dr. G. C. Jenner, a member of the famous family who had perfected the smallpox vaccine: “Medecine [sic] has never before produced any single improvement of such utility You have erased from the calendar of human afflictions one of its greatest.” Letter from President Thomas Jefferson, to Doctor G. C. Jenner (May 14, 1806) (on file with the College of Physicians of Philadelphia).

Following a similar trajectory, public opinion toward vaccination in the United States has vacillated. As such, both courts and Congress have actively sought to explain the status of vaccination law in the United States. With respect to compulsory vaccination for school attendance, state law controls. Supreme Court precedent allows states to utilize their police power to regulate vaccination law. Additionally, courts exhibit a strong deference to local health ordinances.

Leaving these decisions to the states, however, has resulted in a checkerboard of vaccination matriculation requirements for public elementary and secondary school entry across the country. While some states' requirements are stringent—prohibiting all non-medical vaccination exemptions—other states' requirements fall to the opposite side of the spectrum. Prior to the Covid-19 pandemic, school matriculation vaccine exemptions had been credited with outbreaks of vaccine-preventable diseases such as measles, mumps, and chickenpox.⁵

Clarifying the role of mandatory vaccinations for school matriculation in the United States is timely. The world is currently experiencing its first pandemic in over 100 years. Concurrently, several vaccines have been approved for emergency use in the United States by the United States Food and Drug Administration (“FDA”). Thus, a salient question emerges: how do schools—whose role in the transmission of Covid-19 is still not completely understood—play a part in preventing the transmission of infectious diseases?⁶ This brings to mind the parallel points regarding America's ability to effectively address school safety in the wake of future pandemics or outbreaks, as well as the ability to keep schools open and competitive during future health crises. With these objectives in mind, this Note argues for the implementation of a congressional response to lenient, state-controlled, school matriculation vaccination exemptions.

This congressional response would standardize vaccination exemptions for school matriculation across the country. Although a federal response was previously attempted by some members of Congress and suggested by some scholars,⁷ these suggestions have not gained traction. This Note contends that previous proposals failed because they did not allow states to preserve religious vaccination exemptions for school matriculation. As such, this Note revises one previous attempt to legislate

⁵ A famous recent outbreak of a vaccine-preventable disease is the 2015 measles outbreak, also known as the “Disneyland Outbreak.” This outbreak resulted in 125 measles cases. See, e.g., Maimuna S. Majumder et al., *Substandard Vaccination Compliance and the 2015 Measles Outbreak*, 169 JAMA PEDIATRICS 494 (May 2015); Jennifer Zipprich et al., *Measles Outbreak: California, December 2014–December 2015*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 20, 2015), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6406a5.htm>. This outbreak included the infection of twelve patients who were “too young to be vaccinated.” Zipprich et al., *supra*.

⁶ As of September 18, 2020, the World Health Organization released the following guidance regarding Covid-19 transmission in schools:

The role of children in [the] transmission [of Covid-19] is not yet fully understood. To date, few outbreaks involving children or schools have been reported. However, the small number of outbreaks reported among teaching or associated staff to date suggests that spread of C[ovid]-19 within educational settings may be limited.

Coronavirus disease (COVID-19): Schools, WORLD HEALTH ORG. (Sept. 18, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19-schools>.

⁷ See *infra* Section I.B.v.

mandatory school vaccination: The Vaccinate All Children Act of 2019 (“VACA 2019”).⁸

As written, VACA 2019 does not allow for religious exemptions. Instead, it eliminates all non-medical vaccination exemptions. This is a fatal flaw. For various reasons, such a statute would never pass through a divided Congress.⁹ Rather, the solution to America’s checkerboard of vaccination requirements is congressional legislation that allows for religious exemptions but *not* for philosophical objections. This approach provides the most cogent response to constitutional and partisanship concerns, all while preserving the religious liberties of individuals who believe that vaccination is against their religion.

This Note argues that Congress should enact a federal statute to control vaccination laws across state lines, thus standardizing religious vaccination exemptions across the United States. It argues that these goals can be accomplished by amending the failed VACA 2019 with a new act: Vaccinate All Children Act of 2021 (“VACA 2021”). VACA 2021 would permit religious vaccination exemptions, standardizing the process across states and providing clear administrative guidelines for the renewal of these exemptions. VACA 2021 would also preserve states’ rights to determine whether or not they wish to allow non-medical vaccination exemptions in the first instance; it would do this by containing an “opt-out” provision by which states would retain the choice to ban all non-medical vaccination exemptions for public school matriculation.

This Note proceeds in four sections. Section I discusses the scope of the problem created by state-controlled vaccination policies. Section I.A reviews the trajectory of mandatory vaccination jurisprudence for school matriculation in the United States. Section I.B reviews vaccine exemptions. Section I.B.i discusses the resurgence of the anti-vaccination movement prior to the Covid-19 pandemic. Section I.B.ii defines the vaccination exemptions that exist in the current political landscape and provides some examples. Section I.B.iii studies Mississippi, a state that has eliminated all non-medical vaccination exemptions. Section I.B.iv analyzes the patterns that emerge from across different states’ exemption statutes and the current trajectory of the law. Section I.B.v discusses previous scholarship that has addressed legislative responses to mandatory vaccination for school matriculation at both a federal and state level.

Section II lays the foundation for the government’s ability to regulate vaccination requirements across the states. Section II.A discusses the federal government’s power to regulate public health and how Congress can do so. Section II.B discusses the limitations on that authority and the methods by which congressional action may be found unconstitutional.

Section III introduces VACA 2019. Section III.A discusses VACA 2019 and the debate surrounding its language. Section III.B analyzes why VACA 2019 is not a feasible solution, laying out the various problems raised by VACA 2019 as written. Section III.B.i discusses the constitutional and public policy concerns raised by VACA 2019. Section III.B.ii addresses both the partisan challenges and the prospective conflicts with state laws presented by VACA 2019.

⁸ H.R. 2527, 116th Cong. (2019).

⁹ See *infra* Section III.B.

Section IV proposes three revisions to VACA 2019. Section IV.A proposes the religious exemption language Section IV.B creates the provision which would protect states that have current legislation or that choose to exercise the “opt-out” provision. Section IV.C defines the relevant terms created in these new provisions. This Note concludes by calling for the immediate adoption of VACA 2021. Afterwards, the Appendix includes the full text of the VACA 2021.

I. HISTORY OF MANDATORY VACCINATIONS

A. COMPULSORY VACCINATION JURISPRUDENCE

United States legislation regulating mandatory vaccination began in Massachusetts. In 1809, Cambridge, Massachusetts enacted a vaccination law in response to a smallpox outbreak.¹⁰ Four years later, vaccination was addressed at a national level when Congress enacted “An Act to Encourage Vaccination.”¹¹ This Act created the first National Vaccine Agency which guaranteed access to the smallpox vaccine.¹²

By the late nineteenth century, compulsory vaccination laws in the United States had become more common, appearing in several states including New York and Massachusetts.¹³ Although mandatory vaccination was litigated, early litigation focused on “alleged ill-treatment or negligence in exposure by persons under treatment or in vaccination, less because of any claim that [mandatory] vaccination was improper or illegal.”¹⁴

The issue of vaccination as a prerequisite for school attendance did not arise until the mid-nineteenth century. In the 1860s, the rise of compulsory education led to a convergence of vaccination laws and education in the United States.¹⁵ This was because mandatory school attendance, along with the societal prevalence of smallpox, led to large outbreaks in schools.¹⁶

It would take more than sixty years, however, before mandatory vaccination requirements in any context reached the Supreme Court. Thus, the Supreme Court faced an issue of first impression in 1905 in *Jacobson v. Massachusetts*.¹⁷ There, the Court reviewed a Massachusetts law that gave municipal boards of health the authority to require the vaccination of people older than twenty-one against smallpox.¹⁸ The Massachusetts law stated that:

¹⁰ LAWRENCE O. GOSTIN & LINDSAY F. WILEY, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 181 n.27 (3d ed. 2000).

¹¹ An Act to Encourage Vaccination, ch. 37, 2 Stat. 806 (1813), *repealed by* An Act to Repeal the Act to Encourage Vaccination, ch. 50, 3 Stat. 677 (1922).

¹² Rebecca Bucchieri, Article, *Religious Freedom versus Public Health: The Necessity of Compulsory Vaccination for Schoolchildren*, 25 B.U. PUB. INT. L.J. 265, 269 (2016).

¹³ W.P. PRENTICE, *POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY* 132–34 (1894).

¹⁴ *Id.* at 133.

¹⁵ James G. Hodge & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 850 (2002).

¹⁶ John Duffy, *School Vaccination: The Precursor to School Medical Inspection*, 33 J. HIST. MED. 344 (1978).

¹⁷ 197 U.S. 11 (1905).

¹⁸ *Id.* at 12.

[T]he board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars.¹⁹

In February 1902, Cambridge, Massachusetts implemented its own statute in response to a smallpox outbreak.²⁰ The statute ordered anyone who had not received a vaccination since March 1, 1897 to be vaccinated or revaccinated.²¹ Jacobson argued that forcible vaccination was an abrogation of his constitutional rights laid out in the Preamble of the Constitution and the Privileges and Immunities Clause of the Fourteenth Amendment.²²

The Court held that Massachusetts had the power to forcibly vaccinate Jacobson.²³ The Court stated that “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.”²⁴ The Court did not, however, define the bounds of these public health goals.

Additionally, the Court commented on the importance of vaccination law. While opining on the situation specific to smallpox, the Court announced in dicta:

We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities If such be the privilege of a minority, then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the State.²⁵

These comments suggest that the definition of a “public health goal” is one that protects the health of the majority of citizens.²⁶ Additionally, the comments underscore a fundamental problem raised by vaccination law: compliance by a majority of the population is required to achieve herd immunity for the population. As such, the *Jacobson* Court limited the individual’s freedom to act in the face of a state experiencing a public health crisis. By doing this, the Court allowed the state,

¹⁹ *Id.* (quoting chap. 75 § 137 of The Revised Laws of Massachusetts Commonwealth).

²⁰ *Id.* at 22.

²¹ *Id.*

²² *Id.* at 13–14.

²³ *Id.* at 39.

²⁴ *Id.* at 25.

²⁵ *Id.* at 37–38.

²⁶ Natalie A. Dana, Article, *Compulsory Vaccination Laws: Searching for a Policy-Making Process Immune to Bias*, 37 SETON HALL LEGIS. J. 1, 6 (2012).

with the goal of achieving the “welfare, comfort, and safety of the many,” to “not permit the interests of the many to be subordinated to the wishes or convenience of the few.”²⁷

This analysis is not to suggest that the *Jacobson* Court ignored the rights of individual citizens. The Court noted that a local community or a state’s power might infringe on individual rights in an “arbitrary” and “unreasonable manner,” or that power might “go so far beyond what was reasonably required for the safety of the public.”²⁸ Such actions, the Court said, would “authorize or compel the courts to interfere for the protection of such persons.”²⁹ Even with this strong endorsement of judicial intervention to prevent state encroachments upon individual rights, however, the Court gave no guidance as to how the reasonableness of a state or municipality’s actions was to be measured or the remedies that a court could or should take to rectify the violation of a citizens’ rights.

The next Supreme Court case in vaccination jurisprudence was the 1922 case of *Zucht v. King*.³⁰ *Zucht* involved a San Antonio, Texas mandate that required vaccination prior to school entry. The local ordinance provided that “no child or other person shall attend a public school or other place of education without having first presented a certificate of vaccination.”³¹ When the student in question failed to show such a certificate and refused to submit to vaccination, she was excluded from her local public school.³²

The student argued that the compulsory vaccination law amounted to a deprivation of her liberty since she was being required to submit to a vaccination against her will.³³ In an opinion by Justice Brandeis, the Court reaffirmed the police power of the state established in *Jacobson*.³⁴ The Court further stated “that in the exercise of police power reasonable classification may be freely applied, and that regulation is not violative of the [E]qual [P]rotection [C]ause merely because it is not all-embracing.”³⁵ Thus, the Court held that the law did not deny the plaintiff equal protection and upheld the rights of the state to regulate school entry.³⁶

At the same time that courts were determining states’ rights to dictate vaccination requirements, they were also considering parents’ rights to dictate the lives of their children—even when a parent’s desired form of childrearing might be contrary to the law.³⁷ In a case factually unrelated to vaccines, the Supreme Court addressed a legal guardian’s right to make decisions on behalf of her ward. Specifically, *Prince v. Massachusetts* dealt with child labor.³⁸ The plaintiff was Sarah Prince, a devout Jehovah’s Witness.³⁹ On December 18, 1941, Prince prepared to distribute leaflets to the public in an attempt to raise donations for her church on a

²⁷ *Jacobson*, 197 U.S. at 29.

²⁸ *Id.* at 28.

²⁹ *Id.*

³⁰ *Zucht v. King*, 260 U.S. 174 (1922).

³¹ *Id.* at 175.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 176.

³⁵ *Id.* at 177.

³⁶ *Id.*

³⁷ Bucchieri, *supra* note 12, at 273.

³⁸ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

³⁹ *Id.* at 161.

public sidewalk in Brockton, Massachusetts.⁴⁰ Her children and her niece requested to accompany her.⁴¹ For this incident, Massachusetts charged Prince with a violation of its child labor laws.⁴² These laws prohibited women under the age of eighteen from distributing printed material in public places and imposed criminal liability on the individual who provided the printed material to the minor and allowed the minor to work.⁴³

Prince argued that her niece was “exercising her God-given right and her constitutional right to preach the gospel” and that no individual “ha[d] the right to interfere with God’s commands.”⁴⁴ In terms of a constitutional basis for her claims, Prince argued that the laws “contravene[d] the Fourteenth Amendment by denying or abridging [her niece’s] freedom of religion and by denying to her the equal protection of the laws.”⁴⁵

The Court, in an opinion authored by Justice Rutledge, rejected Prince’s argument. The Court supported the state’s right to monitor behaviors in a family. The Court said that:

[T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. . . . Acting to guard the general interest in youth’s wellbeing, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting child’s labor, and in many other ways.⁴⁶

Thus, the Court stated that grounding legal claims in matters of conscience or religion did not nullify a state’s police power.⁴⁷

Expanding upon this power, Justice Rutledge discussed mandatory vaccinations. He stated that a legal guardian “cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”⁴⁸ Thus, the Court’s words created an understanding regarding a state’s ability to place restrictions upon parental discretion and, in a broader sense, a parent’s ability to refuse to vaccinate their children based upon religious reasons.

These three cases—*Jacobson*, *Zucht*, and *Prince*—created a framework for compulsory immunization laws within the United States. Additionally, they laid the groundwork for the Court’s general attitude of refusing to interfere with the states’ discretion to set forth public health laws.⁴⁹

B. VACCINE EXEMPTIONS

⁴⁰ *Id.* at 161–62.

⁴¹ *Id.*

⁴² *Id.* at 159.

⁴³ MASS. GEN. LAWS CH. 149, §§ 69, 80–81 (1932).

⁴⁴ *Prince*, 321 U.S. at 162.

⁴⁵ *Id.* at 160.

⁴⁶ *Id.* at 166–67.

⁴⁷ *Id.* at 166.

⁴⁸ *Id.* at 166–67.

⁴⁹ Bucchieri, *supra* note 12, at 274.

i. *Vaccine Skepticism: Misinformation Prior to the Covid-19 Pandemic*

Perhaps the most recent “landmark” in the anti-vaccination movement occurred with the publication of the now-retracted 1998 article purporting to find a connection between autism and the Measles, Mumps and Rubella (“MMR”) vaccine.⁵⁰ This article was published in the prominent medical journal, the *Lancet*, and authored by the now-licensed British surgeon Andrew Wakefield and twelve other medical professionals.⁵¹ Specifically, the article claimed to have identified “gastrointestinal disease and developmental regression in a group of previously normal children” who had been administered the MMR vaccine.⁵² The article generated significant media attention, and it led to the creation of organizations that sought to help families whose children’s autism had been allegedly caused by MMR vaccines.⁵³

Six years after this article’s publication, the *Sunday Times* published an exposé detailing the alleged improprieties committed by Wakefield during the course of the study.⁵⁴ Among other misconduct, the article alleged that Wakefield had not “disclose[d that] he was being funded through solicitors seeking evidence to use against vaccine manufacturers” when he published the original article.⁵⁵ A month later in March 2014, ten of the thirteen authors of the paper retracted the interpretation of their paper, stating: “We wish to make it clear that in this paper no causal link was established between MMR vaccine and autism as the data were insufficient.”⁵⁶ Concurrently, the *Lancet* would issue a statement responding to the allegations stating that any relations between the litigation and Wakefield should have been disclosed.⁵⁷ However, the *Lancet* denied the allegations of misconduct committed by Wakefield.⁵⁸

⁵⁰ See, e.g., CARY FUNK ET AL., VAST MAJORITY OF AMERICANS SAY THE BENEFITS OF CHILDHOOD VACCINES OUTWEIGH RISK, PEW RSCH. CTR. 4 (Feb. 2017), https://www.pewinternet.org/wp-content/uploads/sites/9/2017/02/PS_2017.02.02_Vaccines_FINAL.pdf; *Do Vaccines Cause Autism?*, HIST. OF VACCINES, <https://www.historyofvaccines.org/index.php/content/articles/do-vaccines-cause-autism> (last visited May 8, 2021).

⁵¹ A.J. Wakefield et al., *Retracted: Ileal-lymphoid-nodular hyperplasia, non-specific colitis, and pervasive developmental disorder in children*, 351 LANCET 637 (Feb. 28, 1998), [https://doi.org/10.1016/S0140-6736\(97\)11096-0](https://doi.org/10.1016/S0140-6736(97)11096-0).

⁵² *Id.*

⁵³ See, e.g., *President-Elect Donald Trump and Vaccines*, HIST. OF VACCINES (Nov. 10, 2016), <https://www.historyofvaccines.org/trump-and-vaccines>; Alexander Smith, *Jim Carrey on California Vaccine Law: Gov. Jerry Brown Is ‘Fascist,’* NBC NEWS (July 1, 2015, 5:22 AM), <https://www.nbcnews.com/news/us-news/jim-carrey-california-vaccination-law-gov-brown-corporate-fascist-n384931>; *The Vaccine Safety Project*, CHILDREN’S HEALTH DEF., <https://childrenshealthdefense.org/members-only/vaccine-safety-project-presentation/> (last visited May 8, 2021); Jenny McCarthy & Jim Carrey, *Jenny McCarthy: My son’s recovery from autism*, CNN (Apr. 2, 2008), <https://www.cnn.com/2008/US/04/02/mccarthy.autismtreatment/>; Aaron Holmes, *An anti-vaxxer group is suing Facebook for putting fact-checking labels on anti-vaccine posts*, BUS. INSIDER (Aug. 18, 2020, 10:04 AM), <https://www.businessinsider.com/anti-vax-group-sues-facebook-over-fact-checking-labels-2020-8>.

⁵⁴ Brian Deer, *Revealed: MMR research scandal*, TIMES (Feb. 22, 2004, 12:00 AM), <https://www.thetimes.co.uk/article/revealed-mmr-research-scandal-7ncfntn8mjq>.

⁵⁵ *Id.* See also Brian Deer, *How the case against the MMR vaccine was fixed*, 342 BRIT. MED. J. 77 (Jan. 2011), <https://www.bmj.com/content/342/bmj.c5347>.

⁵⁶ Simon H. Murch et al., *Retraction of an interpretation*, 363 LANCET 750 (Mar. 6, 2004).

⁵⁷ Richard Horton, *A statement by the editors of The Lancet*, 363 LANCET 820 (Mar. 6, 2004), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2804%2915699-7>.

⁵⁸ Specifically, the editors of the *Lancet* denied that (1) ethics approval for the highly invasive procedures on the children had not been given; (2) ethics approval for a different study was actually used to clear this study;

On January 6, 2010, more than twelve years after the study's original publication date, the *British Medical Journal* published an editorial noting that the "[c]lear evidence of falsification of data . . . close[d] the door on this damaging vaccine scare[.]"⁵⁹ This was after Wakefield was found guilty of dishonesty and irresponsibility by the General Medical Council ("GMC"), the United Kingdom's medical regulatory body, in January 2010.⁶⁰ Wakefield was later disbarred.⁶¹ In February 2010, Wakefield's article was formally retracted by the *Lancet*.⁶²

While Wakefield's tenure as a practicing medical doctor ended in February 2010, the repercussions of the retracted article have remained. For example, a national study conducted in the United States and published in January 2009 in *Pediatrics* found that "[a]lthough parents overwhelmingly share the belief that vaccines are a good way to protect their children from diseases, these same parents express concerns regarding the potential adverse effects and especially seem to question the safety of newer vaccines."⁶³ Additionally, misinformation about vaccines on social media has led to increased vaccine skepticism—even before the Covid-19 pandemic.⁶⁴ Indeed, in a 2019 analysis of social media fake news trends by *NBC News*, vaccine misinformation was some of the most engaged with health news content.⁶⁵ This discourse provided the backdrop against which Americans entered into the Covid-19 pandemic in early 2020.

ii. *What are Vaccine Exemptions?*

Vaccination exemptions for school matriculation typically fall into three categories: medical exemptions, religious exemptions, and philosophical exemptions. A medical exemption is generally defined as "a medical condition that prevents [an

and (3) children were invited to participate in the study rather than being referred by the Royal Free Hospital and School of Medicine in Hampstead, United Kingdom. *Id.*

⁵⁹ Fiona Godlee et al., *Wakefield's article linking MMR vaccine and autism was fraudulent*, 342 *BRIT. MED. J.* 64 (Jan. 2011), <https://www.bmj.com/content/342/bmj.c7452>.

⁶⁰ See, e.g., Nick Triggle, *MMR scare doctor 'acted unethically', panel finds*, *BBC NEWS* (Jan. 1, 2010, 17:35 GMT), <http://news.bbc.co.uk/2/hi/health/8483865.stm>; Laura Salahi, *Report Linking Vaccine to Autism 'Fraudulent,' Says British Medical Journal*, *ABC NEWS* (Jan. 5, 2011, 2:52 PM), <https://abcnews.go.com/Health/Autism/link-vaccine-autism-link-fraud-british-medical-journal/story?id=12547823>.

⁶¹ See, e.g., CNN Wire Staff, *Autism study doctor barred for 'serious misconduct,' CNN* (May 24, 2010), <http://www.cnn.com/2010/HEALTH/05/24/autism.vaccine.doctor.banned/index.html>; John F. Burns, *Autism study doctor barred for 'serious misconduct,' N.Y. TIMES* (May 24, 2010), <https://www.nytimes.com/2010/05/25/health/policy/25autism.html>; *Controversial Autism Doctor Stripped of License*, *HCP LIVE* (May 25, 2010), https://www.hcplive.com/view/autism_doctor.

⁶² Editors of the *Lancet*, *Retraction—ileal-lymphoid-nodular hyperplasia, non-specific colitis, and pervasive developmental disorder in children*, 375 *LANCET* 445 (Feb. 6, 2010), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2810%2960175-4>.

⁶³ Gary L. Freed et al., *Parental Vaccine Safety Concerns in 2009*, *AM. ACAD. OF PEDIATRICS* (Mar. 1, 2010), <https://pediatrics.aappublications.org/content/pediatrics/125/4/654.full.pdf>.

⁶⁴ Vanessa Lam et al., *Refuting A Lie That Won't Die: Taking The Fight For Vaccines Beyond The Doctor's Office*, *HEALTH AFFAIRS* (Feb. 28, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190226.742851/full/>.

⁶⁵ Brandy Zadrozny, *Social media hosted a lot of fake health news this year. Here's what went most viral*, *NBC NEWS* (Dec. 29, 2019, 7:09 AM), <https://www.nbcnews.com/news/us-news/social-media-hosted-lot-fake-health-news-year-here-s-n1107466>.

individual] from receiving a vaccine.”⁶⁶ As of February 2021, all fifty states have medical exemptions from mandatory vaccinations.⁶⁷

A religious vaccination exemption is understood to be an exemption based upon religious concerns.⁶⁸ The conditions for achieving this exemption vary by state. For example, in Indiana “a student may not be required to undergo any testing, examination, immunization, or treatment . . . when a child’s parents objects [sic] on religious grounds.”⁶⁹ To make this objection, the parents need only request a religious exemption in writing and sign the request.⁷⁰ The parent then must deliver this request to the teacher.⁷¹ The statute is silent as to how long this exemption is valid, although case law suggests that these requests need to be periodically resubmitted.⁷² New Jersey has similar requirements. There, a parent seeking a religious exemption must only “submit[] a written, signed request for exemption from mandatory immunization(s) due to religious beliefs, [and] the statement should be accepted and the religious exemption granted.”⁷³ The parent does not need to identify his or her religious denomination in order to make this request.⁷⁴

Some states have relatively more rigorous processes. In Kansas, students seeking an exemption are required to submit “a written statement signed by one parent or guardian that the child is an adherent of a religious denomination whose religious teachings are opposed to such tests or inoculations” before May 15 of the following school year.⁷⁵ Some states actually require an affidavit. For example, Nebraskan students seeking exemptions must submit an affidavit which is “signed by a legally authorized representative stating that the immunization conflicts with the tenets and practices of a recognized religious denomination of which the student is a member.”⁷⁶ As of February 2021, forty-five states permitted religious exemptions from vaccinations for public school matriculation.⁷⁷

Another non-medical exemption offered by some states is the philosophical exemption. Philosophical exemptions are provided for by statute and allow parents to exempt their children from school vaccination matriculation requirements if these requirements “contradict[] parental beliefs beyond those considered religious or

⁶⁶ *What is an Exemption and What Does it Mean?*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 12, 2017), <https://www.cdc.gov/vaccines/imz-managers/coverage/schoolvaxview/requirements/exemption.html>.

⁶⁷ *States With Religious and Philosophical Exemptions From School Immunization Requirements*, NAT’L CONF. OF STATE LEGISLATURES (June 26, 2020), <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [hereinafter NCSL].

⁶⁸ Aleksandra Sandstrom, *Amid measles outbreak, New York closes religious exemption for vaccinations – but most states retain it*, PEW RSCH. CTR. (June 28, 2019), <https://www.pewresearch.org/fact-tank/2019/06/28/nearly-all-states-allow-religious-exemptions-for-vaccinations/>.

⁶⁹ IND. CODE ANN. § 20-34-3-2 (West 2021).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *G.G.B.W. v. S.W.*, 80 N.E.3d 264, 267 (Ind. Ct. App. 2017) (“Mother then signed the form, and Child began attending the school unvaccinated. In subsequent years, Mother submitted the form without consulting Father, and Child has continued to attend the public school.”).

⁷³ STATE OF N.J., DEP’T OF HEALTH, N.J.A.C. 8:57-4.3 & N.J.A.C. 8:57-4.4, IMMUNIZATION OF PUPILS IN SCHOOLS, MEDICAL AND RELIGIOUS EXEMPTIONS (May 19, 2017), https://www.nj.gov/health/cd/documents/imm_requirements/religious_exemption.pdf.

⁷⁴ *Id.*

⁷⁵ KAN. STAT. ANN. § 72-6262 (West 2021).

⁷⁶ *School Immunization Reporting*, NEB. DEP’T OF HEALTH & HUM. SERVS., <https://dhhs.ne.gov/Pages/School-Immunization.aspx> (last visited May 8, 2021).

⁷⁷ NCSL, *supra* note 67.

spiritual beliefs. These exemptions can include moral, philosophical, or personal beliefs that relate to vaccines.⁷⁸ Philosophical exemptions are usually not codified separately from a state's religious requirements. Rather, the religious exemptions are written broadly enough to encompass a philosophical exemption. For example, Pennsylvania's philosophical exemption is captured within its definition of a "Religious Exemption." Pennsylvania Code Section 23.84(b) states: "Children need not be immunized if the parent, guardian or emancipated child objects in writing to the immunization on religious grounds or on the basis of a strong moral or *ethical conviction similar to a religious belief*."⁷⁹ As of February 2021, fifteen states allowed for philosophical exemptions.⁸⁰

The process by which a student obtains a philosophical exemption varies by state. For example, in Texas an applicant "must present to the school or child-care facility a completed, signed and notarized affidavit on a form provided by the department stating that the child's parent, legal guardian, or the student declines vaccinations for reasons of conscience, including because of the person's religious beliefs."⁸¹ The signed affidavit must be submitted to the school within ninety days of completion.⁸² After submission, the affidavit is valid for a period of two years.⁸³ The previously described statutes are just some examples of philosophical exemption statutes from across different states.

iii. *The Mississippi Example*

On the other end of the spectrum, some states have banned *all* religious and philosophical exemptions. For example, Mississippi prohibits all non-medical vaccine exemptions for school matriculation.⁸⁴ This broad prohibition sprung from the 1979 Mississippi Supreme Court decision, *Brown v. Stone*.⁸⁵ *Brown* dealt with a school vaccination exemption obtained by six-year-old prospective student, Chad Brown. Chad's family belonged to the Church of Christ.⁸⁶ Although the Church of Christ had no teachings against the use of medications or vaccinations, Chad's father had "strong convictions against the use of any kind of medications"⁸⁷ Thus, Chad's father obtained a certificate in accordance with the Mississippi Code requesting a vaccine exemption for public school attendance.⁸⁸ The Mississippi Code, in relevant part, said:

⁷⁸ Douglas S. Dickema, *Personal Belief Exemptions From School Vaccination Requirements*, 35 ANN. REV. PUB. HEALTH 275, 277 (2014), <https://www.annualreviews.org/doi/pdf/10.1146/annurev-publhealth-032013-182452>.

⁷⁹ 28 PA. CONS. STAT. § 23.84(b) (2021) (emphasis added).

⁸⁰ *School Vaccination Requirements and Exemptions*, CTRS. FOR DISEASE CONTROL & PREVENTION: SCHOOL, <https://www.cdc.gov/vaccines/imz-managers/coverage/schoolvaxview/requirements/index.html> (last visited May 8, 2021); NCSL, *supra* note 67.

⁸¹ *Exemption Information - School Immunizations*, TEX. DEP'T OF STATE HEALTH SERVS., <https://www.dshs.texas.gov/immunize/school/exemptions.aspx> (last visited May 8, 2021).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ MISS. CODE ANN. § 41-23-37 (2021).

⁸⁵ 378 So. 2d 218 (Miss. 1979).

⁸⁶ *Id.* at 220.

⁸⁷ *Id.*

⁸⁸ *Id.*

[A] certificate of religious exemption may be offered on behalf of a child by an officer of a church of a recognized denomination. This certificate shall certify that parents or guardians of the child are bona fide members of a recognized denomination whose religious teachings require reliance on prayer or spiritual means of healing.⁸⁹

Chad's father presented a certificate stating that, while the church to which he belonged did not preach against the use of vaccines, Chad's family did "have strong convictions against the use of any kind of medications and [that his church] respect[ed] his views."⁹⁰

The Mississippi Supreme Court overturned the vaccination exemption statute. It found that the vaccination statute in question, which required vaccination "against certain crippling and deadly diseases particularly dangerous to children[,] served:

[A]n overriding and compelling public interest, and that such interest extends to the exclusion of a child until such immunization has been effected, not only as a protection of that child but as a protection of the large number of other children comprising the school community and with whom he will be daily in close contact in the school room.⁹¹

The Mississippi Supreme Court further clarified that a religious exemption would discriminate against the majority of schoolchildren under the equal protections provided by the Fourteenth Amendment.⁹²

Since 1979, Mississippi has forbidden non-medical vaccination exemptions for school enrollment. As a result, Mississippi has some of the highest vaccination rates in the country—estimated to be as high as 99%.⁹³ This high vaccination rate has been credited in helping to prevent outbreaks of infectious diseases. For example, in April 2019 a traveler with measles visited the state.⁹⁴ Despite this visit, there was no outbreak reported within Mississippi.⁹⁵

iv. *Patterns in Exemptions: Past and Present*

In spite of the divergence between states' non-medical vaccination exemption statutes, some patterns emerge. One tendency is that vaccination exemption legislation is usually silent on when exemptions expire. For example, parents in Louisiana need only submit a completed form to their school district to

⁸⁹ MISS CODE ANN. § 37 (1972 Supp.).

⁹⁰ *Brown*, 378 So. 2d at 220.

⁹¹ *Id.* at 222–23.

⁹² *Id.* at 223.

⁹³ Kim Krisberg, *In Mississippi, strong vaccine laws keeping measles at bay*, NATION'S HEALTH (July 2019), <https://www.thenationshealth.org/content/49/5/E17>.

⁹⁴ *Id.*

⁹⁵ *Id.*

obtain the exemption.⁹⁶ As written, there is no expiration to this exemption.⁹⁷ Similarly, Oklahoma’s statute provides no expiration for vaccination exemptions.⁹⁸

A second tendency across state vaccination legislation has been to follow Mississippi’s example and completely eliminate non-medical vaccination exemptions. For instance, in 2019, New York Senate Bill 2994 banned all non-medical vaccination exemptions.⁹⁹ This was in response to a nationwide measles outbreak whose origin was traced back to New York State; this outbreak infected more than 1,000 people in around twenty-eight states.¹⁰⁰ Similarly, Washington State enacted House Bill 1638 in May 2019.¹⁰¹ This Bill removed the personal belief and philosophical exemption for the MMR vaccine requirement for public and private schools as well as day care centers.¹⁰² The Bill’s passage came in the midst of a measles outbreak in Washington State, with more than seventy cases reported at the time of the Bill’s signing in May 2019.¹⁰³ Similarly, Maine took action in 2019. Spurred in part by the measles outbreak in other states—as well as having some of the highest non-medical vaccination exemption rates in the country—Maine enacted House Bill 586 in 2019.¹⁰⁴ Bill 586 removed personal and religious belief exemptions for public school immunization requirements.¹⁰⁵ Bill 586 generated significant backlash, and a referendum was held in 2020. However, Bill 586 was upheld, and the new restrictions will take effect in September 2021.¹⁰⁶

Similarly, some states are trying to eliminate all non-medical vaccine exemptions for school matriculation. For instance, in March 2020 Illinois Senator Heather Steans introduced Senate Bill 3668 (“S.B. 3668”) to the Illinois General Assembly.¹⁰⁷ S.B. 3668 sought to remove religious vaccination exemptions from Illinois law.¹⁰⁸ While S.B. 3668 failed to gain traction, this move by Senator Steans is illustrative of the fact that vaccination exemptions are on the forefront of

⁹⁶ LA. DEP’T OF EDUC., STATEMENT OF EXEMPTION FROM IMMUNIZATIONS, <https://ldh.la.gov/assets/oph/Center-PHCH/Center-PH/immunizations/statement-of-exemption-from-immunizations.pdf> (last visited May 8, 2021).

⁹⁷ See LA. STAT. ANN. § 17:170 (2021).

⁹⁸ OKLA. STAT. tit. 70, §§ 1210.191–192 (2021).

⁹⁹ Sandstrom, *supra* note 68.

¹⁰⁰ Bobby Allyn, *New York Ends Religious Exemptions For Required Vaccines*, NAT’L PUB. RADIO (June 13, 2019, 5:26 PM), <https://www.npr.org/2019/06/13/732501865/new-york-advances-bill-ending-religious-exemptions-for-vaccines-amid-health-crisis>.

¹⁰¹ H.R. 586, 129th Leg., 1st Reg. Sess. (Me. 2019)

¹⁰² *MMR Vaccine Exemption Law Change FAQs*, WASH. STATE DEP’T OF HEALTH (July 12, 2019), <https://www.doh.wa.gov/CommunityandEnvironment/Schools/Immunization/ExemptionLawChange/ExemptionLawFAQs>; NCSL, *supra* note 67.

¹⁰³ Gillian Flaccus & Rachel La Corte, *Washington state limits exemptions for measles vaccine*, ASSOCIATED PRESS (May 10, 2019), <https://apnews.com/article/d04be727cdbe4ae997a2830962371a99>.

¹⁰⁴ Caitlin Andrews, *Maine voters uphold new law tightening school vaccination requirements*, BANGOR DAILY NEWS (Mar. 3, 2020), <https://bangordailynews.com/2020/03/03/politics/maine-voters-uphold-new-law-tightening-school-vaccination-requirements/>; Patty Wight, *Vaccine Exemptions Defeated In Maine, A New Law Dividing Parents Is Upheld*, NAT’L PUB. RADIO (Mar. 3, 2020 5:00 AM), <https://www.npr.org/sections/health-shots/2020/03/03/811284575/vaccine-requirements-are-on-the-ballot-in-maine-after-a-new-law-divided-parents>.

¹⁰⁵ *Maine Vaccine Exemption Law Change 2019*, ME. DEP’T OF HEALTH & HUM. SERVS., MAINE.GOV, <https://www.maine.gov/dhhs/mecdc/infectious-disease/immunization/maine-vaccine-exemption-law-changes.shtml> (last visited May 8, 2021).

¹⁰⁶ H.R. 586. For an example of new restrictions, see Allyn, *supra* note 100.

¹⁰⁷ S.B. 3668, 101st Gen. Assemb., Reg. Sess. (Ill. 2020).

¹⁰⁸ *Id.*

lawmakers' and constituents' minds, with several states pondering whether or not to modify existent legislation regulation on non-medical vaccination exemptions for school matriculation.

A third tendency across vaccination exemption statutes is that many states abridge the rights of parents to send their non-vaccinated children to school during outbreaks of infectious diseases. For example, Texas law “permits a child to be excluded from school in times of emergency or epidemic declared by the commissioner of the department.”¹⁰⁹ Similarly, Louisiana empowers schools to exclude non-vaccinated students from school in “the event of an outbreak of a vaccine-preventable disease at the location of an educational institution”¹¹⁰

Some states even give localities the power to compel non-vaccinated students during outbreaks to receive their vaccinations. For example, prior to March 29, 2021, Kentucky gave the Cabinet for Health and Family Services the power by emergency order during an epidemic to require immunization against the disease responsible for the epidemic of all inhabitants within the area of the disease's spread.¹¹¹ This power proved controversial. In February 2021, Kentucky lawmakers responded to constituents' concerns that the Governor of Kentucky would mandate Covid-19 vaccinations—even though there were no such plans being discussed by Kentucky's Governor.¹¹² Kentucky lawmakers passed a bill abridging the Cabinet for Health and Family Services' power to require the immunization of all persons during epidemics.¹¹³ As supporter of the bill, Kentucky Senator Mike Wilson, stated: “I am not an anti-vaxxer In the future though, we wanted to make sure [constituents] have an exemption.”¹¹⁴

This move by Kentucky lawmakers suggests three conclusions. First, it shows that allowing a state-by-state approach to vaccination exemption legislation allows for legislatures to pass laws in a reactionary manner. Second, it underscores the fact that religious exemptions are not disappearing in the near future; federal legislation seeking to eliminate religious vaccination exemptions ignores the reality that some states and constituents want religious exemptions to stay. Finally, it serves as a useful illustration of the fluidity of vaccination law when controlled at a state level.

v. *Current Scholarship*

Some politicians have taken the position that the federal government ought to regulate vaccination requirements. Indeed, several government officials have discussed the suitability of federal involvement in public health broadly. For example, former Deputy Secretary of the United States Department of Health and Human Services Eric Hargan discussed the limitations of federal responses to health crises generally in a 2008 interview. In considering the appropriateness of a federal

¹⁰⁹ 25 TEX. ADMIN. CODE § 97.62(2).

¹¹⁰ LA. STAT. ANN. § 17:170(f) (2021).

¹¹¹ KY. REV. STAT. ANN. § 214.036 (West 2021).

¹¹² Daniel Desrochers, *Lawmakers urge people to get vaccinated, then pass bill preventing mandatory vaccines*, LEXINGTON HERALD LEADER (Feb. 3, 2021), <https://www.kentucky.com/news/politics-government/article248975850.html#storylink=cpy>.

¹¹³ *Id.*

¹¹⁴ *Id.*

government response to a public health crisis as detailed in 42 U.S.C. § 247d and §319 of the Public Health Service Act, Hargan noted that:

The federal government is constitutionally one of plenary state power, with federal authority primarily depending on one clause of the Constitution and one set of Supreme Court decisions for its wider powers. Even though there are also statutory powers, which give [the federal government] broad authority, they are not paired with appropriations to implement them.¹¹⁵

Here, former Deputy Secretary Hargan seemed to be calling for an exercise of congressional spending power so as to give the federal government the appropriations to back the federal government's plenary authority.

In a more concrete move by a United States Representative from Florida in 2015, Representative Frederica Wilson proposed a bill to regulate vaccination requirements and eliminate all non-medical vaccine exemptions for school matriculation.¹¹⁶ Although the bill failed to get out of Committee, she repropoed the bill in 2019.¹¹⁷ In that same year, then FDA-Commissioner Dr. Scott Gottlieb suggested the federal regulation of vaccination requirements. His suggestion, however, centered on regulations by a federal agency rather than by Congress. In a February 19, 2019 television interview, Dr. Gottlieb told CNN:

Some states are engaging in such wide exemptions that they're creating the opportunity for outbreaks on a scale that is going to have national implications. [If] certain states continue down the path that they're on, I think they're going to force the hand of the federal health agencies.¹¹⁸

While Dr. Gottlieb was vague as to when or what measures would be taken by the federal health agencies, he elaborated further by saying that “[y]ou could mandate certain rules about what is and isn't permissible when it comes to allowing people to have exemptions[.]”¹¹⁹ This avenue provides another possible route by which the federal government could encourage greater vaccine compliance: through federal health agencies. While vague, this interview provided an avenue for federal action.

The suggestion that the federal government regulate vaccination policy is not novel within the legal scholarship context either.¹²⁰ Some scholars have recommended general legislative intervention to eliminate philosophical vaccine

¹¹⁵ Eric Hargan, *Setting Expectations for the Federal Role in Public Health Emergencies*, 36 J.L. MED. & ETHICS 8, 12 (2008).

¹¹⁶ See *infra* Section III.A.

¹¹⁷ See H.R. 2527, 116th Cong. (2019).

¹¹⁸ Elizabeth Cohen & John Bonifield, *DA chief: Federal government might step in if states don't change lax vaccine laws*, CNN (Feb. 20, 2019), <https://www.cnn.com/2019/02/20/health/vaccine-exemptions-fda-gottlieb/index.html>.

¹¹⁹ *Id.*

¹²⁰ See, e.g., Stephanie H. Barclay, *An Economic Approach to Religious Exemptions*, 72 FLA. L. REV. 1211 (2020) (analyzing the incommensurate and incompatible values at stake between parents who are religiously opposed to mandatory vaccinations for school attendance and parents who support mandatory vaccination for school attendance); Dorit Rubinstein Reiss & Y. Tony Yang, *How Congress Can Help Raise Vaccine Rates*, 96 NOTRE DAME L. REV. ONLINE 42 (2020) (discussing several “noncoercive” measures that Congress can take to further encourage vaccination).

exemptions.¹²¹ Others have proposed eliminating all non-medical vaccine exemptions through congressional action.¹²² Some have proposed that, instead of eliminating non-medical vaccine exemptions, a tax should be imposed by the federal government on those who seek to opt out of vaccinating their children.¹²³ Still others have suggested eliminating all non-medical vaccination exemptions,¹²⁴ with some scholars specifying that this elimination should be undertaken at the state level.¹²⁵

Thus, while the suggestion that the federal government regulate vaccination requirements is not novel, a federal vaccination requirement created by redrafting language of a previously proposed House Bill is an innovative suggestion—particularly where the revised bill preserves the option for states to retain religious vaccination exemptions for school matriculation.

II. FEDERAL POWER, STATES, AND PUBLIC HEALTH

A. FEDERAL AUTHORITY TO REGULATE PUBLIC HEALTH

From a macro-perspective, the federal government's role in the regulation of public health is far from settled. Generally speaking, however, the federal government possesses "considerable authority to act and exert extensive control in the realm of public health and safety."¹²⁶ Specifically, the Necessary and Proper Clause¹²⁷ of Article I, Section 8 of the Constitution allows Congress to make "all Laws which shall be necessary and proper for carrying into Execution" the powers vested by the Constitution in the federal government of the United States.¹²⁸

Additionally, Article I, Section 8 of the Constitution permits Congress to tax and "provide for the . . . general Welfare of the United States."¹²⁹ The taxing power is integral to discussions of the use of the federal power to regulate public health because of both its ability to provide Congress with the funds to provide for public

¹²¹ Linnea Nasman, *Philosophical Vaccine Exemptions and Their Risk To Public Health*, 21 LBJ J. PUB. AFF. 69, 73–75 (2013).

¹²² Bucchieri, *supra* note 12, at 267.

¹²³ Anthony Ciolli, *Religious and Philosophical Exemptions to Mandatory School Vaccinations: Who Should Bear the Costs to Society*, 74 MO. L. REV. 287, 297–98 (2009).

¹²⁴ Bucchieri, *supra* note 12.

¹²⁵ Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589 (2016).

¹²⁶ Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design*, 11 HEALTH MATRIX 265, 271 (2001).

¹²⁷ The definition of the Necessary and Proper Clause is debated. The Court in *McCulloch v. Maryland* found that laws enacted by Congress were constitutional under the Necessary and Proper Clause if the ends were legitimate and the means were within the scope of the Constitution—plainly adapted to the end desired. 17 U.S. (4 Wheat.) 316 (1819). More recently, the Court grappled with the definition of the Necessary and Proper Clause. In *United States v. Comstock*, Justice Breyer, writing for the majority, opined that the Necessary and Proper Clause conferred expansive power on Congress to enact legislation that is convenient or useful. *United States v. Comstock*, 560 U.S. 126, 133 (2010) (internal citations omitted). According to the majority, per *McCulloch*, a law need not grant the power to Congress specifically—the law need only be rationally related to a goal within the scope of Congress's power. *Id.* at 134 (internal citations omitted). On the other hand, Justice Thomas argued in dissent that although the Necessary and Proper Clause granted Congress broad powers, it only allowed actions aimed at a legitimate end of carrying out some other enumerated power given to Congress. *Id.* at 166–67 (Thomas, J., dissenting).

¹²⁸ U.S. CONST. art. I, § 8.

¹²⁹ *Id.*

health measures, and its ability to allow Congress to “regulate risk behavior and influence health-promoting activities.”¹³⁰ Most recently, legislation and Court decisions regarding the Patient Protection and Affordable Care Act of 2010, known colloquially as the “Affordable Care Act,” have “opened the door for Congress to use its taxing power to achieve myriad policy objectives.”¹³¹

Another source of congressional power lies in the congressional spending power. Article I, Section 8, Clause 1 of the Constitution grants Congress broad authority to spend for the general welfare of the people.¹³² The Spending Clause permits the federal government to control states, acting as “a contract in return for federal funds, the States agree to comply with federally imposed conditions.”¹³³

In the public health context, the congressional spending power reaches to a variety of federally funded programs, including public health programs.¹³⁴ In education, the Spending Clause has been the cornerstone of major federal legislation such as the No Child Left Behind Act (“NCLBA”). While that broad federal power to legislate education was challenged by some states,¹³⁵ the NCLBA’s testing regulations were upheld by the courts.¹³⁶

Thus, although still litigated, the federal government’s ability to regulate individual states’ health requirements is an established practice. With regard to childhood vaccination, as state health agencies are particularly reliant on federal funding, regulating vaccination requirements through the Spending Clause provides a feasible method through which vaccination regulation could be accomplished.¹³⁷

B. LIMITATIONS ON FEDERAL AUTHORITY

Generally, there are three ways in which a congressional action can be found to be unconstitutional.¹³⁸ First, a congressional action may be found unconstitutional if the conditions regarding the funding are unclear at the time that the grants are accepted by the state.¹³⁹ Second, congressional actions may be found unconstitutional if the conditions on the use of federal property or privileges are not reasonably related

¹³⁰ Gostin, *supra* note 126, at 273 (citing R. ALTON LEE, A HISTORY OF REGULATORY TAXATION 1–11 (1973)).

¹³¹ See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); Michelle M. Mello & I. Glenn Cohen, *The Taxing Power and the Public’s Health*, 367 NEW ENG. J. MED. 1777 (2012).

¹³² United States v. Butler, 297 U.S. 1, 64 (1936).

¹³³ Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

¹³⁴ Gostin, *supra* note 126, at 280.

¹³⁵ Sam Dillon, *Connecticut Sues the U.S. Over School Testing*, N.Y. TIMES (Aug. 23, 2005), <https://www.nytimes.com/2005/08/23/nyregion/connecticut-sues-the-us-over-school-testing.html>.

¹³⁶ Robert Frahm, *State NCLB lawsuit dismissed*, CT. MIRROR (July 14, 2010), <https://ctmirror.org/2010/07/14/state-nclb-lawsuit-dismissed/>.

¹³⁷ At the state and local level, governments are usually governed by balanced-budget requirements which “are constitutional or statutory rules that prohibit states from spending more than they collect in revenue.” *Briefing Book: What are state balanced budget requirements and how do they work?*, TAX POL’Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-are-state-balanced-budget-requirements-and-how-do-they-work> (last visited May 8, 2021). Because of these restrictions, state health agencies are particularly reliant on federal support. As of February 2016, the average state received 50% of its public health funding from federal grants, contracts, and cooperative agreements excluding Medicaid and Medicare reimbursements. *Id.*

¹³⁸ Samuel R. Bagenstos & Ilya Somin, *Common Interpretation: The Spending Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/755> (last visited May 8, 2021).

¹³⁹ South Dakota v. Dole, 483 U.S. 203, 207 (1987).

to the federal government's interest in particular national projects or programs.¹⁴⁰ Third, congressional actions can be found unconstitutional if the financial inducement offered by Congress is "so coercive as to pass the point at which 'pressure turns into compulsion.'"¹⁴¹

Another way that federal power is limited is through the Tenth Amendment. The Supreme Court has interpreted the Tenth Amendment to prevent the federal government from requiring state officers to carry out federal directives.¹⁴² The commandeering principle prevents Congress from requiring states to pass mandatory laws.¹⁴³ However, it does not prevent Congress from using its spending power to provide non-coercive incentives to the states to enact laws.¹⁴⁴

An additional constraint on federal authority to enact a law regulating vaccination requirements for school lies in the realm of conflicting legislation at the state level. Specifically, the Religious Freedom Restoration Act of 1993 ("RFRA") prohibits the government from substantially burdening a person's sincere exercise of religion.¹⁴⁵ While the RFRA of 1993 was found to be an unconstitutional overreach of the federal government's Fourteenth Amendment authority in *City of Boerne v. Flores*,¹⁴⁶ several states have passed their own versions of RFRA.¹⁴⁷ Other states have created RFRA-like protections through court decisions whereby state constitutions were liberally construed so as to provide such protections.¹⁴⁸

All of these methods provide important limitations to the ways that Congress can regulate vaccination policies, and all of these limitations need to be considered in light of any proposed vaccination policy.

III. THE VACCINATE ALL CHILDREN ACT OF 2019

A. BACKGROUND

On May 1, 2015, Representative Frederica Wilson introduced the "Vaccinate All Children Act of 2015" ("VACA 2015"). This bill was an attempt to regulate vaccination requirements through Congress' spending powers, and it removed both religious and philosophical exemptions.¹⁴⁹ However, it permitted medical

¹⁴⁰ *Massachusetts v. United States*, 435 U.S. 444, 461 (1977).

¹⁴¹ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012) (quoting *Dole*, 483 U.S. at 211).

¹⁴² *See* *Printz v. United States*, 521 U.S. 898 (1997); WEN W. SHEN, CONG. RSCH. SERV.: LEGAL SIDEBAR, LSB10300, AN OVERVIEW OF STATE AND FEDERAL AUTHORITY TO IMPOSE VACCINATION REQUIREMENTS 2–3 (2019).

¹⁴³ SHEN, *supra* note 142, at 2.

¹⁴⁴ *Id.*

¹⁴⁵ 521 U.S. 507, 515–16 (1998).

¹⁴⁶ *See id.*

¹⁴⁷ Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 164, 169 (2016).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* Section 1 of the Act states:

(1) REQUIREMENT.—For a State or a political subdivision or other public entity of a State to be eligible to receive a grant under this section, the applicant shall demonstrate to the Secretary's satisfaction that, subject to paragraphs (2) and (3), the State requires each student enrolled in one of the State's public elementary schools or public secondary schools to be vaccinated in accordance with the recommendations of the Advisory Committee on Immunization Practices.

exemptions.¹⁵⁰ Although the bill had seventeen co-sponsors, it failed to reach a vote. Representative Wilson reintroduced the bill in 2019, citing the Washington measles outbreak.¹⁵¹ Again, the bill failed to reach a vote. The 2019 bill would have:

Prohibit[ed] the Department of Health and Human Services from awarding grants to public entities of a state for preventive health service programs unless the state institute[d] certain vaccination requirements for its public schools. Specifically, a state [would have had to] require each student in public elementary or secondary school to be vaccinated in accordance with the recommendations of the Advisory Committee on Immunization Practices. The bill provide[d] an exception for students whose health would be endangered by vaccination in the opinion of a physician conforming to the accepted standard of medical care.¹⁵²

Thus, the Bill proposed a standardization of state vaccination requirements for school matriculation. It also provided for a complete elimination of non-medical vaccine exemptions.

VACA 2019 sought to enforce these changes by amending § 317 of the Public Health Service Act.¹⁵³ VACA 2019 conditioned state preventive health service grants on the establishment of state requirements for public elementary and secondary students to be vaccinated for school attendance.¹⁵⁴ In order for a state to be eligible to receive a preventative health grant, “the applicant shall demonstrate to the Secretary’s satisfaction that . . . the State requires each student enrolled in one of the State’s public elementary schools or public secondary schools to be vaccinated”¹⁵⁵

B. AS WRITTEN, THE VACCINATE ALL CHILDREN ACT OF 2019 IS NOT A FEASIBLE SOLUTION

Although Congress could try to pass VACA 2019 as written—preserving its elimination of all non-medical vaccination exemptions for school entry—VACA 2019’s current drafting does not provide a viable solution to vaccination regulation in the United States. This is for two reasons. First, VACA 2019 is likely to succumb to constitutional challenges and public policy concerns. Second, VACA 2019 fails to address the highly partisan political landscape reflective of the current political arena and would likely fall victim to conflicting legislation at the state level. The following subsections will discuss each of these issues in turn.

Id.

¹⁵⁰ *Id.* Section 2 of the Act states:

(2) EXCEPTION FOR CHILD’S HEALTH.—The funding condition described in paragraph (1) shall not apply with respect to a student if a duly registered and licensed physician submits a written certification at the beginning of the school year to the individual in charge of the health program at the student’s school

Id.

¹⁵¹ Vaccinate All Children Act of 2019, H.R. 2527, 116th Cong. (2019).

¹⁵² CONG. RSCH. SERV., SUMMARY: H.R.2527 – 116TH CONGRESS (2019-2020), <https://www.congress.gov/bill/116th-congress/house-bill/2527> (last visited May 8, 2021).

¹⁵³ H.R. 2527 § 2(a).

¹⁵⁴ *Id.* § 2(a)(1).

¹⁵⁵ *Id.*

i. *Constitutionality & Social Equity Concerns of VACA 2019*

The first issue with VACA 2019 as written is its prospective constitutionality. This dovetails with another issue: public policy. Beginning with issues relating to VACA 2019's constitutionality, VACA 2019 falls prey to arguments that it is unconstitutional, as it is an unduly coercive measure of the states.

What makes a measure “coercive” varies. For example, the directive provided by the Court in *South Dakota v. Dole* in 1987 stated that “the financial inducement offered by Congress [must not be] so coercive as to pass the point at which ‘pressure turns into compulsion.’”¹⁵⁶ There, the Court examined the financial inducement offered by Congress to the states to encourage them to raise their drinking ages to twenty-one.¹⁵⁷ The financial inducement was a reduction in federal highway funding to states where the drinking age was below twenty-one.¹⁵⁸ The Court found that this financial inducement, which would amount to a 5% loss of total highway funds to states that did not raise the drinking age, was not coercive.¹⁵⁹ This was because Congress directed that states who failed to comply with the Act would “lose a relatively small percentage of certain federal highway funds.”¹⁶⁰

A case that involved a coercive exercise of the congressional spending power is the 2012 case of *National Federation of Independent Businesses v. Sebelius*.¹⁶¹ *Sebelius* involved a challenge to the Affordable Care Act.¹⁶² Inter alia, *Sebelius* handled a Medicaid expansion that sought to increase the number of individuals covered by Medicaid.¹⁶³ This expansion threatened non-compliant states with the loss of all Medicaid funds.¹⁶⁴ While the majority in *Sebelius* found that this measure was coercive,¹⁶⁵ not all members of the Court agreed with the characterization.¹⁶⁶

The range of opinions in *Sebelius*—and range of criteria for determining coerciveness—did not provide a clear benchmark for what constitutes “coercive” measures by Congress. However, these opinions do seem to provide a starting point by which coercion within the Spending Clause context can be analyzed: one must look at the amount of the state budget which is being threatened.¹⁶⁷

¹⁵⁶ *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

¹⁵⁷ *Dole*, 483 U.S. at 205–06.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 211.

¹⁶⁰ *Id.*

¹⁶¹ 567 U.S. 519 (2012).

¹⁶² Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010).

¹⁶³ *Sebelius*, 567 U.S. at 541–42.

¹⁶⁴ *Id.* at 542.

¹⁶⁵ In evaluating the coerciveness of Congress' measures, Chief Justice Roberts, joined by Justices Kagan and Breyer, thought that Congress' plan was “much more than ‘relatively mild encouragement’—it [was] a gun to the head.” *Id.* at 581. Chief Justice Roberts wrote that the inducement to require expanded Medicaid coverage or lose all Medicaid was unduly coercive on the states because a state that “opt[ed] out of the Affordable Care Act's expansion in health care coverage thus st[ood] to lose not merely ‘a relatively small percentage’ of its existing Medicaid funding, but *all* of it.” *Id.*

¹⁶⁶ In her concurrence, Justice Ginsburg argued that the underlying facts of the litigation did not present a fact pattern necessitating an evaluation of congressional coercion. *Id.* at 633 (Ginsburg, J., concurring).

¹⁶⁷ *Id.* at 581; see *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

VACA 2019 specifically threatened noncompliant states by withholding funding under 42 U.S.C. § 247b.¹⁶⁸ This provision of the Code allows for the award of grants to states, political subdivisions of states, and to other public entities in order to “to assist them in meeting the costs of establishing and maintaining preventive health service programs.”¹⁶⁹ The amount of money distributed by this program varies both by the state and the agency involved, with agencies other than the state eligible for awards.¹⁷⁰ There is limited centralized information regarding the monies awarded under this section of the U.S. Code.¹⁷¹ Given this situation, there is not a simple way to calculate the total amount of a state’s budget that these funds comprise.

Yet even absent this information, VACA 2019 could be argued to be a “gun to the head”¹⁷² that is compelling states to act as Congress hopes. First, this is because VACA 2019 threatens states with the loss of all preventive health services grants under 42 U.S.C. § 247b. Per the plain language of VACA 2019, failure to comply with the law would render a state, public entity, or subdivision completely ineligible to receive preventative health grants. Like in *Sebelius*, states are threatened with not losing just a portion of their preventive health services grants, but all of them.

Connected with this constitutional concern is a question of social equity. Preventative health grants provide states with the latitude to address a variety of public health concerns.¹⁷³ These grants have helped disadvantaged populations and municipalities with poor health care services in the United States since 1981.¹⁷⁴ These grants have assisted communities to implement necessary programs such as water fluoridation, tuberculosis laboratory testing, and sexual assault response units.¹⁷⁵ By hinging the receipt of these grants on vaccination requirements, VACA 2019 would have a disproportionate effect on poorer municipalities who are more dependent on the preventative health grants for health care services. Consequently, VACA 2019 forces states that wish to preserve a religious exemption to sacrifice the wellbeing of some of their neediest residents—many of whom are receiving public health services through the benefit of federal preventative health grants.

In sum, more information is needed regarding how large an effect the withdrawal of preventative health grants would have on a state’s total health budget, ultimately allowing for an evaluation of the coerciveness VACA 2019. Yet even

¹⁶⁸ 42 U.S.C. § 247b.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ The Federal Register contains records of appropriations made under this provision of Title 42. For example, a June 2012 “Notice of Intent To Award Affordable Care Act (ACA) Funding, HM10-1001” released by the U.S. Department of Human and Health Services and the Center for Disease Control announced a grant of some 20,000 dollars to the Association of Public Health Laboratories. Notice of Intent To Award Affordable Care Act (ACA) Funding, HM10-1001, 77 Fed. Reg. 35981 (Ctr. for Disease Control & Prevention June 15, 2012). Another award under this provision of Title 42 was a 2016 award to the National Resource Center on Domestic Violence in Harrisburg, Pennsylvania for around \$200,000. Announcing the Award of a Single Source Program Expansion Supplement Grant to the National Resource Center on Domestic Violence (NRC DV) in Harrisburg, PA 79 Fed. Reg. 6888 (Health & Human Servs. Nov. 14, 2014).

¹⁷² Nat’l Fed’n of Indep. Bus. v. *Sebelius*, 567 U.S. 519, 581 (2012).

¹⁷³ *Frequently Asked Questions, CTRS. FOR DISEASE CONTROL & PREVENTION: PREVENTATIVE HEALTH & HEALTH SERVS. BLOCK GRANT* [hereinafter *PPHHS FAQ*], <https://www.cdc.gov/phhsblockgrant/faqs.htm> (last visited May 8, 2021); *Preventative Health Services Block Grant, PA. DEP’T OF HEALTH* [hereinafter *PA. DEP’T OF HEALTH*], <https://www.health.pa.gov/topics/Research/Pages/PHHSBG.aspx> (last visited May 8, 2021).

¹⁷⁴ *PPHHS FAQ, supra* note 173; *PA. DEP’T OF HEALTH, supra* note 173.

¹⁷⁵ *PPHHS FAQ, supra* note 173; *PA. DEP’T OF HEALTH, supra* note 173.

absent this analysis, the current text of VACA 2019 has a strong countervailing factor playing against its passage: the prospective adverse consequences on needier municipalities and residents in given states. By forcing states who wish to preserve their religious exemption to make a choice between religious vaccination exemptions and preventative health grants, the wellbeing of these states' residents would be jeopardized. This problem is mitigated by revising VACA 2019 to allow states to provide a religious exemption option if they so choose, allowing states to maintain their religious exemptions without sacrificing the needs of their neediest residents.

ii. *Practical Politics: Partisanship & RFRA Challenges*

Even assuming that VACA 2019 is not an unconstitutional overreach of the congressional spending power and presents limited concerns with respect to social equity, VACA 2019 is not a practical solution to the variety of vaccination exemptions across the states. This is because VACA 2019's proposal to eliminate all non-medical exemptions to school vaccinations would not be passed through a heavily divided Congress.

VACA 2019 supporters seem to have considered partisanship concerns when evaluating the Bill. For example, in a description of the Bill by non-governmental legislative tracking tool GovTrack, the context read that “[f]ive states—a mix of red and blue states—currently allow no exemptions except for medical reasons: California, Maine, Mississippi, New York, and West Virginia.”¹⁷⁶ The implication drawn from this description seems to be that partisan issues raised by the elimination of all non-medical exemptions are resolved by the fact that two of these five states tend to vote for Republican candidates (thus, falling under the categorization of “red” states). Crucially, however, this argument overlooks the fact that the forty-five states on *both* sides of the political spectrum have declined to eliminate vaccine exemptions and have preserved religious exemptions.¹⁷⁷

An additional challenge to VACA 2019's feasibility lies in the presence of states' Religious Freedom Restoration Acts (“RFRA”). As of February 2021, twenty-one states had enacted RFRA.¹⁷⁸ Several other states had preserved additional religious protections through the common law.¹⁷⁹

State RFRA typically mirror the language of the 1993 federal RFRA. For example, Oklahoma's RFRA (known as “ORFA”), lays out the following:

- A. Except as provided in subsection B of this section, no governmental entity shall substantially burden a person's free

¹⁷⁶ *H.R. 2527 (116th): Vaccinate All Children Act of 2019*, GOVTRACK (last updated Aug. 8, 2019), <https://www.govtrack.us/congress/bills/116/hr2527/summary>.

¹⁷⁷ As of February 2021, California, Mississippi, New York, and West Virginia do not permit religious or philosophical exemptions to vaccination for school entry. Washington State allows for non-medical exemptions for vaccinations under the MMR vaccine. *See supra* notes 99–106 and accompanying text.

¹⁷⁸ *Map of Federal & State RFRA Map*, BECKET: RELIGIOUS LIBERTY FOR ALL, <https://www.becketlaw.org/research-central/rfra-info-central/map/> (last visited May 8, 2021).

¹⁷⁹ *See, e.g., Humphrey v. Lane*, 728 N.E.2d 1039 (Oh. 2000); Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASH. POST (Mar. 1, 2015, 2:13 PM), <https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/>.

exercise of religion even if the burden results from a rule of general applicability.

B. No governmental entity shall substantially burden a person’s free exercise of religion unless it demonstrates that application of the burden to the person is:

1. Essential to further a compelling governmental interest; and
2. The least restrictive means of furthering that compelling governmental interest.¹⁸⁰

ORFA is one example of a state RFRA that could stonewall VACA 2019’s success if VACA 2019 were passed as written. If VACA 2019 were enacted, the federal government would need to show how its promulgation of a vaccination mandate for public primary and secondary schools with no religious exemptions—even where a religious denomination may have a core doctrinal objection to vaccinations—would be furthering a compelling governmental interest and was achieving this interest through the least restrictive means.

Although analyzing both the probability of litigation and success of the same to VACA 2019 is beyond the scope of this Note, this discussion brings up a single important fact: there is a large probability of litigation implicated by VACA 2019. The partisanship challenges, coupled with current state legislation that may directly conflict with VACA 2019, render the passage of VACA 2019 unwise where a simpler and more economically sound option is available: a revised VACA 2019 which permits a closely regulated cluster of religious vaccination exemptions.

IV. THE SOLUTION

The above objections to VACA 2019 could be addressed in a redrafted bill: “Vaccinate All Children Act of 2021” (“VACA 2021”). VACA 2021 would include a provision permitting for religious vaccination exemptions. It would eliminate philosophical and personal exemptions. VACA 2021 would also provide an option for states which have already elected to eliminate all non-medical vaccination exemptions, preserving the ability of the states themselves to decide if they wish to allow religious vaccination exemptions in the first instance. In doing so, VACA 2021 would provide a solution to VACA 2019’s problems of constitutionality, public policy, partisanship, and state legislative challenges.

VACA 2021 adds three main sections to VACA 2019. First, VACA 2021 creates a section allowing for religious exemptions. Next, VACA 2021 specifies exactly which states are affected by the Bill, carefully tailoring the proposed religious exemption language to ensure that states that have opted to ban all non-medical vaccine exemptions are not affected by VACA 2021. Third, VACA 2021 adds to the current definitions section of VACA 2019 in order to clarify the terms used in VACA 2021. Each of these suggestions will be discussed in turn.

A. ALLOWING FOR RELIGIOUS EXEMPTIONS

¹⁸⁰ OKLA. STAT. tit. 51 § 253 (2021).

To begin, VACA 2021 adds a section to VACA 2019 allowing for a group of closely regulated religious vaccination exemptions. This Section could be drafted as follows:

(3) Vaccination exception based upon sincerely held religious beliefs

Unless otherwise exempted under the terms of paragraph 4, a State shall provide individuals who satisfy the below qualifications with the following religious vaccination exemption option. In order to qualify for said religious vaccination exemption from mandatory school entry vaccination requirements laid out under the terms of Section 3 of this Act, a student must submit an affidavit:

(A) before the beginning of each school year to the individual in charge of the health program at the student's school at a date specified by the school district;

(B) certifying that the child holds sincerely held religious beliefs that preclude the child from receiving the requisite vaccinations for public school attendance; and

(C) supporting such affidavit with an additional affidavit from his or her parents or with the affidavit of a religious minister.

This proposed Section provides several advantages. First, it lays out a clear process by which a student can obtain a religious exemption. This procedure would serve to standardize both the process and the scope of religious exemptions across all states. Additionally, it allows for individual school districts to retain discretion and agency within this process by permitting these districts to choose the date each year on which they would receive these exemption letters.

In addition, Subsection C adds an extra layer of administrative approval to the exemption process discussed generally in Section 3. Subsection C ensures that individuals with sincerely held beliefs regarding vaccinations would be able to obtain these exemptions. However, by forcing the student to consult with another party in the process of seeking an exemption, the student is required to consider whether or not he or she wishes to pursue an exemption. Thus, although individuals with highly personalized beliefs against vaccines who claim such beliefs are religious (like the plaintiff in *Brown*) would still be able to opt out of vaccination if they had the requisite paperwork,¹⁸¹ the number of these individuals who would opt-in to this condition would likely be lessened by the administrative tedium created by this Act.

Moreover, VACA 2021 avoids prospective Establishment Clause and ministerial exception challenges by allowing either a parent or a minister to submit a supporting affidavit. For example, had VACA 2021 only allowed for a supporting affidavit from a minister, VACA 2021 would likely given way to arguments that it gives preferences to conventional religious beliefs. As stated by the Court in

¹⁸¹ *Brown v. Stone*, 378 So. 2d 218 (Miss. 1979).

Employment Division v. Smith, courts must apply heightened scrutiny with the “application of a neutral, generally applicable law to religiously motivated action.”¹⁸² This heightened scrutiny would greatly increase the likelihood of the failure of this provision of VACA 2021.

In addition to this potential problem, even using the term “minister” raises constitutional issues. Given the thorny issue of precisely who qualifies as a minister, if VACA 2021 only allowed for a supporting affidavit from a “minister,” it could succumb to challenges that it was encroaching into the territory of churches to define their ministers.¹⁸³ Thus, by mandating that either a parent, legal guardian, or a minister submit a supporting affidavit, VACA 2021 avoids these issues.

In sum, these revisions to VACA 2019 would lessen the number of individuals who actually pursued the vaccination exemption. Moreover, by standardizing and formalizing the process, VACA 2021 would create a uniform application of vaccine exemption law for school matriculation; this would help to avoid the inconsistencies between states’ application elaborated in Section I. Prospective partisan issues would also be put to rest since states would still be permitted to allow religious exemptions should they so desire, and local governments would have agency in deciding when they required their local exemption letters to be due each year.

B. PRESERVING A STATE’S AUTHORITY TO BAN NON-MEDICAL EXEMPTIONS

Next, VACA 2021 would specify precisely to which states these recommendations apply. Remembering that the aim of VACA 2021 is to standardize and narrow vaccination exemptions in states that decide to retain exemptions, it is important that the revised Act not infringe upon the rights of states who wish to eliminate all non-medical exemptions. This goal could be accomplished by the following language:

(4) Scope of religious vaccination exemptions and applicability to States that decline to recognize non-medical vaccination exemptions

The religious vaccination exemption condition described in Section 3, paragraph 3 (1) shall only apply to a student with sincerely held religious beliefs and (2) such exemption shall not apply in States where, either by ballot or legislative action, the State has banned non-medical vaccine exemptions. (3) Such ballots or legislative measures by the States shall not be construed to abridge or alter the substance of this Act.

This provision sets the scope of the applicability of the exemptions provided in VACA 2021. Paragraph 4 sets forth the clear intention that states that have decided to

¹⁸² *Emp. Div., Dep’t. of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 881 (1990) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 304–07 (1940)).

¹⁸³ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171 (2012) (reaffirming the ministerial exception and finding that that employee in question was a minister, thus barring the applicability of employment discrimination legislation to the employee).

eliminate or limit non-medical vaccination exemptions either by ballot or legislative order—like Mississippi, New York, Maine, and Washington—need not begin to permit non-medical vaccination exemptions because of VACA 2021. Additionally, this provision preserves states’ rights to choose how they wish to eliminate non-medical vaccination exemptions should they decide to do so in the future—whether it be by legislative action or by ballot.

C. DEFINING TERMS

Finally, the revised Act would define the new terms it introduces. In the new definitions section, VACA 2021 would define the terms “religious vaccination exemption,” “sincerely held religious beliefs,” “parent,” and “minister.” The Definitions Section of VACA 2021 could look as follows:

(5) Definitions

In this subsection:

(A) The term *Advisory Committee on Immunization Practices* means the Advisory Committee on Immunization Practices established by the Secretary, acting through the Director of the Centers for Disease Control and Prevention.¹⁸⁴

(B) The terms *elementary school* and *secondary school* have the meanings given to such terms in section 8101 of the Elementary and Secondary Education Act of 1965.¹⁸⁵

(C) The phrase *religious vaccination exemption* is defined as a provision created by this Act that allows children to be exempted from mandatory school vaccination if such vaccination contradicts their sincerely held religious beliefs.¹⁸⁶

(D) The phrase *sincerely held religious beliefs* means people who belong to organized religions or whose belief system treats issues of ultimate concern of a religious, ethical, or moral nature.¹⁸⁷

(E) The term *parent* shall mean the lawful father, mother, caretaker, or legal guardian of a person.¹⁸⁸

¹⁸⁴ H.R. 2527, 116th Cong. (2019).

¹⁸⁵ *Id.*

¹⁸⁶ This definition relies on language drafted by the National Conference of State Legislatures. NCSL, *supra* note 67.

¹⁸⁷ The language in this definition relies on phrases utilized in the Title VII of the Civil Rights Act, as well as definitions set forth by philosopher Paul Tillich which is frequently cited in court opinions. Title VII Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253; PAUL TILlich, DYNAMICS OF FAITH, 1–2 (1958).

¹⁸⁸ This language relies on the definition and explanation provided by *What is Parent*, LAW DICTIONARY <https://thelawdictionary.org/parent/> (last visited May 8, 2021).

(F) The term *minister* means all regularly ordained ministers of the gospel or elders in communion with some church, even if the cleric does not perform religious functions for an individual congregation, such as a minister of the gospel, a priest, a bishop, an archbishop, imam or rabbi.¹⁸⁹

By defining the previously described categories, VACA 2021 clarifies the overall goal of VACA 2021: to standardize and formalize the religious exemptions offered across the country while respecting and preserving the diversity and dignity of religious beliefs in the United States.

CONCLUSION

Well before the Covid-19 pandemic, the United States experienced outbreaks of previously eradicated childhood diseases.¹⁹⁰ In response to these outbreaks, some members of Congress proposed a legislative solution in the form of the Vaccinate All Children Act. Proposed first in 2015 and again in 2019, the Vaccinate All Children Act failed to reach a vote on either occasion.

This Note has argued that this failure was due in large part to the Vaccinate All Children Act's failure to provide states with the option to preserve religious vaccination exemptions. By revising the Vaccinate All Children Act to include a narrowly defined and standardized religious exemption provision which would be renewed by the child and his or her parents at the start of each school year, the Vaccinate All Children Act becomes a palatable solution to the checkerboard of differing vaccination requirements and enforcement across the country.

There has never been a better time to enact a federal legislative solution to school vaccination law. With families in the United States dealing with more than a year of school closures, lack of childcare, and economic distress, the societal need to protect our children and keep our schools competitive is on the forefront of Americans' minds. Especially as public health officials will soon be coping with the possibility of another mandatory vaccination—the Covid-19 vaccine—these issues should be addressed now in order to stop the mutation of the Covid-19 virus, and hopefully, prevent future outbreaks and pandemics.

¹⁸⁹ The language from this definition borrows from Florida Statutes § 741.07 and Indiana Code § 31-11-6-1. FLA. STAT. § 741.07 (2021); IND. CODE § 31-11-6-1 (2021).

¹⁹⁰ See *supra* Section I.

V. APPENDIX

Vaccinate All Children Act of 2021¹⁹¹

To amend the Public Health Service Act to condition receipt by States (and political subdivisions and public entities of States) of preventive health services grants on the establishment of a State requirement for students in public elementary and secondary schools to be vaccinated in accordance with the recommendations of the Advisory Committee on Immunization Practices, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Vaccinate All Children Act of 2021.”

SECTION 2. REQUIRING STUDENTS AT PUBLIC ELEMENTARY AND SECONDARY SCHOOLS TO BE VACCINATED.

(a) REQUIREMENT.—Section 317 of the Public Health Service Act (42 U.S.C. 247b) is amended by adding at the end the following:

n) REQUIRING STUDENTS AT PUBLIC ELEMENTARY AND SECONDARY SCHOOLS TO BE VACCINATED.—

‘(1) REQUIREMENT.—For a State or a political subdivision or other public entity of a State to be eligible to receive a grant under this section, the applicant shall demonstrate to the Secretary’s satisfaction that, subject to paragraphs (2) and (3), the State requires each student enrolled in one of the State’s public elementary schools or public secondary schools to be vaccinated in accordance with the recommendations of the Advisory Committee on Immunization Practices.

(2) EXCEPTION FOR CHILD’S HEALTH.— The funding condition described in paragraph (1) shall not apply with respect to a student if a duly registered and licensed physician submits a written certification at the beginning of the school year to the individual in charge of the health program at the student's school—

(A) certifying that the physician has personally examined the student during the preceding 12 months;

¹⁹¹ Sections 1 and 2 of VACA 2021 rely on the original language of H.R. 2527, 116th Cong. (2019).

(B) certifying that, in the physician's opinion, the physical condition of the student is such that the student's health would be endangered by the vaccination involved; and

"(C) demonstrating (to the satisfaction of the individual in charge of the health program at the student's school) that the physician's opinion conforms to the accepted standard of medical care.

SEC. 3. ALLOWING STUDENTS AT PUBLIC ELEMENTARY AND SECONDARY SCHOOLS WITH SINCERELY HELD RELIGIOUS BELIEFS TO BE EXEMPTED FROM MANDATORY VACCINATION.

(3) Vaccination exception based upon sincerely held religious beliefs

Unless otherwise exempted under the terms of paragraph 4, a State shall provide individuals who satisfy the below qualifications with the following religious vaccination exemption option. In order to qualify for said religious vaccination exemption from mandatory school entry vaccination requirements laid out under the terms of Section 3 of this Act, a student must submit an affidavit:

(A) before the beginning of each school year to the individual in charge of the health program at the student's school at a date specified by the school district;

(B) certifying that the child holds sincerely held religious beliefs that preclude the child from receiving the requisite vaccinations for public school attendance; and

(C) supporting such affidavit with an additional affidavit from his or her parents or with the affidavit of a religious minister.

(4) Scope of religious vaccination exemptions and applicability to States that decline to recognize non-medical vaccination exemptions

The religious vaccination exemption condition described in Section 3, paragraph 3 (1) shall only apply to a student with sincerely held religious beliefs and (2) such exemption shall not apply in States where, either by ballot or legislative action, the State has banned non-medical vaccine exemptions. (3) Such ballots or legislative measures by the States shall not be construed to abridge or alter the substance of this Act.

(b) APPLICATION.—The amendment made by subsection (a) applies only with respect to fiscal years beginning after the date that is 6 months after the date of enactment of this Act.¹⁹²

(5) Definitions

In this subsection:

(A) The term *Advisory Committee on Immunization Practices* means the Advisory Committee on Immunization Practices established by the Secretary, acting through the Director of the Centers for Disease Control and Prevention.¹⁹³

(B) The terms *elementary school* and *secondary school* have the meanings given to such terms in section 8101 of the Elementary and Secondary Education Act of 1965.¹⁹⁴

(C) The phrase *religious vaccination exemption* is defined as a provision created by this Act that allows children to be exempted from mandatory school vaccination if such vaccination contradicts their sincerely held religious beliefs.¹⁹⁵

(D) The phrase *sincerely held religious beliefs* means people who belong to organized religions or whose belief system treats issues of ultimate concern of a religious, ethical, or moral nature.¹⁹⁶

(E) The term *parent* shall mean the lawful father, mother, caretaker, or legal guardian of a person.¹⁹⁷

(F) The term *minister* means all regularly ordained ministers of the gospel or elders in communion with some church, even if the cleric does not perform religious functions for an individual congregation, such as a minister of the gospel, a priest, a bishop, an archbishop, imam or rabbi.¹⁹⁸

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See *supra* note 186 and accompanying text.

¹⁹⁶ See *supra* note 187 and accompanying text.

¹⁹⁷ See *supra* note 188 and accompanying text.

¹⁹⁸ See *supra* note 189 and accompanying text.